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Robin Walker Sterling
University of Denver Sturm College of Law

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"CHILDREN ARE DIFFERENT": IMPLICIT BIAS, REHABILITATION, AND THE "NEW" JUVENILE JURISPRUDENCE

Robin Walker Sterling∗

In several recent Supreme Court decisions, the Court has expanded the protections available to juvenile offenders in the criminal justice system, based on adolescent brain development research demonstrating that children merit different considerations than adults. This Article chronicles the Court's recent juvenile justice decisions from Roper v. Simmons *to* Miller v. Alabama*, tracing the Court's increasing reliance on the "children are different" rationale. But despite this resurgence in expanded protection for adolescents, youths of color have historically been excluded from the "children are different" philosophy.*

Dating back to the early nineteenth century, youths of color were subjected to disproportionate treatment in the criminal justice system as exemplified by convict leasing, lynching, and the Jim Crow era. The vestiges of the Jim Crow era eventually gave rise to the modern-day superpredator myth—a stereotype depicting youths of color as violent creatures devoid of remorse. The historical discrimination against youths of color, coupled with the rise of the superpredator myth, has inculcated an implicit bias against youths of color in the criminal

∗ Assistant Professor, University of Denver Sturm College of Law; LL.M., Georgetown University Law Center; J.D., New York University School of Law; B.A., Yale College. I would like to extend my sincerest thanks to the editors for inviting me to participate in this symposium. The Article benefitted greatly from the perspectives offered by the junior faculty at the University of Denver Sturm College of Law as part of the Junior Faculty Summer Scholarship Series. I am particularly indebted to Professors Patience Crowder, Rashmi Goel, Christopher Lasch, Nantiya Ruan, and Catherine Smith. Christopher Linas and Quinn Girrens provided excellent research assistance.

justice system. This implicit bias functions as a pernicious force, hindering the inclusion of youths of color in the "children are different" paradigm and impeding their ability to benefit from the protections mandated by the Court. This Article proposes several suggestions for mitigating the effects of implicit racial bias in juvenile life without parole proceedings, thereby extending the benefits of the "children are different" philosophy to youths of color.

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I. INTRODUCTION

In *Miller v. Alabama*,[1] the Supreme Court reaffirmed, for the fourth time in seven Terms, that children are different from adults and that those developmental differences are of constitutional dimension. Beginning with *Roper v. Simmons*[2] in 2005, the Court held that the federal Constitution categorically bars a sentence of death for all juvenile offenders who commit capital crimes.[3] Five years later, in *Graham v. Florida*,[4] the Court held that the Constitution categorically bars a sentence of life in prison without the possibility of parole for juvenile offenders who commit nonhomicide offenses.[5] In 2011 the Court in *J.D.B. v. North Carolina*[6] held that, under *Miranda v. Arizona*,[7] a custody analysis must take a child's age into account.[8] Finally, in *Miller*, the Court held that the Constitution bars a mandatory sentence of life without the possibility of parole for juvenile offenders in homicide cases, because such a sentence denies juvenile offenders the opportunity to present mitigating evidence concerning youth development.[9]

The adolescent development research on which the Court relied in each of these decisions has had a very meaningful impact on both the Court's rulings and on the criminal justice system's treatment of youths accused of crimes.[10] In *Roper*, the Court overturned a previous ruling based in part on such research.[11] In *Graham*, the

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1. 132 S. Ct. 2455, 2468–69 (2012).
2. 543 U.S. 551 (2005).
3. *Id.* at 586.
4. 130 S. Ct. 2011 (2010).
5. *Id.* at 2034.
6. 131 S. Ct. 2394 (2011).
7. 384 U.S. 436 (1966).
8. *J.D.B.*, 131 S. Ct. at 2408.
9. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).
10. *Id.* at 2464; *J.D.B.*, 131 S. Ct. at 2401; *Graham*, 130 S. Ct. at 2054; Roper v. Simmons, 543 U.S. 551, 569 (2005). The American Psychological Association (APA) filed amicus briefs in *Roper*, *Graham*, and *Miller*. Brief for the American Psychological Association et al. as Amici Curiae Supporting Petitioners, Miller v. Alabama, 132 S. Ct. 2455 (2012) (No. 10-9646); Brief for the American Psychological Association et al. as Amici Curiae Supporting Petitioners, Graham v. Florida, 130 S. Ct. 2011 (2010) (No. 08-7412); Brief for the American Psychological Association and the Missouri Psychological Association as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633).
11. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that capital punishment for a sixteen- or seventeen-year-old did not constitute cruel and unusual punishment); *see also Roper*,

Court tore down the wall in Eighth Amendment jurisprudence that had for decades separated capital and noncapital jurisprudence for decades.[12] Lastly, in *J.D.B.*, the Court explicitly extended the influence of the adolescent development research beyond sentencing to a critical pretrial investigative stage and juvenile court proceedings.[13] The Court seemed convinced, as Justice Kagan wrote in the *Miller* majority, that in the same way that "death is different"[14] and requires special substantive and procedural protections for capital defendants, "children are different too."[15]

But the "children are different" argument is old wine in new bottles. In fact, the juvenile justice system was founded on it. According to the oft-told narrative about the beginnings of juvenile court,[16] in the late nineteenth century, the "Child Savers," a group of Progressive reformers, championed the establishment of separate

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543 U.S. at 578–79 (holding that the Eighth Amendment categorically prohibits a sentence of death for juveniles).

12. Alison Siegler & Barry Sullivan, "Death is Different" No Longer: Graham v. Florida and the Future of Eighth Amendment Challenges to Noncapital Sentences, 2010 SUP. CT. REV. 327, 328 (2010).

13. *J.D.B.*, 131 S. Ct. at 2407–08; *see also* Yarborough v. Alvarado, 541 U.S. 652, 668–69 (2004) (holding that a state court's decision not to mention a seventeen-year-old's age as part of the *Miranda* custody analysis was not objectively unreasonable).

14. Scholars have written extensively on what Justice Thomas lamented in his dissent—that after *Graham*, "death is different no longer." *Graham*, 130 S. Ct. at 2046 (Thomas, J., dissenting). *See, e.g.*, Mary Berkheiser, *Death Is Not So Different After All:* Graham v. Florida *and the Court's "Kids Are Different" Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1 (2011); Elizabeth Bennion, *Death is Different No Longer: Abolishing the Insanity Defense Is Cruel and Unusual Under* Graham v. Florida, 61 DEPAUL L. REV. 1 (2011); Siegler & Sullivan, *supra* note 12, at 328.

15. *Miller*, 132 S. Ct. at 2470.

16. I have canvassed this subject previously in an earlier article, Robin Walker Sterling, *Fundamental Unfairness:* In re Gault *and the Road Not Taken*, 72 MD. L. REV. 607 (2013). For law review articles detailing the origins of the Juvenile Court from a range of perspectives, see, for example, Cheryl Nelson Butler, *Blackness as Delinquency*, WASH. L. REV. (forthcoming 2013); Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771 (2010); Kristin N. Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. (forthcoming 2013); and Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012). For books recounting the Juvenile Court's origins, see JANE ADDAMS, THE SOCIAL THOUGHT OF JANE ADDAMS, (Christopher Lasch ed., 1965); BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF JUVENILE COURT (Michael Tonry & Norval Morris eds., 1999); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2nd ed. 1977); DAVID TANENHAUS, JUVENILE JUSTICE IN THE MAKING (2004); DAVID TANEHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN: *IN RE GAULT* AND JUVENILE JUSTICE (2011); and GEOFFREY WARD, THE BLACK CHILD SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE (2012).

juvenile courts based on the belief that children were less culpable and more amenable to rehabilitation than adults.[17] The Supreme Court's recent pronouncements about youth and its unique characteristics read like a Child Savers' position paper.[18] Like the Court, the Child Savers intuitively understood the common sense reality that "youth is more than a chronological fact."[19] Like the Court, they understood youth as "a moment and 'condition of life when a person may be most susceptible to influence and to psychological damage,'"[20] and that youth's "signature qualities" are all "transient."[21] And, like the Court, they were persuaded that these differences mandated that children receive treatment that recognizes their amenability for rehabilitation.[22]

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17. Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1137 n.76 (2003); Walker Sterling, *supra* note 16; *see also In re* Gault, 387 U.S. 1, 22 (1967) (noting the goals of proponents of the juvenile justice system).

18. *See* FIFTEENTH ANNUAL REPORT OF THE BOARD OF GUARDIANS OF THE CHICAGO REFORM SCHOOL TO THE MAYOR AND COMMON COUNCIL OF THE CITY OF CHICAGO 24 (1871), *available at* http://archive.org/stream/annualreportofsupe15chic#page/n0/mode/2up (lamenting that juveniles are being sent to jail too often and not to reform school often enough); COM. ON THE HISTORY OF CHILD-SAVING WORK, HISTORY OF CHILD SAVING IN THE UNITED STATES 2–4 (1893), *available at* http://archive.org/stream/historychildsav00workgoog#page/n22/mode/2up ("We call upon all who recognize that these are the little ones of Christ, all who believe that crime is best averted by sowing good influences in childhood, all who are friends of the helpless, to aid us in our enterprise.") (quoting an excerpt from the first circular of the Children's Aid Society, dated 1853); *see also* CHARLES LORING BRACE, THE DANGEROUS CLASSES OF NEW YORK AND TWENTY YEARS' WORKING AMONG THEM (1872), *available at* http://www.gutenberg.org/cache/epub/33431/pg33431.html (writing, as the founder of the New York Children's Aid Society, that "[a] child, whether good or bad, is, above all things, an individual requiring individual treatment and care").

19. Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

20. *Miller*, 132 S. Ct. at 2467 (quoting *Eddings*, 455 U. S. at 115).

21. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)) (internal quotation marks omitted).

22. Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1455–59 (2003). For a catalog of instances in both civil and criminal cases in which the Court has recognized youths as being different, see *Miller*, 132 S. Ct. 2455; J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011); Graham v. Florida, 130 S. Ct. 2011 (2010); and Roper v. Simmons, 543 U.S. 551 (2005), as well as Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 804–05 (2003) ("Two related claims were at the heart of the rehabilitative model of juvenile justice: that young offenders were misguided children rather than culpable wrongdoers, and that the sole purpose of state intervention was to promote their welfare through rehabilitation."); and Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 146 (2003) ("[T]he state could best address the resulting inappropriate conduct of these children through remedial rather than punitive measures. Common sense and casual observation—buttressed by emerging psychological insight—aided the Progressives' claim that genuine differences existed between a child and an adult.").

For all its persuasive force, the "children are different" philosophy had and has serious limitations. Chief among these was the fact that the rehabilitative ideal in late nineteenth-century juvenile court was, in practice and in rhetoric, reserved for white children.[23] Pursuant to an unspoken "cross-class alliance,"[24] in which "upper-middle-class, native stock, urban whites would try to reform poorer whites" to help them assimilate into American society,[25] the "proper objects" of the Child Savers' solicitous care and concern were commonly understood to be poor white and European immigrant youths.[26] Meanwhile, racial mores relegated black children to whippings, convict leasing, lynchings, executions, and Jim Crow juvenile justice.[27] In other words, black children were black before they were children, and were therefore exempt from the presumption that they were amenable to rehabilitation.[28] All across the country, youths of color were overrepresented in the juvenile justice systems in jurisdiction after jurisdiction.[29] Even though the enlightened juvenile justice system rhetoric applied to "children," at every stage, the system's treatment of black youths was separate and unequal.[30] The disparate treatment of system-involved youths of color persists today at every critical discretion point in the system.[31]

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23. WARD, *supra* note 16, at 86 ("Prior historical research stresses that poor and foreign-born white youths were a primary target of early child-saving initiatives. Most accounts overlook how this focus disguised the way in which racial privilege was based on a shared white or potentially white racial status, despite distinctions.").

24. *Id.* at 73.

25. *Id.*

26. *Id.*

27. Walker Sterling, *supra* note 16, at 625–31.

28. *Id.* at 611 & nn.10–11.

29. *Id.*

30. *Id.* at 627–30.

31. *Id.* at 642–47 (arguing this disparate treatment is a legacy of the Supreme Court's choice to root delinquency due process in fundamental fairness in *Gault*). Some important studies of the racial history of juvenile justice include ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE (1972); WILEY BRITTON SANDERS, NEGRO CHILD WELFARE IN NORTH CAROLINA (1933); WARD, *supra* note 16; and Alexander Pisciotta, *Race, Sex and Rehabilitation: A Study of Differential Treatment in the Juvenile Reformatory, 1825–1920*, 29 CRIME & DELINQ. 254 (1983). For examples of histories written largely from the perspective of the majority racial group, see THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE (1992); ROBERT M. MENNEL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825–1940 (1973); PLATT, *supra* note 16; DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971); and STEVEN L. SCHLOSSMAN, LOVE & THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825–1920 (1977); as well as Bela August Walker, Note, *The Color of Crime: The Case Against Race-Based*

This Article offers a critique of the racially coded nature of the "children are different" rationale. Using *Miller v. Alabama* and the application of juvenile life without parole sentences as examples, this Article examines how racial disparities creep into the ostensibly race-neutral procedures of our modern-day juvenile justice system, and proposes a range of solutions to ensure that application of the reinvigorated "children are different" mantra includes youths of color.

This Article proceeds in four parts. Part II reviews recent Supreme Court caselaw, from *Roper v. Simmons* to *Miller v. Alabama*, tracing through each decision the progress of the Court's reliance on the adolescent brain development research that forms the bedrock of the renewed "children are different" rationale. Narrowing the scope to *Miller*, Part III excavates the history of race disparities in very serious juvenile cases and describes how these deeply embedded disparities seep into modern-day juvenile and criminal court practice. Part IV prescribes procedures for making the "children are different" philosophy inclusive, so that youths of color are not disproportionately sentenced to the ultimate juvenile sentence of death in prison. The conclusion follows.

II. THE REINVIGORATION OF "CHILDREN ARE DIFFERENT"

Although the Court commented on the relevance of youth as a mitigating circumstance in prior cases,[32] *Roper v. Simmons*,[33] which held that the Eighth and Fourteenth Amendments[34] require

Suspect Descriptions, 103 COLUM. L. REV. 662, 680–81 (2003) ("Disproportionate burdens on people of color emerge at each point that discretion is used: whether it be the decision to detain a suspect, to make a traffic stop, to search a driver, to shoot at a civilian, to handcuff a suspect, to make an arrest, to prosecute a case, to try a minor defendant as an adult, to increase charges, to plea bargain, to convict, to determine sentence length, or [until *Roper v. Simmons*,] ultimately whether to apply the death penalty or not.").

