

CRIMINALIZING BLACK ADOLESCENCE: Synthesizing
Discourses of Diminished Capacity Jurisprudence and
Perceptions of Black Criminality.

by

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The contemporary juvenile justice system is characterized by a striking racial disparity in which young, Black boys are the most disadvantaged at every level. This dynamic, first, is contextualized by the history of juvenile crime in which Black youth were dubbed ‘superpredators’ undeserving of rehabilitative treatments and instead the recipients of new levels of mass incarceration. The contemporary system has several critical characteristics, including ineffectiveness, abuse and violence. For youth waived to adult court, these features are further exacerbated. Such findings become increasingly problematic in light of developmental science that points to the biological and functional immaturity of the adolescent brain, producing an increased propensity for risk-taking and impulsivity. In order to address these deficiencies, a decade of case law by the Supreme Court has outlined new guidelines for juvenile justice based on diminished capacity jurisprudence. This precedential background is then gradually reflected in shifts in state legislatures and justice, as will be demonstrated in this research with the example of Oregon. Still remaining, however, is a system in which race inhibits the mitigating value of youth so that young White boys are afforded the casualty of adolescence while Black boys are viewed as more culpable and less reformable. In order to address the current discrepancies, we must more fundamentally transform the juvenile justice system and invest in the needs of youth through preventative and treatment-oriented options.

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Introduction

Sterling Cunio had a good childhood. His grandma, who he called “Momma”, instilled principles of honesty, responsibility, manners, kindness, and a strong work ethic.¹ She raised him with affection, guidance and discipline. She died before Sterling turned thirteen years old. With her absence, Sterling spent time in various homes, streets, and places across the U.S., from Texas to Arkansas and eventually Oregon. He was quickly exposed to a life of drugs, alcohol, violence, and gangs. He previously enjoyed school but grew to dread it as he felt ostracized by his “ethnic” appearance and untraditional background.

Sterling was excited to live with his uncle in Portland; he had always thought of him as “cool”. He was also eager to participate in any activity that would make him “one of the guys”, which included joining in minor thefts and smoking joints by the age of fourteen. His uncle’s home lacked any form of structure or authority. Sixth grade was the last year of public schooling he would complete. It was at this time that Sterling internalized toxic masculinity: toughness, the rejection of authority, the willingness to engage in risky endeavors and the sexual exploitation of women. His first interaction with police came shortly after his fourteenth birthday and landed him in foster care. The draws of group inclusion were compelling, and Sterling became fascinated with the glamorized lifestyle of crime and street culture. With a group of older peers, he established a pattern of “run away, steal cars, party, and sex” followed by a short period inside juvenile confinement. There was no point during his adolescence that Sterling

¹ S. Cunio, personal communication, February 10, 2022.

committed a crime by himself, he was always accompanying at least one older teen or adult.

Sterling was eventually, at age sixteen, sent to MacLaren Youth Correctional Facility in Woodburn, Oregon. He described his experience there as one that immersed him in and reinforced the general crime culture. He developed associations with more criminally advanced youth, and “learned how to play the game”. At MacLaren, Sterling wasn’t involved in any programs, therapies or services intended to enhance life skills. He emerged from MacLaren after 90 days, no more mature, reformed, or healed than when he went in. As he recalled: “It was as if I had been released from summer camp for aspiring thugs where I had become more sophisticated in my criminality.” Within weeks, he returned to his familiar behavioral cycle of “run, steal, drive, party, sex, arrest.” Through group home after group home, Sterling began to participate in more serious crimes, escalating from petty theft to stealing cars and carrying guns.

In 1994, Sterling, lanky, muscular and mixed-race yet just a sixteen-year-old kid² too young for facial hair when he committed his crimes, was convicted of two counts of aggravated murder, two counts of first-degree kidnapping, and two counts of first-degree robbery (*State v. Cunio*, 138 Or App 375). He was waived to adult court and sentenced to two consecutive indeterminate life sentences plus 280 months in prison. Over the next decade, lawyers on behalf of Sterling filed a series of post-conviction reliefs, arguing his sentence was cruel, unusual and disproportionate under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. These petitions

² Although it is customary to stipulate age brackets for the terms kid, child, youth, and teen, I will use them somewhat interchangeably to emphasize the developmental fragility shared by the entire cohort of non-adults we are tempted to judge as if they are.

were consistently unsuccessful until February 2020, when U.S. Magistrate Judge Mustafa T. Kasubhai, a South Asian-American and Muslim-American, finally found Sterling's sentence to be cruel and unusual (*Cunio v. Brown*, 6:14-cv-01647-MK). The District Court held that Sterling had been denied any meaningful opportunity for release based on demonstrated maturity and rehabilitation. He would spend 26 years in prison, sentenced at the age of seventeen and released at 40. As applied, Sterling wouldn't have been eligible for release until 2065, at the age of 88. Instead, today, at the age of 42, Sterling works as an adjunct educator and program manager with Willamette University engaged in outreach for the Transforming Justice Initiative. He is also a staff writer for the homeless services provider Church of the Park in Salem, Oregon, and writes and reviews clemency petitions for currently incarcerated offenders.

For Sterling, the consequences of the conduct of the juvenile justice systems and practices were enormous: imprisonment with adults at seventeen years of age with two life sentences plus time. His story reflects a recurring and systemic dynamic that continues to undermine the 'justice' of our criminal justice system. This research will consider how recent neuroscientific findings on decision-making and legal responsibility should impact standards in the sentencing and treatment of youth, in order to better address racial disparities.³ First, I explore the history of the juvenile justice system in the U.S., beginning in the early 20th century with the great migration and industrialization, through periods of reform and then the era of 'Get Tough on Crime' and the social construction of racialized 'superpredators' to justify more punitive

³ Race is a social construct. The terms 'Black' and 'White' lack any biological meaning and are poorly defined markers of genetic diversity. The term lacks any coherent and consistent operationalizable legal definition.

sentencing. Then, I explore the contemporary juvenile justice system, providing a general background and exploring claims of maltreatment, ineffectiveness and the experience of children in adult facilities. Next, I outline the current neuroscience on the developing adolescent brain, the resulting behavioral deficiencies, and the developmental impacts of unsupportive and unhealthy environments at a young age. I continue with a summary of the relevant case law on juvenile justice over the last two decades, including the most recent 2021 case *Jones v. Mississippi*. From here, I take a narrower stance and explore juvenile justice in Oregon, considering one of the state's most famous juvenile offenders, Kip Kinkel. These sections lay the legal groundwork of juvenile justice at both the federal and state levels. I continue with case studies of two men who spent time in prisons across Oregon, under similar circumstances but with strikingly different subjective experiences. Finally, I investigate the racial disparities prevalent in the juvenile justice system, from neighborhood mechanisms and police contact, to trial and sentencing, to incarceration and waiver decisions, and beyond. I conclude by considering the larger implications for the future of incarceration and the more just treatment of juveniles under the law.

The History of Juvenile Justice in the U.S.

Before we can engage with the contemporary dynamics of juvenile justice, we must consider the history of how we got here. Youth in the early American socio-economic order, impacted by urbanization and industrialization, were considered 'mini-adults' (Feld, 2017). The explosion of the Industrial Revolution in the United States throughout the 19th century spurred rapid urbanization and waves of European immigrants. Young men entered the workforce early and engaged in forms of discourse

and socialization that facilitated the internalization of a narrowly gender-defined conception of hetero-masculinity from a young age. Rapid urbanization also led to an increase in youth crime in concentrated minority areas of cities (Feld 2017, p. 10). The philosophical underpinnings of the early juvenile justice system pioneered by progressives utilized the doctrine of *parents patriae* to pursue rehabilitation for wayward youth (Ferdinand, 1991). In providing accountability, supervision, and treatment for youth within juvenile facilities and the community where possible, the early juvenile justice system promoted both short-term and long-term safety for the adolescent and the public at large (Steinberg, 2017). Despite these broad goals, progressive era reformers also, and perhaps ultimately, intended juvenile courts to control poor, immigrant, and minority children (Feld, 2017), thereby setting the foundational basis for the criminal justice system we have today.

Juvenile justice emerged primarily under the discretion of state governments. Progressive era reformers, acting under the somewhat novel understanding that kids were fundamentally different than adults, designed several forms of institutions to address adolescent delinquency with a focus on reform and rehabilitation, including Houses of Refuge and Industrial schools (Ferdinand 1991, p. 209). These new schools offered alternatives to the decrepit penal institutions to which young delinquents were previously confined. The New York House of Refuge was established in 1825, through the efforts of pioneering reformers Thomas Eddy and John Griscom, who opposed the placement of youth in adult jails and penitentiaries (Pickett, 1969). Progressive era champions, sometimes referred to as ‘Child Savers’ (Sterling, 2013), advanced early conceptions of adolescence that then shifted moral and ethical standards of juvenile

treatment in the early 20th century. In the following decades, juvenile correctional schools and facilities were constructed in many of the most populated American cities.

In re Gault was the first motion by the U.S. Supreme Court in 1967 to apply the legal rights of adults in criminal court to juveniles, therefore formally establishing the procedural safeguards in the juvenile court as an adversarial process. Gerald Francis Gault was a fifteen-year-old boy taken into custody for allegedly making an obscene phone call (*In Re Gault*, 387 U.S. 1). Gault was committed to a State Industrial School until the age of majority without his parents knowing. The Supreme Court ruled the proceedings of the juvenile court to be in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, henceforth extending the due process rights of the adult court to juveniles. The Gault court set juvenile justice on a new path, one that veered sharply away from the goals of the emerging Civil Rights Movement. (Sterling, 2013). That is, the new privileges and protections afforded to juveniles on par with adults also sanctioned increasingly punitive measures in juvenile court, like those arising for adults. These developments were applied most severely to minority youth (Feld, 2017, p. 11).

The urban influx of Black people from the rural South in the periods prior to and following World War II brought disparities in racial justice and civil rights to a national spotlight. Black soldiers returning from war were confronted with the violent realities of the Jim Crow South. White southerners feared a new class of military-trained Black Americans, engendering a period of inner turmoil, political change, and protest. Hostile sentiments of racial superiority left many Black Americans seeking substantial change.

In the 1960s and 70s, then, racial tensions rose sharply, and society responded with increasing reliance on punitive practices and extended incarceration.

'Get-Tough Era' and Superpredators

Amid rising crime rates and growing drug abuse, pernicious stereotypes regarding Black youth and their drug susceptibility and criminality justified a new era of racialized mass incarceration in the 1980s and 90s. Structural economic changes and sociopolitical obstacles throughout the late 20th century adversely impacted Black Americans. During this period of increased incarceration, known as the 'Get Tough Era' or by the informal slogan 'Adult Time for Adult Crime' (Fountain 2021, p. 2), Black youth were increasingly targeted by the criminal justice system. Crucially, teen crime was characterized by the mainstream media, many academics, and politicians of both parties alike using racially coded terms (Brief for the NAACP, *Miller*, 2012). In fact, the media's false connections between race and youth crime were corroborated and endorsed by pseudo-scientific research that predicted with panic an impending rise of juvenile crime (Brief for the NAACP, *Miller*, 2012; Steinberg, 2017). Further, some of this scholarship depicted Black and Latino youth as inherently dangerous, using highlighted instances of young, urban males to characterize them all as dangerous classes (Lowery, Burrow & Kaminski, 2018).

The movement to criminalize Black youth was spurred by Professor John Dilulio, who starting in 1995 coined, or at least popularized, the term 'superpredator' to refer to what he described as a "new breed" of juvenile offenders (Dilulio, 1995). Dilulio warned against an imminent wave of "radically impulse, brutal remorseless youngsters, including ever more teenage boys, who murder, assault, rob, burglarize,

deal deadly drugs, join gun-toting gangs” and more (Dilulio as quoted in Howell, 2008, p.4). His theories appeared to come to fruition when linked to forecasts of increased levels of juvenile violence. For two decades in a row, he predicted waves of juvenile superpredators described as crime bombs that would be impossible to defuse (Dilulio, 1995, pp. 4-5). Dilulio specifically pointed to inner-city urban Black males as culprits (Lehmann, Chiricos & Bales, 2016). In hindsight, he relied heavily on and cued widespread implicit racist imagery and stereotypes associating African Americans as violence-prone, criminal and savage.

Federal and state institutions and officials supported, even reinforced the superpredator ideology. The Department of Justice (1996), itself, warned about a future wave of youth violence which it associated with African American males. Then President Bill Clinton referred to juvenile crime as the ultimate threat to the country and passed the Violent Crime Control and Law Enforcement Act of 1994, which introduced harsh sanctions for juvenile crime and prompted new levels of adult mass incarceration. States across the U.S. passed harsh crime bills in response, introducing increasingly punitive sanctions to young juveniles for minor crimes. As a result, the substantive goals of the juvenile court evolved from rehabilitation to more punitive retribution and deterrence. Minority youth disproportionately fell victim to harsher sentences, to transfers to adult court, and ultimately to higher rates of recidivism (Feld 2017). Disciplinary practices in educational settings subsequently reinforced the ‘school-to-prison pipeline’ that disproportionately targeted urban Black males (p. 14). In the ensuing decades, rather than increasing, the juvenile crime rate dropped by more than half (Brief for the NAACP, *Miller*, 2012). The superpredator theory, now myth, was

discredited.⁴ However, the legacies of the ‘Tough on Crime’ era endured, particularly within the juvenile justice system.

In the preceding section, we explored the emergence and history of the juvenile justice system. The first juvenile facilities were established during the Industrial Revolution in the 19th century in the interest of rehabilitation and reform for juvenile delinquents. The end of the 20th century reflected the culmination of a growing shift in the national political discourse towards ‘Get Tough’ on crime. Punitive policies and mass incarceration targeted minority and poor communities. Black youth, in particular, were demonized by claims of a looming generation of violent superpredators. Although later disproved, these claims were reinforced by state and federal policies which sanctioned mass incarceration. Now that we have a baseline understanding of the historical roots and ideological momentum of the juvenile justice system, we can pivot to the current system and the prevailing problems.

Contemporary Juvenile Justice System

The theoretical goals of punishment fall into four main categories: rehabilitation, deterrence, retribution and incapacitation. Each theory justifies different forms of treatment. Within the contemporary juvenile justice system, the treatment options include incarceration, probation, house-arrest, transitional housing, counseling, and more. The early history of juvenile justice emphasized rehabilitation as the central premise. The later period culminating in the 1990s and 2000s leaned towards

⁴ DiLulio eventually conceded that “he wished he had never become the 1990’s intellectual pillar for putting violent juveniles in prison and condemning them as superpredators” (Becker, 2001). Despite being “sorry for any unintended consequences” he postulated that he “is not responsible for teenagers’ going to prison”.

incarceration. Since then, the current status quo has been shifting to somewhat redress those jurisprudential excesses observed in the preceding section. Despite a significant decrease in juvenile crime, the U.S. still incarcerates more juveniles than any other developed country (Casey et al., 2020). Ironically, the steepest drops in juvenile crime rates have been found in states that reduced their reliance on juvenile incarceration (Bernstein, 2014, p. 203). Amidst continuing claims of ineffectiveness, maltreatment and bias, it is unclear if the system is fulfilling the resounding goal of reformation and rehabilitation of young offenders.

In 2019, the U.S. incarcerated 36,479 kids under the age of eighteen (Puzzanchera & Hockenberry, 2021). Many incarcerated juveniles are youth of color, live in poverty, have a disability, struggle with mental health or substance abuse, were in foster care, or have been the victim of abuse, neglect, and other violent crimes (Bernstein, 2014). Despite comprising only 15% of all youth across the United States, Black youth make up 41% of all youth in correctional institutions (Rovner, 2021). This disparity is clear; and mirrored by adult incarceration statistics. Once behind bars, these children fall victim to further physical and psychological abuse, as well as sexual assault and inadequate education, resulting in mental and emotional illness and vulnerability to suicidal ideation. Juvenile incarceration fails to adequately deliver on the penological goals of criminal justice, and instead drives recidivism for many youths. The evidence of abuse and ineffectiveness, together with the rising public costs of sustaining mass penal institutions, have led a growing number of reformers, across party lines, to push for better solutions. Yet, incarceration persists, buttressed to some extent

by the fears of elected politicians as well as public officials (including sheriffs and judges of being labeled ‘soft’ on crime.

