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The Racialization of Juvenile Justice and the Role of the Defense Attorney

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THE RACIALIZATION OF JUVENILE JUSTICE AND THE ROLE OF THE DEFENSE ATTORNEY

TAMAR R. BIRCKHEAD

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THE RACIALIZATION OF JUVENILE JUSTICE AND THE ROLE OF THE DEFENSE ATTORNEY

TAMAR R. BIRCKHEAD*

Abstract: The existence of structural racism is not new. In fact, as the second decade of the twenty-first century comes to a close, there is evidence of a national political openness to acknowledging the phenomenon. This Article seizes upon this openness as it seeks to provide a fuller understanding of how structural racism operates within a branch of the criminal justice system that is often overlooked—the juvenile justice system. The Article offers a definition of racialization that acknowledges its multi-dimensional and fluid nature and the ways it is perpetuated via juvenile court rhetoric, processing, and procedure. It demonstrates how the racial bias that animates today’s juvenile justice system has deep echoes in its early history. The Article examines the harms of racialization and the impact of those harms on children charged with crimes, providing insight into how the construction of race operates within the system as well as how the system itself contributes to the construction of race. In turn, the Article shines a light on how young offenders, who are disproportionately children of color living in poverty, are perceived and understood within American society. The Article also explores the roles of the various actors within the system, focusing upon the juvenile defense attorney and the question of whether it is ethical to utilize racialized narratives during litigation, a discussion that illustrates the tension between two very different models of criminal defense. It analyzes the rules of professional ethics that address the potential conflict between a lawyer’s duty to her client and adherence to her own moral code, and it explores a middle ground that takes into account the unique challenges of defending adolescents charged with crimes. The Article argues that the harms of racialization should be confronted in the context of broader strategies for reform of the juvenile justice system. It considers the efficacy of implicit bias training for police officers and other court actors and proposes im-

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plementing practical safeguards that enable defense attorneys to inoculate against bias, rather than focus on the nearly impossible task of eradicating it. The Article concludes with a call to diversify the overwhelmingly white bench and bar in order to create a racially, and ethnically, heterogeneous court culture that emphasizes fair and impartial lawyering, no matter one's role.

Our society applies a presumption of dangerousness and guilt to young black men, and that's what leads to wrongful arrests and wrongful convictions and wrongful death sentences, not just wrongful shootings. There's no question that we have a long history of seeing people through this lens of racial difference. It's a direct line from slavery to the treatment of black suspects today, and we need to acknowledge the shamefulness of that history.

—Jeffrey Toobin, *The Legacy of Lynching, on Death Row* (quoting Bryan Stevenson)¹

INTRODUCTION

It is a common scenario: I am in juvenile court supervising a third-year law student, she is giving a carefully-prepared argument on behalf of her young client at a hearing, and I hear the phrase that makes me cringe: "He's a good kid, Your Honor." It is not something that was in the draft that I reviewed the night before, but it seems to have flowed naturally from her. Alternatively, the student expresses the same sentiment but does it in the inverse: "Really, Your Honor, he's not a bad kid." At this, the judge barely raises his head and continues to scan the papers in the file in front of him. I look around, but no one else seems bothered. Then the prosecutor riffs on the characterization of the juvenile that the student has offered: "He may be a good kid, Judge, but his persistent violation of the law suggests otherwise." The judge looks up with a nearly imperceptible nod. The client's parent (typically a mother, as most children in juvenile court come from single parent families headed by women²) may echo the language when it is her

¹ Jeffrey Toobin, *The Legacy of Lynching, on Death Row*, NEW YORKER (Aug. 22, 2016), <http://www.newyorker.com/magazine/2016/08/22/bryan-stevenson-and-the-legacy-of-lynching> [<https://perma.cc/CP2P-65Q7>] (quoting Bryan Stevenson).

² See NAT'L RESEARCH COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 76–77 (Joan McCord et al. eds., 2001) (discussing research that shows that being born and raised in a single-parent family has been associated with increased risk of delinquency and antisocial behavior, but suggesting there is not necessarily a causal relationship between family structure and delinquency, as there are no differences in delinquency rates between children in single- and two-parent homes within the same socioeconomic group); see also Stephen Demuth & Susan L. Brown, *Family Structure, Family Processes, and Adolescent Delinquency: The Significance of Parental Absence Versus Parental Gender*, 41 J. RES. CRIME & DELINQ. 58, 58, 61 (2004) (find-

turn to speak, some insisting and some only reluctantly acknowledging, “Yes, he’s a good boy.” Meanwhile, the adolescent to whom the various adults in the courtroom are referring is silent. Almost always a child of color,³ he or she is usually a teenager but sometimes much younger—ten or eleven-years-old or even as young as six-years-old, as one of our clients was last year.⁴

If the juvenile courtroom were a stage and its inhabitants were characters in a drama, most of the adults would look the same from scene to scene—white judges⁵ in black robes and white lawyers⁶ in suits or skirts, all

ing that youths residing in single-parent homes have higher rates of delinquency than those living in families with two biological parents).

³ In regard to racial nomenclature, this Article uses several different terms to describe people with brown or black skin, including “Black,” “African-American,” and “Latino.” On occasion, for groups of nonwhite people labeled in a variety of ways, including people of Hispanic, Latino, or Spanish origin, Asian people, Black Americans or Americans of African descent, American Indian or Native American people, etc., this Article refers to “people of color.” The term “white” is used in its conventional sense, to mean non-Hispanic Caucasian. The author recognizes that these terms are imprecise and socially constructed but consider them sufficient for purposes of this Article. In addition the author has chosen to capitalize “Black” but not white or brown, because the author considers “Black” to constitute an ethnicity equivalent to African-American, Irish, or Chinese. For further commentary, see generally, Erika V. Hall et al., *A Rose by Any Other Name? The Consequences of Subtyping “African-Americans” from “Blacks,”* 56 J. EXPERIMENTAL SOC. PSYCHOL. 183 (2015) (finding that white people react more negatively when a person of color is identified as Black vs. African-American, and suggesting that the African-American racial label invokes a mental image of someone of a relatively higher social class than the Black racial label); Ben L. Martin, *From Negro to Black to African American: The Power of Names and Naming*, 106 POL. SCI. Q. 83 (1991) (discussing the ways in which naming can be a political exercise and the significance for the African-American community of the shift in labels from the 1960s through the 1980s); Judith N. Martin et al., *Exploring Whiteness: A Study of Self Labels for White Americans*, 44 COMM. Q. 125 (1996) (finding that white Americans resist self-labeling by race, but that the label of “White” is preferred over “Anglo” and “WASP”).

⁴ See N.C. GEN. STAT. § 7B-1501(7) (2016) (establishing that juvenile court jurisdiction begins at age six and ends at age sixteen). There is ample data suggesting that the demonization of Black children begins as early as pre-school. See U.S. DEP’T OF EDUC., CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 7 (2014) (finding that Black children represent 18% of preschool enrollment, but 48% of those receiving more than one out-of-school suspension).

⁵ KAREN R. HUMES ET AL., 2010 CENSUS BRIEFS: OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 (Mar. 2011) (finding that 72% of the reported U.S. population are white); *Standing Committee on Judicial Independence: National Database on Judicial Diversity in State Courts*, AM. B. ASS’N (June 2010), <http://apps.americanbar.org/abanet/jd/display/national.cfm> [<https://perma.cc/V89M-N399>] (finding that in state trial courts in the United States, which includes juvenile courts, 86% of the judges are white, 7% are African-American and 7% of the judges are another minority, such as Asian/Pacific Islander, Hispanic American, or Native American, making the judiciary disproportionately white); see also Malia Reddick et al., *Racial and Gender Diversity on State Courts: An AJS Study*, 48 JUDGES’ J. 28, 28 (2009) (finding that 12.6% of the U.S. state court judges chosen since 2000, including both trial and appellate courts, were minorities); *infra* notes 424–433 and accompanying text (discussing the ramifications of the fact that the legal profession is disproportionately white).

speaking the language of the state juvenile code, knowing when to rise and when to sit, and revealing little emotion from case to case. The children and families who enter the courtroom, however, might share the same race or ethnicity and the same low-income (or no-income) socioeconomic status, but the differences among them—subtle though they may be—would often predetermine the result. This includes differences in the clothes they wear, the words they say and how they say them, as well as their personal, family, educational, medical and court “histories,” and of course the immutable characteristics by which we all implicitly judge other people—shade or darkness of skin, gender expression, and shape or size.⁷

For instance, consider these two clients we have represented in the University of North Carolina Youth Justice Clinic.⁸ The first, whom I will call Campbell, is a light-skinned Black fifteen-year-old who is small for his age, standing at five feet three inches tall and weighing ninety-five pounds. His hair is cut very close to his head, and he wears a blue button-down shirt and khaki pants to court. He and two other teenagers were charged with common law robbery,⁹ a serious felony, after taking an iPhone from another student at their high school. The allegations were that Campbell and one boy grabbed the student’s neck and hands, while the other teen went through the student’s pockets and took his phone. Then the three adolescents ran in different directions, while the student whose iPhone was taken found the nearest teacher to report what had happened, describing Campbell as “a short little kid.” After the student advocate negotiated with the prosecutor, the parties agreed that based on Campbell’s lack of a prior juvenile record and the fact that the two others involved in the offense were a couple of years older, the felony would be dismissed if he admitted to larceny, a misdemeanor.¹⁰

At the dispositional hearing, Campbell made a positive impression on the judge. The youth was soft spoken and expressed regret when he made

⁶ AM. BAR ASS’N, 2016 NATIONAL LAWYER POPULATION SURVEY (2016) (finding that 88% of the lawyers in the United States, as of 2010, were white, making the legal profession disproportionately white).

⁷ See *infra* note 223 and accompanying text (discussing implicit bias).

⁸ Names and other identifying information of clients and their families in addition to specific facts regarding their cases have been changed. See Supervisory Case Notes of Author (on file with author).

⁹ N.C. GEN. STAT. § 14.87-1 (2016) (classifying robbery as defined at common law as a felony); *State v. Smith*, 607 S.E.2d 607, 618 (N.C. 2005) (requiring, under the common law, that someone feloniously take and carry away another’s personal property by means of force or violence).

¹⁰ N.C. GEN. STAT. § 14-72 (requiring that the value of the items stolen is less than one thousand dollars).

eye contact with the victim and readily apologized to him in open court.¹¹ Campbell told the judge about his interest in drawing and painting, and the judge asked him to bring in samples of his art on the next court date. Campbell's mother, born in Trinidad, had straightened hair, muted lipstick, and wore a long floral skirt and wool sweater. She worked as a dental assistant and had no prior court experience. I watched as she stood up proudly and in her light Caribbean accent told the judge, a middle-aged white woman, that her son behaved very well at home and that he "has the potential to be a very good boy." The judge thanked her for her words and praised Campbell for taking responsibility for his actions. Although troubled by Campbell's recent in-school suspension and mediocre grades, the judge placed him on probation for six months with only a few conditions, including thirty hours of community service via a program that would pay restitution to the victim to replace his phone, which had not been recovered.¹² Upon leaving the courtroom that day, Campbell smiled and appeared relieved.

In contrast, another of our clients, whom I will call Raekwon,¹³ is a dark-skinned¹⁴ African-American fifteen-year-old charged with a serious felony: assault inflicting serious bodily injury.¹⁵ The case emanated from an altercation in his neighborhood with a seventeen-year-old youth in which Raekwon threw a hand weight, hitting the boy's head, which subsequently required medical attention. Raekwon is tall and sturdy for his age, nearly

¹¹ See Martha Grace Duncan, "So Young and So Untender": Remorseless Children and the Expectations of the Law, 102 COLUM. L. REV. 1469, 1471 (2002) (emphasizing the importance of displays of remorse in juvenile court, the absence of which militates in favor of more punitive treatment); see also Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 310 & nn.46-49 (1999) (citing relevant case law and discussing the ways in which remorse or its absence can bear on the criteria for transfer of youths from juvenile court to the criminal system).

¹² See N.C. GEN. STAT. § 7B-2506 (describing dispositional alternatives for delinquent juveniles).

¹³ Names and other identifying information of clients and their families as well as specific facts regarding their cases have been changed. See Supervisory Case Notes of Author (on file with author).

¹⁴ See Kimberly Jade Norwood, *Introduction*, in COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POST-RACIAL AMERICA 4-7 (Kimberly Jade Norwood ed., 2014) (examining the phenomenon of colorism that is practiced within Black communities, enabling the policing of Black identity); Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 674 n.1, 676-77 (2004) (finding that Afrocentric features, including darker skin, a broader nose, and fuller lips, significantly correlate with harsher sentences after controlling for race, criminal history, and seriousness of the crime); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1497-99 (2000) (defining the concept of "colorism" or differential treatment based on skin color).

¹⁵ N.C. GEN. STAT. § 14-32.4(a) (requiring bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, or other such conditions).

six feet and one-hundred eighty-five pounds. His hair is in short braids, and he wears his jeans hanging low on his hips, with the top portion of his boxer shorts visible. Although Raekwon denied any gang involvement and claimed that he had acted in self-defense, the police officer's report alleged that the incident was "gang related," the low-income housing complex where Raekwon lives is "high crime," and Raekwon is "known to the officer."¹⁶ After the law student advocate persuaded the prosecutor that the nature of the injuries did not rise to the level required by the statute and emphasized that Raekwon had no prior record, the prosecutor offered Raekwon an admission to a "lesser included offense,"¹⁷ assault inflicting serious injury, which is a misdemeanor.¹⁸ After much discussion with the student advocate about how a bench trial would play out, including the fact that the alleged victim and the police officer would likely counter any self-defense claim, Raekwon agreed to admit to the misdemeanor.

At the disposition hearing, things did not go well. Despite the student advocate's insistence that Raekwon was not gang involved and that the incident was not gang related, the same white female judge who had presided over Campbell's case scoffed and threatened Raekwon with detention so the youth would see that she "wasn't messing around." Raekwon's mother, a thin, tired looking African-American woman who had several children younger than Raekwon and recently lost her job, appeared dispirited and said very little.¹⁹ During the hearing, despite preparation and coaching from the student advocate, Raekwon nervously stood with his hands in his pockets and mumbled, not saying "ma'am" or "your honor" when answering the judge's questions.²⁰ When the judge asked him about a recent school

¹⁶ See Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 23, 45 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (finding that African-American youths are perceived to be more threatening and gang involved than white youths).

¹⁷ A lesser included offense is "a crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime." *Lesser Included Offense*, BLACK'S LAW DICTIONARY (8th ed. 2004).

¹⁸ N.C. GEN. STAT. § 14-33(c)(1).

¹⁹ See Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1388-92 (2013) (discussing the false stereotype that Black women fail to raise moral children and the strategies Black women reformers have used to challenge the myth of the "delinquent Black mother").

²⁰ There is a rich literature on the importance of incorporating client perspectives and narratives in litigation, something that may not have been sufficiently explored by the student advocate in this scenario. See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 563-70 (1994) (emphasizing the importance of reconstructing case theory to more fully capture client perspectives); see also Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71, 76-

suspension and below-average grades, Raekwon only shrugged his shoulders. After being placed on probation for six months with numerous conditions, including a six p.m. curfew for the first thirty days, drug testing, and participation in gang intervention program, Raekwon quickly pushed back his chair and left the courtroom.

This Article is principally a diagnostic project. It contributes to the burgeoning literature examining structural racism in the juvenile justice system and the effects of racialization on juvenile court decision making.²¹ Although the standard dictionary definition of the term “racialization” is

99 (1996) (discussing how relationships of equality and collaboration between lawyers and clients can be created and sustained).

²¹ See Bishop, *supra* note 16, at 45 (providing an overview of the research finding that minority youths are more likely to be arrested, referred to court, and detained by police); Butler, *supra* note 19, at 1363–68 (discussing the way in which Blackness itself became synonymous with delinquency during the early development of the juvenile court and how race impacted the emerging jurisprudence on delinquency); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 415–26, 443 (2013) (discussing the perception that normal adolescent conduct appears more dangerous in poor communities of color, that the denial of rehabilitative options to youth of color reflects explicit and implicit biases about their culpability and maturity, and that juvenile court prosecutors are vulnerable to racialized perceptions of aggressiveness, violence, and risk of dangerousness in discretionary decision making); Robin Walker Sterling, “*Children Are Different*”: *Implicit Bias, Rehabilitation, and the “New” Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1065–66 (2013) (examining how racial disparities develop despite the formally race-neutral procedures of the juvenile justice system, and proposing solutions to ensure that youths of color are not disproportionately sentenced to juvenile life without parole); Sacha M. Coupet, Comment, *What to Do with the Sheep in Wolf’s Clothing: the Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1327–31, 1340 (2000) (discussing the “get tough on crime” rhetoric of the 1990s and its impact on the passage of punitive juvenile justice legislation, and suggesting that the rhetoric about young Black “thugs” may play a role in explaining disproportionate minority representation in the juvenile and criminal justice systems). See generally BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* (1999) (discussing the disproportionate sanctions placed on minority juveniles and proposing an alternative model for youth crime control and child welfare); GEOFF K. WARD, *THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY & JUVENILE JUSTICE* (2012) (discussing the negative implications of progressive juvenile justice reforms on Black youth). In addition, there is a robust body of legal scholarship that has explicitly explored the use of racialized narratives in other areas of legal practice, including immigration. See generally Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545 (2011) (explaining how immigration metaphors influence judicial outcomes as well as social discourse and the broader debate over immigration reform); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012) (exploring the narratives told about “good” and “bad” immigrants and the ways these narratives affect judicial exercises of discretion); Deborah Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 FORDHAM INT’L L.J. 141 (2015) (examining the ways that Latin Americans in general and Mexicans in particular have been subordinated through narratives that reinforce the depiction of the Mexican-as-criminal).

useful,²² for purposes of this Article racialization more specifically refers to the dynamic of racial formation that has animated the juvenile justice system for centuries and that the system continues to reproduce.²³ It refers not only to the linguistic codification of race-based²⁴ stereotypes that influences the practices and decision making of the various players in the juvenile justice system—from judges and lawyers to police and probation officers—but also refers to narratives that court actors use to construct baseline norms, informed by white cultural norms, in order to distinguish the “good” kids from the “bad” ones. The process of racialization allows such epithets to serve as code for racially biased judgments of the young person rather than reflect an objective analysis of the relevant risk factors and demonstrated needs of an individual child.²⁵ For instance, when a juvenile court probation officer describes an adolescent male as from a “broken home,” having a “negative peer group,” and living in a “bad” or “high crime” neighborhood, the odds are that the child is Black. When a prosecutor refers to an adolescent female as someone who is “running the streets” and whose family has a “long history in the system,” these terms may also be racially coded.²⁶

²² The terms “racialization” and “to racialize” represent a concept used by social scientists to refer to differentiating or categorizing according to race, to impose a racial character or context upon something or someone, or to perceive or experience in racial terms. See *Racialize*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016), available at <http://www.thefreedictionary.com/racialization> [https://perma.cc/3DL7-Z9PU].

²³ See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 53–76 (3d ed. 2014) (discussing the authors’ theory of racial formation, which emphasizes “the social nature of race, the absence of any essential racial characteristics, the historical flexibility of racial meanings and categories, the conflictual character of race at both the ‘micro-’ and ‘macro-social’ levels, and the irreducible political aspect of racial dynamics”).

²⁴ Although other minority groups, including Native American and Mexican children, have been subjected to a racialized juvenile justice system, the focus here is on the treatment of Black children. This is not to suggest that other minority groups in the juvenile justice system have not been harmed by the use of these narratives (or have been harmed to a lesser degree than Blacks), but rather to acknowledge the specific focus of this Article’s analysis.

²⁵ See Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1592 (2012) (proposing that prosecutors “foster a destructive cultural dynamic when they use dehumanizing and racially coded language to describe criminal defendants”); see also Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23, 66 (2014) (noting that federal crack cocaine legislation, which was enforced disproportionately based on race, was passed during a time of intense media coverage that used racially coded language).

²⁶ See Kim Taylor-Thompson, *Girl Talk—Examining Racial & Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137, 1151, 1148–62 (2006) (discussing the history of the harsh treatment of Black girls in the juvenile justice system). In many ways, the system’s neglect and mistreatment of Black girls, who comprise nearly 30% of those who appear in juvenile court, has continued to this day. KIMBERLÉ WILLIAMS CRENSHAW ET AL., AFRICAN AM. POLICY FORUM & CTR. FOR INTERSECTIONALITY & SOC. POLICY STUDIES, BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED

Racialized rhetoric, however, is merely a visible signal of a more complex phenomenon that perpetuates the introduction of race and racial bias into a formally race-neutral system. This phenomenon is not of recent vintage but reflects attitudes and reinforces procedures that have been part of the fabric of the juvenile justice system for the past two hundred years.²⁷ Throughout the system's evolution, race has been used to distinguish children who have diminished culpability and a right to second-chances from those who are "superpredators" or "incorrigible, undeserving, and expendable."²⁸ In other words, notions of Black childhood have long been distorted such that African-American youths have few options that won't reflexively be equated with immorality and/or criminality.²⁹ This sort of line drawing can be particularly pernicious when decisions are based on multifactor balancing tests—the type found throughout a contemporary juvenile delinquency case.³⁰

This Article is the third in a series that explores and attempts to answer the question of why, given that adolescents commit criminal acts at the same rate regardless of race,³¹ the juvenile justice system is principally

AND UNDERPROTECTED 19–24 (2016) (evaluating the greater punitive disparity that Black female students face in public education compared to students of the same gender).

²⁷ See WARD, *supra* note 21, at 33–38 (characterizing the juvenile justice agenda as a "long-standing 'racial project'" that has distorted the idea of Black childhood and undermined the claims of Black youths to citizenship); Butler, *supra* note 19, at 1358–63 (arguing that the juvenile court's stated commitment to protecting and supporting children as they mature has always masked racial and socioeconomic biases).

²⁸ WARD, *supra* note 21, at 14, 38.

²⁹ *Id.* at 35.

³⁰ See N.C. GEN. STAT. § 7B-1903(b) (2016) (stating that the judge may order secure custody when she finds a "reasonable factual basis" to believe the juvenile committed the offense and that one or more of eight enumerated circumstances exist).

³¹ See 1 THE ENCYCLOPEDIA OF POLICE SCIENCE 725 (Jack R. Greene ed., 2007) (noting that almost all minors could be considered delinquents, because most engage in at least one illegal behavior at some time during their juvenile years); NAT'L RESEARCH COUNCIL ET AL., *supra* note 2, at 73 ("Most adolescents in U.S. society at some time engage in illegal behaviors, whether some kind of theft, aggression, or status offense."); Tonia L. Nicholls et al., *The Assessment and Treatment of Offenders and Inmates: Specific Populations*, in INTRODUCTION TO PSYCHOLOGY AND LAW 248, 250 (James R.P. Ogloff & Regina A. Schuller eds., 2001) ("Most adolescents engage in some antisocial and illegal behavior. Indeed, approximately 85 percent to 95 percent of adolescents report having participated in at least one criminal act in the previous year."); Van Jones, *Are Blacks a Criminal Race? Surprising Statistics*, HUFFINGTON POST (May 10, 2005), http://www.huffingtonpost.com/van-jones/are-blacks-a-criminal-rac_b_8398.html [<https://perma.cc/2KR2-T5GL>] (highlighting that African-American youth have lower or similar rates of drug abuse, possession of weapons, and assault compared to those of whites); Leadership Conference on Civil Rights & Leadership Conference Educ. Fund, *Executive Summary to Justice on Trial: Racial Disparities in the American Criminal Justice System*, LEADERSHIP CONF. (Feb. 1, 2001), <http://www.civilrights.org/publications/justice-on-trial/> [<http://web.archive.org/web/20160820152757/http://www.civilrights.org/publications/justice-on-trial/>] (remarking that even though drug use

composed of poor children of color.³² The first two articles focused on socio-economic status, examining the structural and institutional factors that combine to push a disproportionate number of low-income children and families into juvenile court.³³ This Article expands the analysis by arguing that the process of racialization exacerbates this phenomenon, as it is harmful both to the children who appear in these courtrooms, such as Campbell and Raekwon, and to the families and communities from which they come. When characterizations such as “good kid” and “bad kid” are racialized or when risk-assessment tools exacerbate racial disparities, the impact is harmful. When decision making is characterized by malleable standards that invite unchecked exercises of discretion, the impact is harmful.³⁴ When children of color must abandon their legal, privacy, or dignitary rights in order to be perceived as a “good Black”³⁵ or to survive an interaction with a po-

rates have been lower among black youths than white youths, arrests for minority juvenile crimes increased, and that “[s]imilar disparities appear in relation to non-drug-related crimes”).

³² See *infra* notes 199–201 and accompanying text (discussing the intersection between race and class and the ways in which juvenile court continues to be a forum for people living in poverty).

³³ See generally Tamar R. Birkhead, *Closing the Widening Net: The Rights of Juveniles at Intake*, 46 TEXAS TECH L. REV. 157 (2013) (examining the intake process, which operates as one of the primary gateways to juvenile court, resulting in a wider net being cast around minority and low-income children); Tamar R. Birkhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL’Y 53 (2012) [hereinafter Birkhead, *Delinquent*] (exploring the causes of the disproportionate representation of low-income children in the juvenile justice system). For a related discussion of the complicated ways in which class and privilege impact how people within the Black community think about and consider the era of mass incarceration, see generally James Forman, Jr., *The Black Poor, Black Elites, and America’s Prisons*, 32 CARDOZO L. REV. 791 (2011). See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 52–58 (2012) (arguing that the impact of class and class differences within the African American community is often obscured when analogizing mass incarceration to Jim Crow).

³⁴ See Michele Benedetto Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 98 (2011) (pointing out the “expansive discretionary powers of judges in juvenile court”); see also 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 racial prejudice can affect discretionary judgments made in the juvenile justice system, as seen in Louisiana); Christine Chamberlin, Note, *Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System*, 42 B.C. L. REV. 391, 396 (2001) (noting that the “informal nature of the juvenile justice system and the wide discretion given to juvenile court judges” was blamed for the failure of rehabilitation goals in the juvenile justice system).

³⁵ DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN “POST-RACIAL” AMERICA 16, 99–100 (2013) (arguing that the public views racial profiling as a problem only if it is used against “good Blacks” who are “innocent or respectable” African Americans who “don’t deserve” to be racially profiled); see also Hall et al., *supra* note 3, at 184–85 (discussing the process of subtyping by which group members who deviate from the group stereotype are considered an “exceptional” subset of the group and are given a more “favorable” label, such as W.E.B. Du Bois’s the “talented tenth” in the early 1900s or the “Black bourgeoisie” of the 1960s).

lice officer, the impact is harmful. In all of these ways, the racialization of juvenile justice is a symptom as well as a cause of the disproportionate representation of African-American children in the system.³⁶

The two contrasting scenarios described above exemplify the multi-dimensional and fluid nature of racialization. Although the offenses for which Campbell and Raekwon were charged were both serious, and although the two young people received similar plea deals and dispositions, the court *experiences* could not have been more dissimilar. The juvenile court judge appeared to have made very different assumptions about the youths during each of the hearings, which was reflected in her tone of voice, body language, and the substance of what she conveyed. She made her decisions based, at least in part, on intra-racial distinctions. For instance, both Campbell and his mother “worked their identities,” whether consciously or unconsciously, such that their appearances and behavior were “stereotype-negating,” particularly when contrasted with Raekwon.³⁷ Even the boys’ first names, one that sounds “white” (Campbell) and the other that sounds “Black” (Raekwon), provided the judge with information she could use to evaluate whether negative stereotypes about African-Americans as a group should apply to them. All of these factors gave Campbell an advantage over Raekwon. Similarly, although both young men are Black, the fact that Campbell is physically slight with light brown skin and short hair may have been more racially palatable to the judge than Raekwon’s physical bulk, dark skin, and braids.³⁸ Likewise, the fact that Campbell was well spoken and easily expressed remorse may have been more racially palatable than Raekwon’s behavior, which the judge could perceive as reticence.³⁹ The judge could believe that Campbell’s seemingly friendly and cooperative demeanor should be encouraged because he appears to be *less* stereotypically Black, whereas Raekwon’s seemingly negative attitude should be chastised because he appears to be *more* stereotypi-

³⁶ See CARBADO & GULATI, *supra* note 35, at 99, 113 (discussing the preference for some Blacks over others).