32. *See, e.g.*, Johnson v. Texas, 509 U.S. 350, 367 (1993) ("There is no dispute that a defendant's youth is a relevant mitigating circumstance . . . ."); *id.* at 376 (O'Connor, J., dissenting) ("[T]he vicissitudes of youth bear directly on the young offender's culpability and responsibility for the crime."); Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.").

33. 543 U.S. 551 (2005).

34. *See* Walker Sterling, *supra* note 16, at 635–36; *see also* Robinson v. California, 370 U.S. 660, 675 (1962) (Douglas, J., concurring) ("The command of the Eighth Amendment . . . is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment.").

"reject[ion of] the imposition of the death penalty on juvenile offenders under 18,"[35] was the first case to ascribe constitutional dimension to the developmental deficiencies of adolescence.

The facts were grisly. Respondent Christopher Simmons was convicted and sentenced to death for the murder of Shirley Crook.[36] Simmons, a white, seventeen-year-old junior in high school, broke into Ms. Crook's house, covered her eyes and mouth with duct tape, bound her hands, drove her to a state park, tied her hands and feet with electrical wire, and threw her from a railroad trestle.[37] She drowned in the waters below.[38] At trial, the judge instructed the jurors that they could consider Simmons's age as a mitigating factor, and Simmons's attorney could put on mitigating evidence about his youth.[39] However, the prosecutor turned that instruction on its head and argued Simmons's youth as an aggravator.[40] "Think about age," the prosecutor entreated.[41] "Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."[42]

The architecture of the Court's ruling in *Atkins v. Virginia*,[43] which struck down the death penalty for the mentally retarded,[44] was instrumental for the *Roper* Court's reasoning. In the same way that the *Atkins* Court overruled *Penry v. Lynaugh*,[45] which had held that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded,[46] the Court deciding *Roper* had to take on *Stanford v. Kentucky*,[47] which had held that the Eighth and Fourteenth Amendments did not mandate a categorical exemption from the death penalty for juvenile offenders.[48] The same

35. *Roper*, 543 U.S. at 568.
36. *Id.* at 556.
37. *Id.* 556–57. For photos of Christopher Simmons, see Juan Ignacio Blanco, *Christopher Lee Simmons*, MURDERPEDIA, http://murderpedia.org/male.S/s/simmons-christopher-photos.htm (last visited Nov. 20, 2012).
38. *Roper*, 543 U.S. at 556–57.
39. *Id.* at 558.
40. *Id.*
41. *Id.*
42. *Id.*
43. 536 U.S. 304 (2002).
44. *Id.* at 321.
45. 492 U.S. 302 (1989).
46. *Id.* at 340.
47. 492 U.S. 361 (1989).
48. *Id.* at 380.

way that the *Atkins* Court found that the mental deficiencies of the mentally retarded rendered them "categorically less culpable,"[49] the *Roper* Court determined that youths' developmental deficiencies left them with diminished culpability as a class.[50] The Court also factored international mores into its calculus of the acceptability of the execution of the mentally retarded and of the juvenile death penalty.[51] In *Atkins*, the Court alluded to the world community's "overwhelming disapproval" of the execution of the mentally retarded.[52] In *Roper*, the majority concluded with an involved discussion of international law that declared foreign and international law to be "instructive" for the Court's interpretation of the Eighth Amendment.[53] Even "[t]he evidence of national consensus," as measured by legislative enactments and judicial interpretation between the two cases, was "similar, and in some respects parallel."[54] An identical number of states prohibited the juvenile death penalty at the time the Court considered *Roper* as had prohibited the execution of the mentally retarded when the Court considered *Atkins*.[55]

Atkins also allowed the Court to return to the pre-*Stanford* rule: "[T]he Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty."[56] In ascertaining its own determination in the exercise of its independent judgment, the Court endorsed adolescent brain development research documenting three hallmark "qualities of youth."[57] First, youths are marked by "[a] lack of maturity and an underdeveloped sense of responsibility" that "often result[s] in impetuous and ill-considered actions and decisions."[58] Second, youths are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure[,]" making it more

49. *Atkins*, 536 U.S. at 316.
50. Roper v. Simmons, 543 U.S. 551, 570–71 (2005).
51. *Id.* at 575–76.
52. *Atkins*, 536 U.S. at 324.
53. *Roper*, 543 U.S. at 575. The *Roper* Court noted that "it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty." *Id.* at 577.
54. *Id.* at 564.
55. *See id.*
56. *Id.* at 563 (quoting Coker v. Georgia, 433 U.S. 584, 497 (1977)).
57. *Id.* at 570 (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)).
58. *Id.* at 569 (quoting *Johnson*, 509 U.S. at 367).

difficult for youths "to extricate themselves from a criminogenic setting."[59] Third, youths are more amenable to rehabilitation than adults.[60]

Roper is hortatory for two reasons. First, although *Roper* was a death penalty decision and the Court had traditionally applied a categorical analysis in death penalty cases, the Court explicitly defended its decision to hand down a categorical rule instead of accepting the petitioner's invitation to adopt a rule allowing jurors to consider mitigating, youth-related arguments on an ad hoc basis. The Court found "the likelihood" that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course," to be "unacceptable," even when "the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[61] In other words, completely counter to the teachings of brain development science, jurors might be inclined to think that a juvenile offender who has committed a depraved crime is irredeemable—a bad seed.

Second, the normative force of the *Roper* decision sends a remarkable message about redemption. The Court's holding endorsed the message that no child—not even Christopher Simmons, who bragged that he could "get away with" a cold-blooded murder because he was a minor[62]—is so far beyond redemption that the state can completely renounce the rehabilitative ideal and "extinguish [the child's] life and his potential to attain a mature understanding of his own humanity."[63]

Four years later, in *Graham v. Florida*,[64] the Court considered whether a determinate life sentence is a disproportionate punishment

59. *Id.* (quoting Elizabeth S. Scott & Laurence Steinberg, *Less Guilty By Reason Of Adolescence: Developmental Immaturity, Diminished Responsibility, And the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)) (internal quotation marks omitted).

60. *Id.*

61. *Id.* at 573. Indeed, the prosecutor's argument that Simmons's youth was "scary" instead of "mitigating" illustrates the Court's point exactly.

62. *Id.* at 556.

63. *Id.* at 574. It is notable that, far from shrinking away from the horrifying facts of the case, Justice Kennedy's opinion for the majority included a detailed recounting of the crime. *Id.* at 556–57. As Justice O'Connor noted in her *Roper* dissent, "one can scarcely imagine the terror that this woman must have suffered through the ordeal leading to her death." *Id.* at 600–01 (O'Connor, J., dissenting).

64. 130 S. Ct. 2011 (2010).

for juveniles convicted of nonhomicide offenses. When Terrance Graham was sixteen years old, he and three other teenagers tried to rob a barbecue restaurant in Jacksonville, Florida.[65] Graham was charged as an adult with one count of armed burglary with assault or battery and one count of attempted armed robbery.[66] Pursuant to a plea agreement, Graham pled guilty to both charges.[67] In a letter to the trial court that was archetypically juvenile, Graham wrote, "[T]his is my first and last time getting in trouble" and vowed, "I've decided to turn my life around . . . I made a promise to God and to myself that if I get a second chance, I'm going to do whatever it takes to get to the National Football League."[68] The trial court accepted the plea agreement.[69] Although the court sentenced Graham to concurrent three-year terms of probation, the two charges carried maximum sentences of life without parole and of fifteen years imprisonment, respectively.[70]

In December 2004, a year after he entered his plea, Graham was arrested for taking part in two robberies, this time with two twenty-year-old men.[71] The three escaped the first robbery uninjured, but one of Graham's alleged accomplices was shot in the second robbery.[72] Graham was apprehended while fleeing from police after having driven his alleged accomplices to the hospital.[73] Two weeks after Graham was arrested, his probation officer filed for a revocation of his probation on the grounds that Graham had possessed a firearm, broken the law, and associated with persons engaged in criminal activity.[74] In December 2005 and January 2006, the trial court held hearings on Graham's alleged violations.[75] Graham admitted that he violated his probation by fleeing but denied involvement in the robberies.[76] The court found that, by his own admission, Graham had violated his probation by fleeing. The court

65. *Id.* at 2018.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 2018–19.
72. *Id.*
73. *Id.* at 2019.
74. *Id.*
75. *Id.*
76. *Id.*

went on to sustain each of the allegations Graham's probation officer had made and eventually revoked Graham's probation.[77]

The recommendations for the court at resentencing were wildly disparate. Defense counsel argued for the minimum sentence of five years.[78] The probation department recommended a one-year departure from the minimum, so that Graham would serve only four years.[79] The prosecutor argued for thirty years on the armed burglary and fifteen years on the attempted armed robbery, for a total of thirty years concurrently or forty-five years consecutively.[80] Even though Graham had never been incarcerated before, none of the parties had recommended the maximum, and Graham had admitted the violation, the court skipped any intermediate sentence and imposed the maximum.[81] The court sentenced Graham to life without parole on the probation revocation, figuratively shaking its head and stating, on the record, "I don't know why it is that you threw your life away. I don't know why."[82] In explaining the sentence it imposed, the court expressed dismay at Graham's "decision" to "thr[o]w [his] life away" several times.[83]

The Supreme Court in *Graham* held that the Constitution no longer abides life without parole sentences for juvenile offenders convicted of nonhomicides who have not had a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[84] In doing so, the Court "left behind more than thirty years of consistent Supreme Court jurisprudence" that had separated

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77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 2019–20.
82. *Id.* at 2019.
83. *See, e.g.*, *id.* at 2020. The trial judge went on to say the following:

> The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you . . . . This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision . . . . You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice. . . . [and] [g]iven your escalating pattern of criminal conduct, it is apparent to the [c]ourt that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions.

Id. The First District Court of Appeal of Florida attributed a similar degree of intentionality to Graham when it upheld the trial court's sentence, stating that Graham had "rejected his second chance and chose[n] to continue committing crimes at an escalating pace." *Id.*

84. *Id.* at 2030.

challenges to noncapital sentences and capital sentences, "seemingly without a second thought or backward glance."[85] Before *Graham*, the Court had "drawn a clear and unmistakable line down the middle of"[86] its cases challenging the proportionality of sentences under the Eighth Amendment's ban on cruel and unusual punishments.[87] For noncapital cases involving a term-of-years sentence, the Court had traditionally employed a two-stage balancing test.[88] The threshold question focuses on proportionality: has the defendant established "an inference of gross disproportionality"?[89] In the rare instance that the defendant establishes gross disproportionality, the Court then engages in both an intrajurisdictional analysis, comparing the defendant's sentence to sentences for the same crime in the same jurisdiction, and an interjurisdictional analysis, comparing the defendant's sentences to sentences for the same crime in different jurisdictions.[90] For capital cases, the Court had applied a two-step categorical test.[91] The first step of the Court's capital proportionality test involves an examination of whether "objective indicia of society's standards" illustrate a national consensus against the death penalty, for a particular crime or for a particular class of defendants.[92] The second step involves the Court exercising its own "subjective," "independent judgment" as to whether capital punishment contravenes the Eighth Amendment.[93] Because of the difficulty of establishing an inference of gross disproportionality in noncapital cases and the Court's well-entrenched "death is different" redoubt,[94] over the almost five decades of the modern death penalty era, defendants seeking relief from noncapital sentences "saw their chances of gaining relief diminish with each Supreme Court decision."[95]

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85. Siegler & Sullivan, *supra* note 12, at 328.

86. *Id.* at 331.

87. *Id.*

88. *Id.* at 334.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 334–35.

93. *Id.* at 335.

94. *See* Woodson v. North Carolina, 428 U.S. 280, 323 (1976) (observing that "[o]ne of the principal reasons why death is different is because it is irreversible"); Berkheiser, *supra* note 14, at 15.

95. Berkheiser, *supra* note 14, at 15. This is, of course, relative. Challenges to death penalty cases were of course still very difficult to win until *Atkins*. *See id.* at 27–28.

But *Graham* broke with precedent. Even though Graham's challenge was to a noncapital sentence, the Court applied the two-step categorical test that it had jealously guarded for capital cases. Justice Thomas, in his dissent, lamented that "'death is different' no longer,"[96] because *Graham* marked the first time the Court has struck down a noncapital sentence for an entire class of offenders.[97] Chief Justice Roberts, in his concurrence, agreed with Justice Thomas that the majority's analysis "is at odds with our longstanding view that 'the death penalty is different from other punishments in kind rather than degree'"[98] and disparaged the *Graham* test as "a new constitutional rule"[99] grounded in "dubious provenance."[100]

The majority justified its choice.[101] It explained that the threshold inquiry into whether Graham had established "an inference of gross disproportionality" would not "advance the analysis" because Graham's was a categorical challenge to "a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."[102] The majority then offered three reasons in defense of its choice to exempt an entire class of offenders from life without parole sentences.[103] The majority reiterated the developmental deficiencies described so comprehensively in *Roper*, in support of the proposition that, as a class, juveniles are less culpable than adults for their actions because they are more immature, more easily swayed by external pressures, and more amenable to rehabilitation.[104] The fact that even adolescent development experts admitted to having difficulty identifying "with sufficient accuracy" the "few incorrigible juvenile offenders"[105] who might possess the maturity and neural development to merit the

96. Graham v. Florida, 130 S. Ct. 2011, 2046 (2010) (Thomas, J., dissenting).

97. *Id.* ("[F]or the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone.").

98. *Id.* at 2038–39 (Roberts, C.J., concurring).

99. *Id.* at 2036.

100. *Id.*

101. Siegler and Sullivan question whether or not the Court actually had a "choice," noting, "If the Court's prior jurisprudence were truly controlling in *Graham*, the Court faced no 'choice' of methodology; it was required to analyze Graham's claims under the traditional balancing test." Siegler & Sullivan, *supra* note 12, at 356.

102. *Graham*, 130 S. Ct. at 2022–23.

103. *Id.* at 2023–31.

104. *Id.* at 2026–27.

105. *Id.* at 2032.

ultimate punishment a juvenile could receive gave the Court the license it needed to adopt a categorical approach.[106] In addition, the majority also explained that "a categorical rule gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform."[107] In other words, intriguingly, the *Graham* Court's categorical rule would allow case-by-case discretion.

The Court further justified a categorical exclusion by augmenting the adolescent development findings articulated so comprehensively in *Roper* in an unexpected way: the *Graham* Court detailed "additional distinctions between adults and juveniles in the context of the penological goals,"[108] including the special challenges inherent in representing juveniles accused of crimes. Specifically, *Graham* explained that juveniles' "limited understandings of the criminal justice system,"[109] their "mistrust [of] adults," and their tendency toward impulsive decision making make them "less likely . . . to work effectively with their lawyers to aid in their own defense."[110] Because it is more difficult for juveniles to assist their counsel, the quality of their representation is "likely to [be] impair[ed]."[111] A "case-by-case approach," however, "does not take account of [these] special difficulties encountered by counsel in juvenile representation."[112] Accordingly, the Court determined that a categorical exclusion was appropriate.