General Background on Contemporary Juvenile Incarceration

Certain criteria dictate how a youth reaches a correctional facility, who is held in custody, and what treatment options are provided. Most incarcerated juveniles are there for minor or non-violent crimes. In 2019, fewer than one in three youth nationwide were incarcerated for violent crimes (Annie E. Casey Foundation, 2021). Of those in detention facilities, 21% were there for damaging property without the owner’s permission, 14% for violating the terms of probation, such as missing curfew, 14% for disturbing public order, 4% for violating drug laws, and 4% for committing status offenses that are only illegal for those below the age of majority, such as truancy or underage drinking. This reality is a stark contrast to the violent, dangerous juvenile offender depicted in the popular media and contemporary rhetoric of the past three decades. Almost all of the youth who enter correctional facilities for minor crimes have no prior record (Mendal, 2011, p. 13).

Incarceration invites a number of increased challenges to a youth’s development. Adolescents miss critical periods of brain growth and identity formation while incarcerated. Instead, they spend portions of their childhood behind bars, in many cases without access to suitable education or mental health support. As a general matter, U.S. juvenile facilities lack the resources to provide effective treatment for the diverse variety of children who are confined within their walls (Mendal, 2011). In this regard, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) (2017, p. 3) stresses that over 67% of youth in detention or correctional facilities have at least one

diagnosable mental health problem. Incarcerated youth are more than 10x as likely as youth in the general population to suffer from psychosis. Few facilities diagnose such conditions as disabilities, and even fewer provide treatment. Incarcerated children form their identities, behavior and character traits based on their experiences behind bars. Overwhelmingly, youth come out of jail unprepared for the realities of the real world. They lack any form of professional experience, have an unfavorable relationship towards those in positions of authority, in many cases don't have a driver's license, haven't graduated high school, and so on. Once released, unsurprisingly, youth face a significant number of obstacles in becoming functional in mainstream society (Bernstein, 2014, p. 185). Due to their offender status, they are turned away from jobs, housing, and schools. Youth released from juvenile facilities, in cases when they return to school, seldom succeed (Mendal, 2011, p. 12). Some, with supportive family systems are able to live with their parents, but many upon release go straight from behind bars to the streets. Many previously incarcerated juveniles also describe the challenge of transitioning from highly structured environments to a world of freedom. Probation requirements might seem natural for the adult who has learned about time-management, fulfilling responsibilities and communication from attending school and having jobs. For the incarcerated juvenile, these traits and behaviors have not yet been learned and properly understood.

Ineffectiveness

Resounding evidence points to the ineffectiveness of juvenile detention facilities. Incarceration is expensive. On average, in the U.S., it costs \$88,000 per year to keep a young person in a state facility (Bernstein, 2014, p. 6). This is more than 8x

the \$10,652 (on average) that we invest in that same adolescent's education.

Incarceration has also been identified as the single most significant factor in predicting whether a youth will reoffend, more so than family difficulties or gang membership (p. 7). Most of the adolescents who enter the juvenile justice system for minor charges, as described above, will end up reoffending for more serious crimes (p. 182). This reflects the ultimate failure of the institution, who's central mission is to enhance the safety of the public and improve the future prospects of the offender. Prison-like detention centers are the most common mode of incarceration, but also the most ineffective.

Juvenile recidivism rates are around 75% (Drinan, 2017, p. 148). A majority of studies find that incarceration is not any more effective than probation or alternative sanctions for preventing youth criminality (Mendal, 2011, p. 11). Further, many studies suggest that correctional facilities actually exacerbate the propensity for crime. Contemporary juvenile institutions thus perpetuate a feedback loop in which youth enter the system for minor crimes, are denied access to appropriate academic and support services, are released without the skills to get a job or avoid future crime, and eventually reoffend, often with a more serious crime. Juvenile incarceration is not only ineffective, but also marked by claims of mental, emotional, physical abuse and other forms of maltreatment.

Maltreatment

Juvenile facilities are fraught with reports of pervasive violence and abuse. Maltreatment has been well-documented since at least 2000. These findings are derived either (1) from lawsuits filed by the U.S. Justice Department and court-sanctioned remedies secured by public interest legal advocates, or (2) reports from reputable media

outlets or public and private agencies (Mendal, 2011). As a whole, this documented abuse demonstrates the incapacity of youth facilities to protect the young kids they incarcerate, from themselves, from other youth, and from staff. To provide a few examples, the Oregon Youth Authority (OYA) recently came under fire for a 2019 Oregon Supreme Court ruling holding the OYA accountable for ignoring rampant sexual abuse of children and teens in custody (Woodworth, 2019). The lawsuit revolved around the OYA's employment of Frank Milligan; a convicted sex offender who sexually assaulted more than one juvenile incarcerated in MacLaren Youth Correctional Facility. One of Milligan's victims described the lawsuit as a shining light, exposing a general culture within OYA in which the abuse of juveniles was accepted. In September 2021, the State of Washington agreed to settle a lawsuit brought by ten incarcerated juveniles who had been sexually abused at a juvenile rehabilitation facility (Krell, 2021). The lawsuit alleged sexual abuse among staff and other juvenile residents and occurred over a 40-year period. Knowledge of this abuse was prevalent among the highest levels of management at the facility as well as the State agencies charged with protecting the juveniles sent there. The lawsuit was settled for \$2,136,175. In December 2021, seven incarcerated youths sued state officials and staff for obscene abuse at a juvenile facility in Vermont (Rathke, 2021). The lawsuit detailed the following:

“vulnerable children, some of whom had been physically, mentally and/or sexually abused by caregivers before they were taken into state custody and sent to Woodside, were physically assaulted and sometimes stripped of their clothing by Woodside staff members who demanded compliance with their orders.”

Rather than isolated events, these instances delineate a sustained pattern of maltreatment. Many claims of abuse are unrecognized, unaddressed, or concealed.

When guards are found to have sexually abused their young wards, they often face minimal, if any formal punishment (Bernstein, 2014, p. 109). These stories of abuse are surfacing after years of juvenile justice reform. Horrifying narratives of physical abuse and sexual assault in some cases resulting in deaths of incarcerated juveniles punctuate the history of juvenile facilities.

The continued prevalence of unsafe environments inside juvenile detention centers is facilitated by the unsafe practices in place. For instance, prone restraint is still utilized by institutions across the U.S., including juvenile facilities, schools and residential placements. This form of restraint involves two or three guards pinning a child to the floor by sitting or lying on that child to obstruct movement. As this practice often restricts breathing, a number of children have died from it (Bernstein, 2014, p. 31).⁵ As recently as May 2020, sixteen-year-old Cornelius Frederick died of cardiac arrest as a result of prone restraint by multiple staff at a residential placement facility in Michigan (Haskins, 2020).

Solitary confinement is another practice frequently utilized in juvenile facilities and an internationally recognized form of abuse. According to the American Academy of Child and Adolescent Psychiatry (2012), a majority of the suicides that occur within juvenile correctional facilities transpire when the individual is confined in solitary. Children in juvenile facilities across the U.S. are placed in solitary confinement for up to 22, even 24 hours a day with no personal belongings, no tangible interactions, no access to mental or emotional health services, and nothing more than a concrete pad to

⁵ This practice closely resembles the technique that police officers recently used on George Floyd, which resulted in his death.

sleep on (Juvenile Law Center, n.d.). Despite the persisting use of this treatment, there is no evidence that it reduces violence. Solitary confinement of juveniles has been banned internationally for over fifteen years. In 2007, the United Nations Committee on the Rights of the Child explicitly forbid solitary confinement for children (defined as persons under the age of eighteen). Despite efforts, including those by then President Barack Obama to stop the use of solitary for incarcerated juveniles, solitary confinement of children persists. A 2020 study found that over 35% of youth offenders are held in solitary at some point during their confinement, and over half of those were there for over 24 hours at once (Kraut, 2020). In institutions designed to rehabilitate, children are subject to antiquated practices that produce abuse and isolation. In adult facilities, these features are only amplified.

Adult Facilities

Young children convicted of serious crimes are often sentenced to serve time in adult facilities. In most states today, the *minimum* age in which a juvenile's case can be transferred to the adult court is fourteen (Interstate Commission for Juveniles, 2022). Many states, however, have no minimum age for adult waivers, leaving open the possibility that youth as young as twelve can be tried as an adult (Thomas et al., 2019). There are a few ways youth can end up in the adult criminal system. State legislation can statutorily require juveniles below the age of eighteen be automatically tried in the adult court. For instance, before the passage of S.B. 1008 in Oregon, Measure 11 required all juveniles as young as fifteen be automatically tried as adults. In 2015, nation-wide, over 65,000 youth were automatically tried as adults due to the jurisdiction of the juvenile court in a given state (OJJDP, 2017). On the other hand, the *maximum*

age of juvenile jurisdiction in most states today is seventeen (Tiegen, 2020). Youth can also be tried as adults through judicial and prosecutorial discretion waivers. Judicial transfers are less common than statutory provisions and prosecutorial waivers (Thomas et al., 2019). However, 46 states in the U.S. have discretionary judicial waiver provisions, which allow judges the discretion to refer juvenile cases to criminal court (Hockenberry, 2021). Judicial waivers can be presumptive or mandatory. Evidence indicates that transferred youth experience a punishment penalty in that they're viewed as a unique subgroup of dangerous offenders (Lehmann, Chiricos & Bales, 2016). Court actors are more inclined to consider the gravity of the transferred juvenile's crime over their age (p. 173). A closer look at juvenile justice proceedings confirms that age does influence guilty verdicts and blame. However, crime severity, rather than age, accounts for the greatest variance in sentencing (McPhetres & Hughes, 2016). Further, studies conducted with mock jurors demonstrate that age differences are acknowledged but may not be perceived as much of a mitigating factor (Fountain, Mikytuck & Woolard, 2020).

Once waived to adult facilities, incarcerated juveniles are faced with diminished treatment and rehabilitative options and a lesser likelihood for success once released. Adult prosecution and incarceration of adolescents leads to high recidivism rates (Brief for the APA, *Roper*, 2005; Bryson & Peck, 2020; Casey, 2020). Research has failed to establish that the threat of adult criminal punishment deters juvenile offending (Brief for the APA, *Roper*, 2005). Therefore, transfer laws are not in the interest of the protection of society. Once a juvenile is shifted to adult jurisdiction, the focus of their treatment becomes less on meeting the youth's needs and preventing future delinquency and more

on retribution and punishment (Bryson & Peck, 2020). Relative to adolescents incarcerated in juvenile facilities, children who are sentenced as adults are twice as likely to be assaulted by a correctional officer, five times as likely to be sexually assaulted, and 36x as likely to commit suicide (Drinan, 2017; Goff et al., 2014). Transfer laws, then, protect neither society nor the offender.

The contemporary juvenile justice system, building upon its foundational roots in American history, is marked by several key characteristics which we explored in the foregoing section. Evidence of ineffectiveness and maltreatment challenge the appropriateness of the institutional confinement of juvenile offenders. Adolescents placed in the custody of adult facilities experience higher degrees of abuse and a lack of rehabilitative treatments. Efforts underway to raise the age of juvenile jurisdiction reference neuroscience which demonstrates the brain continues to develop through the mid-20's (Thomas et al., 2019; Ard, 2020). Developmental science insists adolescence as a unique, important stage of growth that justifies a more tailored treatment under the law. In order to substantiate such treatment, it is necessary to explore the biological immaturities of the adolescent brain and the behavior that it produces.

Neuroscience on Adolescent Immaturity

Cognitive function changes dramatically with age. Parents know this well. The Supreme Court has said as much too. Teachers see it every day. Juvenile immaturity is reflected in behavior and decision-making, for instance, in the propensity to take risks and the failure to consider long-term consequences. The neurological underpinnings of adolescent behavior are today increasingly well-understood among scientific communities, but not widely among the larger legal or public discourse, and yet they are

notably relevant to understanding juvenile crime. The brain undergoes important changes during and beyond adolescence. Investigation of the structural and functional immaturity of the brain provides insights to the uncontrollable deficiencies' adolescents face with everyday challenges. These insights on adolescence as a distinct and special developmental phase warrant differential treatment, specifically in regard to youth crime. Given the findings on neurologically driven behavioral immaturity, a developmentally informed approach supports a specialized response by the juvenile justice system that recognizes young people as different from both children and adults. Juveniles commit more crimes than any other age group. In fact, offending rates in the U.S. build steeply up to age eighteen and then taper off (Brief for the APA, *Roper*, 2005). Scientists from the American Psychological Association note that it is “statistically normative for adolescents to engage in some form of illegal activity” (p. 7). This trend, depicted in Figure 1, is typically referred to as the ‘age-crime- curve’ (Cohen & Casey, 2014; Olmsted, 2019; Steinberg, 2017). The observation that criminal behavior increases significantly during adolescence and decreases during adulthood is one of the most consistent findings in behavioral criminology (Shulman, Steinberg & Piquero, 2013). In order to effectively understand and address this pattern, however, it is important to decipher the neurological processes that underlie adolescent behavior.

Regions of the Brain

Deep within the brain there is a collection of regions necessary for processing of emotion, sensation, and memory. These structures form the limbic system, which consists of the amygdala, hippocampus, thalamus, hypothalamus, basal ganglia, and

more. Each of these anatomically defined regions have specialized functionality that relates to behavior (see Fig. 2).

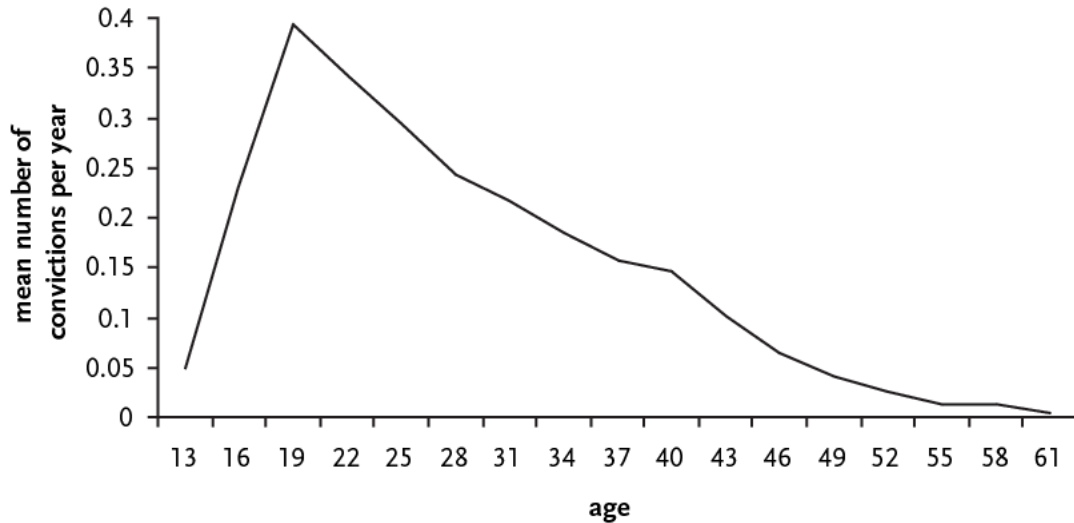


Figure 1: Age-Crime Curve

Crime peaks during early to mid-adolescence and drops consistently throughout the remainder of adulthood (Blokland, 2005).

