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ABSTRACT

This article demonstrates how advocates can leverage empirical literature regarding adultification bias to craft doctrinal interventions that recognize and remedy the disproportionately harsh treatment of Black youth in the juvenile and adult criminal legal system. Through case examples, all of which I litigated in the Civil Rights Clinic at Seattle University School of Law, I demonstrate how adultification bias was used to explain the racial disproportionality in the transfer of young people to adult court for prosecution, as well as the harshness of the sentences received by young people in both juvenile and adult court. These cases provide roadmaps for clinicians and advocates to educate criminal legal system stakeholders about the risk of adultification bias and other forms of implicit bias, either as amicus or in direct service to clients. The briefs proposed new legal standards in cases that require criminal legal system stakeholders to account for adultification bias. These litigation strategies are designed to obtain outcomes for clients that account for one way that race plays a role in prosecutorial and judicial decision-making, a problem which is clear in the aggregate but has historically evaded remedy in individual cases. These proposals also provide a concrete example of how law school clinics can put theory into practice and produce doctrinal interventions that advance racial justice.

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INTRODUCTION

The problem of mass incarceration and its disproportionate impact on Black communities and other communities of color is one that is clear in the aggregate, but much more difficult to isolate and prove in individual cases. This is, in part, due to the shameful legacy of *McClesky v. Kemp*,[1] and the judiciary's hesitance to accept that systems can—and do—produce racist outcomes without direct proof of invidious intent traceable to specific actors.[2] However, stakeholders in Washington's criminal legal system are increasingly pushing back against that narrative, including through education of bench and bar about systemic and institutional racism as explanations for the observed racial disproportionalities,[3] and litigation

1. In the death penalty context, *McCleskey v. Kemp* rejected statistical analysis as insufficient to prove racial bias in the administration of the death penalty. 481 U.S. 279, 297 (1987). The *McCleskey* decision substantially limited subsequent challenges to the death penalty in both state courts and the U.S. Supreme Court. In rejecting Mr. Kemp's Fourteenth Amendment equal protection claim, the Court relied, in part, on the deeply flawed analysis from *Washington v. Davis*, 426 U.S. 229 (1976) that equal protection claims require "'the existence of purposeful discrimination.'" *McCleskey*, 481 U.S. at 292 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)); *see id.* at 292 n.10 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington*, 426 U.S. at 240); *see also Washington*, 426 U.S. at 239 ("But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.").

2. *See generally* Mario L. Barnes & Erwin Chemerinsky, *What Can Brown Do for You?: Addressing* McCleskey v. Kemp *as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293 (2018).

3. In the words of the Race and Criminal Justice Task Force leaders:

> Task Force 2.0 picks up where the previous task force left off, working to address racial disparity in Washington's criminal justice system. Convened by the deans of Washington's three law schools, Task Force 2.0 seeks to answer the current moment, precipitated by the killing of George Floyd, which called national attention to the devaluation of Black lives by police but which also called broader attention to systemic discrimination in the criminal justice system. The current moment led the Washington Supreme Court to issue its call on June 4, 2020, in which it acknowledged that the "devaluation and degradation of black lives is not a recent event" and is instead a persistent feature of our justice system and calling "on every member of our legal community to reflect on this moment and ask ourselves how we may work together to eradicate racism." Organizations and individuals have come together in this volunteer effort. History will judge whether we have answered this moment.

Fred T. Korematsu Ctr. For L. & Equal., *Race and Criminal Justice Task Force*, SEATTLE UNIV. SCH. OF L., https://law.seattleu.edu/centers-and-institutes/korematsu-center/initiatives-and-projects/race-and-criminal-justice-task-force/ [https://perma.cc/V3HP-HZLS].

For the reports generated by Task Force 2.0 on the adult and juvenile criminal legal system, see TASK FORCE 2.0 RSCH. WORKING GRP., RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM: 2021 REPORT TO THE WASHINGTON SUPREME COURT (2021), https://digitalcommons.law.seattleu.edu/korematsu_center/116/ [https://perma.cc/Q9BJ-BRZJ] (this report was subsequently published at 45 SEATTLE U. L. REV. 969, 972 (2022)) and TASK FORCE 2.0 JUV. JUST. SUBCOMM., REPORT AND RECOMMENDATIONS TO ADDRESS RACE IN WASHINGTON'S JUVENILE LEGAL SYSTEM: 2021 REPORT TO THE WASHINGTON

about the same. Notably, this includes the state supreme court's 2018 invalidation of Washington's capital punishment statute on the basis of racial arbitrariness under the Washington State—using its authority to interpret the cruel punishment clause to account for racism in a way that United States Supreme Court precedent renders virtually impossible.[4] The state supreme court's commitment to acknowledging and remedying implicit bias, as well as institutional and systemic racism,[5] have catalyzed other challenges that expose the myriad of ways the criminal legal system disproportionately impacts people of color.

For instance, in *In re Personal Restraint of Asaria Miller*,[6] at the urging of both merits counsel from the Race and Justice Clinic at University of Washington School of Law and amicus counsel from the Seattle University School of Law Civil Rights Clinic, the Washington State Court of Appeals took an important step in accounting for the ways that youth of color likely receive harsher punishment than their white counterparts. This litigation effort resulted in judicial recognition of the operation of adultification bias in the criminal law context, as well as a mandate that sentencing courts consider adultification bias whenever sentencing youth of a color[7]—the

SUPREME COURT (2021) [hereinafter JUVENILE RACE REPORT], https://digitalcommons.law.seattleu.edu/korematsu_center/118/ [https://perma.cc/N96Q-EN6C] (this report was subsequently published at 45 SEATTLE U. L. REV. 1025, 1028 (2022)).

4. State v. Gregory, 427 P.3d 621 (Wash. 2018). In 2018, the Washington Supreme Court did what the U.S. Supreme Court had declined to do in *McClesky* and invalidated Washington's capital punishment statute as unconstitutional because it was being imposed in an arbitrary and racially biased manner and therefore in violation of Washington's prohibition of cruel punishment. *Id.* at 633. In doing so, the court relied on a defense commissioned study that sought to determine the effect of race on the imposition of the death penalty without requiring proof of purposeful discrimination. *Id.* at 630. The study included a regression analysis that controlled for various factors and concluded that Black defendants were between 3.5 and 4.6 times more likely to be sentenced to death than similarly situated White defendants. *Id.* at 630, 634. In holding the state's death penalty statute unconstitutional, the court noted there was at most an 11% possibility that the observed association between race and the death penalty was a result of random chance. *Id.* at 634, 647. The court declined to require "indisputably true social science to prove that our death penalty is impermissibly imposed based on race," and also relied on historical evidence of racism in Washington's legal system. *Id.* at 634-35. Significantly, the court did not require Mr. Gregory to prove that a decision maker acted with discriminatory purpose that resulted in him being punished more harshly than other defendants similarly situated to him. *Id.* at 634. Statistical evidence of a relationship between race and imposition of the death penalty, that was not explained by other factors, along with historical evidence of racism in the legal system was sufficient for the court to determine that racial bias infected the entire sentencing scheme. *Id.* at 634-35.

5. Letter from The Supreme Court of the State of Washington to Members of the Judiciary and the Legal Community (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf [https://perma.cc/8ZF8-U9WY].

6. *In re* Pers. Restraint of Miller, 505 P.3d 585, 589 (Wash. App. Ct. 2022).

7. *Miller*, 505 P.3d at 589-60.

first time adultification bias has been incorporated into a legal standard in any court.[8]

Part I discusses the pedagogical approach we employ in the Civil Rights Clinic, where we select cases that allow for a deep examination of racial disproportionality in the criminal legal system in Washington, as well as the creation of doctrinal interventions that can help to remedy the disproportionality. Part II discusses our approach to identifying the specific problems addressed in this article—namely, the racial disproportionality of youth who are selected for prosecution in adult court, as well as the likelihood of race affecting the severity of punishment youth of color receive, whether in juvenile or adult court. Part III summarizes the germinal literature on adultification bias, which allowed us to propose explanations for the patterns of racial disparity we observed in Part II. Part IV sets forth the controlling legal standards for the transfer of youth to adult court, as well as the sentencing of youth in both juvenile and adult court; this part explains how the language used in these legal standards invites the operation of adultification bias and reveals the need for specific interventions that account for that bias. Part V reviews in detail four Civil Rights Clinic cases, including both amicus advocacy and direct representation, where we put theory into practice. In these cases, we leveraged the empirical literature on adultification bias to educate courts about how adultification bias was likely operating against youth of color in both the transfer and punishment contexts, and we articulated a path for courts to adopt the doctrinal interventions discussed in Part IV.

I. CLINIC APPROACH

The Civil Rights Clinic engages in carefully selected litigation, both direct representation and amicus curiae advocacy, where we seek to highlight underlying race disproportionality, and then to advocate for new legal standards and remedies that account for the operation of institutional and systemic racial bias.

The work to translate adultification bias literature into doctrinal interventions is an example of the larger project of the Civil Rights Clinic at Seattle University School of Law, including establishing pathways under state constitutional frameworks to recognize and remedy how race discrimination operates within systems—i.e., where the evidence of discrimination arises not from the racist actions of individuals, but instead from the stark patterns of racial disproportionality, or from more implicit interpersonal forms of racism.[9] Cases litigated in the Civil Rights Clinic

8. As of Mar. 26, 2024, a search of both Westlaw and Lexis lists *Miller* as the first published case to invoke a standard of recognition of adultification bias.

9. *See, e.g.*, Brief of Fred T. Korematsu Ctr. for L. and Equal. as Amicus Curiae in Support of Petitioner at 4-7, State v. Bagby, 522 P.3d 982 (Wash. 2023) (No. 99793-4)

have been central to the development of state constitutional law in cases that have overturned the death penalty based on racial arbitrariness,[10] categorically barred juvenile life without parole sentences,[11] and created meaningful remedies to race discrimination in jury selection, race-based prosecutorial misconduct,[12] and police seizure contexts.[13] The clinical

[hereinafter *Bagby* Amicus Brief] (discussing empirical literature regarding coded language and priming to explain that prosecutor's referring to Mr. Bagby's nationality, who is both Black and an American citizen, could inflame racial prejudice and constituted prosecutorial misconduct); Brief of Fred T. Korematsu Ctr. for L. and Equal. et al. as Amicus Curiae in Support of Petitioner at 12-19, State v. Zamora, 512 P.3d 512 (Wash. 2023) (No. 99959-7) [hereinafter *Zamora* Amicus Brief] (discussing empirical literature regarding priming to explain that prosecutor's repeated references to illegal immigration and safety concerns during voir dire invoked an anti-immigrant script and constituted prosecutorial misconduct); Brief of Fred T. Korematsu Ctr. for L. and Equal. et al. as Amicus Curiae in support of Appellants, E.E.O.C. v. Evans Fruit Co., Inc., No. 13-35885 (9th Cir. filed Apr. 7, 2014) (supporting plaintiff-intervenor Latina farmworkers' request for a new trial based on improper racialization of the case, and specifically educating the court about the dangers of implicit in-group favoritism that could have manifested between the all-white jury and the white owners of the defendant corporation); *see also Bagby*, 522 P.3d at 997 (noting Mr. Bagby's and amici's request to adopt a *per se* prejudice rule in cases of race-based prosecutorial misconduct); *Zamora*, 512 P.3d at 532 (noting amici's recommendation that the court adopt the objective observer standard derived from GR 37).