The majority's unspoken justifications, however, reveal the normative importance of the *Graham* decision, which has been labeled "landmark,"[113] "pivotal,"[114] "revolutionary,"[115] and "game-

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106. *See id.*

107. *Id.*

108. Hillary B. Farber, J.D.B. v. North Carolina*: Ushering in a New "Age" of Custody Analysis Under Miranda*, 20 J.L. & POL'Y 117, 129–30 (2011).

109. *Graham*, 130 S. Ct. at 2032.

110. *Id.*

111. *Id.*

112. *Id.*

113. John Evan Gibbs, Note, *Jurisprudential Juxtaposition: Application of* Graham v. Florida *to Adult Sentences*, 38 FLA. ST. U. L. REV. 957, 957 (2011).

114. Leslie Patrice Wallace, *"And I Don't Know Why It Is That You Threw Your Life Away": Abolishing Life Without Parole, the Supreme Court in* Graham v. Florida *Now Requires States to Give Juveniles Hope for Second Chance*, 20 B.U. PUB. INT. L.J. 35, 47 (2010).

115. Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 102 (2010).

changing."[116] Most importantly, the Court's choice underscores, in word and in deed, that "children are different."[117] The alloyed *Graham* test marks the Court's recognition that, in light of the teachings of adolescent development research, the practice of simply superimposing adult criminal protections and jurisprudence on proceedings for children accused of crimes is inappropriate. As a corollary, *Graham* marks the Court's constitutional internalization of the brain development research in *Roper*. Indeed, the two-step categorical test was not the only thing that the Court transported from death penalty jurisprudence to noncapital cases; the brain science also made the jump.[118] In addition, the *Graham* Court explicitly linked sentences of death and life without parole—or what some advocates refer to as "death in prison"[119]—not just through the adoption of the categorical test, but also in an explicit comparison. The majority observed that a life without parole sentence and a death sentence share an uncompromising and innate hopelessness "that [is] shared by no other sentences."[120] The Court explained that although "[t]he State does not execute the offender sentenced to life without parole," the punishment is similar to the death penalty because it "alters the offender's life by a forfeiture that is irrevocable," signals "[the] denial of hope," and means that "whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."[121] Fourth, *Graham* had both formalist and functional components.[122] A judge sentencing a youth to a life term in a state with no parole system is not in compliance with *Graham*'s holding, even though the youth is not specifically sentenced to life without parole.[123] Finally, *Graham* is important because, once again, the Court had an opportunity to adopt, but chose

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116. Michelle Marquis, Note, Graham v. Florida*: A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 LOY. L.A. L. REV. 255, 288 (2011); *see also* Berkheiser, *supra* note 14, at 1.

117. Marquis, *supra* note 116, at 258 (quoting PETER ELIKANN, SUPERPREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW 123 (1999)).

118. *See* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

119. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13-AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 3 (2007), *available at* http://www.eji.org/files/20071017cruelandunusual.pdf.

120. *Graham*, 130 S. Ct. at 2027.

121. *Id.*

122. Aaron Sussman, *The Paradox of* Graham v. Florida *and the Juvenile Justice System*, 37 VT. L. REV. 381, 384 (2012).

123. *Id.* at 384–85.

to reject, an ad hoc approach to according importance to youth in sentencing.[124]

Two years later, in *J.D.B. v. North Carolina*, the Court turned its focus from juvenile sentencing and the Eighth Amendment to juvenile pretrial protections and the Fifth Amendment.[125] Finding "no reason for police officers or courts to blind themselves to th[e] commonsense reality"[126] that "children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave,"[127] the Court held that "a child's age properly informs the *Miranda* custody analysis."[128]

Thirteen-year-old J.D.B. was a seventh-grade special-education student when a uniformed police officer removed him from his social studies class, took him to a "closed-door conference room"[129] where two police officers, the school's assistant principal, and the assistant principal's intern were waiting. They questioned him for thirty to forty-five minutes. Police suspected J.D.B. because he was seen behind a residence in the neighborhood where several home break-ins had occurred, and because a digital camera matching the description of a stolen item was seen in J.D.B.'s possession.[130] Before the questioning began, J.D.B. was not given the opportunity to speak to his grandmother, who was his legal guardian, or to have her or any other family member present.[131] The interviewers did not read any *Miranda* warnings. They similarly did not tell him that he was free to leave the room.[132] During the questioning, the assistant principal even advised J.D.B. to "do the right thing," telling him that "the truth always comes out in the end."[133] J.D.B. confessed to committing the two home break-ins and gave a written statement.[134]

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124. *Cf. Graham*, 130 S. Ct. at 2038 (Roberts, C.J., concurring) (disagreeing with the majority's categorical rule and arguing for reversal of Graham's sentence in an "as applied" type of decision).

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

126. *Id*. at 2398–99; *see also id.* at 2401–06 (discussing the *Miranda* custody analysis regarding children).

127. *Id.* at 2398–99.

128. *Id.* at 2399; *see also id.* at 2401–06 (discussing the *Miranda* custody analysis regarding children).

129. *Id.* at 2399.

130. *Id.*

131. *Id.* at 2399–400.

132. *Id.* at 2399.

133. *Id.*

134. *Id.* at 2400.

When J.D.B. was charged in juvenile court, his court-appointed public defender moved to suppress the statements on both *Miranda* and due process involuntariness grounds.[135]

The specifics of the Court's first brush with the question of how age intersects with the *Miranda* custody inquiry illustrates the persuasive force of the "children are different" argument made in *J.D.B.*[136] In *Yarborough v. Alvarado*,[137] a federal habeas corpus case, the Court rejected the Ninth Circuit's conclusion that the Court's prior caselaw allowed consideration of a child's age to inform the *Miranda* custody analysis. Like the *J.D.B.* dissenters, the *Yarborough* Court expressed concern that folding a minor suspect's age into the *Miranda* custody analysis "could be viewed as creating a subjective inquiry."[138] Because *Yarborough* was a habeas case, the narrow question before the Court was whether the state court's decision, which omitted mention of seventeen-year-old Michael Alvarado's age in its discussion of the *Miranda* custody analysis, was "objectively unreasonable under the deferential standard of review set forth by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)."[139] The *J.D.B.* majority handily distinguished *Yarborough* by pointing out its very different procedural posture, carefully noting that all *Yarborough* represented was an affirmance of the state court's judgment. The question of whether and how age should affect the *Miranda* custody inquiry, the *J.D.B.* majority wrote, remained open, so that *Yarborough* "in no way undermines" the Court's decision in *J.D.B.*[140]

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135. *Id.*

136. Before *J.D.B. v. North Carolina*, whether age is a relevant factor in the *Miranda* custody determination was an open question. *See id.* at 2402–03. Although courts took age into account when appraising the voluntariness of a suspect's statements and the suspect's waiver of the right against compelled self-incrimination, age was not part of the *Miranda* custody analysis. *See* Fare v. Michael C., 442 U.S. 707, 725 (1979). When *Miranda* was decided in 1966, the Court had not yet held that youths had the privilege against compelled self-incrimination; that ruling would come a year later, in *In re Gault*. *In re* Gault, 387 U.S. 1, 12–13 (1967). Accordingly, the *Miranda* custody analysis presumed that a reasonable adult would be the subject of interrogation. *See J.D.B.*, 131 S. Ct. at 2408 ("[I]gnor[ing] the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.").

137. 541 U.S. 652 (2004).

138. *Id.* at 654.

139. *J.D.B.*, 131 S. Ct. at 2405.

140. *Id.*

Although the *Yarborough* Court was not tasked with conducting a de novo review to determine "whether the [state court] was right or wrong,"[141] some lower courts thought *Yarborough* signaled that the Court was reticent to import age into "the ease and clarity of"[142] *Miranda*'s objective "reasonable person" test for determining custody. The normative force[143] of the *Yarborough* decision gave courts around the country an excuse to decline to consider age as part of the *Miranda* custody analysis. For example, in the Districts of Columbia and North Carolina, where the issue of how age intersects with the *Miranda* custody determination had been an open question, post-*Yarborough* caselaw preempted consideration of the issue.[144] And worse, Iowa and Illinois, which had folded age as a factor into the calculus of the *Miranda* custody determination, ended that practice after *Yarborough*.[145]

Against this backdrop, *J.D.B.*'s rationale broke new ground. The theme of the majority's opinion was a modest, reasonable, and accessible consideration of the unique vulnerabilities of youth[146] that melded social science, precedent, and above all, common sense.[147] The *J.D.B.* Court drew support for its common sense proposition that

141. *Id.* (alteration in original) (quoting Renico v. Lett, 130 S. Ct. 1855, 1865 n.3 (2010)).

142. *Id.* at 2409 (Alito, J., dissenting) (quoting Moran v. Burbine, 475 U.S. 412, 425 (1986)).

143. Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 147 (2012) (observing that the majority's opinion in *Yarborough v. Alvarado* "appeared to signal that the Court was leaning towards the view that the *Miranda* custody determination should not take account of a minor suspect's age").

144. *See In re* J.F., 987 A.2d 1168, 1175–76 (D.C. 2010) (refusing to consider the age of fourteen-year-old J.F. because "the Supreme Court has not held that a suspect's age . . . is relevant to the *Miranda* custody analysis," and instead describing the totality of circumstances as being that he "was never told that he was required to speak with the officers, he was not handcuffed, and he traveled to the station in an unmarked car with plainclothes officers" to conclude that he was not in custody); *In re* W.R., 675 S.E.2d 342, 344 (N.C. 2009) (applying the objective "reasonable person" standard without consideration of the age of the juvenile to conclude that fourteen-year-old W.R. was not in custody when he was questioned by authorities).

145. *E.g.*, State v. Bogan, 774 N.W.2d 676, 681 n.1 (Iowa 2009) (citations omitted) ("Previously, we . . . use[d] age as part of the analysis in determining a defendant's custodial status. However, subsequent[ly] . . . the Supreme Court decided *Yarborough v. Alvarado*, which questions whether age is a factor to consider under a federal constitutional analysis."); People v. Croom, 883 N.E.2d 681, 689 (Ill. App. Ct. 2008) (holding that "we decline to consider defendant's age [sixteen] when determining whether he was in custody" in light of the "emphasis on objectiveness [in *Yarborough*]").

146. So "modest and sensible" is the majority opinion that its reasonableness is the target of the very first line of the dissent. *See J.D.B.*, 131 S. Ct. at 2408–09 (Alito, J., dissenting) ("The Court's decision in this case may seem on first consideration to be modest and sensible, but in truth it is neither.").

147. *Id.* at 2406–07 (majority opinion).

"the differentiating characteristics of youth"[148] inform youths' perception, decision-making, and behavior from two lines of cases. On the one hand, the Court relied on *Haley v. Ohio*[149] and *Gallegos v. Colorado*,[150] which both involved due process challenges to whether the confessions of the juveniles that had been charged with homicide were involuntary under the 14th Amendment. On the other hand, the Court also drew support from *Roper* and *Graham*, which are two Eighth Amendment cases. Interestingly, the Court linked the cases by citing the *Roper* and *Graham* scientific evidence as support for similar statements the Court had made about youths in *Haley* and *Gallegos*.[151] The Court thus relied upon the sentencing practices for juveniles tried as adults in order to bolster pretrial interrogation protections for juveniles prosecuted in juvenile courts. This is noteworthy because normally the difference between the procedural treatment of youths in the adult system and in the juvenile system is quite stark.[152]

Observing that "the pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people' to confess to crimes they never committed," the majority alluded to recent social science studies described in an amicus brief by the Center for the Wrongful Convictions of Youth[153] that suggest that the risk of false confessions is "all the more troubling" and "all the more acute" in custodial interrogations of juveniles.[154] A leading study of 125 proven false confessions revealed that, although youths comprise only 8 percent of suspects arrested for murder and 16 percent of suspects arrested for rape, 63 percent of suspects who gave false confessions were under the age of 25, and 35 percent were

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148. *Id.* at 2404.

149. 332 U.S. 596 (1948).

150. 370 U.S. 49 (1962).

151. Guggenheim & Hertz, *supra* note 143, at 153.

152. For example, juveniles do not have the right to trial by jury or indictment by grand jury. In addition, in most jurisdictions, youths charged in delinquency proceedings face indeterminate sentencing, where the maximum charge is removal from the home for the balance of the child's minority. With a few notable exceptions, youths charged as adults risk the same determinate sentences faced by similarly-charged adults. For a discussion of the procedural and substantive differences between juvenile delinquency and adult criminal proceedings, see Walker Sterling, *supra* note 16, at 612–14.

153. Brief for Ctr. on Wrongful Convictions of Youth et al. as Amici Curiae Supporting Petitioner at 2, J.D.B. v. North Carolina, 131 S. Ct. 2394 (2010) (No. 09-11121), 2010 WL 5385329, at *2.

154. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2401 (2010).

under 18.[155] Another study of 340 exonerations since 1989 revealed that juveniles under the age of 18 were three times as likely to give false confessions as adults and that 42 percent of juvenile exonerees had given false confessions, compared to only 13 percent of wrongfully convicted adults.[156] In addition, a 2010 study of 103 wrongful convictions revealed that while false confessions contributed to 17.8 percent of adult wrongful convictions, 31.1 percent of the juvenile cases studied were tainted by false confessions.[157]

But the *J.D.B.* majority's great contribution was that it described the unique characteristics of youth in a way that made those vulnerabilities imminently accessible. There was an appreciable difference between the way the *J.D.B.* majority used social scientific data referenced in *Roper* and *Graham* and how it acknowledged the "children are different" argument. The *Roper* and *Graham* Courts included a comprehensive summary of well-researched scientific literature. But for the *J.D.B.* majority, at some point, the plural of anecdote became data. The *J.D.B.* Court, like the *Haley* and *Gallegos* Courts, relied instead on "commonsense propositions"[158] for which "citation to social science and cognitive science authorities is unnecessary."[159] As "any parent knows,"[160] and as societal laws limiting the youths' abilities to marry, vote, drive, and enter contracts acknowledge, "a child's age is far 'more than a chronological fact.'"[161] The Court all but took judicial notice of the vulnerabilities of youth *Roper* and *Graham* had articulated.

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155. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 945 (2004); *see also* HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE ARRESTS 2004 (2006) (analyzing 2004 juvenile arrest statistics). This study was cited by the Court in *Corley v. United States*, 556 U.S. 303, 321 (2009) (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 906–07 (2004)).

156. Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544–45 (2005).

157. *See* Joshua A. Tepfer, Laura H. Nirider & Lynda Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 904 (2010).

158. Guggenheim & Hertz, *supra* note 143, at 154.

159. *Id.* at 156.