³⁷ See *id.* at 16 (discussing the concept of “working one’s identity” and the ways in which it represents a form of compromise by the one who engages in it); Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1136–37 (2013) (providing examples of how people distinguish and stereotype along intraracial lines).

³⁸ See *infra* notes 267–269 and accompanying text (discussing the “adultification” of Black youths, in which white people perceive Black children to be older than their actual age as a result of the dehumanization of Black children); see also Jones, *supra* note 14, at 1497–99 (discussing colorism).

³⁹ See Bishop, *supra* note 16, at 45–47 (finding that youths of color are more likely to be perceived as hostile and uncooperative compared to whites, and that as a result, they are more likely to be arrested, charged with more serious offenses, referred to court, detained, and to suffer from race bias while in court).

cally Black.⁴⁰ Similarly, the fact that Campbell has a Caribbean mother with a “respectable” job is, perhaps, less racially noteworthy than Raekwon’s African-American mother who is unemployed.⁴¹ The judge could believe that Campbell’s mother should be affirmed because she appears to be *less* stereotypically Black and more assimilationist, whereas Raekwon’s mother should be, at best, ignored and, at worst, castigated because she appears to be *more* stereotypically Black.⁴² In the end, Campbell left the hearing believing it had been fair and feeling hopeful, whereas Raekwon was distraught and embarrassed—responses that are significant, as social science research has demonstrated that when juveniles believe they have been treated unfairly by the courts, which has been shown *not* to be dependent on the case’s outcome, they are more likely to recidivate.⁴³ Although interracial

⁴⁰ See *id.* at 45 (summarizing research indicating that whites and minorities tend to be treated similarly when charged with serious crimes, but when the threat is less serious, extralegal factors—especially demeanor—influence decision making).

⁴¹ Intra-racial discrimination proliferates in the juvenile justice system, as it does in most settings in American culture, with judges and other court actors presuming, for instance, that African-American Blacks are more likely to be associated with criminality than Blacks of other heritages, such as those of Caribbean descent. See, e.g., BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” AND OTHER CONVERSATIONS ABOUT RACE 70–71 (1997) (discussing research indicating that Black immigrants from the Caribbean distance themselves from African-Americans, “due in part to their belief that West Indians are viewed more positively by whites than those American Blacks whose family roots include the experience of U.S. slavery”); Leonard M. Baynes, *Who Is Black Enough for You? The Stories of One Black Man and His Family’s Pursuit of the American Dream*, 11 GEO. IMMIGR. L.J. 97, 108–09 (1996) (observing that Black Americans of Caribbean descent and African-Americans who do not fit into what whites perceive as the “Black” stereotype have been considered the “model minority” within the Black community); see also Baynes, *supra*, at 101–04 (observing that although race is a social construct, people in the African-American community are ostracized for not being “Black” if they are, inter alia, too light skinned, middle class, ambitious, highly educated, or were born outside the United States); Blair et al., *supra* note 14, at 678 (concluding that racial stereotyping in sentencing is “not a function of the racial category of the individual,” but rather “based on the facial appearance of offenders” related to Afrocentric features); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006) (discussing the association between stereotypically Black physical features and perceptions of criminality in the context of capital punishment); William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 330–31 (2005) (finding that defendants with “more pronounced Afrocentric features tend to receive longer sentences” because of “discrimination . . . within racial categories”).

⁴² See Carbado, *supra* note 37, at 1135 (observing that Black people are judged not only based on the color of their skin but also on *how* Black, stereotypically or race-consciously, they are perceived to be); see also Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2089–91 (2005) (discussing the legal profession’s commitment to the color blindness of lawyers and that when white lawyers (and judges) fail to examine the influence of their white identity on their lawyering, they merely reinforce the general tendency of white people to avoid issues of race).

⁴³ TOM R. TYLER, WHY PEOPLE OBEY THE LAW 24–27 (1990) (finding that people obey the law when the rules and procedures are consistent with their personal values and attitudes, such that

discrimination may be easier to recognize, these scenarios illustrate the ways in which intra-racial discrimination can be equally harmful.

In addition to serving a diagnostic purpose, this Article is prescriptive in that it re-envision the role of the defense attorney within the juvenile justice system. It also considers the efficacy of various types of training intended to reduce instances of racial bias among attorneys and law enforcement and calls for diversification of the legal profession and related fields to create a racially- and ethnically-heterogeneous juvenile court culture.

Yet, even with such advances, complications remain, particularly for the juvenile defense attorney. Recall the law student described earlier, the one who assured the judge that her young client was one of the “good” kids.⁴⁴ What if using such a racialized label in the course of a defense attorney’s advocacy is helpful to the case? What if the student knows that the judge before whom she is appearing consistently uses this phrase herself in a racially biased manner and that the judge is likely to concur that this client *is* one of the good kids? Assume that after the student and I, as her clinical supervisor, discuss the use of this rhetoric, she agrees that it is potentially damaging from a macro perspective but believes that it is also a particularly effective way to characterize her client. Is it ethical for an advocate to deploy a strategy that benefits one client but has negative ramifications for the broader community? Imagine further that the student has several juvenile cases on the docket that morning but only refers to a white client as a “good kid,” whereas offering objective descriptions of the others, who are Black, but not an ultimate characterization relying on the binary concept of “good” and “bad.” Is it ethical to use a strategy that explicitly benefits one client but implicitly harms others? Professor Anthony Alfieri has explored similar questions in the context of high-profile criminal cases involving racial vio-

when people are personally committed to obeying the law, they voluntarily assume the obligation to follow laws, irrespective of the risk of punishment); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW 49–75, 141–51 (2002) (finding, based on a sample of interviews with Caucasian, African-American, and Latino residents of two cities, that deference to legal authorities is shaped by procedural justice and trust in the motives of legal actors); Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 231, 233 (2005) (finding that perceptions of fair treatment enhance children’s evaluations of the law, whereas unfair treatment triggers negative reactions, anger, and defiance of the law’s norms); Tom R. Tyler et al., *Armed, and Dangerous (?): Motivating Rule Adherence Among Agents of Social Control*, 41 LAW & SOC’Y REV. 457, 470 (2007) (“The procedural justice perspective suggests that people will comply with, and more strikingly, voluntarily defer to rules when they feel that the rules and authorities . . . are following fair procedures”); see also Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1454, 1479–83 (2009) (discussing the causal connection between adolescents’ views of the legitimacy of the juvenile and criminal justice systems and their likelihood to recidivate).

⁴⁴ See *supra* notes 2–20 and accompanying text.

lence, and he has condemned defense attorneys' use of racialized narratives because of the harm inflicted upon the African-American community.⁴⁵ In response, Professor Abbe Smith has argued that defendants and their lawyers should always deploy whatever narratives serve clients' best interests.⁴⁶ The debate, which has been discussed or at least referenced by other legal scholars,⁴⁷ is instructive, although certainly not definitive. Enriched by consideration of the ethical rules that address the potential conflict between a lawyer's duty to her client and her own moral code, this Article explores a middle ground that takes into account the unique challenges of defending adolescents charged with crimes.

The Article proceeds as follows. Part I establishes that the racial bias that animates today's juvenile justice system has deep echoes in the system's early history.⁴⁸ It describes the House of Refuge movement, beginning in 1824 when Progressives built reformatories for the ostensible purpose of providing discipline, moral guidance, and practical training for "wayward youths." For many decades these institutions were open only to impoverished white and European immigrant youths, whereas African-American youths were deemed undeserving of rehabilitation and incapable of assimilating into the dominant white American culture. Part I examines the shift from a juvenile court philosophy emphasizing individualized attention and indeterminate sentencing to a more punitive one characterized by

⁴⁵ Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1339–42 (1995).

⁴⁶ Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1595–96 (1999).

⁴⁷ For articles that explicitly reference the debate between Professors Alfieri and Smith, see, for example, Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL'Y & L. 117, 122–23 (2003); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1272–73 & n.104 (2002); Naomi Cahn, *Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law*, 2002 U. ILL. L. REV. 651, 686 & n.218; Aya Gruber, *Leniency as a Miscarriage of Race and Gender Justice*, 76 ALB. L. REV. 1571, 1597 n.152 (2013); John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U.L. REV. 207, 223 n.62 (2008); Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 958 n.292 (2007); David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1459 n.124 (2008); Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1, 24–25 & n.137 (2000); Margaret Raymond, *Criminal Defense Heroes*, 13 WIDENER L.J. 167, 179 & n.41 (2003); Rebecca Sharpless, *More Than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347, 383 & n.184 (2012); Christopher Slobogin, *Race-Based Defenses: The Insights of Traditional Analysis*, 54 ARK. L. REV. 739, 739–49, 739 n.2, 755 n.78 (2002); For an article that addresses the general contours of the debate without necessarily referencing the work of Professors Alfieri and Smith, see Ellen Yankiver Suni, *Who Stole the Cookie from the Cookie Jar? The Law and Ethics of Shifting Blame in Criminal Cases*, 68 FORDHAM L. REV. 1643, 1651–52 (2000).

⁴⁸ See *infra* notes 51–184 and accompanying text.

lengthy commitments to substandard facilities and increasing rates of transfer to adult criminal court. Part I concludes with a discussion of the 1990s era of the “superpredator,” when politicians and the media exploited sensationalized predictions of a new “scourge of feral youths,” thereby racializing criminal justice policy.

Part II argues that racialization stigmatizes and devalues youths of color, causing immediate and enduring harm to young people and their families as well as the wider community.⁴⁹ Racialized narratives and practices entrench negative stereotypes of Black criminality, sustaining a system that rewards those children who most closely conform to mainstream, or white, norms of acceptability and penalizes those who are unable or unwilling to conform to these norms. Part II analyses the ways in which each decision-point of a juvenile case provides yet another opportunity for subjective race-based judgments to negatively impact the result. It closes with an examination of the ways in which racialized practices of police officers, juvenile court actors, and school personnel force children of color to choose between their rights—legal, privacy, and dignitary—and their safety or security.

Part III considers the role of the juvenile defender in perpetuating the use of racialized narratives within the court system.⁵⁰ It explores whether the lawyer’s duty of zealous representation requires her to follow the rhetorical approach that is most strategic for her young client, regardless of its impact on the broader community, or whether this contradicts professional ethics and a normative commitment to anti-subordination. Using the robust dialogue between Professors Anthony Alfieri and Abbe Smith as a baseline, Part III suggests that the perceived dichotomy between these two very different models of advocacy is a false one. It considers the strategies *du jure* directed at eradicating implicit racial bias and concludes that racial and ethnic integration of the juvenile court bench and bar provides the best hope for inoculating against it.

I. THE PERSISTENCE OF RACIAL BIAS WITHIN JUVENILE JUSTICE

The structure and procedures of the juvenile justice system have changed over the decades, but the influence of racial bias has persisted. From the court’s earliest incarnation through the present, distinctions between and among children have been made through the lens of race. Whether children are referred to as “wayward youths” or “superpredators,” racialized rhetoric has become a type of shorthand that helps entrench stereotypes

⁴⁹ See *infra* notes 185–269 and accompanying text.

⁵⁰ See *infra* notes 270–449 and accompanying text.

of Black criminality and perpetuate racialized practices in juvenile court. Although facially race-neutral ones have replaced overt policies of discrimination such as segregation, the construction of race continues to animate the juvenile court system, and the system continues to construct conceptions of race. This Part examines these trends as to provide context for Part II's analysis of racialization's harms.

A. Wayward Youths of the Nineteenth Century

1. Evolution of the Concept of Race

During colonial times, child discipline was left to the family, making a formal system of laws governing youthful misconduct unnecessary.⁵¹ From 1790 to 1830, the northeastern cities of New York, Boston, and Philadelphia dramatically grew in size, and young people flocked to them from rural areas, seeking out newly created industrial jobs.⁵² Many of these youths came alone, without their parents, and did not attend school.⁵³ Simultaneously, large numbers of European immigrants, many from Germany and Ireland, were flooding these same urban areas.⁵⁴ Some immigrant children were left orphaned after their parents died on the journey to America, whereas others were left unsupervised when their parents joined the ranks of factory workers in mechanized industries.⁵⁵ As a result, large numbers of children ended up fending for themselves, and juvenile delinquency⁵⁶ and dependency⁵⁷ were labeled “serious social problems.”⁵⁸

Organizations that ran child welfare institutions made classifications among groups of white immigrants and their children, using the ambiguous concept of “race” to determine which immigrants were “fit for self-government” in the emerging American republic.⁵⁹ This practice, in which the at-

⁵¹ See Gayle Olson-Raymer, *The Role of the Federal Government in Juvenile Delinquency Prevention: Historical and Contemporary Perspectives*, 74 J. CRIM. L. & CRIMINOLOGY 578, 582 (1983).

⁵² See Priscilla Ferguson Clement, *The Incurable Child: Juvenile Delinquency in the United States from the 17th Through the 19th Centuries*, in 2 HISTORY OF JUVENILE DELINQUENCY: A COLLECTION OF ESSAYS ON CRIME COMMITTED BY YOUNG OFFENDERS, IN HISTORY AND IN SELECTED COUNTRIES 453, 458 (Albert G. Hess & Priscilla F. Clement eds., 1993) (finding that Philadelphia tripled in size and New York grew six-fold between 1790 and 1830).

⁵³ See *id.* at 450.

⁵⁴ *Id.* at 458.

⁵⁵ *Id.* at 458–59.

⁵⁶ See *Juvenile Delinquency*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁵⁷ See *Dependent Child*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁵⁸ Clement, *supra* note 52, at 458; WARD, *supra* note 21, at 24–25.

⁵⁹ 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, *supra* note 16, at 105, 109–10.

tainment of citizenship was a racial project, reflected what was happening more broadly in the country.⁶⁰ From the 1840s through the 1920s, “[A]mericans used ‘race’ not only to distinguish between ‘white’ and ‘nonwhite’” people, but “to classify the various ‘white’ races, including ‘Anglo-Saxons, Celts, Hebrews, Iberics, Latins, Mediterraneans, Slavs, and Teutons.”⁶¹

By 1820, public concern in the cities about growing poverty, increasing crime, and the “wretched state” of young people prompted the establishment of the first Houses of Refuge and residential reform schools—public institutions that provided a structured setting in a wholesome “family-style” environment.⁶² Child advocates recognized that young people who were imprisoned with adults in overcrowded institutions learned only how to become better criminals.⁶³ One reformer, John Griscom, visited juvenile facilities in Europe and was determined to replicate them in New York.⁶⁴ As a result of his efforts, in 1824 the New York legislature granted authority to the Society for the Prevention of Pauperism—renamed the Society for the Reformation of Juvenile Delinquents—to build the first House of Refuge for youths in the United States.⁶⁵ Within five years, Houses of Refuge had also been established in Boston and Philadelphia.⁶⁶ Their formal objective was to provide “wayward youth” with “practical training, discipline, and moral guidance.”⁶⁷

The legal justification for the development of Houses of Refuge was grounded in the doctrine of *parens patriae*, which envisioned the state as

⁶⁰ *Id.* (describing W.E.B. Du Bois’s 1899 study on how Americans used race to structure citizenship).

⁶¹ *Id.*; JULIAN B. CARTER, *THE HEART OF WHITENESS: NORMAL SEXUALITY AND RACE IN AMERICA, 1880–1940*, at 33 (2007) (explaining that in the late nineteenth and early twentieth centuries, “[w]hiteness was fractured into many races—for instance, Celtic, Teutonic, and Mediterranean . . . [and] their positions in relation to that larger racial category were not identical”); see also MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 39–90 (1999) (highlighting the racial refinement from white to “Anglo-Saxon” that began in the 1840s in order to treat the Irish and other white races differently); JEANNE CAMPBELL REESMAN, *JACK LONDON’S RACIAL LIVES: A CRITICAL BIOGRAPHY* 36 (2009) (noting that “Anglo-Saxon exclusivity lasted until the 1920s, when . . . whiteness was extended to certain non-English Europeans”).

⁶² Clement, *supra* note 52, at 459; WARD, *supra* note 21, at 52; Taylor-Thompson, *supra* note 26, at 1148–50. The terms House of Refuge, reformatory, and residential reform schools are used here interchangeably.

⁶³ Clement, *supra* note 52, at 460.

⁶⁴ *Id.*

⁶⁵ *Id.*; Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 616–17 (2013) (discussing the history of the origins of the juvenile justice system).

⁶⁶ Clement, *supra* note 52, at 460.

⁶⁷ WARD, *supra* note 21, at 52.

the “parent of the nation” that could exercise control *in loco parentis* when family members refused or were deemed incapable.⁶⁸ This concept provided a framework for the government to unilaterally address the “seemingly interdependent social problems of child neglect,” delinquency, and adolescent misbehavior.⁶⁹ In this way, Houses of Refuge, and later the juvenile court system, became an effective means of providing social welfare as well as attaining social control over ethnic and racial minorities.⁷⁰

The middle-class reformers who ran Houses of Refuge made few distinctions between children who were paupers and those who had committed minor crimes.⁷¹ For the proponents of the movement, living in a state of poverty and committing a criminal offense were virtually synonymous because both conditions were conceived of in strictly moral terms.⁷² Reformers believed that immorality *caused* poverty and that the poor, as a result of their economic status, posed a threat to society.⁷³ As stated by legal historian Sanford Fox: “Unattended pauperism was thought to ripen into criminality, and uncontrolled criminality—particularly vagrancy, beggary, and minor thefts—swelled the ranks of paupers who had to be supported in public institutions.”⁷⁴

By the late nineteenth century there were more adolescents in reformatories as a result of poverty or status offenses such as begging, cheating, and swearing than those convicted of crimes, with the justification that these youths were potential criminals in need of supervision.⁷⁵ In this way, the House of Refuge movement, which sanctioned the punishment of children who deviated from the norm, was driven by a “punitive, reactive ideology” borrowed straight from the colonists.⁷⁶

⁶⁸ Barry Feld, *Race and the Jurisprudence of Juvenile Justice: A Tale in Two Parts, 1950–2000*, in OUR CHILDREN, THEIR CHILDREN, *supra* note 16, at 122, 122; WARD, *supra* note 21, at 25.

⁶⁹ WARD, *supra* note 21, at 25.

⁷⁰ See JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL AND ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 3–5 (Shadi Rahimi ed., 2008) (describing the early exclusion of Black youth from rehabilitation services and the use of the judicial system to criminalize and provide them as cheap forced labor instead); Feld, *supra* note 68, at 122 (describing how the creation of the juvenile court expanded the role of the state to act as *parens patriae* over immigrant youth in an effort to assimilate and control them).

⁷¹ Birkhead, *Delinquent*, *supra* note 33, at 62; Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1192–93 (1970).

⁷² Fox, *supra* note 71, at 1199.

⁷³ *Id.* at 1199–200; see also Birkhead, *Delinquent*, *supra* note 33, at 61–62 (discussing the development of Houses of Refuge).

⁷⁴ Fox, *supra* note 71, at 1199.

⁷⁵ Clement, *supra* note 52, at 482.

⁷⁶ Olson-Raymer, *supra* note 51, at 583.

2. Disparate Treatment Based on Race

In addition to providing moral instruction, Houses of Refuge had another critical objective: to “Americanize” the children of European immigrants considered worthy of rehabilitative intervention but *not* the children of slaves or other non-whites, who had been “rendered unsalvageable and undeserving” of these citizen-building ideals.⁷⁷ For many years, these institutions were open exclusively to white immigrant children, prioritizing their rehabilitation over that of Blacks and other youths of color.⁷⁸ Black youths were considered “less suitable” for these reformatories not only because of a lack of confidence in their rehabilitative potential but also due to the ever-present “specter of racial commingling.”⁷⁹ Instead, Black children, both free and slaves, were either handled informally by plantation owners and local sheriffs, placed in apprenticeship or “binding out” programs, or committed to facilities for adults, from almshouses and work-houses to jails and prisons.⁸⁰ In fact, by 1850 a disproportionate number of Black youths were jailed in cities with majority white populations.⁸¹

Disparate treatment of youths of color persisted in Houses of Refuge through the second half of the nineteenth century. Most reformatories were built during this period, largely in response to an upsurge in juvenile crime, which was attributed at least in part to a lack of jobs for youths who were being replaced by more reliable adult workers during the later stages of industrialization.⁸² White boys populated these institutions, with white girls admitted to do the housekeeping chores, including cooking, cleaning, and sewing.⁸³ In the Northeast, a few reformatories were constructed for Black youths, but the focus of these institutions was not to provide education and

⁷⁷ WARD, *supra* note 21, at 33, 52, 87, 238.

⁷⁸ *Id.* at 3 (“White adults controlled juvenile justice systems, and those systems were typically reserved for white youth, denying nonwhite youths and adults equal recognition, opportunity, and influence.”).

⁷⁹ *Id.* at 3, 52; *see also id.* at 52–53 (quoting the superintendent of a house of refuge who stated that “it would be degrading to the white children to associate them with [Black children] . . . given up to public scorn”).

⁸⁰ *Id.* at 53; Vernetta D. Young, *Punishment and Social Conditions: The Control of Black Juveniles in the 1800s in Maryland*, in 2 HISTORY OF JUVENILE DELINQUENCY, *supra* note 52, at 557, 560–61.

⁸¹ *See* Sterling, *supra* note 65, at 624 (citing LEONARD P. CURRY, THE FREE BLACK IN URBAN AMERICA, 1800–1850: THE SHADOW OF THE DREAM 115–16 (1981) (“In 1850, . . . Blacks constituted sixty percent of all persons incarcerated in the Maryland penitentiary at Baltimore who were under sixteen years of age at the time of commitment Almost one-half of the children under the age of fifteen in the Providence jail were black, as were all of the persons under sixteen in the District of Columbia penitentiary at Washington.”)).

⁸² Clement, *supra* note 52, at 461.

⁸³ WARD, *supra* note 21, at 52.

training for future farmers and skilled artisans but to prepare them for manual labor and servile positions, offering minimal academic instruction.⁸⁴ Furthermore, although white children were generally placed in Houses of Refuge on a temporary basis, Black children often found themselves committed indefinitely.⁸⁵

It took until 1873 for a southern state to open a single reformatory that admitted Black children.⁸⁶ By the 1890s, Black reformers in the rural South began to create and maintain their own juvenile facilities, but their subordinate social position, limited resources, and lack of access to government officials meant that they achieved only modest success.⁸⁷ The prison system continued to place most delinquent and dependent “colored children” in existing penal institutions intended for adults.⁸⁸ Black children across the United States were also subjected to brutal violence in the form of whipping and lynching as well as the exploitative convict-lease system and chain gangs.⁸⁹

Whether the criminal courts treated Black children differently than whites prior to the establishment of the first juvenile court is difficult to conclusively demonstrate; there is, however, an oft-cited analysis⁹⁰ that may serve as a relevant data point. In 1969, sociologist Anthony Platt looked closely at fourteen appellate decisions issued between 1806 and 1882, which represented all of the appellate cases during that period that addressed the criminal responsibility of children, and he found evidence of disparate treatment based on race.⁹¹ Within this group of criminal court cases, of the ten children who were ultimately acquitted based on criminal in-

⁸⁴ *Id.* at 52, 56–57.

⁸⁵ Clement, *supra* note 52, at 481–82 (discussing the more lengthy stays of Black youths in Houses of Refuge than whites).

⁸⁶ WARD, *supra* note 21, at 60 (finding that in 1873 Maryland was the first and only southern state to have a reformatory for Black children).

⁸⁷ *Id.* at 8–9, 157–58.

⁸⁸ *Id.* at 53.

⁸⁹ *Id.* at 59, 67–68, 114–15; *see also* BELL & RIDOLFI, *supra* note 70, at 6 (discussing the “retributive mob justice” that was perpetuated against Black children during this period, including the brutal murder by spectators of a teenager who had been sentenced to death by hanging).

⁹⁰ *See, e.g.*, RANDALL G. SHELDEN, *DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY* 29 (2011) (quoting Platt’s study to assert that “[c]riminal law recognized at that time that some children under 14, particularly children of color, were held as responsible for their actions as adults”); CASEY WELCH & JOHN RANDOLPH FULLER, *AMERICAN CRIMINAL COURTS: LEGAL PROCESS AND SOCIAL CONTEXT* 422 (2013) (highlighting Platt’s observation that if the Black defendants, who were children, “had been white, their lives might have been spared”); Steven Alan Samson, *Due Process and the Juvenile System: The Effects of In Re Gault*, LIBERTY U. FAC. PUBLICATIONS & PRESENTATIONS, Paper 286, Aug. 3, 1980, at 2 (citing Platt’s study to note that only three out of fourteen leading cases actually led to conviction).

⁹¹ WARD, *supra* note 21, at 48–50.

capacity, nine were white, including four who were charged with murder, and one was Black.⁹² Of the four children whose convictions were affirmed on appeal, two were white and two were Black.⁹³ One of these white children received an unreported sentence, the other white child was sentenced to three years in a juvenile reformatory, and the remaining two Black boys—a ten year old and a twelve year old who were both convicted of killing whites—were each sentenced to death and executed following unsuccessful appeals.⁹⁴ This arguably representative group of cases suggests that the racialization of juvenile social control existed even before the establishment of specialized forums for youths.⁹⁵ As Platt has explained:

[These cases] suggest that the criminal law recognized that children under fourteen years old were not to be held as responsible for their actions as adults. [Yet,] Black children apparently were not granted the same immunities as white children and it seems unlikely that [the two Black youths] would have been executed if they had been white.⁹⁶

Other data confirms that once juvenile courts were established, there was an overrepresentation of Black youths who received punitive sanctions and an underrepresentation of those who received rehabilitative services.⁹⁷ In the first U.S. juvenile court, founded in Chicago in 1899, white and Black youths committed the same types of offenses, but the court committed Black boys to the state-run reformatory for delinquent offenders, St. Charles School for Boys, “sooner than it would have in the cases of Jewish, Italian, or Polish children.”⁹⁸ As a result, the “benevolent” juvenile court became a system in which orphaned Black boys who had committed no crimes were treated like serious offenders, whereas white immigrant children who had committed minor crimes were sent to institutions for orphaned children.⁹⁹ This development was in keeping with the early and sustained criminalization of Blackness that has long persisted in the justice system.¹⁰⁰

⁹² *Id.* at 49.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 48.

⁹⁶ ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 262 (40th Anniversary ed., Rutgers Univ. Press 2009) (1969).

⁹⁷ Sterling, *supra* note 65, at 627–28.

⁹⁸ DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* 38 (2004).

⁹⁹ *Id.*

¹⁰⁰ Paul Finkelman, *The Crime of Color*, 67 *TULANE L. REV.* 2063, 2067–70 (1993) (discussing the relationship between race and crime in early America and the fact that a presumption of guilt based on race developed as early as the colonial period). There is an extensive body of scholarship on the racialization of crime. See generally Angela Y. Davis, *Race and Criminalization:*

B. Mid-Century Lads of Tender Years

1. Delinquency as Contagion

From the 1920s through the 1940s, there was an influx of more than one million Blacks and migrating to Midwestern and northern cities to escape Jim Crow laws and the convict leasing system.¹⁰¹ These changing urban demographics caused increasing numbers of Black youths to come into contact with the juvenile court system. As a result, children of color continued to be disproportionately represented in juvenile courts across the United States well into the 1950s and 1960s.¹⁰²

One of the first national studies of its kind, conducted in the 1940s by researcher Mary Huff Diggs, surveyed fifty-three juvenile courts located throughout the country and found a larger proportion of delinquency cases for “Negro children” than their proportion in the general population.¹⁰³ Diggs attributed this imbalance not to the default assumption of innate Black criminality but to a lack of community resources for Black children and the fact that minority groups were exposed to “features of community life that are the least desirable.”¹⁰⁴ Further, although probation was intended to be the disposition of first resort for juvenile offenders and commitment to juvenile institutions the disposition of last resort, this philosophy apparently did not apply to Black youths.¹⁰⁵ As a result of her research, Diggs conclud-

Black Americans and the Punishment Industry, in CRIMINOLOGICAL PERSPECTIVES: ESSENTIAL READINGS 301 (Eugene McLaughlin & John Muncie eds., 3d ed. 2013) (discussing how the dehumanization of Black people has allowed for the criminalization of race and has led to mass incarceration); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2011) (discussing the history of Black criminality in modern urban United States).

