

SUPERPREDATOR THE CHILD STUDY MOVEMENT TO TODAY

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INTRODUCTION

The 1995 superpredator narrative is often called out as the impetus for our nation's harmful sentencing policies for Black children. After all, 75 percent of all kids sentenced to life without parole (JLWOP) were sentenced in the 90s or later, and 70 percent of this population are kids of color (60 percent Black). But the pseudo-scientific, unsubstantiated, and racialized superpredator theory is actually part of an American tradition of deeming some children something other than children.

The term superpredator first appeared in a publication by American political scientist John J. Dilulio, Jr. in 1995. Dilulio predicted that a wave of teenagers driven by "moral poverty" numbering in the tens of thousands would soon be on the streets committing violent crime. [1] These "hardened, remorseless juveniles" were framed in the article as a pressing "demographic crime bomb." [2] Dilulio's narrative used racist tropes to further stoke fear — broadly attributing "moral poverty" to "Black inner-city neighborhoods" and families and specifically and repeatedly calling attention to gang violence and "predatory street criminals" among "Black urban youth." [3]

Five years later, Dilulio renounced the superpredator theory, apologizing for its unintended consequences. While Dilulio predicted that juvenile crime would increase, it instead dropped by more than half. [4] Conceding that he made a mistake, Dilulio regretted that he could not "put the brakes on the super-predator theory" before it took on a life of its own. [5]

Despite his later distancing from the idea, Dilulio's terminology spread like wildfire through major news outlets and academic circles. [6] Coming just a few years after headlines using "wilding" and "wolf pack" to describe five teenagers convicted and later exonerated of raping a woman in Central Park, the rhetorical dehumanization of youth suspected of violence was not new, but Dilulio's coining of "superpredator" lent new credibility and energy. [7] The superpredator myth reinforced and sought to legitimize longstanding fears of Black criminality, disguised as developmental science and resting on pseudo-scientific assumptions that certain children are not children at all.

While the widespread adoption and popularization of Dilulio's rhetoric and the broader tough on crime atmosphere of the 1990s is instructive in examining our extreme sentencing policies, it is important to place them in the context of our long history of only regarding some children as worthy of protection. This report highlights the superpredator theory as one manifestation of a longstanding practice in which policymakers, lawyers, and academics classify children on the basis of moral and racial beliefs. These classifications permit racially biased perceptions of deviance to replace chronological age as the defining characteristic of youth.

This report takes as its jumping off point the Child Study movement of the 19th century, which had long lasting impact on the contours of academic inquiry and the American legal system. The Child Study movement itself was of course rooted in a deeply racist culture, profoundly influenced by the justifications used to uphold slavery and Jim Crow, and with its own ideological predecessors dating back to the Enlightenment of the 18th century.*

TIMELINE

A BRIEF HISTORY OF THE ORIGINS OF THE SUPERPREDATOR MYTH

John Dilulio's since debunked "Superpredator" myth was part of a long history of classifying certain children as deviant and less deserving of protection.

1870s

Child psychologists begin measuring children's bodies to establish developmental "norms." Using white children as a baseline, these studies were used to assert racial superiority as biological.

1899

The first juvenile court in the United States is established in Illinois. While intended to provide age-appropriate care, these courts separated out the "incorrigible." Increasing fears around immigration and racial impurity mean that frequently "rehabilitation" meant conforming to Anglo-Protestant values.

1945

By 1945, every state and the federal government had a juvenile court system, and most had mechanisms for transferring children to the adult system. The transfer system permitted courts to identify deviance and incorrigibility via racial stereotype.

1968

Congress enacts JJDPA, marking part of a broader shift in federal funding priorities from social welfare to law enforcement.

1985-1994

The number of juveniles tried as adults nationally grew by 71%. Among youth transferred to the adult system racial disparities are stark. Despite representing only 14% of youth, Black children make up almost half of those transferred.

1904

G. Stanley Hall, later called "the father of adolescence" argues that "the child and the race are keys to each other" and that criminal behavior is linked to "morphological deviance from the normal". Hall's conclusions about race's relevance in identifying the causes of crime inspired and influenced research and policy for decades to come.

1966

Kent v. United States affords procedural protection to youth facing transfer. In so doing, it also reinforced the belief that criminal activity could replace age as a yardstick to measure developmental maturity.

1972-1978

Federal funds go to studies using unchecked racial classifications to study crime. These **flawed studies** advocated more punitive approaches for Black youth and ignored evidence of racial profiling contributing to heightened police contact.

1995

John Dilulio publishes **"The Coming of the Superpredators"**in the Weekly Standard.

