

## **Designed to Fail: Implicit Bias in Our Nation's Juvenile Courts**

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**Abstract**

Our nation's juvenile courts espouse the admirable mission of creating a fair court of empathy capable of helping youth that have erred take a more positive path and become productive citizens, regardless of their backgrounds. Yet juvenile court dispositions yield troubling racial disproportionalities, and the proceedings themselves seem riddled with bias. Citing implicit bias, mind- science, and corporate sector research, this Article argues that today's juvenile courts are so vulnerable to widespread and non- conscious human biases that they are practically designed to fail in their mission of fair adjudication. The Article also advocates for fair solutions to this broken system that can help courts better align their practices with principles of empathy and fairness.

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*Designed to Fail*

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*“Under our Constitution, the condition of being a boy does not justify a kangaroo court.”*

*-Justice Abe Fortas, writing for eight Justices of the Supreme Court<sup>1</sup>*

## **I. Mechanical Dispositions – An Introduction to Juvenile Courts**

A man sits atop a throne-like chair behind an even more imposing desk. Throughout the room, others—the district attorney, probation officer, bailiff, and court appointed defense counselor—are propelled by the familiarity of their task. The judge mumbles a name and the armed bailiff walks to a walled off holding area and returns carrying a Black adolescent boy by the arm. The child keeps his chin at his chest, his eyes on his feet, and his hands behind his back.

The proceeding starts. The boy’s alleged crimes are described in detail. He nervously, but unhesitatingly, admits to all of them—just as his counselor instructed. The judge asks the boy leading questions to which there are only two correct answers (“Yes sir” and “No sir”). None of them relate to his accomplishments or strengths. Finally, the judge hands down a harsh sentence, alongside harsher condescendence. The gavel sounds, signaling to the adults that it is time to swap out defendants, leaving an indelible mark on the psyche of the boy. The process is all too mechanical, without individualized care or attention to the juvenile defendant.

This paper first seeks to examine the reason that juvenile court proceedings are so damaging for Black juveniles. A review of implicit bias research suggests that our juvenile courts are so susceptible to biased determinations that they are practically designed to fail. Secondly, this paper seeks to explain and suggest ways to improve the current juvenile system. This paper will draw from studies from courtrooms and businesses to offer suggestions. This paper is intended to find ways to help all children, regardless of race, receive the empathy, justice, and fairness they deserve from our nation’s juvenile courts.

## **II. Solid Foundations, Biased Outcomes, and Broken Practices**

### *A. Historical Foundations and Good Intentions*

The juvenile court system was designed over a century ago to provide an alternative to the adult justice system for minors. At the inception of the juvenile court system, children were considered too innocent and capable of rehabilitation to warrant harsh adult court

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<sup>1</sup> In *Re Gault*, 387 U.S. 1, 28 (1967).

proceedings and prison placements.<sup>2</sup> The current federal statutory scheme continues this trend, and it attempts to encourage rehabilitation and reduce racial disproportionalities by funding rehabilitative community projects, keeping juveniles out of adult prisons, and requiring states to create plans to reduce the number of minority youth contact with the juvenile justice system.<sup>3</sup> Many state codes express parallel aspirations to rehabilitate children, to act in their best interests, and to reunite them with their families.<sup>4</sup> Similarly, Supreme Court cases have expressed the critical importance of providing constitutional due process protections for children.<sup>5</sup> These courts have indicated, “children are constitutionally different from adults for purposes of sentencing” because “juveniles have diminished culpability and greater prospects for reform.”<sup>6</sup>

### B. Law, Order, and Disparate Impacts

Despite strong constitutional and statutory protections, Black youth

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<sup>2</sup> Juvenile courts were developed across the country in the late 19th and early 20th centuries to “rehabilitate rather than . . . punish juvenile offenders.” “The History of Juvenile Justice” in *DIALOGUE ON YOUTH & JUST.* 5, AM. BAR ASS’N. DIV. FOR PUB. EDUC. (2007).

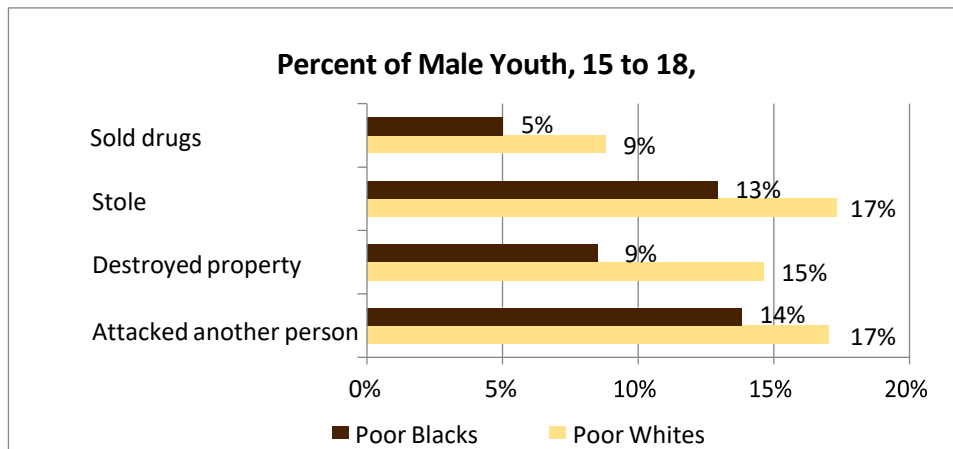
<sup>3</sup> Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5601 (2017).

<sup>4</sup> *See, e.g.*, CAL. WELFARE AND INST. CODE § 202(a) (2017) (“The purpose of this chapter is to provide for the protection and safety of . . . each minor under the jurisdiction of the juvenile court and to preserve and strengthen the minor’s family ties whenever possible”); *id.* at §202(b) (“Minors under the jurisdiction of the juvenile court who are in need of protective services shall receive care, treatment, and guidance consistent with their best interest”); *id.* at §224.71 (“It is the policy of the state that all youth confined in a facility of the Division of Juvenile Facilities shall have the following rights: (a) To live in a safe, healthy, and clean environment conducive to treatment and rehabilitation and where they are treated with dignity and respect.”); N.J. CODE § 2A:4A-21 (2001) (“This act shall be construed so as to effectuate” the creation of “an adequate program of supervision, care and rehabilitation, and a range of sanctions designed to promote accountability and protect the public”); S.C. CHILD.’S CODE § 63-19-350 (2008) (“The department [of juvenile justice] shall provide . . . services leading to the rehabilitation of delinquents either within the department or through cooperative arrangements with other appropriate agencies”).