160. *Id.* at 154 (citing J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2010)).

161. *J.D.B.*, 131 S. Ct. at 2403. As Guggenheim and Hertz note, "By shifting from a reliance on social scientific studies to what amounts to judicial notice of generally known facts, [the *J.D.B.* majority] probably has made it easier for the lower courts to apply the standard that emerges from *J.D.B.* in assessing *Miranda* 'custody' in juvenile cases." Guggenheim & Hertz, *supra* note 143, at 154–55.

J.D.B. revolutionized juvenile jurisprudence in several specific ways. Here was the Court holding that the differences between juveniles and adults have constitutional implications in criminal cases outside of sentencing, and outside of very serious cases. Youth means youth, whether the youth is charged in adult criminal court with first-degree murder and facing a life sentence, or in juvenile court facing charges of shoplifting and a sentence of probation. And, by appealing to what every parent knows, the Court made the differences of youth immediately and equally accessible to all juvenile justice system stakeholders, from police officers to judges.

Where *Graham* mandated a meaningful opportunity to present evidence of maturity to a parole board, and *J.D.B.* demanded consideration of such evidence in important pretrial decisions, *Miller* required a meaningful opportunity to present mitigating evidence during sentencing.[162] In *Miller v. Alabama*, the Court struck down mandatory juvenile life without parole sentences for juvenile homicide offenders.[163] Evan Miller, a white fourteen-year-old,[164] and his friend Colby Smith went to the trailer of Cole Cannon, who had just left Miller's trailer after making a drug deal with Miller's mother.[165] At Cannon's trailer, the three smoked marijuana and played drinking games. When Cannon passed out, Miller stole his wallet, splitting about $300 with Smith. When Miller then tried to put the wallet back in Cannon's pocket, Cannon awoke and grabbed Miller by the throat. Smith hit Cannon with a baseball bat lying nearby. Then Miller grabbed the bat and repeatedly hit Cannon with it. The boys decided to set fire to Cannon's trailer to cover up any evidence of their crime. Cannon died from his injuries and smoke inhalation.[166] The Alabama district attorney moved to transfer the case to adult criminal court.[167] After a waiver hearing,[168] the juvenile court granted the district attorney's motion to transfer. Miller was prosecuted as an adult and charged with murder in the course of

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162. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

163. *Id.* at 2459.

164. For pictures of Evan Miller, see Juan Ignacio Blanco, *Evan Miller*, MURDERPEDIA, http://murderpedia.org/male.M/m/miller-evan-photos.htm (last visited Apr. 12, 2013).

165. *Miller*, 132 S. Ct. at 2462.

166. *Id.*

167. *Id.*

168. *See* Kent v. United States, 383 U.S. 541, 547–48 (1966) (describing the kind of evidence normally presented in a waiver case).

arson, which carries a mandatory minimum punishment of life without parole. At trial, Smith testified against Miller in return for a lesser sentence. Miller was convicted and sentenced to life without parole.

The Court based its holding on the confluence of two strands of precedent addressing the Eighth Amendment's proportionality requirement. The first strand focuses on the categorical culpability of a class of offenders in relation to the severity of a particular penalty. *Kennedy v. Louisiana*,[169] *Atkins*, *Roper*, and *Graham* all fall in this genus. Noting that *Miller* once again presented the issue of appropriate sentences for juveniles, this time for juveniles who had received mandatory sentences of life without parole for homicides, the Court reaffirmed its by now familiar emphasis of the distinctive attributes of youth, "even when they commit terrible crimes."[170] It quickly zeroed in on *Roper* and *Graham* to support the proposition that "children are constitutionally different from adults for purposes of sentencing."[171] The Court noted that its previous holdings were based on science, social science, and common sense (or what "any parent knows").[172] Also, the Court described the "foundational principle" of *Roper* and *Graham* as the principle "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[173]

Because *Graham* specifically compared the finality in juvenile life without parole sentences to the irrevocability of capital sentences, the Court applied a second strand of precedent that requires individualized consideration of the characteristics of a defendant, including the mitigating factors of youth and the particulars of his crime, before imposition of a death sentence. *Woodson v. North Carolina*[174] and *Lockett v. Ohio*[175] are slotted in this second category. As the Court explained, "In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment. We imposed a categorical ban on the sentence's use, in a way

169. 554 U.S. 407 (2008) (abolishing the death penalty for the rape of a child).
170. *Miller*, 132 S. Ct. at 2465.
171. *Id.* at 2463–64.
172. *Id.* at 2464.
173. *Id.* at 2465.
174. 428 U.S. 280 (1976) (plurality opinion).
175. 438 U.S. 586 (1978).

unprecedented for a term of imprisonment."[176] The intersection of these two lines of precedent led the Court to conclude that "mandatory life-without-parole [sentences] for juveniles violate[] the Eighth Amendment."[177]

By the time the Court decided *Miller*, the maxim that "children are different" had found its footing.[178] In *Roper*, the principle functioned to place children on the same footing as other groups similarly exempt from the ultimate penalty.[179] The *Graham* Court held that the fact that "children are different" meant that youths could not be sentenced to life without parole for nonhomicides, and forged an amalgamated, uniquely juvenile Eighth Amendment test for sentencing review.[180] In *J.D.B.*, the "children are different" idea was expanded to encompass three new axes. First is the *Miranda* custody determination, which is common to many more cases than those involving an Eighth Amendment cruel and unusual punishment analysis. The second is juvenile court proceedings, which encompasses far more youths accused of crime than the relatively small percentage of very serious violent crimes prosecuted in adult criminal court. Third is commonsense experience, or "what every parent"—whether that parent is a police officer, prosecutor, judge, defense attorney, or probation officer—"knows."[181] Finally, in *Miller*, "children are different" evolved to include children who were facing mandatory juvenile life without parole.[182]

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176. *Miller*, 132 S. Ct. at 2466.

177. *Id.* at 2457.

178. Roper v. Simmons, 543 U.S. 551, 567 (2005).

179. *Id.* at 578–79.

180. *See* Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 464 (2012) ("The entire focus of Justice Kennedy's opinion was on the special characteristics of juveniles, never suggesting that the decision changed the Court's understanding that death penalty sentencing decisions have no application in non-death penalty cases. In other words, *Graham* is not a variant on death penalty jurisprudence[.] . . . *Graham* is a case about how and why children are different from adults that states a constitutional principle with broad implications across the entire landscape of juvenile justice.").

181. Guggenheim & Hertz, *supra* note 143, at 175.

182. *Miller*, 132 S. Ct. at 2475.

III. RACE DISPARITIES IN SERIOUS JUVENILE CASES: THEN AND NOW

The promise of a renewed "children are different" jurisprudence, however, may yet ring hollow. Unearthing the history of racial disparities in serious juvenile cases reveals that the "children are different" precept has failed to include black children since its inception.[183] So illuminated, these patterns might in turn reveal how and why black children were exempted from the principle, and suggest ways to avoid repeating that pitfall now that the Court has reinvigorated "children are different" as a legal principle.

A. The Seeds of Disparate Treatment in Serious Juvenile Cases

Pre-juvenile court data supports the idea that black and system-involved children did not benefit from ideas about lessened culpability as white children did. In his seminal work *The Child Savers*,[184] sociologist Anthony Platt used fourteen sample cases of juveniles charged with serious offenses to examine cultural ideas about the criminal responsibility of children.[185] Before the twentieth century, only an extremely small number of cases involving very young children accused of very serious crime found their way into the court system, as most cases of this type were handled informally.[186] Platt selected fourteen cases from all the cases that landed in court spanning the seventy-six year period from 1806 to 1882.[187] Because these cases feature discussions of the criminal capacity of young children, they provide an opportunity to examine whether youth as a mitigating factor held equal force for black and white juveniles accused of serious crimes.[188] In this sample, two youths were charged with petit larceny; two were charged with grand larceny; one was charged with burglary and larceny; one was charged with malicious trespass; and eight were charged with murder.[189] Ten were acquitted.[190] Of the four children who were

183. PLATT, *supra* note 16, at 202.
184. PLATT, *supra* note 16.
185. *Id.* at 198–99.
186. *But see id*. at 187–89 (noting that by beginning of the twentieth century, rules of criminal procedure was well established in England and that American caselaw was even more elaborate).
187. *Id.*
188. *See id.* at 190–202.
189. *Id.* at 198–99.

convicted, one white child received an unreported sentence, one white child was sentenced to three years in a reformatory, and two of the children, both black, were executed.[191]

Focusing on the convictions in the murder cases illuminates the disparate treatment of black, system-involved children in very serious cases. Four of the eight accused in murder cases were white children. In *State v. Doherty*,[192] an 1806 case from Tennessee, a twelve-year-old white girl was charged with murdering her father.[193] In 1834, a white twelve-year-old was acquitted of murder in federal court.[194] In *State v. Bostick*,[195] an 1845 case from Delaware, twelve-year-old Mary Bostick was accused of intentionally setting fire to her mistress's house and killing the two young children she had in her care. In *Angelo v. People*,[196] an 1880 Illinois case, eleven-year-old Theodore Angelo was charged with homicide.[197] Each of these youths was ultimately acquitted.[198] The two youths accused in *Doherty* and the 1834 federal case were acquitted outright;[199] the two youths in *Bostick* and *Angelo* saw their convictions reversed on appeal.[200]

In stark contrast, all four of the cases involving black juvenile murder defendants resulted in convictions. In *State v. Aaron*,[201] an 1818 New Jersey case, an eleven-year-old slave stood accused of murdering another child.[202] In *State v. Guild*,[203] an 1828 New Jersey case, a twelve-year-old slave was charged with beating an old woman to death.[204] In *Godfrey v. State*,[205] an 1858 Alabama case, an eleven-year-old slave was charged with murdering the four-year-old child in his care because the child had broken Godfrey's kite.[206]

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190. *Id.*
191. *Id.* at 202.
192. 2 Tenn. (2 Overt.) 80 (1806).
193. *Id.*
194. PLATT, *supra* note 16, at 194 n.35, 198.
195. 4 Del. (4 Harr.) 563 (1845).
196. 96 Ill. 209 (1880).
197. *Id.*
198. *Bostick*, 4 Del. at 566; *Angelo*, 96 Ill. at 209.
199. *See generally* State v. Doherty, 2 Tenn. 80 (1806).
200. *Bostick*, 4 Del. at 564; *Angelo*, 96 Ill. at 209.
201. 4 N.J.L. 231 (1818).
202. *Id.*
203. 10 N.J.L. 163 (1828).
204. *Id.* at 164–65.
205. 31 Ala. 323 (1858).
206. *Id.* at 324–25.

Finally, in *State v. Adams*,[207] an 1882 Missouri case, a twelve-year-old black boy was charged with first-degree murder for stabbing a seventeen-year-old in the heart with a pocket knife.[208]

Examination of the sentences that the youths received sharpens the point. Of the six convicted children, four won postconviction relief. As described above, the convictions of Mary Bostick and Theodore Angelo were reversed on appeal. Sentenced to death, the eleven-year-old defendant in *Aaron* was spared when, on appeal, defense counsel argued successfully for reversal because the prosecution had not rebutted the presumption that an eleven-year-old lacks the capacity to form the mens rea required to support a finding of guilt.[209] The twelve-year-old in *Adams* was similarly spared when the appellate court found that "no effort seem[ed] to have been made at the trial to show the defendant possessed criminal capacity."[210] The remaining two defendants, slaves Godfrey and Guild, were both sentenced to death and executed.[211] Guild was convicted even though, in light of Guild's young age, Guild's trial judge instructed jurors to resolve any doubts they might have regarding the reliability of his confession and his criminal intent in his favor.[212]

The executions of Guild and Godfrey foreshadowed "the positioning of black youths and communities outside the legal conventions and communities from which modern juvenile justice emerged."[213] As Platt concluded, these cases suggest that even though the common law recognized that children under fourteen years old were less culpable for their actions than adults, "[b]lack children apparently were not granted the same immunities as white

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207. 76 Mo. 355 (1882).

208. *Id.* at 355–56.

209. *See Aaron*, 4 N.J.L. at 245–47.

210. *Adams*, 76 Mo. at 358.

211. *Godfrey*, 31 Ala. 323, 328–29.

212. Frank Vanderhoort & William E. Ladd, *The Worst of All Possible Worlds: Michigan's Juvenile System and International Standards of Treatment for Children*, 78 U. DET. MERCY L. REV. 203, 203–04 (2001).

213. WARD, *supra* note 16, at 50–51. The fact that both Guild and Godfrey were convicted of killing white victims reflects the later, meticulously-documented reality that the severity of the sentence often correlates with the race of the victim. *See generally* David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the George Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983) (detailing the correlation between race and severity of sentence for youth offenders).

children and it seems unlikely that Guild and Godfrey would have been executed if they had been white."[214]

B. Creation of the Juvenile Court

A group of Progressives called the Child Savers successfully championed the creation of the nation's first separate juvenile court in Chicago, Illinois, in 1899.[215] From its inception, the Child Savers campaign was a crusade on behalf of wayward, indigent children. The Child Savers believed that wayward youths resulted from an "unwholesome environment, especially the baneful influence of squalid urban life,"[216] and that state intervention in the form of social services was the cure for what ailed them. They subscribed to the "Rehabilitative Ideal," which had three basic tenets: first, children are capable of rehabilitation; second, all that rehabilitation requires is the proper intervention; and third, the appropriate goal of rehabilitation was for "[a]ll Americans . . . to become middle class Americans."[217]

The Child Savers envisioned juvenile court as more of a social welfare agency than a court system. The juvenile court judge[218] was charged with determining not whether the child was "guilty" or "innocent," but "[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[219] Using this information about the child's background and having virtually unfettered discretion, the judge, acting as the parent that the ungovernable child needed,[220]

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214. PLATT, *supra* note 16, at 262.

215. *See* WARD, *supra* note 16, at 83–84.

216. Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1097 (June 1991); *see also* Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53 (2012) (explaining that the early juvenile court system created standards that were unattainable for lower-class families).

217. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 48–49 (1980).

218. *In re* Gault, 387 U.S. 1, 15–16 (1967) ("[T]he child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.").

219. Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909). Judge Mack's article about the juvenile court is one of the most-cited law review articles of all time. *See* Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540 (1985).

220. Mack, *supra* note 219, at 117 (describing the relationship between the juvenile court and its charges as "not so much the power, as the friendly interest of the state"); *see* WARD, *supra*

would fashion an individualized sentence aimed to rehabilitate the child.[221] The entire hearing was geared toward ensuring a successful disposition in the child's best interests.

