A CENTURY OF JUVENILE JUSTICE: A WORK IN PROGRESS OR A REVOLUTION THAT FAILED?

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I. INTRODUCTION

A century ago, Progressive reformers adopted a more modern construction of childhood as a developmental period of innocence, dependence, and vulnerability. They embraced a more scientific understanding of social control – positive criminology – and tried to identify the causes of crime and to treat, rather than to punish, offenders. Reformers combined the new vision of childhood with new insights into criminality to create a judicial-welfare alternative to the adult criminal process. Jurisdiction over dependent as well as delinquent children reflected juvenile courts' broader role as a child-saving welfare agency and not simply a "junior" criminal court.[1]

Juvenile courts simultaneously asserted families' responsibility to raise their children and expanded states' prerogative to act as *parens patriae* or "super-parent." Because some poor and immigrant parents failed to meet their responsibilities, juvenile courts intervened to socialize and control their children.[2] At its inception, they attempted to assimilate and "Americanize" the children of southern and eastern European immigrants pouring into industrial cities of the East and Midwest.[3] A century later, one of juvenile courts' primary missions is to control young black males in America's post-industrial cities.

For most of its existence, juvenile courts' rehabilitative goals and discriminatory means remained unquestioned and unchallenged. Systematic

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1. *See, e.g.*, DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 4 (2004) (emphasizing that juvenile court legislation "asserted state responsibility for both dependent and delinquent children and thus merged concerns about child welfare with crime control.").

2. *See, e.g.*, W. NORTON GRUBB & MARVIN LAZERSON, BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN (1982); BARRY FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 55-60 (1999).

3. *See, e.g.*, JOHN SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640-1981 122 (1988); ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 75-83 (1977); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVE IN PROGRESSIVE AMERICA 221-22 (2002); STEVEN SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF PROGRESSIVE JUVENILE JUSTICE, 1825-1920 58 (1977); TANENHAUS, *supra* note 1, at ix (noting "the consistent and core role of the juvenile court as an instrument of the crime control industry – controlling those who might produce unrest or disturb the social order (immigrants, the poor, children of color, wayward girls).").

criticism emerged in the 1960s and culminated in the Supreme Court's *In re Gault*[4] decision in 1967. Critics contested both the underlying theory of the "Rehabilitative Ideal" and the legitimacy of coercive intervention. They disputed the benevolence of juvenile justice officials, questioned whether correctional personnel could treat offenders effectively, and objected to discretionary decisions that treated minority offenders more harshly. During the 1960s, the Warren Court increasingly emphasized procedural formality to regulate criminal and juvenile justice decision-making. Court decisions formalized delinquency hearings, transformed the juvenile court from a welfare agency into a legalistic one, and fostered a convergence between the juvenile and criminal justice systems.[5]

As in so many domains of public policy, the role of race provides a window through which to view changes in juvenile justice policies. During the second-half of the twentieth century, race had two distinct and contradictory influences. In the 1950s and 1960s, the Supreme Court overturned Southern states' "separate but equal" Jim Crow legal system and imposed national norms affirming equality and the rule of law.[6] The Court's school desegregation, criminal procedure and juvenile justice decisions reflected a broader constitutional agenda to protect individual rights and the civil rights of racial minorities.

Juvenile justice policies changed initially in response to *In re Gault* and subsequently with "get tough" legislation during the late-1980s and early-1990s. Beginning in the 1960s, Republican politicians attributed rising "baby boom" crime rates and urban race riots to the Court's judicial activism which led to a breakdown of "law and order." They pursued a "Southern Strategy" to mobilize white voters' opposition to school integration and suburban voters' racial antipathy and to realign the political parties around issues of race.[7] During the

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4. *In re* Gault, 387 U.S. 1 (1967).

5. *See, e.g.*, Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 718-22 (1991) (summarizing the procedural and substantive convergence between juvenile and criminal courts) [hereinafter Feld, *The Transformation of the Juvenile Court*]; Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 357-69 (1999) (arguing that social structural changes and race account for adoption of more punitive juvenile justice policies) [hereinafter Feld, *Race and the "Crack Down"*].

6. *See generally* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 490 (2000) (arguing that the Court, beginning with *Brown v. Board of Education*, and reinforced by the Civil Rights Act of 1964 and the Voting Rights Act of 1965, altered the "southern way of life." "[T]he legal regime of race was nationalized with a single operative standard for the entire country. But the effort . . . was directed exclusively at the South and was designed to force the South to conform to northern – that is, national – norms."); *see generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S 55-56 (2nd ed. 1994).

7. THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS 11-14 (1991); KEVIN PHILLIPS, THE EMERGING REPUBLICAN MAJORITY (1969).

1970s-1990s, conservative politicians used crime as a "code word" for race and advocated "get tough" policies. When black youth homicide rates peaked in the early 1990s, politicians advocated a "crack down" on youth crime and enacted tougher juvenile transfer and sentencing laws to garner electoral advantage.

This article analyzes changes in juvenile justice policies over the past century. Part I provides a brief history of the juvenile court, highlights the discriminatory premises embedded in its processes, and provides a baseline against which to measure subsequent changes. Part II examines the Court's juvenile justice decisions and puts them in the broader context of the civil rights movement and the quest for racial equality. Part III analyzes structural, criminological, racial, and political dynamics in the 1980s and 1990s to explain the ascendance of "get tough" juvenile justice policies.[8] Part IV reviews recent developmental psychological research on adolescents' competence and culpability and explores their implications for a justice system for children. It focuses on three policy issues: 1) procedural justice and delivery of legal services; 2) waiver of youths to criminal court for sentencing as adults; and 3) disproportionate confinement of minority offenders. It concludes with an assessment of the contemporary juvenile court.

II. THE PROGRESSIVE JUVENILE COURT – PROCEDURAL INFORMALITY AND THE "REHABILITATIVE IDEAL"

A century ago, economic modernization transformed America from a rural, agricultural, Anglo-Protestant society into an ethnically diverse, urban and industrial one.[9] The growth of manufacturing spurred a massive influx of immigrants from southern and eastern Europe.[10] They crowded into ethnic

8. *See, e.g.*, DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 3 (2001) (analyzing repudiation of "penal welfarism" since the 1970s); MICHAEL TONRY, MALIGN NEGLECT 81-123 (1995) (analyzing political backdrop of war on drugs); FELD, *supra* note 2, at 189 (describing politics of war on juveniles).

9. *See generally* ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877-1920 (1967) (impact of industrialization on growth of bureaucracy); PLATT, *supra* note 3, at 101-36 (discussing the role of women child-savers in promoting the first juvenile court in Cook County, Illinois, 1899); *see generally* ROTHMAN, *supra* note 3 (discussing social structural changes associated with modernization); ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 125-136 (1978) (analyzing influence of social science research on formulation of juvenile court's treatment ideology); MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTI-POVERTY POLICY 14 (1999) ("In the span of seventy years, an economy dominated by agriculture was transformed into a modern industrial economy in which a majority of workers were employed in manufacturing, mining, construction, trade, finance, and transportation.").

10. *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 (2d ed. 1988) (noting that the new immigrants differed in language, religion, and culture from the Anglo-Protestant American and these differences hindered their assimilation); RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 94-130 (1955); STANLEY LIEBERSON, A PIECE OF THE PIE: BLACK AND WHITE IMMIGRANTS SINCE 1880 20-30 (1980) (changing patterns of European immigration and difficulties of assimilation because of religious,

ghettos around industrial factories.[11] The rise of manufacturing reallocated work from farms, homes, and family-shops to larger industrial settings and modified the roles of women and children in the family.[12] The idea of childhood is socially constructed and during this modernizing era upper- and middle-class women promoted a vision of children as vulnerable, fragile, dependent, and innocent who required protection and supervision in their transition to adulthood.[13]

The Progressive movement addressed many social problems associated with modernization including economic regulation, criminal justice, and political

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linguistic and cultural differences).

11. *See, e.g.*, FELD, *supra* note 2, at 27 ("Industrial growth spurred population increases and altered the urban landscape. The immigrant poor crowded into the urban center surrounding the industrial core . . . ."); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 26 (1993) ("Dense clusters of tenements and row houses were constructed . . . to house the burgeoning work force.").

12. Children have less economic value in an industrial economy than in an agricultural economy and the shift from the family farm to industry encouraged a reduction in the number and spacing of children. JOSEPH F. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA, 1790 TO THE PRESENT 114-16 (1977) (modernization modified the roles of women and children); CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 178-209 (1980); TANENHAUS, *supra* note 1, at 58 (arguing that "Progressive reformers were concerned about whether the family could survive in the modern world. The expansion of the wage economy and the spread of market processes, the rise of large-scale industrialization, rapid urbanization, and mass immigration were all radically transforming American life. The family, symbolized by the image of the home, appeared to be fracturing under these new pressures.").

13. The idea of childhood is a social construct that embodies cultural understandings of how children differ from adults. Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1091, 1093 (1991) ("[T]he life-stage we call 'childhood' is likewise a culturally and historically situated social construction. . . . The definition of childhood—who is classified as a child, and what emotional, intellectual, and moral properties children are assumed to possess—has changed over time in response to changes in other facets of society."); DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 16-17 (1993) (The modern construction of childhood views the period between infancy and adulthood as a separate stage of development and does not perceive children as miniature adults); PHILLIPPE ARIES, CENTURY OF CHILDHOOD: A SOCIAL HISTORY OF THE FAMILY 365-404 (1962) (tracing the modernizing conception of childhood to the upper classes in the sixteenth and seventeenth centuries). By the early nineteenth century, a newer view of childhood began to alter child-rearing practices in America. By the end of the century, urban upper and middle-class parents restricted children's autonomy to prepare them for adult roles. DEGLER, *supra* note 12, at 66 ("[C]hildren began to be seen as different from adults; among other things they were considered now more innocent; childhood itself was perceived as it is today, as a period of life not only worth recognizing and cherishing but extending. Moreover, simply because children were being seen for the first time as special, the family's reason for being, its justification as it were, was increasingly related to the proper rearing of children."). Middle and upper class women assumed a greater role in supervising children's moral and social development. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 46 (Margaret K. Rosenheim et al., eds., 2002) ("The inventors of the juvenile court considered themselves part of a humanitarian movement which, in the nineteenth century, had transformed the status of children from the sole property of their fathers into a dependent class in need of state protection.").

reforms.[14] Progressives created and expanded private and public agencies to assimilate and "Americanize" immigrants and their children. They enacted child-centered reforms – juvenile courts, child labor laws, social welfare laws, and compulsory school attendance laws – which reflected the new construction of children as different from adults and in need of protection.[15] The presence of children in police stations, jails, criminal courts and prisons appalled Progressive reformers and led to the quest for institutional alternatives for misbehaving youths.[16] The first function of the juvenile court was simply to provide a diversion from the adult criminal justice system.[17]

Ideological ferment provided Progressives with a criminological rationale to treat children differently and apart from adults. Positive criminology supplanted classical criminal law's emphasis on crime as a free-will choice and supported a more scientific conception of social control.[18] Progressives attributed criminal

14. HOFSTADTER, *supra* note 10, at 131-73 (arguing that social structural changes associated with modernization sparked the Progressive Movement). The Progressive Movement addressed a broad spectrum of social, political, and economic issues. *See, e.g.*, GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM, 1900-1916, 195-99 (1963) (economic regulation); ROTHMAN, *supra* note 3, at 5-13 (criminal and juvenile justice); WALTER TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 108-54 (3d ed. 1984) (urban welfare); SUSAN TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 141-61 (1982) (child welfare).

15. Many Progressive programs focused on controlling, molding, and protecting children. *See, e.g.*, WIEBE, *supra* note 9, at 169 ("The child was the carrier of tomorrow's hope whose innocence and freedom made him singularly receptive to education in rational, humane behavior. Protect him, nurture him, and in his manhood he would create that bright new world of the progressives' vision."); LAWRENCE CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957 (1961) (attributing compulsory school attendance laws to efforts to structure childhood); WALTER TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN NEW YORK STATE 119-142 (1970) (attributing child labor laws to protection of children).

16. TANENHAUS, *supra* note 1, at 6.

17. Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477, 2481 (2000) (Prof. Zimring argues that diversion from the criminal process constituted an improvement per se in the handling of children. "The first belief was that a child-centered juvenile court could avoid the many harms that criminal punishment visited on the young. The reformers found penalties unnecessarily harsh, and considered places of confinement to be schools for crime that corrupted the innocent and confirmed the redeemable in the path of chronic criminality.").

18. Ideological assumptions about the causes of crime shape criminal justice policies. DAVID GARLAND, PUNISHMENT IN MODERN SOCIETY 195 (1990) (noting that ideologies of crime "structure the ways in which we think about criminals, providing the intellectual frameworks (whether scientific or religious or commonsensical) through which we see these individuals, understand their motivations, and dispose of them as cases."). For example, classical criminal law assumed free-willed actors made blameworthy choices to commit crimes and that they deserved punishment. At the turn of the 20th Century, new theories about human behavior and social deviance led Progressives to reformulate the ideology of crime and to modify criminal justice administration. Positive criminology asserted that antecedent forces—biological, psychological, social, or environmental—determined or caused criminal behavior. *See, e.g.*, ROTHMAN, *supra* note 3, at 50-52. It sought to scientifically identify the causes of crime and to prescribe appropriate remedies. FRANCIS A. ALLEN, *Legal Values and the Rehabilitative Ideal*, *in* THE BORDERLAND OF THE CRIMINAL LAW: ESSAYS IN LAW AND CRIMINOLOGY 26 (1964) [hereinafter Allen, *Legal Values and the Rehabilitative Ideal*]; DAVID MATZA, DELINQUENCY AND DRIFT 1-32 (1964). Positivism

behavior to deterministic forces that reduced personal responsibility for crime and they employed medical analogies to rationalize treating rather than punishing offenders.[19] Several criminal justice reforms – probation, parole, indeterminate sentences, and the juvenile court – reflected their "Rehabilitative Ideal."[20]

Combining the new ideologies of childhood with positivist criminology provided the rationale for "an institution that would intervene forcefully in the lives of all children at risk to effect a rescue."[21] Zimring argues that despite juvenile courts' ambitious interventionist and rehabilitative justifications, they provided a diversionary alternative to criminal courts regardless of whether they treated youths successfully.[22] Although rehabilitation provided a more politically attractive and impressive rationale for Progressive reformers, diversion was then and remains today an important part of juvenile courts' mission.[23]

Despite standard historical accounts, the juvenile court did not emerge fully-formed in Cook County, Illinois, in 1899, but rather constituted an evolutionary

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attributed criminal behavior to deterministic forces that compelled offenders to act as they did. Because antecedent forces determined offenders' behavior, they bore less responsibility for their crimes and criminal justice agencies sought to reform rather than to punish them. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 3-7 (1981); KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 8 (1997) ("[D]eviant behavior is at least partially caused (rather than freely chosen). Progressive reformers therefore identified rehabilitation – operationally defined as the use of 'individualized corrective measures adapted to the specific case or the particular problem' – as the appropriate response to deviant behavior.").

19. MATZA, *supra* note 18, at 12-21; ROTHMAN, *supra* note 3, at 50-52; RYERSON, *supra* note 9, at 22.

20. Francis Allen describes the central assumptions of the "Rehabilitative Ideal:"

> The rehabilitative ideal . . . assumed, first, that human behavior is the product of antecedent causes. These causes can be identified. . . Knowledge of the antecedents of human behavior makes possible an approach to the scientific control of human behavior. Finally, . . . it is assumed that measures employed to treat the convicted offender should serve a therapeutic function; that such measures should be designed to effect changes in the behavior of the convicted person in the interests of his own happiness, health, and satisfactions and in the interest of social defense.

ALLEN, *Legal Values and the Rehabilitative Ideal*, *supra* note 18, at 26. Progressives believed that the social and behavioral sciences provided them with the ability to systematically change people.

21. Zimring, *supra* note 17, at 2480. *See also*, Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of Juvenile Courts, in* A CENTURY OF JUVENILE JUSTICE 145 (Margaret K. Rosenheim et al., eds., 2002). Zimring argues that "the interventionist argument emphasized the positive good that new programs administered by child welfare experts could achieve. A child-centered court was an opportunity to design positive programs that would simultaneously protect the community and cure the child." Zimring, *supra* note 17, at 2482-83.

22. Zimring, *supra* note 17, at 2480 (Prof. Zimring describes the two justifications for the juvenile court as diversionary and interventionist. "The diversionary goal of the court was to save kids from the savagery of the criminal courts and prisons. The interventionist goal was to create programs that would rescue delinquents from crime and truancy.").

23. *Id.*

"work-in-progress."[24] "Juvenile courts . . . were not immaculate constructions; they were built over time."[25] Tanenhaus argues that "significant changes in the structure, rules, and self-conception of juvenile justice have been a part of its history from the beginning. Juvenile justice grew by accretion, and its experiential growth was largely fueled by local politics."[26] Understanding the juvenile court as a "work-in-progress" emphasizes its historically contested structure and functions and on-going debates about its jurisdiction and who would decide how to handle different categories of children.[27] *In re Gault*'s "constitutional domestication" of the juvenile court in 1967 and "get tough" policies of the 1980s and 1990s reflect the on-going politically and legally contested, "work-in-progress" character of juvenile courts.

The juvenile court melded the ideology of childhood with positivist conceptions of social control, introduced a judicial-welfare alternative to the criminal justice system, and provided the organizational mechanism to empower the state as *parens patriae*.[28] Progressive "child-savers" described the juvenile court as a benign, non-punitive, and therapeutic agency.[29] Its jurisdiction over both delinquent and dependent children melded child welfare and crime control goals.[30] Because reformers characterized intervention as a civil, child-welfare proceeding rather than as a criminal prosecution, they enjoyed wide latitude to supervise children. Juvenile courts' status jurisdiction allowed them to control non-criminal behavior such as "sexual precocity," truancy, and "immorality" as well as criminality.[31]

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24. *See, e.g.*, Tanenhaus, who emphasizes that:

> Illinois's pioneering juvenile court act read like a rough blueprint. Most of the features that later became the hallmarks of progressive juvenile justice – private hearings, confidential records, the complaint system, detention homes, and probation officers – were either omitted entirely from the initial law or were included without any provisions for public funding. As a result, the world's first juvenile court opened on July 3, 1899, with an open hearing, a public record, no means to control its calendar (i.e. no complaint system), and without public funds to pay either the salaries of probation officers or to maintain a detention home for children.

Tanenhaus, *supra* note 13, at 42-43 (citation omitted).

25. *Id.* at 43.

26. TANENHAUS, *supra* note 1, at xxvii.

27. TANENHAUS, *supra* note 1, at xxvii-xxix.

28. FELD, *supra* note 2, at 55-57; ROTHMAN, *supra* note 3, at 205-35.

29. PLATT, *supra* note 3, at 176-181; SCHLOSSMAN, *supra* note 3, at 58; SUTTON, *supra* note 3, at 232-58.

30. FELD, *supra* note 2, at 46; TANENHAUS, *supra* note 1, at 22. Tanenhaus argues that "progressive child savers conceived of all children as being different from adults and, accordingly, did not draw sharp distinctions between dependents and delinquents and believed that a unified children's court could serve both." *Id.* at 59.

