

Addressing Bias in Delinquency and Child Welfare Systems

Eliminating Racial and Ethnic Disparities in Juvenile and Family Courts is Critical to Creating a Fair and Equitable System of Justice for All Youth.

A. Racial and Ethnic Disparities in Juvenile Court¹

Eliminating racial and ethnic disparities in juvenile and family courts is critical to creating a fair and equitable system of justice for all youth. While the number of youth who come into formal contact with the court system has declined in recent years, little progress has been made in reducing racial and ethnic disparities.²

Youth of color are disproportionately represented at every decision point of the juvenile delinquency court process.³ They face higher arrest rates for similar conduct, fewer opportunities for diversion, and are far more likely to be detained and incarcerated.⁴ For instance, in 2001, “Black youth were four times as likely as whites to be incarcerated”; today, they are five times as likely.⁵ Additionally, Black youth “are at least 10 times as likely to be held in placement as white youth” in six states: New Jersey,

Wisconsin, Montana, Delaware, Connecticut, and Massachusetts.⁶ Native youth “were three times as likely to be incarcerated as white youth,” while Latino youth “were 65 percent more likely to be detained or committed” than white youth.⁷

Youth of color face these same disparities in the child welfare system, as do their families, who are disproportionately referred into the system by institutions such as hospitals, schools, and law enforcement.⁸ Where youth are dually involved in both the delinquency and child welfare systems, these disparities are exacerbated.⁹ Addressing the overrepresentation of children and families of color in our juvenile courts requires careful consideration and reform of the policies and practices that drive bias and structural racism.¹⁰

1. Features of Adolescent Development are Consistent Across Racial Groups and Cannot Account for the Racial and Ethnic Disparities in the Court System

Developmental research shows that behaviors and characteristics common in adolescence are consistent across all races, ethnicities, and socioeconomic groups.¹¹ These studies, controlling for race and ethnicity, found no significant difference in key features of adolescent development, such as impulsivity, sensation seeking, susceptibility to peer influence, and a limited ability to plan ahead or anticipate consequences.¹² The disproportionate representation of youth of color in juvenile court, therefore,

cannot and should not be attributed to differences in adolescent development or differences in behavior across racial and ethnic groups.¹³

Similarly, rates of child abuse and neglect are not higher in families of color; however, these families are disproportionately petitioned and brought into the court system and face greater likelihood of removal of their children than white families.¹⁴

2. Bias

A fundamental canon of judicial conduct states that judges must perform all duties of office fairly and impartially, without bias or prejudice;¹⁵ avoid actual bias and the appearance of bias;¹⁶ and be aware of and work proactively to address bias in the courtroom.

To eliminate bias, we must address the structural bias of the justice system and honestly assess personally held explicit and implicit biases.

a. What Is Structural Bias?

Structural, institutional, or systemic bias refers to “a set of processes that produce unfairness in the courtroom . . . [which] lock in past inequalities, reproduce them, and . . . exacerbate them . . . without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong.”¹⁷ It is the “cumulative and compounding effects of an array of factors that systemically privilege white people and disadvantage people of color.”¹⁸

Structural bias may exist as rules, procedures, practices, or policies, and as a result of legislation, administrative decisions, or historical attitudes and practices, and may also be countermanded in the same way.¹⁹ For example, structural biases may be embedded in criminal statutes, such as harsher penalties for certain drug use (e.g., crack cocaine versus powder cocaine), which may subject people of color to longer sentences for comparable behavior.²⁰ Structural bias is perpetuated by those who implement or execute policies by following existing rules or norms that promote racial differences in opportunities, outcomes, and consequences, even though they may have no consciousness of how those policies negatively impact certain groups.²¹

b. What Is Explicit Bias?

Explicit bias refers to attitudes and beliefs that are consciously held about a person or group of people.²² Overt racism is an example of explicit bias; e.g., Black youth are denied opportunities for diversionary programs because of the belief that (1) they should be punished, and (2) they are dangerous. Racism is defined as “prejudice plus power,” which combines “the concepts of prejudice and power, point[ing] out the mechanisms by which racism leads to different consequences for different groups.”²³

Explicit bias has no place in our justice system. Where expressions of explicit bias are observed, justice system stakeholders have an ethical obligation to address and/or report the person responsible.²⁴ Stakeholders must prevent explicit biases and prejudices from influencing decision-making in courts.

c. What Is Implicit Bias?

Implicit bias refers to subconscious feelings, attitudes, and stereotypes that affect our understanding, actions, and decision-making processes in an unconscious manner.²⁵ These assessments, both favorable and unfavorable, are “activated involuntarily and without an individual’s awareness or intentional control.”²⁶ “Implicit biases are not accessible through introspection” because these “associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages” in the form of “media and news programming” and other life experiences.²⁷

Implicit biases result when we use cognitive shortcuts to filter information, fill in missing data, and categorize people and evidence.²⁸ This often occurs in fast-paced environments, such as juvenile court. Our strongly held conscious beliefs, intentions, and explicit efforts to treat people fairly do not prevent our implicit biases from affecting our perceptions and actions, even among “those [of us] who actively support equality, vehemently reject racism and discrimination, and have positive relationships with people of other races.”²⁹

Implicit biases may, despite our best intentions, influence decisions such as whether to remove a youth from the home, what disposition should be imposed, and other case outcomes. Each and every judicial officer, regardless of race and ethnicity, has an obligation to consciously ensure all decisions are based on the facts in evidence rather than implicitly held biases.