Form follows function, so the focus on rehabilitation instead of punishment meant that the juvenile court "shun[ned] the burdensome formalities of criminal procedures."[222] The state derived its power to act from the doctrine of *parens patriae*,[223] making the proceedings informal, nonadversarial, and civil, instead of "rigid[], technical[], harsh[,]" and criminal.[224] In many jurisdictions, the criminal rules of evidence and procedure did not apply.[225] Hearings were confidential.[226] Records were sealed so that system-involved youths could avoid the stigma of a criminal conviction.[227] In most jurisdictions, children were tried by judges and did not have the right to trial by jury.[228] The informality was justified as "a part of the rehabilitative process."[229]

Rehabilitation, however, was reserved only for white children. When the juvenile court was established, the national memory of slavery, the Civil War, and Reconstruction was fresh and raw. Unsurprisingly then, the "proper objects" of the Child Savers' efforts were understood to be poor white and European immigrant youths,[230] who benefitted from an unspoken "cross-class alliance" that

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note 16, at 78 (explaining a Cook County, Illinois, judge's description of the separate juvenile court as acting as a "kind and just parent ought to treat his children.").

221. *See* Ainsworth, *supra* note 216, at 1099.

222. James E. Starrs, *A Sense of Irony in Southern Juvenile Courts*, 1 HARV. C.R.-C.L. L. REV. 129, 134 (1966).

223. *Parens patriae* describes "the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1221 (9th ed. 2009).

224. *In re* Gault, 387 U.S. 1, 15–16 (1967) ("[T]he apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.").

225. *Id.* at 15. *See also* Feld, *supra* note 17, at 1137. Because of the Rehabilitative Ideal, the major criminal justice reforms of this period—probation, parole, indeterminate sentences, and the juvenile court—share an emphasis on "open-ended, informal, and flexible policies" that reform offenders. *Id.* at 1137.

226. PLATT, *supra* note 16, at 137–63 (describing the philosophy behind the creation of juvenile court).

227. *Id.*

228. *See* Ainsworth, *supra* note 216, at 1100.

229. *Id.*

230. *See* WARD, *supra* note 16, at 73.

prioritized their needs over those of black children.[231] "North or South, the basic pattern was that upper-middle-class, native stock, urban whites would try to reform poorer whites" to help them assimilate into American society.[232] In stark contrast, the treatment of black children accused of crime was characterized by violence against black children in the South, convict leasing, and Jim Crow juvenile justice.

C. Convict Leasing, Lynchings, and Jim Crow

The confluence of desperate labor needs, the reassertion of the racist social norms that survived the abolition of slavery, and the legal and economic vulnerability of newly-freed slaves meant blacks involved in the criminal justice system suffered severe penalties for relatively minor crimes and brutality for serious crimes. Convict leasing,[233] a system of forced labor in which white business owners paid local sheriffs for each black person the sheriff arrested and delivered, quickly emerged to fill the labor void left by the abolition of slavery.[234] Black children were easily swept up in this "convict labor machine."[235] For example, in 1868, of the 222 convicts in the Louisiana penitentiary, forty-three were between the ages of ten and

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231. *Id.* at 73, 86 ("[P]rior historical research stresses that poor and foreign-born white youths were a primary target of early child-saving initiatives. Most accounts overlook how this focus disguised the way in which racial privilege was based on a shared white or potentially white racial status, despite distinctions.").

232. *See id.* at 73.

233. Douglas Blackmon described convict leasing as follows:

> It was a form of bondage distinctly different from that of the antebellum South in that for most men, and the relatively few women drawn in, this slavery did not last a lifetime and did not automatically extend from one generation to the next. But it was nonetheless slavery—a system in which armies of free men, guilty of no crimes and entitled by law to freedom, were compelled to labor without compensation, were repeatedly bought and sold, and were forced to do the bidding of white masters through the regular application of extraordinary physical coercion.

DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 4 (2008).

234. *Id.*

235. *See* DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 46–48 (1996). The convict leasing system persists. As New York Times columnist Charles M. Blow discussed in his eight-part series about Louisiana's private prison system, which thrives on high incarceration rates and harsh sentences, the convict leasing system is alive and well. The series offered the following description of Louisiana's private prison system: "A prison system that leased its convicts as plantation labor in the 1800s has come full circle and is again a nexus for profit." *See* Charles M. Blow, *Plantations, Prisons and Profits*, N.Y. TIMES, May 26, 2012, at A21.

twenty.[236] By 1880, at least 25 percent of Mississippi's convicts were under the age of eighteen.[237] According to an 1890 census analysis by W.E.B. Du Bois, more than 18 percent of all black prisoners were juveniles.[238] No crime was too small to justify imprisonment. For example, one sixteen-year-old Mississippi farmhand was sentenced to 729 days in the mines for "an unrecorded theft" just before Thanksgiving of 1910.[239] In the 1880s, six-year-old Mary Gay of Vicksburg was sentenced to thirty days incarceration at Parchman Farm plus court costs for stealing a hat.[240]

Eventually, convict leasing came to an end.[241] But the essential practice underlying convict leasing—the disparate treatment of poor blacks and whites, even poor black children and poor white children—persisted long after the institution's abolition.

Jim Crow, the system of American apartheid that relegated blacks to second-class citizenship using a comprehensive set of laws and social mores, came to prominence after convict leasing. During the Jim Crow era, which spanned the late nineteenth century through the first half of the twentieth century, black children were overrepresented in juvenile court proceedings and underrepresented in rehabilitative agencies and services.[242] From the Deep South to Chicago and New York, white civic leaders elevated the care and rehabilitation of white youths in segregated juvenile justice systems over the needs of black children.[243] During this time, black children, however, were not only being denied their fair share of rehabilitative services; indeed, corporal punishment in the form of whippings was also reserved for them. For example, white North Carolina juvenile court judges articulated "a widespread feeling . . . that whipping is the most effective way of handling delinquent Negro boys."[244] Their impression led to violent consequences: of the 159 youths in North

236. *See* WARD, *supra* note 16, at 67.

237. *See* OSHINSKY, *supra* note 235, at 46–48.

238. *See* JAMES BELL & LAURA JOHN RIDOLFI, ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM, W. HAYWOOD BURNS INSTITUTE 5 (2008), *available at* http://www.burnsinstitute.org/downloads/BI%20Adoration%20of%20the%20Question.pdf.

239. *See* BLACKMON, *supra* note 233, at 328.

240. *See* OSHINSKY, *supra* note 235, at 47.

241. *Id.* at 52.

242. *See* BELL & RIDOLFI, *supra* note 238, at 6.

243. *See* WARD, *supra* note 16, at 229.

244. *Id.*

Carolina's juvenile justice system who were whipped in 1933, 134, or over 80 percent, of them were black.[245]

Like whipping, lynching[246] was integral to social control in the Jim Crow era, and black children were not exempt from this terrorization. Well into the first half of the twentieth century, black youths were victims of extrajudicial mob executions. In 1908, a black teenager in Dallas, Texas, accused of raping a white woman was burned to death.[247] In 1916, seventeen-year-old Jesse Washington was lynched in Waco, Texas.[248] In 1942, a white motorist saw Charlie Lang and Ernest Green, both fourteen years old, chasing a white playmate and called the police.[249] Held at the local jail after being arrested on suspicion of attempted assault, the two boys were hanged from a bridge by a white mob.[250] In his study of black life in a Mississippi Delta town in the 1930s, sociologist John Dollard found that "the threat of lynching was ever-present in the minds of even very young children."[251]

Black youths were also subject to legal executions.[252] Between 1900 and 1959, after the creation of the juvenile court, at least 208 youths under eighteen years old were executed.[253] More than 70 percent of those were executions of black youths.[254] In 1947, fifteen-year-old James Lewis and sixteen-year-old Charles Trudell were executed for an attempted robbery of their employer that left their employer dead.[255] They were convicted by an all-white jury in a case

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245. *See id.* at 115.

246. As Ida B. Wells wrote, "The Convict Lease System and Lynch Law are twin infamies which flourish hand in hand in many of the United States. They are the two great outgrowths and results of the class legislation under which our people suffer to-day." IDA B. WELLS, THE REASON WHY THE COLORED AMERICAN IS NOT IN THE WORLD'S COLUMBIAN EXPOSITION 23 (1999).

247. BLACKMON, *supra* note 233, at 324–25.

248. *See* BELL & RIDOLFI, *supra* note 238, at 6–7. For a detailed recounting of this tragedy, see PATRICIA BERNSTEIN, THE FIRST WACO HORROR: THE LYNCHING OF JESSE WASHINGTON AND THE RISE OF THE NAACP (2006).

249. WARD, *supra* note 16, at 118.

250. *Id.*

251. PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 83 (2002).

252. Professor Geoff Ward suggests that the "substitution thesis" explains the increased executions of black youths during the second half of the twentieth century. WARD, *supra* note 16, at 118. The "substitution thesis" holds that state-sanctioned, legal executions supplanted extralegal lynchings. *Id.*

253. *Id.* at 117.

254. *Id.* at 116–20.

255. *Id.* at 118.

built on the boys' coerced confessions.[256] Their NAACP federal appellate attorney, Thurgood Marshall, compared the trial to the trial of the Scottsboro boys.[257] The case triggered an international outcry, with protests coming from London's League of Colored People, the West African Student Union, and the government of India.[258] Three members of the British House of Commons sent President Truman a telegram entreating him to "protect basic human rights by intervening" and stopping the executions.[259] In a scene reminiscent of a lynching, a crowd of white spectators cheered outside the jail the day the boys were executed.[260]

D. *The Supreme Court Blesses Trying Youths as Adults*

Beginning in 1966, the Supreme Court considered a series of cases that examined fundamental fairness in juvenile delinquency court hearings. The first of this series, *Kent v. United States*,[261] stands as the Court's clearest pronouncement about the process due to children facing judicial waiver to adult criminal court.

Sixteen-year-old Morris Kent was accused of housebreaking, robbery, and rape in the District of Columbia.[262] The government successfully moved to transfer him for prosecution in adult criminal court pursuant to the District of Columbia's Juvenile Court Act, which allowed youths to be transferred to adult criminal court without a hearing and without defense counsel having access to the social records considered by the court.[263] Kent challenged the procedure by which the District of Columbia's juvenile court waived jurisdiction to allow a youth to be prosecuted in adult criminal court.[264] Although defense counsel filed motions for a hearing on the

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256. *Id.* at 118–19.
257. *Id.*
258. *Id.* at 119.
259. *Id.*
260. Ward pointed out that because the boys would be too short to fit the electric chair, their trial attorney suggested that the boys be propped up on the United States Constitution, the Bible, *The Age of Reason*, and *The Rise of Democracy*, "so that Mississippi can destroy them all at the same time." WARD, *supra* note 16, at 119–20. The case triggered an international outcry against "juvenile murder" and "white justice." *Id.*
261. 383 U.S. 541 (1966).
262. *Id.* at 544.
263. *Id.* at 546.
264. *Id.* at 548.

issue of whether Kent was amenable to rehabilitation,[265] and for access to the social service file[266] that had been accumulated by the staff of the juvenile court during his probationary period in an earlier case,[267] the trial judge simply issued an order stating that after "'full investigation, I do hereby waive' jurisdiction of petitioner" and direct that the jurisdiction of Kent's case be transferred to adult court. The trial court did not rule on defense counsel's motions.[268] It did not hold a hearing.[269] It did not make any findings.[270] It did not indicate any reasons for waiver.[271]

In response to what it considered "disturbing" procedures,[272] the Supreme Court held that the District of Columbia's Juvenile Court Act required a waiver hearing that comported with "the essentials of due process and fair treatment."[273] In this instance, the Court defined the "gossamer"[274] contours of due process as requiring the juvenile court to hold a transfer hearing; grant defense counsel access to the youth's social records in advance of the transfer hearing; and accompany its waiver order with a statement of the reasons for transfer.[275] The *Kent* Court summarized its efforts to imbue juvenile court with due process while preserving its rehabilitative spirit, stating, "We do not mean . . . to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment."[276] The Court remanded the case to the trial court for a de novo hearing on waiver consistent with the Court's opinion.

Nevertheless, *Kent* did endorse the process of transferring youths to be prosecuted as adults. Although the Court was careful to

265. *Id.* at 545.

266. *Id.* at 546. A social file can include documents like the child's prior record; signed releases from the child and the child's parents; mental health and other evaluations; police reports; school attendance, academic, and disciplinary records; and a running file detailing the probation officer's contacts (or lack thereof) with the child and the child's family. *Id.* at 546–47.

267. *Id.* at 546.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 543.

273. *Id.* at 562.

274. Haley v. Ohio, 332 U.S. 596, 602 (1948).

275. *Kent*, 383 U.S. at 560–62.

276. *Id.* at 562.

emphasize the drastic nature of transfer proceedings and explicitly held that certification to criminal court is a "critically important" stage,[277] the Court nonetheless blessed the practice. The Court's admonishment that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons"[278] would soon fall by the wayside in the face of rising crime rates and knee-jerk legislative reactions to dire predictions of a juvenile crime wave.

E. Transfer and the Rise of the Myth of the Superpredator

Kent was part of the Warren Court's due process revolution, which addressed the Court's profound "concern over racial injustice and state institutional failure" with major decisions in areas as far-ranging as "federalism; separation of powers; criminal law and procedure; freedom of speech, association, and religion; procedural due process of law; and democracy."[279] Beginning in the 1960s, the focus of the juvenile court changed,[280] so that by the end of the twentieth century, the juvenile court tilted on a punitive axis instead of a rehabilitative one.[281] Media-stoked fears about the threat to public safety from juvenile offenders of color,[282] concomitant general disillusionment about the efficacy of rehabilitation,[283]

277. *Id.* at 560 (internal quotation marks omitted).

278. *Id.* at 554 (internal quotation marks omitted).

279. Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 210 SUP. CT. REV. 59, 60 (2010).

280. *See* Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 340 (1999) (grounding early evidence of shift from rehabilitation to punitiveness in the "turbulent years of the 1960s").

281. *Id.*

282. Perry L. Moriearty, *Framing Justice: Media, Bias and Legal Decisionmaking*, 69 MD. L. REV. 849, 850–51 (2011) (discussing how the public became "consumed by [a] looming threat posed by America's youth" and a forecast of an increase in violent juvenile crime).

283. Arthur R. Blum, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L.J. 349, 363–72 (1996) (discussing the of erosion of confidence in the amenability to rehabilitation of juvenile system-involved youths); Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System"*, 22 PEPP. L. REV. 907, 907–09 (1995). Rossum argues that as the rate of serious juvenile crime increased, the public's belief in the juvenile justice system's effectiveness waned, and then proposes a "justice model" in juvenile courts that specifically contemplates offenders' accountability and determinate sentences. *Id.*

victims' rights campaigns,[284] and public cries for a legislative response that emphasized youth accountability[285] all colluded to erode the focus on rehabilitating youths.