¹⁰¹ JAMES BELL, W. HAYWOOD BURNS INST. FOR YOUTH JUSTICE FAIRNESS & EQUITY, REPAIRING THE BREACH: A BRIEF HISTORY OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 11 (2015).

¹⁰² See BELL & RIDOLFI, *supra* note 70, at 7 (“In short, by 1940, law enforcement used arrests predominately as a mechanism to regulate boys who were darker skinned and—allegedly—more often criminal.”); WARD, *supra* note 21, at 4 (providing a chart captioned, “White and nonwhites among male youths committed to juvenile correctional institutions and within the U.S. Population, 1880–2000 (in percentages)”).

¹⁰³ Mary Huff Diggs, *The Problems and Needs of Negro Youth as Revealed by Delinquency and Crime Statistics*, 9 J. NEGRO EDUC. 311, 313 (1940); see also BELL & RIDOLFI, *supra* note 70, at 8 (discussing the juvenile court research of Mary Huff Diggs, articulating “disproportionality”); Henning, *supra* note 21, at 407 & n.139 (highlighting Diggs’ findings of racial disparity as “a precursor to the even larger disparities of today”); Gabrielle Prisco, *When the Cure Makes You Ill: Seven Core Principles to Change the Course of Youth Justice*, 56 N.Y.L. SCH. L. REV. 1433, 1449–50 (2012) (comparing modern statistics to Diggs’ findings and concluding that they are “eerily similar”).

¹⁰⁴ Diggs, *supra* note 103, at 312.

¹⁰⁵ FELD, *supra* note 21, at 2.

ed that there were in essence two different juvenile justice systems operating under the guise of one: Black youths entered the system at younger ages than whites, their cases were less frequently dismissed, and they were more likely to be committed to institutions.¹⁰⁶ Although liberal Black professional leaders advocated for Black children to have equal access to the resources and publicly funded facilities of the juvenile court system, there was significant and sustained resistance.¹⁰⁷ Black children were left to rely on private institutions for rehabilitative services, but even some church-run programs for delinquent youths refused to integrate.¹⁰⁸

For more than a decade after the U.S. Supreme Court's 1954 decision in *Brown v. Board of Education*,¹⁰⁹ white authorities continued to insist that court-ordered integration did not apply to juvenile justice administration.¹¹⁰ Illustrating the extent of the opposition, juvenile court judges adjudicated teenage Black civil rights activists as delinquents and committed them to juvenile institutions, whereas similarly situated young white activists received no punishment.¹¹¹ Several states maintained segregated juvenile facilities through the 1960s and into the 1970s.¹¹² A class-action lawsuit filed in 1960 by Thurgood Marshall and Jack Greenberg seeking declaratory relief from Maryland's racial segregation policies in their juvenile institutions and the passage of the 1965 Civil Rights Act forced the gradual integration of Southern reformatories.¹¹³

Similar to the way in which concern for the "wayward child" was reserved for white working-class and immigrant youths during the nineteenth century, growing concern during the 1950s about the purported rise of delinquency¹¹⁴ did not extend to children in the Black community. Instead,

¹⁰⁶ Diggs, *supra* note 103, at 313–16.

¹⁰⁷ WARD, *supra* note 21, at 183; *see also* Butler, *supra* note 19, at 1340–55 (chronicling the role of Black female activists in the juvenile court movement and the ways they shaped the national discourse on race).

¹⁰⁸ WARD, *supra* note 21, at 183–84.

¹⁰⁹ *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that "separate but equal" public education facilities are inherently unequal).

¹¹⁰ WARD, *supra* note 21, at 201–02.

¹¹¹ *Id.* at 202.

¹¹² *Id.*

¹¹³ *Id.* (discussing the state appellate court decision declaring segregation in juvenile reformatories to violate the Fourteenth Amendment); *see also* *State Bd. of Pub. Welfare v. Myers*, 167 A.2d 765, 766, 768–69 (Md. 1961) (rejecting the state's argument that *Brown v. Board of Education* does not apply because juvenile reformatories are more analogous to prisons than schools and that segregation is permissible in prisons).

¹¹⁴ *See, e.g.*, THOMAS J. BERNARD & MEGAN C. KURLYCHEK, *THE CYCLE OF JUVENILE JUSTICE* 33 (1992) (noting that alarms over juvenile crime rising out of control were raised in the 1950s to 1960s); JAMES GILBERT, *A CYCLE OF OUTRAGE: AMERICA'S REACTION TO THE JUVENILE DELINQUENT IN THE 1950S*, at 54–55 (1986) (discussing the fact that despite claims that

national groups such as the American Association of University Women and the National Congress of Parents and Teachers perpetuated the claim that “our children” were vulnerable to a phenomenon spread by “other people’s children” from “the wrong side of the tracks.”¹¹⁵ This fear was premised on the idea that modern mass culture—the portrayals of violence and crime featured in radio programs, movies, and comic books—caused delinquency.¹¹⁶ Vocal segments of the public clamored for government action, and in 1953, the U.S. Senate initiated hearings on juvenile delinquency that lasted in various forms for more than a decade.¹¹⁷ Other organizations followed suit, such as the American Bar Association (“ABA”), which designated a special section to examine the relationship between mass media and delinquency.¹¹⁸

The growing hysteria over the “social decay” caused by delinquency was promoted during this time by no less controversial a figure than J. Edgar Hoover. In the same spirit that he cultivated postwar fear of communism, Hoover cast delinquency as another form of subversion and called for a renewed commitment to the institutions of family, home, and church.¹¹⁹ A letter written in 1954 by “a busy mother” illustrates the degree to which the public envisioned delinquent culture as a toxic force that could contaminate their homes: “We are a respectable middle class family, residing in a good neighborhood, but there is an ever increasing amount of delinquency among the young here. . . . [I] think and pray things will turn out all right for our children in spite of the bad outside influences.”¹²⁰ Similarly, the following

delinquency rates were rising in the late 1940s and 50s, national statistics on juvenile crime were not available at that time); GRACE PALLADINO, *TEENAGERS: AN AMERICAN HISTORY* 81–93 (1996) (describing the recognition of teenagers as a societal entity in the 1940s, and corresponding fears over the rise of juvenile delinquency); HARRISON SALISBURY, *THE SHOOK-UP GENERATION* 15, 210–11, 215–16 (1958) (exploring causes and consequences of increased juvenile delinquent activity in the mid-twentieth century); Patrick N. McMillin, Comment, *From Pioneer to Punisher: America’s Quest to Find Its Juvenile Justice Identity*, 51 HOUS. L. REV. 1485, 1494–95 (2014) (finding that juvenile delinquency was in the spotlight in the 1950s, causing great public concern).

¹¹⁵ GILBERT, *supra* note 114, at 60–61, 74–75.

¹¹⁶ *Id.* at 60.

¹¹⁷ *Id.* at 60–61, 143, 149.

¹¹⁸ *Id.* at 64.

¹¹⁹ *Id.* at 72–73; see also BERNARD & KURLYCHEK, *supra* note 114, at 32–33; Rachel Devlin, *Female Juvenile Delinquency and the Problem of Sexual Authority in America, 1945–1965*, 9 YALE J.L. & HUMAN. 147, 158–59 (1997) (noting Hoover’s “single-minded crusade for publicity” of the rise in sexual delinquency, and quoting his lament that “the increasing waywardness of teenage girls is tragic”); James Herbie Difonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1, 43–44 (2001) (quoting J. Edgar Hoover’s speech that the “tragic anarchy of juvenile delinquency” can be attributed to parenting failure). See generally ATHAN G. THEOHARIS & JOHN STUART COX, *THE BOSS: J. EDGAR HOOVER AND THE GREAT AMERICAN INQUISITION* (1988) (describing Hoover’s manipulation of American politics through fear-mongering, surveillance, and social control throughout his tenure at the FBI).

¹²⁰ GILBERT, *supra* note 114, at 74.

year, Senator Robert Hendrickson of New Jersey explicitly compared Communism to juvenile delinquency, invoking images of infection, “Not even the Communist conspiracy could devise a more effective way to demoralize, disrupt, confuse, and destroy our future citizens than apathy on the part of adult Americans to the scourge known as Juvenile Delinquency.”¹²¹

The view of delinquency as a form of contagion persisted during the 1950s and into the 1960s.¹²² It provided the perfect metaphor to justify using the state’s *parens patriae* authority to “fix” juvenile delinquents without providing them with procedural safeguards.¹²³ The first national law aimed at juvenile delinquency, the Federal Juvenile Delinquency and Youth Offenses Act of 1961, established that the solution to the nation’s youth crime problems lay in “developing techniques for . . . prevention and control” rather than promoting justice and due process.¹²⁴ The Act’s emphasis upon the punitive orientation of the system was a direct repudiation of the philosophy of the juvenile court’s founders. Among the Act’s findings was that delinquency offenses disproportionately occurred among a very specific population: school dropouts, unemployed youths, and youths in “deprived family situations.”¹²⁵ These were categories that most white middle-class Americans would associate with racial and ethnic minority groups—with “them” rather than “us.”

During the 1960s, public dissatisfaction with the juvenile courts grew. The promise of confidentiality of records and processes had become more rhetoric than reality, and juvenile delinquents were responsible for more than 20% of all arrests and nearly 50% of arrests for serious offenses.¹²⁶ Recidivism rates of young offenders were also increasing, and there was growing concern about the failure of the system to effectively rehabilitate youths.¹²⁷ Yet, juvenile delinquency was no longer a top priority for federal policy-makers. The Juvenile Delinquency Prevention and Control Act of 1968, which provided block grants to assist state and local communities in providing community-based diversion and treatment, was overshadowed by the Omnibus Crime Control and Safe Streets Act of 1968, just as the War on

¹²¹ *Id.*

¹²² *Id.* at 75.

¹²³ FELD, *supra* note 21, at 77.

¹²⁴ Juvenile Delinquency and Youth Offenses Act of 1961, Pub. L. No. 87-274, § 2(b), 75 Stat. 572, 572 (1961) (expired).

¹²⁵ *Id.* § 2(a).

¹²⁶ DAVID S. TANENHAUS, *THE CONSTITUTIONAL RIGHTS OF CHILDREN: IN RE GAULT AND JUVENILE JUSTICE*, at xv (2011).

¹²⁷ FELD, *supra* note 21, at 97 (discussing the President’s Crime Commission of 1967 and its analysis of juvenile justice administration).

Delinquency was recast as a War on Crime.¹²⁸ The race riots of the 1960s¹²⁹ had in large part catalyzed the crime bill, which focused on enforcement strategies for preventing further rioting, thereby racializing law enforcement.¹³⁰ In short, President Lyndon B. Johnson's law and order directive meant that federal officials had set aside delinquency prevention and instead committed themselves to militarizing the police in order to focus on the surveillance and punishment of young offenders.¹³¹

2. The Expansion of Children's Rights

It was in this context that the U.S. Supreme Court decided *In re Gault* in 1967, establishing basic due process rights in juvenile court proceedings.¹³² Until then, youths appearing in delinquency court were denied critical procedural protections, including the right to counsel, notice of the charges, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.¹³³ Gerald Francis Gault, the appellant, was a 15-year-old white boy¹³⁴ in Gila County, Arizona, who had been adjudicated delinquent for making an obscene phone call to an adult female neighbor.¹³⁵ Police had taken him into custody overnight without notifying his parents, and he appeared in juvenile court the following day without an attorney.¹³⁶ At the initial hearing, although the complaining witness did not appear, the judge aggressively questioned Gault about the phone call; at a second hearing, the judge summarily committed Gault to the State Industri-

¹²⁸ Olson-Raymer, *supra* note 51, at 590.

¹²⁹ Virginia Postrel, *The Consequences of the 1960's Race Riots Come into View*, N.Y. TIMES (Dec. 30, 2004), http://www.nytimes.com/2004/12/30/business/the-consequences-of-the-1960s-race-riots-come-into-view.html?_r=0 [https://perma.cc/44C2-DS8V] (reporting that from 1964–1971, there were more than 750 riots, killing 228 people and injuring 12,741 others, as well as 15,000 separate incidents of arson, destroying many black urban neighborhoods).

¹³⁰ See NINA M. MOORE, *THE POLITICAL ROOTS OF RACIAL TRACKING IN AMERICAN CRIMINAL JUSTICE* 138 (2015) (discussing the minimal concern Congress had toward racial minorities in their establishment of the 1968 crime bill).

¹³¹ Olson-Raymer, *supra* note 51, at 589–90.

¹³² *In re Gault*, 387 U.S. 1, 30–31 (1967).

¹³³ *Id.* at 10.

¹³⁴ *Id.* at 4. Consistent with using whiteness as the default presumption, the Court did not explicitly include Gerald Gault's race; photographs and videos of him in subsequent decades, however, reveal that he is, in fact, white. See, e.g., *LSU Law Center Hosts Symposium on Transfer of Juveniles to Adult Court*, LSU LAW (Apr. 28, 2010), <http://www.law.lsu.edu/news/2010/04/28/l-su-law-center-hosts-symposium-on-transfer-of-juveniles-to-adult-court/> [https://perma.cc/FX2Q-PUMB].

¹³⁵ *In re Gault*, 387 U.S. at 4.

¹³⁶ *Id.* at 5.

al School until age twenty-one.¹³⁷ The U.S. Supreme Court reversed the judgment of the Supreme Court of Arizona and remanded the case.¹³⁸

In the opinion, Justice Fortas portrayed Gerald Gault sympathetically, a seemingly deliberate choice¹³⁹ that mirrored a societal shift in the conception of children: once viewed as a form of property, children in the mid-twentieth century were more likely to be seen as autonomous, rights-bearing individuals, independent of parents and the state.¹⁴⁰ Justice Fortas repeatedly referred to Gault by his first name and emphasized the trivial nature of the offense, stating that Gerald and another “boy” made remarks of “the irritatingly offensive, adolescent, sex variety.”¹⁴¹ He mentioned that both of Gerald’s parents were at their jobs when their son was picked up by police and taken into custody, suggesting that the family was hard-working.¹⁴² He dismissed the juvenile court proceedings as those of “a kangaroo court,” implying that it was disorganized and unreliable, in which witnesses at the second hearing had differing recollections of what Gerald had admitted to at the first.¹⁴³

There is only one explicit mention of race in the *Gault* opinion. Before holding that the constitutional privilege against self-incrimination applies to juveniles in the same way it applies to adults, Justice Fortas quoted a U.S. Supreme Court case from twenty years earlier.¹⁴⁴ In 1948, in *Haley v. Ohio*, an early children’s rights case, the Court reversed the adult court murder conviction of a Black fifteen-year-old boy because of a coerced confession

¹³⁷ *Id.* at 5–7. In contrast, if Gault had been an adult convicted of the same crime, the maximum penalty would have been a five dollar to fifty dollar fine or two months’ imprisonment, rather than six years commitment as a juvenile delinquent. *Id.* at 8–9, 29.

¹³⁸ *Id.* at 59.

¹³⁹ *See id.* at 4 (describing Gault making a call with “another boy” in which they made remarks of the “irritatingly offensive, adolescent, sex variety”); e.g., Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 141, 142 (1997) (describing the way in which judicial opinions select from among many facts, and that this “resulting rendition of ‘the facts’ can thus be seen as a story crafted to support the court’s holding,” and acknowledging that if the court were to reach a different result, it would select different facts and tell a different story); Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 *YALE J.L. & HUMAN.* 1, 6–17, 22–25 (2006) (characterizing the 1968 U.S. Supreme Court opinion in *Bumper v. North Carolina* as an example of courts engaging in the construction of narrative); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 *GEO. L.J.* 281, 290 (2013) (arguing that narrative provides an underlying structure for judicial decisions); David Ray Papke, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, 40 *J. LEGAL EDUC.* 145, 146–47 (1990) (discussing ways in which restatements of facts in appellate opinions are stories, not socio-legal developments).

¹⁴⁰ *See* Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children’s Rights*, 9 *HARV. WOMEN’S L.J.* 1, 10 (1986) (describing the problematic dominant rhetoric of rights in legal scholarship).

¹⁴¹ *See In re Gault*, 387 U.S. at 4.

¹⁴² *See id.* at 5.

¹⁴³ *See id.* at 5–7, 28.

¹⁴⁴ *Id.* at 45 (emphasizing that admissions and confessions of juveniles warrant caution).

following five hours of questioning by several different police officers.¹⁴⁵ The *Haley* Court proclaimed that age fifteen is “a tender and difficult age for a boy of any race” and that “a lad of tender years” is no match for the police.¹⁴⁶ The *Haley* Court’s explicit message was that even “Negro boy[s]” should be deemed worthy of the due process of law commanded by the Fourteenth Amendment.¹⁴⁷ Justice Fortas applied this reasoning to *Gault*, suggesting that if Black boys are considered to be “lads of tender years” in need of counsel and support, then Gerald, a white teenager, should certainly be as well.¹⁴⁸

By the time of the *Gault* decision, Black children were disproportionately confined in juvenile correctional facilities¹⁴⁹ and forty-two percent lived below the poverty line.¹⁵⁰ Delinquency court, once considered revolutionary for its focus on the child’s “needs” rather than their past “deeds,” frequently determined which children were less culpable than adults based on race.¹⁵¹ As in the nineteenth century, juvenile court judges treated “lads” who looked like their own children with “tenderness” and placed them on probation, whereas foreign, alien or “colored” children required “toughness,” which often meant commitment to institutions that were punitive.¹⁵² Such distinctions reflected the continued status of children of color as “less than,” as they were deemed not worthy of full citizenship, not worthy of government resources, and not capable of change. Yet, in some critical ways, the worst was yet to come.

¹⁴⁵ *Haley v. Ohio*, 332 U.S. 596, 597–99, 601 (1948).

¹⁴⁶ *Id.* at 599.

¹⁴⁷ *See id.* at 597, 599.

¹⁴⁸ *In re Gault*, 387 U.S. at 4, 47 (emphasizing the special caution to be applied to juveniles’ confessions); cf. Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL’Y 109, 115–16 nn.37, 40 (2012) (suggesting another dimension of critical race theory analysis as applied to the *Haley* case).

¹⁴⁹ WARD, *supra* note 21, at 4 fig.0.1, 236 fig.8.1 (showing that in 1970, approximately 35% of male youths committed to juvenile correctional institutions were “nonwhite” although they comprised less than 15% of the population of all youths); *see also* PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9 (1967) (finding that surveys indicated that minority offenders were vastly overrepresented in the nation’s largest juvenile courts).

¹⁵⁰ NAT’L RESEARCH COUNCIL ET AL., *supra* note 2, at 240.

¹⁵¹ *See* Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash,”* 87 MINN. L. REV. 1447, 1448–51, 1460 n.34 (2003) (suggesting that *Gault* signaled that the Court was aware that minority youths did not receive equal treatment in juvenile court).

¹⁵² FELD, *supra* note 21, at 72–73.

C. 1990s “Superpredators”

1. The Crime of Blackness

Crime rates fluctuate, and “crime” itself can refer to several different categories of conduct, including violent crime, such as murder, rape, robbery and assault; property crime, such as burglary, theft, and arson; and juvenile crime, committed by individuals under the age of eighteen. Beginning in the 1970s and extending to the 1980s, the rate of violent crime and serious property crime in the United States climbed.¹⁵³ Rates of these categories of crime then declined during the mid-1980s, rebounded by the early 1990s, and decreased dramatically by 1995, falling to mid-1970s levels.¹⁵⁴ In short, contrary to media reports and public perceptions, the overall rate of all serious crime and juvenile crime did not increase substantially by the mid-1990s but “oscillated within a ‘normal’ plus or minus ten percent range that has prevailed since the late 1970s.”¹⁵⁵ In addition, violent crime constituted only ten to fifteen percent of all crime, and juveniles accounted for a minority of all of those arrested for violent crime.¹⁵⁶

Nevertheless, there *was* an increase in the lethality of violence committed by young men between the ages of fourteen and twenty-four, which could be attributed almost exclusively to the illegal drug trade and the easy availability of guns.¹⁵⁷ During the 1990s, the slow collapse of the manufacturing sector of the American economy¹⁵⁸ and deep cuts to the social safety net by the U.S. Congress¹⁵⁹ had given rise to the crack epidemic.¹⁶⁰ The abuse of crack cocaine, which was overwhelmingly a drug of adolescents and young adults, and the violence generated by its illicit sale led to the decimation of much of the African-American community.¹⁶¹ Young men in

¹⁵³ *Id.* at 198 (citing the FBI Crime Index).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 207.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See André Bernard, *Trends in Manufacturing Employment*, 10 PERSP. ON LABOUR & INCOME 5, 5 (2009) (finding that the U.S. lost nearly one-quarter (4.1 million) of its manufacturing jobs between 1998 and 2008).

¹⁵⁹ See Marianne P. Bitler & Hilary W. Hoynes, *The State of the Social Safety Net in the Post-Welfare Reform Era*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY 71, 95–96, 99 (Fall 2010) (discussing the decline in cash welfare as well as food stamps government expenditures in the United States during the 1990s).

¹⁶⁰ Roland G. Fryer, Jr. et al., *Measuring Crack Cocaine and Its Impact*, 51 ECON. INQUIRY 1651, 1652 (2013) (describing the rise of crack cocaine in the 1980s in Black and Hispanic communities and the resulting impacts).

¹⁶¹ See generally *id.* (examining the impact of the crack epidemic on crime rates and finding that the rise in crack sales in large urban areas from 1984–1989 is associated with a doubling of homicide deaths of Black males, including those aged fourteen to seventeen).

their teens through their mid-twenties—a group that was disproportionately Black—committed a disproportionate number of the serious and violent crimes of this period, and arrests of this subgroup increased “significantly and more sharply” than for older adults.¹⁶² In response, legislators passed bills in dozens of states that made it easier for judges and prosecutors to transfer youths from juvenile to adult criminal court.¹⁶³ As a result, the numbers of juveniles in adult jails rose sharply through the 1990s to a high of almost 9500 in 1999.¹⁶⁴ Although young Black men who committed murders with guns were a “very narrow segment of the youth crime phenomenon,” this cohort and the fear they engendered catalyzed the “tough on crime” policies of the 1990s.¹⁶⁵

Indicative of this climate was “the rise and fall of the superpredator.”¹⁶⁶ The racially-coded label was a term coined by then-Princeton political scientist John J. DiIulio Jr. in the 1990s, meaning “feral youths devoid of impulse control or remorse”¹⁶⁷ who are “fatherless, Godless, and jobless.”¹⁶⁸ The reason for the emergence of these marauding packs of “feral, pre-social being[s],”¹⁶⁹ according to DiIulio and the conservative scholar James Q. Wilson, was “moral poverty,” a condition caused by parents who

¹⁶² FELD, *supra* note 21, at 207; see also Philip J. Cook & John H. Laub, *The Unprecedented Epidemic in Youth Violence*, 24 CRIME & JUST. 27, 28 (1998) (noting a sharp rise in adolescent criminal behavior for serious crimes and highlighting that “the increase was concentrated on black males”); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 37–38 (2008) (highlighting data that shows huge discrepancy in juvenile arrest rate for drug offenses based on race during the 1990s); Miles Corwin, *NYPD Blues*, L.A. TIMES (May 28, 2000), <http://articles.latimes.com/2000/may/28/books/bk-34775> [<https://perma.cc/PN67-M74V>] (describing the rise in the mid-1990s of “hard-charging, militaristic methods . . . employed primarily in minority communities” to make arrests).

¹⁶³ Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 JUV. JUST. 81, 86 (2008).

¹⁶⁴ *Id.* at 95.

¹⁶⁵ FELD, *supra* note 21, at 208; Brief for Jeffrey Fagan et al. as Amici Curiae Supporting Petitioners at 37, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174240, at *37 (arguing that empirical research on the tough on crime legislation of the 1990s was misinformed by the superpredator myth that juvenile crime would continue to rise sharply).

¹⁶⁶ See Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 746–51 (2011) (presenting the “superpredator era” as a manifestation of the reconfiguration of modern criminology, in which the goal shifted from social welfare to social control in a world in which “the individual is an afterthought”).

¹⁶⁷ See Feld, *supra* note 68, at 142–47; Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, N.Y. TIMES (Apr. 6, 2014), <https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html> [<https://perma.cc/NP3C-MXJV>].

¹⁶⁸ WILLIAM J. BENNETT ET AL., *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* 79 (1996).

¹⁶⁹ James Q. Wilson, *Crime and Public Policy*, in CRIME 489, 492 (James Q. Wilson & Joan Petersilia eds., 1995).

do not want to raise them, schools that do not educate them, and government agencies too overburdened to assist them.¹⁷⁰ Politicians quickly exploited the theory by calling for “adult time for adult crime.”¹⁷¹ Yet, the fact that DiIulio’s sensationalized predictions about a major crime wave by juveniles did not come to pass coupled with the fact that murders committed by youths aged ten to seventeen fell dramatically after 1994 was not part of the narrative.¹⁷² Neither was the mea culpa issued in 2014 by DiIulio, who finally admitted, “Demography is not fate.”¹⁷³

Meanwhile, the media’s crime coverage grew increasingly racially biased as print and broadcast journalists also exploited the “superpredator” myth.¹⁷⁴ News outfits directed their cameras on young Black males, showing them hand-cuffed and shackled, held down by police, or led into courtrooms wearing orange jumpsuits.¹⁷⁵ Such images fed the public’s fears and were consistent with this negative characterization of the threat: “Radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders.”¹⁷⁶

When journalists covered crimes in which the suspects were adolescents, rather than emphasize their youth and limited culpability, they portrayed them as dangerous beyond their years, or as “superpredators.”¹⁷⁷ In

¹⁷⁰ BENNETT ET AL., *supra* note 168, at 13, 56, 79 (defining “moral poverty” as “the poverty of being without loving, capable, responsible adults who teach you right from wrong”); *see also supra* notes 62–76 and accompanying text (discussing the emphasis on providing “moral guidance” to youths during the House of Refuge movement in the nineteenth century).

¹⁷¹ *See* Joe Davidson, *Clinton, Dole Getting Tough on Violent Juvenile Crime*, WALL ST. J. (Aug. 22, 1996), <https://www.wsj.com/articles/SB840671096873438500> [<https://perma.cc/TLR2-GWZH>] (describing Dole’s campaign against juvenile delinquency); *Watch Hillary Clinton’s Controversial 1996 ‘Super-Predators’ Comment*, WASH. POST (Feb. 26, 2016), https://www.washingtonpost.com/video/politics/watch-hillary-clintons-controversial-1996-super-predators-comment/2016/02/26/1d0dce4-dc88-11e5-8210-f0bd8de915f6_video.html [<https://perma.cc/GQ7F-5PAY>] (showing Hillary Clinton speaking in support of the crime bill and referring to youthful offenders as superpredators who need to be “brought to heel”).

¹⁷² FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 11, 13–14 (2013) (debunking DiIulio’s theory of the superpredator); Haberman, *supra* note 167 (citing statistics of the Justice Department’s Office of Juvenile Justice and Delinquency Prevention).

¹⁷³ Haberman, *supra* note 167.

¹⁷⁴ *See* Suzanne Fields, *The Super-Predator*, WASH. TIMES, Oct. 17, 1996, at A23 (calling the “superpredator”: “a monster of a problem”).

¹⁷⁵ Feld, *supra* note 68, at 145–46.

¹⁷⁶ BENNETT ET AL., *supra* note 168, at 27.

