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Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform

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CRIMINALIZING NORMAL ADOLESCENT BEHAVIOR IN COMMUNITIES OF COLOR: THE ROLE OF PROSECUTORS IN JUVENILE JUSTICE REFORM

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There is little dispute that racial disparities pervade the contemporary American juvenile justice system. The persistent overrepresentation of youth of color in the system suggests that scientifically supported notions of diminished culpability of youth are not applied consistently across races. Drawing from recent studies on implicit bias and the impact of race on perceptions of adolescent culpability, Professor Kristin Henning contends that contemporary narratives portraying black and Hispanic youth as dangerous and irredeemable lead prosecutors to disproportionately reject youth as a mitigating factor for their delinquent behavior. Although racial disparities begin at arrest and persist through every stage of the juvenile justice process, this Article focuses specifically on the unique opportunity and obligation that prosecutors have to address those disparities at the charging phase of the juvenile case.

Professor Henning implores juvenile prosecutors to resist external pressures to respond punitively to exaggerated perceptions of threat by youth of color and envisions a path toward structured decision making at the charging phase that is informed by research in adolescent development, that challenges distorted notions of race and maturity, and that holds prosecutors accountable for equitable decision making across race. While fully embracing legitimate prosecutorial concerns about victims' rights and public safety, Professor Henning frames the charging decision as one requiring fairness, equity, and efficacy. Fairness requires prosecutors to evaluate juvenile culpability in light of the now well-documented features of adolescent offending. Equity demands an impartial application of the developmental research to all youth, regardless of race and socioeconomic status. Efficacy asks prosecutors to rely on scientifically validated best practices for ensuring positive youth development and achieving public safety. Thus, even when neighborhood effects and social structures produce opportunities for more serious and frequent crime among youth of color, prosecutors have a duty to evaluate and respond to that behavior with the same developmentally appropriate options that are so often available to white youth.

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Further, as the gatekeepers of juvenile court jurisdiction, prosecutors should work with developmental experts, school officials, and other community representatives to develop and publish juvenile charging standards that reflect these goals. To increase transparency and encourage buy-in from the public, Professor Henning recommends that prosecutors track charging decisions according to race and neighborhood and provide community representatives and other stakeholders with an opportunity to review those decisions for disparate impact. Finally, to ensure that communities of color are able to respond to adolescent offending without state intervention, Professor Henning contemplates a more expansive role for prosecutors who will engage school officials and community representatives in the identification and development of adequate community-based, adolescent-appropriate alternatives to prosecution.

INTRODUCTION

Over the last quarter century, psychological research has shown that much of youth crime and delinquency is the product of normal adolescent development.[1] Compared to adults, adolescents often make impetuous and ill-considered decisions, are susceptible to negative influences and outside pressures, and have a limited capacity to identify and weigh the short- and long-term consequences of their choices.[2] As most youth mature, however, they age out of delinquent behavior and rarely persist in a life of crime.[3] Because children and adolescents are more malleable and amenable to rehabilitation than adults, the Supreme Court has recognized youth as a mitigating factor in the disposition of even the most serious criminal behavior by ado-

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1 *See* discussion *infra* Part I.D.1.

2 *See* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 37–40 (2008) (noting that adolescents are more susceptible to peer influences, more likely to discount the future, and more likely to engage in activities perceived to be dangerous); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 555–56 (2000) [hereinafter Scott, *Adolescence*] (stating that adolescents' "inexperience and immature judgment may lead them to make poor choices").

3 *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) [hereinafter Steinberg & Scott, *Less Guilty*].

lescents.[4] Most notably, in *Roper v. Simmons* in 2005, *Graham v. Florida* in 2010, and *Miller v. Alabama* in 2012, the Supreme Court relied upon developmental research to conclude, respectively, that the death penalty is categorically inappropriate for youth under the age of eighteen,[5] the sentence of life without the possibility of parole is too severe for youth convicted in nonhomicide cases,[6] and a mandatory sentence of life without the possibility of parole in homicide cases is impermissible because it denies youth the opportunity to present mitigating evidence concerning their development.[7]

Ironically, the developmental research seems to have had little effect in reversing the pervasive overreliance on law enforcement officials and juvenile courts when responding to typical adolescent behaviors, particularly among youth of color. Whereas school officials were once willing to address normal adolescent misconduct through counseling and other in-school interventions, school officials now routinely rely on police officers to manage student discipline.[8] A typical schoolyard fight is labeled as a felony assault, and students who play "catch" with a teacher's hat are charged with robbery.[9] While teachers, law enforcement officers, and ultimately prosecutors are rightly concerned about public safety, youth accountability, and compensating victims for their harms, these concerns are too often addressed with law enforcement strategies that ignore scientifically supported conclusions about adolescent offending and diminished culpability. These strategies also disregard more effective, community-based alternatives to prosecution that are more likely to ensure adolescents' successful transition to adulthood.

There is little dispute that racial disparities pervade the contemporary American juvenile justice system. Although black youth comprised only 16% of all youth in the United States from 2002 to 2004, they accounted for 28% of all juvenile arrests, 37% of detained youth, 34% of youth formally processed by the juvenile court, 35% of youth judicially waived to criminal court, and 58% of youth sent to adult state prison.[10] The persistent overrepresentation of youth of color in the juvenile justice system is consistent with empirical evidence that racial stereotypes negatively affect judgments about adolescent culpa-

4 *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2467–68 (2012) (murder in the course of arson); Graham v. Florida, 130 S. Ct. 2011, 2032–33 (2010) (armed burglary with assault or battery); Roper v. Simmons, 543 U.S. 551, 557, 572–73 (2005) (murder).

5 *Roper*, 543 U.S. at 568–70.

6 *Graham*, 130 S. Ct. at 2026–27, 2030.

7 *Miller*, 132 S. Ct. at 2463–66.

8 *See* Aaron Kupchik & Torin Monahan, *The New American School: Preparation for Post-Industrial Discipline*, 27 BRIT. J. SOC. EDUC. 617, 620–21, 623–24 (2006) (discussing the increased presence of police in schools and their growing role in student discipline).

9 *See infra* note 264 and accompanying text.

10 *See infra* note 145 and accompanying text.

bility, maturity, risk of recidivism, and deserved punishment.[11] This Article posits that the juvenile justice system treats youth of color more harshly than their white peers in part because decision makers throughout the system are less inclined to recognize their developmental immaturity. Although the juvenile justice process as a whole needs reform, this Article focuses specifically on the role of prosecutors at the charging phase and contends that prosecutors have a unique responsibility as gatekeepers of juvenile court jurisdiction to correct racial disparities in the system by filtering out illicit and implicit bias and applying the findings of developmental psychology equitably to all youth in the charging decision.

This Article proceeds in three parts. Part I reviews recent findings in the study of normative adolescent development and considers how society's understanding of adolescence has shaped law and policy since the inception of the first juvenile courts. Part II recognizes that society has always tolerated some disruptive, and even delinquent, adolescent behavior without formal state intervention and without significant cost or threat to public safety. However, as is evident in data documenting the disproportionate arrest and prosecution of youth of color, state actors appear particularly unwilling to excuse and tolerate adolescent misconduct by black and Hispanic youth. Part II identifies factors that may be creating disparities in police and prosecutorial decision making and contends that distinctions in normative adolescent development or amenability to treatment across race or class cannot explain racial disparities in the system. Drawing from contemporary research on implicit bias, including the most recent studies on the impact of race on perceptions of adolescent culpability, Part II contends that contemporary narratives portraying youth of color as dangerous and irredeemable fuel pervasive fear of these youth and cause prosecutors to disproportionately reject developmental immaturity as a mitigating factor for their misconduct.

Part III seeks to improve prosecutorial decision making and reduce the prosecution of youth of color for low- to midlevel offenses that would likely be excused or handled informally if they were committed by white youth in middle-class communities. To ensure fairness, equity, and efficacy in the charging decision, Part III recommends that prosecutors collaborate with developmental experts and community representatives to draft intake and charging standards that challenge distorted notions of race and maturity, are informed by research in adolescent development, and provide a fair and equitable

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11 *See* Patricia Soung, *Social and Biological Constructions of Youth: Implications for Juvenile Justice and Racial Equity*, 6 NW. J.L. & SOC. POL'Y 428, 437 (2011) (citing Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 499 (2004)).

framework for identifying those youth who should be diverted from juvenile court intervention. More important, Part III challenges prosecutors to derationalize racially coded decision making by recognizing that even when neighborhood effects and social structures produce opportunities for more serious and frequent crime among youth of color, prosecutors have a duty to evaluate and respond to that behavior with the same developmentally appropriate options so often available to white youth.

To increase transparency and accountability to the public, standards should require prosecutors to track charging decisions by race and neighborhood and encourage community representatives and other stakeholders to periodically review those decisions for disparate impact. To achieve and sustain reforms, prosecutors must change the culture from the top down, resist external pressures to react punitively to high-profile juvenile crime, and challenge faulty public perceptions of mature and dangerous youth of color. Finally, to ensure that communities of color are equipped to address adolescent offending without state intervention, Part III recommends that prosecutors work with policymakers and community representatives to identify and develop a continuum of community-based, adolescent-appropriate alternatives to prosecution.

I
Criminalizing Normal Adolescent Behavior: Conceptions of Youth and Adolescence in the Evolution of Juvenile Courts

A. The Progressives' Vision of Youth and Adolescence

Though adolescent deviance has existed in American society as long as social norms have, the concept of juvenile delinquency did not emerge until the late eighteenth and early nineteenth centuries, when the United States began its transition from a largely rural, agrarian society to an urban, industrial nation.[12] An emerging view of childhood and adolescence as distinct developmental stages accompanied America's transformation into an urban society.[13] With the recognition of these developmental stages, youth were treated as "vulnerable, innocent, passive, and dependent beings who needed extended preparation for life," and parents were given "a greater responsibility . . . to supervise their children's moral and social development."[14] These evolving views of childhood coincided with an ideological acknowl-

12 Geoff K. Ward, The Black Child-Savers: Racial Democracy & Juvenile Justice 23 (2012).

13 Barry C. Feld, *The Transformation of the Juvenile Court*, 75 Minn. L. Rev. 691, 693–94 (1991) [hereinafter Feld, *Transformation*].

14 *Id.* at 694.

edgement of the rehabilitative potential of all offenders and contributed to reforms in the criminal justice system.[15] Progressive reformers of the late nineteenth century believed that professionals could diagnose the causes of crime and "treat" offenders whose behavior was the product of external forces.[16] Children were significant beneficiaries of this new rehabilitative ideal.

A group of Progressive reformers, commonly referred to as "Child Savers," who were particularly concerned about the welfare and development of children, established juvenile courts based on the assumption that children were less culpable than adults and more responsive to rehabilitation.[17] The reformers intuitively understood that children were physically, mentally, and morally different from adults and that society should respond to their behavior accordingly.[18] Assuming that youth lacked the capacity for moral and reasoned judgment[19] and concluding that much of adolescent misconduct was the product of environmental factors beyond their control,[20] reformers advocated for the justice system to divert youth offenders from the traditional criminal justice system to newly established juvenile courts that would "rescue" them from their negative home environments and transform them into responsible citizens.[21] Reformers believed that

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15 *See id.*

16 *See* Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 335–36 (1999) [hereinafter Feld, *Transformation Part II*].

17 *See* David S. Tanenhaus, *Degrees of Discretion: The First Juvenile Court and the Problem of Difference in the Early Twentieth Century*, *in* OUR CHILDREN, THEIR CHILDREN 105, 107 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (citing Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909)). For an alternative account of the history of juvenile courts as a response to fear of poor children in newly urbanized cities, see *infra* Part II.A.

18 Tanenhaus, *supra* note 17, at 107 (discussing Progressives' call to find out where children were in each of these categories).

19 *See* Elizabeth S. Scott, *The Legal Construction of Childhood*, *in* A CENTURY OF JUVENILE JUSTICE 113, 117 (Margaret K. Rosenheim et al. eds., 2002) [hereinafter Scott, *Childhood*] (noting that juvenile court founders believed that children lacked "the capacity for reasoning, moral understanding, and judgment on which attributions of blameworthiness must rest").

20 *See* Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125, 127–31 (2007) (discussing the view that children are not predisposed to committing bad acts and such behavior must be due to the influence of adults); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141–42 (1997) (discussing the view that criminal conduct was believed to be the "symptom of an underlying condition . . . caused by poor parental guidance, care and supervision as well as social harms associated with poverty").

21 Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 16 (2007) [hereinafter Feld, *Unmitigated Punishment*]; *see also* Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1456–58 (2003) [hereinafter Feld, *Race, Politics, and Juvenile Justice*] (discussing Progressives' view of juvenile courts as a "therapeutic agency");

children, like adult offenders, could be diagnosed and cured of underlying conditions that lead to delinquency.[22]

The paternalistic philosophy of the new juvenile court allowed staff to address both criminal and noncriminal behavior such as "smoking, sexual activity, truancy, immorality, or living a wayward, idle, and dissolute life."[23] The Progressives created agencies to inculcate delinquent youth with middle-class values and help them become moral, law-abiding citizens.[24] The emphasis on rehabilitation also led reformers to advocate for flexible and indeterminate sentences aimed at reforming young offenders.[25] As such, judges in the early juvenile courts had broad discretion and convened informal hearings with flexibility in the application of due process standards and confidentiality protection that shielded youth from public stigma.[26] Flexibility allowed paternalistic judges to engage youth face-to-face[27] and to "fashion individualized treatments" that served the best interests of the child.[28] Progressives described the new juvenile courts as "benign, nonpunitive, and therapeutic" and claimed that probation officers would try to diagnose and cure delinquent youth, rather than punish them.[29] Procedural formalities, such as the right to counsel, the right

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Scott & Grisso, *supra* note 20, at 141–44 (discussing historical focus on inadequate parenting and social harms of poverty as causes of adolescent criminal behavior); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 804–05 (2003) [hereinafter Scott & Steinberg, *Blaming Youth*] (describing the belief that juvenile courts could "redirect[ ]" delinquents); Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 146 (2003) (noting Progressives' view of adolescents as misguided and "likely to benefit from treatment and intervention").

22 Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1189 (1970).

23 Feld, *Transformation Part II*, *supra* note 16, at 337–38.

24 *See* Feld, *Transformation*, *supra* note 13, at 693; *see also* WARD, *supra* note 12, at 30–33 (tracing the impact of the idea of juvenile social control on juvenile justice).

25 Feld, *Race, Politics, and Juvenile Justice*, *supra* note 21, at 1459–60.

26 Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 525–38 (2004) [hereinafter Henning, *Eroding Confidentiality*] (reviewing the history of confidentiality in juvenile courts); Mack, *supra* note 17, at 117 (describing the relationship between the juvenile court and its charges as "not so much [about] the power, as the friendly interest of the state"); David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE, *supra* note 19, at 42, 43 (discussing founders' intent to shield youth from "stigmatizing publicity").

27 *See* Mack, *supra* note 17, at 119–20; *see also In re* Gault, 387 U.S. 1, 25–26 (1967) (noting that the early conception of the juvenile court envisioned a "fatherly judge touch[ing] the heart and conscience of the erring youth by talking over his problems [and] by paternal advice and admonition"); WARD, *supra* note 12, at 78 (noting that a judge in Cook County, Illinois described the separate juvenile court as acting as a "kind and just parent ought to treat his children" (internal quotation marks omitted)).

28 Tanenhaus, *supra* note 17, at 110; *see* Feld, *Race, Politics, and Juvenile Justice*, *supra* note 21, at 1459–60 (noting that judges tailored sentences to match a child's best interests).

29 Feld, *Transformation*, *supra* note 13, at 694–95.

to jury trials, and adherence to the rules of evidence, were deemed unnecessary since juvenile courts were not meant to punish.[30]

B. Due Process and the Diminishing Relevance of Adolescence

The Progressives' assumptions about youth and the rehabilitative vision of juvenile court prevailed at least in theory until the 1960s, when advocates began to question the state's commitment to rehabilitation and the lack of procedural protections for accused youth.[31] The "flexibility" and "informality" that were once championed as hallmarks of the rehabilitative mission of the early juvenile courts came under attack during the Due Process Revolution of the Civil Rights Era, when proponents of due process complained that the rhetoric of rehabilitation was a mask for punishment imposed without necessary procedural safeguards.[32] Critics of the modern juvenile court characterized the court as a "coercive instrument[ ] of social control through which the state oppressed the poor and minorities."[33] Thus, it is no surprise that juvenile justice reforms became a significant part of the Supreme Court's broader effort to protect the rights of racial minorities.[34]

By necessity, proponents of due process have been less concerned with preserving early conceptions of adolescence and have sought to equate delinquency proceedings with criminal trials in order to secure additional procedural protections.[35] Some advocates have gone so far as to call for the abolition of juvenile courts.[36] Although the Supreme Court was unwilling to require states to abandon the juvenile court

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30 *See In re Gault*, 387 U.S. at 15; Richard Kay & Daniel Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401, 1402–03 (1973).

31 Feld, *Race, Politics, and Juvenile Justice*, *supra* note 21, at 1482–89.

32 *See, e.g.*, Schall v. Martin, 467 U.S. 253, 263 (1984) (discussing the need for due process in the characteristically informal juvenile court); *In re* Winship, 397 U.S. 358, 365–66 (1970) (same); Feld, *Race, Politics, and Juvenile Justice*, *supra* note 21, at 1480–94 (discussing the expansion of procedural safeguards for juveniles during the "Due Process Revolution" of the civil rights era).

33 Feld, *Transformation Part II*, *supra* note 16, at 347.

34 *Id.* at 345.

35 *See, e.g.*, Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 941–44 (1995) [hereinafter Ainsworth, *Youth Justice*].

36 *See* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1118–32 (1991) [hereinafter Ainsworth, *Re-Imagining Childhood*] (calling for abolition of the juvenile courts and urging criminal courts to treat youth as a mitigating factor at sentencing); Ainsworth, *Youth Justice*, *supra* note 35, at 948–51 (same); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 25 (1990) (same); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 69 (1997) (same).

"experiment"[37] altogether, it did acknowledge concerns about due process in *Kent v. United States* and again in *In re Gault*, when it concluded that juvenile court was the "worst of both worlds," providing neither the individualized rehabilitation promised to youth nor the procedural rights afforded to adults.[38] *Gault* ultimately guaranteed youth accused of a crime a number of constitutional protections (but not all of the protections afforded adults): the right to timely notice of charges, the right to counsel, the right to confront witnesses, and the right against self-incrimination.[39] In subsequent cases, the Court required that the prosecution prove allegations of delinquency beyond a reasonable doubt[40] and extended the ban on double jeopardy to delinquency adjudications.[41]

Following the procedural victories in *Gault*, the absence of juries in juvenile courts was the next target for procedural justice advocates who believed that even proof beyond a reasonable doubt was not enough to constrain the bias and discretion of juvenile court judges at the adjudicatory phase.[42] Because jurors bring diverse backgrounds and perspectives to the case, scholars have argued that deliberation among multiple jurors improves the integrity of the adjudicatory process by exposing and correcting prejudices through the interactive exchange of ideas.[43] The advocates' call for jury trials posed a direct

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37 McKeiver v. Pennsylvania, 403 U.S. 528, 544 (1971) (plurality opinion) (referring to the creation of the juvenile court as an "experiment").

38 *In re* Gault, 387 U.S. 1, 18 n.23 (1967) (quoting Kent v. United States, 383 U.S. 541, 556 (1966)). *But see McKeiver*, 403 U.S. at 543–50 (discussing the Court's unwillingness to abandon the juvenile court experiment despite disappointment in the juvenile court system).

39 *In re Gault*, 387 U.S. at 33, 41, 55, 57–58 (declining to rule on whether juveniles have a right to appeal); *see also* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 558–62 (1998) (detailing the Court's decision in *Gault* to recognize some rights for juveniles but not others).

40 *See In re* Winship, 397 U.S. 358, 368 (1970).

41 *See* Breed v. Jones, 421 U.S. 519, 528–31 (1975).

42 *See* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver: *Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1145 (2003) [hereinafter Feld, *Constitutional Tension*] (noting that the juvenile court would benefit from a jury's check against the unequal administration of justice as well as racial bias); *cf.* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (acknowledging that juries may provide an important safeguard against "the compliant, biased, or eccentric judge").

43 *See* Guggenheim & Hertz, *supra* note 39, at 578–82 (citing studies showing that members of a group commonly "reconsider and change even the firmest of prejudgments" as they begin to understand and appreciate different viewpoints and values); *see also* Gayle W. Hill, *Group Versus Individual Performance: Are N+1 Heads Better Than One?*, 91 PSYCHOL. BULL. 517, 535 (1982) (discussing studies that have shown that group performance was generally "qualitatively and quantitatively superior to the performance of the average individual"). *But see* Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 LAW & SOC'Y REV. 69, 92 (2011) (finding that, contrary to expectations, differences in the way black and white defendants

challenge to the special treatment afforded to children and adolescents in the early juvenile courts. In declining to find a federal constitutional right to jury trials for accused youth in *McKeiver v. Pennsylvania*, the Supreme Court expressed concern that jury trials would threaten the rehabilitative mission of the juvenile justice system and destroy the "intimate, informal protective" character of the proceedings.[44] Ironically, advocates who favor jury trials often ground their argument in a belief that juvenile courts have already lost their original mission.[45] When the Kansas Supreme Court held that its state constitution guaranteed juveniles the right to jury trials notwithstanding *McKeiver*, it expressly found that the state's juvenile court system had lost its "benevolent *parens patriae* character" and that few distinctions were left between the contemporary juvenile and criminal justice systems.[46] In light of these dwindling distinctions, procedural justice advocates have been willing to abandon many of the features of juvenile court in their quest for due process.[47]

Confidentiality has been another recurring target of the due process agenda. Critics have challenged the long tradition of confidentiality in juvenile courts as providing cover for unethical judicial conduct and allowing juvenile court actors to believe they are immune from scrutiny and accountability.[48] Advocates for public oversight believe that media access to hearings and records will hold judges ac-

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are treated are *more* divided after deliberations, showing that strong punitive and likely biased opinions were accentuated rather than moderated in a deliberative setting).

44 McKeiver v. Pennsylvania, 403 U.S. 528, 540–41, 545, 547 (1971) (plurality opinion) (finding neither a Sixth Amendment nor a due process right to jury trial for youths facing delinquency proceedings).

45 *See* Gerald P. Hill, II, *Revisiting Juvenile Justice: The Requirement for Jury Trials in Juvenile Proceedings Under the Sixth Amendment*, 9 FLA. COASTAL L. REV. 143, 160–67 (2008) (arguing the right to a jury trial should be extended to juvenile proceedings because the juvenile justice system is not in fact rehabilitative); Sandra M. Ko, Note, *Why Do They Continue to Get the Worst of Both Worlds? The Case for Providing Louisiana's Juveniles with the Right to a Jury in Delinquency Adjudications*, 12 AM. U. J. GENDER SOC. POL'Y & L. 161, 189–90 (2004) (arguing that the current system impedes rehabilitation but that a jury system would better advance it by improving procedural fairness).

46 *In re* L.M., 186 P.3d 164, 170 (Kan. 2008) (emphasis added).

47 *See, e.g.*, Henning, *Eroding Confidentiality*, *supra* note 26, at 530 (noting that reformers in the 1960s argued for reduced confidentiality and increased scrutiny of the juvenile courts as a check on racism and ineffective counsel); Hill, *supra* note 45, at 162–63 (arguing that because the juvenile court is not fulfilling its ideals, notions of individualized justice should be abandoned in favor of stricter due process protections, including jury trials); Ko, *supra* note 45, at 191–95 (arguing that Louisiana's juvenile justice system has already become a punitive model akin to the adult system, and therefore features such as confidentiality and vast judge discretion should be replaced with the jury as a check on the system and in the interest of accurate fact-finding).

48 *See, e.g.*, Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 306–08 (2008) (noting that the confidential nature of juvenile court proceedings shields decision makers from accountability and fosters inequity); Michele Benedetto Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 130 (2011) (pointing out

countable to the community's moral conscience and improve the courts' integrity by providing a check on corrupt practices, including racism and bias.[49] Confidentiality remains a source of considerable debate, even among child advocates and scholars committed to adolescent-appropriate responses to juvenile delinquency. Many scholars, including myself, have long supported confidentiality to shield youth from the stigma of a juvenile record and its collateral consequences.[50] This perspective is buttressed by claims that the media too often sensationalizes high-profile juvenile violence, rather than challenging inequities and protecting the rights of the accused child.[51] With legitimate arguments on both sides of the confidentiality debate and the Supreme Court's express declination to interfere with the states' right to maintain the confidentiality of juvenile proceedings,[52] states differ in their approach to the issue. Juvenile court proceedings in most states remain closed to the public, but states often allow public access to juvenile records that involve arrests or adjudications for serious offenses.[53]

Despite the Supreme Court's hope that states could fairly accommodate both rehabilitation and due process, that accommodation

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that the wide discretion given to judges in the "private world of juvenile court" leaves much room for unethical judicial conduct).