The hippocampus is a complex brain structure located in the temporal lobe. One of its central roles is to prepare the brain for academic and learning-focused environments that are common during adolescence. The hippocampus generates an abundance of cells during puberty which allow the juvenile brain to be particularly responsive to learning (Curlik, DiFeo, & Shors, 2014). The amygdala is the center for emotions, emotional behavior, motivation, and memory encoding. During puberty, a surge of hormones increases the physical size of the amygdala, leading to higher activity rates. In fact, one cross-sectional study found that the amygdala increases in size by about 40% from five years of age to adulthood (Schumann, Bauman, & Amaral, 2011). The nucleus accumbens is responsible for decision-making and reward-related

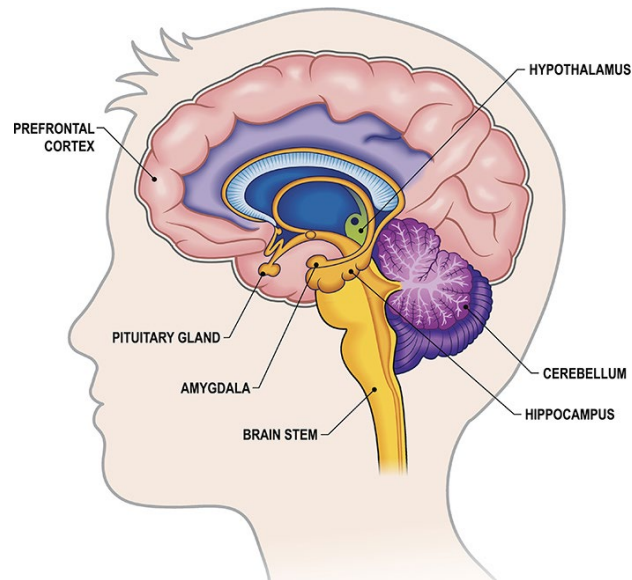


Figure 2: Parts of the Limbic System

This diagram depicts the major regions that make up the limbic system and provides their main roles (Guy-Evans, 2021).

behavior. Additionally, the structure is involved in a variety of psychiatric disorders, including “depression, obsessive-compulsive disorder, bipolar disorder, anxiety disorders, Parkinson's disease, Alzheimer's disease, Huntington's disease, obesity, and in drug abuse and addiction” (Salgado & Kaplitt, 2015, p. 75). The nucleus accumbens is highly sensitive in adolescents. When faced with a potentially rewarding opportunity, the adolescent receives stronger electrochemical impulses to attain that desirable opportunity.

The adolescent brain is structurally immature. One of the last regions to fully develop is the prefrontal cortex. Maturation of this structure occurs primarily during adolescence but crucially it does not reach full potential until twenty-five years of age (Arain et al., 2014). The prefrontal cortex is implicated in behavior control, risk assessment, reward evaluation, decision-making, evaluating future consequences, responses to feedback, moral judgements, and more. (Brief for the AMA, Miller, 2012).

The frontal cortex and limbic systems form the relevant structures of the brain guiding certain mechanisms and behaviors.

Mechanisms of Plasticity

Adolescent behavior is strongly shaped by activity in the emotional centers of the brain. To understand adolescent behavior, we must then understand the activity in these regions. The limbic system drives emotionally motivated behaviors. During puberty, increases in estrogen and testosterone link receptors in the limbic system (Arain et al., 2014). This increases emotional volatility and impulsivity, while also stimulating sex drive. Both positive and negative stimuli result in hyperactivation of limbic structures in adolescents, specifically in comparison to younger children and adults (Grose-Fifer et al., 2013). As depicted by Figure 3, adolescents rely more heavily on the emotional regions of their brains over the prefrontal cortices, which govern impulsive behavior.

The limbic system develops earlier and faster than the frontal cortex, which is responsible for higher-order functioning. This makes it neurologically challenging for adolescents to make logical and measured judgements. Adolescents rely on the limbic system for understanding and communicating emotion, and for this reason often fail to do so correctly (Arain et al., 2014). Differences in limbic activity, function, and anatomy translate into differences in behavior.

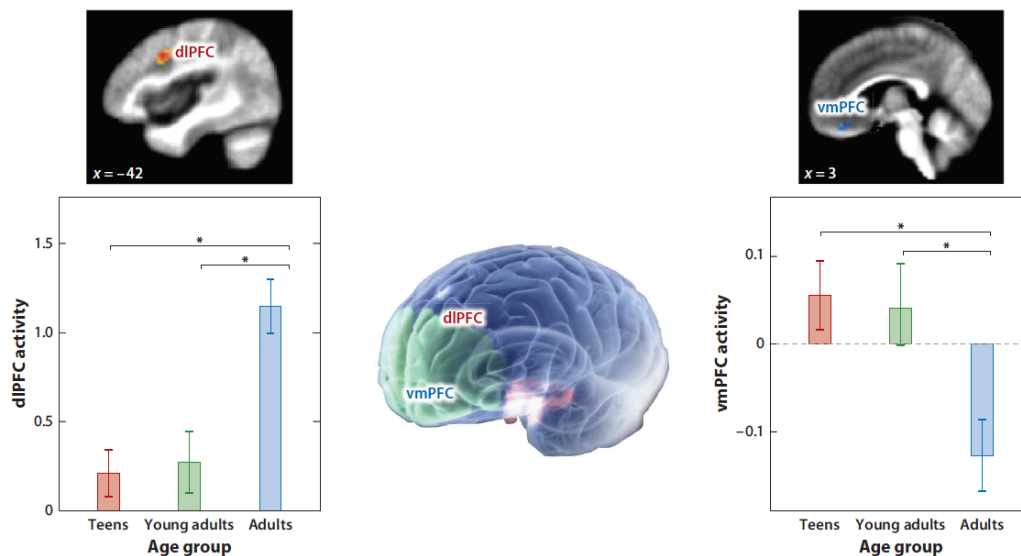


Figure 3: Cortex and Limbic Imbalance

In stressful situations, young adults and teens show less activity in the prefrontal cortex and greater activity in the limbic system relative to adults (Casey et al., 2020).

Lack of Support

Social environments influence brain development. A growing body of science, entitled developmental traumatology, explores how adversity early in life alters neurological development in children. Chronic interpersonal violence among families exists worldwide. Ongoing research reveals the powerful and enduring role of abuse and neglect on the developing adolescent brain. Abuse in early life⁶ results in impaired emotional regulation, self-control and cognitive development.

The relationship between dysfunctional families and stressed children is well-established. In animal models, prenatal stress in the mother impairs features of normal brain development (McEwan, 2011). In humans, inconsistent and unsupportive

⁶ including that in the home and inside institutions, such as juvenile incarceration,

parenting results in impaired decision-making, earlier onset of sexual activity, poor mood regulation, bad performance in school and even substance abuse. Neglect and abuse also increase the likelihood of several cardiovascular, metabolic and immune system diseases (De Bellis & Zisk, 2014; McEwan, 2011). For instance, obesity, cardiovascular reactivity, increased inflammation and generally poor health are a few potential symptoms of such treatment. The lack of consistent verbal communication and training from a young age, specifically, can result in increased anxiety, lowered self-esteem, and reduced verbal ability, all functions that are distinctly essential for learning.

Children who have experienced abuse and neglect also have a lesser ability to regulate emotions. Even neglected *infants* display a reduced range of emotional expression and longer duration of negative emotion relative to infants who have not experienced maltreatment (Toth & Manly, 2019). One feature of early childhood is secure attachment to caregivers. Children who have experienced abuse or neglect are at an increased risk of developing insecure attachments. These early behavioral deficiencies inhibit the success of a young person in school. The relationship between maltreatment and aggression is consistently affirmed by studies (Cullerton-Sen et al., 2012). Aggression, paired with impairments in various cognitive, social and behavioral domains leaves the young adolescent at a predisposition to struggle in school.

Brain Functioning and Risk-Taking Behavior

The structural and functional immaturity of the adolescent brain predisposes them for certain behaviors. First, adolescents have a heightened propensity for risk-taking (Arain et al., 2013; Bonnie & Scott, 2013; Chein et al., 2011; O'Brien et al., 2011; Smith, Chein & Steinberg, 2014; Somerville & Casey, 2010; Steinberg, 2017;

Steinberg et al., 2008). From early to late adolescence, death rates increase by more than 200% (APA Roper Brief). Adolescents weigh motivational cues of potential reward differently than adults and are more likely to make risky and suboptimal choices (Arain et al., 2013; Somerville & Casey, 2010). Emotional inputs are processed through the reward-sensitive dopamine system and connected to rapid hormonal pubertal changes (Olmsted, 2019). Adolescents are less-risk averse partly as a result of their innate desire for spikes in dopamine.

The relationship between risk-taking and age is best understood by the developmental trajectories of sensation-seeking and self-regulation (Arain et al., 2013; Bonnie & Scott, 2013; Steinberg, 2017; Olmsted, 2019). Self-regulation broadly refers to the ability to monitor and control one's own emotions, behavior and body. Sensation-seeking is the tendency to pursue new, exciting, and often risky endeavors, hence the name. Mid-adolescence is uniquely characterized by high sensation-seeking and low self-regulation (Steinberg et al., 2008; Steinberg, 2017). Along the lines of pubertal maturation, sensation-seeking increases from ages ten to fifteen and declines thereafter (Steinberg et al., 2008).

Second, impulsivity and the lack of impulse control is an established feature of adolescence. Impulsivity is heightened during 'hot' situations of high emotional stress. Adolescents have a lessened inability to navigate these high stress environments and respond appropriately (Chein et al., 2011; Dreyfuss et al., 2014; Fountain, Mikytuck & Woolard, 2020; Olmsted, 2019; Steinberg, 2017; Steinberg et al., 2008)

Third, peer pressure both directly and indirectly amplifies the nature of risk-taking in adolescents (Chein et al., 2011; Grose-Fifer et al., 2013; O'Brien et al., 2011;

Smith, Chein & Steinberg, 2014; Steinberg & Monahan, 2007). Adolescence is a stage in which children leave home for the first time and become dependent on peers. Through driver's licenses, school dances, part-time jobs, and romantic relationships, adolescents undergo a distinct period of developmental growth. Children who make risky decisions exhibit altered activity in the regions of the brain associated with incentive processing systems most notably in the presence of peers (Chein et al., 2011). One study found that, relative to young adults and adults, adolescents in a driving simulation were more likely to engage in risky behavior, even that resulted in crashes, when in the presence of peers (Chein et al., 2011). Another study found that adolescent participants chose to gamble more often when they believed a peer was observing, even when they were aware of a high probability of loss (Smith, Chein & Steinberg, 2014). Adolescents demonstrate a greater preference for immediate rewards while with peers than alone (O'Brien et al., 2011).

Connecting Neuroscience to Juvenile Justice

The adolescent brain is different than the child or adult. Neurological and structural immaturity manifests in behavioral deficiencies. The adolescent brain is marked by a period of neurological plasticity, the brain's ability to mold and shape in response to events makes adolescence a period of impermanence and great potential. As a result, adolescents have a higher propensity for risk-taking including sensation-seeking and self-regulation, are distinctly impacted by peer pressure, and struggle with impulse control. These challenges are not permanent, the neuroplasticity of the adolescent brain allows for drastic periods of growth and development, for overcoming poor decisions and learning to make better-informed and more consequential choices.

Juveniles who commit violent crime frequently desist from this behavior as increased life experience, an education, and higher degree of maturity, and more allow for a stronger degree of control.

Equipped with a basic understanding of the neurological substrates of adolescent behavior, we can address youth crime through more focused mediation on behavior. Before proceeding further, it is worth stressing here, that observational science on the developing brain and its functioning in contexts undermines the core premise of punitive jurisprudence of juveniles, namely, that they bear sufficient individual responsibility for their actions to merit punishment. Confinement might still be defended on self-harm and protection of society grounds, although the net implication is that deterrent effects will be minimal and youth crime is better addressed through more focused cultivation of better decision-making and behavior than punishment.

Despite challenges associated with youth, juvenile offenders can grow, rehabilitate, and be safe for re-entry to the public. Despite this, a large proportion of this nation's prisoners are there for crimes committed as a youth. The neuroplasticity of the adolescent brain outlined by developmental science calls for the transformative renovation of the juvenile justice system. Now that we've explored the neuroscience relevant to juvenile crime, we can turn to the Supreme Court jurisprudence that has arisen in response to these findings.

Case Law on Diminished Capacity Jurisprudence

The courts, as the primary gatekeepers for criminal sentencing, play a critical role in determining who will be sentenced and what punishments will be assigned. In the past two decades, and to some extent countering 'Get-Tough-on-Crime' legal

populism, the Supreme Court has reinforced and expanded the protections of minors in the criminal justice system through a series of cases referred to as the *Miller* trilogy. The Eighth Amendment, which explicitly prohibits “cruel and unusual punishment” has served as the constitutional basis for protection. Notably, this line of cases is the first in which explicit references of neuroscience and developmental science are used to confirm that adolescents are different in legally relevant ways (Steinberg, 2017). In the past dozen years, the Supreme Court has banned capital punishment and significantly restricted the use of life without parole sentences, even in a retroactive manner. Disregarding the specific details, the *Miller* trilogy elucidates, again, what “any parent knows” (*Roper v. Simmons*, 543 U.S. 551, p. 15), that the adolescent is different from a juvenile, both neurologically and behaviorally. These differences warrant specialized treatment and justify exclusion from extreme sentencing.

Several cases prior to the *Miller* trilogy set the stage for the developments to come. As early as 1988 in *Thompson v. Oklahoma*, the Supreme Court determined capital punishment was unconstitutional for defendants under the age of sixteen at the time the crime was committed. The Supreme Court has determined “evolving standards of decency that mark the progress of a maturing society” (*Trop v. Dulles*, 356 U.S. 86, p. 101) to be particularly relevant to Eighth Amendment proceedings. Specifically, in regard to capital punishment, the Supreme Court determines evolving standards by looking to two objective indicators: state legislation and capital sentencing data (Niven & Cover, 2018). In determining categorical exemptions to capital punishment based on the Eighth Amendment, the Court must be guided by these evolving standards as demonstrated through recent legislative enactments and the behavior of juries to

determine the validity of the death penalty. Because the language of the Eighth Amendment is so broad, the Supreme Court has found it to be the duty of future generations of judges to determine categorical prohibitions against the infliction of cruel and unusual punishments like the death penalty. In *Thompson*, the Court's rationale was that contemporary standards of decency confirm a young person is not capable of acting with a degree of culpability that justifies the extremity of punishment. The majority opinion noted that the "inexperience, less education, and less intelligence makes the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion of peer pressure than is an adult (*Thompson v. Oklahoma*, 487 U.S. 815, p. 816). This rationale paired with the growing consensus of state legislature and recent jury decisions warranted the protection of juvenile offenders under the age of sixteen. Merely one year later, however, the Supreme Court denied an extension of this protection to juvenile offenders for crimes committed at sixteen or seventeen years of age (*Stanford v. Kentucky*, 492 U.S. 361). Justice Scalia grounded the opinion of the court on the fact that no national consensus forbids the imposition of capital punishment on sixteen or seventeen-year-old offenders. *Stanford v. Kentucky* noted the insufficiency of "socioscientific or ethioscientific" (p. 363) findings in demonstrating the diminished retributive capacity based on the immaturity and therefore moral blameworthiness of the sixteen or seventeen-year-old offender. The Court in *Stanford* noted that scientific evidence is not a valid weapon in the field of the Eighth Amendment (p. 378). This would change in the years to come.

Atkins v. Virginia

In 2002, the pendulum swung back in favor of categorical exemptions grounded by diminished culpabilities. The Supreme Court in *Atkins v. Virginia* held that capital punishment for individuals with intellectual disabilities violates Eighth Amendment protections. This decision came as a direct reversal of the Court’s last ruling on the issue. Thirteen years prior in *Penry v. Lynaugh*, the Supreme Court sanctioned the death penalty for mentally disabled offenders. Justice Stevens cited the shift in public opinion as evidence of the growing national consensus and therefore the driving factor for the *Atkins* decision. Recent state legislation outlined enhanced protections under the law for individuals with disabilities (*Atkins v. Virginia*, 536 U.S. 304). The Court also explored the failure of the execution of criminals with mental disabilities to serve either retribution or deterrence as the penological goals of capital crime (*Atkins v. Virginia*, 536 U.S. 304). Justice Stevens concluded the majority opinion with the determination that the evolving standards of decency dictate capital punishment of individuals with intellectual disabilities to be unconstitutional. *Atkins* laid the foundation for the Court’s rationale in *Roper*.