THE CHILD STUDY MOVEMENT AND THE JUVENILE JUSTICE SYSTEM

I. The Child Study Movement

In the eighteenth and nineteenth centuries, experimental psychologists treated children's anatomy as a window into the nature of human progress. In an effort to establish developmental "norms," child psychologists in Europe and the United States began measuring children's height, weight, head size, arm length, and growth rate. [8] Even when scientists adopted empirical research methods, many believed that children could be classified according to racial group, social status, and intellectual ability.

By importing scientific language to justify these unfounded assumptions, marginalized children were frequently identified as sub-human, deviant, and dangerous. [9] In addition to measuring children's bodies, social scientists and medical doctors in the late nineteenth century conducted studies of African and Indigenous bodies in order to prove racial superiority as a biological fact. [10] In so doing, these researchers collapsed the distinctions between scientific classification and racial taxonomy: by comparing children of color to "savage races," childhood studies reinforced the belief that nonwhite children represented a different class of children altogether, which placed them outside the boundaries of "normal" development. [11]

G. Stanley Hall, one of the founders of the Child Study movement, analogized child psychological development to macro human development, which tracked a Darwinian process from the "less evolved savage races" to a fully-realized (and civilized) adulthood. [12] Later identified as the "father of adolescence," Hall argued that "the child and the race are each keys to each other," and explained that "degeneration of mind and morals is usually marked by morphological deviations from the normal." [13]

In 1891, as Hall's course and theories gained prominence within the academy, the Whittier State School in California institutionalized these ideas that criminal behavior could be predicted by race and body type into practice. Based on this pseudo-scientific pretext, Black, Mexican, and Filipino children at the school were deemed "feeble-minded" and irredeemable to justify their confinement and sterilization. [14]

II. The Juvenile Justice System

Hall's contributions to child psychology and developmental science influenced subsequent research and informed public policy. Although later scientists critiqued Hall's methods as deficient, Hall's conclusions about racial classification and its relevance for identifying the "causation of crime" had already taken root.

THE JUVENILE JUSTICE SYSTEM AND INCORRIGIBILITY

In the same era during which Harvard, Yale, and Princeton established child development programs to research and explain the differences between children and adults, the Illinois legislature passed the Juvenile Court Act and established the first juvenile justice system. [15] In this way, childhood studies intersected with a burgeoning progressive movement, which sought to "rehabilitate" wayward children by providing juveniles with support, guidance, and intervention from the state. [16]

The motivating impulse of the juvenile justice system was to protect youth from the "corrupting influence" of adults, in order to provide children with age-appropriate care. [17] However, not all children were perceived to be amenable to this intervention. Just as the child study movement adopted scientific language to justify racial classification, the juvenile justice system created a distinct pseudo-scientific class of "incorrigible" children, whose criminal status served as proof of their moral and physical maldevelopment. [18] By 1945, every state and the federal government had enacted a juvenile court system. [19] In almost all of these states, juvenile courts were permitted to transfer juvenile cases into the adult justice system, when the child explicitly or implicitly was perceived incorrigible. [20] And because of the influence of the child study movement and related racialized perceptions of children — in addition to racial segregation in education, housing, and social welfare — conceptions of the incorrigible child were conflated with Black children, Indigenous children, and children of color, thus depriving them of the protections of their chronological age. [21]

III. The Due Process Revolution

While reformers nurtured a growing trend of separating children who broke the law from adults, Black children continued to be confined in adult prisons and excluded from protections extended to white children. Far from the reformers goals of rehabilitative programming and social support, during this time Black children were subjected to racial terror under Jim Crow. While states were adopting juvenile justice systems into the 1940s, in 1944 South Carolina, 14-year-old George Stinney was executed after a one-day trial before an all white jury. [22]

Movements to end structural racism in juvenile justice informed efforts to reform the juvenile waiver system. [23] In 1966, the Supreme Court attempted to address these concerns by affording procedural protections to youth facing transfer proceedings. [24] However, these protections did not challenge race-based and crime-based classifications of children. Instead, sentencers and legislatures continued to believe that a child's offense could serve as a more reliable measure of a child's disposition than a child's chronological age. [25]

The decades following the so-called "Due Process Revolution" reveal the consequences of these crime-based waiver statutes: Between 1985 and 1994, the number of juveniles tried as adults

THE WAR ON CRIME

nationally grew by 71 percent, with more than 12,000 juvenile cases being waived into adult criminal court. [26] Among youth transferred to adult custody, racial disparities increased. Between 1985-1995, Black youth were more likely than their white counterparts to be transferred to adult criminal court for all offense types, all age categories, and all years. [27] Today, despite representing 14 percent of the total youth population, Black youth make up almost half of the youth transferred into adult custody. [28]