<sup>5</sup> *See Gault*, 387 U.S. at 32-57 (1967) (holding, in an 8-1 opinion, that juvenile defendants should be entitled a variety of due process rights, including the right to timely notification of the charges, the right to confront witnesses, the right against self-incrimination, and the right to counsel); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding that it is unconstitutional to impose capital punishment for crimes committed while under the age of eighteen); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (holding that juvenile offenders cannot be sentenced to life imprisonment without parole for non-homicide offenses).

<sup>6</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

are arrested and incarcerated at shocking rates.<sup>7</sup> Many sociologists attribute these discrepancies to police practices driven by decades of race-baiting campaigns for tougher – and often racialized – crime laws and negative media depictions of Blacks.<sup>8</sup> Some retort that Black adolescents, especially those who are poor, are actually more crime prone, and are thus getting what they deserve.<sup>9</sup> But as the chart below demonstrates, in 2000, poor Black youth were actually *less* likely to commit every major category of crime than poor, White youth.<sup>10</sup>



<sup>7</sup> Joshua Rovner, *Racial Disparities in Youth Commitments and Arrests*, SENTENCING PROJECT (April 1, 2016), <http://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/> (noting that “between 2003 and 2013, the racial gap between black and white youth in secure commitment increased by 15%” and that the Black juvenile commitment rate in 2013 was 294 per 100,000 Black youth which compares to 69 per 100,000 for White youth, meaning Black youth were more than 4 times more likely to be committed; and noting that “Despite few differences in delinquent behaviors or status offending, African American juveniles throughout this period have much more likely to be arrested”).

<sup>8</sup> KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 38-43 (1997) (providing a history of criminal law reform in the United States); Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUD. AM. POL. DEV.* 230, 239-50 (2007); Naomi Murakawa, *Electing to Punish: Congress, Race, and the American Criminal Justice State* 76 (May 2005) (unpublished Ph.D. dissertation, Yale University).

<sup>9</sup> See, e.g., Jason Riley, *Family secret: What the left won't tell you about black crime*, THE WASH. TIMES (July 21, 2014), <http://www.washingtontimes.com/news/2014/jul/21/family-secret-what-the-left-wont-tell-you-about-bl/> (arguing that Black arrest and incarceration rates are a result of higher Black crime rates rather than any bias in systems of policing and justice).

<sup>10</sup> This data is adapted from BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 41 (2006).

Yet, despite lower levels of crime, and despite representing only 16% of American youth, Black youth make up 28% of juvenile arrestees.<sup>11</sup> Once in court, they become 37% of juvenile hall detainees, 38% of those removed from their schools and homes and relocated in restrictive residential placements, 35% of those waived to be tried as adults, and 58% of youth admitted to state adult prisons.<sup>12</sup> The problem is not localized—Black youth are overrepresented in juvenile detention facilities in forty-five states,<sup>13</sup> and are, per capita, four times more likely to be detained than White youth.<sup>14</sup> Holding offense type constant, Black youth are, on average, six times more likely to be incarcerated than White youth.<sup>15</sup> When incarcerated, Black youth are confined for an average of sixty-one days longer than White youth.<sup>16</sup>

The situation is even bleaker when Black youth face allegations of drug use. In 2011, Black teens were 22% less likely than White teens to have used drugs in the last year.<sup>17</sup> Yet, while only 16% of all youth, Black teens make up 27% of juvenile arrests for drug abuse.<sup>18</sup> When accused of drug related offenses, they are more than twice as likely to be detained.<sup>19</sup> Once detained for a drug offense, they are incarcerated for on average ninety-one more days than White juveniles.<sup>20</sup> Following drug charges, Black teens are also twice as likely to end up in highly restrictive residential facilities rather than receive in home probation,<sup>21</sup> and 70% more likely to be waived to adult criminal court proceedings where they

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<sup>11</sup> *And Justice for Some Differential Treatment of Youth of Color in the Justice System*, NATIONAL COUNCIL ON CRIME AND DELINQUENCY 3 (January 2007), [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/justice-for-some.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf) [hereinafter *National Crime Council Report*].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Teen Drug and Alcohol Use Lowest among Blacks, Asians*, HUFFINGTON POST (Nov. 8, 2011, 1:33 PM), [http://www.huffingtonpost.com/2011/11/08/teen-drug-and-alcohol-use\\_n\\_1082219.html](http://www.huffingtonpost.com/2011/11/08/teen-drug-and-alcohol-use_n_1082219.html).

<sup>18</sup> *National Crime Council Report*, *supra* note 11, at 7.

<sup>19</sup> *Id.* at 13 (presenting a graph that shows that Black youth were detained 31% of the time compared to White youth who were detained only 15% of the time).

<sup>20</sup> *Id.* at 29 (presenting a graph that shows that Black youth were detained for 435 days compared to White youth who were detained for only 144 days).

<sup>21</sup> *Id.* at 22 (presenting a graph that shows that, for drug offenses, Black youth were placed outside of the home 32% of the time compared to White youth who were placed outside of the home only 16% of the time).



can receive even harsher penalties.<sup>22</sup>

### *C. The Design of Failure: Current Court Practices*

While Black adolescents actually commit fewer crimes than their White peers, they face much harsher juvenile consequences. Our juvenile courts feature structural elements that render them deeply vulnerable to implicit biases. This section explores these elements.

#### *1. Discretion to Consider Evidence, Decide Cases, Record Reasoning and Review Decisions*

In California, juvenile judges have nearly unbounded discretion to review or ignore evidence, allow or foreclose additional comments by affected and concerned community members (including the juvenile defendant and their family members), consider various, often competing factors, decide the ultimate disposition, and include any level of detail in their final order. In California, only the juvenile defendant has a statutory right to speak,<sup>23</sup> and any letters to the court are read at the judge's leisure.<sup>24</sup>

Following a selective review of available evidence, a California judge in any given case is free to issue any one of at least thirteen potential dispositions, alone or in combination.<sup>25</sup> These dispositions may

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<sup>22</sup> *Id.* at 19 (presenting a graph that shows that Black youth cases were waived to criminal court 1.2% of the time compared to White youth whose cases were waived only 0.7% of the time).