Case	Year Decided	Opinion	Rationale
<i>Atkins v. Virginia</i>	2002	Capital punishment for persons with intellectual disabilities is unconstitutional.	“Because of [the mentally retarded persons] disabilities in areas of reasoning, judgement, and control of their impulses...they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”
<i>Roper v. Simmons</i>	2005	Capital punishment for persons under the age of 18 is unconstitutional.	“The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible

			conduct is not as morally reprehensible as that of an adult”
<i>Graham v. Florida</i>	2010	Life without parole is unconstitutional for persons under the age of 18 convicted of crimes other than homicide.	“No recent data provide reasons to reconsider the Court’s observations in <i>Roper</i> about the nature of juveniles. ... developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”
<i>Miller v. Alabama</i>	2012	Life without parole is unconstitutional for persons under the age of 18 convicted of any crime, including homicide.	“the science and social science supporting <i>Roper’s</i> and <i>Graham’s</i> conclusions have become even stronger... It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions”
<i>Montgomery v. Louisiana</i>	2016	The ruling in <i>Miller</i> applies retroactively to all persons sentenced to life without parole as juveniles.	“In light of what this Court has said in <i>Roper</i> , <i>Graham</i> , and <i>Miller</i> about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption.”
<i>Jones v. Mississippi</i>	2021	A finding of permanent incorrigibility is not constitutionally required to impose a sentence of life without parole on a juvenile.	“ <i>Miller</i> and <i>Montgomery</i> require a consideration of an offender’s youth, but not any particular fact finding.”

Table 1: A Summary of Relevant Court Cases Regarding Adolescents

The opinion and rationale for several important court cases dictating the guidelines for sentencing and incarceration of juvenile offenders.

Roper v. Simmons

The first of the *Miller* trilogy came three years after the Court's ruling in *Atkins*. In *Roper v. Simmons* the Supreme Court found it unconstitutional to impose the death penalty on offenders for crimes committed while under the age of eighteen. This landmark case was decided in 2005, sixteen years after the holding in *Stanford*. The significance and notoriety of *Roper* derived not from what the Court said about capital punishment, but its findings on adolescence (Steinberg, 2017). The facts of the case are as follows. At the age of seventeen, Christopher Simmons committed a premeditated murder (*Roper v. Simmons*, 543 U.S. 551). It took less than two hours for Simmons, without a lawyer whom he waived, to confess and perform a videotaped reenactment at the crime scene (p. 3). The state charged him with burglary, kidnapping, stealing, and murder in the first degree. At the age of seventeen, Simmons was outside of Missouri's juvenile court jurisdiction, and therefore was tried as an adult. The jury returned a verdict of murder and recommended the death penalty, which the trial judge imposed (p. 4). Subsequently, lawyers on behalf of Simmons conducted a series of appeals over the next nine years, each which were unsuccessful. After the U.S. Supreme Court delivered their opinion in *Atkins*, the Missouri Supreme Court decided to reconsider Simmons' case. The Missouri Supreme Court delivered an opinion that the execution of juveniles as sanctioned by *Stanford* in the years prior was no longer valid based on numerous state court decisions and shifting public opinion. The U.S. Supreme Court granted certiorari on this question.

The majority opinion presented by Justice Anthony Kennedy affirmed the ruling of the Missouri Supreme Court (*Roper v. Simmons*, 543 U.S. 551). Under the standard

of proportionality (*Weems v. United States*, 217 U.S. 349.), the *Roper* court examined the validity of the execution of minors given their ‘diminished culpability’ and greater capacity for rehabilitation. Justice Kennedy outlined the rationale of the court as being based upon the emerging national standards and more substantially to the sociological studies provided in the *Amicus Curiae* briefs. First, the Court examined the substantive changes in state legislation and jury opinions since the decision in *Stanford*. Using the same logic developed in *Atkins*, the Court noted that the *Stanford* decision was no longer pertinent and instead the review of objective indicia of consensus was of strongest relevance (p. 10). In short, the Court found an overwhelming trend towards the abolition of the death penalty for juveniles based on a rejection of it in the majority of states and infrequency of use in the ones that retain it (p. 13). The *Roper* court relied significantly on the *Amicus Curiae* briefs submitted on behalf of Simmons, including those by the American Psychological Association and the American Medical Association. In support of Simmons, both *amici* outlined the growing scientific discourse on the neurological deficiencies of the adolescent brain. Although the opinion lacked an explicit mention of the new brain science, it still held a major role in the ruling. First, Justice Kennedy articulated “as any parent knows... a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young” (p. 15). Second, the Court noted the increased susceptibility of adolescents to outside influences. Third, the transitory nature of a juvenile’s personality traits and identity made it less feasible to conclude their behavior could be evidence of an irretrievably depraved character (p. 16). The Court also identified the diminished culpability of juvenile offenders as evidence of a failure

to accomplish any penological justifications of the death penalty. Ultimately, Justice Kennedy conferred on behalf of the Court's majority that the differences between an adult and juvenile offender were too markedly potent and fully outlined to warrant the most serious punishment to individuals for crimes committed while under the age of eighteen (p. 19). As a closing note, the Court briefly referenced the caveat that eighteen was in no way a bright line; the mitigating qualities of adolescence in some cases persist beyond this developmental stage, and in others might be fully fledged before eighteen. Finally, the Court considered the extent of the execution of juveniles on a global scale and determined that the United States stood almost alone in the field of capital punishment for individuals under the age of eighteen. In fact, only seven countries other than the United States had executed juveniles since 1990 (p. 23). In *Roper v. Simmons*, then, the Supreme Court outlawed the execution of juveniles for crimes committed under the age of eighteen, an extension of the decision in *Thompson* and a reversal of that in *Stanford*.

The decision in *Roper* only affected a handful of individuals, as despite its legality, capital punishment for juveniles in the U.S. was already somewhat rare. The significance of *Roper* became more apparent in its implication for future cases. After the decision in 2005, the Court spoke more frequently of the diminished culpability of adolescent offenders. The implied references to neuroscience and behavioral science in the Court's opinion also created a space within which the advancing science could gain visibility. Science continued to advance and would become increasingly relevant in the judicial system, largely due to the exposition provided in *Roper*. It would lead the court,

five years later, to rule on the imposition of life sentences without the possibility of parole for non-homicide offenses by juveniles.

Graham v. Florida

In *Graham v. Florida*, the second of the Miller trilogy, the Supreme Court held that sentences of life without the possibility of parole (LWOP) were unconstitutional for individuals under the age of eighteen convicted of crimes other than homicide. The petitioner Terrance Jamar Graham was sixteen at the time of his first arrest (*Graham v. Florida*, 560 U.S. 48). His story, like Sterling's, reflects the brutal and despondent reality of the experience of many youths who commit crimes in the United States. From his entrance to the world, he was plagued by the realities of drug abuse and addiction from his parents (p. 1). Lacking a supportive environment, he struggled with academia and began consuming alcohol, tobacco and eventually marijuana at the age of nine. In July 2003, Graham committed an attempted robbery with another youth. At this time, Florida law allowed prosecutors the discretion to charge sixteen and seventeen-year-olds as adults for most felonies. Graham's prosecutor charged him as an adult, and Graham pleaded guilty to armed burglary with assault or battery and attempted armed robbery under a plea agreement to avoid a life sentence (p. 3). In December 2004, Graham was arrested again for violation of his probation and a string of alleged home robberies. The judge could determine a sentence ranging from five years to life. Graham's attorney requested the minimum sentence of five years and the Florida Department of Corrections recommended four years at most (p. 4). Despite this, the trial court found Graham guilty of the earlier charges and sentenced him to the maximum sentence allowed at that time, life imprisonment for the armed burglary plus fifteen

years for the attempted armed robbery. The First District Court of Appeal of Florida affirmed the sentence by the trial court, ruling that the crimes “were not committed by a pre-teen, but a seventeen-year-old who was ultimately sentenced at the age of nineteen” (982 So. 2d 43, p. 52) and that he was incapable of rehabilitation. The Florida Supreme Court denied review and the U.S. Supreme Court granted certiorari in 2009.

The Supreme Court’s review followed the same rationale outlined in *Roper* and *Atkins*. In a review of objective indicia, the Court found that although a majority of states still technically permitted LWOP for juveniles under the age of eighteen, actual sentencing practices demonstrated a growing consensus towards prohibition (*Graham v. Florida*, 560 U.S. 48). The global consensus also supported this direction, in fact the U.S. was the only nation that imposed LWOP sentences on juvenile nonhomicide offenders (p. 30). While the evolving standards of decency can be informative for interpreting the Eighth Amendment, the ultimate task remains with the Court. Therefore, the Court further embraced the developing brain and behavioral science, with specific regard again to the *Amicus Curiae* briefs from the American Psychological Association and the American Medical Association. As Justice Kennedy stated, “parts of the brain involved in behavior control continue to mature through late adolescence” (p. 17). The Court also noted the failure of juvenile LWOP to accomplish any of the penological justifications, which include retribution, deterrence, incapacitation, and rehabilitation. The *Graham* court likened the punishment of LWOP to the death penalty, which they had already decided in *Roper* was unconstitutional. As the second most severe form of punishment, it was unbecoming for juvenile offenders who have “twice diminished moral culpability” (p. 18) relative to adult offenders. As the Court

explained, a categorical approach was necessary in order to address the deficiencies of the current system based on the evolving standards. *Atkins*, *Roper*, and *Kennedy* all determined a categorical rule to be the appropriate method to address the entire class of offenders committing a range of crimes, and the *Graham* court agreed. In the majority opinion, Justice Kennedy reversed the judgement of the First District Court of Appeal of Florida and remanded the case for further proceedings (p. 32). *Graham v. Florida* held life without parole sentences unconstitutional for juveniles convicted of non-homicidal offenses. The Court took special notice to distinguish between homicide and non-homicide offenses due to the gravity of the offense and moral culpability. Two years later, the Supreme Court would re-examine this determination.

In *Graham*, the Supreme Court significantly expanded the considerations proposed by *Roper*. The opinion directly referenced brain science cited by the *amici* as evidence of the diminished culpability of adolescent offenders. While the *Roper* court implied the relevance of these findings, the Court in *Graham* stated them explicitly. In addition to the wide-reaching influence that the holding had for juveniles, the implications of the Court's reliance on brain science and psychology marked a shift in the role of science in criminal justice.

Miller v. Alabama

The *Miller* trilogy was completed in 2012 with *Miller v. Alabama* and *Jackson v. Hobbs* (the two cases were joined, and the ruling concerned them both) in which the Supreme Court extended the categorical protection for juvenile offenders from LWOP sentences to most homicide cases. The first petitioner, Kuntrell Jackson, was barely fourteen at the time of his arrest. Up to that point, his life was exceptionally turbulent.

He grew up in a public housing community, frequently exposed to drugs, abuse, guns and violence (kuntrelljackson.com). He was arrested for his involvement in an attempted robbery at a video store, where his cousin and a friend shot and killed the clerk (*Miller v. Alabama*, 567 U.S. 460, p. 2). Jackson stood outside the store while most of the events unfolded. Under Arkansas law, prosecutors had the authority to try offenders as young as fourteen as adults for certain serious offenses. The prosecutor in Jackson's case elected to transfer his case to adult court and charged him with capital felony murder and aggravated robbery, by which he was sentenced to a mandatory term of life without the possibility of parole.⁷ In light of both *Roper* and *Graham*, Jackson exercised a series of appeals until finally reaching the U.S. Supreme Court, who granted certiorari on his and a companion case to determine the constitutionality of juvenile LWOP sentences for most homicide cases.

Evan Miller was also fourteen years old at the time of his crime. His adolescence was characterized by alcoholism and drug addiction from his mother, abuse from his stepfather, and repeated stints in and out of foster care (*Miller v. Alabama*, 567 U.S. 469, p. 4). At the ripe age of fourteen, Miller regularly used drugs and alcohol and had attempted suicide four times. In 2003, Miller and a friend beat a neighbor on the head with a bat and lit a fire to cover up the evidence. The neighbor died of his injuries

⁷ As with many juvenile offenders, Kuntrell Jackson would go on to become a fully functioning member of society. Kuntrell was officially released from prison on February 21, 2017 (kuntrelljackson.com). After his release, he joined the Equal Justice Initiative's Post-Release Education and Preparation (PREP) program. He had dreams of being a professional actor, writer, and ultimately an inspiration to youth who had the same background as him. Today, Kuntrell is a vibrant and outspoken activist, author, and advocate who regularly speaks at churches, schools and nonprofits around the U.S. on behalf of kids currently fighting for their rights in the criminal justice system. He uses his experience to speak to audiences regarding the realities of children in America who are surrounded by abuse, neglect, violence, and poverty, and the connections this draws to mass incarceration. He has a campaign in the works, entitled 'Preventing Adolescents from Incarceration' (P.A.I.N.) to focus on "educating, empowering, and equipping" young people despite the realities of mass incarceration.

and smoke inhalation. Alabama law required the prosecutor to charge Miller as a juvenile but allowed the District Attorney to remove the case to adult court. Once under adult jurisdiction, the State charged Miller with murder in the course of arson and a jury sentenced him to the mandatory minimum punishment of LWOP. The Alabama Court of Criminal Appeals affirmed, and the Alabama Supreme Court denied review.⁸

The *Miller* court expanded on the rationales provided in *Thompson*, *Roper*, and *Graham* to eventually establish a categorical exemption. The Court identified two relevant strands to perform a proportionality review: (1) the culpability of the overall class of offenders (juveniles) and (2) the severity of the penalty (*Miller v. Alabama*, 567 U.S. 460). The State argued the objective indicia of national consensus as portrayed through state legislatures left no question as to if juvenile LWOP was unconstitutional. The Court answered in the negative, stating this argument was weaker than the one rejected in *Graham*, and instead that precedent was the guiding factor in this case. The Court specifically addressed the mandatory sentencing schemes in place in these States that removed the ability of a sentencing authority to consider the mitigating features of a juvenile offender and their background. Instead, the harshest terms of imprisonment were dished out to juveniles despite their behavioral and neurological immaturities and greater capacity for change. The Court also explored the substantial differences between children and adults. Once again, *Amicus Curiae* briefs filed by the American Psychological Association and American Medical Association were largely influential

⁸ Miller’s LWOP sentence was reaffirmed in 2021. The Alabama judge insisted that Miller’s offense was not mitigated by his exposure to violence and abuse from a young age. The judge noted it to be a “reluctant but necessary conclusion” and the Alabama Attorney General issued a statement supported the decision, stating “today, the court restored the punishment that is fitting for Evan Miller’s wicked actions” (al.com). Evan Miller remains in prison to this day.

on the Court's understanding of the developing brain and behavioral science. The Court noted that "the evidence presented to us in these cases indicates that the science and social science supporting *Roper's* and *Graham's* conclusions have become even stronger" (p. 9). The role of science in Justice Kagan's majority opinion was significantly noteworthy relative to the previous cases. As the science on the adolescent brain continued to develop, the willingness of the Court to include it as relevant became increasingly apparent. *Miller* prohibited the imposition of mandatory LWOP sentences for juvenile homicide offenders. Importantly, *Miller* allowed *discretionary* LWOP sentences for those offenders, provided sentencing authorities consider the offender's individual circumstances, including their age and maturity level.

Montgomery v. Louisiana

Four years later, in *Montgomery v. Louisiana*, the Supreme Court revisited juvenile LWOP to determine if it applied retroactively. Petitioner Henry Montgomery was convicted of murder in 1970 for a crime committed at the age of seventeen and given a sentence of LWOP (*Montgomery v. Louisiana*, 577 U.S. ____). In 1963, he killed a deputy sheriff in Louisiana. Montgomery had spent over fifty years in prison by the time *Miller* was decided. In light of the Court's opinion, Montgomery sought collateral review for his mandatory life sentence. The trial court denied Montgomery's appeal, holding that *Miller* was not retroactive on collateral review, and the Louisiana Supreme Court denied his application. The Supreme Court was presented with two questions, (1) do they have the jurisdiction to challenge the Louisiana Supreme Court's holding that *Miller* does not apply retroactively, and (2) does *Miller* apply retroactively?

To the first question, the Court answered yes. The Supreme Court did have jurisdiction to challenge the Louisiana Court's holding on the retroactive application of *Miller* and outlined two reasons. First, the Court set forth a framework in *Teague v. Lane* (489 U.S. 288) that held that courts must give retroactive effect to (1) novel substantive rules of constitutional law and (2) watershed rules of criminal procedure (*Montgomery v. Louisiana*, 577 U.S. ___, p. 7). Although *Teague* was an interpretation of a federal habeas statute, the Court argued it did not preclude state courts giving retroactive effect to new substantive or watershed rules as a constitutional matter. The Court concluded that the Constitution requires state collateral review courts to give retroactive effect to new substantive rules of constitutional law (p. 8).