10. Brief of Fred T. Korematsu Ctr. for L. and Equal. as Amicus Curiae in Support of Petitioner at 12-17, State v. Gregory, 427 P.3d 621 (Wash. 2018) (No. 99793-4) (addressing the role that implicit favoritism plays in racially disproportionate imposition of the death penalty on Black defendants, whereby majority or all-white juries are more inclined to exercise mercy on white defendants, and arguing for relief based solely on the heightened protection of the cruel punishment provision of the Washington state constitution).

11. Brief of Fred T. Korematsu Ctr. For L. and Equal. et al. as Amicus Curiae in Support of Petitioner at 3-16, State v. Bassett, 428 P.3d 423 (Wash. 2018) (No. 94556-0) (providing the analysis necessary for independent state constitutional analysis of Mr. Bassett's request to categorically bar juvenile life without parole under the Washington constitution).

12. *Zamora* Amicus Brief, *supra* note 9, at 7-19 (successfully arguing for the adaptation of the "objective observer" standard that had been adopted in GR 37, a court rule designed to combat race discrimination in the exercise of peremptory challenges that defines objective observer as one who is aware of institutional and systemic racism as well as implicit bias, to determine whether a prosecutor's race-based misconduct had "apparently intentionally" appealed to racial bias); *Bagby* Amicus Brief, *supra* note 9, at 11-19 (successfully arguing for the same standard described in *Zamora*). Both amicus briefs also successfully argued for the adoption of a *per se* prejudice standard for race-based prosecutorial misconduct claims, instead of subjecting race-based prosecutorial to constitutional harmless error, which still had not deterred such conduct since it announced the change to constitutional harmless error years before in *State v. Monday*, 257 P.3d 551, 558 (Wash. 2011) ("If our past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct, then we must apply other tested and proven tests . . . . Such a test exists: constitutional harmless error."). *Zamora* Amicus Brief, *supra* note 9, at 19-21; *Bagby* Amicus Brief, *supra* note 9, at 19-29.

13. Brief of King County Department of Public Defense et al. as Amicus Curiae at 17-23, State v. Sum, 511 P.3d 92 (Wash. 2022) (No. 99730-6) (along with counsel for King County Department of Public defense and other amici, successfully arguing the objective observer standard, discussed *supra* note 12, should be employed in the seizure analysis under article I, section 7 of the Washington constitution). The analysis is now that "a person is seized . . . if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate

approach articulated below, however, did not develop overnight. Over approximately 12 years, we have refined this approach through experimentation, internal collaboration, and generous feedback from merits counsel and other external partners in the criminal defense and civil legal aid communities.

The first step that guides case selection is to recognize and identify the problem: this often begins with examining how race operates to produce racially disparate outcomes at various decision-points in the criminal legal process, whether it be interactions with police, prosecutor discretion, juror decision making, or judicial decision making. This step usually involves use of publicly available criminal justice data, empirical studies, and other sources that examine racial disproportionality; on occasion, it also involves use of publicly available data to generate our own measures of racial disproportionality.[14]

The second step, after recognizing and defining the problem, is to investigate what the scholarly literature teaches us about possible explanations for the racial disparity. Due to the Clinic's home within an academic institution, and specifically within a law school, we engage in civil rights litigation that pushes boundaries, questions assumptions, and does so from a well-researched and multi-disciplinary posture. With other faculty experts down the hall or across campus, and with nearly unbridled access to social science publications and other scholarly journals, the Civil Rights Clinic is uniquely situated to act as a conduit between other disciplines and the judiciary. Articulating the salience of other disciplines to the judiciary results in better informed legal decision making. Through both the robust amicus curiae advocacy, as well as carefully selected direct representation, the cases educate bench and bar about how other disciplines understand the operation of racism, as well as how to change legal rules to account for those understandings.

Once versed in the empirical and scholarly literature, our third step is to create and propose a doctrinal intervention that accounts for the operation of race. Through the advocacy, members of the bench and bar come face to face with the racial impact of our criminal legal system, are educated about the operation of implicit bias, and become more comfortable participating in social change. The results of this advocacy are

the encounter due to law enforcement's display of authority or use of physical force. *Sum*, 511 P.3d at 97; *see also id.* at 101 (noting thorough briefing by parties and amici of this issue).

14. In other cases not discussed in this Article, Civil Rights Clinic faculty use publicly available data and generate relatively simple descriptive statistics such as relative and comparative disproportionality to define the problem. *See, e.g.*, Amended Brief of Freedom Project et al. as Amici Curiae in Support of Petitioner at 17-19, State v. Kelly, No. 102002-3 (Wash. filed Dec. 29, 2023) (discussing internally generated racial disproportionality measures regarding imposition of firearm enhancements on Black people and other people of color).

not simply the outcomes and changed legal standards in individual cases. Education has the transformative power to change hearts and minds, creating the ripple effects necessary for change.

These steps have become our formula for approaching complex problems in different areas of the law. Throughout these steps, clinic students work shoulder to shoulder with Civil Rights Clinic faculty, whereby students are exposed to a rigorous, interdisciplinary mode of critiquing and understanding the criminal legal system and are trained to advocate for meaningful remedies that account for racism.

II. IDENTIFYING THE PROBLEM: RACIAL DISPROPORTIONALITY OF YOUTH PROSECUTED AND PUNISHED IN WASHINGTON'S CRIMINAL LEGAL SYSTEM

The first step of the Clinic's advocacy approach is to identify racial disparities in the criminal legal system. The second step is to investigate what empirical literature teaches us in so far as possible explanations for that problem.

Set forth here are the racial disparity findings and empirical literature, in addition to the adultification literature discussed in Part III, that formed the basis for the litigation described in Part V. In these cases, we leveraged quantitative data and empirical literature that specifically helped to explain the race disparity problem at both the "front end"—i.e., transfer,[15] as well as the "back end"—i.e., disposition (if the youth was adjudicated in juvenile court) or sentencing (if the youth was ultimately prosecuted and punished in adult court).

According to Washington's Task Force on Race and the Criminal Justice System,

> there is clear evidence of persistent overrepresentation of youth of color at each stage of the juvenile legal system . . . Although arrest rates have dropped in the last decade, and progress has been made in reducing overall arrest and detention rates, youth of color continue to be disproportionately arrested, referred to juvenile court, transferred to adult court, prosecuted, detained, and incarcerated compared to their white peers. In fact, Black/white race disproportionality has increased, indicating that progress is disproportionately benefiting white youth.[16]

A. DECLINE

Against this backdrop of overrepresentation in the juvenile legal system, Black and Latinx children are disproportionately overrepresented

15. In Washington, transfer or waiver of juvenile jurisdiction is called "decline." *See* WASH. REV. CODE § 13.40.110(1)(a)-(b).

16. JUVENILE RACE REPORT, *supra* note 3, at A-1.

in transfer to adult court.[17] In Washington, there are two primary ways that youth are transferred: discretionary decline[18] and auto decline.[19] An Administrative Office of the Courts (AOC) report analyzing youth convictions and charges from 2009 to 2019 revealed not just that Black and Latinx children are disproportionately overrepresented among youth convictions, discretionary decline, and auto decline cases, but also that this overrepresentation cannot be explained by differences in criminal history or offense type.[20] Even when offense type is accounted for, youth of color are over-represented.[21]

Black youth are the most severely overrepresented in those subject to auto decline.[22] "Black children make up the largest proportion (38%) of juveniles sentenced as adults through the auto decline process," whereas their white counterparts comprise the largest proportion (53%) of juveniles not sentenced as adults when convicted in Washington State.[23] When put into the context of the demographics of all young people in Washington State, "racial disparity measures demonstrate a stark overrepresentation of children of color among juveniles selected for adult sentencing during 2009-2019."[24]

Specifically, the auto decline statute is administered such that Black children are adjudicated as adults at a rate that is 25.8 times higher—2,484% higher—than white children, and Latinx children are adjudicated as adults at a rate that is 4.9 times higher—386% higher—than white children.[25] These disparity ratios persist, even when those who are auto declined are compared to the demographics of all convicted youth.[26] Black youth have a disparity ratio of 6.28, meaning they are adjudicated as adults

17. JUVENILE RACE REPORT, *supra* note 3, at 13.

18. WASH. REV. CODE § 13.40.110(1)(a)-(b). Discretionary decline permits the prosecutor, respondent, or court to request a hearing to decline jurisdiction if the youth in question is at least 15 years old and charged with a serious violent offense, or is 14 years old or younger and charged with first or second-degree murder. A discretionary decline hearing is also permitted if a young person is charged with custodial assault and already serving a sentence to age 21. WASH. REV. CODE § 13.40.110(1)(c). A court conducting a discretionary decline hearing must consider, on the record, the factors articulated in *Kent v. United States*, 383 U.S. 541 (1966), discussed *infra* notes 93-94 and accompanying text.

19. WASH. REV. CODE § 13.04.030(1)(e)(v). Auto decline exempts the juvenile court of exclusive original jurisdiction when the young person is 16 or 17 years old at the time of the alleged offense, and the offense is a serious violent offense, a violent offense where the young person has a significant criminal history (as defined in detail in the statute), or first-degree rape of a child. *Id.*

20. HEATHER D. EVANS, PH.D. & STEVEN HERBERT, PH.D., ADMIN. OFF. OF THE CTS., JUVENILES SENTENCED AS ADULTS IN WASHINGTON STATE, 2009-2019 at 4 (June 14, 2021) [hereinafter JUVENILE SENTENCING REPORT].

21. *Id.* at 26.

22. *Id.* at 19.

23. *Id.*

24. *Id.* at 19-20.

25. *Id.* at 20.