31. Reformers conceived juvenile courts as a social welfare system to control behaviors that criminal courts previously ignored or handled informally. PLATT, *supra* note 3, at 46-74; SUTTON, *supra* note 3, at 121-53. Its broader jurisdiction included not only criminal acts but also a child's "status" and social circumstances. *See, e.g.*, SCHLOSSMAN, *supra* note 3, at 151-53; RYERSON, *supra* note 9, at 47. The "status jurisdiction" reflected the newer conception of childhood and the

Progressives separated children from adults, diverted them to a judicial-welfare alternative to the criminal justice system, and rejected the criminal law's procedural safeguards and jurisprudence.[32] Juvenile courts used informal procedures, excluded lawyers and juries, and adopted a euphemistic vocabulary to de-emphasize any resemblance to criminal proceedings.[33] Juvenile courts increasingly employed separate detention homes to remove delinquents from adult jails.[34] The original Cook County juvenile court initially conducted public hearings because of concerns by political interests and religious groups about state intrusions into the lives of working-class and ethnic families.[35] Within a decade of its creation, the juvenile court closed its doors to the public and press and conducted confidential hearings.[36] Judges imposed indeterminate and non-proportional dispositions to achieve offenders' "best interests" and future welfare rather than to punish them for past offenses.[37] By the 1920s, "child-

legal differentiation between children and adults. "Through truancy, compulsory education, and child labor laws aimed to keep children off the streets, in school, and out of the labor market, progressives attempted to prolong youth dependency." Tanenhaus, *supra* note 1, at 61.

32. *See* ROTHMAN, *supra* note 3, at 212; FELD, *supra* note 2, at 60-63.

33. *See, e.g.*, NAT'L RESEARCH COUNCIL & INST. OF MEDICINE, JUVENILE CRIME, JUVENILE JUSTICE 154 (Joan McCord et al. eds., 2001) summarize the Progressive's conception of juvenile court procedures:

> It was to focus on the child or adolescent as a person in need of assistance, not on the act that brought him or her before the court. The proceedings were informal, with much discretion left to the juvenile court judge. Because the judge was to act in the best interests of the child, procedural safeguards available to adults, such as the right to an attorney, the right to know the charges brought against one, the right to trial by jury, and the right to confront one's accuser, were thought unnecessary. Juvenile court proceedings were closed to the public and juvenile records were to remain confidential so as not to interfere with the child's or adolescent's ability to be rehabilitated and reintegrated into society.

34. TANENHAUS, *supra* note 1, at 34-35.

35. Tanenhaus notes that:

> [t]he progressive efforts to extend the reach of the state into the everyday lives of predominantly working-class urban dwellers raised troubling questions about the proper relationship of new institutions, such as the juvenile court, to "the public.". . . The process . . . of making the juvenile court into a sheltered place to protect children . . . would take more than two decades.

TANENHAUS, *supra* note 1, at 25.

36. TANENHAUS, *supra* note 1, at 49.

37. *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 83 (1992) ("It was a social welfare agency, the central processing unit of the entire child welfare system. Children who had needs of any kind could be brought into the juvenile court, where their troubles would be diagnosed and the services they needed provided by court workers or obtained from other agencies."). Juvenile court judges imposed indeterminate and non-proportional dispositions that could continue for the duration of minority. FELD, *supra* note 2, at 69-74. "Indeterminate" meant that the dispositions had no set limit and could continue indefinitely until adulthood. *Id.* at 70. "Non-proportional" meant that no relationship existed between what the child allegedly did and the length of disposition. *Id.* The particular behavior that brought a child before the court affected neither the degree, the duration, nor the intensity of intervention. *Id.* Each child's circumstances differed and judges based dispositions on their future "needs" rather than their past "deeds." RYERSON, *supra* note 9, at 39-

savers" further "medicalized" delinquency and described it as a mental disorder that required an individualized treatment plan.[38] Judges enjoyed broad discretion to diagnose and treat a child based on her lifestyle and "real needs" rather than simply her crime.[39]

Progressive reformers recognized that real differences existed in children's lives and circumstances, and they expected juvenile courts to discriminate and to exercise greater control over poor and immigrant children because they had greater needs.[40] They did not regard racial and ethnic discrimination as invidious, but rather as an opportunity to make "other peoples' children" more like "our children."[41] Probation was the disposition of first resort for most delinquents,[42] but because poor and immigrant children had farther to go and required greater controls, they quickly filtered through the benevolent system into its more punitive institutions.[43]

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40. The emergence of the "therapeutic state" affected children's families as well as the delinquents themselves. Tanenhaus, *supra* note 13, at 53. Tanenhaus futher states that:

> The child who got into trouble with the law . . . not only brought the state into his or her life, but also opened up the family home to state intervention and extended supervision. Thus, the entire family, not only the child, became the subject for extended case work, which could involve demands to change jobs, find a new residence, become a better housekeeper, prepare different meals, give up alcohol, and abstain from sex.

Tanenhaus, *supra* note 13, at 53-54 (citation omitted).

38. TANENHAUS, *supra* note 1, at 111–37 (describing the medicalizing of delinquency and placing it in the broader context of the increased influence of psychology and psychiatry in matters of public policy).

39. ROTHMAN, *supra* note 3, at 38; RYERSON, *supra* note 9, at 40-41; SCHLOSSMAN, *supra* note 3, at 157-80.

40. GRUBB & LAZERSON, *supra* note 2, at 69 (describing selective application of *parens patriae* ideology in a class-based society); ROTHMAN, *supra* note 3, at 222; PLATT, *supra* note 3, at 36-39; FELD, *supra* note 2, at 75-76; NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 154-155 (tension between social control and social welfare and balancing best interest of the child with protection of society).

41. FELD, *supra* note 2, at 75-76.

42. *See, e.g.*, TANENHAUS, *supra* note 1, at 35 (Tanenhaus argues that "[p]robation officers were the 'right arm of the court' because they investigated homes; interviewed neighbors, teachers and employers; made recommendations to the judge about what should be done with children; represented them during hearings; and supervised those on probation."); SCHLOSSMAN, *supra* note 3, at 77.

43. Steven Schlossman & Stephanie Wallach, *The Crime of Sexual Precocity: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. ED. REV. 65, 66 (1978); ROTHMAN, *supra* note 3, at 103 (Rothman notes that "[t]he exercise of judicial discretion helped to effect a dual system of criminal justice: one brand for the poor, another for the middle and upper classes. Judicial discretion may well have promoted judicial discrimination."). TANENHAUS, *supra* note 1, at 37–39 (arguing that the unwillingness of private institutions to accept dependent and delinquent black children caused juvenile courts to commit them to institutions more quickly and for less serious offenses than they did their white counterparts).

III. THE CONSTITUTIONAL CONTEXT OF THE JUVENILE COURT DECISIONS

In the decades before and after World War II, Blacks migrated from the rural south to the urban north and the "great migration" made race a national rather than a regional issue and fostered a more assertive civil rights movement.[44] These broader structural changes contributed to the Warren Court's civil rights, criminal procedure, and juvenile court decisions during the 1960s.[45] The Court's decisions and Congressional passage of Civil Rights and Voting Rights laws in the mid-1960s coincided with "baby boom" increases in youth crime and urban racial riots. By the end of the decade, conservative politicians began to exploit the volatile issues of race and crime for political advantage.

A. *Racial Demographics and Legal Change*

Black migration from the rural South to the industrial cities of the North and West in the decades before and during World War II put the quest for racial equality and civil rights on the national political agenda. In 1914, World War I curtailed European immigration and created a demand for southern Blacks to work in northern factories.[46] Between World Wars I and II, the mechanization of cotton-picking further reduced the need for black laborers in the South.[47] Half-million southern Blacks migrated north between 1910 and 1920 and three-quarters of a million moved in the following decade.[48] During the Great Depression, dire economic conditions caused an out-migration of another 400,000 Blacks to northern cities.[49] Jim Crow laws, segregated schools, job discrimination, and Ku Klux Klan violence drove more Blacks out of the South.[50] During World War II, one and one-half million Blacks left the rural

44. *See generally* NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1991); *see generally* THE GREAT MIGRATION IN HISTORICAL PERSPECTIVE: NEW DIMENSIONS OF RACE, CLASS & GENDER (Joe William Trotter, Jr. ed., 1991).

45. *See* POWE, *supra* note 6, at 437-39; FELD, *supra* note 2, at 97-106; KLARMAN, *supra* note 6, at 344-64.

46. *See, e.g.*, LEMANN, *supra* note 44, at 15-17 (arguing that World War I reduced the flow of European immigrants and labor recruiters solicited rural southern Blacks to work in northern factories); MASSEY & DENTON, *supra* note 11, at 28-29 (attributing the beginning of the "great migration" to the outbreak of World War I in 1914).

47. *See, e.g.*, LEMANN, *supra* note 44, at 5-6 (noting that in the 19th Century, the cotton gin made the growing of cotton commercially viable and slavery became the economic foundation of the pre-Civil War southern economy; in the 20th Century, the mechanical cotton picker dramatically reduced the need for cheap, black laborers); MASSEY & DENTON, *supra* note 11, at 27-29 (noting the impact of the boll weevil that devastated cotton crops and shifted southern agriculture from cotton to less labor-intensive food and livestock production); MARC MAUER, RACE TO INCARCERATE 52 (1999) ("Blacks had been disproportionately affected by the shift to mechanized agriculture in the South, which was contemporaneous with the increased demand for labor in the growing northern economies.").

48. *See* MASSEY & DENTON, *supra* note 11, at 29.

49. *See id.* at 29-38; FELD, *supra* note 2, at 84.

50. *See* LEMANN, *supra* note 44, at 14-15 ("push" factors as well as "pull" factors motivated black migration).

South to work in northern defense-industries[51] and another one and one-half million followed during the 1950s.[52]

Blacks settled primarily in urban ghettos when they migrated.[53] Northern Whites' racial hostility and violence reinforced segregation in housing, education, and employment.[54] After World War II, northern Whites began to move to suburbs and to isolate Blacks in inner-city ghettos.[55] A variety of public and private policies – federal mortgage, insurance, housing, tax, and highway construction – contributed to the growth of predominantly white suburbs surrounding poor and minority neighborhoods within most major cities.[56]

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51. *See, e.g.*, EDSALL & EDSALL, *supra* note 7, at 33; GILENS, *supra* note 9, at 104-05 ("The average black out-migration from the South between 1910 and 1939 was only 55,000 people per year. But during the 1940s it increased to 160,000 per year, during the 1950s it declined slightly (to 146,000 per year), and between 1960 and 1966 it fell to 102,000 per year."); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 24 (rev. ed. 1995) ("The real changes began during the Second World War, when for the first time black Americans were courted by white society. A shortage of civilian labor forced employers to offer jobs to workers who previously had been excluded."); Lieberson states that:

> [i]n 1920, only a few years before massive new European immigration was to end, 85 percent of all blacks lived in the South. Three-fourths were still in the South when the United States entered World War II. This figure decreased in succeeding decades, thanks to the massive changes during and after the war, but in 1970 a bare majority of blacks was still living in the South.

LIEBERSON, *supra* note 10, at 9.

52. MASSEY & DENTON, *supra* note 11, at 45 (noting that 1,500,000 migrated during the 1950s and 1,400,000 during the 1960s); LEMANN, *supra* note 44, at 6 (between 1940 and 1970, five million blacks moved out of the South and reduced the proportion of Blacks remaining in the South from three-quarters to half).

53. *See* MASSEY & DENTON, *supra* note 11, at 45 (during the "great migration" southern blacks flooded Chicago, Detroit, Philadelphia and other northern and midwestern industrial centers); *see generally* TROTTER, *supra* note 44 (analyzing causes and impact of great migration in different regions of the country); In 1910, fewer than one-quarter of Blacks lived in cities. MASSEY & DENTON, *supra* note 11, at 21. By 1940, half of Blacks lived in cities, and by 1960, more than three-quarters did. *Id.*; FELD, *supra* note 2, at 85. In 1870, 80% of black Americans lived in the rural south; by 1970, 80% of black Americans resided in urban locales, half in the North and West. *See* MASSEY & DENTON, *supra* note 11, at 68; *see also* GILENS, *supra* note 9, at 105. Although African-Americans comprised only 2% of northerners in 1910, by 1960, they accounted for 7% of the northern population and 12% of urban residents. *Id.* at 105.

54. *See* MASSEY & DENTON, *supra* note 11, at 30 (describing upsurge of racial violence in northern cities between 1900 and 1920 and attacks on individual blacks); LIEBERSON, *supra* note 10, at 260 ("[B]lack segregation in the urban North increased from 1900 onward not only because their proportion of the population grew, but also because the same composition led to more isolation than it had during earlier decades."); HACKER, *supra* note 51, at 18.

55. MASSEY & DENTON, *supra* note 11, at 44-45; MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 133-37 (1989).

56. Federal mortgage, housing, and tax policies subsidized construction of privately-owned single-family homes in almost exclusively white suburbs. The federal interstate highway program facilitated suburban expansion. MASSEY & DENTON, *supra* note 11, at 44-45 ("In making this transition from urban to suburban life, middle-class whites demanded and got massive federal investments in highway construction that permitted rapid movement to and from central cities by car."); KATZ, *supra* note 55, at 134. ("Federal policy ensured that housing development happened in suburbs rather than within cities and favored the white middle classes rather than minorities and the poor."). Interstate highways and housing projects disrupted many black urban communities and

During the 1950s and 1960s, the Civil Rights movement confronted racism and segregation in the South, demanded racial equality and social justice, and ultimately transformed both political parties.[57] Until the 1960s, southern Jim Crow laws, customs, and violence enforced an apartheid system of white supremacy and black subordination.[58] The Warren Court's school desegregation, civil rights, and criminal procedure decisions attempted to dismantle the white southern racial regime.[59] In *Brown v. Board of Education*, the Court repudiated the "separate but equal" doctrine and initiated efforts to desegregate public schools.[60] Southern politicians condemned *Brown* as illegitimate judicial activism and urged "massive resistance" to its intrusion on states' prerogatives.[61] Southern opposition to desegregation in the 1950s and Republican presidential campaigns of Barry Goldwater in 1964 and Richard Nixon in 1968 underscored the political value of appeals to white voters' racial antipathy.[62]

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created physical barriers to contain their expansion. *See id.* at 135-36 ("Not only did new highways and expressways encourage commuting and population dispersal; they also divided cities into new sections, creating walls between poor or minority neighborhoods and central business districts."); MASSEY & DENTON, *supra* note 11, at 55-56 ("During the 1950s and 1960s, local elites manipulated housing and urban renewal legislation to carry out widespread slum clearance in growing black neighborhoods that threatened white business districts and elite institutions.").

57. *See* OMI & WINANT, *supra* note 6, at 95-100 (arguing that during the 1950s, the race-based Civil Rights movement contested the social construction of race).

58. POWE, *supra* note 6, at 490, concludes that the Warren Court explicitly intended to change southern legal and cultural traditions.

> By 1953 the South had created, by law and custom (backed by whatever force necessary), a caste system based on white supremacy. From laws against miscegenation, to laws mandating segregation, to subterfuges maintaining a basically all-white electorate, to the use of peremptory challenges to ban African-Americans from juries, to the enforced customs of better jobs for whites, to mandating social deference . . . the southerners lived in a society that told all whites, no matter how poor, ignorant, or illiterate, that they were better than any African-American.

59. *See* POWE, *supra* note 6, at 492-96; Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 94 (2000) ("[T]he Supreme Court probably was a better gauge of national opinion on race than was a United States Congress in which white supremacist southern Democrats enjoyed disproportionate power because of Senate seniority and filibuster rules.").

60. Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see* G. Edward White, *Warren Court (1953-1969)*, *in* AMERICAN CONSTITUTIONAL HISTORY: *SELECTIONS FROM THE* ENCYLOPEDIA OF THE AMERICAN CONSTITUTION 279, 280 (Leonard W. Levy et al. eds., 1986) ("The context of the Warren Court's first momentous decisions was decisive in shaping the Court's character as a branch of government that was not disinclined to resolve difficult social issues, not hesitant to foster social change, not reluctant to involve itself in controversy.").

61. *See* POWE, *supra* note 6, at 47 (white southern leaders urged resistance and described *Brown* as a decision by "a lawless Court, abandoning the Constitution ('a mere scrap of paper') for the personal and political values of unelected judges").

62. *See* EDSALL & EDSALL, *supra* note 7, at 77-79; POWE, *supra* note 6, at 60-62 (Powe is describing southern congressional Democrats drafting the "Southern Manifesto" which denounced *Brown* as an abuse of judicial power and advocating non-compliance with an unlawful decision. In the aftermath of *Brown*, Southern racial moderates virtually disappeared under the pressure of more hard-line racists.).

The passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 created a national legal standard and imposed racial equality on the South.[63] The majority of white Americans at least tacitly subscribe to cultural and legal norms of racial equality.[64] Although a commitment to equality prohibits *de jure* segregation or expressing racist opinions, American society, then and now, remains deeply divided over matters of race and some politicians have exploited those racial resentments for electoral advantage.[65]

B. *Civil Rights as Impetus for Juvenile Justice Decisions*

Criminal procedure and juvenile justice reforms further advanced the Warren Court's civil rights agenda because the poor, minorities, and the young disproportionately comprised those accused of crimes.[66] During the 1960s, the Court's decisions endorsed adversarial procedures and adopted constitutional rules to limit police discretion, to protect minorities from state officials, and to protect defendants' rights.[67] The Fourteenth Amendment and the Bill of Rights provided the Court with the constitutional authority to limit the state, to expand equality for minorities, and to control criminal justice decision-making.[68]

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63. TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY 18 (2001) (arguing that the norm of racial equality emerged in the United States during the 1950s and 1960s as cultural leaders and influential elites attacked segregation, lynching and brutality, and denial of the right to vote); GILENS, *supra* note 9, at 108 (noting that passage of the Voting Rights Act led to increased registration of Blacks nationwide from 29 percent in 1962 to 67 percent in 1970); POWE, *supra* note 6, at 232 (104 of the 130 congressional votes cast against the Civil Rights Act were by southern Democrats "who fully understood that this bill was aimed directly at the white South").

64. MENDELBERG, *supra* note 63, at 18 ("In the age of equality, neither citizens nor politicians want to be perceived or to perceive themselves as racist. The norm of racial equality has become descriptive and injunctive, endorsed by nearly every American.").

65. *Id.* at 19 ("Because the civil rights era came and went without fully resolving the problems of racial inequality, individuals and institutions are forced to continue to reach decisions about racial matters, matters that count among the most difficult of our national problems.").

66. *E.g.*, POWE, *supra* note 6, at 198; Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. FORUM 518.

67. *See, e.g.*, FRED P. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW at 110-11 (1970); GARLAND, *supra* note 8, at 57 ("In effect, the new critique of rehabilitation was the extension of civil rights claims to the field of criminal justice, a process that had already begun with the Warren Court of the 1960s and its extension of due process protections to suspects and juveniles."); POWE, *supra* note 6, at 386 ("African-Americans were disproportionately affected by whatever abuses or inequities there were in the criminal justice system"); Note, *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1488-94 (1988) (equality principle in reform of criminal procedures after *Brown v. Board of Education*); White, *supra* note 60, at 288 ("By intervening in law enforcement proceedings to protect the rights of allegedly disadvantaged persons—a high percentage of criminals in the 1960s were poor and black—the Warren Court Justices were acting as liberal policymakers."); *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule); Miranda v. Arizona, 384 U.S. 436 (1966) (protection of privilege against self-incrimination).

68. *See, e.g.*, GRAHAM, *supra* note 67, at 41-66; POWE, *supra* note 6, at 412 ("[T]he Court recognized that the Bill of Rights offered national standards for criminal procedure regardless of

The Supreme Court critically re-examined juvenile justice administration in the 1960s.[69] In *Kent v. United States,* the Court observed that that "the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children" and required procedural safeguards in judicial waiver proceedings.[70] In 1967, the Court in *In re Gault* emphasized disjunctions between the theory and the practice of rehabilitation, the differences between criminal procedural safeguards adult defendants enjoyed and those used for delinquents, and ordered a major procedural overhaul.[71] It rejected Progressives' claims that delinquency proceedings were civil, non-adversarial, and rehabilitative.[72] Instead, it focused on high recidivism rates, the stigma of a delinquency label, and the arbitrariness of the process.[73] *In re Gault* required states to adopt "fundamentally fair" procedures for delinquents charged with criminal offenses that could lead to confinement.[74] These protections included notice,[75] a fair hearing,[76] assistance of counsel,[77] opportunity to confront and cross-examine witnesses,[78] and the

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how the states wished to conduct trials, and it quickly applied all the relevant provisions of the Bill of Rights to the states to create minimum national guarantees of fairness in criminal trials."); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1323-25 (1977) (three themes of the Warren Court's due process "revolution" were: "selective incorporation of Bill of Rights' guarantees," "equality," and "expansive interpretations of constitutional rights that protect the accused").