This holding led the Court to the second question, if *Miller's* prohibition on mandatory LWOP was a substantive rule of Constitutional law that must apply retroactively. Substantive rules, as the Court explained, either prohibit criminal punishment for certain conduct or a category of punishment for a class of offenders based on their status or offense (*Montgomery v. Louisiana*, 577 U.S. ___, p. 14). The central premise of the *Miller* line of cases (*Roper, Graham & Miller*) was of the proportionality of certain punishments in their application to juveniles. *Miller* recognized that children differ from adults in their "diminished culpability and greater prospects for reform" (p. 15). The Court elucidated this distinction to have certain implications for the penological justifications of punishment. The *Montgomery* court determined *Miller* to protect a class of offenders, juveniles, whose crimes reflect the transient immaturity of youth. As a result, the Court insisted, *Miller* was a substantive rule of criminal law, and therefore must apply retroactively. For the same reason most

other substantive rules are retroactive, there is a substantial risk that a large portion of juvenile offenders will face punishment that the law, as articulated in *Miller*, cannot impose upon them (p. 17). The *Montgomery* court established that prisoners like Montgomery, who have evolved from the immaturity of adolescence to model members of the prison community, are provided “the opportunity to demonstrate *Miller*’s central intuition—that children who commit even heinous crimes are capable of change” (p. 3).⁹

After the holding in *Montgomery*, all individuals sentenced to LWOP for crimes committed before the age of eighteen in the U.S. became entitled to a parole hearing or resentencing. *Montgomery* once again affirmed the behavioral and developmental science outlined in *Roper*, *Graham* and *Miller*. The differences between children and adults, the Court postulated, were significant enough to warrant specialized treatment that applies to all offenders before and after its official holding (*Montgomery v. Louisiana*, 577 U.S. ____).

Jones v. Mississippi

In 2021, the Supreme Court was again confronted with the realities of juvenile crime. In *Jones v. Mississippi*, the Court held that the Eighth Amendment does not require a sentencing authority to find a juvenile ‘permanently incorrigible’ before imposing a sentence of LWOP (*Jones v. Mississippi*, 593 U.S. ____). *Jones* marked a

⁹ Henry Montgomery was released from the Louisiana State Penitentiary on November 17th, 2021 at the age of 75, after serving 57 years in prison for a crime committed at the age of 17. Montgomery had an excellent disciplinary record and arguably had long since demonstrated rehabilitation. Inside prison, he established an inmate boxing team and became both a trainer and coach (*Montgomery v. Louisiana*, 577 U.S. ____, p. 21). He contributed time and labor to the prison’s silkscreen department and strived to be a role model to other inmates for many years. His parole board unanimously affirmed his release and determined him to be at low risk for reoffending (jjie.org).

pendulum swing back in favor of ‘tough on crime’ rhetoric and thinking. Prior to this case, the Supreme Court had repeatedly bolstered procedural and substantive protections of juvenile offenders based on growing behavioral and brain science that indicated their diminished culpability and greater capacity for reform (*Roper, Graham, Miller & Montgomery*). Three important changes within the Court had occurred since the *Montgomery* holding. The appointments of Justices Neil Gorsuch in 2017, Brett Kavanaugh in 2018, and Amy Coney Barrett in 2020 by then President Donald Trump had shifted the ideological leaning of the Court, giving the conservative wing a supermajority.

At the age of fifteen, Brett Jones stabbed and killed his grandfather using a kitchen knife during the height of an argument (*Jones v. Mississippi*, 593 U.S. ___, p. 2). Jones made feeble attempts to cover up the crime before fleeing with his then girlfriend. A jury found Jones guilty of murder. Under Mississippi law, LWOP was the mandatory sentence for murder, and so the trial judge imposed this sentence on Jones. In the wake of both *Miller* and *Montgomery*, Jones appealed his LWOP sentence. At his resentencing, the trial judge acknowledged that although Jones’ “chronological age and its hallmark features” (p. 4) diminished the efficacy of the severe sentence, LWOP was still be the most appropriate sentence relevant to his culpability. Jones appealed this ruling to the Mississippi Court of Appeals with the argument that the sentencing authority must make a factual finding that the juvenile defendant is permanently incorrigible in order to impose a LWOP sentence. This argument was rejected by the Mississippi court, and the Supreme Court granted certiorari.

The Court’s argument, presented by Justice Kavanaugh, was based in large part on the finding in *Miller* that trial courts are “not required to make a finding of fact regarding a child’s incorrigibility” (*Montgomery v. Louisiana*, 577 U.S. ___, 19). Jones argued that the *Miller* holding required more than a discretionary sentencing procedure and provided three rationales. First, certain eligibility criteria must be met before an offender can be sentenced to death, such as sanity or lack of intellectual disability. Jones argued this must also be true for juveniles, and therefore the Constitution required sentencing authorities find permanent incorrigibility before sentencing a homicide offender under the age of eighteen to LWOP (*Jones v. Mississippi*, 593 U.S. ___). The Court agreed with the State’s response, that (1) it would be difficult for experts to determine between the transient juvenile offender and that who’s crime reflects irreparable corruption, and (2) the eligibility criterion the court has considered in past cases was not incorrigibility but an objective indicium of society’s standards. Second, in deeming *Miller* a substantive holding, Jones insisted, the *Montgomery* court must have assumed a separate factual finding of permanent incorrigibility to be necessary (pp. 10-11). The Court argued this to be an incorrect interpretation of *Miller* and *Montgomery* based on the statement provided above.¹⁰ Third, Jones contended that the infrequency of LWOP sentences for juveniles was a central impetus for *Miller* and *Montgomery*, and the only means by which to achieve this would be to require a separate finding of permanent incorrigibility (p. 13). The Court disagreed and stated instead that a discretionary sentencing procedure would make LWOP sentences relatively rare for

¹⁰ “the finding in *Miller* that trial courts are “not required to make a finding of fact regarding a child’s incorrigibility” (*Montgomery v. Louisiana*, 577 U.S. ___, p. 19).”

juvenile homicide offenders under eighteen. If the Court rejected these rationales, Jones alternatively provided that the sentencing authority must at the least provide implicit findings of permanent incorrigibility on the record. The Court again rejected this appeal and contended that implicit findings were (1) not necessary to ensure a consideration of the defendant's youth, (2) not required by *Miller*, (3) not consistent with the Court's precedent on capital punishment, and (4) not precluded by any sentencing practices across the U.S. (p. 15). Therefore, the Court's majority opinion articulated by Justice Kavanaugh held that a sentencing authority had no need to find a juvenile permanently incorrigible before imposing LWOP. The majority argued their opinion did not disturb the holdings in *Miller* or *Montgomery*. The dissent categorically disagreed.

Authored by Justice Sotomayor, the dissent criticized the majority opinion for narrowing the holdings in *Miller* and *Montgomery*. According to the Court's majority, explained Sotomayor, the sentencer was not required to determine whether a juvenile's crime reflected irreparable corruption or was the unfortunate reality of the transient immaturity of youth (*Jones v. Mississippi*, 593 U.S. ___, Sotomayor, J. dissenting opinion). The dissent argued this finding to be in direct conflict with the premise of the Court's previous holdings, which provided "even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "unfortunate yet transient immaturity"" (p. 6). The dissent emphasized the important differences between children and adults and reviewed the relevant changes under the law that had been introduced based on these scientific distinctions. Sotomayor argued the majority violated precedent by interpreting *Miller* to only require a discretionary sentencing procedure rather than

fully measuring the mitigating qualities of youth. In limiting the holding in *Miller* to prohibit merely mandatory LWOP sentences, argued the dissent, the Court disregarded half the opinion's reasoning. In fact, Miller explicitly held that "no set of discretionary procedures can render a sentence of LWOP constitutional for a juvenile whose crime reflects "unfortunately yet transient immaturity"" (p. 9). In her conclusion, Sotomayor returned back to the petitioner Brett Jones to highlight his troubled background, surrounded by violence, neglect, verbal and physical abuse by his biological and stepfather,¹¹ alcoholism from his parents, mental health issues including hallucinations, and more (pp. 18-19). Additionally, the dissent recognized the evidence provided at Jones' resentencing hearing which pertained to his maturation, namely through a GED, employment within prison, and testimony from his grandmother who insisted her grandson "is not and was never irreparably corrupt" (p. 21). How then, the dissent questioned, does this individual not reflect the transiency of youth? With the majority's holding, Jones and other juvenile offenders would now face an uphill battle in demonstrating they are not one of those rare children whose crime warrants LWOP as a constitutionally permissible sentence.

Narrowing the Scope

Roper, *Graham* and *Miller* set the precedential background upon which lower court systems navigated juvenile crime. The Supreme Court jurisprudence on the diminished culpability of juvenile offenders engendered a decade of shifts by state legislatures. Decades of case law piece together the history of juvenile justice,

¹¹ Including beatings with belts, switches and a paddle, named 'The Punisher' (*Jones v. Mississippi* 593 U.S. ___, Sotomayor, J. dissenting opinion, p. 19).

contemporary problems, and developmental science on the adolescent brain to produce focused guidance. Having reviewed the relevant jurisprudence on juvenile crime at the federal level, we can now look at how judicial policy is carried out in an individual state. Reviewing brute statistics at the state level suggests that no state is dramatically better or worse at implementing the implications of Supreme Court jurisprudence nor of developmental science findings. Each state is typical while maintaining its own particularities. In the following section we will explore the history of juvenile justice, legislative and judicial responses, and specific case studies in Oregon.

Juvenile Justice in Oregon

Our coverage of the history of juvenile justice in Oregon can start with the ‘Get Tough’ period. The spike of violent crime in the 1990’s and false predictions nationally of an impending wave of violent, delinquent, criminal youths reinvigorated states to pass strict legislation to control youth crime. Public opinion at the time supported the ‘tough on crime’ rhetoric, motivated largely by racial fearmongering by Dilulio’s ‘superpredator’ myth. As we know, these claims were disproven, and youth crime hit a record low at the start of the 21st century. Nonetheless, many politicians (and also elected police, prosecutors, and judges) around the country, fearful of being labeled ‘soft on crime’ reinforced these claims and elevated fears among the general public. The same was true in Oregon, as voters and politicians remained consistent with the national rhetoric on preventing the rise of crime.

Measure 11: Tough on Crime Bill

In 1994, Oregon, a state that allows voters to directly approve ballot measures, passed Ballot Measure 11. The bill required mandatory minimum prison sentences for ‘serious crimes against persons’ and mandated juveniles aged fifteen or older be automatically transferred to adult court (Taylor, 2004). The rehabilitative ideals of the juvenile justice system were overtaken by the fear of rising crime rates. Instead, voters expressed support for stringent sentencing policies to ensure violent criminal youths weren’t allowed to run free on the streets. Measure 11 had 3 main goals: (1) eliminate any opportunity for early release, (2) establish automatic transfers of youth who commit serious crimes to adult courts, and (3) create longer sentences. Under Measure 11, no amount of mitigating circumstances could factor into sentencing decisions. This was specifically notable for youth, as age is typically considered a ‘mitigating’ feature when measuring the gravity of a crime and determining appropriate punishment. The bill shifted the function of juvenile institutions from rehabilitation to a more punitive system focused on facilitating accountability. Among the changes, adult waivers and mandatory minimum sentencing were some of the harshest for the young, often non-violent and first-time offenders. Two years after the passage of Measure 11, as amplified fears of a rapid increase in violent crime loomed, Oregon voters amended the State Constitution. At the time of its adoption in 1859, the document outlined that criminal punishment “shall be founded on the principles of reformation, and not of vindictive justice.” In 1996, Oregon voters amended the state constitution to read as “laws for the punishment of crimes shall be founded on these principles: the protection of society, personal responsibility, accountability for one’s actions and reformation” (Schulberg, 2021). This

shift reflecting the growing public opinion and the changing politics of crime and punishment in Oregon, and around the country. Instead of seeking to fulfill the foundational goal of juvenile justice to rehabilitate offenders, the state reinforced penological goals of punishment and retribution.

Measure 11 introduced a series of changes to the Oregon juvenile justice system. First, by automatically transferring a substantial portion of juveniles to the adult system, the bill removed any rehabilitative capacity. The adult criminal system is not set up to address first-time, 15-year-old offenders. In addition, adult sentences cannot be expunged and carry significant implications for future prospects of acquiring an education or occupation for adolescents (Olmsted, 2019). Juvenile court sentences are flexible and designed to account for the variability in an adolescent's brain and behavior. Mandatory transfer systems are consistently disputed for failing to prevent future crime. Studies demonstrate, including those by the U.S. Department of Justice, that adult prosecution and incarceration of juveniles leads to high recidivism rates after release (Bryson & Peck, 2019; Casey, 2020; Olmsted, 2019). Second, the underlying logic of Measure 11 undermined the ability of the criminal justice system to account for the mitigating quality of an offender's age. The modal penal code, Oregon statutes, and the Supreme Court have consistently affirmed that age, among other factors such as family background and past abuse, should be mitigating when determining blameworthiness for a crime. Measure 11 removed this ability by asserting that older juveniles have the same degree of criminal culpability as adult offenders (Olmsted, 2019). Measure 11 created a system of inflexibility that was specifically discriminatory towards wayward youth.

A striking racial disparity emerged as a prominent feature of the new Measure 11 era. Youth of color were significantly disadvantaged by the structural changes ushered in by the new juvenile sentencing rules. In fact, Black youth were three times more likely than White youth to face a Measure 11 charge (Puzzanchera & Hockenberry, 2021). The proportion of youth of color that constituted total Measure 11 indictments was nearly five times greater than their relative proportion of the general population. These statistics were only exacerbated with time. By 1995, Black youth were 7.3 times more likely to be indicted for a Measure 11 offense than White youth. By 1996, they were 26.1 times more likely. Despite these sweeping changes, no discernible link was identified between the number of youths charged with a Measure 11 offense and the juvenile crime rate.

As the ‘Get Tough’ rhetoric was discredited and Supreme Court released their guidance on the developmental immaturity of adolescents, state governments gradually adjusted their antiquated sentencing authorities like that of Measure 11. In Oregon, this change came in 2019.

Senate Bill 1008: Juvenile Justice Reform

Eventually, the myths that proliferated during the ‘Get Tough’ era were largely disproved. Legislative change, in Oregon, didn’t come until 25 years after the passage of Measure 11. In 2019, legislators approved OR Senate Bill 1008. The bill was driven by the recent series of Supreme Court cases, outlining the diminished culpability and capacity for rehabilitation of adolescents. S.B. 1008 set forth three main changes to improve youth justice in Oregon. First, it introduced a ‘Second Look’ program, by which all juveniles are entitled to a hearing halfway through their sentence to determine

if they have been rehabilitated and taken responsibility for their crimes (ACLU Oregon, n.d.). Second, it ensured all criminal youth start in the juvenile court and must go through a special hearing at the request of prosecutors to be transferred to adult court.¹² Third, it eliminated all life without parole sentences by mandating that youth convicted under the age of 18 are eligible for a parole hearing after a minimum of 15 years of incarceration. Amidst claims of judicial bribery, former District Attorney of Oregon Josh Marquis summarized S.B. 1008 as “a law deliberately written not to make it fair, not to make it more even-handed, but to prevent, ever anyone under the age of eighteen no matter how sophisticated, diabolical and intelligent, from ever having to face the consequences of their crimes”. His statement reflects the growing frustrations of prosecutors across the U.S. who now face a much tougher battle placing juveniles behind adult bars.¹³

In Oregon, a working group of district attorneys, the occupational licensing board, defense bar, law enforcement, and more are working in collaboration to launch a new initiative to reduce barriers for individuals with juvenile records. Following the guidance from the Supreme Court on the neural plasticity of the adolescent brain, the expungement of records allows for rehabilitated youth to successfully re-enter society. These efforts are not without objection, however. Mr. Marquis points to Kip Kinkel,

¹² In an interview I conducted on January 18, 2022, former District Attorney of Oregon Josh Marquis expressed significant displeasure with this provision, explaining that a judge would have to determine it in the best interest of a juvenile to go to prison, and that this situation is very unlikely.

