

The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform

Kristin Henning*

ABSTRACT

In 1965, President Lyndon B. Johnson established the Commission on Law Enforcement and Administration of Justice to study the causes of crime and delinquency and identify strategies for prevention. After eighteen months of investigation, the Commission published a report, The Challenge of Crime in a Free Society, in February 1967. Citing youth crime as one of the most significant concerns, the Commission devoted considerable attention to research and recommendations for reducing juvenile delinquency.

In light of recent bipartisan efforts to launch a new National Criminal Justice Commission in 2017, this Article takes a close look at the successes and shortcomings of the 1967 Report. The Article contends that although the first Commission's insights on the source of youth crime and recommendations for reform were progressive for the time and rightly guided by a rehabilitative ideal, the Report failed in one key respect: it did not explicitly identify racial justice as one of its core objectives. Although the Commission articulated a commitment to reducing "unfairness" in the system, it failed to meaningfully explore the scope and cause of racial disparities in the administration of juvenile and criminal justice and, even worse, frequently referred to the causes of crime in language that conveyed negative racial overtones. The Article not only urges any new Commission to be more transparent about the existence and causes of racial disparity but also draws upon the hindsight of fifty years of data on racial disparities in the juvenile justice system and twenty-five years of research on normative adolescent development and the cognitive science of implicit racial bias, to identify new ideas for reform. Ultimately, the Article offers a series of recommendations to stimulate a new round of juvenile and criminal justice reform.

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* Professor Kristin Henning is the Agnes N. Williams Research Professor of Law and Director of the Juvenile Justice Clinic at Georgetown Law. She earned her J.D. at Yale Law School and her LL.M. at Georgetown Law. She would like to thank Isaiah Boyd, Eduardo Ferrer, Emma Mlyniec, and Drew Smith for their invaluable research assistance and editorial support.

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INTRODUCTION

On July 23, 1965, President Lyndon B. Johnson established the Commission on Law Enforcement and Administration of Justice (“Commission”) in recognition of “the urgency of the Nation’s crime problem and the depth of ignorance about it.”¹ He instructed the Commission to “inquire into the causes of crime and delinquency” and provide recommendations for preventing crime and “improving law enforcement and the administration of criminal justice.”² Led by then-Attorney General Nicholas deB. Katzenbach, the Commission had nineteen members and was aided by sixty-five staffers and more

1 Nicholas deB. Katzenbach, *Foreword* to PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).
 2 PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *supra* note 1, app. A at 311.

than one hundred consultants and advisors, including law professors, law enforcement and corrections personnel, social science researchers, attorneys, and school personnel.³ The Federal Bureau of Investigation, the U.S. Bureau of Prisons, the Department of Health, Education, and Welfare, and a number of other federal agencies assisted the Commission in its work. After eighteen months of investigation, during which the Commission called three national conferences, conducted five national surveys, held hundreds of meetings, and interviewed thousands of people, the Commission published a report, *The Challenge of Crime in a Free Society*, in February 1967.⁴

Concern about juvenile delinquency figured prominently in the 1967 Report. Citing youth crime as one of the most significant contributors to the problem of crime in a free society, the Commission opined that “[i]n short, crime is evidently associated with two powerful social trends: the increasing urbanization of America and the increasing numerousness, restlessness, and restiveness of American youth.”⁵ One of the earliest chapters in the thirteen-chapter report was devoted entirely to youth and opened with a claim that “America’s best hope for reducing crime is to reduce juvenile delinquency and youth crime.”⁶

The Commission’s perceptions of the source of youth crime and recommendations for reform were rightly guided by a rehabilitative ideal and were progressive for the time. The Commission clearly understood that the theoretical purpose of juvenile court was to “help” youth through individualized treatment and nonadversarial procedures, even if that theory did not always play out in practice.⁷ Included in the recommendations were a commitment to treatment over punishment; a directive to fund a Youth Services Bureau that would rehabilitate children through counseling, education, work, recreation programs, and job placement; and a commitment to community-based resources instead of incarceration.⁸ The Commission also rightly identified social conditions—such as poverty, housing, and unemployment—that breed youth crime and highlighted the need for structural reforms in American schools.⁹

³ *Id.* at 309–12.

⁴ *Id.*

⁵ *Id.* at 5.

⁶ *Id.* at 55.

⁷ *Id.* at 7.

⁸ *Id.* at 55–89.

⁹ *Id.* at 55–77, 88.

Despite its progressive reform agenda and enlightened understanding of social and structural causes of youth crime, the Report failed in two key respects: it did not explicitly identify the elimination of racial inequities as one of its seven core objectives, and it did not meaningfully explore the scope and cause of racial disparities in the administration of juvenile and criminal justice.¹⁰ While the Commission articulated a commitment to reducing unfairness in the system, it failed to adequately account for the system's own role in perpetuating that unfairness, especially as it involved race. Focusing instead on racial discrimination in other social institutions, the Commission recommended fighting racial and economic segregation in schools, creating citizen advisory groups to improve police-community relations, and encouraging police departments to hire minorities.¹¹ Race was notably absent from the Commission's reporting on prosecutorial discretion, juries, conviction rates, and sentencing.¹² Even worse, the Commission frequently referred to the causes of crime in language that conveyed negative racial overtones.¹³ While professing sympathy for the plight of the "Negro," the report frequently spoke of "slum neighborhoods" and "slum children" as both disproportionately racial minorities and disproportionately responsible for crime.¹⁴

Given these shortcomings, it is no surprise that the Commission's report failed to offer any meaningful or effective strategies to address racial inequities in the juvenile and criminal justice systems. In fact, although youth crime has declined across the country,¹⁵ racial disparities have only increased since the 1967 Report.¹⁶ Fifty years after the release of *The Challenge of Crime in a Free Society*, America continues to face many of the same obstacles to an effective and fair criminal justice system.

On March 8, 2017, Democratic Senator Gary C. Peters introduced a bipartisan bill to establish a new National Criminal Justice Commission to undertake a comprehensive review of the criminal justice system.¹⁷ The bill, which has twenty-eight bipartisan sponsors,

¹⁰ See *id.* at vi–xi (discussing seven core objectives of the Report).

¹¹ See *infra* notes 41–43 and accompanying text.

¹² PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 1, at 127–28, 133–34, 141–49, 156–57.

¹³ See, e.g., *id.* at 60 (referring to "slums and slum dwellers").

¹⁴ See *id.* at 57, 69–70, 73–74.

¹⁵ See *infra* notes 110–14 and accompanying text.

¹⁶ See *infra* notes 116–17 and accompanying text.

¹⁷ Tom Jackman, *Senators Seek to Reform Justice System Nationwide by Launching National Criminal Justice Commission*, WASH. POST (Mar. 8, 2017), <https://www.washingtonpost.com/news/true-crime/wp/2017/03/08/senators-seek-to-reform-justice-system-nationwide-by->

with an even split between Democrats and Republicans, has been read twice and referred to the Senate Committee on the Judiciary.¹⁸ If approved, the Commission would revisit and build upon the work of President Johnson's 1965 Commission.¹⁹ The new Commission would bring together federal, state, tribal, and local governments, law enforcement agencies (including rank-and-file officers), civil rights organizations, community-based organization leaders, civic organizations, religious institutions, business groups, and individual citizens to review evidence and consider how to improve the criminal justice system. Sponsors of the bill, which include leading civil rights organizations such as the National Association for the Advancement of Colored People ("NAACP"), the National Urban League, and the Leadership Conference on Civil and Human Rights, hope that a new Commission will help "reduce crime, improve public safety and promote more equitable criminal justice practices."²⁰ Unfortunately, any new task force will be destined to make the same mistakes as the 1965 Commission unless it explicitly identifies and aggressively challenges racial inequities as one of the most significant barriers to the fair administration of justice.

This Article focuses specifically on race and youth crime, in part because youth crime figured so prominently in the 1967 Report and in part because racial injustice has a profound impact on the way youth are socialized to respect and comply with the law and legal authorities.²¹ With the hindsight of fifty years of data on racial disparities in the juvenile justice system, and twenty-five years of research on normative adolescent development and the cognitive science of implicit racial bias, the Commission will be better equipped to eliminate racial injustice in juvenile and criminal justice policy and practice.

To aid any new Commission in its analysis and recommendations, this Article seeks to accomplish three things. First, it urges a new Commission to be more transparent about the root causes of racial disparity in the administration of criminal justice and to identify the elimination of racial inequities as one of its core objectives. To that end, Part I laments the 1965 Commission's failure to explicitly ac-

launching-national-criminal-justice-commission/?noredirect=on&utm_term=.c811f388f3e1
[<https://perma.cc/6LHM-TSL9>].

¹⁸ See *All Information (Except Text) for S.573—National Criminal Justice Commission Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/573/all-info> [<https://perma.cc/8VNS-KFBC>].

¹⁹ See Jackman, *supra* note 17.

²⁰ *Id.*

²¹ See *infra* Part I.

knowledge America's long history of racial inequities in the juvenile and criminal courts and examines the Commission's role in perpetuating racialized fears of children of color. Second, this Article encourages any new Commission to draw upon contemporary research on race, adolescence, and procedural justice in its effort to reduce racial disparities in the juvenile and criminal justice systems. Recognizing that we know so much more now than we did in 1967, Part II briefly summarizes contemporary studies in adolescent development, implicit racial bias, and the legal socialization of youth. Finally, this Article offers a series of recommendations in Part III to stimulate the Commission's work. The recommendations are necessarily broad and encourage commissioners to consult with a range of experts and community stakeholders. The recommendations also draw upon best practices in law enforcement as identified by President Barack Obama's Task Force on Twenty-First Century Policing and by the Department of Justice Civil Rights Division in recent "findings" letters evaluating police departments in Ferguson, Missouri, and Baltimore, Maryland.

I. RACE AND THE 1965 COMMISSION

A. *"Unfairness" in the Administration of Juvenile and Criminal Justice*

In discussing the third of its seven objectives, "eliminating unfairness," the 1965 Commission noted that "the system of criminal justice must eliminate existing injustices if it is to achieve its ideals and win the respect and cooperation of all citizens."²² It elaborated on this objective by observing that "[o]ur society must give the police, the courts, and correctional agencies the resources and the mandate to provide fair and dignified treatment for all."²³ The Commission seemed primarily concerned with improving "cramped and noisy courtrooms, undignified and perfunctory procedures, [and] badly trained personnel overwhelmed by enormous caseloads."²⁴ The Commission expressed additional concern about the injustice of detaining persons charged with crime solely because they cannot afford bail.²⁵ Although the Commission mentioned race in the context of eliminating unfairness, race was relegated to the second-to-the-last paragraph of the discussion and was framed largely as a concern about the rela-

²² PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 1, at vi.

²³ *Id.* at viii.

²⁴ *Id.*

²⁵ *Id.*

tionship between police and poor urban minorities.²⁶ To ensure the fair and dignified treatment of all minorities, the Report recommended only that police departments establish community-relations machinery in minority neighborhoods, recruit “minority group officers,” and ensure that complaints of unfair treatment be dealt with fairly.²⁷ Implicit in the Commission’s language was a concern about racial injustice, but at no point did the Commission explicitly identify racial disparities or racial discrimination in the administration of criminal justice as one of its chief concerns.

The 1967 Report was divided into thirteen chapters.²⁸ No one chapter was devoted to the question of racial disparities.²⁹ Instead, the Report was organized by topics such as juvenile justice, the police, and corrections.³⁰ Race or racial disparity was addressed to some degree in chapters two (crime in America), three (juvenile delinquency and youth crime), and four (the police).³¹ The Report did not discuss race in any significant way in chapters five (the courts), six (corrections), seven (organized crime), eight (narcotics and drug abuse), nine (drunkenness offenses), ten (control of firearms), eleven (science and technology), or twelve (research). Among more than 200 total recommendations, the Commission made only three specific recommendations regarding race. The first was to combat racial segregation in schools,³² the second was to create citizen advisory committees in minority-group neighborhoods,³³ and the third was to prioritize recruiting minority-group officers in minority-group neighborhoods.³⁴

The sections of the Report that analyzed inner-city “slums” contained the most references to race.³⁵ Noting that “slum dwellers” were disproportionately nonwhite, the Commission devoted considerable attention to the impact of “slum” conditions and poor education on juvenile delinquency.³⁶ In its most explicit acknowledgement of racial discrimination, the Commission noted that “[d]iscrimination in employment, education, and housing, based on such a visible criterion as color, is harder to break than discrimination based on language or eth-

²⁶ *See id.*

²⁷ *Id.*

²⁸ *See id.* at i–iv.

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.* at 17–124.

³² *Id.* at 60.

³³ *Id.* at 101.

³⁴ *Id.* at 102.

³⁵ *See id.* at 60–63.

³⁶ *See infra* notes 85–86 and accompanying text.

nic background.”³⁷ The Commission also paralleled contemporary conditions of racial minorities in urban centers to those of previous eastern European immigrants and acknowledged that it is even harder for racial minorities to move out of poverty due to racism that European immigrants did not experience.³⁸ In its reflections on how to reduce delinquency, the Commission urged communities and government agencies to combat racial and economic segregation in schools.³⁹ Although the Commission wrote about the racial barriers to movement in housing, education, and employment,⁴⁰ its efforts to “eliminate unfairness” were seemingly limited to discrimination that originated *outside* of the juvenile and criminal justice systems. The Commission neglected to consider evidence of discrimination within the justice system itself and failed to explore the deleterious impact of law enforcement intervention on entire communities of color.

The one exception to the Commission’s omission of racial discrimination in its analysis of the criminal justice system appeared in the Commission’s analysis of policing and police-community relations. In chapter four of the Report, the Commission concluded that police-community relations were “overwhelmingly a problem of the relations between the police and . . . Negroes, Puerto Ricans, and Mexican-Americans.”⁴¹ The Commission noted that minority-group resentment of authority was no surprise given the nation’s history of race relations, and concluded that “[t]hroughout the country minority-group residents have grievances not just against society as a whole, but specifically against the police.”⁴² The Commission opined that for police-community relations to improve, “there [must] be a sufficient number of minority-group officers at all levels of activity and authority” and that “all officers [must] be thoroughly aware of, and trained in, community-relations problems.”⁴³ The Commission made several additional suggestions within the text of the Report that were never listed as formal recommendations, including the need for “[b]ackground investigations of and oral interviews with police candidates, and careful

37 PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *supra* note 1, at 37.

38 *See id.* at 35–37.

39 *Id.* at 69–73.

40 The Commission pointed to racial discrimination as one, nondominant, reason for crime: “In a sense, social and economic conditions ‘cause’ crime. Crime flourishes, and always has flourished, in city slums, those neighborhoods where overcrowding, economic deprivation, social disruption and *racial discrimination* are endemic.” *Id.* at 17 (emphasis added).

41 *Id.* at 99.

42 *Id.* (also discussing riots).

43 *Id.* at 101.

scrutiny of recruits during their probationary period,” to ensure “that prejudiced or unstable officers are not added to or retained in the force.”⁴⁴ The Commission also suggested that “[c]ommunity-relations subjects, such as the psychology of prejudice, the background of the civil rights movement[,] and history of the Negro in the United States should be emphasized in both recruit and inservice [sic] training programs.”⁴⁵ From this discussion, it is clear that the Commission recognized the need to include minority voices in law enforcement and eliminate racial bias among system actors. Unfortunately, police-community relations was the only context in which the Commission proffered this strategy.

Finally, the Commission discussed race in the context of riots. The Commission noted that the principal targets of riots were “those people or institutions, insofar as they were within reach, that the rioters thought of as being their principal oppressors: Policemen and white passers-by, or white-owned commercial establishments, especially those that charged high prices, dealt in inferior merchandise or employed harsh credit policies.”⁴⁶ The Commission quoted a study in which rioters explicitly stated that “they had been protesting against, indeed trying to call the attention of the white community to, police misconduct, commercial exploitation and economic deprivation, and racial discrimination.”⁴⁷ The Commission’s response was to encourage a more determined effort to “eradicate conditions that invite riots,” by moving more rapidly than America had done so far “toward fundamental reorganization of the institutions of the slum community, and toward the abolition of the discriminatory practices that maintain the ghetto in existence.”⁴⁸ Here again, the Commission’s focus was on the discriminatory practices that seemed to *contribute* to crime and delinquency and not on the discriminatory or racially insensitive responses to crime that occur within the juvenile and criminal justice systems.

A few other recommendations mentioned race in the aggregate or included the word “discrimination” without specifically mentioning racial discrimination.⁴⁹ These include a recommendation that “[a]ll officers should be acquainted with the special characteristics of adolescents, particularly those of the social, racial, and other specific groups

⁴⁴ *Id.* at 102.

⁴⁵ *Id.*

⁴⁶ *Id.* at 37.

⁴⁷ *Id.* at 38.

⁴⁸ *Id.*

⁴⁹ See, e.g., *id.* at 77 (making recommendation to “[r]educe barriers to employment posed by discrimination, the misuse of criminal records, and maintenance of rigid job qualifications”).

with which they are likely to come in contact.”⁵⁰ The Commission did not elaborate on how police officers might understand or adjust their encounters with youth of color. Race is barely mentioned after chapter four. Although the Commission did recommend that “[p]rocedures for avoiding and correcting excessive, inadequate, or disparate sentences should be devised and instituted,”⁵¹ it seemed to blame disparities on the personalities of different judges and did not contemplate the impact of racial bias on sentencing.⁵²

Although the Commission emphasized the need for innovative statistical research,⁵³ it did not suggest that researchers track decision-making and outcome data by race throughout the system. The report includes race-based statistics primarily in reference to rates of victimization and interracial crime, noting that “[a]nother source of the concern about crime, in addition to its violence and its frequency, is the extent to which it is assumed to involve interracial attacks.”⁵⁴ The Commission reported on a study showing that, except for robberies, very little crime in Chicago and the District of Columbia proved to be interracial, and suggested using these victimization statistics to correct misconceptions that bred race-related fears.⁵⁵ The Commission also provided statistics on arrest rates by race and briefly concluded that “if conditions of equal opportunity prevailed, the large differences now found between the Negro and white arrest rates would disappear.”⁵⁶ The Commission did not seek to understand rates and patterns of adult and adolescent offenders across race and class, and seemed to assume that arrest rates reliably reflected the prevalence of criminal conduct.