B. Bias in the Juvenile Courtroom

1. Bias Impacts Who is Brought to Court

Structural, explicit, and implicit biases impact which children and families enter the courtroom before judges ever consider their cases. Children of color and their families face a greater likelihood of referral to the court system³⁰ — in both the juvenile justice and child welfare systems.³¹ Beginning as early as pre-school,³² children of color face discriminatory application of school discipline policies and are pushed out of schools and into the juvenile and criminal justice systems.³³

2. How Does Bias Impact How I Do My Job as a Judge?

Being aware of bias, particularly implicit bias and its role in how we process information and perceive people and events, is a first step to recognizing how our implicit biases can affect the judicial decision-making process.

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- e. Engage in “de-biasing,” a practice of developing a greater appreciation of cultural communities different from our own, through active engagement with those communities.⁵²
- f. Question the information you receive from others. It is not enough to correct our own biases; we must also question others’ biases. (For example: a police report states “the juvenile had a belligerent attitude and she was uncooperative.” Are there specific facts to support that conclusion, or could the officer’s perception have been based on implicit or explicit biases?)
- g. Consider the tools and instruments used to assess youth and their families in the juvenile justice and child welfare systems. Are the risk-assessment tools racially neutral?
- h. Become familiar with data. Data is a good tool to identify trends and patterns that may suggest our decisions are based in bias rather than fact. (For example: do plea negotiations, sentencing recommendations, and imposed sentences differ along racial lines?)
- i. Practice mindfulness. Mindfulness means paying attention in a special way; “on purpose, in the present moment, and non-judgmentally.”⁵³ It is a practice of being non-judgmental about anything you notice, of not labeling things as good or bad.
- j. Exercise leadership in dismantling bias. Convene meetings of juvenile court stakeholders in the delinquency and child welfare systems to develop concrete plans to address bias.
- e. Am I using an assessment or other standardized tool to determine if a youth should be detained? If I am using a standardized assessment, are the criteria used neutral across racial and ethnic identities? How do I know?
- f. If there are override criteria for any assessment instrument I am using, do I know if and how the criteria negatively impact youth of color?
- g. What criteria are being used by the court or other agencies to conclude that removal from the home is necessary? Are those criteria neutral or do they have a disproportionate impact on youth of color?
- h. Is the safety assessment tool the child welfare agency is using dependent on objective criteria? Do those criteria disproportionately impact youth of color? If so, how? And what can be done to address the disparate impact of the tools and criteria used on our decision making?
- i. Do I have access to commitment data in my jurisdiction regarding race, ethnicity, and gender?
- j. Do I have access to data concerning transfer or waiver rates of all youth broken down by race, ethnicity, and gender?

2. Systemic Considerations

In addition to the recommendations previously mentioned about self-reflection, it is critical that judges are aware of the data and systems they are operating within before they can attempt to mitigate any structural biases that exist. Some questions that judges should ask, or request data regarding, include the following:

- a. Does the court or prosecutor’s office in my jurisdiction maintain data by race and ethnicity regarding which youth are referred for diversion?
- b. Does the diversion program in my jurisdiction provide for referrals prior to arraignment?
- c. Are diversion eligibility decisions informed or limited by the nature of the offense?
- d. Do I have access to data regarding the race, ethnicity, and gender of youth who are detained in my jurisdiction?

Addressing the overrepresentation of children and families of color in our juvenile courts requires careful consideration and reform of the policies and practices that drive bias and structural racism.



TRAINING AND TECHNICAL ASSISTANCE

This bench card provides judges with introductory principles and best practices to support the elimination of disparities in the juvenile justice and child welfare systems. Comprehensive, supplementary training is strongly recommended in conjunction with use of this card. To connect with leading experts in the field of correcting implicit bias, please contact the National Juvenile Defender Center at 202-452-0010 or by emailing inquiries@njdc.info.

Implicit Association Tests, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (last visited Nov. 7, 2017).

Project Implicit created a series of Implicit Association Tests (IAT) that measure the strength of associations between concepts (e.g., Black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). Available IATs include (1) Presidents; (2) Religion; (3) Gender-Career; (4) Skin-tone; (5) Sexuality; (6) Weapons; (7) Asian; (8) Native; (9) Gender-Science; (10) Weight; (11) Age; (12) Disability; (13) Arab-Muslim; and (14) Race.

James Bell & Raquel Mariscal, Race, Ethnicity, and Ancestry in Juvenile Justice, in JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE 111–130 (2011).