¹⁷⁷ *See, e.g.*, Ted Guest & Victoria Pope, *Crime Time Bomb*, U.S. NEWS & WORLD REP., Mar. 1996, at 28, 28 (“It may take an even greater bloodbath [by superpredators] to force effective crime solutions to the top of the nation’s agenda.”); Richard Zoglin & Sam Allis, *Now for the Bad News: A Teenage Time Bomb*, TIME INT’L, Jan. 15, 1996, at 52 (predicting a “teenage time bomb” in the form of the superpredator); Warren Richey, *Teen Crime Trend Puts Them Behind Adult Bars*, CHRISTIAN SCI. MONITOR (June 2, 1997), <http://www.csmonitor.com/1997/0602/060297>.

contrast, the press continued to focus on crime victims who were white, female, and middle-class, despite the reality that the rates of Black victimization exceeded that of whites.¹⁷⁸

2. Racialized Public Policy

In these ways, the connection between race and crime was reinforced, and public policy became racialized. For example, the War on Drugs in the late 1980s and early 1990s focused on street-level crack and heroin dealers in high-poverty urban areas that were populated by African-Americans rather than powder cocaine dealers in suburbs populated by white middle-class people.¹⁷⁹ Laws themselves targeted the behaviors, habits, and life conditions associated with Black youths living in poverty. Mandatory transfer of fifteen- and sixteen-year-olds from juvenile to adult court, for instance, was triggered in Illinois by a statute criminalizing drug violations within one-thousand feet of public housing.¹⁸⁰ A similar statute in Massachusetts carried harsh penalties for drug distribution that occurred within one-thousand feet of a Head Start facility or one hundred feet of a public park or playground.¹⁸¹ Public curfew ordinances for juveniles were implemented in increasing numbers of cities and counties, enabling police to stop and question youths based on their appearance alone.¹⁸² Comprehensive anti-gang initiatives were also launched in the 1980s, targeting young men in urban areas.¹⁸³

Today, nearly two decades into the twenty-first century, disproportionate numbers of Black and brown adolescents continue to be stopped,

us.us.4.html [https://perma.cc/GM9Q-P7VU] (“America is being threatened by a growing cadre of cold-blooded teens called ‘superpredators.’”).

¹⁷⁸ Feld, *supra* note 68, at 146.

¹⁷⁹ See Bishop, *supra* note 16, at 36.

¹⁸⁰ *Id.*

¹⁸¹ See MASS. GEN. L. ch. 94C, § 32J (2016). Head Start is a federal program of the U.S. Department of Health and Human Services that provides comprehensive early childhood education and other services to low-income children and their families. See *About the Office of Head Start*, OFF. HEAD START, <http://www.acf.hhs.gov/programs/ohs> [https://perma.cc/TP9T-J68D].

¹⁸² See Bishop, *supra* note 16, at 37 (describing urban curfew laws as one example of how the law established disparate social control over minority youth); Tik Root, *Life Under Curfew for American Teens: “It’s Insane, No Other Country Does This,”* THE GUARDIAN (May 28, 2016), <https://www.theguardian.com/us-news/2016/may/28/curfew-laws-san-diego> [https://perma.cc/F5AE-5PJJ] (finding that since the 1990s, millions of U.S. teenagers have been arrested for breaking curfew, which a policy analysis in San Diego has shown, has a disproportionate impact on minority youths).

¹⁸³ See *Comprehensive Anti-Gang Initiative*, OFFICE JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/programs/antigang/> [https://perma.cc/8YMQ-WSLR] (stating that “since the 1980s, OJJDP has developed, funded, and evaluated community-based anti-gang programs that coordinate prevention, intervention, enforcement, and reentry strategies”).

searched, arrested and to receive more punitive sanctions in juvenile court than white youths—even when charged with the same offenses.¹⁸⁴ The case law and rules of criminal procedure that led to the disparate treatment of children of color may be facially race-neutral, but the impact is racially discriminatory. Likewise, court actors continue to use rhetoric that reinforces and promotes racial stereotypes: deserving vs. undeserving youth, gang-involved youths vs. youths with positive peers, and youths from “good” families vs. youths from “troubled” ones. The labels may be facially race-neutral, but the language is racially-coded. In other words, legal formalism may be used to deny the realities of race, but structural racism remains, such that when a judge enters a disposition ostensibly based on the factors stipulated in the state’s juvenile code, her decision will likely be motivated, consciously or not, by biased notions of race.

The next Part argues that these racialized practices, which cause immediate and enduring harm to children and their communities, permeate the contemporary juvenile justice system.

II. THE HARM OF RACIALIZATION

On the most basic level, the process of racialization reinforces negative stereotypes about the “other,” whether they are people of color, immigrants, or poor people. As Kimberlé Williams Crenshaw has written, racialized stereotypes are rooted in American history, in which a clearly subordinated “other” has consistently been “contrasted with the norm in a way that reinforces identification with the dominant group.”¹⁸⁵ The non-stigmatized groups, or white elites and subordinated whites, then coalesce around a common identity that is defined in opposition to the symbolic “other.”¹⁸⁶ Racist ideology replicates this pattern, so that each traditional negative image of Blacks correlates with a dominant counter-image of whites: if Blacks are lazy, unintelligent, immoral, and ignorant, then whites are industrious, intelligent, moral, and knowledgeable; if whites are law-abiding, responsible, and virtuous, then Blacks are criminal, shiftless, and lascivious.¹⁸⁷ In

¹⁸⁴ See BELL & RIDOLFI, *supra* note 70, at 7, 9 (discussing data showing that in Los Angeles County, Black youths were more than three and a half times more likely to be arrested than white youths, and Latino youths were nearly one and half times more likely).

¹⁸⁵ Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1372 (1988).

¹⁸⁶ *Id.* at 1372–73 (“Western thought . . . has always been structured in terms of dichotomies or polarities: good vs. evil, being vs. nothingness, presence vs. absence These polar opposites do not, however, stand as independent and equal entities. The second term in each pair is considered the negative, corrupt, undesirable version of the first, a fall away from it.” (quoting Jacques Derrida)).

¹⁸⁷ *Id.*

short, stereotypes are used to rationalize the subordination of Blacks, making their position in the hierarchy seem “logical and natural.”¹⁸⁸ The harm of racialization is particularly damaging when a forum designed for children instead utilizes practices that entrench stereotypes of Black criminality.

A. Perpetuation of Negative Stereotypes

1. Children of Color

The juvenile justice system rewards those children who most closely conform to mainstream, or white, norms of acceptability, whether in terms of appearance, family structure, or socioeconomic status,¹⁸⁹ and in contrast, it penalizes those children who are perceived to be unable or unwilling to conform to these norms.¹⁹⁰ For instance, recall Campbell, the small fifteen-year-old of Caribbean descent who wore a blue button-down shirt and khakis to court, expressed remorse in court, and spoke of his interest in drawing and painting; and recall Raekwon, the tall, Black fifteen-year-old with braids who entered the juvenile courtroom wearing low-riding baggy jeans, mumbled his answers to questions during the disposition hearing, and failed to address the judge as “ma’am” or “your honor.”¹⁹¹ Juvenile court judges are statutorily required to base a disposition upon factors that allow for discretion as well as some degree of subjectivity.¹⁹² Therefore, after observing and interacting with youths in court, the judge will likely use information about each child’s appearance and behavior to evaluate—consciously or unconsciously—whether negative stereotypes about African-Americans as a group should apply or whether stereotypes about positive, or white, social norms should apply. If it is the former, the judge’s assessment of the youth

¹⁸⁸ *Id.* at 1370.

¹⁸⁹ See Birkhead, *Delinquent*, *supra* note 33, at 70–81 (discussing the structural and institutional causes of the disproportionate representation of low-income children in the juvenile justice system); Donna M. Bishop et al., *Contexts of Decision Making in the Juvenile Justice System: An Organizational Approach to Understanding Minority Overrepresentation*, 8 YOUTH VIOLENCE & JUV. JUST. 213, 215 (2010) (finding that actors within the system make assessments about juveniles’ culpability, dangerousness, and treatment needs based on contextual and extralegal factors, including socioeconomic status).

¹⁹⁰ See Bishop, *supra* note 189, at 214 (finding that because of limited time and information, juvenile court judges and other decisionmakers develop a “perceptual shorthand” that relies on common stereotypes associated with offender characteristics, such as race and class, as well as legal factors, such as the seriousness of the offense and the youth’s criminal history).

¹⁹¹ See *supra* notes 8–20 and accompanying text.

¹⁹² See, e.g., N.C. GEN. STAT. § 2501 (2016) (enumerating such factors as the degree of culpability indicated by the circumstances of the particular case).

will typically be more critical and unforgiving; if it is the latter, it will be more positive and affirming.¹⁹³

The intersection between race and class must also be recognized, particularly in the context of juvenile court, which traditionally has been a forum for the poor and impoverished.¹⁹⁴ Although there have been, and continue to be, families of means whose children appear in delinquency court, they are the exception rather than the rule.¹⁹⁵ Although few juvenile courts document the socioeconomic status of children's families, those that do have confirmed that nearly sixty percent are on public assistance and/or have household incomes of less than twenty-thousand dollars per year.¹⁹⁶ Further, although court officials and police officers assert that they direct low-income families into the juvenile justice system out of a desire to provide "help," this paternalistic attitude ultimately allows the state to attain social control over a wider swath of the poor.¹⁹⁷ It is a contemporary dynamic that echoes the nineteenth century House of Refuge movement, which was catalyzed in large part by the belief that immorality *caused* poverty.¹⁹⁸

In addition, the decisions that drive low-income families into the juvenile system are based on criteria that explicitly favor families of means, similar to the ways in which facially race-neutral policies and practices have a racially-discriminatory impact. For instance, research shows that police are more suspicious of children living in low-income neighborhoods than those from middle- or upper-class ones, a judgment that can be used to condone and even encourage aggressive law-enforcement tactics.¹⁹⁹ When

¹⁹³ See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) ("Merely thinking about Blacks can lead people to evaluate ambiguous behavior as aggressive . . ."); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2630 (2013) (arguing that being aware of racial stereotypes, even without acknowledgement of them, activates them in one's mind, such as negatively categorizing Blacks with negative traits like criminality).

¹⁹⁴ See *supra* notes 62–70 and accompanying text (discussing the House of Refuge movement, motivated in large part by the desire of the state to provide social welfare while simultaneously attaining social control over racial and ethnic minorities living in poverty); see also *supra* notes 71–76 and accompanying text (discussing the labeling of poor children as "wayward youths" and the underlying belief that immorality causes poverty, a state that "ripens into criminality" and poses a threat to society).

¹⁹⁵ See H. Ted Rubin, *Impoverished Youth and the Juvenile Court: A Call for Pre-Court Diversion*, JUV. JUST. UPDATE, Dec.–Jan. 2011, at 1, 1–2.

¹⁹⁶ *Id.* at 1 (discussing the 2008 report of the Juvenile Court of Memphis and Shelby County, Tennessee).

¹⁹⁷ See Tamar R. Birckhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959, 970–73 (2010) (finding that today's juvenile court judges often focus on the needs of the juvenile when adjudicating them delinquent without first objectively determining whether a criminal offense has been committed).

¹⁹⁸ See *supra* notes 70–76 and accompanying text.

¹⁹⁹ Bishop, *supra* note 16, at 45.

low-income parents do not appear for the initial intake interview with the juvenile court probation officer, in some jurisdictions they are automatically deemed “uncooperative” and the child is ineligible for a diversion contract, even if the cause is a lack of reliable transportation or the inability to receive mail because of transient housing.²⁰⁰ Similarly, when a low-income parent does not appear at her child’s school suspension hearing or contest the resulting referral to juvenile court, teachers and probation officers may view her as “not caring” about her child when the true cause may be an inability to secure leave from her job or advocate effectively.²⁰¹ All such characterizations are based on stereotypes that are socioeconomically and also frequently racially coded.

By perpetuating negative stereotypes, racialization enables legislators and policy makers to more readily justify punitive practices that disproportionately harm racial minorities. In the context of the delinquency court system, this includes such practices as the indiscriminate use of shackles—handcuffs, leg irons, and belly chains—on children, no matter their age or circumstances;²⁰² detention in jail-like settings that offer neither meaningful treatment nor education;²⁰³ and transfer to adult criminal court premised on

²⁰⁰ Birkhead, *Delinquent*, *supra* note 33, at 83–84 (discussing empirical research that poor children are less likely to be diverted from the system because of the lack of resources required by racially neutral diversion policies); Bishop, *supra* note 16, at 48–49 (describing how some organizational policies and regulations, such as policies related to diversion, have a differential impact on minority youth); *see also, e.g.*, N.C. GEN. STAT. § 7B-1706(a)–(c) (2016) (allowing a juvenile to enter into a diversion contract with the probation department, which provides referrals to such resources as community service, mediation, or counseling in lieu of filing a delinquency petition).

²⁰¹ *See* Zanita E. Fenton, *Disabling Racial Repetition*, 31 J.L. & INEQ. 79, 79, 98 (2012) (“Black children, especially boys, are disciplined, suspended, and expelled [from school] when it is least likely that their parents will challenge the outcome; this most often is the case when their parents are in poverty.”); Rubin, *supra* note 195, at 2 (“The parents of low-income youth often do not contest an arrest as vigorously as more affluent middle-income parents might.”).

²⁰² *See* NAT’L JUVENILE DEF. CTR., CAMPAIGN AGAINST INDISCRIMINATE JUVENILE SHACKLING, TOOLKIT 5, 13, 14 (2016) (finding that the rationalizations for shackling are not supported by the data); Candace Johnson & Mae C. Quinn, *Chaining Kids to the Ever Turning Wheel: Other Contemporary Costs of Juvenile Court Involvement*, 73 WASH. & LEE L. REV. ONLINE 159, 162–65 (2016), <http://lawreview.journals.wlu.io/chaining-kids-to-the-ever-turning-wheel-other-contemporary-costs-of-juvenile-court-involvement/> [<https://perma.cc/CF97-BR5G>] (describing shackling as an unregulated practice that perpetuates second-class citizenship by subjugating an entire population of children through actual bondage).

²⁰³ *See, e.g.*, DIGNITY IN SCHOOLS CAMPAIGN, THE RIGHT TO EDUCATION IN THE JUVENILE AND CRIMINAL JUSTICE SYSTEMS IN THE UNITED STATES 8–11 (2008) (discussing the low-quality of education programs offered in juvenile detention facilities); BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2, 4–5, 8–10 (2006) (finding that juvenile detention facilities are overcrowded and understaffed, breeding neglect and violence, ultimately harming juveniles’ futures).

factors that place people of color at a distinct disadvantage.²⁰⁴ For youths who end up in criminal court, the practices include imprisonment with adults, which puts them at high risk of sexual violence;²⁰⁵ prolonged periods of solitary confinement, which research has shown causes psychological, physical, social and developmental harm to youths;²⁰⁶ and extreme sentences such as juvenile life without parole.²⁰⁷ All of these practices are countenanced based on judgments, whether implicit or explicit, that juvenile offenders deserve “toughness.”²⁰⁸ Legislators, prison administrators, and policy makers defend the practices and deem them appropriate, an unsurprising result when the impact is felt by “other people’s children,” namely, the Black kids, the poor kids, the throwaway kids: the kids who have no voice.

2. Risk Assessment

Stereotypes underlying racialized rhetoric in juvenile court are further perpetuated by the increasing application of risk assessment tools that rely on algorithms based on a small number of variables about the child and her family.²⁰⁹ These statistical models and software programs are designed to

²⁰⁴ See Fagan, *supra* note 163, at 96–98 (discussing the “cumulative disadvantages by race” that exist in a juvenile case, including at charging, detention, and the decision to seek waiver, and concluding that racial disparities in the incarceration of minors in state prisons results in large part from implicit bias); see also N.C. GEN. STAT. § 7B-2203(b) (stating that in a transfer hearing, the court shall consider, inter alia, the prior record of the juvenile and prior attempts to rehabilitate the juvenile, both of which may be impacted by implicit racial bias and whether the alleged offense was “committed in an aggressive, violent, premeditated, or willful manner,” a conclusion that allows for a subjective race-based determination by the judge).

²⁰⁵ See CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: CHILDREN IN ADULT JAILS & PRISONS 1 (2011) (stating that although federal law requires that youth in the juvenile system be removed from adult jails or have sight-and-sound separation from adults, these requirements do *not* apply to youth in the adult criminal justice system); James E. Robertson, *The “Turning-Out” of Boys in a Man’s Prison: Why and How We Need to Amend the Prison Rape Elimination Act*, 44 IND. L. REV. 819, 827–28 (2011) (finding that although there is a “dearth of [empirical] data” on the rate of victimization of youths in adult facilities is, it is well documented that youths serving adult time are “easy and frequent sexual prey”).

²⁰⁶ See Tamar R. Birkhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 25 (2015) (discussing the harm of solitary confinement of youths).

²⁰⁷ See THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 3 (2016) (stating that racial disparities “plague the imposition of [Juvenile Life Without Parole] sentences,” with over 42% imposed on African Americans convicted of killing white people).

²⁰⁸ See *supra* note 165 and accompanying text (discussing the catalyzation of the touch on crime policies in reaction to fear of black male youths).

²⁰⁹ See Anna Maria Barry-Jester et al., *The New Science of Sentencing*, MARSHALL PROJECT (Aug. 4, 2015), https://www.themarshallproject.org/2015/08/04/the-new-science-of-sentencing?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20160523-492#.sKRwyz8PJ [<https://perma.cc/AA9F-4YQP>] (reporting that risk assessment tools are used at some stage of the criminal justice process in nearly every state and utilize such variables as the age of the child, gang association, and level of parental supervision).

use current and historical data to help judges and juvenile probation officers assess the child's "risk" during the juvenile court process—including intake, when determining whether to approve the filing of a juvenile petition, divert the child to a program in lieu of court-involvement, or reject the petition; the initial court appearance, when deciding whether to allow the juvenile to remain at home or place her in preventative detention during the pendency of the case;²¹⁰ and disposition, when ruling on whether to place her on probation or commit her to a juvenile institution.

The degree to which risk assessment tools either help or hinder the attainment of equal justice within the court system is subject to debate. Because these tools tie the degree of risk most closely to prior criminal history, including prior arrests as well as convictions, and because criminality is often a proxy for Blackness, there is a strong argument that they exacerbate racial disparities.²¹¹ With this in mind, United States Attorney General Eric Holder suggested that risk assessments for defendants were injecting bias into the court system and should be studied.²¹² Legal scholars have weighed in on both legal and empirical grounds to argue that risk assessments that include demographic and socioeconomic variables are unconstitutional as well as bad policy, as they embrace otherwise-rejected discrimination under the guise of science.²¹³ For instance, one has argued that because such variables as the offender's family background or the family's criminal history are beyond the offender's control and are unchanging, they are quasi-suspect classifications that violate the Equal Protection Clause.²¹⁴

²¹⁰ See Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 303–04 (2008) (discussing *Schall v. Martin* and arguing that the subjective nature of many preventative detention statutes adds to the risk of arbitrary outcomes); see also *Schall v. Martin*, 467 U.S. 253, 256–57, 263, 281 (1984) (holding that a New York statute allowing for pretrial detention of a juvenile based on a finding of "serious risk" of recidivism met the due process "fundamental fairness" standard).

²¹¹ Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 238 (2015); see also Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 565–66, 585–86 (2014) (arguing that prior convictions can be an unreliable indicator of a defendant's relative culpability as a result of disparities in enforcement, including those in which the convictions had been the product of racial profiling and the corresponding sentences affected by implicit racism).

²¹² Eric Holder, Attorney General, *Attorney General Eric Holder Speaks at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference* (Aug. 1, 2014), available at <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th> [<https://perma.cc/VL4X-8SAG>].

²¹³ See Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STANFORD L. REV. 803, 821–23 (2014) (providing the equal protection concerns of evidence based sentencing based on socioeconomic status and demographics).

²¹⁴ *Id.*

In contrast, there are federal agencies, such as the Department of Justice's National Institute of Corrections, that encourage the use of such assessments and a sentencing reform bill pending in the United States Congress, which mandates the use of such assessments in federal prisons.²¹⁵ Advocates for statistical approaches to juvenile and criminal justice say they reduce racial disparities, minimize incarceration rates, and result in lower costs,²¹⁶ but the empirical research on whether predictive algorithms accomplish these goals is limited.²¹⁷ Some academics contend that at the very least, these tools should be rigorously tested before adoption, and that the data should be made available to the defendant and her attorney to ensure "an open, full-court adversarial proceeding."²¹⁸

B. Race-Based Decision Making

1. Inside the System

The founders of the juvenile court system were driven by a desire to replace a system that did not differentiate between adults and children with one that focused holistically on the child.²¹⁹ This philosophical shift required that decisionmakers have wide-ranging discretion to subjectively consider not only the facts regarding the offense but every aspect of the child's nature and environment.²²⁰ In 1909, one of the first judges of the Chicago Juvenile Court contended that the juvenile court judge should act

²¹⁵ See Sentencing Reform & Corrections Act of 2015, S. 2123, 114th Cong (2015) (requiring the Bureau of Prisons to use a risk and needs assessment systems); ROGER K. WARREN, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES, 73-77 (2007) (arguing that principles of evidence-based practice provide a sound foundation to create policies to target the most at-risk offenders); Starr, *supra* note 213, at 811 (discussing Judge Roger Warren's argument that the DOJ report was, in part, the catalyst for the use of specialized risk assessment instruments to sentence sex offenders).

²¹⁶ ANGÈLE CHRISTIN ET AL., DATA & SOCIETY RESEARCH INST., COURTS AND PREDICTIVE ALGORITHMS 1-2 (2015).

²¹⁷ Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://pmera.cc/HDY6-B7JQ>] ("There have been few independent studies of these criminal risk assessments."); see also DAVID STEINHART, ANNIE E. CASEY FOUND., JUVENILE DETENTION RISK ASSESSMENT: A PRACTICAL GUIDE TO JUVENILE DETENTION REFORM 5-6 (2006) (stating that although certain risk instruments have curbed subjective decisions to incarcerate children in locked facilities, improperly drafted ones can produce "higher rates of secure detention, overcrowded juvenile facilities, and higher government costs").

²¹⁸ Angwin et al., *supra* note 217 (quoting Christopher Slobogin of Vanderbilt Law School).

²¹⁹ See Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106-107 (1909) (describing the development of the new juvenile justice regime).

²²⁰ *Id.* at 119-21.

“as a wise and merciful father handles his own child whose errors are not discovered by the authorities.”²²¹

This legacy is significant, as the contemporary journey from a child’s single act of misbehavior to the issuance of criminal charges is one with multiple decision-points along the way, each of which involves some degree of discretion on the part of the person entrusted to make the decision.²²² With unchecked discretion inevitably comes implicit bias, the phenomenon in which human beings unconsciously hold attitudes or stereotypes about certain social categories, such as race, gender, or ethnicity.²²³ For instance, police officers, whether patrolling neighborhoods or assigned to schools, often must act based on the accumulation of split-second judgments about youths regarding who should be stopped, who should be arrested and referred to juvenile court, who should be diverted from the court system, and who should be disciplined informally.²²⁴ These judgments by law enforcement are frequently impacted by the phenomenon of implicit racial bias.²²⁵ School administrators,²²⁶ intake probation officers,²²⁷ and prosecutors²²⁸ then consider the officers’ initial judgments and determine whether to rely upon and follow them or question and potentially reject them—decisions

²²¹ *Id.* at 107.

²²² For judicial decisions noting the wide discretion of judges over juvenile justice matters, see .”); *Commonwealth v. Harold H.*, 682 N.E.2d 1369, 1371 (Mass. App. Ct. 1997) (“[A] judge has wide discretion in determining whether a juvenile should remain within the juvenile system or be tried as an adult”); *State v. L.W.*, 6 P.3d 596, 599 (Wash. Ct. App. 2000) (“[T]he [Juvenile Justice Act] explicitly gives trial courts wide discretion, including discretion to detain the juvenile, and if detention is not necessary, to release him or her with a wide variety of conditions.”).

²²³ See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012) (defining the term, “implicit bias”).

²²⁴ See Fagan, *supra* note 204, at 98 (“A long line of studies shows how race influences police officers’ decision making and judgment about suspicion and dangerousness.”).

²²⁵ *Id.*; Kang et al., *supra* note 223, at 1135 (discussing the implicit racial bias of police during the initial police encounter when a decision is made whether to interrogate, frisk, or arrest).

²²⁶ See Cheryl Staats, *Understanding Implicit Bias: What Educators Should Know*, AM. EDUCATOR, Winter 2015–2016, at 29, 30–33 (discussing implicit bias in education and strategies for mitigating its influence).

²²⁷ See Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 494, 499–500 (2004) (finding that as a result of negative stereotypes and implicit bias, juvenile probation officers perceive African-American youths as having more negative traits, a greater chance of recidivism, and greater culpability than white youths).

²²⁸ See Kang et al., *supra* note 223, at 1139–42 (discussing findings that prosecutors are more likely to charge Black suspects over white suspects, that the charges brought against Black defendants are likely to be more severe than for white defendants, and that generous plea bargains and sentences are more likely for white defendants). See generally Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U.L. REV. 795 (2012) (considering how prosecutorial discretion may be influenced by implicit bias).

that also may be affected by implicit bias. Once young people are in the court system, judges must interpret statutes that allow for a significant degree of discretion, allowing for additional determinations colored by implicit racial bias.²²⁹ Even defense attorneys are likely to reinforce and perpetuate these judgments throughout a case, from the race-based decisions they make during jury selection and voir dire²³⁰ to advising their young Black clients to speak, dress, and act like “good Blacks” during court hearings:

Social science evidence . . . suggests the banal, commonplace, and normalized influence of racial biases in everyday case processing in the juvenile and criminal courts, much of it influenced by implicit biases. Either directly or through surrogates and substitutes such as clothing, demeanor, neighborhood, or other racial cues, unconscious or conscious biases influence decisions about whom to arrest and how to charge and sentence them.²³¹

In short, racial biases permeate the justice system, affecting all of its actors.

2. Outside the System

Decisionmakers within the juvenile justice system must also rely on information from sources *outside* the system to inform them, creating additional opportunities for discretion to negatively impact the way cases are handled and ultimately resolved. For instance, the juvenile court has broad authority to order evaluations of youths by forensic psychologists and psychiatrists for the purpose of assisting court personnel in a variety of contexts, such as the determination by the judge whether to waive jurisdiction and transfer the youth from juvenile to adult court or the dispositional rec-

²²⁹ See David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 349, 374 (2012) (finding from an analysis of empirical data that some judges treat defendants differently on the basis of their race, at least with respect to the decision to incarcerate); Kang et al., *supra* note 223, at 1146–48 (discussing a study showing that judges’ attitudes are susceptible to implicit bias); see also JUVENILE COURT WORKING GRP. ON SENTENCING BEST PRACTICES, DISPOSITIONAL AND SENTENCING BEST PRACTICES FOR DELINQUENT AND YOUTHFUL OFFENDER MATTERS 7, 2–18 (Apr. 2016) (instructing that juvenile court judges “should strive to be ever-mindful of the effects of implicit bias on decision making,” as it has long-reaching impact).

²³⁰ Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U.L. REV. 755, 763–67 (2012) (discussing how biases of criminal defense attorneys get in the way of seeing what clients need); see also Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 999, 1022–42 (2013) (discussing opportunities that defense lawyers have to educate others about implicit racial bias during litigation, including motions practice, voir dire, jury instructions, and sentencing advocacy).

²³¹ Fagan, *supra* note 204, at 98.

ommendations of the probation officer, including the type and number of probationary conditions that are proposed.²³² Subjectivity influences forensic evaluations in large part because of racial disparities in the diagnosis and treatment of certain disorders, resulting from “individual and institutional racism, as well as negative stereotypes in the healthcare system.”²³³ Overrepresentation or underrepresentation of certain racial groups is particularly likely in diagnostic categories that researchers characterize as “judgmental” or those that do not have a clear biological basis and for which contextual factors are important.²³⁴

Research has indicated, for example, that African-American children are more likely than white children to be diagnosed with disorders that are part of the Disruptive Behaviors Disorder spectrum.²³⁵ This group of disorders includes Conduct Disorder,²³⁶ which is characterized by having diffi-

²³² See Keith R. Cruise, *Special Issues in Juvenile Justice*, 2 APPLIED PSYCH. CRIM. JUST. 177, 179–80 (2006) (discussing the types proceedings during which forensic evaluations may be utilized).