¹³ Because S.B. 1008 has only been in place for three years, the conclusions that can be drawn from its impact within the State are limited. We don’t yet know whether the bill will reduce the striking racial disparity among juvenile detention in Oregon. In rejecting the retroactive application of the Bill, Oregon legislatures inhibited the steps towards reform. Beyond Oregon, no state is a standout in terms of juvenile justice. In light of the past decade of Supreme Court guidance, most states have reformed their policies, raised the minimum age of juvenile jurisdiction, and reduced transfers.

asking “is this the type of person that we want to become a lawyer under any circumstance? My response is absolutely not. That’s insane!”. Under the new system, he insists, sentences are lifted off the shoulders off the most violent juvenile offenders following their release. So, who is Kip Kinkel?

Kip Kinkel

In May of 1998, Kipland Kinkel, then fifteen-years-old, shot and killed his mother, father, and then went to his high school in Springfield, Oregon and killed two of his classmates and wounded 25 others (Schulberg, 2021). The shockwave from this incident was wide-reaching, severe, and engendered fears of impending mass school shootings in the coming years. At fifteen, Kip was sentenced to 111 years and 8 months in prison without the possibility of parole. In Oregon, the image of Kip as a violent juvenile school shooter was frozen in time. Like Mr. Marquis, prosecutors across the state and beyond pointed to Kip as the reason to vote against juvenile justice reform bills like S.B. 1008. In fact, growing concerns that the new legislation would allow Kip and other ‘dangerous youth’ who had grown up in the juvenile justice system an opportunity for release induced Oregon legislatures to pass Senate Bill 1005. The new statute established that Senate Bill 1008 was not retroactive; it did not apply to individuals who were originally sentenced before January 1, 2020. S.B. 1005 barred incarcerated juvenile offenders from any potential resentencing relief (S.B. 1005, 2019), including Kip and many of his companions.

In speaking about his crimes after twenty years in prison, Kip explains the haunting psychosis that undergirded his troubling childhood (Schulberg, 2021). He was suffering from then-undiagnosed paranoid schizophrenia and had been hearing voices

since the age of twelve. He became obsessed with a theory that the voices in his head were coming from a chip planted by the Disney corporation in collaboration with the U.S. government. His obsession with knives and guns developed in conjunction with his fixation that China was going to invade the U.S. After his parents found materials to make a bomb in his room, they took him to a therapist who diagnosed him with depression. At the point in his life in which he committed the shooting, he describes being consumed by the voices so much so that “everything was a threat, everything was evil”. The trial was also traumatic, Kip describes being found “curled up in a ball, struggling to breathe after experiencing a panic attack and hearing voices”. He pleaded guilty in court without reviewing most of the relevant documents. His lawyers at the time chose not to pursue a conviction of guilty except for insanity because “a jury wouldn’t stomach it”.

Despite remaining frozen in the minds of most Americans, Kip is not the same person today (Schulberg, 2021). He has earned a college degree, met with members of the community, advocated for criminal justice reform to elected officials, and even become a certified yoga instructor. Through years of therapy and effective medications, Kip came to terms with his disorder and no longer suffers from the most serious symptoms. If the primary goal of punishment, as explicated by the 1996 amended Oregon Constitution, is for the protection of society, and Kip no longer represents a threat to public safety, should he not be released? The Oregon Supreme Court said no (*Kinkel v. Persson*, 2018). Kip appealed his sentence as unconstitutional under the new *Miller* ruling, arguing that his LWOP sentence for a crime committed at the age 15 was cruel and unusual. In dissent, Justice Egan articulated that Kip’s horrific crimes were a

symptom of a psychotic process that had been building intermittently over a three-year period, not a matter of “irreparable corruption” (p. 32). Despite his denial of resentencing, Kip’s case is one that involves the special circumstances of mental illness that can dominate a child but reflect the plasticity of childhood. We must consider the question; would the story be different if Kip had been an adult? Developmental science tells us that adolescents are uniquely vulnerable and subject to change. Regarded as one of the most violent juvenile criminals ever in Oregon, Kip is now a reformed adult arguably capable of functioning safely among society.

Given the denial by the Oregon legal system, Kip remains among the many incarcerated juvenile offenders. In 2020, there were 1,465 individuals serving life *without* parole and 6,916 serving life *with* parole for crimes committed before the age of eighteen (Nellis, 2021). An additional 1,716 individuals were serving sentences that effectively match up to LWOP, entitled ‘de facto life without parole (DLWOP) (Nellis, 2021; Olmsted, 2019). These numbers persist despite the Supreme Court jurisprudence ruling LWOP sentences unconstitutional for crimes committed by youth under the age of eighteen.

Next, let’s consider two specific case studies of individuals incarcerated in Oregon. The stories of two similarly situated men with seemingly comparable backgrounds but starkly contrasting subjective experiences might shine a light on the disparity still prevalent in Oregon, and beyond. In both cases, I draw upon personal interviews conducted on the following dates: January 27, 2022 for the first and February 10, 2022 for the second.

Trevor Walraven

“What people don’t realize,” said Trevor, “is that every minute you are incarcerated, you are reminded of the choices that you made to get there and the hardships that exist because of that.” Trevor regrets the decisions he made early in his life. He sympathizes with the victims of his crimes and wishes he could undo the anguish he caused. Aware of his failures, he is also excited to use his second chance to inspire positive change in the world.

When he was younger, Trevor followed his older brother Josh around everywhere. The two grew up deep in the mountains of rural Southern Oregon. Without a telephone, television, or the Internet, they liked to ride dirt bikes at their 52-acre home. The boys were home-schooled for a large part of their lives, but well regarded by the Josephine County community. “They were good boys,” some said. Their parents made a living through traveling flea markets, attending an average of twenty a year. Behind the façade of a stable two parent family who lived at a nice home in the country was a shocking and unfortunate reality of drugs, guns and violence. Trevor remembers trying alcohol for the first time at ten years old, and only harder drugs followed.

At the age of fourteen, Trevor shot and killed a lodge owner near his house. Trevor used his brother’s gun to shoot the victim William Hull in the forehead. After hiding the body, Trevor and Josh took a three-day joy ride to Eugene and Reedsport in the victim’s car. They stopped at a Wal-Mart, pizza parlor, and drive-in movie theater along the way – doing what precocious kids would want to do. William’s decomposing body was found a week later hidden in a remote field.

Under Oregon law, prosecutors had discretion to try Trevor as an adult. He was convicted of aggravated murder and sentenced to life imprisonment without the possibility of parole. “I didn’t understand what being waived to adult court meant” Trevor explained. He also described not being aware of the scope of punishment that would follow due to limited interactions with his legal team.

“The environment inside youth facilities laid a foundation for me to get involved in programs,” he said. Trevor excelled in the University of Oregon’s Inside-Out program, which allowed him to get a college degree while inside prison. He accredits much of his rehabilitation to this educational opportunity, and the support from his family who encouraged him to be an active participant. In juvenile facilities, “treatment, education and programs are encouraged in ways that they simply are not in adult facilities” Trevor explained. “I was lucky to get a job in maintenance at OSP” he said, “where I had the responsibility to show up to work on time, fill out paperwork, do my job, and advocate for higher wages.” These skills were invaluable for Trevor who had never held any kind of professional role. Mostly, Trevor was grateful for the various programs offered by the different facilities in which he was confined. He learned to control his behavior, be mature and responsible, and mediate healthy relationships.

After serving 18 years of his 30-year minimum life term, Trevor was released through a ‘second-look’ hearing. Through S.B. 1008, Oregon statutory law now requires courts to re-evaluate a juvenile’s sentence either (1) after half of the time has been served or (2) by the time they reach 24 years old. The judge at his trial determined Trevor had achieved ‘outstanding reformation’ while incarcerated and was no longer deemed a threat to public safety. Despite this, Trevor had a GPS ankle monitor for two

and a half years and a curfew for six years following his release. “Both of these restrictions were extreme and unnecessary for me” he said, “but they allowed me an opportunity to prove that I was willing to follow rules and that I am no longer a threat to society”.

Now, at the age of 38, Trevor speaks regularly at universities, correctional facilities, advocacy organizations, and various events. In the six years since his release, Trevor has had a successful reentry to society. He co-founded the Oregon Youth Justice Project, which helps youth impacted by the adult criminal justice system. He also serves as the Prison Outreach Coordinator and Policy Associate of the Oregon Justice Resource Center. In this capacity, he provides training and consulting with experiential expertise on juvenile justice, restorative justice, and advocacy for prison reform.

Still, the public’s response is “this sociopath is NOT innocent”, “he and his litter mate should be put to death”, and “I hope he’s laying on a cold slab within six months” (Facebook.com accessed on 1/25/22). After a meaningful pause in our personal interview, Trevor acknowledged the feelings of injustice remaining in his community. “Those who cause harm are oftentimes frozen in the minds of those who they cause harm to” Trevor said. Because he served a little over half his prescribed sentence, he explained, individuals are predisposed to feel justice has not been served.

“What is justice?” he postulated. Most people, when he asks this question, will regurgitate some number of years based on societal norms. Trevor’s response to them is always “If they do that time, come out and commit another crime, was justice served?” The answer is always no. “The root of harm is the desire for the individual to not

commit a crime again,” he said. Feelings of injustice are created based on how the stage is set.

Trevor entered prison a drug-addicted miscreant youth and through education, love, and support he emerged a mature, stable adult. He asks that juvenile offenders be given the same opportunity to demonstrate their capacity for reform as he was. In recent years, Trevor has been an advocate for juveniles still behind bars. He hopes his story will demonstrate that adolescents can make horrifying mistakes and still be reformed.

With Trevor’s story in mind, we can think back to Sterling Cunio. From a young age, Sterling fell prey to a recurring pattern of crime and short periods of confinement inside juvenile facilities. Once he reached late adolescence, he was led to more serious crime and eventually served with two life sentences. However, Sterling was also granted an early release through juvenile justice reform in Oregon and good behavior. Similar to Trevor, Sterling has had a successful re-entry with a stable job, housing, a community, and more.

Sterling Cunio

Sterling spoke to his experience while incarcerated. “The first lesson a teenager learns in prison,” he said, “is that you have to be willing to defend yourself.” “200-pound men hungry from thousands of pushups hit hard when they want your canteen sack.” Plagued by behavioral issues, Sterling spent ten years in and out of solitary confinement. ‘The hole’ was a miserable, isolating, torturous environment of complete deprivation for a young, developing early adult. Eventually, Sterling came to terms with his background, his experience in the world up to that point, and his crimes. He got his Bachelor’s degree from the University of Oregon while incarcerated. He found love

and education to be the most influential in his growth. “Through education,” he explained, “you start learning how to define a problem and then start learning for ways to resolve it.” Before his degree, Sterling’s philosophy in life could be summed up as “dolla dolla bills yo.” However, he came to learn about “systems of disparity, failures of social safety nets, policing policies, intergenerational cultural dysfunction,” and discovered his problems were a lot bigger than money. “People loving me and me educating myself, that’s what did it, that’s the formula” he said.

Comparing Experiences

Sterling Cunio and Trevor Walraven committed offenses of similar degree, served time in the same facilities at the same time, but had strikingly different experiences. “I don’t even know why this needs to be a question anymore in the larger discourse,” Sterling responded when I asked him about the distinction between his and Trevor’s experience. “I know Trevor, Trevor’s a friend,” he told me. What it really boils down to, is that Black offenders are punished more harshly. “That shows up in what programs certain people are disqualified for, what infractions are imposed, which are not,” he said. “Trevor wasn’t an angel,” Sterling added while chuckling, “but they was paying attention to us Black and Brown kids.” Within incarceration, the programs and opportunities prisoners are selected for is dictated by race. Offenders are disqualified from participating in programs due to misbehavior. Young Black boys are watched more closely by prison officials and are more likely to be punished for behavior deemed as violent. “When you get a smart, White kid that is a hard worker, he will get different attention than the poor, Black motherf****r with nobody asking how he’s doing,” Sterling explained. “My experience inside institutions was that we had to create space to

interrupt prison culture,” he added. The racial disparity that is evident across all spheres exists inside prisons as well, “disparity doesn’t disappear inside prison,” Sterling said, “prison is the utopia.”

Some people think Oregon is a leader in the field of juvenile justice reform. Trevor described the opportunities and culture of juvenile and adult facilities in Oregon as supporting. Sterling had a different perspective. “You can put my quote down as F**K Oregon, they got this s**t all wrong, and the only person who is doing any kind of work is Kate Brown who is commuting people, and you can put my name on that,” he insisted emphatically.

Sterling made it clear that he was an outlier, Trevor was an outlier. He does not believe prisons and juvenile facilities have the resources to reform offenders. The distribution of programs and classes provided is exclusive. “I know people in there who have tried for years to get into classes,” he added. “On the books, Oregon looks very progressive,” Sterling said, “but in practice, that s**t don’t work!” He remains hopeful about solutions. “We need to employ credible messengers that go and be a part of these specific reform budgets and projects,” he said. Sterling emphasized the need for ‘restructuring’ the system (“dismantling might be too militant for my new prosocial career,” he reflected laughingly). He also expressed support for restorative justice, which he has been practicing since 2012. The current systems don’t allow for this kind of restoration, so we don’t even know if it will work. “What we’re really talking about is *transformative* justice, because we need to transform systems, we need to transform cultures, we need to transform people,” he insisted. “What are we restoring? A social status that has been oppressive since the beginning? What are we restoring? We need to

transform it.” Sterling was hopeful about the capacity of transformative processes to help people desist from crime, avoid life sentences, and prevent mass incarceration.

Sterling wanted to be clear that his experience was one of privilege, “I know I’m very fortunate.” He re-entered the world with a community of support, but this is not the experience of many other offenders after release. “The real power comes when people out here get involved because we the public and they public institutions,” he said, “once we start organizing, mobilizing and working with those coming home, *we can change the system.*”

The stories of Trevor and Sterling shine a partial light on the racial disparities and discrimination present in Oregon’s justice system. While they offer merely one paired example, this section has reviewed Oregon’s history of juvenile justice, characterized largely by the controversial guidelines stipulated by Measure 11. In response to federal juvenile justice jurisprudence and growing body of neuroscience informing adolescent immaturity, Oregon legislature passed Senate Bill 1008 to repeal Measure 11 and kickstart a new era of reform. Despite this, and as the case studies described above exhibit, disparity remains. Now, we will consider the prevailing racial inequities permeating the juvenile justice system.

Racial Disparity in the Contemporary Juvenile Justice System

A persisting racial disparity remains in the contemporary juvenile justice system. With each interaction, be it administrators, law enforcement, prosecutors, attorneys, judges, prison guards, or the general public, evidence demonstrates that young Black boys are the most disadvantaged. In many cases, this results in serious

consequences for them. First, let's consider the story of young Black boy playing in a park.

Tamir Rice

One late afternoon in November 2014, a man spotted a twelve-year-old boy playing with a toy gun in a playground (United States Department of Justice, 2020). He called 911. The man described to the police “a guy with a pistol”, “probably a juvenile” pointing a gun that was “probably fake” at others in the park. The dispatcher broadcasted the call to the Cleveland Police Department. Officers Frank Garmback and Timothy Loehmann were instructed to look for “a Black male” who was “pulling a gun out of his pants and pointing it at people.” The officers arrived at the playground, located the twelve-year-old boy, and within two seconds of them exiting the patrol car, Tamir Rice was fatally shot twice.

The video was grainy, and the testimony was inconsistent on Tamir's hand positioning and whether or not the officers gave verbal warnings. The outcome, however, was clear: two trained law enforcement officers killed a twelve-year-old boy in a playground for having a toy gun (U.S. D.O.J., 2020). “Shots fired. Male down. Black male, maybe twenty” was how the officers reporting the incident described the boy (Lopez, 2014a). In court, prosecutors insisted that Tamir was “big for his age” (Ingraham, 2015). Six years after the shooting, the U.S. Department of Justice announced they would not be pursuing federal criminal charges against the offending officers (U.S. D.O.J., 2020).

To what extent did implicit racial bias influence the officers' actions that day? Historically, African Americans are depicted as violent, dangerous and even predatory.

For Black youth, this narrative renders the categories of ‘child’ and ‘adult’ as less distinct. Young Black boys in particular come to be seen as less innocent and more culpable. The underdeveloped adolescent brain is shared by persons of all races, but its impacts are compounded by unstable family lives and crime-ridden social settings, all of which disproportionately impact Black youth. The result is that Black adolescents, when they commit crimes, or even appear to, become the victim of the juvenile justice system as a whole.