B. The Racialized History of Juvenile and Criminal Justice in America

Because the 1965 Commission failed to identify racial justice as a core component of its commitment to eliminating unfairness and failed to understand how the very structure, procedures, and practices of the juvenile and criminal justice systems perpetuate racial inequities, policymakers missed a critical opportunity to achieve meaningful reform. Any new Commission is destined to make the same mistakes

⁵⁰ *Id.* at 79.

⁵¹ *Id.* at 146.

⁵² *Id.* at 145.

⁵³ *Id.* at 273–78.

⁵⁴ *Id.* at 40.

⁵⁵ *Id.*

⁵⁶ *Id.* at 45.

unless it acknowledges the long history of racial injustice within the administration of criminal justice and develops an aggressive, comprehensive, and multidimensional plan to reverse the trends and outcomes of the past.

Looking specifically at the juvenile justice system, the Commission's shortcomings probably start with its failure to acknowledge the original sins of racial subordination and injustice at the very inception of the first juvenile courts. The Commission noted, seemingly with pride, that all three aspects of the juvenile justice system—the police, courts, and corrections—have developed special ways of handling youth over the years.⁵⁷ As the Commission understood it, police developed specialized skills in interacting with youth and making difficult decisions about how to respond to youth crime; corrections systems established separate institutions for youth and emphasized probation over institutionalization; and juvenile courts adopted a philosophy and procedures markedly different from adult courts.⁵⁸ What the Commission failed to acknowledge was the disparate treatment of children of color in the first institutions and courts for troubled youth. We cannot start this discussion fifty years ago. It must begin in the late nineteenth century, when the first child welfare and juvenile justice facilities opened.

Race has animated the juvenile court system since its inception. Traditional renditions of juvenile court history report that a group of progressive reformers, who were particularly concerned about children's welfare and development, advocated that young offenders be diverted from the traditional criminal justice system to newly established juvenile courts that would “fashion individualized treatments” and serve the children's best interests.⁵⁹ These reformers, commonly referred to as “child savers,” established separate juvenile courts based on the assumption that children lacked the same capacity for moral and reasoned judgment as adults and were more responsive to

⁵⁷ *Id.* at 78.

⁵⁸ *Id.* Ironically, in the same year the Commission's Report was released, the U.S. Supreme Court recognized that the juvenile justice system often operated as a “kangaroo court” that resulted in the worst of both worlds for youth, with no due process and no developmentally appropriate rehabilitative services. *In re Gault*, 387 U.S. 1, 28 (1967).

⁵⁹ See David S. Tanenhaus, *Degrees of Discretion: The First Juvenile Court and the Problem of Difference in the Early Twentieth Century*, in *OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE* 105, 110 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005); see also Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash,”* 87 *MINN. L. REV.* 1447, 1459–60 (2003) (noting that judges tailored sentences to match a child's best interests).

rehabilitation.⁶⁰ With their emphasis on rehabilitation, progressives described the new juvenile courts as “benign, nonpunitive, and therapeutic” and claimed that probation officers would try to diagnose and cure delinquent youth, rather than punish them.⁶¹

Recent revisionist accounts of the evolution of child welfare and juvenile justice in America are more skeptical of the child savers’ motives. As has been documented at length elsewhere, many contend that progressive reformers designed these systems to control the influx of poor immigrant youth from southern and eastern Europe into American urban centers in the early to mid-1800s.⁶² The new juvenile courts allowed upper- and middle-class Anglo-Protestant Western Europeans, who had arrived a few generations earlier, to assimilate the new poor immigrants into “sober, virtuous, middle-class Americans like themselves.”⁶³ When the first juvenile court opened in Chicago in 1899, early reformers focused their attention on “normalizing” or “whiten[ing]” European immigrant youth they characterized as neglected and delinquent, and they did not consider black youth worthy of the rehabilitative citizen-building efforts.⁶⁴

From the outset, reformers viewed black children as a “perennial ‘lost cause[.]’ . . . lacking the physical, moral, and intellectual capacity on which normalization would depend.”⁶⁵ When some refuge homes for orphaned or neglected children finally opened their doors to black children, they relegated black youth to the “colored section” and denied them rehabilitative services, which were viewed as a waste of re-

60 See Tanenhaus, *supra* note 59, at 107 (citing Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909)).

61 See Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 694–95 (1991).

62 See Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 394–405 (2017); Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 333–34 (1999); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 404–08 (2013). For the most comprehensive treatment of the racialized history of juvenile justice and child welfare in America, see generally GEOFF K. WARD, *THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE* (2012).

63 Feld, *supra* note 62, at 332–34; see WARD, *supra* note 62, at 73.

64 WARD, *supra* note 62, at 38–39, 86–87; see also Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607 (2013); JAMES BELL & LAURA JOHN RIDOLFI, *ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM* 3 (Shadi Rahimi ed., 2008) (“From the earliest days of our nation, segregationist policies dictated that the detention of youth of color would be different than that of [w]hite youth . . .”).

65 WARD, *supra* note 62, at 39.

sources for black youth.⁶⁶ While these homes provided white youth with academic education and training to be farmers and skilled artisans, black boys received little if any recreation, education, and moral instruction, and were instead trained to meet the agricultural and other manual labor needs of the day.⁶⁷ Black girls were trained to be cooks, maids, and seamstresses.⁶⁸

As European mass immigration came to an end after World War I and white immigrants assimilated into society,⁶⁹ black youth displaced poor white immigrants as the youth population disproportionately involved in court proceedings. Thus, the system that arguably started as a means to control poor immigrant youth morphed into a racially motivated system of isolation and control over black youth.⁷⁰ In the years between Emancipation and World War II, many newly freed blacks migrated from the rural South to the urban North in search of work in the North's industrial factories.⁷¹ With the influx of Southern blacks, Northern whites reacted with fear and hostility and forced blacks into segregated urban ghettos.⁷² Although Northerners were more willing to accommodate black youth in the segregated and dilapidated facilities of the juvenile justice system,⁷³ Northern reformers were ultimately no more invested in the citizen-building of black youth than their counterparts in the South.⁷⁴ State and local leaders across the United States invested little in juvenile justice services for black youth before the courts required them to do so. Indeed, in 1943, Missouri's governor vetoed a planned appropriation of \$5,000 for the overcrowded, black-run reformatory for black girls in the state, claiming the funds "exceeded the [girls'] needs by \$4,297.00."⁷⁵

Given this history, it is not hyperbole to say that racial equity has never been possible in the framework of American juvenile and criminal justice. It is unclear why the 1965 Commission missed or ignored

⁶⁶ *Id.* at 53–56; see BELL & RIDOLFI, *supra* note 64, at 3.

⁶⁷ WARD, *supra* note 62, at 56–58, 74.

⁶⁸ *Id.* at 56, 74.

⁶⁹ See Feld, *supra* note 62, at 340.

⁷⁰ See Tanenhaus, *supra* note 59, at 108–10; see also Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 704–06 (2002) (discussing how society's perception of black youth as "others" leads to disproportionate treatment by the juvenile justice system).

⁷¹ See WARD, *supra* note 62, at 79, 106–07.

⁷² See, e.g., Feld, *supra* note 59, at 1464; Feld, *supra* note 62, at 343–45.

⁷³ See WARD, *supra* note 62, at 110–14.

⁷⁴ See *id.*

⁷⁵ DOUGLAS E. ABRAMS, *A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI* 106 (2003).

the long history of racism in the very foundation of the juvenile and criminal justice systems. Maybe the fairly progressive-minded commissioners did not know this history; maybe they thought highlighting it would undermine reform efforts. Whatever the reason, this omission certainly contributed to the Commission's failure to provide meaningful and effective strategies for addressing racial disparities in the system.

C. *Race and Fear in the Commission's Report*

At best, the Commission was simply negligent in its failure to take on systemic discrimination and racial injustice within the juvenile and criminal justice systems. At worst, the Report exacerbated the injustice by stoking existing public fears of youth in general, and of "slum-dwell[ing]" Negroes, Puerto Rican, and Mexican-American children in particular.⁷⁶ As is so often the case in even the most benevolent discussions of the plight of the poor, the Commission fell into the trap of using seemingly race-neutral language in ways that heightened racialized fears of crime.

First, drawing heavily on statistics of high and rising crime among young people, the Commission predicted that youth would be the greatest threat to public safety in the years to come. Attributing crime in part to "the increasing numerousness, restlessness, and restiveness of American youth,"⁷⁷ the introduction to the Report expressed considerable concern that "young people commit a disproportionate share of crime and the number of young people in our society is growing at a much faster rate than the total population."⁷⁸ Thus, "[t]he problem in the years ahead is dramatically foretold by the fact that 23 percent of the population is 10 or under."⁷⁹ The introduction then devoted several pages to statistics on youth crime. For example, at the time of the Report, eleven- to seventeen-year-olds made up only 13.2% of the population but accounted for 50% of arrests.⁸⁰ Arrests of persons under eighteen jumped 52% between 1960 and 1965.⁸¹ One-third of all robberies were committed by youth, and 60% of those arrested for auto theft (joyriding) in 1965 were under eighteen.⁸² Finally, more fifteen-year-olds were arrested for index crimes, petty larceny,

⁷⁶ PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 1, at 60.

⁷⁷ *Id.* at 5.

⁷⁸ *Id.* at vi.

⁷⁹ *Id.*

⁸⁰ *Id.* at 56.

⁸¹ *Id.*

⁸² *Id.*

and negligent homicide than people of any other age, and sixteen-year-olds were a close second.⁸³

Although the Commission's predictions and fears about rising youth crime were not explicitly tied to race, its comingling of race and urban slum dwellings reveals an implicit prediction that crime would grow among young, poor minorities. In drawing a tight connection between race, crime, and impoverished residence, the Commission contended that

[t]here have always been slums in the cities, and they have always been places where there was the most crime. What has made this condition even more menacing in recent years is that the slums, with all their squalor and turbulence, have more and more become ghettos, neighborhoods in which racial minorities are sequestered with little chance of escape.⁸⁴

The Report frequently reminded readers that "Negroes, who live in disproportionate numbers in slum neighborhoods, account for a disproportionate number of arrests" and offers an extensive narrative on the link between slum living and delinquency.⁸⁵

In chapter three, the Commission repeatedly referred to children in poor neighborhoods as "slum children," "slum dwellers," and "slum youth," and spoke of their families as "slum families."⁸⁶ By labeling certain youth in this way, the Commission focused attention on purported differences between children of color and other youth and ignored evidence that youth of all races and socioeconomic classes engage in risky and delinquent behavior.⁸⁷ Scholars have criticized this type of racially coded language for its role in entrenching negative stereotypes of black criminality and introducing race and racial bias into a purportedly race-neutral system.⁸⁸ Throughout history, youth of color have been described in dehumanizing ways as "incorrigible, undeserving, and expendable," "wayward," "inner-city," "gang-involved," and "superpredators."⁸⁹ Conditions like "broken home," "negative peer group," and "bad or high crime neighborhood" readily convey an implicit racial meaning and perpetuate modern racist senti-

⁸³ *Id.* at 44.

⁸⁴ *Id.* at 6.

⁸⁵ *See, e.g., id.* at 37, 57.

⁸⁶ *Id.* at 56–66, 59 (noting that "[d]elinquency in the slums . . . is a disproportionately high percentage of all delinquency and includes a disproportionately high number of dangerous acts"); *see also, e.g., id.* at 57, 59–60, 70, 74.

⁸⁷ *See infra* notes 128–32 and accompanying text.

⁸⁸ Birkhead, *supra* note 62, at 387–88, 394.

⁸⁹ *Id.* at 387, 388, 395; Feld, *supra* note 59, at 1453–55.

ments without seeming racist or discriminatory.⁹⁰ The racialized narratives of the 1967 Report were particularly dangerous given the Commission's own recognition that many Americans had already become suspicious of "Negroes" and adolescents they believed to be responsible for crime.⁹¹

The Commission also devoted considerable attention to the problem of "ghetto riots."⁹² Although it acknowledged the riots' role in protesting ghetto conditions and rightly focused its recommendations on eradicating the conditions that invite riots,⁹³ the Report legitimized the more nefarious and popularly held beliefs about riots. In particular, the Commission described riots as giving "moral license to compulsively or habitually criminal members of the ghetto community to engage in their criminal activities, and to ordinarily law-abiding citizens to gratify such submerged tendencies toward violence and theft as they may have."⁹⁴ The Commission was not alone in its reactionary and reductive response to the civil rights riots of the 1960s. The increase in social disorder caused by racial unrest, paired with an increase in youth crime during that era, led many politicians to call for "law-and-order" measures rather than rehabilitative responses to adolescent offending.⁹⁵ Lawmakers passed new legislation such as the Omnibus Crime Control and Safe Streets Act of 1968, militarizing the police force and racializing law enforcement in an effort to prevent further rioting.⁹⁶

The racialized analysis of and responses to crime persisted into the 1980s and 1990s, when Americans witnessed an increase in violent and lethal crime committed by young men between the ages of fourteen and twenty-four and largely attributable to the illegal drug trade and ready availability of guns.⁹⁷ By the end of the 1980s, the use of crack cocaine in the inner city, the prevalence of guns among youth of color, and the rapid increase in homicides involving black youth fueled the push for punitive "law and order" responses to juvenile crime.⁹⁸ Black youth were demonized by conservative politicians and

⁹⁰ Birkhead, *supra* note 62, at 387; Feld, *supra* note 59, at 1459.

⁹¹ PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 1, at 1.

⁹² *Id.* at 37–38.

⁹³ *Id.* at 38.

⁹⁴ *Id.* at 37.

⁹⁵ Feld, *supra* note 62, at 340, 345–46; see BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 97 (1999) (discussing Johnson's 1967 Commission); Birkhead, *supra* note 62, at 404 (discussing increasing recidivism rates).

⁹⁶ Birkhead, *supra* note 62, at 404–05.

⁹⁷ *Id.* at 408; FELD, *supra* note 95, at 207.

⁹⁸ Feld, *supra* note 59, at 1507.

the media and became the principal targets of the war on crime and the war on drugs.⁹⁹ Casting the “crime problem” as primarily a poor, black male problem, politicians “exploited . . . racially tinged perceptions [of crime] for political advantage.”¹⁰⁰ In this way, the 1980s and 1990s ushered in the most explicit attack on black children.

The Commission’s 1967 predictions of rising youth crime in the “slums” hauntingly foreshadowed the vile and racialized super-predator predictions that would emerge in the 1990s.¹⁰¹ In a series of articles and television interviews, Princeton professor and criminologist John DiIulio, Jr., predicted that an increase in the number of young males in the U.S. population would “put an estimated 270,000 more young predators on the streets” by 2010.¹⁰² Inciting terror among the public and policymakers, DiIulio claimed that “a new generation of street criminals is upon us—the youngest, biggest and baddest generation any society has ever known.”¹⁰³ “America is now home to thickening ranks of juvenile ‘superpredators’—radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders.”¹⁰⁴

The superpredator myth was racialized in explicit and unapologetic ways, as evident from DiIulio’s now-infamous 1996 *City Journal* headline that boldly proclaimed “My Black Crime Problem, and Ours.”¹⁰⁵ DiIulio predicted that “not only is the number of young black criminals likely to surge, but . . . as many as half of these juvenile super-predators could be young black males.”¹⁰⁶ In language eerily similar to that of the 1965 Commission, DiIulio appeared to sympathize with poor black children:

Not that we can’t understand where they come from
[T]hink how many inner-city black children are without parents, relatives, neighbors, teachers, coaches, or clergymen to

⁹⁹ *Id.* at 1523; see also Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 870–73 (2010) (surveying media treatment of black youth and crime in the 1990s).

¹⁰⁰ Feld, *supra* note 59, at 1518.

¹⁰¹ See PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *supra* note 1, at 60.

¹⁰² John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, *CITY J.* (Spring 1996), http://www.city-journal.org/html/6_2_my_black.html [<https://perma.cc/NRU9-VYLF>].

¹⁰³ Elizabeth Becker, *As Ex-theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, *N.Y. TIMES* (Feb. 9, 2001), <https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-super-predators-bush-aide-has-regrets.html> [<https://perma.cc/7VDZ-CR54>].

¹⁰⁴ *Id.*

¹⁰⁵ See DiIulio, *supra* note 102.

¹⁰⁶ *Id.*

teach them right from wrong, give them loving and consistent discipline, show them the moral and material value of hard work and study, and bring them to cherish the self-respect that comes only from respecting the life, liberty, and property of others. Think how many black children grow up where parents neglect and abuse them, where other adults and teenagers harass and harm them, where drug dealers exploit them. Not surprisingly, in return for the favor, some of these children kill, rape, maim, and steal without remorse.¹⁰⁷

Like the 1965 Commission, DiIulio warned that the trouble would be greatest in black inner-city neighborhoods.¹⁰⁸ Unfortunately, DiIulio's predictions were accepted as fact, despite the lack of evidentiary foundation.¹⁰⁹ Fortunately, his fictitious band of violent young black super-predators never materialized, ultimately disproving his predictions.

Aside from a momentary increase in crime in the mid-1990s, crime decreased considerably among youth in the years that followed. Both the juvenile crime rate and arrest rate declined by half between 1994 and 2009, reaching their lowest levels since the 1980s.¹¹⁰ The youth arrest rate for murder fell even more dramatically in that time frame, with the number of youth arrested for murder in the three years preceding the superpredator craze exceeding the number of youth arrested for murder in the entire decade from 2000 to 2009.¹¹¹ Youth crime has continued to decline since 2009. Youth arrests for robbery in 2015 were seventy percent lower than their peak in the mid-1990s, aggravated assault arrests also fell by seventy percent, other assaults were down forty-nine percent, and the rate of youth arrests for weapon offenses was seventy-three percent lower than the previous peak.¹¹² These reductions in youth crime and arrests have occurred despite a growth in the overall size of the nation's youth population.¹¹³

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See* Vincent M. Southerland, *Youth Matters: The Need to Treat Children Like Children*, 27 J.C.R. & ECON. DEV. 765, 776 (2015).

¹¹⁰ *See id.* at 777.