²³³ JONATHAN METZL, *THE PROTEST PSYCHOSIS: HOW SCHIZOPHRENIA BECAME A BLACK DISEASE*, at x–xi (2010) (arguing that racial bias heavily impacts medical diagnosis of schizophrenia); Ruby Dhand, *Access to Justice for Ethno-racial Psychiatric Consumer/Survivors in Ontario*, 29 WINDSOR Y.B. ACCESS JUST. 127, 130 (2011) (noting that systematic racism impacts diagnosis and treatment of “ethno-racial psychiatric consumer/survivors” in Canada); Kevin Newman, Note, *Sounding the Mind: On the Discriminatory Administration of Psychotropics Against the Will of the Institutionalized*, 22 S. CAL. REV. L. & SOC. JUST. 265, 283–84 (2013) (suggesting that there are “unconscious cultural forces” that disproportionately diagnose African-Americans with psychiatric conditions); Charmayne Maddox & Keith B. Wilson, *Race Matters: Disparities in African-American Children with Attention Deficit Hyperactivity Disorder* 145, 145 (July 2004), available at <http://www.gradschool.psu.edu/diversity/mcnair/papers2003/maddoxpdf/> [<https://perma.cc/32TQ-RZZX>] (unpublished paper presented at the McNair Scholars Conference at Penn State University) (examining the relationship between race and health care disparities in the treatment for ADHD); see also Sasha Atkins-Loria et al., *Young African American Men and the Diagnosis of Conduct Disorder: The Neo-colonization of Suffering*, 43 CLINICAL SOC. WORK J. 431, 431, 439–40 (2015) (finding that African-American men are overrepresented among those diagnosed with conduct disorder, which likely reflects “institutionalized racism within psychological clinical practice,” and that this fact “fits seamlessly into the legacy of criminalizing Black men in the United States”).

²³⁴ Maddox & Wilson, *supra* note 233, at 156.

²³⁵ See Atkins-Loria et al., *supra* note 233, at 432–33 (finding that African-American youths with serious mental health needs caused by behavioral disorders are more likely to be diagnosed with these conditions than white youths and that white youths with such disorders are referred to hospitals, whereas African-American youths are steered towards the juvenile justice system); see also Margarita Alegria et al., *Racial and Ethnic Disparities in Pediatric Mental Health*, 19 CHILD ADOLESCENT PSYCHIATRIC CLINICIANS N. AM. 759, 762 (2010) (reporting that there are “high rates of serious emotional disturbance” among groups of youths in the juvenile justice and child welfare systems, which have high percentages of underserved minority youth).

²³⁶ See Atkins-Loria, *supra* note 233, at 433 (finding that conduct disorder is one of the most frequent diagnoses given to youth within the juvenile justice system); Eddie Clark, *Conduct Disorders in African American Adolescent Males: The Perceptions That Lead to Overdiagnosis and Placement in Special Programs*, 33 ALA. COUNSELING ASS’N 1, 5 (2007).

culty following rules and behaving in a “socially acceptable way.”²³⁷ Such children are considered “‘bad’ or delinquent, rather than mentally ill”.²³⁸ Similarly, Black children are more likely than whites to be diagnosed with a second disorder in the spectrum, Oppositional Defiant Disorder,²³⁹ which is characterized by “an ongoing pattern of uncooperative, defiant, and hostile behavior toward authority figures.”²⁴⁰ In contrast, some studies suggest that Black children are *less likely* than whites to be diagnosed with Attention Deficit and Hyperactivity Disorder (“ADHD”), characterized by symptoms of inattention, hyperactivity, or impulsivity and considered to have a biological, rather than environmental basis.²⁴¹ Other studies suggest that, although white healthcare providers are more likely to rate African-American children with *higher* levels of hyperactive or disruptive behaviors than white children, they still fail to diagnose them with ADHD, even when the concerning behaviors are “normal, within the context of cultural expectations.”²⁴² Black children with ADHD are also less likely to receive adequate treatment or to be prescribed psychotropic medication for the condition than white children with ADHD.²⁴³ In short, the stigma of a conduct disorder

²³⁷ *Conduct Disorder*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Aug. 2013), http://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Conduct-Disorder-033.aspx.

²³⁸ *Id.*; see also Fenton, *supra* note 201, at 81, 93–94 (discussing the subjectivity of intellectual and emotional disability classifications).

²³⁹ See Joseph Day, *The Effect of Race on the Diagnosis of Oppositional Defiant Disorder* 1, 19 (Nov. 14, 2000), available at https://www.researchgate.net/publication/36210496_The_Effect_of_Race_on_the_Diagnosis_of_Oppositional_Defiant_Disorder [https://perma.cc/JV79-JYNF] (unpublished M.A. thesis, Governors State University).

²⁴⁰ *Oppositional Defiant Disorder*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (July 2013), http://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-With-Oppositional-Defiant-Disorder-072.aspx.

²⁴¹ See Rahn K. Bailey et al., *Sociocultural Issues in African American and Hispanic Minorities Seeking Care for Attention-Deficit/Hyperactivity Disorder*, 16 PRIMARY CARE COMPANION FOR CNS DISORDERS (2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4318677/?report=printable> [https://perma.cc/86Z3-H4RS] (reporting that African-American children showed more ADHD symptoms than white children but were diagnosed less often, possibly related to parental misconceptions about ADHD and the lack of access to treatment); Clark, *supra* note 236, at 1; see also Rahn Kennedy Bailey & Ejike Kingsley Ofoemezie, *The Impact of Attention Deficit/Hyperactivity Disorder in African-Americans; Current Challenges Associated with Diagnosis and Treatment*, in ATTENTION DEFICIT HYPERACTIVITY DISORDER IN CHILDREN AND ADOLESCENTS 193, 199 (ed. Somnath Banerjee 2013) (finding that African-American families are less likely than white families to have access to the healthcare system and more likely to lack insurance coverage for psychiatric or psychological evaluations, which contributes to fewer diagnoses of ADHD).

²⁴² Bailey & Ofoemezie, *supra* note 241, at 198.

²⁴³ Maddox & Wilson, *supra* note 233, at 148, 150–51. See generally Sophie Trawalter et al., *Racial Bias in Perceptions of Others’ Pain*, 7 PLOS ONE 1 (2012) (finding that physicians underestimate Black patients’ pain more than white patients’ pain, and concluding that people, includ-

diagnosis in legal proceedings, as opposed to a biological-based one, such as ADHD, can influence decision making in a punitive direction, resulting in exclusion from community-based mental health programs, transfer to adult court, or a longer sentence.²⁴⁴ One group of researchers explained: “[T]here is a continued epistemological and linguistic assault on the identities of Black youth and that violence continues through the threads of clinicians’ language, descriptions, and conceptualizations of minority groups when formulating diagnostic pathology.”²⁴⁵

Because a significant percentage of delinquency court cases emanate from school-based incidents and behaviors, a similar dynamic in public schools also impacts juvenile court proceedings.²⁴⁶ As in the court setting, research confirms that students of color of all household income levels experience a disproportionate amount of discipline at school.²⁴⁷ Black students, for instance, are more likely to be referred to the school administration for misbehavior than white students, and the reported behaviors for Black students are more likely to require subjective evaluations (defiance, excessive noise, or disrespectfulness), whereas white students are more typically referred for observable, objective behaviors (smoking, vandalism,

ing medical personnel, assume that Blacks feel less pain than do whites, which is related to the “intergroup empathy gap”).

²⁴⁴ Atkins-Loria et al., *supra* note 233, at 433–34.

²⁴⁵ *Id.* at 438.

²⁴⁶ See ADVANCEMENT PROJECT, TEST, PUNISH, & PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 4–5 (Mar. 2010) (finding that arrests in school represent the most direct route into the juvenile and criminal justice systems); Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273, 275 (2010) (“[S]chools have begun to rely more on police and the juvenile courts to respond to certain school misbehavior.”).

²⁴⁷ See CRENSHAW ET AL., *supra* note 26, at 9–22 (finding, among other things, that in 2011–12 Black girls represented 90% of all girls expelled from N.Y.C. public schools, 56% of all girls disciplined, and they were ten times more likely to be suspended than white girls); RUSSELL J. SKIBA & NATASHA T. WILLIAMS, THE EQUITY PROJECT, ARE BLACK KIDS WORSE? MYTHS AND FACTS ABOUT RACIAL DIFFERENCES IN BEHAVIOR 1–5 (2014) (finding that Black students continue to receive a disproportionate amount of discipline, including number of out-of-school suspensions and expulsions); EDWARD J. SMITH & SHAUN R. HARPER, UNIV. OF PA., CTR. FOR THE STUDY OF RACE & EQUITY IN EDUC., DISPROPORTIONATE IMPACT OF K–12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES 2, 3 (2015) (reporting that minority overrepresentation in school punishment has been well-established by various research); Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, 63 SOC. PROBS. 68, 68 (2016) (confirming that minority students are more likely to be suspended from school than white students); see also ADVANCEMENT PROJECT, *supra* note 246, at 15 & nn.72 & 73 (finding that there is no empirical support for the theory that disparities in school discipline rates can be explained by differences in the behavior of racial groups).

leaving campus without permission).²⁴⁸ When the misbehavior of Black students is a manifestation of an emotional disability, they are more likely than white students to be punished and pushed out of the traditional school setting than to receive counseling or other types of assistance.²⁴⁹

C. Relinquishment of Rights

1. Interactions with the Police

In addition to perpetuating negative stereotypes and validating subjective decision making, racialization profoundly harms children and communities by forcing people of color to choose between their rights—legal, privacy, dignitary—and their safety or security. For youths, this “negotiation” can occur within a variety of contexts, most commonly during interactions with police. As Professors Devon Carbado and Mitu Gulati have explained:

[T]he immediate issue when police treat minorities unfairly isn’t fairness, but the ability to negotiate between a suspect’s sense of self as a rights-bearing person of worth and dignity and the suspect’s sense of what he needs to do to manage the police encounter and to establish that he is neither a criminal nor otherwise dangerous. Engaging in conduct to demonstrate that one is neither dangerous nor a criminal will often compromise one’s rights.²⁵⁰

Yet, even when people of color alter their behavior or relinquish their rights in order to counter negative stereotypes, troubling interactions with police and other authority figures cannot always be prevented.²⁵¹ For instance, when Black youths have interactions with police, they are more likely than white youths to give up a legal right (to remain silent upon arrest or

²⁴⁸ Adam C. Wright, Teachers’ Perceptions of Students’ Disruptive Behavior: The Effect of Racial Congruence and Consequences for School Suspension 5 (Nov. 2015), available at <https://aefpweb.org/sites/default/files/webform/41/Race%20Match,%20Disruptive%20Behavior,%20and%20School%20Suspension.pdf> [<https://perma.cc/SMP5-8ZU7>] (unpublished paper, Department of Economics, University of California, Santa Barbara).

²⁴⁹ Fenton, *supra* note 201, at 81 (quoting Theresa Glennon, *Disabling Ambiguities: Confronting Barriers in the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 325–28 (1993)); see also Bailey & Ofoemezie, *supra* note 241, at 203 (“African-American males make up the majority of students described as ‘emotionally disturbed’ and are more likely to be suspended, expelled from school or subjected to corporal punishment than their white or female peers.”).

²⁵⁰ CARBADO & GULATI, *supra* note 35, at 103.

²⁵¹ This is, of course, an understatement, given the many instances of racially-biased treatment and violence by police against people of color. See generally TA-NEHISI COATES, *BETWEEN THE WORLD & ME* (2015) (demonstrating the many ways in which police brutality is a systemized, ubiquitous threat to Black bodies).

refuse to consent to a search without a warrant), a privacy right (to refuse to provide personal information when randomly stopped), or a dignitary right (to be treated with respect) in an attempt to appear non-threatening and less “Black.”²⁵² Add to the mix a lifelong distrust of law enforcement, and a youth’s determination *not* to arouse a police officer’s suspicion may become even stronger. Many African-American parents and grandparents, particularly of young males, take pains to teach the importance of immediate demonstration of “subservience and respect” when in the presence of a police officer.²⁵³ They also prepare their Black children for police interactions by telling them to pull up their pants, keep their hands out of their pockets, move slowly, carry identification, and do what the officer says.²⁵⁴ In other words, surrender your rights or endanger your life.

The survival instinct that kicks in when a teenager is confronted by law enforcement can be easily overcome, however, by the realities of adolescent brain development, including impulsivity, risk-taking, and emotional outbursts.²⁵⁵ For instance, a Black youth who acts particularly nervous when stopped by a police officer may “cause” the officer to ask to search him.²⁵⁶ The teen, out of a desire to prove his innocence and compensate for his nervousness, may consent to a search even if he possesses illicit materials, because he believes that only people with something to hide would refuse to be searched. Or maybe the youth consents to the search because he

²⁵² See CARBADO & GULATI, *supra* note 35, at 96–97 (“These performances constitute a form of racial labor that is potentially stigmatizing, dignity destroying, and privacy compromising.”).

²⁵³ *Id.* at 103; see also PBS NEWSHOUR, *How Parents Talk to Their African-American Sons About the Police* (Mar. 20, 2015), <http://www.pbs.org/newshour/bb/parents-talk-african-american-sons-police/> [<https://perma.cc/XP8Y-E8BA>] (“It’s maddening. I get so frustrated and angry about having to prepare my kids for something that they’re not responsible for. And these are conversations that people of other races do not have to have with their children.”).

²⁵⁴ See Michael Martinez et al., *Within Black Families, Hard Truths Told to Sons Amid Ferguson Unrest*, CNN (Aug. 21, 2014), <http://www.cnn.com/2014/08/15/living/parenting-Black-sons-ferguson-missouri/> [<https://perma.cc/C56U-TJHA>].

²⁵⁵ See Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1011–15 (2003) (describing adolescents’ deficiencies in decision making, heightened vulnerability to coercion, and unformed character as limitations on their criminal culpability).

²⁵⁶ See Tamar R. Birkhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 WASH. & LEE L. REV. 385, 417–18 (2008) (stating that “[i]t has . . . been shown that teenagers, as a result of lack of confidence and general anxiety during [police] questioning, avoid making eye contact, qualify their statements, respond in monosyllables, and provide nonlinear narratives that are difficult to follow,” all of which are behaviors that investigators are trained to associate with deception); Rebecca Gold, *Perceptions of Search Consent Voluntariness as a Function of Race* 9–10 (2015), available at http://scholarship.claremont.edu/scripps_theses/652/ [<https://perma.cc/6QF3-GK27>] (unpublished senior thesis, Scripps College) (finding that the race of police officers and the person they search affects how that person perceives the search and suggesting that the voluntariness of consent is also affected by race).

does not believe that he has a right to refuse to cooperate. This type of circular reasoning only increases the likelihood that the teenager will make a poorly considered decision—to resist or to run—that could turn what should be a routine encounter into a deadly one.

2. In Juvenile Court and School

This form of “racial labor”²⁵⁷ can also occur in the juvenile system when Black youths are interacting with judges, probation officers, and even their own lawyers.²⁵⁸ For instance, when youths of color appear in court, they not only regularly abandon their dignitary and privacy rights in order to demonstrate that they are “good Blacks” but their legal rights as well. When the success of a particular defense relies upon the juvenile to take the stand and testify, such as in self-defense, entrapment, or conspiracy, a Black youth will likely consider very different factors than a white youth when deciding whether to go forward with a contested hearing. For instance, fear of taking the stand and answering questions in a hostile forum or disbelief that the judge will objectively evaluate their testimony as a result of their race may be the driving factor in a Black youth’s decision to waive the right to an adversarial hearing and admit to the charge.²⁵⁹ Likewise, delinquency court norms place particular significance on the sincerity of the juvenile’s expression of remorse (with judges regularly directing the juvenile to turn and face the victim in the courtroom and “tell them you’re sorry”), but this

²⁵⁷ CARBADO & GULATI, *supra* note 35, at 96–97 (describing the incentive for African Americans to “work their identities” and give up some rights and dignity to defy racial stereotypes in their interactions with police officers).

²⁵⁸ See Elyce Zenoff Ferster et al., *The Juvenile Justice System: In Search of the Role of Counsel*, 39 *FORDHAM L. REV.* 375, 387–88 (1971) (discussing a study of lawyers’ attitudes in a public defender office, which found that attorneys would advise their juvenile clients to invoke the privilege against self-incrimination based on several factors including whether “the defender believes that the juvenile is a ‘good kid’ or a ‘bad kid’”); Richardson & Goff, *supra* note 193, at 2636–38 (finding that when defense attorneys make biased judgments about client credibility during the initial meeting, they may irrationally question their client’s version of events and as a result decide not to pursue investigative leads or file motions challenging the government’s evidence).

²⁵⁹ See RANDY HERTZ ET AL., *TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES* 326 (2015) (discussing situations in which the juvenile is agreeing to plea “only with considerable reluctance” or when the juvenile is “unable to cope with the nervous stress that attends a trial”); Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 *WAKE FOREST L. REV.* 553, 574 (discussing juvenile court and “judges’ tendency to credit police officers even when their accounts seem highly dubious” and to be “unduly skeptical of the testimony of the accused”).

too may be cause for heightened anxiety or embarrassment for a child of color, whose sincerity may not be fairly judged because of his race.²⁶⁰

In the school setting there also is pressure to surrender one's rights in order to counter or at least dissipate negative racial stereotypes, including the right to speak, ask questions, and interact with their peers—in essence, the right to learn. Black students, particularly when in the minority, may avoid class participation as well as mere engagement with the material so as not to draw attention to themselves and risk negative feedback or ridicule, whether from white students or teachers.²⁶¹ The phenomenon of “stereotype threat,” as defined by social psychologist Claude M. Steele, is the risk of confirming, as a self-characteristic, a negative culturally shared stereotype about one's group, and finding that this “predicament” disrupts the performance of individuals who identify with that group.²⁶² Therefore, Black students may choose not to play “Black” sports like basketball or football and opt for the cross-country or lacrosse team instead.²⁶³ They may refuse to participate in extracurricular activities and disengage completely from peers out of fear that they cannot effectively adhere to white norms of respectability.²⁶⁴ If there is a critical mass of Black students at a school, this group may retreat from the school community in other ways. They may cluster together in the hallway, on the playground, or at the same table in the cafeteria, assuming an “oppositional stance” as protection from potential racism and to keep the dominant (white) group at a distance.²⁶⁵ Similarly, Black youths may underperform academically for reasons unrelated to ability, such as associating studying and academic success with “acting white” or with compliance with the majority culture, norms they may have been socialized to reject.²⁶⁶

²⁶⁰ See Duncan, *supra* note 11, at 1473 (challenging the law's view of remorse as an emotional state that “decent” people—regardless of age—demonstrate after committing a heinous offense, and explaining that for developmental reasons, adolescents “may show less grief than the system demands”).

²⁶¹ See TATUM, *supra* note 41, at 58–59 (providing a few examples of students who received negative feedback from teachers based on stereotypes associated with being Black).

²⁶² Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995); see also Nalini Ambady et al., *Stereotype Susceptibility in Children: Effects of Identity Activation on Quantitative Performance*, 12 PSYCHOL. SCI. 385, 388–89 (2001) (finding that children are affected by stereotype threat in the similar ways as adults).

²⁶³ TATUM, *supra* note 41, at 63.

²⁶⁴ *Id.* at 59–60.

²⁶⁵ *Id.* at 60; see also DONNA Y. FORD, REVERSING UNDERACHIEVEMENT AMONG GIFTED BLACK STUDENTS 173 (2d ed. 2010) (explaining that Black students may have a particularly strong need to bond with others with similar concerns, and that, when confronted with racism, they may develop an oppositional social identity).

²⁶⁶ TATUM, *supra* note 41, at 62–64; see also Carla O'Connor et al., *The Meaning of “Blackness”: How Black Students Differentially Align Race and Achievement Across Time and Space*, in

In each of these settings, pressures come to bear on Black youths as a result of negative stereotypes as well as the “adultification” of children of color. Empirical studies have recently shown that whites routinely perceive Black children and adolescents to be older than their actual age. For instance, a study released in 2014 found that “Black boys are seen as older and more responsible for their actions relative to White boys.” and are “less likely to be afforded the full essence of childhood” than their white peers.²⁶⁷ The authors suggest that this phenomenon results from the dehumanization of Black children, which allows white people to perceive them as not needing basic protections and leaves them vulnerable to the harshest treatment and punishments typically reserved for adults.²⁶⁸ The findings suggest that “although most children are allowed to be innocent until adulthood, Black children may be perceived as innocent only until deemed suspicious.”²⁶⁹ In this way, the research helps crystalize the extent of the harm to young people when racialization perpetuates negative stereotypes, encourages biased decision making, and compromises a child’s sense of herself and her legal rights.

In addition to causing harm to the individual child, the racialization of juvenile justice exposes a critical tension between two very different models of criminal defense, as discussed in the next Part.

III. THE ROLE OF THE DEFENSE ATTORNEY

Until the Court decided *In re Gault* in 1967, criminal defense attorneys had a minimal role in juvenile court cases, as few juveniles had their own lawyers.²⁷⁰ The prevailing view was that children did not need representation because juvenile court was a non-adversarial treatment court, and counsel would “seriously hamper” the process.²⁷¹ Many judges also explicitly discouraged juveniles and their parents from retaining counsel, as they

CONTESTING STEREOTYPES AND CREATING IDENTITIES: SOCIAL CATEGORIES, SOCIAL IDENTITIES, AND EDUCATIONAL PARTICIPATION 183, 185 (Andrew J. Fuligni ed., 2007) (noting that Black students may have a notion that schooling is the “province of white Americans and threatens their own cultural identity”); John A. Powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 U.S.F. L. REV. 419, 432 & n.59 (2000) (citing Signithia Fordham and Ogbu’s study that Black students may deliberately under-perform to disassociate themselves with perceived whiteness of academic excellence).

²⁶⁷ Phillip Attiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 539 (2014).

²⁶⁸ *Id.* at 527.

²⁶⁹ *Id.* at 529, 541.

²⁷⁰ David R. Barrett et al., Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 796 (1966) (“In most of the [juvenile] courts studied, attorneys appear for the juveniles in no more than five per cent of the cases.”).

²⁷¹ *Id.*

believed that the presence of a defense lawyer would likely thwart the court's "'childsaving' [sic] mission" and the judge's otherwise unbridled discretion.²⁷² In addition, many families of children appearing in juvenile court were of limited means and simply could not afford to hire attorneys, because there was no constitutional right to the appointment of counsel for the indigent pre-*Gault*.²⁷³

One of the most significant changes from the pre- to post-*Gault* era was the shift in the defense lawyer's role vis-à-vis her young client.²⁷⁴ Pre-*Gault*, defense attorneys assumed a similar orientation toward the youth as did the judge, probation officer, and other social services personnel—to act in the "best interests of the child."²⁷⁵ This approach was consistent with the traditional court's focus on the history and circumstances of the child's life rather than the specific offense charged, because the court's goal was to diagnose and prescribe a "cure" for each delinquent child, regardless of the seriousness of the case itself.²⁷⁶ In 1966, the attorney's role pre-*Gault* was described this way: "He is not to utilize 'technical objections' to obtain a finding of no delinquency. Rather he is to act as the servant of the court in the process of *ascertaining the truth*—a function that seems to entail actively encouraging his client to confess."²⁷⁷

Although *Gault* was not explicit about the role of counsel in delinquency matters, the decision did signal a change from a single-minded emphasis on the moral and emotional needs of the child (often without concern for whether the youth had, in fact, committed the offense) to ensuring that the child's rights were protected.²⁷⁸ The *Gault* majority stated:

²⁷² See Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1192 (1989) (describing the hostility of juvenile court judges to attorneys in delinquency proceedings).

²⁷³ See David L. Skoler, *The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings*, 43 IND. L.J. 558, 575 (1968) (estimating the rate of indigency in juvenile court cases and suggesting that 50% of those appearing in juvenile court would qualify for appointment of counsel).

²⁷⁴ See Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 246–47, 250 (2005) (describing *Gault*'s guarantee of juveniles' right to counsel, as well as the resulting ambiguities as to the role of the juvenile's lawyer in delinquency cases).

²⁷⁵ *Id.* at 246–47.

²⁷⁶ See Jacqueline L. Bullard, "Whose Side Are You on Anyway?": *Best Interest Versus Expressed Interest Representation of Minors in Delinquency Court*, in PROMISE UNFULFILLED: JUVENILE JUSTICE IN AMERICA 105, 109 (Cathryn Crawford ed., 2012) (utilizing a model of representation based in the original rehabilitative goals of the juvenile court).

²⁷⁷ Barrett et al., *supra* note 270, at 797 (emphasis added).

²⁷⁸ See Bullard, *supra* note 276, at 108–09 (describing the shifting models of representation post-*Gault*); Ferster et al., *supra* note 258, at 385–86 (discussing the development of juvenile

The juvenile [requires] the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child “requires the guiding hand of counsel at every step in the proceedings against him.”²⁷⁹

Post-*Gault*, with the judge’s newfound focus on determining the child’s legal guilt or innocence, defense attorneys were expected to assume a zealous and client-directed role more akin to that of an adult’s criminal defense lawyer.²⁸⁰ The attorney’s new role was to act as the state’s adversary or in juvenile court parlance, to act in accordance with “the expressed interests of the child” or what the child states to be her objectives.²⁸¹ Nonetheless, best-interest advocacy continues to persist in many juvenile courts in the United States today²⁸² despite consensus among professional organizations and legal scholars that the appropriate role for counsel in delinquency cases is as an expressed-interest advocate.²⁸³

The credo of expressed-interest lawyering, however, does not provide a clear answer to the question of the propriety of adopting racialized rhetoric when defending juveniles. This Part considers the ethical rules relevant to this dilemma, the application of those rules to the juvenile court context, and strategies for finding an answer to the question that is sustainable, if not ideal.

attorneys’ role post-*Gault* to include protection of the juvenile’s rights, with different interpretations of what this entails).

²⁷⁹ *In re Gault*, 387 U.S. 1, 36–37 (1967) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

²⁸⁰ Henning, *supra* note 274, at 246; *see also In re Winship*, 397 U.S. 358, 359, 368 (1970) (holding that “proof beyond a reasonable doubt is among the ‘essentials of due process and fair treatment’ required during the adjudicatory stage” of a juvenile case).

²⁸¹ Henning, *supra* note 274, at 246.

²⁸² *Id.* at 257 (“[I]t is clear that the expressed-interest zealous advocate model is far from uniform in practice throughout the country.”).

²⁸³ *See, e.g., IJA-ABA JOINT COMM. ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 3.1(a)* (1980) (providing that “the lawyer’s principal duty is the representation of the client’s legitimate interests”); Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 86 (1984) (stating that the rights that *Gault* gave to juveniles “would be rendered illusory if the child were not given the power to direct his own counsel”); 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, 295 (2003) (arguing that the different views of counsel’s role in juvenile court are misleading because “zealous advocacy is in the child’s best interests” (emphasis added)); *see also Birkhead, supra* note 197, at 967–68 (describing the development of zealous representation or expressed-interest representation as the current standard of delinquency lawyering).

A. Zealous Representation vs. Social Costs

1. The Parameters of the Debate

The forgoing emphasis on the harm engendered by racialization may seem to imply that the practice should always be avoided. Yet the questions posed in the Introduction remain: Is it an ethical violation to utilize a strategy that benefits one's client but implicitly harms the broader community? What if the decision has the potential to harm one's other clients? In the alternative, does the duty of zealous representation *require* utilization of the strategic approach that is the most beneficial for each individual client, regardless of its impact on others? Two decades ago, Professors Anthony Alfieri and Abbe Smith engaged in a dialogue related to these questions that continues to resonate today.²⁸⁴

In a series of three articles, Professor Anthony Alfieri argued that "race-talk," which he defined as the "colorblind and color-coded narratives heard in courtrooms and law offices," may "appear facially neutral but inflict[s] invidious injury."²⁸⁵ For illustration, he discussed the strategy used by defense attorneys on behalf of two African-American men who were charged with participating in riots following the acquittal of police officers on allegations of brutally beating Rodney King in 1992.²⁸⁶ Alfieri condemned the lawyers' use of "deviance and defiance narratives," in which some young Black males are portrayed as "bad," meaning predatory and controlled by bestial instincts, whereas others are "good," meaning law-

²⁸⁴ Compare Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1304 (1998) [hereinafter Alfieri, *Race Trials*] (arguing against defense attorneys who "acknowledge and exploit racialized norms to advance the chosen purposes of representation"); and Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063, 1066 (1997) [hereinafter Alfieri, *Lynching Ethics*] (calling for remedial regulation that directs criminal defense lawyers to "reject the use of deviance-based racialized strategies unless such strategies are necessary to frustrate, by means of jury nullification, a racially discriminatory prosecution"), and Alfieri, *supra* note 45, at 1306 (arguing that "criminal defense lawyers representing Black males in cases of racially-motivated private violence bear a race-conscious responsibility to forgo narratives or stories that construct racial identity in terms of individual, group, or community deviance"), with Smith, *supra* note 46, at 1591 (arguing that "Alfieri's project is wrong-headed and regressive as a matter of both practice and theory" and that he is "joining forces with those who care least about the least among us: the poor, the Black, the accused, and the imprisoned").