69. *See, e.g.*, Joel Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 1, 3; Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L REV. 775, 775-76 (1966); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY (1967).

70. Kent v. United States, 383 U.S. 541, 556 (1966). The Court concluded that the loss of the special protections of the juvenile court—closed proceedings, confidential records, and protection from a criminal conviction—as a result of a waiver decision was a "critically important" action that required a hearing, assistance of counsel, access to social investigations, and written findings and conclusions that an appellate court could review. *Id.* at 553-63. *See generally* Monrad Paulsen, Kent v. United States*: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167.

71. *See In re* Gault, 387 U.S. 1 (1967).

72. *See id.*

73. *See id.* at 21.

74. The Court only considered the constitutional contours of a delinquency trial. *See In re Gault*, 387 U.S. at 13. The Court specifically held that "[w]e do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile 'delinquents'." *Id. See also* Frances Barry McCarthy, *Pre-Adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 459-60 (1981) (discussing the limitations on juveniles' procedural rights). The Court's holding did not address a juvenile's rights in either the pre-adjudicatory (i.e., intake and detention) or post-adjudicatory (i.e., disposition) stages of the proceeding, but narrowly confined itself to the actual adjudication of guilt or innocence in a trial-like setting. *See In re Gault*, 387 U.S. at 13, 31 n.48.

75. *In re Gault*, 387 U.S. at 33.

76. *Id.* at 36.

77. *Id.* at 41.

78. *Id.* at 57.

privilege against self-incrimination.[79] *In re Gault* endorsed adversarial procedures both to determine the truth – factual accuracy – and to limit the power of the state – prevent governmental oppression – and asserted that "fundamentally fair" procedures would not impair courts' ability to treat juveniles.[80] *In re Gault* based delinquents' rights to notice, counsel, and confrontation on generic Fourteenth Amendment "fundamental fairness" rather than the Sixth Amendment,[81] but explicitly relied on the Fifth Amendment to grant juveniles the privilege against self-incrimination.[82]

Subsequent decisions further elaborated the criminal nature of delinquency proceedings. In *In re Winship*, the Court required states to prove delinquency "beyond a reasonable doubt," rather than by the civil preponderance of evidence standard.[83] For the majority in *In re Winship*, preventing factually erroneous convictions and limiting the power of the state outweighed the dissent's concern

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79. *Id.* at 31-57; *see also In re Gault*, 387 U.S. at 22, 24, 27 (discussing whether juveniles should be afforded constitutional protection through procedural safeguards); Irene Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 662-63 (1980) (arguing that constitutional protections should attach in proceedings that may result in incarceration of a child); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court,* 69 MINN. L. REV. 141, 155-56 (1984).

80. *See In re Gault*, 387 U.S. at 21.

81. U.S. CONST. amend. VI. *In re Gault* made no reference to the Sixth Amendment's provision for notice; rather, the Court held that "due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding." *In re Gault*, 387 U.S. at 33. Similarly, although the Court described a delinquency proceeding as "comparable in seriousness to a felony prosecution," *id.* at 36, the Court grounded the right to counsel in a delinquency proceeding in the "Due Process Clause of the Fourteenth Amendment" rather than the Sixth Amendment's right to counsel. *Id.* at 41. Finally, the Court's analysis of the right to confront and examine witnesses rested on "our law and constitutional requirements" rather than the language of the Sixth Amendment. *Id.* at 57. In deciding the applicability of the Fifth Amendment privilege against self-incrimination, however, the majority used an analytical strategy akin to selective incorporation, finding a functional "equivalence" between a delinquency proceeding and an adult criminal trial. *See id.* at 50; *see, e.g.*, Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L. J. 74 (1963); Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication – Survey and Criticism*, 66 YALE L. J. 319, 327-33 (1967) (analyzing historical constitutional debate between proponents of "selective incorporation" and proponents of "fundamental fairness" and "total incorporation" of provisions of the Bill of Rights).

82. *In re Gault* holds that:

> It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. . . . [J]uvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination.

In re Gault, 387 U.S. at 49-50. Because *In re Gault* applied the privilege against self-incrimination to delinquency proceedings, juvenile courts' proponents could no longer characterize delinquency proceedings as either "noncriminal" or "nonadversarial."

83. *In re* Winship, 397 U.S. 358, 368 (1970). The Bill of Rights does not define the standard of proof in criminal cases so *In re Winship* first held that the constitution requires proof beyond a reasonable doubt in adult criminal proceedings as a matter of "due process." *See id.* at 361-64. The Court then extended the same standard of proof to juvenile proceedings for the same reason. *See id.* at 365-67.

that criminal procedural safeguards would impair juvenile courts' ability to rehabilitate delinquents or erode their differences with criminal courts.[84] The Court in *Breed v. Jones* applied the Fifth Amendment's Double Jeopardy provision to state delinquency trials because of their functional equivalence with criminal trials.[85]

The Court in *McKeiver v. Pennsylvania* rejected delinquents' appeal for a constitutional right to a jury trial.[86] *McKeiver* relied on the Fourteenth Amendment Due Process clause rather than the Sixth Amendment's jury clause, reasoned that delinquency trials required only "accurate fact finding," and concluded that a judge could find facts as well as a jury.[87] *McKeiver* employed "rehabilitative rhetoric," ignored the reality of juvenile "treatment," and exhibited no awareness of the dangers that closed and confidential proceedings posed for accurate fact-finding.[88]

Despite *McKeiver*'s constitutional retreat, *In re Gault* provided impetus to transform the juvenile court from a social welfare agency into a scaled-down criminal court. *In re Gault* and *In re Winship* fostered adversarial delinquency

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84. *See id.* at 376-77 (Burger, C.J., dissenting). According to the majority, while *parens patriae* intervention may be a laudable goal to deal with miscreant youths, "that intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult." *Id.* at 367.

85. Breed v. Jones, 421 U.S. 519, 528-29 (1975). With respect to the risks associated with double jeopardy, the Court concluded that "we can find no persuasive distinction in that regard between the [juvenile] proceeding . . . and a criminal prosecution, each of which is designed to 'vindicate [the] very vital interest in enforcement of criminal laws.'" *Id.* at 531 (bracketed "the" in original).

86. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Even though the Court noted that the Sixth Amendment right to a jury trial applied to state criminal proceedings by its incorporation into the Fourteenth Amendment, *McKeiver* relied on the Fourteenth Amendment due process and "fundamental fairness." *See id.* at 540. The Court insisted that "the juvenile court proceeding has not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label." *Id.* at 541. The Court cautioned that "[t]here is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *Id.* at 545.

87. *See id.* at 543. In concluding that due process required only accurate fact finding, however, the Court departed significantly from its prior emphasis on the dual rationales of accurate fact finding and protection against governmental oppression. *See, e.g., In re Winship*, 397 U.S. at 363-64; *In re Gault*, 387 U.S. at 47.

88. *See McKeiver*, 403 U.S. at 547-48, 550 (criticizing advocates of procedural formality and a jury trial for ignoring "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates."). There are reasons to question the accuracy of fact finding in the juvenile justice system. *See*, FELD *supra* note 2, at 153-57 (describing the inherently prejudicial nature of juvenile court fact-finding); Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1140-60 (2003) (analyzing differences between judge and jury application of "beyond a reasonable doubt" burden of proof).

proceedings – attorneys, privilege against self-incrimination, and criminal standard of proof. Providing procedural safeguards shifted the focus of a delinquency trial from a child's "real needs" to proof that she committed a crime and made the connection between criminal conduct and delinquency sanctions explicit.

C. *The Politics of Crime and Race Riots – Blame the Warren Court*

The Supreme Court's criminal procedure and juvenile justice decisions during the 1960s coincided with increased crime rates and urban race riots.[89] Crime rates escalated dramatically as "baby boom" children began to reach adolescence,[90] more so in urban areas where crime rates generally are higher, and especially in areas of black population concentration.[91] In the mid-1960's riots erupted in black ghettoes in cities across the nation.[92] The National Advisory Commission on Civil Disorders – the Kerner Commission – attributed the riots to historic and continuing racial discrimination in employment, education, social services, and housing.[93] The Kerner Commission warned that America was moving "toward two societies, one black, one white – separate and unequal,"[94]

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89. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (application of Fourth Amendment exclusionary rule to the states); Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel at pre-indictment police interrogation); Miranda v. Arizona, 384 U.S. 436 (1966) (requirement of warning of rights prior to police interrogation); *See* GRAHAM, *supra* note 67, at 67-85 (discussing political reactions to Supreme Court's decisions); FELD, *supra* note 2, at 87-88 (increased crime rates associated with the demographics of the "baby boom" generation and increased urbanization of Blacks); Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1480-1501 (2003) (analyzing political backlash to Supreme Court's criminal procedure and juvenile decisions).

90. As the children of the baby boom reached their crime prone teenage years beginning in the mid-1960s, the rates of serious violent and property crimes increased more than 75 percent. The simple changes in the age structure of the population accounted for most of that rise. *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME (1975); POWE, *supra* note 6, at 408 (between 1963 and 1970, the homicide rate doubled from 4.6 to 9.2 per 100,000); ALLEN, *supra* note 18, at 30 ("Perceptions of increasing crime in the late 1960s brought with them a heightened sense of insecurity and fears of a collapse of public order. These perceptions were based in part on demographic realities.").

91. *See, e.g.*, FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 66 (1997) ("Homicide rates are highest in the slum neighborhoods of big cities that exclusively house the black poor. The race of the residents, the socioeconomic status of the neighborhood, and city size are all associated with elevated rates of homicide victimization."); MAUER, *supra* note 47, at 51-52 ("[U]rbanization is generally equated with higher rates of crime.").

92. HACKER, *supra* note 51, at 22; *see generally* UNITED STATES NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS REPORT (1968), *available at* http://hdl.handle.net/2027/lmc.95032.1968.001 [hereinafter KERNER COMMISSION]; LEMANN, *supra* note 44, at 190 ("[I]t seemed at least possible that a full-scale national race war might break out."); POWE, *supra* note 6, at 276 (noting that three years of riots left more than 200 dead, thousands wounded, and property damage in the tens of billions of dollars and that the assassination of Martin Luther King, Jr. in 1968 provoked hundreds more urban riots).

93. KERNER COMMISSION, *supra* note 92, at 1.

94. *Id.*

and cautioned that to continue policies that contributed to racial segregation, discrimination, and poverty would divide the nation and "would lead to the permanent establishment of two societes: one predominately white and located in the suburbs, in smaller cities, and in outlying areas, and one largely Negro located in central cities."[95]

Beginning in the mid-1960s, crime and race became potent political issues. Liberals echoed the Kerner Commission and emphasized the need to address social-structural conditions and racial and economic inequality to reduce crime.[96] Conservatives emphasized personal responsibility and minimized the role of poverty, poor education, and lack of jobs.[97] Many Whites associated the Court's criminal procedure decisions with urban riots and rising crime rates.[98] Conservative critics encouraged those perceptions and simplistically blamed increasing crime and urban disorder on the Warren Court's criminal procedure and civil rights decisions.[99]

Violent riots affected many Whites' views of the legitimacy of Blacks' grievances[100] and inclined them to attribute criminality to personal choices rather than to structural forces.[101] Conservative politicians appealed to white voters' racial resentments and exploited the coincidence between rising crime rates and

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95. *Id.* at 220.

96. *See, e.g.*, POWE, *supra* note 6, at 495; *see also* KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 53-54 (2000).

97. *See, e.g.*, POWE, *supra* note 6, at 495; BECKETT & SASSON, *supra* note 96, at 53-54. Beckett argues that the competing views of crime reflect a political contest about the balance of social welfare and social control as elements of public policy:

> As the civil rights, welfare rights, and student movements pressured the state to assume greater responsibility for the reduction of social inequalities, conservative politicians attempted to popularize an alternative vision of government—one that diminishes its duty to provide for the social welfare but enlarges its capacity and obligation to maintain social control. . . . The conservative view that the causes of crime lie in the human "propensity to evil," rests on a pessimistic vision of human nature, one that clearly calls for the expansion of the social control apparatus.

BECKETT, *supra* note 18 at 10.

98. GILENS, *supra* note 9, at 107-10; EDSALL & EDSALL *supra* note 7, at 74-77 (Richard Nixon's presidential campaign in 1968 focused on Supreme Court decisions that he found "highly problematic," and he resolved the conflict by "simultaneously affirming his belief in the principles of equality while voicing opposition to the use of federal intervention to enforce compliance.").

99. *See* MAUER, *supra* note 47, at 53.

100. GARLAND, *supra* note 8, at 97 ("Televised images of urban race riots, violent civil rights struggles, anti-war demonstrations, political assassinations, and worsening street crime reshaped the attitudes of the middle-American public in the late 1960s . . . ."); POWE, *supra* note 6, at 277-78 ("black power" advocates frightened white voters); LEMANN, *supra* note 44, at 200 ("The beginning of the modern rise of conservatism coincides exactly with the country's beginning to realize the true magnitude and consequences of the black migration, and the government's response to the migration provided the conservative movement with many of its issues.").

101. HACKER, *supra* note 51, at 22 ("As the 1970s started, so came a rise in crimes, all too many of them with black perpetrators . . . . Worsening relations between the races were seen as largely due to the behavior of blacks, who had abused the invitations to equal citizenship white American had been tendering."); GILENS, *supra* note 9, at 110.

urban riots and the Court's decisions.[102] Beginning in 1966, Republicans scored electoral gains by blaming liberal social programs and the Warren Court for urban riots and increased crime.[103]

IV. THE BROADER CONTEXT OF THE "GET TOUGH" ERA OF JUVENILE JUSTICE

Rehabilitation provided the dominant criminal and juvenile justice paradigm from its Progressive origins until the early 1970s.[104] Beginning in the 1960s, several forces combined to erode support for indeterminate sentences and rehabilitation programs.[105] By the early 1970s and for different reasons, liberal and conservative critics endorsed "just deserts," penal proportionality, and determinate sentences.[106] Critics on the political Left described indeterminate

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102. *See* GRAHAM, *supra* note 67, at 71-85; Feld, *supra* note 89, at 1494-1501; Edsall & Edsall argue that:

> [T]he *fusion* of race with an expanding rights revolution and with the new liberal agenda, and the fusion, in turn, of race and rights with the public perception of the Democratic party, and the fusion of the Democratic party with the issues of high taxes and a coercive, redistributive government, that created the central force splintering the presidential coalition behind the Democratic party throughout the next two decades....

EDSALL & EDSALL, *supra* note 7, at 72.

103. *See* POWE, *supra* note 6, at 278 (in the 1966 election, Republicans gained 47 House seats and three Senate seats and California voters elected Ronald Reagan governor by a landslide); HACKER, *supra* note 51, at 56 ("Conservatives believe that for at least a generation, black people have been given plenty of opportunities, so they have no one but themselves to blame for whatever difficulties they face.").

104. From its Progressive foundations until the early 1970s, "correctionalist commitment to rehabilitation, welfare and criminological expertise" provided the intellectual framework, cultural vocabulary, and the shared professional understandings that defined criminal justice policy and practices. GARLAND, *supra* note 8, at 27. The central tenets of the "Rehabilitative Ideal" include a focus on the individual offender, justice administration by clinical specialists and expert professionals, and welfare-oriented, indeterminate and discretionary decision-making practices. ROTHMAN, *supra* note 3, at 53-61; FRANCIS A. ALLEN, *The Juvenile Court and the Limits of Juvenile Justice*, *in* THE BORDERLAND OF THE CRIMINAL LAW: ESSAYS IN LAW AND CRIMINOLOGY 44-61 (1964).

105. GARLAND, *supra* note 8, at 60 ("The movement for determinate sentencing reform created an unusually broad and influential alliance of forces. The campaign included not only radical supporters of the prisoners' movement, liberal lawyers and reforming judges, but also retributivist philosophers, disillusioned criminologists and hard-line conservatives.") Left-wing critics characterized the criminal justice system as a repressive institution of social control to maintain the status quo. *See, e.g.*, MAUER, *supra* note 47, at 45. Beckett and Sasson argue that:

> since the late 1960s, conservative politicians, together with the mass media and activists in the victim rights movement, have kept the issue of crime at the top of the nation's political agenda. Focusing on the most sensational and violent crimes, these actors have promoted policies aimed at "getting tough" and "cracking down."

BECKETT & SASSON, *supra* note 96, at 4.

106. *See* ANDREW VON HIRSCH, DOING JUSTICE 31-39 (1976); AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 83-97 (1971). During the 1970s, empirical evaluation studies questioned both the effectiveness of rehabilitative programs and the scientific expertise of those who administered the enterprise. ALLEN, *supra* note 18, at 33-59. In the 1970s, determinate sentences based on present offense and prior record increasingly supplanted indeterminate

sentences and rehabilitation programs as disguised instruments of social control with which the State oppressed minorities and the poor.[107] Liberals objected that correctional personnel treated similarly-situated offenders differently and discriminated against minorities.[108] Conservatives perceived a breakdown of "law and order" and advocated more punitive policies.[109] Criminological studies of career criminals provided theoretical support for selectively incapacitating serious and persistent offenders.[110] Evaluations of treatment programs

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sentences for adults as "just deserts" and retribution displaced rehabilitation as the underlying rationale for criminal sentencing. *Id.* By the mid-1980s, about half the states enacted determinate sentencing laws, ten eliminated parole boards, and many more used guidelines to structure sentence decisions. *See, e.g.*, MICHAEL TONRY, SENTENCING MATTERS 6-13 (1996). Similar jurisprudential changes occurred in sentencing and waiving delinquents, as "just deserts" concerns spilled-over into the juvenile justice system as well. *See, e.g.*, Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 483-87 (1987) [hereinafter Feld, *Legislative Changes in Juvenile Waiver Statutes*]; Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence* 24 CRIME AND JUST. 189, 220-22 (1998) [hereinafter Feld, *Responses to Youth Violence*]; FELD, *supra* note 2, at 208-31. These changes affected the sentencing of ordinary delinquents as state laws and judicial practices emphasized offense criteria rather than a child's "best interests." *See, e.g.*, Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 835-36 (1988) [hereinafter Feld, *Punishment, Treatment, and the Difference it Makes*]; Julianne P. Sheffer, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation within the Juvenile Justice System*, 48 VAND. L. REV. 479 (1995); Feld, *Responses to Youth Violence*, *supra* note 106, at 220-43; FELD, *supra* note 2, at 249-86.

107. *See* AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 106 (arguing that no criminal justice programs or reforms could ameliorate or avoid the consequences that flowed from racial inequality and economic and social injustice in the larger society); FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 39-40 (1982); GARLAND, *supra* note 8, at 55; MAUER, *supra* note 47, at 44 (rehabilitation incompatible with coercive institution such as prison; personal change requires voluntary involvement which cannot be compelled).

108. *See* ALLEN, *supra* note 18, at 87-88; GARLAND, *supra* note 8, at 36; ROTHMAN, *supra* note 3, at 82-84 (arguing that liberal disenchantment with the "Rehabilitative Ideal" reflected a broader disillusionment about the ability of the State to "do good" and its failure to deal justly with its most vulnerable citizens).

109. Conservatives' efforts to "get tough" have produced a succession of "wars" on crime and later on drugs, longer criminal sentences, increased prison populations; and disproportional incarceration of racial minority offenders. *See* TONRY, *supra* note 8, at 94-95. For conservatives, the confluence of rising youth crime rates, civil rights marches and civil disobedience, students' protests against the war in Viet Nam, and urban and campus turmoil indicated an even deeper moral crisis and breakdown of traditional society. CULLEN & GILBERT, *supra* note 107, at 4; HACKER, *supra* note 51, at 22; EDSALL & EDSALL, *supra* note 7, at 49-52.

