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# Cognitive Warfare and Young Black Males in America

*Perry L. Moriearty\* & William Carson\*\**

## I. INTRODUCTION

During the 1990s, deep into America's Wars on Crime and Drugs, an incursion commenced against a target that had, to that point, remained largely outside the crosshairs. Prompted by rising crime rates and a handful of high-profile incidents, politicians, the media, and much of the public became consumed by what they characterized as a looming threat. What made this target distinct was that it belonged to a cohort traditionally shielded from public scorn by both law and custom. The target was a subset of America's own children. Waged in race-neutral terms, this war's racial connotations were unmistakable. The most violent, the most adult-like, and the most amoral of adolescents were young black males.

This incursion bore many of the classic features of other modern American social wars: rhetorical excess, political extremism, graphic media, punitive policies, and, perhaps most critically, the casting of the enemy as a moral reprobate.<sup>1</sup> To this end, the image of the adolescent "super-predator," a term a Princeton professor coined in 1995,<sup>2</sup> was a particularly salient symbol.

This Article considers the fallout from America's "super-predator" war. Some of it was unambiguous. During the 1990s, nearly every state in the country enacted laws that made it easier to try kids as adults, expanded criminal court sentencing authority over juvenile offenders, and modified or

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1. See *infra* Part II (discussing the common attributes of U.S. social wars).

2. John J. Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23, available at <http://cooley.libarts.wsu.edu/schwartzj/criminology/dilulio.pdf>.

eliminated juvenile court confidentiality laws.<sup>3</sup> These changes have been called the “broadest and most sustained legislative crackdown ever on serious offenses committed by youth within the jurisdictional ages of American Juvenile Courts.”<sup>4</sup> The result was the incarceration of literally thousands of youth, the majority of whom were black males.<sup>5</sup> By 1998, African-Americans constituted about 15% of youth under age eighteen,<sup>6</sup> but nearly two-thirds of those transferred to adult court,<sup>7</sup> a disparity for which crime commission rates could not begin to account. The country continues to feel the broader economic and sociological reverberations of these numbers. Today, nearly one in three African-American males in their twenties is under the jurisdiction of the criminal justice system.<sup>8</sup>

The focus of this Article, however, is on a less visible set of phenomena. Why is it that we, as a country, were so willing during the 1990s to depart from our traditional posture of restraint toward child lawbreakers and adopt policies that have had such a devastating impact on so many of them? And why, now that we know how disproportionately damaging these policies are, have we done virtually nothing to change them?

3. See *infra* notes 112–14 and accompanying text.

4. Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from an Ideological Battleground*, 11 FED. SENT’G REP. 260, 260 (1999).

5. According to the National Council on Crime and Delinquency, the number of youth incarcerated in adult jails increased by 208% between 1990 and 2004. CHRISTOPHER HARTNEY, NAT’L COUNCIL ON CRIME & DELINQUENCY, FACT SHEET: YOUTH UNDER AGE 18 IN THE ADULT CRIMINAL JUSTICE SYSTEM 3 (2006). Significantly, studies conducted during this period confirmed that African-American youth were far more likely to be charged as adults and receive sentences of incarceration than white or Latino youth. JOLANTA JUSZKIEWICZ, BLDG. BLOCKS FOR YOUTH, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED? 5–6, 10 (2000), available at [http://www.cclp.org/documents/BBY/Youth\\_Crime\\_Adult\\_Time.pdf](http://www.cclp.org/documents/BBY/Youth_Crime_Adult_Time.pdf) (providing a study of more than 2500 cases filed in eighteen of the largest jurisdictions in the country demonstrated that African-American youth were disproportionately charged in adult court and were more likely than white or Latino youth to receive a sentence of incarceration); see also ELEANOR HINTON HOYTT ET AL., THE ANNIE E. CASEY FOUND., 8: PATHWAYS TO JUVENILE DETENTION REFORM: REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION (2001), available at <http://www.aecf.org/upload/publicationfiles/reducing%20racial%20disparities.pdf> (documenting the significant increases in racial disproportionality in juvenile detention facilities during the 1990s).

6. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: SECTION 1. POPULATION 22 (1998), available at <http://www.census.gov/prod/3/98pubs/98statab/sasec1.pdf>.

7. See BUREAU OF JUSTICE STATISTICS, SURVEY OF 40 COUNTIES, 1998: JUVENILE FELONY DEFENDANTS IN CRIMINAL COURTS 1 (1998), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jf dcc98.pdf>; EILEEN POE-YAMAGATA & MICHAEL A. JONES, NAT’L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM 12 (2009), available at <http://www.cclp.org/documents/BBY/jfs.pdf>.

8. MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (1995), available at [http://www.sentencingproject.org/doc/publications/rd\\_youngblack\\_5yrslater.pdf](http://www.sentencingproject.org/doc/publications/rd_youngblack_5yrslater.pdf); MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 11 (2011) [hereinafter TONRY, PUNISHING RACE].

Part of the answer may lie in what this Article calls the “social psychology of social war.” Recent research into the mechanics and effects of “social cognition”<sup>9</sup> suggests that preexisting stereotypes of the groups with which people are associated largely shape our perceptions of individuals.<sup>10</sup> It further suggests that we rely on these stereotypes unconsciously and automatically, often without even realizing we are doing it.<sup>11</sup> We also now know that both the content of our stereotypes and the frequency with which they are activated and applied are especially susceptible to certain outside influences.<sup>12</sup> Importantly, several studies from the last two decades suggest that the graphic media imagery, political posturing, militaristic rhetoric, and Manichean moralizing often associated with American social wars are among these influences. These images and ideas impact not just the type of associations we make with our “enemies,” conflating Muslims with terrorism, Latinos with drug smuggling, and African-Americans with crime, for instance, but also the likelihood that we will draw upon these associations when we evaluate them. The more negative the association, the more negative the evaluation—and the more likely it is that we will support punitive responses to the threat we perceive.<sup>13</sup>

In the case of the “super-predator” war, however, it was not only the mental *associations*, but also the mental *dissociations* that were critical. At the same time the “super-predator” war amplified the American public’s predisposition to associate adolescents of color, and in particular young black males, with violence and moral depravity, it also led the public to dissociate young black males from the one trait that should not have been up for debate: their youth. The result was a veritable feedback loop whose cognitive output, the mental imprint of “morally impoverished” “super-

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9. Experts have defined social cognition as “how ordinary people think about people and how they think they think about people.” SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 1 (2d ed. 1991); see also Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*, 56 *AM. PSYCHOLOGIST* 717, 721–25 (2001).

10. Part III of this Article discusses the basic proposition that our cognitive functioning predisposes us to prejudice and stereotyping. Cf. Gary Blasi, *Advocacy Against the Stereotype*, 49 *UCLA L. REV.* 1241, 1256–57 (2002) (citing neuroscience as supporting the proposition that “basic cognitive mechanisms . . . predispose us toward stereotypes”); Allen J. Hart et al., *Differential Response in the Human Amygdala to Racial Outgroup vs. Ingroup Face Stimuli*, 11 *NEUROREPORT* 2351, 2353–54 (2000); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1187–88 (1995) (linking social cognition theory to discrimination).

11. Krieger, *supra* note 10.

12. See, e.g., ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 49 (2001).

13. See discussion *infra* Part III.

predators,”<sup>14</sup> continually fed its input. Thus, even as crime rates among black youth have dropped steadily since the mid-1990s, these self-reinforcing associations and dissociations have prompted lawmakers and their constituents to continue to support laws and policies that they know disproportionately punish and incapacitate young black males.

Admittedly, factors other than social war and social psychology have played a pivotal role in this dynamic. For instance, the history of race relations in this country, changes in our attitudes toward punishment, rising violent crime rates among adolescents, and conscious political strategy also played a role.<sup>15</sup> But a look at the juvenile justice policies and youth imprisonment rates of other Western countries, even those that experienced a similar spike in adolescent crime during the period in question, suggest that we were extreme in our degree of political and social antipathy toward young offenders and nearly alone in our willingness to champion policies that punish them as harshly as adults.<sup>16</sup> Not coincidentally, we have also been virtually alone in our willingness to wage what this Article characterizes as a veritable domestic social war against them.

This Article proceeds in two primary parts. Part II traces the origins, manifestations, and impact of the so-called American “super-predator” war that emerged in the late 1980s and lasted until the early 2000s, when the War

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14. These characterizations appeared in a now-infamous article written by former Princeton Political Science Professor John Dilulio. See Dilulio, *supra* note 2, at 23–24.

15. See, e.g., TONRY, PUNISHING RACE, *supra* note 8, at 77–114 (arguing that the psychology of American race relations, America’s long-standing “economic, political, and social dominance of blacks by whites,” and the “Republican Southern Strategy of appealing to racial enmities and anxieties” contributed to state and federal policymakers’ willingness to enact criminal justice policies that have a disparate impact on African-Americans).

16. Consider the Canadian experience. In 1998, in response to rising crime rates, the Canadian federal government decided to replace its rehabilitation-oriented Young Offenders Act of 1982 with a new Youth Criminal Justice Act, which placed greater emphasis on accountability and the nature of the offense. See Anthony Doob & Jane Sprott, *Punishing Youth Crime in Canada*, 8 PUNISHMENT & SOC’Y 233 (2008). Like the slew of state laws enacted in the United States during the 1990s, the Youth Criminal Justice Act placed greater emphasis on accountability and the nature of the offense than the rehabilitation and the characteristics of the offender. *Id.* However, despite significant political pressure to lower the age of criminal responsibility below age twelve, the Canadian legislature resisted. *Id.* Nor would the legislature reconsider its adult court transfer laws, which were historically restricted to a small group of serious violent offenders and sex offenders. *Id.* In fact, the Youth Criminal Justice Act reversed course in some significant ways, establishing considerably more options for dealing with cases informally and keeping juvenile offenders in the community. *Id.* Finally, and most symbolically, the Youth Criminal Justice Act continues to state as one of its objectives that it strives for rehabilitation of offenders. *Id.*; see also Youth Criminal Justice Act, S.C. 2002, c. 1 (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/Y-1.5/>. Indeed, even in England and Wales, where youth can be transferred to adult court for particularly serious crimes, juvenile rather than criminal justice policies continue to apply until youth reach the age of eighteen and are deemed criminally responsible. NEAL HAZEL, YOUTH JUSTICE BD., CROSS-NATIONAL COMPARISON OF YOUTH JUSTICE 35 (2008), available at [http://www.yjb.gov.uk/publications/Resources/Downloads/Cross\\_national\\_final.pdf](http://www.yjb.gov.uk/publications/Resources/Downloads/Cross_national_final.pdf).

on Terror took center stage. Beginning with a brief discussion of the history and anatomy of modern American social wars, it explores the laws, policies, politics, and rhetoric that coincided with dramatic increases in the incarceration of black youth during the “super-predator” era. Part III considers the role that social psychology may have played in this progression and in the progression of social wars more generally. Drawing upon recent studies into causes, functions, and consequences of social cognition,<sup>17</sup> this Article argues that stereotypes linking race, adolescence, and crime drove, and at the same time reinforced, the manifestations of war Part II describes. The result was a self-reinforcing feedback loop that has altered the social meaning of “young black male” in profound and intractable ways. Because the majority of the people in this country now harbor such stereotypes about the criminality, deviance, and adulthood of young black males, large segments of the public remain willing to enact, administer, and support policies that cause substantial and disproportionate harm to this segment of our youth population and are among the harshest in the Western world.

