

You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana

Sara Sun Beale*

I. INTRODUCTION

As described more fully in other papers in this Symposium,¹ in what has come to be called the Jena Six case, District Attorney (“D.A.”) Reed Walters made several critical charging decisions involving black and white youths. Although Walters has defended his decisions as necessary and proper,² many critics see his actions—and those of the trial judge³—as examples of the pervasive racial disparities in the criminal justice system.⁴

* Charles L.B. Lowndes Professor, Duke Law School. The author would like to thank Duke Law research assistants Kristin Collins Cope, Michael Devlin, and Meghan Ferguson for their able assistance, and colleagues Guy Charles and Robert Mosteller for their valuable comments.

¹ See, e.g., Andrew E. Taslitz & Carol Steiker, *Introduction to the Symposium: The Jena Six, the Prosecutorial Conscience, and the Dead Hand of History*, 44 HARV. C.R.–C.L. L. REV. 275, 279-83 (2009).

² See Reed Walters, Op-Ed. *Justice in Jena*, N.Y. TIMES, Sept. 26, 2007, at A27 (stating that he would take the same actions but would better explain several points: the nooses on the tree did not constitute a crime under state law; the facts revealed a brutal beating rather than a schoolyard fight; there was serious harm inflicted with a dangerous weapon; and adult charging status for one particular defendant was appropriate because of his role as the instigator, his prior criminal record, and the seriousness of the crime).

³ See *infra* note 21 and accompanying text (describing the removal of the trial judge because his inflammatory comments about the defendants created an appearance of impropriety).

⁴ See, e.g., Ellen S. Podgor, *Race-ing Prosecutor's Ethics Codes*, 44 HARV. C.R.–C.L. L. REV. 461, 467-69 (2009) (criticizing Walters for disparate charging decisions for black and white students in the Jena Six case); Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.–C.L. L. REV. 393, 456-59 (2009) (criticizing Walters for failing to consider the racial impact of his charging decisions in the Jena Six case); Scott Farwell, *Marching Behind Six Young Men: Concern for Black Defendants in Louisiana Fills Texas Buses*, DALLAS MORNING NEWS, Sept. 20, 2007, at 1A (describing 1,000 protesters leaving Texas for civil rights protest in Jena and noting that some see the Jena Six case as “a symptom of a diseased American legal system, in which laws are colorblind but lawyers and judges and juries see the world through prisms of racial bias”); Richard Fausset, *Protesters March to Support 'Jena Six'*, L.A. TIMES, Sept. 21, 2007, at A-1 (describing crowd of up to 50,000 protesters in Jena and speakers “describing the case as an example of an American justice system that continued to treat African Americans unfairly”); Leonard Pitts, *Still No Justice in 'Black Justice': Black People Continue to Receive Starkly Unequal Treatment*, CHARLOTTE OBSERVER, Sept. 20, 2007, at 13A (noting historic use of criminal justice system to intimidate blacks and comparing modern cases of “unjust justice,” such as the prosecution of the Jena Six, Genarlow Wilson, and Marcus Dixon); Peter Whoriskey, *Thousands Protest Blacks' Treatment: Six Students Who Were Prosecuted in Louisiana Town Garner Nationwide Support*, WASH. POST, Sept. 21, 2007, at A1 (describing marches and demonstrations in Jena and cities throughout the country to protest both the overzealous prosecution of the Jena Six as well as “unequal treatment black people receive from the criminal justice system everywhere”). But see, e.g., Charlotte Allen, *The Case of the Amazing Disappearing Hate Crime*,

The Jena Six charges grew out of a series of interracial clashes at a Louisiana high school after white students hung nooses from a tree. After each incident, the D.A. had to decide whom to charge, which charges were appropriate, and whether to proceed against any of the minors as adults. For example, Robert Bailey, who would later become one of the Jena Six, was attacked by a white male at a party. Bailey's white assailant was charged with simple battery and sentenced to probation.⁵ The critical incident occurred a few days later at Jena High School. The six black students who came to be known as the Jena Six allegedly attacked a white student, Justin Barker.⁶ Accounts concerning the event and the severity of the injuries vary. By some accounts, Barker was quickly released from the hospital and attended a class ring ceremony that evening.⁷ D.A. Walters, however, contends that Barker was knocked unconscious and then kicked repeatedly as he lay defenseless on the floor.⁸

D.A. Walters charged Mychal Bell and the other Jena Six teens with multiple offenses, including attempted second degree murder and conspiracy to commit second degree murder, which meant that they faced up to 100 years in prison if convicted.⁹ Although five of the Jena Six were juveniles at the time of the assault, D.A. Walters chose to proceed against the first student tried, Mychal Bell, as an adult. Under Louisiana law, the D.A. had the unreviewable discretion to proceed against Bell as an adult because of his

WKLY. STANDARD, Jan. 21, 2008, at 20 (arguing that professional activists and some journalists promoted very distorted accounts of the events concerning the Jena Six to present it as a symbol of racial injustice); Raquel Christie, *Double Whammy*, Editorial, AM. JOURNALISM REV., Feb.-Mar. 2008, at 18, 22-23 (concluding that national media came late to the Jena Six story and failed to report important information, including Mychal Bell's prior record and the seriousness of Justin Barker's injuries).

⁵ A second confrontation involving Bailey occurred the next day. Accounts of the event differ. Bailey and some of his friends reportedly wrestled a shotgun away from Matthew Windham, 18, who had grabbed it from his truck and threatened them with it. Windham says that the youths beat him and stole the shotgun. Only Bailey was charged with theft of a firearm, second degree robbery, and disturbing the peace. John Barr & Nicole Noren, *'Jena Six' Controversy Swirls Around Football Star*, ESPN, Sept. 21, 2007, <http://sports.espn.go.com/espn/news/story?id=3030458> (last visited Apr. 3, 2009); see also Howard Witt, *Racial Demons Rear Heads*, CHI. TRIB., May 20, 2007, at 6 (describing incident in which a young white man pulled a shotgun on three black students at a convenience store and was not charged in the incident).

⁶ In a later incident, Barker was arrested for bringing a loaded rifle to the parking lot of Jena High. Witt, *supra* note 5 (describing arrest and noting that Barker told police he had forgotten the gun was there).

⁷ Witt, *supra* note 5 (stating that Barker "was not seriously injured and spent only a few hours in the hospital"); Whoriskey, *supra* note 4 (stating that Barker was knocked unconscious but released after treatment and attended the class ring ceremony the same evening); *Victim in Jena Six Case Takes the Stand*, KATC.COM, July 2, 2007, <http://www.katc.com/Global/story.asp?S=6719374> (stating that Barker testified that he attended class ring ceremony the night of the beating, despite a swollen face and temporary blindness in one eye that lasted three weeks).

⁸ See Walters, *supra* note 2; see also Christie, *supra* note 4, at 23 (noting that many accounts seemed to minimize Barker's injuries and did not mention his medical expenses).

⁹ Howard Witt, *Charge Reduced in 'Jena 6' Case*, CHI. TRIB., June 26, 2007, at 4 (describing initial charges and potential penalties).

age and the inclusion of the attempted murder charge.¹⁰ Walters has defended his decision to charge Bell as an adult on the grounds that he was the instigator and had a prior record.¹¹ Just as jury selection was about to begin in Bell's case, Walters reduced the charges to aggravated second degree battery and conspiracy to commit that offense.¹² These offenses carried a maximum sentence of twenty-two-and-one-half years.¹³ Use of a "dangerous weapon" and serious bodily injury are elements of aggravated second degree battery.¹⁴ At trial, the prosecution argued that Bell used his tennis shoes as a dangerous weapon.¹⁵ Bell was convicted of conspiracy and aggravated second degree battery.¹⁶

In an unreported decision, the Louisiana Court of Appeals reversed Bell's conviction because of the prosecution's last minute decision to drop the attempted murder charge.¹⁷ Absent this charge, Bell was not subject to trial as an adult, so his case was sent back to juvenile court.¹⁸ Bell remained in custody throughout the proceedings because he could not provide \$90,000 in bail, and several months later he pled guilty to the battery charge as a juvenile and was sentenced to an eighteen-month juvenile term.¹⁹

The five remaining members of the Jena Six still await trial.²⁰ In response to a motion filed by these defendants, the judge who presided over

¹⁰ See *infra* notes accompanying Part III.B.

¹¹ See Walters, *supra* note 2.

¹² See Witt, *supra* note 9 (describing last minute reduction in the charges against Bell and also stating that D.A. Walters offered Bell a plea agreement to a felony with a suspended sentence that Bell and his family rejected).

¹³ Second degree aggravated battery is punishable by a maximum term of fifteen years imprisonment with or without hard labor, and punishment for conspiracy carries a maximum of one-half of that provided for the object offense. See LA. REV. STAT. ANN. §§ 14:34.7B (2007) (aggravated second degree battery); 14:26C (2007) (conspiracy).

¹⁴ See LA. REV. STAT. ANN. § 14:34.7A(1) (2007) (defining aggravated second degree battery as "a battery committed with a dangerous weapon when the offender intentionally inflicts serious bodily injury").

¹⁵ Howard Witt, 'Jena 6' Conviction Vacated: Louisiana Beating Case Stirred Cries of Racism, CHI. TRIB., Sept. 15, 2007, at 1 (reporting that D.A. Walters originally charged the Jena Six with attempted murder, later reduced the charges to aggravated second degree battery, and argued at trial that the tennis shoes Bell was wearing constituted a dangerous weapon).

¹⁶ Christie, *supra* note 4, at 19-20 (noting that between June 25 and 28, 2007, Bell was convicted of aggravated second degree battery and conspiracy to commit that offense, and that in August 2007 the trial judge sent the conspiracy case back to juvenile court and upheld the battery conviction).

¹⁷ State v. Bell, No. KW 07-01129, 2007 La. App. Unpub. LEXIS 40, at *1 (La. App. 3d Cir., Sept. 18, 2007).

¹⁸ Although there was no published decision, it appears that the court accepted the defense's theory of the appeal. See, e.g., Witt, *supra* note 15 (stating that Louisiana's Third Circuit Court of Appeals ruled Bell should not have been tried as an adult and overturned his conviction).

¹⁹ Associated Press, *Teenager in Jena Six Pleads Guilty to Lesser Charge*, N.Y. TIMES, Dec. 4, 2007, at A24 (reporting Bell's guilty plea to a juvenile charge of second degree battery in return for an eighteen-month sentence, with credit for the ten months he had already served).

²⁰ Some press accounts of the Bell case state that, under pressure from national civil rights groups, the prosecutor also reduced the charges against some of the other defendants in 2007. See, e.g., Richard D. Jones, *Conviction in Racially Tinged Louisiana Case Is Overturned*, N.Y.

Bell's case was removed from their cases because his statements that the teens were "troublemakers" and "a violent bunch" created an appearance of impropriety.²¹

These events raise questions about the procedural protections available to juveniles charged with serious offenses, particularly the adequacy of the remedies to challenge prosecutorial discretion and disparate treatment by the prosecution. They also raise questions concerning the boundary line between the juvenile and adult criminal justice systems and the applicability of harsh sanctions to juvenile offenders. Although D.A. Walters dropped the attempted murder charge and an appellate court reversed Bell's conviction and remanded his case to the juvenile court, Bell's case stands as a stark reminder of the dramatic impact of transferring juveniles to the jurisdiction of the adult criminal courts and the extremely harsh penalties they may face.

Changes enacted in virtually every state during the 1990s made it much easier to prosecute juveniles as adults and increased the sanctions applicable to juveniles. This legislation was part of the "tough on crime" hyperpunitiveness of that period. The juvenile justice legislation paralleled the efforts in the adult criminal justice system to enact three strikes and other mandatory minimum punishment statutes, as well as longer sentences in general.²² Racial imagery and racially based political appeals played an important role in creating the climate that led to the enactment of this legislation.²³ In addition, politicians and the media warned the public that we faced a new breed of youthful superpredators and cold-blooded killers, as well as a demographic threat of a huge increase in juvenile crime.²⁴ The reforms enacted in this climate seem to stand in sharp contrast to both the initial concept of the juvenile courts and to the juvenile justice reforms of the 1960s, which were spurred by a series of Supreme Court decisions extending many of the constitutional rights applicable in criminal courts to juvenile proceedings.²⁵ Under the leadership of Chief Justice Earl Warren, the Supreme Court's criminal procedure decisions fundamentally reshaped not only the adult criminal justice system, but also the juvenile justice system. This Article will assess the impact of both the Warren Court's procedural reforms and the new juvenile justice legislation, particularly on minority youth, focusing on the role of prosecutorial discretion and race.