Tamir’s story is but one example of the ways in which young Black Americans are perceived, targeted, and subjected to gross forms of police misconduct and police brutality. Less known, but equally problematic are the ways in which people of color and particularly young Black folk are subjected to problematic sentencing patterns. While White youth are afforded the casualty of ‘adolescent immaturity’ and ‘mischief-making’, Black youth are dubbed ‘superpredator criminals’ and placed behind bars. A kid is just that, a kid. White youth are just as likely as Black youth to consume drugs and alcohol, get in school fights, drive recklessly, and so on. Developmental psychologists confirm that adolescence looks the same around the world. However, Black youth are more likely to be watched, stopped, arrested, and punished for everything they do. Consider Ahmaud Arbery, Philando Castile, George Floyd, Breonna Taylor, Tamir Rice, Michael Brown, and more. African Americans face lethal consequences at the hands of law enforcement for simply existing in their neighborhoods. Disproportionate contact with law enforcement begins at home and continues through the rest of their lives. This has distinct implications in the criminal justice system, where Black youth face excessive police force, disproportionate arrests,

harsher sentences, and unequal incarceration policies. In light of the growing developmental science, the harsh treatment of Black juveniles in the justice system becomes increasingly relevant and problematic. Studies reveal implicit and explicit associations that prevent neuroscientific findings from applying to Black youth. Ultimately, race inhibits the mitigating value of youth.

History of Race Relations in the United States

The horrifying history of race relations in the United States remains apparent through contemporary practices and patterns. The ‘tough on crime era’ was especially turbulent for Black youth, who were depicted as “dangerous, belligerent, angry and violent” (Dilulio, 1995). Historically, the mass media held a prominent role in reinforcing racial stereotypes. Black males were portrayed through print, video and other media forms as deviant and angry (Casey, 2020; Steffensmeier, Ulmer & Kramer, 1998). During the years in which rampant crime was predicted to proliferate, the media used a variety of labels to refer to Black youth, including “drop-outs, delinquents, dope addicts, street-smart dudes and welfare pimps” (Steffensmeier, Ulmer & Kramer, 1998, p. 769). Therefore, young Black men were, and are still more likely to be perceived as dangerous gangsters who are less reformable than women or older offenders (Bryson & Peck, 2020). Perceptions reinforced by the media fostered among popular societal rhetoric and eventually informed policies that directly targeted minority neighborhoods and communities. The stories of the Scottsboro boys and Emmett Till are contextualized by the pestilential nature of racial fearmongering during the late 20th century. It is no longer permissible in contemporary society to justify explicit discrimination through racism, but this has not always been true.

Through a historical lens, the legacies of slavery in the U.S. shine through the criminal justice system in the form of enduring stereotypes of perceived aggression, status and culpability. Michelle Alexander's *The New Jim Crow* (2010) explains the current criminal justice system as a rebirth of forced segregation in which a disproportionate percentage of African Americans are relegated to a second-class citizenship behind bars, and within these positions denied the very rights they secured during the Civil Rights movement. A disproportionate number of Black juveniles are condemned to spend their childhoods behind bars. The theoretical underpinnings that get them there derive from an extensive history of racialized oppression.

Dehumanization of Young Black Boys

Dehumanization is a necessary prelude to the historically state-sanctioned violence towards African Americans (Goff et al., 2014). Black boys are routinely demonized by major institutions and people in power. This treatment violates the defining characteristics of adolescence, “being innocent and thus needing protection” (p. 527) and renders the ‘child’ less distinct from the ‘adult’. For Black children within the criminal justice system, this can lead important actors (judge, jury, police officer, etc.) to view them as older than they are. Tamir Rice, for instance, was depicted by the police officers who killed him as a physically fully-grown adult instead of the innocent twelve-year-old child that he actually was.¹⁴

Perceptions of dangerousness associated with race and ethnicity are informed by external attributions linking Black and Hispanic youth to violent crime. A study on

¹⁴ “Shots fired. Male down. Black male, maybe twenty” (Lopez, 2014a)

Black youth in the criminal justice system reveal that they are (1) afforded the privilege of innocence to a lesser degree than youth of other races, (2) seen as more culpable for their actions, (3) misperceived as older than peers of other races, and (4) implicit dehumanization is the culprit in facilitating racial discrepancies. These findings, which paint a disturbing portrait of the reach of racism in U.S. society, become especially horrifying when considering they came from a study conducted on police officers. Officers overestimate the age of Black youth by an average of 4.59 years (p. 535). Despite being better versed, even *trained*, to deal with young criminal suspects, police officers view thirteen-year-old Black youth as fully grown adults criminally culpable for their behavior. White children are not subject to such overestimation. In the study, perceptions of innocence diverged at the age of ten, where participants began to think of Black children as more culpable than any other race. This implicit dehumanization further predicted the racially disparate use of force against Black children. These findings highlight the concept that Black boys can be “prematurely perceived as responsible for their actions during a developmental period where their peers receive the beneficial assumption of childlike innocence” (p. 540).

Another study explored the perceived associations with criminal behavior as mediated by race (Bridges & Steen, 1998). Probation officers routinely portray the behavior of White youth offenders as stemming from negative social environments. For Black delinquency, these same officers assign negative attitudes and inherent personality traits as the culprit. These biased determinations have distinct implications for assessments of future dangerousness and recommended sentencing. Young Black male offenders receive harsher sentencing recommendations as a result of perceived

assessments of dangerousness based on internal attributions of negative personality traits (p. 567). Probation officers are specifically trained to handle troubled youth, and yet their behavior is moderated by conscious racial biases.

Still another study found police officers and juvenile probation officers to be influenced by unconscious biases in their behavior towards African American youth (Graham & Lowery, 2004). Implicit (and, as demonstrated by Bridges & Steen (1998), explicit) racial biases moderate the perceived negative traits, culpability, and likely recidivism of offenders. Officers endorsed harsher punishments for racialized youth. Police and probation officers provided with a set of subliminal cues related to African Americans were less likely to judge the hypothetical juvenile offenders as immature and more likely to perceive their behavior as characteristic of an adult.

Children of all races are not afforded the presumption of innocence equally. Black boys are dehumanized by criminal justice actors in positions of power, effectively justifying excessive violence and harsh treatment. In light of the developmental science outlining adolescent immaturity, the dehumanization of Black youth has significant consequences. Children of different racial groups are afforded the essence of childhood differently. In other words, who is considered a child deserving of protection varies based on individual and external social structural factors (Casey et al., 2020).

Neighborhood Mechanisms and Police Contact

Racism begins at the most primary level in neighborhoods and follows Black youth to school, job interviews, and beyond. Disproportionate minority contact is an established feature of the contemporary U.S. Minority youth come into contact with the juvenile justice system at a higher rate than any other youth (National Conference of

State Legislatures, 2011). Black boys are more likely to be arrested, detained, and incarcerated, leaving them overrepresented in every stage of criminal proceedings. African American youth make up only 13% of the population, but represent 31% of those arrested, 42% of those detained, 32% of those on probation, 35% of those adjudicated, 40% of those transferred to adult facilities, and 58% of those sentenced to prison. Black youth are more than four times as likely as White youth to be detained for an identical offense (Bernstein, 2014, p. 60; Rovner, 2021). This racial disparity is not explained by offending rates. Police practices that target low-income, urban communities perpetuate the disparate rate of minority police contact.

Neighborhood mechanisms such as poverty and concentrated disadvantage become synonymous with risk, and lead race to become a salient predictor of incarceration (Lowery, Burrow & Kaminski, 2018; Lowery & Burrow, 2019). The justice system effectively criminalizes poverty while linking attributes that facilitate racial and ethnic injustice. In addition, those most poverty-stricken are less capable than the privileged to obtain effective counsel (Drinan, 2017, pp. 58-59). Juveniles living in high income, low crime areas with defined family structures are more likely to be viewed as malleable or redeemable (Lowery & Burrow, 2019). These circumstances warrant a distinctly different set of punishments, for instance community treatment or probation tied to program participation.

Black adolescents also face unique challenges within the home. One out of every nine African American children have an incarcerated parent, compared to one out of every 28 Hispanic children and one out of every 57 White children (Drinan, 2017, pp. 40-41). Young children with incarcerated parents more often exhibit traits of anger,

aggression and hostility towards caregivers and siblings. Therefore, Black youth can be predisposed to commit crimes through intergenerational patterns that our socioeconomic institutions have created and maintained.

Racial disparity extends into institutionalized environments, such as schools, or workplaces. Zero-tolerance policies and ‘student resources officers’ (police officers stationed in elementary, middle and high schools around the U.S.) are increasingly prevalent and targeted at minority schools (Drinan, 2017, p. 51). Historically, the placement of police (though ‘safety officers’ is the preferred euphemism) in schools has been justified for the prevention of school shootings (Henning, 2021, p. 132). School shootings occur in mostly White suburban areas. However, Black youth are more likely to attend schools monitored by law enforcement officers than White youth. In many cases, draconian school policies punish youth of color for minor offenses, skipping class, getting in a fist fight, talking back to a teacher, and so on. Black youth are then removed from schools, taken away from their peers, and effectively pushed into the criminal justice system. Without a structured environment reinforced by stable adults, immature youth become more likely to commit crime. This pattern pulls young minority into a spiral, as incarcerated youth are less likely to complete high school, more likely to endure mental health problems, more frequently pursue unstable relationships, and experience higher rates of unemployment (Casey et al., 2020, p. 95).

Increased police presence is sometimes regarded as the starting point for the racial disparity in the juvenile justice system, as it carries through to each successive step in the process. A study conducted in New York revealed that out of five million stops recorded by their police department, 86% of those stopped were Black and Latino

(Drinan, 2017, p. 37). Only 10% of the stops resulted in any kind of criminal sanction, meaning those detained were either innocent or merely ticketed. Arrests in low-income communities are prevalent (Casey et al., 2020). A majority of youth within the criminal justice system come from backgrounds of public assistance or low-income families. Youth of color are overrepresented among economically disadvantaged communities, with 66% of Black youth arising from a background of poverty compared to 6% of White youth (p. 95).

Michael Brown, Hulk Hogan, and Ferguson, MO

Another feature of racial inequity characterizing the criminal justice system is the disproportionate use of force by the police. Young Black men are more likely than others to be fatally shot when they're unarmed (Fox et al., 2019). In 2014, eighteen-year-old Michael Brown Jr. was shot and killed by Darren Wilson, a White police officer in Ferguson, Michigan (Lopez, 2016). Wilson believed that Brown, an unarmed young Black man, was a robbery suspect. Two sides of the story dictate separate narratives. Wilson's, which would eventually be supported by a grand jury, claimed that Brown turned and charged at him when he started firing shots. On the other hand, an overwhelming majority of eyewitnesses concurred that Brown put his hands in the air in surrender upon being fired at. Brown was shot six times and died about 150 feet from Wilson's vehicle.

During trial, Wilson described Brown, who was the same height, and weighed roughly 50lb more than him, as a WWE wrestler (Lopez, 2014b). "Hulk Hogan, that's just how big he felt and how small I felt just from grasping his arm" court records revealed. Despite Wilson being older, armed, in a position of power, and the one who

initiated the exchange, he claimed to have been manipulated by Brown, stating he was never in control of the interaction. He described thinking that Brown could punch him unconscious, or even to death. Wilson does not carry a taser because “they are very large” and “it is not the most comfortable thing”. During his exchange with Brown, he did have mace and a baton, but deemed those both ineffective. Wilson also described Brown to have been “grunting” as he charged at him.

Wilson was exonerated of any wrongdoing by a grand jury (Halpern, 2015). The prosecutor on the case, Robert P. McCulloch was accused of treating the defendant, Wilson, favorably. McCulloch’s father had been killed in a shootout with a Black suspect earlier in his life. This was not the first time Wilson was exonerated of criminal wrongdoing. His behavior, his animalistic portrayal of an innocent eighteen-year-old adolescent in court, and the resulting exoneration is evidence of a racially permeated disparate system.

Following the death of Michael Brown, the U.S. Department of Justice released a scathing 105-page report on the Ferguson Police Department. The report identified several strands of deficiencies, including patterns of unconstitutional stop and arrests, First Amendment violations, heavy fines, excessive force, unnecessary barriers and harsh punishments in Court, inequitable treatment of African Americans in violation of Federal Law, law enforcement practices motivated by discriminatory intent, and community distrust (U.S. Department of Justice, 2015). After the report’s release, Ferguson’s police chief resigned, and city prosecutor Robert McCulloch lost his re-election. Five years after the D.O.J’s report, however, not much has changed in Ferguson (Equal Justice Initiative, 2019). Initial efforts by then President Barack

Obama provided hopeful outcomes of unprecedented police reform, but these efforts were abandoned after the election of Donald Trump. Wilson declined to read the D.O.J. report, expressing frustrations that it depicted him as part of a corrupt racist system (Halpern, 2015).

Incarceration and Adult Waivers

Throughout U.S. federal and state courts, defendants appear to be treated differently based on race, ethnicity, gender and age. Specifically, the overlapping layers of intersectional identities leaves certain offenders at a disadvantaged state. Concepts of race, gender, sexuality and class are historically grounded in societally transient issues surrounding power, dominance, oppression and inequality (Bryson & Peck, 2020).

Young Black and Hispanic male defendants overwhelmingly receive the harshest treatment both in sentencing (Doerner & Demuth, 2010; Freiburger & Sheeran, 2020; Lowery & Burrow, 2019; Lowery, Burrow & Kaminski, 2018; Steffensmeier, Ulmer & Kramer, 1998; Warren, Chiricos & Bales, 2012) and transfers to adult court (Bryson & Peck, 2020; Casey, 2020; Lehmann, Chiricos & Bales, 2017; Lowery, Burrow & Kaminski, 2018).

Young Black males are viewed as more culpable and less reformable than their peers. As a result, they are less likely to receive probation instead of jail (Bernstein, 2014; Doerner & Demuth, 2010; Lowery, Burrow & Kaminski, 2018; Warren, Chiricos & Bales, 2012) and receive prison sentences that are 7.8% longer than White youth (Lehmann, Chiricos & Bales, 2017). Studies outline the crime records of young Black men are defined as more serious and indicative of future dangerousness compared to other types of defendants, including older Black men (Steffensmeier, Ulmer & Kramer,

1998). Additionally, the punitiveness of sanctions for young Black males increases as the size of the Black population in a given community increases (Lowery, Burrow & Kaminski, 2018). African Americans are far more likely to be incarcerated for the same charges and prior offenses than White youth. In fact, Black boys are 9x more likely to face charges for person crimes and 48x more likely for drug offenses (Bernstein, 2014, p. 60). In New York City in 2014, a shocking 93.5% of juveniles in custody were youth of color (p. 251). In Oregon, Black youth are 3.7 times more likely than White youth to be incarcerated (Rovner, 2021). In New Jersey, this rate jumps to 17.5%.

The number of youths transferred to adult court has decreased significantly, nearly 75% since its peak in the tough on crime era of the late 90's (Bryson & Peck, 2020; OJJDP, 2017). However, a disparity remains. Black males make up approximately 14% of the total youth population, but 47.3% of all juvenile offenders transferred to adult court (OJJDP, 2017). In Oregon, cases involving Black male youth are more likely than any other demographic group to be waived (Hockenberry, 2021). In 2019, Black youth in Oregon were over six times more likely than White youth to be tried as adults (Oregon.gov). The proportion of judicially waived cases in Oregon shows a rising disparity for Black offenders. Data shows a steady increase, with Black youth making up 39% of waived cases in 1984, to 45% in 1994, and to 52% in 2018 (p. 3). This progression is particularly interesting, considering the shift in rhetoric on youth crime from the late 90's to current decade discussed in an earlier section. In some cases, judges have even expressed a reluctance to send White offenders to state prisons in fear they will be victimized by an overwhelmingly Black population (Steffensmeier, Ulmer & Kramer, 1998). It logically follows, then, that Black defendants are more likely to be

sentenced to secure confinement while White defendants receive probation (Lowery, Burrow & Kaminski, 2018; Warren, Chiricos & Bales, 2012).