## II. THE ANATOMY OF THE AMERICAN SOCIAL WARS

Over the last half century, this country has been in a perpetual state of war. From Lyndon Johnson’s War on Poverty, to the Wars on Crime and Drugs, to our current War on Terror, to smaller incursions against cancer and immigration, we, as a nation, have spent the last fifty years in an ever-present posture of social anxiety and metaphorical combat. Each of this century’s most prominent social wars has followed a similar pattern: an intense period of political posturing about the dangers of the chosen target, accompanied by episodic media coverage of a few sensationalized incidents, followed by a period of public outcry and polls that reflect the public’s mounting fear of the target, followed finally by a flurry of punitive laws at both the federal and state level that lawmakers have justified as efforts to reassure an anxious public.<sup>18</sup> More often than not, these laws have a

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17. The interplay between social psychology and American social wars plainly implicates research beyond social cognition. In particular, Lawrence Bobo’s recent work on the links between racial resentment and policy punitiveness, see Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445, 445–72 (2006), and Mark Peffley and Jon Hurwitz’s work on attitudes toward punishment, see generally MARK PEFFLEY & JON HURWITZ, *JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES* (2010), suggest that the political and social casting of metaphorical “enemies” also impacts conscious beliefs and attitudes toward punishment and the willingness of Euro-Americans to rationalize an obviously unjust justice system. For a comprehensive and highly accessible overview of this body of research, see chapter four of TONRY, *PUNISHING RACE*, *supra* note 8.

18. See *infra* Part II (discussing the elements and sequence of the Wars on Crime and Drugs);

disproportionately negative impact on a racial or ethnic “out-group.”<sup>19</sup> America’s Wars on Crime and Drugs are illustrative. The “super-predator” war followed a similar pattern. One difference, however, is that unlike the racial minorities and poor whites the Wars on Crime and Drugs swept up, our adolescent population had never before experienced the groundswell of social antipathy that the “super-predator” war generated.

### A. The Wars on Crime and Drugs

This Part retraces the origins and ramifications of the War on Crime and the War on Drugs. It begins by recounting the ways in which politics and media drove public support for the Wars’ most punitive policies. Next, it discusses the impact of these wars on racial minorities in the justice system.

#### 1. Politics, Media, Public Opinion, and Lawmaking

##### a. The War on Crime

The “law and order” rhetoric that has dominated political discourse in the United States for the last half century first emerged in the late 1950s. Southern politicians, angered by the U.S. Supreme Court’s decision in *Brown v. Board of Education*, called for a crackdown on the “hoodlums” and “agitators” who challenged segregation and African-American disenfranchisement.<sup>20</sup> Crime officially took its place on the national political scene a decade later with presidential candidate Barry Goldwater’s thinly veiled “crime in the streets” condemnation.<sup>21</sup> “History shows us . . . that . . . nothing prepares the way for tyranny more than the failure of public officials to keep the streets from bullies and marauders,” Goldwater warned during his acceptance speech at the 1964 Republican convention.<sup>22</sup> That message resonated with the public. By 1968, more than four in five U.S. citizens

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see also Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 45 CRIME & DELINQ. 419, 425 (1999) (“[P]ublic nomination of crime as the nation’s most pressing problem and public support for harsh laws typically follow, not precede, media and political preoccupation with crime.”).

19. TONRY, PUNISHING RACE, *supra* note 8, at 77–114.

20. Katherine Beckett & Theodore Sasson, *The Origins of the Current Conservative Discourse on Law and Order*, in CONSERVATIVE AGENDAS AND CAMPAIGNS, THE RISE OF THE MODERN “TOUGH ON CRIME” MOVEMENT 44, available at [http://www.defendingjustice.org/con\\_agendas/toughcrime.html](http://www.defendingjustice.org/con_agendas/toughcrime.html).

21. See Gerald Caplan, *Reflections on the Nationalization of Crime, 1964–1968*, 3 LAW & SOC. ORD. 583, 583–85 (1973).

22. Barry Goldwater, 1964 Acceptance Speech at the 28th Republican National Convention (July 16, 1964), available at <http://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwaterspeech.htm> (providing a transcript of the speech).

agreed that “law and order had broken down,” that crime was on the rise, and that “Negroes who start riots” were the cause.<sup>23</sup> Being “tough on crime” has been a virtual political necessity ever since.<sup>24</sup>

The news media was an indispensable ally. This has been especially true since the onset of the “soft news” era of the late 1990s.<sup>25</sup> Between 1990 and 1993, crime leapt from the fifth to the first most covered topic on the national evening news.<sup>26</sup> By the end of the decade, coverage of homicides had increased more than five-fold.<sup>27</sup> “If it bleeds, it leads,” became the mantra.<sup>28</sup> According to opinion polls, the American people believed the

23. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 38 (1997).

24. Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1396 tbl.1 (2006); see Beckett & Sasson, *supra* note 20, at 6. George H.W. Bush's use of the infamous “Willie Horton” advertisement may be the starkest example. See *George Bush and Willie Horton*, N.Y. TIMES, Nov. 4, 1988, <http://www.nytimes.com/1988/11/04/opinion/george-bush-and-willie-horton.html>. While on a furlough from a Massachusetts prison, Horton kidnapped a couple and raped the woman. *Id.* During the 1988 presidential campaign, Bush highlighted the incident as evidence that “liberal Democrats,” like his opponent, Massachusetts Governor Michael Dukakis, were soft on crime. *Id.* The ad is often credited with securing his eventual victory. See *id.* Analysts often describe not one, but three, separate “Wars on Crime.” The first is said to have begun in the early part of the twentieth century; the second, during the Nixon administration; and the third, shortly after Ronald Reagan took office. Kenneth Nunn, *Race, Crime & the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381, 381 n.1 (2002) (citing STEVEN WITSOSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY (1990)). This Article treats the period beginning with the 1964 presidential election and extending until 2001, when the War on Terror began, as a single War on Crime.

25. “Soft news” has been described as a set of story characteristics that often include a sensationalized presentation format, a human interest theme, a lack of public policy content, and an emphasis on dramatic subjects, such as crime. THOMAS E. PATTERSON, HARVARD UNIV., JOAN SHORENSTEIN CTR. ON THE PRESS, POLITICS & PUB. POLICY, DOING WELL AND DOING GOOD: HOW SOFT NEWS AND CRITICAL JOURNALISM ARE SHRINKING THE NEWS AUDIENCE AND WEAKENING DEMOCRACY—AND WHAT NEWS OUTLETS CAN DO ABOUT IT 3–5 (2000), available at [http://www.hks.harvard.edu/presspol/publications/reports/soft\\_news\\_and\\_critical\\_journalism\\_2000.pdf](http://www.hks.harvard.edu/presspol/publications/reports/soft_news_and_critical_journalism_2000.pdf).

26. 1990 - *The Year in Review*, MEDIA MONITOR (Ctr. for Media and Pub. Affairs, Washington, D.C.), Jan. 1991, at 2–3 (reporting that network evening news stories on crime aired 542 times; of these, stories on murder and homicide statistics aired 86 times, while stories on the high-profile Marion Barry drug arrest aired 55 times); 1993 - *The Year in Review*, MEDIA MONITOR (Ctr. for Media and Pub. Affairs, Washington, D.C.), Jan.–Feb. 1994, at 2 (reporting that network evening news stories on crime and drugs aired 1698 times; of these, 329 were stories on murder, triple the number of murder stories that aired in 1992). For the decade as a whole, crime was by far the number one news topic. *The Media at the Millennium*, MEDIA MONITOR (Ctr. for Media and Pub. Affairs, Washington, D.C.), July–Aug. 2000, at 2–3 (reporting that during the 1990s, network news programs produced 14,289 total crime stories—nearly 4000 more than the second most covered topic, economy and business—and that “[s]ince 1993, when the networks’ infatuation with crime began, crime has been the number one news topic four out of seven years”).

27. *The Media at the Millennium*, *supra* note 26, at 3–4.

28. See RICHARD L. FOX ET AL., TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA



hype. From 1994 to 1998, respondents to national polls consistently identified crime as the most important problem the nation faced.<sup>29</sup> In a 1997 *Los Angeles Times* poll, 80% of respondents stated that the media's portrayal of violent crime had increased their personal fear of becoming a crime victim.<sup>30</sup>

Deeming them necessary to reassure an anxious public, lawmakers followed each "law and order" panic wave with a series of executive actions and legislative changes. In 1968, for example, in an attempt to neutralize the attacks of Republican candidates contending that he was soft on crime,<sup>31</sup> President Johnson signed the Omnibus Crime Control and Safe Streets Act of 1968,<sup>32</sup> which increased funding for law enforcement, attempted to overturn Supreme Court precedent protecting criminal defendants, and provided for expanded use of wiretaps and *Miranda*-less confessions.<sup>33</sup> The Omnibus Bill was the first of many federal tough-on-crime laws that legislatures would enact over the next three decades. These included the Omnibus Bill's eventual successor, the Violent Crime Control and Law Enforcement Act of 1994, which authorized more than thirty billion dollars for crime prevention efforts, law enforcement, and state prison construction.<sup>34</sup>

More draconian were the laws individual states enacted during the War on Crime. One quintessential example is California's three-strikes law, which mandates twenty-five years to life sentences following conviction for any third felony.<sup>35</sup> New Jersey's Megan's Law, which requires sex offender registration and public notification, is another.<sup>36</sup> Today, more than half of all

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FRENZY 6–7 (2d ed. 2007).

29. See, e.g., Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 418 (2006) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 106 tbl.2.1 (2004)).

30. Greg Braxton, *Ratings vs. Crime Rates*, L.A. TIMES, June 4, 1997, [http://articles.latimes.com/1997-06-04/local/me-65443\\_1\\_crime-stories](http://articles.latimes.com/1997-06-04/local/me-65443_1_crime-stories).

31. Jonathan Simon, *Governing Through Crime Metaphors*, 67 BROOK. L. REV. 1035, 1044 (2002).

32. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 201–406, 82 Stat. 197 (1968) (codified at 42 U.S.C. § 3711 (2006)).