¹¹¹ *See id.*

¹¹² *See* Jeffrey A. Butts, *Total Youth Arrests for Violent Crime Still Falling Nationwide*, DATABITS (Sept. 27, 2016), <https://johnjayrec.nyc/wp-content/uploads/2016/09/databit201601.pdf> [<https://perma.cc/S8G3-R6SH>]; *see also* *Statistical Briefing Book: Juvenile Arrest Rate Trends*, OFF. JUV. JUST. & DELINQ. PREVENTION (Dec. 6, 2017), http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200 [<https://perma.cc/S5PR-29K8>].

¹¹³ *See* Southerland, *supra* note 109, at 777.

Notwithstanding the clear evidence of DiIulio's error, children still experience the devastating effects of legislative and policy shifts that undermined the core rehabilitative philosophy of American juvenile courts in the wake of the superpredator myth. Today, children as young as thirteen and fourteen are tried as adults, hundreds of youth have been sent to prison without the possibility of parole, and even children who remain in juvenile court are subject to zero-tolerance policies, pretrial detention, and lengthy punitive sentences in youth correction facilities.¹¹⁴ As to be expected, black youth have disproportionately borne the brunt of this legislative fallout. For example, data from a 2005 Human Rights Watch report indicated that although black youth made up only sixteen percent of America's youth population, they accounted for sixty percent of all youth serving life sentences without parole in adult courts.¹¹⁵ Similar disparities are still evident at all stages of the juvenile justice system.¹¹⁶ In 2014, for example, black youth were just sixteen percent of all minors ages ten to seventeen nationally but accounted for forty-two percent of all detained youth, thirty-seven percent of all adjudicated youth, and fifty-three percent of youth waived into the adult system.¹¹⁷

II. CONTEMPORARY RESEARCH ON RACE, ADOLESCENCE, AND PROCEDURAL JUSTICE

Hindsight is twenty-twenty. Any new Commission on criminal justice reform will have the advantage of accuracy in both the historical evolution of American juvenile justice and in the fifty-year statistical arc of youth crime. A new Commission cannot afford to miss this second opportunity to meaningfully address racial disparities and racial discrimination in the juvenile and criminal justice systems. It is not

¹¹⁴ For a comprehensive review of legislative changes in response to the superpredator outcry, see *id.* at 778–81.

¹¹⁵ See AMNESTY INT'L & HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 39 (2005); Southerland, *supra* note 109, at 781.

¹¹⁶ For a comprehensive review of racial disparities at all stages, see Ellen Marrus & Nadia N. Seeratan, *What's Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America*, 8 J. MARSHALL L.J. 439 (2015).

¹¹⁷ *Easy Access to Juvenile Court Statistics: 1985–2015*, OFF. JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/ojstatbb/ezajcs/asp/selection.asp> [https://perma.cc/S95U-VYYT] (under “Year of Disposition,” select 2014; under “Age at Referral,” select <12, 12, 13, 14, 15, 16, and 17; and under “Detention,” select “Detained”; then click “Show Table”); *Easy Access to Juvenile Populations: 1990–2016*, OFF. JUV. JUST. & DELINQ. PREVENTION, <https://www.ojjdp.gov/ojstatbb/ezapop> [https://perma.cc/Y8CT-XQZA] (for “Column Variable,” select race; under “Year,” select 2014; and under “Age Range,” select 0 to 17; then click “Show Table”).

enough for the Commission to acknowledge racial discrimination in other aspects of society. It must also be concerned about the scope and causes of racial inequities in the administration of criminal justice.

Fortunately, the new Commission will have the benefit of thirty or more years of research on adolescent development, implicit racial bias, and procedural justice to better understand the nature of normal adolescent behavior across all races and classes, as well as the impact of even perceived injustice on public safety and adolescents' willingness to comply with the law. This Part briefly explores these three areas of research to aid the new Commission in its work to eliminate unfairness in the system.

A. *Adolescent Development Across Race and Class*

The 1965 Commission implicitly accepted the child savers' intuitive recognition that youth are different than adults and should be rehabilitated or "treated" rather than punished for their criminal conduct.¹¹⁸ Those intuitive perceptions are now bolstered by a wealth of developmental research and neurological science confirming that compared to adults, adolescents are more impulsive,¹¹⁹ more likely to engage in sensation seeking,¹²⁰ less likely to consider the future consequences of their actions,¹²¹ and more likely to attend to the potential rewards—especially the immediate rewards—of a risky decision than to the potential costs.¹²² Studies have also provided empirical support for claims that adolescents are more susceptible to peer pressure than adults,¹²³ the presence of peers makes adolescents more sensitive to rewards,¹²⁴ and the presence of peers increases risky decisionmaking

¹¹⁸ See PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 1, at 7.

¹¹⁹ See Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764, 1774 (2008).

¹²⁰ See *id.*

¹²¹ See Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 39 (2009).

¹²² See Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193, 204 (2010); Lia O'Brien et al., *Adolescents Prefer More Immediate Rewards When in the Presence of Their Peers*, 21 J. RES. ON ADOLESCENCE 747, 751 (2011); Karol Silva et al., *Peers Increase Late Adolescents' Exploratory Behavior and Sensitivity to Positive and Negative Feedback*, 26 J. RES. ON ADOLESCENCE 696, 702 (2016); Alexander Weigard et al., *Effects of Anonymous Peer Observation on Adolescents' Preference for Immediate Rewards*, 17 DEVELOPMENTAL SCI. 71, 75–76 (2014).

¹²³ See Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1538 (2007).

¹²⁴ Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 DEVELOPMENTAL SCI. F1, F7 (2011); Karol Silva et al., *Adolescents*

among adolescents.¹²⁵ Research has further demonstrated that personality traits like self-control and conscientiousness tend to stabilize after late adolescence¹²⁶ and that most young offenders desist from or lessen their criminal activity within three years of court involvement.¹²⁷

More important for our analysis of racial disparities in the juvenile justice system, studies controlling for socioeconomic status and race have found similar patterns of impulsivity, sensation seeking, susceptibility to peer influence, and limited future orientation across all youth groups. For example, in one study, psychologists found a normative preference among adolescents for risk-taking and short-term rewards over long-term gain, with no significant differences among ethnicities.¹²⁸ In another study, psychologists controlled for ethnicity and socioeconomic class and found that all youth of similar ages exhibited similar levels of weak future orientation.¹²⁹ In yet another, researchers found that patterns in resistance to peer influence vary only slightly by ethnicity and socioeconomic status and generally all groups follow the same basic age pattern in developing resistance to peer pressure.¹³⁰ Other research found that youth demonstrate increased sensation seeking and impulsivity across ethnic groups.¹³¹ Two major self-report studies on youth violence and drug use supplement this developmental research by documenting similar patterns of self-reported delinquency and risky behaviors among white, black, and Hispanic youth.¹³²

in Peer Groups Make More Prudent Decisions When a Slightly Older Adult Is Present, 27 *PSYCHOL. SCI.* 322, 327 (2016).

¹²⁵ Chein et al., *supra* note 124, at F7; Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 *DEVELOPMENTAL PSYCHOL.* 625 (2005); Ashley R. Smith et al., *Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes Are Known*, 50 *DEVELOPMENTAL PSYCHOL.* 1564 (2014).

¹²⁶ See Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *FORDHAM L. REV.* 641 (2016).

¹²⁷ NAT'L CTR. FOR JUVENILE JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 71* (Melissa Sickmund & Charles Puzzanchera eds., 2014); Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 *DEV. & PSYCHOPATHOLOGY* 453 (2010) (finding that 73.8% of youth in a study of 1,119 male adolescents who had been adjudicated of a serious offense reduced their offending to low or zero involvement in offending behavior two years after being adjudicated).

¹²⁸ See Cauffman et al., *supra* note 122, at 204–06.

¹²⁹ See Steinberg et al., *supra* note 121, at 36–37.

¹³⁰ See Steinberg & Monahan, *supra* note 123, at 1538–39.

¹³¹ See Steinberg et al., *supra* note 119, at 1775.

¹³² See LLOYD D. JOHNSTON ET AL., *MONITORING THE FUTURE: NATIONAL SURVEY RE-*

With the aid of new technology, researchers have also been able to identify a neurobiological basis for the differences between the development and psychosocial maturity of children and adults.¹³³ Using magnetic resonance imaging (“MRI”) technology, researchers have determined that the brain continues to change significantly during childhood and adolescence despite the fact that the brain does not grow in size much past the age of five.¹³⁴ During the period of adolescence in particular, the brain experiences two simultaneous processes that fundamentally alter the brain’s composition in preparation for adulthood.¹³⁵ As a result of these neurological changes, the period of brain development during adolescence is defined by its heightened “plasticity,” or an ability to change, adapt, and respond to experience and environment.¹³⁶ Research also reveals that different regions of the brain develop and mature at different times.¹³⁷ Using MRI images of the brains of thirteen youth taken every two years over the course of eight to ten years, researchers found that the “[p]arts of the brain associated with more basic functions matured early,” while the parts of the brain associated with “executive function, attention, and motor coordination” were among the last to develop.¹³⁸ Specifically, parts of the brain most associated with risk-taking, sensation-seeking, and incentive-processing develop earlier than the parts of the brain most responsible for regulating impulses and behavior.¹³⁹ Researchers were also able to identify specific ways in which adolescents’ brains work differently than adults’ brains and thereby validate earlier developmental research on youths’ different psychosocial capacities and di-

SULTS ON DRUG USE, 1975–2011, at 1 (2011); *High School YRBS*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://nccd.cdc.gov/Youthonline/App/Default.aspx> [<https://perma.cc/8TCR-WM3X>] (showing school survey data from 1991 to 2017).

¹³³ See Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1012, 1016 (2001) (discussing the lessons learned from MRI technology and the promise of functional MRI technology).

¹³⁴ See *id.* at 1014.

¹³⁵ See *id.*; see also Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861–62 (1999) (discussing the significant increase of the “white matter” of the brain during childhood and adolescence due to the process of myelination and the decrease of “gray matter” in the brain during adolescence).

¹³⁶ See LAURENCE STEINBERG, *AGE OF OPPORTUNITY* 25 (2014). This time concept is now commonly referred to as developmental plasticity and “refers to the malleability of the brain during periods in which the brain is being built.” *Id.*

¹³⁷ See Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT’L ACAD. SCI. 8174 (2004).

¹³⁸ See *id.* at 8177; see STEINBERG, *supra* note 136, at 76–78.

¹³⁹ See Chein et al., *supra* note 124, at F2 (discussing the research regarding the different timetables on which the incentive processing and cognitive control systems mature).

minished decisionmaking capabilities. For example, researchers were able to pinpoint a neurological basis for increased risk-taking by adolescents when in the presence of their peers.¹⁴⁰ As the study found, “adolescents’ especially heightened propensity to take risks when with peers may derive from the maturational imbalance between . . . competing brain systems.”¹⁴¹

Recent legislative and judicial responses to this broad body of developmental and neurological research demonstrate how effective juvenile justice policy can be crafted from judicial opinions,¹⁴² state legislative reforms,¹⁴³ and new law enforcement policies and practices. Between 2005 and 2014, eleven states passed laws limiting the detention of youth in adult jails; five states raised the age of their juvenile court jurisdiction to some degree; fifteen states reformed their transfer laws; and twelve states changed their sentencing laws “to take into account the developmental differences between youth and adults.”¹⁴⁴ Since 2014, at least two states, Louisiana and New York, raised the age of juvenile court jurisdiction and significantly reduced the number of youth charged in adult court.¹⁴⁵ At the local level, a number of police and probation departments have launched innovative programs or policies consistent with what we now know about adolescent development. In Philadelphia, for example, officers have participated in trainings to help them understand the key features of adolescent

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

¹⁴² *See, e.g.,* *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *JDB v. North Carolina*, 564 U.S. 261 (2014); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁴³ CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS 2–3 (2014), http://www.campaignfor-youthjustice.org/images/nationalreports/state_trends-_updates_from_the_2013-2014_legislative_session.pdf [<https://perma.cc/7RVF-PSV2>] (discussing legislative changes between 2005 and 2014, when eleven states passed laws limiting the housing of youth in adult jails; five states raised the age of their juvenile court jurisdiction to some degree; fifteen states reformed their transfer laws; and twelve states changed their “sentencing laws to take into account the developmental differences between youth and adults”).

¹⁴⁴ *See id.* at 2–3. Typically, the age of juvenile court jurisdiction is the age at which cases against delinquent youth automatically originate in juvenile court. *See id.* at 4–5. Transfer statutes provide a mechanism for youth in the juvenile justice system to be transferred to adult court. *See id.* at 5.

¹⁴⁵ Kevin Litten, ‘*Raise the Age*’ Bill Passes House of Representatives, *TIMES-PICTAYUNE* (Aug. 9, 2016, 3:19 PM), http://www.nola.com/politics/index.ssf/2016/06/raise_the_age_bill_passes.html [<https://perma.cc/X2VC-GVK7>]; Jesse McKinley, ‘*Raise the Age*,’ Now Law in New York, *Is Still a Subject of Debate*, *N.Y. TIMES* (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/nyregion/raise-the-age-new-york.html?_r=0 [<https://perma.cc/U8SE-VM7K>].

development and to develop skills to improve their encounters with youth.¹⁴⁶

The last ten to fifteen years of juvenile justice reform might be called the developmental era of juvenile justice.¹⁴⁷ It is an era that should continue. Any new Commission should insist that juvenile justice policy and practice comport with the principles of contemporary developmental and neurological science, including research on the similarities in adolescent offending across race and class. Children of color raised in the “slums” are not as different as the racially disparate arrest data would suggest. A new Commission should ensure that youth of color are granted the same mitigating benefits of adolescence as white youth in the juvenile and criminal justice systems. This will be the Commission’s greatest challenge, as research on implicit racial bias demonstrates that black youth are often seen as older and more responsible for their behavior than white youth.¹⁴⁸

B. *Cognitive Science of Implicit Racial Bias*

Even without the benefit of recent advances in the study of cognitive bias, the 1965 Commission intuitively understood the impact of stereotypes, assumptions, and bias on the exercise of police discretion. Commenting on various sources of officer suspicion in a criminal investigation, the Commission observed that

a policeman in attempting to solve crimes must employ, in the absence of concrete evidence, circumstantial indicators to link specific crimes with specific people. Thus policemen may stop Negro and Mexican youths in white neighborhoods, may suspect juveniles who act in what the policemen consider an impudent or overly casual manner, and may be influenced by such factors as unusual hair styles or clothes uncommon to the wearer’s group or area.¹⁴⁹

What the Commission alludes to—in more anecdotal than scientific terms—is the impact of implicit racial bias on the broad range of discretion that police officers have. The police often make assumptions based on physical appearance, demeanor, apparent geographic incongruity, and adolescent culture and attitudes. As is true with developmental research, the study of cognitive bias has grown substan-

¹⁴⁶ See *infra* notes 287–88 and accompanying text.

¹⁴⁷ Cf. Barry C. Feld, *My Life in Crime: An Intellectual History of the Juvenile Court*, 17 NEV. L.J. 299, 302 (2017) (referring to the era as the “Kids Are Different” era).

¹⁴⁸ See *infra* notes 158–89 and accompanying text.

¹⁴⁹ PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *supra* note 1, at 79.

tially since the 1960s, especially as it relates to bias in the juvenile and criminal justice systems. All of us rely on cognitive shortcuts and biases to sort through the vast amount of information we receive and to manage the many decisions we must make every day.¹⁵⁰ Shortcuts allow us to filter information, fill in missing data, and categorize people and information according to cultural stereotypes.¹⁵¹

The study of “implicit racial biases” focuses on those cognitive shortcuts that involve race and include both “unconscious stereotypes (beliefs about social groups) and attitudes (feelings, either positive or negative, about social groups).”¹⁵² Implicit bias is often so subtle that we are generally not aware of it and may act on it reflexively without realizing it.¹⁵³ Once stereotypes and biases are subconsciously triggered by environmental stimuli, they may evoke negative judgments and behaviors that are involuntary and unplanned.¹⁵⁴ As a result, people of all races have implicit racial biases that may negatively affect their behavior, even those who actively support equality, vehemently reject racism and discrimination, and have positive relationships with people of other races.¹⁵⁵

The impact of implicit racial bias has been well documented in all phases of the criminal justice system.¹⁵⁶ Researchers have found evidence of implicit racial bias among police officers, potential jurors, judges, probation officers, prosecutors, defense attorneys, and policy-

¹⁵⁰ See generally L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 297–301 (2012).

¹⁵¹ See *id.*; see also Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 877 (2004).

¹⁵² L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2630 (2013).

¹⁵³ See Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 956 (2004); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1145 (2000); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 759 (2012); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2043 (2011).

¹⁵⁴ See Richardson, *supra* note 153, at 2043; Richardson & Goff, *supra* note 152, at 2629–30.

¹⁵⁵ See Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1540 (2004); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009); Richardson, *supra* note 153, at 2039; see also Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1072 (2006) (discussing studies in which African American and Latino test subjects reject racism but still display implicit bias).