²⁸⁵ Alfieri, *supra* note 45, at 1303. In this Article's discussion of these issues, the author uses Alfieri's term, "race-talk," in a manner that is consistent with his definition.

²⁸⁶ *Id.* at 1301–04 (describing the defenses utilized, "mistaken identity" and "diminished capacity under a 'group contagion' theory of mob violence," in order to investigate "race-talk" in criminal defense advocacy); see also *The Rodney King Riots Erupt in Los Angeles*, ASSOCIATED PRESS (Apr. 29, 1992), available at http://www.aaregistry.org/historic_events/view/rodney-king-riots-erupt-los-angeles [https://perma.cc/AN9Y-25FN] (describing the large-scale urban race riot).

abiding and rational.²⁸⁷ He rejected the defense teams' decision to characterize their clients as deviant and having "diminished capacity"²⁸⁸ to resist the "contagion" of violent group behavior that occurred in South Central Los Angeles.²⁸⁹ He depicted their strategy as illustrating "the tendency in criminal defense advocacy to *pathologize* racial difference."²⁹⁰ Alfieri defined the harm of such advocacy as "demonizing" and "subordinat[ing]" Black males and "falsify[ing Black] experience."²⁹¹ He argued that in the context of criminal prosecutions of private acts of violence motivated by racial difference (Black on white or white on Black), criminal defense attorneys have a "race-conscious responsibility to forego" any and all narratives that "construct racial identity in terms of individual, group, or community deviance."²⁹² This is Alfieri's "strong" version of the defense attorney's obligation to the community, which differs in part from his alternate "weak" version in which "lawyers abide by a *lesser obligation* to inform clients of their reservations concerning the use of racialized narratives and urge them to consider through character and community deliberation the impact that such narratives may have on their communities."²⁹³ In other words, according to Alfieri, the criminal defense lawyer must choose one of these two approaches to demonstrate her "commitment to a collective, race-conscious conversation."²⁹⁴ If, instead, the lawyer makes a deliberate choice, with or without client consultation, to use a racialized narrative, the lawyer has exposed herself to ethical as well as moral scrutiny.²⁹⁵ In this instance, consciously using "race-talk" is akin to "deny[ing], exploit[ing], and ultimately demean[ing] race in the name of advocacy."²⁹⁶

In response, Professor Abbe Smith contended that in the grand scheme of the criminal justice system, defense attorneys have the least power and remain the most under-valued and under-resourced, making them ill-equipped to take on these additional burdens.²⁹⁷ She argued that the crimi-

²⁸⁷ Alfieri, *supra* note 45, at 1304, 1309.

²⁸⁸ See *Diminished Capacity*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the term as "an impaired mental condition . . . that is caused by intoxication, trauma, or disease and that prevents a person from having the mental state necessary to be held responsible for a crime").

²⁸⁹ Alfieri, *supra* note 45, at 1311, 1323–24 (arguing that this "privileging of a narrative of racial deviance," perpetuates this stigmatizing narrative throughout the Black community).

²⁹⁰ *Id.* at 1312.

²⁹¹ *Id.* at 1332, 1334.

²⁹² *Id.* at 1303, 1306.

²⁹³ *Id.* at 1338 (emphasis added).

²⁹⁴ *Id.* at 1339.

²⁹⁵ Ahmad, *supra* note 47, at 122 (discussing the ethical debate between Professors Alfieri and Smith).

²⁹⁶ Alfieri, *supra* note 45, at 1342.

²⁹⁷ Smith, *supra* note 46, at 1587–91.

nal lawyer's sole responsibility is to provide zealous advocacy to her client, not to protect the community either by wholly rejecting these narratives or by urging her clients to consider the negative impact on their communities.²⁹⁸ She characterized Alfieri's theory as fitting the mold of "emerging neo-conservatism in legal ethics" that focuses on tearing down criminal defense lawyering and expressing hostility toward the adversarial system.²⁹⁹ She agreed that high publicity cases have the potential to impact how the broader community thinks about race and to reinforce prejudices, but that no "real, tangible harm" results from race-talk by defense lawyers.³⁰⁰ Smith concluded by observing that because racism exists in every aspect of the criminal justice system, under Alfieri's ethical analysis, *every* defense story would be considered a racialized narrative, thereby thwarting the practice of criminal defense.³⁰¹

The way in which these two scholars framed the debate invites further examination of the role of the juvenile defender³⁰² although first there are several distinctions that must be acknowledged. The dialogue between Professors Alfieri and Smith seems, at least on paper, to be cabined by their emphasis on rhetorical strategies used by defense lawyers³⁰³ and does not consider the related question: whether judges, prosecutors, and other court actors as well as legislators and the media at large have their own obligations to refrain from exploiting "race-talk." Similarly, Alfieri explicitly limited his argument to high-profile cases of racially motivated private violence,³⁰⁴ without examining racialization as it has been and continues to be used throughout the juvenile justice system—in all types of cases, by all categories of people, regardless of the offense charged.³⁰⁵

Yet, even with these differences in mind, there are helpful analogies that can be made using the contrasting positions of Alfieri and Smith as touchstones. Although it is a fact that seems of little relevance today, the

²⁹⁸ *Id.* at 1589–91, 1595 n.56; Alfieri, *supra* note 45, at 1338 (discussing the "strong" and "weak" versions of race-conscious responsibility that criminal defense lawyers have in their legal storytelling).

²⁹⁹ Smith, *supra* note 46, at 1591–93.

³⁰⁰ *Id.* at 1597–99.

³⁰¹ *Id.* at 1601–02.

³⁰² See *supra* notes 284–301 and accompanying text (describing the debate between Professors Alfieri and Smith regarding the use of race-talk by criminal defense attorneys in defense of their clients).

³⁰³ See Alfieri, *supra* note 45, at 1304; Smith, *supra* note 46, at 1587–91.

³⁰⁴ See, e.g., Alfieri, *supra* note 45, at 1302 ("[I] explore the form and substance of the Williams and Watson legal teams' diminished capacity defense.").

³⁰⁵ See *supra* notes 185–269 and accompanying text (describing the various ways in which the juvenile justice system racializes children in the perpetuation of negative stereotypes, race-based decision making, and the relinquishment of black children's rights).

adversarial criminal trial is of recent historical origin. Before the eighteenth century, prisoners were denied the right to counsel, to subpoena and depose witnesses, and to notice of charges.³⁰⁶ It was not until the nineteenth century that prisoners were routinely allowed representation and the right to challenge the state's evidence.³⁰⁷ This symbolized a radical shift from the inquisitorial system, in which the parties played a less direct role and a neutral magistrate objectively undertook the task of managing the evidence in order to ascertain the truth.³⁰⁸ Some of the same tensions that exist between the adversarial and inquisitorial systems may be seen today in the dynamic between expressed-interest and best-interest advocacy in delinquency court: in both pairs, the former requires zealous, passionate representation by the lawyer for the accused, and the latter relies on the judge to define the scope and the extent of the inquiry.³⁰⁹ Likewise, the former is premised on the belief that the best way to ascertain the truth is to allow adversaries to try to prove their competing version of the facts, and the latter relies on neutral parties to embark on an objective quest for the truth.³¹⁰

A further analogy can be made to the tensions that arise when considering different "modes of persuasion and the centrality of narrative."³¹¹ Alfieri's approach to persuasive narrative is consistent with the philosophies that undergird the inquisitorial system and best-interest advocacy, with all three purporting to reject a "deformed adversarial environment"³¹² that "by its nature, is competitive, antagonistic, and frequently destructive."³¹³ Likewise, all three embrace contextual analysis that yearns for "authenticity" and strives to achieve "an actual or absolute sense of truth."³¹⁴ In con-

³⁰⁶ JOHN HOSTETTLER, *FIGHTING FOR JUSTICE: THE HISTORY AND ORIGINS OF ADVERSARY TRIAL* 11 (2006).

³⁰⁷ *Id.* at 17.

³⁰⁸ *See id.*; Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1088–90 (1975) (discussing the role of the magistrate and the parties in an inquisitorial system).

³⁰⁹ *See Inquisitorial System*, BLACK'S LAW DICTIONARY (10th ed. 2014) (describing how the presence of this tension in the juvenile justice system has resulted in a "culture clash"); Birkhead, *supra* note 197, at 964; *see also supra* notes 274–283 and accompanying text (discussing best-interest vs. expressed-interest advocacy in juvenile court).

³¹⁰ Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 914, 929 (2011/12) (discussing the differences between adversarial and inquisitorial justice systems).

³¹¹ Ahmad, *supra* note 47, at 122.

³¹² Alfieri, *Race Trials*, *supra* note 284, at 1335–36.

³¹³ *Id.* at 1335 (quoting Peter Goodrich, *Law in the Courts of Love: Andreas Capellanus and the Judgments of Love*, 48 STAN. L. REV. 633, 675 (1996)).

³¹⁴ *Id.* at 1336; *see also* Findley, *supra* note 310, at 929–35 (discussing the features of adversarial and inquisitorial systems).

trast, Smith's perspective is directly in line with the fervor that drives expressed-interest advocacy and the adversarial model:

[E]specially in these angry times, there is all the more need for passion on behalf of the accused. There is all the more need for the kind of fierce devotion that the best defenders afford their clients. Without this kind of passion and devotion, an accused might as well have no lawyer at all.³¹⁵

In other words, Smith refused to allow for any considerations, ethical or otherwise, to compromise the defense attorney's single-minded allegiance to her client—or even to give the appearance of compromise.

2. The Ethical Rules

With each of the two opposing groups of categories,³¹⁶ there is a shared orientation toward the rules of professional ethics, reflected by Smith's invocation³¹⁷ and Alfieri's rejection of them.³¹⁸ Although the rules can be interpreted to provide at least some support for both views, there is more explicit support for Smith's position. The Model Rules of Professional Conduct ("MRPC"), for instance, emphasize the lawyer's duty to "zealously assert[] the client's position *under the rules of the adversary system*," a clear reinforcement of the duty of unmitigated loyalty to one's client.³¹⁹ The MRPC also recognize that "a lawyer can be a zealous advocate on behalf of a client and *at the same time assume* that justice is being done," by upholding "legal process"³²⁰ This suggests that as long as a defense attorney provides rigorous representation to her client within the bounds of the law, her ethical obligations are complete; she need not take any additional steps to achieve justice. Similarly, the ABA standards for defense attorneys explicitly state that defense counsel's "*primary duties . . . are to serve as the ac-*

³¹⁵ Smith, *supra* note 46, at 1600–01.

³¹⁶ See *supra* notes 309–315 and accompanying text (referring to one group as comprising the inquisitorial system, best-interest advocacy, and Alfieri's position, and the other group as comprising the adversarial system, expressed-interest advocacy, and Smith's position).

³¹⁷ Smith, *supra* note 46, at 1589 n.26 (citing MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 1997) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.") and MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (AM. BAR ASS'N 1969) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law")).

³¹⁸ Alfieri, *Lynching Ethics*, *supra* note 284, at 1066 (contending that the American Bar Association's Model Rules of Professional Conduct and Model Code of Professional Responsibility allow "racialized or color-coded criminal defense strategies to survive unregulated").

³¹⁹ MODEL RULES OF PROF'L CONDUCT pmb. § 2 (AM. BAR ASS'N 2016) (emphasis added).

³²⁰ *Id.* at pmb. §§ 5, 8 (emphasis added).

cused's counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, quality representation."³²¹ Perhaps most explicitly, the Model Code of Professional Responsibility ("MCPR") states: "In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is *ultimately for the client and not for himself*."³²² In short, consistent with Smith's position, the ethical rules give defense attorneys the freedom, in consultation with the client, to craft persuasive narratives that "draw upon prevailing norms and beliefs, no matter how problematic they may be."³²³

On the other hand, the MCPR also states that "[i]n assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is *morally just as well as legally permissible*."³²⁴ Similarly, the MRPC recognizes that a lawyer's professional judgment is determined *not only* by law but by "other considerations such as moral, economic, social and political factors."³²⁵ Comments to the MRPC add that "[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."³²⁶ Nevertheless, these considerations or factors must "be relevant to *the client's* situation."³²⁷ Whether harm to the community can be said to come under the rubric of "the client's situation" is arguable. The MCPR states that, although a lawyer's devotion to one's client does not detract from "concurrent obligations" to treat others "with consideration" and "avoid the infliction of needless harm," such consideration is limited to third parties who are "*involved in the legal process*."³²⁸ Whether the client's community can be said to be "involved in the legal process" is also arguable. Thus, interpreting the formal rules in the light most favorable to Alfieri, it can be said that, although they

³²¹ STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION, Standard 4-1.2(b) (AM. BAR ASS'N, 4th ed. 2015) (emphasis added) (approved, but published online only), http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition-TableofContents.html [<https://perma.cc/27AE-F6GF>].

³²² MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (AM. BAR ASS'N 1983) (emphasis added).

³²³ Ahmad, *supra* note 47, at 122.

³²⁴ MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (AM. BAR ASS'N 1983) (emphasis added).

³²⁵ MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2016).

³²⁶ *Id.* at cmt. 2.

³²⁷ *Id.* at r. 2.1 (emphasis added).

³²⁸ MODEL CODE OF PROF'L RESPONSIBILITY EC 7-10 (AM. BAR ASS'N 1983) (emphasis added).

do not *mandate* that a lawyer forgo “race-talk,” they do *encourage* a lawyer to consider a narrative’s broader impact upon their community.

B. Beyond the Ethical Rules

1. The Juvenile Court Context

Although there is value in the arguments of both Professors Alfieri and Smith, the open question is how best to approach the quandary as an attorney defending youths in juvenile court. As argued earlier, there is a legacy of racialized juvenile justice in the United States.³²⁹ Racialized language, expressed explicitly or implicitly via facially race-neutral labels, is not benign.³³⁰ Whether it is used in a case that is covered closely by the press or in a courtroom that is closed to the public, it is harmful. For two hundred years, racialization within the juvenile justice system has caused and continues to cause actual and sustained damage to individual children and their families, and it compromises the values of an egalitarian society.³³¹ Professor Alfieri contended that the use of denigrating racialized narratives by criminal defense attorneys is always problematic and should be avoided.³³² Professor Smith conceded that defense strategies in high-profile cases can indeed “influence public opinion and discourse” and thus potentially hurt the community, but she maintained that the decision to use race talk is a matter of “individual client conscience, not legal ethics.”³³³ She also distinguished these cases from the bread and butter matters that comprise the bulk of the criminal court docket.³³⁴

Because the focus here is on the juvenile court, a forum populated by children, adolescents and their families, the problem should be parsed somewhat differently. As the U.S. Supreme Court recognized in *Roper v. Simmons* in 2005, juveniles are different developmentally, intellectually, and socially from adult offenders: they are comparatively immature, vulnerable to outside pressures, and in a perpetual state of transition, with their characters and personalities in flux.³³⁵ Therefore, when a lawyer adopts a defense

³²⁹ See *supra* notes 51–184 and accompanying text (describing the history of race in the juvenile justice system over the past two hundred years).

³³⁰ See *supra* notes 185–269 and accompanying text (describing the abstract and concrete harms caused by the racialization of Black youth in the juvenile justice system).

³³¹ See *supra* notes 185–269 and accompanying text (describing the social, political, and legal inequities resulting from the racialization of the juvenile justice system).

³³² See *supra* notes 285–296 and accompanying text (describing Professor Alfieri’s articles arguing against the exploitative use of “race-talk” by defense attorneys).

³³³ Smith, *supra* note 46, at 1596.

³³⁴ *Id.* at 1596 & n.58.

³³⁵ *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

strategy that requires portraying people of color as deviant or predatory, the potential damage to the youth's self-image may be profound. It can even be said that, because of adolescents' greater vulnerability to the phenomenon of "stereotype threat," resulting at least in part from the plasticity of the adolescent brain, such acts of racialization are especially harmful.³³⁶ Yet, a juvenile defender's conclusion that a rhetorical strategy causes harm, whether to the individual child or the community, does not justify Alfieri's blanket prohibition of that strategy *for all cases and clients*—but neither does it justify Smith's insistence that as long as the strategy advances the client's objectives, little or no attention need be paid to the nature of the harm perpetuated by defense counsel. In short, the dichotomy between *never* using racialized rhetoric and *always* using it when it helps strategically is a false one.

2. Finding a Middle Ground

Particularly because of the unique challenges of defending adolescents,³³⁷ an alternative, or middle ground, must be found. It may be inferred from the ethical rules that the juvenile defense attorney has an ethical obligation, as well as a moral one, to make a deliberate decision whether to use such rhetoric, rather than doing so impulsively or without regard for the resulting harm. The attorney also has an ethical duty to be a zealous advocate, but this does not require that defense attorneys *always* use whatever rhetorical approach is most "strategic," which can itself be a subjective determination. Although ethical rules clearly instruct that strategic decisions are ultimately for the lawyer and not the client,³³⁸ the decision of whether to

³³⁶ See *supra* notes 261–266 and accompanying text (discussing "stereotype threat"); see also James R. Andretta et al., *A Study on the Psychometric Properties of Connors Comprehensive Behavior Rating Scales-Self Report Scores in African Americans with Juvenile Court Contact*, 14 J. FORENSIC PSYCHOL. PRAC. 1, 18 (2014) (suggesting that it would be worthwhile to study the impact of "stereotype threat" on the incidence of mental disorders of African-American youth with juvenile court encounters); Samantha Buckingham, *A Tale of Two Systems: How Schools and Juvenile Courts Are Failing Students*, 13 U. MD. L.J. RACE RELIGION GENDER & CLASS 179, 190 (2013) (discussing an instance of stereotype and labeling threat that a young Latino defendant faced in juvenile court); Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 651–52 (2016) (noting that when children are referred to delinquency court or punished disproportionately in school based on structural racism, the sense of unfairness that they experience threatens their potential for achievement).

³³⁷ See *supra* notes 335–336 and accompanying text (describing the Supreme Court's understanding that juveniles are fundamentally different than adults to justify why juvenile defense attorneys must treat them differently).

³³⁸ See MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2016) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

utilize the narrative should result from a process that respects the lawyer's commitment to zealous advocacy as well as the client's autonomy. Yet, balancing these obligations is admittedly complicated when one's client is a child who may lack the intellectual and emotional wherewithal to weigh the nuanced pros and cons of deploying racialized rhetoric.³³⁹ It may also be complicated by the fact that *the very act of raising the topic* of the potential harm to the community of a certain strategy may itself place pressure on the client to make a decision that is against her interests.³⁴⁰ Likewise, it may cause the client to question the defense attorney's own allegiance to her and to her case.

Several legal scholars, Professor Kristin Henning prominent among them, have offered an approach to navigating these waters. They have argued that decisions in juvenile cases be made only after weighing all the factors, discussing with one's client all the options in the context of the theory of the case,³⁴¹ and maintaining fidelity to the client's goals.³⁴² As part of this organic process, the juvenile defender must carefully take into account "moral, economic, social, and political factors," but only to the extent that they are relevant to the client and her situation.³⁴³ Because developmental

³³⁹ See *Roper*, 543 U.S. at 569–70 (describing the developmental, intellectual, and social differences of juveniles from adults).

³⁴⁰ See Jean R. Sternlight & Jennifer Robbenolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 530 (2008) (warning that when an attorney asks for a client's opinion in a case, "even if an attorney has the goal of letting clients make their own decisions, it will be virtually impossible . . . not to influence their clients' decisions by framing the choices in one way or another"). For a discussion of suggestibility phenomenon in children's responses in criminal investigations, see Tara Urs, *Can the Child Welfare System Protect Children Without Believing What They Say?*, 38 N.Y.U. REV. L. & SOC. CHANGE 305, 322–25 (2014) (suggesting that repeated asking, wording of a question, or subtle verbal/nonverbal cues can lead to false responses from a child; these concerns may be applicable in the context of asking a child to consider a decision's long-term consequences to the community as well).

³⁴¹ See Miller, *supra* note 20, at 487–88 (discussing the way in which case theory links the "case" to the "client's experience of the world," as it "serves as a lens for shaping reality, in light of the law, to explain the facts, relationships, and circumstances of the client" so as to achieve the client's goals); *supra* notes 278–283 and accompanying text (describing the post-*Gault* shift toward a more client-centered model of representation).

³⁴² See, e.g., Henning, *supra* note 274, at 322–24 (endorsing a collaborative model of advocacy in which defense lawyers educate their young clients on the short- and long-term consequences of case-related decisions, lead the youth through the pros and cons of each option, and attempt to enhance the youth's decision-making skills).

³⁴³ MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2016). Nevertheless, if the lawyer's own sense of moral repugnance is so intense that she cannot meet her professional obligation to her client, she must withdraw. See *id.* at r. 1.7(b) (limiting the exception to MRPC 1.7(b), requiring that, "the lawyer reasonably believe[] that the lawyer will be able to provide competent and diligent representation to each affected client"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32(2)(b) (AM. LAW INST. 2000) (stating that "a lawyer . . . must withdraw

factors may affect the attorney-client dynamic, the lawyer must cultivate strategies to make the process of interviewing, counseling, and decision making with juvenile clients more effective.³⁴⁴ She must patiently explain the rationale for her use or rejection of racialized rhetoric in the client's case.³⁴⁵ The lawyer must be candid about the fact that the use of the language could result in perpetuating stereotypes, facilitating subjective decision making, and encouraging the relinquishment of one's rights.³⁴⁶ She should provide her client with examples of each of these potential harms so that the discussion is concrete and not abstract. In these conversations, the lawyer should structure the options in a way that does not implicitly lead the client toward one over the other. The lawyer should also be open to the possibility that her client will persuade her to change *her own* mind. In addition, the lawyer and client may be able to find a strategic *alternative to "race-talk"* that will be equally or more effective, thereby enabling the defense attorney to "win" for her client as well as "protect" the community and remain in compliance with the ethical rules.³⁴⁷ In other words, in the spirit of *collaboration* the lawyer should aspire, while recognizing the many

from the representation of a client if . . . the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client"); MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(A) (AM. BAR ASS'N 1980) ("[A] lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own . . . personal interests.").

³⁴⁴ Henning, *supra* note 274, at 321.

³⁴⁵ See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (AM. BAR ASS'N 1983) (describing the guidance that the decision to forgo certain methods is ultimately up to the client to decide). The challenges and difficulties inherent in accomplishing this objective, particularly given the developmental status of juvenile clients, cannot be over-emphasized. Nevertheless, there are excellent resources available for the juvenile defense attorney who is committed to creating a supportive counseling atmosphere and to developing a positive relationship with the client. See, e.g., HERTZ ET AL., *supra* note 259, at 115–29 (2015) (discussing strategies for interviewing juvenile clients, including ways in which to put the client at ease and establish a relationship of trust and explain the attorney-client relationship); Henning, *supra* note 274, at 317–22 (recommending strategies for achieving a balance between advice and client autonomy); Kimberly A. Thomas, *Sentencing: Where Case Theory and the Client Meet*, 15 CLINICAL L. REV. 187, 201–04 (2008) (discussing the importance of client autonomy and decision making in developing case theory).

³⁴⁶ See Miller, *supra* note 20, at 563–67 (presenting a vision of case theory that provides a framework for achieving true collaboration between client and lawyer, rather than a dynamic that focuses merely on who decides which procedural mechanism to pursue in the case, e.g., negotiation, plea, or trial).

³⁴⁷ See MODEL RULES OF PROF'L CONDUCT r. 1.1 cmts. 1–5 (AM. BAR ASS'N 2016) ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.").

challenges of juvenile representation, to make the young client a partner in her advocacy.³⁴⁸

Although this approach may resemble Professor Alfieri's "weak" version of the "principle of collectivity," it differs in an important way: it leaves room for the lawyer and client to conclude that the benefits of using racialized rhetoric *outweigh* the potential harms.³⁴⁹ In contrast, Alfieri's "lesser obligation" is only "lesser" because, rather than direct the lawyer to forgo any and all narratives of racial deviance, it obliges the lawyer to *inform* the client of one's reservations regarding the narratives and then *urge* the client to consider the harmful impact the narratives may have on their community.³⁵⁰ In other words, either the lawyer must forgo all "race-talk" or she must tell her client why she does not want to use "race-talk" and then provide a litany of the likely harms. There is no option, however, for the lawyer to suggest to the client that a racialized narrative *should be* used. Therefore, this is not a description of a conversation or an honest attempt to have a meeting of the minds; rather, it is a scenario in which the person in the position of power, the lawyer, coerces the person in the position of weakness, the young client. In this way, Alfieri's "weak" version is merely a less direct approach to prohibiting the use of racialized narratives than his "strong" one, but it is not fundamentally different.

The calculus becomes quite different, however, when the juvenile defender hits a proverbial brick wall in her interactions with the adolescent client, making collaboration, if not simple communication, difficult at best. Given the important shift in the role of defense counsel in juvenile cases post-*Gault*, one might naturally turn to the expressed-interest advocacy model for guidance as to how best to approach such scenarios.³⁵¹ Scholars and practitioners have argued, however, that the model fails to adequately take into account the myriad challenges that juvenile defenders face when trying to determine and understand their young clients' objectives.³⁵² Fur-

³⁴⁸ See ROBIN WALKER STERLING, NAT'L JUVENILE DEF. CTR., *ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT* 8 (2009) ("Juvenile defense counsel do not assume they know what is best for the client, but instead employ a client-centered model of advocacy that actively seeks the client's input, conveys genuine respect for the client's perspective, and works to understand the client in his/her own socioeconomic, familial, and ethnic context.").

³⁴⁹ Alfieri, *supra* note 45, at 1338.

³⁵⁰ *Id.*

³⁵¹ See *supra* notes 274–283 and accompanying text (describing the shift to the role of counsel to be more protective of children's rights).

³⁵² See, e.g., Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 243, 243–44 (Thomas Grisso & Robert G. Schwartz eds., 2000) (summarizing the "competency problems" of juvenile clients most frequently discussed in the literature); NAT'L JUVENILE DEF. CTR., *JUVENILE DEFENSE ATTORNEYS: A CRITICAL PROTECTION AGAINST INJUSTICE* 4–6 (2014) (dis-

ther, it is not uncommon for criminal defense lawyers to lack the time, energy, or competence to establish rapport with their clients.³⁵³ Public defenders in particular may have unwieldy caseloads or multiple courtroom assignments that prevent them from providing their clients with much more than a few abbreviated conversations in the corridor of the courthouse.³⁵⁴ It is also not uncommon for a criminal defendant, whether an adult or youth, to lack the ability (whether the result of intellectual, emotional, or situational hurdles) to form a bond with her lawyer such that counseling *can be* effectively accomplished.³⁵⁵ Alternatively, the client may be unable or unwilling to *express her interests*, let alone her views regarding strategy or tactics.³⁵⁶ After adding in the difference in age and maturity between client and lawyer, and the often complicating influence of the child's parent or guardian, the challenge becomes even greater.³⁵⁷

Instances such as these can leave the conscientious lawyer in the regrettable position of having to decide a case-related strategic, ethical, or moral decision without the client's input. One viable option, after concluding that appointing a different lawyer would not overcome the impasse,³⁵⁸ is for the client to direct her lawyer to make the decision on her behalf, as long as deference to defense counsel is the result of the juvenile's independent

cussing the difficulties juvenile defenders experience in communicating with their clients and developing meaningful advocacy strategies); Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMP. L. REV. 357, 414 (2006) (arguing for "an adapted interviewing and counseling methodology" for juvenile clients, different from that used for adults); Lisa M. Geis, *An IEP for the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process*, 44 U. MEM. L. REV. 869, 889–90 (2014) (noting a variety of challenges faced by juvenile defenders, including difficulties in honest discussions, parental relationships, and acquiring records); Henning, *supra* note 274, at 313–15 (discussing the limitations of the expressed-interest or "client-centered" model of advocacy).

³⁵³ See Richardson & Goff, *supra* note 193, at 2631–32 (describing the crisis of public defender offices, which lack resources to realistically provide each client with zealous advocacy and require public defenders to triage client needs).