49 *See* United States v. A.D., 28 F.3d 1353, 1357–58 (3rd Cir. 1994); Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 308–09 (2007); Gordon A. Martin, Jr., *Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 393, 400–01 (1995); Moriearty, *supra* note 48, at 299.

50 Henning, *Eroding Confidentiality*, *supra* note 26, at 527–30; Ellen Marrus, *"That Isn't Fair, Judge": The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 HOUS. L. REV. 1323, 1353 (2004); Leila R. Siddiky, Note, *Keep the Court Room Doors Closed so the Doors of Opportunity Can Remain Open: An Argument for Maintaining Privacy in the Juvenile Justice System*, 55 HOW. L.J. 205, 222–31 (2011).

51 *Cf.* RICHARD A. MENDEL, LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS—AND WHAT DOESN'T 29–30 (2000) (discussing the media's increasing coverage of juvenile crime despite its decline).

52 *See In re* Gault, 387 U.S. 1, 25 (1967) (noting that due process does not prohibit states from continuing to provide for confidentiality of police and court records regarding juveniles); *cf.* McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (plurality opinion) ("We are reluctant to disallow the States to experiment further . . . and we feel that we would be impeding that experimentation by imposing the jury trial."). *But see* Davis v. Alaska, 415 U.S. 308, 319–20 (1974) (holding that a juvenile confidentiality statute cannot interfere with defendant's Sixth Amendment right to confront witnesses in order to establish bias).

53 *E.g.*, ALA. CODE § 12-15-129 (LexisNexis Supp. 2011) (presumptively closed proceedings, but allow judges to open proceedings to interested parties); D.C. CODE § 16-2316(e) (LexisNexis 2001) (same); KY. REV. STAT. ANN. § 610.070(3) (West 2006) (same); N.H. REV. STAT. ANN. § 169–B:34 (Supp. 2012) (mandatory closed proceedings); UTAH CODE ANN. § 78A-6-114(1)(c) (LexisNexis 2008) (open hearing for specific enumerated offenses); N.J. CT. R. 5:19-2(a)(1) to (a)(2) (presumptively closed proceedings, but allow judges to open proceedings to interested parties); OHIO JUV. R. 27(A)(1) (LexisNexis 2011) (open hearings for "serious youthful offender proceedings"); *see also* Henning, *Eroding Confidentiality*, *supra* note 26, at 536–37 (discussing confidentiality statutes).

proved difficult to achieve. At the end of the Due Process Revolution, the United States was left with a crippled juvenile justice system that tried, without much success, to accommodate at least two competing goals: procedural justice and rehabilitation. The challenges facing the evolving hybrid were compounded in the late 1980s and 1990s when victims' advocates and law-and-order politicians forced accountability, punishment, and victims' rights into the juvenile court debate.

C. The Loss of Adolescence in the Era of Law-and-Order Politics

Beginning in the Civil Rights Era and continuing into the twenty-first century, American juvenile courts witnessed a gradual shift from their early treatment-oriented focus to a punishment-oriented system that paid greater attention to the nature and number of the youth's prior and pending allegations.[54] Amid policymaker skepticism about the viability of rehabilitation, especially in the 1990s,[55] increased media attention to public safety, the demand for youth accountability, and the campaign for victims' rights eroded rehabilitative responses to adolescent behavior.[56] In the late 1980s and 1990s, state legislatures throughout the country passed punitive laws to address juvenile delinquency in response to false public perceptions of high and rising crime rates.[57] Politicians attacked notions of childhood, hoping to

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54 Feld, *Transformation Part II*, *supra* note 16, at 340 (discussing causes of shifting philosophy during the "turbulent 1960s").

55 *See* Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 PEPP. L. REV. 907, 907–09, 918–20 (1995) (contending that serious juvenile crime was soaring while the public's confidence in the juvenile justice system's effectiveness was plummeting, and advocating for a "justice model" in juvenile court that relies on proportional and determinate dispositions and increased offender accountability); Scott & Grisso, *supra* note 20, at 137, 148–49; Scott & Steinberg, *Blaming Youth*, *supra* note 21, at 799–800, 805; Arthur R. Blum, Comment, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L.J. 349, 363–72 (1996) (describing the erosion of faith in the ability of the juvenile justice system to rehabilitate juvenile criminals successfully). *But see* Mark W. Lipsey, *Can Rehabilitative Programs Reduce the Recidivism of Juvenile Offenders? An Inquiry into the Effectiveness of Practical Programs*, 6 VA. J. SOC. POL'Y & L. 611, 611–16, 640 (1999) (discussing how meta-analysis of the efficacy of rehabilitative programs shows these programs can reduce recidivism rates).

56 Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1112–15 (2009) [hereinafter Henning, *Victims' Rights*] (detailing the punitive-policy wave of the 1980s and 1990s); Scott & Grisso, *supra* note 20, at 141–53 (discussing the shift from the rehabilitative era to the due process era to the "get tough" era).

57 *See* Scott & Steinberg, *Blaming Youth*, *supra* note 21, at 806–10; *see also* MENDEL, *supra* note 51, at 29–37 (discussing an increased public fear of juvenile crime during the 1980s and 1990s, resulting from representations by the media and public officials despite an actual decrease in juvenile crime); HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 127 (2006) (reporting that between 1994 and 2003 there were substantial declines in arrests for overall juvenile violent crime (32%), murder (68%), forcible rape (25%), robbery (43%), and aggravated assault (26%), and noting that declines were proportionately greater for juveniles than for adults); David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal*

garner support for this new approach. As Bob Dole declared in 1996, "A violent teenager who commits an adult crime should be treated as an adult in court and should receive adult punishment."[58] Similarly, the district attorney for Ventura County, California wrote in an op-ed supporting California's Proposition 21 that the state's "juvenile courts too frequently focus their precious resources on violent and repeat juvenile felons, many of whom are gang-involved, often without any realistic likelihood of achieving rehabilitation."[59]

Legislators amended statutes to require that youths be tried in adult court at younger ages and for more offenses.[60] New statutes allowed judges to impose harsher penalties, such as lengthy periods of incarceration in state facilities, mandatory minimum sentences, and blended-sentencing schemes that required youth to spend time in both juvenile and adult prisons.[61] Additionally, policymakers endorsed collateral consequences such as sex-offender registration, DNA data banking, eviction from public housing, and exclusion from public schools.[62] More explicitly, legislators amended juvenile court purpose clauses to incorporate the new goals of youth accountability, public safety, victims' rights, and, on occasion, punishment.[63] Even where juvenile courts preserved the treatment rhetoric, policies

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Response to Juvenile Homicide, 92 J. CRIM. L. & CRIMINOLOGY 641, 642–43 (2002) (discussing data that casts doubt on the validity of the perception of an increase in youth violent crime).

58 *Dole Seeks to Get Tough on Young Criminals*, L.A. TIMES, July 7, 1996, at A16.

59 Michael D. Bradbury, Op-Ed., *More Tools Are Needed to Curb Juvenile Crime*, L.A. TIMES, Feb. 29, 2000, at B7 (discussing Proposition 21, which would allow youth who commit certain enumerated felonies to be tried in adult court); *see also* Tom Gorman, *In Law's Eyes, 14-Year-Old Is an Adult*, L.A. TIMES, May 11, 1995, at A1 (quoting San Diego County District Attorney Paul Pfingst as saying, "No community can celebrate prosecuting 14-year-olds as adults for murder, but it's something we have to do because of the types of crimes they're committing. I don't know that there's an alternative but to hold them responsible by adult standards.").

60 *See, e.g.*, Gorman, *supra* note 59 (noting that California changed its law to reduce the age of transfer from sixteen to fourteen at a time when the number of children committing murder was ballooning around the nation).

61 Feld, *Race, Politics, and Juvenile Justice*, *supra* note 21, at 1558–68 (discussing waiver laws and harsher sentences in juvenile courts after the 1980s); Moriearty, *supra* note 48, at 308 (observing the increase of mandatory minimum sentencing).

62 *See* Henning, *Eroding Confidentiality*, *supra* note 26, at 537–38, 542–76; *see also* Jonathan Kimmelman, *Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking*, 28 J.L. MED. & ETHICS 209, 210, 219 (2000) (listing twenty-six states with laws that include juveniles in DNA collection); Suzanne Meiners-Levy, *Challenging the Prosecution of Young "Sex Offenders": How Developmental Psychology and the Lessons of* Roper *Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 505 (2006) (addressing the political climate leading to the harsh prosecution of juvenile sexual offenders and the requirement to register).

63 Henning, *Eroding Confidentiality*, *supra* note 26, at 1113–15 (surveying changes in juvenile court purpose clauses); Hill, *supra* note 45, at 165–66 (discussing changing purpose clauses involving a shift from rehabilitative to punitive juvenile court).

adopted in the name of rehabilitation are often punitive in practice.[64] Punitive practices in the "law-and-order" era suggest that policymakers lost sight of the reformers' earlier recognition of the immaturity and malleability of youth.

D. The Age of Science and the Revival of Adolescence

1. *Developmental Psychology and Adolescent Brain Science*

Psychological research in adolescent development over the last twenty-five years has confirmed much of what the early reformers assumed and seems to have paved the way for the revival of adolescence as an important factor in the response to juvenile delinquency. Studies tracking the normative, cognitive, and psychosocial development of youth have consistently found significant deficiencies in adolescent decision-making capacities, especially in the fast-paced, emotionally charged settings common to adolescent offending.[65] Generally, the capacity to reason and understand develops progressively from preadolescence through the late-teen years.[66] Research in cognitive development indicates that youth in early adolescence have difficulty conceptualizing future consequences.[67] Many youth simply lack the knowledge and experience needed to reason through the short- and long-range consequences that an individual should contemplate in any decision.[68] More recent studies in neurological development have confirmed that the brain structures responsible for logical reasoning, planning, self-regulation, and impulse control are the last to mature and develop.[69] Thus, youths' capacity to critically assess the

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64 *See, e.g.*, Jennifer M. Segadelli, Note, *Minding the Gap: Extending Adult Jury Trial Rights to Adolescents While Maintaining a Childhood Commitment to Rehabilitation*, 8 SEATTLE J. FOR SOC. JUST. 683, 695–99 (2010) (pointing out the changes in Washington State's juvenile code, making it more punitive in the name of rehabilitation).

65 *See* Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211, 216–20 (2011); Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583, 586 (2009) [hereinafter Steinberg et al., *"Flip-Flop"*]; Jennifer L. Woolard & N. Dickon Reppucci, *Researching Juveniles' Capacities as Defendants*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 173, 176–79 (Thomas Grisso & Robert G. Schwartz eds., 2000).

66 *See* Scott & Grisso, *supra* note 20, at 157–58.

67 *See* Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL, *supra* note 65, at 291, 303–05 [hereinafter Scott, *Criminal Responsibility*].

68 *See* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 351–52 (1992); Melinda G. Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 177 (2003) (noting this deficiency and its potential effect in the context of juvenile offenders' relationships with their attorneys); Scott, *Adolescence*, *supra* note 2, at 547, 555–56, 591 (noting that inexperience and immature judgments may lead to poor choices).

69 *See* Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as Amici Curiae Supporting Neither Party at 14–36, Miller v.

consequences of their actions improves with age—in part because their base of knowledge grows and in part because the cognitive skills necessary to process and learn from their experience improve.

Social, emotional, and temporal perceptions and judgments that mature during a youth's psychosocial development may further hinder a youth's cognitive capacity.[70] Significantly, cognitive and psychosocial abilities do not develop at the same rate.[71] Research shows that cognitive deficiencies begin to abate by late adolescence, such that by the age of fifteen or sixteen, youth have cognitive abilities similar to adults in controlled settings. Youths' psychosocial deficiencies, however, persist well into late adolescence and even early adulthood.[72] Deficiencies in psychosocial development tend to cause youth to underestimate the risks involved in a given course of conduct, focus heavily on the present while failing to consider the future, and encounter difficulty regulating their emotions and controlling their conduct.[73] Empirical studies assessing youths' capacity for self-

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Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647) (collecting and summarizing studies); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 793, 812 (2005) [hereinafter Scott & Grisso, *Developmental Incompetence*]. Some scholars have cautioned against relying on neuroscientific findings to support arguments for reduced culpability for juvenile offenders. *See* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L. Rev. 89, 116–18 (2009) (warning that neuroscientific findings have generally been vulnerable to inaccurate conclusions by legal advocates, and that an emphasis on neuroscience inevitably raises autonomy and equality concerns); Soung, *supra* note 11, at 441–43 (expressing concern that misinterpretation and misapplication of adolescent neuroscience may fuel notions of racial inferiority and perpetuate racial bias). Notwithstanding these concerns and the relative recency of these studies in developmental neurology, others contend that "[t]here is incontrovertible evidence of significant changes in brain structure and function during adolescence" and "there is already strong consensus among developmental neuroscientists about the nature of this change." Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 Am. Psychologist 739, 742 (2009).

70 *See* Scott, *Adolescence*, *supra* note 2, at 555–56.

71 *See id.* at 560.

72 Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 459, 466–68 (2009); Steinberg et al., *"Flip-Flop,"* *supra* note 65, at 586.

73 *See* Scott & Steinberg, *Blaming Youth*, *supra* note 21, at 813–16; *see also* Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 Developmental Psychol. 193, 206 (2010) (concluding that decision making and risk assessment improves throughout adolescence due to affective processing rather than cognitive maturation); Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 Applied Developmental Psychol. 257, 265, 268 (2001) (finding adolescents less likely than adults to identify long-term consequences, evaluate risks and benefits, and examine possible alternative options); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 38–39 (2009) [hereinafter Steinberg et al., *Future Orientation*] (finding that adolescents are particularly attuned to immediate rewards and tend to discount long-term consequences); Steinberg & Scott, *Less Guilty*, *supra* note 3, at 1009, 1012 (finding that, compared to adults, adolescents place less weight on risk than reward). For additional studies, see Brief for the American Psychological Association et al. as Amici Curiae Supporting Petitioners at 6–30, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647) [hereinafter Brief for APA, *Miller*].

regulation also reveal that adolescents score significantly lower than adults on measures of "temperance," "impulse control," and "suppression of aggression."[74] Adults tend to make better decisions than adolescents given their capacity to remain focused on long-term goals and resist social and emotional influences.[75]

Developmental research further indicates that youth "are more . . . responsive to peer influence than are adults."[76] As empirical evidence demonstrates, peer presence makes youth significantly more likely than adults to take risks and engage in antisocial behavior, with susceptibility to peer pressure peaking around age fourteen and then declining slowly during late adolescence.[77] The fear of rejection and desire for approval from peers help explain why delinquency is more common in adolescence and why adolescents are more likely than adults to engage in illicit behavior in groups.[78]

Given the gap between cognitive and psychosocial development, it is plausible that a fifteen-year-old boy would have the cognitive ability to understand—in a conversation with his father—that robbery is wrong yet impulsively participate in such conduct with a group of friends who snatch a stranger's hat and run away.[79] Psychosocial features of adolescence, such as susceptibility to peer influence, a desire to save face and maintain loyalty to friends, and impulsivity driven by fear and adrenaline, may prevent the fifteen-year-old from engaging, in the heat of the moment, in a logical analysis of the long-term conse-

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74 Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741, 748–49, 754 tbl.4 (2000) [hereinafter Cauffman & Steinberg, *(Im)maturity*] (emphasis omitted); *see* Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764, 1774–76 (2008) [hereinafter Steinberg et al., *Sensation Seeking*].

75 *See* Albert & Steinberg, *supra* note 65, at 219–20 (suggesting that adults' ability to resist social and emotional influences and focus on long-term goals explains why they make more "adaptive decisions" than do adolescents); *see also* Adriana Galvan et al., *Risk-Taking and the Adolescent Brain: Who Is at Risk?*, 10 DEVELOPMENTAL SCI. F8, F9–F13 (2007) (finding that impulse control continues to develop throughout adolescence and early adulthood); Rotem Leshem & Joseph Glicksohn, *The Construct of Impulsivity Revisited*, 43 PERSONALITY & INDIVIDUAL DIFFERENCES 681, 684–86 (2007) (reporting significant decline in impulsivity from ages fourteen to twenty-two).

76 SCOTT & STEINBERG, *supra* note 2, at 38.

77 *See id.*; Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 626–34 (2005); Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1538–39 (2007).

78 *See* SCOTT & STEINBERG, *supra* note 2, at 38–39; Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 686–88 (1993).

79 *See* SCOTT & STEINBERG, *supra* note 2, at 38–39 (discussing group crime among adolescents); Scott, *Adolescence*, *supra* note 2, at 560 (stating that cognitive and psychosocial abilities develop at different rates).

quences of his actions.[80] Reckless behavior, including the delinquent activity described here, is so common among adolescents that it has been described as "virtually a normative characteristic of adolescent development."[81] Incidents of both minor delinquency and more serious violent crime "peak sharply" in adolescence and "drop precipitously in young adulthood."[82]

Although delinquency is common in adolescence,[83] not every adolescent violates the law. The transition to a healthy, safe, and productive adulthood depends on a number of variables, including the youth's environmental context and social supports.[84] Even among those youth who do engage in delinquency, most are "adolescence-limited" offenders who age out of delinquent behavior by late adolescence; few go on to become "life-course-persistent" offenders as adults.[85] As youth grow and mature, their cognitive and psychosocial capacities improve and their sense of self-identity evolves.[86] Over time, youth develop the skills they need to process information and think in hypotheticals.[87] As they transition into adulthood, youth are also less likely to make impulsive, peer-driven decisions as they acquire new values, learn to resist peer pressure, and begin to understand and control their emotions.[88] Because adolescence is a time when youth experience significant and rapid growth in their capacities, positive changes in a youth's family, school, or community are likely to have

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80 *See* SCOTT & STEINBERG, *supra* note 2, at 39 (stating that the desire for approval and fear of rejection affect an adolescent "even without direct coercion" from his or her peer group); Albert & Steinberg, *supra* note 65, at 219–20 (describing adolescents' inability to focus on long-term consequences).

81 Arnett, *supra* note 68, at 344, 350–51 (noting that at least 50% of adolescents report partaking in unprotected sex, illegal drug use, drunk driving, or some form of minor criminal activity).

82 *See* Moffitt, *supra* note 78, at 675 (discussing crime rates among various age groups, including crimes of homicide, forcible rape, robbery and aggravated assault).

83 *See* Arnett, *supra* note 68, at 344.

84 *See* He Len Chung et al., *The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective*, *in* ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS 68, 73–85 (D. Wayne Osgood et al. eds., 2005); Scott & Grisso, *supra* note 20, at 154, 156, 188; Gregory M. Zimmerman, *Impulsivity, Offending, and the Neighborhood: Investigating the Person–Context Nexus*, 26 J. QUANTITATIVE CRIMINOLOGY 301, 325–29 (2010). For an additional discussion of how environmental factors influence healthy adolescent transition to adulthood, see *infra* Part II.C.2.

85 Moffitt, *supra* note 78, at 685–86; *see* SCOTT & STEINBERG, *supra* note 2, at 54–56.

86 *See* Scott & Grisso, *supra* note 20, at 157–58; Steinberg & Scott, *Less Guilty*, *supra* note 3, at 1014; *see also* Brief for APA, *Miller*, *supra* note 73, at 19 (discussing brain development in adolescence).

87 Scott & Steinberg, *Blaming Youth*, *supra* note 21, at 812 n.54.

88 *See* Brief for APA, *Miller*, *supra* note 73, at 19–21; Scott & Steinberg, *Blaming Youth*, *supra* note 21, at 816.

considerable corrective influence on the youth's development.[89] As a result, the vast majority of youth who engage in criminal or delinquent behavior—including serious offenders—desist from crime when they mature.[90]

2. *Adolescent Development and the Supreme Court*

The revival of adolescence as a relevant and important period of behavioral development for juvenile and criminal law may have found its greatest support in the Supreme Court. The developmental research reviewed here has had a remarkable impact on the evolution of Supreme Court jurisprudence regarding minors' culpability in the criminal justice system. The Court first considered this research in 2005 when it concluded in *Roper v. Simmons* that sentencing a minor to death constitutes cruel and unusual punishment.[91] The Court relied upon developmental research again in 2010, in *Graham v. Florida*, when it held that sentencing a youth to life without the possibility of parole is unconstitutional in nonhomicide cases,[92] and in 2012, in *Miller v. Alabama*, when it held that mandatory life sentences were inappropriate for youth in homicide cases.[93] In each of these cases, the Court highlighted three key differences between juveniles and adults that justify differential treatment of juveniles in the criminal courts. First, the Court recognized that juveniles' immaturity and susceptibility to negative influences means "their irresponsible conduct is not as morally reprehensible as that of an adult."[94] Second, the Court found that youths' "vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[95] Third, the Court concluded that because youth are still forming their identities, "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence

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89 Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 393 (1999).

90 *See* Brief for APA, *Miller*, *supra* note 73, at 33; Moffitt, *supra* note 78, at 685–86; *see also* Steinberg & Scott, *Less Guilty*, *supra* note 3, at 1014–15 (describing how and why adolescents outgrow criminality).

91 543 U.S. 551, 569–70 (2005).

92 130 S. Ct. 2011, 2026 (2010).

93 132 S. Ct. 2455, 2464 n.5 (2012).

94 *Roper*, 543 U.S. at 561 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)); *see also Miller*, 132 S. Ct. at 2465 ("[T]ransient rashness, proclivity for risk, and inability to assess consequences . . . lessen[ ] a child's 'moral culpability' . . . ."); *Graham*, 130 S. Ct. at 2026–27 (arguing that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult" (quoting *Roper*, 543 U.S. at 570)).

95 *Roper*, 543 U.S. at 570 (citing Stanford v. Kentucky, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting)).

of irretrievably depraved character."[96] To the contrary—as the Court accepted in *Roper*, *Graham*, and *Miller*—juveniles are "more capable of change than are adults," and courts cannot reliably classify them among the worst offenders.[97]

Addressing the principles of retribution and deterrence, the *Graham* Court concluded that minors are categorically less deserving of retribution than adults and recognized that the very features of adolescence that make youth less culpable also make them less susceptible to deterrence.[98] Because youth are often unable to control their impulses or hypothesize about the potential consequences of their actions, harsh penalties are unlikely to deter them.[99] Likewise, lengthy periods of pretrial detention or long-term residential placements after disposition may be inappropriate if most youth are amenable to rehabilitation and will likely mature out of crime.[100] The net result of the Court's analysis is a presumption of diminished capacity and amenability to rehabilitation that has mitigated criminal responsibility and eroded the most serious consequences for youth charged as adults in the criminal justice system.

3. *Preserving Adolescence and Seeing Our Way Forward*

We are clearly at a turning point in the juvenile court's history. Given the sustained validation from both developmental research and Supreme Court jurisprudence, the role of adolescence in criminal justice policy and practice is on firmer footing than ever before and may be here to stay. State legislatures and decision makers are only just now beginning to revisit the juvenile justice legislation of the 1990s. Thus far, state legislatures and decision makers' efforts have largely concentrated on reversing or tempering juvenile transfer laws and other particularly harsh criminal sanctions.[101] Fewer efforts have

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96 *Id.* (recognizing juveniles' malleable nature and potential for maturation).

97 *Graham*, 130 S. Ct. at 2026; *see Miller*, 132 S. Ct. at 2465–66; *Roper*, 543 U.S. at 570.

98 *Graham*, 130 S. Ct. at 2027–29.

99 *See id.* at 2028–29; *Roper*, 543 U.S. at 571–72; *see also* Brief for APA, *Miller*, *supra* note 73, at 34 n.79 (discussing studies showing that the threat of adult criminal sanctions had no deterrent value on juvenile delinquency).

100 *See* Moriearty, *supra* note 48, at 306 (arguing that pretrial detention is usually ineffectual and damaging); Scott & Steinberg, *Blaming Youth*, *supra* note 21, at 837–38 (noting that long-term incarceration may not be necessary, as most youths mature out of antisocial behavior).