33. Clayton & Pickerill, *supra* note 24, at 1399.

34. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 20109, 30104, 30202, 30403, 30702, 30802, 31132, 31707, 31904, 40414, 40422, 40603, 90206, 200112, 200210, 210306, 250005, 270009, 310003, 310004 (1994) (codified at 42 U.S.C. §§ 13071–14223 (2006)).

35. See CAL. PENAL CODE § 667 (West 2010) (providing for a five-year enhancement for each prior felony and an indeterminate life sentence of at least twenty-five years for a third felony).

36. New Jersey enacted Megan's Law one month after the abduction, rape, and murder of

states have habitual felony offender laws akin to California's three-strikes law,<sup>37</sup> and all fifty states have a version of Megan's Law.<sup>38</sup> In addition, nearly every state has adopted truth-in-sentencing laws, mandatory minimum sentencing laws, and zero-tolerance practices; these laws and policies have resulted in harsher penalties and the virtual elimination of rehabilitation programs.<sup>39</sup>

#### b. The War on Drugs

Launched on the heels of the War on Crime, the War on Drugs was even more ubiquitous. Not heavily regulated during the first half of the century,<sup>40</sup> drugs emerged as a potent political issue in the second half. In 1971, Richard Nixon declared drug abuse "Public Enemy No. 1"<sup>41</sup> and created a new agency, the Special Action Office for Drug Abuse Prevention, which received enhanced funding for drug treatment and enforcement.<sup>42</sup> This would be the first and the last time during the War on Drugs that more funding went toward treatment than punishment.<sup>43</sup> By 1985, nearly four-fifths of funds lawmakers allocated to the drug problem went to law enforcement.<sup>44</sup>

Following in Nixon's footsteps, subsequent administrations

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seven-year-old Megan Kanka by a convicted sex offender. N.J. STAT. ANN. § 2C:7-12 to -19 (West 2001). Congress enacted a federal version of Megan's Law in 1996, which requires states to form registries of offenders convicted of either sexually violent offenses or offenses against children. See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, Pub. L. No. 104-236, 110 Stat. 3096 (1996), amended by Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. § 16912 (2006)) (maintaining earlier version). It also requires states to adopt strict registration requirements for convicted sex offenders, verify the addresses of sex offenders annually for at least ten years, verify the addresses of those classified as "sexually violent predators" for life, and requires law enforcement to disseminate information about registered sex offenders to the public. *Id.*

37. See Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 27 (2007).

38. See Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1135 (2000).

39. See TONRY, PUNISHING RACE, *supra* note 8, at 124.

40. ANDREW B. WHITFORD & JEFF YATES, PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS 42-49 (2009).

41. *The Nation: The New Public Enemy No. 1*, TIME, June 28, 1971, <http://www.time.com/time/magazine/article/0,9171,905238-1,00.html>.

42. *Id.*

43. Frontline, *Thirty Years of America's Drug War: A Chronology*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited Apr. 1, 2012).

44. Beckett & Sasson, *supra* note 20, at 54.

successfully used the War on Drugs to cast drug use as a moral problem.<sup>45</sup> By framing drug addicts as aggressors rather than victims, the Reagan, Bush, and Clinton Administrations' zero-tolerance policies toward drug use made sense.<sup>46</sup> The best known example, and a centerpiece of Ronald Reagan's presidency, was Nancy Reagan's "Just Say No" Campaign<sup>47</sup>—a phrase she coined while speaking at an Oakland grade school.<sup>48</sup> Almost overnight, thousands of "Just Say No" groups emerged,<sup>49</sup> which largely targeted white middle-class children.<sup>50</sup> Under the rubric of "Just Say No," it was entirely a matter of individual choice to use or become involved in drug use.

Again, the news media was only too happy to cooperate, and the infiltration of crack cocaine into urban areas in the mid-1980s gave them their storyline.<sup>51</sup> By 1986, major news magazines were running cover stories calling crack the "The Plague Among Us."<sup>52</sup> The media focused, in particular, on crack cocaine use by African-Americans and the alleged "crack baby" epidemic, postulating a biological underclass of children who would require state support for the rest of their lives.<sup>53</sup> The media also linked crack babies to other inner-city crime, such as prostitution and gang violence.<sup>54</sup> "[C]rack bab[ies] '... bec[a]me a convenient symbol for an aggressive war on drug users because of the implication that anyone who is selfish enough to irreparably damage a child for the sake of a quick high deserves retribution."<sup>55</sup>

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45. WHITFORD & YATES, *supra* note 40, at 64.

46. Cf. Congressman Bob Barr & Eric Sterling, Debate at Georgetown University Law Center (Mar. 14, 2001), in *The War on Drugs: Fighting Crime or Wasting Time?*, 38 AM. CRIM. L. REV. 1537, 1539 (2001).

47. *Id.*

48. Claire Suddath, *Brief History: The War on Drugs*, TIME, Mar. 25, 2009, <http://www.time.com/time/world/article/0,8599,1887488,00.html>.

49. *Id.*

50. *Id.*; Frontline, *supra* note 43.

51. See Susan Okie, *The Epidemic That Wasn't*, N.Y. TIMES, Jan. 26, 2009, <http://www.nytimes.com/2009/01/27/health/27coca.html?pagewanted=1> (giving examples of newspaper headings surrounding the scare the "nationwide epidemic" produced).

52. CRAIG REINARMAN & HARRY G. LEVINE, *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 4 (1997).

53. Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 854 (2010).

54. Kimani Paul-Emile, *Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy*, 19 CORNELL J.L. & PUB. POL'Y 691, 734 (2010).

55. Lindsey Tanner, *Study Fights 'Crack Baby' Syndrome*, ASSOCIATED PRESS, Mar. 27, 2001 (quoting Dr. Wendy Chavkin of Columbia University). As it turns out, cocaine is no more harmful to fetuses than alcohol or tobacco. Okie, *supra* note 51. Doctors today seem determined to avoid

Federal and state lawmakers took swift action in an apparent attempt to placate a concerned public. The 1970s saw the centralization of federal drug agencies, including the creation of the Drug Enforcement Agency, and increased federal prosecution of drug use and trafficking.<sup>56</sup> Federal legislation soon followed suit with the Sentencing Reform Act of 1984,<sup>57</sup> and, later, the Anti-Drug Abuse Act of 1986,<sup>58</sup> which established the infamous 100-to-1 sentencing disparity for crack versus powder cocaine.<sup>59</sup> State laws were equally harsh. Perhaps the most notorious was the 1973 Rockefeller Drug Laws in New York,<sup>60</sup> which increased penalties from two to five years for first-time drug offenders (under the Boggs Act<sup>61</sup>) and to mandatory fifteen years to life sentences for subsequent offenses.<sup>62</sup>

## 2. Racial and Penal Segregation

More than one author has suggested that politicians must have known that the Wars on Crime and Drugs would have a disparate impact on African-American communities,<sup>63</sup> and some have argued that lawmakers

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repeating the same rhetorical mistakes, calling for politicians and reporters to abstain from using derogatory terms like “ice babies” or “meth babies.” Stephen Ornes, *What Ever Happened to Crack Babies?*, DISCOVER, Nov. 29, 2006, <http://discovermagazine.com/2006/dec/crack-baby-unfounded-stigma>. Interestingly, the percentage of whites who use meth is seven times higher than the percentage of African-Americans. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NATIONAL SURVEY ON DRUG USE AND HEALTH, METHAMPHETAMINE USE, ABUSE, AND DEPENDENCE: 2002, 2003, AND 2004 (2005), available at <http://oas.samhsa.gov/2k5/meth/meth.htm>.

56. WHITFORD & YATES, *supra* note 40, at 45–51.

57. Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211–38, 98 Stat. 1987-2040 (codified as amended in scattered sections of 18 U.S.C. and at 28 U.S.C. §§ 991–98 (2006)) (reducing judicial discretion in sentencing and instituting truth-in-sentencing minimum time requirements).

58. Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 31 U.S.C., and 42 U.S.C.).

59. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1287–88 (1995). This disparity has subsequently been reduced to 18:1, which is, needless to say, a “half-a-loaf compromise.” See Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 276 (2010) [hereinafter Tonry, *Causes*].

60. See 1973 N.Y. Laws 1040-80, 2190-239, 3023-31 (codified at N.Y. PENAL LAW § 220.00-.65, 221.00-.55 (McKinney 2010)); *c.f.* Madison Gray, *A Brief History of New York’s Rockefeller Drug Laws*, TIME, Apr. 2, 2009, <http://www.time.com/time/nation/article/0,8599,1888864,00.html>.

61. WHITFORD & YATES, *supra* note 40, at 38.

62. See *People v. Thompson*, 633 N.E.2d 1074, 1081 (N.Y. 1994) (Bellacosa, J., dissenting) (referring to the Rockefeller Drug Laws as a “draconian sentencing scheme”).

63. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 40–57 (2010); Marc Mauer, *Race, Class, and the Development of Criminal Justice Policy*, 21 REV. POL’Y RES. 79, 81 (2004).

enacted these policies precisely because they would have such a disparate impact.<sup>64</sup> The impact of these measures is largely undebatable. Between 1970 and 2003, the U.S. prison population increased from 200,000 to 1.4 million.<sup>65</sup> At 780 per 100,000, U.S. incarceration rates are now “four to five times higher than Spain, England, and New Zealand” and “seven to ten times higher than those in most other Western countries.”<sup>66</sup> Individual states have seen similar spikes in imprisonment. Since their enactment in 1973, the Rockefeller Drug Laws, for example, have increased New York prison populations by 500%.<sup>67</sup>

These changes have primarily impacted persons of color. While it had long been the case that racial and ethnic minorities were more likely to be arrested, charged, and incarcerated than their white counterparts, these disparities increased considerably during the late 1980s and 1990s.<sup>68</sup> African-Americans constituted about one-third of all state and federal prisoners in the United States in 1960, but by 1995, they made up approximately one-half of the prison population.<sup>69</sup> Between 1980 and 2006, the increase in African-American rates of imprisonment was nearly four times the increase in white rates.<sup>70</sup> Individual states saw similar changes. For example, while African-Americans and Latinos make up just about one-third of New York’s population, they constitute 94% of those convicted under the Rockefeller Drug Laws.<sup>71</sup> Until its repeal, the federal 100-to-1 sentencing scheme for crack cocaine had a similar effect. In 1992, for example, 92.6% of those sentenced in the United States under the 100-to-1 regime were African-Americans.<sup>72</sup> These numbers are especially troubling because multiple studies have shown that whites use drugs at higher rates than African-Americans<sup>73</sup> and sell drugs at roughly equivalent rates.<sup>74</sup>

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64. MICHAEL TONRY, *MALIGN NEGLECT* 82 (1995) (attributing racial disparities in the criminal justice system in part to a “calculated effort foreordained to increase [the] percentage” of African-Americans in prison). *But see* WILLIAM WILBANKS, *THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM* 5–6 (1987) (contending that while individual cases show evidence of discrimination, the system as a whole is not discriminatory).

65. BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 3 (2006).

66. TONRY, *PUNISHING RACE*, *supra* note 8, at 122.

67. Ernest Drucker, *Commentary: Population Impact of Mass Incarceration Under New York’s Rockefeller Drug Laws: An Analysis of Years of Life Lost*, 79 J. URB. HEALTH 1, 1 (2002).

68. *See* MARC MAUER, *RACE TO INCARCERATE* 157–76 (1999).

69. TONRY, *PUNISHING RACE*, *supra* note 8, at 31–32 fig.2.1.

70. *Id.* at 34.

71. Drucker, *supra* note 67, at 3.

72. *United States v. Clary*, 846 F. Supp. 768, 786 (E.D. Mo. 1994).

73. TONRY, *PUNISHING RACE*, *supra* note 8, at 56.

By 1999, studies showed that an African-American man born in the 1960s had a one-in-five chance of spending at least one year in prison.<sup>75</sup> For those who had not completed high school, that number climbed to one in three.<sup>76</sup> In 2002, a full 12% of African-American men in their twenties were incarcerated,<sup>77</sup> while in 2000, only 1% of white men in their twenties were incarcerated.<sup>78</sup> This means that today, 33% of African-American men in their twenties are in jail, on probation, or on parole, and 33% of African-American baby boys born in 2001 will spend time behind bars.<sup>79</sup> Amazingly, much of this has happened during a period of falling crime rates,<sup>80</sup> with African-American crime commission rates falling at a faster rate than any other group.<sup>81</sup>

### B. The “Super-Predator” War

The first section of this Part describes the emergence of the iconographic image of the adolescent “super-predator” as a symbol of juvenile crime in the United States. It then discusses the concomitant adoption of punitive juvenile justice policies throughout the country. Next, it details the ways these policy changes have impacted youth of color.

#### 1. The Coming of the Adolescent “Super-Predator”

It is remarkable that the proponents of the Wars on Crime and Drugs would turn their sights to adolescents in the early 1990s, especially when one considers the history and purpose of the U.S. juvenile justice system. Established at the turn of the twentieth century, this country’s juvenile justice system rested on the prevailing Progressive philosophy that the

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74. *Id.*

75. Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1030 (2010).

76. *Id.*

77. Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 151 (2004).

78. Aliya Saperstein & Andrew M. Penner, *The Race of a Criminal Record: How Incarceration Colors Racial Perceptions*, 57 SOC. PROBS. 92, 94 (2010).

79. See Tonry, *Causes*, *supra* note 59, at 274.

80. Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 235 fig.2 (2007).

81. TONRY, PUNISHING RACE, *supra* note 8, at 29 (noting that African-American participation in violent crime has fallen proportionately more than other populations).

system should treat, rather than punish, child offenders.<sup>82</sup> In the case of children, the belief was that delinquent acts were not borne of malevolence, but rather were a product of social forces largely beyond the children's control. The Supreme Court emphasized that "[t]he child was to be 'treated' and 'rehabilitated,' and the 'procedures,' from apprehension through institutionalization, were to be 'clinical' rather than punitive."<sup>83</sup>

The U.S. juvenile justice system has experienced shifts in penal philosophy over time. During the first half of the twentieth century, a belief in rehabilitation and individualized treatment gave way to concern over the indeterminate nature of dispositions.<sup>84</sup> Juvenile offenders often received the "worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children," the Supreme Court lamented in 1966.<sup>85</sup> In response, the Court imported a series of key constitutional safeguards from the adult system during the 1960s and 1970s,<sup>86</sup> including the rights to notice, to counsel, to confront and cross-examine witnesses, to a fair and impartial hearing, and to protections against self-incrimination.<sup>87</sup> With these changes, however, came increased formality and an ideological shift in focus from the "best interests" of the offender to the gravity of the offense itself.<sup>88</sup>

Nonetheless, few anticipated the changes of the 1990s. While the push for more punitive juvenile justice policies had already begun in the late 1980s as members of both parties witnessed the political benefits of getting "tough on crime," a few high-profile incidents aided these efforts. The most notable of these was the infamous "Central Park Jogger" case. In April 1989,

82. See Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 691–94 (1991) [hereinafter Feld, *The Transformation of the Juvenile Court*] (noting that the emerging perception of children "as vulnerable, innocent, passive, and dependent beings who needed extended preparation for life" at the turn of the century reflected a shift from the pre-industrial view of children as miniature adults).

83. *In re Gault*, 387 U.S. 1, 15–16 (1967).

84. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9 (1967) ("In theory the [juvenile] court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. . . . In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law—knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's.").

85. *Kent v. United States*, 383 U.S. 541, 556 (1966).

86. In 1967, for example, the Court held that the constitutional rights to notice, to counsel, to confront and cross-examine witnesses, to a fair and impartial hearing, and to protections against self-incrimination all applied equally in juvenile court. *In re Gault*, 387 U.S. at 31–58.

87. *Id.* at 33–34, 41, 55, 57.

88. See BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 162–65 (1999) [hereinafter FELD, *BAD KIDS*].

a young, white female jogger was brutally beaten, raped, and left to die in Manhattan's Central Park.<sup>89</sup> Within hours, police arrested and charged a group of seven African-American and Latino teens ranging in age from fourteen to sixteen with rape, assault, and attempted murder.<sup>90</sup> Almost immediately, a new term was coined: the incident was part of a new adolescent practice known as "wilding."<sup>91</sup> Local politicians seized on the incident. In the summer of 1989, New York City Mayor Edward Koch called for the death penalty for "wilding," deemed the seven suspects "monsters," and complained that the juvenile justice system was too lenient.<sup>92</sup> A similar response came from mayoral candidate David Dinkins, who responded with a call for a "new 'antiwilding law.'"<sup>93</sup>

As crime rates continued to climb in the early 1990s,<sup>94</sup> the calls for stiffer penalties for juvenile offenders reached a fever pitch. Unlike the Wars on Crime and Drugs, however, there was no executive clarion call to arms. The closest thing to a declaration came in the form of a 1995 magazine article. In *The Coming of the Super-Predators*, former Princeton University political science professor John Dilulio warned of an oncoming tsunami of adolescent "super-predators," "morally-impoverished" youth who had grown up "surrounded by deviant, delinquent, and criminal adults in abusive,

89. David E. Pitt, *Jogger's Attackers Terrorized at Least 9 in 2 Hours*, N.Y. TIMES, Apr. 22, 1989, <http://www.nytimes.com/1989/04/22/nyregion/jogger-s-attackers-terrorized-at-least-9-in-2-hours.html>.

90. Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 220 (2006); Pitt, *supra* note 89. Notably, thirteen years later, a convicted rapist named Matias Reyes confessed to the crime, and the five juveniles' convictions were vacated. Davies, *supra*.

91. Pitt, *supra* note 89. *New York Times* journalist David Pitt was told the term from a New York City detective who heard the term from the suspected schoolboys, writing:

The youths who raped and savagely beat a young investment banker as she jogged in Central Park Wednesday night were part of a loosely organized gang of 32 schoolboys whose random, motiveless assaults terrorized at least eight other people over nearly two hours, senior police investigators said yesterday.

Chief of Detectives Robert Colangelo, who said the attacks appeared unrelated to money, race, drugs or alcohol, said that some of the 20 youths brought in for questioning had told investigators that the crime spree was the product of a pastime called "wilding."

*Id.*

92. Lynell Hancock, *Wolf Pack: The Press and the Central Park Jogger*, COLUM. JOURNALISM REV. 39 (2003) ("Mayor Ed Koch was often quoted calling the arrested boys 'monsters' and complaining that juvenile laws were too soft."); Michael Welch et al., *Moral Panic over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 YOUTH & SOC'Y 3, 10 (2002).

93. Welch et al., *supra* note 92, at 9–10.

94. See FELD, BAD KIDS, *supra* note 88, at 201 (noting that the juvenile arrest rate for all violent crimes increased 67.3% between 1986 and 1995).



violence-ridden, fatherless, Godless, and jobless settings.”<sup>95</sup> These were “kids who have absolutely no respect for human life and no sense of the future . . . ‘stone-cold predators.’”<sup>96</sup> One year later, DiIulio projected that “by the year 2010 there [would be] approximately 270,000 more juvenile super-predators on the streets than there were in 1990.”<sup>97</sup> In *My Black Crime Problem, and Ours*, Professor DiIulio predicted that “the black crime rate, both black-on-black and black-on-white, is increasing, so that as many as half of these juvenile super-predators could be young black males.”<sup>98</sup>

The news media ran with this narrative. In a headline announcing that the “super-predators” have arrived, *Newsweek* asked, “Should We Cage the New Breed of Vicious Kids?”<sup>99</sup> Borrowing rhetoric from the Wars on Crime and Drugs, the theme of “moral depravity” again played a central role. “Kids Without a Conscience?” asked the cover of *People* magazine in June 1997.<sup>100</sup> The style of news reporting that dominated the era only reinforced the message. In its coverage of juvenile offending, news media often relied on a technique called episodic framing.<sup>101</sup> Instead of placing an individual incident in its broader statistical, political, or socioeconomic context, the

95. DiIulio, *supra* note 2, at 25–26.

96. *Id.* at 23–24.

97. JOHN J. DI IULIO, JR., MANHATTAN INST., HOW TO STOP THE COMING CRIME WAVE 1 (1996); see also WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS 26 (1996) (charting the projected increase in the U.S. juvenile population between 1990 and 2010).

98. John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, 6 CITY J. 19 (1996), available at [http://www.city-journal.org/html/6\\_2\\_my\\_black.html](http://www.city-journal.org/html/6_2_my_black.html).

99. Peter Annin, “*Superpredators*” Arrive: *Should We Cage the New Breed of Vicious Kids?*, NEWSWEEK, Jan. 22, 1996, at 57. Other cover stories from our nation’s most popular news magazines were similar in tone: *Big Shots: An Inside Look at the Deadly Love Affair Between America’s Kids and Their Guns*, TIME, Aug. 2, 1993; *Kids and Guns: A Report from America’s Classroom Killing Grounds*, NEWSWEEK, Mar. 9, 1992; *Teen Violence: Wild in the Streets*, NEWSWEEK, Aug. 2, 1993; *Teenage Time Bombs: Violent Juvenile Crime Is Soaring—and It Is Going to Get Worse*, U.S. NEWS & WORLD REP., Mar. 25, 1996; and *When Killers Come to Class: Even Suburban Parents Now Fear the Rising Tide of Violence*, U.S. NEWS & WORLD REP., Nov. 8, 1993. See Robert E. Shephard, *How the Media Misrepresents Juvenile Policies*, 12 CRIM. JUST. 37, 38 (1998) (listing cover stories in national magazines that have “heightened the emphasis on youth crime”).