Juvenile arrests for violent crimes and homicides increased sharply between 1986 and 1994.[286] But in spite of appearances, "there never was a general pattern of increasing adolescent violence in the 1980s and 1990s."[287] Instead, the juvenile crime rates were more accurately explained by "narrower bands of behavior," specifically "a thin band of highly lethal gun attacks . . . and garden variety assaults."[288]

Although juvenile crime rates had fallen consistently since 1993,[289] the media's coverage of juvenile crime was unrelenting, even sensationalist. Some media portrayed juvenile offenders as depraved, violent, and of color.[290] Media depictions of youthful offenders were laced with "silent, racially charged messages" that linked criminal behavior and race.[291] For example, a 2001 survey

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284. *See* Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1112–15 (2009) (detailing the punitive policy trend of the 1980s and 1990s).

285. PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME, xi (July 1996), *available at* http://www.ncjrs.gov/pdffiles/statresp.pdf ("Inherent in many of the changes [was] the belief that serious and violent juvenile offenders must be held more accountable for their actions. Accountability [was] . . . defined as punishment or a period of incarceration . . . .").

286. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 29 (2007).

287. Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality,* 33 WAKE FOREST L. REV. 727, 728 (1998).

288. *Id.*

289. *See* ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 4 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf ("After 1993, the [homicide offending] rate fell so much that by 2000, the offending rate for teens was near its 1985 level.").

290. Moriearty, *supra* note 282, at 865–67. While this Article focuses on the print and news media, it should be noted that Hollywood had its part in advancing the link in the public consciousness between youth violence and race. The 1980s saw the birth of a new genre, "hood films," which all focused on aspects of urban African American culture, including rap music, gangs, violence, poverty, and race discrimination. Some of the films in this genre that were met with considerable commercial and critical success include BOYZ N THE HOOD (Columbia Pictures 1991), NEW JACK CITY (Warner Brothers 1991), JUICE (Island World 1992), MENACE II SOCIETY (New Line Cinema 1993), JASON'S LYRIC (The Jackson/McHenry Company 1994), SUGAR HILL (Beacon Communications 1994), FRESH (Lumiere Pictures 1994), CLOCKERS (Universal Pictures 1995), and DEAD PRESIDENTS (Caravan Pictures 1995).

291. Jane Rutherford, *Juvenile Justice Caught Between* The Exorcist *and* A Clockwork Orange, 51 DEPAUL L. REV. 715, 720–21 (2002).

showed that throughout the 1990s, the media had "misrepresent[ed] crime, who suffer[ed] from crime, and the real level of involvement of young people in crime," so that whites were underrepresented as violent offenders and African Americans and Latinos were overrepresented as violent offenders.[292] These false stories "reinforce[d] the erroneous notion that crime [wa]s rising, that it [wa]s primarily violent, that most criminals [we]re nonwhite, and that most victims [we]re White."[293]

The "Central Park Jogger" case provides the most illustrative example of the public hysteria surrounding youth crime. In 1989, a young, white, female jogger was raped, beaten, and left for dead in Manhattan's Central Park by what police initially believed to be as many as twelve youths.[294] Five youths, aged fourteen to sixteen, all black or Latino, were arrested and charged with rape, assault, and attempted murder.[295] They confessed to the attack.[296] Adopting a term used by some of the young people who were questioned, the police described the attacks as "wilding."[297] In the press, the term "wilding" was used to communicate a kind of wanton, predatory criminality reserved for youths of color.[298] The youths themselves were commonly referred to in the media as "wolf packs," "rat packs," "savages," and "animals."[299] The five teenagers were convicted, only to be exonerated years later after another perpetrator, who went on to commit two additional rapes while the teenagers

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292. LORI DORFMAN & VINCENT SCHIRALDI, BUILDING BLOCKS FOR YOUTH, OFF BALANCE: YOUTH RACE & CRIME IN THE NEWS 26 (2001), *available at* http://www.cclp.org/documents/BBY/offbalance.pdf; *see also* Moriearty, *supra* note 282, at 870 (observing that youths of color were routinely "overrepresented as perpetrators and underrepresented as victims in media crime stories").

293. DORFMAN & SCHIRALDI, *supra* note 292, at 26; *see also* Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System,* 51 DEPAUL L. REV. 679, 712 (2002) ("Many white Americans believe African Americans are the cause of crime, and that when African Americans enter a neighborhood, as residents or visitors, crime will surely follow.").

294. Craig Wolff, *Youths Rape and Beat Central Park Jogger*, N.Y. TIMES, Apr. 21, 1989, at B1.

295. David E. Pitt, *Jogger's Attackers Terrorized at Least 9 in 2 Hours*, N.Y. TIMES, Apr. 22, 1989, at 11. *See also* Moriearty, *supra* note 282, at 862 ("All of the suspects were African-American or Latino").

296. Moriearty, *supra* note 282, at 864.

297. *Id.* at 862–63; Pitt, *supra* note 295, at 11.

298. *See* N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1348 (2004).

299. *Id.*

stood accused and convicted, confessed to the crime.[300] The youths' confessions were coerced.[301]

Academics chimed in with the dire forecast that a new generation of juvenile "super-predators" was on the horizon.[302] According to academics, sociologists, and criminologists, superpredators were a new and vicious breed of youths who would "kill, rape, maim, and steal without remorse."[303]

Professor John DiIulio coined the term in repeated and explicitly racist predictions of a wave of juvenile crime.[304] DiIulio harbingered that crime stemmed from moral poverty, or the "poverty of being without loving, capable, responsible adult" role models and "growing up surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings."[305] Moral poverty created superpredators, who, Professor DiIulio and his colleagues claimed, were more likely to be African American children and other children of color, because they were growing up in "criminogenic communities."[306] According to Professor DiIulio, "My black crime problem, and ours, is that for most Americans, especially for average white Americans, the distance is not merely great but almost unfathomable, the fear is enormous and largely justifiable, and the black kids who inspire the fear seem not merely unrecognizable but alien."[307] Professor DiIulio projected that "as many as half of these juvenile super-predators could be young black males."[308] Professor DiIulio also adumbrated that "the trouble will be greatest in black inner-city neighborhoods" and that "the

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300. Susan Saulny, *Convictions and Charges Voided In '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1 (describing exoneration).

301. *Id.*

302. John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, CITY J., Spring 1996, at 1, *available at* http://www.city-journal.org/printable.php? id=62.

303. *Id.* at 5.

304. *See id.* at 1; John J. DiIulio, Jr., *The Coming of the Super-Predators*, WEEKLY STANDARD, Nov. 27, 1995, at 23, *available at* http://cooley.libarts.wsu.edu/schwartj /criminology/dilulio.pdf.

305. DiIulio, *supra* note 304, at 25.

306. *See generally* WILLIAM J. BENNETT, JOHN J. DIIULIO, JR. & JOHN P. WALTERS, BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 18–34 (1996) ("[T]he problem is that most inner-city children grow up surrounded by teenagers and adults who are themselves deviant, delinquent, or criminal. At best, these teenagers and adults misshape the characters and lives of the young in their midst. At worst, they abuse, neglect, or criminally prey upon the young.").

307. DiIulio, *supra* note 302, at 4.

308. *Id.* at 1.

demographic bulge of the next [ten] years will unleash an army of young male predatory street criminals who will make even the leaders of the Bloods and Crips . . . look tame by comparison."[309]

DiIulio's jeremiad spread like a fever. Politicians looking to score points with voters clamored for increased youth offender accountability.[310] In 1993, prominent civil rights activist Jesse Jackson remarked, "There is nothing more painful to me at this stage of my life than to walk down the street and hear footsteps and start thinking about robbery—then look around and see somebody white and feel relieved."[311] In 1996, then presidential candidate Bob Dole announced that "[a] violent teenager who commits an adult crime should be treated as an adult in court and should receive adult punishment,"[312] adding that "[u]nless something is done soon, some of today's newborns will become tomorrow's super-predators—merciless criminals capable of committing the most vicious acts for

309. DiIulio, *supra* note 302, at 1, 3. Professor DiIulio's was just the loudest voice in a chorus. For example, James Alan Fox, Dean of Northeastern University's College of Criminal Justice, sent a report to U.S. Attorney General Janet Reno warning of "teen killers" who would be at the crest of a "future wave of youth violence" because of a predicted population increase in the number of fourteen- to seventeen-year-old African Americans starting in 2005 and "continu[ing] to expand well into the next century, easily surpassing the population levels of twenty years ago." JAMES ALAN FOX, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING 1, 3 (1996). Decreasing violent crime rates revealed DiIulio's prediction as a canard. Of course, DiIulio famously renounced his prediction and stated that he was sorry that he made it. Elizabeth Becker, *As Ex-Theorist on Young "Superpredators," Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19. In fact, he filed a brief in *Miller*, along with other professors, that specifically denounced the superpredator myth. Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners at 18–19, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 U.S. S. Ct. Briefs LEXIS 216, at *22.

310. The response in New York, home of the Central Park jogger attack, was particularly fervent and vitriolic. Donald Trump took out a full-page ad in the New York Times calling for reinstatement of the death penalty. Michael Welch et al., *Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 YOUTH & SOC'Y 3, 21 (2002). Particularly wrongheaded in light of the recent adolescent development research describing youths' unique vulnerability to peer pressure and inability to excise themselves from criminogenic acts in progress, Manhattan Borough President and mayoral candidate David Dinkins proposed an "antiwilding law" with increased penalties for anyone who committed a crime as part of a group. *Id.* at 9–10. Mayoral candidate Rudolph Giuliani argued for severe measures to "combat 'mindless violence' perpetrated by marauding gangs on 'wilding' sprees," and Mayor Ed Koch advocated for expanding the "death penalty" to "incidents of wilding." *Id.* at 10.

311. Bob Herbert, Editorial, *In America: A Sea Change on Crime*, N.Y. TIMES, Dec. 12, 1993, at E15.

312. *Dole Seeks to Get Tough on Young Criminals*, L.A. TIMES (July 7, 1996), http://articles.latimes.com/1996-07-07/news/mn-22017_1_bob-dole.

the most trivial of reasons."[313] In that same year, Senator John Ashcroft, who would later become the U.S. Attorney General, testified before the Senate Subcommittee on Youth Violence that "[i]n America today, violent juvenile predators prowl our businesses, schools, neighborhoods, homes and parking lots, leaving in their wake maimed bodies, human carnage and desecrated communities."[314] Carol Moseley-Braun, the first African American woman elected to the Senate, warned that the "new category of [youthful] offender" had "no respect for human life [and were] arming themselves with guns and roaming the streets."[315] In 1997, President Bill Clinton labeled juvenile crime "our top law enforcement priority," adding that "we've got about six years to turn this juvenile-crime thing around or our country is going to be living in chaos."[316]

Juxtaposing the federal legislative response to the superpredator predictions with the federal response to the rash of school shootings in predominantly white, suburban schools brings the racialized aspect of the superpredator hysteria into specific relief. Researchers conducted a study of sixteen congressional hearings on youth violence between 1995 and 2001.[317] While gang violence resulted in "'get-tough' legislation, punitive political rhetoric, and racialized media imagery that promote[d] fear of the urban [African American and Latino] male," school violence required "the attention and therapeutic, disciplinary, and benevolent resources of state power" to intervene in the lives of children and prevent such incidents from happening again.[318]

State legislators took up the call. States hastened to enact legislation that jettisoned the rehabilitative goals of the Child Savers' juvenile justice system through "the broadest and most sustained

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313. *Id.*

314. *The Violent and Hard-Core Juvenile Offender Reform Act: Hearing on S. 1245 Before the Subcomm. on Youth Violence of the S. Comm. on the Judiciary*, 104th Cong. 7 (1996) (statement of Sen. John Ashcroft).

315. Carol Moseley-Braun, *Should 13-Year-Olds Who Commit Crimes with Firearms Be Tried as Adults? Yes: Send a Message to Young Criminals*, 80 A.B.A. J. 46, 46 (1994).

316. Jonathan Peterson, *Gangs, Youth Crimes Target of Major Effort: Clinton Says Juveniles Top Enforcement Priority*, CONTRA COSTA TIMES, Feb. 20, 1997, at B1.

317. Elizabeth Brown, *Crime, Governance, and Knowledge Production: The "Two Track Common-Sense Approach" to Juvenile Criminality in the United States*, 36 SOC. JUST. 102 (2009), *available at* 2009 WLNR 25016000.

318. *Id.*

legislative crackdown ever on serious offenses committed by youth within the jurisdictional ages of American Juvenile Courts."[319] As of 1997, seventeen states had changed the purpose clauses of their juvenile codes to incorporate goals of punishment, accountability, and public safety—goals traditionally reserved for the criminal justice system.[320] And although many jurisdictions still include language safeguarding rehabilitation as a goal in their purpose clauses, only three states prioritize the best interests of the child as the central aim of the juvenile court.[321] New juvenile codes also allow youths to be tried as adults at younger ages for more offenses,[322] at the risk of serving procrustean sentences in state adult correctional facilities.[323] Juvenile offenders, previously shielded from the long-term stigmatizing effects of conviction, are now subject to sex-offender registration, fingerprint and DNA data banking, eviction from public housing, disqualification from military service, and exclusion from public schools.[324]

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

320. Katherine Hunt Federle, *Blended Sentencing and the Sixth Amendment*, CHILD. RTS. LITIG. COMMITTEE, Summer 2009, at 4, *available at* http://apps.americanbar.org/litigation/committees/childrights/content/newsletters/childrens_summer2009.pdf; *Purpose Clause*, NAT'L CENTER JUV. JUST. (2010), http://www.ncjj.org/Topic/Purpose-Clause.aspx. These states included Alabama, Alaska, California, the District of Columbia, Florida, Idaho, Illinois, Indiana, Maryland, Minnesota, Montana, New Jersey, Oregon, Pennsylvania, Washington, Wisconsin, and Kansas. Henning, *supra* note 284, at 1113–15 (canvassing changes in juvenile court purpose clauses); Gerald Hill, *Revisiting Juvenile Justice: The Requirement for Jury Trials in Juvenile Proceedings Under the Sixth Amendment*, 9 FLA. COASTAL L. REV. 143, 165–66 (2008) (examining purpose clause revisions in the context of a punitive rather than rehabilitative juvenile court).

321. Federle, *supra* note 320.

322. Feld, *supra* note 22, at 1558–68 (discussing waiver laws and harsher sentences in juvenile courts after the 1980s); *see also* Sarah Sun Beale, *You've Come a Long Way Baby: Two Waves of Juvenile Justice Reform as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 521 (2009)

323. Peter Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 308 (2008) (observing the increase of mandatory minimum sentencing).