101 *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/5–130(1)(a) (West Supp. 2012) (limiting the mandatory transfer of youth over fourteen to enumerated serious offenses); Engrossed Substitute S.B. 5746, 61st Leg., Reg. Sess. (Wash. 2009) (repealing automatic transfer statute enacted in 1994 and prohibiting the transfer of youths under the age of fifteen except for murder and aggravated assault); S. & H.R. B. 1196, Gen. Assemb., Jan. Sess. (Conn. 2007) (amending section 46b–120 of Connecticut General Statutes to raise the age of juvenile court jurisdiction from sixteen to eighteen); *see also* CONN. JUVENILE JURISDICTION PLANNING & IMPLEMENTATION COMM., FINAL REPORT 2–4 (2007), *available at* http://www.ncdjjdp.

been made to apply the developmental research to the low- and midlevel offenses that pervade juvenile courts today.[102]

Even before the Supreme Court's recent Eighth Amendment rulings, very few convicted youths faced the severe sentences of death or life without the possibility of parole in adult courts, and today, most young offenders are prosecuted in juvenile courts across the country.[103] Moreover, most juvenile court referrals involve nonviolent offenses and misdemeanors; for example, 84% of juvenile arrests in 2008 involved property offenses, simple assault, and nonviolent crimes.[104] Nowhere has the increase in low- to midlevel juvenile court referrals been more evident than in school-based referrals.[105] Although schools were once willing to handle normal adolescent misconduct through time-outs, counseling, and other in-school interventions, schools now routinely employ school resource officers (SROs) to monitor hallways and manage even the least offensive adolescent behavior.[106]

The prevalence of minor, low-impact offenders in juvenile courts today reflects society's continued unwillingness to tolerate "normal"

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org/resources/youthAccountabilityTaskForce/systemCosts/connecticut.pdf (citing research on the immaturity of juveniles as a basis for raising the age of juvenile court jurisdiction).

102 *See infra* notes 336–47 and accompanying text for discussion of school offense protocols.

103 *See Graham*, 130 S. Ct. at 2023 (noting that only 109 juvenile offenders were serving sentences of life without the possibility of parole for nonhomicide offenses); *Roper*, 543 U.S. at 566–68; Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, 60 RUTGERS L. REV. 33, 50–51 (2007) (pointing out that even though waiver to adult court is a growing concern, out of the 2.2 million youths who were under eighteen and arrested in 2003, 71% of those eligible were referred to juvenile court, while only 7% were referred to criminal court).

104 C. Puzzanchera et al., *Easy Access to FBI Arrest Statistics: 1994–2009*, OFF. JUV. JUST. & DELINQ. PREVENTION, www.ojjdp.gov/ojstatbb/ezaucr/asp/ucr_display.asp (last visited Nov. 6, 2012). In 2008, only 16% of juvenile arrests were for murder, forcible rape, aggravated assault, and robbery. *See id.* Although nonviolent offenses make up the majority of offenses in juvenile court, see *id.*, juvenile arrest and commitment rates rose beginning in the 1970s, peaked in the 1990s, and subsequently fell, albeit not to the previous rate. *See* Jeffrey Fagan & Aaron Kupchik, *Juvenile Incarceration and the Pains of Imprisonment*, 3 DUKE F. FOR L. & SOC. CHANGE 29, 31–32 (2011). The number of youth adjudicated, committed, and placed in residential placement across the country has decreased since the late 1990s from 76,600 in 1999 to 47,062 in 2010. M. Sickmund et al., *Easy Access to the Census of Juveniles in Residential Placement: 1997–2000*, OFF. JUV. JUST. & DELINQ. PREVENTION, http://ojjdp.gov/ojstatbb/ezacjrp/asp/selection.asp (last visited Nov. 6, 2012) (select "Adjudicated, placed here"; then select "Show Table"). The number of youth convicted in criminal court, however, has risen from 1,235 in 1999 to 1,365 in 2010. M. Sickmund et al., *Easy Access to the Census of Juveniles in Residential Placement: 1997–2000*, OFF. JUV. JUST. & DELINQ. PREVENTION, www.ojjdp.gov/ojstatbb/ezacjrp/asp/State_Offense.asp (last visited Nov. 6, 2012).

105 See *infra* Part II.B for a discussion of data regarding school-based referrals to juvenile courts.

106 *See* Kupchik & Monahan, *supra* note 8, at 617, 620–21 (noting the increase in the use of SROs in schools since 1990 and the reasons behind the increase).

adolescent misconduct—particularly among poor youth of color.[107] One cannot understand contemporary juvenile justice policies and practices without examining the impact race and class have on the American conception of adolescence. Before considering the prosecutors' role in juvenile justice reform, the next Part examines how race influences juvenile justice referrals and charging decisions. Part II contends that socioeconomic disparities and harmful narratives about youth of color contribute to the overrepresentation of black and Hispanic youth in juvenile courts, especially for low- and midlevel offenses.

II
The Intersection of Race and Adolescence in the Juvenile Justice System (E-racing Adolescence)

The historical evolution of adolescence is only part of the Progressives' story. A more complete narrative considers the impact of race and class on the development of American juvenile justice and suggests that the Progressives' motives were not entirely altruistic. Many revisionist accounts of this history have argued that the Progressive agenda was always one of social control, and that reformers designed child welfare agencies and juvenile courts to protect their middle-class existence and control poor immigrants—and later people of color.[108] Today, disparities in the treatment of poor youth of color persist notwithstanding similarities in the normative development of youth across all ethnicities and socioeconomic classes.[109]

A. Race and Class in the Early Juvenile Court

From its inception, the juvenile court has operated as an institution for "other," nonmainstream youth living outside of the middle-class ideal.[110] The American transformation into a modern industrialized society brought with it an influx of immigrants from southern and eastern Europe who "crowded into ethnic enclaves and urban ghettoes."[111] Even before the first juvenile court opened in Chicago in 1899,[112] the upper- and middle-class Anglo-Protestant Western Europeans, who had arrived a few generations earlier, sought to assim-

107 *See, e.g.*, Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 681–82, 706–07 (2002) (discussing the juvenile justice system's disparate treatment of African American children).

108 *See infra* notes 110–27 and accompanying text.

109 *See infra* Part II.B.

110 *See* Nunn, *supra* note 107, at 704–06.

111 Feld, *Transformation Part II*, *supra* note 16, at 332.

112 Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 Wash U. J.L. & Pol'y 53, 63 (2012).

ilate the poor immigrants into "sober, virtuous, middle-class Americans like themselves."[113] The Child Savers treated poverty like a crime and blamed poor parents for their children's delinquent behavior and conditions.[114] As some scholars have argued, the Progressives deliberately constructed the juvenile court to discriminate against and control poor immigrants and provide coercive measures to distinguish between "our children" and "other people's children."[115]

The "enlightenment" of the American juvenile justice system peaked during a period that spanned from the final years of slavery to the Progressive Era reforms of 1920.[116] Early juvenile justice reformers did not initially contemplate the rehabilitation and "citizen-building" of "Negro" children, and instead, focused their efforts on "normaliz[ing]" or "whiten[ing]" European immigrant youth deemed neglected and delinquent.[117] Reformers only admitted boys who were deemed salvageable to the first child welfare facilities,[118] while black children, who were viewed as a "perennial 'lost cause' . . . lacking the physical, moral, and intellectual capacity on which normalization would depend," did not benefit from the Child Saver efforts.[119] During slavery, Southern plantation owners viewed black children as property to be disciplined, controlled, and nurtured into docile and productive adult laborers.[120] Slave masters, rather than the state, typically whipped or used other forms of corporal punishment to discipline disobedient black children.[121] After Emancipation, delinquent black children in the South faced convict leasing, lynching, and other forms of physical abuse.[122] When some refuge homes for wayward children finally opened their doors to black children, they relegated

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113 Feld, *Transformation Part II*, *supra* note 16, at 332–34; *see* WARD, *supra* note 12, at 73; Fox, *supra* note 22, at 1188–92.

114 *See* Birckhead, *supra* note 112, at 62.

115 Feld, *Transformation Part II*, *supra* note 16, at 339–40.

116 WARD, *supra* note 12, at 38.

117 *Id.* at 38–39, 86–87. For an excellent summary of the disparate treatment and denial of rehabilitative services to children of color during the Child Saver Era, see Robin Walker Sterling, *Still at the Back of the Bus:* In re Gault *and the Unfinished Due Process Revolution in Juvenile Justice*, 72 MD. L. REV. (forthcoming 2013) (manuscript at 10–29), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079767; *see also* JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 3 (Shadi Rahimi ed., 2008) ("From the earliest days of our nation, segregationist policies dictated that the detention of youth of color would be different than that of [w]hite youth . . . .").

118 *See* Fox, *supra* note 22, at 1191.

119 WARD, *supra* note 12, at 39, 52–53, 60, 86–87.

120 *Id.* at 35.

121 *Id.* at 50, 60, 62 (noting that it was unusual for enslaved youth to be subject to state sanction and that "plantation discipline took care of the disobedient Negro child" (quoting ROBERT M. MENNEL, THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES 1825–1940, at 75 (1973))).

122 WARD, *supra* note 12, at 63–70, 98–102.

the black children to the "colored section" and denied them rehabilitative services, which were was seen as a waste of resources for black youth.[123] While these homes provided white youth with academic education and training to be farmers and skilled artisans, black boys received little if any recreation, education, and moral instruction, and were instead trained to meet the labor needs of the day, which were largely agricultural and other forms of manual labor.[124] Likewise, black girls were trained to be cooks, maids, and seamstresses.[125]

As European immigration came to an end after World War I,[126] black youth eventually displaced poor white immigrants as the youth population disproportionately involved in court proceedings. Thus, what started as a means to control poor immigrant youth later morphed into a racially motivated system of isolation and control as white immigrants assimilated into society.[127] In the years between Emancipation and World War II, many newly freed blacks migrated from the rural South to the urban North in search of work in the North's industrial factories.[128] With the influx of Southern blacks, Northern whites reacted with fear and hostility and forced blacks into segregated urban ghettos.[129] However, in comparison to their Southern counterparts, the Northerners were more willing to accommodate black youth in the segregated and dilapidated facilities of the juvenile justice system where the youth could remain under the control of the parental state.[130] As to be expected, juvenile justice in the North was marked by discrimination, and as in the South, the scarcity of facili-

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123 *Id.* at 53–56; *see* BELL & RIDOLFI, *supra* note 117, at 3.

124 WARD, *supra* note 12, at 56–58, 74.

125 *Id.* at 56, 74. Black boys learned "how to handle the hoe, shovel and spade; to manage horses, mules and cattle, to plow, to sow, and to reap," and black girls learned "to scrub, wash, and iron, to bake and cook; [and] to wait upon the family." *Id.* at 74 (citing HOUSE OF REFORMATION FOR COLORED CHILDREN, SECOND ANNUAL REPORT, 1875, at 7 (Baltimore Price Current Printing, 1875)). Although this Article's scope is limited to the historical treatment of black youth, it is important to note that this country's powerful elite subjected other youth of color to similar treatment. Most notably, disobedient Native American children faced labor and confinement for their purported transgressions in the nineteenth century. BELL & RIDOLFI, *supra* note 117, at 5. At the same time, the federal government established Indian boarding schools and relied on missionaries to "civilize" Native youth with the English language, Christianity, and other European values. *Id.* (quoting WARD CHURCHILL, KILL THE INDIAN, SAVE THE MAN: THE GENOCIDAL IMPACT OF AMERICAN INDIAN RESIDENTIAL SCHOOLS (2004)).

126 Feld, *Transformation Part II*, *supra* note 16, at 340–41.

127 *See* Tanenhaus, *supra* note 17, at 108–10; *see also* Nunn, *supra* note 107, at 706 (discussing how society's perception of black youth as "others" leads to disproportionate treatment by the juvenile justice system).

128 *See* WARD, *supra* note 12, at 79, 106–07; *see also* Feld, *Transformation Part II*, *supra* note 16, at 340–42 (discussing the demand for black southern laborers to work in northern industrial factories after World War I).

129 *See* Feld, *Race, Politics, and Juvenile Justice*, *supra* note 21, at 1464; Feld, *Transformation Part II*, *supra* note 16, at 343–45.

130 *See* WARD, *supra* note 12, at 110–14.

ties, apprenticeship opportunities, and resources that would serve black youth undermined any hope for rehabilitation.[131] White juvenile justice reformers were no more invested in citizen-building for black youth in the North than their counterparts were in the South.[132]

Disparities in the incarceration of black children have been documented since the nineteenth century. In the years before the first juvenile court—when delinquent children were still prosecuted in criminal courts—legislators excluded black children from criminal laws, recognizing that courts should not hold youth under fourteen as responsible for their actions as adults.[133] In one study published in 1850, black youth were significantly overrepresented in adult prisons in Providence, Baltimore, and Washington, D.C.[134] Furthermore, because juvenile courts evolved slowly, especially in rural parts of the country, jurisdictions continued to subject many youths to adult prosecution long after the first juvenile court opened.[135] Between 1900 and 1959, the State executed at least 162 persons eighteen years old or younger after adult criminal proceedings, with nearly 70% of those executions involving black youth.[136] Even in Chicago, where the first juvenile court was established, a 1913 study found that although blacks represented less than 3% of Chicago's population, black boys and men made up 12% of the jail population, while black girls and women made up nearly 33% of the female jail population.[137] Records indicate that by 1927, black Americans constituted only 7% of Chicago's population, but accounted for 22% of the juvenile court caseload.[138] These early disparities were evident across the nation through the 1940s and were a precursor to the even larger disparities of today.[139]

In the 1960s, a rise in juvenile crime, and an increase in social disorder caused by racial unrest in particular, led politicians to call for

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131 *Id.*

132 *See id.*

133 *Id.* at 48–50, 62.

134 BELL & RIDOLFI, *supra* note 117, at 4 (citing Cecile P. Frey, *The House of Refuge for Colored Children*, 66 J. NEGRO HIST. 10, 17 (1981)).

135 WARD, *supra* note 12, at 83.

136 *Id.* at 116–20.

137 *Id.* at 85, 88–90 (discussing additional disparities in the institutionalization of black youth, native youth, and immigrant white youth across the country).

138 *Id.* at 84.

139 *See* BELL & RIDOLFI, *supra* note 117, at 8 (discussing Mary Huff Diggs's review of fifty-three courts across the country in the 1940s and her findings that "Negro children [we]re represented in a much larger proportion of the delinquency cases than they [we]re in the general population," that "[c]ases of Negro boys were less frequently dismissed than were white boys," and that black boys "were committed to an institution or referred to an agency . . . much more frequently than were white boys" (quoting Mary Huff Diggs, *The Problems and Needs of Negro Youth as Revealed by Delinquency and Crime Statistics*, 9 J. NEGRO EDUC. 311, 313–16 (1940))).

"law-and-order" measures rather than rehabilitative responses to adolescent offending.[140] By the end of the 1980s, the appearance of crack cocaine in the inner city, the prevalence of guns among youth of color, and the rapid increase in homicides involving black youth had exacerbated the push for "get tough" responses to juvenile crime.[141] Casting the "crime problem" as primarily a poor, black male problem, politicians targeted black men and "exploited . . . racially tinged perceptions [of crime] for political advantage."[142] Black youth, who the media and conservative politicians demonized, became the prime targets of the war on crime and the war on drugs.[143] Today, broad and imprecise juvenile court purpose clauses have multiple and competing goals—ranging from rehabilitation to victims' rights, public safety, and accountability—that allow police officers, probation staff, and judges to hide illicit motives and subconscious racial bias behind whatever state interest is most politically salient at the time.[144]

B. Race and Adolescence in Contemporary Juvenile Courts

More than one hundred years after the first juvenile court opened its doors, disparate treatment of youth of color continues to define juvenile courts across the country. Considering the scope of racial disparities in the juvenile justice system today, it would be easy to conclude that mechanisms of social control are still at work to keep children of color in their assigned place in society. At every decision point in the system, statistics show that black youth are more likely to experience harsher dispositions and penetrate further into the system than white youth. As documented by the National Council on Crime and Delinquency, while African Americans comprised only 16% of all youth in the United States from 2002 to 2004, they accounted for 28% of all juvenile arrests, 30% of juvenile court referrals, 37% of detained youth, 34% of youth formally processed by the juvenile court, 30% of adjudicated youth, 35% of youth judicially waived to criminal court, 38% of youth in residential placements, and 58% percent of youth sent to adult state prison.[145] In 2009, 57% of youth under the age of

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140 Feld, *Transformation, Part II*, *supra* note 16, at 340, 345–46.

141 Feld, *Race, Politics, and Juvenile Justice*, *supra* note 21, at 1507.

142 *Id.* at 1518.

143 *Id.* at 1523; *see also* Perry L. Moriearty, *Framing Justice: Media, Bias and Legal Decisionmaking*, 69 MD. L. REV. 849, 870–73 (2010) (surveying media treatment of black youth and crime in the 1990s).

144 For a survey of contemporary juvenile court purpose clauses and a discussion of how victims' rights allow for racial bias, see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 362, 406–07 (1996); see also Henning, *Victims' Rights*, *supra* note 56, at 1112–14, 1118–22, 1143 (summarizing changes in purpose clauses across the country).

145 NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 3 (2007).

eighteen in the United States were white, 22% were Hispanic, 15% were African American, 5% were Asian, and 1% were American Indian.[146] Yet, African American youth made up 31% of all youth arrested in that year, an arrest rate nearly twice that of white youth.[147]

Black youth have also been disproportionately represented in detention and other out-of-home placements. Although the proportion of juvenile cases involving detained youth fluctuated between 1985 and 2008, the volume of cases grew generally, with a 41% increase in the total number of cases involving detained youth over the twenty-four-year period.[148] Cases involving black youth in detention, however, experienced an 85% increase during that period, while cases involving white youth in detention saw only a 19% increase.[149] Data from the Office of Juvenile Justice and Delinquency Prevention shows that for every 100,000 youth living in the United States on October 24, 2007, 279 were held in a long-term residential placement facility for some delinquent offense.[150] That average conceals significant racial disparities. For every 100,000 black youth in the United States, 738 were in a residential facility on that date.[151] For American Indian youth, that number was 477; for Hispanic youth, 305; for non-Hispanic white youth, 157; and for Asians, 75.[152] As one might expect, racial disparities persist for the most serious consequence of delinquency—transfer to adult court. National data are only available for waiver of juvenile court jurisdiction by judicial transfers and do not account for jurisdictional waivers by statutory exclusion of designated offenses or by statutes that grant prosecutors unchecked discretion to transfer accused youth.[153] In 2005, 7,000 youth were transferred by judicial waivers; 39% of these youth were black.[154] Although black youth were only 13% more likely than whites in that year to be judicially waived to adult court, this relative rate index likely underestimates the racial disparities of youth transferred since judicial waiver represents only a small portion of youth tried in the adult system.[155] According to 2008 statistics, Hispanic children were 43% more likely

146 *Easy Access to Juvenile Populations: 1990–2011*, Off. Juv. Just. & Delinq. Prevention, www.ojjdp.gov/ojstatbb/ezapop (last visited Nov. 6, 2012).

147 Howard N. Snyder, U.S. Dep't of Justice, Arrest in the United States, 1980–2009, at 22 (2011).

148 *Easy Access to Juvenile Court Statistics: 1985–2009*, Off. Juv. Just. & Delinq. Prevention, www.ojjdp.gov/ojstatbb/ezajcs (last visited Nov. 6, 2012).

149 *Id.*

150 Sickmund et al., *supra* note 104.

151 *Statistical Briefing Book*, Off. Juv. Just. & Delinq. Prevention, http://www.ojjdp.gov/ojstatbb/corrections/qa08203.asp?qaDate=2007 (last visited Nov. 6, 2012).

152 *Id.*

153 Neelum Arya & Ian Augarten, Campaign for Youth Justice, 2 Critical Condition: African-American Youth in the Justice System 25 (2005).

154 *Id.*

155 *Id.*

than white youth to be waived to the adult system and 40% more likely to be admitted to adult prison.[156] Native youth were 1.5 times more likely than white youth to receive out-of-home placement and 1.5 times more likely to be waived to the adult criminal system.[157]

The intersection of race and the waning tolerance of adolescence has been especially vivid in school-based arrests. Recently, school officials have been among the least willing to tolerate "normal" adolescent misconduct, as evident in the tremendous increase in referrals of youth from public schools to juvenile courts.[158] Whereas schoolteachers, principals, and school counselors once handled school-based incidents such as fighting, disorderly conduct, and destruction of property in school, school officials now rely on local police or in-house SROs to handle even the most minor of school infractions.[159] In 2005, 68% of students in the United States between ages twelve and fifteen reported the presence of security guards or assigned police officers in their schools, an increase from 54% in 1999.[160] In North Carolina, the number of SROs has nearly doubled over the last decade; in Texas, 163 school districts now have their own police departments.[161] Statistics reveal that in some states, such as North Carolina, close to 40% of juvenile court referrals come from schools.[162] In Pennsylvania, the number of school-based arrests has almost tripled in just seven years.[163] In Florida, there were 21,289 arrests and referrals of students to the Florida Department of Juvenile Justice in the 2007–2008 academic year; almost 15,000 of them—or 69%—were for misdemeanor offenses.[164] In North Carolina, schools made 16,499 delinquency referrals to juvenile court in the 2008–2009 year.[165] In Colorado, schools made 9,563 referrals to law enforcement in the

156 NEELUM ARYA ET AL., CAMPAIGN FOR YOUTH JUSTICE, 3 AMERICA'S INVISIBLE CHILDREN: LATINO YOUTH AND THE FAILURE OF JUSTICE 6 (2009).

157 NEELUM ARYA & ADDIE C. ROLNICK, CAMPAIGN FOR YOUTH JUSTICE, 1 A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS 8 (2008).

158 *See, e.g.*, M. Lynn Sherrod et al., *Childish Behavior; Criminal Behavior*, HUNTSVILLE TIMES, June 1, 2008, at A23 (noting that referrals from Clayton County schools skyrocketed from 36 in 1995 to 264 in 1998 when police officers were stationed in schools, and to 1,262 in 2003).

159 *See id.* (noting that "referrals for misdemeanors like disorderly conduct spiked out of control").

160 ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 15 (rev. 2010).

161 *Id.*

162 Donna St. George, *Judge Steve Teske Seeks to Keep Kids with Minor Problems Out of Court*, WASH. POST, Oct. 17, 2011, http://www.washingtonpost.com/lifestyle/style/judge-steve-teske-seeks-to-keep-kids-with-minor-problems-out-of-court/2011/09/21/gIQA1y8ZsL_story.html.

163 ADVANCEMENT PROJECT, *supra* note 160, at 18–19.

164 *Id.*

165 *Id.*

2006–2007 academic year.[166] In both North Carolina and Colorado, the vast majority of the referrals were for relatively minor offenses.[167]

The increase in referrals from schools to juvenile courts has disproportionately affected youth of color.[168] For example, in Florida, black students were 2.5 times as likely as white students to be arrested and referred to the state's Department of Juvenile Justice in the 2007–2008 academic year.[169] In Colorado, black students were more than twice as likely as white students to be referred to law enforcement, while "Latino students were 50% more likely than [w]hite students to be referred."[170] In Philadelphia, "a [b]lack student was three-and-a-half times more likely to be taken into police custody than a [w]hite student," and "a Latino student was 60% more likely to be taken into police custody than a [w]hite student."[171]

C. The Root of Racist and Racialized Outcomes

In a well-known scene of the 1986 Hollywood film, *Ferris Bueller's Day Off*, high-school senior Ferris Bueller makes an impassioned plea to his friend, Cameron, to take his father's Ferrari for a ride without permission.[172] Eager for excitement, Ferris provides the classic American representation of a risky adolescent adventure. Although Ferris's behavior reflects the same poor judgment, impulsivity, and risk taking that are endemic to all adolescents, his race, class, and relative isolation from state intervention shield him from the punitive outcomes, which poor youth of color across the country disproportionately experience. This section examines the underlying causes of racial disparities in the juvenile justice system.

1. *"Risky Business" Across the Racial Divide: Controlling for Class and Ethnicity in the Developmental Research*

Differences in normative adolescent development across different ethnic or socioeconomic groups cannot explain the overrepresentation of youth of color at every stage of the juvenile justice system. Studies controlling for socioeconomic status and ethnicity have found

166 *Id.*

167 *Id.*

168 Heather Cobb, Note, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.-C.L. L. REV. 581, 583–84 (2009); *see also* Donna St. George, *Black Students Are Arrested More Often, Data Reveal*, WASH. POST, Mar. 6, 2012, at A2 (discussing a U.S. Department of Education study of school systems that have more than fifty thousand students enrolled and its findings that "African American students represented 24 percent of enrollment but 35 percent of arrests," while "[w]hite students accounted for 31 percent of enrollment and 21 percent of arrests").

169 ADVANCEMENT PROJECT, *supra* note 160, at 18–19.

170 *Id.* at 19.