TIMES, Sept. 15, 2007, at A14, available at <http://www.nytimes.com/2007/09/15/us/15jena2.html> ("Facing increasing pressure from national civil rights groups, prosecutors in recent weeks have reduced the charges against some of the other defendants, who are yet to face trial.").

²¹ Associated Press, *Judge Ousted for Remarks*, CHI. TRIB., Aug. 2, 2008, at 4 (reporting removal of Judge J. P. Mauffray for calling the defendants "troublemakers" and "a violent bunch").

²² See *infra* notes 55-58 and accompanying text.

²³ See *infra* notes 146-61 and accompanying text.

²⁴ See *infra* notes 162-68 and accompanying text.

²⁵ See *infra* Part III.

This Article comes first to the surprising conclusion that race was almost entirely absent from the Warren Court's criminal procedure opinions, and that the Court's constitutional rulings have little to offer to defendants such as the Jena Six. Although the Warren Court was well aware of the problems of racial oppression and its effects in the criminal justice system, it did not respond directly to those problems. Instead, the Court adopted race-neutral procedural mechanisms to increase the general fairness of the criminal justice process, and it imposed no real check on the discriminatory exercise of prosecutorial discretion. The Court recognized the possibility that the discriminatory exercise of law enforcement authority could violate the Equal Protection Clause, but made it virtually impossible to prove such a claim. The Warren Court did extend the right to trial by jury to a wide range of cases in the state systems, and it enforced the right to a jury drawn from a cross-section of society from which the prosecutor could not exclude individual jurors on the basis of their race.²⁶ To some extent the right to a jury trial serves as a check on racial bias or discrimination by the prosecutor, but that check is not available in the juvenile court system.²⁷ Thus the defendants in the Jena Six prosecution and other juvenile defendants have no real means of challenging the prosecutor's exercise of discretion in their cases.

The absence of judicial oversight of discretionary decisions sets the stage for an evaluation of the statutory reforms of the juvenile justice system in Louisiana and elsewhere during the 1990s. Two key features stand out. First, the legislation reflects a judgment that juvenile courts' traditional commitment to rehabilitation must give way to the need to protect the public, particularly in cases of violent offenses. Accordingly, the new legislation generally restricts the jurisdiction of the juvenile courts and removes more cases to the criminal courts. Second, discretion to treat juveniles as adults has shifted from the courts to prosecutors. Louisiana's system is particularly harsh, and it offers multiple ways to move a case from the juvenile courts to the criminal courts. In general, the prosecutor's decision is not subject to judicial review under state law.

The absence of judicial review or oversight of discretionary decisions by the prosecutor, as well as others such as police and probation officers, is especially troubling because of the mounting evidence that racial imagery, stereotypes, and prejudice affect the multiple discretionary judgments made in the juvenile justice system. Neither the Constitution nor state law provides judicial oversight or review.

²⁶ See *infra* notes 127-29 and accompanying text.

²⁷ See *infra* notes 52-55 and accompanying text.

II. THE CRIMINAL PROCEDURE REVOLUTION AND THE FIRST REFORM OF THE JUVENILE JUSTICE SYSTEM

As the Supreme Court recognized most recently in *Roper v. Simmons*,²⁸ juveniles are different from adults. The juvenile justice system is separate from the criminal justice system for precisely this reason. From its inception at the turn of the century, the juvenile justice system has been based upon the view that the state's role in juvenile justice should be benevolent and paternalistic.²⁹

Because of their immaturity, rehabilitation—rather than punishment—should be the overriding social purpose when juveniles are involved in anti-social or criminal activity. The original procedures of the juvenile courts reflected this conception of the courts' function: they assumed that the rigidity and technicality of the criminal process were unnecessary and unhelpful.³⁰ Instead of an adversarial process intended to determine guilt or innocence, the juvenile court was to determine what was in the child's best interest.³¹

Under Chief Justice Earl Warren, the Supreme Court brought about the first major reforms of the juvenile justice system. The Warren Court decided a series of cases that so fundamentally reshaped the criminal justice system that they came to be known as the criminal procedure revolution,³² and many of those decisions were eventually extended to the juvenile courts. Although

²⁸ 543 U.S. 551, 569-71 (2005) (recognizing juveniles' lack of maturity and reduced sense of responsibility, greater susceptibility to negative influences and outside pressures, including peer pressure, and less settled or formed character).

²⁹ For an introduction to the history and theory of the juvenile courts, see BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 46-78 (1999) [hereinafter FELD, *BAD KIDS*]; ANTHONY M. PLATT, *THE CHILD SAVERS* (2d ed. 1977); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1096-97 (1991); see also Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 969 (1995); David S. Tanenhaus, *The Evolution of the Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002).

³⁰ See *In re Gault*, 387 U.S. 1, 14-18 (1967) (reviewing scholarly literature).

³¹ One doctrinal justification was the theory that a child, unlike an adult, has no right to liberty, and hence the state, acting as *parens patriae*, does not violate any right when it takes a child into custody. *Id.* at 16. But see PLATT, *supra* note 29, at 159 (arguing that the adoption of the *parens patriae* justification for juvenile court was "an *ex post facto* fiction" designed to give spurious legitimacy to the new court).

³² For a general description of some of the major cases comprising the criminal procedure revolution, see, for example, CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 18-36 (1993); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1373-1420 (2004); and Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 12-17 (1988).

the Warren Court decided hundreds of criminal cases,³³ the landmark cases of the revolution were decided in an intense eight-year period from 1961 to 1968.³⁴ These included *Mapp v. Ohio* (1961),³⁵ which enunciated the Fourth Amendment exclusionary rule, *Gideon v. Wainwright* (1964),³⁶ which held that the Sixth Amendment right to counsel applied in state proceedings, and best known of all, *Miranda v. Arizona* (1965),³⁷ which required suspects to be informed of their rights during custodial interrogation. Three years later, in *Duncan v. Louisiana*,³⁸ the Court held that the Sixth Amendment right to jury trial applies to the states.

The Warren Court soon turned its attention to the juvenile justice system. Gerald Gault's case reached the Court in 1966 and was decided in 1967.³⁹ Fifteen-year-old Gerald had been adjudicated a delinquent and ordered to be confined in the state industrial school until he was twenty-one.⁴⁰ Although Gerald and his parents were not formally advised of the charges against him, the court records "listed the charge as 'Lewd Phone Calls.'" ⁴¹ Gerald was not represented by a lawyer, and his parents were given only a general notice of the proceeding, which was short and informal.⁴² The state called no witnesses, there was no transcript, and the parties later disputed whether Gerald had admitted making any of the lewd statements.⁴³ State law did not provide for an appeal, so Gerald's parents petitioned for a writ of *habeas corpus* to obtain his release.⁴⁴

The case presented the question whether the rights afforded to criminal defendants were applicable in juvenile proceedings. The Supreme Court recognized as the purpose of the juvenile court system its "therapeutic attitude," historically provided by "benevolent and wise institutions."⁴⁵ It contrasted that aspiration with the "reality" that Gerald had been "committed to an institution where he may be restrained of liberty for years."⁴⁶ After describing what incarceration in the industrial school would entail,⁴⁷ the Court concluded:

³³ See Francis A. Allen, *The Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 519 (stating that during Chief Justice Warren's tenure the Court decided more than 600 criminal cases).

³⁴ See Schulhofer, *supra* note 32, at 12-13.

³⁵ 367 U.S. 643 (1961).

³⁶ 372 U.S. 335 (1963).

³⁷ 384 U.S. 436 (1966).

³⁸ 391 U.S. 145 (1968).

³⁹ *In re Gault*, 387 U.S. 1 (1967).

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 7.

⁴² *Id.* at 6 (quoting the notice, which merely states the time and date for "further Hearings on Gerald's delinquency").

⁴³ *Id.* at 5-7.

⁴⁴ *Id.* at 8.

⁴⁵ *Id.* at 26.

⁴⁶ *Id.* at 27.

⁴⁷ The Court noted that regardless of the "euphemistic" term "industrial school," Gerald would be separated from his family and "confined" to a "world" of "regimented routine and

In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo court. . . . The essential difference between Gerald’s case and a normal criminal case is that safeguards available to adults were discarded in Gerald’s case. The summary procedure as well as the long commitment was possible because Gerald was 15 years of age instead of over 18.⁴⁸

Accordingly, the Court held that Due Process required that a juvenile must be given adequate notice of the charges against him, the assistance of counsel, the right to confront and cross-examine witnesses, and the privilege against compelled self incrimination.⁴⁹ The Court did not, however, cast doubt upon the continued existence of juvenile courts. Rather, it indicated that due process standards, “intelligently and not ruthlessly administered,” would be compatible with the “substantive benefits of the juvenile process.”⁵⁰

The Court left open the question whether the other procedural rights associated with the criminal trial would also be enforced in juvenile proceedings, and indeed whether juvenile court processes would have to fully mimic criminal cases. The Court held in *In re Winship* that proof beyond a reasonable doubt is required in juvenile proceedings.⁵¹ However, in *McKeiver v. Pennsylvania* the Court rejected the claim that juveniles have a right to trial by jury in juvenile court,⁵² reasoning that imposing all the formalities of a criminal trial on the juvenile process would cast doubt upon the continued existence of a separate juvenile court system.⁵³ Justice Blackmun’s plurality opinion opposed the notion of remaking juvenile proceedings “into a fully adversary process,” and refused to close the door on “what has been the idealistic prospect of an intimate, informal protective proceeding.”⁵⁴ The plurality referred sympathetically to the aspects “of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.”⁵⁵

institutional hours” with “guards, custodians, state employees, and ‘delinquents’” who might be there “for anything from waywardness to rape and homicide.” *Id.* (citing *In re Holmes*, 109 A.2d 523, 530 (Pa. 1954) (Musmanno, J., dissenting)).

⁴⁸ *Id.* at 27-29.

⁴⁹ *Id.* at 31-57.

⁵⁰ *Id.* at 21.

⁵¹ 397 U.S. 358, 368 (1970).

⁵² 403 U.S. 528, 545 (1976). For a discussion of *McKeiver* and a review of subsequent state law and practice, see Tina Chen, Note, *The Sixth Amendment Right to a Jury Trial: Why Is It a Fundamental Right for Adults and Not Juveniles?*, 28 J. JUV. L. 1, 6-7 (2007).

⁵³ 403 U.S. at 551.

⁵⁴ *Id.* at 545.

⁵⁵ *Id.* at 550.

III. THE NEW PUNITIVENESS AND THE SECOND REFORM OF THE JUVENILE JUSTICE SYSTEM

The second round of sweeping change in the juvenile court system arose from legislative rather than judicial change. Like the first round of change, which had its roots in the broad procedural changes affecting the criminal justice system, this second round of change was also driven by strong currents that affected the criminal justice system as a whole. Beginning in the late 1970s and peaking during the 1990s, a host of punitive policies were adopted by Congress and every state. In most jurisdictions these changes included (1) increasing the length of sentences for some or all offenses and (2) revising the sentencing laws to require the imposition of mandatory or mandatory minimum sentences.⁵⁶ For example, many states adopted the “three strikes” laws requiring life imprisonment for recidivists during this period.⁵⁷ This increase in sentence severity helped fuel unprecedented growth in the U.S. prison population and the national rate of incarceration. Between 1987 and 2007, the national prison population nearly tripled.⁵⁸ For the first time, more than one in every one hundred adults is confined in an American jail or prison.⁵⁹

During the mid-1990s, as states were increasing the severity of sentences, many states also sought to make the conditions of incarceration harsher. For example, during a single year, thirty states abolished various inmate privileges ranging from weightlifting and family visits to furloughs to attend family funerals.⁶⁰ Most remarkably, eight states reintroduced the chain gang, in which shackled inmates work outside the prison walls.⁶¹

A. *The National Trends in Juvenile Justice*

The same currents that drove the changes in the adult criminal justice system brought a demand for changes in the juvenile justice system as well.

⁵⁶ See Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 405-06 (2006).