¹⁵⁶ Implicit bias studies demonstrate that bias against blacks and Hispanics persists even when study subjects profess a commitment to racial equality. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1514 (2005); see also Richardson & Goff, *supra* note 152, at 2637 (summarizing studies).

makers.¹⁵⁷ The details of these studies are readily available to any new Commission. Most important for our discussion of racial disparities and adolescence, several studies have explored the unique ways in which implicit racial bias affects perceptions of childhood and adolescent innocence and culpability, predictions about adolescent reoffending, and recommendations for punishment or treatment after a juvenile adjudication. In one of the earliest studies, researchers reviewed 233 narrative reports written by probation officers in anticipation of a youth's disposition in juvenile court.¹⁵⁸ After controlling for

¹⁵⁷ See, e.g., Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1009–13, 1015–17 (2007) (finding that police officers and civilians were more likely to see weapon and elect to shoot black person in first half of trials of a video-game simulation in which they were confronted with a black or white person and were instructed to shoot if person was armed or press “don’t-shoot” button as quickly as possible if the person was unarmed); Eberhardt et al., *supra* note 151, at 881 (finding study participants quicker to believe an ambiguous object was a weapon when associating the object with a black face than with a white face); Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 L. & HUM. BEHAV. 413, 415 (2011) (summarizing implicit bias research conducted with defense attorneys); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 499 (2004) (demonstrating that police officers and juvenile probation officers who were primed with image of black adolescent assigned higher culpability and punishment than those who were not primed); Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 642 (2003) (finding that participants with higher levels of implicit bias took longer to perceive black faces in a movie clip change from hostile to friendly, but not white faces, and perceived the onset of hostility much earlier for black faces than white faces); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347–50, 381 (2007) (finding mock jurors significantly more likely to recall fictional defendant as being aggressive when he was black than when he was white or Hawaiian and finding judges prone to “stereotype-consistent memory errors,” causing them to remember facts through a racially biased filter); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 189–90 (2010) (finding evidence of bias that causes judges and jurors to associate black defendants with guilt); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 310 (2010) (explaining mock jurors primed with black perpetrator were significantly more likely to find ambiguous evidence to be indicative of guilt than white perpetrator); Lyon, *supra* note 153, at 759 (discussing implicit bias in public defenders); E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers’ Responses to Criminal Suspects*, 16 PSYCHOL. SCI. 180, 182 (2005) (finding police officers initially more likely to mistakenly shoot unarmed black suspects than unarmed white suspects in a simulated study but, over time, shifted from a liberal bias toward shooting in early trials to a more conservative response in later trials involving both black and white suspects); Rachlinski et al., *supra* note 155, at 1221 (finding both black and white judges displayed link between their bias in an Implicit Association Test and their judgments regarding individual defendants of different races).

¹⁵⁸ George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 557–84 (1998).

the severity of the youth's current and past criminal behavior, researchers found that probation officers were significantly more likely to attribute crime to internal personality causes, such as lack of remorse, lack of cooperation with the probation officer, and failure to take the proceedings seriously, when a black youth was involved rather than when a white youth was involved.¹⁵⁹ Those same probation officers were more likely to attribute crime to external influences, such as dysfunctional families, drug and alcohol use, difficulties at school, and the influence of delinquent peers, when white youth were involved.¹⁶⁰ Probation officers were also much more likely to view black youth as prone to criminal behavior in the future and to recommend sentences longer than the sentencing guideline range.¹⁶¹

A few years later, researchers tested the endurance of beliefs about adolescents' diminished culpability in the face of stereotypes that African-American youth are "violent, aggressive, dangerous, and possess adult-like criminal intent."¹⁶² To examine this question, researchers conducted two studies—one with police officers and one with probation officers—to study the impact of key decisionmakers' unconscious racial stereotyping on their perceptions of adolescent culpability, deserved punishment, and likely recidivism.¹⁶³ The researchers asked participants to read a vignette of a crime allegedly committed by a youth and rate the youth based on traits relating to their culpability, blameworthiness, and expected recidivism.¹⁶⁴ Although none of the participants received information about the race of the youth in the vignettes, some participants were primed with a series of words commonly associated with black Americans.¹⁶⁵ Consistent with the researchers' predictions, police officers who were primed with words about black Americans perceived the young offenders to be less immature (i.e., more "adult-like") and more responsible for their behavior than did officers who were not primed with race.¹⁶⁶ Similarly, probation officers who were primed with words about black Americans judged the alleged offender to be less immature, more vio-

¹⁵⁹ *Id.* at 563–64.

¹⁶⁰ *Id.* at 561, 563.

¹⁶¹ *Id.* at 563–64.

¹⁶² Graham & Lowery, *supra* note 157, at 485, 494, 499 (hypothesizing that widely held stereotypes about black youth would supersede shared cultural beliefs that adolescence is a "developmental period characterized by vulnerability, malleability, and immaturity in judgment").

¹⁶³ *Id.* at 487.

¹⁶⁴ *Id.* at 487, 490, 495.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 493.

lent, more culpable, more likely to reoffend, and more deserving of punishment.¹⁶⁷ In both instances, the participants ultimately endorsed harsher punishment for youth perceived to be more violent and culpable.¹⁶⁸ These outcomes were consistent across the ethnicity and gender of each participant and persisted even when the decisionmakers consciously desired to avoid prejudice.¹⁶⁹

In 2012, researchers studied the impact of race on public support for severe sentences such as life without the possibility of parole for youth under age eighteen.¹⁷⁰ To measure the extent to which the public believed that youth who commit serious crimes should be considered less blameworthy than adults who committed the same crime, researchers provided participants with a factual summary of a recent Supreme Court case involving a violent youth offender along with information in support of and in opposition to life without parole sentences for youth in nonhomicide cases.¹⁷¹ Specifically, participants read about a fourteen-year-old male with seventeen prior convictions on his record who brutally raped an elderly woman.¹⁷² In half of the case summaries, researchers manipulated the race of the offender from black to white.¹⁷³ Even when controlling for the participant's political ideology and evidence of racial bias, researchers found that study participants were more likely to favor harsher sentences, such as life without the possibility of parole, when they believed the offender was black than when believed the offender was white.¹⁷⁴

In perhaps one of the most comprehensive and revealing studies of all, a team of researchers conducted a series of four experiments with university students and police officers to examine the perceived ages and levels of culpability of black, Latino, and white boys given a variety of felony and misdemeanor offenses.¹⁷⁵ The researchers found that study participants perceived black boys as older and less innocent than white boys of the same age, especially among participants who

¹⁶⁷ *Id.* at 496.

¹⁶⁸ *Id.* at 493, 496.

¹⁶⁹ *Id.* at 499.

¹⁷⁰ See Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLoS ONE 1, 2 (2012).

¹⁷¹ See *id.* at 2 (citing Transcript of Oral Argument, *Sullivan v. Florida*, 129 S. Ct. 2157 (2010) (No. 08-7621)).

¹⁷² *Id.*

¹⁷³ See *id.* at 2.

¹⁷⁴ *Id.* at 2, 4 (reporting the results of 735 white American study subjects who are over-represented in jury pools, the legal field, and the judiciary).

¹⁷⁵ Phillip Ateeba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 529–35 (2014).

more readily associated black boys with apes.¹⁷⁶ In one pair of experiments, researchers first showed university students, and then police officers, a series of photographs of white, black, and Latino males between ages ten and seventeen along with a description of a felony or misdemeanor crime.¹⁷⁷ The participants were asked to estimate the age of each child and answer a series of questions related to the “suspect’s” culpability for the offense.¹⁷⁸ The university and law enforcement participants perceived black youth felony suspects as 4.53 and 4.59 years older, respectively, than they actually were, meaning that black boys thirteen-and-a-half years old could be misperceived as eighteen-year-old legal adults.¹⁷⁹ Study participants also perceived adolescent black felony suspects as significantly more culpable than white or Latino felony suspects for the identified crime.¹⁸⁰ Further nuancing their inquiry, researchers asked students and officers to take a “dehumanizing” implicit association test to determine the extent to which the officers associated black men with apes.¹⁸¹ This experiment found that the more readily participants implicitly associated black men with apes, the higher their age misperceptions and culpability ratings were for black suspects.¹⁸² In their final experiment, researchers found that the more officers implicitly associated black men with apes, the more frequently they had used force against black children relative to children of other races throughout their career.¹⁸³

Research has confirmed similar public perceptions of black girls.¹⁸⁴ In 2017, researchers surveyed 325 adults to determine “whether adults assign Black girls qualities that render them more like adults—and less innocent—than their white peers.”¹⁸⁵ Participants were randomly assigned to answer either a questionnaire that asked about their perceptions of black girls or about their perceptions of white girls.¹⁸⁶ As survey responses revealed, participants viewed black girls—especially in the age range of five to fourteen—as more likely

¹⁷⁶ *Id.* at 540.

¹⁷⁷ *Id.* at 530, 533.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 532, 534.

¹⁸⁰ *Id.* at 532, 534.

¹⁸¹ *Id.* at 534.

¹⁸² *Id.* at 532, 535.

¹⁸³ *Id.* at 535, 536.

¹⁸⁴ See REBECCA EPSTEIN ET AL., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> [<https://perma.cc/YTF3-6B3D>].

¹⁸⁵ *Id.* at 7.

¹⁸⁶ *Id.*

to appear and behave older than their stated age, more knowledgeable about adult topics, including sex, and more likely to take on more adult roles and responsibilities than would be expected for girls of their age.¹⁸⁷ Researchers refer to this phenomenon as the “adultification” of black youth.¹⁸⁸ Results confirming that adults view black girls as less innocent and more adult-like than their white peers help explain racial disparities in school discipline and juvenile court referrals, as well as the more punitive treatment of black girls in the juvenile justice system.¹⁸⁹

Collectively, this body of research demonstrates the profound impact of racial bias on juvenile justice policy, public tolerance for adolescent misconduct, and sentencing outcomes for children of color. Even in an era guided by extensive developmental research and strong public support for claims that children should be held less responsible for their actions and are capable through natural development and rehabilitation to desist from adolescent delinquency,¹⁹⁰ society has been consistently unwilling to grant black boys and girls the same leniency as other children. While judges and politicians may forgive or excuse white youth for their reckless indiscretions, key decisionmakers are more likely to hold black youth fully culpable for their conduct and deprive them of the special benefits and special considerations for youth.¹⁹¹

C. *Procedural Justice: Black Youths’ Responses to Racial Injustice*

Racial disparities in the criminal justice system should be of critical concern in any society committed to principles of fairness and equity, but racial disparities and other perceived injustices implicate more than principle. They also undermine public safety. In one of its

¹⁸⁷ *Id.* at 8.

¹⁸⁸ *Id.* at 2.

¹⁸⁹ *Id.* at 9–13.

¹⁹⁰ See Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, & Alleged APA “Flip-Flop,”* 64 AM. PSYCHOL. 583, 593 (2009).

¹⁹¹ See Kareem L. Jordan & Tina L. Freiburger, *Examining the Impact of Race and Ethnicity on the Sentencing of Juveniles in the Adult Court*, 21 CRIM. JUST. POL’Y REV. 185, 194–97 (2010); Brooke Donald, *Stanford Psychologists Examine How Race Affects Juvenile Sentencing*, STAN. NEWS (May 24, 2012), <http://news.stanford.edu/news/2012/may/race-juvenile-offenders-052412.html> [<https://perma.cc/686A-73ST>] (quoting Aneeta Rattan, lead author of the Stanford study); see also Nicholas Espiritu, *(E)racing Youth: The Racialized Construction of California’s Proposition 21 and the Development of Alternate Contestations*, 52 CLEV. ST. L. REV. 189, 199–201 (2005) (linking perception of violent crime as primarily perpetuated by youth of color and the passage of Proposition 21 in California, which made it possible to transfer youth as young as fourteen to adult court).

most insightful observations, the 1965 Commission noted that “[t]he slum dweller may not respect a law that he believes draws differences between his rights and another’s, or a police force that applies laws so as to draw such differences; he does recognize the law’s duty to deal with law-breakers, and he respects the policeman who does so with businesslike skill and impartiality.”¹⁹² The Commission was particularly aware of the impact of perceived police discrimination on the attitudes and responses of youth:

Naturally, the adolescents involved are aware of . . . police distinctions. They are at a notoriously sensitive age and are ready to see themselves as victims of police harassment. In the words of one boy: “Them cops is supposed to be out catching *criminals*. They ain’t paid to be looking after my hair!” When boys are actually stopped by policemen, their own attitudes and their demeanor appear often to play a part in what happens next. Some observers have suggested that those who act frightened, penitent, and respectful are more likely to be released, while those who assert their autonomy and act indifferent or resistant run a substantially greater risk of being frisked, interrogated, or even taken into custody.¹⁹³

These observations preceded a body of empirical research on procedural justice and the legal socialization of children that would follow twenty-five years later.¹⁹⁴ Because adolescence is a critical time during which youth form their own beliefs and norms about the law and legal institutions, youths’ perceptions of fairness and justice during adolescence may have a substantial impact on their willingness to obey the law as they transition into adulthood.¹⁹⁵ As intuited by the 1965 Commission, youth are particularly sensitive to issues of fairness and respect,¹⁹⁶ and negative experiences and negative attitudes youth acquire about the police during childhood and adolescence have a lasting effect on adults’ opinions about police.¹⁹⁷ Legal socialization is the process by which individuals come to understand and appreciate

192 PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *supra* note 1, at 60.

193 *Id.* at 79.

194 See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (providing some of the earliest research on procedural justice).

195 Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 220 (2005).

196 Jennifer L. Woolard et al., *Anticipatory Injustice Among Adolescents: Age and Racial/Ethnic Difference in Perceived Unfairness of the Justice System*, 26 BEHAV. SCI. & L. 207, 209 (2008).

197 Fagan & Tyler, *supra* note 195, at 218–19; Lyn Hinds, *Building Police-Youth Relationships: The Importance of Procedural Justice*, 7 YOUTH JUST. 196 (2007).

the law, the institutions that create those laws, and the people who enforce those laws.¹⁹⁸ Effective socialization occurs when youth develop a healthy respect for legal authority and internalize the social norms that prohibit illegal behavior.¹⁹⁹ Young people come to respect the law over time through a series of fair and “procedurally just” social interactions with legal authorities.²⁰⁰ When authorities enforce rules and make decisions fairly, young people are more likely to cooperate with those authorities and obey their rules.²⁰¹

Studies involving police have found a strong correlation between youths’ perceptions of police legitimacy and self-reported compliance with the law.²⁰² The more youth perceive police to behave fairly, the more likely they are to view the police as legitimate, the less cynical they are likely to be about the laws, and the more likely they are to comply with the rules.²⁰³ Thus, in the long run, fair and equitable policing enhances public safety, while racially disparate and arbitrary policing tends to erode law and order. Similarly, youth who experience the decisionmaking process in juvenile and criminal courts as fair and respectful are more likely to believe in the legitimacy of the law and, in turn, are less likely to reoffend.²⁰⁴ In one recent study, researchers found that perceptions of procedural justice and legitimacy were inversely associated with self-reported recidivism among youth on probation over and beyond well-established risk factors for delinquency, such as peer offending, substance abuse, and psychopathy.²⁰⁵

These studies should frame any contemporary analysis of criminal and juvenile justice reform. Racial justice is important not only to advance the system’s goals related to fairness, but also to reduce youth crime and improve public safety. As youth of color continue to perceive policing, courts, and corrections as biased and unfair, they have

198 Fagan & Tyler, *supra* note 195, at 220.

199 Rick Trinkner & Ellen S. Cohn, *Putting the “Social” Back in Legal Socialization: Procedural Justice, Legitimacy, and Cynicism in Legal and Nonlegal Authorities*, 38 L. & HUM. BEHAV. 602, 602 (2014).

200 *Id.*; Fagan & Tyler, *supra* note 195, at 222.

201 Trinkner & Cohn, *supra* note 199, at 603.

202 *Id.* at 606–08; Erika K. Penner et al., *Procedural Justice Versus Risk Factors for Offending: Predicting Recidivism in Youth*, 38 L. & HUM. BEHAV. 225, 225 (2014).

203 See Penner et al., *supra* note 202, at 234; Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC’Y REV. 513, 536 (2003) (noting that people are more cooperative with authority when treated with fairness and respect); Trinkner & Cohn, *supra* note 199, at 608.

204 See Fagan & Tyler, *supra* note 195, at 236; Penner et al., *supra* note 202, at 225, 230–32.

205 Penner et al., *supra* note 202, at 225, 232 (explaining that reduced recidivism occurred in the short term but did not persist in the long term, likely due to instability of youths’ opinions over time and youths’ tendency to focus on the present).

little incentive to obey the law and cooperate with the rehabilitative efforts of the juvenile courts.

III. RECOMMENDATIONS

At this moment, the National Criminal Justice Commission Act of 2017²⁰⁶ awaits further congressional action. Senator Gary Peters first introduced the Act in the Senate on March 8, 2017, and it was referred to the Senate Judiciary Committee on the same date.²⁰⁷ The bill remains in committee. Representative Theodore Deutch introduced two versions of a related bill in the House, the first on March 17, 2017, and the second on March 31, 2017. The latter version was identical to the Senate bill and also entitled the National Criminal Justice Commission Act of 2017.²⁰⁸ Both House versions were referred to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, where they remain. It is not clear when, or whether, Congress will move on these provisions. What is clear is that Senator Peters and his bipartisan cosponsors were right about the need for a new Commission. Given the shortcomings of the 1965 Commission's report and all that we have learned since, it is time for a comprehensive review of the criminal justice system and a thorough analysis of the nature, scope, and source of racial inequities in all aspects of the system. A new Commission must explicitly embrace the elimination of racial inequities as one of its core objectives and be intentional not only about eliminating the broader social discrimination that contributes to racial disparities in the system, but also about eliminating unfairness in the administration of criminal justice itself.

In furtherance of these objectives, a new Commission must thoroughly investigate the sources of disparity in criminal justice outcomes, including bias among key decisionmakers and inherent biases in the laws that undergird the system. With the benefit of fifty years of comprehensive arrest and crime data and a growing body of research on cognitive racial bias, adolescent development, and procedural justice, a new Commission will be well positioned to develop a robust and meaningful continuum of recommendations to eliminate unfairness in the system.

Following the 1965 Commission's lead, a new Commission must engage the entire community in the work of reform. In its seventh objective, the first Commission noted that "individual citizens, social-

²⁰⁶ S. 573, 115th Cong. (2017).

²⁰⁷ *Id.*

²⁰⁸ H.R. 1886, 115th Cong. (2017); H.R. 1607, 115th Cong. (2017).

service agencies, universities, religious institutions, civic and business groups, and all kinds of governmental agencies at all levels” should be involved in planning and executing changes in the criminal justice system.²⁰⁹ To that end, the Commission crafted recommendations for public and private entities, community-based coalitions and nongovernmental organizations, and federal, state, and local governments, as well as local communities. The Commissioners called for both social and legal reforms and sought changes in practice and procedure.

The recommendations in this Article are intentionally broad. They provide a framework upon which a new Commission can build. Each of the recommendations will require research, expert advice, and a review of best practices. These recommendations also focus specifically on the unique interplay between race, adolescence, and the court system. Although a new Commission will necessarily be concerned with eliminating discrimination and disparity for youth and adults, this Article focuses on youth as an entry point into reform. Not only did youth crime factor heavily into the 1967 Report, but, as discussed above, research also shows that fairness and equity have a significant impact on adolescents’ willingness to obey the law when they become adults. By focusing on fairness in the administration of juvenile justice, we have a lot to gain in both racial equity and public safety. Moreover, many, if not most, of the recommendations offered below will apply across the juvenile and criminal courts.