171 *Id.*

172 FERRIS BUELLER'S DAY OFF (Paramount Pictures 1986).

similar patterns in developmental features such as impulsivity, sensation seeking, susceptibility to peer influence, and limited future orientation across all youth groups.[173] For example, in one 2010 study, psychologists found a normative preference among adolescents for risk taking and short-term reward over long-term gain, with no significant differences among ethnicities.[174] In another 2009 study, psychologists controlled ethnicity and socioeconomic class and found that youth of similar ages exhibited similar levels of weak future orientation.[175] Two major self-report studies on youth violence and drug use, which document risk taking and delinquency across whites, blacks, and Hispanics, supplement these findings.[176] Where racial disparities do exist in self-reported data, they do not correspond to the disproportionate representation of youth of color in the juvenile justice system.[177]

The University of Michigan and the Center for Disease Control (CDC) have each separately collected and analyzed youth self-reported data for more than thirty-five years.[178] The University of Michigan study has tracked trends from 1975 to 2010, relying on data collected from around 17,000 middle school students in approximately 150 middle schools and around 15,000 high-school students in approximately 130 high schools around the country.[179] Overall, self-report data support the findings of developmental psychologists that all youth—especially those between the ages of fifteen and nineteen—

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173 A number of studies on adolescent development have controlled for race and socioeconomic status, finding no significant differences. *See, e.g.*, Cauffman et al., *supra* note 73, at 204–06 (showing a preference in adolescents for risk taking and short-term reward over long-term gain but no significant differences between ethnicities); Steinberg et al., *Future Orientation*, *supra* note 73, at 36 (finding that youth of similar ages in the study exhibited similar levels of weak future orientation when controlling for both ethnicity and socioeconomic status); Steinberg & Monahan, *supra* note 77, at 1538–39 (finding that patterns in resistance to peer influence vary only slightly by ethnicity and socioeconomic status and generally all groups follow the same basic age pattern in developing resistance to peer pressure); Steinberg et al., *Sensation Seeking*, *supra* note 74, at 1775 (finding that all youth have increased sensation seeking and impulsivity across ethnic groups).

174 Cauffman et al., *supra* note 73, at 200, 204–06.

175 Steinberg et al., *Future Orientation*, *supra* note 73, at 36.

176 LLOYD D. JOHNSTON ET AL., 1 MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE 1975–2010, at 1 (2011) [hereinafter JOHNSTON ET AL., MONITORING THE FUTURE]; *Youth Online: High School YRBS*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://apps.nccd.cdc.gov/youthonline (last visited Nov. 6, 2012) [hereinafter CDC].

177 *Compare* JOHNSTON ET AL., MONITORING THE FUTURE, *supra* note 176, at 34 (noting that white youths report a significantly greater use of certain drugs than African American youths), *with Statistical Briefing Book*, OFF. JUV. JUST. & DELINQ. PREVENTION, http://www.ojjdp.gov/ojstatbb/crime/jar.asp (last visited Nov. 6, 2012) (indicating that African American youth accounted for just 17% of the total youth population but represented 27% of all youth arrests for drug abuse violations).

178 JOHNSTON ET AL., MONITORING THE FUTURE, *supra* note 176, at 9; CDC, *supra* note 176.

179 JOHNSTON ET AL., MONITORING THE FUTURE, *supra* note 176, at 65.

are more likely than adults to engage in dangerous, risk-taking behaviors, such as drunk driving, unprotected sex, and drug use.[180] Developmental psychologists attribute the prevalence of risk taking by this cohort to emotional and cognitive variables that affect decision making by youth of all classes and ethnicities.[181] The desire and ability to avoid harm and resist peer influence increase with age, with adults avoiding harmful or otherwise disadvantageous options at higher rates than adolescents.[182]

When the self-reported data is disaggregated by race, statistics reveal that African American youth consistently report less drug use than whites and Hispanics for most types of drugs, but that Hispanics tend to slightly outpace both African American and white youth depending on the type of drug. Findings from the 2011 University of Michigan report are telling:

> African-American 12th graders have consistently shown lower usage rates than [w]hite 12th graders for most drugs, both licit and illicit. At the lower grade levels, where few have yet dropped out of school, African-American students also have lower usage rates for many drugs, though not all. . . .
>
> In 12th grade, occasions of heavy drinking are much less likely to be reported by African-American students (13%) than [w]hite (28%) or Hispanic students (22%).
>
> In 12th grade, of the three racial/ethnic groups, [w]hites tend to have the highest rates of use on a number of drugs, including marijuana, salvia, hallucinogens, LSD specifically, hallucinogens other than LSD, narcotics other than heroin, OxyContin specifically, Vicodin specifically, amphetamines, Ritalin specifically, Adderall specifically, sedatives (barbiturates), tranquilizers, alcohol, getting drunk, flavored alcoholic beverages, cigarettes, and smokeless tobacco.
>
> Hispanics have tended to have the highest usage rate in terms of annual prevalence in 12th grade for a number of the most dangerous drugs, such as crack, crystal methamphetamine (ice), heroin in general and heroin with a needle (though in 2009–2010, specifi-

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180 *See* Steinberg et al., *Future Orientation*, *supra* note 73, at 39 (noting that youth are less oriented to the future than adults across all races); Steinberg et al., *Sensation Seeking*, *supra* note 74, at 1771, 1774 (showing that adolescents across ethnicities experience heightened sensation seeking between the ages of twelve and fifteen and experience heightened impulsivity throughout adolescence and into early adulthood); CDC, *supra* note 176 (providing statistics on self-reported sexual behavior, drunk driving, and drug use by youth).

181 *See generally* Albert & Steinberg, *supra* note 65, at 211, 218–19 (summarizing research over the past decade confirming adolescent decision-making tendencies, which include emotional factors, lack of resistance to peer influence, and preference of short-term rewards over long-term risks).

182 *Id.* at 218–19.

> cally, [w]hites were highest for heroin use and African Americans were highest for heroin use with a needle).[183]

Self-reported data does not correspond with or explain racial disparities in drug arrest rates. For example, in 2008, African American youth accounted for just 16% of the total youth population, but represented 27% of all youth arrests for drug abuse violations[184] and were arrested at almost 1.7 times the rate of white youth for such offenses.[185] As such, these rates appear to exaggerate the prevalence of drug use among black youth and mask the extent of self-reported drug use among white youth.

Self-report studies also provide evidence that race does not predetermine violent offending. Although African American youth are arrested at much higher rates than white youth for weapons offenses, self-reported data from the Youth Risk Behavior Surveillance System administered by the CDC reveals small differences in weapons offenses between these groups.[186] While African American youth accounted for 38% of all youth arrested for a weapons offense in 2008,[187] CDC data from that same year revealed that white youth were almost as likely to report bringing some type of weapon to school as Hispanic and multiracial youth and slightly more likely to report bringing a weapon than African American youth.[188] African American youth, however, were more likely to bring a gun specifically.[189] That same study showed that white youth were more likely than all other races to report driving while drinking alcohol, and thus were more likely to put themselves and others in danger on the road.[190] African American and American Indian youth were more likely than white youth to report being in a physical fight at school at least once.[191] Ultimately, while the age of onset, types of violence, types of

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183 JOHNSTON ET AL., MONITORING THE FUTURE, *supra* note 176, at 34–35 (emphasis omitted).

184 *Statistical Briefing Book*, *supra* note 177.

185 *See id.*

186 *See* CDC, *supra* note 176.

187 Charles Puzzanchera, *Juvenile Arrests 2008*, JUV. JUST. BULL., Dec. 2009, at 9.

188 *See* CDC, *supra* note 176 (follow "Unintentional Injuries and Violence"; follow "Carried a weapon on at least 1 day"; then select column variable "Race" and 2009) (indicating the percentage of students who carried a weapon at least one day: white, 18.6%; black, 14.4%; Hispanic, 17.2%; multiracial, 17.9%; Asian, 8.4%; American Indian, 20.7%).

189 *Id.* (follow "Unintentional Injuries and Violence"; follow "Carried a gun on at least 1 day"; then select column variable "Race" and 2009) (indicating the percentage of students who carried a gun at least one day: white, 5.8%; black, 7.6%; Hispanic, 5.1%; multiracial, 7.2%; Asian, 3.4%; and American Indian 7.6%).

190 *Id.* (follow "Unintentional Injuries and Violence"; follow "Drove when drinking alcohol one or more times"; then select column variable "Race" and 2009) (indicating the percentage of students who drove when drinking alcohol: white, 10.8%; black, 6.4%; Hispanic, 9.4%; multiracial, 8.6%; Asian, 4.4.%; American Indian, 10.7%).

191 *Id.* (follow "Unintentional Injuries and Violence"; follow "In a physical fight on school property one or more times"; then select column variable "Race" and 2009) (indi-

weapon, and drug preferences may differ across races in self-reporting, adolescents of all races engage in risky and delinquent behavior, and often at rates that call into question racial disparities at arrest.

2. *Understanding Neighborhood Effects, Opportunity Structures, and Deliberate Indifference*

Many researchers have offered theories to explain the disparity between self-report studies and arrest data. Explanations include the increased presence of police officers in neighborhoods and communities where African American and Hispanic youth reside, selective reporting of offenses to the police, racial and ethnic bias by police, victims, and witnesses, and racial and ethnic biases in self-reporting.[192] Some researchers challenge self-report studies, claiming that African American males underreport their involvement in delinquency and that self-reporting among all groups on serious types of offenses is less reliable.[193] Recent validity and reliability studies, however, suggest that self-reporting has improved over time and that self-report measures of delinquency are as reliable as, if not more reliable than, most social science measures.[194]

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cating the percentage of students who were in a physical fight on school property: white, 8.6%; black, 17.4%; Hispanic, 13.5%; multiracial, 12.4%; Asian, 7.7%; American Indian, 20.7%).

192 *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 30 (2001) (citing ALFRED BLUMSTEIN ET AL., COMM. ON RESEARCH ON LAW ENFORCEMENT & THE ADMIN. OF JUSTICE, CRIMINAL CAREERS AND "CAREER CRIMINALS" (1986)); Roy L. Austin & Mark D. Allen, *Racial Disparities in Arrest Rates as an Explanation of Racial Disparity in Commitment to Pennsylvania's Prisons*, 37 J. RES. CRIME & DELINQ. 200, 208–14 (2000); Darnell F. Hawkins et al., *Race, Ethnicity, and Serious Juvenile Offending*, *in* SERIOUS & VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 30–33 (Rolf Loeber & David P. Farrington eds., 1998); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 330–33 (1997).

193 *See* D. Wayne Osgood et al., *Analyzing Multiple-Item Measures of Crime and Deviance I: Item Response Theory Scaling*, 18 J. QUANTITATIVE CRIMINOLOGY 267, 272 (2002) (pointing to the concern that "self-report measures typically over emphasize less serious, and therefore less important, forms of offending"); Terence P. Thornberry & Marvin D. Krohn, *The Self-Report Method for Measuring Delinquency and Crime*, *in* 4 CRIMINAL JUSTICE 33, 58 (2000) (providing an historical survey of validity and reliability studies of the self-reporting methodology, including those that questioned whether African American males underreport delinquency).

194 *See* Thornberry & Krohn, *supra* note 193, at 58–59. *See generally* N.D. DEP'T OF PUB. INSTRUCTION, DO STUDENTS TELL THE TRUTH ON THE YOUTH RISK BEHAVIOR SURVEY (YRBS)? (1990), *available at* http://www.dpi.state.nd.us/health/yrbs/truth.pdf (identifying ways in which survey design ensures reliable responses, including comparison with other surveys showing that YRBSs receive similar results, consistency over time, removal of inconsistent answers on the same answer sheet from the data set, logic within groups of questions, psychometric studies confirming the validity of the test, logical subgroup differences such as greater male reported use of smokeless tobacco than female, and a survey environment ensuring anonymity of students).

Another hypothesis for the disproportionate representation of youth of color in the juvenile justice system is that normal adolescent delinquency may be more visible and even appear more dangerous in poor communities of color. Thus, communities may perceive a Hispanic youth who uses crack or crystal meth as engaging in more dangerous behavior than a white youth who uses marijuana. Communities may perceive a black youth with a gun as more threatening than a white youth with a knife or an intoxicated youth who drives a car recklessly in a residential neighborhood. Similarly, poor youth who buy and sell drugs in open-air markets where they live are frequently more visible and perceived as more threatening and antagonistic to law enforcement officials and the community than wealthier youth who may engage in drug use and violence in the privacy of their own homes and clubhouses, or white youth who may visit high-drug neighborhoods to buy marijuana or heroin and take it home in cars where they are shielded from police view.[195] Theorists have long used neighborhood effects and opportunity structures like these to explain disparate offending rates by race.[196] Neighborhoods with low collective cohesion, high residential mobility, extensive legal cynicism, frequent opportunities for offending, and few opportunities for educational advancement and legitimate wealth accumulation produce higher rates of delinquency, particularly drug dealing and violent crime.[197] As research demonstrates, the effects of adolescent

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195 *See* Soung, *supra* note 11, at 436. In this context, race and class may be inextricably intertwined. Black and Hispanic youth are nearly three times as likely to live in poverty as non-Hispanic white youth. *Statistical Briefing Book*, OFF. JUV. JUST. & DELINQ. PREVENTION, http://ojjdp.gov/ojstatbb/population/qa01402.asp?qaDate=2010 (last visited Nov. 6, 2012).

196 Heidi E. Grunwald et al., *Influences of Neighborhood Context, Individual History and Parenting Behavior on Recidivism Among Juvenile Offenders*, 39 J. YOUTH & ADOLESCENCE 1067, 1068–69, 1076 (2010) (discussing social disorganization theory and effects of neighborhood processes on adolescent recidivism, and noting that youths living in environments with ethnic homogeneity, poverty, and well-organized drug trafficking will easily turn to illicit activities); Beverly Kingston et al., *A Test of Social Disorganization Theory in High-Risk Urban Neighborhoods*, 41 YOUTH & SOC'Y 53, 55–61 (2009) (discussing the history of social disorganization theory, including neighborhood effects and opportunity structures); Jeremy Mennis et al., *The Effect of Neighborhood Characteristics and Spatial Spillover on Urban Juvenile Delinquency and Recidivism*, 63 PROF. GEOGRAPHER 174, 175–76 (2011) (summarizing the history of the theory of "neighborhood effects" on crime, including the role of neighborhoods in promoting or prohibiting crime and delinquency through cohesion among neighbors and community-level social control).

197 *See generally* John P. Hoffmann & Timothy O. Ireland, *Strain and Opportunity Structures*, 20 J. QUANTITATIVE CRIMINOLOGY 263, 266–71 (2004) (discussing "legitimate" opportunity structures such as education that facilitate the accumulation of wealth and reduce the risk of crime and "illegitimate" opportunity structures that create both physical and social opportunities for crime); Michelle Little & Laurence Steinberg, *Psychosocial Correlates of Adolescent Drug Dealing in the Inner City: Potential Roles of Opportunity, Conventional Commitments, and Maturity*, 43 J. RES. CRIME & DELINQ. 357, 359–60 (2006) (studying neighborhood effects on urban adolescent drug dealing and noting a rising number of opportunities for juveniles to sell drugs in urban areas); Ramiro Martínez, Jr. et al., *Social*

impulsivity are likely amplified in neighborhoods with lower levels of socioeconomic status and greater opportunities for criminal behavior and legal cynicism.[198] Against this backdrop, a law enforcement decision to aggressively target open-air drug markets and urban neighborhoods with high rates of crime may reflect a legitimate concern about the increase in violence that often accompanies the public drug trade and a genuine desire to make these communities safer rather than any conscious or subconscious police discrimination.

Nonetheless, rational explanations for arrest and charging decisions cannot absolve state actors of responsibility for racially disparate outcomes in the juvenile justice system. Even if the disparate impact of criminal justice policies on people of color is not the product of blatant and deliberate racism, it is equally unlikely that such ongoing disparities are the inadvertent product of innocent decisions made by those who were ignorant of the likely outcomes.[199] As Professor Michael Tonry claims, it is more likely that policymakers eager to earn or maintain political reputation are aware that people of color have been and will be disproportionately affected and do not care.[200] As many others have argued, the disproportionate representation of people of color in prisons is the cumulative product of police practices, legislative decisions, and executive directives that systematically treat poor people and people of color differently in order to maintain racial dominance and a hierarchy of white elites across American social, economic, and legal institutions.[201] By opting for punitive "get tough"

Disorganization, Drug Market Activity, and Neighborhood Violent Crime, 43 URB. AFF. REV. 846, 863–64 (2008) (stating that residential instability has "significant and positive direct effects on rates of aggravated assault").

198 *See* Zimmerman, *supra* note 84, at 301 (finding an interplay between community-level explanations for offending and individual traits of impulsivity among adult offenders).

199 *See* Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, *in* 39 CRIME AND JUSTICE: A REVIEW OF RESEARCH 273, 274–75 (Michael Tonry ed., 2010) (contending that "[n]o credible case can be made that gross racial disparities were unforeseeable").

200 *Id.* at 275, 293–300. Tonry offers three broad explanations for racial disparities in the criminal justice system, including the psychology of race relations (e.g., contemporary bias and colorism), whites' economic, political, and social dominance of blacks to preserve current racial stratification, and Republican exploitation of racial fears to achieve political gain. *See id.* at 280–81.

201 For a history of social policies and practices including contemporary criminal justice policies and practices that maintain current social stratification of whites over poor blacks, see DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 54, 94, 251 (2007) (examining the history of social stratification and arguing that crime policy supports white interests); Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs*, 1 DU BOIS REV. 151, 151–56 (2004) (examining scholars who view changes in U.S. criminal justice policy as an effort to reassert control and domination over African Americans); Glenn C. Loury, *Race, Incarceration, and American Values*, *in* RACE, INCARCERATION, & AMERICAN VALUES 3, 36–37 (2008) (examining mass incarceration as a "principal vehicle for the re-

strategies, including laws that impose harsher legal sanctions on crack—more prevalent in black communities—than on cocaine, policymakers perpetuate racial disparities and displace strategies aimed at correcting structural deprivations and social inequalities that are more likely to improve public safety in communities of color.[202] As Professors Jeffrey Fagan and Tracey Meares argue, public policy choices that shift "social and economic resources" away from employment opportunities, education, and neighborhood supports in poor communities create cynicism and undermine both community cohesion and informal social controls that serve as a natural deterrent to crime.[203]

In the juvenile justice context, prosecutors, probation officers, and judges make collective and individual decisions to impose harsh legal sanctions on black youth instead of relying on the preventive and treatment-oriented strategies often available for white youth.[204] Notwithstanding differences in the type of drugs or weapons prevalent in communities of color, there is no support for a claim that youth of color will not benefit from developmentally appropriate responses to adolescent offending. Thus, given normative research that youth as a class are more amenable than adults to positive corrective responses to crime,[205] there is no reason to believe that a Hispanic youth who sells crystal meth is inherently less amenable to rehabilitation than a

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production of racial hierarchy in our society"); Tonry, *supra* note 199, at 274–80 (tracing social control and racial stratification from slavery, through Jim Crow, to the war on drugs); Loïc Wacquant, *Forum*, *in* RACE, INCARCERATION, & AMERICAN VALUES, *supra* at 57, 65 [hereinafter Wacquant, *Forum*] (claiming that "the prison was called upon to help contain a population widely viewed as deviant, destitute, and dangerous"); Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the 'Race Question' in the US*, 13 NEW LEFT REV. 41, 41–60 (2002) [hereinafter Wacquant, *From Slavery*] (arguing that American legal institutions and social practices have perpetuated patterns of racial dominance and hierarchy for three centuries).

202 *See* Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 176–77, 180 (2008) (discussing the failure of punitive legal sanctions like incarceration to reduce crime, especially in poor communities of color).

203 *Id.* at 173, 176, 183–84 (explaining that localized informal social controls such as work, social status, stigma, marriage, and political participation serve as natural deterrents or regulators of crime, while more punitive policies of incarceration actually increase crime); *see also* Zimmerman, *supra* note 84, at 325–26 (finding that impulsivity is exacerbated in areas with lower socioeconomic status and collective efficacy and higher levels of criminal opportunity and moral or legal cynicism).

204 *See* Fagan & Meares, *supra* note 202, at 178–79 (noting that "African Americans have borne the brunt of law enforcement efforts" to address illegal drug use and trafficking, widening the racial gap in prisoner demographics); Tonry, *supra* note 199, at 274 (noting the emphasis on law enforcement approaches to drug abuse as opposed to preventive approaches).

205 *See supra* notes 85–90 and accompanying text (discussing research indicating that most delinquent youth cease to engage in delinquent behavior once they mature); *infra* notes 381–85, 424–30 and accompanying text (discussing evidence-based, community-based practices that have worked even with serious, violent offenders).

white youth who sells ecstasy to his friends at home. A punitive response to crystal meth may even do more harm than good if the Hispanic youth perceives punishments to be unjust and inequitable across races and ethnicities.[206] As discussed in the next section, the denial of rehabilitative options available to youth of color likely reflects both explicit and implicit biases about the culpability and maturity of youth of color.

D. Implicit Bias and the Failure to Recognize Developmental Immaturity in Youth of Color

Class and neighborhood distinctions can only partially explain racial disparities in the juvenile justice system. Overemphasizing such explanations may conceal the impact of negative stereotypes and harmful narratives about race and crime in America. As studies have repeatedly documented, many Americans are predisposed to consciously or subconsciously associate black youth with crime and dangerousness.[207] Pervasive stereotypes suggest that youth of color are prone to violence and crime, are not in school, are unwilling to work,

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206 Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1479–80 (2009) (summarizing studies on the link between perceived fairness in the judicial system and recidivism among juveniles and concluding that despite individual shortcomings in various studies, a link exists between a lack of faith in the judicial system and higher recidivism rates); Sandra Graham & Colleen Halliday, *The Social Cognitive (Attributional) Perspective on Culpability in Adolescent Offenders*, *in* YOUTH ON TRIAL, *supra* note 65, at 345, 354, 358–59 (observing that youth who perceive the legal process as unfair are more likely to project a negative attitude, which juvenile justice decision makers may read as "unremorseful" and therefore more culpable); Kristina Murphy & Tom Tyler, *Procedural Justice and Compliance Behaviour: The Mediating Role of Emotions*, 38 EUR. J. SOC. PSYCHOL. 652, 662–65 (2008) (confirming earlier studies that connect people's perception of fairness with their willingness to cooperate with authority).

207 *See* Tonry, *supra* note 199, at 281–93 (summarizing five strands of psychological research documenting the ways in which blackness is associated with crime and danger and results in more serious punishment for blacks); *see also* George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 561 (1998) (discussing an empirical study in which probation officers' narratives about the youth they supervised were analyzed for attributions of character, likeliness to reoffend, and sentencing, resulting in a finding that officers view black youth as more likely to reoffend than white youth); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876–93 (2004) (discussing studies that show that black targets are spontaneously viewed as more criminal); Nicholas Espiritu, *(E)racing Youth: The Racialized Construction of California's Proposition 21 and the Development of Alternate Contestations*, 52 CLEV. ST. L. REV. 189, 199–201 (2005) (discussing California polls showing an attribution of a perceived spike in crime rates to youth of color, an overrepresentation of youth in the media's representation of violence, and a de facto assumption of gang membership for youth of color under California's gang monitoring system); Aliya Saperstein & Andrew M. Penner, *The Race of a Criminal Record: How Incarceration Colors Racial Perceptions*, 57 SOC. PROBS. 92, 96 (2010) (summarizing studies showing an association of blackness with criminality); Scott & Steinberg, *Blaming Youth*, *supra* note 21, at 809–10 (pointing out that African American youths are perceived as "being more mature, more dangerous, and more deserving of punishment than are comparable white youths").

and are likely to be incarcerated at some point in their lives.[208] Years of research on the portrayal of criminals in the media further document the imaging of violent offenders and drug dealers as black.[209]

Consistent with the historical evolution of juvenile court, Professor Kenneth Nunn discusses the differentiation and rejection of youth of color as the process of "othering."[210] Child and adolescent behavior that is "cute" in one's own child becomes frightening and threatening in another person's child.[211] Nunn's discussion is supported by numerous studies documenting "people's tendency to automatically associate positive characteristics with their ingroups more easily than outgroups . . . as well as their tendency to associate negative characteristics with outgroups more easily than ingroups."[212]

This Article contends that decision makers, such as police, probation officers, and prosecutors, treat youth of color more harshly than white youth in part because of an implicit bias to ignore developmental immaturity in youth of color. While few empirical studies explicitly consider the impact of implicit racial bias on perception of impulsivity, lack of control, and culpability, two studies conducted by Sandra Graham and Brian Lowery provide early support for this position and lay the foundation for additional research.[213]

In 2004, Graham and Lowery designed two studies to examine the impact of key decision makers' unconscious racial stereotyping on their perceptions of culpability, deserved punishment, and expected recidivism.[214] The researchers hypothesized that widely held stereotypes that African American youth are "violent, aggressive, dangerous, and possess adult-like criminal intent" would supersede shared cultural beliefs that adolescence is a "developmental period characterized by vulnerability, malleability, and immaturity in judgment."[215]

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208 *See* James Bell, *Throwaway Children: Conditions of Confinement and Incarceration*, *in* THE PUBLIC ASSAULT ON AMERICA'S CHILDREN: POVERTY, VIOLENCE AND JUVENILE INJUSTICE 188, 189 (Valerie Polakow ed., 2000); *see, e.g.*, Nicholas K. Peart, Op-Ed., *Why Is the N.Y.P.D. After Me?*, N.Y. TIMES, Dec. 18, 2011, at SR6 (discussing the firsthand experience of a young black man stopped and frisked by the New York Police Department numerous times, sometimes violently, for no apparent reason).