⁵⁷ The phrase “three strikes” is a baseball analogy: after three strikes, you are “out,” i.e., subject to harsher penalties. After California and Washington State adopted their three strikes laws in 1994, twenty-two states and the federal government adopted new laws enhancing punishments for repeat felony offenders. See *Ewing v. California*, 538 U.S. 11, 15, 30 (2003) (holding twenty-five-year-to-life sentence under California’s three strikes law for theft of three golf clubs did not violate the Eighth Amendment ban on cruel and unusual punishment); see also Michael G. Turner & Jody L. Sundt, *Three Strikes and You're Out Legislation: A National Assessment*, FED. PROBATION, Sept. 1995, at 16, 17. See generally JOHN CLARK, JAMES AUSTIN & D. ALAN HENRY, U.S. DEP'T OF JUSTICE, “THREE STRIKES AND YOU'RE OUT”: A REVIEW OF STATE LEGISLATION (1997).

⁵⁸ PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

⁵⁹ *Id.* at 3.

⁶⁰ Beale, *supra* note 56, at 406.

⁶¹ *Id.* at 407.

During the 1990s, there was a fundamental shift in juvenile justice policy. As Barry Feld explained:

Increasingly, people and politicians view juvenile courts' traditional commitment to rehabilitation as a bias toward leniency often to the detriment of protecting the public or satisfying the victim. For more than three decades, conservatives have denounced juvenile courts for "coddling" young criminals, and, more recently, state legislatures have adopted more punitive policies toward young offenders in both the juvenile and criminal justice systems.⁶²

These pressures led to constriction of the jurisdiction of the juvenile courts by a number of mechanisms: making it easier to transfer some juveniles to criminal court, removing some serious crimes from juvenile court jurisdiction regardless of the juvenile's age, and lowering the age of eligibility for criminal prosecutions.⁶³

The National Center for Juvenile Justice surveyed state laws in the mid-1990s and found that a fundamental shift was occurring:

Traditional notions of individualized disposition based upon the best interest of the juvenile are being diminished by interests in punishing criminal behavior. Inherent in many of these changes is the belief that serious and violent juvenile offenders must be held more accountable for their actions. Accountability is, in many instances, defined as punishment or a period of incarceration with less attention paid to the activities to be accomplished during that incarceration. Toward that end, dispositions are to be offense based rather than offender based, with the goal of punishment rather than rehabilitation.⁶⁴

All states allow juveniles to be tried as adults under certain circumstances, by way of transfer laws. States use one of three mechanisms to determine which cases will be transferred to criminal court: judicial transfer (also called judicial waiver), statutory exclusion (also called "mandatory" or "automatic" transfer), and prosecutorial discretion (also called "direct filing").⁶⁵ Furthermore, in many states multiple mechanisms are in place.⁶⁶ Between 1992 and 1995, forty states adopted or modified laws making it

⁶² FELD, *BAD KIDS*, *supra* note 29, at 189-90; *see also* Barry C. Feld, *The Politics of Race and Juvenile Justice: The "Due Process Revolution" and the Conservative Reaction*, 20 *JUST. Q.* 765 (2003) (placing the get-tough movement in a larger social and political context).

⁶³ FELD, *BAD KIDS*, *supra* note 29, at 191.

⁶⁴ PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, *STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME* xi (1996), available at <http://www.ncjrs.gov/pdffiles/statresp.pdf>.

⁶⁵ R.E. Redding & B.S. Mrozowski, *Adjudicatory and Dispositional Decision-Making in Juvenile Justice*, in *JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT, AND INTERVENTION* 232, 236-37 (Kirk Heilbrun, Naomi E. Sevin Goldstein & Richard E. Redding eds., 2005).

⁶⁶ *Id.* at 237.

easier to prosecute juveniles as adults in criminal court, and forty-seven states and the District of Columbia made changes in their laws targeting juveniles who commit serious or violent crimes.⁶⁷ In contrast to the traditional regime, which based dispositions on the needs of the juvenile with the goal of rehabilitation, the states increasingly focused on the offense, with a goal of punishment.⁶⁸ Indeed, by 1997 about one-third of the states had enacted laws redefining the purpose of their juvenile courts to emphasize public safety, certain sanctions, and/or the accountability of offenders.⁶⁹

The new state laws expanded the types of offenses and offenders eligible for transfer from the juvenile court system to the adult criminal court.⁷⁰ They lowered the minimum age for transfer, increased the number of transfer-eligible offenses, or expanded prosecutorial discretion and reduced judicial discretion in transfer decision-making. Twenty-nine states have enacted statutory exclusions, which have removed a large number of cases from the juvenile justice system.⁷¹ For example, thirteen states have set the upper age for juvenile court jurisdiction at fifteen or sixteen.⁷² Other states grant the power to remove individual juvenile cases to the prosecutor, rather than the judge. By 2004, fifteen states had authorized concurrent jurisdiction over some cases in both the juvenile and criminal courts and had given prosecutors the discretion to file cases against juveniles in either system.⁷³ In general, the prosecutor's decision in these cases is equated to the routine exercise of charging discretion, and is not subject to judicial review or oversight.⁷⁴

All the reforms shared the same general purpose: "to ease and support the State's decision to punish, hold accountable, and incarcerate for longer periods of time those juveniles who had, by instant offense or history, passed a threshold of tolerated 'juvenile' criminal behavior."⁷⁵ As a result, the number of juveniles being charged and tried in criminal court increased, as did the number of those detained and incarcerated in adult correctional institutions.⁷⁶

⁶⁷ TORBET ET AL., *supra* note 64, at 3, 59.

⁶⁸ *Id.* at xi.

⁶⁹ PATRICIA TORBET & LINDA SZYMANSKI, U.S. DEP'T OF JUSTICE, STATE LEGISLATIVE RESPONSES TO VIOLENT CRIME: 1996-97 UPDATE (1998), available at <http://www.ojjdp.ncjrs.org/jjbbulletin/9811/judicial.html>.

⁷⁰ RICHARD E. REDDING, U.S. DEP'T OF JUSTICE, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 1 (1996), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>.

⁷¹ H.N. SNYDER & M. SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 111, 112 (2006), available at <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

⁷² *Id.* at 114.

⁷³ *Id.* at 113.

⁷⁴ *Id.*

⁷⁵ TORBET ET AL., *supra* note 64, at xv.

⁷⁶ *Id.* at 6.

The reforms had a major effect on the allocation of authority, shifting authority to determine whether cases should be handled in the juvenile justice system from the courts to prosecutors.⁷⁷ This occurs in states with prosecutorial direct filing, but it is also present in other jurisdictions that exclude particular offenses from the juvenile courts, since the prosecutor often has discretion in the choice of offenses.⁷⁸

B. *Juvenile Justice in Louisiana*

Although most states enacted laws in the mid-1990s to deal more severely with juvenile crime, Louisiana's juvenile justice system is particularly harsh. Indeed, Louisiana was one of the few states that cracked down in every major category tracked by national researchers.⁷⁹

Louisiana has both judicial waiver and statutory exclusions from juvenile jurisdiction based upon age as well as offense type. By setting the maximum age for juvenile court jurisdiction at sixteen, Louisiana requires all seventeen-year-olds to be prosecuted in criminal court.⁸⁰ It also mandates the transfer to criminal court for offenders aged fifteen or older who are charged with first or second degree murder, aggravated rape, or aggravated kidnapping (as well as any lesser included offenses that accompany these charges).⁸¹ Judicial waiver on the motion of the prosecutor or the court is authorized for juveniles who were at least fourteen at the time of the offense if they are charged with serious violent offenses.⁸²

Most importantly for our purposes, Louisiana prosecutors have wide discretion, in cases of concurrent jurisdiction, to send a case to either the juvenile or the criminal justice system. Under Louisiana law, the scope of concurrent jurisdiction is quite broad. It includes all juveniles fifteen years or older who have been charged with a wide range of crimes, including offenses against the person, as well as specified property and drug of-

⁷⁷ *Id.* at xv, xvi; see also Eric C. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 395 (1998).

⁷⁸ Klein, *supra* note 77, at 397 (explaining that the prosecutor also has discretion to move for a judicial waiver and prosecutor's discretionary choice of initial charges is determinative for charges subject to statutory exclusion).

⁷⁹ TORBET ET AL., *supra* note 64, at xv. The categories were wider transfer provisions, broader sentencing authority, less confidentiality of juvenile court records, broader victims' rights, and increased correctional programs.

⁸⁰ LA. CHILD. CODE ANN. art. 804 (2008). At the other end of the range, Louisiana allows trial in the juvenile courts of children as young as ten years of age. *Id.*

⁸¹ LA. CHILD. CODE ANN. art. 305(A)(1)-(2) (2008); see also PATRICK GRIFFIN, NAT'L CENTER FOR JUVENILE JUSTICE, STATE JUVENILE JUSTICE PROFILES: LOUISIANA TRANSFER PROVISIONS (2008), available at <http://www.ncjj.org/stateprofiles>.

⁸² LA. CHILD. CODE ANN. art. 857(A)(1)-(8) (2008) (including first or second degree murder, aggravated kidnapping or rape, aggravated battery involving discharge of a gun, armed robbery committed with a gun, and forcible rape committed upon a child at least two years younger than the rapist).

fenses.⁸³ For cases that meet these criteria, the prosecutor has three options: (1) obtain a grand jury indictment, bypassing the juvenile system altogether; (2) file criminal charges without a grand jury indictment, which results in a transfer of the case to the criminal court if the juvenile court finds probable cause for the charges; or (3) file a delinquency petition, giving jurisdiction to the juvenile court.⁸⁴

In essence, Louisiana law has multiple mechanisms that create a ratchet toward criminal jurisdiction. Seventeen year old juveniles are not eligible for juvenile court, and all of the most serious charges against juveniles aged fifteen or older must go to criminal court. There is no mechanism allowing the criminal court to transfer individual cases back to the juvenile system, even if the court concludes that a juvenile court would be the more appropriate venue.⁸⁵ Even if a juvenile pleads guilty to or is convicted of a lesser included offense—rather than the offense that removed the case from the juvenile justice system—the criminal court retains jurisdiction.⁸⁶ On the other hand, if the prosecutor initially elects to bring the case in juvenile court or the case does not meet the other criteria noted above, the juvenile court may use its discretion to transfer the case to the criminal system. The prosecutor's discretionary choice to bring the case in the punitive criminal justice system rather than the juvenile justice system is unreviewable,⁸⁷ though the court has discretion to override the prosecutor's decision to bring the case in the juvenile system.

The key Louisiana provisions were revised multiple times during the 1990s, including, for example, a variety of statutes that lowered the age for statutory exclusion from juvenile court jurisdiction⁸⁸ and added various offenses to the jurisdictional provisions.⁸⁹ Louisiana also adopted an additional law in 1997 that deserves mention, though it is no longer in force.

⁸³ LA. CHILD. CODE ANN. art. 305(B)(3) (2008); SNYDER & SICKMUND, *supra* note 71, at 113; *see also* GRIFFIN, *supra* note 81 (noting additional offenses eligible for this transfer mechanism include attempted murder, manslaughter, aggravated oral sexual battery, and a second or subsequent aggravated battery or burglary, as well as certain controlled substance violations).

⁸⁴ GRIFFIN, *supra* note 81; *see also* LA. CHILD. CODE ANN. art. 305(B)(3)-(4) (2008).

⁸⁵ About half of the states provide for such a mechanism, which is referred to as a "reverse waiver." Although reverse waiver provisions are common, Louisiana is one of the twenty-five states that make no provision for reverse waivers. *See* SNYDER & SICKMUND, *supra* note 71, at 111.

⁸⁶ LA. CHILD. CODE ANN. art. 305(D) (2008) (providing that the "court exercising criminal jurisdiction shall retain jurisdiction over the child's case, even though he pleads guilty to or is convicted of a lesser offense" and that "[a] plea to or conviction of a lesser included offense shall not vest jurisdiction in the court exercising juvenile jurisdiction over such child").

⁸⁷ *Cf.* State v. Dixon, 712 So. 2d 1078, 1081 (La. Ct. App. 1998) (holding that no notice or hearing is required before prosecutor sends a case to criminal court by obtaining an indictment charging a juvenile with an offense that subjects him to that court's exclusive jurisdiction under LA. CHILD. CODE ANN. art. 305(A)(1)).

⁸⁸ Act Effective Aug. 27, 1994, 1994 La. Acts 710, 710-13; Act Effective Aug. 27, 1994, 1994 La. Acts 779, 779-82.