The recommendations that follow are organized loosely into four domains: (a) data collection, (b) legislative reform, (c) stakeholder responsibilities, and (d) community education. Of course, as the 1967 Report rightly concluded, criminal justice reform must be accompanied by structural and institutional reforms in other key social domains, such as education, employment, and housing.²¹⁰

A. Data Collection and Federal Oversight

The importance of accurate, nuanced, and longitudinal data cannot be overstated. As evident from the disastrous legislative backlash after the 1990s superpredator scare, incomplete data and faulty predictions based on high-profile incidents of violence or brief, time-limited upticks in crime produce ineffective responses to crime and increase recidivism. Research on the effects of youth incarceration reveal that the draconian law-and-order responses to adolescent offending have done little, if anything, to reduce recidivism. A number of

²⁰⁹ PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *supra* note 1, at xi.

²¹⁰ *Id.* at v.

state-based studies since the mid-1990s have shown that youth who have been incarcerated are no less likely, and in some cases are more likely, to reoffend than those who were sentenced to community-based alternatives.²¹¹ In some states, youth who served longer sentences in confinement showed little or no decrease in rates of rearrest compared to those who served shorter sentences.²¹² At least one study found that incarcerated youth were more likely to commit “homicide, violent crime, property crime and drug crimes” than their peers who were never incarcerated.²¹³

As noted in Part I, although the 1965 Commission emphasized the need for statistical research, it did not recommend that researchers track racial disparities at key decision points in the juvenile and criminal justice systems.²¹⁴ A new Commission should not only review existing data on historical trends in arrest and court processing but also recommend that all stakeholders track outcomes by race at every stage of the system, from arrest and diversion through sentencing and

211 See, e.g., TONY FABELO ET AL., *CLOSER TO HOME: AN ANALYSIS OF THE STATE AND LOCAL IMPACT OF THE TEXAS JUVENILE JUSTICE REFORMS 53–57* (2015), <https://csgjusticecenter.org/wp-content/uploads/2015/01/texas-JJ-reform-closer-to-home.pdf> [<https://perma.cc/384X-KKVE>] (finding that youth who had served time in Texas state-run facilities were more than two times more likely to be reincarcerated than those who were on probation in the community and finding in a multivariate analysis controlling for forty-one variables including demographics, school outcomes, gang affiliation, living situation, and prior offenses, that incarcerated youth were twenty-one percent more likely to be rearrested within one year than similarly situated youth who had been disposed to community supervision); Brent B. Benda & Connie L. Tollett, *A Study of Recidivism of Serious and Persistent Offenders Among Adolescents*, 27 J. CRIM. JUST. 111 (1999) (discussing study of Arkansas’ incarcerated youth finding that incarceration was most significant factor for predicting recidivism and the odds of recommitment to the Department of Youth Services (“DYS”) increased 13.5 times when the juvenile had a prior commitment in DHS); Thomas A. Loughran et al., *Estimating a Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders*, 47 CRIMINOLOGY 699, 722–23 (2009), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2801446> [<https://perma.cc/254T-QUM7>] (finding youth sentenced to custodial settings in Maricopa County, Arizona, and Philadelphia County, Pennsylvania, were no less likely to reoffend than youth who remained at home on probation); Mulvey et al., *supra* note 127, at 471 (finding that youth who offended least (i.e., low-risk) before custodial placement were more likely to reoffend after placement); Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges* 22 (Nat’l Bureau of Econ. Research, Working Paper No. 19102, 2013), <http://www.nber.org/papers/w19102> [<https://perma.cc/6XQ7-AC4J>] (discussing MIT study of 35,000 former Chicago public school students finding that youth who were incarcerated were sixty-seven percent more likely to be in jail again by the age of twenty-five than similar offenders who did not go to prison).

212 See, e.g., Loughran et al., *supra* note 211, at 702 (studying youth who were incarcerated for three to thirteen months and finding that youth who were sentenced to longer stays showed little or no decrease in rates of rearrest compared to those sentenced to shorter stays).

213 Aizer & Doyle, *supra* note 211, at 22.

214 See *supra* Section I.A.

postdisposition proceedings, such as revocation of probation. Data collection is critical to validate anecdotal claims of discrimination, help decisionmakers identify the sources of disparity, and aid in the search for solutions.

Beyond traditional data collection within the system, the Commission should also review existing youth violence and youth risk self-report data and engage with experts from the University of Michigan and the Centers for Disease Control and Prevention, who have been tracking youths' involvement in risky and delinquent behavior for over forty years.²¹⁵ In two major youth self-report studies, researchers determined that white youth engage in dangerous risk-taking behavior, such as drunk driving,²¹⁶ drug use,²¹⁷ and bringing a weapon to school,²¹⁸ at the same or higher levels than black or Hispanic youth. Self-report data provides an important response to claims that racial disparities at arrest are attributable solely to higher rates of offending among youth of color.

Although juvenile justice falls largely within the purview of state and local governments that are best equipped to understand the unique cultural and demographic needs of their youth population, there is an important role for the federal government to play. Most important, the federal government can provide financial incentives to drive data collection. Racial disparity in the juvenile justice system gained congressional attention in 1988 in response to pressure from state advisory groups concerned about disparities in the confinement of youth of color.²¹⁹ To address these inequities, improve outcomes for youth, and enhance public safety, Congress amended the Juvenile Justice and Delinquency Prevention Act ("JJDP") of 1974 by offering funding to states that would take action to decrease the disproportion-

²¹⁵ See JOHNSTON ET AL., *supra* note 132, at 1; *High School YRBS*, *supra* note 132.

²¹⁶ *High School YRBS*, *supra* note 132 (select "Unintentional Injuries and Violence"; select "Drove when they had been drinking alcohol"; then select year 2013 and column variable "Race") (indicating the percentage of students who drove when drinking alcohol: white, 10.4%; black, 6.2%; Hispanic, 6.2%).

²¹⁷ See JOHNSTON ET AL., *supra* note 132, at 36 ("In 12th grade, of the three racial/ethnic groups, [w]hites tend to have the highest rates of use on a number of drugs, including marijuana, hallucinogens, LSD specifically, hallucinogens other than LSD, salvia, narcotics other than heroin, OxyContin specifically, Vicodin specifically, amphetamines, Ritalin specifically, Adderall specifically, sedatives (barbiturates), tranquilizers, alcohol, getting drunk, cigarettes, and smokeless tobacco.").

²¹⁸ See *High School YRBS*, *supra* note 132 (select "Unintentional Injuries and Violence"; select "Carried a weapon on at least 1 day"; then select year 2009 and column variable "Race") (indicating the percentage of students who carried a weapon at least one day: white, 18.6%; black, 14.4%; Hispanic, 17.2%; multiracial, 17.9%; Asian, 8.4%; American Indian, 20.7%).

²¹⁹ Marrus & Seeratan, *supra* note 116, at 448–54.

ate confinement of youth of color in pre- and postadjudication juvenile justice facilities.²²⁰ Additional amendments in 1992 and 2002 reinforced Congress's commitment to reform by making the issue of disproportionate minority confinement a core requirement of the JJDP, tying states' eligibility for funding to the states' compliance with the core requirements and expanding funding and data collection from disproportionate minority *confinement* to disproportionate minority *contact*.²²¹

This latter amendment required states to collect data at all points of the juvenile justice system, not just at the points of confinement.²²² Key decision points include arrest, referral to court, diversion, secure detention, charging, adjudication, probation supervision, secure confinement, and transfer to adult court.

Continued authorization, adequate funding, and the reinforcement of the core principles of the JJDP should be a high priority in any contemporary criminal justice reform agenda. The JJDP was most recently reauthorized on August 1, 2017, with the Senate passage of the Juvenile Justice and Delinquency Reauthorization Act of 2017,²²³ following a decade-long delay after its expiration in 2007.²²⁴ Similar legislation, the Juvenile Justice Reform Act of 2017, passed in the House on May 24, 2017.²²⁵ Given its renewed attention to racial disparities in the juvenile justice system, the JJDP Reauthorization Act received strong support from civil rights organizations such as the NAACP.²²⁶ Going forward, funding incentives should favor community-based alternatives to incarceration and reinforce state requirements to collect data and develop strategies to reduce disproportionate minority contact as a core requirement of the JJDP.

²²⁰ Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (1974); HEIDI M. HSIA ET AL., U.S. DEP'T OF JUSTICE, DISPROPORTIONATE MINORITY CONFINEMENT: 2002 UPDATE (2004), <http://www.ncjrs.gov/pdffiles1/ojjdp/201240.pdf> [<https://perma.cc/66DV-HZY7>].

²²¹ For a comprehensive review of the treatment of disproportionate minority confinement or contact in the JJDP, see Marrus & Seeratan, *supra* note 116, at 448–54.

²²² *Id.* at 449–50.

²²³ Juvenile Justice and Delinquency Prevention Reauthorization Act of 2017, S. 860, 115th Cong. (2017).

²²⁴ Marrus & Seeratan, *supra* note 116, at 449.

²²⁵ Juvenile Justice Reform Act, H.R. 1809, 115th Cong. (2017).

²²⁶ *Reauthorization of Juvenile Justice Legislation Passes Another Big Hurdle!*, NAACP (Aug. 4, 2017), <http://www.naacp.org/latest/reauthorization-juvenile-justice-legislation-passes-another-big-hurdle> [<https://perma.cc/AL8N-ZDXX>].

B. Legislative Reforms: Rethinking the Criminal Law

While data collection helps researchers understand the ways in which bias affects individual decisionmakers at key decision points in the system,²²⁷ researchers pay considerably less attention to the ways in which the laws themselves define crime and delinquency in racially biased and developmentally inappropriate ways. A new Commission should work with experts to identify laws that either implicitly or explicitly criminalize normal adolescent behavior among youth of color. The Commission should also engage advocates who have been thinking about how to use the law prospectively to limit racial discrimination among system actors and assess the impact of any new legislation on youth of color. The NAACP, for example, has developed a toolkit for local advocates interested in adopting antiprofiling legislation,²²⁸ and the Sentencing Project has provided extensive guidance on racial impact statements.²²⁹

1. Decriminalizing Normal Adolescent Behavior

Ironically, one of the central debates that stalled the reauthorization of the JJDPa was congressional debate over the treatment of youth who engage in status offenses such as skipping school, running away, breaking curfew, and possessing or using alcohol, which are only crimes if committed by a minor.²³⁰ As the original drafters of the 1974 JJDPa understood and as research later confirmed, best practice advises against incarcerating youth for these behaviors. Nonetheless, some senators insisted for years that an exception be permitted for the incarceration of youth who commit status offenses in violation of a “valid court order.”²³¹ Thus, when a judge specifically orders a child to abide by a curfew, the judge may incarcerate the youth for failing to comply.

Consistent with best practice, any new or amended legislation should eliminate the valid court order exception and prohibit incarcer-

²²⁷ See *supra* notes 150–91 and accompanying text.

²²⁸ See NAACP, BORN SUSPECT 10 (2014), https://www.naacp.org/wp-content/uploads/2018/07/Born_Suspect_Report_final_web.pdf [<https://perma.cc/5MVN-4FGM>].

²²⁹ See Nicole D. Porter, *Racial Impact Statements*, SENT’G PROJECT (Dec. 1, 2014), <https://www.sentencingproject.org/publications/racial-impact-statements> [<https://perma.cc/5HZS-BSB4>].

²³⁰ Bill Myers, *Advocates Focus on Conference Committee After JJDPa Reauthorization Passes Senate*, JUV. JUST. INFO. EXCHANGE (Aug. 2, 2017), <http://jjie.org/2017/08/02/advocates-focus-on-conference-committee-after-jjdp-a-reauthorization-bill-passes-senate> [<https://perma.cc/3AKL-ZEL7>].

²³¹ *Id.*

ation for status offenses.²³² The Commission should also consult with state leaders and community advocates in Texas who led efforts to decriminalize truancy altogether and provide recommendations on how states can positively intervene in such behaviors without involving the justice system.²³³ Advocates convinced state leaders to repeal the state's longstanding truancy law after highlighting data from a Texas Appleseed study revealing that criminal prosecutions, fines, and incarceration had a disproportionate impact on low-income Hispanic, black, and disabled students and were more harmful than effective in improving school attendance.²³⁴

Equally if not more important, the new Commission should advocate for the decriminalization of certain adolescent behaviors on school grounds and in school-related activities.²³⁵ Considering the developmental research on normal adolescent impulsivity, peer influence, and risk-taking discussed in Section II.A,²³⁶ states might decriminalize or severely limit law enforcement responses to adolescent behaviors such as disorderly conduct, trespass, simple drug possession, disregard of police commands, petty thefts, school fights that do not involve serious injuries to others, and adolescent aggressive speech, including profanity and threats. Commissioners might consult with leaders in Clayton County, Georgia, or Birmingham, Alabama, who developed school offense protocols to reduce the number of school-based arrests and referrals to juvenile courts for low-level misdemeanor conduct.²³⁷ Following these new protocols, Clayton County was able to reduce its school-based referrals by more than seventy

²³² The House passed the Juvenile Justice Reform Act of 2017, H.R. 1809, 115th Cong. (2017), on May 23, 2017. *Reauthorization of Juvenile Justice Legislation Passes Another Big Hurdle!*, *supra* note 226. The Senate passed a related bill entitled Juvenile Justice and Delinquency Prevention Reauthorization Act of 2017, S. 860, 115th Cong. (2017), on August 1, 2017 (with two amendments from what the Judiciary Committee had proposed). Because the Senate version still contains the valid court order exception, it will need to be reconciled in conference with the House version of the bill. *See Juvenile Justice and Delinquency Prevention Reauthorization Act*, S. 860, 115th Cong. § 205(b)(15)(Q)(iii)(II) (2017). The Senate sent notice of their action (i.e., passing the bill and copy of what they passed) to the House. *Actions: S.860–115th Congress (2017–2018)*, CONGRESS.GOV, <https://congress.gov/bill/115th-congress/senate-bill/860/all-actions?overview=closed#tabs> [<https://perma.cc/C6C9-JFHA>]. It was marked as “received in the house” on August 4, 2017, and remains “held at desk.” *Id.*

²³³ *Texas Decriminalizing Students' Truancy*, USA TODAY (June 20, 2015, 6:16 PM), <https://www.usatoday.com/story/news/nation/2015/06/20/texas-truancy-absent-students-criminalized/29047285> [<http://perma.cc/NZQ9-63WL>].

²³⁴ *Id.*

²³⁵ Henning, *supra* note 62, at 444.

²³⁶ *See supra* notes 128–41 and accompanying text.

²³⁷ For a discussion of school offense protocols, see Henning, *supra* note 62, at 444–45.

percent between 2004 and 2010.²³⁸ It reduced the referral of African American youth by forty-six percent.²³⁹ Other recommendations might include the decriminalization of low-level drugs, such as marijuana, that contribute to the disproportionate arrests of youth of color. The Commission might follow the lead of jurisdictions like the District of Columbia that have legalized simple possession of marijuana for adults and decriminalized it for youth by making it a civil violation instead of a criminal offense punishable by incarceration.²⁴⁰

Beyond the school, the Commission should target state and local ordinances that explicitly ban dress commonly associated with hip-hop culture or with children of color. In the last decade, several cities across the country have made it a crime to wear saggy, baggy, or droopy pants.²⁴¹ Offenders who violate these provisions often face fines and community service obligations, in addition to the stigma of being arrested and ordered to conform to traditional dress norms. In the face of public pressure from organizations like the NAACP and constitutional challenges from legal advocates, some judges and legislators have rescinded these laws or found them unlawful.²⁴² Yet, the

²³⁸ *Id.*

²³⁹ Heather Cobb, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 581, 592 (2009).

²⁴⁰ See, e.g., 62 D.C. Reg. 880 (Jan. 23, 2015) (Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014, D.C. Law 20-565); 61 D.C. Reg. 3482 (April 4, 2014) (Marijuana Possession Decriminalization Amendment Act of 2014, D.C. Law 20-305). Of note, when decriminalizing the possession of small amounts of marijuana, the District of Columbia took further steps to minimize the disproportionate impact that marijuana use has had on youth of color by (1) legislating that neither the odor of marijuana nor the possession of an ounce or less of marijuana alone, or together, would constitute reasonable articulable suspicion of a crime; (2) restricting when marijuana use can result in the revocation of probation or community placement; and (3) limiting the District's ability to impose additional penalties for marijuana possession or use other than those explicitly outlined in the statute. See 61 D.C. Reg. 3482 (April 4, 2014).

²⁴¹ Jessica Higa & John-Michael Seibler, *Wearing Sagging Pants Just Became Illegal in Another Town. It's a Low Blow.*, DAILY SIGNAL, July 19, 2016, <http://dailysignal.com/2016/07/19/wearing-sagging-pants-just-became-illegal-in-another-town-its-a-low-blow> [<https://perma.cc/N6QH-A464>]; *Baggy Pants Law Will Fine Offenders in Louisiana Parish*, HUFFPOST (Apr. 14, 2013, 1:13 PM), https://www.huffpost.com/entry/baggy-pants-law-fine-louisiana_n_3080851 [<https://perma.cc/E88Q-96UL>]; *Saggy Pants Ban at Chicago Public Schools? Aldermen Push for Uniforms*, HUFFPOST (May 31, 2014, 1:40 PM), https://www.huffingtonpost.com/2012/05/31/saggy-pants-ban-at-chicag_n_1559248.html [<https://perma.cc/FKV4-VJAA>].