This chapter identified major elements of disparities by race, ethnicity, and ancestry in the juvenile justice system. Some key decision points prior to judicial appearance include “cite and release,” arrest, diversion after arrest, referral to a detention facility, and admission to detention. At each key decision point, juvenile justice professionals exercise judgments about how the young person and their family should be handled. Monitoring these decision points, pursuant to federal policy, reveals that youth of color are funneled deeper into the system for behaviors similar to their white counterparts. In response, the chapter identifies promising policies and practices for reducing racial and ethnic disparities, demonstrating that juvenile justice systems can operate with fairness and equity for all young people, including collaboratively using data to conduct critical self-examination of policies and practices and determine how they impact youth of color.

David Arnold, Will Dobbie & Crystal S. Yang, Racial Bias in Bail Decisions (Nat’l Bureau of Econ. Research, Working Paper No. 23421, 2017).

This study used Becker’s model of racial bias, which predicts that rates of pre-trial misconduct will be identical for marginal white and marginal Black defendants if bail judges are racially unbiased. In contrast, marginal white defendants will have higher rates of pre-trial misconduct than marginal Black defendants if bail judges are racially biased against Blacks, whether that racial bias is driven by racial animus, inaccurate racial stereotypes, or any other form of racial bias. Evidence suggested that there was a substantial bias against Black defendants, indicating that bail judges rely on inaccurate stereotypes that exaggerate the relative danger of releasing Black defendants versus white defendants.

Additionally, this study made three findings:

- Both white and Black bail judges were racially biased against Black defendants;
- Bail judges make race-based prediction errors due to anti-Black stereotypes and representativeness-based thinking, which in turn leads to the over-detention of Black defendants; and
- Racial bias is significantly higher among both part-time and inexperienced judges.

Phillip Atiba Goff et al., The Essence of Innocence: Consequences of Dehumanizing Black Children, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014).

This study examined whether Black male youth are given equal protections of childhood as their peers.

- Three hypotheses were tested:
 - That Black male youth are seen as less “childlike” than their white peers;
 - That the characteristics associated with childhood will be applied less when thinking specifically about Black male youth relative to white male youth, and;
 - That these trends would be exacerbated in contexts where Black males are dehumanized by associating them (implicitly) with apes.
- Findings:
 - The general population sees Black children as less innocent than white children.
 - Black children are seen as older and more culpable than their counterparts.
 - Police officers are also subject to dehumanizing Black children.
 - Black children are not equally “afforded the privilege of innocence – resulting in violent inequalities.”

Miles v. United States, No. 13-CF-1523, 2018 WL 1527860 (D.C. Mar. 29, 2018).

The D.C. Court of Appeals held that a tip that only identifies a suspect is insufficient, and that where the police received an anonymous tip alleging use of a firearm, the police needed to observe something that corroborated the presence of the gun before stopping the suspect. *Id.* at 2. The Court identified Miles' flight as the only potential corroborating action in this case and conducted a totality of the circumstances analysis. *Id.* at 14. The Court noted that a person "may be motivated to avoid the police by a natural fear of police brutality . . . or other legitimate personal reasons." *Id.* at 17 (citing *In re D.J.*, 532 A.2d 138, 142 n.4 (D.C. 1987)). The Court also referenced the "proliferation of visually documented police shootings of African Americans . . . and the Black Lives Matter protests." *Id.* at 17. In finding the stop unlawful, the Court went on to note that the experience of being followed by a police officer on foot, blocked by a police cruiser that drove up on the sidewalk, and then told to stop "would be startling and possibly frightening to many reasonable people." *Id.* at 20-22. Moreover, unlike the cases cited by the government, "there was nothing about the character of Mr. Miles' flight that seemed particularly incriminating," as it was not unprovoked. *Id.* at 21. Thus, where Miles' flight was too "equivocal to reasonably corroborate the anonymous tip" the police lacked reasonable articulable suspicion for the *Terry* stop.

Commonwealth v. Warren, 475 Mass. 530 (2016).

The Supreme Judicial Court of Massachusetts held that the defendant's race alone was insufficient to give officers reasonable articulable suspicion that he was the suspect of an earlier crime when the description lacked any information about facial features, hairstyles, skin tone, height, weight, or other physical characteristics separate from race. *Id.* at 339. The Court also noted that the police had no justifiable cause to arrest the defendant for running away from them in the first place; it was within the defendant's legal rights to run from the police, and the act of doing so does not imply guilt and is not grounds for arrest. *Id.* at 341-42. Black men were disproportionately targeted to the extent that flight from police should not necessarily be an admission of guilt. *Id.* at 342. Rather, Black men have "reason for flight totally unrelated to consciousness of guilt," such as the desire to avoid the recurring indignity of being racially profiled. *Id.*

United States v. Smith, 794 F.3d 681 (7th Cir. 2015).

The United States Court of Appeals for the Seventh Circuit held that officers' encounter with a Black defendant in a dark alley at night in a minority-dominated urban area was a seizure, and that the defendant was not free to leave. *Id.* at 687-88. The Court further acknowledged that race was relevant in everyday police encounters with citizens in Milwaukee and around the country, and that existing empirical data demonstrates the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system. *Id.* at 688.

DIVERSITY & INCLUSION 360 COMM'N, AM. BAR ASS'N, HIDDEN INJUSTICE: BIAS ON THE BENCH (2016), https://www.americanbar.org/news/abanews/aba-news-archives/2016/02/hidden_injusticebi.html.