⁸⁹ *See, e.g.*, Act Effective Aug. 15, 1995, 1995 La. Acts 1033, 1033-34; Act Effective Aug. 15, 1995, 1995 La. Acts 2597, 2597-98; Act Effective Aug. 15, 1995, 1995 La. Acts 1647,

The 1997 law allowed the transfer of juveniles to an adult correctional facility to serve the remainder of their juvenile disposition as soon as they reached the age of seventeen.⁹⁰ Although this provision was justified as a measure to free up bed space in the juvenile facilities, it subjected the transferred juveniles to the same conditions as adult felons, including hard labor.⁹¹ Thus, in the case of individuals who entered the system as juveniles but then reached the age of seventeen, the legislature authorized state authorities to abandon any pretense of special rehabilitative treatment. The Louisiana Supreme Court held that the new law violated due process under the state constitution.⁹² Because the legislation and accompanying regulations deprived the juvenile adjudication of its central rehabilitative focus, the state could not impose these sanctions in a proceeding in which the juveniles were not accorded the right to trial by jury.⁹³

With this exception, the Louisiana courts have upheld the constitutionality of the state legislative scheme. The state courts have found that the statutory classifications bear a rational relationship to the state's interest in protecting its citizens by exposing older minors accused of committing serious and violent felonies to the procedures and sanctions of the adult criminal justice system, and that the statutes are a proper exercise of the state's police powers.⁹⁴

IV. RACE AND THE TWO WAVES OF REFORM

The Jena Six prosecutions put the issue of race front and center, and require us to ask what role, if any, race played in the developments described in Parts II and III, and how those developments affect individual juveniles such as the Jena Six. The answer is complex. In the case of the judicially inspired reforms, it is generally understood that responding to racial discrimination and abuse was an important factor motivating the Warren Court, but, curiously, race was almost entirely absent from the Court's criminal procedure opinions. The Court chose to adopt race-neutral procedural mechanisms to increase the fairness of the criminal justice process in the South and

2647-48 (adding aggravated burglary, aggravated sexual battery, and aggravated sexual battery committed with firearm).

⁹⁰ LA. REV. STAT. ANN. § 15:902.1 (2007) (authorizing rules and regulations to enable the transfer of adjudicated juvenile delinquents to adult correctional facilities when the delinquents have attained the age of seventeen years, the age of full criminal responsibility).

⁹¹ *In re C.B.*, 708 So. 2d 391, 393-94, 399 (La. 1998) (describing background of legislation and its effect).

⁹² *Id.* at 396-400.

⁹³ *Id.* at 400.

⁹⁴ *See, e.g.*, *State v. Perique*, 439 So. 2d 1060, 1064 (La. 1983) (holding that *de facto* transfer to adult court for juveniles accused of specific offenses under statutory predecessor to § 305 is valid exercise of state's police powers that does not deprive juvenile of any right); *State v. Leach*, 425 So. 2d 1232, 1236-37 (La. 1983) (holding that legislative classification by age and offense committed does not violate equal protection); *State v. Pilcher*, 655 So. 2d 636, 641 (La. App. 1995) (reaffirming *Perique* and *Leach* and holding constitution does not require hearing prior to transfer of individual juvenile).

elsewhere, but it imposed no real check on prosecutorial discretion. Although it recognized the possibility that the discriminatory exercise of law enforcement authority could violate the Equal Protection Clause, the Court made it all but impossible to prove such a claim. The Court did extend the right to trial by jury to a wide range of cases in the state system, and it enforced the right to a jury drawn from a cross section from which the prosecutor could not exclude individual jurors on the basis of their race. To some extent, the right to a jury trial serves as a check on racial bias or discrimination by the prosecutor, though even that check is unavailable in the juvenile court system.

The Jena Six incident shows that the Warren Court reforms have little to offer if the problem is—as critics charge—the comparatively harsh treatment of black as opposed to white defendants. The defendants in the Jena Six prosecution had no real means of challenging the prosecutor's seemingly inequitable exercise of discretion in their cases.

In the case of the more recent legislative reforms, race played a more troubling role. As discussed below, although an increase in crime rates played an important role in spurring the trends toward increasing punitiveness in the criminal justice system and restricting the jurisdiction of the juvenile courts, both politicians and the news media played an important role as well. Politicians played the race card consciously or unconsciously, and both the politicians and the news media claimed that the public faced a new threat from cold-blooded juvenile “super-predators.” The news media also increased the coverage of crime news, despite falling crime rates, and covered it in a manner that promoted racial stereotypes and increased support for punitive policies affecting the criminal and juvenile justice systems. The harsh criminal justice policies adopted during this period have had a disproportionately severe effect on racial minorities, and this impact is magnified by the fact that unconscious racism and stereotypes affect individual decisions at each stage of the process.

A. *Race and the Criminal Procedure Revolution*

Under Chief Justice Earl Warren, the Supreme Court pursued multiple agendas, combining a vigorous pursuit of equality and civil liberty (most notably school desegregation,⁹⁵ political reapportionment,⁹⁶ and voting rights⁹⁷) with the seminal criminal procedure cases described in Part I. It seems beyond dispute that the Warren Court was very much aware of the

⁹⁵ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that state's assignment of students to schools on the basis of race violated Equal Protection Clause).

⁹⁶ See, e.g., *Baker v. Carr*, 369 U.S. 186, 209-10 (1962) (holding that the reapportionment of state legislative districts is not a political question and is justiciable by the federal courts).

⁹⁷ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (holding that the redrawing of Tuskegee's electoral district to exclude virtually all black voters violated the Fifteenth Amendment).

crushing racial oppression of blacks in the southern states, and its relationship to the criminal justice system. Indeed, criminal cases involving the brutalization and mistreatment of black defendants in the South formed what one scholar has called “the racial origins of modern criminal procedure”: cases before 1940 in which the Supreme Court interpreted the Due Process Clause to invalidate the state criminal convictions of black defendants who were beaten until they confessed, who were given no more than sham counsel, or whose trials were dominated by violent mobs outside the courthouse.⁹⁸

During the critical period of 1961 to 1968, in which the Warren Court decided the core cases of the criminal procedure revolution, both the Court’s own docket and the nightly news made it impossible to ignore the legal travesties of Jim Crow justice in the South and the brutality and racial animus of southern law enforcement authorities. Many cases arising from the civil rights protests in the South made their way to the Court. In 1964, for example, the Court held that the South Carolina courts had denied the due process rights of civil rights protestors by giving the state trespass law an expansive new interpretation and applying that interpretation retroactively to the demonstrators.⁹⁹ In 1966, the Court unanimously reversed the dismissal of an indictment under 18 U.S.C. § 242 charging the deputy sheriff of Neshoba County, Mississippi with conspiring to release civil rights workers Michael Schwerner, James Earl Chaney, and Andrew Goodman from jail at night and later intercepting, assaulting, and killing them, then disposing of their bodies.¹⁰⁰ The coverage in the national news media also made it impossible to ignore the violent attacks by law enforcement officials on black demonstrators in the South. Some of the most indelible images from the period showed police deploying vicious police dogs and high pressure hoses on peaceful demonstrators, many of whom were children, and state and local police armed with billy clubs, tear gas, and bull whips attacking peaceful civil rights marchers at Selma’s Edmund Pettis Bridge.¹⁰¹ These events were heavily covered on television and in national newspapers, and the wide-

⁹⁸ Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48 & n.2 (2000) (citing, *inter alia*, *Brown v. Mississippi*, 297 U.S. 278 (1936) (coerced confessions); *Powell v. Alabama*, 287 U.S. 45 (1932) (right to counsel); and *Moore v. Dempsey*, 261 U.S. 86 (1923) (mob-dominated trial)). For a rich account of the Supreme Court’s decisions involving the Scottsboro Boys, see Michael J. Klarman, *Powell v. Alabama: The Supreme Court Confronts “Legal Lynchings,”* in CRIMINAL PROCEDURE STORIES 1 (Carol S. Steiker ed., 2006).

⁹⁹ *Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964).

¹⁰⁰ *United States v. Price*, 383 U.S. 787, 798-800 (1966) (upholding indictment charging conspiracy of law enforcement officers and private citizens to violate 18 U.S.C. § 242); *see also* *United States v. Guest*, 383 U.S. 745, 746-49, 760 (1966) (upholding indictment under 18 U.S.C. § 241 that alleged, *inter alia*, that private individuals conspired to keep black residents of Georgia from exercising their rights by, *inter alia*, causing their arrest by false reports of crimes).

¹⁰¹ *See* Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 145-48 (1994) (describing news coverage and its impact on public and political opinion).

spread revulsion they evoked served as a catalyst for the passage of national civil rights legislation.¹⁰²

It is surprising, then, to see that signature cases of the criminal procedure revolution contain virtually no references to racial issues and no discussion of criminal procedure as a tool to promote racial equality.¹⁰³ Even in *Duncan v. Louisiana*, which held that the Sixth Amendment right to trial by jury applied to defendants in state proceedings, the Court made no reference to the value of the jury in cases with an obvious racial component.¹⁰⁴ The case arose in a Louisiana parish that was in the throes of bitter and sometimes violent opposition to the court-ordered desegregation of the public schools.¹⁰⁵ A black man had been convicted and sentenced to sixty days imprisonment for assaulting a white youth, though the black witnesses testified that he had headed off a confrontation between a group of black and white students and merely touched the white youth on the arm, urging him to head home.¹⁰⁶ The brief for the appellant underscored the importance of the right to trial by jury in this context:

It is plain that in cases such as this—where the personal and political leanings of the trial judge will often be antagonistic to the defendant—the potential for a factual determination that is influenced by considerations other than the evidence of record is very great. This situation, particularly in civil rights related prosecutions in the Deep South, is not uncommon. Because of the accepted limitation on federal review and state appellate review of factual determinations in state trial courts, the only effective remedy is to guarantee the accused the right to have the crucial factual determination of guilt or innocence made by a jury, rather than by a judge. Trial by twelve jurors representing a cross-section of the community not only dilutes the effect of any individual bias, it tends to make certain that persons not antagonistic to the accused will participate in the fact-finding process.¹⁰⁷

¹⁰² See *id.* at 146-47. Klarman argues that this result was anticipated by civil rights leaders, who gave up hope of persuading southern whites to give up segregation and redirected their energies to obtain support from northerners by provoking and then peacefully enduring violent assaults by southern law enforcement and mobs. *Id.* at 141-46.

¹⁰³ Cf. Carol S. Steiker, *Introduction to CRIMINAL PROCEDURE STORIES*, *supra* note 98, at vii, ix (noting absence of “discussion of criminal procedure as a tool of racial equality” in formal decisions of the Court in the 1960s).

¹⁰⁴ 391 U.S. 145, 156 (1968).

¹⁰⁵ For an exceptionally rich description of the events leading up to the *Duncan* opinion, and its aftermath, see Nancy J. King, *Duncan v. Louisiana: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, in *CRIMINAL PROCEDURE STORIES*, *supra* note 98, at 261.

¹⁰⁶ *Id.*

¹⁰⁷ Brief for Appellant at 23-24, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (No. 410), 1967 WL 113845.

Despite this invitation, the Court's opinion in *Duncan* made virtually no reference to the racial context of the case. In a brief, bland statement of facts, the Court referred to the race of the defendant, the victim, and the witnesses,¹⁰⁸ and noted, in a single sentence, that the defendant stopped to assist his cousins, "who had recently transferred to a formerly all-white high school . . . [and] had reported the occurrence of racial incidents at the school."¹⁰⁹ After developing the history of the jury as an institution, the Court described the jury as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," and emphasizes the framers' "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."¹¹⁰ The majority, the concurrence, and the dissent failed to make an effort to tie those general concepts to the case before the Court, or to the events in the South.