26. *Id.* at 21.

at a rate that is more than 6 times higher than their white counterparts.[27] These data also demonstrate severe disproportionality index scores,[28] where scores equal to 1.0 indicate statistically proportional representation, and scores above 1.0 indicate over-representation.[29] In auto decline, Black youth have a disproportionality index of 9.3.[30]

In addition to the descriptive statistics contained in the AOC report, the researchers conducted bivariate statistical tests to examine the effect of prior convictions on auto decline cases, as these tests "reliably assess significant relationships between two variables, indicating the presence and direction of impact of one factor on another."[31] The researchers concluded that the distribution of prior criminal history across racial and ethnic groups provided no evidence that criminal history is a primary driving factor.[32]

When it comes to discretionary decline, both Black and Latinx youth are severely impacted. For Latinx youth, their race is highly predictive of decline, as they are disproportionately over-represented in the discretionary decline process, even when the analysis accounts for criminal history and type of offense.[33] From 2009-2019, the racial composition of youth convicted as adults remained relatively stable.[34] Approximately 52% of youth defendants were white, 28% Latinx, and 14% Black.[35] Latinx youth represent 42.5% of all youth sentenced as adults through discretionary decline, and are "selected for treatment as adults at a rate 4.5 times the rate of [w]hite children";[36] expressed another way, the rate at which Latinx youth are subjected to discretionary decline is 350% higher than the rate of white youth.[37] Black youth represent 22.8% of all youth sentenced as adults through discretionary decline, making them selected for treatment as adults at a rate that is 11.4 times the rate of white youth.[38]

Criminal history is not a statistically significant factor in prosecutors' decisions to seek decline.[39] Prior convictions in Superior Court explain less than one percent of variance (0.07%) of decline status, and prior convictions in Municipal Court explain 0.01% of the variance of decline

27. JUVENILE SENTENCING REPORT, *supra* note 20, at tbl. 10.
28. *See id.* at 6 (explaining disproportionality index and disparity ratios).
29. *Id.* at 21.
30. *Id.* at 21 fig. 4, 41 tbl. A8.
31. *Id.* at 23.
32. *Id.* at 23 tbl. 12, 32 ("[D]ifferences in criminal histories explain less than one percent of the variance in . . . auto [decline cases].")
33. *Id.* at 32.
34. *Id.* at 19-20.
35. *Id.* at 19 tbl. 9.
36. *Id.* at 20; *id.* at 22, 41 tbl. A6 (disparity ratio of 4.5, using the racial composition of youth residing in Washington State as the population comparison).
37. *Id.* at 19 tbl. 9, 20, 41 tbl. A6.
38. *Id.* at 19 tbl. 9, 20, 41 tbl. A6 (disparity ratio of 11.4, when using the racial composition of youth residing in Washington State as the population comparison).
39. *Id.* at 23.

status.[40] According to the data, criminal history is a statistically insignificant factor in determining whether a youth will be subject to decline.[41] The authors found "no evidence that criminal history is a primary driving factor in prosecutors' decisions to initiate a discretionary decline hearing."[42]

Nor does offense type significantly influence whether the prosecution will seek to prosecute that youth in adult court.[43] For all offense types, Latinx youth have disproportionality index scores far greater than 1.0.[44] This means that Latinx youth are disproportionately over-represented when compared to youth convicted of the same offenses who were prosecuted in juvenile court.[45] And for five out of the seven offense types, Black youth have disproportionality index scores greater than 1.0, meaning that Black youth are disproportionately over-represented when compared to youth convicted of the same offenses who were prosecuted in juvenile court.[46] For example, Black youth convicted of homicide were subject to adult prosecution through discretionary decline at a rate 4.9 times higher than white youth convicted of the same offense.[47]

Similarly, the disparity ratios[48] for Black and Latinx youth based on offense type—comparing these groups to white youth convicted of the same offense type—are stark.[49] For felony homicide, Latinx youth were prosecuted as adults at a rate 4 times the rate of white youth convicted of the same crime, and Black youth at a rate almost 5 times the rate of white youth convicted of the same crime.[50]

Youth of color are, to an extraordinary degree, disproportionately over-represented among youth adjudicated as adults through discretionary decline, even when accounting for the type of offense and criminal

40. JUVENILE SENTENCING REPORT, *supra* note 20, at 23. A 0% variance would signify prior convictions in Superior Court have no effect on whether a youth is declined.

41. *Id.* at 32.

42. *Id.* at 23.

43. *Id.* at 25 fig. 5.

44. *Id.* at 25. A disproportionality index score of 1.0 would signify perfect representation compared to the overall juvenile population in Washington.

45. *Id.*

46. *Id.* at 25, 25 fig. 5.

47. *Id.*at 26.

48. A disparity ratio indicates how the likelihood or "risk" of selection among one racial/ethnic group compares to the risk of selection for a comparison group.

49. *Id.* at 25-26.

50. *Id.* at 25-26, 25 fig. 5., 30. A King County specific analysis from the same data set supports the Decline Report's finding that race is a relevant factor in decline; however, the King County data sample was not large enough to disaggregate between automatic and discretionary decline. In King County, there is a strong, statistically significant association between race and decline status among convicted youth, indicating youth of color are not randomly over-represented in this sample. *See* HEATHER D. EVANS, PH.D., ADMIN. OFF. OF THE CTS., JUVENILES SENTENCED AS ADULTS IN WASHINGTON STATE, 2009-2019 PART 2: KING COUNTY at 21 (Sept. 15, 2021).

history.[51] Drs. Evans and Herbert conclude "in the Washington juvenile justice system: race matters."[52] The implication for youth of color is that, solely based on their race, the criminal legal system is much more likely to adjudicate and sentence them according to adult standards than their white counterparts with similar criminal histories for similar offenses.[53]

B. SENTENCING

Researchers have not yet produced a similar statistical analysis of Washington sentencing data to examine racial bias in sentencing of youth. However, ample empirical evidence supports the proposition that race matters in sentencing, just as it does in decline and all other points in the criminal legal process. Across Washington, Black youth are nearly three times as likely as white youth to be arrested.[54] "Youth of color are less likely to receive diversion relative to white youth,"[55] and Black youth are convicted 4.8 times the rate of white children.[56] As of 2017, the incarceration rate for white youth was 73 per 100,000 versus a rate of 386 per 100,000 for Black youth–a Black-white disparity of 5.29.[57]

Other empirical literature (not specific to Washington state) also suggests that race matters in sentencing. In 2012, researchers established the "the first direct empirical evidence that a racial priming manipulation can affect the degree to which juveniles (in general) are afforded the established protections associated with their age status in the context of a severe crime."[58] The study surveyed 735 white Americans divided into two groups, giving them a factual scenario involving a 14-year-old defendant with prior juvenile convictions who was convicted of rape and was being considered for a life sentence without the possibility of parole.[59] In one group, a male defendant was described as white; in the other, Black.[60] Those in the group with the Black defendant expressed significantly more support for life without parole sentences for juveniles, and perceived juvenile defendants overall as more similar to adults in blameworthiness.[61] In other words, even though the legal system now accepts the scientific and

51. JUVENILE SENTENCING REPORT, *supra* note 20, at 32.
52. *Id.* at 33.
53. *Id.* at 31-33.
54. JUVENILE RACE REPORT, *supra* note 3, at 12.
55. *Id.* at 13 (citing WASH. STATE DEP'T OF CHILD., YOUTH & FAMS., WASHINGTON STATE JUVENILE JUSTICE REPORT TO THE GOVERNOR & STATE LEGISLATURE 11, Ex. 10 (Aug. 2020), https://www.dcyf.wa.gov/sites/default/files/pdf/2020WA-PCJJgov.pdf [https://perma.cc/S9RW-Q4YN]).
56. *Id.*
57. *Id.* at A-8.
58. Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLOS ONE at 4 (2012).
59. *Id.* at 2.
60. *Id.*
61. *Id.* at 3 fig. 1.

legal difference between youth and adult culpability, that bedrock principle was undermined by a single racial prime.[62]

III. REVIEWING THE LITERATURE: GERMINAL EMPIRICAL LITERATURE ON ADULTIFICATION

Two germinal studies on adultification—one concerning Black boys, and the other Black girls—provided the empirical foundation to explain the racial disparities observed in the cases discussed below.

A. *THE ESSENCE OF INNOCENCE*

In a study on adultification of Black youth, Phillip Atiba Goff and colleagues demonstrated that Black youth are perceived to be more adult, less innocent, more culpable, and less in need of protection than their white counterparts.[63] While there was robust empirical literature establishing that racial bias was partially responsible for the harsh treatment of Black adults, no study had linked racial prejudice to the treatment of individuals as being older than their chronological age.[64] The researchers hypothesized that because childhood affords protections against harsh treatment, then dehumanized children would be treated with adult severity.[65] Unlike prejudice, which is a "broad intergroup attitude[,] . . . dehumanization is the route to moral exclusion, the denial of basic human protections to a group or group member."[66]

In four studies using laboratory, field, and a combination of laboratory and field methods, researchers found that Black children, 10 years of age and older, were consistently perceived as less innocent than their white peers.[67] Participants also deemed Black boys more culpable for their actions than any other racial group, especially when those targets were accused of serious crimes.[68] Black boy felony suspects were seen as approximately 4.5 years older than their actual age; boys were therefore misperceived as legal adults at roughly the age of 13.5.[69] And when primed with dehumanizing associations for Black people, the participants' belief in the essential distinction between Black children and Black adults was reduced, causing

62. Rattan et al., *supra* note 58, at 4; *see also* Kristen Hennings, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 420-22 (2013) (studies have found evidence of bias in perceptions of culpability, risk of reoffending, and deserved punishment of youth when the decision-maker explicitly knew the race of the offender).

63. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 529, 539-40 (2014).

64. *Id.* at 526.

65. *Id.* at 527.

66. *Id.* at 527.

67. *Id.* at 529.

68. *Id.* at 532.

69. *Id.* at 532.

a decreased perception of innocence.[70] In policing contexts, this dehumanization is related to Black children's disproportionate experiences of violent encounters with law enforcement.[71] Finally, contexts that "provoke[] consideration of a child as an adult," such as prosecution in adult court, or being punished for committing crimes, are more likely to be "particularly susceptible to the effects of dehumanization."[72]

The implications of this study are enormous—they demonstrate that "perceptions of the essential nature of children can be moderated by race."[73] "Black boys can be misperceived as older than they actually are and prematurely perceived as responsible for their actions during a developmental period where their peers receive the beneficial assumption of childlike innocence."[74]

B. *GIRLHOOD INTERRUPTED*

In a groundbreaking study by the Georgetown Law Center on Poverty and Inequality, Rebecca Epstein, Jamila Blake, and Thalia González provided intersectional data on the adultification of Black girls, building on the research of Dr. Goff and colleagues.[75] The research presented in *Girlhood Interrupted* demonstrated that Black girls are perceived as less innocent and more adult-like than their white peers.[76] For Black girls, gender stereotypes compound the harmful effects of adultification bias. Adults see Black girls as needing less nurturing, less support, and less protection than other groups.[77] Simultaneously, they see Black girls as being far more mature than their age, knowing more about sex and adult topics, and being overly independent.[78] This combination can lead to a view that Black girls have greater culpability for their actions and deserve greater punishments to match.[79] In both the education system and the criminal legal system, adultification likely contributes to the disproportionate punishment of Black girls.[80]

These inaccurate perceptions of Black girls lead to the disciplinary discrepancies between Black girls and their peers. Data from the U.S. Department of Education's Office of Civil Rights, Civil Rights Data

70. Goff et al., *supra* note 63, at 540.
71. *Id.* at 536.
72. *Id.* at 528.
73. *Id.* at 540.
74. *Id.*
75. REBECCA EPSTEIN ET AL., GEO. L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 1 (2017), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf [https://perma.cc/E8C7-E3ND].
76. *Id.* at 2, 4, 8.
77. *Id.* at 1, 8.
78. *Id.*
79. *Id.* at 9-12.
80. *Id.* at 1, 8-12.