The American Bar Association's recently formed Diversity and Inclusion 360 Commission released a video tool to raise awareness and provide practical tips for judges in the United States on the damages caused by implicit bias and the necessary steps to combat it.

JUDICIAL DIV., AM. BAR ASS'N, JUDGES: 6 STRATEGIES TO COMBAT IMPLICIT BIAS ON THE BENCH (2016), <https://www.americanbar.org/publications/youraba/2016/september-2016/strategies-on-implicit-bias-and-de-biasing-for-judges-and-lawyer.html>.

The American Bar Association's Judicial Division summarized six techniques and strategies judges can use on a weekly basis to mitigate implicit bias and successfully "de-bias," based on an original study, *Long-term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, published by Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin, and William T. L. Cox – (1) Become aware; (2) Individuation; (3) Stereotype replacement; (4) Counter-stereotypic imaging; (5) Perspective-taking; and (6) Increasing opportunities for contact.

THOMAS RUDD, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, RACIAL DISPROPORTIONALITY IN SCHOOL DISCIPLINE: IMPLICIT BIAS IS HEAVILY IMPLICATED (2017), <http://kirwaninstitute.osu.edu/racial-disproportionality-in-school-discipline-implicit-bias-is-heavily-implicated/>.

Research shows that Black students are disciplined more often and receive more out-of-school suspensions and expulsions than white students. In 2010, over 70 percent of the students involved in school-related arrests or referred to law enforcement were Hispanic or

Black. Overall, Black students were three-and-a half times more likely to be suspended or expelled than their white peers. According to the Kirwan Institute, implicit bias was heavily implicated as a contributing factor when the causes of racial disproportionality in school discipline were analyzed.

NAT'L JUVENILE DEF. CTR. ET AL., BENCH CARD: ACCESS TO JUVENILE JUSTICE IRRESPECTIVE OF SEXUAL ORIENTATION, GENDER IDENTITY, AND GENDER EXPRESSION (SOGIE) (2017), http://njdc.info/wp-content/uploads/2017/08/NJDC_SOGIE_Benchcard-1.pdf.

In partnership with the National Council of Juvenile and Family Court Judges (NCJFCJ), the National Juvenile Defender Center released *Access to Juvenile Justice Irrespective of Sexual Orientation, Gender Identity, and Expression (SOGIE)*, a bench card to promote judicial leadership in supporting Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Gender Non-Conforming (LGBTQ-GNC) Youth.

NAT'L JUVENILE DEF. CTR. ET AL., BENCH CARD: APPLYING PRINCIPLES OF ADOLESCENT DEVELOPMENT IN DELINQUENCY PROCEEDINGS (2017), http://njdc.info/wp-content/uploads/2017/08/NJDC_Adolescent-Development_Bench-Card.pdf.

In partnership with the National Council of Juvenile and Family Court Judges (NCJFCJ), the National Juvenile Defender Center released *Applying Principles of Adolescent Development in Delinquency Proceedings*, a bench card to promote judicial leadership in recognizing the developmental differences between youth and adults and integrate, at each stage of the case, applicable principles supported by the research on adolescent development.

THE SENTENCING PROJECT, FACT SHEET: BLACK DISPARITIES IN YOUTH INCARCERATION (2017), <http://www.sentencingproject.org/publications/black-disparities-youth-incarceration/>.

Despite long-term declines in youth incarceration, the disparity at which Black and white youth are held in juvenile facilities has grown. As of 2015, Black youth were five times as likely to be detained or committed to youth facilities. Since 2001, racial disparities have grown in 37 states, and at least doubled in five – Maryland, Montana, Connecticut, Delaware, and Wisconsin.

THE SENTENCING PROJECT, FACT SHEET: NATIVE DISPARITIES IN YOUTH INCARCERATION (2017), <http://www.sentencingproject.org/publications/native-disparities-youth-incarceration/>.

Despite long-term declines in youth incarceration, the disparity at which Native and white youth are held in juvenile facilities has grown. Native youth were three times as likely to be incarcerated as white youth. The disparity has increased since 2001 when Native youth were roughly two-and-a-half times as likely to be detained or committed to juvenile facilities.

THE SENTENCING PROJECT, FACT SHEET: LATINO DISPARITIES IN YOUTH INCARCERATION (2017), <http://www.sentencingproject.org/publications/latino-disparities-youth-incarceration/>.

Latino youth are 65 percent more likely to be detained or committed than their white peers. While this disparity is concerning, the data shows a modest improvement from 2001, when Latino youth were 73 percent more likely to be in placement. The Latino disparity is smaller than that for Black youth, who are 500 percent more likely than white youth to be detained or committed.

Disparity and Disproportionality, Am. Public Human Services Ass'n, <http://aphsa.org/content/APHSA/en/pathways/Positioning-Public-Child-Welfare-Guidance-PPCWG/Disparity-and-Disproportionality.html> (last visited Nov. 8, 2017) (no longer on website) (on file with NJDC).