²⁴² *Florida City Repeals Saggy Pants Ordinance After Legal Threat from NAACP*, CBS TAMPA BAY (Sept. 17, 2014, 8:30 AM), <http://tampa.cbslocal.com/2014/09/17/florida-city-repeals-saggy-pants-ordinance-after-legal-threats-from-naacp> [<https://perma.cc/FJS8-W4R9>]; John Pertzborn, *City of Collinsville Repeals 'Sagging Pants' Ordinance*, FOX 2 NEWS (Sept. 13, 2017, 9:31 AM), <http://fox2now.com/2017/09/13/city-of-collinsville-repeals-sagging-pants-ordinance> [<https://perma.cc/AM44-5JBS>].

number of cities adopting these provisions continues to grow, with Timmonsville, South Carolina, passing such legislation in 2016²⁴³ and Augusta, Georgia, city leaders considering such legislation in 2017.²⁴⁴

2. *Racial Impact Statements*

Even when a law is racially neutral on its face, it may carry unforeseen consequences. Racial impact statements are a tool lawmakers can use to evaluate the potential racially disparate consequences of a law before adopting or implementing it.²⁴⁵ Racial impact statements function similarly to fiscal and environmental impact statements and contain statistical forecasts of a proposed law's effects on populations by race.²⁴⁶ Once presented with the facts, lawmakers may be able to rewrite the legislation to eliminate the disparate impact on minorities. Given that laws, particularly sentencing laws, are easier to modify prior to implementation rather than retroactively, racial impact statements are particularly useful in the criminal and juvenile justice context.²⁴⁷ Iowa, Connecticut, and Oregon have already passed legislation requiring racial impact statements when considering criminal justice policies, and the Minnesota Sentencing Guidelines Commission routinely produces racial impact statements, although it is not required to do so by law.²⁴⁸ Arkansas, Florida, Maryland, Mississippi, Texas, and Wisconsin have also introduced legislation to adopt racial impact statements.²⁴⁹

Any state committed to reducing the disproportionate number of youth of color in the juvenile justice system should consider partnering with third-party agencies, such as sentencing commissions, departments of corrections, and fiscal agencies, to produce racial impact statements.²⁵⁰ The federal government, twenty-one states, and the District of Columbia already have sentencing commissions likely capable of producing racial impact statements given the databases of statistics

²⁴³ Higa & Seibler, *supra* note 241.

²⁴⁴ Jason Raven & Britneé McCoy, *Commission Hears Support on Possible Sagging Pants Ordinance*, NEWS 12 WRDW (Apr. 18, 2017, 7:58 PM), <http://www.wrdw.com/content/news/Commissioner-wants-to-crack-down-on-sagging-pants-419088874.html> [<https://perma.cc/NV6G-W8JV>].

²⁴⁵ Porter, *supra* note 229.

²⁴⁶ Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 16 (2009).

²⁴⁷ *Id.*

²⁴⁸ Porter, *supra* note 229.

²⁴⁹ *Id.*

²⁵⁰ See Mauer, *supra* note 246, at 19.

they keep.²⁵¹ Many state and federal corrections agencies also keep sophisticated datasets that could help predict changes in prison populations based on current trends and could help in producing racial impact statements as well.²⁵² Alternatively, states could delegate the preparation of racial impact statements to budget or fiscal agencies that routinely prepare impact statements for legislative initiatives.²⁵³

3. *Anti-Racial Profiling Legislation*

According to a recent poll conducted by Reason magazine, seventy percent of Americans oppose the practice of racial profiling by law enforcement agencies and officers.²⁵⁴ Yet, in 2004, Amnesty International USA found that thirty-two million Americans have reported experiencing racial profiling and eighty-seven million Americans are at risk of victimization by the practice in their lifetime.²⁵⁵ Recognizing that racial profiling is both degrading to those who are profiled and ineffective as a law enforcement strategy, many community leaders and legislators have advocated for anti-racial profiling legislation to achieve racial equity and curtail human rights violations.²⁵⁶

To date, at least thirty states have enacted at least one anti-racial profiling law,²⁵⁷ while legislators in several other states have introduced similar provisions without success. For example, Oregon passed an antiprofiling bill in 2015 that created a system for people to report profiling incidences and required law enforcement agencies to pass formal profiling bans.²⁵⁸ In 2017, the state passed supplemental legislation creating a standard method of data collection and reporting in police traffic stops.²⁵⁹ Yet, in Alabama, a debate over similar data collection legislation stalled as legislators weighed other factors, such as

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Emily Ekins, *Poll: 70% of Americans Oppose Racial Profiling by the Police*, REASON (Oct. 14, 2014, 7:30 AM), <https://reason.com/poll/2014/10/14/poll-70-of-americans-oppose-racial-profi> [<https://perma.cc/3XJU-7YQX>].

²⁵⁵ NAACP, *supra* note 228, at 9.

²⁵⁶ PROACTIVE TEAM, RACIAL PROFILING: TOOLKIT ON STATE ANTI-RACIAL PROFILING LEGISLATION 2, 7 (2013) (“Racial profiling is an ineffective law enforcement practice.”).

²⁵⁷ NAACP, *supra* note 228, at 19.

²⁵⁸ Ian K. Kullgren, *Kate Brown Signs Bill Aimed at Stopping Police Profiling*, OR. LIVE (July 13, 2015, 11:08 PM), http://www.oregonlive.com/politis/index.ssf/2015/07/kate_brown_signs_bill_aimed_at.html [<https://perma.cc/8ZBA-ARLS>].

²⁵⁹ Jonathan Maus, *Oregon Governor Signs Anti-profiling Bill Aimed at Racially Motivated Traffic Stops*, BIKEPORTLAND (Aug. 18, 2017, 1:28 PM), <https://bikeportland.org/2017/08/18/oregon-governor-signs-anti-profiling-bill-aimed-at-racially-motivated-traffic-stops-239333> [<https://perma.cc/V6HC-FTMF>].

whether the legislation would send a harmful message of distrust in law enforcement.²⁶⁰ The U.S. Congress has also failed to pass any anti-racial profiling legislation despite Senator Ben Cardin's repeated attempts to secure support for the End Racial and Religious Profiling Act ("ERRPA").²⁶¹ Notwithstanding the endorsement of over twenty-four cosponsors in 2017, the bill has failed to pass due to the lack of bipartisan support.²⁶² A new Commission should encourage support for the passage of comprehensive and effective antiprofiling legislation.

Although anti-racial profiling statutes allow policymakers to articulate a commitment to racial justice, the NAACP has expressed concerns that not one state antiprofiling statute meets all of the provisions necessary for an effective law.²⁶³ In its 2014 report, *Born Suspect*, the NAACP provided a comprehensive review of existing antiprofiling legislation and identified several key components of model legislation.²⁶⁴ First, an effective law would set forth a detailed definition of racial profiling, including race, ethnicity, national origin, immigration or citizenship status, religion, gender, gender identity, gender expression, sexual orientation, housing status, occupation, and disability status. Second, the law would explicitly ban the practice of racial profiling by all law enforcement agencies and officers across a broad range of investigatory activities. These activities include all forms of pretextual stops in public and private transportation, immigration enforcement methods, and surveillance practices. Third, the law would provide a complaint process and legal recourse for violations in addition to penalties for repeat violators. Fourth, the law would mandate data collection, analysis and reporting, and training requirements for all law enforcement agencies and officers. Data would include race, gender, age, and immigration status, among other demographic factors. Finally, the law would provide funds for periodic retraining and equipment such as in-car and body cameras.

²⁶⁰ Mike Cason, *Alabama Senate Passes Bill to Track Racial Profiling by Police*, AL.COM (Jan. 16, 2018), http://www.al.com/news/index.ssf/2018/01/alabama_senate_passes_bill_to_6.html [<https://perma.cc/6U7N-3ZP4>].

²⁶¹ Press Release, Senator Ben Cardin, Cardin Introduces Bill to Ban Religious, Racial and Discriminatory Profiling by Law Enforcement (Feb. 16, 2017), <https://www.cardin.senate.gov/newsroom/press/release/cardin-introduces-bill-to-ban-religious-racial-and-discriminatory-profiling-by-law-enforcement> [<https://perma.cc/F3LU-WQ36>].

²⁶² *All Information (Except Text) for S.411—ERRPA*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/411/all-info> [<https://perma.cc/DQ66-MZXP>].

²⁶³ NAACP, *supra* note 228, at 19.

²⁶⁴ *See id.* app. at 000–004; PROACTIVE TEAM, *supra* note 256, at 4.

C. *Stakeholder Responsibilities: Police, Corrections, and Courts*

The 1965 Commission framed the criminal justice system as consisting of three parts: police, corrections, and courts.²⁶⁵ Individual decisionmakers within each sector of the system have an independent responsibility to identify and alleviate racial disparities.

1. *Police*

Although the 1965 Commission paid considerable attention to the tensions in police-minority community relations, it did not go far enough in studying the scope and source of those tensions. The Commission's recommendations for hiring a diverse pool of police officers and training in community relations missed the critical need for data tracking,²⁶⁶ reforms in department policies governing procedures for police stops, and training in important areas such as de-biasing strategies and adolescent development.

a. *COPS in Schools*

Given the substantial number of school-based referrals of youth to the juvenile justice system, the role of police officers in schools deserves special attention. Although the 1965 Commission considered the impact of racial discrimination and resource inequities in urban schools on the rise of youth crime,²⁶⁷ it did not examine the ways in which law enforcement responses to youths' school-based behavior might reinforce bias both in the school and the courts.

Much has changed in America's public-school system since the 1967 Report. Schools have militarized their security forces, and police officers now proliferate in schools as "school resource officers" ("SROs") in response to several high-profile school shootings in the 1990s.²⁶⁸ In 1999, the Office of Community Oriented Policing Services ("COPS") initiated the COPS in Schools grant program to facilitate federal financial support for hiring SROs in primary and secondary schools.²⁶⁹ President Obama's administration renewed support for this

²⁶⁵ See PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 1 (addressing the police, courts, and corrections in chapters four, five, and six, respectively).

²⁶⁶ See *supra* notes 41–45 and accompanying text.

²⁶⁷ See PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 1, at 69–71.

²⁶⁸ See Bethany J. Peak, *Militarization of School Police: One Route on the School-to-Prison Pipeline*, 68 ARK. L. REV. 195, 196, 208–13 (2015) (recounting that California's Compton Unified School District recently authorized its police officers to carry military-grade assault rifles, converting schools into correctional facilities or military zones).

²⁶⁹ BRAD A. MYRSTOL, JUSTICE CTR., UNIV. OF ALASKA ANCHORAGE, PUBLIC PERCEPTIONS OF SCHOOL RESOURCE OFFICER (SRO) PROGRAMS (2010), <https://scholarworks.alaska>

initiative in response to yet another school shooting in Connecticut in 2012.²⁷⁰ Ironically, SROs are especially common in urban public schools in impoverished communities, notwithstanding evidence that most recent mass shootings have occurred in schools and other venues dominated by middle-class whites.²⁷¹

The rapid growth of SROs has led to a tremendous increase in school-based arrests in general and racially disparate arrests in particular.²⁷² According to Department of Education statistics for the 2013–2014 school year, black preschool children were 3.6 times as likely as white preschool children to receive one or more out-of-school suspensions.²⁷³ Although black children represented 19% of preschool enrollment, they were “47% of preschool children receiving one or more out-of-school suspensions; in comparison, white children represent[ed] 41% of preschool enrollment, but 28% of preschool children receiving one or more out-of-school suspensions.”²⁷⁴ Department of Education data also revealed that black K–12 students were 3.8 times as likely as white students to receive one or more out-of-school suspensions.²⁷⁵ Although “6% of all K–12 students received one or more out-of-school suspensions,” 18% of black boys and 10% of black girls received such suspensions, compared to 5% of white boys and 2% of white girls.²⁷⁶ In the 2013–2014 school year, black students were 1.9 times as likely as white students to be expelled from

.edu/bitstream/handle/11122/7233/1008.02.sro_perceptions.pdf?sequence=1 [https://perma.cc/KGZ9-54DE].

²⁷⁰ *Police in Schools: Arresting Developments*, ECONOMIST (Jan. 9, 2016), <https://www.economist.com/news/united-states/21685204-minorities-bear-brunt-aggressive-police-tactics-school-corridors-too-many> [https://perma.cc/N7MH-N7WP]; see NATHAN JAMES & GAIL McCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS 12–13 (2013).

²⁷¹ See *Police in Schools: Arresting Developments*, supra note 270.

²⁷² See, e.g., Kerrin C. Wolf, *Booking Students: An Analysis of School Arrests and Court Outcomes*, NW. J.L. & SOC. POL’Y 77–78 (2013) (finding that although black students made up only thirty-two percent of the student body in Delaware, they accounted for sixty-seven percent of all students arrested); *Data Analysis: Most Commonly Charged Offenses by McKinney Police Department’s School Resource Officers, Disaggregated by Student Race: January 2012–June 2015*, TEX. APPLESEED (2015), https://www.texasappleseed.org/sites/default/files/McKinneyPDFact%20Sheet_2012-2015.pdf [https://perma.cc/845G-84QE] (finding that while African-American students made up only thirteen percent of the total school population in McKinney, they accounted for fifty-three percent of the disorderly conduct arrests and forty-six percent of the “disruption of class/transportation” offenses charged).

²⁷³ U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, 2013–2014 CIVIL RIGHTS DATA COLLECTION (2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> [https://perma.cc/3ZQK-WCS5].

²⁷⁴ *Id.* at 3.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

school without educational services.²⁷⁷ Although black boys represented 8% of all students, they accounted for 19% of students expelled without educational services.²⁷⁸ While black girls were 8% of all students, they accounted for 9% of students expelled without educational services.²⁷⁹ Black students were also 2.2 times as likely as white students “to receive a referral to law enforcement or be subject to a school-related arrest.”²⁸⁰

To correct these imbalances, some advocates have called for the removal of all police officers from schools,²⁸¹ while others have advanced more modest reforms such as limiting the scope of police authority in schools to drugs, weapons, or serious violent offenses.²⁸² For example, the Philadelphia police chief instructed his officers in 2014 to stop arresting youth for minor infractions, such as schoolyard fights and possession of small amounts of marijuana, which together accounted for approximately sixty percent of all school-based arrests.²⁸³ Similarly, Denver Public Schools signed a memorandum of understanding with the Denver Police Department to prevent officers from writing tickets for minor misbehavior such as bad language and to require officers to participate in training on topics such as teenage psychology and cultural competence.²⁸⁴

Any contemporary review of juvenile justice must seek experts to assess the role of SROs and identify strategies to reduce racial disparities in school-based referrals. Congress should also divest spending in SROs and reallocate funding to increase the number of school administrators, counselors, social workers, and mental-health professionals specially trained to respond effectively to adolescent behavior.²⁸⁵

²⁷⁷ *Id.* at 4.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ AMANDA PETTERUTI, JUSTICE POLICY INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS: EXECUTIVE SUMMARY (Nov. 15, 2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_executivesummary.pdf [<https://perma.cc/2TEH-GUTQ>].

²⁸² See Sadie Gurman, *Agreement Keeps Denver Police Out of Most School Discipline Problems*, DENVER POST (Feb. 19, 2013, 7:39 AM), <https://www.denverpost.com/2013/02/19/agreement-keeps-denver-police-out-of-most-school-discipline-problems> [<https://perma.cc/HS55-BD6T>] (discussing Denver Public Schools agreement with Denver Police Department to prevent officers from writing tickets for minor misbehavior).

²⁸³ *Police in Schools: Arresting Developments*, *supra* note 270.

²⁸⁴ Gurman, *supra* note 282.

²⁸⁵ See Arrick Jackson, *Police-School Resource Officers' and Students' Perception of the Police and Offending*, 25 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 631, 631 (2002).

b. Police Training

To improve relations between police and youth of color, officers—especially SROs—need training in three critical areas: adolescent development, implicit racial bias, and procedural justice. A few innovative programs have found that police who participate in training to enhance their knowledge of adolescent development hold more favorable attitudes toward youth after the training.²⁸⁶ In Philadelphia, new and experienced law enforcement officers participate in a training to help them understand the key features of youth culture, adolescence, and youth coping skills, as well as to distinguish between normal adolescent behavior and criminal conduct.²⁸⁷ In separate sessions, youth learn how “respect” impacts their interactions with police and discuss strategies for creating positive and safe encounters with law enforcement.²⁸⁸ The training also engages minority youth and experienced officers in facilitated discussions about policing and mutual mistrust and allows participants to suggest recommendations for improving youth-police relations.

A new Commission might consult with experts from Strategies for Youth (“SFY”), who developed a national curriculum for training police on how to work effectively with youth.²⁸⁹ SFY trains officers to draw upon their knowledge of adolescent development and engage youth with empathy, patience, and de-escalation techniques in response to youth outbursts. To address the unique interplay between police and children of color, police departments should pair adolescent development training with training in implicit racial bias and procedural justice. Studies suggest that well-intentioned actors can overcome automatic or implicit biases, at least to some extent, when they are made aware of the stereotypes and biases they hold, have the cognitive capacity to self-correct, and are motivated to do so.²⁹⁰ Other research recommends strategies such as stereotype replacement, counter-stereotypic imaging, individuation, perspective-taking, and in-

²⁸⁶ See, e.g., Valerie LaMotte et al., *Effective Police Interactions with Youth: A Program Evaluation*, 13 POLICE Q. 161, 174 (2010); see also ANNA BAHNEY ET AL., LAW ENFORCEMENT’S LEADERSHIP ROLE IN JUVENILE JUSTICE REFORM (2014), <https://www.theiacp.org/sites/default/files/all/i-j/JuvenileJusticeSummitReport.pdf> [<https://perma.cc/X4JS-WFST>].

²⁸⁷ BAHNEY ET AL., *supra* note 286.

²⁸⁸ *Id.*

²⁸⁹ STRATEGIES FOR YOUTH, <http://strategiesforyouth.org> [<https://perma.cc/3Z7D-LN2Y>].

²⁹⁰ See John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 McGEORGE L. REV. 1, 8–9 (2010) (summarizing research on strategies to reduce implicit judicial bias); Kang, *supra* note 156, at 1529–30, 1529 n.207 (2005); Rachlinski et al., *supra* note 155, at 1196–97, 1221 (indicating that judges are able to control implicit biases when they are aware of them and motivated to do so).

creased opportunities for contact with people of color to reduce implicit racial bias.²⁹¹

A few police departments have been successful in developing training curricula that seek to improve police-citizen contacts through procedural justice.²⁹² These trainings seek to enhance public trust and confidence in the police by teaching officers to treat people with dignity and respect in every interaction, make decisions based on facts instead of inappropriate factors such as race, give people a voice, and act in a way that encourages the community to believe they will be treated fairly and with goodwill in the future.²⁹³ Police departments that employ these principles ideally experience higher levels of cooperation in resolving crime, greater compliance with the law, more public support for the police, and greater deference to police in face-to-face interactions with civilians.