IV. The War on Crime

Backlash to the Civil Rights Movement and Due Process Revolution influenced juvenile justice reforms and the development of social science in subsequent decades. [29] In response to racial justice uprisings, the Johnson and Ford Administrations responded with efforts to promote "domestic tranquility." [30] Although the first Civil Rights Era legislation directed at juvenile justice authorized funding for state and local governments through the U.S. Department of Health, Education, and Welfare, subsequent legislation shifted control away from social welfare agencies to the U.S. Department of Justice. [31] In 1968 Congress passed the Juvenile Delinquency Prevention and Control Act (JJDPA), which authorized the Department of Justice to fund the growth of state law enforcement personnel and programs to address social inequalities. [32] By treating juvenile justice as a matter of crime control rather than a response to systemic racial discrimination and economic deprivation, the United States government contributed to the false narrative that children and adolescents, and particularly Black adolescents, required adult criminal punishment for the sake of public safety.

The federal government's "War on Crime" created a financial incentive for social scientists to develop a research agenda focused on crime-control. However, as with the juvenile transfer statutes, crime-based rhetoric left racial classifications unchecked. In 1972, for example, University of Pennsylvania law professor Marvin Wolfgang received federal funding for a study that reinforced the assumption that police contact could be used as a valid instrument to identify and predict criminal behavior. [33] Notwithstanding racist assumptions driving arrests in Philadelphia, Wolfgang did not credit African American delinquency to anti-Black discrimination. Instead, his report stated simply that "more social harm is committed by nonwhites." [34]

As criminologists and law professors competed for federal grants to conduct similar research, their focus on contact with the justice system continued to exacerbate misleading assumptions about the relationship between race, adolescence, and criminal behavior. In 1995, Princeton professor John Dilulio coined the term "superpredator" to describe the "thickening ranks" of "radically impulsive, brutally remorseless youngsters." [35] Rather than treat adolescence as a transient period, Dilulio and other academics characterized teenagers who commit crime as permanently morally deficient.

THE "SUPERPREDATOR" AND SENTENCING CHILDREN TO LIFE

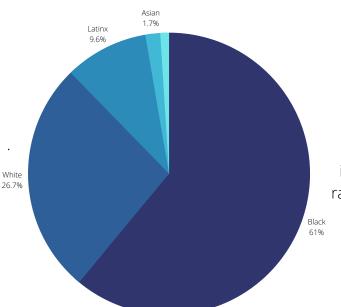
V. JLWOP and Other Extreme Sentences

Convinced by federally-funded studies that "nothing works," state legislatures determined that juvenile deviancy could only be addressed through incapacitation. [36] Between 1992-1997, nearly every state changed its laws to increase penalties for juvenile offenders and facilitate the automatic transfer of children into adult custody. [37] Mandatory minimums replaced discretionary review and the Supreme Court announced that sentencing guidelines need not include rehabilitation measures of any sort. [38]

For this reason, the War on Crime's research agenda provided sentencing courts with scientific language to justify extreme sentences for youth, without addressing or correcting entrenched racial assumptions in the justice system and within the Academy. Reflecting this wave of policy changes and legislative priorities, the number of juvenile life without parole sentences imposed

peaked in the mid-1990s. [39] These sentences were fueled by mandatory sentencing laws and the wholesale abolition of parole inspired by the tough on crime notions of the era and legislation like the 1994 Crime Bill. [40]

These sentences also bear the stain of extreme racial disparity and prejudice — of the more than 2,800 children ever sentenced to life without parole, 70 percent are children of color.



150

1980

1990

2000

2010

1970

JLWOP sentences by year of offense

1960

More than 60 percent are Black. [41] Recent intervention from the U.S. Supreme Court has led to increased judicial discretion in sentencing children, but racial disparities have actually worsened in that time - of children sentenced to life without parole with this guidance, almost 70 percent are Black. [42]

RECOMMENDATIONS FOR RECTIFYING THE HARM

While the Supreme Court has recently weighed in to limit life without parole for youth, there is much work to be done to address the harm caused by the superpredator theory, the historic injustice it built upon, and the related tough-on-crime rhetoric. As of May 2021, twenty-five states and the District of Columbia have banned the practice of sentencing children to die in prison, and six more have no one serving. [43] While this momentum has led to a sea change of reform, too many states still allow children to die in prison either via life without parole or other extreme sentences. States must continue to act to undo harmful 1990s sentencing statutes and ensure regular meaningful opportunities at sentence review for all kids.

As states have acted, federal legislation can help challenge and change this systemic undervaluing of children of color as well. Historically, federal statutes like the Violent Crime Control and Law Enforcement Act (known as the 1994 crime bill) created incentives for states to impose harsher prison sentences. In order to repair these harmful practices, legislative reform can help re-shape the narrative around youth and criminal justice.