<sup>23</sup> “If the minor is present at the hearing, the court shall inform the minor that he or she has the right to address the court and participate in the hearing and the court shall allow the minor, if the minor so desires, to address the court and participate in the hearing.” CAL. WELFARE AND INST. CODE § 349(c) (2017). As a result, judges may miss out on opportunities to get a full picture of the defendant by hearing from the defendant's caretakers or teachers.

<sup>24</sup> CAL. WELFARE AND INST. CODE §229 (“A judge of the juvenile court shall have the power to issue subpoenas requiring attendance and testimony of witnesses and production of papers at hearings of the commission.”).

<sup>25</sup> CAL. WELFARE AND INST. CODE § 258 (2017) (noting that California judges can do any of the following with the delinquent: “(1) reprimand and take no further action, (2) direct probation to supervise the youth (3) order a fine, (4) order restitution be paid (5) order driving privileges suspended (6) require traffic school (for a traffic offense), (7) require proof of compliance with the Vehicle Code (8) require at most 50 hours of community service over at most 60 days (although the timeframe can be shifted if in the child's best interest), (9) order attendance at counseling or an educational program (if a misdemeanor or drug offense), (10) require perfect attendance at a school program, (11) set a curfew, (12) issue Fish and Game Act related penalties (13) perform as many as 20 hours of

include reprimanding the minor and taking no further action, putting them on probation (including 24-hour GPS monitoring), incarcerating them in juvenile hall, or removing them from the custody and care of their parents and local school to send them to a residential facility.<sup>26</sup> While judges must consider “the safety and protection of the public,” victim reparation, and the “best interests of the minor,”<sup>27</sup> the California Welfare and Institutions Code (henceforth the “California Code”) is silent regarding when any of the thirteen general dispositions may or may not be rendered. While the judge must “promptly furnish a written report” of findings and orders,<sup>28</sup> the orders rarely include any actual findings. Orders are not sent to any meaningful reviewing body, but to the Department of Motor Vehicles.<sup>29</sup>

## 2. Responsibility in Helpless Hands: The Defense Counselor

For most Black youth, legal protections rarely materialize because they require spirited advocacy by the court-appointed juvenile defender.<sup>30</sup> Regardless of their qualifications or motivation, juvenile public defenders are almost universally overworked. A recent study found that court appointed juvenile defenders must juggle more cases than is ideal and have less time available per case as would be preferable.<sup>31</sup> Even if they had time to devote to a given juvenile case, there is little incentive to develop a

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community service in under 30 days for loitering and selected local violations”); *see also id.* at § 202(e) (which notes that Permissible sanctions may include any of the following: (1) a fine, (2) community service, (3) limitations on liberty as a condition of probation or parole, (4) commitment to a local detention or treatment facility, (5) commitment to Division of Juvenile Facilities, Department of Corrections and Rehabilitation); *id.* at § 202(f) (“In addition to the actions authorized by subdivision (e), the juvenile court may, as appropriate, direct the offender to complete a victim impact class, participate in victim offender conferencing subject to the victim’s consent, pay restitution to the victim or victims, and make a contribution to the victim restitution fund after all victim restitution orders and fines have been satisfied, in order to hold the offender accountable or restore the victim or community.”).

<sup>26</sup> CAL. WELFARE AND INST. CODE § 202(e); *id.* at § 258 (2017).

<sup>27</sup> *Id.* at § 202(d).

<sup>28</sup> *Id.* at § 260.

<sup>29</sup> *Id.*

<sup>30</sup> According to the Bureau of Justice Statistics, less than 18% of felony defendants in cases in the 75 largest U.S. counties have private attorneys. Caroline Wolf Harlow, *Bureau of Justice Statistics Special Report: Defense Counsel in Criminal Cases*, U.S. DEPT OF JUST. (Nov. 2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf>.

<sup>31</sup> Hannah Levintova et al., *Charts: Why You’re in Deep Trouble If You Can’t Afford a Lawyer*, MOTHER JONES (May 6, 2013, 5:00 AM), <http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts>.

powerful brief, as judges, who have unbounded discretion and are forced to hear dozens of cases a day, might not read them.

### III. Loose Screws: Implicit Biases in Juvenile Courts

#### A. *Foundational Fissures: The Self-Serving Myth of Judicial Exceptionalism*

Judges and citizens have asymmetric views of judicial bias. In the most comprehensive assessment of judicial bias yet conducted at the time of publication, researchers in 2009 found that 97% of trial court judges in Florida believed they are in the top half of judges in terms of their ability to “avoid racial prejudice in decision-making.”<sup>32</sup> To the extent that California judges perceive themselves similarly to Florida judges, there is a discrepancy between how they see themselves and how they are perceived by California citizens. A majority of Californians, and 87% of African American Californians, believe that judges render more severe judgments to African Americans.<sup>33</sup>

Research suggests that citizens have good reason to suspect that judges harbor pro-White and/or anti-Black bias. The Implicit Association Test assesses the extent to which individuals associate positive traits and words with White faces, and negative words and traits with Black faces. Researchers ask individuals to press a button if they see a positive word or a White face, and another button if they see a negative word and a Black face. Individuals tend to handle this task accurately and quickly, suggesting that their brains have an implicit association between positive traits and White individuals, and between negative traits and Black individuals. However, when asked to perform the task by pressing a button if they see a positive word or a Black face, and a different button if they see a negative word or a White face, participants often struggle, making more mistakes and moving more slowly. Multiple studies have found that people of all races demonstrate consistent and substantial implicit negative associations of Blacks.<sup>34</sup> One study also found that 75% of individuals reveal automatic preferences for White individuals over Black

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<sup>32</sup> Jeffrey Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009).

<sup>33</sup> David Rottman, *Trust and Confidence in California Courts: A Survey of the Public and Attorney*, NATIONAL CENTER FOR STATE COURTS 29 (2005), [http://www.courts.ca.gov/documents/4\\_37pubtrust1.pdf](http://www.courts.ca.gov/documents/4_37pubtrust1.pdf).

<sup>34</sup> Anthony Greenwald & Linda Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 952, 958 (2006).

individuals.<sup>35</sup>

Research suggests that judges also harbor this type of bias. In one Implicit Association Test study, 87% of White Florida trial judges exhibited pro-white/anti-Black implicit bias.<sup>36</sup> These high levels of White judicial bias are significantly higher than the already alarming levels of bias among average White Americans.<sup>37</sup> These studies thus suggest that judges are unaware of their subconscious biases, which may lead to biased dispositions.