209 Tonry, *supra* note 199, at 283 (summarizing studies); *see also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1550–53 (2005) (discussing ways in which local news provides data we use to develop opinions about criminal justice policy, including associating criminality with African Americans).

210 Nunn, *supra* note 107, at 682, 697, 706.

211 *Id.* at 704.

212 Kang, *supra* note 209, at 1512; *see* SCOTT & STEINBERG, *supra* note 2, at 114–15 (discussing studies that suggest that African Americans are more likely than whites to favor leniency toward young offenders); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 476 (2010).

213 *See* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 494, 499 (2004).

214 *Id.*

215 *Id.* at 485.

The study sought to determine whether and to what extent unconscious racial stereotypes would influence perceptions of whether a youth's criminal behavior was controllable (i.e., volitional and not impulsive) and the result of factors that would likely stabilize over time.[216] The researchers further hypothesized that decision makers who perceived the causes of the youth's crime as volitional would be more likely to infer responsibility, culpability, and blameworthiness by the youth and decisions makers who perceived the causes of the youth's crime as stable would be more likely to expect future criminal behavior from the youth.[217] In both instances, the researchers believed that the decision makers would endorse harsher punishment for the youth.[218]

To test these hypotheses, the researchers conducted two separate experiments—one with police officers and one with probation officers.[219] The researchers asked participants to first, read a vignette of a crime allegedly committed by a youth and second, make judgments and rate the offender on traits reflective of culpability, expected recidivism and deserved punishment.[220] None of the participants received information about the race of the youth in the vignettes, but in some instances the researchers subconsciously primed the participants before the vignettes with a series of words commonly associated with African Americans.[221] Consistent with the researchers' predictions, the "police officers in the race prime condition judged the hypothetical offenders to be less immature (i.e., more adult-like)" and more culpable than did the officers in the neutral prime condition and ultimately endorsed harsher punishments for the youth.[222] The "[p]robation officers in the race prime condition judged the alleged offender to be less immature and more violent, . . . more culpable, more likely to reoffend, and more deserving of punishment."[223] Both experiments involved an ethnically and gender-diverse pool of police officers and probation officers.[224] The participants' conclusions were consistent across ethnicity and gender as well as the decision makers' consciously held prejudices or stated desires to avoid prejudice.[225] As a result, this study supports the conclusion that unconscious racial stereotypes influenced black, white, and Hispanic officers.

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216 *Id.* at 486.
217 *Id.* at 486–87, 497.
218 *Id.* at 487.
219 *Id.* at 488–90.
220 *Id.* at 495
221 *Id.*
222 *Id.* at 493.
223 *Id.* at 496.
224 *Id.* at 488, 494.
225 *Id.* at 499.

The Graham and Lowery research is unique because it sought to measure the impact of implicit racial bias on decision makers' perceptions of developmental immaturity and adolescent culpability, which is central to the philosophy of the juvenile justice system and affects social consensus on how society should respond to adolescent offending.[226] Their work is buttressed by at least two other studies finding evidence of bias in perceptions of culpability, risk of reoffending, and deserved punishment for adolescents when the decision maker *explicitly* knew the race of the offender.[227]

In 1998, researchers George Bridges and Sara Steen studied 233 narrative reports written by probation officers for judges in anticipation of a youth's disposition after a crime.[228] The researchers anticipated that the narratives would reveal a relationship between the youth's race and the probation officers' perceptions about causes of the crime, the likelihood of recidivism by the youth, and the sentence the youth should receive.[229] In examining the probation reports for the cause of crime, the researchers looked for a record of external (i.e., environmental) versus internal (i.e., personality) influences on crime and hypothesized that the offending youth's race would influence the probation officers' assessment of cause, which would in turn influence the officers' perception of the proper sentence and the youth's likelihood of recidivism.[230] External influences included evidence of delinquent peers, dysfunctional families, drug use, alcohol use, and difficulties at school.[231] Personality influences included lack of remorse, lack of cooperation with the probation officer, and failure to take the proceedings seriously.[232] After controlling for the severity of the youth's current and past criminal behavior, researchers found that probation officers were significantly more likely to attribute crime to internal causes with black rather than white youth and were more likely to view black youth as responsible for their crimes and prone to criminal behavior in the future.[233] Probation officers were also much more likely to recommend sentences longer than the sentencing guideline range when the officers perceived the youth to have negative personality traits and a high risk of recidivism.[234] Because probation officers consistently portrayed black youth with more negative personality traits than white youth for the same or similar behavior in

226 *Id.* at 500.

227 *See* Bridges & Steen, *supra* note 207, at 561–67; Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, PLoS ONE, May 2012, at 1–5.

228 Bridges & Steen, *supra* note 207, at 557–58.

229 *See id.* at 558.

230 *See id.* at 559 (emphasis omitted).

231 *See id.*

232 *Id.*

233 *Id.* at 563–64.

234 *Id.* at 567.

the probation reports, black youth faced more severe penalties, including confinement.[235]

More recently, in a 2012 Stanford University study on the effects of race on the perception of juvenile culpability, psychologists found that race had a significant effect on white Americans' support for severe sentences, such as life without the possibility of parole for youth and perceptions of juveniles' blameworthiness relative to adults.[236] Researchers in the Stanford study provided participants with a factual summary of the Supreme Court case *Sullivan v. Florida* and information about support for and opposition to life without parole sentences for youth in nonhomicide cases.[237] To examine the impact of race on the participants' perceptions of youth as a mitigating factor in this context, researchers manipulated the race of the offender from black to white in half of the case summaries.[238] Even when controlling for the participant's political ideology and evidence of racial bias, the researchers found that study participants were more likely to impose harsher sentences when researchers explicitly primed participants to believe that the offender was black than when researchers primed participants to believe that the offender was white.[239] Remarkably, the effect of race on perceptions of juvenile culpability was the same for both liberal and conservative white Americans.[240] As the researchers at Stanford point out, the findings on implicit bias demonstrate the "fragility of protections for juveniles when race is in play,"[241] which may significantly influence public policy regarding adolescent sentencing and transfer to adult court.[242]

The results of these three studies should not be surprising in light of the many studies demonstrating that black defendants—both juvenile and adult—receive longer and more severe punishments at sentencing.[243] Studies on the correlation between skin tone and criminal punishment reveal that "dark-skinned people are more likely to be suspected" of criminal behavior and are likely to receive more severe

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235 *Id.*

236 Rattan et al., *supra* note 227, at 4.

237 *Id.* at 2 (citing Transcript of Oral Argument, Sullivan v. Florida, 129 S. Ct. 2157 (2010) (No. 08-7621)).

238 *Id.*

239 *Id.* at 2, 4 (reporting the results of 735 white American study subjects who are overrepresented in jury pools, the legal field and the judiciary).

240 *Id.*

241 Brooke Donald, *Stanford Psychologists Examine How Race Affects Juvenile Sentencing*, STAN. NEWS (May 24, 2012), http://news.stanford.edu/news/2012/may/race-juvenile-offenders-052412.html (quoting Aneeta Rattan, lead author of the Stanford study).

242 Rattan et al., *supra* note 227, at 1–2, 4.

243 Graham & Lowery, *supra* note 213, at 483, 494, 499; Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 629 (2005); Margaret C. Stevenson & Bette L. Bottoms, *Race Shapes Perceptions of Juvenile Offenders in Criminal Court*, 39 J. APPLIED SOC. PSYCHOL. 1660, 1680 (2009).

punishment than those meted out to whites or light-skinned blacks for the same offense.[244] When courts transfer youth to the adult system, it is equally well documented that black youth receive significantly more punitive sentences than white youth.[245] Thus, while courts may forgive or excuse white youth for engaging in reckless adolescent behavior, courts often perceive youth of color as wild, uncontrollable, and morally corrupt and hold them fully culpable for their conduct.[246]

Within the juvenile and criminal justice systems, racialized assumptions and attitudes tend to reduce sympathy for those who have been accused.[247] In individual cases, negative stereotypes and assumptions about blacks as a group are attributed to individual defendants in the system.[248] As a result, juvenile court personnel who perceive black youth as violent may process them differently from white youth.[249] "Although the extent to which prejudice shapes opinion and practice is quite uncertain, the research evidence supports the view that it plays a pernicious role."[250] Collectively, these studies demonstrate an unwillingness among stakeholders to apply theories of diminished culpability and immaturity to youth of color and suggest that contemporary juvenile justice policies have been implemented unevenly based on distorted perceptions of race, crime, and threat.[251]

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244 Tonry, *supra* note 199, at 283–84 (discussing research on "colorism" and citing Nilanjana Dasgupta, *Group Entitativity and Group Perception: Associations Between Features and Psychological Judgment*, 77 J. PERSONALITY & SOC. PSYCHOL. 991 (1999) and Travis L. Dixon & Keith B. Maddox, *Skin Tone, Crime News, and Social Reality Judgments: Priming the Stereotype of the Dark and Dangerous Black Criminal*, 35 J. APPLIED SOC. PSYCHOL. 1555 (2005)).

245 Kareem L. Jordan & Tina L. Freiburger, *Examining the Impact of Race and Ethnicity on the Sentencing of Juveniles in the Adult Court*, 21 CRIM. JUST. POL'Y REV. 185, 194–97 (2010); *see also infra* notes 250–51 (discussing additional studies).

246 *See* Espiritu, *supra* note 207, at 199–201 (linking the perception of violent crime as primarily perpetuated by youth of color and the passage of Proposition 21 in California, which made it possible to transfer youth as young as fourteen to adult court); Nunn, *supra* note 107, at 706–09; Soung, *supra* note 11, at 436–38; Tonry, *supra* note 199, at 283–85.

247 *See* Scott & Steinberg, *Blaming Youth*, *supra* note 21, at 809–10 (noting that racial stereotypes against minorities can override paternalistic rehabilitative goals of juvenile justice systems); Tonry, *supra* note 199, at 293 (noting a widespread belief that "the conditions of life that lead some black people to crime are their own fault and they deserve whatever punishment they get").

248 Tonry, *supra* note 199, at 281–82 (describing the phenomenon of "statistical discrimination").

249 BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 265 (1999); Nunn, *supra* note 107, at 707–08 (noting that some judges may use characteristics like race to build mental maps of defendants' "underlying character" to predict the defendants' future actions).

250 Scott & Steinberg, *Blaming Youth*, *supra* note 21, at 810; *see also* Bridges & Steen, *supra* note 207, at 556 (finding probation officers are more likely to perceive black youth as likely to reoffend than white youth); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196–97, 1221–26 (2009) (discussing an empirical study showing that trial judges hold implicit biases along racial lines that can affect their judicial decision making).

251 *See* Scott & Steinberg, *Blaming Youth*, *supra* note 21, at 809–10.

Although many scholars have speculated about the role of prosecutors in perpetuating inequalities in the criminal justice system, few empirical studies have engaged prosecutors as research participants.[252] Nonetheless, there is little reason to believe that prosecutors are less susceptible to the tendency of even the most well-intentioned, egalitarian people to automatically associate blacks with crime and make decisions accordingly.[253] Implicit bias studies demonstrate that bias against blacks and Hispanics persists even when study subjects profess a commitment to racial equality.[254] Where insidious claims that blacks are racially inferior have been abandoned, they are often replaced by the view that blacks are responsible for their own life conditions and thus deserve whatever punishment they receive in response to crime.[255]

Statistical evidence also confirms that prosecutors are more likely to charge black suspects than whites, even when their prior criminal records are the same.[256] Likewise, while there are no national data on the number of youth transferred to adult court on the basis of prosecutorial waivers, evidence demonstrates that youth of color are disproportionately represented in the criminal justice system.[257] In deciding whether to charge, what charge to bring, and whether to transfer a youth to criminal court, prosecutors are vulnerable to racialized perceptions of aggressiveness, violence, and danger that typically undergird prosecutorial discretion.[258] The Vera Institute, in coopera-

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252 Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 796, 804, 822 (2012) (suggesting that despite compelling proof of implicit bias in a range of domains, there is no direct empirical proof of implicit bias in prosecutorial decision making). *But see* WAYNE MCKENZIE ET AL., VERA INST. OF JUSTICE, PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION 2, 6–9 (2009), *available at* http://www.vera.org/download?file=3482/Using-data-to-advance-fairness-in-criminal-prosecution.pdf (describing the Prosecution and Racial Justice (PRJ) program's data collection efforts at prosecutor offices, which include multivariable data collection at four different decision-making stages (initial case screening, charging, plea offers, and disposition) and interpretation of the data); Geoff Ward et al., *Racial Politics of Juvenile Justice Policy Support: Juvenile Court Worker Orientations Toward Disproportionate Minority Confinement*, 1 RACE & JUST. 154, 179 n.16 (2011) (finding "[b]y a very wide margin, defense attorneys are most inclined to strongly agree or agree that minority overrepresentation is a problem, followed by probation officers and judges," and noting that "[f]ew prosecutors express any agreement with this statement").

253 Smith & Levinson, *supra* note 252, at 801, 810.

254 Kang, *supra* note 209, at 1514–15.

255 Tonry, *supra* note 199, at 280, 305–07 (contending that "[a]s time passed, most white people abandoned ideas about black racial inferiority but replaced them with racial resentments: that disadvantaged black people have received too much support from the state and are responsible for the adverse social and economic conditions of their lives").

256 *See* Smith & Levinson, *supra* note 252, at 806 n.48 (citing studies).

257 *See supra* notes 156–59.

258 Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 35 (1998) (noting that prosecutors may unconsciously view a case involving a white victim as more serious than a case involving a black victim in making charging and

tion with district attorney offices in select jurisdictions throughout the country, recently collected data through its Prosecution and Racial Justice Project to identify racial disparities in prosecution practices.[259] Upon finding evidence of disparity in the charging decisions, the Vera Institute worked with the local district attorney to identify and address the source of that disparity.[260] The next Part explicitly examines the role of race in prosecutorial decision making and identifies strategies prosecutors may employ to confront their own bias and correct racial disparities throughout the system.

III
The Role of Prosecutors in Correcting Racial Disparities in the Juvenile Justice System

A. Understanding Prosecutorial Discretion

1. *Case Examples*

Although the Due Process Revolution of the 1960s constrained the informality of juvenile courts across the country,[261] it is unlikely that discretion will—or ever should—be completely eliminated.[262] State actors today still exercise vast discretion at all stages of the juvenile justice system.[263] Police must decide whether to arrest or release an accused youth; prosecutors must decide whether to prosecute, divert, or dismiss a juvenile case; and judges must decide whether to detain or release a youth awaiting trial or at disposition. Implicit in each of these decisions is a determination of whether the decision maker will treat the youth's conduct as "normal" adolescent behavior that society is willing and able to tolerate or deviant behavior warranting law enforcement intervention. The benefits and risks of discretion are best understood through the lens of case examples involving

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other related decisions); Smith & Levinson, *supra* note 252, at 811 (suggesting that when prosecutors decide to charge juvenile suspects in adult court as opposed to juvenile court, they assess the seriousness of the alleged offense in relation to the offender).

259 McKenzie et al., *supra* note 252, at 6–7 (discussing findings of and solutions to disparities in Milwaukee charging decisions); *see also infra* notes 267–72 and accompanying text (discussing prosecutorial discretion and the potential for bias).

260 McKenzie et al., *supra* note 252, at 6–7.

261 Bishop & Farber, *supra* note 20, at 132–36 (discussing the due process revolution); *see* Feld, *Race, Politics, and Juvenile Justice*, *supra* note 21, at 1461–83 (tracing the racial and political history from the first juvenile courts to the due process revolution).

262 Feld, *Race, Politics, and Juvenile Justice*, *supra* note 21, at 1491–93 (pointing out that the Supreme Court's decision not to extend the jury right to juveniles rested partly on the need for juvenile judges to have "flexibility"); Neitz, *supra* note 48, at 109–12 (discussing the benefits of granting judges in juvenile court discretion to both determine degree of culpability and dispositions).

263 Moriearty, *supra* note 48, at 286 ("Criminal jurisprudence was eschewed in favor of procedural informality and nearly unfettered discretion . . . .").

youth recently charged with delinquency in an urban juvenile court.[264]

> ***Jaquan****: Several boys are sitting outside in a public park. Jaquan, aged fifteen, finds marijuana in his older brother's room and brings it out to share with his friends. All of the boys try it—each one excited about the opportunity to experiment and afraid of appearing lame in front of his friends. Police arrest all of the boys and prosecutors charge each with possession of marijuana. Prosecutors also charge Jaquan with distribution.*
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> ***James****: Fifteen-year-old James is wearing a hoodie sweatshirt in public, a violation of an obscure city ordinance prohibiting such attire. James mouths off at the police officer who tells him to take it off. The police officer arrests James. Prosecutors charge James with resisting a police officer for refusing to comply with the officer's instructions.*
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> ***Eric, Mark, & Derrick****: Fifteen-year-old Eric sees twelve-year-old Robert standing in line at an ice cream truck. Eric grabs Robert's money, throws it in the air, and runs away laughing. Robert runs away in the opposite direction without picking up the money. Mark and Derrick, two other twelve-year-olds standing in line at the ice cream truck, pick up the money from the ground and pocket it. Mark and Derrick are prosecuted in juvenile court for taking property without right. Prosecutors charge Eric with robbery.*
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> ***Rodney & Roland****: Two African American boys, Rodney and Roland, throw pebbles across the train tracks at a young Hispanic boy, José, for no reason other than they are bored and José is different. Rodney and Roland, both aged fourteen, are charged in juvenile court with assault with a dangerous weapon.*
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> ***Shannon****: Sixteen-year-old Shannon is riding a public bus with five classmates from her special education school when she notices one of the teacher's aides from her school at the back of the bus. Shannon snatches the aide's hat and tosses it to one of her classmates. After playing a game of catch with the hat through peals of laughter, the children drop the hat and get off the bus. Police arrest Shannon at school the next day. Prosecutors charge her with robbery.*
>
> ***Jacob****: For several weeks, two or three classmates verbally tease Jacob, a chubby thirteen-year-old. Jacob is visibly pained and distraught by the verbal abuse. About two months into the school year, a group of unknown youth approach Jacob as he is sitting alone at a lunch table. Unsure of their motives, but without any physical provocation to justify a claim of self-defense, Jacob throws a book, hitting one of the youth in the face and breaking his glasses. Prosecutors charge Jacob with felony assault and destruction of property.*

All of these examples involve allegations that, if true, meet the statutory elements for the crimes listed. Yet, as with any decision in the juvenile justice system, police and prosecutors have discretion *not* to act. Notwithstanding the obvious dangers of drug experimentation

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264 Each of these examples comes from my own representation of youth in Washington, D.C. I have changed the names to protect confidentiality.

and the frustration caused to the teacher's aide who lost his hat, few would criticize a law enforcement officer who exercised discretion to send Jaquan and his friends home with a warning and referral to a local drug education class or a school principal who decided not to call the police in response to Shannon's school bus prank. Many would even respect and applaud the prosecutor who refused to prosecute a black youth who had been arrested for wearing a hoodie in public or the prosecutor who simply encouraged Mark and Derrick to return the money to the boy at the ice cream truck. Likewise, many would be pleased with the prosecutor who declined to prosecute Rodney and Roland and instead made them apologize to José and participate in a victim-offender mediation session. Others would be satisfied if Jacob could receive counseling from the school psychologist, apologize to the student he hit, and pay for the broken glasses or participate in community service. Equally important, teachers could use the circumstances to educate the other youth who teased Jacob about the effects of bullying and require them to participate in mediation. Yet, despite the availability of these options, cases like these routinely populate juvenile courts across the country and at rates that disproportionately include youth of color.[265] These cases also routinely send youth of color to overnight detention, or in Jacob's case, consign them to long-term out-of-home placements for mental health services.[266]

Excusing adolescent behavior from criminal liability is not a new concept. Early statutes in many jurisdictions prohibited states from prosecuting youth under the age of seven and imposed a burden on the prosecution to prove beyond a reasonable doubt that children between the ages of seven and fourteen understood the wrongfulness of their conduct and could control their behavior.[267] Several contemporary commentators have called for a return to this "infancy defense" and have explored ways in which current research in adolescent development may provide a complete defense, excuse, or justification for delinquency.[268] Others have advocated a reasonable child standard that would ease the evaluation of affirmative defenses for youth, such

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265 *See supra* notes 168–71 and accompanying text.

266 *See supra* notes 148–49 and accompanying text.

267 Kaban & Orlando, *supra* note 103, at 36–37.

268 Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687, 734–49 (2006) (arguing that the infancy defense is deeply rooted in tradition and constitutionally mandated because juveniles under fourteen lack the moral culpability for criminal conduct); Kaban & Orlando, *supra* note 103, at 36–37 (describing the recent use of brain imaging for juveniles in evaluating culpability); Merril Sobie, *The Delinquent "Toddler": The Minimum Age of Responsibility*, CRIM. JUST., Winter 2012, at 36, 36, 41–42 (arguing for the establishment of a minimum age of criminal responsibility); Lara A. Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 190–98 (2000) (suggesting revitalization of the

as self-defense, and allow defense counsel to challenge evidence regarding the mens rea necessary to satisfy the requirement of criminal intent.[269] Whether by statutory authority or the reasonable exercise of discretion implicitly granted to all decision makers in the system, there is value in fairly and equitably accounting for the normative features of adolescent development in deciding how to respond to delinquency.

Of course, the problem with discretion lies in the risk of bias and abuse. Abuses of prosecutorial discretion in the juvenile and criminal justice systems have been thoroughly critiqued,[270] and literature on the disproportionate representation of children of color in juvenile courts has repeatedly condemned the broad discretion afforded to prosecutors, judges, and probation officers as providing a safe haven for implicit or explicit racial animus.[271] Like other stakeholders in the system, prosecutors are susceptible to the unconscious effects of negative stereotypes and harmful narratives about youth of color. The deluge of police and school referrals involving African American and Hispanic youth likely further distort prosecutorial decisions.[272] Although reform is certainly needed throughout the juvenile justice process, this section focuses on the unique opportunity and responsibility prosecutors have to confront bias and reduce racial disparities at the charging phase.

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infancy defense by adopting a presumption against the necessary mens rea for preadolescents).

269 *See, e.g.*, Nina W. Chernoff & Marsha L. Levick, *Beyond the Death Penalty: Implications of Adolescent Development Research for the Prosecution, Defense, and Sanctioning of Youthful Offenders*, 39 CLEARINGHOUSE REV. 209, 213–15 (2005); Taylor-Thompson, *supra* note 21, at 165–67.

270 *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 33–39 (2007); Victor L. Streib, *Prosecutorial Discretion in Juvenile Homicide Cases*, 109 PENN. ST. L. REV. 1071, 1083–84 (2005) (arguing that "jurisdictions that permit prosecutors to file juvenile homicide cases either in juvenile court or in criminal court raise the most serious concerns about unchecked prosecutorial discretion").

271 *See, e.g.*, Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 515 (2009) (suggesting that the absence of judicial review of prosecutors' discretionary decisions is troubling because racial prejudice can affect discretionary judgments made in the juvenile justice system, as seen in Louisiana); Davis, *supra* note 258, at 35 (explaining the danger of unconscious racial biases in prosecutors); Neitz, *supra* note 48, at 131–32 (discussing how wide discretion on the part of juvenile justice judges may allow room for racially biased decision making); Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 416–21 (2009) (stating that "[t]ruly unconscious racial prejudice, even by whites thoroughly and consciously committed to racial equality, is likely even more widespread").

272 *See* Taslitz, *supra* note 271, at 417–20 (recognizing that biased decision making and the overrepresentation of minorities in each stage of the criminal process before prosecution likely contribute to prosecutorial bias).

2. *The Prosecutor as Gatekeeper of Juvenile Court Jurisdiction*

As the statistics in Part I reveal, racial disparities surface in the juvenile justice system long before the charging decision. Police arrest youth of color at rates that far exceed their proportion in society,[273] and zero tolerance policies in many public schools contribute to the disproportionate referral of youth of color to juvenile courts.[274] Once police or school officials refer a youth to the judicial system, prosecutors who evaluate the strength and merits of the delinquency allegation and probation officers who review information about the youth's family, neighborhood, school, and academic performance share responsibility for the case.[275] Probation officers may also advise prosecutors whether to file or decline to file a formal complaint.[276] Despite the significant role that probation officers, police, and schools play in contributing to racial disparities in the juvenile justice system, prosecutors are arguably the system's most powerful decision makers.[277] As the gatekeepers of juvenile court jurisdiction, prosecutors wield enormous power to decline prosecution, divert youth from the system, and identify creative alternatives to adjudication.