It is not clear why the Court failed to discuss racial equality in its criminal procedure decisions. Carol Steiker has speculated that the focus on incorporation under the Due Process Clause may not have lent itself to concerns with equality, or that "incorporation felt more universal and 'color-blind,' or less controversial and 'political,' than overtly race-based rulings, given the divisive politics of the time."¹¹¹ This explanation has some appeal. Although the *Gideon* decision affording all defendants the right to counsel was popular, the Court's other major decisions were widely seen as handcuffing the police and coddling criminals.¹¹² The Republican Party was aggressively pursuing southern voters in the 1960s with a strategy that emphasized both crime control and opposition to civil rights legislation.¹¹³ In 1968, the year the *Duncan* decision came down, presidential candidate Richard Nixon made law and order a major theme of his campaign.¹¹⁴ This was also the year Congress passed legislation intended to overrule *Miranda*.¹¹⁵

Although this explanation suggests that the Court may have disguised its motivation, it seems equally possible that the Court intended to broaden its focus from problems that affected primarily the southern states in order to bring about national changes that would reduce the disparity in justice between rich and poor (including but by no means limited to minorities), bol-

¹⁰⁸ *Duncan*, 391 U.S. at 147.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 156.

¹¹¹ Steiker, *supra* note 103, at ix.

¹¹² See LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* 379, 391-92, 399-400 (2000) (noting *Gideon* was the Warren Court's "only popular criminal procedure decision" and describing the strong negative reaction to *Escobedo* and *Miranda*).

¹¹³ See Sara Sun Beale, *What's Law Got to Do With It: The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 40-41 (1997).

¹¹⁴ POWE, *supra* note 112, at 407-10.

¹¹⁵ See *id.* (describing the politics of law and order during this period and the passage of the legislative repeal of *Miranda*).

ster the adversarial process, and create legal rules that would be readily enforceable.¹¹⁶ Certainly, the concern with equality between rich and poor defendants is a strong theme in the Warren Court's criminal procedure decisions.¹¹⁷ Ironically, however, although the Court's own focus seemed to have shifted away from cases that were what one scholar has called "disguised race cases" to a broader conception of equality and an emphasis on other values, the public generally perceived the later cases as race cases, because race and crime merged in the public (or white public).¹¹⁸

During its halcyon days, the Warren Court issued one more decision of note, denying relief in a capital case to a black defendant convicted by an all-white jury in a county in which no blacks had served on a petit jury in more than a decade.¹¹⁹ The Court could easily have gone the other way. As early as 1879, the Supreme Court had held that the Equal Protection Clause prohibits the states from excluding blacks from grand and petit juries.¹²⁰ And it had also ruled in *Yick Wo v. Hopkins* that the discriminatory enforcement of a law that is race-neutral on its face violates the Equal Protection Clause.¹²¹ In *Swain v. Alabama*, decided in 1964, the Court held that the deliberate exclusion of black jurors in an individual case violates the defendant's right to equal protection.¹²² However, as noted by subsequent Court decisions, the remainder of the opinion made it virtually impossible for any defendant to establish that claim.¹²³ Although the prosecution had used peremptory challenges to remove every black juror, the Court found this insufficient to establish the necessary deliberate exclusion.¹²⁴ Similarly, the Court found the evidence that no black jurors had served for more than a decade insufficient to establish a prima facie case of discrimination.¹²⁵ Although an all-white jury convicted the defendant and sentenced him to death for rape, the Court was unwilling to disturb the practice of using peremptory challenges,¹²⁶ and it erected an impossibly high standard for the use of statistical

¹¹⁶ Cf. Schulhofer, *supra* note 32, at 16-17 (describing three themes of Warren Court's decisions as: (1) an "egalitarian impulse . . . to stamp out not only racial discrimination but also to insure fair treatment of rich and poor alike"; (2) the need to bolster the adversarial process to check executive power; and (3) a concern for practical implementation).

¹¹⁷ See Powe, *supra* note 112, at 379-99.

¹¹⁸ *Id.* at 386 (noting that *Gideon* was "the last important purely southern criminal procedure case" and arguing that the public perception of later decisions was influenced by its conflation of race and crime).

¹¹⁹ *Swain v. Alabama*, 380 U.S. 202 (1965).

¹²⁰ *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

¹²¹ 118 U.S. 356, 374 (1886).

¹²² *Swain*, 380 U.S. at 203-04.

¹²³ See *Batson v. Kentucky*, 476 U.S. 79, 92-93 (1986) ("Since . . . *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny.").

¹²⁴ *Swain*, 380 U.S. at 210, 221-22.

¹²⁵ *Id.* at 223-24.

¹²⁶ The Court explained:

In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that

or historical evidence to create a prima facie case of purposeful discrimination by the prosecutor.

Adding *Swain* to the mix highlights the Supreme Court's reluctance to regulate or review exercises of prosecutorial discretion. Although *Swain* was later overruled in *Batson v. Kentucky*,¹²⁷ *Batson* remains an outlier. *Batson* and its progeny¹²⁸ are the *only* line of authority that offers any real means of challenging the exercise of prosecutorial discretion.¹²⁹ The Court has rebuffed other efforts to take a more active role in overseeing the enormous discretion exercised by prosecutors, despite troubling evidence that this discretion is being exercised in a discriminatory fashion.

In *McCleskey v. Kemp*,¹³⁰ in which the defense introduced a very sophisticated statistical study showing a significant racial discrepancy in the application of the death penalty in Georgia, the Court addressed the issues involving jury decision-making but dismissed out of hand claims of prosecutorial discrimination at the charging stage.¹³¹ As reviewed in Justice Blackmun's dissent, however, the defense study demonstrated that (1) Georgia prosecutors advanced black defendant/white victim cases to the death penalty stage at a much higher rate than similar cases involving black victims; (2) racial factors at this stage were statistically significant after excluding other variables; and (3) the decision-making at this stage was unstructured and subject to abuse.¹³² This showing, Justice Blackmun argued, would have been sufficient to establish a prima facie case of discrimi-

the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. Hence the motion to strike the trial jury was properly denied in this case.

Id. at 222.

¹²⁷ 476 U.S. at 96.

¹²⁸ *Batson* was later extended to sex-based peremptory challenges. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128-29 (1994).

¹²⁹ The efficacy of *Batson* challenges is also in dispute. See, e.g., Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 633 (1994) ("Despite the *Batson* rule's noble purpose, it cannot prevent clever lawyers from using peremptory challenges to strike potential jurors based upon impermissible rationales so long as they pretend to use other, permissible bases. Lawyers will continue to strike, with impunity . . ."); Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 WILLAMETTE L. REV. 293, 318 (1989) (noting that such challenges have failed "[i]n the overwhelming majority of reported cases implementing *Batson*").

¹³⁰ 481 U.S. 279 (1987).

¹³¹ *Id.* at 296-97, 311-13.

¹³² *Id.* at 356-57 (Blackmun, J., dissenting) (noting that the prosecutor was five times more likely to seek the death penalty in black defendant/white victim cases than black defendant/black victim cases and three times more likely to seek the death penalty in black defendant/white victim cases than in white defendant/black victim cases).

nation by jury commissioners,¹³³ but the Court was not willing to pierce the veil of prosecutorial discretion. Similarly, in *United States v. Armstrong*, the Court reversed a decision providing discovery to a defendant who alleged that prosecutors were exercising their discretion in a discriminatory fashion in drug cases.¹³⁴ Having held that the defense must prove purposeful discrimination to establish that a prosecutor has violated equal protection, the Court denied the procedural tools necessary to establish that such discrimination had occurred.¹³⁵

The Supreme Court's cases from the criminal procedure revolution evidenced little explicit concern with racial equality or the distortions that race may produce in the criminal justice system, and—excepting the use of peremptory challenges—they do not subject prosecutorial decision-making to judicial review or oversight. The Court's decisions seek to ensure the fairness of the process through other means: providing the defendant with counsel, with the right to trial by jury, and with other procedural protections during the investigation and trial.

Whatever the assessment of the efficacy of these decisions in criminal cases, there is an important missing link in juvenile cases because the Court stopped short of requiring the states to provide the right to trial by jury in juvenile proceedings.¹³⁶ Indeed, the case in which the Court refused to extend the jury to juvenile proceedings had obvious racial overtones: it involved black North Carolina children who were found to be delinquent because of their actions during civil rights demonstrations protesting school assignments.¹³⁷ Even more important, as Part III explains,¹³⁸ prosecutorial discretion is enormously important in juvenile cases, particularly in states like Louisiana where the reforms of the 1990s have increased the prosecutor's unreviewable authority to prosecute juveniles in the criminal courts.

¹³³ See *id.* at 349-50 (describing test under *Castaneda v. Partida*, 430 U.S. 482, 493-94 (1977)).

¹³⁴ 517 U.S. 456, 470-71 (1996).

¹³⁵ See, e.g., Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 606 (1998) ("The *Armstrong* ruling will prevent many defendants who were selectively prosecuted from gaining discovery, and thereby ensure that many meritorious claims will never be proven."); Marc Michael, Note, *United States v. Armstrong: Selective Prosecution—A Futile Defense and Its Arduous Standard of Discovery*, 47 CATH. U. L. REV. 675, 713-18 (1998) (explaining the background of *Armstrong* and criticizing the standard of review for making it "nearly impossible" to prove selective prosecution).

¹³⁶ See *supra* notes 52-55 and accompanying text.

¹³⁷ *McKeiver v. Pennsylvania*, 403 U.S. 528, 536-38 (1971). The Court consolidated two cases, one from Pennsylvania, and the other involving the North Carolina school protests. The North Carolina juvenile court had entered custody orders declaring each of the juveniles a "delinquent 'in need of more suitable guardianship' and committing him to the custody of the County." *Id.* at 537-38. The juvenile court then "suspended these commitments and placed each juvenile on probation," with several conditions that could result in their probation being revoked: in addition to the condition that they not violate any State laws, the juveniles were also required to report monthly, to be home by eleven p.m. each evening, and to attend an approved school. *Id.* at 538.

¹³⁸ See *supra* notes 56-94 and accompanying text.

B. Race and the Statutory Reforms of the Juvenile Justice Systems

The statutory reforms of the 1990s described in Part III were, at least in part, responses to high rates of adult and juvenile crime.¹³⁹ An increase in youth homicide rates was especially alarming to the public.¹⁴⁰ National polls identified crime as the most important problem facing the nation each year from 1994 to 1998, and those surveyed ranked it only slightly lower in 1999 and 2000.¹⁴¹ Additionally, although crime rates fell dramatically during the 1990s, a large proportion of the public believed that crime was still on the rise.¹⁴² The public generally favored harsher sentences as a response. In every year from 1980 to 1998, more than 74% of respondents in a national poll believed that the courts in their area did not deal harshly enough with criminals.¹⁴³ The public also believed that juvenile crime was rising and that the judicial system treated juveniles too leniently. For example, a 1989 Time/CNN poll found that 88% of respondents believed that teen violence was a more serious problem than in the past, and 70% thought that “lenient treatment of juvenile offenders by the courts” was partly to blame for the situation.¹⁴⁴ A 1993 poll found that 73% of respondents were in favor of trying violent juveniles as adults rather than in the “‘lenient juvenile courts.’”¹⁴⁵

The effect of the high crime rates was magnified exponentially by the actions of politicians and the news media. Politicians campaigned on the crime issue, and the news media responded to economic and market conditions by reshaping the volume and content of crime coverage in ways that promoted punitiveness. Although the precise mechanisms are not yet fully understood, racial attitudes and imagery seem to have played an important role in increasing the public’s support for harsh policies such as those described in Part III. Moreover, these policies have fallen most heavily on minorities because they commit crimes at a higher rate than other groups, and this disproportionate impact has been magnified by the unconscious racism and stereotypes that affect individual decisions at each stage of the process.

¹³⁹ See, e.g., FELD, *BAD KIDS*, *supra* note 29, at 197-208 (comparing increases in juvenile and adult crime and noting that “[t]he intersection of race, guns, and homicide fanned the public and political ‘panic’ that, in turn, led to the recent get-tough reformulation of juvenile justice waiver and sentencing policies”); see also FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997) (arguing that U.S. crime rates overall are not higher than those of other nations and that policymakers should focus on violent crime).

¹⁴⁰ FELD, *BAD KIDS*, *supra* note 29, at 205.

¹⁴¹ Beale, *supra* note 56, at 418.

¹⁴² *Id.* at 418-19.

¹⁴³ *Id.* at 420.

¹⁴⁴ Robert E. Shepherd, Jr., *How the Media Misrepresents Juvenile Policies*, *CRIM. JUST.*, Winter 1998, at 37 (citing a Time/CNN poll).