*B. Black-Criminality Bias, Dehumanization, Race-Age Bias, and Racial Memory Bias*

If judges are susceptible to implicit biases, there is reason to worry that various biases against African Americans are poisoning the criminal process for Black juveniles. Psychological research suggests that subconscious processes can encourage individuals to give harsher sentences to Blacks. In one study, when judges with high levels of pro-white bias were primed with words that called to mind Black defendants<sup>38</sup> the judges gave harsher sentences to theoretical defendants.<sup>39</sup> In another study, police and probation officers who were subliminally primed with “Black” words, such as “Harlem” or “dreadlocks,” recommended harsher sentences for a hypothetical individual whose race was not disclosed than officers in the control condition (who had not been primed).<sup>40</sup> Similarly,

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<sup>35</sup> MAHZARIN BANAJI & ANTHONY GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 47 (Random House Publishing Group 2013). The negative words tested included such extreme terms as “disaster,” “agony,” “hatred,” and “rotten.” *Id.* at 43.

<sup>36</sup> Jeffrey Rachlinksy et al., *supra* note 32, at 1210. While the authors warn that these results might be inflated by question order effects or difficulties that elderly judges might have with the IAT task, the overall finding that White judges suffer from high levels of bias is bolstered by a comparison to Black judges in the same study (who were half as likely to show Whites preference as their White judicial counterparts) as ordering effects and task comfort effects likely affected Black judges as well. *See, id.* at 1210-11.

<sup>37</sup> *Id.* at 1211.

<sup>38</sup> The words used to prime associations with Blacks were “graffiti, Harlem, homeboy, jerricurl, minority, mulatto, negro, rap, segregation, basketball, black, Cosby, gospel, hood, Jamaica, roots, afro, Oprah, Islam, Haiti, pimp, dreadlocks, plantation, slum, Tyson, welfare, athlete, ghetto, calypso, reggae, rhythm, [and] soul.” *Id.* at 1213, n.86.

<sup>39</sup> *Id.* at 1214-15. Implicit biases have also been deemed predictive of behavior in a variety of contexts. A recent meta-analysis of 122 reports involving 14,900 subjects revealed that IAT scores predict behavior, and did so better than explicitly held beliefs. A. Greenwald et al., *Understanding and Using the Implicit Association Test: Meta-Analysis of Predictive Validity*, 97 J. PERS. SOC. PSYCHOL. 17 (2009).

<sup>40</sup> Sandra Graham & Brian Lowery, *Priming Unconscious Racial Stereotypes About*

two reviews of Florida defendant data found that, even controlling for offense severity and criminal record, defendants with more afrocentric features<sup>41</sup> received longer prison sentences,<sup>42</sup> and that Black defendants who had more stereotypically afrocentric features than average were sentenced to death 2.4 times more often than Blacks who had less afrocentric features.<sup>43</sup>

But *why* does seeing a Black individual or feature lead to more aggressive punishment? What do Black words and faces make people feel? One answer is “aggression.” Individuals subconsciously primed with Black faces are more likely to react aggressively than individuals subconsciously primed with White faces when faced with frustrating situations (such as being required to repeat a tedious experimental task due to a sudden loss of data).<sup>44</sup> Given the frustrations that are present in juvenile courts, it is possible that simply seeing a Black defendant on a typical day could ignite feelings of aggression in a juvenile judge, which may result in harsher sentencing.

Another potential source of racialized punishments is an association between Blacks and crime. In one study, both African American and White participants perceived individuals with afrocentric features as being more crime prone than White individuals.<sup>45</sup> Moreover, in police shooting simulations where participants must determine whether to shoot or not shoot individuals based on whether they are holding guns or innocuous items, both Black and White participants “are faster and more accurate when shooting an armed Black man than an armed White man, and faster and more accurate when responding ‘don’t shoot’ to an

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*Adolescent Offenders*, 28 L. HUM. BEHAV. 483 (2004).

<sup>41</sup> Afrocentric features are “those features that are perceived as typical of African Americans, e.g., darker skin, fuller lips, or a broader nose.” William Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 331 (2005).

<sup>42</sup> *Id.* at 348.

<sup>43</sup> Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006). *See also*, Margaret Stephenson and Bette Bottoms, *Race Shapes Perceptions of Juvenile Offenders in Criminal Court*, 39 J. APPLIED SOC. PSYCHOL. 1660, 1672 (2009) (finding that White, male mock jurors give harsher sentences in juvenile cases featuring Black defendants and White victims).

<sup>44</sup> John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct & Stereotype Activation on Action*, 71 J. PERS. SOC. PSYCHOL. 230, 240 (1996).

<sup>45</sup> *See*, Pizzi et al., *supra* note 41, at 340.

unarmed White man than an unarmed Black man.”<sup>46</sup> This effect, termed “shooter bias,” has been found to vary with levels of implicit bias, and to be unrelated to levels of explicit bias.<sup>47</sup> These studies suggest that, as different members of society harbor unrecognized implicit bias, even self-proclaimed “fair” judges may suffer from this bias. Moreover, to the extent that decisions to shoot or not reflect determinations about the dangerousness and social value of a given individual, these implicit biases could lead judges to more easily render harsh dispositions, including incarcerating or relocating black defendants in residential facilities.

Another potential source of bias is subconscious Black dehumanization. Perhaps partially explaining aggressive subconscious responses to Black faces and figures, researchers have found that individuals are quicker to identify apes when primed with Black faces than they are when primed with White faces.<sup>48</sup> These individuals were asked to quickly identify an image of an ape as it faded gradually into focus. Individuals who were subconsciously primed with images of a Black face (rather than a White face) were quicker to identify the image of the ape as it slowly faded into view. In a separate study, individuals were subconsciously primed with pictures of apes. Individuals subconsciously primed with images of apes were more likely to support police brutality against Black individuals—that is to say, to express that they condone the behavior of a police officer in a story in which the officer is blatantly physically abusive of a Black person.<sup>49</sup> The results of these two studies suggest that there is a latent association between Blacks and apes, and that the association, when triggered, dehumanizes Blacks in our minds and makes us more likely to support police brutality against Blacks as we see them as sub-human. If implicit biases similarly encourage juvenile judges to see Black juveniles as less human, it is not hard to imagine that they would discourage acknowledgments of potential mitigating factors, reduce the ability to assess the juvenile’s positive contributions to society, and encourage harsher sentences.