Unlike school officials and police officers who generally interact with youth in a limited geographic space, prosecutors typically screen referrals from across the city and may track and compare patterns of arrests and referrals by neighborhood.[278] Prosecutors who recognize that youth of color are routinely referred from one or more schools for drug use, disorderly conduct, or other low- to midlevel offenses may decline to prosecute and encourage schools and community leaders to identify responses to adolescent offending that do not impose the stigma and collateral consequences of a juvenile court adjudication.[279] By declining to prosecute categories of adolescent behavior, prosecutors set the standard for juvenile court intake and over time may significantly influence patterns of arrest and referral. To avoid claims that prosecutors and police officers ignore or underenforce criminal laws in communities of color,[280] prosecutors must communicate the rationale for their charging decisions and actively engage the

273 *See supra* notes 145–57 and accompanying text.

274 *See supra* notes 168–71 and accompanying text.

275 *See* Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 304–05 (2003).

276 *See id.*

277 *See* Davis, *supra* note 258, at 17–18.

278 *See, e.g.*, MCKENZIE ET AL., *supra* note 252, at 1–7 (explaining how charging data was tracked across Charlotte, Milwaukee, and San Diego).

279 *See* Davis, *supra* note 258, at 37.

280 *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19 (1997); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1716–18 (2006); *see also* Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v Morales, 1998 U. CHI. LEGAL F. 197, 199–200 (discussing the passage and enforcement of gang

community, legislators, and school leaders in developing alternatives to prosecution.[281]

B. Addressing Implicit Bias and Derationalizing Race-Based Disparities

Scholars and advocates have advanced several models for reducing racial bias in the exercise of prosecutorial discretion. Proposals include limiting prosecutorial discretion through statutory amendments, imposing greater oversight on prosecutorial discretion by courts, requiring prosecutors to collect and publish data in racial impact studies that track the race or ethnicity of the defendant and victim in each case, designating staff to mask the demographic information on case files before prosecutors make charging decisions, providing financial incentives to reduce charging in cases where the government's evidence is weak or unsubstantiated, and even fundamentally changing the nature and role of the prosecutor.[282] This Article builds upon these strategies by recognizing the unique intersection of racial bias and adolescent development at the charging phase of adjudication and by encouraging prosecutors to develop a decision-making framework that directly confronts bias, is informed by research in adolescent development, and allows the public to hold prosecutors accountable for racial disparities in charging practices over time. Specifically, this section returns to the research on implicit bias in search of strategies to overcome unconscious preconceptions and invites prosecutors to stop rationalizing racially disparate outcomes and think more creatively about how to satisfy the competing interests of public safety and victims' rights without perpetuating stereotypes and disparities.

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loitering legislation in response to "voluminous citizen complaints about" violence and "open-air drug dealing").

281 *See infra* Part III.B, D.

282 *See* Beale, *supra* note 271, at 515 (noting the lack of judicial review of prosecutorial discretion); Davis, *supra* note 258, at 54–56 (advocating for data collection and racial impact studies); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 873–89 (1995) (proposing that financial incentives be applied to various duties of the public prosecutor); Smith & Levinson, *supra* note 252, at 823–26 (proposing a range of solutions including the masking of demographic data on prosecution files); Streib, *supra* note 270, at 1084–85 (advocating for a statutory minimum age for transfer to adult court in juvenile homicides); Taslitz, *supra* note 271, at 442–49 (advocating for moving away from the adversarial model of prosecution toward a new collaborative approach deemed the "Medical Model"); *Prosecutorial Discretion*, VERA INST. JUST., http://www.vera.org/project/prosecution-and-racial-justice (last visited Nov. 6, 2012).

1. *Filtering Out Explicit and Implicit Bias*

Any effort to reduce racial disparities in the juvenile or criminal justice system must start with a commitment to address implicit bias. Some studies have suggested that well-intentioned actors can overcome automatic or implicit biases, at least to some limited extent, when they are made aware of the stereotypes and biases they hold, have the cognitive capacity to self-correct, and are motivated to do so.[283] While some evidence supports the suggestion that more deliberative decision making may weaken implicit biases,[284] some scholars have argued that attempts to suppress stereotypes may actually exacerbate biases by causing people to think about them more.[285] To counter this possibility, one group of researchers has suggested that bias affirmation may be offset by being "motivat[ed] to control stereotyping, [having] experience or practice with stereotype control, having egalitarian replacement thoughts," collecting and relying on information that individualizes the suspect, and committing to avoid prejudice in decision making.[286] Prosecutors may be especially motivated by a desire to avoid a reputation of racism, a genuine dedication to principles of equity, and a commitment to ensure accurate outcomes in adjudication.[287]

Other research suggests that implicit bias can be improved when actors are repeatedly exposed to positive images of people within an identified racial group.[288] Studies indicate that implicit bias may be significantly improved when the actors develop a relationship with a member of a previously stereotyped or devalued group.[289] For example, a parent whose child marries a person from another race may be better equipped to reexamine stereotypes. In the justice system context, prosecutors interested in overcoming stereotypes may engage

283 *See, e.g.*, John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 McGEORGE L. REV. 1, 8–9 (2010) (summarizing research on strategies to reduce implicit judicial bias); Kang, *supra* note 209, at 1529–30 & n.207 (citing Patricia G. Devine & Margo J. Monteith, *Automaticity and Control in Stereotyping*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 339, 346–47 (Shelly Chaiken & Yaacov Trope eds., 1999)); Rachlinski et al., *supra* note 250, at 1221 (indicating that judges are able to control implicit biases when they are aware of them and motivated to do so).

284 Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 962–65 (2006).

285 *See* Margo J. Monteith et al., *Suppression as a Stereotype Control Strategy*, 2 PERSONALITY & SOC. PYSCHOL. REV. 63, 64 (1998); B. Keith Payne et al., *Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 384, 390–95 (2002).

286 Monteith et al., *supra* note 285, at 73.

287 Kang, *supra* note 209, at 1530.

288 Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 802, 806–07 (2001).

289 *See* Greenwald & Krieger, *supra* note 284, at 964.

more closely with communities of color by attending neighborhood meetings, volunteering at neighbor recreation centers, or serving on a collaborative task force with community representatives to develop creative alternatives to prosecution.

Training and periodic reviews of prosecutorial decisions should accompany any effort to combat bias.[290] Training curricula would expose prosecutors to implicit bias research and educate prosecutors on the normative similarities in adolescent development across socioeconomic and ethnic groups.[291] The leadership in the state's attorney's office may set office-wide goals to reduce racial disparities and invite new and experienced prosecutors to brainstorm about strategies to combat disparities that occur at arrest and referral. Collectively, prosecutors may identify and agree to reexamine common stereotypes and presumptions that are made about youth of color, not only by themselves, but also by the system's other decision makers. Experienced prosecutors may identify their own biases by taking the Implicit Association Test (IAT) and reviewing their own race-correlated charging decisions over the previous year.[292]

2. *Derationalizing Race-Based Outcomes*

If asked, most prosecutors would say they are not racist and would be offended by the suggestion. Most would also be able to provide a rational, race-neutral explanation to support each of the charging decisions they made by pointing to the dangerousness of the crime, the youth's record of prior offending, the child's lack of family support, the victim's rights, public safety, and the need to respond to community and constituent interests. Even prosecutors who have been introduced to adolescent development research may rationalize differential treatment of serious juvenile offenders with claims—albeit unfounded—that serious offenders must fall outside of the normative developmental trajectory.[293] Unfortunately, this type of rationalization of racial disparities prevents even well-intentioned prosecutors from meaningfully addressing the core concern of disproportionate minority contact within the juvenile justice system. Prosecutors cannot absolve themselves of responsibility for racial disparities by over-

290 *See* Irwin & Real, *supra* note 283, at 9 (suggesting that postdecision auditing and exposure to positive role models might mitigate judges' implicit biases); Smith & Levinson, *supra* note 252, at 824.

291 *See supra* note 175 and accompanying text (discussing developmental research controlling for ethnicity and socioeconomic status).

292 *See generally* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 852–60 (2012) (discussing the controversial proposal that jurors, judges, and attorneys take the IAT).

293 *See supra* notes 65–90 and accompanying text (discussing normative adolescent development); *see also* Brief for APA, *Miller*, *supra* note 73, at 33 (positing that the vast majority of serious juvenile offenders desist from crime when they mature).

looking structural factors that produce different types of adolescent offending, by pandering to explicit or implicit racist constituent interests, or by refusing to confront the impact of implicit bias on their own interpretation of factors such as the perception of dangerousness and a youth's ties to the community.

Prosecutors occupy a unique position in the justice system and are often called upon to satisfy many competing interests. Victims in individual cases expect prosecutors to recoup restitution, secure an apology from the offender, and even make sure the victims have their own day in court.[294] Communities expect prosecutors to hold youth accountable for harm to their property and physical safety, and legislators expect prosecutors to be fiscally responsible in choosing between rehabilitative and law enforcement options. Local frontline attorneys are also often beholden to elected district attorneys who dole out promotions, bonuses, raises, and even continued employment according to convictions, pleas, and adjudications.[295] In this landscape, race becomes irrelevant and disparities seem intractable.

Prosecutors committed to reducing racial disparities will need to think creatively about how to satisfy competing interests without perpetuating racially disparate outcomes. To address public safety concerns, prosecutors must be familiar with evidence-based, best practices for successful interventions with serious juvenile offenders.[296] Those strategies will often involve community-based responses instead of traditional law enforcement interventions such as incarceration. To address the victims' needs, prosecutors may consider research suggesting that many victims are receptive to meaningful alternatives to adjudication and formal court involvement.[297] Empirical studies comparing victim satisfaction in restorative justice programs with victim satisfaction in court found that participants in victim-offender mediation were more satisfied with the way their cases were handled than

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294 *See* Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 48–58 (1999) (discussing the right of victims to be present at the criminal justice proceedings).

295 *See* Catherine M. Coles, *Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor* 11 (Program in Criminal Justice Policy & Mgmt. of the Malcolm Wiener Ctr. for Soc. Policy, Working Paper No. 00-02-04, 2000), *available at* http://130.203.133.150/viewdoc/download;jsessionid=D35E277C93209F69FA3353DA3EC5F238?doi=10.1.1.91.2361&rep=rep1&type=pbf (discussing the "considerable discretion" of the district attorney to retain prosecutors based on the number of trials, percentage of convictions and pleas, and the length of sentences attained).

296 *See infra* notes 381–85, 424–30 and accompanying text (discussing evidence-based strategies to facilitate positive youth development and a successful transition from adolescence to an adulthood free of crime).

297 *See* Henning, *Eroding Confidentiality*, *supra* note 26, at 1163–66 (discussing the benefits for victims of participating in adjudicative alternatives).

victims who only participated in court.[298] Victims who participated in mediation and other restorative justice programs were also more likely than victims who appeared in court to believe that the mediator had been fair and that the offenders had been held accountable.[299] These victims were equally likely to believe that their opinions had been adequately considered in the criminal justice process and were less likely to feel afraid or upset about the crime than those who only met the offenders in court.[300]

In response to constituent concerns about high and rising juvenile crime, prosecutors will need to correct faulty perceptions about the nature and scope of youth crime in the community. Despite the focus on high-profile crime in the media, most juvenile offending involves misdemeanors and low- and midlevel felonies. In 2010, approximately 71% of youth detained or committed by the juvenile justice system were charged with simple assault, drug offenses, property crimes, violations of a public order, technical violations, or "status offenses."[301] Just 27% of detained or committed youth had committed homicide, violent sexual assault, robbery, or aggravated assault.[302] Further, as the case examples above reveal, even felony labels such as the charge of robbery imposed on Shannon, who snatched a hat from the teacher's aide, may mask typical adolescent behavior that can likely be redirected without court involvement.

Ultimately, although prosecutors may temporarily sacrifice reputation among constituents who are upset by the prosecutor's failure to charge and pursue a juvenile offense, prosecutors can restore reputation by educating the community on the key features of adolescent offending and resilience and by being transparent about policies and practices that intend to address racial disparities in the system. Scientific validation and Supreme Court endorsement of the developmental research give much-needed credibility to adolescent-appropriate responses to delinquency and shield prosecutors accused of being soft on crime.[303] Even when constituents and victims remain committed

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298 *See* Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 180 (collecting and analyzing studies); *see also* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 132 (2004) (discussing studies that confirm that offenders are more likely to apologize after meaningful face-to-face interaction with their victim).

299 Poulson, *supra* note 298, at 185, 187.

300 *Id.* at 185, 193, 195–96.

301 Puzzanchera et al., *supra* note 104.

302 *Id.*

303 *See* Maroney, *supra* note 69, at 104–06 (detailing how Justice John Paul Stevens's dissent from the denial of petition for writ of habeas corpus in *In re* Stanford, 537 U.S. 968 (2002), which endorsed scientific arguments regarding adolescent development, drew "a groundswell of attention to the teen brain from advocates, commentators, and the media," leading to the later involvement of developmental research in juvenile criminal cases).

to retribution and incarceration for young offenders, prosecutors will have to make hard choices that disappoint some but nonetheless apply principles of diminished culpability more equitably to youth of color and achieve public safety through strategies that promote rehabilitation and positive youth development.

C. Refining Prosecutorial Discretion: Identifying a Framework for Developmentally Informed Decision Making

To meaningfully and equitably extend the principles of diminished culpability to all youth at the intake phase of the juvenile case, prosecutors need a practical framework for applying the developmental research to the charging decision. Because the fields of developmental psychology and neurology are normative—and thus only seek to identify general trends in the development of youth as a class—it is difficult to translate the research into individual case decisions.[304] The research cannot tell us why any particular youth committed an offense or whether that youth will engage in criminal behavior in the future.[305] Consequently, the developmental literature cannot provide infallible and precise guidelines for how to respond to every child in every circumstance. Nonetheless, decision-making guidelines and trainings that highlight the features of adolescent development should help prosecutors contextualize the behavior of youth of color within identified developmental norms and reduce prosecutors' overreliance on juvenile courts to regulate normal adolescent offending in communities of color. By requiring prosecutors to explicitly consider features of normative adolescent development in every case, they will begin to unpack and discard deeply embedded perceptions of youth of color as callous, mature, and irredeemable.

This section envisions a path toward structured decision making at the charging phase that capitalizes on the differences between juveniles and adults and targets racial inequalities by challenging distorted notions of race and maturity. The ultimate goal is to identify charging criteria that produce fair, equitable, and effective outcomes for *all* youth. Fair decisions account for developmental research supporting the diminished culpability of youth; equitable decisions apply the relevant research to all alleged offenders; and effective responses improve public safety by promoting positive youth development. To

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304 *See* Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 13–14 (2006) (discussing the difficulties of evaluating the capacities of youths on a case-by-case basis).

305 *See* Brief for APA, *Miller*, *supra* note 73, at 21–25; *see also* David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1584 (2004) (noting that, despite a strong correlation between age and maturity, there will always be individual variance).

ensure community buy-in and expert guidance, I propose that local jurisdictions convene a committee of prosecutors, probation officers, experts in developmental psychology, school officials, and other community stakeholders to develop and publish charging standards that reflect these goals. Recognizing that discretion is an important component of juvenile justice and that committees should develop and modify charging criteria over time to meet the specific needs of the community, this section does not propose a rigid set of rules. Instead, this section offers a broad framework guided by adolescent psychology research that will be useful across jurisdictions.

1. *Charging Standards and Commentary*

In most states, prosecutors make charging decisions with little guidance about whether and how to charge youth. Even when statutes and court rules express a preference for diversion or the least restrictive response to adolescent offending, these statutory provisions are often vague and rarely provide specific guidelines for charging youth in juvenile court.[306] Moreover, prosecutors have published few internal standards to guide prosecutorial decisions at the juvenile intake and charging stage.[307] The guidelines that do exist do not adequately account for contemporary developmental research and provide little or no guidance for prosecutors who seek to address racial disparities.

The criteria that the National District Attorney's Association's (NDAA) identified in the National Prosecution Standards provide a foundation for analyzing how prosecutors can incorporate developmental research into charging standards and commentary.[308] Current

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306 *See, e.g.*, ALASKA STAT. § 47.12.010 (2010) (including diversion from the formal adjudication process as a goal of the system); D.C. CODE § 16-2301.02(2) (LexisNexis 2001) (including "promot[ing] youth development . . . through early intervention, diversion, and community-based alternatives" as a goal); MINN. STAT. ANN. § 388.24(2)(1) (West Supp. 2012) (outlining goals of Minnesota's pretrial diversion "to provide eligible offenders with an alternative to adjudication that emphasizes restorative justice"); NEB. REV. STAT. ANN. § 43-260.04 (LexisNexis 2011) (outlining factors to consider before diversion including the juvenile's age and nature of offense, but no overt reference to developmental considerations); N.J. STAT. ANN. § 2A:4A–71 (West Supp. 2012) (outlining factors to consider before diversion including, broadly, a juvenile's "age and maturity"); WIS. STAT. ANN. § 938.01(2)(e) (West Supp. 2011) (including in the legislative intent the goal of diverting juveniles "as warranted").

307 *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1543 (1981) (discussing prosecutors' reluctance to limit their discretion and impose internal guidelines). *But see* INST. FOR JUDICIAL ADMIN.–ABA JOINT COMM'N ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO PROSECUTION §§ 4.1–4.4, at 17–18 (1979) (discussing standards for the "[p]readjudication [p]hase" that impose certain duties on juvenile prosecutors); NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS § 4-11, at 64–67 (3d ed. 2010) (outlining various factors a prosecutor should consider when making decisions regarding juveniles, such as whether to transfer them to adult court).

308 NAT'L DIST. ATT'YS ASS'N, *supra* note 307, at 64–67.

NDAA standards recommend that prosecutors in juvenile cases consider the "seriousness of the alleged offense"; the alleged role of the accused youth in the offense; the "nature and number of previous cases" against the youth and their disposition; the youth's "age, maturity, and mental status"; the availability of appropriate treatment or services through the juvenile court or diversion; the youth's admission of guilt or acceptance of responsibility for involvement in the charged offense; the "dangerousness or threat posed by the juvenile to the person or property of others"; "decision[s] made with respect to similarly-situated juveniles"; the "provision of financial restitution to victims"; and "[r]ecommendations of the referring agency, victim, law enforcement and advocates for the juvenile."[309]

Notwithstanding the explicit reference to age and maturity, these standards differ little from adult charging guidelines.[310] Many of the criteria lack detail and specificity, and none adequately account for the youth's diminished culpability and amenability to treatment. Written standards such as these should incorporate commentary that illuminates the meaning and relevance of specific charging criteria. The commentary should explain key features of adolescent offending and incorporate research on adolescents' amenability to treatment as an important reminder that retributive responses are not always necessary or warranted when responding to delinquency. Moreover, the commentary should explain terms and concepts such as age, maturity, and mental status with sufficient nuance to distinguish between cognitive capacity and psychosocial deficiencies that persist long after youth develop the capacity to reason. A closer examination of some of the charging criteria proposed by the NDAA is instructive.

Alleged role in offense. Research in normative developmental psychology would provide important background for prosecutors evaluating a youth's alleged role in the offense. As examined in Part I, normative features of adolescence include the prevalence of risk taking among all youth, the limits of adolescent cognitive and psychosocial capacity in the heat of a crime, the impact of impulsivity and peer influence on adolescent judgments, and the tendency of adolescents to underestimate the risk of harm in a given situation. These insights would help prosecutors understand the spontaneous and unplanned roles youth often play in delinquency cases.[311] More importantly, the commentary should encourage prosecutors to consider the role of group dynamics in adolescent offending and help

309 *Id.* at 65.

310 *Cf. id.* at 52–53 (outlining factors to consider in filing charges against an adult). *See generally* Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1112–20 (2011) (discussing the development of standards to guide prosecutorial decision making).

311 *See supra* notes 65–90 and accompanying text.

prosecutors understand the difficulties an adolescent may face when attempting to exit from an escalating criminal event. While these normative features cannot account for every incidence of delinquency, this contextual backdrop will help put seemingly callous behavior in perspective and, over time, decrease the chances that prosecutors automatically view youth of color as cruel, calculating, or indifferent to the harms caused to others.

Ideally, prosecutors and probation officers who understand deficiencies in adolescents' psychosocial development will be better equipped to respond to youth like Jaquan and his friends, who experimented with drugs in the case example above. Prosecutors who understand that teenagers are particularly susceptible to peer influence, frequently underestimate the risks that drug use poses, and often focus heavily on immediate gratification while ignoring the long-term consequences of their actions may be more willing to divert Jaquan from the juvenile justice system to a community-based drug-awareness program. Similarly, a prosecutor who understands that many adolescents like Jacob lack impulse control, have a heightened perception of threat, and have difficulty regulating their emotions, may credit Jacob's claim of self-defense and send Jacob back to his school for counseling and mediation.[312]

Seriousness of the current offense and nature and number of prior offenses. Standards should encourage prosecutors to be especially mindful about labeling offenses when youth are involved. Prosecutors should consider the nature and number of current and previous juvenile offenses in terms that avoid the often meaningless classifications of misdemeanor and felony. As evident in each of the case examples above, the decision of whether and how to charge an offense is a highly subjective endeavor that assigns labels that often mask the true nature and circumstances of the underlying offense. Thus, a youth who has a record of two "violent felonies" (e.g., robbery and assault with a dangerous weapon) may have engaged in little more than playing catch with a teacher's hat or throwing pebbles at a classmate. By requiring prosecutors to look more closely at charges through the lens of adolescent development, standards may help prosecutors measure perceptions of danger and the seriousness of the offense against the normative behavior of a typical adolescent who is likely to mature out of his delinquent behavior with correction from teachers and relatives.

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312 *See* Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, *in* YOUTH ON TRIAL, *supra* note 65, at 371, 390–91 (arguing that the claim of self-defense should be used more liberally as a claim of "contextual influence" in juvenile cases, considering juveniles' social environment in determining culpability for violent encounters); *see also* Taylor-Thompson, *supra* note 21, at 165–67 (discussing an adolescent's ability to assert "developmental negligence").

Youth's admission of guilt and acceptance of responsibility. The NDAA's reference to the youth's admission of guilt and acceptance of responsibility for the charged offense provides the prosecutor with little guidance and is subject to multiple interpretations. For some, the criterion may imply that youth are entitled to a lesser punishment for confessing early and taking responsibility.[313] For others, the criterion may suggest that an offender's confession provides firm evidence to justify formal prosecution. Commentary by developmental psychologists would illuminate this criterion in two ways. First, developmental research would help prosecutors understand the difficulties that youth often face in expressing remorse in the hours and days after an offense.[314] Youth who have limited life experiences and diminished capacity to reason may not experience or understand remorse like an adult.[315] Similarly, youth who lack strong language skills may struggle to convey remorse to a police officer, victim, or probation officer shortly after an offense.[316] Other developmental features of adolescence, such as peer influence and teenage bravado, may further block adultlike expressions of grief and remorse.[317] Moreover, because remorse itself is a form of suffering, youth sometimes employ defense mechanisms such as humor, denial, or apparent indifference to avoid it.[318] Given these limitations, empathy and remorse provide a particularly unreliable measure of a youth's amenability to treatment and need for punishment, especially in police interrogation and intake in-

313 *See* Bridges & Steen, *supra* note 207, at 567 n.2 (noting in their empirical study of probation officers that the most influential factor on risk assessments was negative internal attributes including lack of cooperation and remorse); Graham & Halliday, *supra* note 206, at 359 (noting that adolescents often lack the ability to manage the impression they are making on others or understand how that impression may negatively impact their navigation through the juvenile justice system); Henning, *Victims' Rights*, *supra* note 56, at 1148 (discussing the expectation of adolescent remorse in the juvenile justice system).

314 *See* Martha Grace Duncan, *"So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1491 (2002) (arguing that the practice of looking for sorrow in the first few hours after the crime inaccurately assumes that remorse is an "automatic reaction, not something that may be achieved over time"); Henning, *Victims' Rights*, *supra* note 56, at 1148–53 (discussing the unreliability of empathy and remorse as a measure of a youth's amenability to treatment).

315 Henning, *Victims' Rights*, *supra* note 56, at 1149.

316 *See* Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 142–44 (2006); *see also* People v. Superior Court *ex rel.* Soon Ja Du, 7 Cal. Rptr. 2d 177, 181 (Ct. App. 1992) (discussing the trial court's grant of a probationary sentence after defendant was convicted of voluntary manslaughter because the defendant's failure to show remorse likely resulted from cultural and language barriers); *cf.* Joseph A. Nese, Jr., Comment, *The Fate of Mentally Retarded Criminals: An Examination of the Propriety of Their Execution Under the Eighth Amendment*, 40 DUQ. L. REV. 373, 383 (2002) (discussing how "mentally retarded" criminal defendants' courtroom demeanor may give a false impression of lack of remorse).

317 *See* Duncan, *supra* note 314, at 1504–07 (discussing how youth culture often requires youth to hide their weaknesses, project a violent image, and stifle guilt and other remorseful emotions).