¹⁴⁵ Klein, *supra* note 77, at 374 (citing a USA Today poll).

i. Politics, Pundits, and Super-Predators

As noted above,¹⁴⁶ the legislative changes in the juvenile justice system reflected a move away from the traditional emphasis on rehabilitation toward tougher, more punitive treatment of juvenile as well as adult criminals. Crime became a hot button political issue, and a central theme in many political campaigns.¹⁴⁷ Conservative calls for “law and order” began in the 1960s, during the period of widespread civil rights protests, and they were widely interpreted (and perhaps intended) as code words that invoked racial stereotypes without being explicitly racist.¹⁴⁸ The most famous use of such appeals was the Willie Horton television ads in the 1988 presidential campaign.¹⁴⁹ The law and order campaigns played an important role in the Republican Party’s success in realigning the political parties, increasing Republican strength in both the South and the suburbs.¹⁵⁰ Indeed, supporting more punitive policies became a political necessity.¹⁵¹ Being soft on crime was the new equivalent of being soft on Communism in the 1950s. Democrats tired of taking a beating on the crime issue, and, by 1992, Bill Clinton ran on his own tough on crime platform, which included support for the death penalty.¹⁵² Legislative proposals that were seen as tough on crime passed with little or no opposition at the state and federal levels.¹⁵³

Juvenile crime became a particularly hot political issue twice in the past four decades, first for a brief period in the 1970s, and then again beginning in the 1990s.¹⁵⁴ The federal legislative movement of the 1990s that is one of the foci of this Article was presaged by a similar development in some states, including New York, in the 1970s. The New York experience shows how a single publicized case, when seized on by key political leaders, can prompt significant legislative action.¹⁵⁵ The case of Willie Bosket has been

¹⁴⁶ See *supra* Part III.A.

¹⁴⁷ See, e.g., Beale, *supra* note 113, at 40-44; Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash,”* 87 MINN. L. REV. 1447, 1538-52 (2003).

¹⁴⁸ See DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 221-57 (1996); Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & FAM. STUD. 11, 32-33 & nn. 112-19 (2007); see also Feld, *supra* note 62, at 786-91 (describing political developments and the use of coded racial appeals).

¹⁴⁹ See generally DAVID C. ANDERSON, *CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE* (1995).

¹⁵⁰ But see JAMES M. GLASER, *RACE, CAMPAIGN POLITICS, AND THE REALIGNMENT IN THE SOUTH* 186 (1996) (arguing that racial cues played little role in presidential elections where other ideological differences were so stark that “race simply has not mattered much”).

¹⁵¹ For a general discussion of the problem of politicizing crime, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

¹⁵² See Beale, *supra* note 113, at 42-43.

¹⁵³ *Id.*

¹⁵⁴ See FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 4 (1998).

¹⁵⁵ *Id.* Legislation in other states has been traced back to a single case. In Massachusetts, fifteen-year-old Eddie O’Brien’s murder of his neighbor led to legislation requiring the automatic transfer to criminal court of any murder charge involving a juvenile. See PETER

widely credited with prompting a significant revision of New York's juvenile justice system.¹⁵⁶ At age fifteen, Bosket (dubbed the "Baby-Faced Butcher" by the New York press) shot and killed two subway passengers in the course of robberies.¹⁵⁷ Because of his age, Bosket was subject to the exclusive jurisdiction of the juvenile courts, and would be released at the age of twenty-one. Governor Hugh Carey was a Democrat facing a tough election campaign in which he had been accused of being soft on crime.¹⁵⁸ Two weeks after Bosket was sentenced, Carey called the New York legislature into a special session solely for the purpose of rewriting state law to allow children as young as age thirteen to be transferred to criminal court if charged with murder or other extremely serious offenses.¹⁵⁹ The legislation passed with almost no dissent, as legislators noted the public's "revulsion," the pressure to take some action, and the need for juveniles to "pay the penalty" for their actions.¹⁶⁰

Although juvenile justice seems to have moved off center stage for a period of several years, it returned in full force in the late 1980s and the 1990s, which Franklin Zimring has described as a period of "legislative frenzy."¹⁶¹ During this period, both politicians and commentators/pundits warned that the United States faced a new threat from juvenile "super-predators." The term "super-predator" appears to have been coined during this period by John DiIulio, who wrote that the United States was "sitting atop a demographic crime bomb" and facing "ever growing numbers of hardened, remorseless juveniles who were showing up in the system."¹⁶²

ELIKANN, SUPERPREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW 108-09 (1999) (describing the individual incident and the ensuing hysteria that led to passage of the Massachusetts legislation). The abduction and murder of Polly Klaas had a similar effect in California, leading directly to the passage of the most severe three strikes law in the United States. See Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 409-22 (1997) (describing effect of Klaas' murder in galvanizing support for three strikes bill, including Governor Pete Wilson's announcement of his support at her funeral, despite widespread recognition of problems with the bill); see also JENNIFER E. WALSH, THREE STRIKES LAWS 37-42 (2007) (describing Klaas's murder and passage of California's three strikes law, including Wilson's decision to support the harshest version of the law).

¹⁵⁶ See, e.g., FOX BUTTERFIELD, ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE 226-27 (1997) (describing how public outcry over Bosket's case led to passage of New York's Juvenile Offender Act of 1978); Klein, *supra* note 77, at 383-84 (describing the Bosket case as the "straw that broke the proverbial camel's back . . . [starting] a national wave in favor of mandating transfer to adult criminal court for violent young offenders").

¹⁵⁷ Klein, *supra* note 77, at 383.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 383-84.

¹⁶⁰ SIMON SINGER, RECRIMINALIZING DELINQUENCY: VIOLENT JUVENILE CRIME AND JUVENILE JUSTICE REFORM 61 (1996); see also *id.* at 59-68 (noting that votes in the Assembly and Senate were 125 to 10 and 50 to 2, respectively, in favor of the bill, and citing comments of different legislators).

¹⁶¹ ZIMRING, *supra* note 154, at 16.

¹⁶² John J. DiIulio, *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23.

According to one prosecutor, they would “kill or maim on impulse, without any intelligible motive.”¹⁶³ DiIulio quotes a prisoner as describing these juveniles as “stone-cold predators,” and he argues that they “place zero value on the lives of their victims.”¹⁶⁴

Many politicians employed similar rhetoric to argue that there was a new and more dangerous form of juvenile crime. For example, Representative Bill McCollum warned Congress of “an unprecedented surge of youth violence that has only begun to gather momentum” and “*the coming generation of ‘super-predators.’*”¹⁶⁵ Paul McNulty, a senior Republican staffer in Congress, warned that “America has been heavily victimized by recidivistic teenage thugs who were quickly returned to the streets by idealistic judges,” and that it must brace itself to respond to a new breed of “natural born killers.”¹⁶⁶ In California, Representative Chuck Quackenbush, a key promoter of state legislation to lower the age at which children could be tried as adults for murder, warned of the “Little Monsters we have today who murder in cold blood” who must be “punished and walled off from society for a very long period of time, if not forever.”¹⁶⁷

A survey of the political and policy literature from this period reveals that frequent references to juvenile super-predators were part of three broad themes that served as the catalyst for juvenile justice legislation: “the viciousness of the new breed of offender, the revolving door of juvenile justice as a cause of crime, and the treatment of youths as adults as an attractive solution to the problem.”¹⁶⁸ As described in the next section, the media fanned the flames of fear towards these youthful predators and helped increase support for punitive juvenile justice policies.

¹⁶³ *Id.* at 23. DiIulio later co-authored a book that presented his arguments in greater length. See WILLIAM J. BENNETT, JOHN DI IULIO & JOHN P. WALTERS, *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* (1996). DiIulio’s co-authors were neoconservative Bill Bennett, who served as Secretary of Education in the Reagan administration and drug czar in the Bush administration, and John Walters, who had served as Bennett’s chief of staff and later himself served as drug czar.

¹⁶⁴ DiIulio, *supra* note 162, at 24, 26.

¹⁶⁵ ZIMRING, *supra* note 154, at 4-5 (citation omitted).

¹⁶⁶ Paul J. McNulty, *Natural Born Killers?*, *POLY REV.*, Winter 1995, at 84, 85.

¹⁶⁷ Barry Krisberg, *The Politics of the War Against the Young*, in *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION* 195 (Mary Louise Frampton, Ian Haney López & Jonathan Simon eds., 2008) (citation omitted). Quackenbush utilized the media, organizing a series of events at which family members of murder victims testified. *Id.* at 194. Although the bill in question affected only a small number of youths, it marked an important break with the rehabilitative tradition for juvenile offenders, and it led to additional, more far-reaching proposals at nearly every legislative session in California. *Id.* at 195-97.

¹⁶⁸ ZIMRING, *supra* note 154, at 6. For example, then-Senator John Ashcroft “characterized the juvenile justice system as one that ‘reprimands the crime victim for being at the wrong place at the wrong time, and then turns around and hugs the juvenile terrorist, whispering ever so softly into his ear, ‘Don’t worry, the State will cure you.’” Klein, *supra* note 77, at 374 (quoting 143 CONG. REC. S145-01 (daily ed. Jan. 21, 1997) (statement of Sen. Ashcroft)).

ii. The Role of the News Media

The news media played a critical role in keeping crime issues before the public and in portraying a distorted image of crime. The news media dramatically increased coverage of crime—especially violent crime—even as crime rates fell, disproportionately depicted blacks and Hispanics as the perpetrators of crime, and triggered fears of juvenile crime and a new breed of super-predators. Indeed, the meteoric rise of public concern about crime as the number one problem facing the nation came within months of a spike in the news media's coverage of crime.¹⁶⁹ During this time, however, crime rates were actually declining.¹⁷⁰

Both entertainment and news programming use portrayals of violence as part of an economic strategy to develop particular audiences. Responding to economic and market pressures, the television networks dramatically increased their coverage of crime during the 1990s despite the fact that crime rates were falling.¹⁷¹ For example, crime coverage was the number one topic on local television news during the 1990s and well into the new decade.¹⁷² Detailed studies comparing crime rates with the coverage of crime demonstrate that the incidence of crime coverage bears no relationship to the amount or type of crime found in the local viewing area.¹⁷³ Instead, local stations manipulate crime and violence as a marketing strategy.¹⁷⁴ Similarly, studies of newspaper coverage of juvenile crime found no relationship between the amount or placement of the coverage and the rate of juvenile crime. For example, between 1987 and 1996, Hawaiian newspapers increased their coverage of juvenile delinquency thirty-fold and their coverage of gangs forty-fold, despite the fact that juvenile crime rates declined or remained stable during that period.¹⁷⁵

¹⁶⁹ Jeffrey D. Alderman, *Leading the Public: The Media's Focus on Crime Shaped Sentiment*, THE PUBLIC PERSPECTIVE, Mar.-Apr. 1994, at 26, 26-27 & fig.1.

¹⁷⁰ *Id.*

¹⁷¹ Crime was the leading topic covered in the networks' dinner hour news programs throughout the 1990s, and the number of crime stories tripled from the beginning to the end of the decade. Beale, *supra* note 56, at 422-23 (noting an increase in average crime stories per year, from 557 at the beginning of the decade to 1,613 at the end of the decade). Although the murder rate fell during this period, the number of murder stories increased five-fold. *See id.* at 423 (noting increase in average murder stories per year from fewer than 100 at the beginning of the decade to more than 500 at the end of the decade). The networks responded to greatly increased economic pressures that made it expedient to move away from hard news and to emphasize tabloid-style crime stories. *See id.* at 424-29 (noting pressure for profits from conglomerate corporate owners, loss of audience share, and proliferation of television news magazines).

¹⁷² *See id.* at 430 nn.129-30 (collecting studies of local news content).

¹⁷³ *See id.* at 430-32 (citing authorities, including JAMES T. HAMILTON, CHANNELING VIOLENCE: THE ECONOMIC MARKET FOR VIOLENT TELEVISION PROGRAMMING (1998)).

¹⁷⁴ The emphasis on crime in the local news depends on local viewer interest in violent programming, not on the crime in the area. Stations also select news topics and style of presentation to establish their brand identity in the local market. *See id.* at 430.

¹⁷⁵ LORI DORFMAN & VINCENT SCHIRALDI, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 18 (2001), available at <http://www.buildingblocksforyouth.org/media>.