324. Jonathan Kimmelman, *Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking*, 28 J.L. MED & ETHICS 209, 210, 219 (2000) (listing twenty-six states that require juvenile offenders to surrender DNA samples); Suzanne Meiners-Levy, *Challenging the Prosecution of Young "Sex Offenders": How Developmental Psychology and the Lessons of* Roper *Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 504–05 (2006) (describing the political climate leading to harsh prosecution of juveniles for sexual offenses and the juvenile sex offender registration).

F. Increasing Reliance on Juvenile Life Without Parole as a Sentencing Option

With the rise of the superpredator myth came a dramatic increase in the reliance on life without parole as a sentencing option for youths convicted of very serious crimes. In 2005, Human Rights Watch and Amnesty International published *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, the first and most comprehensive examination of juvenile life without parole sentences.[325] Researchers discovered that, at the time of the report, at least 2,225 people in the United States had been sentenced to life without parole for crimes they committed when they were children. Approximately 59 percent of youths sentenced to life without parole received the sentence for their first-ever criminal conviction.[326] Sixteen percent were between thirteen and fifteen years old at the time they committed their crimes.[327]

According to the report, the rate of juvenile life without parole sentences remained stable and low in the two decades between 1962 and 1981, with an average of two youth offenders being sentenced to life without parole each year.[328] In 1980, only two youths nationwide were sentenced to life without parole.[329] In 1982, the number began to climb, with a high of 152 youths receiving the sentence in 1996.[330] In just fifteen short years, the number had increased exponentially—an increase from two such sentences in all of 1980 to twelve each month in 1996.[331] While the number of juvenile life without parole sentences meted out each month has declined since 1996,[332] it has not returned to the low figures of the twenty years preceding 1981.[333]

But, while there has been a decrease in the absolute number of youths sentenced to life without parole since 1996,[334] that reduction

325. AMNESTY INT'L & HUM. RTS. WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES (2013), *available at* http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

326. *Id.* at 1.

327. *Id.*

328. *Id.* at 31.

329. Adam Geller, *For Adult Crimes, Juveniles Receive Life Without Parole*, LAWRENCE JOURNAL-WORLD (Dec. 9, 2007), http://www2.ljworld.com/news/2007/dec/09/adult_crimes_juveniles_receive_life_without_parole.

330. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 325, at 31.

331. *See id.*

332. *Id.* at 2 (stating that "in 2003, 54 child offenders entered prison with the sentence").

333. *Id.* at 31.

334. *Id.*

hints at only half the story. Since that same year, the proportion of youths sentenced to life without parole for murder has increased in comparison to the total number of youths arrested for or credibly suspected of murders across the country.[335] In fact, the percentage of youths sentenced to life without parole in 2000 was more than three times the percentage of youths sentenced to life without parole in 1990.[336] The data comparing the total number of youths implicated in murders to the number of youths sentenced to life without parole indicate that youths convicted of murder are facing an unprecedented level of punitiveness.[337]

In fact, youths convicted of very serious crimes are more likely to be sentenced to life without parole than their adult counterparts. Studies show that in eleven out of the seventeen years between 1985 and 2001, youths convicted of murder were more likely to be sentenced to life without parole than adults convicted of murder.[338] Although the juvenile death penalty has been struck down, including the historical consideration of death sentences in the analysis is instructive. Even when death sentences were constitutional, youths convicted of murder were more likely to receive either the death penalty or life without parole than adults convicted of murder.[339] Particularly in light of the fact that during most of the years in this period, many states had abolished the juvenile death penalty, these data make a clear statement about the feebleness of age as a mitigating factor for youths convicted of murder before the Court's ruling in *Roper v. Simmons*.[340]

G. Race Disparities in Juvenile Life Without Parole Sentencing

Accompanying this tide of punitiveness is a great deal of evidence that minority youths are disproportionately sentenced to life without parole. The numbers vary slightly from study to study, but the unmistakable conclusion is that while African American youths comprise far less than half of the population of youths eligible to be

335. *Id.*
336. *Id.* at 32.
337. *Id.* at 33.
338. *Id.*
339. *Id.*
340. *See* Roper v. Simmons, 543 U.S. 551 (2005).

sentenced to life without parole, approximately half or more of the youths sentenced to life without parole are African American.

Researchers for *The Rest of Their Lives* found that although African Americans comprise only 16 percent of the national youth population, the available data reveal that African Americans make up 60 percent of all youths serving life without parole sentences.[341] According to this same data, "the rate for black youth sentenced to life without parole" exceeds that of white youth in every state with juvenile life without parole.[342] 71 percent of youths serving life-without-parole sentences are youths of color, and 60 percent of those are African American.[343] Only 29 percent of youths serving life-without-parole sentences are white.[344] The per capita rate of African American youths serving life-without-parole sentences is 6.6 per 10,000 youths, almost four times the national average of 1.8, and ten times the per capita rate of 0.6 for white youths.[345]

On February 22, 2008, the United Nations Committee on the Elimination of Racial Discrimination (CERD) held a hearing. At that hearing the United States Department of Justice claimed, in response to allegations of invidious discrimination in juvenile life-without-parole sentencing, that black youths were more likely to be sentenced to life without parole because crime rates among black youths were higher.[346] Because black youths committed a disproportionate share of crimes, the "disparate impacts [were] not per se evidence of racial discrimination," and "[t]here [was] no proof that they were sentenced to life without parole because of racial discrimination."[347]

In response to those statements, the authors of the 2005 report issued a 2008 update that "found evidence that, while not conclusive, seriously challenge[d] [the] claim [of the United States' Department of Justice]."[348] Researchers compared data concerning sentencing practices for murder across twenty-five states.[349] They discovered

341. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 325, at 39.
342. *Id.* at 42.
343. *Id.* at 39.
344. *Id.*
345. *See id.* at 2.
346. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 325, at 5–7.
347. *Id.*
348. *Id.* at 6.
349. These states included, *inter alia*, California, Connecticut, Delaware, Colorado, Arizona, North Carolina, Washington, Illinois, Pennsylvania, and Nebraska. *See id.* at *3*. California had the

that, across the country, a black youth arrested for murder was 1.59 times more likely to be sentenced to life without parole than a white youth arrested for murder; in other words, for every white youth sentenced to life without parole following a murder arrest, 1.59 black youths arrested for murder received that same sentence.[350] Researchers concluded that this statistic reveals discriminatory impact even among children arrested for the same crime, and suggested that there is“[s]omething other than the relative criminality of [black and white youths]—something that happens after their arrest for murder, such as discriminatory treatment by prosecutors, before courts, and by sentencing judges—that causes the disparities between sentencing of black and white youth to JLWOP.”[351]

Two studies concluded that the racially disparate impact is worse for juvenile life without parole sentences than it is for juvenile life sentences in general, including life with the possibility of parole. A 2007 report by the Equal Justice Initiative included a data sample of seventy-three children who were thirteen or fourteen years old when they were sentenced to juvenile life without parole.[352] Of this group, 49% are African American, 9.6% are Latino, 30% are white, one individual is Native American, and one individual is Asian American.[353] At the time the study was conducted, "all of the children condemned to death in prison for non-homicide offenses [were] children of color."[354] The report concludes that "[i]n cases involving children sentenced to die in prison, race, vulnerability, and family dysfunction are predominant factors."[355] A 2009 study by The Sentencing Project also found that that black youths are serving 47.3% of all juvenile life sentences and 56.1% of juvenile life without parole sentences.[356]

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largest disparity, with a black youth arrested for murder 5.83 times more likely to be sentenced to juvenile life without parole than a white youth arrested for murder. *Id.* at 7.

350. *Id.*

351. *Id.*

352. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 21 (2008), *available at* http://www.eji.org/files/Cruel%20and%20Unusual%202008_0.pdf.

353. *Id.* at 21.

354. *Id.*

355. *Id.*

356. ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 7–24 (2009), *available at* http://sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf.

And, in findings that evoke the Baldus study[357] that the Court rejected in *McCleskey v. Kemp*,[358] two studies have found that the races of victims and offenders predict the likelihood of juvenile life-without-parole sentences. In its 2007 report, the Equal Justice Initiative analyzed a smaller subset of fifteen children sentenced to juvenile life without parole for "its litigation campaign for young children."[359] Notably, of these fifteen cases, twelve were people of color. Of those cases, nine of the victims were white.[360] And a March 2012 national study by The Sentencing Project suggests that the races of victims and offenders still "may play a key role in determining which offenders are sentenced to juvenile life without parole[.]"[361] The study revealed that:

> the proportion of African Americans serving [juvenile life without parole] sentences for the killing of a white person (43.4%) is nearly twice the rate at which African American youth are arrested for taking a white person's life (23.2%)[.] Conversely, white juvenile offenders with black victims are only about half as likely (3.6%) to receive a [juvenile life without parole] sentence as their proportion of arrests for killing blacks (6.4%).[362]

IV. ALL CHILDREN ARE DIFFERENT

A. *Deconstructing the Superpredator*

"The weight of history, the pseudo-scientific validation of the superpredator myth, and the influence of the stereotype-saturated media"[363] conspire to enable "many Americans, consciously or

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357. *See generally* Baldus, *supra* note 213. Examining over 2000 murder cases that occurred in Georgia, the Baldus Study concluded that black defendants were 1.1 times more likely than white defendants to receive the death penalty. *Id.* However, a 2006 study of federal death penalty cases from 1995 to 2000 by the RAND Corporation found no evidence of racial bias. STEPHEN P. KLEIN ET AL., RACE AND THE DECISION TO SEEK THE DEATH PENALTY IN FEDERAL CASES 129 (2006). Rather, researchers ultimately concluded that "[the Attorney General's final charging decisions] were driven by heinousness of the crimes rather than race." *Id.*

358. 481 U.S. 279 (1987).

359. EQUAL JUSTICE INITIATIVE, *supra* note 352, at 21.

360. *Id.*

361. THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 3 (2012).

362. *Id.*

363. Henning, *supra* note 16 (manuscript at 35) ("Years of research on the portrayal of criminals in the media further document the imaging of violent offenders and drug dealers as

subconsciously, [to] link black youth with crime, violence, and dangerousness."[364] These kinds of subconscious associations, also called implicit biases, have been studied extensively. Implicit biases are "attitudes and stereotypes that are not consciously accessible through introspection."[365] Because these are attitudes that are "not consciously accessible through introspection," implicit bias studies reveal that a subject might harbor biases against people of color in spite of a stated or demonstrated commitment to racial equality.[366]

Numerous studies show that implicit bias affects the behavior of justice system stakeholders.[367] The data indicating the overrepresentation of black youths at every critical stage in the juvenile justice system are dispositive.[368] Thus, although African Americans comprise only 16% of the youth population, they make up 28% of juvenile arrests, 30% of referrals to juvenile court, 37% of the detained youth population, 34% of youths formally processed by the juvenile court, 30% of adjudicated youths, 35% of youths judicially waived to criminal court, 38% of youths in residential placement, and 58% of youths admitted to state adult prison.[369] The

black"); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW 1–20 (2010) (describing the intentional efforts of the Reagan administration to flood the media with stories of black drug abusers, drug dealers, and welfare queens to woo poor whites back to the Republican party); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1550–53 (2005) (discussing how information from local news shapes viewers' opinions about criminal justice policy, including linking criminality to African Americans).

364. Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 281–83 (2010) (describing psychological research indicating the ways in which blackness is associated with crime, danger, and more severe punishments); *see also* Aliya Saperstein & Andrew M. Penner, *The Race of Criminal Record: How Incarceration Colors Racial Perceptions*, 57 SOC. PROBS. 92, 96 (2010) (summarizing studies showing people's associating blackness with criminality).

365. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2012).

366. *See id.* at 1141; *see also* Kang, *supra* note 363, at 1512–14.

367. *See* Henning, *supra* note 16, at 36 n.18 (finding that probation officers believe black youths are more likely to reoffend than white youths); Jeffrey Rachlinski et al., *Does Unconscious Race Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1209–17 (2009) (finding that trial judges do hold implicit biases along racial lines that can affect their judicial decision-making).

368. *See* Tonry, *supra* note 364, at 281–82 (describing the phenomena of "statistical discrimination").

369. NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 37 (2007), *available at* http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf; *see also* HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 176 (2006), *available at* http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf (finding a "disproportionate share of cases at all stages of case processing" in 2002).

fact that this overrepresentation includes youths who are transferred to adult court for prosecution is critical. Black youths are more likely to be prosecuted as adults and, once convicted, receive significantly harsher sentences than white youths prosecuted as adults.[370]

In particular, implicit biases based on racial stereotypes conflate assessments of youth culpability, maturity, sophistication, future dangerousness, and severity of punishment.[371] In one study, after being unconsciously primed to believe that the youth in a crime vignette was black, police and probation officers gave more severe sentences and harsher evaluations than officers who were not similarly primed.[372] Additionally, a 2012 Stanford University study found that participants who were primed to believe that offenders were black were more likely to impose extremely harsh sentences, such as life without the possibility of parole, on youths than when they were primed to believe the offender was white.[373] This study has direct implications for the administration of juvenile justice across the country. The study reported the results of 735 whites who are "overrepresented in jury pools . . . the legal field, and the judiciary."[374] As in other implicit bias studies, the effect of race on perceptions of perpetrator culpability was consistent across political affiliations for whites.[375]

These numbers indicate that, for many Americans who harbor these biases, the maxim is not that children are different, but that white children are different. That is, before black children are seen as amenable to rehabilitation, susceptible to peer pressure, and less culpable, they are seen as "prone to violence and crim[e] . . . not in

370. *See* NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 369, at 34, 37.

371. Scott & Steinberg, *supra* note 22, at 810.

372. *See* Keith B. Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 269, 287 (2006), *available at* www.psych.uncc.edu/pagoolka/cdps287.pdf.

373. Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction between Juveniles and Adults*, PLOS ONE (May 23, 2012), http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0036680; *see also* Brooke Donald, *Stanford Psychologists Examine How Race Affects Juvenile Sentencing*, STAN. UNIV. REP. (May 24, 2012), http://news.stanford.edu/news/2012/may/race-juvenile-offenders-052412.html (analyzing how race affects juvenile sentencing).

374. Aneeta Rattan et al, *supra* note 373, at 2. The researchers controlled for political preferences and evidence of racial bias. *Id.*

375. *Id.* at 4.

school or working, and [likely] to be incarcerated" at some point in their lives.[376] Black children are black first, and children second.

In the face of evidence that race blunts the mitigating value of youth, states should take steps to countervail judgments based on invidious race discrimination in juvenile life without parole proceedings.[377] One tack might be to educate jurors. For example, at the beginning of trial and again at the start of the sentencing phase in every juvenile life without parole case, the jury should be required to watch a video about implicit bias and how it might affect their decision. Judges should show jurors, for example, information that explicitly debunks the superpredator myth, proves that rates of offending are static across races, and illustrates that black youths are not any more prone to commit violent crimes than any other youths.