110. *See generally* CRIMINAL CAREERS AND "CAREER CRIMINALS" (Alfred Blumstein et al., eds., 1986). Beginning in the 1970s, longitudinal research has focused on the development of delinquent and criminal careers. MARVIN WOLFGANG, ROBERT FIGLIO, & THORSTEN SELLIN, DELINQUENCY IN A BIRTH COHORT (1972); DONNA M. HAMPARIAN ET AL., THE VIOLENT FEW: A STUDY OF DANGEROUS JUVENILE OFFENDERS 128-30 (1978); Joan Petersilia, *Criminal Career Research: A Review of Recent Evidence*, 2 CRIME & JUST. 321 (1980). The criminal career research initially offered the prospect that sentencing policies significantly might reduce or prevent crime through "selective incapacitation" of the most active career offenders. Unfortunately, selective incapacitation strategies founder on the inability prospectively to predict who the high base-rate offenders will be. Jacqueline Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities*

questioned clinicians' ability to coerce behavioral changes and highlighted the subjectivity inherent in therapeutic justice.[111] The cumulative criticism of the "Rehabilitative Ideal" prompted calls for a return to classical principles of criminal law and shifted sentencing decisions from broad consideration of each offender to narrower, offense-based factors. The cultural and criminological erosion of support for rehabilitation combined with increases in serious and violent crimes, especially by Blacks, to push public opinion in a markedly more conservative direction.[112] Politicians discovered that "law and order" provided them with a coded method by which to discuss legitimate issues of criminal policy and simultaneously exploit Whites' racial fears.[113]

A. *De-Industrialization and the Black "Underclass"*

Macro-economic and racial demographic changes in American cities during the 1970s and 1980s contributed to an escalation in black youth homicide rates in the late-1980s. The epidemic of crack cocaine spurred gun violence and homicides.[114] That increase fueled the politics of crime that produced "get-tough" juvenile justice policies. Conservative politicians used youth violence as a way to evoke anti-black animus and pledged to "crack down" on youth crime.[115]

During the post-World War II period, federal housing and highway policies and private banks' mortgages and real estate sales practices spurred the growth of predominantly white suburbs surrounding poor and minority urban cores.[116] As Blacks migrated from the rural South to urban areas, Whites increasingly moved from cities to the suburbs and these population shifts altered the configuration of cities.[117]

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and Pitfalls, 5 CRIME AND JUST. 1 (1983); Jan Chaiken, Marcia Chaiken, & William Rhodes, *Predicting Violent Behavior and Classifying Violent Offenders, in* 4 UNDERSTANDING AND PREVENTING VIOLENCE: CONSEQUENCES AND CONTROLS 217 (Albert J. Reiss, Jr., & Jeffrey A. Roth, eds., 1994).

111. *See, e.g.*, Robert Martison, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974) ("[W]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on rehabilitation."); ALLEN, *supra* note 18, at 57-58; MAUER, *supra* note 46, at 48-49.

112. *See* EDSALL & EDSALL, *supra* note 7, at 111-12 ("By 1977, the percentage describing court treatment of criminals as too harsh or about right had fallen to a minimal 11 percent, and those who said the courts were not harsh enough had risen to 83 percent.").

113. MENDELBERG, *supra* note 63, at 90-98; EDSALL & EDSALL, *supra* note 7, 69-73.

114. *See* Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10 (1995).

115. *See e.g.*, FELD, *supra* note 2, at 206-07.

116. *See* MASSEY & DENTON, *supra* note 11, at 19-59. During the 1960s, "urban renewal" projects eliminated about 20% of the housing available in central cities in which Blacks resided. BECKETT & SASSON, *supra* note 96, at 39; MAUER, *supra* note 47, at 123; KATZ, *supra* note 55, at 136 (arguing that in the 1950s and 1960s, urban renewal and highway construction disrupted and destroyed many urban black communities).

117. *See supra* notes 46-56 and accompanying text; *see also* GARLAND, *supra* note 8, at 84 (the

From the end of World War II until the early 1970s, men with only a high school degree could get good jobs in the automobile, steel, construction, and manufacturing industries.[118] Beginning in the 1970s, the transition from an industrial to an information and service economy reduced workers' prospects in the manufacturing sectors and many of them lacked the skills or education needed to succeed in the post-industrial economy.[119] The globalizing economy adversely affected the domestic automobile and steel industries and the black workers who had arrived more recently to work in them.[120] The most severe losses occurred in higher-paying, lower-skilled manufacturing jobs which benefited urban minority workers.[121] Job growth occurred primarily in suburbs and in information and service industries that required higher levels of education than most urban minority workers possessed.[122] Over several decades, the economic, spatial, and racial reconfiguration of cities led to an urban black underclass living in concentrated poverty and in social and cultural isolation.[123]

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automobile and the accompanying construction of highways and the large-scale migration of whites from cities to suburbs constitute major developments in post-War urban social ecology); KATZ, *supra* note 55, at 134 ("After 1945, suburbanization accelerated. Massive increases in automobile ownership, the federal highway program, and federal housing policies that underwrote suburban mortgages and redlined cities composed one set of factors speeding its development."); LEMANN, *supra* note 44, at 118 ("The interstate highway program was encouraging the flight of the white middle class to the new, sterile, soulless suburbs . . .").

118. WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS 25-34 (1996); KATZ, *supra* note 55, at 128-29.

119. The transition to a post-modern society produced a bifurcation of economic opportunities based on education and training. Garland notes that the revolution in technology:

> [G]ave rise to the 'information society' that we now inhabit; made possible the cities and suburbs in which we dwell; linked the four corners of the globe into a single accessible world; and created new social divisions between those who have access to the high-tech world and those who do not.

GARLAND, *supra* note 8, at 78; KATZ, *supra* note 55, at 124-25 (describing the post-industrial city as a study in contrasts—the shiny towers of revitalized commercial centers near the closed factories of the industrial districts, wealthy "yuppies" living in gentrified older neighborhoods and impoverished minorities living in concentrated poverty).

120. *See* EDSALL & EDSALL, *supra* note 7, at 27 (noting that the "political consequences of a globalized economy provide a case study of how race interacts catalytically with seemingly race-neutral developments to produce a powerful reaction"). The effects of declining industrial productivity and global competition eroded jobs, wages, and employment security. *Id.* at 201-02. *See, e.g.*, WILSON, *supra* note 118, at 25-100; KATZ, *supra* note 55, at 130 ("Economic stagnation, the disproportionate growth of low-wage jobs, the declining minimum wage, the mismatch between better jobs and the education of the urban poor, and shifts in occupational structure have worsened poverty within America's cities.").

121. KATZ, *supra* note 55, at 130; WILSON, *supra* note 118, at 39-46.

122. *See* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER-CITY, THE UNDERCLASS, AND PUBLIC POLICY 100-02 (1987).

123. *See generally* CHRISTOPHER JENCKS & PAUL E. PETERSON, THE URBAN UNDERCLASS (1991); MICHAEL B. KATZ, THE UNDERCLASS DEBATE: VIEWS FROM HISTORY 3 (1993); KATZ, *supra* note 55, at 199 ("Blacks' detachment from 'the standardized institutions' feeding the primary labor market reinforced their entrapment in the underclass."). Edsall and Edsall note that:

> The concentration among the black poor of single motherhood, crime and withdrawal from the labor market – combined with an intensified geographic

B. *Crack + Guns = Black Youth Homicide*

In the mid-1980s, entrepreneurs introduced crack cocaine into devastated urban areas and the drug trade produced a sharp escalation in black youth homicides.[124] Crack cocaine spawned a violent drug industry in large cities and led to a sharp increase in gun murders committed by black youths.[125] Youths in the drug industry arm themselves for self-protection and take more risks than do adults.[126] The presence of guns during illegal drug transactions can quickly escalate to homicidal violence.[127]

The crack cocaine epidemic exacerbated racial differences in arrest rates for violent crimes committed by juveniles.[128] Police arrest black youths for violent crimes—murder, rape, robbery, and assault—about five times more frequently than they do white juveniles.[129] Between 1986 and 1993, as youth homicide

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> isolation – has made it possible to partially segregate this segment of the population from the political, social, and economic mainstream.... [T]he emergence of the underclass and of an expanding body of the black urban poor has created a growing perception of a society in which the poor are no longer linked to the larger social network....The black urban poor have increasingly come to constitute a divergent and threatening segment of society from which ties to the mainstream through work, neighborhood, and shared communal values have been severed.

EDSALL & EDSALL, *supra* note 7, at 244.

124. *See, e.g.*, ALFRED BLUMSTEIN, *Disaggregating the Violence Trends, in* THE CRIME DROP IN AMERICA 13-20 (Alfred Blumstein & Joel Wallman eds., 2000); Philip J. Cook & John H. Laub, *The Unprecedented Epidemic in Youth Violence*, 24 CRIME & JUST. 27, 51-58 (1998); FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 3-16 (1998); FELD, *supra* note 2, at 197-202; HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 13 (1999); BLUMSTEIN, *supra* at 13.

125. *See* Blumstein, *supra* note 114, at 39 ("introduction of crack in the mid-1980s; recruitment of young minority males to sell the drugs in street markets; arming of the drug sellers with handguns for self-protection; diffusion of guns to peers; irresponsible and excessively casual use of guns by young people, leading to a 'contagious' growth in homicide . . ."); BECKETT & SASSON, *supra* note 96, at 8, 28 (high homicide rate attributable to interaction of numerous factors—prevalence of guns, economic and racial inequality reflected in concentrated poverty, traffic in illegal drugs such as crack, and a "code of the streets" that encourages violent responses to disrespect); MAUER, *supra* note 47, at 97 (as many as half of murders may be drug-related and so changes in drug markets affect homicide rates); Cook & Laub argue that:

> The leading explanation for why youth-homicide rates began increasing in the mid-1980s is the introduction of crack cocaine and, in particular, the conflict that attended its marketing . . . . [f]or many youths, the response to the increased threat of violence was to carry a gun or join a gang for self-protection, while adopting a more aggressive interpersonal style.

Cook & Laub, *supra* note 124, at 53-54; Alfred Blumstein & Daniel Cork, *Linking Gun Availability to Youth Gun Violence,* 59 L. & CONTEMP. PROBS. 5, 9-10 (1996).

126. Blumstein & Cork, *supra* note 125, at 9-12.

127. *See* NATIONAL RESEARCH COUNCIL, UNDERSTANDING AND PREVENTING VIOLENCE 256-260 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993).

128. FELD, *supra* note 2, at 199-205.

129. *See, e.g.*, FELD, *supra* note 2, at 197-206; ZIMRING & HAWKINS, *supra* note 91, at 76 (blacks about seven times as likely as whites to be arrested for violent crimes and eight times as likely for homicide); Cook & Laub, *supra* note 124, at 42-43 ("half of all juvenile violence arrests

rates escalated sharply, police arrests of white juveniles increased about 40%, while arrests of black youths increased 278%.[130] Guns accounted for most of the increase as well as for the racial differences in youth homicide arrests.[131] Between 1984 and 1994, the juvenile homicide rate nearly tripled[132] and the use of guns by juveniles to kill their victims quadrupled.[133] Because of the nexus between the crack industry and inner cities, almost all of the increases in homicides involved urban black males.[134]

Policies to "get tough" on youth violence effectively meant targeting young black men.[135] Because the public views juvenile courts' clientele primarily as poor, urban black males,[136] politicians could exploit these perceptions for political advantage with demagogic pledges to "crack down" on youth crime which served as a "code word" for black males.[137] In response to the spike in youth homicide arrests, legislators changed states' juvenile waiver and delinquency sentencing laws.[138]

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were of blacks, implying an arrest rate over five times as high as for whites").

130. *See* MELISSA SICKMUND, HOWARD N. SNYDER & EILEEN POE-YAMAGATA, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 13 (1997); MAUER, *supra* note 47, at 84 (between 1984 and 1993, the homicide rate for white males ages 14-17 doubled from 6.9 to 14.4 per 100,000, while the black male homicide rate quadrupled from 33.4 to 151.6 per 100,000); ZIMRING & HAWKINS, *supra* note 91, at 66 ("Homicide rates are highest in the slum neighborhoods of big cities that exclusively house the black poor. The race of the residents, the socioeconomic status of the neighborhood, and city size are all associated with elevated rates of homicide victimization.").

131. The number of deaths that juveniles caused by means other than firearms averaged about 570 per year and fluctuated within a "normal range" of about 10%. *See, e.g.*, Franklin E. Zimring, *Kids, Guns, and Homicide: Policy Notes on an Age-Specific Epidemic*, 59 L. & CONTEMP. PROBS. 25, 29 (1996); ZIMRING & HAWKINS, *supra* note 91, at 106-23; FELD, *supra* note 2, at 207-08.

132. *See* Zimring, *supra* note 131, at 29; ZIMRING, *supra* note 124, at 89 (rate of homicide arrests for offenders under eighteen for gun killings more than tripled between 1985 and 1994).

133. Zimring, *supra* note 131, at 29; *see also* ZIMRING & HAWKINS, *supra* note 91, at 108 (guns account for more than twice as many murders as all other methods combined); Blumstein, *supra* note 114, at 29-30, 32 (weapons involved in adolescent conflict shifted to handguns and semi-automatic weapons; between 1985 and 1993, juveniles' use of guns nearly quadrupled).

134. *See* Cook & Laub, *supra* note 124; Blumstein, *supra* note 114, at 16-22; Blumstein & Cork, *supra* note 125, at 15-16.

135. The politicization of crime policies and the connection in the public and political minds between race and youth crime provided a powerful political incentive for changes in waiver policies and juvenile court sentencing policies that coincided with escalating rates of youth crime and violence in the late 1970s and again in the late 1980s. FELD, *supra* note 2, at 197-202.

136. FELD, *supra* note 2, at 205-09 (concentration of gun violence within the urban black male population creates a misleading perception of juvenile courts' larger role in dealing with generic youth crime).

137. BECKETT, *supra* note 18, at 83-88.

138. *See, e.g.*, PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT 3-9 (1996); FELD, *supra* note 2, 192-95.

C. *"Get Tough" Politics and the War on Juveniles*

The confluence of guns, homicide and race provided the impetus for a political "crack down" on youth crime generally and tougher juvenile justice waiver and sentencing policies. Conservative politicians exploited the public's fears of a "blood-bath" and warned of a coming generation of "super-predators."[139] Public officials proposed to transfer more youths to criminal court to staunch the flood.[140]

The politicization of crime policies and the adoption of harsher juvenile transfer and sentencing laws culminated a process that began decades earlier. In the 1950's, conservative southerners ascribed a link between race and crime as part of a strategy to discredit the civil rights movement. Civil rights activism to desegregate schools and public facilities included civil disobedience and sit-ins.[141] Southern politicians and sheriffs variously described protesters as "criminals," "outside agitators," and "mobs."[142] Conservative politicians equated political dissent and civil disobedience with criminality and reinforced the connection between race and crime.[143] During the 1960s, the increase in

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139. *See, e.g.*, JAMES ALAN FOX, U.S. DEP'T JUSTICE, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING (1996); WILLIAM J. BENNETT ET AL., BODY COUNT (1996).

140. *See, e.g.*, JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); Zimring argues that:

> To talk of a "coming storm" creates a riskless environment for getting tough in advance of the future threat. If the crime rate rises, the prediction has been validated. If the crime rate does not rise, the policies that the alarmists put in place can be credited with avoiding the bloodbath. The prediction cannot be falsified, currently or ever.

ZIMRING, *supra* note 124, at 63; MAUER, *supra* note 46, at 12 ("as the image of the criminal as an urban black male has hardened into public consciousness, so too, has support for punitive approaches to social problems been enhanced").

141. *See, e.g.*, OMI & WINANT, *supra* note 6, at 98.

142. *See, e.g.*, BECKETT & SASSON, *supra* note 96, at 49 (Southern officials called for a crackdown on "'hoodlums,' 'agitators,' 'street mobs,' and 'lawbreakers' who challenged segregation and Black disenfranchisement, [and] these officials made rhetoric about crime a key component of political discourse on race relations."); BECKETT, *supra* note 18, at 28 ("discourse of law and order was initially mobilized by southern officials in their effort to discredit the civil rights movement"); Feld, *supra* note 89, at 1538-52 (analyzing the politicization of crime policies and the political exploitation of those differences).

143. BECKETT, *supra* note 18, at 32 argues that

> the introduction and construction of the crime issue in national political discourse in the 1960s was shaped by the definitional activities of southern officials, presidential candidate Goldwater, and the other conservative politicians who followed his cue. Categories such as street crime and law and order conflated conventional crime and political dissent and were used in an attempt to heighten opposition to the civil rights movement. Conservatives also identified the civil rights movement—and in particular, the philosophy of civil disobedience—as a leading cause of crime. These forms of protest were depicted as criminal rather than political in nature, and the excessive "lenience" of the courts was also identified as a main cause of crime. Countering the trend toward lawlessness, they argued, would require holding criminals—including

crime and urban disorders evoked further fears of "crime in the streets" and a breakdown of "law and order."[144] Republican politicians blamed rising crime rates, urban riots, and social disorder on the Warren Court and liberal Democratic social policies.[145]

Clear differences between the political parties about race-related policy issues emerged during the 1964 presidential race between Lyndon Johnson and Barry Goldwater.[146] Democrats' support for the civil rights movement alienated white southerners and other voters who began to see differences between the two parties.[147] Republicans used several race-related "wedge issues" – crime, affirmative action, and welfare – to distinguish themselves from Democrats and to make crime policies a partisan issue.[148] In 1968, George Wallace[149] and

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protesters—accountable for their actions through swift, certain, and severe punishment.

144. GARLAND, *supra* note 8, at 97 argues that:

> Appealing to the social conservatism of 'hard-working', 'respectable' (and largely white) middle classes, 'New Right' politicians blamed the shiftless poor for victimizing 'decent' society—for crime on the streets, welfare expenditure, high taxes, industrial militancy—and blamed the liberal elites for licensing a permissive culture and the anti-social behaviour it encouraged.

145. EDSALL & EDSALL, *supra* note 7, at 51-73; GILENS, *supra* note 9, at 116-23; MENDELBERG, *supra* note 63, at 93-98; BECKETT & SASSON, *supra* note 96, at 10 ("In response to the civil rights movement and the expansion of the War on Poverty programs of the 1960s, conservative politicians highlighted the problem of 'street crime' and argued that this problem was caused by an excessively lenient welfare and justice system that encouraged bad people to make bad choices."); BECKETT, *supra* note 18, at 87 ("By attributing the very real economic plight of 'taxpayers' and 'working persons' to the behavior of the 'underclass,' conservatives diminish the likelihood that these grievances will give rise to policies aimed at redistributing opportunities and resources in a more egalitarian fashion."); HACKER, *supra* note 51, at 210 ("playing on white fears of 'black crime' has moved to the center of political campaigns. Even though most white Americans do not live in or near areas where violence stalks the streets, the issue crops up in every poll and has become a conversational staple.").

146. Lyndon Johnson's presidential leadership led to passage of the 1964 Civil Rights Act which Barry Goldwater, a staunch conservative, opposed. *See* EDSALL & EDSALL, *supra* note 7, at 35. The 1964 Republican party convention rejected a party platform in favor of civil rights by a two-to-one margin. *Id.* at 44.

147. *Id.* at 74-80; BECKETT & SASSON, *supra* note 96, at 52-58; GILENS, *supra* note 9, at 116-22; MENDELBERG, *supra* note 63, at 81-93.