Although procedural justice strategies cannot fully resolve tensions between the police and youth of color, simple changes like explaining the reasons for a stop and respectfully responding to a youth's questions may help increase a youth's sense of justice.²⁹⁴ Deep and lasting improvements in police-community relations will require the police to eliminate aggressive and disproportionate stop-and-frisk practices in communities of color, increase oversight to prevent racially biased policing, and actively engage with the community to understand and address local concerns about harmful police conduct.

c. Best Practices in Policing: Trust and Legitimacy

State and local law enforcement agencies have been under considerable scrutiny in the last ten years in response to the rash of recent high-profile police-involved deaths that have led to federal investigations and national studies of police reform. In March 2015 and August 2016, respectively, the U.S. Department of Justice completed extensive investigations of the police departments in Ferguson, Missouri,

²⁹¹ Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1267–68, 1270–71 (2012).

²⁹² Lorraine Mazerolle et al., *Shaping Citizen Perceptions of Police Legitimacy: A Randomized Field Trial of Procedural Justice*, 51 CRIMINOLOGY 1, 33–63 (2013); DANIELA GILBERT ET AL., *PROCEDURAL JUSTICE AND POLICE LEGITIMACY: USING TRAINING AS A FOUNDATION FOR STRENGTHENING COMMUNITY-POLICE RELATIONSHIPS*, CALIFORNIA PARTNERSHIP FOR SAFE COMMUNITIES (2015), <https://www.bja.gov/bwc/pdfs/Procedural-Justice-and-Police-Legitimacy-Paper-CPSC-Feb-2015.pdf> [<https://perma.cc/3Q49-LZH5>].

²⁹³ Mazerolle et al., *supra* note 292, at 33–34.

²⁹⁴ *See id.*; Penner et al., *supra* note 202, at 234.

and Baltimore, Maryland. Each of the reports prepared in connection with those investigations provide important suggestions for reform that may be adapted to address the unique police-community dynamics in other jurisdictions.

The Department of Justice (“DOJ”) was particularly critical of unconstitutional and racially targeted stops, searches, arrests, and excessive uses of force that undermine public safety and community trust.²⁹⁵ The Ferguson report recommends enhanced tracking, review, and analysis of data in each of these categories.²⁹⁶ Other recommendations include policing methods that ensure fair and effective enforcement without regard to race or class, robust training, close supervision, data collection and analysis, and accountability for misconduct.²⁹⁷ Both reports acknowledge the important role of police-youth relations. In Baltimore, DOJ investigators found that local police used unnecessary and excessive force with youth and failed to adjust their tactics to account for the age and developmental status of the youth they encountered.²⁹⁸ In Ferguson, investigators urged the Ferguson Police Department to work with school administrators, teachers, students, and parents to improve school behavior and enhance learning without criminalizing youthful behavior or imposing lengthy suspensions.²⁹⁹ Investigators also recommend training and evaluations for SROs.³⁰⁰

Community policing featured prominently in both the Ferguson and Baltimore reports. In the Ferguson report, the DOJ called upon the local police department to engage the community in identifying the causes of crime and disorder and to focus on crime prevention.³⁰¹ Recognizing that community engagement helps police departments understand community concerns about police conduct, reduce racial stereotypes and biases, and restore trust within the community,³⁰² the

295 CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, at v, ix (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf [<https://perma.cc/K65H-RVMS>].

296 CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 91–92 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/GZG5-B3V6>].

297 *Id.* at 90–91, 94–96.

298 CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 85–87 (2016), <https://www.justice.gov/crt/file/883296/download> [<https://perma.cc/W9QM-5AKB>].

299 CIVIL RIGHTS DIV., *supra* note 296, at 94.

300 *Id.*

301 *Id.* at 87–88.

302 *Id.*; see also JACK GLASER, SUSPECT RACE 207–11 (2015) (discussing research showing

DOJ report urged Ferguson police to develop and implement a comprehensive community policing agenda that increases the officers' opportunity for positive interactions with community members outside of the traditional law enforcement context.³⁰³ DOJ investigators in Baltimore described the relationship between the Baltimore Police Department ("BPD") and many of the communities it serves as "broken."³⁰⁴ Investigators met with officers who openly expressed antagonistic feelings towards community members³⁰⁵ and lamented the BPD's failure to build effective partnerships with existing community groups to help combat crime.³⁰⁶ To address these concerns, investigators recommended that every BPD member, especially uniformed patrol officers, practice community collaboration and engagement and that the BPD implement training to teach effective community policing practices and develop a proactive community policing strategy to overcome divisive dynamics that disconnect residents and police forces.³⁰⁷

Also responding to concerns about police-related shootings and tensions in cities like Ferguson and Baltimore, President Barack Obama convened a national Task Force on Twenty-First Century Policing to identify best practices and recommendations for how policing can reduce crime while building public trust.³⁰⁸ Trust and police legitimacy received the highest priority in the Task Force's six broad categories of recommendations, and the Task Force identified procedural justice as the guiding principle upon which to improve police-community relationships.³⁰⁹ To that end, police must treat people with dignity and respect, give individuals "voice" in police encounters, be transparent, make neutral decisions, and convey trustworthy motives.³¹⁰ Specific recommendations to advance trust and legitimacy include measures that ensure transparency and police accountability in the community and publicly acknowledge the role of policing in past and

that community policing and similar approaches can help reduce racial bias and stereotypes and improve community relations); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 143–47 (2014) (describing how fully implemented and inclusive community policing can help avoid racial stereotyping and violence).

³⁰³ CIVIL RIGHTS DIV., *supra* note 296, at 90.

³⁰⁴ CIVIL RIGHTS DIV., *supra* note 298, at 157–58.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 158–60.

³⁰⁷ *Id.* at 160–61.

³⁰⁸ FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (2015), http://www.theiacp.org/Portals/0/taskforce_finalreport.pdf [<https://perma.cc/KW9D-JXY2>].

³⁰⁹ *Id.* at 1.

³¹⁰ *Id.* at 10.

present injustices. The Task Force also urged police departments to engage with the community in non-law-enforcement activities, evaluate existing police policies and procedures, and develop a diverse police workforce that reflects all aspects of the community the police serve.³¹¹

2. *Youth Corrections*

Youth corrections include a continuum of institutional and community-based programs to confine or rehabilitate youth. To reduce racial disparities in corrections, any new Commission must be attentive to the long-term impact of correctional choices on children of color. Specifically, the Commission should engage experts to evaluate the effectiveness and dangers of adolescent incarceration and the impact of bail, fines, and fees on indigent youth of color.

a. *Community-Based Alternatives to Incarceration*

The 1965 Commission stated a preference for community-based alternatives to incarceration in response to youth crime.³¹² That preference was accompanied by recommendations for the funding of federal, state, and local youth services bureaus that would rehabilitate children through counseling, education, recreation, and vocational opportunities. The early Commission's intuitive preference for community-based alternatives is now supported by a growing body of research that demonstrates that youth incarceration is not effective in reducing adolescent offending.³¹³

As noted in Section III.A, a number of studies have shown that youth who have been incarcerated are more likely—or, at least, no less likely—to reoffend than those who were sentenced to community-based alternatives.³¹⁴ For example, a 2015 Texas study analyzing the state and local impact of Texas juvenile justice reforms found that while many system-involved youth reoffended within five years re-

³¹¹ *Id.* at 9–16.

³¹² *See supra* notes 41–45 and accompanying text.

³¹³ Daniel S. Nagin et al., *Imprisonment and Reoffending*, in 38 CRIME & JUST. 115, 115–200 (Michael Tonry ed., 2009) (finding that multiple meta-analyses, or studies that combine the results of multiple other studies, also suggested that juvenile incarceration does not lower the likelihood of reoffending and in some cases increases it). *But see* PATRICE VILLETAZ ET AL., CAMPBELL COLLABORATION, THE EFFECTS OF CUSTODIAL VS. NON-CUSTODIAL SENTENCES ON RE-OFFENDING: A SYSTEMATIC REVIEW OF THE STATE OF KNOWLEDGE (2006).

³¹⁴ *See infra* notes 318–22 and accompanying text; *see also* Benda & Tollet, *supra* note 211, at 111–26 (discussing a 1999 study of Arkansas's incarcerated youth finding that incarceration was the most significant factor for predicting recidivism and that the odds of recommitment to the DYS increased 13.5 times when the juvenile had a prior commitment in DYS).

ardless of disposition, youth who had served time in state-run facilities were more than two times more likely to be reincarcerated than those who were on probation in the community.³¹⁵ In the same study, a multivariate analysis controlling for forty-one variables, including demographics, school outcomes, gang affiliation, living situation, and prior offenses, showed that incarcerated youth were twenty-one percent more likely to be rearrested within one year than similarly situated youth who had been assigned to community supervision at disposition.³¹⁶ A 2013 Massachusetts Institute of Technology study of 35,000 former Chicago public-school students showed that youth who were incarcerated were sixty-seven percent more likely to be in jail again by the age of twenty-five than similar offenders who did not go to prison.³¹⁷ The researchers also found that incarcerated youth were more likely to commit “homicide, violent crime, property crime and drug crimes” than their peers who were never incarcerated.³¹⁸ This study further examined the negative effects of incarceration on education, finding that youth who went to prison were thirty-nine percent less likely to finish high school than students from their same neighborhoods who did not serve time.³¹⁹

Studies have also demonstrated that longer sentences of confinement do not reduce recidivism any more than shorter sentences. A 2009 longitudinal study of youth adjudicated in Maricopa County, Arizona, and Philadelphia County, Pennsylvania, found that, after holding constant for sixty-six factors, youth sentenced to custodial settings were no less likely to reoffend than youth who remained at home on probation.³²⁰ The study found that of youth who were incarcerated for three to thirteen months, the youth who were sentenced to longer stays showed little or no decrease in rates of rearrest compared to those sentenced to shorter stays.³²¹ A 2010 study of the same data found that the youth who offended least (i.e., low risk) before custodial placement were more likely to reoffend after placement.³²²

Given the disproportionate placement of children of color in state juvenile justice institutions,³²³ it is essential that the Commission iden-

³¹⁵ FABELO ET AL., *supra* note 211, at 71.

³¹⁶ *Id.* at 57.

³¹⁷ Aizer & Doyle, *supra* note 211, at 22.

³¹⁸ *Id.* at 22–23.

³¹⁹ *Id.* at 19.

³²⁰ Loughran et al., *supra* note 211, at 699, 723.

³²¹ *Id.* at 702.

³²² See Mulvey et al., *supra* note 127, at 471.

³²³ See *supra* notes 223–32 and accompanying text.

tify and recommend strategies to eliminate correctional practices that are not only racially disparate but also ineffective. The Commission should consider several cost-effective, community-based interventions that have proven to reduce crime across a range of offending patterns, including those involving serious, violent, and chronically offending youth.³²⁴ Two such models are multisystemic therapy (“MST”) and functional family therapy (“FFT”).³²⁵ MST, which has been particularly successful with violent and aggressive youth, is a community-based intervention model grounded in developmental research that seeks to empower families with the skills and resources they need to cope with family challenges, address peer group concerns, and advocate on behalf of their children in the school and community.³²⁶ FFT seeks to strengthen the family by providing therapists who work to improve the emotional connection between youth and their parents and to teach authoritative parenting that imposes structure and limits on children.³²⁷ Other effective community-based intervention models include aggression replacement therapy (“ART”), which seeks to develop social skills, emotional control, and moral reasoning among chronically aggressive and violent adolescents, and trauma focused cognitive behavioral therapy (“TF-CBT”), which is designed to help adolescents from three to eighteen years of age overcome serious emotional problems caused by posttraumatic stress, fear, anxiety, and depression, by teaching children and parents new skills to process thoughts and feelings arising out of traumatic life events.³²⁸

b. Bail Reform

Bail reform efforts have gained considerable momentum over the last five years, due, at least in part, to a number of tragic high-profile cases, including the suicide of sixteen-year-old Kalief Browder in New York’s Riker’s Island,³²⁹ that have exposed the unfairness and irreversible harm that can result from holding youth in detention prior to trial. In addition to the psychological harms and physical abuse that

³²⁴ See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 217–20 (2008).

³²⁵ *Id.* at 217–19.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ See *Program Profile: Trauma Focused Cognitive Behavioral Therapy*, NAT’L INST. JUST. (June 21, 2011), <https://www.crimesolutions.gov/ProgramDetails.aspx?ID=195>.

³²⁹ For a compilation of stories on Kalief Browder, see *Kalief Browder*, NEW YORKER, <https://www.newyorker.com/topics/kalief-browder-in-the-new-yorker> [https://perma.cc/3TH3-PGU8].

youth like Kalief have suffered,³³⁰ research shows that pretrial detention decreases a youth's likelihood of graduating from high school and obtaining formal employment and increases a youth's likelihood of committing a new offense, taking a plea even when innocent, and receiving an out-of-home placement upon adjudication.³³¹ Given the high rates of poverty among youth of color in the juvenile justice system, a new Commission on the Administration of Criminal Justice should engage experts in a study of the racial impact of bail practices on the increasing mass incarceration of youth of color. Information available now reveals that although African-American youth represent thirteen percent of youth nationally,³³² they account for forty-two percent of youth detained.³³³ National data is not available on the assignment of bail for youth by race, but data reveals that black men are assigned bond amounts that are thirty-five percent higher than white men, and Latino men are assigned bond amounts that are nineteen percent higher than white men.³³⁴

When considering the impact of bail on youth, the Commission will need to study bail practices in both the juvenile and criminal justice systems. The most recent analysis of state juvenile bail statutes, which was conducted in 2005, indicated that bail for youth in the juvenile justice system was permitted in sixteen states, not permitted in eighteen states, and not discussed by case law or statute in seventeen other states.³³⁵ All states and the District of Columbia offer the possibility of money bail for adults, including bail for youth who have been

330 See RICHARD A. MENDEL, NO PLACE FOR KIDS 5 (2011), <http://www.aecf.org/m/recordedoc/aecf-NoPlaceForKidsFullReport-2011.pdf> [<https://perma.cc/2KXU-5DDH>]; see also Karen M. Abram et al., *Suicidal Thoughts and Behaviors Among Detained Youth*, JUV. JUST. BULL. 2 (July 2014), <https://www.ojjdp.gov/pubs/243891.pdf> [<https://perma.cc/7NK2-5XJA>].

331 See Willie Dobbie et al., *The Effects of Pre-trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* (Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016), https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy_bail_0.pdf [<https://perma.cc/G8JJ-GJTH>]; see also Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 471–73 (2016); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 761–62 (2017); Kareem L. Jordan, *Preventive Detention and Out-of-Home Placement: A Propensity Score Matching and Multilevel Modeling Approach*, 2 J. JUV. JUST. 41 (2012); Aizer & Doyle, *supra* note 211, at 3, 21, 28.

332 See NAT'L CONFERENCE OF STATE LEGISLATURES, DISPROPORTIONATE MINORITY CONTACT: JUVENILE JUSTICE GUIDE BOOK FOR LEGISLATORS, <http://www.ncsl.org/documents/cj/jjguidebook-dmc.pdf> [<https://perma.cc/EA4P-G83W>].

333 See *id.*

334 See Kelly Allen, *The Unintended Consequences of Money Bail*, BURNS INST. (Apr. 18, 2016), <https://www.burnsinstitute.org/blog/the-unintended-consequences-of-money-bail> [<https://perma.cc/Z2G3-BQYH>].

335 See Linda A. Szymanski, *Juvenile's Right to Bail in Pre-adjudicatory Proceedings*, NCJJ

transferred to criminal courts for prosecution as an adult.³³⁶ Advocates for bail reform in both systems have called for the elimination of monetary bail systems that allow any person to be detained solely as a result of their inability to pay.³³⁷ Other groups have recommended more limited reforms, such as the elimination of certain types of bonds, strict enforcement of speedy trial rights, and restrictions on bail bondsmen or for-profit entities that can be assigned to post bail.³³⁸

Even with these restrictions, money bail leaves considerable room for abuse. If concerns about community safety and risk of flight can be addressed with money, they can also likely be minimized with appropriate youth interventions and conditions of release.³³⁹ Some states have modified their detention statutes to limit the circumstances in which youth can be detained pending trial. In the District of Columbia, for example, legislators amended the juvenile preventative detention statute to create a presumption of release unless the youth poses a danger of significant harm to the person or property of others or a risk of flight.³⁴⁰ In less than a year, the new provision cut secure detention by over fifty percent.³⁴¹

3. Courts

Courts play a significant role in exacerbating racial disparities in the juvenile and criminal justice systems. As noted in Section I.C, youth of color penetrate at disproportionately high rates through all

SNAPSHOT, Sept. 2005, at 1, 1, http://www.ncjj.org/PDF/Snapshots/2005/vol10_no9_righttobail.pdf [<https://perma.cc/ESL8-6LZX>].

³³⁶ See *Pretrial Release Conditions*, NAT'L CONF. ST. LEGISLATURES (Sept. 15, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx#> [<https://perma.cc/UUE4-LAXT>].

³³⁷ See JUSTICE POLICY INST., *BAIL FAIL* (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf> [<https://perma.cc/335Y-3QPX>]; see also *How to Fix Pretrial Justice*, PRETRIAL JUST. INST., <https://www.pretrial.org/get-involved/learn-more/how-to-fix-pretrial-justice/> [<https://perma.cc/8S26-CSU5>].

³³⁸ See JUSTICE POLICY INST., *supra* note 337; see also PRETRIAL JUST. INST., *supra* note 337.

³³⁹ RICHARD A. MENDEL, *JUVENILE DETENTION ALTERNATIVES INITIATIVE: PROGRESS REPORT 2014*, at 8 (2014) <http://www.aecf.org/m/resourcedoc/aecf-2014JDAIProgressReport-2014.pdf> [<https://perma.cc/W7L6-5QCT>].

³⁴⁰ D.C. CODE § 16-2310 (as amended on Apr. 4, 2017, by D.C. Law 21-238, § 102(c), 63 DCR 15312).