Framing the relationship between institutional and structural racism and disparate treatment raises awareness about how and why disproportionality occurs in public child welfare and the role the system can play to eliminate disparate practices within the agency. Disparities can be produced by the service strategy of an agency within the public child welfare system, due to lack of culturally relevant policies, procedures, practices, and decision-making. Poorly resourced public education systems and inequitable parental arrests are also significant contributors to disparate treatment, which yields negative outcomes for children, youth, and families. Addressing disparities and disproportionalities begins with data assessment, and collectively belongs to all members of the agency.

Child Welfare Information Gateway compared the percentage of children by race in the general population to their percentage at various points in the child welfare continuum. They also compared a particular racial or ethnic population's representation in the child welfare system to its representation at the prior decision point (e.g., comparing a proportion of children adopted with the proportion of children of that race waiting to be adopted). Four possible explanations for racial disproportionality and disparity were identified: (1) Disproportionate and disparate needs of children and families of color due to higher rates of poverty; (2) Racial bias and discrimination exhibited by individuals (e.g., caseworkers, mandated and other reporters); (3) Child welfare system factors (e.g., lack of resources for families of color, caseworker characteristics); and (4) Geographic context, such as region, state, or neighborhood. A number of suggested strategies to address these issues were identified, but in implementation they should be specific to the disproportionality and disparities present in each jurisdiction, both in terms of the racial and ethnic populations affected and the points within the child welfare process at which those differences are apparent.

CITIZENS FOR JUVENILE JUSTICE ET AL., MISSED OPPORTUNITIES: PREVENTING YOUTH IN THE CHILD WELFARE SYSTEM FROM ENTERING THE JUVENILE JUSTICE SYSTEM (2017), <https://www.cfjj.org/misled-opp>.

Children pulled into the child welfare system are often not afforded stabilizing support systems, which puts them at high risk of developing reactive behaviors that lead to their entry into the juvenile justice system. Involvement in the juvenile justice system is tied to academic failure, future arrests, and other long-term consequences. Citizens for Juvenile Justice worked with the Massachusetts Department of Youth Services (DYS) and the Department of Children and Families (DCF) to examine aggregate case information for the more than 1,000 youth with open cases with both DCF and DYS in 2014. This review found that within the children welfare system, children who eventually had juvenile justice involvement had significantly different experiences than those who did not. These findings present opportunities to intervene, and incorporate different policies and programs that can prevent these children's experience with the juvenile court system.

Endnotes

¹ For the purposes of this Bench Card, Juvenile Court applies to all court proceedings affecting youth, including delinquency, child protective, and/or proceedings related to status offenses.

² Nat'l Research Council, *Executive Summary, in REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 6-7* (2013) [hereinafter REFORMING JUVENILE JUSTICE]; BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE 143 (2017); CITIZENS FOR JUVENILE JUSTICE & MASS. BUDGET AND POL'Y CTR., MISSED OPPORTUNITIES: PREVENTING YOUTH IN THE CHILD WELFARE SYSTEM FROM ENTERING THE JUVENILE JUSTICE SYSTEM (2015), <https://www.cfjj.org/misled-opp>; THE SENTENCING PROJECT, FACT SHEET: BLACK DISPARITIES IN YOUTH INCARCERATION (2017) [hereinafter BLACK DISPARITIES], <http://www.sentencingproject.org/publications/black-disparities-youth-incarceration/>; THE SENTENCING PROJECT, FACT SHEET: NATIVE DISPARITIES IN YOUTH INCARCERATION (2017) [hereinafter NATIVE DISPARITIES], <http://www.sentencingproject.org/publications/native-disparities-youth-incarceration/>; THE SENTENCING PROJECT, FACT SHEET: LATINO DISPARITIES IN YOUTH INCARCERATION (2017) [hereinafter LATINO DISPARITIES], <http://www.sentencingproject.org/publications/latino-disparities-youth-incarceration/>.

³ CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVICES, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 4 (2016), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

⁴ See generally SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2013 at 7 (2015), <https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2013.pdf>; NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 176 (2014), <http://www.ncjj.org/pdf/NR2014.pdf>.

⁵ BLACK DISPARITIES, *supra* note 2.

⁶ *Id.*

⁷ See NATIVE DISPARITIES; LATINO DISPARITIES, *supra* note 2.

⁸ See CHILDREN'S BUREAU, *supra* note 3, at 9. See also CTR. FOR THE STUDY OF SOCIAL POL'Y, DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH 16 (2011) [hereinafter ANALYSIS OF THE RESEARCH], https://www.cssp.org/publications/child-welfare/alliance/Disparities-and-Disproportionality-in-Child-Welfare_An-Analysis-of-the-Research-December-2011.pdf.

⁹ Denise Herz & Joseph Ryan, *Building Multisystem Approaches in Child Welfare and Juvenile Justice*, in CTR. FOR JUVENILE JUSTICE REFORM & AM. PUB. HUMAN SERVICES ASS'N, BRIDGING TWO WORLDS: YOUTH INVOLVED IN THE CHILD WELFARE AND JUVENILE JUSTICE SYSTEMS 37-39 (2008), http://cjjr.georgetown.edu/wp-content/uploads/2015/03/BridgingTwoWorlds_2008.compressed.pdf; Pam Fessler, *Report: Foster Kids Face Tough Time After Age 18*, NAT'L PUBLIC RADIO, Apr. 7, 2010, <https://www.npr.org/templates/story/story.php?storyId=125594259>; MARK E. COURTNEY ET AL., CHAPIN HILL CTR. FOR CHILDREN, UNIV. OF CHICAGO, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 19 (2005), <https://www.chapinhall.org/wp-content/uploads/Midwest-Eval-Outcomes-at-age-19.pdf>.