148. *See, e.g.*, BECKETT, *supra* note 18, at 30-43; GILENS, *supra* note 9, at 4-8; EDSALL & EDSALL, *supra* note 7, at 4 (noting that "race has become a powerful wedge, breaking up what had been the majoritarian economic interests of the poor, working, and lower-middle classes in the traditional liberal coalition"). In the pre-civil rights era, poor southern whites supported liberal policies on a host of economic issues and a larger governmental role in medical care, education, and employment. *Id.* at 41-42. Southern populism and economic liberalism foundered on their hostility to blacks and the perception that federal programs primarily benefited blacks. *Id.* at 41. OMI & WINANT, *supra* note 6, at 149 (describing racial politics as a powerful wedge issue that fractured the New Deal economic coalition of the poor, working, and middle-classes).

149. *See* EDSALL & EDSALL, *supra* note 7, at 77, 79; OMI & WINANT, *supra* note 6, at 124 (calling Wallace a law and order, anti-State, southern populist who made racial appeals the centerpiece of his campaign); Phillips argues that:

> The common denominator of Wallace support, Catholic or Protestant, is alienation from the Democratic Party and a strong trend – shown in other years

Richard Nixon attributed rising crime rates and urban riots to liberal "permissiveness" and Warren Court decisions "coddling criminals."[150] Against this backdrop, conservatives' calls for "law and order" acquired a racial subtext.[151] "Code words" implicitly invoke racial stereotypes without explicitly seeming racist or discriminatory.[152] Conservative politicians could talk about crime and simultaneously activate white voters' negative views of Blacks without explicitly playing the "race card."[153]

Republican strategists pursued a "southern strategy" to realign the political parties around racial issues and to achieve a stable electoral majority.[154] Republicans spoke to white southern and suburban constituencies with code words like "law and order" and knew that they carried racial meanings.[155] By

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> and other contests – toward the GOP. Although most of Wallace's votes came from Democrats, he principally won those in motion between a Democratic past and a Republican future.

PHILLIPS, *supra* note 7, at 463.

150. TED GEST, CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER 14 (2001) (during the 1968 presidential campaign, Nixon gave 17 speeches on law and order); BECKETT, *supra* note 18, at 38 (as a result of political and media attention to crime during the 1968 campaign, by 1969, 81% of poll respondents asserted a breakdown in law and order had occurred and attributed it to communists and Negroes who start riots); POWE, *supra* note 6, at 399 (Nixon's domestic policy stump speech emphasized "crime in the streets" and urban riots).

151. After three years of urban riots, rising youth crime rates, anti-Vietnam protests, and the assassinations of Robert F. Kennedy and Martin Luther King, Jr., a climate of fear and anger produced political demands for "law and order." BECKETT & SASSON, *supra* note 96, at 51 ("The racial subtext of these arguments was not lost on the public: Those most opposed to social and racial reform were also most receptive to calls for law and order.").

152. *See, e.g.*, OMI & WINANT, *supra* note 6, at 123 (code words are "phrases and symbols which refer indirectly to racial themes, but do not directly challenge popular democratic or egalitarian ideals"); Richard Dvorak, *"Cracking the Code: 'De-Coding' Colorblind Slurs During the Congressional Crack Cocaine Debates,"* 5 MICH. J. RACE & L. 611, 615 (2000) ("[L]egislators can appeal to racist sentiments without appearing racist"); GILENS, *supra* note 9, at 67 ("Although political elites typically use race-neutral language in discussion poverty and welfare, it is now widely believed that welfare is a 'race-coded' topic that evokes racial imagery and attitudes even when racial minorities are not explicitly mentioned.").

153. *See* OMI & WINANT, *supra* note 6, at 123 (defining racial "code words" as "phrases and symbols which refer indirectly to racial themes, but do not directly challenge popular democratic or egalitarian ideals (e.g., justice, equal opportunity)."); *see also* Martin Gilens, *"'Race Coding' and White Opposition to Welfare,"* 90 AM. POL. SCI. REV. 593, 595 (1996); Dvorak, *Cracking the Code*, *supra* note 29, at 615; ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND 20 (2000) ("Whites whose animosity is inflamed—including ambivalent Whites responding to specific situations and stimuli—become receptive to coded campaign appeals designed to mobilize them into coalitions with traditional racists.").

154. GARLAND, *supra* note 8, at 96-97 (arguing that "growing crime, worsening race relations, family breakdown, growing welfare rolls, and the decline of 'traditional values'—together with concerns about high taxes, inflation, and declining economic performance—created a growing anxiety about the effects of change that conservative politicians began to pick up on and articulate"); LEMANN, *supra* note 44, at 201 ("The great migration then delivered the coup de grace to the Democrats as a presidential party: it hastened the movement of millions of middle-class white voters to the Republican suburbs, and it caused millions more blue-collar voters who didn't move to stop voting for the Democratic candidate for president.").

155. *See, e.g.*, PHILLIPS, *supra* note 7, at 22; OMI & WINANT, *supra* note 6, at 124 (Phillips

conflating race and crime and associating both with the Democrats, Republicans turned criminal justice policies into hotly contested partisan issues.[156] Over the next two decades, they highlighted the symbolic relationship between race and crime with campaign advertisements focused on drugs, the death penalty, youth crime, and "Willie Horton."[157] By the late-1980s, voters understood campaigns to "get tough" and "crack down" on "youth crime" as code words for harsher treatment of young black males.[158]

V. COMPETENCE AND CULPABILITY IN THE CONTEMPORARY JUVENILE JUSTICE SYSTEM: ACCESS TO COUNSEL; WAIVER AND CRIMINAL SENTENCING; AND DISPROPORTIONATE MINORITY CONFINEMENT

Against the backdrop of the politicization of crime policies, some politicians blamed the increase in youth violence in the late-1980s on the failure of juvenile courts adequately to punish young offenders.[159] By the early 1990s, nearly every state amended its laws to transfer more youths to criminal courts and to sentence delinquents more severely. [160] The changes in waiver and sentencing laws

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suggested "coded" strategy of anti-black rhetoric to appeal to conservative blue-collar and southern voters); EDSALL & EDSALL, *supra* note 7, at 98 (arguing that "[r]ace was central . . . to the fundamental conservative strategy of establishing a new, non-economic polarization of the electorate, a polarization isolating a liberal, activist, culturally-permissive, rights-oriented, and pro-black Democratic Party against those unwilling to pay the financial and social costs of this reconfigured social order").

156. TONRY, *supra* note 8, at 10; GARLAND, *supra* note 8, at 153 (arguing that "anxieties about crime, on top of the more inchoate insecurities prompted by rapid social change and economic recession, paved the way for a politics of reaction in the late 1970s").

157. The 1988 Bush campaign used symbols and images – ACLU, Willie Horton, the death penalty—to appeal to white voters' concerns about race, morality, and cultural values and to associate Democratic candidate Michael Dukakis with criminal defendants' rights, black crime, and the erosion of traditional values. EDSALL & EDSALL, *supra* note 7, at 215-16; DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE 224 (1995); BECKETT & SASSON, *supra* note 96, at 68 (Bush campaign director described Horton as "a wonderful mix of liberalism and a big black rapist."); ENTMAN & ROJECKI, *supra* note 153, at 92 (Bush's blatant anti-Black Horton advertisements deliberately raised the crime issue to arouse the fear in many Whites of dangerous Blacks).

158. *See* BECKETT, *supra* note 18; HACKER, *supra* note 51, at 57 (arguing that "when crime rates rise, conservatives do not call for confronting basic causes—unemployment, for example, or inferior education—but rather invoke a firmer use of force."); MILLER, *supra* note 140, at 149 (arguing that "welfare and crime have never been far from the reach of any politician who wishes to posture on race without ever having actually to mention it"); Gilens, *supra* note 153, at 602 (arguing that public officials who use crime and welfare as "code" to mobilize anti-black sentiments for electoral advantage among white voters practice a politics of division).

159. *See, e.g.*, GARLAND, *supra* note 8, at 108; BERNARD, *supra* note 37, at 3-5 (cyclical pattern of oscillation between severity and leniency in juvenile justice policy).

160. *See, e.g.*, NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 223. It states that:

> Policies of the last decade have become more punitive toward delinquent juveniles, but especially toward juveniles who commit violent crimes. Punitive policies include easier waivers to adult court, excluding certain offenses from juvenile court jurisdiction, blended juvenile and adult sentences, increased

emphasized punishment and focused primarily on juveniles' present offense and prior record.[161] The shift from rehabilitation to retribution marked a substantial departure from traditional juvenile court sentencing policies.[162] As a consequence, harsher waiver and sentencing policies raise important questions about the quality of procedural justice in juvenile courts and states' compliance with *Gault*'s mandate to provide adequate legal services.[163]

A. *Right to Counsel in Juvenile Court*

Progressive reformers used informal procedures to adjudicate and to impose dispositions in the child's "best interests." *Gault* granted delinquents greater procedural safeguards because of the gap between Progressives' rhetoric and juvenile courts' reality. However, *Gault*'s increased procedural formality legitimated punishment and contributed to greater severity in juvenile jurisprudence and practice.[164] Although juvenile courts increasingly converge with criminal courts, states do not provide delinquents with all adult criminal procedural safeguards, such as the right to a jury trial, or with special procedures to protect them from their own immaturity, such as mandatory appointment of counsel. Perversely, states put juveniles on an equal footing with adults when formal equality places them at a practical disadvantage.[165] For example, states use the adult waiver standard – "knowing, intelligent, and voluntary" under the totality of the circumstances – to gauge juveniles' waivers of rights including the right to counsel.

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authority to prosecutors to decide to file cases in adult court, and more frequent custodial placement of adjudicated delinquents.

161. *See, e.g.*, PATRICIA TORBET ET AL., *supra* note 138; Feld, *Responses to Youth Violence, supra* note 106, at 189-261.

162. *See, e.g.*, Feld, *Responses to Youth Violence*, *supra* note 106; NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 210 ("State legislative changes in recent years have moved the court away from its rehabilitative goals and toward punishment and accountability . . . include[ing] blended sentences, mandatory minimum sentences, and extended jurisdiction."); MAUER, *supra* note 47, at 137-38 (sentencing discretion shifted from judges to prosecutors and "judicial discretion is exercised in an open courtroom subject to public scrutiny, but the exercise of prosecutorial discretion is conducted behind closed doors with little accountability").

163. N. Lee Cooper et al., *Fulfilling the Promise of In re Gault: Advancing the Role of Lawyers for Children*, 33 WAKE FOREST L. REV. 651, 652 (1998) (describing changes in juvenile codes – waiver of younger youths, exclusion of more offenses from juvenile court jurisdiction, wider sharing of records and erosion of confidentiality, greater emphasis on punishment – and the increased importance of effective representation).

164. *See* Feld, *Punishment, Treatment, and the Difference it Makes*, *supra* note 106 (describing changes in juvenile court sentencing statutes to impose longer and determinate sentences); Feld, *Legislative Changes in Juvenile Waiver Statutes*, *supra* note 106 (describing legislative changes in waiver statutes to make it easier to transfer more youths to criminal court for prosecution as adults); Feld, *supra* note 88, at 1140-81 (criticizing procedural deficiencies of juvenile courts in light of states' use of prior delinquency convictions to enhance adult criminal sentences).

165. *See, e.g.*, Feld, *supra* note 79, at 272-76 (arguing that states treat juveniles just like adults when formal equality results in practical inequality and enables the state to take advantage of juveniles' immaturity).

Gault likened the seriousness of a delinquency proceeding to a felony prosecution and granted juveniles the right to counsel.[166] But, the Court based juveniles' right to counsel on the Fourteenth Amendment Due Process Clause, rather than the Sixth Amendment which protects adult defendants' right to counsel.[167] *Gault* relied heavily on the President's Commission on Law Enforcement and the Administration of Justice which recommended that juvenile courts appoint counsel "wherever coercive action is a possibility, without requiring any affirmative choice by child or parent."[168] By contrast, *Gault* relied only on "fundamental fairness" and did not mandate appointment of counsel for delinquents, but instead only required that "the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."[169]

When the Supreme Court decided *Gault*, lawyers seldom appeared in juvenile courts.[170] After *Gault*, states amended their codes to conform with the constitutional requirement to make counsel available to delinquents. Despite formal changes of the "laws on the books," the "law in action" lagged behind and most states failed to deliver legal services. Evaluations of initial compliance with *Gault* found that most judges did not advise juveniles of their right to or appoint counsel.[171] A survey of judicial compliance conducted in Kentucky two years after *Gault* reported that about two-thirds of judges appointed lawyers for fewer than half of delinquents and one-third for fewer than 10% of juveniles.[172] Studies of counties or courts in several jurisdictions in the 1970s and 1980s reported that juvenile courts failed to appoint counsel for most juveniles.[173]

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166. *In re Gault*, 387 U.S. at 36-38 (asserting that as a matter of due process "the assistance of counsel is . . . essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution").

167. *See Gideon*, 372 U.S. at 344 (granting criminal defendants a Sixth Amendment right to counsel because "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

168. *In re Gault*, 387 U.S. at 39 n. 65 (quoting recommendations of the President's Commission on Law Enforcement and the Administration of Justice which emphasized the importance of counsel); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967).

169. *In re Gault*, 387 U.S. at 41.

170. *See, e.g.*, Note, *Juvenile Delinquents*, *supra* note 69, at 796-99 (attorneys appear for juveniles in no more than five percent of cases).

171. Norman Lefstein et al., *In Search of Juvenile Justice: Gault and Its Implementation*, 3 LAW & SOC'Y REV. 491, 506-16, 537 n.92 (1969); Elyce Z. Ferster et al., *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375 (1971).

172. Bardley C. Canon & Kenneth Kolson, *Rural Compliance with Gault: Kentucky, A Case Study*, 10 J. FAM. L. 301, 316 (1971) (reporting that most Kentucky juvenile courts failed to achieve compliance with Gault's requirement to appoint counsel).

173. *See, e.g.*, Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 L. & SOC'Y REV. 263, 297 (1980) (reporting that in North

Research in Minnesota in the mid-1980s reported that most youths appeared without counsel,[174] that rates of representation varied widely in urban, suburban and rural counties,[175] and that a substantial minority of youths whom judges removed from their homes or confined in institutions had no lawyer at their trial or sentencing hearing.[176] Feld's comparative study of six states reported that only three of them appointed counsel for a substantial majority of juveniles in delinquency proceedings.[177] Studies in the 1990s continued to describe juvenile court judges' failure to appoint lawyers for many youths who appear before them.[178] In 1995, the General Accounting Office replicated and confirmed Feld's findings that rates of representation varied widely among and within states and that juvenile courts tried and sentenced many unrepresented youths.[179] Burruss and Kempf-Leonard's study in Missouri found urban, suburban and rural variation in rates of representation (73%, 25%, and 18%) and reported that after controlling for other variables, an attorney's presence consistently and adversely affected juveniles' likelihood of receiving out-of-home placements in all settings.[180]

In the mid-1990's the American Bar Association (ABA) published two reports on the legal needs of young people. In *America's Children at Risk*, the ABA reported that "Many children go through the juvenile justice system without the benefit of legal counsel. Among those who do have counsel, some

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Carolina, the juvenile defender project represented only 22.3% of juveniles in Winston-Salem, N.C., and only 45.8% in Charlotte, N.C.); David P. Aday, Jr., *Court Structure, Defense Attorney Use, and Juvenile Court Decisions*, 27 SOC. Q. 107, 114 (1986) (reporting rates of representation of 26.2% and 38.7% in the jurisdiction he studied); M. A. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE 139 (New York University Press 1982) (studying a large, mid-western county's juvenile court and reporting that "[o]ver half (58.2 percent) [of the juveniles] were not represented by an attorney"); KIMBERLY KEMPF LEONARD ET AL., MINORITIES IN JUVENILE JUSTICE 82 (1995) (reporting that substantial majority of urban and rural juveniles in Missouri appeared in juvenile court without counsel).

174. Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1214 (1989) (reporting that in 1986, overall rate of representation was 48% with rates ranging from a high of 100% in some counties to a low of less than five percent in other counties); *see also*, BARRY C. FELD, JUSTICE FOR JUVENILES: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS (1993).

175. Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variation in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156 (1991); FELD, *supra* note 174.

176. Feld, *supra* note 174, at 1238 (reporting that 31% of juveniles removed from their homes and 27% of those incarcerated were not represented by counsel).

177. Barry C. Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393, 401 (1988) (reporting that interstate rates of representation were highly variable: California, 85%; Minnesota, 48%; Nebraska, 53%; New York, 96%; North Dakota, 38%; and Pennsylvania, about 90%).

178. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, JUVENILE JUSTICE: REPRESENTATION RATES VARIED AS DID COUNSEL'S IMPACT ON COURT OUTCOMES 15 (1995); George W. Burruss, Jr. & Kimberly Kempf-Leonard, *The Questionable Advantage of Defense Counsel in Juvenile Court*, 19 JUST. Q. 37 (2002).

179. U.S. GEN. ACCOUNTING OFFICE, *supra* note 178, at 15.

180. Burruss & Kempf-Leonard, *supra* note 178.

are represented by counsel who are untrained in the complexities of representing juveniles and fail to provide 'competent' representation." [181] In *A Call for Justice*, the ABA focused on the quality of lawyers in juvenile courts and again reported that many delinquents appeared without an attorney.[182] Since the late-1990s, the ABA has conducted a series of state-by-state assessments of juveniles' access to counsel and the quality of representation they receive. These studies consistently report that many, if not most, juveniles appear without counsel and that lawyers who represent them often provide substandard services because of structural impediments to effective advocacy.[183] Moreover, regardless of the inadequacy of a youth's representation, the juvenile justice process is nearly incapable of correcting its own errors.[184] Juvenile defenders rarely, if ever, appeal adverse decisions and often lack even a record with which to challenge an invalid waiver of counsel.[185]

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181. A.B.A., AMERICA'S CHILDREN AT RISK 60 (1993).

182. A.B.A., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 45 (1995).

183. *See e.g.*, GABRIELLA CELESE & PATRICIA PURITZ, THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF LEGAL PRESENTATION IN DELINQUENCY PROCEEDINGS IN LOUISIANA 59–62 (2001) (reporting that observers in several parishes estimated that 80-90% of delinquents appeared without counsel) [hereinafter CELESE & PURITZ, THE CHILDREN LEFT BEHIND]; PATRICIA PURITZ & KIM BROOKS, A.B.A., KENTUCKY: ADVANCING JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 29 (2002) (noting that despite efforts to improve delivery of legal services, large numbers of youths continue to appear without counsel) [hereinafter PURITZ & BROOKS, KENTUCKY]; PATRICIA PURITZ ET AL., A.B.A., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 24–5 (2002) (estimating that half or more of juveniles appeared without counsel, including many charged with serious offenses) [hereinfter PURITZ ET AL., VIRGINIA];KIM BROOKS & DARLENE KAMINE, JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO 25 (2004) (reporting that juvenile courts processed as many as 80% of youths without benefit of counsel); Susanne M. Bookser, *Making Gault Meaningful: Access to Counsel and Quality of Representation in Delinquency Proceedings for Indigent Youth*, 3 WHITTIER J. CHILD & FAM. ADVOC. 297 (2004) (analyzing and identifying commonalities in the separate state reports assessing delivery and quality of legal services).

184. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 633 (2002) (describing the lack of appellate counsel to challenge trial judges' procedural short-comings).