Related to the phenomenon of dehumanization, and especially

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<sup>46</sup> Joshua Correll et al., *Across the Thin Blue Line: Police Officers & Racial Bias in the Decision to Shoot*, 92 J. PERS. SOC. PSYCHOL. 1006, 1007 (2007).

<sup>47</sup> Adam Benforado, *Quick on the Draw: Implicit Bias & the Second Amendment*, 89 OR. L. REV. 1, 43-44 (2010).

<sup>48</sup> Phillip Goff et al., *Not yet Human: Implicit Knowledge, Historical Dehumanization, & Contemporary Consequences*, 94 PERS. SOC. PSYCHOL. 292, 292-96 (2008).

<sup>49</sup> *Id.* at 302.

relevant in the context of juvenile courts, individuals primed with thoughts about Black juveniles are more likely to blur lines between juveniles and adults and support harsher punishments for juveniles. Specifically, when primed with a story about a Black juvenile, rather than a White juvenile, participants were more likely to perceive juveniles as being as morally blameworthy as adults, and were subsequently more supportive of adult sentences for juveniles, including life imprisonment without parole.<sup>50</sup> To the extent that judges are also susceptible to this bias, this study may suggest that judges render harsher punishments on Black juveniles in part because they subconsciously perceive them as adults.

Yet another potential source of biased verdicts is a phenomenon called racial memory bias. One researcher posits that “implicit racial biases affect the way judges . . . encode, store, and recall relevant case facts,” and that the facts judges correctly recall will vary based on the race of the defendant.<sup>51</sup> In his experiment, participants read identical stories about a confrontation that varied only in the name of the protagonist. Participants were more able to recall the protagonist’s aggressive actions when the protagonist’s name was a stereotypically Black one (Tyrone) than when the name was stereotypically White (William).<sup>52</sup> Moreover, the participants misattributed additional aggression to the protagonists with stereotypically Black names, such as (example of misattribution of additional aggression).<sup>53</sup> Interestingly, participants with *lower* levels of explicit bias showed higher levels of racial memory bias, suggesting that even individuals committed to racial egalitarianism might be susceptible to racial memory bias.<sup>54</sup> Juvenile judges may be more susceptible to racial memory bias than other members of the judiciary since they have full discretion to hear and attend to whatever evidence they want and they can write orders devoid of any factual content. As such, they are freer than other judges to respond to a biased recollection of the record, and there is little to help rein their biases in.

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<sup>50</sup> Aneeta Ratta et al., *Race & the Fragility of the Legal Distinction Between Juveniles and Adults*, PLOS ONE (May 23, 2012),

<http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0036680>.

<sup>51</sup> See, Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision-making, & Misremembering*, 57 DUKE L. J. 345 (2007).

<sup>52</sup> *Id.* at 398-99.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 404-406.

C. *Inadequate Time and an Unfit Setting to Properly Adjudicate Complex Cases*

Biases are likely to drive decisions made under time pressure.<sup>55</sup> Studies have suggested that a commitment to fairness “only overrides [an] implicit attitude if the individual has the cognitive capacity available to do so,”<sup>56</sup> and mustering that cognitive capacity requires time. But juvenile judges must move their bloated dockets, and will often review the record, meet the defendant, hear arguments, and orally decide the case in just a few hours. Moreover, when individuals make particularly complex decisions, they are more likely to rely on mental shortcuts (or heuristics) to ease their cognitive load.<sup>57</sup> As previously noted, juvenile judges must balance competing obligations to protect the best interests of the child, ensure rehabilitation, engender contrition and responsibility, reunite children with their families, protect society from crime, and reduce unfair disproportionalities.<sup>58</sup> Clearly, juvenile determinations are complex. Finally, when individuals are “tired, distracted, or rushed, they are more likely to respond based on automatic impulses” and give in to their implicit biases.<sup>59</sup> With huge caseloads and long days packed with emotionally taxing cases, juvenile judges are likely some of the most fatigued members of the judiciary. In the rushed and stressful courtroom, juvenile judges’ implicit biases will likely drive many of their decisions.

D. *Unbounded Discretion and Lacking Criteria*

A review of available psychological research found that “implicit biases translate most readily into discriminatory behavior...when people have wide discretion in making quick decisions with little accountability.”<sup>60</sup> Moreover, when individuals do not commit to judgment

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<sup>55</sup> See Randall Gordon & Kris Anderson, *Perceptions of Race-Stereotypic & Race-Nonstereotypic Crimes: The Impact of Response-Time Instructions on Attributions and Judgments*, 16 BASIC & APPLIED SOC. PSYCHOL. 455 (1995).

<sup>56</sup> Kipling Williams & Cassandra Govan, *Reacting to Ostracism: Retaliation or Reconciliation?*, in THE SOCIAL PSYCHOLOGY OF INCLUSION AND EXCLUSION 56 (Dominic Abrams et al. eds., 2005) (citing Timothy D. Wilson et al., *A Model of Dual Attitudes*, 107 PSYCHOL. REV. 101 (2000)).

<sup>57</sup> Dan Milech & Melissa Finucaine, *Decision Support & Behavioral Decision Theory*, in IMPLICIT AND EXPLICIT MENTAL PROCESSES 293 (Kim Kersner et al. eds., 1998).

<sup>58</sup> See CAL. WELFARE & INST. CODE § 202.

<sup>59</sup> B. Keith Payne & Bertram Gawronski, *A History of Implicit Social Cognition*, HANDBOOK OF IMPLICIT SOCIAL COGNITION; MEASUREMENT, THEORY, AND APPLICATIONS 10 (B. Keith Payne & Bertram Gawronski eds., 2010).

<sup>60</sup> Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142 (2012).



criteria before making decisions, they often develop criteria that validate predetermined biased outcomes. In one study, individuals were asked to decide whether a man or a woman would make a batter police chief. When the man in their fact pattern was more street-smart, they indicated that street smarts was more important to the position of police chief, and when the man in the fact pattern was better educated, they indicated that education was more important to the position.<sup>61</sup> As noted above, California juvenile judges have incredible discretion and almost no predetermined criteria regarding which of the thirteen dispositions, alone or in combination, to render in any given case.<sup>62</sup> They are free to invent justifications, shared only with themselves, for why they send a child home or waive them to be tried as an adult.<sup>63</sup> A total lack of pre-trial standards for when to render specific dispositions is likely to encourage judges to rely on implicit biases regarding Black criminality, aggressiveness, and incorrigibility to guide their conclusions.