Collection shows that despite being only 15.6% of the enrolled population of K-12 public schools across the country in 2013-14, Black girls constituted 36.6% of in-school suspensions, 41.6% of single suspensions, and 52% of multiple suspensions.[81] Analysis of the same data shows that again, despite being only 15.6% of the enrolled population of K-12 schools in 2013-14, Black girls constituted 28.2% of all girls referred to law enforcement, and 37.3% of all girls arrested.[82] Black girls were more likely to experience these disciplinary measures for subjective reasons, such as disobedience and detrimental behavior, hinging on the subjective judgment of school officials.[83]

Adultification bias similarly impacts the way that Black girls are treated in the juvenile and adult criminal legal systems.[84] Police and security officers' actions towards Black girls have already proven to be excessive and far beyond what other children are subjected to in practice. In Seattle, a 7-year-old Black girl wandered out of class and into the hall of her building during the school day.[85] She was met by a security guard who put his knee into her back and his arm across her neck until she said "I can't breathe."[86] When she dropped to the floor, he then dragged her by the leg and put his knee into her back.[87]

After initial contact with law enforcement, Black girls are three times more likely to be referred to juvenile court than cases involving their white and Latina peers.[88] Once referred, more than half of these cases were

81. EPSTEIN ET AL., *supra* note 75, at 9 (citing NAT'L WOMEN'S L. CTR., LET HER LEARN: STOPPING SCHOOL PUSH OUT FOR GIRLS OF COLOR at 15 fig. 6 (2017), https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_GirlsofColor.pdf [https://perma.cc/3WX4-YD5Q]); *see also* KIMBERLÉ WILLIAMS CRENSHAW ET AL., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED 18-24 (2015), http://schottfoundation.org/resources/black-girls-matter-pushed-out-overpoliced-and-underprotected/ [https://perma.cc/EV4V-645E] (analyzing disparities in discipline, suspension and expulsion rates in New York and Boston public schools from 2011-12 school year).

82. *Id.* (citing NAT'L WOMEN'S L. CTR., *supra* note 81, at 13 fig. 5, 15 fig. 6).

83. *Id.* at 10 (citing Edward W. Morris & Brea L. Perry, *Girls Behaving Badly? Race, Gender, & Subjective Evaluation in the Discipline of African American Girls*, 90 SOC. ED. 127 (2017)) (discipline data from Kentucky).

84. *See generally* Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1505-06 (2012) (discretion in the criminal legal system exercised without sensitivity to implicit racial bias dictates Black girls' futures).

85. Ann Dorfield, *'I can't breathe': A 2nd-grader. A security guard. A Seattle school.*, KUOW-NPR (June 25, 2020, 12:26 PM), https://www.kuow.org/stories/i-can-t-breathe-a-2nd-grader-a-security-guard-a-seattle-school?fbclid=IwAR2KGoZtN7rA-Opjot3s9PSSkO4vhFjVDjpJtqEomUYikgEznBJ-IxNCyYw [https://perma.cc/W6DR-69SL].

86. *Id.*

87. *Id.*

88. SAMANTHA EHRMANN ET AL., U.S. DEP'T OF JUST., JUVENILE JUSTICE STATISTICS: GIRLS IN THE JUVENILE JUSTICE SYSTEM 13 (Apr. 2019),

petitioned for formal processing, compared with approximately 44% of cases involving their white or Latina peers.[89] Girls of color make up a disproportionate percentage of the female juvenile justice population.[90] And Black girls receive more severe dispositions than their white peers after controlling for the seriousness of the offense, prior record, and age.[91]

The empirical literature underscores the need for criminal legal system actors to account for the operation of race at all points in the process. While larger reforms to keep youth out of the criminal legal system to begin with are of utmost importance, it is also important that we construct race-conscious rules for those already entangled in the system.

IV. DEVELOPING A DOCTRINAL INTERVENTION

The legal tests in Washington for declination of youth from juvenile court, as well as punishment of youth at both juvenile and adult court, invite adultification bias. The structure and language of these tests require courts to assess qualities such as culpability, maturity, and sophistication—all of which invite subjective judgment about personal characteristics. Adultification seemed a likely explanation for the observed disparities, as the literature demonstrated how dehumanization can negate the constitutional protections afforded to children, leaving race to operate as an aggravator at both decline and sentencing.

A. DECLINE

Auto decline, as the name suggests, does not involve any judicial decision-making—the decline of jurisdiction results strictly from the age of the young person and the crime charged.[92]A discretionary decline hearing in Washington requires the juvenile court to consider the eight factors from *Kent v. United States*,[93] including:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
>
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251486.pdf [https://perma.cc/S8XB-AMBD].

89. EHRMANN ET AL., *supra* note 88, at p. 13.

90. Kim Taylor-Thompson, *Girl Talk-Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137, 1138 (2006).

91. Lori D. Moore & Irene Padavic, *Racial and Ethnic Disparities in Girls' Sentencing in the Juvenile Justice System*, 5 FEMINIST CRIMINOLOGY 263, 269, 279-80 (2010) (analyzing comprehensive data from FY 2006 Florida Dep't of Juvenile Justice).

92. WASH. REV. CODE § 13.04.030(1)(e)(v) (West 2022).

93. Kent v. United States, 383 U.S. 541, 566-67 (1966).

> 3. Whether the alleged offense was against persons or against property . . . .
>
> 4. The prosecutive merit of the complaint . . . .
>
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults . . . .
>
> 6. The sophistication and maturity of the juvenile as determined by consideration of his [or her] home, environmental situation, emotional attitude and pattern of living.
>
> 7. The record and previous history of the juvenile . . . .
>
> 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services and facilities currently available to the Juvenile Court.[94]

Many of these factors ask courts to consider crime-related characteristics that invite operation of adultification bias, or child-related characteristics that do not account for the systemic racism of the criminal legal system. For instance, *Kent* factor 2 requires courts to consider "whether the alleged offense was committed in an aggressive, violent, premediated, or willful manner."[95] The adultification literature demonstrates that Black children are perceived as older, less innocent, and more culpable than any other racial group,[96] which may lead to courts viewing conduct by a Black child as *more* aggressive, violent, or willful than that of a white counterpart.

Under *Kent* factor 7, courts are instructed to consider the "record and previous history of the juvenile," including contact with law enforcement agencies.[97] This factor, however, does not account for disproportionate law enforcement actions against Black children at every step of the juvenile legal system.[98] Considering a Black child's history in the justice system, without recognizing that the system operates in a racially disparate manner, tips the scale towards decline before the child ever steps into court.

Finally, under factor 6, courts consider "the sophistication and maturity of the juvenile as determined by consideration of his home, environmental

94. *Kent*, 383 U.S. at 566-67; *see also* State v. Williams, 453 P.2d 418, 419-20 (1969) (adopting *Kent* factors); State v. M.A., 23 P.3d 508, 511-13 (Wash. App. Ct. 2001) (stating a trial court abuses its discretion when it does not give the eight *Kent* factors "appropriate consideration").

95. *Kent*, 383 U.S. at 567.

96. Goff et al., *supra* note 63, at 539-40.

97. *Kent*, 383 U.S. at 567; *see also* State v. Furman, 858 P.2d 1092 (Wash. 1993).

98. *See generally* JUVENILE RACE REPORT, *supra* note 3, at 1-3, 12-14, Appx A.

situation, emotional attitude and pattern of living."[99] But *Kent* was decided long before advances in neuroscience demonstrated that all children are biologically different than adults in ways that directly impact behavior and decision-making—no matter their specific life circumstances.[100] Since then, we have also come to understand that a child's individualized circumstances, such as trauma and family situations, may further impact development and therefore support retaining jurisdiction of a child in juvenile court.[101]

Courts should decouple consideration of a child's "sophistication and maturity" from the "consideration of [the] home, environmental situation, emotional attitude, and pattern of living" because these considerations assess different aspects of a child's circumstances. Decoupling allows for consideration of juvenile brain science, and separately allows for consideration of the home life and other living circumstances.

Like *Kent* factors 2 and 7, the consideration of "sophistication and maturity" in factor 6 also creates the potential for adultification bias to infect the decline decision, both because Black boys are perceived as less innocent than white children,[102] and because they are consistently perceived as chronologically older than their white peers.[103] Further, when properly understood through the lens of brain science, "sophistication and maturity" are better understood as the "immaturity, impetuosity, and failure to appreciate risks and consequences" that courts must consider when sentencing a child.[104] Ensuring that *Kent* factor 6 accounts for brain science allows courts to "better incorporate modern understanding of youth, their behaviors, and the best ways to effectively facilitate their development into healthy, prosocial adults."[105] With this developmentally appropriate lens, courts are directed to consider a characteristic that all children possess—immaturity and impetuosity[106]—rather than characteristics they innately lack—maturity and sophistication.[107]

99. *Kent*, 383 U.S. at 567.

100. Amanda NeMoyer, *Kent Revisited: Aligning Judicial Waiver Criteria with More Than Fifty Years of Social Science Research*, 42 VT. L. REV. 441, 442-47 (2018) (explaining outdated assumptions about children on which juvenile courts were originally based).

101. *Id*. at 472-73.

102. Goff et al., *supra* note 63, at 529.

103. *Id*. at 532.

104. State v. Houston-Sconiers, 391 P.3d 409, 421 (Wash. 2017) (quoting Miller v. Alabama, 567 U.S. 460, 477 (2012)).

105. NeMoyer, *supra* note 100, at 456; *See* Frank W. Putnam, *The Impact of Trauma on Child Development*, 57 JUV. & FAM. CT. J. 1, 7, 11 (2006) (history of trauma has long-term negative impacts on youth's neurological and psychosocial development).

106. *See* Roper v. Simmons, 543 U.S. 551, 570 (2005).

107. When considering a child's "home, environmental situation, emotional attitude and pattern of living," *Kent*, 383 U.S. at 567, courts should also consider a child's history of trauma. This approach (1) recognizes that trauma further impedes adolescent brain development; (2) assesses whether the young person's trauma may be better addressed in

B. SENTENCING IN ADULT COURT

The legal standards for punishment of young people in juvenile and adult court also invite operation of adultification bias. In *State v. Houston-Sconiers*, a landmark decision by the Washington Supreme Court, the court held that a child, when tried as an adult in Washington, has a right to have the mitigating qualities of their youth considered by a court that has absolute discretion to impose a mitigated sentence and disregard both the standard range as well as any mandatory enhancements.[108] The mitigating qualities of youth include:

> age and its 'hallmark features,' such as the juvenile's 'immaturity, impetuosity, and failure to appreciate risks and consequences.' It

juvenile court; and (3) reduces the likelihood that a child's behavior will be understood as showing a lack of remorse, because trauma causes emotional numbing.