318 *Id.* at 1472, 1478–79, 1485, 1500.

terviews that occur before the youth has had an opportunity to reflect or benefit from counseling.[319]

Second, developmental research should educate prosecutors on the particular susceptibility of youth to false confessions and prompt prosecutors to closely investigate and critically evaluate the circumstances surrounding a minor's admission.[320] Indeed, youth is a significant risk factor for police-induced false confessions.[321] The very features of adolescence that make youth vulnerable to peer influence and poor decision making also make youth susceptible to police coercion. Many traits of adolescence, such as a limited appreciation for the future, impulsiveness, and inadequate legal knowledge, explain why youth falsely confess to police.[322] Moreover, contemporary police interrogation strategies, such as physical custody, isolation from supportive adults, the presentation of false or nonexistent evidence to convey guilt, and minimization of the severity of the crime or the suspect's culpability, all take advantage of adolescents' particular vulnerabilities and increase the likelihood of a false confession.[323] Whatever meaning prosecutors assign to this criterion must account for these developmental findings and avoid prosecutions based solely on a youth's purported confession or failure to show remorse.

Dangerousness of the threat posed to others. The implicit bias studies discussed in Part II show that charging criteria involving the perceived threat and dangerousness of an accused youth are particularly susceptible to racial bias. Criteria that emphasize "dangerousness" may also increase the prosecutor's tendency to rely on traditional law enforcement responses to adolescent offending and detract from evidence-based, positive youth responses that are more likely to improve public safety by facilitating the youth's successful maturation. Instead, these criteria should force prosecutors to consider the youth's ability to reintegrate into society with appropriate interventions and encourage

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319 *Id.* at 1473–75.

320 *See* J.D.B. v. North Carolina, 131 S. Ct. 2394, 2401 (2011) (recognizing the tenuous nature of juvenile confessions in overwhelming situations such as in the presence of a police officer); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1112 (2010) (proposing that courts appoint experts to evaluate individuals who are suggestible to false confessions); Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 953 (2010) (examining whether the tendency of adolescents to give false confessions translates into a higher rate of guilty pleas for juveniles than adults).

321 Redlich, *supra* note 320, at 953.

322 *Id.*

323 *Id.* at 952–53; *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 907–18 (2004) (describing modern police interrogation tactics that at times "lead the innocent to confess falsely"); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 6–7, 19 (2010) (discussing how police interrogation presupposes guilt and employs tactics to extract confessions).

prosecutors to identify and rely on community-based responses that have been shown to correct the behavior of even serious, violent offenders.[324] In addition, to remind prosecutors that risk taking is normatively common among all adolescent groups, even if opportunities for crime are different, standards and commentary should incorporate research on the impact of implicit bias on perceptions of danger and aggressiveness and highlight developmental studies that have controlled for ethnicity and socioeconomic status. Review of this literature will remind prosecutors, for example, that children of color who use crack cocaine are essentially no different than other youth who experiment with drugs.

Decisions made with respect to similarly situated persons. The implicit admonition to treat similarly situated persons the same is particularly inadequate to address racial disparities in the juvenile justice system. Such admonition begs the question of what the relevant, distinguishing criteria should be. As is evident in our discussion of offense labeling, charging practices that draw artificial lines between felonies and misdemeanors provide little more than a superficial way to identify similarly situated persons. Office-wide policies that prevent a prosecutor from diverting a felony ignore the fact that prosecutors choose the felony label. In addition, policies that prevent frontline attorneys from diverting drug cases involving "more dangerous" drugs such as crack, crystal meth, or heroin may systemically disadvantage youth of color who live in communities where those drugs are less expensive and more accessible.

To better understand the impact of office-wide policies on communities of color, the state's attorney and a committee of stakeholders may identify patterns in how prosecutors handle various offenses at the charging phase according to race and neighborhood. The Vera Institute's Prosecution and Racial Justice Project employed a similar tracking system in Milwaukee in 2009 and revealed that Milwaukee prosecutors declined to prosecute 41% of white adults charged with possession of drug paraphernalia compared to only 27% of nonwhite adults arrested for the same offense.[325] The project revealed that African American defendants commonly possessed crack pipes, whereas white defendants possessed more varied types of paraphernalia.[326] The study further revealed that prosecutors pursued the drug paraphernalia charges more aggressively if the paraphernalia was a crack pipe.[327] Following this revelation, the Milwaukee district attorney adopted a policy that directs staff to decline all paraphernalia cases

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324 *See infra* text accompanying notes 381–85, 425–30.

325 MCKENZIE ET AL., *supra* note 252, at 6–7.

326 *Id.*

327 *Id.*

"whenever it [is] reasonable to do so and to refer the arrested individuals to drug treatment."[328] As the Vera Institute discovered, while prosecutors treated all crack cocaine paraphernalia charges similarly, there was a categorical disparity between the response to crack cocaine paraphernalia and other drug paraphernalia.[329]

In the juvenile justice context, prosecutors distinguish between alleged offenders not only on the basis of the alleged offense, but also on the basis of what Professor Perry Moriearty refers to as "attributional stereotypes."[330] Attributional stereotypes, such as perceived family stability, community support, and school performance, are closely correlated with race and contribute to the disproportionate incarceration of children of color.[331] For example, probation officers and prosecutors may decline to divert youth from the system when the youth's parents appear uncooperative and are unavailable for the intake interview.[332] State actors may also presume that parents who work long or nontraditional hours are unable to provide adequate supervision at home.[333] Youth of color, whose parents are more likely to have low-wage jobs with strict leave policies, bear the brunt of these factors.[334]

As a result, prosecutors should routinely evaluate and revise prosecution standards to correct for evidence of racially disparate outcomes. Prosecutors may engage community stakeholders for a periodic review of the charging criteria to monitor and adjust for such unintended consequences. For instance, when a parent is unable to attend the intake interview, the probation officer should have the discretion to conduct a phone interview, identify other relatives or adults who may supervise the child, or refer the youth to an after-school program in lieu of the automatic default to formal prosecution.

Recommendations of the referring agency, victim, law enforcement, and advocates for the youth. Although victims and witnesses who report an

328 *Id.*

329 *Id.*

330 Moriearty, *supra* note 48, at 304.

331 *See id.* at 287, 299–308; *see also* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 412 (2007) (discussing how facially neutral, yet racially loaded, factors such as "family structure" were replaced by "whether there is an adult willing to be responsible for assuring the youth's appearance in court" after the disproportionate minority contact (DMC) standard required states to consider how an agency's decisions may contribute to racial disparity) (quoting ELEANOR H. HOYTT ET AL., REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION 57 (2004), *available at* http://www.aecf.org/upload/publicationfiles/reducing%20racial%20disparities.pdf); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1020–27 (2001) (discussing the disparate treatment of black juvenile delinquents in a number of jurisdictions).

332 Johnson, *supra* note 331, at 405.

333 *Id.*

334 *See id.*

offense and police officers who investigate a case will necessarily influence prosecutorial discretion, prosecutors must exercise independent judgment at the charging phase. Indeed, rote implementation of the police recommendation merely perpetuates racial disparities that surface before the charging decision. Similarly, even when victims' rights provisions require that victims have a voice in the charging decision, prosecutors should be careful not to return the criminal justice system to its past as a system of private redress that sanctions and reinforces implicit biases and stereotypes that private citizens hold.[335] Consequently, standards should encourage prosecutors to educate victims on meaningful alternatives to prosecution for youth and be transparent about the underlying reasons for each charging decision.

Prosecutors have an opportunity to systemically influence private and public agencies (e.g., schools), which repeatedly and disproportionately refer youth of color to the juvenile justice system. Following the lead of Judge Steven Teske and others who have developed protocols to reverse the trend toward escalating school referrals, prosecutors may routinely decline to prosecute school referrals that involve disorderly conduct, trespass, simple drug possession, disregard of police commands, school fights that do not involve serious or ongoing injuries, and petty thefts when the victim receives restitution or the benefit of community service.[336] Disturbed by the increasing reliance on law enforcement and juvenile courts to manage adolescent behavior on school campuses, Judge Teske led a stakeholder team in 2003 in Clayton County, Georgia to develop a School Offense Protocol to reduce the number of referrals for low-level misdemeanor offenses that accounted for the majority of school referrals to the courts.[337] Pursuant to the protocol, SROs must impose a series of graduated sanctions and educational programming within the school before they can refer a student to court for the specified offenses.[338] The protocols recognize that state intervention through formal complaints, po-

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335 *See* Henning, *Victims' Rights*, *supra* note 56, at 1110, 1143.

336 Cooperative Agreement Between the Juvenile Court of Clayton County, the Clayton County Public School System, the Clayton County Police Department, the Riverdale Police Department, the Jonesboro Police Department, the Forest Park Police Department, the Clayton County Department of Family and Children Services, the Clayton Center for Behavioral Health Services, Robert E. Keller, District Attorney and the Georgia Department of Juvenile Justice 2–4 (2004) [hereinafter Cooperative Agreement], *available at publichealth.lsuhsc.edu/iphj/pdf/SOLibrary1.pdf* (agreeing that minor acts of misbehavior by juvenile delinquents do not justify court intervention or supervision); *see also* Sherrod et al., *supra* note 158 (noting that incarceration increases the likelihood that a juvenile will not graduate from high school, which reduces enrollment and decreases federal funding to the school); St. George, *supra* note 162 (highlighting Judge Teske's efforts to reform the juvenile justice system).

337 St. George, *supra* note 162.

338 Students may receive a warning for a first offense and may be referred to a school conflict diversion program or mediation for a second or subsequent offense. A student

lice involvement, and adjudication of delinquency is not always necessary to redirect youth and prevent recidivism.[339] As discovered in Georgia, school social workers and counselors are often in a better position than courts to prevent and correct misconduct among youth.[340]

School Offense Protocols have had some success in reducing disproportionate minority contact with the juvenile court. With the protocols in place, Clayton County school referrals declined by 45% between 2004 and 2005 and by more than 70% between 2004 and 2010.[341] Referrals of African American youth to court were reduced by 46%.[342] Other communities have followed Clayton County's lead. Judge Brian Huff from Birmingham, Alabama, replicated the Clayton County protocols in 2009 and reduced referrals for school-based conduct from 528 in the 2007–2008 academic year to 174 in 2010–2011 academic year.[343] In Denver, advocates convinced the Denver Public School system to revise school discipline practices to require school officials to handle minor acts of misconduct within the school setting and limit suspensions, expulsions, and police referrals to serious misconduct.[344] These efforts have reduced school-based referrals by 63%.[345] Similarly, San Francisco schools adopted policies restricting police intervention in schools to situations where such responses were required to "protect the physical safety of students and staff" or were "required by law."[346] System-wide efforts like these to resist the steady influx of delinquency referrals from schools would allow states to conserve limited resources by identifying youth whom school officials may treat outside of the juvenile court and by encouraging policymakers and community leaders to find more effective and less expensive public safety measures.[347]

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may only be referred to the juvenile court for a third or subsequent minor delinquent offense. COOPERATIVE AGREEMENT, *supra* note 336, at 11–13.

339 *Cf.* Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 946, 965–70 (2009) (observing that school discipline policies including zero tolerance run counter to what we know about adolescent development and can be altogether harmful, and outlining recommended alternative disciplinary approaches).

340 *See* St. George, *supra* note 162 (quoting Luvenia Jackson, former Clayton County School District Assistant Superintendent).

341 Sherrod et al., *supra* note 158.

342 *Results from the Juvenile Detention Alternatives Initiative*, ANNIE E. CASEY FOUND., http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/JDAIResults.aspx (last visited Nov. 6, 2012).

343 St. George, *supra* note 162.

344 ADVANCEMENT PROJECT, *supra* note 160, at 35.

345 *Id.*

346 *Id.* at 37.

347 *See* Davis, *supra* note 258, at 53 (suggesting that prosecutors should consider the "attitudes, values and priorities of the . . . community" to determine which cases to prosecute given limited resources).

2. *Changing Cultures and Holding Prosecutors Accountable*

A significant shortcoming of charging standards like those drafted by the NDAA is the standards' potential lack of enforceability and limited transparency to the public.[348] The lack of public accountability for prosecutors, minimal enforcement of internal decision-making guidelines in prosecutors' offices, and Supreme Court jurisprudence shielding prosecutors from public and judicial scrutiny have hindered many of the current strategies that address disproportionate minority contact.[349] Even more than judges, prosecutors operate in virtual secrecy with unreviewable charging authority, especially in juvenile courts where court records and proceedings are confidential.[350] I propose to guard against these concerns in three ways: first, by identifying incentives that encourage voluntary compliance with the standards; second, by recommending legislative reforms that would require prosecutors to comply with standards; and third, by providing an opportunity for community representatives to participate in both the drafting of the standards and periodic review of charging decisions.

Internal guidelines like those I discuss here generally require buy-in from the leadership and a commitment from the entire district attorney's staff to comply with the standards. To achieve and sustain reforms, prosecutors' offices must change the culture that rationalizes racially disparate outcomes and firmly resolve to resist external pressures to react symbolically to high profile crimes and faulty perceptions of high and rising juvenile offending. The willingness of prosecutors in Milwaukee, San Diego, and Charlotte to submit their charging decisions to scrutiny by the Vera Institute's Prosecution and Racial Justice Project suggests that some prosecutors are inclined to examine their own practices and adopt policies to reduce disproportionate minority contact in the system.[351] Given the unique role of prosecutors in the juvenile justice system, I am even more optimistic

348 *See* NAT'L DIST. ATT'YS ASS'N, *supra* note 307, at 1 (pointing out that standards do not create causes of action and are not to be used by disciplinary agencies). *See generally* Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 206–10 (2007) (recognizing that even with standards in place, unconscious racism may still play into decision making and discussing the lack of legal remedies to counteract disparities in the system caused by implicit bias).

349 *See* Davis, *supra* note 258, at 20–21 (discussing the lack of public accountability, the absence or minimal enforcement of internal policies, and the Supreme Court jurisprudence protecting prosecutors from public and judicial scrutiny).

350 *See* Beale, *supra* note 271, at 521, 530–31 (citing statutes that allow prosecutors unreviewable discretion to transfer to adult court); Davis, *supra* note 258, at 16–17 (arguing that prosecutorial discretion plays a "profound" role in racial inequality in the criminal justice system); Streib, *supra* note 270, at 1083–84 (arguing that prosecutorial discretion should be reviewable due to its enormous consequences).

351 MCKENZIE ET AL., *supra* note 252, at 6–8.

about the willingness of juvenile prosecutors to learn and apply key features of adolescent development to a range of prosecutorial decisions. Even when prosecutors must consider other state interests, such as public safety and victims' rights, the needs and the best interests of the accused child must remain an important consideration throughout the juvenile case.[352]

Standards should require prosecutors to document individual charging decisions and criteria considered, tally their decisions by race and neighborhood, and periodically share that data with the public.[353] Over time, prosecutors may track decisions by race and residence of the offender and adjust when recurrent justifications for charging decisions disproportionately affect youth of color. A state's attorney's office could easily identify prosecutors whose individual charging decisions routinely disproportionately include youth of color and require these prosecutors to explain their decisions. Each state's attorney's office should develop a uniform checklist of developmentally informed criteria for charging and require prosecutors to articulate specific, non-race-related reasons for dismissals, diversions, and formal prosecution in every case. With this framework in place, a state's attorney who decides to prosecute Shannon for robbery for snatching and tossing the aide's hat should be required to articulate how Shannon is any different, developmentally or otherwise, from a white youth in a low-crime school who snatches a classmate's lunch bag and hides it in the bathroom as a practical joke. Even a prosecutor who is legitimately concerned about bullying by children should be forced to consider whether schools or the community can provide any developmentally appropriate rehabilitative responses to Rodney and Roland, who threw rocks at José.

When prosecutors are unwilling to develop or enforce standards on their own initiative, state legislators may provide the impetus. Statutory mandates may require prosecutors to convene a multidisciplinary stakeholder task force to develop and publish guidelines like those described here. Like prosecutors, legislators have a significant role to play in addressing racial disparities in the juvenile and criminal justice systems. Examples of existing legislative reforms promoting ra-

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352 *See, e.g.*, D.C. CODE § 16–2301.02 (LexisNexis 2001) (asserting the purpose of the juvenile justice system includes "plac[ing] a premium on the rehabilitation of children"); N.Y. FAM. CT. ACT. § 301.1 (McKinney 2008) (stating that in every juvenile proceeding, the court should consider the "needs and best interests of the respondent"); NAT'L DIST. ATT'YS ASS'N, *supra* note 307, at 66 (noting that juvenile prosecutors should "give special attention" to the interests and needs of the juvenile offender, provided that the interests are consistent with community safety and welfare).

353 *See* Davis, *supra* note 258, at 18–19 (proposing racial impact studies); Smith & Levinson, *supra* note 252, at 824–25 (proposing the same and suggesting other potential remedies).

cial justice include the federal Juvenile Justice and Delinquency Prevention Act's (JJDPA) Disproportionate Minority Contact Standard, which requires state actors to determine how their decisions contribute to disparities even when agency policies and practices are reasonable and not responsible for the disparity;[354] the North Carolina Racial Justice Act, which allows a defendant to appeal a death sentence when evidence demonstrates that race weighed heavily in the prosecutor's or jurors' death penalty decisions at the time the death sentence was sought or imposed on the defendant;[355] and state statutes in Iowa[356] and Connecticut,[357] which require racial impact statements to prospectively evaluate how proposed criminal justice legislation will likely affect racial minorities.[358]

Whether voluntary or legislatively mandated, standards should be developed and periodically reviewed with input from community representatives and adolescent development experts. By engaging the public, prosecutors may cultivate support from those most affected by racial disparities, set crime control priorities that reflect the needs of the local community, and ultimately make the juvenile charging decision more transparent. To further ward against implicit bias and improve the quality of office-wide decision making, some scholars have recommended that prosecutors' offices hire and promote a more diverse pool of attorneys from the communities most affected by these decisions.[359]

Prosecution standards developed with input from the community would not only enhance the credibility of prosecutors and the justice system as a whole within communities of color, but would also provide the state's attorney with a strategy to address claims of racial bias and

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354 *See* 42 U.S.C. § 5633(a)(22) (2006) (requiring state plans to "reduce . . . the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system"). *See generally* Johnson, *supra* note 331, at 407–16 (providing an historical overview of the JJDPA's DMC standard).

355 N.C. GEN. STAT. § 15A-2010 (2011); *see also* § 15A-2011(a)–(b) (describing how a defendant may establish that "race was a significant factor in decisions to seek or impose the sentence of death").

356 *See* IOWA CODE ANN. § 2.56(1) (West Supp. 2012) (requiring "correctional impact statement[s]" to asses the impact of sentencing, parole, or probation reforms on minorities).

357 *See* CONN. GEN. STAT. ANN. § 2–24b (West Supp. 2012) ("[A] racial and ethnic impact statement shall be prepared with respect to certain bills and amendments that could, if passed, increase or decrease the pretrial or sentenced population of the correctional facilities in this state.").

358 *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 530–33 (2010) (surveying how Canada and numerous U.S. jurisdictions have taken measures to address racial inequities in criminal justice systems).

359 Smith & Levinson, *supra* note 252, at 825–26 (noting research in the jury context shows that diverse group decision making is better than homogenous group decision making).

overenforcement of criminal laws in these communities. Collaboration among community leaders and adolescent development experts would provide an opportunity for training that educates all stakeholders—not just prosecutors—on the benefits of adolescent-appropriate responses to delinquency.[360] Community leaders who are frustrated with juvenile crime, but willing to participate in the collective effort to reduce racial disparities in the juvenile justice system, may better understand the causes of adolescent offending and be better equipped to identify and develop community-based and school-based responses that meet the needs of neighborhood youth.

D. The Prosecutor's Choice: Choosing and Planning for Positive Youth Development

Although we know that most youth age out of delinquent behavior after adolescence, the successful transition to adulthood is not automatic.[361] The transition to a healthy, safe, and productive adulthood depends on a number of variables, including the youth's environmental context and social supports.[362] For at-risk youth, decisions within the justice system play a significant role in facilitating or undermining a youth's successful development. A decision to charge, dismiss, or divert a youth from the system will often determine where the youth will live, what services he will receive, and with whom he will interact on a daily basis in or outside of the court system.[363]

Good prosecutorial decision making requires more than a nominal commitment to rehabilitation. It requires a true understanding of what interventions are effective and a willingness to sacrifice temporary political and reputational gains achieved from rapid law-and-order responses to adolescent offending in favor of alternative strategies

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360 Some states have started training for prosecutors. *See, e.g.*, ACT 4 JUVENILE JUSTICE, VERMONT: STATE PROFILE OF FEDERAL JUVENILE JUSTICE AND DELINQUENCY PREVENTION FUNDING 1–3 (2012), *available at* http://act4jj.org/media/factsheets/factsheet_66.pdf (noting that Vermont uses Title II funds to train prosecutors in adolescent brain development); Jonathan Lippman, *Rethinking Juvenile Justice*, N.Y. L.J., Jan. 23, 2012, http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202539352935 (referring to effort by New York to hold trainings for prosecutors on adolescent development); *Juvenile Forensic Evaluations: Competency to Stand Trial and Treatment Amenability*, CHILD. L. CENTER U.N.M., http://childlaw.unm.edu/programs-past.php (last visited Nov. 6, 2012) (discussing "training for Children's Court judges, prosecutors and public defenders with Dr. Thomas Grisso, a nationally recognized expert in adolescent development and the juvenile justice system"); *PCCD Awards Recovery Grants to Assist Counties, Prosecutors Within Juvenile Justice System*, ALIPESNEWS (Sept. 9, 2009, 11:45 AM), https://www.alipesnews.com/App.aspx#id=3058263000000000&languageId=4000 (discussing an award of $75,000 in federal funds to the Pennsylvania District Attorneys Institute to provide training for juvenile prosecutors, including child and adolescent development training).

361 SCOTT & STEINBERG, *supra* note 2, at 54–56.

362 *See* Chung et al., *supra* note 84, at 69, 73–85.

363 *See id.* at 92 (discussing decision making generally throughout the juvenile justice system).

that have been proven to yield positive outcomes for youth and ultimately the community at large. Efforts to address disproportionate minority contact may also call for an expansion of the role of the prosecutor. Specifically, where community-based resources are not available to provide alternatives to formal prosecution, prosecutors may assume a leadership role in encouraging legislators and community representatives to develop those options.[364]

1. *Achieving Positive Youth Development: Knowing What Works*

Research shows that youth need to develop a range of cognitive and psychosocial capacities to become healthy and productive adults.[365] Youth need educational and vocational training that will provide them with the skills, knowledge, and "mastery and competence" to participate in society's production and culture.[366] They need interpersonal skills and social functioning to cooperate and collaborate with others, maintain healthy and satisfying intimate relationships, and behave responsibly toward the community in which they live.[367] And they need "self-definition and self-governance" that will equip them with a positive sense of their own worth, independence, and the ability to set and achieve their own goals.[368] The social context in which adolescents transition to adulthood has a significant impact on the development of necessary cognitive and psychosocial capacities. Youth who have the benefit of caring, committed, and supportive parents or guardians who provide them with authoritative guidance and actively advocate for them in school and work are more likely to experience healthy psychosocial development.[369] Healthy psychosocial development is also facilitated by positive peer supports that can compensate for deficient family relationships; positive school environments that expose youth to positive role models, prosocial peers, and extracurricular activities; vocational skills-training that allow youth to achieve financial independence; and structured extracurricular activities, neighborhood youth groups, and community

364 *See* NAT'L DIST. ATT'YS ASS'N, *supra* note 307, at 54, 68 (encouraging prosecutors to take a leadership role in assuring availability of dispositional alternatives for youth who have been adjudicated, and urging the establishment, maintenance, and enhancement of diversion programs deemed insufficient by the chief prosecutor); *see also* James C. Backstrom & Gary L. Walker, *The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community*, 32 WM. MITCHELL L. REV. 963, 982–87 (2006) (discussing strategies for preventing juvenile crime and advocating for a broader role for prosecutors in such efforts); Coles, *supra* note 295, at 1–2 (describing several prosecutors' innovative approaches to preventing juvenile crime or implementing alternative intervention strategies).

365 Chung et al., *supra* note 84, at 76.

366 *Id.*

367 *Id.*

368 *Id.*

369 *See* SCOTT & STEINBERG, *supra* note 2, at 56–57; Chung et al., *supra* note 84, at 77.

programs that help youth understand civic commitment and provide them with opportunities to think critically and independently and make decisions that have real-world consequences.[370]

Even those youth who engage in delinquency in adolescence often experience a "turning point[ ]" toward responsible law-abiding behavior in late adolescence and early adulthood.[371] Research suggests that the development of a positive, supportive relationship, such as with a girlfriend, boyfriend, or a concerned adult in the neighborhood, is the most important factor in helping youth reach this turning point.[372] Educational resources, employment opportunities, the birth of a child, and emotional support such as encouragement are other factors that positively affect the successful transition from delinquency to law-abiding maturity.[373] Young offenders may also benefit from mentoring by neighbors and employers who help them develop healthy goals and values, encourage them to participate in positive activities like school or work, and help them develop the skills they need to assume adult roles and responsibilities.[374]

Youth entering the delinquency system often face multiple disadvantages at home and in the community and are more likely than their nondelinquent peers to experience poor school performance, mental health problems, unstable and unsupportive family connections, poverty, crime-ridden neighborhoods, negative peer influences, and few positive role models.[375] The significant levels of unmet mental health needs among youth in the juvenile justice system are well documented, as are the high rates of academic and intellectual deficits among this population.[376] Left unaddressed, these conditions are likely to impede the transition to adulthood.[377] Fortunately, as documented in the developmental research, youth, whose identities and characters are in rapid transition, have an inherent potential for growth, change, and rehabilitation and will likely benefit from positive corrections in their family, school, or community.[378] Youth can often

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370 *See* SCOTT & STEINBERG, *supra* note 2, at 57–58; Chung et al., *supra* note 84, at 77–78.