¹⁰ Over sixty-years after *Brown v. Board of Education*, 347 U.S. 483 (1954), residential segregation has resulted in youth of color attending under-resourced schools which contribute to the school-to-prison pipeline. See CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION (2004).

¹¹ NAT'L JUVENILE DEF. CTR. ET AL., BENCH CARD: APPLYING PRINCIPLES OF ADOLESCENT DEVELOPMENT IN DELINQUENCY PROCEEDINGS (2017) [hereinafter ADOLESCENT DEVELOPMENT BENCH CARD], http://njdc.info/wp-content/uploads/2017/08/NJDC_Adolescent-Development_Bench-Card.pdf; RUSSELL J. SKIBA & NATASHA T. WILLIAMS, THE EQUITY PROJECT AT IND. UNIV., ARE BLACK KIDS WORSE? MYTHS AND FACTS ABOUT RACIAL DIFFERENCES IN BEHAVIOR (2014), <http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American->

Differential-Behavior_031214.pdf; Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 56 AM. CRIM. L. REV. 649, 652-55 (2017) [hereinafter *Race, Paternalism, and the Right to Counsel*]; L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 297 (2012) [hereinafter *Self-Defense*] (finding that people are more likely to see weapons in the hands of unarmed Black men than white men, which is more likely to lead to systematic and predictable errors in judgments of criminality); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 877 (2004) [hereinafter *Seeing Black*] (finding that Black faces influenced a person's ability to spontaneously detect degraded images of crime-relevant objects more than white faces); Dustin Albert & Laurence Steinberg, *Age Differences in Strategic Planning as Indexed by the Tower of London*, 82 CHILD DEV. 1501 (2011) (finding similar levels of maturation across groups in a study controlling for ethnicity and socio-economic status, and additionally finding that although strategic planning improved steadily as youth mature, an advanced ability to strategically plan did not develop until ages 22-25); Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193 (2010) (finding a preference in adolescents for risk taking and for short-term reward over long-term gain, with no significant differences between ethnicities or socio-economic status); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009) (controlling for both ethnicity and socio-economic status, and finding that youth of similar ages in the study exhibited similar levels of weak future orientation across ethnicity and socio-economic status); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764 (2008) (measuring both sensation-seeking and impulsivity amongst a sample of 935 participants, controlling for ethnicity and socio-economic status, and finding that youth across all ethnic and socio-economic groups exhibited similar patterns in sensation-seeking and impulsivity); Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531 (2007) (measuring resistance to peer pressure, controlling for ethnicity and socio-economic status, and finding that between 10 and 14, little growth in the ability to resist peer pressure occurs, that between 14 and 18 resistance to peer pressure increases linearly, and that between 18 and 30 little growth occurs, in all groups); LLOYD D. JOHNSON ET AL., MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE 1975-2010, VOLUME I: SECONDARY SCHOOL STUDENTS (2011) (suggesting that Black youth self-report using alcohol and different types of drugs less than other groups and by the 12th grade, white youth report using illicit drugs or alcohol more than any other group); CENTERS FOR DISEASE CONTROL & PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE (2014), <http://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf> (according to self-report measures, white youth are engaged in illegal behavior at similar or higher rates compared to youth of color).

¹² See sources cited, *supra* note 11.

¹³ See JOSHUA ROVNER, THE SENTENCING PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS 6 (2016).

¹⁴ See sources cited, *supra* note 8.

¹⁵ MODEL CODE OF JUDICIAL CONDUCT r. 2.2, 2.3(A) (Am. Bar Ass'n 2011).

¹⁶ See MODEL CODE OF JUDICIAL CONDUCT r. 2.3 (Am. Bar Ass'n 2011).

¹⁷ Jerry Kang, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1133 (2012).

¹⁸ ANNIE E. CASEY FOUND., RACE EQUITY AND INCLUSION ACTION GUIDE: 7 STEPS TO ADVANCE AND EMBED RACE EQUITY AND INCLUSION WITHIN YOUR ORGANIZATION (2014), http://www.aecf.org/m/resourcedoc/AECF_EmbacingEquity7Steps-2014.pdf.

¹⁹ Constitutional amendments, legislation, and Supreme Court decisions have addressed instances of structural or institutional bias in marriage, deed restrictions, voting boundaries, voting registration, school desegregation, college admission and other areas. Statutes may include racial or cultural prejudices that are not overt. The court staff may lack diversity. The courthouse grounds may infer a bias by the inclusion or positioning of flags, monuments, plaques, or photographs that suggest a bias or prejudice. The

courthouse location, court services location, or jail and prison locations may cause an impediment to access to justice and services. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (“practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory . . . practices.”).