Considering a child's environment and family circumstances to explicitly include neglect and trauma ensures the decline analysis remains rooted in the impacts of trauma rather than blaming the child for circumstances outside of his control. *See* Miller v. Alabama, 567 U.S. at 477 (sentencer must consider "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional" to prevent imposition of same sentence on a "child from a stable household and the child from a chaotic and abusive one"). Courts must address a child's history of trauma because of "[t]he long-term negative impacts of childhood trauma on neurological and psychosocial development." NeMoyer, *supra* note 100, at 472 (citing Putnam, *supra* note 105, at 1, 7, 11).

Consideration of a child's history of neglect or abuse also encourages courts to consider whether the child could be better treated in the juvenile system because those with such history "would likely be further traumatized by involvement in the criminal system and would likely benefit from specialized, trauma-informed services provided in the juvenile system." NeMoyer, *supra* note 100, at 469. Because justice-involved youth have high levels of experience with these issues, *id.* at 472, it is particularly important that judges be required to explore trauma history as part of their consideration of factor six. California, Illinois, and New Jersey legislatures have adopted specific transfer criterion dedicated to a youth's history of neglect or abuse for discretionary transfers. *See* CAL. WELF. & INST. CODE § 707(a)(2) (2017); 705 ILL. COMP. STAT. 405/5-805 (2017); N.J. STAT. ANN. § 2A:4A-26.1(3) (2017).

Finally, consideration of a child's environment and family circumstances helps prevent an assumption that children lack empathy and remorse if they fail to outwardly express those emotions. NeMoyer, *supra* note 100, at 468 (citing Patricia K. Kerig & Stephen P. Becker, *Posttraumatic Stress Symptoms Are Associated with the Frequency and Severity of Delinquency Among Detained Boys*, 40 J. CHILD & ADOLESCENT PSYCHOL. 765, 768-69 (2011)) ("[R]esearch investigating the effects of trauma on youth has consistently revealed a link between trauma exposure and delinquency . . . ."). "[Trauma] often include[s] emotional numbing, which may develop to protect the child . . . [and] avoid[] the painful emotions associated with past trauma; however, juvenile justice personnel may view this emotionlessness as a *lack of empathy or remorse or detachment* when evaluating a youth's demeanor." *Id.* at 468-469 (citing Patricia K. Kerig & Stephen P. Becker, *From Internalizing to Externalizing: Theoretical Models of the Processes Linking PTSD to Juvenile Delinquency*, *in* POSTTRAUMATIC STRESS DISORDER (PTSD): CAUSES, SYMPTOMS, AND TREATMENT 33, 37, 43, 58 (Sylvia J. Egan ed., 2010)). With this lens, courts can address trauma exposure and how it might contribute to delinquency rather than focusing on a perceived lack of empathy.

108. *Houston-Sconiers*, 391 P.3d 409.

> must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and 'the way familial and peer pressures may have affected him [or her].' And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.[109]

A few years later, the Washington Supreme Court held *Houston-Sconiers* was a significant change in the law and applied retroactively.[110] For those individuals who sought resentencing before the court severely retrenched this right,[111] part of the challenge was the established prejudice test: demonstrating by a preponderance that the original sentencing outcome would have been different, had the court considered the mitigating

109. *Houston-Sconiers*, 391 P.3d at 421 (internal citations omitted) (quoting *Miller v. Alabama*, 567 U.S. at 477).

110. *In Re* Pers. Restraint of Domingo-Cornelio, 474 P.3d 524, 524, 531 (2020) (holding that *Houston-Sconiers* applies retroactively, and that "a petitioner establishes actual and substantial prejudice when a sentencing court fails to consider mitigating factors relating to the youthfulness of a juvenile tried as an adult and/or does not appreciate its discretion to impose any exceptional sentence in light of that consideration"); *In re* Pers. Restraint of Ali, 474 P.3d 507, 519 (2020) (a petitioner establishes prejudice if original sentencing court expressed desire to impose an exceptional sentence down but believes the discretion to do so was unavailable).

111. Under Washington state's collateral attack rules, a petitioner seeking relief from the operation of a final judgment and sentence must show, in addition to the substantive criteria set forth in rule 16.4(c) of Washington State Court Rules of Appellate Procedure and sections 10.73.090 and 10.73.100 of the Washington Revised Code, that other remedies are inadequate. WASH. RAP R. 16.4(d). In 2023, the court limited the availability of collateral relief under *Domingo-Cornelio* and *Ali*, reasoning that the juvenile parole statute, section 9.94A.730 of the Washington Revised Code, allowed those individuals with sentences over 20 years to petition for parole, and that this possibility of parole provided an adequate remedy. *In re* Pers. Restraint of Carrasco, 525 P.3d 196, 197 (2023) (RCW 9.94A.730 provides an adequate remedy for young person sentenced to 93 years where trial court imposed the consideration without consideration of the mitigating qualities of youth); *In re* Pers. Restraint of Hinton, 525 P.3d 156, 157-58 (2023) (same, for sentence of 37 years imposed without consideration of mitigating qualities of youth); WASH. REV. CODE § 9.94A.730 (allowing children who were convicted and sentenced in adult court for crimes committed under the age of 18 to petition the ISRB for release beginning at 20 years). The court did not address the larger question of whether the availability of parole cures an unconstitutional sentence, instead holding that while the substantive mandate of *Houston-Sconiers*—that the Eighth Amendment prohibits adult range sentences for youth who have diminished culpability—is retroactive, the procedural mandates that require consideration of the mitigating qualities of youth and grant discretion to impose sentences below the standard range are not independently retroactive on collateral review. *See generally Carrasco*, 525 P.3d 196; *Hinton*, 525 P.3d 156. It remains an open question whether those challenging sentences of 20 years or less, and who therefore have no opportunity for early release, will be able to obtain resentencing. It is also unclear how courts will resolve petitioners' claims that a violation of the substantive, retroactive rule of *Houston-Sconiers* has occurred without reference to the procedural, nonretroactive rules that are central to obtaining proportionate sentencing outcomes.

qualities of youth.[112] As courts began to implement *Houston-Sconiers* retroactively, which turned on the question of prejudice (retroactively, under *Domingo-Cornelio* and *Ali*) under the state collateral challenge procedures,[113] concern mounted that youth of color would have been sentenced more harshly in the first instance, making the prejudice inquiry more difficult. And the empirical literature discussed in Parts II and III suggests that white children more likely will benefit from the exercise of discretion under *Houston-Sconiers*, whereas Black children will not. Adultification bias, as well as other implicit racial bias, likely influences how harshly judges punish young people, and influences their consideration of the mitigating qualities of youth under *Houston-Sconiers*.

C. DISPOSITION IN JUVENILE COURT

Finally, the juvenile disposition standards, particularly in the case of manifest injustice dispositions (the exceptional sentencing regime in juvenile court), also invite operation of adultification bias. The statutory mitigating and aggravating factors that form the basis for manifest injustice dispositions under section 13.40.150 of Washington's Revised Code invite subjective judgments that can be influenced by adultification bias. For example, although a youth's lack of contemplation that their conduct "would cause or threaten serious bodily injury" is a mitigating factor,[114] if judges do not control for adultification bias, judges could subjectively conclude that a young person of color had an appropriate amount of time or experience to "contemplate" their conduct, given that they are perceived to be older and more culpable than their white counterparts.

Additionally, some of the aggravating factors require judges to draw subjective conclusions about a young person's internal characteristics that could lead to harsher punishments for youth of color due to adultification bias: for example, whether the youth committed the offense in an especially "heinous, cruel, or depraved manner."[115] Moreover, the aggravating factors that are based on criminal history, allowing judges to consider "other complaints which have resulted in diversion or a finding or a plea of guilty,"[116] and whether the standard range disposition "is clearly too lenient considering the juvenile's prior adjudications,"[117] both leave room for enhanced punishment on potentially biased decisions of others.

112. To obtain relief on state collateral review, the petitioner must also show actual and substantial prejudice resulting from the alleged constitutional errors by a preponderance of the evidence. *In re* Pers. Restraint of Cook, 792 P.2d 506 (1990); *see also supra* note 111 (discussing *Domingo-Cornelio* and *Ali*).

113. WASH. RAP R. 16.4; WASH. REV. CODE § 10.73.100.

114. WASH. REV. CODE § 13.40.150(3)(h)(i).

115. *Id.* § 13.40.150(3)(i)(ii).

116. *Id.* § 13.40.150(3)(i)(vii).

117. *Id.* § 13.40.150(3)(i)(viii).

Due to adultification bias, Black children—and possibly other children of color—may be deprived of the considerations of youth in both decline and sentencing,[118] leading them to be overrepresented and more harshly punished.

V. CONVERTING THEORY INTO DOCTRINE: CASE EXAMPLES

The following case examples demonstrate the application of the interventions discussed in Part IV, and introduce related interventions not already discussed that arose out of the specific issues of each case.