When the news media covered youth, it generally focused on crime and violence. For example, a study of television news programming in California found that a majority of the stories about youth also concerned violence, and over two-thirds of the stories about violence concerned youth.¹⁷⁶ A national study of newspaper and television coverage in 1993—at the height of the legislative activity concerning juvenile transfers to adult court—found that 48% of network news segments about youth concerned violence, as did 40% of newspaper stories.¹⁷⁷ The coverage significantly misrepresented the degree to which violent crime involved juveniles. For example, one study of local news programs in California found that seven of ten stories about violence involved youth, but only 14.1% of violent arrests involved young people.¹⁷⁸

During the early 1990s, the national newsmagazines also sensationalized youth violence, often presenting it in cover stories. In 1992, for example, *Newsweek* and *Time* published cover stories entitled “Children Without Pity,” “Big Shots: An Inside Look at the Deadly Love Affair Between America’s Kids and Their Guns,” “Teen Violence: Wild in the Streets,” and “Kids and Guns: A Report from America’s Classroom Killing Grounds.”¹⁷⁹ The news media made frequent use of terms such as “super predators,” “teen killers,” and “youthful predators.”¹⁸⁰

Studies of media coverage found skewed crime content that implicitly portrayed some groups, such as juveniles and minorities, as more criminally dangerous than others.¹⁸¹ Researchers who studied the content of local television programming in different areas found a disproportionate emphasis on violent crime, especially violent crime involving black perpetrators. For example, in California, black violent crime was significantly overrepresented, with Hispanic violent crime overrepresented to a lesser degree.¹⁸² Similarly, in Philadelphia local news programming disproportionately depicted persons of color in crime stories, and presented them primarily as perpetrators rather than as bystanders, experts, or other participants.¹⁸³ Whites were disproportionately shown as victims.¹⁸⁴ This disparity did not reflect the offense rates

¹⁷⁶ Lori Dorfman, Katie Woodruff, Vivian Chavez & Lawrence Wallack, *Youth and Violence on Local Television News in California*, 87 AM. J. PUB. HEALTH 1311, 1314 (1997).

¹⁷⁷ DORFMAN & SCHIRALDI, *supra* note 175, at 18-19.

¹⁷⁸ *Id.* at 20.

¹⁷⁹ Shepherd, *supra* note 144, at 38.

¹⁸⁰ *Id.*

¹⁸¹ See DORFMAN & SCHIRALDI, *supra* note 175, at 7 (collecting existing studies of crime reporting by the media and finding that blacks and young people are disproportionately portrayed as criminals); Feld, *supra* note 62, at 782-86.

¹⁸² Franklin D. Gilliam, Jr., Shanto Iyengar, Adam Simon & Oliver Wright, *Crime in Black and White: The Violent Scary World of Local News*, 1 HARV. INT'L J. PRESS/POLITICS 6, 8 (1996).

¹⁸³ Daniel Romer, Kathleen H. Jamieson & Nicole J. De Coteau, *The Treatment of Persons of Color in Local Television News: Ethnic Blame Discourse or Realistic Group Conflict?*, 25 COMM. RES. 286, 292 (1998).

¹⁸⁴ *Id.* at 293.

for each group.¹⁸⁵ On two of three stations, whites were shown more frequently as victims of violence than persons of color, though at that time victims of color outnumbered white victims four to one.¹⁸⁶ These studies are consistent with other research finding that crime coverage has been distorted along racial lines, over-representing white victims as compared to black victims and depicting minorities much more frequently as criminal suspects than as crime victims or law enforcement officers.¹⁸⁷ There is also evidence that the news media disproportionately depicts minorities in threatening or menacing contexts.¹⁸⁸

The news media has also exaggerated the prevalence of juvenile crime,¹⁸⁹ and, as noted above, the media in the 1990s publicized the image of the coming wave of juvenile super-predators. In light of this disproportionate coverage, it is unsurprising that the public greatly overestimated the prevalence of juvenile crime. For example, one study found that juveniles were arrested for only 9% of homicides in 1999, but the public estimated this figure to be 43%.¹⁹⁰

In at least one case, the local news media's decision to increase coverage of juvenile crime—though there was no increase in such crime—has been linked directly to legislative action. In 1993, the *Denver Post* increased the number of stories concerning youth crime by 168.5%, tripled the column inches devoted to juvenile crime, and placed fourteen times more stories on juvenile crime in section A than in the previous summer.¹⁹¹ The increased coverage was dubbed Denver's "Summer of Violence."¹⁹² Although homicides by juveniles had not increased in 1993, and in fact were less frequent that year than in 1992 or 1994, the press treatment put the issue of youth crime on the public agenda. The governor called a special legislative session and the legislature passed several punitive juvenile justice laws that had been considered and rejected in the past.¹⁹³ The experience in Colorado, though extreme, is consistent with both survey and experimental studies supporting the view that the news media's market-driven focus on crime played an important role in increasing both the political salience of crime and the public

¹⁸⁵ *Id.* at 294.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (citing ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 78-106 (2000)). Entman and Rojecki found that there was a three to one disparity in the time allocated in the media to white victims as opposed to black victims in Chicago. *Id.* at 81.

¹⁸⁸ Beale, *supra* note 56, at 459-60 (noting research concerning portrayals in mug shots, in the physical custody of police, or in prison clothing).

¹⁸⁹ See DORFMAN & SCHIRALDI, *supra* note 175; Beale, *supra* note 56, at 458 n.276; Robert K. Goidel, Craig M. Freeman & Steven T. Procopio, *The Impact of Television Viewing on Perceptions of Juvenile Crime*, J. BROAD. & ELEC. MEDIA 119, 122 (2006).

¹⁹⁰ Beale, *supra* note 56, at 458-59.

¹⁹¹ DORFMAN & SCHIRALDI, *supra* note 175, at 22-23.

¹⁹² *Id.*

¹⁹³ *Id.*

support for punitive policies during the 1990s.¹⁹⁴ The mechanism by which the media promotes punitiveness is not presently well understood, and there are competing theories.¹⁹⁵ Although a full explanation of these theories is beyond the scope of this Article, the key point for now is the evidence that race appears to play a pernicious role.

Readers and viewers form well-developed expectations based upon stock stories and scripts,¹⁹⁶ and in the case of news coverage of crime, these stock stories have a significant racial element. A summary of research on the content of local television news concluded that "the typical news story on crime consists of two 'scripts': crime is violent, and criminals are non-white."¹⁹⁷ Many studies have documented the effects of the expectations created by these common scripts. For example, in one experimental simulation 60% of the subjects who viewed a news broadcast that included no perpetrator falsely recalled that they had seen the perpetrator, and 70% of those subjects identified the unseen perpetrator as an African American.¹⁹⁸ Similarly, subjects can more accurately recall seeing African American or Hispanic than white perpetrators because of their stereotypes about who commits street crimes.¹⁹⁹

In experimental settings, the crime script's racial element appeared to operate as a significant cue that triggered public support of punitive policies such as three strikes laws and capital punishment.²⁰⁰ For example, viewing a news segment that included a youthful black or Hispanic crime suspect significantly increased white experimental subjects' support for punitive juvenile justice policies such as placing youths in adult detention facilities, and

¹⁹⁴ See Beale, *supra* note 56, at 442-65. Data from hundreds of experimental simulations and surveys has confirmed the news media's agenda setting and priming effects. Agenda setting refers to the media's ability to focus the public's attention on certain issues, and many studies confirm the common sense view that media has the power to influence the public agenda. *Id.* at 442-43. Once the news media has increased the salience of an issue by agenda setting, the media then primes viewers and readers to believe that those issues require more political attention, and to judge candidates by their positions on these issues. *Id.* at 443-44. Experimental simulations show that the priming effect of crime stories increases the importance of presidential candidates' positions on crime. *Id.* (citations omitted). Moreover, this effect seems to be linked to racial attitudes. *Id.* at 444 (citations omitted). In an experimental simulation, adding a crime story including a mug shot of a black suspect dramatically decreased the support for Democratic presidential candidate Bill Clinton, apparently bringing stereotypes about party race allegiances to the forefront of viewers' minds. *Id.* at 44-45 (citations omitted).

¹⁹⁵ For a general discussion of the research on framing, fear, and racial typification, see *id.* at 446-61. For another overview of the research in this area, see Feld, *supra* note 62, at 782-86.

¹⁹⁶ Beale, *supra* note 56, at 448-49.

¹⁹⁷ Gilliam et al., *supra* note 182, at 6, 8.

¹⁹⁸ Franklin D. Gilliam & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 563-64 (2000).

¹⁹⁹ Franklin D. Gilliam & Shanto Iyengar, *Super-Predators or Victims of Societal Neglect: Framing Effects in Juvenile Crime Coverage*, in FRAMING AMERICAN POLITICS 148, 156-57 (Karen Callaghan & Frauke Schnell eds., 2005).

²⁰⁰ Gilliam & Iyengar, *supra* note 198, at 565-68.

somewhat increased their fear of crime.²⁰¹ Survey research comparing the views of individuals who watched television news regularly found that they were substantially more likely to support punitive policies than those who seldom watched the news, and found an even greater degree of support among regular viewers who scored high on one measure of racist attitudes.²⁰² Other research found that repeated exposure to media that disproportionately represents minorities as violent criminals and whites as victims can alter unconscious racial schema and promote punitive attitudes, although there is evidence that the impact of such programming varies among individuals.²⁰³

What was the effect of the news media's disproportionate and skewed coverage of juvenile crime? Researchers found that increased viewing of television news is positively associated with the misperception that juvenile crime is increasing rather than decreasing.²⁰⁴ It is also associated with an overestimate of the percentage of juvenile offenders who have been imprisoned for violent crimes and with the beliefs that imprisonment is more effective than rehabilitation for juveniles and that sentencing in juvenile cases is race-neutral.²⁰⁵

iii. The Racial Impact of the New Punitive Policies

Blacks and other minorities have been disproportionately affected by the punitive policies described in Part III, and already high rates of imprisonment have skyrocketed.²⁰⁶ Multiple factors are involved. First, minority

²⁰¹ Gilliam & Iyengar, *supra* note 199, at 156-57, 163. Exposure to a news segment that included a white victim also had a significant effect, increasing fear of random street crime, juvenile crime, and violence, but not increasing fear of crime or support of punitive policies. *Id.* at 163.

²⁰² Gilliam & Iyengar, *supra* note 198, at 570-71.

²⁰³ *Id.* at 560-61.

²⁰⁴ Goidel et al., *supra* note 189, at 128-35.

²⁰⁵ *Id.*

²⁰⁶ At the end of 2007, there were 2,293,157 persons in local jails and state and federal prisons. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2007, at 6 tbl.8 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf>. At the end of 2006, there were 92,845 juveniles incarcerated in juvenile facilities. *Id.* at 7 tbl.10. The rate of incarceration is much higher for persons of color than for whites in both the adult and juvenile systems. The rate of imprisonment in local jails and state and federal prisons for black males in 2007 was 3,138 per 100,000, in contrast to the rate of 1,259 per 100,000 for Hispanic or Latino males and 481 per 100,000 for white males. *Id.* at 4 tbl.6; see also MARC MAUER & RYAN KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3 (2007) (noting black incarceration rate is 5.6 times the rate of whites, Hispanic incarceration rate is 1.8 times the rate for whites, and ratios vary substantially state to state), available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=593>; Brett E. Garland, Cassia Spohn & Eric J. Wodahl, *Racial Disproportionality in the American Prison Population: Using the Blumstein Method to Address the Critical Race and Justice Issue of the Twentieth Century*, 5 JUST. POL'Y J. 4, 4-6 (2008), available at http://www.cjcr.org/files/racial_disproportionality.pdf (noting that at end of 2005, blacks made up 12% of population and 40% of the 1,525,924 persons incarcerated in the United States and arguing that racial disproportionality in imprisonment "is the most serious race and justice issue facing criminal justice policymakers"); PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, *supra* note 58 (evaluating impact of unprecedented rate of imprisonment).

youths suffer distinct social disadvantages, and they are involved in more delinquent and criminal activities than other youth.²⁰⁷ For that reason, harsher policies naturally have a greater impact on minorities.²⁰⁸ Barry Feld summarized the impact of the new laws as follows:

Recent “get tough” changes have exacerbated disproportionate minority confinement. The numbers of youths in custody increased almost 40% between 1985 and 1995, and while white juveniles comprised 32% of all incarcerated delinquents, black youths comprised 43% and Hispanics 21% of all confined youths. Within the past decade, these disparities have increased further and minority youth, who make up 34% of the juvenile population, comprise 62% of youths in detention and 66% of youths in correctional facilities.²⁰⁹

Data on the effects of the new transfer laws is still relatively sparse, but the studies to date reveal that laws are applied to minority youth disproportionately.²¹⁰ For example, data from the U.S. Office of Juvenile Justice and Delinquency Prevention found that black youths were more likely than whites

With regard to the juvenile justice system, the National Center for Juvenile Justice provides information on 26,344 juveniles in custody at the end of 2006, of whom 8,167 were white and 11,089 were black. MELISSA SICKMUND, T.J. SLADKY & WEI KANG, CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT DATABOOK, OFFENSE PROFILE OF DETAINED RESIDENTS BY SEX AND RACE/ETHNICITY FOR UNITED STATES, 2006, available at http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/asp/Offense_Detained.asp. It appears that this information is quite incomplete, however, since the *Bureau of Justice Statistics Bulletin, Prisoners in 2007* states that more than 90,000 juveniles were incarcerated in juvenile facilities in 2006. WEST & SABOL, *supra*, at 7 tbl.10. In 1995, minority youth constituted 68% of the population confined in secure facilities but only 32% of the country's total youth population. Roger Jackson & Edward Pabon, *Race and Treating Other People's Children as Adults*, 28 J. CRIM. JUST. 507, 512 (2000).