²⁰ See AM. CIVIL LIBERTIES UNION, RACIAL DISPARITIES IN SENTENCING: HEARING ON REPORTS OF RACISM IN THE JUSTICE SYSTEM OF THE UNITED STATES 5 (2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

²¹ See MP ASSOCIATES & CTR. FOR ASSESSMENT & POLICY DEV., RACIAL EQUITY TOOLS’ GLOSSARY [hereinafter RACIAL EQUITY TOOLS], http://www.racialequitytools.org/images/uploads/RET_Glossary913L.pdf (last visited Jan. 3, 2018).

²² See, e.g., CMTY. RELATIONS SERVICES, U.S. DEP’T OF JUSTICE, COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING, UNDERSTANDING BIAS: A RESOURCE GUIDE, <https://www.justice.gov/crs/file/836431/download> (last visited Dec. 14, 2017); *Explicit Bias*, PERCEPTION INST., <https://perception.org/research/explicit-bias/> (last visited Dec. 14, 2017).

²³ See RACIAL EQUITY TOOLS, *supra* note 21.

²⁴ Even where an explicit bias does not appear to be harmful on its face, for example preference for a person who is from the same university alma matter as one’s self, where such bias unfairly favors one group over another to their detriment, it can be harmful. See, e.g., *Griggs*, 401 U.S. 424. See generally MODEL CODE OF JUDICIAL CONDUCT r. 2.3 (Am. Bar Ass’n 2011).

²⁵ See, e.g., Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV. 190 (2013) [hereinafter *First, Do No Harm*], <http://www.ncsc-jurystudies.org/~media/microsites/files/cjs/what%20we%20do/cr49-4elek.ashx>; Mark Soler, *Reducing Racial and Ethnic Disparities in the Juvenile Justice System*, in NAT’L CTR. FOR STATE COURTS, TRENDS IN STATE COURTS: JUVENILE JUSTICE AND ELDER ISSUES 27 (2014), http://www.ncsc.org/~media/Microsites/Files/Future%20Trends%202014/Reducing%20Racial%20and%20Ethnic%20Disparities_Soler.ashx; Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009); Kristin A. Lane et al., *Understanding and Using the Implicit Association Test: IV: What We Know (So Far) About the Method*, in IMPLICIT MEASURES OF ATTITUDES: PROCEDURES & CONTROVERSIES (Bernd Wittenbrink & Norbert Schwarz eds., 2007).

²⁶ KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, UNDERSTANDING IMPLICIT BIAS, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> (last visited Jan. 3, 2018).

²⁷ *Id.*

²⁸ See *First, Do No Harm*, *supra* note 25; *Race, Paternalism, and the Right to Counsel; Self-Defense; Seeing Black*, *supra* note 11.

²⁹ See *Race, Paternalism, and the Right to Counsel*, *supra* note 11, at 653. See generally JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2039 (2011); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1540 (2004); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1072 (2006) (discussing studies, including those in which test subjects were Black, rejected racism, and still displayed implicit bias).

³⁰ See ANALYSIS OF THE RESEARCH, *supra* note 8. See also CHILD WELFARE INFO. GATEWAY, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE (2016) [hereinafter RACIAL DISPROPORTIONALITY AND DISPARITY], https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf; OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE (2014) [hereinafter DATA SNAPSHOT: SCHOOL DISCIPLINE], <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>; Donna St. George, *Federal Data Show Racial Gaps in School Arrests*, WASH. POST, Mar. 6, 2012, https://www.washingtonpost.com/national/federal-data-show-racial-gaps-in-school-arrests/2012/03/01/gJQApbjvtR_story.

html?utm_term=.fe5c0b5f42ab; DAVID J. LOSEN & RUSSELL SKIBA, *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS* (2010), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Suspended_Education.pdf.

³¹ THE SENTENCING PROJECT, *DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM* (2014) [hereinafter *DISPROPORTIONATE MINORITY CONTACT*], <http://www.sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf>; ASHLEY NELLIS, THE SENTENCING PROJECT, *POLICIES & PRACTICES THAT UNFAIRLY SHIFT YOUTH OF COLOR INTO THE JUVENILE JUSTICE SYSTEM*, https://www.juvjustice.org/sites/default/files/ckfinder/files/resource_473.pdf (last visited Dec. 19, 2017). See generally *Statistics*, STRATEGIES FOR YOUTH CONNECTING COPS & KIDS, <https://strategiesforyouth.org/resources/facts/> (last visited Dec. 19, 2017).

³² DATA SNAPSHOT: SCHOOL DISCIPLINE, *supra* note 30.

³³ AM. CIVIL LIBERTIES UNION, *SCHOOL-TO-PRISON PIPELINE*, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> (last visited Dec. 19, 2017); LIBBY NELSON & DARA LIND, *THE SCHOOL TO PRISON PIPELINE EXPLAINED* (2015), <http://www.justicepolicy.org/news/8775>.

³⁴ See *ADOLESCENT DEVELOPMENT BENCH CARD*, *supra* note 11.

³⁵ See *BLACK DISPARITIES; NATIVE DISPARITIES; LATINO DISPARITIES*, *supra* note 2; CHILDREN'S BUREAU, *supra* note 3; *ANALYSIS OF THE RESEARCH*, *supra* note 8. See also JOLANTA JUSKIEWICZ, *BUILDING BLOCKS FOR YOUTH, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED?* (2000), http://www.njjn.org/uploads/digital-library/resource_127.pdf.