A. *IN RE PERSONAL RESTRAINT OF ASARIA MILLER* (ADULTIFICATION IN YOUTH SENTENCED IN ADULT COURT)

In 2012, at the age of 16, Asaria Miller, was recruited by her father to kill his ex-girlfriend.[119] Asaria, who is Black, and her boyfriend, carried out the act.[120] Asaria was initially charged with first-degree burglary with a firearm enhancement, conspiracy to commit first-degree murder, and first-degree murder with a firearm enhancement.[121] In exchange for her guilty plea, the State amended the charges and recommended a midrange standard sentence for murder in the first-degree.[122] Even though the parties jointly recommended a sentence of 300 months plus 60 months for the firearm enhancement, the court imposed 330 months, with 60 months for the firearm enhancement.[123] At no time during her original sentencing did the court consider the mitigating qualities of her youth.[124]

In her collateral attack filed in the Court of Appeal, Asaria argued that she was entitled to a new sentencing hearing under *Domingo-Cornelio*, and that instead of applying the usual "actual and substantial" prejudice test to determine her entitlement to relief, that a rule of *per se* prejudice was appropriate to protect against the real risk that certain groups of youth, particularly Black girls, receive disparate treatment during sentencing.[125]

In Asaria's case, the Civil Rights Clinic filed an amicus brief at the Court of Appeals supporting the request for a *per se* prejudice standard on collateral review, that would have automatically entitled a young person to resentencing, rather than have to show by a preponderance that a different

118. At sentencing in adult court, consideration of mitigating qualities of youth is required under *State v. Houston-Sconiers,* 391 P.3d 409, 420 (Wash. 2017). But the adultification literature, see *supra* Part II and Part III, suggests that even in juvenile court, Black youth are dehumanized—deprived of the being perceived as a child.
119. *In re* Pers. Restraint of Miller, 505 P.3d 585, 586 (Wash. App. Ct. 2022).
120. *Miller*, 505 P.3d at 586.
121. *Id.*
122. *Id.*
123. *Id.* at 586-87.
124. *Id.* at 588.
125. *Id.* at 589

outcome had youth been considered.[126] This rule would account for the very real possibility that the original sentence was impacted by adultification bias, as indicated by statements in the sentencing transcript, coupled with the judge's decision to add 30 months beyond the parties' agreed recommendation.[127]

The amicus brief started by educating the court about the germinal adultification research summarized above, arguing that being deprived of the benefit of being treated as children—as required under *Houston-Sconiers* and made retroactive under *Domingo-Cornelio*—"leaves a vacuum within which race can operate as an aggravator, leading to harsher punishment [of Black girls] than their white counterparts."[128] The brief also explained that while initial adultification scholarship mainly focused on Black boys, Black girls also suffer from "adultification."[129] Relying on *Girlhood Interrupted* and the other empirical literature discussed above, the brief explained how the mapping of harmful stereotypes of Black women onto Black girls compounds the adultification bias observed in Dr. Goff's study, both of which negate the constitutional protections afforded to children.[130]

Adultification bias was likely operating at Asaria's sentencing hearing. The court refused to sentence Asaria according to the joint recommendation, instead adding 30 months, stating the sentence should be "'beyond the midpoint of the range, based on the culpability of her conduct . . . [because] when she said that, yes, it was rather matter of fact, and yes, there may have even been a hint of pride in that.'"[131] This comment calls into question the operation of bias in the court's sentencing decision. The court also told Asaria that "'most young people's lives aren't set in stone by the time they are 17 years old. Yours is.'"[132] The court not only failed to consider the mitigating factors of Asaria's youth, "but it disregarded her age as not worthy of the same benefits 'most young people' would be afforded."[133]

The brief also argued that by subjecting her resentencing request on collateral review to the actual and substantial prejudice standard (the preponderance standard), reviewing courts ignore the operation of race and

126. Brief of Fred T. Korematsu Ctr. for L. and Equal. as Amicus Curiae in Support of Petitioner at 2, 11-12, *Miller*, 505 P.3d at 589 (No. 52119-9-II) [hereinafter *Miller* Amicus Brief].
127. *Id*. at 11, 14.
128. *Miller* Amicus Brief, *supra* note 126, at 1.
129. *Id*. at 3.
130. *Id.*
131. *Id*. at 11 (quoting Supp. Br. of the Petitioner at 20, 22, *Miller*, 505 P.3d 585 (No. 52119-9-II)).
132. *Id*. (quoting Supp. Br. of the Petitioner, *supra* note 131, at 21.
133. *Id*. at 11-12.

remain complicit in devaluing Black lives.[134] When requiring a petitioner to show actual and substantial prejudice, the court endorses an implicit judgment that the State's interest in finality is a matter of far more importance than correcting the constitutional error.[135] "Gatekeeping tests like the actual and substantial prejudice test—particularly in post-conviction settings where a significant change in the law has been given retroactive effect—need to be carefully scrutinized to ensure that they do not perpetuate the prior product of racial bias."[136]

As a result of the advocacy on adultification bias, the court's opinion stated, "We agree that adultification may detrimentally affect children of color at criminal sentencings."[137] While the court declined to adopt the proposed "*per se*" prejudice standard advanced by both merits and amicus counsel, which would be applicable to post-conviction claims seeking resentencing to account for youth, the court more broadly directed lower courts to consider adultification bias whenever sentencing a young person of color: "in the face of this convincing information about disparities in sentencing, trial courts should consider, in addition to issues common with all youths . . . , these potential biases when sentencing children of color."[138] Notably, this direction is not limited to post-conviction claims, or to any particular intersection of race and gender—but a broad directive to account for adultification bias *whenever* sentencing a youth of color. After the decision in *Miller* came down, Civil Rights Clinic faculty received numerous emails from public defenders saying that the decision provided them a pathway to argue about the salience of race at sentencing for their clients of color.

On remand from the Court of Appeals for resentencing, the superior court sentenced Asaria to 168 months or 14 years, down from the original 32.5 year sentence, with the 60 month firearm enhancement run concurrently to the base sentence.[139]

B. *IN RE PERSONAL RESTRAINT OF KEONTE AMIR SMITH* (ADULTIFICATION IN DECLINE & SENTENCING)

Keonte Amir Smith, a Black youth, was prosecuted for second-degree human trafficking, promoting commercial sexual abuse of a minor, and second-degree unlawful possession of a firearm,[140] for actions that occurred

134. *Cf.* Letter from The Supreme Court of the State of Washington, *supra* note 5 ("[W]e must recognize the role we have played in devaluing [B]lack lives."); *Miller* Amicus Brief, *supra* note 126, at 2.
135. *Miller* Amicus Brief, *supra* note 126, at 2.
136. *Id.*
137. *Miller*, 505 P.3d at 589.
138. *Id.* at 590.
139. Felony Judgment and Sentence at 6, *Miller*, 505 P.3d 585 (No. 52119-9-II).
140. State v. Smith, No. 52323-0-II, 2020 WL 5015897, at *1 (Wash. App. Ct. Aug 25, 2020).

when he was just 17 years old.[141] Keonte and his girlfriend, H.H., worked together to engage in prostitution, where Keonte would set up dates and arrange hotel rooms, and H.H. would keep the money.[142] He pleaded guilty to second-degree human trafficking, and the State dropped all other charges after the state successfully moved the juvenile court to decline jurisdiction.[143] The juvenile court considered multiple factors when declining jurisdiction, including that the adult court would be required to consider youth as a mitigating factor under *Houston-Sconiers*.[144]

At sentencing, Keonte provided extensive evidence of the mitigating qualities of youth via a forensic assessment, including that he had an incarcerated father and a mother who struggled with substance abuse, that he had witnessed severe domestic abuse throughout his life, and that he witnessed the tragic drowning of his brother.[145] Keonte struggled with depression and anxiety, and by ninth grade, was using Xanax, marijuana, and alcohol on a daily basis.[146] The forensic psychologist testified that Keonte had high scores on the anxiety and depression scale, that he was a low to moderate risk for future violent behavior, that his level of maturity and sophistication was lower than other youth offenders, making him less capable of understanding the consequences of his behavior.[147] None of this information persuaded the sentencing court to give Keonte a mitigated sentence, which instead sentenced him to a standard adult range of 111 months, followed by 18 months of community custody.[148] Keonte had requested 36 months of incarceration followed by 18 months of community.[149] Had Keonte remained in juvenile court, he would have faced a sentence of 103-129 weeks of confinement.[150]

On direct appeal, the Court of Appeals affirmed his conviction, finding the sentencing court had not abused its discretion in failing to fully and meaningfully consider his youth as a mitigating factor.[151] In a timely collateral attack,[152] Keonte claimed, *inter alia*, that the juvenile court's decision to decline jurisdiction was improperly influenced by Keonte's race, and that he was entitled to a resentencing during which the court

141. *State v. Smith*, 2020 WL 5015897, at *1.
142. *Id.*
143. *Id.* at *1-2.
144. *Id.* at *1.
145. *Id.* at *2.
146. *Id.* at *3.
147. *Id.*
148. *Id.* at *5.
149. *Id.* at *2.
150. *Id.*
151. *Id.* at *1.
152. WASH. REV. CODE § 10.73.090; WASH. REV. CODE § 10.73.100.

would have to fully and meaningfully weigh each mitigating quality of youth.[153]

The Civil Rights Clinic filed an amicus brief before the Court of Appeals supporting the post-conviction claims.[154] It argued that "[w]hen the [United States Supreme] Court stated 'children are different,' it did not say that only white children are different, or that only white children deserve the benefit of the carefully crafted procedures that guard against harsh punishment."[155] The brief warned that "[w]ithout careful attention by jurists to the impact of adultification bias, as well as a record that enables meaningful appellate review, disproportionate outcomes in decline and sentencing will persist."[156] Further, it argued for various interventions to guard against adultification bias, at both the decline and sentencing phases.[157]

First, it asked the court to not only recognize and warn lower courts that adultification bias will likely favor decline, but also instruct trial courts to be mindful of adultification bias in the discretionary decline context,[158] as it did in the sentencing context in *In re Pers. Restraint of Miller*.[159] The brief argued for this instruction because

> [d]ecline requires the high stakes binary choice between treating a child as a child, or as an adult subject to the full panoply of adult punishment. The observed race disproportionality in decline set forth in the amicus brief, not explainable by criminal history and offense type, shows that discretion exercised at decline produces the unacceptable risk that race plays too great a role. These data strongly indicate that if Keonte were white, his chances of remaining in juvenile court would have been much greater.[160]

Second, the brief argued Washington courts should be required to explicitly address disproportionality in discretionary decline, in an effort to counteract adultification bias.[161] Other states, for example Missouri, have instructed judges to consider "racial disparity in certification" when making a transfer determination.[162] This "encourage[s] judges to consider the potential for such [racial] disparities to have negative effects on youth at earlier points of contact . . . and to be mindful of propagating such

153. Personal Restraint Petition at 60-62, *In re* Pers. Restraint of Smith, No. 56917-5-II, 2024 WL 940709 (Wash. App. Ct. Mar. 5, 2024).
154. Brief of Fred T. Korematsu Ctr. for L. and Equal. et al. as Amici Curiae in Support of Petitioner at 2, *Smith*, 2024 WL 940709 [hereinafter *Smith* Amicus Brief].
155. *Id.* at 1 (quoting Miller v. Alabama, 567 U.S. 460, 480 (2012)).
156. *Smith* Amicus Brief, *supra* note 154, at 1.
157. *Id.* at 2.
158. *Id.* at 2-3.
159. *In re* Pers. Restraint of Miller, 505 P.3d 585, 589-90 (Wash. App. Ct. 2022).
160. *Smith* Amicus Brief, *supra* note 154, at 11.
161. *Id.* at 13.
162. *Id.* (quoting MO. ANN. STAT. § 211.071-6(10) (West 2021)).

disproportionality when making their transfer decisions."[163] This instruction, the brief argued, would require "courts to engage directly with race bias in the criminal legal system and, with proper consideration, may lead to a decrease in cases where race plays an improper role in decline decisions."[164] The brief asked the court to hold that lower courts should consider adultification bias when applying *Kent* factor 2 (i.e., "[w]hether the alleged offense was committed in an aggressive, violent, premeditated or willful manner"),[165] and to consider the race disparities in the criminal legal system when assessing a child's history in *Kent* factor 7.[166] Finally, the brief argued that "instructing courts to apply *Kent* factors 2, 6 ["sophistication and maturity"],[167] and 7 through the lens of juvenile brain science would also help mitigate the improper influence of adultification bias, and will harmonize discretionary decline with how neurobiological differences of children are considered at sentencing."[168]