185. *See, e.g.* Berkheiser, *supra* note 61, at 633 (describing low rate of appeals from delinquency proceedings); Patricia Puritz & Wendy Shang, *Juvenile Indigent Defense: Crisis and Solutions*, 15 CRIM. JUST. 22, 23 (Spring 2000) (reporting that public defenders and court appointed counsel rarely, if ever, file appeals); Donald J. Harris, *Due Process vs. Helping Kids in Trouble: Implementing the Right to Appeal from Adjudications of Delinquency in Pennsylvania*, 98 DICK. L. REV. 209 (1993) (reporting that public defenders filed about ten times as many appeals for adult defendants as for delinquents and attributing the differences to juvenile defense lawyers' internalization of *parens patriae* ideology); Gary L. Crippen, *Can the Courts Fairly Account for the Diminished Competence and Culpability of Juveniles? A Judge's Perspective, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 403, 411, 414 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[S]ervices of counsel . . . must be sufficient to create a meaningful right of appeal. Without a healthy juvenile court appellate practice, legal rights are often illusory . . . "); Bookser, *supra* note 60, at 306 ("Post-disposition advocacy is minimal with defender offices not structured to support appeals. Excessive caseloads and restrictions on

There are several reasons why so many youths appear in juvenile courts without counsel.[186] Public-defender legal services may be inadequate or non-existent in non-urban areas.[187] Juvenile court judges may encourage and readily find waivers of the right of counsel to ease administrative burdens on the courts.[188] For example, judges may give cursory advisories of rights that imply that it is just a technicality.[189] Judges in more traditional juvenile courts resent lawyers who challenge their discretion.[190] In other instances, judges may not appoint counsel for a juvenile if they expect to impose a non-custodial sentence.[191]

Waiver of counsel is the most common reason why so many juveniles are unrepresented.[192] In most states, courts gauge juveniles' waivers of rights by assessing whether they were "knowing, intelligent, and voluntary" under the "totality of the circumstances."[193] In *Fare v. Michael C.*,[194] the Court endorsed

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compensation hamper willing attorneys. Frequently, appointments officially end at disposition, making post-disposition advocacy a moot issue.").

186. *See* A.B.A., *supra* note 182, at 45.

187. Canon & Kolson, *supra* note 172, at 323 (noting that the unavailability of lawyers in rural counties may deter judges from appointing counsel); A.B.A., *supra* note 182, at 45 (noting that "In rural areas, where pressure from the legal community to appoint lawyers if virtually nonexistent, youth waive counsel frequently. Furthermore, attorneys often have to travel hundreds of miles in rural counties to reach their clients, and these long distances inherently limit clients' access to counsel.").

188. Berkheiser, *supra* note 184, at 609-622 (analyzing 99 appellate cases reviewing validity of juveniles' waivers of counsel and describing blatant judicial non-compliance with constitutional and state law requirements); Canon & Kolson, *supra* note 172, at 321-322 ("[J]udges whose juvenile workload is already heavy are reluctant to adopt a liberal policy of appointing counsel for indigent defendants because it is likely to make the cases all the more time consuming and the backlog that much greater."); A.B.A., *supra* note 182, at 45 (reporting that judges often induce juveniles to waive counsel by suggesting that "lawyers are not needed because no serious dispositional consequences are anticipated.").

189. Cooper et al., *supra* note 163, at 658 (reporting that judges rarely give juveniles as complete a waiver colloquy as that received by adults prior to waiving counsel or pleading guilty); Berkheiser, *supra* note 184, at 616 (describing waivers that "demonstrate a disturbingly cavalier attitude by the juvenile courts toward a child's waiver of the right to counsel."); Bookser, *supra* note 183, at 304 (reporting that "waiver is usually an uninformed decision made without consulting with an attorney and based on limited and inadequate colloquy").

190. *See, e.g.*, Berkheiser, *supra* note 184, at 617 (attributing failure of state laws and court rules to assure delivery of legal services to "resistance of juvenile court judges to externally imposed limits on their discretion"); Canon & Kolson, *supra* note 172, at 323 (reporting that judges who see themselves as "counsellors [sic] to the misguided youth as well as judges . . . feel that an attorney would interfere with their counseling relationship by turning it into a legal battle").

191. Feld, *supra* note 79, at 190; Lefstein et al., *supra* note 171, at 531; BORTNER, *supra* note 173, at 140 (noting that court officials are likely to recommend counsel only in cases with the potential for serious dispositions); *see generally* Burruss & Kempf-Leonard, *supra* note 178.

192. Feld, *supra* note 174, at 1324; Berkheiser, *supra* note 184, at 609-22 (analyzing all 99 appellate decisions reviewing validity of juveniles' waivers of rights); Cooper et al., *supra* note 164; A.B.A., *supra* note 182, at 44–45.

193. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 725 (1979) (articulating requirements for adequate waiver of a juvenile's right to an attorney); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (finding that a defendant may waive her right to counsel); Berkheiser, *supra* note 184, at 602–07 (reviewing constitutional evolution of counsel waiver standard and its application to juveniles).

the adult waiver standard – "knowing, intelligent, and voluntary under the totality of the circumstances" – to evaluate juveniles' waivers of *Miranda* rights.[195] The Court rejected the idea that developmental or psychological differences between children and adults required special procedures for youths.[196] As a result, juveniles can waive constitutional rights, like the right to counsel, without consulting with either a parent or an attorney.[197] *Fare* asserted that the adult standard provided trial judges with appropriate flexibility to assess juveniles' waivers of *Miranda* rights.[198] Trial judges use the same waiver standard to evaluate juveniles' waivers of counsel at trial.[199]

When trial judges decide whether a juvenile made a "knowing, intelligent, and voluntary" waiver, they typically consider characteristics of the offender such as age, education, I.Q., and prior contacts with law enforcement.[200] The "totality" approach gives judges broad discretion with which to decide whether youths understand and voluntarily waive their rights. However, a review of appellate cases reports that juvenile court judges frequently failed to give delinquents any counsel advisory, often failed to provide any record of a waiver colloquy, and readily accepted waivers of counsel from manifestly incompetent children.[201]

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194. *Fare*, 442 U.S. at 726-27 (finding a "knowing, intelligent and voluntary" waiver of *Miranda* rights by a 16½-year-old offender with several prior arrests who had "served time" in a youth camp).

195. *Id.* at 718-24. *Fare* held that a youth's request to speak with his probation officer when police interrogated him constituted neither a *per se* invocation of his *Miranda* privilege against self-incrimination nor the functional equivalent of a request for counsel which would have required further questioning to cease. *Compare, e.g.*, Edwards v. Arizona, 451 U.S. 477 (1981).

196. *Fare*, 442 U.S. at 725. *See* Rosenberg, *supra* note 79 (decrying Court's failure to provide additional procedural safeguards); McCarthy, *supra* note 74 (analyzing *Fare's* inconsistency with earlier Court decisions); *see generally* Feld, *supra* note 79 (noting the Court's departure from earlier concerns about the impact of immaturity on legal decision-making).

197. Berkheiser, *supra* note 184, at 602-07 (analyzing constitutional waiver standard and its application in criminal and juvenile proceedings).

198. *Id.* at 722-24. The majority of states follow the "totality" approach approved in *Fare* and eschew any special procedural protections for juveniles. *See, e.g.*, Kimberly Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of* Miranda, 48 VILL. L. REV. 629, 645-46 (2003) (summarizing majority of states' use of "totality of circumstances" test and factors they consider); Quick v. State, 599 P.2d 712 (Alaska 1979) (concluding that a juvenile may waive *Miranda* rights without consulting parent or other adult); Carter v. State, 697 So.2d 529, 533-34 (Fla. Dist. Ct. App. 1997) (affirming "totality of circumstances" test and trial court rejection of "Grisso Test" to measure juvenile's understanding of *Miranda* warnings); Dutil v. State, 606 P.2d 269 (Wash. 1980) (rejecting per se rule to require presence of parent, guardian or counsel at interrogation).

199. Berkheiser, *supra* note 184, at 605 (concluding that courts apply the same standard to juvenile and adult defendants in federal and state courts prohibiting waiver unless made "competently and intelligently").

200. *See, e.g.*, West v. United States, 399 F.2d 467, 469 (5th Cir. 1968) (listing factors for trial judges to consider when they assess the validity of juveniles' waiver decisions); *Fare*, 442 U.S. at 725 (listing factors); State v. Benoit, 490 A.2d 295, 302 (N.H. 1985) (listing factors).

201. Berkheiser, *supra* note 184, at 609-22.

Research on juveniles' adjudicative competence and ability to exercise *Miranda* rights strongly questions whether they can make "knowing, intelligent, and voluntary" waivers. Thomas Grisso has studied juveniles' legal competencies across several domains for three decades and reports that many juveniles simply do not understand the meaning of a *Miranda* warning or counsel advisory well enough to make a valid waiver.[202] If juveniles do not understand *Miranda* warnings or judicial advisories, then they cannot exercise their rights as effectively as adults.[203] Significantly, juveniles most frequently misunderstood the warning that they had the right to an attorney and to have one present when police question them.[204] Although older juveniles understood *Miranda* warnings about as well as did adults, substantial minorities of both groups failed to grasp at least some elements of the warning.[205]

Even youths who understand the abstract words of a *Miranda* warning or judicial advisory of counsel may not be able to exercise their rights effectively. Juveniles may not appreciate the function or importance of rights as well as do

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202. *See* THOMAS GRISSO, JUVENILES' WAIVERS OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 106-07 (1981) (reporting that only about half of mid-adolescents understand their *Miranda* warning, a rate lower than that of adults); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1154-54 (1980) (reporting that majority of juveniles who received *Miranda* warnings did not understand them well enough to waive their rights; that only 20.9% of the juveniles, as compared with 42.3% of the adults, exhibited understanding of all four components of a *Miranda* warning; and 55.3% of juveniles, as contrasted with 23.1% of the adults, manifested no comprehension of at least one of the four warnings) [hereinafter Grisso, *Juveniles' Capacities to Waive*]; Thomas Grisso, *Juveniles' Consent in Delinquency Proceedings*, *in* CHILDREN'S COMPETENCE TO CONSENT 131 (Gary B. Melton, Gerald P. Koocher, & Michael J. Saks eds., 1983) [hereinafter Grisso, *Juveniles' Consent*].

203. Larson, *supra* note 75, at 648-49; J. Thomas Grisso & Carolyn Pomiciter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 L. & HUM. BEHAV. 321, 339 (1977) (reporting that juveniles invoked their rights in about 10% of cases compared with 40% of adults); A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 53 (1970) (reporting that over 90% of the juveniles whom police interrogated waived their rights, that an equal number did not understand the rights they waived, and that even a simplified version of the language in the *Miranda* warning failed to cure these defects); Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. MAG. 27, 28 (Summer 2000) (reporting that more than half of juveniles did not understand the words of the Miranda warning).

204. Grisso, *Juveniles' Capacities to Waive*, *supra* note 202, at 1159; *see also*, Beyer, *supra* note 203, at 28 (reporting that juveniles' misunderstood role of defense counsel).

205. Grisso, *Juveniles' Capacities to Waive*, *supra* note 202, at 1157. *See also*, Rona Abramovitch, Karen L. Higgins-Biss, & Stephen R. Biss, *Young Persons' Comprehension of Waivers in Criminal Proceedings*, 35 CANADIAN J. CRIM. 309, 319 (1993) ("[I]t seems likely that many if not most juveniles who are asked by the police to waive their rights do not have sufficient understanding to be competent to waive them."); Chevon M. Wall & Mary Furlong, *Comprehension of Miranda Rights by Urban Adolescents with Law-Related Education*, 56 PSYCHOL. REP. 359 (1985) (reporting that urban, black high school students who participated in a "Street Law" course that included information about *Miranda* rights did not understand their rights well enough to assert them); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL., PUB. POL'Y & L. 3, 11 (1997) (summarizing research on adolescents understanding of *Miranda* warnings and reporting "good understanding for a majority of 16- to 19-year olds," both delinquents and non-delinquents).

adults.[206] They have greater difficulty than adults conceiving of a right as an entitlement that they can exercise without adverse consequences.[207] Societal expectations of obedience to authority and children's lower social status make them more vulnerable than adults during police interrogation and more likely to acquiesce to judges' pressures to waive counsel.[208]

Developmental psychologists' research on juveniles' adjudicative competence raises further concerns about juveniles' capacity to exercise legal rights.[209] A defendant must be able to understand legal proceedings, make rational decisions, and process information from and assist counsel in order to be competent to stand trial.[210] Mental illness or retardation normally produces the disabilities that substantially impair defendants' competence.[211] However,

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206. Larson, *supra* note 198, at 649-53 (reviewing social psychological research and juveniles' limited understanding of the concept of "rights" as an entitlement to be exercised); Grisso, *supra* note 205 (distinguishing between understanding words of warning and appreciating functions of rights that warning conveys); GRISSO, *supra* note 202, at 130 (reporting that majority of juveniles view "a right as an allowance which is bestowed by and can therefore be revoked by the authorities"); A.B.A., *supra* note 182, at 44 (reporting that youths who waived counsel explained that they felt intimidated or did not understand the vocabulary used and did not listen closely).

207. Grisso, *supra* note 205, at 29; Larson, *supra* note 198, at 651-52; Grisso, *supra* note 205, at 11 (arguing that a larger proportion of delinquent youths bring to the defendant role an incomplete comprehension of the concept and meaning of a right as it applies to adversarial legal proceedings.").

208. *See, e.g.*, Larson, *supra* note 198, at 657-58 (summarizing psychological research reporting that "children are more compliant and suggestible than adults"); Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 716 (1992) (noting that children are socialized to obey authority figures).

209. Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 335 (2003) (explaining that adjudicative competence entails "a basic comprehension of the purpose and nature of the trial process (Understanding), the capacity to provide relevant information to counsel and to process information (Reasoning), and the ability to apply information to one's own situation in a manner that is neither distorted nor irrational (Appreciation)."). Trying only competent defendants assures the legitimacy of the criminal process, reduces the risk of erroneous convictions, and protects the dignity and autonomy of the accused. Bonnie and Grisso argue that:

> The dignity of the criminal process is undermined if the defendant lacks a basic moral understanding of the nature and purpose of the proceedings against him or her. The accuracy or reliability of the adjudication is threatened if the defendant is unable to assist in the development and presentation of a defense. Finally, to the extent that decisions about the course of adjudication must be made personally by the defendant, he or she must have the abilities needed to exercise decision-making autonomy.

Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 73, 76 (Thomas Grisso & Robert G. Schwartz eds., 2000).

210. Drope v. Missouri, 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").

211. Dusky v. United States, 362 U.S. 402 (1960) (requiring defendants to possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of proceedings against him").

generic developmental limitations impair juveniles' ability to understand legal proceedings, make rational decisions, and assist counsel.[212] Grisso's recent research found significant age-related differences between adolescents' and young adults' adjudicative competence, legal understanding, and quality of judgment.[213] Many juveniles below the age of fourteen were as severely impaired as mentally-ill adult defendants who lacked competence to stand trial.[214] A significant proportion of youths younger than sixteen years of age lacked competence and some older youths exhibited substantial impairments.[215] Age and intelligence interacted to produce higher levels of incompetence among younger adolescents with lower IQs than among low IQ adults.[216] Even formally competent adolescents made poorer decisions than did young adults because they emphasized short-term over long-term consequences and sought peer approval.[217]

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212. *See, e.g.*, Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005); Grisso, et al, *supra* note 209; Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353 (2001); Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform*, 12 CRIM. JUST. 5, 7-9 (Fall 1997) (questioning youths' ability to understand trial process, to assist counsel, and to make strategic legal decision); *see, e.g.*, Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 1005 (2004) (arguing that "juvenile suspects share many of the same characteristics as the developmentally disabled, notably their eagerness to comply with adult authority figures, impulsivity, immature judgment, and inability to recognize and weigh risks in decision-making, and appear to be at a greater risk of falsely confessing when subjected to psychological interrogation techniques . . .").

213. Grisso, et al., *supra* note 209, at 343-346; Redding & Frost, *supra* note 212, at 374-378 (summarizing research on adjudicative competence of adolescents and reporting younger age, lower IQ, and mental illness combine to detract from juveniles' ability to understand proceedings and to assist counsel).

214. Grisso, et al., *supra* note 209, at 344 ("30% of 11- to 13-year-olds, and 19% of 14- to 15-year olds, were significantly impaired on one or both of these subscales" measuring Understanding and Reasoning); Redding & Frost, *supra* note 212; Bonnie & Grisso, *supra* note 209, at 87 ("Some youths, especially those who are nearer to the minimum age for waiver to criminal court, may have significant deficits in competence-related abilities due not to mental disorder but to developmental immaturity."); Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 652 (1995) (reporting that majority of juveniles fifteen and younger failed to meet adult standard of competence).

215. Grisso et al, *supra* note 209.

216. Grisso et al, *supra* note 209, at 356. Reported that:

> approximately one fifth of 14- to 15-year-olds are as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial by clinicians who perform evaluations for courts. . . . Not surprisingly, juveniles of below-average intelligence are more likely than juveniles of average intelligence to be impaired in abilities relevant for competence to stand trial. Because a greater proportion of youths in the juvenile justice system than in the community are of below-average intelligence, the risk for incompetence to stand trial is therefore even greater.

217. Bonnie & Grisso, *supra* note 209, at 91; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997); Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the*

In summary, research on juveniles' ability to exercise *Miranda* rights and their adjudicative competence consistently reports that, as a group, younger adolescents possess less ability than adults to understand legal proceedings and to make rational decisions.

A few states recognize juveniles' developmental differences and prohibit their waivers of counsel or incarceration without representation.[218] Most states allow juveniles to waive *Miranda* rights and the right to counsel in delinquency proceedings without even consulting an attorney.[219] Like many other states, Kentucky has struggled to provide adequate legal defense representation for delinquents.[220] A 1996 report described substantial deficiencies in access to and quality of defense lawyers – excessive caseloads for full-time public defenders; inadequate representation by court-appointed attorneys; many unrepresented juveniles at detention hearings and court proceedings; lack of time for attorneys to meet with clients, file motions, prepare for trials, or advocate for appropriate dispositions; and lack of resources to pursue appellate remedies.[221] Judicial and administrative changes in the late-1990s began to address those deficiencies.[222] To avoid uninformed waivers of counsel, the Kentucky Court of Appeals in *D.R. v. Commonwealth* required mandatory consultation with counsel prior to any juvenile's waiver.[223] Despite that judicial impetus, a subsequent assessment of juvenile indigent defense services reported continuing instances of excessive

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Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders, 6 VA. J. SOC. POL'Y & L. 389 (1999).

218. *See* Feld, *supra* note 79, at 187 & nn.152-53 (discussing Iowa and Wisconsin); *see also* Institute of Judicial Admin. - ABA Joint Comm'n on Juvenile Justice Standards, Standards Relating to Pretrial Court Proceedings 5.1 cmt. 81 (advocating that the juvenile should have the mandatory and nonwaivable right to effective assistance of counsel at all stages of the proceedings).

219. *See, e.g.*, Berkheiser who argues that:

> The broad discretion granted to juvenile court judges by the court's founders and later by state statutes, coupled with the informality of juvenile court proceedings, have impeded the full recognition of juveniles' constitutional rights. . . Juveniles do not have the capacity for sound decision making or an understanding of the significance of right to counsel and the consequences of waiving the right.

Berkheiser, *supra* note 184, at 649-50.

220. *See* Kim Brooks, Kim Crone, & James Earl, *Beyond* In re Gault*: The Status of Juvenile Defense in Kentucky*, 5 KY. CHILD. RTS J. 1 (Spring 1997); PATRICIA PURITZ & KIM BROOKS, ADVANCING JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2002).

221. Brooks et al., *supra* note 220 (reporting inadequate training and compensation for attorneys who represent children and high rates of waiver of counsel by adjudicated youths and incarceration without representation).

222. PURITZ & BROOKS, *supra* note 220 (describing creation of Blue Ribbon Group to Improve Indigent Defense Services, creation of Juvenile Post-Disposition Branch to advocate on behalf of incarcerated juveniles, and appropriations to increase salaries, provide additional staff, and reduce case-load size).