³⁶ Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 422 (2013).

³⁷ SOPHIE GATOWSKI ET AL., NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES* (2016).

³⁸ *Disparity and Disproportionality*, Am. Public Human Services Ass'n, <http://aphsa.org/content/APHSA/en/pathways/Positioning-Public-Child-Welfare-Guidance-PPCWG/Disparity-and-Disproportionality.html> (last visited Nov. 8, 2017) (no longer on website) (on file with NJDC).

³⁹ *DISPROPORTIONATE MINORITY CONTACT*, *supra* note 31, at 8.

⁴⁰ *Id.*

⁴¹ David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 30 (Nat'l Bureau of Econ. Research, Working Paper No. 23421, 2017).

⁴² See ANNA AIZER & JOSEPH J. DOYLE, JR., THE NAT'L BUREAU OF ECON. RESEARCH, *JUVENILE INCARCERATION, HUMAN CAPITAL AND FUTURE CRIME: EVIDENCE FROM RANDOMLY-ASSIGNED JUDGES* 3 (2013), http://www.mit.edu/~jjdoyle/aizer_doyle_judges_06242013.pdf. See also Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 *Jus. Q.* 462, 473 (2006) (A first-time arrest during high school doubles the likelihood that a youth will drop out and a court appearance quadruples that likelihood.); Randi Hjalmarsson, *Criminal Justice Involvement and High School Completion*, 63 *J. URBAN ECON.* 613, 613 (2008) (Arrested youth are 11 percent less likely to graduate from high school and incarcerated youth are 26 percent less likely to graduate.).

⁴³ RICHARD MENDEL, THE ANNIE E. CASEY FOUND., *NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION* 24 (2011), <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>.

⁴⁴ Jeffrey J. Shook, *Racial Disproportionality in Juvenile Justice: The Interaction of Race and Geography in Pretrial Detention for Violent and Serious Offenses*,

⁴⁵ See *Self Defense*, *supra* note at 11.

⁴⁶ Black, Latino, Asian American & Pacific Islander, Native & Alaskan Native youth are significantly more likely to be transferred to adult court and sentenced to incarceration than white youth who commit comparable crimes. See *BLACK DISPARITIES; NATIVE DISPARITIES; LATINO DISPARITIES*, *supra* note 2; *DISPROPORTIONATE MINORITY CONTACT*, *supra* note 31.

⁴⁷ CTR. FOR CHILDREN'S LAW & POLICY, *GRADUATED RESPONSES TOOLKIT: NEW RESOURCES AND INSIGHTS TO HELP YOUTH SUCCEED ON PROBATION* 29 (2016), <http://www.cclp.org/wp-content/uploads/2016/06/Graduated-Responses-Toolkit.pdf>.

⁴⁸ See *REFORMING JUVENILE JUSTICE*, *supra* note 2, at 192. See also Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *CRIME & JUST.* 283 (2003).

⁴⁹ *Implicit Association Tests*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (last visited Nov. 7, 2017).

⁵⁰ See, e.g., *What Can I Do About Bias?*, MTV'S LOOK DIFFERENT CAMPAIGN, <http://www.lookdifferent.org/what-can-i-do> (last visited Dec. 20, 2017).

⁵¹ See generally Ed Yong, *Justice is Served, But More So After Lunch: How Food-Breaks Sway the Decisions of Judges*, *DISCOVER MAG.*, Apr. 11, 2011, <http://blogs.discovermagazine.com/notrocketscience/2011/04/11/justice-is-served-but-more-so-after-lunch-how-food-breaks-sway-the-decisions-of-judges/#.Wk0A7dKnEnR>; John Tierney, *Do You Suffer From Decision Fatigue*, *N.Y. TIMES MAG.*, Aug. 17, 2011, <http://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html?pagewanted=all&r=0>; J.D. Meier, *10 Ways to Defeat Decision Fatigue*, *SOURCES OF INSIGHT*, <http://sourcesofinsight.com/10-ways-to-defeat-decision-fatigue/> (last visited Jan. 3, 2018).

⁵² See *JUDICIAL DIV., AM. BAR ASS'N, JUDGES: 6 STRATEGIES TO COMBAT IMPLICIT BIAS ON THE BENCH* (2016), <https://www.americanbar.org/publications/youraba/2016/september-2016/strategies-on-implicit-bias-and-de-biasing-for-judges-and-lawyer.html> (Judge Bernice B. Donald of the 6th Circuit Court of Appeals stated, "Each of us in doing our jobs are viewing the functions of that job through the lens of our experiences, and all of us are impacted by biases, stereotypes and other cognitive functions that enable us to take shortcuts in what we do."). See also Patricia Devine et al., *Long Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 *J. EXPERIMENTAL SOC. PSYCHOL.* 1267, 1270 (2012).

⁵³ Jon Kabat-Zinn, *Defining Mindfulness* (2017), <https://www.mindful.org/jon-kabat-zinn-defining-mindfulness/>.