As far as sentencing, the amicus brief asked the court to recognize a presumption of a mitigated sentence under Article I, Section 14 of the Washington Constitution (the Eighth Amendment analogue) when prosecuting children in adult court, to counteract not only adultification bias, but anchor bias[169] as well.[170] This presumption of a mitigated sentence would shift the burden to the state to demonstrate youth was not a factor in the crime.[171]

> While the defense must still present mitigating evidence of youth under *Houston-Sconiers* as relevant to the extent of the downward departure, by presuming a mitigated sentence and placing the burden on the state to prove that a standard range sentence is

163. NeMoyer, *supra* note 100, at 475.
164. *Smith* Amicus Brief, *supra* note 154, at 14 (citing NeMoyer, *supra* note 100, at 474-75).
165. Kent v. United States, 383 U.S. 541, 567 (1966).
166. *Smith* Amicus Brief, *supra* note 154, at 14.
167. *Kent*, 383 U.S. at 567.
168. *Smith* Amicus Brief, *supra* note 154, at 20.
169. The brief also explored anchor bias as a possible explanation for failure to give youth mitigated sentences. *See Smith* Amicus Brief, *supra* note 154, at 24-25. Anchor bias reliance on an initial starting value affects a decisionmaker's ability to objectively consider new information in decision-making. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128 (1974). Anchor bias has been shown to impact judicial decision-making in sentencing. *See, e.g.*, Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1537 (2001). Research shows that many judges adhere to guidelines in discretionary sentencing schemes, suggesting judges may experience anchor bias when imposing sentences. Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 525-26 (2014). In Washington, although sentencing judges have discretion to give mitigated sentences, data suggests they may be anchored to the SRA. *See Smith* Amicus Brief, *supra* note 154, at 25.
170. *Smith* Amicus Brief, *supra* note 154, at 3.
171. *Id.* at 28.

> warranted, the court acknowledges that children are different, and only in rare cases should children receive an adult sentence.[172]

The amicus brief also argued that the court should require written findings at sentencing so appellate courts can determine compliance with the constitutionally required consideration of the mitigating qualities of youth, and to more easily discern whether race played an impermissible role.[173] Though courts are required to consider all of the mitigating qualities of youth,[174] there is no requirement for that consideration to be put into written findings. To date, the Washington Supreme Court has expressed a preference for written findings to ensure consideration of the constitutionally required *Miller* factors and to facilitate appellate review.[175] These same considerations animated *Kent*'s requirement for written findings in the discretionary decline context.[176]

The brief underscored how Keonte's case illustrates that without the requirement of written findings like in the decline context, the constitutional protections against disproportionate punishment may not be fully realized.[177] The record demonstrated only that the first *Houston-Sconiers* factor had been considered;[178] without detailed written findings, "[t]he lack of discussion leaves [an appellate] court unable to determine whether the *Houston-Sconiers* factors were meaningfully considered."[179] The brief concluded that "[r]equiring written findings helps serve as a check on implicit racial biases inherent in discretionary sentencing."[180] The arguments above can be adapted to the specific transfer and sentencing standards in other jurisdictions.

On March 4, 2024, the Court of Appeals denied post-conviction relief.[181] The court did not squarely address the arguments raised in the amicus brief.[182] However, in responding to the argument that Keonte did

172. *Smith* Amicus Brief, *supra* note 154, at 28.
173. *Id.* at 3.
174. State v. Houston-Sconiers, 391 P.3d 409, 420 (Wash. 2017).
175. State v. Ramos, 387 P.3d 650, 663 (Wash. 2017).
176. Kent v. United States, 383 U.S. 541, 560-61 (1966).
177. *Smith* Amicus Brief, *supra* note 154, at 30-31.
178. All the record shows beyond consideration of the first *Houston-Sconiers* factor is that the sentencing court read all of the mitigation materials; despite the court's assurances that it had "considered all of it," there is no way to discern how or whether the additional mitigating evidence was considered. State v. Smith, No. 52323-0-II, 2020 WL 5015897, at *9 (Wash. App. Ct. Aug. 25, 2020) (Glasgow, J., dissenting in part).
179. *Id.*
180. *Smith* Amicus Brief, *supra* note 154, at 31.
181. *In re* Pers. Restraint of Smith, No. 56917-5-II, 2024 WL 940709, at *1 (Wash. App. Ct. Mar. 5, 2024).
182. *Id.* at *11 n. 15 ("To the extent the Amici argue that we should consider this issue more broadly and determine whether the Kent factors result in disproportionate treatment of Black children because they incorporate adultification bias and harmful racial stereotypes and do not account for disproportionate law enforcement action against Blacks, we do not address those arguments because they exceed the scope of the issues raised by Smith."). *But*

not receive the benefit of being perceived as a child during the declination process, the court acknowledged the risk of adultification bias:

> We also echo our prior concerns about adultification discussed in *In re Personal Restraint of Miller*, 21 Wn. App. 2d 257, 265-66, 505 P.3d 585 (2022). As we stated in *Miller*, we acknowledge that studies have demonstrated that adultification may be detrimental to children of color at criminal sentencing hearings and may result in disproportionately harsh sentences. *Id*. at 266. Thus, it is imperative that trial courts conscientiously consider that adultification is real and can result in disproportionate outcomes for children of color in order to avoid biased outcomes.[183]

With respect to Keonte's argument that the record prevented a determination of whether Keonte's youth was meaningfully considered, and amici's argument that written findings would help serve as a check on implicit racial biases inherent in discretionary sentencing, the court declined to revisit this issue because it had been addressed on appeal.[184] The court also declined to engage with amici's argument because it "exceeds the scope of Smith's sentencing arguments."[185]

C. *STATE V. J.W.M.* (JUVENILE COURT DISPOSITION)

A tragedy occurred when J.W.M., who was 17 years old, pointed what he thought was an unloaded gun at his friend and pulled the trigger. The gun was loaded and discharged, and J.W.M.'s friend ultimately died.[186] The State charged J.W.M. with first-degree manslaughter while armed with a firearm and unlawful possession of a firearm.[187] J.W.M. was subject to auto decline[188] and was tried in adult court.[189] A jury found him guilty of second-degree manslaughter, and in a bifurcated bench trial the court found him guilty of unlawful possession of a firearm.[190] Because neither of his convictions were subject to auto decline, J.W.M. was sent back to juvenile court for a disposition hearing.[191] The State recommended a manifest

see id. at *11 ("Smith contends that the juvenile court did not apply the *Kent* factors in a race-conscious manner that accounts for the existence of implicit racial bias at his declination hearing.").

183. *Smith*, 2024 WL 940709,at *10 n. 14.
184. *Id.* at *21.
185. *Id.* at *21 n. 26.
186. State v. J.W.M., 524 P.3d 596, 603 (Wash. 2023) (en banc).
187. *Id.*
188. First-degree manslaughter is a serious violent offense subject to the "auto decline" statute, WASH. REV. CODE § 13.04.030(1)(e)(v)(A) (2022).
189. *J.W.M.*, 524 P.3d at 603.
190. *Id.*
191. *Id.*

injustice disposition, seeking an exceptional sentence that would require J.W.M. to be incarcerated until he turned 25.[192]

J.W.M. argued he should be sentenced to time served. Due to the prosecution's charging decision transferring the case to adult court, and shutdowns of jury trials because of the COVID-19 pandemic, by the time of sentencing J.W.M. had been in jail for 1,011 days,[193] which accounted for the 12-month firearm enhancement.[194] Given his prior adjudications, the range for Manslaughter 2 was 15-36 weeks—far less than his proposed sentence.[195]

J.W.M. argued against a manifest injustice disposition due to his traumatic childhood in Kenya.[196] He immigrated when he was 13 years old after his family had experienced violence at the hands of the Mungiki.[197] J.W.M. witnessed the killing of his uncle and another person.[198] Two forensic neuropsychologists diagnosed J.W.M. with attention deficit hyperactivity disorder (ADHD) and posttraumatic stress disorder (PTSD).[199]

The juvenile court imposed the maximum possible manifest injustice upward disposition: confinement until age 25.[200] J.W.M.'s case reached the state supreme court.[201]

Similar to the arguments we made in the amicus filings in *Miller* and *Smith*, in J.W.M.'s case, the Civil Rights Clinic's amicus brief filed before the Washington Supreme Court explored how adultification may be operating in the context of juvenile dispositions: "Even when prosecuted in juvenile court, which is ostensibly designed to account for children's diminished culpability and capacity for change, not all children are extended the same privileges of youth. Instead, a young person's race likely influences how harshly a young person is punished."[202]

192. *J.W.M.*, 524 P.3d at 603; WASH. REV. CODE § 13.40.300(2) (2019) ("A juvenile offender . . . found to be armed with a firearm and sentenced to an additional twelve months pursuant to RCW 13.40.193(3)(b), may be committed by the juvenile court to the department of children, youth, and families for placement in a juvenile rehabilitation facility up to the juvenile offender's twenty-fifth birthday, but not beyond.").

193. Petitioner's Supplemental Brief at 5, *J.W.M.*, 524 P.3d 596 (No. 100894-5).

194. *J.W.M.*, 524 P.3d at 604.

195. WASH. REV. CODE § 13.40.0357 (2023) (categorizing Manslaughter 2 as C+, and indicating the range for C+ crimes as 15-36 weeks under Option A, Juvenile Offender Sentencing Grid, Standard Range).

196. Petitioner's Supplemental Brief, *supra* note 193, at 23-24.

197. *J.W.M.*, 524 P.3d at 604-05.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 605.

202. Brief of Fred T. Korematsu Ctr. for L. and Equal. et al. as Amici Curiae in Support of Petitioner at 3, 19, *J.W.M.*, 524 P.3d 596 (No. 100894-5) [hereinafter *J.W.M.* Amicus Brief].