#### *E. Lacking Accountability and Reviewability*

As noted above, when high discretion is coupled with low personal accountability, biases steer decisions.<sup>64</sup> However, research regarding fighting implicit biases in the private sector suggests that the most effective methods eschew individualistic thinking, and “assign *organizational* responsibility for change”<sup>65</sup> by developing “[s]tructures that embed accountability, authority, and expertise” in decision making and reviewing bodies.<sup>66</sup> Currently, many juvenile courts are not accountable to any data and case reviewing body.

In addition, research suggests that implicit biases are likely to guide decisions in contexts where the “need for decisional confidence” is low—which is to say in situations where an individual is not as concerned about the outcomes of their decision.<sup>67</sup> In court proceedings, the need for

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<sup>61</sup> See generally Eric Uhlmann and Geoffrey Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCH. SCI. 474.

<sup>62</sup> See CAL. WELFARE AND INST. CODE §258.

<sup>63</sup> See CAL. WELFARE AND INST. CODE §260 (requiring juvenile judges to furnish a written report of any orders but not requiring them to provide their reasoning or justifications for the dispositions they render).

<sup>64</sup> Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142 (2012).

<sup>65</sup> Frank Dobin et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action & Diversity Policies*, 71 AM. SOC. REV. 589, 611 (2006).

<sup>66</sup> *Id.*

<sup>67</sup> Galen V. Bodenhausen & Andrew R. Todd, *Automatic Aspects of Judgment and Decision Making*, HANDBOOK OF IMPLICIT SOCIAL COGNITION; MEASUREMENT, THEORY,

decisional confidence stems from judges' fears of decisional reversal. However, because juvenile orders can be written briefly rendering them essentially immune from review, the need for decisional confidence is incredibly low in juvenile courts. This can encourage implicit biases to drive these determinations.

#### F. *Boosting Effects*

Implicit biases can also improve opinions of favored groups even when they do not lead to negative biases against disfavored groups. In one study, closer implicit associations between Whites and effective litigator characteristics predicted higher evaluations of White litigators, but did not predict lower evaluations of Asian litigators.<sup>68</sup> Using the same rationale, White judges may confer these "boosts" on White juveniles due to "implicit egotism," or the tendency to have positive implicit biases towards groups we are members of.<sup>69</sup> Thus, even absent bias against Blacks juveniles, these juveniles may receive differential treatment in the courtroom as they do not benefit from these boosts from judges, and especially from White judges. This may help explain why White juvenile defendants are much more likely to be sent home without punishment, or sent home on probation, when they commit the same crimes as Black juveniles.<sup>70</sup>

#### G. *Lack of Individuating Information*

Research suggests that individuals more quickly assume "out-group" members are representative of stereotypes,<sup>71</sup> and that individuation, or the process of seeing others as being more than stereotypes, requires both having and focusing on "individuating information."<sup>72</sup> Because many juvenile defendants have limited time to construct a factual record for their clients,<sup>73</sup> juvenile judges often do not

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& APPLICATIONS 278, 285 (B. Payne and Bertram Gawronski eds., 2010).

<sup>68</sup> Jerry Kang et al., *Are Ideal Litigators White?*, 7 J. EMPIRICAL LEGAL STUD. 886, 901 (2010).

<sup>69</sup> Anthony G. Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem, & Self-Concept*, 109 PSYCHOL. REV. 3, 20 (2002).

<sup>70</sup> *National Crime Council Report*, *supra* note 11, at 23.

<sup>71</sup> See, e.g., Kurt Hugenberg et al., *The Categorization Individuation Model: An Integrative Account of the Other-Race Recognition Deficit*, 117 PSYCHOL. REV. 1168 (2010).

<sup>72</sup> *Id.*

<sup>73</sup> Hannah Levintova et al., *Charts: Why You're in Deep Trouble If You Can't Afford a*

have access to individuating information about defendants.<sup>74</sup> In addition, like all judges, they are most often White and thus may struggle to view out-group members (like Black juveniles) through non-stereotypical lenses.<sup>75</sup>

#### IV. Fair Fixes: Reducing Implicit Biases in Juvenile Courts

In *Miller v. Alabama*, Justice Kagan noted that life imprisonment for juveniles impermissibly “reflects an irrevocable judgment about an offender’s value and place in society at odds with a child’s capacity for change”<sup>76</sup> and “poses too great a risk of disproportionate punishment.”<sup>77</sup> But, as discussed above, various factors work together to encourage juvenile court systems’ biased evaluations of Black children’s value, place in society, and capacity for change, and thus lead to impermissible disproportionalities. The recommendations below are meant to help our justice system undergo needed repairs to ensure all children are adjudicated as individuals capable of growing and contributing to our country.

##### A. *Implicit Bias Education to Generate Intrinsic Motivation*

There are three reasons to focus on juvenile judges’ implicit associations. First, as noted in this paper, there is reason to believe that anti-Black biases predict judicial behavior. Secondly, ignoring implicit bias has been shown to lead judges and decision makers in other contexts to misguidedly believe that they can control how their biases impact their decisions, entrenching and enhancing the impact of their biases.<sup>78</sup>

Finally, multiple studies have shown that judges and other decision makers are willing and able to mitigate the impact of their implicit biases when they are taught to recognize and consider them, and are taught “concrete and applicable” strategies<sup>79</sup> for reining them in.<sup>80</sup> For example,

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*Lawyer*, MOTHER JONES (May 6, 2013).

<sup>74</sup> See, e.g., CAL. WELFARE AND INST. CODE § 349(c) (noting that the juvenile defendant has the right to speak to the court, but conferring no similar right to the defendant’s parents or teachers); CAL. WELFARE AND INST. CODE §229 (allowing the juvenile judge to do what they will with letters to the court, including ignoring them altogether).

<sup>75</sup> *Id.*

<sup>76</sup> *Miller*, 132 S. Ct. at 2465.

<sup>77</sup> *Id.* at 2469.