Recently, several federal bills have been filed that take some steps to undo this harm. The Childhood Offenders Rehabilitation and Safety Act of 2021 would:

- Raise the age of criminal responsibility in federal court;
- Prohibit the placement of children in federal adult correctional facilities;
- Eliminate the application of the felony murder rule to people under 18;
- Ensure childhood trauma, foster care placement, and adverse childhood experiences are considered at sentencing;
- Provide a grant for local child welfare and juvenile justice department collaborations that meet the needs of families and their children who are excluded from adult or criminal adjudication by age to ensure trauma-focused, developmentally appropriate services are delivered by multidisciplinary teams that create treatment plans with the children, family, stakeholders, and service providers. [44]

Sara's Law and the Preventing Unfair Sentencing Act (H.R.2858) would:

- Prohibit federal judges from sentencing juveniles to life in prison without parole and bring federal law into compliance with the 2012 Supreme Court decision *Miller v. Alabama*. Juveniles sentenced to life in prison would be guaranteed a parole hearing after serving 20 years;
- Provide that juveniles found guilty of crimes against persons who sexually trafficked, abused, or assaulted them shall not be required to serve the mandatory minimum sentence otherwise associated with the crime;

RECOMMENDATIONS FOR RECTIFYING THE HARM

• Allow judges to consider "the diminished culpability of juveniles compared to that of adults" when sentencing those who committed crimes as juveniles and allow federal judges to depart from mandatory minimum sentences by up to 35 percent if deemed appropriate based on the juvenile's age and prospects for rehabilitation. The presiding judge may also suspend any portion of an otherwise applicable sentence if the circumstances so warrant. [45]

The Protecting Miranda Rights for Kids Act (H.R. 8685) would:

- Require law enforcement to notify and contact parents or guardians in the event a child is arrested or detained;
- Require children to consult with their parent in person, by phone, or by video conference and consult with legal counsel in person before they can waive their Miranda rights;
- All interrogation of a minor should take place with an appointed (not a stand in substitute) legal counsel physically present at the time of interrogation;
- Make inadmissible in any criminal prosecution brought by the U.S. or District of Columbia, any statement given by a minor during a custodial interrogation that does not comply with the requirements;
- Define minor as an individual 17 years or younger. [46]

Rather than classify youth according to race, class, or criminal history, federal policy makers can incentivize states to pursue non-carceral reforms, implement restorative justice programs, revive meaningful parole consideration, and implement age-appropriate intervention. Congress can also convene a truth and reconciliation commission to explore ways in which we can begin to repair the specific harms of the superpredator myth and the policy change it is symptomatic of. As John Dilulio recanted his baseless theory and joined efforts to end extreme sentences for youth, so too must advocates renounce intra-child classifications and protect all youth from unconstitutional punishment.

ENDNOTES

- *This report draws from and was made possible by extensive research done by Hannah Duncan (Yale Law '21).
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- [5] Id.
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- [17] Donna M. Bishop & Hillary B. Farber, Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by in Re Gault, 60 Rutgers L. Rev. 125, 127, 128 (2007).
- [18] David S. Tanenhaus, <u>The Evolution of Transfer Out of the Juvenile Court</u>, 21, 39, fn. 4. (<u>Changing Borders of Juvenile Justice:</u> <u>Transfer of Adolescents to the Criminal Court</u>, Jeffrey Fagan and Franklin Zimring eds., 2000) (2000).
- [20] Id.
- [21] Id.; see also Hubert Williams and Patrick Murphy, <u>The Evolving Strategy of Police: A Minority View,</u> U.S. Department of Justice, Office of Justice Programs 3 (January 1990).
- [22] Bell, supra note 14, at 14.
- [23] Bishop & Farber, supra note 23, at 125, 133.
- [24] <u>Kent v. United States</u>, 383 U.S. 541 (1966). [25] U.S. 541, 551 (1966), citing D.C. Code, § 11-914 (1951) ("if a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult...the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult.").
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- [37] See Amicus Curiae Brief of NAACP Legal Defense & Educational Fund, Inc., et. al in Support of Petitioners, Miller v. Alabama, No. 10-9647, 567 U.S. 460 (2012) at 25.
- [38] Hinton, supra note 32, at 243; Mistretta v. United States, 488 U.S. 361, 367 (1989).
- [39] Data on file with the Campaign for the Fair Sentencing of Youth.
- [40] Bureau of Justice Statistics, <u>Truth in Sentencing in State Prisons</u> (1999), https://www.bjs.gov/content/pub/pdf/tssp.pdf (last visited April 6, 2021).
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- [44] Bass, Cárdenas Introduce Bipartisan Legislation to Reform Juvenile Justice System, https://bass.house.gov/media-center/press-releases/bass-c-rdenas-introduce-bipartisan-legislation-reform-juvenile-justice (last visited May 12, 2021).
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