Because J.W.M. had been subjected to a manifest injustice disposition—the equivalent of an exceptional sentence—the brief explained how adultification bias may contribute to disparate outcomes in disposition decisions, and that those disparities will be left intact if courts fail to appreciate these biases in their decisions.[203]

Consistent with the analysis above explaining how the disposition standards may invite adultification bias, the amicus brief combed through the sentencing record to find indicia of adultification. The brief argued:

> [i]n its determination that J.W.M. deserved a manifest disposition upward, the court (and the State) consistently characterized his current crime, as well as some of his criminal history, as more serious than they actually were by misrepresenting J.W.M.'s criminal history, and failing to acknowledge J.W.M.'s presumption of innocence for pending crimes, all of which suggest that adultification bias contributed to the lengthy sentence.[204]

First, both the court and the prosecution consistently referred to J.W.M.'s adjudication of second-degree manslaughter as being either intentional or reckless, while knowing full well J.W.M.'s conduct was accidental.[205] The prosecutor twice referred to the crime as murder,[206] which requires intent to kill. Furthermore, the court mischaracterized J.W.M.'s mens rea, repeatedly suggesting that J.W.M.'s actions were reckless, not negligent, despite the trial court's findings of negligence:

> Everyone knows you don't point a gun at a person, whether you think it's loaded or not; that's what makes this clearly negligent, and, I would argue reckless conduct. But, he was convicted of Negligence, and that's what I'm addressing it as.[207]

203. The brief also provided an opportunity to highlight that some members of the Washington Supreme Court had noted *Miller*'s warning about adultification bias. *See* State v. Anderson, 516 P.3d 1213, 1236 (Wash. 2022) (Yu, J., concurring in dissent) (quoting *In re* Pers. Restraint of Miller, 505 P.3d 585, 589-590 (Wash. App. Ct. 2022)) ("[I]t is well established by empirical literature and has been acknowledged by [this court] that Black children are prejudiced by, in addition to other stereotypes, 'adultification,' or the tendency of society to view Black children as older than similarly aged youths."). In *Anderson*, the concurrence in dissent highlighted how facially neutral factors—like the mitigating qualities of youth a court must consider when sentencing a young person prosecuted in adult court—can be unevenly applied based on the defendant's race. Put another way, the same set of facts can be a mitigator for one individual and an aggravator for another. *Id.* (Yu, J., concurring in dissent) (discussing how differing evaluations of Mr. Anderson's mitigating qualities of youth were seen as aggravators, whereas very similar mitigating qualities of youth were appropriately treated as mitigating for white defendants).

204. *J.W.M.* Amicus Brief, *supra* note 202, at 16-17.

205. Report of Proceedings on Appeal at 29, 41, 43, *J.W.M.*, 524 P.3d 608 (No. 100894-5) [hereinafter R.P.].

206. *Id*. at 7.

207. *Id*. at 40.

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> I don't think that [J.W.M.] intended to kill his friend; I think that he was reckless with guns.[208]

With respect to J.W.M.'s criminal history, that acted as an aggravator under section 13.40.150(3)(i)(vii) of the Washington Revised Code, the prosecution and the court repeatedly refer to J.W.M.'s fourth-degree assault conviction as second-degree assault.[209] Fourth-degree assault is a misdemeanor and by definition does not implicate serious harm to the victim.[210] The court repeatedly referred to J.W.M. being charged with second-degree assault, followed by a disclaimer, in parentheses, that it was resolved as a fourth-degree assault.[211] Counsel for the state: ""The Assault 4 was filed, actually, as an Assault 2, which really was a first-degree Robbery."[212]And the court in its oral ruling referred to J.W.M.'s fourth-degree assault as second-degree assault: "he was on EHD while other matters were pending, repeatedly, *or on release for the Assault 2*."[213]

Second, uncharged or dismissed criminal conduct is not a valid basis for the court to determine that the standard sentencing range is too lenient, as J.W.M. is entitled to the presumption of innocence for crimes that have not been adjudicated.[214]

The brief asked the Washington Supreme Court to "instruct juvenile courts to consider on the record how adultification might influence their disposition decisions when sentencing youth of color, particularly when considering the statutory mitigating and aggravating factors under [Washington Revised Code, section] 13.40.150."[215]

Two important outcomes resulted from the amicus effort. First, the supreme court acknowledged that "J.W.M. and amici rightly point out how racial bias can impact sentencing decisions."[216] Second, the court

208. R.P., *supra* note 205, at 43.
209. *Id*. at 21, 39.
210. WASH. REV. CODE § 9A.36.041 (2022).
211. Clerk's Papers on Appeal at 31, 32, *J.W.M*. 524 P.3d 596 (No. 100894-5) [hereinafter C.P.].
212. R.P., *supra* note 205, at 20.
213. *Id*. at 43 (emphasis added).
214. *See* C.P., *supra* note 211, at 33 (basing manifest injustice disposition on fact that J.W.M. has "uncharged and dismissed criminal conduct").
215. *J.W.M.* Amicus Brief, *supra* note 202, at 2.
216. *J.W.M.*, 524 P.3d at 608; *see also* Reply to State's Resp. to Mot. for Discr. Rev. at 10-11, *J.W.M*., 524 P.3d 596 (No. 100894-5) (citing Laura Beckman & Nancy Rodriguez, *Race, Ethnicity, and Official Perceptions in the Juvenile Justice System: Extending the Role of Negative Attributional Stereotypes*, 48 CRIM. JUST. & BEHAV. 1536, 1540, 1550 (2021); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 415-26 (2013) (noting "courts are more likely to perceive Black children as dangerous and impose harsher punishments"); *see also J.W.M.* Amicus Brief, *supra* note 202, at 4 (citing TASK FORCE 2.0 RSCH. WORKING GRP., *supra* note 3, at 13) ("Youth of color are less likely to receive a

acknowledged amici's proposed remedy to adopt non-statutory factors that a juvenile court must consider when imposing a manifest injustice disposition—specifically, that "juvenile courts must 'explicitly consider adultification bias on the record when sentencing young people of color . . . .'"[217] While the court declined to adopt the proposed non-statutory factor because it was raised only by amici, the court underscored that "these are certainly important considerations in juvenile sentencing."[218] This acknowledgment leaves the door open for advocates representing youth at manifest disposition hearings to raise this, creating the proper record on appeal on which the appellate courts could adopt this non-statutory factor.

D. *IN RE PERSONAL RESTRAINT OF [CLIENT]*[219] (ADULTIFICATION IN DECLINE)

After filing the amicus briefs in *Personal Restraint of Miller*, *Personal Restraint of Smith*, and *State v. J.W.M.*, the Civil Rights Clinic took on the post-conviction representation of a Latino youth who had been discretionary declined to adult court for a homicide he allegedly committed at the age of 15; he was tried with his adult co-defendant and received an adult-range sentence of almost 16 years.

Representing a client in post-conviction proceedings provided a different opportunity to engage with the adultification literature. We had to articulate claims based on established legal theories, rather than propose new ones. However, in articulating the claim our client's rights to procedural due process were violated in his decline hearing due to lack of fundamental fairness, we suggested that adultification bias may have played a role in how the court analyzed the *Kent* factors. We pointed to instances in the record indicating the court found him to be more sophisticated and mature than his age (or the forensic evaluation) supported.

Additionally, we leaned on *Miller*'s mandate to account for adultification bias when sentencing children of color in adult court to mitigate the possibility that their race may result in a harsher sentence—guidance issued from the same court where we filed our client's post-conviction case.[220] We argued that mandate is equally important in the decline context, where the data above demonstrate that race continues to

diversion relative to white youth, and Black youth are convicted at a rate 4.8 times the rate of white children.").

217. *J.W.M.*, 524 P.3d at 608 n.4 (citing *J.W.M.* Amicus Brief, *supra* note 202, at 15-16, 33) (discussing how statutory mitigating and aggravating factors of a manifest injustice disposition can "invite 'subjective judgments' influenced by adultification bias").

218. *Id*.

219. Because this case is currently pending, I am using "client" to preserve anonymity. References in this section to documents on appeal are on file with author while case is pending.

220. *In re* Pers. Restraint of Miller, 505 P.3d 585, 589-90 (Wash. App. Ct. 2022).

play a statistically significant role in decline decisions, and likely played a role in the decision to decline our client.

In articulating the claim that the sentencing court failed to engage in the constitutionally required consideration of the mitigating qualities of youth—all of which need to be meaningfully considered—we against suggested adultification bias contributed to the court's imposition of an adult-range sentence despite his request for a mitigated sentence under *Houston-Sconiers* due to the mitigating qualities of youth. Again, drawing on the success of *Miller*, we argued that adultification bias and statewide sentencing data[221] suggested that imposition of a disproportionate sentence in the adult standard range, rather than a mitigated sentence, was based partly on the impermissible basis of our client's race. We hope this leads the court to engage with these issues in a way it declined to do in *Smith*.

We filed the case in the Court of Appeals in 2023, and as of the writing of this article, briefing is still underway.

We also attempted to find research that investigated how and whether adultification bias operated specifically against youth of color who are not Black, and found a dearth of research examining adultification of Latinx youth outside the immigration context.[222] We hope that researchers will soon fill that gap. In the meantime, however, we suggested, consistent with *Miller*'s direction to consider adultification bias for all youth color, that adultification operated against our young Latino client as well.

CONCLUSION

The shameful legacy of *McClesky v. Kemp* is not only found in its refusal to permit claims based on evidence of stark racial disparity under the Eighth and Fourteenth Amendments. Equally chilling is the Court's brazen acceptance that sentencing disparities reflecting differential treatment based on race are "an inevitable part of our criminal justice system."[223] In this latter statement, the Court once again showed itself to be among the "authors of devastation" about which James Baldwin wrote:

221. To support this claim, we filed an expert declaration from a data scientist on the board of American Equity and Justice Group. AEJG publishes an "Equity Dashboard," created by data and criminal justice experts, the tool converts publicly available adult felony case data from the Administrative Office of the Courts into a user-friendly format. *See Dashboard*, AM. EQUITY & JUST. GRP. (2022), https://www.americanequity.org/dashboard.html [https://perma.cc/FB8B-8UH8].

222. Some research regarding adultification of children exists in the immigration context. *See, e.g.*, Laila Hlass, *The Adultification of Immigrant Children*, 34, 204-05, GEO. IMMIGR. L.J. 199 (2020). Hlass asserts that children are adultified in the immigration context through laws and practices that "ignor[e] youth-related vulnerabilities throughout . . . enforcement and adjudication proceedings." *Id.* at 205. She notes the immigration system has subjected many juvenile immigrants to physical abuse, dehumanization, and racial subordination. *Id.*

223. McClesky v. Kemp, 481 U.S. 279, 312 (1987).

> this is the crime of which I accuse my country and my countrymen, and for which neither I nor time nor history will ever forgive them, that they have destroyed and are destroying hundreds of thousands of lives and do not know it and do not want to know it. One can be, indeed one must strive to become, tough and philosophical concerning destruction and death, for this is what most of mankind has been best at since we have heard of man. (But remember: most of mankind is not all of mankind.) But it is not permissible that the authors of devastation should also be innocent. It is the innocence which constitutes the crime.[224]

The Civil Rights Clinic presents courts with evidence that makes it harder to claim innocence, and, in its circles of influence, demands that we all "confront the ugliness of who we are."[225]

224. James Baldwin, *The Fire Next Time* 5 (1963).

225. Interview with Eddie Glaude Jr., https://www.une.edu/news/2021/une-hosts-princeton-scholar-eddie-s-glaude-jr-discussion-race-and-democracy [https://perma.cc/U863-PT7L].

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