371 Chung et al., *supra* note 84, at 74.

372 *Id.*

373 *Id.* (summarizing studies).

374 *Id.* at 83.

375 *Id.* at 71.

376 THOMAS GRISSO, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS 6–13 (2004) (discussing study results); Regina M. Foley, *Academic Characteristics of Incarcerated Youth and Correctional Education Programs: A Literature Review*, 9 J. EMOTIONAL & BEHAV. DISORDERS 248, 249, 257 (2001); Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1133–38 (2002).

377 *See* Chung et al., *supra* note 84, at 71.

378 *See supra* notes 86–90; *cf.* Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) ("But none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."); Graham v. Florida,

achieve these corrections through a range of community-based responses that are less harmful, less expensive, and more effective than traditional law enforcement and juvenile court interventions.[379]

Studies have shown that even serious, violent, and chronic offenders can benefit from community-based interventions.[380] A number of cost-effective, community-based responses to adolescent offending have been shown to reduce crime across a range of offending patterns.[381] Among them are Functional Family Therapy (FFT), Multisystemic Therapy (MST), and Multidimensional Treatment Foster Care (MTFC).[382] FFT seeks to strengthen the family by providing therapists who work to improve the emotional connection between youth and their parents and to teach authoritative parenting that imposes structure and limits on children.[383] MST, which has been particularly successful with violent and aggressive youth, is a community-based program grounded in developmental research that seeks to empower families with the skills and resources they need to cope with family problems, address peer group concerns, and advocate on behalf of their children in the school and community.[384] MTFC, which has been particularly effective with high-risk and chronic offenders, separates youth from their delinquent peers, provides them with adult mentoring, heightened supervision, and support in school and the community, and places youth with trained foster parents for six to twelve months while they complete family therapy with their own family.[385] The success of these programs arises in part out of their attention to the psychosocial capacities youth need to prepare for adulthood.[386] Although these strategies have been employed most often within the context of formal court involvement, there is no reason they cannot be implemented with motivated youth and families in

130 S. Ct. 2011, 2026 (2010) ("No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles."); Roper v. Simmons, 543 U.S. 551, 570 (2005) ("The personality traits of juveniles are more transitory, less fixed.").

379 *See, e.g.*, *supra* note 364 (discussing the benefits of alternative interventions and means of preventing juvenile crime); *see also* Chung et al., *supra* note 84, at 84 ("[T]he juvenile justice system as it is currently designed is neither equipped nor philosophically driven to effectively address such psychological vulnerabilities among incarcerated youth . . . ." (citation omitted)); Laurence Steinberg et al., *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 2 YOUTH VIOLENCE & JUV. JUST. 21, 29–30 (2004) [hereinafter Steinberg et al., *Reentry*] (summarizing relevant literature on the obstacles to the rehabilitation of already incarcerated youths).

380 *See* SCOTT & STEINBERG, *supra* note 2, at 217–20.

381 *Id.* For a discussion of the cost-effectiveness of the various programs, see *id.* at 219–20.

382 *Id.* at 217–19.

383 *Id.*

384 *Id.*

385 *Id.*

386 *Id.* at 216–17.

diversion programs and administered by well-resourced public or private agencies disentangled from the court system.

2. *Knowing What Does Not Work*

Just as developmentally appropriate responses to delinquency can increase the chances that adolescents will reach a healthy turning point in their transition to adulthood, developmentally inappropriate interventions by the juvenile justice system can derail or impede that transition. Unfortunately, Justice Abe Fortas's 1966 claim that youth often experience the worst of both worlds in juvenile courts (i.e., that juvenile courts provide neither the full range of procedural protections available to adults nor the rehabilitation promised to youth) may be truer than ever.[387] As discussed above, adolescents are referred to juvenile court more often and for less serious crimes, are more likely to be detained than ever before, and face a host of collateral consequences that impede their development.[388]

As Professors Jeffrey Fagan and Tracey Meares have argued, harsh punishments like incarceration appear to have an iatrogenic—or counterdeterrent—effect on crime, especially among persons of color who live in poor neighborhoods.[389] In what they describe as a "paradox of punishment,"[390] Fagan and Meares contend that public policy choices that shift resources to traditional law enforcement strategies and away from employment opportunities, education, and neighborhood supports undermine informal social controls that provide a natural deterrent to crime and produce stable, if not higher, levels of crime.[391] These findings are especially relevant for youth who need role models, educational and vocational training, and community supports to foster a successful transition to adulthood. High rates of punishment in communities of color also reduce the stigma traditionally associated with a finding of delinquency and undermine the value of incarceration as a deterrent to crime and delinquency.[392] Individual and community dissatisfaction with procedural and distributive justice can foster cynicism and noncompliance and can further undermine the deterrent effect of juvenile and criminal justice interventions.[393]

Pretrial detention, incarceration, and secure treatment during adolescence are particularly detrimental to healthy psychosocial devel-

387 Kent v. United States, 383 U.S. 541, 556 (1966).
388 *See supra* notes 60–64, 150–52 and accompanying text.
389 Fagan & Meares, *supra* note 202, at 173.
390 *Id.* at 176.
391 *Id.* at 173, 183–202.
392 *Id.* at 173–74, 228.
393 *Id.* at 173–74, 216–19 (discussing Tom Tyler's work on procedural justice and perceptions of police legitimacy).

opment.[394] Incarceration disrupts important opportunities for proper socialization,[395] may fracture or further deteriorate youths' already troubled relationships with their parents, and may cause youth to lose the support of adults when they need it most.[396] Youth who are separated from family and friends during incarceration withdraw from school, lose any employment they had in the neighborhood, and have little opportunity to develop positive peer relationships while away from home.[397] Not surprisingly, incarcerated youth are more likely to increase antisocial behavior after exposure to and placement with other delinquent youth.[398] Further, any stigma and rejection associated with the court involvement will likely have a significant psychological impact on the self-image and identity of incarcerated youth who are removed from their communities.[399] As at least one study has shown, youth who are labeled delinquents may develop fears about their future and themselves that exceed their hopes and expectations.[400] Given this reality, youth returning to the community after incarceration are particularly unprepared with the psychosocial capacities they need to succeed as adults.[401]

Youth placed in facilities euphemistically named "residential treatment centers" fare little better than youth in more traditional correctional facilities. There is little to no reliable research to support the presumption that residential treatment centers improve behavioral problems.[402] In fact, placing youth with behavioral difficulties with other children with similar issues may exacerbate the youth's

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394 *See* Steinberg et al., *Reentry*, *supra* note 379, at 27–28.

395 *See* Chung et al., *supra* note 84, at 79.

396 *See id.* at 101(summarizing studies); Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 862 (2006).

397 *See* Chung et al., *supra* note 84, at 81–82.

398 *Id.*

399 *Id.* at 82 (discussing studies).

400 Steinberg et al., *Reentry*, *supra* note 379, at 29.

401 Chung et al., *supra* note 84, at 80 (noting that even when correctional facilities have educational and vocational training, the programs are not designed to train youth to be more psychosocially mature).

402 *See, e.g.*, MAGELLAN HEALTH SERVS., PERSPECTIVES ON RESIDENTIAL AND COMMUNITY-BASED TREATMENT FOR YOUTH AND FAMILIES 4 (2010), *available at* http://www.magellanhealth.com/media/2718/CommunityResidentailTreatment_White_Paper.pdf (noting the lack of research to prove effectiveness of residential treatments); U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 118 (2001) (discussing evaluations of residential programs that show little promise of reducing subsequent crime and violence in delinquent youths); UNIV. LEGAL SERVS., INC., OUT OF STATE, OUT OF MIND: THE HIDDEN LIVES OF D.C. YOUTH IN RESIDENTIAL TREATMENT CENTERS 10 (2009), *available at* http://www.uls-dc.org/out-2520of-2520state-2520out-2520of-2520mind-2520revision-2520final.pdf (stating residential treatment centers are not evidence-based practices because there is "weak evidence" for the effectiveness of residential treatments).

problems.[403] Not only do residential treatment centers deprive youth of positive role models, but they may also cause youth to adopt their peers' negative behaviors.[404] Residential treatment programs can also be physically dangerous, as youth may be at risk of abuse from other residents or from staff who rely on aggressive behavioral control methods such as seclusion and restraints.[405] In 2007, the Government Accountability Office released a report surveying residential treatment programs throughout the country and documenting rampant allegations of abuse and reports of deaths.[406] Such abuse is particularly harmful to youths' psyche and ability to function upon their return to the community.[407] Furthermore, any skills acquired or other gains made while in "treatment" are often lost in the difficult transition from institutionalization back to the community.[408] As a result, many children revert to old behavioral patterns upon release.[409] One 2002 study showed that only about 30% of young adults attended school or were employed twelve months after their release from a residential or correctional facility.[410]

In many states, the mere decision to charge a youth and the choice of which offense to charge them with affects the likelihood of detention and incarceration, removal from school, loss of public housing, transfer to adult court, and public stigma resulting from the elimination of confidentiality protections for many juvenile offenses.[411] Thus, a child like Rodney or Roland, charged with assault with a dangerous weapon for throwing pebbles, or Shannon, charged with rob-

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403 BAZELON CTR. FOR MENTAL HEALTH LAW, THE DETRIMENTAL EFFECTS OF GROUP PLACEMENTS/SERVICES FOR YOUTH WITH BEHAVIORAL HEALTH PROBLEMS 2 (2006), *available at* http://www.bazelon.org/LinkClick.aspx?fileticket=NCd6-AmZxdg%3d&tabid=166 (positing that segregating youth with behavioral issues is more harmful than helpful).

404 *Id.*; UNIV. LEGAL SERVS., INC., *supra* note 402, at 7.

405 UNIV. LEGAL SERVS., INC., *supra* note 402, at 7–10; *see* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-146T, RESIDENTIAL TREATMENT PROGRAMS: CONCERNS REGARDING ABUSE AND DEATH IN CERTAIN PROGRAMS FOR TROUBLED YOUTH 12–34 (2007) (detailing case studies of death and abuse of youth in residential treatment centers).

406 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 405.

407 *See* MAGELLAN HEALTH SERVS., *supra* note 402, at 4–5 (stating "milieu in residential treatment may have serious adverse effects on many adolescents" who learn inappropriate behavior and do not maintain any improvements made between admission and discharge); UNIV. LEGAL SERVS., INC., *supra* note 402, at 7 (discussing the isolating and abusive nature of residential treatment centers, which impedes clinical treatment and quality of life, including social contacts, economic independence, and work options).

408 MAGELLAN HEALTH SERVS., *supra* note 402, at 4–5.

409 *Id.*

410 *See* Michael Bullis et al., *Life on the "Outs"—Examination of the Facility-to-Community Transition of Incarcerated Youth*, 69 EXCEPTIONAL CHILD. 7, 7 (2002).

411 *See* Beale, *supra* note 271, at 521 (discussing state laws that increasingly focus on the offense with a goal of punishment and expand the types of offenses and offenders eligible for transfer from juvenile courts to adult criminal court); *see also* Henning, *Eroding Confidentiality*, *supra* note 26, at 542–60 (outlining the effects of eliminating confidentiality protections for juvenile offenses, particularly in terms of school exclusion and stigma).

bery for snatching her aide's hat, would automatically be ineligible for diversion and possibly subject to eviction from public housing or exclusion from public schools for engaging in purportedly dangerous felony conduct. Many schools prevent youth from reenrolling after detention because of concerns about the youth's behavior, academic performance, and impact on the school's overall academic rating.[412] Even if a school permits youths to return, academic credits the youth earned in placement often will not transfer to their home schools.[413] Youth incarcerated in juvenile facilities may also be automatically removed from Medicaid rolls and required to reenroll through a lengthy reapplication process upon release.[414] Other youth may become homeless because of laws that make them and their families ineligible to live in Section 8 housing after adjudication.[415] Formerly incarcerated adolescents also have difficulty finding employment and reaching educational goals like attaining a high school diploma or GED.[416] Even when formerly incarcerated youth do secure employment, their earnings are likely to be less than those who have not been incarcerated.[417] Youth adjudicated delinquent by a court are also more likely to depend on welfare and face problems with mental health, substance abuse, divorce, or parenting unexpected children.[418]

3. *Empowering Communities: Identifying and Developing Effective Adolescent-Appropriate Alternatives to Formal Prosecution*

Efforts to reduce racial disparities in juvenile court are not likely to succeed without adequate community-based, adolescent-appropriate alternatives to prosecution. A prosecutor who believes that informal interventions will not meet a victim's needs or that adequate resources are not available in the community to respond to delinquency will be more likely to prosecute.[419] The disproportionate prosecution of offenses committed by black and Hispanic youth may reflect a belief that communities of color are either disempowered or

412 ASHLEY NELLIS & RICHARD HOOKS WAYMAN, YOUTH REENTRY TASK FORCE OF THE JUVENILE JUSTICE & DELINQUENCY PREVENTION COALITION, BACK ON TRACK: SUPPORTING YOUTH REENTRY FROM OUT-OF-HOME PLACEMENT TO THE COMMUNITY 17–18 (2009) (outlining the negative effects of out-of-home placement).

413 *Id.*

414 *Id.* at 19–21.

415 *Id.* at 21–22.

416 *See* Chung et al., *supra* note 84, at 72 (summarizing studies that suggest a low percentage of adolescent offenders find employment or receive high school diplomas or GEDs as adults).

417 *Id.*

418 *Id.* at 73.

419 NAT'L DIST. ATT'YS ASS'N, *supra* note 307, at 65 (including "[t]he existence of the appropriate treatment or services available through the juvenile court or through diversion" as a factor in the charging decision).

unwilling to control and regulate adolescent offending in their own neighborhoods. These explicit or latent perceptions echo those of the founders of the first juvenile courts and reflect more recent claims that poor African American families and communities are not taking responsibility for the welfare, education, and safety of their own children.[420] Unfortunately, these assumptions ignore the long history of self-help in black communities.[421] Marginal realignment of financial resources in communities of color from traditional law enforcement interventions to efforts designed to improve failing schools, dilapidated housing, mental health services, family counseling, and drug treatment would better equip these communities to address adolescent offending without court intervention.

Prosecutors willing to assume a more expansive leadership role in addressing racial disparities should collaborate with probation officers, community leaders, and other juvenile justice stakeholders. Combined, this team should compile a database of existing resources in the community, including faith-based resources, community recreation centers, school-based services, and family support groups that may provide an alternative to prosecution and respond to low- and midlevel offending by youth in communities of color.[422] The team should review this database for gaps in services and analyze it to identify opportunities to combine existing resources for wider impact. Evidence of creative examples across the country demonstrate that community groups are available to facilitate victim-offender mediation, engage youth in drug awareness, provide community service opportunities, and provide mentoring for youth.[423] Prosecutors should provide a list of relevant services to school officials when a prosecutor declines to charge school-based offenses.

Where resources are lacking or inadequate, prosecutors, policymakers, and other state officials arguably have a responsibility to ensure that youth of color have sufficient access to alternatives to prosecution that facilitate healthy, normative development and create

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420 *See supra* notes 113–15 and accompanying text; *see also* Richard Leiby, *Cosby, Saying the Darndest Things*, WASH. POST, May 19, 2004, at C3 (discussing Bill Cosby's public condemnation of African American families).

421 WARD, *supra* note 12, at 127–263 (documenting the long history of black communities attempting to provide resources for delinquent youth).

422 *See infra* notes 424–28 and accompanying text (discussing the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative).

423 *See, e.g.*, *About Omega Boys Club*, STREET SOLDIERS: OMEGA BOYS CLUB, http://www.street-soldiers.org/programs.htm (last visited Nov. 6, 2012) (community-based program helping young men with conflict resolution); *About Us*, LATIN AM. YOUTH CLUB, http://www.layc-dc.org/index.php/about-us-intro.html (last visited Nov. 6, 2012) (community-based holistic case management to aid at-risk youth); *Who We Are*, CROWN HEIGHTS COMMUNITY MEDIATION CENTER, http://www.crownheightsmediationcenter.org/p/who-we-are.html (last visited Nov. 6, 2012) (community-based center helping youth navigate their environment in Brooklyn, New York).

positive opportunities in communities of color. Communities would benefit from creative partnerships with police, substance abuse providers, state and local mental health agencies, and schools. As a potential model for reform, communities may look to the Casey Foundation, which has documented considerable success in reducing the disproportionate confinement of youth of color through its Juvenile Detention Alternatives Initiative (JDAI).[424] The Casey Foundation's allocation of resources to develop alternatives to detention, where none existed, contributed significantly to the success of its JDAI efforts. With the assistance of JDAI, Santa Cruz reduced its average minority population in juvenile detention from 64% to 47% after opening a neighborhood evening center for high-risk Hispanic youth.[425] Multnomah County, Oregon also reduced the proportion of minorities in detention from 73% before JDAI to 50% after JDAI.[426] Prosecutors may follow the lead of the New Orleans District Attorney Office, which is participating in the American Bar Association's Racial Improvement Project and working to expand and improve its diversion program to make it more accessible to Hispanics.[427]

Diversion programs that direct youth out of the system are an important component of any strategy to reduce the disproportionate contact of youth of color with the juvenile justice system. Programs like teen courts hold youth accountable for their misconduct through restitution or community service, but seek to disentangle those rehabilitative and corrective responses from the juvenile adjudication and its collateral consequences.[428] The success of many youth in diversion suggests that nonlegal interventions are often just as effective as law enforcement responses to delinquency.[429] Further, evidence suggests

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424 *Results from the Juvenile Detention Alternatives Initiative, supra* note 342.

425 *Id.*

426 *Id.*

427 *The Racial Justice Improvement Project*, A.B.A. CRIM. JUST. SEC., http://racialjustice project.weebly.com (last visited Nov. 6, 2012). In select jurisdictions, the ABA Racial Justice Improvement Project creates task forces, including district attorneys, in cooperation with courts, public defenders, police departments, and nonprofit organizations, to address discrete racial justice goals at different points in the criminal justice process. *Id.* Task forces have been established in the state of Delaware; St. Louis County, Minnesota; Kings County, New York; and New Orleans, Louisiana. *Id.*

428 Edgar Cahn & Cynthia Robbins, *An Offer They Can't Refuse: Racial Disparity in Juvenile Justice and Deliberate Indifference Meet Alternatives that Work*, 13 UDC L. REV. 71, 97–98 (2010) (discussing the success of the Time Dollar Youth Court program, which allows police to divert youth to teen courts rather than to the traditional adjudication format in juvenile cases); Segadelli, *supra* note 64, at 714–19 (discussing youth court programs and their future role).

429 *See* Joseph J. Cocozza et al., *Diversion from the Juvenile Justice System: The Miami-Dade Juvenile Assessment Center Post-Arrest Diversion Program*, 40 SUBSTANCE USE & MISUSE 935, 937–39 (2005) (discussing the success and characteristics of nonlegal interventions such as Functional Family Therapy and Multisystemic Therapy).

that community-based programs like teen courts save money and reduce crime over time.[430]

A brief word of caution is warranted about court-sponsored and court-monitored diversion. Diversion takes many forms, with some programs providing considerably more state intervention and intrusion into the child's life than others. A youth may be diverted from the juvenile court at any stage of the process, including the precharge, predisposition, or postdisposition phases. True diversion typically takes place before arrest and before referral to the juvenile court.[431] Other diversion efforts—such as dismissing a formal petition after the youth has completed a term of probation—merely reduce the extent to which youth penetrate through the system.[432] Still other diversion efforts refer youth to agencies and programs outside of the justice system.[433]

Some advocates and scholars have complained that diversion merely widens the net of youth under state control without due process.[434] Although diversion is typically voluntary, youth rarely have access to counsel when they agree to participate and diversion requires them to waive their right to trial and admit guilt to the alleged offense before they are eligible for the programs.[435] Youth who violate the conditions of diversion may be referred back to juvenile court and face a greater risk of adjudication and incarceration than they would have had they not been unsuccessful in diversion.[436] Police also flag diverted youth as high risk and subject them to heightened scrutiny and public stigma.[437] Other critics complain that diversion programs

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430 *See, e.g.*, Cahn & Robbins, *supra* note 428, at 98–99 (noting recidivism rates of 5% during the first six months in the Time Dollar Youth Court, 9% in the first twelve months as compared to 33–35% for the comparison group, and estimating the nationwide cost of Youth Court programs at $458 per youth compared to $1,635 per youth on probation and $21,000–$84,000 per youth for juvenile justice processing).

431 Cocozza et al., *supra* note 429, at 937.

432 *Id.*

433 *See id.* (listing various diversion programs in the community that include service components and justice components).

434 *See* Ctr. on Juvenile & Criminal Justice, Widening the Net in Juvenile Justice and the Dangers of Prevention and Early Intervention 1–6 (2001); Cocozza et al., *supra* note 429, at 940; Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 Appalachian J.L. 1, 17–18 (2004); Debra Oldenettel & Madeline Wordes, *The Community Assessment Center Concept*, Juv. Just. Bull., Mar. 2000, at 10.

435 Tracy M. Godwin et al., Am. Prob. & Parole Ass'n, Peer Justice and Youth Empowerment: An Implementation Guide for Teen Court Programs 30 (1996) (pointing out due process concerns when youth are compelled to admit guilt before admission into diversion programs such as teen court).

436 *See, e.g.*, Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 Stan. L. Rev. 751, 761–63 (2000) (discussing the risk that prosecutors will use youth's incriminating statements against them at trial if victim-offender mediation is unsuccessful).

437 *See* Zachary K. Hamilton et al., *Diverting Multi-Problem Youth from Juvenile Justice: Investigating the Importance of Community Influence on Placement and Recidivism*, 25 Behav. Sci. &

generally operate with no judicial oversight and too often include those who are innocent or should otherwise be completely excused.[438] To guard against these concerns, standards should ensure that no case be *prosecuted* or diverted unless the prosecutor reasonably believes that a delinquency charge would be substantiated against the youth with admissible evidence at a trial.[439] More importantly, this Article advocates for the realignment of resources to school-based and community-based interventions that do not require state intervention and oversight. Prosecutors should resist unwarranted juvenile court referrals and systemically limit the use of courts for the regulation of relatively harmless, normal adolescent behavior.

CONCLUSION

Notwithstanding the growing body of developmental research demonstrating that much of juvenile crime and delinquency is the product of normal adolescent development, contemporary narratives portraying youth of color as dangerous and irredeemable lead police, probation officers, and prosecutors to reject age as an excuse or mitigation for these youth. Aggressive institutional approaches toward adolescent offending motivated by explicit or implicit racial bias lead to the disproportionate arrest, prosecution, and disposition of black and Hispanic youth. This Article considers reform in prosecutorial decision making at the intake stage as a viable strategy to reduce disproportionate minority contact in the juvenile justice system. Specifically, this Article proposes that prosecutors acknowledge the unique developmental status of adolescents and develop guidelines for prosecuting youth that adequately account for the youth's amenability to treatment and diminished culpability in criminal activity. These standards should also hold prosecutors accountable for confronting implicit bias not only in their own decisions, but also in the decisions of other system stakeholders. By engaging the community, collaborating with developmental psychologists, and delineating adolescent-appropriate factors to guide the charging decision, prosecution standards should begin to erode harmful stereotypes about youth of color and hopefully reduce racial disparities in the system over time. Recognizing that the actual or perceived lack of community-based resources in

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L. 137, 140–41 (2007) (discussing the theory that mere identification of diverted youth enhances probability of detention and stigma because of continued contact with the system).

438 Frank A. Orlando, *Mediation Involving Children in the U.S.: Legal and Ethical Conflicts*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION 333, 338 (Heinz Messmer & Hans-Uwe Otto eds., 1992) (discussing a study claiming that up to three-quarters of youth would not have been brought to the court's attention if a diversion program had not existed).

439 NAT'L DIST. ATT'YS ASS'N, *supra* note 307, at 65.

communities of color will likely hinder reforms in prosecutorial charging decisions, this Article also proposes that prosecutors take a leadership role to ensure that resources are fairly allocated to the implementation of adolescent-appropriate responses to delinquency as an alternative to law enforcement and juvenile court interventions.