100. PEOPLE WKLY., June 23, 1997, available at <http://www.people.com/people/archive/issue/0,,7566970623,00.html>.

101. See *What’s the Matter with Kids Today?: Images of Teenagers on Local and National TV News*, MEDIA MONITOR (Ctr. for Media and Pub. Affairs, Washington, D.C.) Sept.–Oct. 2000, at 1–2, available at [http://www.cmpa.com/files/media\\_monitor/00septoct.pdf](http://www.cmpa.com/files/media_monitor/00septoct.pdf); CHILDREN NOW, THE LOCAL TELEVISION NEWS MEDIA’S PICTURE OF CHILDREN 5, 16 (2000), available at [http://www.childrennow.org/uploads/documents/local\\_television\\_2001.pdf](http://www.childrennow.org/uploads/documents/local_television_2001.pdf) (referencing studies that show episodic framing was frequently used in reporting children’s news stories during the 1990s).

news media frequently reported juvenile offenses as discrete events,<sup>102</sup> which, social scientists claim, encourages viewers to associate the conduct in question with the moral deficiency of the individual, rather than her broader social milieu.<sup>103</sup> When the topic is crime, episodic framing galvanizes support for more punitive crime policies.<sup>104</sup>

By all indications, the American public was listening. Even as national crime rates were dropping steadily, a flurry of public opinion polls conducted in the late 1990s revealed the American public's fear of violent juvenile offenders.<sup>105</sup> Polls also revealed that the public substantially overestimated the likelihood of being victimized by a person of color. Nearly twice as many respondents to a 1994 poll, for example, believed that they were more likely to be victimized by a perpetrator of color than a white perpetrator<sup>106</sup> when, in reality, the vast majority of crimes are intra-racial.<sup>107</sup>

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102. See CHILDREN NOW, *supra* note 101 (finding that 81% of stories featured on locally produced evening news programs on the three major networks in six American cities between July 1 and July 31, 2000 “made no connection between discrete events (e.g. criminal incidents) and broader trends or themes (e.g. U.S. poverty rates or after school programs)”); LORI DORFMAN & VINCENT SCHIRALDI, BLDG. BLOCKS FOR YOUTH, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 7, 12 (2001), available at [http://www.justicepolicy.org/images/upload/01-04\\_REP\\_OffBalanceNews\\_JJ-RD.pdf](http://www.justicepolicy.org/images/upload/01-04_REP_OffBalanceNews_JJ-RD.pdf) (“Studies spanning almost 100 years—1910 to 2000—are consistent in their findings that news reports describe what happened with little reporting about why the crime and violence happened or what could be done about it.”).

103. See, e.g., ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA 49 (2001) (arguing that framing an incident, such as a drive-by shooting, as a “gang war story,” may obscure “other possible mental associations” and may “make . . . more sympathetic connections less available to the audience”). See generally SHANTO IYENGAR, IS ANYONE RESPONSIBLE?: HOW TELEVISION FRAMES POLITICAL ISSUES 5 (1991) (asserting that because framing focuses on “specific episodes, individual perpetrators, victims, or other actors at the expense of more general, thematic information,” viewers are less likely to attribute responsibility to societal factors). For a broader discussion of the role of the media in influencing crime policy and criminal justice decision-making, see Beale, *supra* note 29, at 400–05 and Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849 (2010).

104. See, e.g., Shanto Iyengar, *Framing Responsibility for Political Issues*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 59, 64–65 (1996) (noting that 36% of participants surveyed after viewing an experimental episodic news story assigned individualistic rather than societal responsibility to the perpetrator of the crime and 60% called for more punitive crime policies); cf. Paul M. Kellstedt, *Media Framing and the Dynamics of Racial Policy Preferences*, 44 AM. J. POL. SCI. 245, 249–50 (2000) (noting that media coverage of race frequently shifts between emphasizing one of two core American values, individualism and egalitarianism, and arguing that when media coverage disproportionately emphasizes the value of individualism, the public is more likely to express conservative policy preferences).

105. For example, even though juvenile homicides declined 68% between 1993 and 1999, 62% of respondents in one 1999 poll believed that juvenile crime rates were increasing. See MARK SOLER, BLDG. BLOCKS FOR YOUTH, PUBLIC OPINION ON YOUTH, CRIME AND RACE: A GUIDE FOR ADVOCATES 5 (2001), available at <http://www.cclp.org/documents/BBY/advocacyguide.pdf>.

106. See, e.g., Walter L. Updegrave, *As Grim Crime Scenes Fill Our Newscasts and Nightmares, Americans Feel More Threatened by Violence Than Ever. But the Surprising Truth for*

Public opinion polls also revealed a concern that America's youth had lost their moral compasses. A 2001 report that the Frameworks Institute published, which compiled information from dozens of surveys on perceptions of youth, was particularly illuminating. Among the findings the study reported were the following: in response to a 1998 survey, only 16% of Americans said that "young people under the age of 30 share[d] most of their moral and ethical values."<sup>108</sup> In a separate 1998 poll, when asked what comes to mind when they think of teens, nearly three-quarters of respondents gave negative descriptions, such as "rude," "wild," or "irresponsible."<sup>109</sup> Eighty-two percent of adults who responded to a 1998 poll felt that youth "[did] not have a strong sense of right and wrong," up from 46% in 1965 and 34% in 1952.<sup>110</sup> Not surprisingly, respondents overwhelmingly endorsed punitive responses to juvenile offending.<sup>111</sup>

Ostensibly to ameliorate these concerns, lawmakers responded. Between 1992 and 1997 alone, legislatures in forty-five states enacted or enhanced waiver laws that made it easier to transfer juvenile offenders to the criminal justice system. Thirty-one states gave both juvenile and criminal courts expanded sentencing authority over juvenile offenders, forty-seven states enacted laws that modified or removed traditional juvenile court confidentiality provisions by making records and proceedings more open, and twenty-two states expanded the role of juvenile crime victims in the

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*Most People Is That . . . You're Safer Than You Think*, CNN MONEY, June 1, 1994, at 114, available at [http://money.cnn.com/magazines/moneymag/moneymag\\_archive/1994/06/01/88911/index.htm](http://money.cnn.com/magazines/moneymag/moneymag_archive/1994/06/01/88911/index.htm) (reporting that "49% of Americans believe that whites are preyed on more often by nonwhite criminals . . . rather than by other whites (26%)").

107. See *id.* ("[O]f the 5.1 million violent crimes with white victims in 1992, the perpetrator was white 66% of the time and black only 21%."); see also CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION AND RACE, 1993-98, at 10 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/vvr98.pdf> ("Sixty-six percent of white victims and 76% of black victims were victimized by an offender of the same race, 1993-98 . . .").

108. MEG BOSTROM, FRAMEWORKS INST., THE 21ST CENTURY TEEN: PUBLIC PERCEPTION AND TEEN REALITY 4, 33 (2001), available at [http://www.frameworksinstitute.org/assets/files/PDF/youth\\_public\\_perceptions.pdf](http://www.frameworksinstitute.org/assets/files/PDF/youth_public_perceptions.pdf) (citing WASH. POST ET AL., AMERICAN VALUES: 1998 NATIONAL SURVEY OF AMERICANS ON VALUES 3 (1998), available at <http://www.kff.org/kaiserpolls/loader.cfm?url=/commons/spot/security/getfile.cfm&PageID=14655>).

109. *Id.* at 4 (summarizing two national telephone polls conducted between December 1 and 8, 1998, one of 1005 adults, including 384 parents of children under eighteen and another of 328 teenagers (citing PUBLIC AGENDA, KIDS THESE DAYS '99, at 3, 10 (1999), available at [http://www.publicagenda.org/files/pdf/kids\\_these\\_days\\_99.pdf](http://www.publicagenda.org/files/pdf/kids_these_days_99.pdf))).

110. *Id.* at 6, 33 n.11-13 (citing the Shell Poll by Hart Research, a national poll of 1277 adults conducted between March 16-20, 1999; a national Gallop Poll of 2783 adults conducted in November 1965; and a national poll conducted by Ben Gaffin and Associates that published the results of 2987 personal interviews of adults conducted in June and July of 1952).

111. *Id.* at 31-32, 38 n.132 (citing a national poll of 1005 adults published by the Public Policy Research Institute conducted from June 6-26, 1995).

juvenile justice process.<sup>112</sup> California's Proposition 21 is among the harshest of these laws. Proposition 21 requires adult trials for juveniles as young as fourteen years of age if they have been charged with a list of enumerated felonies. It also transfers absolute discretion from judges to prosecutors to determine which juveniles should be tried as adults, weakens confidentiality laws, toughens gang laws, and expands California's three-strikes law for both juveniles and adults.<sup>113</sup> Ironically, voters ratified the referendum in 2000, a time when arrest rates among juveniles were hitting their lowest point in thirty years.<sup>114</sup>

The net effect of these laws was astounding. Between 1985 and 1994, the number of delinquency cases waived to criminal court climbed 83%, from 7200 to 13,200.<sup>115</sup> In 1988, approximately 1600 juvenile offenders were confined in adult jails; by 1997, there were more than 9000.<sup>116</sup> By some estimates, nearly 2000 juvenile offenders in adult jails were serving sentences of life without the possibility of parole.<sup>117</sup> To put this in perspective, no other country in the Western world sends juveniles to prison for life, and by 2005, every country except the United States and Somalia had ratified the Convention on the Rights of the Child, which explicitly forbids "life imprisonment without possibility of release" for "offenses committed by persons below eighteen years of age."<sup>118</sup>

In the late 1990s, Congress jumped into the fray. In 1997, the Senate Judiciary Committee took up the Violent and Repeat Juvenile Offender Act of 1997,<sup>119</sup> which proposed multiple "get tough" measures for juvenile offenders, including a provision that lowered the minimum age for trial of

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112. See HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 43, 96-97 (2006), available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/nr2006.pdf>.

113. See CAL. WELF. & INST. CODE § 707(d) (West 2010).

114. THE NAT'L CTR. FOR JUVENILE JUSTICE, OJJDP STATISTICAL BRIEFING BOOK (Oct. 31, 2009), available at [http://www.ojjdp.gov/ojstatbb/crime/JAR\\_Display.asp?ID=qa05200](http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200) (follow "Excel" hyperlink "Juvenile Arrest Rates for All Crimes 1980-2008 statistical spreadsheet" for data).

115. SNYDER & SICKMUND, *supra* note 112, at 186.

116. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS, A NATIONAL ASSESSMENT 5 tbl.2 (2000), available at <https://www.ncjrs.gov/pdffiles1/loja/182503.pdf>.

117. HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 2 (2005), available at <http://www.hrw.org/en/node/11578/section/2>.