There are several points of discretion at which bright-line rules would be useful. Targeting the initial charging decision, however, might be the most efficient way to limit the effects of race discrimination in juvenile life without parole sentences. Consideration of ostensibly race-neutral factors might minimize the disparate treatment of black youths. Prosecutors' offices across the country should adopt strict policies allowing them to seek juvenile life without parole sentences for only the worst of the worst. According to *The Rest of Their Lives*, if prosecutors had just avoided seeking juvenile life without parole for first-time offenders, they would have avoided 59 percent of juvenile life without parole sentences.[378] As another example, prosecutors might decline to seek

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376. JAMES BELL, THE PUBLIC ASSAULT ON AMERICA'S CHILDREN: POVERTY, VIOLENCE, AND JUVENILE INJUSTICE 189 (2000)*; see also, e.g.*, Nicholas K. Peart, *Why Is the N.Y.P.D. After Me?*, N.Y. TIMES, Dec. 17, 2011, at SR6 (discussing the firsthand experience of a young black man stopped and frisked by the New York Police Department numerous times, sometimes violently, for no apparent reason).

377. These biases, like any other biases, should be addressed in juvenile life without parole proceedings. There is, of course, precedence for this antidiscrimination measure. The Supreme Court has consistently condemned the influence of invidious discrimination at all levels of the criminal justice system. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (forbidding race discrimination in use of peremptory strikes); Turner v. Murray, 476 U.S. 28, 35 (1986) (noting that "[m]ore subtle, less consciously held racial attitudes" such as fear of a particular racial group "could also influence" sentencing decisions); Vasquez v. Hillery, 474 U.S. 254 (1986) (discussing race discrimination in grand jury selection); Whitus v. Georgia, 385 U.S. 545 (1967) (discussing race discrimination in grand and petit jury selection); Hernandez v. Texas, 347 U.S. 475 (1954) (discussing race discrimination against Mexican Americans in petit jury selection).

378. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 325, at 4.

a sentence of juvenile life without parole for a youth who is charged with an accomplice or with a group.

B. Jury Instructions

Defense attorneys, prosecutors, and judges should also consider jury instructions that would explicitly incorporate the three major tenets of adolescent development on which the Court has relied in this recent series of cases. In *Roper*, the Court credited three features of adolescent development that explained why youths are categorically less culpable than adults.[379] First, youths are marked by "[a] lack of maturity and an underdeveloped sense of responsibility"[380] that "often result in impetuous and ill-considered actions and decisions."[381] Second, youths are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure[,]"[382] so it is more difficult for youths "to extricate themselves from a criminogenic setting."[383] Third, youths are more amenable to rehabilitation than adults.[384] Each of these three tenets should be adopted as a jury instruction that marries the language about adolescent development and, in light of the realities of implicit bias, specific language about race. The first tenet, that youths are marked by "[a] lack of maturity and an underdeveloped sense of responsibility"[385] that "often result in impetuous and ill-considered actions and decisions,"[386] might become:

> Adolescent development research shows that youths are marked by a lack of maturity and an underdeveloped sense of responsibility that often result in impetuous and ill-considered actions and decisions. Our commonsense experience confirms the fact that youths often do not make good decisions. This fact has proven to be true regardless of race, gender, national origin, sexual orientation, religion,

379. Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).
380. *Id.* at 569.
381. *Id.*
382. *Id.*
383. *Id.*
384. *Id.* at 570.
385. *Id.* at 569.
386. *Id.*

> and economic class. Youths have a more difficult time making decisions—particularly spur-of-the-moment decisions—in part because of their youth. Other factors specific to this case might have contributed as well. But, if you find that the defendant made a decision in this case that bears directly on an element of the case, regardless of the defendant's race, gender, national origin, sexual orientation, religion, and economic class, you are to consider the effect that the defendant's age might have had on the defendant's decision-making process.

The second instruction that should be given when there is evidence that the accused youth acted with an accomplice or as part of a group, might read:

> Adolescent development research shows that youths are uniquely susceptible to peer pressure, negative influences, and outside pressures. It is more difficult for youths to extricate themselves from criminogenic settings than it might seem that it should be in a cool, unhurried assessment of the criminogenic situation by an adult who has the benefit of hindsight. This fact is true regardless of race, gender, national origin, sexual orientation, religion, and economic class. You are to consider, since the defendant in this case acted as part of a group, how this fact might have affected the defendant's actions during the alleged incident, and how it might affect your assessment of the defendant's amenability to rehabilitation.

Finally, state statutes should embed a presumption of amenability to rehabilitation in their juvenile life without parole sentencing schema:

> As you deliberate, you are to keep in mind that 85% of youths grow out of delinquent behavior without significant intervention and go on to lead law-abiding lives. This fact is true regardless of race, gender, national origin, sexual orientation, religion, and economic class.

C. Legislative Remedies: Searching for "Too Much Justice"[387]

In 1974, to encourage states to experiment with programs for delinquency intervention and prevention, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDPA or "the Act").[388] The Act created the National Advisory Committee for Juvenile Justice and Delinquency Prevention, which was charged with developing national juvenile justice standards and guidelines, and the Office of Juvenile Justice and Delinquency Prevention, a division of the U.S. Department of Justice. The 1974 JJDPA identified two core requirements: separation of incarcerated juveniles from incarcerated adults and deinstitutionalization of status offenders.[389] In 1988, Congress amended the JJDPA to encourage states to investigate and take steps to ameliorate the problem of disproportionate minority contact (DMC) in its secure facilities.[390] By 1992, the JJDPA was amended to include the additional core requirement of removal of juveniles from adult jails.[391]

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387. McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

388. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (1974) (prior to 1977 amendments).

389. *Id.* § 223.

390. Pub. L. No. 100-690, § 7258(c), 102 Stat. 4434, 4440 (1988) (codified as amended at 42 U.S.C. § 5633(a)(22) (2006)). Under the JJDPA, the acronym DMC originally stood for "Disproportionate Minority Confinement," which described the fact that the percentage of youths of color detained in juvenile justice system facilities exceeded their proportion in the general population. *See* Juvenile Justice and Delinquency Prevention Act § 223(a), *supra* note 388, 88 Stat. at 1119-22 (codified as amended at 42 U.S.C. § 5633(a)(22) (2006)) (mandating states to provide strategies that aimed to reduce the disproportionate number of youths of color in the juvenile justice system). In 2002, Congress enlarged the concept of DMC to include all critical stages of the juvenile justice process, or all points of juvenile justice system "contact," to reflect that youths of color were not just overrepresented in detention facilities. *See* Pub. L. No. 107-273, § 12209(1)(P), 116 Stat. 1873, 1878 (2002) (codified as amended at 42 U.S.C. § 5633(a)(22) (2006)) (indicating that states should submit strategies to reduce the number of youth of color who "come into contact with the juvenile justice system"). Accordingly, DMC now commonly stands for disproportionate minority contact. For an excellent discussion of the history, see Moriearty, *supra* note 282.

391. Juvenile Justice and Delinquency Act Amendments of 1992, Pub. L. No. 102-586, § 1, 106 Stat. 4982 (1992). This Article focuses largely on the core requirement of reduction of disproportionate minority contact. Explanations of the other three core requirements follow:

> (1) The deinstitutionalization of status offenders requirement mandates that youths who are charged with or who have committed status offenses not be placed in secure detention facilities, secure adult detention facilities, or secure correctional facilities.
>
> (2) The sight and sound separation requirement mandates complete "sight and sound" separation of youths from adult offenders when youths must be processed in adult correctional facilities. Sight and sound separation requires that detained youths have no visual, verbal, or physical contact with adult inmates.

The Act offered federal grants for delinquency prevention programs to states that comply with the strictures of the four core mandates.[392] States must comply with all four of the core requirements to receive full federal JJDPA funding.[393] A state loses 20 percent of annual federal funding for each core requirement with which the state has failed to comply.[394] And, if a state is noncompliant, it must allocate 50 percent of its awarded JJDPA funds to addressing the noncompliant areas.[395] Fifty-five U.S. states and territories receive JJDPA grants.[396] Since the passage of the JJDPA, the laboratories of the states have received hundreds of millions of dollars from the federal government and from prominent foundations, with the result that "municipal commissions have been formed, technical assistance manuals and websites have been created, and dozens of initiatives have been launched to make up what has been called a 'multi-million dollar cottage industry' dedicated to achieving racial equity in this country's juvenile courts."[397] Despite these efforts, the DMC core requirement has failed to yield measurable and lasting systemic changes, as racial disparities in the juvenile justice system persist.[398]

While juvenile justice advocates press for passage of Senate Bill 678, the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2009, which would fortify the provisions of the DMC mandate with clearer, stricter guidelines for states,[399] they scratch their heads trying to ascertain why the Act has been so

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(3) The jail removal requirement minimizes the time youths are held in adult correctional facilities, and generally allows juveniles to be held no longer than six hours in an adult jail or lockup.

392. 42 U.S.C. § 5633 (2006).

393. § 5633(a).

394. § 5633(c)(1).

395. § 5633(c)(2)(A).

396. D'lorah Hughes, *An Overview of the Juvenile Justice and Delinquency Prevention Act and the Valid Court Order Exception*, 2011 ARK. L. NOTES 29, 30 (2011).

397. Moriearty, *supra* note 282, at 859; *see also* BELL & RIDOLFI, *supra* note 238, at 15 (discussing the cottage industry of addressing juvenile disproportionality in order to receive federal funds, without actually striving to make an impact on these disparities).

398. *See* SNYDER & SICKMUND, *supra* note 369, at 163 (demonstrating that there has been little change in the racial make-up of the delinquency case load); *see also* BELL & RIDOLFI, *supra* note 238, at 2 ("We must push for transformation. Without a sense of urgency we are doomed to be forever trapped in a cyclical debate about how to address DMC, thus fulfilling Friedrich Hegel's maxim that unendingly adoring the question overwhelms the search for answers."); *infra* Part V (noting the persistence of racial disparities).

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

ineffective. The list of possible culprits include the Act's imprecise language,[400] a lack of funding,[401] and lax enforcement.[402]

Others continue to point to the Act's unmined potential. Professor Olatunde Johnson cites the Act as a model statutory contribution to the traditional disparate impact discourse on addressing systemic disparities.[403] In her 2007 article *Disparity Rules*, she writes, "The potential practical power of the [DMC mandate] is that it provides a mechanism for encouraging a public institution not only to uncover bias in its practices (both explicit and implicit), but also to examine more broadly how its practices work to reproduce or exacerbate racial disadvantage."[404] In other words, the potential of the DMC mandate is that it requires state actors both to examine their implicit biases and to devise practical strategies to counteract them.

The mandate recognizes that acknowledging the internal process of racism is essential to addressing systemic race bias. "While unconscious bias need not be the express target of antidiscrimination policies themselves, it should be the target of efforts to implement those policies, particularly amid a climate of pronounced racial antipathy toward the cohort those policies are designed to protect."[405]

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400. *See, e.g.*, *Reauthorization of the Juvenile Justice and Delinquency Prevention Act: Protecting Our Children and Our Communities: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 230–31 (2007) [hereinafter *JJDPA Reauthorization Hearing*] (statement of Richard Miranda, Chief, Tucson Police Department) ("This vague requirement that states 'address' efforts to reduce DMC has left state and local officials without a clear mandate or guidance for reducing racial and ethnic disparities."); BELL & RIDOLFI, *supra* note 238, at 15–16 ("Current federal mandates do not provide guidance or engagement.").

401. *See, e.g.*, *JJDPA Reauthorization Hearing*, *supra* note 400, at 4 (statement of Sen. Russell D. Feingold) ("As the Federal commitment has dropped off, there is some evidence suggesting that the rate of violent juvenile crime, which had been declining steadily for many years, has begun in the past couple of years to climb again."); *id.* at 214 (testimony of Deidre Wilson Garton, Chair, Wisconsin Governor's Juvenile Justice Commission) ("Yet, as Federal funds have been severely cut and earmarked over the last seven years, gains are reversing and correctional placements are rising . . . .").

402. *See, e.g.*, Michael J. Leiber, *Disproportionate Minority Confinement (DMC) of Youth: An Analysis of State and Federal Efforts to Address the Issu*e, 48 CRIME & DELINQ. 3 (discussing disparities between different states' assessment programs); *see also* BELL & RIDOLFI, *supra* note 238, at 15–16 (discussing how the lack of strategy, guidance, and consistent standards have contributed to the ineffectiveness of state DMC plans).

403. Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 378 (2007) ("[DMC] is potentially more far-reaching than traditional disparate impact standards . . . . The DMC approach innovatively responds to the complex mechanisms that sustain contemporary racial inequality.").

404. *Id.* at 380.

405. Moriearty, *supra* note 282, at 908 (emphasis deleted).

North Carolina's and Kentucky's Racial Justice Acts are examples of another promising model. Certainly, the Racial Justice Acts and the JJDPA can work in tandem, so that the DMC mandate should require states to keep extensive data enabling each state to produce a Baldus-type study every other year that tracks its progress in reducing racial disparities. Certainly, in light of the racial disparities in JLWOP cases, youths should be allowed to raise evidence of systemic race discrimination after conviction. Here again, the laboratory of the states can provide the protection that the federal government does not.

V. CONCLUSION

Racial disparities in juvenile life without parole sentences are consistent with the racial disparities at every critical stage of the juvenile justice system.[406] "Throughout the [criminal justice] system, youth of color—especially African American youth—receive different and harsher treatment. This is true even when white youth and youth of color are charged with similar offenses."[407] In a study of youths arrested for murder in twenty-five states where there was available data, African Americans were found to be sentenced to juvenile life without parole at a rate that is 1.59 times higher than white youths.[408] Accordingly, these suggestions do not have to be limited to juvenile life without parole proceedings. We do not, as the *McCleskey* dissenters chided, have to be afraid of "too much justice." As the "children are different" philosophy gains new credence, there is an opportunity to ensure that the compassion attendant to an expectation of rehabilitation and a belief in potential reaches all children, regardless of race.

406. *See* Feld, *supra* note 286, at 35–38; *see also* SNYDER & SICKMUND, *supra* note 369, at 188 ("When racial/ethnic disparities do occur, they can be found at any stage of processing within the juvenile justice system. Research suggests that disparity is most pronounced at arrest, the beginning stage, and that when racial/ethnic differences exist, their effects accumulate as youths are processed through the justice system.").

407. NAT'L COUNCIL ON CRIME & DELINQ., *supra* note 369, at 37; *see also* Feld, *supra* note 286, at 36 ("After researchers control for present offense and prior record, . . . studies consistently report additional racial disparities when judges sentence black youths."); AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 325, at 6–7 (noting research finding that "minority youths receive harsher treatment than similarly situated white youths at every stage of the criminal justice system, from the point of arrest to sentencing").

408. *See* AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 325, at 6–7.