³⁵⁴ See *id.*

³⁵⁵ See Stavroola A. Anderson et al., *Language Impairments Among Youth Offenders: A Systematic Review*, 65 CHILD. & YOUTH SERV. REV. 195, 201 (2016) (finding that youth offenders have comprehension and language issues requiring specialized assessment and programming).

³⁵⁶ See *id.* (reflecting the language impairments of many youth offenders).

³⁵⁷ See Birchead, *supra* note 197, at 980–81 (discussing the fact that parents of children in juvenile court may stand in direct opposition to the defense attorney's goals and objectives); Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1291–98 (2004) (discussing the various conflicts of interest that parents can have when acting as an adult advisor to their juvenile child and questioning the effectiveness of allowing this role in the juvenile justice system).

³⁵⁸ This prerequisite would help ensure that the cause of the impasse was not the specific dynamic between a particular lawyer and child.

choice.³⁵⁹ Another option is to request that the judge appoint a guardian ad litem to act as the “eyes of the court” to further the best interests of the child, although introducing another adult decisionmaker into a juvenile delinquency case can be counterproductive.³⁶⁰ If all else fails, there may be little choice but to abandon one’s fealty to a collaborative theory of juvenile defense. In the extreme this may mean that the lawyer must make a unilateral decision without much, if any, input from the client. Admittedly such a result is far less than ideal, as it harkens back to the entrenched history of paternalism in the juvenile court system,³⁶¹ but it may offer the only sustainable strategy under the circumstances. Such a result is also arguably defensible under the ethical rules, as it results not from the lawyer’s opposition to adolescent decision-making autonomy, but from the necessity for the lawyer to substitute her judgment for the client on a matter of strategy.³⁶²

The calculus may also be different when the defense lawyer’s intent is to use a racialized narrative or strategy that will potentially harm her *other clients*. Recall the scenario in which the student advocate, in close consultation with her juvenile client, determines that she will characterize him in court as a “good kid,” describe all the features that make him “good,” and then contrast this with features that make other kids “bad.”³⁶³ According to the foregoing analysis this is not unethical even if it implicitly harms the Black community.³⁶⁴ Take it one step further and imagine that the student advocate has other similarly situated Black clients whom she cannot in good faith describe as fitting the characteristics, which she previously had

³⁵⁹ Henning, *supra* note 274, at 315–16 (discussing the needs and desires of children and adolescents to have the assistance of a knowledgeable adult and legal advisor, which may require the lawyer to “appropriately advise and persuade the client” of a specific course of action or to advise the client that she is choosing a bad alternative and why).

³⁶⁰ Guardians ad litem (“GAL”) are regularly appointed in dependency cases to represent the best-interests of the child. When it happens in delinquency cases, it inserts yet another actor who is focused on the child’s best interests. It is unclear how this can be beneficial from the defense perspective. See Joan L. O’Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 STETSON L. REV. 687, 688 (2002) (discussing the differences in the roles of the defense attorney and the GAL).

³⁶¹ See Henning, *supra* note 274, at 260–63 (discussing the entrenched history of paternalism in the juvenile justice system).

³⁶² See MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2016) (“In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”); STERLING, *supra* note 348, at 9 (“Other decisions concerning case strategy and tactics to pursue the client’s goal, like the determination of the theory of the case, what witnesses to call, or what motions to file, *are left to juvenile defense counsel*, with the critical limitations that counsel’s decisions . . . shall not conflict with the client’s expressed interests in any other case-related area.” (emphasis added)).

³⁶³ See *supra* notes 2–20 and accompanying text.

³⁶⁴ See *supra* notes 297–301 and accompanying text (describing Professor Smith’s defense of the use of race-talk in certain circumstances to zealously defend a client).

identified as “good” and that she will be representing them within the same court session, before the same judge, or in a hearing with the same prosecutor. This could potentially raise a conflict of interest: the ethical rules direct that the relevant inquiry is whether “the attorney-client relationship or the quality of the representation is ‘at risk,’ *even if no substantive impropriety—such as a breach of confidentiality or less than zealous representation—in fact eventuates.*”³⁶⁵ For instance, if the advocate’s relationship with the Black client whom she does not characterize as “good” is jeopardized, even if she continues to provide him with zealous representation, there is a conflict of interest.³⁶⁶ In this scenario, the risk of harm to the relationship must be “substantial,” meaning that it is “significant and plausible” that the representation will be “materially and adversely affected.”³⁶⁷ According to the MCPD, the lawyer should “resolve all doubts against the propriety of the representation.”³⁶⁸ Nevertheless, the affected client has the power to waive the conflict of interest as long as she does so voluntarily, in writing, and with full knowledge of the risks.³⁶⁹ The conflict can also be a ground for court-ordered disqualification of the lawyer.³⁷⁰

Taken to an extreme, as Professor Smith does when responding to the arguments of Professor Alfieri,³⁷¹ this sort of dilemma may appear intractable. If emphasizing a white client’s goodness could harm a Black client, would not such a conflict exist in almost every criminal case? Recalling Campbell and Raekwon,³⁷² for instance, it would mean that the student advocate could *never* emphasize Campbell’s “goodness” during the same court session in which she represents Raekwon, whom she feels she cannot

³⁶⁵ See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 261–62 (5th ed. 2016) (defining conflicts of interest).

³⁶⁶ *Id.*

³⁶⁷ MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(1), MR 1.7 (b) (AM. BAR ASS’N 2016) (describing a conflict of interest with concurrent clients); MODEL CODE OF PROF’L RESPONSIBILITY E-5-14 (AM. BAR ASS’N 1983) (emphasizing the importance of the lawyer retaining independent professional judgment and cautioning against representing two clients with different interests); FREEDMAN & SMITH, *supra* note 365, at 262 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 & cmt. c(iii)).

³⁶⁸ MODEL CODE OF PROF’L RESPONSIBILITY E 5-15 (AM. BAR ASS’N 1983).

³⁶⁹ MODEL RULES OF PROF’L CONDUCT r. 1.7(b)(4) (AM. BAR ASS’N 2016) (describing informed, written consent); FREEDMAN & SMITH, *supra* note 365, at 273 (discussing consent to conflicts of interest).

³⁷⁰ FREEDMAN & SMITH, *supra* note 365, at 276 (discussing conflict of interest as a ground for court-ordered disqualification).

³⁷¹ See Smith, *supra* note 46, at 1601–02 (applying Alfieri’s theory would unjustly burden a defense attorney, as every act can be considered racialized).

³⁷² See *supra* notes 8–20 and accompanying text.

similarly characterize.³⁷³ Such an interpretation of the rules would surely compromise the defense mission and ignore the objective reality that the facts and circumstances of some clients are more readily woven into an effective narrative than others. If Campbell has excellent grades, a record of volunteering at his church, and is a first-time offender, and Raekwon has lousy grades, no outside interests, and a lengthy record, labeling the former but not the latter client a “good kid” can be viewed as an example of a defense lawyer merely fulfilling her duty of zealous representation by utilizing the facts as they are presented to her in each case. On the other hand, this hypothetical may be distinguished from the original scenario in which Campbell and Raekwon *were* similarly situated, as neither had a prior record, they were charged with similar offenses, and both were influenced by older youths.³⁷⁴ Furthermore, in the original scenario, the differences between them resulted not from their own choices but from factors beyond their control, including family situation, appearance (which is related to socioeconomic status), and natural temperament, making it more likely that the contrast in the way in which the judge treated each boy resulted not from an objective weighing of factors, but from implicit, if not explicit, racial bias.

Such dilemmas illustrate one of the limitations of the ethical rules: they are narrowly focused on the representation of individuals. This leaves little room for broader social justice commitments on the part of the defense attorney, such as Professor Alfieri’s condemnation of “deviance narratives.”³⁷⁵ Yet, from the perspective of Professor Smith and other client-centered traditionalists, because the ethical rules are firmly rooted in the Bill of Rights and in the autonomy and dignity of the individual, there can be no compromise.³⁷⁶ Perhaps the most definitive conclusion is the admonition that criminal defense attorneys must always consider the importance of *context* when determining how best to address conflicts of interest that arise as a result of racialized rhetoric.³⁷⁷ Ideally the question of whether it is ethical or moral to promote “race-talk” during a juvenile case should be answered only after the lawyer engages in a comprehensive analysis of the relevant facts and potential strategies together with the client. With this said, the lawyer must prepare herself for an end result that is messy, as she may have little choice but to make what amounts to a unilateral decision on

³⁷³ See *supra* notes 292–296 and accompanying text (describing Professor Alfieri’s argument that the defense attorney must consider the impact of “race-talk” on their client’s community and other defendants).

³⁷⁴ See *supra* notes 8–20 and accompanying text.

³⁷⁵ See *supra* notes 284–296 and accompanying text.

³⁷⁶ FREDMAN & SMITH, *supra* note 365, at 7.

³⁷⁷ *Id.* at 277–80.

behalf of her child client, one that balances, to the best of the lawyer's ability, the ethical, strategic, and moral factors at play.

C. *Shifting the Paradigm*

1. Strategies du Jour

Although juvenile defenders are particularly well situated to address the use of racialized strategies that harm their clients, there are systemic hurdles that must be overcome.³⁷⁸ As many as half of the children in juvenile court appear without counsel, meaning that they have no one whose specific role is to confront inequities in the system on their behalf.³⁷⁹ In most instances this results from “voluntary” waiver of counsel due either to a lack of appreciation of the defense attorney's role³⁸⁰ or the family's inability to pay fees that often accompany court-appointed counsel.³⁸¹ Of the youths who *are* represented, many receive subpar or ineffective assistance of counsel, as the quality of juvenile defense varies greatly from jurisdiction to jurisdiction.³⁸² As discussed earlier,³⁸³ defense attorneys themselves (the

³⁷⁸ See Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2255–63 (2014) (examining the systemic barriers that defense attorneys face in confronting racial injustice, including judicial resistance to zealous defense advocacy).

³⁷⁹ See Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 580 (2002) (“Studies report that more than one-half of children accused of criminal acts appear in juvenile court without counsel and enter pleas to crimes they may or may not have committed.”).

³⁸⁰ See M. DYAN MCGUIRE ET AL., JOURNAL OF APPLIED JUVENILE JUSTICE SERVS., DO JUVENILES UNDERSTAND WHAT AN ATTORNEY IS SUPPOSED TO DO WELL ENOUGH TO MAKE KNOWING AND INTELLIGENT DECISIONS ABOUT WAIVING THEIR RIGHT TO COUNSEL? AN EXPLORATORY STUDY 22–23 (2015) (concluding that “a substantial portion of juveniles probably do not fully understand concepts related to zealous representation and attorney-client privilege,” thereby negatively impacting their ability to make a knowing, voluntary, and intelligent waiver of counsel); Berkheiser, *supra* note 379, at 581 (“The most common explanation for the high number of unrepresented children [in juvenile court] is that they waived their right to counsel at an early stage in the proceedings.”).

³⁸¹ See Tamar Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1641–47 (2015) (describing the almost punitive fines and fees that are levied against youth offenders in the juvenile courts who often cannot afford to pay).

³⁸² See Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 791–92 (2010) (stating that national and state assessments of juvenile defender systems demonstrate that “performance standards and ethical rules appear to be honored mostly in the breach”); see also Rebecca Beitsch, *States Push Tougher Standards for Juvenile Public Defenders*, PEW CHARITABLE TR. (May 5, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/05/05/states-push-tougher-standards-for-juvenile-public-defenders> [https://perma.cc/LV9D-CXDS] (discussing recent state policies that require more training and more rigorous standards for juvenile public defenders).

³⁸³ See *supra* notes 230–231 and accompanying text (discussing implicit bias and its impact on defense attorneys).

majority of whom are white) are not immune from implicit racial biases and may fail to recognize when others use racialized practices.³⁸⁴ This may be particularly so for public defenders, who often must make hurried decisions about which clients merit their attention and resources on any given day, a process akin to medical triage.³⁸⁵ It is in this context—a court system in which youths often lack representation or the counsel they have is ineffective—that the harm of racialization must be acknowledged and confronted.³⁸⁶

One strategy is to mandate implicit bias awareness programs for defense attorneys. In San Francisco, the public defender office recently partnered with researchers to measure racial disparities in plea bargains and found a correlation between race and outcomes: Black defendants were more likely to be convicted and to receive more severe sentences than white defendants.³⁸⁷ The office’s lawyers now undergo twice-yearly bias training, which the Public Defender of San Francisco describes as having a positive impact by requiring the staff to “confront our own racism.”³⁸⁸ The office also implemented practical safeguards, encouraging lawyers to discuss their case strategy with colleagues and use checklists that are designed to identify bias in the ways they prioritize and make decisions in their cases.³⁸⁹ Some professional organizations are heeding these recommendations, including the ABA, which is developing videos and other materials to help defenders as well as judges and prosecutors recognize implicit bias and take concrete steps to prevent it.³⁹⁰

³⁸⁴ See Pearce, *supra* note 42, at 2091–93 (describing a scenario in which a white defense attorney failed to discuss with his African-American client, or argue to the court, that the police officer’s treatment of him was racially-motivated); Richardson & Goff, *supra* note 193, at 2636 (discussing studies that suggest that “when clients are Black or otherwise criminally stereotyped, [implicit biases] can influence evidence evaluation, potentially causing [public defenders] to unintentionally interpret information as more probative of guilt”); see also Richardson & Goff, *supra* note 193, at 2635 (“While [defense] attorneys must evaluate a case’s merits, the problem is that [implicit biases] may influence these judgments.”).

³⁸⁵ Richardson & Goff, *supra* note 193, at 2631–34 (discussing the process of triage in the context of public defense).

³⁸⁶ Law school clinics may be one place to attempt this type of time-intensive advocacy, given law students’ lower caseloads and law schools’ additional resources.

³⁸⁷ Jeff Adachi, *Public Defenders Can Be Biased, Too, and It Hurts Their Non-white Clients*, WASH. POST (June 7, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients/?utm_term=.c9379db861bf [<https://perma.cc/S7DP-7EEM>].

³⁸⁸ *Id.*

³⁸⁹ *Id.* (discussing the use of a checklist that asks questions such as, “How would I handle this case different if my client was another race or had a different social background?”).

³⁹⁰ See generally *Diversity & Inclusion 360 Commission*, A.B.A., <https://www.americanbar.org/diversity-portal/diversity-inclusion-360-commission.html> [<https://perma.cc/M2NZ-TNMS>] (providing materials for judges, prosecutors, and public defenders to understand and combat their implicit biases).

Defense attorneys are also more frequently raising the issue of race during jury selection and trial, recognizing that jurors and judges will notice these dynamics regardless of whether they address them explicitly.³⁹¹ Some scholars have even insisted that defenders have an ethical obligation to do so, for otherwise they risk allowing “jurors’ implicit racial bias [to] become an (invisible) star witness for the prosecution.”³⁹² Strategies for addressing race include neutralizing or contesting racial stereotypes or biases by differentiating the client from the negative stereotype; explicitly challenging racially inflammatory arguments or evidence;³⁹³ and reinforcing norms of fairness and equality.³⁹⁴ Another approach involves taking steps that will inject the issue of racial discrimination into the court narrative, such as filing a motion to suppress that challenges a police officer’s implicit racial bias; gathering evidence of racial disparities related to the charges or in support of your defense; or requesting jury instructions that educate about implicit racial bias.³⁹⁵

³⁹¹ John M. Conley et al., *The Racial Ecology of the Courtroom: An Experimental Study of Juror Response to the Race of Criminal Defendants*, 2000 WIS. L. REV. 1185, 1213–14 (describing the results of the study showing that jurors take race into account in subtle ways and it shaped their expectations of defendants and witnesses); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1586–87, 1610 (2013) (describing scholarly theories that making jurors aware of racial bias in their decision making has the effect of reminding them to guard against racist and anti-egalitarian attitudes in their decisions); John Powell & Rachel Godsil, *Implicit Bias Insights as Preconditions to Structural Change*, 20 POVERTY & RACE 3, 6 (2011) (finding that raising the subject of race may cause implicit racial biases to recede, although avoiding it may leave racial biases in place).

³⁹² See Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 311, 362 (2012) (arguing that capital jurors’ implicit racial biases can and should be alleviated through defense lawyers’ intentional anti-racist narrative during trial).

³⁹³ See ALYSON A. GRINE & EMILY COWARD, UNIV. N.C. SCH. OF GOV’T, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES 8-30 (Indigent Defense Manual Series on Race, John Rubin ed., 2014), available at <http://defendermanuals.sog.unc.edu/race/82-raising-race-during-jury-selection-and-trial> [<http://web.archive.org/web/20160211052156/http://defendermanuals.sog.unc.edu/race/82-raising-race-during-jury-selection-and-trial>] (discussing how to analyze possible stereotypes and develop a plan to interrupt them).

³⁹⁴ See Blasi, *supra* note 47, at 1249–50, 1254, 1277 (finding that addressing fairness and equality explicitly in one’s oral advocacy can counteract the influence of stereotypes on decision making); Wilkins, *supra* note 392, at 332 (“[T]here is reason to believe one can prime persons with ideals of fairness and equality that might suppress, to a degree, racial and other stereotypes.”).

³⁹⁵ GRINE & COWARD, *supra* note 393, at 8-31, 8-35 (suggesting introducing expert testimony about the increased likelihood of misidentification in a cross-racial identification case and other strategies to make racial bias salient); ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 40 (2d ed. 2008) (discussing a case in which public defenders filed suppression motions to argue that the evidence obtained following traffic stops of African American motorists violated equal protection); Sterling, *supra* note 378, at 2266–68, 2270–71 (discussing the use of motions to suppress to introduce evidence of an officer’s racial bias, via his record of ar-

Like defenders, police officers increasingly are mandated to participate in implicit bias training. In June 2016, the U.S. Department of Justice (“DOJ”) announced that it will provide implicit bias training to all of its law enforcement agents and prosecutors.³⁹⁶ DOJ has also funded the development of curricula for state law enforcement agents, which includes various specialized modules for recruits, patrol officers, first-line supervisors, and police trainers.³⁹⁷ The program has been praised for going further than merely identifying stereotypes. It encourages police officers via a program of “cultural immersion” to actively engage with populations outside their circle of knowledge, including people who are undocumented, homeless, or transgender.³⁹⁸ Related to implicit bias awareness training is youth-specific training, in which officers learn about adolescent brain development and disproportionate minority contact.³⁹⁹ The training provides officers with strategies for more effectively interacting with young people during stops and in their neighborhoods, thereby reducing the likelihood that the interactions, especially with minorities “will have negative outcomes and/or result in police action.”⁴⁰⁰ Although most police departments do not offer youth-

rests and claims of need to search in a “high crime” area, and requesting jury instructions that address race discrimination issues); *see also* Maxine Goodman, *A Death Penalty Wake-Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment*, 12 BERKELEY J. CRIM. L. 29, 73 (2007) (proposing a model state statute that provides a mechanism for presenting a claim of racial discrimination in capital sentencing to the trial court at an evidentiary hearing).

³⁹⁶ *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel*, DEP’T OF JUSTICE (June 27, 2016), <https://www.justice.gov/opa/pr/department-justice-announces-new-department-wide-implicit-bias-training-personnel> [<https://perma.cc/V5MU-CD79>] (announcing that over 28,000 department employees will learn how to recognize and address their own implicit biases).

³⁹⁷ *See* Isidoro Rodriguez, *Can Cops Be Trained to Avoid Biased Policing?*, CRIME REP. (Apr. 27, 2016), <http://www.thecrimereport.org/news/inside-criminal-justice/2016-04-can-cops-be-trained-to-avoid-biased-policing> [<https://perma.cc/8K64-V2L9>] (describing a program that helps officers understand how implicit biases impact what they do; how fair and impartial policing leads to effective policing; and how to recognize these biases as well as implement unbiased behavioral responses).

³⁹⁸ *Id.*; *see also* GEORGE FACHNER & STEVEN CARTER, COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT 72 (2015) (discussing a proposed cultural immersion program to help recruits “understand the community they serve in their social and historical context”); Julia Edwards, *Justice Dept. Mandates “Implicit Bias” Training for Agents, Lawyers*, REUTERS (June 27, 2016), <http://www.reuters.com/article/us-usa-justice-bias-exclusive-idUSKCN0ZD251> [<https://perma.cc/DLD3-TBJJ>] (reporting that mandatory implicit bias training will be provided to more than 33,000 federal agents and prosecutors).

³⁹⁹ *See For Police: Juvenile Justice Training for Law Enforcement*, STRATEGIES FOR YOUTH: CONNECTING COPS & KIDS, <http://strategiesforyouth.org/for-police/> [<https://perma.cc/YP6U-NDFR>] (describing the customized in-service juvenile justice training for law enforcement that “translates cutting edge psychiatric practices and neurological research into practical, easy-to-use skills for officers”).

⁴⁰⁰ CTR. FOR APPLIED RESEARCH IN HUMAN DEV., UNIV. OF CONN., EFFECTIVE POLICE INTERACTIONS WITH YOUTH: TRAINING EVALUATION 4 (2008).

specific training and lack the funding and resources to implement it,⁴⁰¹ some law enforcement agencies are beginning to provide it.⁴⁰²

As for additional strategies to improve the interactions between police and youths of color, some of the preliminary work has already been done. Police accountability task forces have generated reports that acknowledge both explicit and implicit racial bias and offer proposals to promote transparency, police accountability, and the investigation of patterns of police abuse within departments.⁴⁰³ The recent report of the task force that evaluated the Chicago Police Department openly discusses the prevalence of racism within the force and the perception that police “approach every encounter with people of color as if the person, regardless of age, gender or circumstance, is a criminal.”⁴⁰⁴ Ensuring that voices of young people are heard and considered must be a critical part of the project. In this spirit, academics and researchers have chronicled the experiences of young Black people in routine encounters with police and offered policy, advocacy, and research agendas that address the issues the youths raised.⁴⁰⁵ The emphasis on the voices of youths has encouraged a more explicit focus on white privilege and strategies for eliminating it in the criminal justice system.⁴⁰⁶ Advocacy groups, such as the National Initiative for Building Community Trust and Justice, have focused on increasing trust between communities and the

⁴⁰¹ INT’L ASS’N OF CHIEFS OF POLICE, 2011 JUVENILE JUSTICE TRAINING NEEDS ASSESSMENT: A SURVEY OF LAW ENFORCEMENT 3 (2011) (finding that the primary reason that law enforcement agencies do not receive juvenile justice training is lack of funding and manpower, and that over half of the agencies surveyed had experienced cuts in training budgets over the past five years).

⁴⁰² Sarah Childress, *Why Some Officers Are Policing Kids Differently*, PBS: FRONTLINE (June 10, 2016), <http://www.pbs.org/wgbh/frontline/article/why-some-officers-are-policing-kids-differently/> [<https://perma.cc/6BLM-EH3V>] (reporting that youth-specific police training is being offered in Massachusetts, Indiana, Los Angeles and Fresno, California, Charlottesville, Virginia, and Cleveland Ohio).

⁴⁰³ See FACHNER & CARTER, *supra* note 398, at 71–72 (acknowledging that “segments of the community feel disenfranchised and distrustful” of police and recommending implicit bias and community policing training); POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 1–21 (2016).

⁴⁰⁴ POLICE ACCOUNTABILITY TASK FORCE, *supra* note 403, at 7.

⁴⁰⁵ See generally Rod K. Brunson & Ronald Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 URB. AFF. REV. 858 (2009) (examining the accounts of young Black and white males in low-income neighborhoods in St. Louis, Missouri, and concluding that race makes a difference in how youths are treated by police and on the youths’ perceptions of police officers); Craig B. Futterman et al., *Youth/Police Encounters on Chicago’s South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125 (studying encounters between youth and police on the South Side of Chicago and proposing a set of policies to improve police accountability and relationships with the Black community).

⁴⁰⁶ Brunson & Weitzer, *supra* note 405, at 864–65 (finding that treatment of youth by police is differential based on race and coincides with differential youth perception of police along race lines).

criminal justice system, by making police aware of the disrespect with which they treat Black crime victims and their families, a phenomenon that only “increases the divide between police and communities of color.”⁴⁰⁷ Ultimately, all of these initiatives are intended to enable communities of color to build a more respectful, trusting, and constructive relationship with police.

There are critics, however, who say that implicit bias training is merely the latest one-size-fits-all trend and that its wide-ranging effects on racial bias have not been supported by the data.⁴⁰⁸ For instance, one researcher has written, “But does implicit bias training reduce racial biases—and, if so, for how long? Do reductions in implicit bias translate into decreased racial disparities in policing? These questions are critical for understanding the promise that implicit bias training holds for policing. Unfortunately, though, empirical support is lacking.”⁴⁰⁹ Other critics suggest that conducting training that conditions people, including police officers, to be aware and more cognizant of their implicit racial biases may actually result in inadvertently increasing those biases.⁴¹⁰ Researchers have also asserted that implicit bias

⁴⁰⁷ *About*, NAT’L INITIATIVE FOR BLDG. CMTY. TR. & JUSTICE, <https://trustandjustice.org/about/mission> [<https://perma.cc/U7K4-BAXS>] (describing the National Initiative’s work in trust-building interventions with police and communities); Donna Ladd, ‘Police vs. Black’: Bridging the ‘Racialized Gulf,’ JACKSON FREE PRESS (May 4, 2016), <http://www.jacksonfreepress.com/news/2016/may/04/police-vs-black-bridging-racialized-gulf/> [<https://perma.cc/QA5G-L2C6>] (describing police treatment of Black communities).

⁴⁰⁸ *See, e.g.*, MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE 152 (2013) (suggesting that once the exposure to implicit bias training ends, implicit association reverts to pre-exposure level); Frank Kineavy, *Implicit Bias Training for Police Gaining Attention*, DIVERSITYINC (Oct. 10, 2016), <http://www.diversityinc.com/news/implicit-bias-training-police-gaining-attention> [<https://perma.cc/2V3D-NQBN>] (highlighting research that suggests that participants revert back to biases after training, and concluding that it is “undetermined whether implicit bias training is effective”); Destiny Peery, *Implicit Bias Training for Police May Help, but It’s Not Enough*, HUFFINGTON POST (Mar. 14, 2016), http://www.huffingtonpost.com/destiny-peery/implicit-bias-training-fo_b_9464564.html [<https://perma.cc/VK76-MUTH>] (stating that there is little evidence that implicit bias trainings alone will have a positive effect on racial bias in policing and may, in fact, lead to negative backlash).

⁴⁰⁹ Robert J. Smith, Keynote Address: *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 302 (2015).

⁴¹⁰ *See, e.g.*, Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145, 164–65 (2016) (describing preliminary research that suggested that calling attention to race increased the tendency of participants to make stereotypically driven decisions to shoot based on the misidentification of objects thought to be weapons); C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808, 809, 814 (1994) (finding that subjects who were instructed not to rely on stereotypes were able to temporarily suppress the stereotype at issue, but once the initial experiment was over, those subjects were more inclined to rely on that stereotype than subjects who were not given any stereotype-suppression instruction); *see also* Ellen Huet, *Rise of the Bias Busters: How Unconscious Bias Became Silicon Valley’s Newest Target*, FORBES (Nov. 2, 2015), <http://www.forbes.com/sites/ellenhuet/2015/11/02/rise-of-the-bias-busters-how-unconscious-bias-became-silicon-valleys-newest-target/#713f86c87cb1> [<http://web.archive.org/web/20160911065024/http://>

training could potentially endanger police officers and the public by encouraging officers to hesitate in situations when they should use lethal force.⁴¹¹

Some reformers contend that the focus should be on inoculating against racial bias rather than *eradicating* bias, which may be an impossible task. This involves the challenging project of changing policies and procedures that exacerbate racial bias and implementing ones that make bias less likely. For instance, data collection, like that implemented by the San Francisco Public Defender, could be used to increase awareness among judges, prosecutors, and probation officers of how their own racial and ethnic biases impact their decision making.⁴¹² In jurisdictions where this has occurred, institutional pressure has been brought to bear on those whose sentencing patterns reflect racial bias.⁴¹³ As a result, there has been evidence of repentance and a subsequent change in these patterns.⁴¹⁴

“Procedural justice training” for police has been proposed as an alternative (or a complement) to implicit bias training. Supported by social science research, procedural justice theory is premised on the notion that people are more likely to comply with law and policy when they believe that the proce-

www.forbes.com/sites/ellenhuet/2015/11/02/rise-of-the-bias-busters-how-unconscious-bias-became-silicon-valleys-newest-target/#525212bed2e2] (citing evidence that “hidden bias training may . . . backfire and cause more prejudiced behavior”).