118. *Id.*

119. See S. 10, 105th Cong. (1st Sess. 1999), available at <http://gpo.gov/fdsys/pkg/BILLS-105s10is/PDF/BILLS-105s10is.pdf>.

capital offenses from eighteen to sixteen.<sup>120</sup> Senator Orrin Hatch, one of the Act's sponsors, explained that "[p]eople are expecting us to do something about these violent teenagers. We've got to move on this."<sup>121</sup> Although it was never put to a vote in 1997,<sup>122</sup> the Act resurfaced in 1999 after the shootings at Columbine High School. The proposed Consequences for Juvenile Offenders Act of 1999 again included multiple measures to make it easier for prosecutors to try children as adults.<sup>123</sup> Although it subsequently died in conference, the Act failed only because of an attached provision that strengthened firearm control laws.<sup>124</sup> Ironically, while Congress was prepared to exact harsh punishments on juveniles in the name of public safety, it was not willing to adopt laws that would keep firearms out of their hands.

## 2. Disproportionate Minority Contact

These so-called "get tough" laws of the 1990s had by far the harshest impact on youth of color. While social scientists had known for decades that adolescents of color were more likely to be arrested, detained, formally charged in juvenile court, transferred to adult court, and confined to secure residential facilities than their white counterparts,<sup>125</sup> these disparities soared during the 1980s and 1990s.<sup>126</sup> Statistics suggest that four out of five youth

120. *Id.* § 103.

121. VINCENT SCHIRALDI & MARK SOLER, JUSTICE POLICY INST., *THE WILL OF THE PEOPLE? THE PUBLIC'S OPINION OF THE VIOLENT AND REPEAT JUVENILE OFFENDER ACT OF 1997*, at 591 (1998) (citing *New Juvenile Crime Bill*, in BULL. FRONT-RUNNER, (July 14, 1997)), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/98-03\\_rep\\_willofthepeople\\_jj.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/98-03_rep_willofthepeople_jj.pdf).

122. See Tara Kole, Note, *Juvenile Offenders*, 38 HARV. J. ON LEGIS. 231, 235–36 (2001) (describing the Act as an "unsuccessful attempt[] by Congress [to enact legislation] to address the perceived rise in juvenile crime").

123. H.R. 1501, 106th Cong. (1st Sess. 1999).

124. JoAnne O'Bryant et al., *Juvenile Justice: Legislative Activity and Funding Trends for Selected Programs*, in JUVENILE CRIME: CURRENT ISSUES AND BACKGROUND 140, 142 (Lawrence V. Moore ed., 2003); see also Michael Grunwald, *Culture Wars Erupt in Debate on Hill*, WASH. POST, June 18, 1999, <http://www.washingtonpost.com/wp-srv/politics/daily/june99/violence18.htm> (discussing the contentious issues surrounding the Act).

125. In fact, the problem of racial disparities in the juvenile justice system is so long-standing, wide-spread, and entrenched that it has earned its own acronym—Disproportionate Minority Contact or "DMC." See POE-YAMAGATA & JONES, *supra* note 7, at 1–3 (2007); see also CARL E. POPE ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, *DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001*, at 10 n.1 (2002); Michael J. Leiber, *Disproportionate Minority Confinement (DMC) of Youth: An Analysis of State and Federal Efforts to Address the Issue*, 48 CRIME & DELINQ. 3, 11–14, app.D (2002).

126. HINTON HOYTT ET AL., *supra* note 5, at 10.

newly held in detention between 1983 and 1997 were juveniles of color.<sup>127</sup> The transfer of juveniles of color to adult court was equally, if not more, disproportionate. A 2000 study, for example, showed that 82% of youth charged in adult court in eighteen of the largest jurisdictions in the country were youth of color and that African-American (43%) and Latino (37%) youth were more likely than white youth (26%) to receive a sentence of incarceration.<sup>128</sup> These numbers persist even today.<sup>129</sup>

Research suggests that these disparities cannot be attributed entirely to crime commission rates. While differential offending contributes to disproportionality, research shows that the statistical differences between the offending patterns of white youth and minority youth are simply not great enough to account for the racial disparities observed at any of the processing points in the juvenile justice system.<sup>130</sup> To date, of the hundreds of multiple regression studies that have been conducted on disparities in juvenile justice, nearly two-thirds have documented a “race effect” on decision-making, which suggests that race-neutral criteria cannot, by themselves, account for the disparities observed in processing outcomes.<sup>131</sup> In other words, *but for*

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127. *Id.*

128. JUSZKIEWICZ, *supra* note 5, at 10.

129. Recent research by the Department of Justice has continued to confirm that minorities fared worse than whites at every stage of the juvenile justice process nationally and that the effects were cumulative. C. PUZZANCHERA & B. ADAMS, NATIONAL DISPROPORTIONATE MINORITY CONTACT DATABOOK (2008), available at <http://www.ojjdp.gov/ojstatbb/dmcd/bdisplay.asp?year=2005&offense=1&displaytype=rri>. Specifically, in 2005, minority youth were 1.7 times as likely to be arrested, 1.1 times as likely to be waived to adult court, 0.9 times as likely to be adjudicated delinquent, and 1.2 times as likely to be placed in a secure facility as white youth. *Id.*

130. HINTON HOYTT ET AL., *supra* note 5, at 21. While it is true that African-American youth commit “slightly more violent crime” than white youth, they commit “about the same amount of property crime, and less drug crime than white youth,” and “[i]n no category can the marginal differences in white and African-American behavior explain the huge disparity in arrest or incarceration rates.” *Id.* at 19. African-American youth are arrested at twice the rate of white youth for drug offenses and 2.5 times the rate of white youth for weapons offenses, even though white youth report substantially higher levels of drug use and commission of weapons crimes. *Id.* at 20–21.

131. To date, five comprehensive reviews of the literature demonstrate that legal and extralegal factors alone are unable to account for race differentials in contact with the juvenile justice system. See Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN JUVENILE JUSTICE 23 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (providing empirical demonstration of racial disparities in juvenile justice); POPE ET AL., *supra* note 125, at 2 (reviewing studies from March 1989 to December 2001); CARL E. POPE & WILLIAM FEYERHERM, OFFICE OF JUVENILE JUSTICE DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, MINORITIES IN THE JUVENILE JUSTICE SYSTEM: RESEARCH SUMMARY (1995) (confirming the overrepresentation of minorities in the juvenile justice system); Rodney L. Engen et al., *Racial Disparities in the Punishment of Youth: A Theoretical and Empirical Assessment of the Literature*, 49 SOC. PROBS. 194, 195 (2002) (“review[ing] theoretical perspectives on racial disparity [and] highlighting the central predictions of each perspective”); Leiber, *supra* note 125, at 3–4 (identifying “the extent of minority overrepresentation in states’ juvenile justice systems and assessment of the causes of

the presence of race bias, overrepresentation would not exist to the same degree.

### III. THE SOCIAL PSYCHOLOGY OF SOCIAL WAR

What accounts for the “race effects” observed in these studies? And, more generally, why is it that we, as a nation, have continued to enact laws and policies that have devastated such a large segment of our adolescent population? In part, we can blame the “social psychology of social war.” This Part summarizes a wealth of contemporary research that shows that humans react to, interpret, and make decisions about the environment, and each other, largely from a series of unconscious cognitive associations and dissociations. When stimulated or “primed,” these processes are automatic; they happen whether we want them to or not.<sup>132</sup> Importantly, several studies conducted over the last decade suggest that the political posturing, media imagery, war rhetoric, and Manichean moralizing associated with the “super-predator” war, and with American social wars in general, have an especially potent effect on this dynamic.<sup>133</sup> These images and ideas influence not only the content of our stereotypes of the enemy, but also the degree to which we rely on those stereotypes.<sup>134</sup> Ultimately, they also influence our willingness to embrace measures that punish and incapacitate the enemy.<sup>135</sup>

#### *A. Social Cognition Theory*

Most research suggests that overt racism and conscious discrimination have declined steadily since the 1960s.<sup>136</sup> What persists, however, are unconscious racial stereotypes that are less visible but no less pernicious.<sup>137</sup> To better understand how unconscious bias works, a brief primer on social cognition theory is warranted.

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DMC”); see also Carl E. Pope & Michael J. Leiber, *Disproportionate Minority Confinement/Contact (DMC): The Federal Initiative*, in *OUR CHILDREN, THEIR CHILDREN*, *supra*, at 51 (providing “a historical overview of the activities employed to address disproportionate minority youth confinement/contact”).

132. See *infra* Part III.A.

133. See *infra* Part III.B.

134. *Id.*

135. *Id.*

136. See generally HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (1997).

137. See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION: FROM BRAINS TO CULTURE* 35–36 (2007) (questioning whether “conscious will is an illusion created by people thinking about an action before performing it”).

In an effort to cope with what would otherwise be an overwhelming environment, humans unconsciously engage in a series of complex cognitive processes that enable us to parse and react quickly to incoming information.<sup>138</sup> When we receive external stimuli, we selectively “map” the information into established categories.<sup>139</sup> For example, when we encounter another human being, we might map our perceptions into categories such as age, gender, race, or sexual orientation.<sup>140</sup> The categorization of these perceptions activates cognitive structures called “schemas,”<sup>141</sup> and from the information or “meanings” embedded in our schemas, we draw inferences and make predictions about the person.<sup>142</sup> These meanings may include both cognitive beliefs (stereotypes) and affective feelings (prejudices) about the groups with which we associate the person.<sup>143</sup> According to psychologists, our respective categories and schemas influence every aspect of our cognition—what information we receive, how that information is classified, how we react to it, and how we remember it.<sup>144</sup> More often than not, these cognitive processes are automatic; they happen almost instantaneously and whether we want them to or not.<sup>145</sup>

Research shows that we develop “racial” meanings, beliefs, and feelings about members of other racial groups, from both direct and vicarious experiences. Our direct experiences with racial others are generally more influential, but our vicarious experiences may be more numerous.<sup>146</sup>

138. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499 (2005).

139. *Id.* at 1498–99.

140. *Id.* at 1499 n.47 (citing Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 376 (Daniel T. Gilbert et al. eds., 4th ed. 1998)).

141. A “schema” is a cognitive framework or concept that helps organize and interpret information. See generally FISKE & TAYLOR, *supra* note 9, at 98.

142. Kang, *supra* note 138, at 1498–99.

143. *Id.* at 1500.

144. *Id.* at 1493 (defining “racial mechanics” as “the ways in which race alters intrapersonal, interpersonal, and intergroup interactions” (citing Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1138–46 (2000))).

145. Psychologists believe that human beings think, make decisions, and react to other people along a continuum of modes that range from purely automatic, at one extreme, to controlled, at the other. See Susan T. Fiske et al., *The Continuum Model: Ten Years Later*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 231, 231–42, 249 (Shelley Chaiken & Yaacov Trope eds., 1999) (noting citations in the social-scientific literature to “the continuum model,” which posits a continuum between automatic and cognitive processes to account for the range of ways that people form impressions of others). When we react automatically, our thought processes are unintentional and unconscious. See John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 231–33 (1996) (discussing theoretical and empirical models in support of an “automaticity” hypothesis).