<sup>78</sup> Jeff Stone & Gordon B. Moskowitz, *Non-Conscious Bias in Medical Decision Making: What Can Be Done to Reduce It?*, 45 MED. EDUC. 768, 772 (2011).

<sup>79</sup> See, e.g., Nilanjana Dasgupta, *Mechanisms Underlying the Malleability of Implicit*

after 71 members of the California judiciary watched an implicit bias documentary, 84% of them believed that most or all individuals free of *explicit* bias can nonetheless be unwittingly influenced by implicit biases (an 80% improvement over their average beliefs before the documentary), and 79% believed that most or all judge's decisions can be impacted by implicit bias (a 167% improvement).<sup>81</sup> Ninety percent of those who watched the documentary indicated they would "apply the course content to their work."<sup>82</sup> Moreover, a review of juvenile court systems that have worked to address implicit bias issues found that "supporting training for judges and other juvenile court professionals to identify implicit bias and to use effective strategies to mitigate their impact on decision-making throughout the system" is an effective means of reducing racial disproportionalities in juvenile dispositions.<sup>83</sup>

Further, individuals seem to best develop positive psychological habits when they are intrinsically motivated, which is to say when they are motivated by their own emotions to engage in a specific course of conduct rather than by a fear of external punishments or rewards.<sup>84</sup> This principle applies with added force to mitigating implicit bias. Individuals warned to be aware of their prejudice often initially reduce biased conduct. However, they exhibit even higher levels of biased conduct after these

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*Prejudice and Stereotypes: The Role of Automaticity & Cognitive Control*, HANDBOOK OF PREJUDICE, STEREOTYPING, & DISCRIMINATION 267-85 (Todd Nelson ed., 2009).

<sup>80</sup> See, e.g., Diana Burgess et al., *Reducing Racial Bias Among Health Care Providers: Lessons from Social-Cognitive Psychology*, 22 J. GEN. INTERNAL MED. 882, 883-84 (2007) (finding that programs can help doctors mitigate the impact of implicit biases on patient treatment by educating them about biases and providing strategies that translate education into action, rather than "stereotype suppression"); Bridget Murray Law, *Retraining the Biased Brain*, 42 MONITOR OF PSYCHOL. 42 (2011) (finding that implicit bias can be combated like any cognitive habit, through awareness, concern, and replacing the behavior with a non-prejudiced response that more closely matches espoused values of equality); Shawn C. Marsh, *The Lens of Implicit Bias*, 16 JUV. & FAM. JUST. TODAY 18 (Summer 2009) (reviewing available psychological research and finding that "simply being aware that implicit bias exists" can help juvenile courts "reduce its influence on" "decisions.").

<sup>81</sup> Pamela M. Casey et al., *Helping Courts Address Implicit Bias: Resources for Education*, NAT'L CTR. FOR ST. CTS. 12 (2012).

<sup>82</sup> *Id.* at 22.

<sup>83</sup> Symposium, *Justice Management Institute, What State Courts Can Do To Promote Juvenile Justice Reform: Summary Of Proceedings* 6 (Oct. 2013); see also Katherine T. Bartlett, *Making good on good intentions: The critical role of motivation in reducing implicit workplace discrimination*, 95 VA. L. REV., 1893-972 (2009).

<sup>84</sup> Edward L. Deci & Richard M. Ryan, *The "What" and "Why" of Goal Pursuits: Human Needs & the Self-Determination of Behavior*, 11 PSYCHOL. INQUIRY 227-44 (2000).

extrinsic warnings become ineffective.<sup>85</sup> Thus, states should provide trainings that help judges accept the existence and unfairness of implicit bias to increase intrinsic motivation, and thereafter inculcate strategies for mitigating bias to ensure sustained effort and avoid rebound effects. One means of increasing empathy and awareness of biases might be to have judges converse with individuals who have been affected by racial bias throughout their lives and hear about their experiences. Researchers have found that taking a similar approach helped expand empathy for gay individuals and increase support for marriage equality.<sup>86</sup>

*B. Ensure Accountability by Creating a Reviewing Body for Decision and Data Evaluations*

Individual and organizational accountability will be essential to the development of sustained momentum towards mitigating the effect of implicit biases and overcoming disproportionalities. Juvenile courts could create centralized, empowered bodies to conduct trainings on implicit bias; review judicial orders for biased and boosting presumptions; set goals regarding reducing disproportionalities; collect, analyze, and present data regarding progress towards goals; and recommend best practice interventions. In addition to facilitating intrinsic motivation, this approach would increase the need for decisional confidence and prevent biased decision making.<sup>87</sup>

*C. Establish Objective Criteria for both Negative and Positive Dispositions*

Juvenile judges are currently free to develop ad-hoc decisional criteria that rationalize biased findings. States should develop guidelines regarding when judges can render specific dispositions.<sup>88</sup> Specifically, to

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<sup>85</sup> C. Neil Macrae et al., *Out of My Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERS. SOC. PSYCHOL. 808, 808-09 (1994).

<sup>86</sup> Michael J. LaCour & Donald P. Green, *When contact changes minds: An experiment on transmission of support for gay equality*, 346 SCIENCE 1366, 1366-69 (Dec. 2014).

<sup>87</sup> This approach would also build on the successes of model districts and the recommendations of commissions convened to reduce bias in juvenile courts. *See, e.g., Reducing the Incarceration of Youth of Color in Berks County Through Structured Decision-Making & Community-Based Alternatives*, CTR. FOR CHILD.'S L. & POL'Y 2 (Dec. 2012); Symposium, *Justice Management Institute, What State Courts Can Do To Promote Juvenile Justice Reform: Summary Of Proceedings*, *supra* note 83; *The Keeper & The Kept: Reflections On Local Obstacles To Disparities Reduction In Juvenile Justice Systems & A Path To Change*, W. HAYWOOD BURNS INST. 14, 16 (Dec. 2009).

<sup>88</sup> These recommendations have been echoed by a Haywood Burns Institute report. W.

stem both bias and boosting effects, states should develop guidelines that clarify when judges may render both harsh and lenient dispositions. For example, states could pass a statute requiring that before a judge can incarcerate a juvenile, they must demonstrate that the juvenile has said or done something that suggests they will be a danger to themselves or others, that the juvenile's specifically positive attributes are not sufficient to deter them from causing others or themselves harm, and that their community cannot manage this danger to keep all parties safe.