Prosecutorial discretion waivers, also called direct file, are statutes that grant the prosecutor discretion to try a juvenile as an adult. Like other actors within the criminal justice system, prosecutors are subject to the same degree of implicit and explicit bias that dictates their behavior towards youth of color (Henning, 2013, p. 429). Prosecutors are increasingly pointed to as the most influential player in racially motivated disparate outcomes.¹⁵ Within the criminal justice system, prosecutors, probation officers and judges dictate harsh legal sanctions on Black youth, and refrain from offering them the preventative strategies assigned to White youth (Henning, 2013). Through explicit and implicit biases, Black children may be perceived as innocent only until deemed suspicious. One striking example of this is the story of the Central Park Five.

Prosecutorial Misconduct Depicted by the Central Park Five

“Mama!” was the last thing Korey Wise cried out before he was ushered away to Rikers Island, one of New York’s most notorious adult jail complexes at sixteen years of age (DuVernay, 2019). Prosecutors on the case utilized their discretion to charge Wise as an adult. He would spend the next twelve years serving time for a crime he did not commit, facing horrific trauma, abuse, and extensive periods of solitary confinement. Korey Wise was one of five men who spent time in prison for a crime they did not take part in. In the Spring of 1998, a violent rape and assault in Central

¹⁵ Or as former District Attorney Josh Marquis put it, in a personal interview conducted with me on January 18, 2022, “the current belief is that prosecutors are at best fascistic automatons whose job it is just to carve another notch on our belts and try to send as many young Black men to prison because we’re all insipient racists and the public defenders are doing god’s work and we should all just be grateful that they get up every day.”

Park occurred. The true culprit would eventually be identified as a serial rapist who had been convicted of multiple rapes and murders in New York, even one in Central Park the week prior. While the five innocent boys she put in prison watched their childhood slip away, Linda Fairstein enjoyed a successful career (Wilkinson, 2019). At the ages of fourteen, fifteen and one sixteen, Kevin Richardson, Raymond Santana, Yusef Salaam, Anton McCray, and Korey Wise fell victim to the realities of unfettered prosecutorial discretion.

In the trial proceedings Linda vilified the young boys despite the facts of the case pointing to their innocence (DuVernay, 2019). DNA samples collected from the crime scene were all linked to a single person. That person was not one of the five boys on trial. The prosecution purposely withheld this critical DNA evidence in order to secure a conviction. Prosecutors are constitutionally required to disclose any evidence that may be exculpatory. In failing to do so, Linda broke the law. Beyond that, she stole the futures of five innocent boys. After a cumulative 36 years served, the boys were exonerated of any wrongdoing. This may not have been the first or only time Linda violated her duty as a prosecutor. Disciplinary records are not kept, and for that reason, we will never know.

In the days following the Central Park attack, the accused boys were denigrated by the media and public officials. Ed Koch, the mayor of New York City at the time, evoked animalistic depictions describing the boys as a “wolfpack,” and concluding that “eight or nine of them engaged in a gang bang” (Duru, 2004). The most virulent response, however, came from Donald Trump. Following the attack, Trump paid \$85,000 to place ads in several local newspapers (Wilkinson, 2019). “BRING BACK

THE DEATH PENALTY. BRING BACK OUR POLICE!” was his message, loud and clear. It was easy for the media and moguls like Trump to paint five young Black boys as predatorial animals who violated an innocent White woman. But why? The tragedy of the Central Park Five, now the Exonerated Five, demonstrates the deeply embedded myth of the ‘Bestial Black Man’, which describes Black men as “animalistic, sexually unrestrained, inherently criminal, and ultimately bent on rape,” (Duru, 2004). The myth was already well-established in the 1931 Scottsboro cases, which were nine young Black men wrongfully convicted of rape. Both stories illuminate the horrifying impact that deeply embedded racialized stereotypes can have in producing wrongful convictions. In recent years, as citizen, candidate, or President, Trump has declined to apologize for his egregious statements on the case (Wilkinson, 2019). Be it racism, ineptitude, or just belligerence, Trump’s pugnacious attitude reflects the deeply engrained sentiments of the public.

Despite being almost single-handedly responsible for the wrongful convictions, Linda was not held accountable (Wilkinson, 2019). She faced no legal liability or professional repercussions for her blatant misconduct. The exonerations hardly tainted her public image. In the following years, she continued writing novels, speaking at her alma-mater, attending book release events, and interviewing at art installments. The State of New York eventually awarded the boys \$41 million in compensation, not a penny of which came from Linda. This story is not uncommon. Prosecutorial misconduct goes unpunished more often than not.

Prosecutors are sworn into their role with an oath that they will perform their duties in good faith. The good faith requirement entails “due regard for fairness,

accuracy, and rights of the defendant, victim, and witnesses” (American Bar Association, 2017). Despite the enumeration of this duty, prosecutors are rarely held accountable for instances of misconduct. When a complaint of prosecutorial misconduct is filed with the disciplinary branch of the Bar Association, it is generally resolved internally. When warranted, a trial-like hearing takes place to determine guilt at which point a punishment can be imposed. Available punishments include informal reprimanding, a sentence of parole, suspension, or complete disbarment. The Bar Association can dismiss charges at any point in the proceedings, likely contributing to the negligible rate that punishment is imposed. In fact, a 2003 report by the Center for Public Integrity revealed that of 2,012 cases involving prosecutorial misconduct, a mere 44 resulted in any form of disciplinary review (Yesko, 2018). Prosecutorial misconduct is difficult to prove. Ironically, prosecutors control access to the evidence that is critical to investigate a claim of misconduct (Zack, 2020).

Prosecutorial Discretion

Prosecutors exercise immense discretion over the criminal justice process. Former Attorney General, later Supreme Court Justice Robert Jackson famously said, “the prosecutor has more control over life, liberty, and reputation than any other person in America,” (Garland, 2021). The first decision a prosecutor is faced with is what charges to pursue, if any. Empirical studies demonstrate that prosecutors are less likely to charge White subjects than Black subjects, even after controlling for prior criminal records (Smith & Levinson, 2012, p. 806). Because Black Americans are more strongly associated with violence and aggression, a crime by a Black adolescent might be viewed by prosecutors as more deserving of punishment, even if unconsciously. Through this

process, racial bias infests the prosecutor's discretion to transfer a juvenile to adult court. Several criteria guide the transfer decision, including environmental considerations, gravity of the offense, whether it was committed violently or premeditated, and prospects for rehabilitation (p. 811). These features don't play out favorably for the young Black adolescent, who most often comes from a background of poverty and is criminalized through implicit and explicit biases to be predatory and incapable of reform. After the charging decision, prosecutors are responsible for discerning a pretrial strategy. Minority defendants receive harsher pretrial detention determinations, such as bail amounts, than their peers. The race of the defendant can also influence the plea-bargaining process. A report by the U.S. Department of Justice illustrates that about 90-95% of Federal and State Court cases are resolved through a plea bargain (Devers, 2011). Prosecutors are responsible for making the decision to offer a plea bargain and which terms to set. In making this decision, prosecutors consider various factors including the nature of the crime, the defendant's remorse, the public's interest, and the expense of the trial (p. 816). Again, the young Black defendant who is routinely stereotyped as more aggressive and less remorseful is disadvantaged by the overwhelming force of White prosecutors.

Disparities in Sentencing

As with each touchpoint along the juvenile justice system, perceptions of innocence diverge at the sentencing stage to the disadvantage of young Black males. One study revealed the physical appearance of a defendant at the time of his trial was influential in the jury's decision (Antonio et al., 2004). The defendant, a then 21-year-old six-foot Black man, was on trial for a crime committed while he was only eleven.

Jurors described the defendant as “large”, “muscular”, and “having big feet” (p. 282). Researches posited that the jury’s apprehension of the defendant’s physical appearance potentially numbed them to the reality that the individual was facing charges for crimes committed ten years ago. Several jurors described the individual as emotionless, despite the fact that others testified he started crying at one instance during the trial. It’s possible, the researchers explained, that jurors didn’t register his tears because they were contradictory to the depiction of the individual as an “adult, African American predator”. This defendant was given the death penalty. Through factors external to the defendant’s identity, his size, his physical appearance, the mitigating quality of age was mediated. He was not regarded as a child under the law and given the benefits of innocence that come along with it.

Another study found a strong association, even within Black defendants, between the ‘stereotypically Black features’¹⁶ of those defendants and the imposition of the death penalty (Eberhardt et al., 2006; Fig. 3).¹⁷ Based one of the most honorific studies on the persisting racial bias in the last 2 decades (Baldus et al., 1983),¹⁸ researchers investigated the influence that the stereotypicality of a Black defendant can

¹⁶ Such as broad nose, thick lips, and dark skin (Eberhardt et al., 2006, p. 383).

¹⁷ While both these studies are over 10 years old, the lessons they provide are enduring. Implicit biases do not disappear in a decade, especially without a corresponding change in institutional disparity (detainment, arrest rate, sentencing, etc.), which demonstrate that racial bias persists in contemporary systems. Making people aware of their implicit biases doesn’t make them go away (Greenwald & Lai, 2020). Therefore, the research remains relevant.

¹⁸ The Baldus study provided groundbreaking findings on the role of race in death penalty cases. Essentially, Professor Baldus and others reported people accused of killing White victims were four times as likely to be sentenced to death as those accused of killing Black victims (Baldus et al., 1983). The study held an influential role in the Supreme Court proceedings in *McCleskey v. Kemp*, 481 U.S. 279 (1987).



Figure 4: Looking Deathworthy

Two examples of the physical variations of Black faced. The individual on the right would be regarded as having more ‘stereotypically Black features’ for the purpose of the study (Eberhardt et al., 2006).

have for cases in which race is the most salient (Eberhardt et al., 2006, p. 383). The study found the perceived stereotypicality of Black defendants convicted of murder predicted death sentencing for White victims, but not Black. Eberhardt and others expanded on the findings of the Baldus study to demonstrate Black defendants accused of killing White victims (a case in which the likelihood of the death penalty is already exceptionally high (Baldus et al., 1983)) are more than two times as likely to receive a death sentence when they are perceived by jurors as stereotypically Black (p. 385). Whereas capital punishment has been deemed unconstitutional for juvenile offenders (*Roper v. Simmons*, 543 U.S. 551), this study has implications for the role that the physical appearance of Black youth can on jury decisions for serious crimes.

Implicit and Explicit Biases of Judges

In the context of bounded rationality, judges rely on stereotyped attributions to determine appropriate punishments. Research overwhelmingly affirms the ‘focal concerns perspective’, which outlines legal decision-making as organized around blameworthiness, dangerousness, and practical constraints (Doerner & Demuth, 2010; Freiburger & Sheeran, 2020; Steffensmeier, Ulmer & Kramer, 1998; Warren, Chiricos & Bales, 2012). Stereotypes and external characteristics of offenders serve as an organizing tool to construct a mental picture of an offender and their behavior (Lowery & Burrow, 2019). Non-controllable external characteristics, such as race, can then be linked to an offender’s blameworthiness. Through this pattern, judges perceive offenders as ‘stereotype consistent’ and generalize traits to other members of the group as a negative attribution (Lowery & Burrow, 2019). Black males match the stereotype of being dangerous and blameworthy, and therefore are subject to the most severe stereotyping based on combined demographics (Freiburger & Sheeran, 2020).

Racial disparity pervades the contemporary juvenile justice system. In the preceding section, we found youth of color to be overrepresented at every stage, including institutional treatment, policing, arrest, sentencing, and incarceration. Young Black males are denied the essence of childhood and innocence more readily. Pervasive stereotypes suggest Black youth to be more prone to violence and aggression, either unmotivated students or not in school, less inclined to work and more likely to be incarcerated. Through unconscious and conscious associations, perceptions of ‘Blackness’ diminish the mitigating quality of age and lead actors across the criminal justice system to perceive Black adolescents as more culpable and deserving of adult

treatment. Once developmental immaturity is diminished, Black youth are more likely to be treated harshly. Racial categories are a socially constructed phenomenon, built upon obvious physical differences within a culture. And yet, race shapes the experiences and outcomes of youth in and out of the justice system. An urban pedagogy informs how those in positions of power view Black youth. This dynamic operates a number of institutional levels but is most apparent within the criminal justice system. Now, we need to change the level of analysis in order to make coherent suggestions in light of the outlined findings.

Conclusion

In this essay, we reviewed the integral features of the juvenile justice system and evolving neuroscience on the adolescent brain to contextualize the racial disparity that pervades contemporary juvenile justice. First, a brief history of the emergence and progression of juvenile justice, beginning in the 18th century spurred by the onset of adolescent crime during the Industrial Revolution. Racial fearmongering of an impending class of ‘superpredators’ reinforced by the media and politicians fostered the ‘War on Crime’ and was the birthplace of mass incarceration. Next, we engaged the contemporary juvenile justice system and claims of ineffectiveness and maltreatment. With this in mind, we considered the growing body of developmental science informing adolescent behavior and decision-making. Neuroscientists confirm the juvenile brain is structurally and functionally immature, deeming adolescence to be a distinct phase of development and vulnerability. From there, we reviewed the precedential background established by the Supreme Court in light of the social science and science through a decade of case law on diminished capacity jurisprudence. In order to narrow the scope,

we then considered a state-level response to the federal guidelines. We reviewed the history of juvenile justice in Oregon, the response of by the state legislature to shifting national rhetoric, and three case studies. We concluded with a comprehensive review of the persisting racial disparity that exists within the current juvenile justice system. Through neighborhood mechanisms, policing, sentencing, incarceration, and every other touchpoint along the system, we found that young Black boys are most significantly impacted by racially discriminatory perspectives, whether implicit or explicit.

The evolving developmental science forces a reckoning with any sort of punitive treatment for juveniles below the age of eighteen, frankly even below the age of 25. Without psychological responsibility, no *legal* responsibility can be assigned. There is an intuitive pattern in which we think of big people as adult, or judge people based on their size. White juvenile offenders are afforded the consideration of diminished capacity jurisprudence because those who occupy the various roles within the judicial system see themselves in those children. However, this cycle of self-identification perpetuates the racial disparity and discrimination reviewed in the sections prior. Neuroscience pushes back against the cognitive reflexes facilitated by a socialized Black criminality by reaffirming that adolescence remains the same across racial boundaries and should be treated as such. All juvenile offenders, regardless of physical size or perceived turpitude, reflect the transient immaturity of adolescence and are capable of rehabilitation far beyond the confines of irreparable corruption. Diminished capacity jurisprudence is moving through the ranks in a top-down manner, beginning with the precedents set by the Supreme Court and manifesting in state jurisprudence.

However, the new cohort of judges appointed by President Trump likely will, and have already started to, push back on these precedents.¹⁹ If the solution cannot be found within the existing structures of limitation, we must turn to new solutions. In order to address the deeply embedded stereotypes and confront figures and institutions who perpetuate discrimination, we must, as Sterling once said, *transform* the system.

Let's explore some of these transformative solutions. First, we need to invest in preventative treatments that consider the needs of youth before contact with the juvenile justice system. As we've found, criminality, in many cases, starts in the home, in the neighborhood, at school, and with friends. We need to educate and train administrators, law enforcement officials, lawyers, judges, prison guards and all others who occupy institutional positions of power to reduce the role of implicit and explicit biases. Rather than relying on the current systems and institutions, we can transition to a bottom-up approach by adjusting the curriculum in law schools to incorporate legal notions of responsibility based on the brain science. With this, we can empower a new generation of legal officials, informed with the findings of developmental science, to eradicate outdated models of decision-making. We need to reduce reliance on prisons in favor of promising alternatives, such as restorative justice, multisystemic therapy and functional family therapy. Prison is expensive and ineffective. Initial evaluations suggest that alternatives can reduce costs and prevent recidivism (Bernstein, 2014). For those few dangerous juvenile offenders, we can design treatment-oriented facilities in place of larger institutions and limit eligibility for correctional placement. We already know adolescents have the capacity for reform, so why not give them the ability to do so? Be

¹⁹ For instance, in *Jones v. Mississippi*.

it a decadent history of racial superiority, or rather inveterate notions of criminality, young Black boys have become the victim of our juvenile justice system. It is time to recognize that when they are sent to jail, we have indicted ourselves.

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