146. Jerry Kang defines “vicarious experiences” as “stories of or simulated engagements with



Vicarious experiences may include films, music, the internet, television shows, newspapers, or political speeches that in some way depict, describe, or report on members of different racial groups.<sup>147</sup> Whites, who by and large live in homogenous communities, are especially likely to rely upon vicarious experiences when evaluating racial others.<sup>148</sup>

In many cases, however, the material presented through our vicarious experiences is imbalanced in some way. This is particularly true when it comes to crime news reporting. Over the last two decades, multiple studies have demonstrated that people of color, and African-Americans in particular, are overrepresented as perpetrators and underrepresented as victims of crime in the media. A well-known study of local news programming in Los Angeles during the mid-1990s, for example, found that the media was 22% more likely to show African-Americans committing violent crime than nonviolent crime, while, in reality, they were equally likely to be arrested for both violent crime and nonviolent crime.<sup>149</sup> White Americans, on the other hand, were 31% more likely to be depicted committing a nonviolent crime than a violent crime, when, in fact, they were just 7% more likely to be arrested for a nonviolent crime.<sup>150</sup> Studies have also shown that the news media over-represents the incidence of interracial crime.<sup>151</sup> Not surprisingly, when vicarious experiences with racial others are imbalanced, the racial meanings in our schemas become imbalanced.<sup>152</sup>

Until recently, the challenge has been to gauge the content of an individual person's racial schemas. Because most of us are unwilling to admit to or are unaware that we possess racial stereotypes and prejudices,<sup>153</sup> self-reported attitudes are not helpful. Instead, social psychologists have begun to develop indirect ways to measure racial meanings. The most recent

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racial others provided through various forms of the media or narrated by parents and our peers." Kang, *supra* note 138, at 1539. In a society as racially segregated as ours, Professors Robert Entman and Andrew Rojecki note that "Whites depend heavily on cultural material, especially media images for cataloging" racial others. ENTMAN & ROJECKI, *supra* note 103, at 49; *see also* Kang, *supra* note 138, at 1539 n.258.

147. *See* Kang, *supra* note 138, at 1540.

148. ENTMAN & ROJECKI, *supra* note 103.

149. Frank Gilliam et al., *Crime in Black and White: The Violent, Scary World of Local News*, 1 HARV. INT'L J. PRESS/POL. 6, 13 fig.4 (1996).

150. *Id.*

151. *See, e.g.*, Susan B. Sorenson et al., *News Media Coverage and the Epidemiology of Homicide*, 88 AM. J. PUB. HEALTH 1510, 1512 (1998). For example, between 1990 and 1994, the *Los Angeles Times* was 25% more likely to report interethnic homicides than intraethnic homicides in Los Angeles. *Id.*

152. Kang, *supra* note 138, at 1540.

153. *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 181 (2001).

phase of this research has sought to take advantage of the automaticity of bias through what are called reaction-time studies. Scientists trigger automatic cognitive processes through subliminal exposure to external stimuli, a technique known as “priming,” which activates a subject’s racial schema without triggering conscious awareness of either the prime or its impact.<sup>154</sup> Subjects are then asked to perform a task.<sup>155</sup> When the prime and the task are consistent with the subject’s schema, the subject’s response time is faster; when they are inconsistent, it is slower.<sup>156</sup> The time differentials observed are viewed as measurements of an individual’s “implicit bias.”<sup>157</sup>

A series of studies researchers at the University of Chicago conducted over the last decade are illustrative. In these experiments, researchers asked subjects to distinguish between computerized images of guns and hand tools.<sup>158</sup> Just before each object appeared, a human face appeared on the screen.<sup>159</sup> In some instances, the face was black; in others, it was white.<sup>160</sup> There were two versions of the experiment.<sup>161</sup> In one, participants were allowed to respond to the objects at their own pace.<sup>162</sup> In the other, they had to respond to each object within half a second.<sup>163</sup> The results were troubling. In the self-paced version, participants detected guns faster in the presence of a black face, and in the split-second version, participants falsely identified guns more often when the face was black than when it was white.<sup>164</sup> Researchers concluded that participants’ response time was faster because the black face “prime” condition and the gun were consistent with subjects’ existing racial schemas and drew upon their stereotypes about blacks and gun possession.<sup>165</sup> Perhaps more notable was the fact that, when forced to make a snap judgment, the subjects’ stereotypic association between race

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154. Kang, *supra* note 138, at 1505 n.72 (citations omitted).

155. *Id.* at 1508–09.

156. *Id.* at 1510 (“Tasks in the schema-consistent arrangement should be easier, and so it is for most of us. How much easier . . . provides a measure of implicit bias.”).

157. *Id.* at 1509.

158. *See* Payne, *supra* note 153.

159. *Id.* at 183–84.

160. *Id.* at 184.

161. *Id.* at 181.

162. *Id.*

163. *Id.* at 188.

164. Payne, *supra* note 153, at 189–90.

165. *See id.*

and violence caused them to misperceive weapons where there were none.<sup>166</sup>

Studies like this one have evolved into an entire industry devoted to measuring implicit bias and a prototype called the Implicit Association Test (IAT).<sup>167</sup> Not surprisingly, the IAT, along with a host of other tests, has repeatedly documented varying degrees of implicit bias against African-Americans, Latinos, Asians, and non-Americans.<sup>168</sup> This implicit bias, in turn, has had demonstrable effects on performance, judgment, and treatment of others.<sup>169</sup> Significantly, recent studies have documented implicit bias not just among members of the general public, but also among police officers, probation officers, prosecutors, capital defense attorneys, and federal magistrate judges who help to administer our justice system.<sup>170</sup>

### B. Cognitive Warfare

These cognitive processes are especially susceptible to several features of American social wars. First, actors in social wars constantly rely on negative portrayals of the enemy. Researchers link this reliance to the formation of and frequent reliance upon negative stereotypes. Second, this strategic employment of war rhetoric increases aggression and hostility toward social “out-groups.” Finally, social wars promote a Manichean mindset, a “good versus evil” diametric, which increases support for harsher punishment.

By all accounts, the politics, rhetoric, and imagery endemic to the

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166. *Id.* at 188–90.

167. The Implicit Association Test, which tests associations between categories, such as “[w]hite,” and attributes, such as “smart,” is now available electronically through Harvard University’s Project Implicit website. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit> (last visited Apr. 1, 2012).

168. Kang, *supra* note 138, at 1512 (citing Nilanjana Dasgupt, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 147 (2004)).

169. *Id.* at 1514–35; *see also supra* note 10.

170. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590–91 (2006) (arguing that prosecutors exhibit cognitive bias); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1553 (2004) (finding that capital defense attorneys exhibit the same levels of implicit bias as the rest of the population); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 487 (2004) (documenting the impact of written racial cues on police officers’ and juvenile probation officers’ judgments about the “culpability, expected recidivism, and deserved punishment” of hypothetical offenders); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) (reporting on a study of 167 federal magistrate judges, which revealed that they are susceptible to heuristics and biases when making decisions); Michael J. Leiber & Kristan C. Fox, *Race and the Impact of Detention on Juvenile Justice Decision Making*, 51 CRIME & DELINQ. 470, 489–90 (2005) (attributing observed negative race effects in outcomes to “racial stereotyping of African-Americans as delinquent, prone to drug offenses, dangerous, and unsuitable for treatment”).

“super-predator” war was extreme in its demonization and adultification of adolescent offenders. Professors Elizabeth Scott and Laurence Steinberg deemed the 1980s and 1990s an era of “moral panic” about juvenile crime, marked by an exaggeration of the threat adolescent offenders posed and collective hostility toward this group.<sup>171</sup> Politicians and the media were both complicit. As Part II detailed, network and cable television stories portraying adolescent “gang-bangers,” magazine covers lamenting the moral deterioration of America’s youth, and politicians trumpeting laws like Proposition 21 and the federal Violent and Repeat Juvenile Offender Act created a veritable onslaught of information that both implicitly and explicitly linked adolescents, and African-American adolescents in particular, with violent crime.<sup>172</sup>

One study from the height of the “super-predator” frenzy shows the impact of these influences particularly well. In 1998, political scientists Frank Gilliam and Shanto Iyengar designed an experiment to test the impact of a “crime news script.”<sup>173</sup> They created four separate versions of a fictitious local newscast that contained a short crime segment in the middle.<sup>174</sup> Before the more than two thousand participants saw the videotape, the researchers asked them to complete a short questionnaire soliciting information about their economic and social backgrounds, their political beliefs, and their customary media habits.<sup>175</sup> They were then divided into four groups.<sup>176</sup> Some participants watched a story in which the alleged perpetrator of a murder was an African-American male.<sup>177</sup> Other subjects were given the same news report, but featuring a white male as the murder suspect.<sup>178</sup> A third group of participants watched the news report

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171. See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 109–12 (2008) (arguing that juvenile gang members were at the center of a moral panic during the 1990s that produced draconian laws such as California’s Proposition 21); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 *TEX. L. REV.* 799, 807 (2003) (arguing that the punitive trend in juvenile justice policy has elements of “moral panic, in which the media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat”). The term “availability heuristic” describes the phenomenon through which collective perceptions of risk become magnified and reinforced by vivid images of crime and crime victims. See, e.g., Daniel Kahnemann & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 11 (Daniel Kahnemann et al. eds., 1982).

172. See *supra* Part II.

173. Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 *AM. J. POL. SCI.* 560, 561 (2000).

174. *Id.* at 563.

175. *Id.* at 564.

176. *Id.* at 563.

177. *Id.*

178. *Id.*

edited to exclude information concerning the identity of the perpetrator.<sup>179</sup> A fourth control group saw no crime news story at all.<sup>180</sup> The participants were then asked to complete a second, longer questionnaire that probed their attitudes toward crime and punishment.<sup>181</sup>

The results were astonishing. More than 60% of those who watched the crime report with no reference to a perpetrator falsely recalled seeing one, and of those, 70% identified the perpetrator as African-American.<sup>182</sup> White participants who saw the version with the African-American suspect exhibited an increased tendency to attribute crime to individual failings and increased negative attitudes toward African-Americans that exceeded the increases observed in those who saw the version with the white suspect.<sup>183</sup> They also exhibited a statistically significant 6% increase in levels of support for punitive crime policies and more than a 10% increase in levels of what Gilliam and Iyengar referred to as “new,” “hidden,” or “covert” racism.<sup>184</sup>

Second, and perhaps more obvious, is the influence of cognitive processes on “war” rhetoric, which implicitly casts the target as “un-American” and exacerbates in-group/out-group hostility. Because war is generally associated with inter-national conflict, it naturally evokes concepts of national identity.<sup>185</sup> In doing so, war rhetoric subtly tends to conflate the proposed in-group with Americanism and implicitly portrays the proposed out-group as un-American.<sup>186</sup> This is particularly important in light of implicit bias research that suggests that Americans of color, including African-Americans, are less easily associated with “American” than are European-Americans.<sup>187</sup> Exposure to nationalistic symbols has also been found to influence levels of aggression and hostility. In one recent study, researchers subliminally exposed participants to images of the American flag.<sup>188</sup> They were then asked to complete word fragments.<sup>189</sup> Those primed

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179. Gilliam & Iyengar, *supra* note 173, at 563.