²⁰⁷ In 2005, the last year for which complete data are available, the delinquency rate for black juveniles was 108.4 per 1,000, compared to 44.4 per 1,000 for white juveniles, and the offense rate for black male juveniles was higher than that for other groups regardless of the offense. CHARLES PUZZANCHERA & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUST., JUVENILE COURT STATISTICS 2005, at 20 (2008), available at <http://ojjdp.ncjrs.gov/ojstatbb/njcda/pdf/jcs2005.pdf>. There have been many structural explanations for this phenomenon. See FELD, BAD KIDS, *supra* note 29, at 191-208; Everette B. Penn, *Black Youth: Disproportionality and Delinquency*, in RACE AND JUVENILE JUSTICE 47, 53-56 (Everette B. Penn, Helen Taylor Greene & Shaun L. Gabbidon eds., 2006).

²⁰⁸ FELD, BAD KIDS, *supra* note 29, at 207.

²⁰⁹ Feld, *supra* note 148, at 38.

²¹⁰ AMANDA BURGESS-PROCTOR, KENDAL HOLTROP & FRANCISCO A. VILLARRUEL, CAMPAIGN FOR YOUTH JUSTICE, YOUTH TRANSFERRED TO ADULT COURT: RACIAL DISPARITIES 9 (2006), available at <http://www.nicic.org/Library/022087>; M. A. Bortner, Marjorie S. Zatz & Darnell F. Hawkins, *Race and Transfer: Empirical Research and Social Context*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 277, 277-320 (Jeffrey Fagan & Franklin Zimring eds., 2000); see also ANNE L. STAHL, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 1987-1996, at 1-2 (1999) (noting that cases involving white youths were less likely to be transferred during time period of analysis than cases involving black youths, especially drug cases).

to be transferred to adult court, in all relevant offense types and all age categories.²¹¹

Although some of the differences between the rates of incarceration reflect different rates of offending and other neutral factors,²¹² a wide range of studies using different methodologies found racial disparities in the treatment of juvenile offenders. A literature review funded by the U.S. Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) found that roughly two-thirds of the studies reported that minorities (in most cases black youths) received more serious outcomes than their white counterparts.²¹³ The race effects were both direct and indirect, and the greatest disparity occurred at intake and detention.²¹⁴

In 1992, the OJJDP created the Disproportionate Minority Confinement initiative (“DMC”), which required states seeking OJJDP grants to determine if disproportionate minority confinement existed, to identify causes, and to develop and implement corrective strategies.²¹⁵ This requirement has spurred additional research, and most state studies produced evidence of race differentials in “juvenile justice outcomes that . . . [could not be] accounted for by differential involvement in crime.”²¹⁶ States that conducted rigorous multivariate analyses found evidence of both direct and indirect effects of race.²¹⁷ Different studies identified racial effects at a variety of points in the processing of juvenile cases (including the police decision making).²¹⁸ Additionally, interviews with juvenile justice officials revealed that almost two-thirds believed that the race of the juvenile influenced the outcome of the case in some fashion.²¹⁹

²¹¹ BURGESS-PROCTOR ET AL., *supra* note 210, at 8-9 (citing Donna M. Bishop, *Juvenile Offenders in the Adult Criminal System*, in 27 CRIME & JUSTICE: A REVIEW OF RESEARCH 81, 81-167 (Michael Tonry ed., 2000)).

²¹² Feld, *supra* note 148, at 35-36 (noting that differences in local police practices, location of crime, and victim reaction can affect the disposition of a case).

²¹³ Michael J. Lieber, *Disproportionate Minority Confinement (DMC) of Youth: An Analysis of State and Federal Efforts to Address the Issue*, in RACE AND JUVENILE JUSTICE, *supra* note 207, at 141, 145.

²¹⁴ *Id.* at 145-46.

²¹⁵ Penn, *supra* note 207, at 47, 49.

²¹⁶ Lieber, *supra* note 213, at 150-51.

²¹⁷ *Id.* at 151.

²¹⁸ *Id.* at 150-51; *see also* Madeline Wordes, Timothy S. Bynum & Charles J. Corley, *Locking up Youth: The Impact of Race on Detention Decisions*, 31 J. RES. CRIME & DELINQUENCY 149 (1994) (studying cases of felony defendants referred by police and detained by the courts and finding that race had an effect after controlling for weapon use, victim injury, and offender’s background). Additionally, schools are an important referral source for the juvenile court and there is evidence of racial bias in school discipline. *See* Bernadine Dohrn, *The School, the Child, and the Court*, in A CENTURY OF JUVENILE JUSTICE, *supra* note 29, at 267, 283.

²¹⁹ *See* Penn, *supra* note 207, at 56.

A recent study of the operation of the juvenile justice system in Louisiana also found evidence of racial disparity.²²⁰ It showed that black youths were four times more likely to be incarcerated than whites.²²¹ Black youths account for 76.8% of the state's secure custody population.²²² Neither offense severity nor prior offense history accounted for this difference.²²³ Black offenders received longer dispositions than whites for nearly every offense category, and the racial disparity for time served was even greater.²²⁴

Although differential access to resources including retained counsel or private counseling may play a role,²²⁵ considerable evidence suggests that racially biased perceptions about minority youth play a substantial role in the differential outcomes. For example, one study found that probation officers were more likely to attribute the conduct of a black youth to his bad character, while attributing virtually the same conduct by a white offender to external circumstances.²²⁶ Semi-structured interviews with juvenile justice personnel in another state found that race bias often operated through negative perceptions of minority youth. Black youth were believed to lack respect for law and authority, be more criminal, and be more likely to reside in a single parent home lacking adequate supervision; lack of respect was judged by eye contact, dress, and demeanor.²²⁷ And a study of the effect of unconscious racial stereotypes found that subliminal exposure to words related to the category "Black" caused juvenile probation officers to evaluate juveniles in hypothetical cases more negatively, rating them as more violent, more culpable, and more likely to reoffend.²²⁸ Importantly, after racial priming the probation officers also judged the hypothetical juveniles to be more mature, i.e., "adult-like and blameworthy," characteristics which would increase their likelihood of being waived to adult court.²²⁹

These studies are consistent with other work on the impact of racial stereotyping and unconscious bias. For example, there is evidence that whites generally believe that blacks are more violent than whites, and that

²²⁰ CASEY STRATEGIC CONSULTING GROUP, REDUCING JUVENILE INCARCERATION IN LOUISIANA (2003), available at <http://www.correctionsproject.com/tallah/pressRoom/reports-rulings/caseyReport.pdf>.

²²¹ *Id.* at 32. At the parish level, the disparity was even greater: blacks were incarcerated at a rate 12.7 times greater than whites. *Id.*

²²² *Id.* at 33.

²²³ *Id.* at 34-35.

²²⁴ *Id.* at 35-37.

²²⁵ *Id.* (noting effects of lack of money to pay for costly private treatments and hire a private attorney).

²²⁶ George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 555-64 (1998) (basing conclusions on review of 233 narrative written reports by probation officers in three counties).

²²⁷ Lieber, *supra* note 213, at 151.

²²⁸ Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 29 L. & HUM. BEHAV. 483, 496 (2004). Racial priming had similar effects on police officers. *Id.* at 493.

²²⁹ *Id.* at 500.

whites have a tendency to attribute conduct by blacks to flaws in their nature, rather than situational pressures.²³⁰ Indeed, one study found a “strong correlation between harsher sentences and stereotypically ‘Afro-centric features,’ suggesting that even judges read such features as signs of basic character flaws.”²³¹ Even whites who believe they are not prejudiced may discriminate due to largely unconscious processes of situational racism, self-fulfilling stereotypes, and a failure of imagination.²³² A study of the attitudes of residents of New Orleans revealed that both blacks and whites were somewhat more likely to express a preference for transfer to adult criminal court for a case involving a black juvenile than a white juvenile.²³³

V. CONCLUSION

This Article explores the Jena Six cases from the perspective of two major waves of change in the juvenile justice system: the procedural reforms stimulated by the Supreme Court’s decisions in the 1960s, and the legislative reforms of the 1990s. It concludes that the procedural revolution provides no mechanism to challenge the prosecutorial discretion that shaped the cases, and that the reforms of the 1990s made the system more punitive and shifted more unreviewable authority to prosecutors. These legislative changes make it easier to charge teens like Mychal Bell as adults, and the Supreme Court’s procedural rulings give juveniles no way to challenge the prosecutor’s discretion.

The highly discretionary nature of the juvenile justice system is a double-edged sword. This subjective design has traditionally been in place in order to be able to focus on the best interests and rehabilitative potential of each child. Yet the discretionary attributes also allow the operation of unconscious biases to tip the balance towards harsher alternatives at various points in the system. Neither state law nor the federal Constitution provides a mechanism to address it. Traditional equal protection doctrine falls short in several respects. It requires proof of purposeful discrimination, and statistical disparity is not sufficient to prove a *prima facie* case or obtain discovery. But in the juvenile system, as elsewhere, unconscious racial biases and stereotypes are a serious problem.

Except for peremptory jury challenges, the Supreme Court has been unwilling to provide minority defendants like the Jena Six—whether charged as juveniles or adults—with any real tools to challenge the ex-

²³⁰ Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 126-27 (2006).

²³¹ *Id.*

²³² LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE (2006) (describing these processes). See generally Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1, 6-7 (2007) (explaining how the processes may apply in the context of criminal cases).

²³³ Stephen M. Feiler & Joseph F. Sheley, *Legal and Racial Elements of Public Willingness to Transfer Juvenile Offenders to Adult Court*, 27 J. CRIM. JUST. 55, 61 (1999).

traordinary power wielded by prosecutors, who choose whom to prosecute, what crimes to charge, and in the case of juveniles, whether to charge them as adults. Supporters of the Jena Six ultimately had to take their case to a different court, the court of public opinion. It was under the intense scrutiny of the national press and pressure from many advocacy groups that D.A. Walters ultimately reduced some of the charges. That option, of course, is not available in the vast majority of cases.

It is time for a reexamination of the punitive juvenile justice legislation of the 1990s, which was enacted at a time when the news media, politicians, and experts of all stripes warned that we were facing a crime wave of unprecedented proportions from a new and more dangerous breed of juvenile super-predators. The expected tsunami of violent juvenile crime never appeared, and indeed juvenile crime rates have been falling since the mid-1990s.²³⁴ Equally important, the justification for moving juvenile cases into adult courts has been called into question. A 2008 review of the extant research found that moving cases from the juvenile to the adult system does not reduce recidivism.²³⁵ To the contrary, the bulk of the empirical studies concluded that transferring juveniles for trial and sentencing in the adult courts had the “unintended effect of increasing recidivism . . . and thereby of promoting life-course criminality.”²³⁶

²³⁴ See PUZZANCHERA & SICKMUND, *supra* note 207, at 6 (noting that juvenile court caseload increased 46% between 1985 and 2005, and that caseload peaked in 1997). It should be noted, however, that crimes against the person have not decreased, and in fact continued to increase after 1995, though at a slower rate. *Id.*

²³⁵ RICHARD E. REDDING, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 3-6 (2008), *available at* <http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>.

²³⁶ *Id.* at 8.