*D. Encourage Careful Case Consideration by Appointing More Judges and Hiring Supports*

Juvenile judges are being asked to decide too many complex cases with too little time. One can imagine that as they are unable to reduce their caseloads, they must unintentionally rely on implicit biases to reduce their cognitive loads and move cases along more quickly. States should prove more funding to increase the number of judges and support staff to ensure that judges have the time and space needed to muster the cognitive energy required to attend to the complexity of juvenile cases, and to collect and attend to sufficient evidence to individuate Black defendants.<sup>89</sup>

The moral argument for hiring more judges and support staff is further buttressed by a fiscal justification. While this type of personnel would cost money to hire and train, the fairer proceedings they might create could slow the flow of school to prison pipeline, reducing the amount of money states spend incarcerating members of their societies, and helping to ensure that more children are ultimately empowered to contribute to state economies.

*E. Require Detailed Written Orders to Ensure Accountability and Appealability*

With reduced caseloads, judges will be able to give their orders the attention they deserve. This should include a detailed overview of the available testimony and evidence in the case, discussion of final

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HAYWOOD BURNS INST., *supra* note 87, at 19-20.

<sup>89</sup> This recommendation is consistent with the National Council of Juvenile and Family Court Judge's 16 "Key Principles," which represent the culmination of three years of work by over 100 experts in juvenile justice. The report recommends the provision of "sufficient numbers of qualified judicial officers" to address juvenile court demands. *Key Principles For Improving Court Practice In Juvenile Delinquency Cases*, JUV. DEV. COMMITTEE, NAT'L COUNCIL OF JUV. & FAM. JUDGES (2005) [hereinafter *Key Principles*].

determinations of fact (to help a reviewing body determine whether racial memory bias has occurred), and clear explanation of how the final disposition is appropriate to the specific individual and case (to help an appealing body determine whether biased assumptions have been made). To address potential boosting effects, written orders should also discuss determinations regarding effective interventions that can assist in rehabilitation and ameliorate a given juvenile's challenges.

*F. Include a Review of Racial Assumptions to Encourage Mindful Deliberation*

In addition to writing detailed opinions, judges should take their implicit racial biases head on by “reflecting on *how* . . . [they] think” about race to challenge “thinking errors.”<sup>90</sup> Family law judges are allowed, and sometimes even required, to consider the races of children and parents in custody determinations.<sup>91</sup> California courts are also required to consider race in juvenile cases involving Native Americans.<sup>92</sup> In both family law and juvenile law, this approach not only holds the potential to encourage judges to become more aware of their biases, it also encourages the drafting of more honest opinions. Research has clearly demonstrated that our implicit biases sit just below the surface, ready to fill gaps where information or cognitive capacity is lacking. Thus, the question is not *whether* we consider race, but when and how. Encouraging judges to slow down and reflect on how they considered race would help dissuade judges from leaning on snap judgments that are often unsupported by sociological data, such as “Black children use and sell more drugs.” It would also provide appealable information wherever a judge was honest about leaning on an impermissible assumption.

*G. Encourage Individuating Testimony by Community Members*

Family members, school staff, and community members are often well positioned to provide individuating information about juvenile defendants. These individuals could be provided notice of juvenile trials and guaranteed speaking time to discuss the defendant's individual character. Mandatory opportunities for individuating testimony could mitigate the influence of biases and boosting effects by tying judicial

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<sup>90</sup> See Marsh, *supra* note 80, at 19 (emphasis added).

<sup>91</sup> See, e.g., Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Palmore v. Sidoti, 466 U.S. 429 (1984); Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C §§ 1901–1963.

<sup>92</sup> CAL. WELFARE AND INST. CODE §224(a)(2).

determinations more closely to the characteristics of the juvenile present.

### V. Discovering New Directions—Pathways for Future Research

As noted previously, despite lower levels of drug use, Black youth are grossly overrepresented among those receiving the harshest dispositions for drug offenses.<sup>93</sup> In a future study, an IAT could assess the extent to which judges implicitly associate drug terms with Black juvenile faces. This study could also determine whether, following a subconscious Black juvenile prime, individuals who have higher levels of Black juvenile/drug bias are more likely to either 1) render harsher dispositions for drug related offenses or 2) express that juvenile drug use is a major social problem. This research could provide additional guidance to juvenile courts regarding biases that require direct attention.

### VI. Patching the Promise of our Nation

Our local and federal laws, our highest Court, and definitive interpretations of our Constitution demand fair juvenile trials for *all* children. But with opportunities for implicit bias and racial disproportionalities against Black youth at every turn, our courts are falling far short of that mark. The need to ensure fair juvenile trials touches on the very soul of our nation. As we continue to provide a two-tiered justice system,<sup>94</sup> we communicate to our youth that young Blacks are neither valuable nor desirable members of today's society. This stigmatizing statement not only torments the hearts of the Black youth, but it perverts the consciences of children of all races, creating deep social fissures. As Dr. Martin Luther King presciently warned, “[w]e must all learn to live together as brothers or we will all perish together as fools.”<sup>95</sup> We cannot achieve our promise as a nation without making good

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<sup>93</sup> *National Crime Council Report*, *supra* note 11.

<sup>94</sup> In an especially disheartening indication of the two-tiered nature of our juvenile system, in 2013, a juvenile judge rendered a disposition of probation and mandatory counseling after Ethan Couch, a white, affluent, 16-year-old, killed four individuals while driving with a blood-alcohol level three times the legal limit, and after the District Attorney moved for 20 years of imprisonment. The judge was stirred by the defense counselor's claim that Couch suffered from “affluenza,” or being too rich to understand social consequences. It is hard to imagine a juvenile judge who would be similarly moved by an indigent Black juvenile's parallel claim of “prejudice-povertous,” or being too dejected from a lifetime of racism and poverty to follow social rules. Gillian Mahoney, *What is Ethan Couch's Affluenza?*, ABC NEWS (Dec. 30, 2015), <http://abcnews.go.com/Health/ethan-couchs-affluenza-explainer/story?id=36011293>.

<sup>95</sup> Martin Luther King, Jr., “*Remaining Awake Through a Great Revolution*:



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*Designed to Fail*

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on our promise to provide fair juvenile court systems that accommodate *all* children.

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*Commencement Address for Oberlin College,*” (Jun. 1965),  
<http://www.oberlin.edu/external/EOG/BlackHistoryMonth/MLK/CommAddress.html>.