180. *Id.*

181. *Id.* at 564–65.

182. *Id.* at 564.

183. *Id.* at 567–70.

184. *Id.* at 566–69.

185. David Ryan, *Framing September 11: Rhetorical Device and Photographic Opinion*, 23 *EUR. J. AM. CULTURE* 5, 7 (2004).

186. *Id.*

187. Thierry Devos & Mahzarin R. Banaji, *American=White?*, 88 *J. PERSONALITY AND SOC. PSYCHOL.* 447, 466 (2005).

188. Melissa J. Ferguson & Ran R. Hassin, *On the Automatic Association Between America and*

with the flag completed the fragments more often with aggression- and war-related words than those who were not exposed.<sup>190</sup> They also were more prone to display hostile behavior in response to a mild computer-based provocation.<sup>191</sup> Interestingly, researchers observed these effects only for those participants who were exposed to high levels of national news.<sup>192</sup> Although research has not yet been done on social “war” rhetoric, race, and the punishment of adolescent offenders, the implications are obvious.

Perhaps the most unique effect of social wars is their ability to moralize issues. Once war is declared, the target changes from a problem in search of a solution to a question of moral superiority between two positions.<sup>193</sup> Consider the title of one of the most controversial texts of the 1990s: *Body Count: Moral Poverty . . . And How To Win America's War Against Crime and Drugs*.<sup>194</sup> Under *Body Count's* formulation, drug addiction is not an affliction, but a moral choice.<sup>195</sup> By framing the conduct of the proposed out-group as an attack on the moral fiber of society, the proposed in-group can claim moral superiority in the form of self-defense, and immorality is imputed on the out-group as the aggressor.<sup>196</sup> The result is a classic Manichean worldview—good waging war against evil. It follows then that a group that views itself as morally superior to another group is more willing to engage in violent or punitive acts against that group.<sup>197</sup>

What is more surprising is the fact that this moral diametric affects not just those who evaluate a targeted cohort from a distance, the everyday consumer of the nightly news, for example, but also those whose job it is to decide how harshly to punish individual members of that cohort. Two studies of decision-making by juvenile justice practitioners bear this out. They also poignantly illustrate how race seems to inform judgments about an individual's relative morality.

In 1999, in an attempt to determine why African-American youth in

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*Aggression for News Watchers*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 1632, 1635, 1647 (2007).

189. *Id.* at 1637.

190. *Id.* at 1637–38.

191. *Id.* at 1640–42.

192. *Id.* at 1642–43.

193. See Mark E. Brandon, *War and American Constitutional Order*, 56 VAND. L. REV. 1815, 1824–26 (2003).

194. BENNETT ET AL., *supra* note 97.

195. See *id.*

196. See Brandon, *supra* note 193.

197. See Kevin R. Binning, “It’s Us Against the World”: How Distrust in Americans Versus People-in-General Shapes Competitive Foreign Policy Preferences, 28 POL. PSYCHOL. 777, 778–79 (2007).

three Washington state counties were receiving harsher sentencing recommendations than white youth charged with the same crimes, sociologists George Bridges and Sara Steen conducted a comprehensive analysis of 233 narrative reports that county probation officers wrote.<sup>198</sup> After controlling for factors such as age, gender, and offense history, Bridges and Steen observed that officers' written rationales for sentencing recommendations indicated that they were more likely to attribute criminal behavior of minority youth to "internal forces," such as personal failure, inadequate moral character, and personality, and the criminal behavior of white youth to "external forces," such as poor home life, lack of appropriate role models, and environment, even when objective risk factors associated with the youth were similar.<sup>199</sup> The officers were also more likely to have a negative reaction to African-American youth when assessing subjective factors, like level of remorse or cooperativeness, and conclude that only state intervention could change their delinquent behavior.<sup>200</sup> To illustrate their point, Bridges and Steen compared the manner in which one probation officer depicted two seventeen-year-old boys, Ed and Lou.<sup>201</sup> Neither had a criminal history, and both were charged with first-degree robbery.<sup>202</sup> Ed, however, was African-American, while Lou was white.

This robbery was very dangerous as Ed confronted the victim with a loaded shotgun. He pointed it at the victim and demanded money be placed in a paper bag. . . . There is an adult quality to this referral. In talking with Ed, what was evident was the relaxed and open way he discussed his lifestyle. There didn't seem to be any desire to change. There was no expression of remorse from the young man. There was no moral content to his comment.<sup>203</sup>

Lou is the victim of a broken home. He is trying to be his own man, but . . . is seemingly easily misled and follows other delinquents against his better judgment. Lou is a tall emaciated little boy who is terrified by his present predicament. It appears

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

199. *Id.* at 561-67.

200. *Id.* at 554-57 (describing the officers' recommendations as being more likely to advocate commitment and confinement).

201. *Id.* at 564.

202. *Id.*

203. *Id.*

that he is in need of drug/alcohol evaluation and treatment.<sup>204</sup>

In 2004, Professors Sandra Graham and Brian Lowery expanded on elements of Bridges and Steen's research.<sup>205</sup> The participants included a racially diverse and gender-balanced group of ninety-one juvenile probation officers in Los Angeles.<sup>206</sup> Members of Experiment 1, police officers, were first asked to perform what the researchers called a "mind-clearing task," which required them to track a string of letters on a rapidly flashing computer screen.<sup>207</sup> Amid the flashing letters, however, certain officers were subliminally exposed to words commonly associated with African-Americans (such as black, homeboy, rap, etc.), while others were exposed to race-neutral words.<sup>208</sup> The researchers then asked participants to read two vignettes about a hypothetical adolescent who allegedly committed either a property crime or an assault.<sup>209</sup> In both, "the race of the offender was left unstated and the scenarios were ambiguous about the causes of the crime."<sup>210</sup> After reading the vignettes, the probation officers rated the offender on various personal traits, such as hostility and immaturity, and "made judgments about the offender's culpability, expected recidivism, and deserved punishment."<sup>211</sup> In contrast to subjects who did not receive the racial priming, the probation officers who were exposed to the subliminal messaging "judged the alleged offender to be less immature and more violent . . . more culpable, more likely to reoffend, and more deserving of punishment," and "their global trait ratings were more negative."<sup>212</sup>

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204. Graham & Lowery, *supra* note 170, at 564.

205. *Id.* at 484.

206. *Id.*

207. *Id.* at 488, 495.

208. *Id.* at 488–90.

The 16 race prime words in the first list were graffiti, Harlem, homeboy, jerricurl, minority, mulatto, negro, rap, segregation, basketball, black, Cosby, gospel, hood, Jamaica, and roots. The words in the second list were afro, Oprah, [I]slam, Haiti, pimp, dreadlocks, plantation, slum, Tyson, welfare, athlete, ghetto, calypso, reggae, rhythm, and soul. The 16 words in the first race-neutral list were baby, enjoyment, heaven, kindness, summer, sunset, truth, playful, accident, coffin, devil, funeral, horror, mosquito, stress, and toothache. The words in the second race-neutral list were warmth, trust, sunrise, rainbow, pleasure, paradise, laughter, birthday, virus, paralysis, loneliness, jealousy, hell, execution, death, and agony.

*Id.* at 489 n.5.

209. Graham & Lowery, *supra* note 170.

210. *Id.*

211. *Id.*

212. *Id.* at 496.



Amazingly, the results were consistent even among officers who self-reported, and likely believed, that they held no racial bias toward minorities.<sup>213</sup>

Taken together, these experiments tell us several important things. First, they reveal that even those whom we might assume to be immune to racial primes and stereotypes linking young black males with criminality, amorality, and adulthood (the police and probation officers whose job it is to provide professional assessments of adolescent offenders on a daily basis) are not. Indeed, while the rhetoric of the “super-predator” war might have influenced them less than members of the general public by virtue of their professional training,<sup>214</sup> it likely affected them nonetheless. Second is the apparent extent to which even subliminal racial primes can influence our perceptions of individuals. That the mere evocation of terms associated with African-Americans could trigger assumptions about the relative culpability of an individual offender is stunning. Third, and perhaps most notable, is the degree to which race aligns with perceived amorality. In the collective subconscious of these decision-makers and, the evidence suggests, in our collective American subconscious, young black males are often associated with “adult qualit[ies],” little “desire to change,” “no . . . remorse,” and “no moral content.”<sup>215</sup> We perceive them as “less immature,” “more violent,” “more culpable, more likely to reoffend, and more deserving of punishment” than their white counterparts.<sup>216</sup> While these associations may also be the product of the history of race relations in this country, strategic politics, and crime rates inasmuch as they are the product of the “super-predator” war, we cannot ignore the role of the “super-predator” war, and social wars in general, in shaping our social cognition.

#### IV. CONCLUSION

The rest of the Western world was not immune from the spike in adolescent crime, the political posturing, the public outcry, and the shifts in penal ideology that impacted the United States during the late 1980s and

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213. *Id.* (“When an ethnicity was incorrectly reported, respondents again were more likely to ‘recall’ that the alleged offender was African-American than either Latino or White.”).

214. Generalized research shows that subliminal racial cues are less likely to interfere with performance and judgment when the subject has been trained for the task at hand. *See, e.g.,* Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 1314, 1326 (2002) (suggesting that training participants to distinguish guns from cell phones may reduce “Shooter Bias”).

215. *See supra* notes 203–04 and accompanying text.

216. *See supra* note 212 and accompanying text.

1990s.<sup>217</sup> Yet no other country in the Western world turned so abruptly and completely on its population of adolescent lawbreakers. Plainly, there are important historical, sociological, political, and demographic differences between the United States and other Western nations that influence the relative severity of their juvenile justice policies, but this Article argues that there is also something about the social psychology of these metaphorical, social wars in which our country has been so continually and readily involved. In the case of the “super-predator” war, these cognitive processes and reverberations have so indelibly altered the meaning of “young black male” within our society that we are immune to the notion that we are systematically destroying a significant portion of our country’s future.

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217. Julian V. Roberts, *Public Opinion and Youth Justice*, 31 *CRIME & JUST.* 495, 495–96 (2004) (noting that, following murders by youthful offenders in Britain, Canada, and Australia, an overall increase in violent juvenile crime, increased media attention, and “get tough” politicians, juvenile crime became the single most discussed criminal justice issue in Western nations during the 1990s, but that the measures adopted in the United States were the most punitive).