³⁴¹ See *Youth Population Snapshot*, DEP'T OF YOUTH REHABILITATION SERVS. (Jan. 17, 2018, 9:00 AM), <https://dysr.dc.gov/page/youth-snapshot> [<https://perma.cc/RGF6-6QNT>]. According to the DYRS population statistics, the population at the Youth Services Center was ninety-one on April 4, 2017 (the effective date of the Comprehensive Youth Justice Amendment Act of 2016), and thirty-nine on January 2, 2018, the most recent date listed on the spreadsheet. *Id.* This represents a decline of fifty-seven percent over the course of ten months. *Id.*

stages of the juvenile justice system. Any strategy to reduce disproportionate minority contact should consider the advantages and disadvantages of risk-assessment instruments and other decisionmaking tools that guide outcomes at key decision points in the system. The Commission should recommend that all key decisionmakers participate in implicit-bias training and implement debiasing strategies.

a. Risk Assessment Instruments

Since the 1965 Commission released its Report, many jurisdictions have adopted risk assessment instruments and evidence-based sentencing tools to aid judges and probation officers in making key decisions in the criminal justice system and reduce racial disparities.³⁴² Unfortunately, these tools have achieved limited success.

Risk-assessment instruments (“RAIs”) rely on data or information about a child and the child’s family to assess the child’s risk of danger to the community during the court process.³⁴³ Probation officers and other court officials use risk-assessment instruments to make decisions regarding intake or diversion from the juvenile justice system, charging, pretrial detention, disposition, and the level of security needed in a postadjudication placement.³⁴⁴ Risk factors include quantifiable information such as age, prior arrests and convictions, family demographics, and family criminal history, as well as more subjective factors, such as parental supervision, negative peer influences, and purported gang involvement.³⁴⁵

Although proponents of RAIs contend that their underlying statistical algorithms reduce racial disparities and minimize incarceration,³⁴⁶ there is still considerable debate about their viability and value. Scholars, policymakers, and advocates have long worried that RAIs merely reinforce existing biases in the system by relying on seemingly race-neutral risk factors that closely align with race.³⁴⁷ For

³⁴² Anna Maria Barry-Jester et al., *The New Science of Sentencing*, MARSHALL PROJECT (Aug. 4, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/08/04/the-new-science-of-sentencing> [<https://perma.cc/AA9F-4YQP>].

³⁴³ See *id.* (reporting that RAIs are used at some stage of the criminal justice process in nearly every state and utilize such variables as the age of the child, gang association, and level of parental supervision); see also Birkhead, *supra* note 62, at 416–17.

³⁴⁴ Birkhead, *supra* note 62, at 416–17.

³⁴⁵ *Id.* at 412, 417.

³⁴⁶ *Id.* at 418 (citing ANGELE CHRISTIN ET AL., COURTS AND PREDICTIVE ALGORITHMS 1–2 (2015)).

³⁴⁷ *Id.* at 417; Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 821–23 (2014) (providing the equal-protection concerns of evidence-based sentencing based on socioeconomic status and demographics); Eric Holder,

example, RAIs that increase risk scores for youth who live in single-parent homes or other nontraditional family structures often penalize youth of color. Similarly, tools that rely on a child's prior-arrest record or the criminal history of the child's family members are likely to disadvantage youth who live in heavily policed neighborhoods. Thus, even quantifiable information carries a layer of subjectivity as police exercise discretion in deciding whom to stop and arrest. At a minimum, these tools must be rigorously tested and screened for bias before they are adopted.³⁴⁸

b. Individual Stakeholder Responsibility

Any new Commission must identify strategies to root out implicit bias at every critical decision point in the juvenile and criminal justice systems. Every stakeholder has an independent and collective responsibility to address racial bias and discrimination in the system. Although reform efforts often focus on policing as the most significant contributor to racial disparities, every stakeholder must be aware of how stereotypes and biases affect their own decisions and hold other key decisionmakers accountable for racial disparities. Stakeholders who do not take an active stance against racial inequities become complicit, if not active, contributors in perpetuating disparities in the system.

After a child is arrested, prosecutors have a unique responsibility as gatekeepers of the juvenile justice system to filter out court referrals based on explicit racial discrimination or implicit bias.³⁴⁹ Even when lawmakers fail to decriminalize normal adolescent behavior, prosecutors may establish community standards by declining to prosecute low-level, nonviolent offenses, especially in certain schools and neighborhoods of color, and instead refer youth for diversion pro-

Attorney Gen., U.S. Dep't of Justice, Address at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference (Aug. 1, 2014), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th> [<https://perma.cc/VL4X-8SAG>] (expressing concern that risk assessments inject bias into the court system); see also Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 238 (2015).

³⁴⁸ See DAVID STEINHART, JUVENILE DETENTION RISK ASSESSMENT 5–6 (Annie E. Casey Found. 2006) <http://www.aecf.org/m/resourcedoc/aecf-juvenile-detention-risk-assessment-1-2006.pdf> [<https://perma.cc/285P-D6GG>] (stating that although certain risk instruments have curbed subjective decisions to incarcerate children in locked facilities, improperly drafted ones can produce “higher rates of secure detention, overcrowded juvenile facilities, and higher government costs”).

³⁴⁹ See generally Henning, *supra* note 62.

grams.³⁵⁰ Likewise, juvenile court intake probation officers may recommend culturally appropriate alternatives to court involvement and urge the juvenile court judge to allow a youth to remain in the community when delinquency charges are necessary.³⁵¹

Judges may address racial disparities by insisting upon rigorous and unbiased probation reports, taking active steps to resist their own implicit associations between race and crime, and rejecting racially coded language and risk factors that drive critical decisions in juvenile cases. At the evidentiary stages of the case, judges should rigorously review police encounters with youth and exclude evidence obtained as a result of unlawful and physically or verbally aggressive conduct by the police. In determining whether the police had reasonable articulable suspicion to stop or frisk a child, the reviewing court may consider a range of factors including the time and location of the purported offense, the suspect's flight, furtive gestures, nervousness, presence in a high-crime area, and association with known offenders.³⁵² Judges should be attentive to the ways in which each of these factors serve as a proxy for race and adolescence. For example, a child's presence in a high-crime area and association with others who have been arrested is virtually synonymous with race in certain cities. Flight from the police is also increasingly common among innocent black youth who are frightened by police shootings and naturally impulsive as adolescents.³⁵³ As such, these factors offer little evidence of guilt.

Even defense attorneys, who are generally perceived as the champions of their client's interests, are not immune from the cognitive effects of racial stereotypes and assumptions.³⁵⁴ In one study measuring implicit bias among capital habeas lawyers, capital trial lawyers, and first-year law students, researchers found that all three groups demonstrated some bias or preference for whites.³⁵⁵ In another study, researchers found that defenders were more willing to accept and recommend plea offers that included more severe sentences for black clients than for white clients.³⁵⁶ Thus, like all court actors in the juvenile

³⁵⁰ See *id.* at 444–45.

³⁵¹ See *id.* at 443–45.

³⁵² See *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000); *Terry v. Ohio*, 392 U.S. 1, 28 (1968).

³⁵³ Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 AM. CRIM. L. REV. 189, 222–23 (2017).

³⁵⁴ Lyon, *supra* note 153, at 762.

³⁵⁵ Eisenberg & Johnson, *supra* note 155, at 1542–45.

³⁵⁶ Edkins, *supra* note 157, at 419.

courts, defenders must participate in implicit racial bias trainings and develop strategies to overcome their biases.

Defenders not only have an obligation to monitor and ameliorate their own biases, but they also have an obligation to challenge racial injustice at every stage of the juvenile case.³⁵⁷ Because the attorney-client relationship is often the primary lens through which children understand broader notions of law, liberty, justice, and fairness and develop positive or negative responses to the rehabilitative goals of the juvenile court, youth who believe their attorneys are biased or complicit in racial injustice may lose respect for the court system and refuse to cooperate with their attorneys or other system actors.³⁵⁸ Any contemporary Commission recommendations must include adequate resources for defenders, comprehensive defender training, and attorney-practice standards that insist upon loyal, client-directed legal advocacy as one the greatest safeguards against the harmful effects of implicit bias.³⁵⁹ As defenders confront their own biases, hopefully they will become even more outraged by the myriad obvious and subtle racial injustices throughout the system and motivated to challenge them head-on.

D. *Community Engagement*

As evident throughout these recommendations, community engagement is an essential component of any criminal justice reform effort. In addition to, or as part of, the community policing initiatives outlined in Section II.A, the Commission should actively engage community leaders and impacted youth and their families in all aspects of juvenile and criminal justice reform. As a framework for those conversations, the Commission should urge law enforcement agencies, courts, and local communities to facilitate community satisfaction surveys that provide leaders with information about community concerns and local priorities and educate communities on existing youth justice initiatives.

1. *Community Satisfaction Surveys*

In an era when police-community relations are perpetually strained, community satisfaction surveys may provide important infor-

³⁵⁷ Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 679, 691 (2017); Marrus & Seeratan, *supra* note 116, at 496–97, 506, 510.

³⁵⁸ See Henning, *supra* note 357, at 679–80.

³⁵⁹ *Id.* at 682–86.

mation upon which to build an effective reform agenda.³⁶⁰ Community satisfaction surveys provide qualitative information that goes beyond the traditional measures of police workload, arrest activity, reported offenses, and calls for service and allow police officers to become more responsive to community concerns and perceptions of injustice.³⁶¹ For example, researchers have found that the public's perception of police performance is shaped largely by officers' "demeanor, fairness and impartiality, emotional and informational support, and professional competence" during encounters with citizens.³⁶²

Law enforcement agencies have used community satisfaction surveys since at least the 1980s to assess citizens' encounters with police, foster community engagement, and address specific issues important to local communities.³⁶³ By 1999, cities like Scottsdale, Arizona, and Reno, Nevada, were conducting annual citizen satisfaction surveys for the specific purpose of gathering feedback on police performance.³⁶⁴ In 1999, the U.S. Department of Justice, through a joint project of the Bureau of Justice Statistics and the Office of Community Oriented Policing Services, introduced a guide for the development and administration of community satisfaction surveys by local police departments.³⁶⁵ The Department explained that in an age of community policing, any "complete measure of success" would necessitate input from community members, and "[s]ince these surveys provide a measure of police performance, they can be used to analyze the way police deliver services and possibly change the allocation of resources where needed."³⁶⁶

A new Commission on criminal justice reform should engage experts to identify best practices in the administration of community surveys. For many years, the Virginia Beach Police Department has employed in-person, door-to-door surveys to gauge public reactions to police facilities and services, as well as new ideas and proposals.³⁶⁷ Al-

³⁶⁰ See Dennis P. Rosenbaum et al., *Measuring Procedural Justice and Legitimacy at the Local Level: The Police-Community Interaction Survey*, 11 J. EXPERIMENTAL CRIMINOLOGY 335, 339–40 (2015).

³⁶¹ *Id.* at 337, 339.

³⁶² *Id.* at 341.

³⁶³ *Id.* at 339, 342; DEBORAH WEISEL, U.S. DEP'T OF JUSTICE, NCJ 178246, CONDUCTING COMMUNITY SURVEYS 4 (1999), <https://www.bjs.gov/content/pub/pdf/ccspglea.pdf> [<https://perma.cc/6MXR-E236>].

³⁶⁴ WEISEL, *supra* note 363, at 4.

³⁶⁵ *Id.* at 1.

³⁶⁶ *Id.*

³⁶⁷ See Jim Cervera, *Ask a Cop for a Cup of Coffee and Some Conversation*, VIRGINIAN-PILOT (Aug. 20, 2014), <https://pilotonline.com/opinion/columnist/guest/cervera-ask-a-cop-for-a>

though the chief of the Virginia Beach department acknowledged that their method is “outdated, inefficient, [and] labor-intensive,” he defended the personalized face-to-face method as a useful way to diffuse tension between citizens and the police.³⁶⁸ Recently, researchers have advocated for a more standardized, qualitative measurement of police performance, which police departments may develop in partnership with a local college, university, or reporting firm. In 2014, Dr. Dennis P. Rosenbaum of the University of Illinois at Chicago created the Police-Community Interaction Survey (“PCI Survey”), a comprehensive, web-based survey “designed to measure the quality of police-citizen encounters” at the local level.³⁶⁹ Through a range of questions, including about the ethnicity of the engaging officer and the community member’s perception of whether they have been treated with dignity and respect,³⁷⁰ the survey seeks to measure police effectiveness, police legitimacy, community members’ satisfaction with police contact, and perceptions of procedural justice during the interaction.³⁷¹

When constructing and administering community satisfaction surveys, agencies should consider, among other variables, the length of the survey, how the survey will be administered, the sample population, and the types of questions asked. The survey agency should also make sure the survey is unbiased and representative of the community it seeks to survey by being attentive to the identity of the person conducting the survey,³⁷² the socioeconomic class of survey participants,³⁷³ and the background of survey participants.³⁷⁴ Most important, agencies should complete longitudinal studies to track responses to community satisfaction surveys over time and determine what effects, if any, the surveys and consequent change in department behavior have had on public perceptions of their own department.³⁷⁵

cup-of-coffee-and/article_c299b02d-4c0f-5aa0-9aeb-d2e80c1af22d.html [https://perma.cc/KY9H-6Q7Q]; see also MAJOR CITIES CHIEFS ASS’N ET AL., ENGAGEMENT-BASED POLICING 11 (2015), https://www.majorcitieschiefs.com/pdf/news/community_engagement_5_27_15.pdf [https://perma.cc/VA8X-22PM].

³⁶⁸ Cervera, *supra* note 367.

³⁶⁹ Rosenbaum et al., *supra* note 360, at 345.

³⁷⁰ DENNIS P. ROSENBAUM ET AL., NAT’L POLICE RESEARCH PLATFORM, RESULTS FROM THE POLICE-COMMUNITY INTERACTION (PCI) SURVEY 2, 4 (2014).

³⁷¹ Rosenbaum et al., *supra* note 360, at 335.

³⁷² See *id.* at 342.

³⁷³ See WEISEL, *supra* note 363, at 5.

³⁷⁴ See *id.*

³⁷⁵ Rosenbaum et al., *supra* note 360, at 336–37.

2. *Community Education and Public Opinion Polls*

Community education is equally important in building support for juvenile and criminal justice reform. As evident in the fallout from the faulty information about race and adolescent offending in the 1960s and 1990s, public perception may be easily manipulated to inspire fear of black youth and undermine public confidence in the rehabilitative potential of the juvenile justice system.³⁷⁶ When stoked by media accounts of isolated, high-profile violence or pseudoacademic predictions of rising deadly crime, state and local constituents readily support punitive law-and-order responses to adolescent offending, including transfer to adult court and sentences of life without the possibility of parole. However, when the public is equipped with accurate and race-neutral data about youth crime and educated on the range of rehabilitative options, national opinion polls show significant voter support for community-based rehabilitative options rather than incarceration.

In 2014, for example, researchers found in a bipartisan public opinion survey by the Pew Charitable Trusts that seventy-five percent of survey participants supported strategies to provide young offenders with the treatment, counseling, and supervision they need to reduce offending, even if that means they spend no time in a juvenile corrections facility.³⁷⁷ Only twenty-one percent supported the counter approach of ensuring that young offenders receive serious punishments, including time in a juvenile correctional facility, instead of a “slap on the wrist.”³⁷⁸ In a more recent 2017 national poll commissioned by the Youth First Initiative and conducted by GBA Strategies, pollsters found that a majority of Americans believe that youth prisons should be closed and replaced with rehabilitation and prevention programs.³⁷⁹ Eighty-seven percent of Americans support incentives for local governments to invest in alternatives to incarceration for youth.³⁸⁰ The GBA Strategies report also demonstrated strong support for reducing racial and ethnic disparities in the juvenile and criminal justice sys-

³⁷⁶ See *supra* notes 86–115 and accompanying text.

³⁷⁷ PEW CHARITABLE TRUSTS, PUBLIC OPINION ON JUVENILE JUSTICE IN AMERICA 1 (2014), https://www.pewtrusts.org/~media/assets/2015/08/pspp_juvenile_poll_web.pdf [<https://perma.cc/ZR58-9J7T>] (noting how participants were registered voters who were equally split among conservative, liberal, and independent).

³⁷⁸ *Id.*

³⁷⁹ GBA STRATEGIES, POLL RESULTS ON YOUTH JUSTICE REFORM 3 (2017), <http://www.youthfirstinitiative.org/wp-content/uploads/2017/02/Youth-First-Initiative-National-Poll-2017.pdf> [<https://perma.cc/S4CS-NEUH>].

³⁸⁰ *Id.* at 1.

tems.³⁸¹ Americans' support for reform is based on the beliefs that rehabilitation both works and saves taxpayer dollars, and that youth who have committed delinquent acts are capable of positive change.³⁸²

CONCLUSION

The time is right for another comprehensive review of the juvenile and criminal justice systems. Recent police-involved shootings of black youth and resulting riots in affected communities create an imperative for racial justice reform. The system can no longer tolerate the criminalization of normal adolescent behavior and the mass incarceration of children of color who are abused and psychologically traumatized in adult and juvenile justice facilities. This Article urges Congress to pass the National Criminal Justice Commission Act of 2017 and make the elimination of racial discrimination and inequity one of the core objectives for the new Commission.

Learning from the insights and shortcomings of the 1965 Report, *The Challenge of Crime in a Free Society*, a new Commission must be honest about America's long history of racial inequities in the very administration of criminal justice. The Commission cannot afford to fuel racialized fears with incomplete data, unreliable research, and anecdotal accounts of violent youth crime. While a new Commission is not likely to refer to poor American youth as "slum children," it should also avoid the common racially coded terms of the day. Our young people are youth, adolescents, teens, and children. They are not "juveniles" or "delinquents," and even those who have committed the most dangerous offenses are not "WOWs," the "worst of the worst." The Commission must avoid any language that undermines racial equity and makes it easier to forget that children of color are children. Fortunately, a new Commission will have the benefit of fifty years of research on normal adolescent development, implicit racial bias, and procedural justice to aid them in their analysis. With the emerging evidence of best practices in policing and juvenile justice reform identified in this Article, the Commission can develop a comprehensive blueprint for developmentally appropriate and racially equitable responses to youth crime.

381 *Id.*

382 *Id.* at 2.