⁴¹¹ See Tami Abdollah, *Police Agencies Line Up to Learn About Unconscious Bias*, POLICE-ONE.COM (Mar. 9, 2015), <https://www.policeone.com/patrol-issues/articles/8415353-Police-agencies-line-up-to-learn-about-unconscious-bias/> [<https://perma.cc/Y7S7-63MM>] (citing a social psychologist who has stated that more research is needed about this potential for implicit bias training to harm officers).

⁴¹² Maurice Chammah, *Do Public Defenders Spend Less Time on Black Clients?*, MARSHALL PROJECT (May 2, 2016), <https://www.themarshallproject.org/2016/05/02/do-public-defenders-spend-less-time-on-black-clients#.3vZ56yfvb> [<https://perma.cc/YW6N-GNR2>] (discussing how data are used to bring attention to implicit bias by court actors). Public defenders can also provide concrete policy recommendations based on research and fact-finding. See TANYA E. COKE, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *CRIMINAL JUSTICE IN THE 21ST CENTURY: ELIMINATING RACIAL AND ETHNIC DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM* 29–30 (2013), available at <https://www.nacdl.org/reports/eliminatedisparity> [<https://perma.cc/4PL4-DFCV>] (making suggestions for criminal justice reform to address racial disparities); EQUAL JUSTICE INITIATIVE OF ALA., *CRIMINAL JUSTICE REFORM IN ALABAMA: REPORT AND ANALYSIS OF CRIMINAL JUSTICE ISSUES IN ALABAMA, PART ONE* 5–8, 46–48, 68, 109, 146 (2005) (providing various policy recommendations based on research and fact-finding). Public defense organizations also testify before policy-makers to raise awareness of racial bias and disproportionate impact. See *Christian Lassiter Presented Testimony on Stop & Frisk to the City Council*, BRONX DEFENDERS: OUR NEWS (Oct. 23, 2012), <http://www.bronxdefenders.org/christian-lassiter-presented-testimony-on-stop-frisk-to-the-city-council> [<https://perma.cc/4DRN-6UHM>] (highlighting a public defender’s testimony to the New York City Council on the racially disproportionate consequences of stop and frisk measures).

⁴¹³ See Adachi, *supra* note 387 (describing the implementation of bias training and practical safeguards to prevent racial bias by San Francisco public defenders); Chammah, *supra* note 412 (reporting that a Black retired judge in Maryland studied his sentencing patterns, found evidence of racial bias, and resolved to change his practices).

⁴¹⁴ Chammah, *supra* note 412.

dures used by decisionmakers are fair, unbiased, and efficient.⁴¹⁵ This type of training typically has an educational component and a practice component: police officers are taught the concepts of procedural justice and then instructed via roleplaying and simulations how to convey to suspects or community members *why* they are taking particular actions.⁴¹⁶ In theory, as long as the officer's reasoning is objective and nonbiased, those affected will be more likely to accept the consequences without suspicion and resentment.⁴¹⁷

On the legislative level, some states have explored "racial impact laws," beginning with Iowa in 2008.⁴¹⁸ The concept of these laws is to forecast the impact that proposed changes in a state's criminal code will have on people of different races and ethnicities, similar to fiscal or environmental impact statements, and to provide lawmakers with an opportunity to amend

⁴¹⁵ See TYLER, *supra* note 43, at 24–27 (suggesting that people obey the law when the rules and procedures are consistent with their personal values and attitudes); Mark R. Fondacaro et al., *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Sciences*, 57 HASTINGS L.J. 955, 976, 981–82 (2006) (arguing that procedural fairness plays a key role in people's willingness to cooperate with a wide range of decisions); Jennifer L. Woolard et al., *Anticipatory Injustice Among Adolescents: Age and Racial/Ethnic Differences in Perceived Unfairness of the Justice System*, 26 BEHAV. SCI. & L. 207, 221–25 (2008) (finding that greater proportions of adolescents of color with no criminal justice system experience anticipate injustice than whites).

⁴¹⁶ LEVIN WHELLER ET AL., COLL. OF POLICING, THE GREATER MANCHESTER POLICE PROCEDURAL JUSTICE TRAINING EXPERIMENT: THE IMPACT OF COMMUNICATION SKILLS TRAINING ON OFFICERS AND VICTIMS OF CRIME 7–8 (2013) (depicting communicating training modules that included signposting, building rapport, and acknowledging the victim); Wesley G. Skogan et al., *Training Police for Procedural Justice*, 11 J. EXPERIMENTAL CRIMINOLOGY 319, 322–23 (2015) (illustrating Chicago Police's training modules that emphasized both concepts of procedural justice and practice guidelines); Daniela Gilbert et al., California Partnership for Safe, Procedural Justice and Police Legitimacy: Using Training as a Foundation for Strengthening Community-Police Relationships 3–14 (Feb. 2015), available at <https://www.bja.gov/bwc/pdfs/Procedural-Justice-and-Police-Legitimacy-Paper-CPSC-Feb-2015.pdf> [<https://perma.cc/WV48-RM5R>] (working draft, limited distribution) (describing specific cases of procedural justice training and their impact).

⁴¹⁷ See Adam Lamparello, *Social Psychology, Legitimacy, and the Ethical Foundations of Judgment: Importing the Procedural Justice Model to Federal Sentencing Jurisprudence*, 38 COLUM. HUM. RTS. L. REV. 115, 153 (2006) (concluding, based on empirical data, that people are more likely to accept outcomes if they believe the procedures to have been fair); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 260 (2008) (arguing that perceptions of procedural justice affect community members' judgment of police legitimacy); Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 321–22 (2009) (suggesting that procedural justice can facilitate acceptance of decisions of legal authorities).

⁴¹⁸ IOWA CODE § 2.56 (1) (2017) (requiring that any bill or amendment that proposes a change in a criminal law must include, inter alia, a statement addressing the impact of the legislation on minorities); Jessica Erickson, Comment, *Racial Impact Statements: Considering the Consequences of Racial Disproportionalities in the Criminal Justice System*, 89 WASH. L. REV. 1425, 1446–47 (2014) (describing Iowa, Connecticut, and Oregon's adoption of racial impact statements).

the legislation as needed.⁴¹⁹ Connecticut⁴²⁰ and Oregon⁴²¹ have passed similar laws, and legislation in several other states has been introduced.⁴²² In Minnesota, the sentencing commission regularly drafts racial impact statements for new legislation, although it is not statutorily required.⁴²³ Such developments signal that politicians are increasingly recognizing that legislation can have a disproportionate racial impact, a result that they, as elected officials, have a responsibility to avoid.

Whether racial impact legislation or instruction in implicit bias, adolescent development, or procedural justice theory will minimize the likelihood of racialization remains to be seen. None of these strategies will work unless the various players recognize and appreciate the ways in which racialization is harmful. Although there may be resistance, the court culture must also allow for open discussion of the impact that racialization has on individual children as well as the community at large.

2. Racial Diversification of Juvenile Court

As demonstrated in the previous section, the strategies currently deployed to eradicate the racialization of juvenile court may be promising but

⁴¹⁹ Nicole D. Porter, *Racial Impact Statements*, SENTENCING PROJECT (Dec. 1, 2014), <http://www.sentencingproject.org/publications/racial-impact-statements/> [<https://perma.cc/RHE5-3QFF>].

⁴²⁰ CONN. GEN. STAT. § 2-24 (b) (2015) (requiring a “racial and ethnic impact statement” for bills and amendments that increase or decrease the populations of Connecticut correctional facilities).

⁴²¹ Act of July 1, 2013, ch. 600, § 4, Or. Laws 1–2 (requiring that all proposed criminal legislation must include a racial and ethnic impact statement that describes the effects of the bill on juveniles or adult criminal defendants, and that the statement must be “impartial, simple and understandable” and must include data on how the bill would change the racial composition of the affected populations as well as its impact on the racial composition of crime victims); see also Dana Tims, *Racial Impact Statements Will Help Oregon Lawmakers Evaluate Effect of Proposed Legislation on Minorities*, THE OREGONIAN (Sept. 16, 2014), http://www.oregonlive.com/politics/index.ssf/2014/09/racial_impact_statements_will.html [<https://perma.cc/JA4V-H6LT>] (describing the widespread support for the Oregon bill, which easily passed the state legislature).

⁴²² Erickson, *supra* note 418, at 1450–55; Porter, *supra* note 419 (finding that legislators in Arkansas, Florida, Maryland, Mississippi, Texas, and Wisconsin have introduced legislation to adopt racial impact statements). As of February 2016, Maryland, Washington, Illinois were debating adopting similar laws. *State Advocacy Update: New Proposals to Challenge Racial Disparity in Criminal Justice System*, SENTENCING PROJECT (Feb. 25, 2016), <http://www.sentencingproject.org/news/state-advocacy-update-new-proposals-to-challenge-racial-disparity-in-criminal-justice-system> [<https://perma.cc/S2EM-6C8J>].

⁴²³ See Erickson, *supra* note 418, at 1445–46; Maggie Clark, *Should More States Require Racial Impact Statements for New Laws?*, USA TODAY (July 31, 2013), <http://www.usatoday.com/story/news/nation/2013/07/31/racial-impact-statements-laws/2602563/> [<https://perma.cc/Q8BQ-YL5K>] (stating that Minnesota uses racial impact statements); MINN. SECOND CHANCE COAL., RACIAL IMPACT STATEMENTS, available at http://www.mnsecondchancecoalition.org/pdf/racial_impact.pdf [<https://perma.cc/A874-SPNQ>] (describing Minnesota’s use of racial impact statements of sentencing policies on felony offenses).

have yet to be fully realized. The bottom line is that racial bias will continue to proliferate within the legal profession as long as lawyers as a group are disproportionately white.⁴²⁴ The lack of Black and Latino attorneys and judges is significant in the juvenile court system, where the respondents are disproportionately children of color.⁴²⁵ Research has shown that people generally do not feel empathy for those whom they view as “social outgroup members” (typically defined as people of a different race or ethnicity) without active and deliberate effort.⁴²⁶ Psychologists have explained:

People generally do not vicariously feel the emotional and motivational states of those they categorize as outgroup members. . . . [T]he more prejudiced people are, the less likely they will intuitively catch the emotive states of outgroup members. This bias in emotional sharing could contribute to an empathy-gap, impairing the experience of empathy for outgroups, which is a capacity that underlies and facilitates social understanding and cooperation and fosters helping, morality, altruism and justice. Thus, when people fail to share the emotional and motivational states of outgroup members they might not be as responsive to outgroup members’

⁴²⁴ AM. BAR ASS’N, *supra* note 6 (finding that 88% of lawyers are white); HUMES ET AL., *supra* note 5, at 4 (finding that white people comprise 72% of the U.S. population); *Standing Committee on Judicial Independence*, *supra* note 5 (finding that 86% of state court judges are white); see also Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 *FORDHAM L. REV.* 2483, 2484–85 (2015) (finding extreme racial and gender disparities among lawyers at law firms and in-house legal departments); Yolanda Young, *Why the U.S. Needs Black Lawyers Even More Than It Needs Black Police*, *THE GUARDIAN* (May 11, 2015), <https://www.theguardian.com/world/2015/may/11/why-the-us-needs-black-lawyers> [<http://web.archive.org/web/20170101232219/https://www.theguardian.com/world/2015/may/11/why-the-us-needs-black-lawyers>] (arguing that more black lawyers are needed in the area of criminal law as well as civil litigation, such as bankruptcy and employment discrimination, in which white attorneys were found to steer more black people into Chapter 13, rather than the less onerous Chapter 7, and to decide whether to reject a case based on perceived “demeanor and mannerisms,” which is often racially-coded).

⁴²⁵ See *supra* note 184 and accompanying text (discussing the greater likelihood that Black and brown youth would be arrested and receive more punitive sanctions in juvenile court than white youth).

⁴²⁶ See Jennifer N. Gutsell & Michael Inzlicht, *Intergroup Differences in the Sharing of Emotive States: Neural Evidence of an Empathy Gap*, 7 *SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE* 596, 601–02 (2012) (finding that people generally do not experience empathy for outgroup members on the same intuitive basis that they do for ingroup members); see also Alessio Avenanti et al., *Racial Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain*, 20 *CURRENT BIOLOGY* 1018, 1020 (2010) (finding that although human beings react empathically to the pain of strangers, racial bias and stereotyping may lessen this reaction); Gutsell & Inzlicht, *supra*, at 596, 602 (defining “empathy” as the ability to share the emotions of another, which enables one person to gain an intuitive understanding of another, and noting that the effects of the “empathy gap” may be temporary and can be reduced by considering the perspective of the outgroup member, which has been shown to reduce prejudice towards the outgroup).

needs and be less likely to help or even to understand that support is needed. This could be particularly true for people high in prejudice, opening the door for discrimination.⁴²⁷

Therefore, if the “neural simulation”⁴²⁸ on which empathy is based is absent, a juvenile court judge’s instinctual response toward a child of a different race or ethnicity may be indifference, lack of understanding, or even hostility.

Yet, this sort of empathy gap can also impact two people of the same race or ethnicity when one perceives the other to belong to an “outgroup,” resulting in intraracial indifference or discrimination.⁴²⁹ Because of this, the vision of racial diversification promoted here is not one that calls for same-race “matching” of lawyers and clients or judges and clients,⁴³⁰ but for a racially, ethnically, and socioeconomically diverse community that allows for the possibility of redefining and reimagining ingroups and outgroups. In short, when the percentage of people of color working in the juvenile court system reflects their presence in the community at large, the aspirational goal of breaking down stereotypes and changing social structures may be more realistic. In this way, policies calling for racial “matching” stand in stark contrast to the vision of a deracialized juvenile court promoted here.

Another function of the stark racial imbalance between white lawyers and children of color in the juvenile justice system is that those making subjective, multifactor decisions—judges, prosecutors, and defense attorneys—typically operate based on an underlying assumption of neutrality in whiteness. This means that when a white judge decides whether a Black child should be released or detained, the calculus will be based on the personal values and norms of the judge without recognizing that whiteness is a particular racial identity that comes with its own set of values and norms that differ from those of non-whites.⁴³¹ As a result, the racial bias inherent in the juvenile court system is rarely confronted (or even consciously acknowl-

⁴²⁷ Gutsell & Inzlicht, *supra* note 426, at 601 (citations omitted).

⁴²⁸ *Id.* at 596 (explaining that “[m]erely seeing others doing something or expressing their emotions engages the same neural networks necessary for the execution of the same behavior or the experience of the same emotions in the observer”).

⁴²⁹ *Id.* at 602 (cautioning against always categorizing ingroups and outgroups by race and explaining that outgroups may also be “culturally disliked groups that change from one society to the next”).

⁴³⁰ See, e.g., Raquel R. Cabral & Timothy B. Smith, *Racial/Ethnic Matching of Clients and Therapists in Mental Health Services: A Meta-Analytic Review of Preferences, Perceptions, and Outcomes*, 58 J. COUNSELING PSYCHOL. 537, 547 (2011) (finding variability as to positive results of racial/ethnic matching of therapists and patients of the same race).

⁴³¹ Pearce, *supra* note 384, at 2089–91 (discussing the fact that white lawyers, and judges, treat whiteness as a neutral norm or baseline, not a racial identity, causing them either to avoid issues of race or to defer to people of color whom they consider “experts” on race).

edged) by the overwhelmingly white group of decisionmakers because of their implicit assumption that whiteness *is* a neutral baseline.⁴³² In this way, white people's values and norms *become* the values and norms of the juvenile justice system and marginalize the values and norms of the "out-group."⁴³³

The differential treatment of Black children in juvenile court is compounded by the fact that there are also low percentages of Black people in many of the other professional disciplines that intersect with the juvenile court system. For instance, only 4% of practicing physicians are Black (although Blacks comprise more than 13% of Americans overall),⁴³⁴ and only 7% of Black students enroll in medical school.⁴³⁵ In the educational context, the differential treatment of Black children is exacerbated by the fact that African-American teachers remain significantly underrepresented in the United States.⁴³⁶ In addition, research has suggested that white teachers are more likely than Black teachers to perceive Black youths as disruptive, and white teachers have significantly lower academic attainment expectations of Black students than do Black teachers.⁴³⁷ A recent study of preschool-age youths found that because of implicit biases, educators of *both races* ex-

⁴³² *Id.*

⁴³³ *Id.*; see also Coco Fusco, *Fantasies of Oppositionality: Reflections on Recent Conferences in Boston and New York*, 29 SCREEN 80, 91 (1988) ("Racial identities are not only black, Latino, Asian, Native American, and so on; they are also white. To ignore white ethnicity is to redouble its hegemony by naturalizing it. Without specifically addressing white ethnicity, there can be no critical evaluation of the construction of the other.").

⁴³⁴ See ASS'N OF AM. MED. COLLS., DIVERSITY IN THE PHYSICIAN WORKFORCE: FACTS & FIGURES 2014, Section II (2014) ("Although blacks and African-Americans comprise 13 percent of the nation, they account for only 4 percent of the physician workforce."); Dennis Thompson, *Too Few Blacks, Hispanics Becoming Doctors: Study*, HEALTHDAY NEWS (Aug. 24, 2015), <https://consumer.healthday.com/general-health-information-16/doctor-news-206/too-few-blacks-hispanics-are-becoming-doctors-study-702572.html> [<https://perma.cc/5G9M-DEFS>] (citing a 2012 study which found that "blacks made up just under 4 percent of practicing physicians, 6 percent of trainees in graduate medical education and 7 percent of medical school graduates"); see also Damon Tweedy, Op-Ed, *The Case for Black Doctors*, N.Y. TIMES (May 15, 2015), https://www.nytimes.com/2015/05/17/opinion/sunday/the-case-for-black-doctors.html?_r=0 [<https://perma.cc/6JYJ-3HVU>] (stating that African-Americans comprise only 5% of the medical profession).

⁴³⁵ See Liliana M. Garces & David Mickey-Pabello, *Racial Diversity in the Medical Profession: The Impact of Affirmative Action Bans on Underrepresented Student of Color Matriculation in Medical Schools*, 86 J. HIGHER EDUC. 264, 265 (2015) (noting that African Americans accounted for only 7% of total medical school enrollment in 2012).

⁴³⁶ See REBECCA GOLDRING ET AL., NAT'L CTR. FOR EDUC. STATISTICS, CHARACTERISTICS OF PUBLIC AND PRIVATE ELEMENTARY AND SECONDARY SCHOOL TEACHERS IN THE UNITED STATES: RESULTS FROM THE 2011–12 SCHOOLS AND STAFFING SURVEY 3, 6 (2013) (finding that in 2011–12, 82% of all public school teachers were white).

⁴³⁷ Wright, *supra* note 248, at 4–6, 25 (finding that 16% of African-American students experienced an out-of-school suspension in the 2011–12 school year, compared with 5% of white students and 7% of Hispanic students).

pected “challenging” behaviors from very young Black children, especially Black boys, at greater rates than white children; it also found that white teachers are more likely than Black teachers to escalate their disciplinary responses to Black children over time.⁴³⁸ The researchers hypothesized that Black teachers may be “better equipped to understand the needs of Black boys and that this understanding may lead to more culturally-aligned and effective early education pedagogy.”⁴³⁹

The argument here, however, is not that diversification will be a panacea for systemic racism. Much of the social science research indicates, in fact, that there is not a strong correlation, much less a causal connection, between, for instance, the race of a police officer and his treatment of a suspect.⁴⁴⁰ Likewise, as discussed earlier,⁴⁴¹ a person of one race may consider another person of the same race to be a member of an outgroup or may have adopted negative stereotypes about other members of their own racial group.⁴⁴² Consistent with these findings, one study has found that only five percent of Blacks and Latinos believed that police officers in their neighborhoods should be *exclusively* of the same race as the majority of their residents, with the vast majority preferring to have mixed-race teams of officers on patrol.⁴⁴³ Statistics, however, are not predictive of individual behavior; there are studies showing “some evidence of harsh treatment” toward Black citizens by Black officers⁴⁴⁴ as well as studies suggesting that Black officers working in Black neighborhoods are more supportive and respectful of the residents than white officers.⁴⁴⁵

⁴³⁸ WALTER S. GILLIAM ET AL., YALE CHILD STUDY CTR., DO EARLY EDUCATORS’ IMPLICIT BIASES REGARDING SEX AND RACE RELATE TO BEHAVIOR EXPECTATIONS AND RECOMMENDATIONS OF PRESCHOOL EXPULSIONS AND SUSPENSIONS? 2, 4, 11 (2016).

⁴³⁹ *Id.* at 4–5.

⁴⁴⁰ See NAT’L RES. COUNCIL, FAIRNESS & EFFECTIVENESS IN POLICING: THE EVIDENCE 3 (Wesley Skogan & Kathleen Frydl eds., 2004) (“Among officer characteristics, neither race nor gender has a direct influence on the outcome of routine police-citizen encounters.”).

⁴⁴¹ See *supra* notes 426–429 and accompanying text.

⁴⁴² See PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING IN BALTIMORE’S EASTERN DISTRICT 39–46 (2008) (discussing, in the context of a qualitative study of Baltimore’s Eastern District, the shared mentality of Black and white police officers toward the Black residents of the neighborhoods they patrol).

⁴⁴³ Ronald Weitzer, *Diversity Among Police Officers Is Key, but It Won’t Solve the Problems with Policing*, THE GUARDIAN (Jan. 20, 2015), <https://www.theguardian.com/commentisfree/2015/jan/20/diversity-among-police-officers-is-key-but-it-wont-solve-the-problems-with-policing> [<https://perma.cc/P6BP-FFJQ>].

⁴⁴⁴ Ivan Y. Sun & Brian K. Payne, *Racial Differences in Resolving Conflicts: A Comparison Between Black and White Police Officers*, 50 CRIME & DELINQ. 516, 519 (2004) (citing studies from 1969 and 1984).

⁴⁴⁵ *Id.* at 519, 534–35; see also Joscha Legewie & Jeffrey Fagan, *Group Threat, Police Officer Diversity and the Deadly Use of Police Force*, 2 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-512, 2016), available at <https://papers.ssrn.com/sol3/>

Despite these limitations in the data, a concerted effort should be made to racially diversify the juvenile court workplace, as well as the overwhelmingly white legal profession, in order to create a culture in which all professionals strive to be fair and impartial in their decision making.⁴⁴⁶ This means that we should racially integrate overwhelmingly white professions that intersect with the juvenile court system—lawyers, judges, doctors, and teachers—as well as the fields of law enforcement, probation, and parole.⁴⁴⁷ There is likely to be public support for such a goal, as evidence has shown, for instance, that a majority of Americans of all races believe that the racial composition of a police force should reflect the racial composition of the community.⁴⁴⁸ Diversity allows for the building of trust and confidence in an institution, and the more the racial and ethnic makeup of that institution reflects its community, the more likely it will have a reputation for fairness. In other words, a representative juvenile justice system can have symbolic benefits that help reduce the public perception that decisions, whether by prosecutors, judges, probation officers, or defense attorneys, are premised on racial bias. Admittedly, past efforts at a related goal—reducing disproportionate minority representation of juveniles in the justice system—have been only marginally successful.⁴⁴⁹ Yet, the project of altering the complex factors that lead to disproportionate numbers of low-income Black children and families in juvenile court is more complex and ambitious than committing to training, recruiting, and hiring greater numbers of people of color throughout the system. In other words, racial integration of these subgroups

papers.cfm?abstract_id=2778692 [https://perma.cc/CR44-SKHY] (arguing that “a diverse police force,” that proportionally represents the population it serves, “mitigates [perceived] group threat and thereby reduces the number of officer-involved killings”).

⁴⁴⁶ See Elizabeth Levy Paluck & Donald P. Green, *Prejudice Reduction: What Works? A Review and Assessment of Research and Practice*, 60 ANN. REV. PSYCHOL. 339, 352 (2009) (suggesting that when people of different races are required to work or play cooperatively, the biased attitudes of all involved decline, and the decline remains consistent for long periods after the experience). See generally AM. BAR ASS’N, PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS (Cie Armstead ed., 2010) (addressing the urgent need to diversify the legal profession).

⁴⁴⁷ See NAZGOLD GHANDNOOSH, SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 21 (2015) (discussing the need for police departments to recruit and retain people of color, as survey data suggest that Black officers are more sensitive to the problem of biased policing than white officers).

⁴⁴⁸ See Weitzer, *supra* note 443 (describing how a diverse police force can help build community trust in the police and decrease the sense that individuals are being stopped solely for their race).

⁴⁴⁹ See Ashley Nellis & Brad Richardson, *Getting Beyond Failure: Promising Approaches for Reducing DMC*, 8 YOUTH VIOLENCE & JUV. JUST. 266, 272–74 (2010) (“Although some modicum of success toward eliminating [racial] disparities [in the juvenile justice system] has been observed, in many places, it still seems reluctant to even budge.”).

in an attempt to inoculate against bias is a more sustainable goal than *eradicating* implicit bias, which requires fundamentally altering the negative way in which many people, regardless of their race, view low-income Black children and adolescents.

CONCLUSION

Recently I was in juvenile court when the judge spoke to a white boy who stood before him. The boy looked to be about fourteen or fifteen, and he was tall and thin with close-cropped brown hair. I did not know what the youth had been charged with, but the purpose of the hearing was for the judge to enter a disposition. The boy's parents, who were also white, sat on the bench behind their son. The boy and his father wore matching blue blazers, white button-down shirts, dark slacks, and brown leather shoes. The boy's mother wore a modest dress with a long coat. I thought I heard the father mention that he worked as an accountant.

I was not paying close attention to the case until I heard the judge say clearly to the boy and his parents, who were all standing at this point, "You don't belong here. You know that, right?" The boy nodded. "You're not supposed to experience this," the judge added, extending his hand in a way that took in the whole room, "but I am confident that it won't happen again, and you will be able to move on." I could not recall another occasion when the judge had so candidly expressed this type of sentiment to a youth in juvenile court.

I felt myself discretely looking around the courtroom at all the black and brown faces—small children, teenagers, mothers, a couple of fathers, and several grandmothers and aunts. There were no other white kids there that morning. The judge and most of the probation officers and court officers were white. The prosecutor and defense attorneys were also white, in addition to the boy and his parents. Those sitting in the audience appeared to be listening, but no one seemed to blink when the judge made his comments. As I glanced back over at the family, the judge and the parents began laughing at something together, as though sharing a joke, while the boy looked relieved. Then the case was done and the next matter was called.

Since that day, I have thought more about the power of data and what could be accomplished if we were able to document every instance of the racialization of juvenile justice. We could then share it with all the court actors during roundtable discussions about implicit bias and the perpetuation of negative racial stereotypes. We could brainstorm ways in which to avoid its use in the future, but would this make a difference? Would there be fewer instances of race-based subjective decision making or youths' relinquishment of rights? Would there be less harm perpetrated on young people

and their families? Or are we so inured to the racism that permeates every aspect of the system that we are unable to tease out these specific instances in which racial bias manifests itself? Besides, even if we could identify racialized practices and attempt to neutralize their power, how much of a difference could this actually make, given the current racial makeup of the system's actors? Would there be a dramatic change in tenor and tone in the courtroom, judge's chambers, and offices of the probation officer, prosecutor, and public defender? Or should we focus on creating a more racially diverse juvenile court system in which more of the decisionmakers look like the children and families who have been disproportionately represented? In other words, might racial integration be the best chance for transformative change?

Several days after the court appearance, a student who had been present told me that her client, a twelve-year-old Black girl, had asked about the judge's comments: "What did he mean that the white kid doesn't belong here? He didn't say that to me. Does that mean I *do* belong here?" The student had tried to reassure her client that judges talk a lot at disposition and that the judge's comments did not mean anything about her or her case. Reflecting on this exchange, I imagined that if we could at least rid the juvenile court system of egregious examples of racialization, like this one, there could indeed be progress. If we could also take steps to ensure that more judges, prosecutors, and defense attorneys (as well as police and probation officers) are people of color, perhaps we would see a true shift in tone. With such a shift, the juvenile court experience, which itself is criminogenic, would be less likely to harm children and their families.