223. D.R. v. Commonwealth, 64 S.W.3d 292 (Ky. Ct. App. 2001) (deciding that "a child may waive the right to counsel only if that child has first been appointed, and consulted with, counsel concerning the waiver") (emphasis omitted).

caseloads, high rates of waiver of counsel by non-detained youths, limited advocacy by attorneys at dispositional hearings, and a variety of structural barriers to effective representation.[224]

Providing effective assistance of counsel for juveniles is a two-step problem. The first step is simply to assure that lawyers are available to represent juveniles in delinquency proceedings. Secondly, once states secure the presence of defense lawyers for delinquents, they must provide the resources necessary to perform adequately. Even when judges appoint lawyers for delinquents, attorneys may not represent their juvenile clients effectively.[225] The juvenile court as an institution functions to thwart the adversarial process.[226] Organizational pressures to maintain stable relationships and to cooperate with other people in the system may impede effective advocacy.[227]

Can lawyers even perform as adversarial litigants in a *parens patriae* juvenile justice system?[228] Lawyers' presence with juveniles in more traditional juvenile courts places their clients at a disadvantage.[229] Judges incarcerate juveniles who appear with counsel more readily than they do those without a lawyer.[230] Research that controlled for the influence of legal variables, such as

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224. PURITZ & BROOKS, *supra* note 220, at 3-5 (reporting that "Effective representation is adversely effected in some parts of the state due to crushing caseloads, court docketing, and geographic challenges in multi-county officers.").

225. *See e.g.*, A.B.A., *supra* note 182; *see e.g.*, CELESE & PURITZ, THE CHILDREN LEFT BEHIND, *supra* note 183 (describing inadequate quality of representation); PURITZ & BROOKS, KENTUCKY, *supra* note 183 (noting that despite efforts to improve delivery of legal services, quality of representation remains problematic); PURITZ ET AL., VIRGINIA, *supra* note183 (reporting excess caseloads and inadequate services to provide competent representation); BROOKS & KAMINE, *supra* note 183 (reporting substantial deficiencies in quality of representation).

226. Feld, *supra* note 79, at 187 ("Organizational pressures to cooperate, judicial hostility toward adversarial litigants, role ambiguity created by the dual goals of rehabilitation and punishment, reluctance to help juveniles 'beat a case,' or an internalization of a court's treatment philosophy may compromise the role of counsel in juvenile court."); Clarke & Koch, *supra* note 173, at 305 (noting juvenile courts' treatment of lawyers as an "impediment"); BORTNER, *supra* note 173, at 136-39 (describing role of counsel in juvenile court).

227. *See, e.g.*, BORTNER, *supra* note 173, at 138 (examining the influence of court personnel on lawyer's perceived role in juvenile court); W. VAUGHAN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 102-06 (1972) (discussing the juvenile court as a "quasi-cooperative system"); Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15, 18-24 (1967) (arguing the impact of institutional pressures upon the ability of attorneys to maintain advocacy posture); Burruss & Kempf-Leonard, *supra* note 178, at 61 (noting that organizational climate within juvenile court may disincline counsel to advocate on delinquents' behalf).

228. *See, e.g.*, STAPLETON & TEITELBAUM , *supra* note 227, at 156-64 (finding juvenile court philosophy limits the ability of lawyers to adequately perform as advocates).

229. *See, e.g.*, BORTNER, *supra* note 173, at 139-40 (characterizing the disadvantages of attorney representation for juvenile defendants); Clarke & Koch, *supra* note 173, at 304-06 (suggesting the absence of an attorney may benefit a juvenile client); Feld, *supra* note 174, at 1280 (describing the adverse impact of representation on juveniles' subsequent sentences); Burruss & Kempf-Leonard, *supra* note 178.

230. BORTNER, *supra* note 173, at 139-40 ("[R]egardless of the types of offenses with which

present offense, prior record, and pre-trial detention status, concluded that "representation by counsel is an additional aggravating factor in a juvenile's disposition."[231] Every study analyzing the presence and effectiveness of counsel in juvenile court reports an adverse impact.[232]

How to explain the consistent finding that juveniles represented by counsel fare worse?[233] Perhaps the lawyers who appear in juvenile courts are so incompetent that they prejudice their clients' cases.[234] Even in jurisdictions where judges routinely appoint counsel for juveniles, many lawyers provide ineffective representation.[235] Public defender offices may assign their least capable or newest attorneys to juvenile court to get trial experience and the neophytes may receive inadequate supervision.[236] Similarly, court-appointed lawyers may be more concerned with maintaining an ongoing relationship with

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they were charged, juveniles represented by attorneys receive more severe dispositions."); STAPLETON & TEITELBAUM, *supra* note 227, at 63-96; Clarke & Koch, *supra* note 50, at 306; David Duffee & Larry Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 7 CRIM. L. BULL. 544, 552 (1971); Burruss & Kempf-Leonard, *supra* note 178; Feld, *supra* note 177, at 418-19 (reporting that "representation by counsel is an aggravating factor in a juvenile's disposition . . . . While the legal variables [of seriousness of present offense, prior record, and pretrial detention status] enhance the probabilities of representation, the fact of representation appears to exert an independent effect on the severity of dispositions.").

231. Feld, *supra* note 174, at 1330.

232. Burruss & Kempf-Leonard, *supra* note 178, at 41 (reviewing research on impact of counsel in juvenile court and reporting that "[i]n every study, attorneys had an adverse effect . . . .").

233. *See, e.g.*, BORTNER, *supra* note 173, at 138-40; Clarke & Koch, *supra* note 173, at 297; Feld, *supra* note 177, at 419; Feld, *supra* note 174, at 1280.

234. *See* JANE KNITZER & MERRIL SOBIE, LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN 8-9 (1984); PLATT, *supra* note 3, at 139; STAPLETON & TEITELBAUM, *supra* note 227, at 38; Lefstein et al., *supra* note 171, at 511-12.

235. The state of New York had the highest rate of representation, over 95%, in a six-state study of the delivery of legal services in juvenile courts. Feld, *supra* note 177, at 400-02. Despite the routine presence of counsel, however, Knitzer and Sobie reported

> Overall, 45% of the courtroom observations reflected either seriously inadequate or marginally adequate representation. . . . Specific problems center around lack of preparation and lack of contact with the children. In 47% of the observations it appeared that the law guardian had done no or minimal preparation. In 5% it was clear that the law guardian had not met with the client at all. . . . In addition, ineffective representation is characterized by violations of statutory or due process rights; almost 50% of the transcripts included appealable errors made either by law guardians or made by judges and left unchallenged by the law guardians.

KNITZER & SOBIE, *supra* note 234, at 8-9.

236. Barbara Flicker, *Providing Counsel for Accused Juveniles, in* CURRENT POLICY ISSUES 1983, at 2 (June 1983) (noting that "[i]n some defender offices, assignment to 'kiddie court'' is the bottom rung of the ladder, to be passed as quickly as possible on the way up to more visible and prestigious criminal court assignments. Little attention may be paid by superiors to performance in juvenile court, providing few incentives for hard work."). Indeed, commentators have noted that judges avoid or resist assignment to juvenile court for similar reasons. "[T]he juvenile court is considered to be the lowest rung on the judicial ladder. Rarely does the court attract men of maturity or ability. The work is not regarded as desirable or appropriate for higher judgeships." Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 17 (1965).

the appointing judge than with vigorously defending their frequently changing clients.[237] Most significantly, the conditions under which many attorneys work constitute a structural impediment to quality representation.[238] Observations and qualitative assessments in several jurisdictions report working conditions – crushing caseloads, inadequate compensation, lack of support services, inexperienced attorneys and inadequate supervision – that detract from or even preclude effective representation.[239]

Judges may appoint lawyers when they anticipate imposing more severe sentences and this could account for the relationship between the presence of an attorney and more severe dispositions.[240] In many jurisdictions, the same judge presides at a youth's arraignment, detention hearing, adjudication, and subsequent disposition.[241] However, if judges appoint a lawyer at a juvenile's arraignment or detention because they expect to incarcerate him, have they already prejudged the case? On the other hand, if judges only appoint an attorney when a severe disposition appears more likely, then a lawyer may be unable to provide an effective defense.[242]

Finally, judges may sentence delinquents who appear with counsel more severely than those who do not because the presence of a lawyer effectively insulates them from appellate reversal.[243] While judges may not punish juveniles

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237. Flicker, *supra* note 236, at 4 (commenting that court officials' hostility to counsel's efforts has resulted in negative performance evaluations, slashed fees, and even pressure from the court to remove the offending attorneys from the panel).

238. Cooper et al., *supra* note 163, at 658-63 (describing direct and indirect barrier to effective representation); A.B.A., *supra* note 182, at 24 (describing systemic barriers to effective representation, including "underfunding, low morale, high turnover, lack of training, low status in 'career ladders,' political pressures, low salaries, and huge caseloads.").

239. Analysts attribute the poor quality of attorneys' performance to lack of preparation, crushing caseloads, and inadequate compensation. CELESE & PURITZ, *supra* note 183, at 62-65 (grueling caseloads preclude any meaningful contact with clients); PURITZ & BROOKS, *supra* note 220, at 31-35 (high caseloads and limited resources adversely affected quality of representation).

240. Aday, *supra* note 173, at 115; Canon & Kolson, *supra* note 172, 319-320 (reporting that "Appointment of counsel is a sign that the judge is leaning toward or had made up his mind to the effect that the defendant is going to be placed in the juvenile detention home or that the judge is going to waive his jurisdiction. . . . The judge, often on the advice of the county attorney, wants to protect his decision from collateral attack by insuring that the record shows that the accused was represented by an attorney.")

241. Feld, *supra* note 79, at 240-241.

242. Burruss & Kempf-Leonard suggest that:

> timing may affect the ability of attorneys to succeed in delinquency matters. For example, juveniles may retain counsel too late in the process. . . . [A]ttorneys may not be appointed until court officials have decided informally on disposition. . . . [B]ecause juvenile courts process cases so much more quickly than adult criminal courts, the time constraints preclude preparation of a successful defense strategy.

Burruss & Kempf-Leonard, *supra* note 178, at 61.

243. Duffee & Siegel, *supra* note 230, at 548-549 (contending that "When the appearance of due process has been maintained, the juvenile court should feel secure about future challenges and safer in prescribing even stricter control over its wards.").

just because they have a lawyer, they can be more lenient with youths who appear without counsel and "throw themselves on the mercy of the court."[244] But, what accounts for judicial hostility toward adversarial litigants?

The direct consequence of delinquency convictions and sentences makes the quality of procedural justice increasingly critical. The use of prior delinquency convictions to waive juvenile court jurisdiction and to enhance adult criminal sentences makes the need for counsel to assure the quality of those convictions all the more imperative.[245]

B. *Waiver to Criminal Court and Sentencing Juveniles as Adults*

Waiver of juvenile court jurisdiction presents the stark choice between rehabilitation in the juvenile system and punishment in the criminal justice system.[246] The administrative details of transfer legislation vary considerably, but judicial waiver, legislative offense exclusion, and prosecutorial direct-file represent the three generic strategies that states use.[247] Waiver laws implicate sentencing policy choices and trade-offs, rely on different justice system actors and processes, and elicit different information to determine whether to try and sentence a young offender as an adult or as a child.[248]

Judicial waiver represents the most common transfer strategy.[249] Juvenile court judges may waive jurisdiction on a discretionary basis after conducting a hearing to determine whether a youth is amenable to treatment or poses a danger to public safety.[250] These case-by-case assessments reflect traditional

244. Canon & Kolson, *supra* note 172, at 320 (reporting that "when the judge feels that the case can be settled with a probated sentence, little need is seen for counsel."); Burruss & Kempf-Leonard, *supra* note 178, at 61 ("Where attorneys appear least often, their unique presence may serve most to disrupt routine procedures. In such cases, they are more likely to invoke formal procedures that limit the ability of court officials to be lenient.").

245. Feld, *supra* note 88.

246. Jurisdictional waiver refers to the process by which states transfer youths to criminal court for prosecution as an adult. *E.g.*, HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT (2006) (discussing judicial waiver, concurrent jurisdiction, and statutory offense exclusion as three legislative methods to transfer juveniles for criminal prosecution); PATRICIA GRIFFIN, PATRICIA TORBET & LINDA SZYMANSKI, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 3-10 (1998).

247. *See generally* Feld, *Legislative Changes in Juvenile Waiver Statutes*, *supra* note 106; FELD, *supra* note 2, at 208-19; HOWARD SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 102-08 (1995); GRIFFIN, ET AL., *supra* note 246, at 2.

248. *See, e.g.*, Franklin E. Zimring & Jeffrey Fagan, *Transfer Policy and Law Reform*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 407 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter Zimring & Fagan, *Transfer Policy*] (discussing multiple policy issues implicated in constructing waiver policy).

249. SNYDER & SICKMUND, *supra* note 124, 102-04; U.S. GEN. ACCOUNTING OFFICE, JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS (1995).

250. *See* Feld, *Legislative Changes in Juvenile Waiver Statutes*, *supra* note 106, at 487-94; Kent v. United States, 383 U.S. 541 (1966) (procedural due process in judicial waiver hearings).

individualized sentencing discretion.[251] By contrast, legislatures possess wide latitude to define juvenile courts' jurisdiction and to exclude youths based on age and seriousness of the offense.[252] Some states exclude the most serious offenses from juvenile court jurisdiction and thereby circumvent judicial waiver provisions.[253] About a dozen states allow prosecutors to decide in which justice system to try some young offenders. Juvenile and criminal courts share concurrent jurisdiction over certain ages and offenses (e.g., older youths and serious crimes) and prosecutors may exercise their discretion to select either forum.[254]

The sharp increase in black youth homicides in the late-1980s and early-1990s caused almost every state to revise its transfer laws to facilitate prosecution of more juveniles in criminal court.[255] These changes lowered the minimum age for transfer, increased the number of offenses excluded from juvenile court jurisdiction, and shifted waiver discretion from the judicial branch – judges in a waiver hearing – to the executive branch – prosecutors who make unreviewable charging decisions.[256] Transfer policies became especially

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251. Proponents of judicial waiver endorse the juvenile courts' rehabilitative philosophy and argue that individualized decisions provide an appropriate balance of flexibility and severity. *See, e.g.*, Franklin E. Zimring, *The Punitive Necessity of Waiver, in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 207 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); Zimring & Fagan, *Transfer Policy, supra* note 125, at 407. Critics object that judges lack clinical tools with which to assess amenability to treatment or to predict dangerousness and that their exercise of discretion results in abuses and inequalities. *See, e.g.*, Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique, in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 83, 89-90 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinates of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM L. & CRIMINOLOGY 314 (1990).

252. *See generally*, Feld, *supra* note 251, at 83-98.

253. Proponents of offense exclusion favor "just deserts" sentencing policies. They advocate sanctions based on relatively objective factors such as seriousness of the crime, culpability, and criminal history. They value uniform treatment of similarly situated offenders. *See, e.g.*, Feld, *supra* note 251, at 102-03. Critics question whether legislators can remove discretion without making the process excessively rigid and over-inclusive. *See, e.g.*, Zimring, *supra* note 251.

254. *See* SNYDER & SICKMUND, *supra* note 124; Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629 (1994); Manduley v. Superior Court of San Diego, 27 Cal. 4th 537 (Cal. 2002). Proponents of prosecutorial waiver claim that prosecutors can act as more objective gatekeepers than either "soft" judges or "get tough" legislators. *See, e.g.*, McCarthy,, *supra* note 131. Critics observe that prosecutors often succumb to political pressures on crime issues, exercise their discretion just as subjectively and idiosyncratically as judges, and create extensive geographic variability in the administration of juvenile justice. *See, e.g.*, Donna M. Bishop & Charles S. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281 (1991); Feld, *Legislative Exclusion*, *supra* note 128, at 117-19.

255. *See, e.g.*, TORBET ET AL., *supra* note 138, at 3-8; Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 966-97 (1995); Feld, *Responses to Youth Violence*, *supra* note 106, at 194; NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 204-09, 214-18.

256. *See* Feld, *supra* note 251, at 124-29.

punitive toward youths charged with violent and drug crimes, offense categories to which black youths contribute disproportionately.

Even prior to the recent "crack down," studies consistently reported racial disparities in waiver decisions by juvenile court judges.[257] As a result of "get tough" statutory reforms, judges and prosecutors now transfer even more minority youths to criminal courts and the disparities are greatest for youths charged with violent and drug offenses.[258] In nearly every jurisdiction, the proportion of minority youths transferred to criminal court greatly exceeded their proportional make-up of the general population.[259] As a result of the successive screening and differential processing of youths by race, the majority of juveniles transferred to criminal court and sentenced to prison are minority youths.[260]

1. Adolescent Culpability, the Death Penalty and Life Without Parole

Judges sentence juveniles transferred to criminal court as if they were adults, send them to adult prisons, and, until the Supreme Court's recent decision in

257. *See, e.g.* DONNA M. HAMPARIAN ET AL., U.S. DEP'T OF JUSTICE, MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: YOUTH IN ADULT COURT: BETWEEN TWO WORLDS 104-05 (1982) (nationally, 39% of all youths transferred in 1978 were black and, in 11 states, minority youths constituted the majority of juveniles waived); Joel Peter Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia, in* READINGS IN PUBLIC POLICY 333, 339-40 (John C. Hall et al. eds., 1981) (interracial effect in transfers in which black youths who murder white victims are significantly more at risk for waiver); Jeffrey Fagan, Martin Forst, & Scott Vivona, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 276 (1987) ("[I]t appears that the effects of race are indirect, but visible nonetheless."); U.S. GEN. ACCOUNTING OFFICE, *supra* note 249, at 59 (examining the effects of race on judicial waiver decisions); M. A. Bortner, Marjorie S. Zatz & Darnell F. Hawkins, *Race and Transfer: Empirical Research and Social Context, in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 277 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (analyzing racial disparity in juvenile transfer proceedings).

258. EILEEN POE-YAMAGATA & MICHAEL A. JONES, AND JUSTICE FOR SOME 12-14 (2000); NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 216 ("A high proportion of the juveniles transferred to adult court are minorities. . . . The preponderance of minorities among transferred juveniles may be explained in part by the fact that minorities are disproportionately arrested for serious crimes."); Bortner et al., *supra* note 257, at 277 (analyzing sources of racial disparity in juvenile transfer proceedings).

259. POE-YAMAGATA & JONES, *supra* note 258, at 17 (minority proportion of youths transferred to criminal court was five times their make-up of the general population in Connecticut, Massachusetts, Pennsylvania, and Rhode Island); MIKE MALES & DAN MACALLAIR, THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA 7-8 (2000) (studying juvenile transfer and criminal court sentencing practices in Los Angeles and reporting that "[c]ompared to white youths, minority youths are 2.8 times as likely to be arrested for a violent crime, 6.2 times as likely to wind up in adult court, and 7 times as likely to be sent to prison by adult courts").

260. *See, e.g.*, NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 220 ("In 1997, minorities made up three-quarters of juveniles admitted to adult state prisons, with blacks accounting for 58 percent, Hispanics 15 percent, and Asians and American Indians 2 percent."); Bortner et al., *supra* note 257, at 277 (analyzing cumulative consequences of racial disparities in transfer decisions).

Roper v. Simmons, executed them for crimes committed as children.[261] For a decade and a half prior to *Simmons*, the Court repeatedly considered whether the Eighth Amendment prohibited states from executing offenders for crimes they committed while under 18 years of age.[262] In 1988, a plurality of justices in *Thompson v. Oklahoma* concluded that fifteen-year-old offenders lacked the culpability necessary to impose the death penalty.[263] The following year, in *Stanford v. Kentucky*, a majority upheld the death penalty for youths who were sixteen or seventeen at the time of their offenses.[264] While *Stanford* recognized that juveniles as a class were less culpable than adult offenders, the Court rejected a categorical ban and allowed juries to decide whether some older adolescents acted with sufficient culpability to justify their execution.[265] After Stanford exhausted his state and federal remedies,[266] outgoing Kentucky

261. *See, e.g.*, Feld, *Responses to Youth Violence*, *supra* note 106, at 212-20; Barry C. Feld, *Competence, Culpability, and Punishment: Implications of* Atkins *for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463 (2003) (analyzing the Court's juvenile death penalty jurisprudence and arguing for constitutional prohibition on execution of juveniles); *compare, e.g.*, Stanford v. Kentucky, 492 U.S. 361 (1989) (upholding the constitutionality of the death penalty for juveniles 16 and 17 years of age) with Roper v. Simmons, 543 U.S. 551 (2005) (holding that the execution of youths for crimes committed under the age of 18 violated the Eighth Amendment).

262. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Earlier decisions averred to the importance of considering youthfulness as a mitigating factor in capital sentencing. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (remanding sixteen-year-old defendant for resentencing after trial court's failure to properly consider youthfulness as a mitigating factor and noting that "youth is more than a chronological fact. . . . minors, especially in their earlier years, generally are less mature and responsible than adults"); Lockett v. Ohio, 438 U.S. 586, 608-09 (1978) (requiring sentencing jury to consider all relevant mitigating factors including age of defendant); Roberts v. Louisiana, 431 U.S. 633, 637 (1977) (per curiam) ("Circumstances such as the youth of the offender . . . are all examples of mitigating facts . . . which are considered relevant in other jurisdictions.").

263. Thompson v. Oklahoma, 487 U.S. 815, 822-23 (1988) (plurality opinion). The *Thompson* plurality looked both to objective indicators of "evolving standards of decency," such as state statutes and jury practices, *Id.* at 821-22, and the views of national and international organizations, and to the justices' own subjective sense of "civilized standards of decency" when it conducted its proportionality analysis. *Id.* at 830. The *Thompson* Court emphasized that deserved punishment must reflect individual culpability and concluded that "[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." *Id.* at 834. The justices asserted that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. . . . Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.* at 835.

264. *See Stanford*, 492 U.S. at 380.

265. *Stanford*, 492 U.S. at 375-76 (arguing that juvenile waiver and capital sentencing procedures were adequate to determine individual culpability unless there was a national consensus "not that 17 or 18 is the age at which most persons, or even almost all persons, achieve sufficient maturity to be held fully responsible for murder; but that 17 or 18 is the age before which *no one* can reasonably be held fully responsible").

266. *See In re* Kevin Nigel Stanford, 537 U.S. 968, 968 (2002).

Governor Paul Patton, as one of his final acts in office, commuted his death sentence because he "believed sentencing a juvenile to death is an excessive punishment."[267]

In 2005, the Supreme Court in *Roper v. Simmons* overruled *Stanford* and categorically prohibited states from executing youths for crimes committed prior to eighteen years of age.[268] The Court found compelling evidence of a national consensus against the death penalty for juveniles in legislative enactments and juries' sentencing decisions.[269] In assessing society's "evolving standards of decency," the Court found that juveniles lacked the maturity and judgment necessary to equate their culpability with that of adults.[270] *Simmons* emphasized that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" which further diminished their criminal responsibility.[271] Finally, because juveniles' personalities are more transitory and less fully-formed, their horrific crimes provide less evidence of confirmed depravity and culpability than do those of adults.[272]

Deserved punishment proportions sentences to the seriousness of the offense.[273] Two elements define the seriousness of a crime — harm and culpability.[274] An offender's age has little bearing on assessments of harm, such

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267. Tom Loftus, *Patton Has Short, Quiet Last Day as Governor*, LOUISVILLE COURIER-J., Dec. 9, 2003, at 1B.

268. *Simmons*, 543 U.S. at 578 (prohibiting execution of youths for crimes committed when seventeen years of age or younger).

269. *Id.* at 564 (noting that legislative trends prohibiting executing children corresponded with those in Atkins v. Virginia, 536 U.S. 304 (2002), in which the Court held that the Eighth Amendment barred execution of defendants with mental retardation); *see also* Feld, *supra* note 261, at 488-97 (analogizing between state laws and jury practices in executing defendants with mental retardation and juveniles).

270. *Simmons*, 543 U.S. at 569 (finding that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often that in adults and are more understandable among the young"); *see also* Feld, *supra* note 261, at 515-21 (analyzing developmental psychological and neuroscience research on juveniles' diminished responsibility).

271. *Simmons*, 543 U.S. at 569. The Court further argued that "[t]he susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* at 570 (quoting *Thompson*, 487 U.S. at 835).

272. *Simmons*, 543 U.S. at 570 (noting that "the character of a juvenile is not as well formed as that of an adult.").

273. *See* ANDREW VON HIRSCH, *supra* note 106, at 48 ("[P]unishing someone conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it."); *see also* ANDREW VON HIRSCH, CENSURE AND SANCTIONS 15 (1993) [hereinafter VON HIRSCH, CENSURE AND SANCTIONS]; ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 31 (1985) [hereinafter VON HIRSCH, PAST OR FUTURE CRIMES].

274. *See Stanford*, 492 U.S. at 393 (Brennan, J., dissenting) ("[T]he proportionality principle takes account not only of the 'injury to the person and to the public' caused by a crime, but also of the 'moral depravity' of the offender.") (citation omitted); Enmund v. Florida, 458 U.S. 782, 815 (1982) (O'Connor, J., dissenting) (arguing that the offender's culpability—"the degree of the

as the injury inflicted or the amount of property taken.[275] But youthfulness bears quite directly on the character of blameworthy choices, the culpability of the actor, and thereby the seriousness of the crime.[276] Youthfulness affects a person's ability to reason and to exercise self-control and thus reduces somewhat a juvenile's degree of criminal responsibility.[277] Younger offenders are less

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defendant's blameworthiness"—is central to determining the penalty) (footnote omitted); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 707 (1998) ("[A] sentence must correspond to the crime—not just to the harm caused by the offense, but also to the culpability of the offender."); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth* 81 TEX. L. REV. 799, 822 (2003) ("Only a blameworthy moral agent deserves punishment at all, and blameworthiness (and the amount of punishment deserved) can vary depending on the attributes of the actor or the circumstances of the offense."); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 271 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("But desert is a measure of fault that will attach very different punishment to criminal acts that cause similar amounts of harm.").

275. Ernest van den Haag contends that:

> There is little reason left for not holding juveniles responsible under the same laws that apply to adults. The victim of a fifteen-year-old muggers [sic] is as much mugged as the victim of a twenty-year-old mugger, the victim of a fourteen-year-old murderer or rapist is [just] as dead or as raped as the victim of an older one. The need for social defense or protection is the same.

ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 174 (1975).

276. Just deserts theory and criminal law grading principles base the degree of deserved punishment on the actor's culpability. For example, a person may cause the death of another individual with premeditation and deliberation, intentionally, "in the heat of passion," recklessly, negligently, or accidentally. *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 105-45 (2d ed. 1960). The criminal law treats the same objective consequence or harm—for example, the death of a person—differently depending on the nature of the choices made. In a framework of deserved punishment, to impose the same penalty upon offenders who do not share equal culpability would be unjust. When gauging the culpability of choices, youthfulness has central importance because young people are neither fully responsible nor the moral equals of adults. *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88. J. CRIM. L. & CRIMINOLOGY 68, 121-23 (1997).

277. *See generally* Feld, *supra* note 261, at 515-21 (analyzing developmental psychological and neurobiological research on adolescents' diminished responsibility). Peter Arenella argues that the criminal law treats children differently than adults because, even though it expects them to adhere to moral norms, it recognizes that they only gradually will

> develop the capacity to understand their normative significance and abide by their dictates. And when they make a rational and voluntary choice to engage in morally objectionable conduct . . . we may hold them accountable to some sanction to teach them the significance of the rule they have broken.
>
> But we do not treat young children as full moral agents, despite their capacity for practical reason and their freedom to act on the basis of their reasoned choices. . . .
>
> [T]hey have not yet fully developed this capacity to respond appropriately to moral reasons for action. This capacity for *moral responsiveness* presupposes that moral agents appreciate the normative significance of the moral norms governing their behavior. It also assumes that moral agents can exercise *moral judgment* about how these norms apply in a particular context. Acting on the basis of moral judgment also requires *moral*

blameworthy than adults because they do not have the developmental capacity to fully to control their actions.[278] While young offenders possess sufficient culpability for the State to hold them accountable for their actions, their reduced blameworthiness requires a qualitatively different youth sentencing policy.[279]

The Court's decision in *Simmons* to bar the death penalty for adolescents has broader implications for sentencing youths. The reduced culpability of youth applies equally to sentences of Life Without Parole (LWOP) and the draconian equivalents imposed on adult offenders. Although the Court's jurisprudence insists that "death is different," no principled bases exist by which to distinguish adolescents' diminished responsibility that bars the death penalty and their equally reduced culpability that warrants shorter sentences for all serious crimes.[280]

> *motivation*: the capacity to use the applicable moral norm as the basis for acting.

Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, SOC. PHIL. & POL'Y, Spring 1990, at 67-68; *see also* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 176 (1997) (arguing that adolescents' "criminal choices are presumed less to express individual preferences and more to reflect the behavioral influences characteristic of a transitory developmental stage that are generally shared with others in the age cohort. This difference supports drawing a line based on age, and subjecting adolescents to a categorical presumption of reduced responsibility."); Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 407-09 (1999) (arguing that youths lack "ability to control [their] impulses, to manage [their] behavior in the face of pressure from others to violate the law, or to extricate [themselves] from a potentially problematic situation," and these deficiencies render them less blameworthy).

278. *See* Feld, *supra* note 261, at 508-12 (analyzing developmental psychological research on adolescents' short-term and long-term risk calculus, maturity of judgment, and self-control that impairs quality of choice); Jeffrey Fagan, Atkins, *Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 235 (2003) (arguing that adolescents' "judgment is immature because they have not yet attained several dimensions of psychosocial development that characterize adults as mature, including the capacity for autonomous choice, self-management, risk perception, and the calculation of future consequences"); Scott & Steinberg, *supra* note 274, at 823 ("[A]ctors, whose decisionmaking [sic] capacities are less severely impaired, or who are subject to compelling (but not overwhelming) pressures and constraints that limit their freedom of choice, may pass the minimum threshold of responsibility but be judged less culpable and deserving of less punishment than the typical criminal actor.").

279. *See* Scott & Steinberg, *supra* note 274, at 830 ("[Y]ouths are likely to act more impulsively and to weigh the consequences of their options differently from adults, discounting risks and future consequences, and over-valuing (by adult standards) peer approval, immediate consequences, and the excitement of risk taking. These influences are predictable, systematic and developmental in nature (rather than simply an expression of personal values and preferences), and they undermine decisionmaking [sic] capacity in ways that are accepted as mitigating culpability.").

280. Professor Zimring argues that

> [d]octrines of diminished responsibility have their greatest impact when large injuries have been caused by actors not fully capable of understanding and self-control. The visible importance of diminished responsibility in these cases arises because the punishments provided for the fully culpable are quite severe, and the reductive impact of mitigating punishment is correspondingly large.

Lionel Tate's case graphically illustrates the hazards of disproportionate sentences and adjudicative incompetence when states try young offenders in criminal court. A grand jury indicted twelve-year-old Tate for first-degree murder for brutal injuries he inflicted on a six-year-old girl.[281] Under Florida waiver law,[282] Tate's indictment for a capital crime required the state to prosecute him as an adult and his conviction of first-degree murder required the judge to impose a mandatory sentence of life without parole.[283] The Court of Appeals reversed his conviction because the trial judge failed to conduct a hearing to determine whether he was competent to stand trial.[284] However, it rejected the claim that imposing a mandatory LWOP sentence on a twelve-year-old child was disproportionate or "cruel and unusual punishment."[285]

For two decades the Court has vacillated about whether the Eighth Amendment contains a "narrow proportionality principle" that "applies to noncapital sentences."[286] In *Rummel v. Estelle,* the Court held that the Eighth Amendment does not prevent a state from sentencing a three-time property offender to life in prison *with the possibility of parole.*[287] In *Solem v. Helm,* the Court held that a sentence of life without possibility of parole for a recidivist convicted of a minor property crime violated the Eighth Amendment.[288]

> But if the doctrine of diminished responsibility means anything in relation to the punishment of immature offenders, its impact cannot be limited to trivial cases. Diminished responsibility is either generally applicable or generally unpersuasive as a mitigating principle.

ZIMRING, *supra* note 124, at 84.

281. *See* Tate v. State, 864 So. 2d 44, 47 (Fla. Dist. Ct. App. 2003).

282. FLA. STAT. ANN. § 985.225 (West 2001 & Supp. 2004) (current version at FLA. STAT. ANN. § 985.56).

283. FLA. STAT. ANN. § 985.225(1) (West 2001 & Supp. 2004) (current version at FLA. STAT. ANN. § 985.56(1)); *see also Tate*, 864 So. 2d. at 46; David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 678-81 (2003) (summarizing waiver procedures, rejected plea offers, and failed defense strategy that ultimately led both prosecutor and defense attorney to recommend that Governor Jeb Bush commute Tate's mandatory LWOP sentence imposed following conviction for murder as manifestly unjust for a twelve-year-old).

284. *See Tate*, 864 So. 2d at 48 ("[A] competency evaluation was constitutionally mandated to determine whether Tate had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a rational, as well as factual, understanding of the proceedings against him.").

285. *See id.* at 54 (discussing other Florida cases affirming sentences of life without parole imposed on defendants convicted of murder at ages thirteen and fourteen years).

286. *E.g.,* Harmelin v. Michigan, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in judgment).

287. Rummel v. Estelle, 445 U.S. 263, 284-85 (1980) (approving Rummel's sentence under a recidivism statute for his third conviction for relatively minor property crimes).

288. Solem v. Helm, 463 U.S. 277, 281 and 303 (1983). The Court noted that the Eighth Amendment's ban on cruel and unusual punishments "prohibits . . . sentences that are disproportionate to the crime committed," *id.* at 284, and that the "constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." *Id.* at 286. *Solem* identified three factors that a court must consider to determine whether a sentence is so disproportionate that it violates the Eighth Amendment: "(i) the gravity of the offense and the

Subsequently, in *Harmelin v. Michigan,* a fractured Court rejected a proportionality challenge and upheld a sentence of life without parole for a first-time drug offender.[289]

In his *Harmelin* concurrence, Justice Kennedy asserted that "[t]he Eighth Amendment proportionality principle also applies to noncapital sentences"[290] and his opinion provides the operative judicial test for disproportionate sentence.[291] Kennedy identified four factors – the primacy of legislative judgments about penalties, the multiplicity of legitimate penal goals, the limited role for federal judicial oversight of state sentences, and the importance of objective factors to inform proportionality review – that bear on whether a penalty is "grossly disproportionate."[292] In *Ewing v. California,* the Court upheld a sentence of twenty-five years to life for the theft of three golf clubs under California's "three-strike" sentencing statute.[293]

Courts have foundered when they apply the Court's proportionality principle to juvenile LWOP sentences.[294] Although proportionality requires an appropriate penal relationship between the seriousness of a crime – harm and culpability – and the sentence imposed, courts focus only on the gravity of the crime – harm – rather than the culpability of the actor when they conduct proportionality analyses.[295] Thus, a serious crime is a serious crime because of

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harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292. Despite the elements of recidivism, the distinguishing factor in *Solem* was the imposition of an LWOP sentence for a minor property crime. *See id.* at 297.

289. *Compare Harmelin,* 501 U.S. at 994 (Scalia., J.) (announcing the opinion of the Court and arguing that the proportionality principle only limited application of the death penalty, but did not constitute a general feature of Eighth Amendment analysis) *with id.* at 997, 1009 (Kennedy, J., concurring) (upholding sentence by finding it proportional under an Eighth Amendment analysis). Neither Justice Scalia's nor Justice Kennedy's legal reasoning was agreed to by a majority of the Court.

290. *Id.* at 997.

291. *Id.* at 1001 (arguing that the Eighth Amendment prohibits "only extreme sentences that are 'grossly disproportionate' to the crime.").

292. *See id.* at 998-1001 (Kennedy J., concurring). According to Justice Kennedy,

> [a]ll of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.

Id. at 1001.

293. Ewing v. California, 538 U.S. 11, 19 and 30-31 (2003) ("We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments.").

294. *See generally* Logan, *supra* note 274, at 703-09 (reviewing cases upholding LWOP sentences on juveniles).

295. For example, see State v. Massey, 803 P.2d 340 (Wash. Ct. App. 1991), where the court upheld a mandatory sentence of life without parole imposed on a thirteen-year-old juvenile convicted of aggravated murder:

the harm caused, regardless of the culpability of the actor. The court in *Harris v. Wright* rejected a constitutional challenge to a mandatory LWOP sentence imposed on a fifteen-year-old convicted of murder.[296] *Harris* held that the Eighth Amendment bars only grossly disproportionate[297] sentences and insisted that

> Youth has no obvious bearing on this problem: If we can discern no clear line for adults, neither can we for youths. Accordingly, while capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences. Like any other prison sentence, it raises no inference of disproportionality when imposed on a murderer.[298]

Defining the gravity of the offense solely by the harm caused excludes from a proportionality inquiry any meaningful consideration of blameworthiness and diminished responsibility.[299] By contrast, the Justices who dissented in *Stanford* and later prevailed in *Simmons* recognized that proportionality analyses require a broader culpability inquiry. Justice Stevens emphasized that

Proportionality analysis requires that we compare "the gravity of the offense,"

> understood to include not only the injury caused, but also the defendant's culpability, with the "harshness of the penalty." . . . [J]uveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty that the Eighth Amendment forbids that they receive that punishment.[300]

> The test is whether in view of contemporary standards of elemental decency, the punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness. That test does not embody an element or consideration of the defendant's age, only a balance between the crime and the sentence imposed. Therefore, there is no cause to create a distinction between a juvenile and an adult who are sentenced to life without parole for first degree aggravated murder.

Id. at 348 (citation omitted). *See also* State v. Stinnett, 497 S.E.2d 696, 701-02 (N.C. Ct. App. 1998) (upholding mandatory LWOP sentence imposed on fifteen-year-old convicted of murder and noting that "when a punishment does not exceed the limits fixed by statute, the punishment cannot be classified as cruel and unusual in a constitutional sense").

296. Harris v. Wright, 93 F.3d 581, 583-85 (9th Cir. 1996).

297. *See id.* at 584 ("Disproportion analysis, however, is strictly circumscribed; we conduct a detailed analysis only in the 'rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'").

298. *Id.* at 585 (citation omitted).

299. *See* Logan, *supra* note 274, at 703 ("By divorcing 'crime' from offender culpability in proportionality analysis, these courts subscribe to an essentially circular inquiry: because murder, for instance, is a very 'serious' crime in the eyes of the legislature, it can be met with a very 'serious' statutory punishment.").

300. *In re* Stanford, 537 U.S. at 969 (Stevens, J., dissenting) (quoting *Stanford*, 492 U.S. at

Although *Simmons* barred the death penalty for crimes committed by those younger than eighteen years of age, the Court has found no constitutional minimum age for imposing sentences of life without parole.[301] While trial judges may consider an offender's youthfulness when they sentence them,[302] appellate courts routinely uphold LWOP and very long sentences and rebuff claims that youthfulness is a mitigating factor that should trump mandatory LWOP sentences.[303] The Florida court in *Tate v. State* "reject[ed] the argument that a life sentence without the possibility of parole is cruel or unusual punishment on a twelve-year-old child."[304] In *State v. Green*, the North Carolina Supreme Court approved a mandatory sentence of life imprisonment imposed on a thirteen-year-old convicted of a first-degree sexual offense.[305] *Green* noted that many states transfer very young offenders to criminal court,[306] that age is not dispositive "in determining whether a punishment is grossly disproportionate to the crime,"[307] and that retributive and incapacitative sentencing policies apply even to young offenders.[308] In *Edmonds v. State*, the Mississippi Court of

394-96).

301. *But cf.* Naovarath v. State, 779 P.2d 944, 947 (Nev. 1989) (questioning the constitutionality of imposing an LWOP sentence on any thirteen-year-old, but overturning sentence on more narrow grounds).

302. *Cf.* Adams v. State, No. CR-98-0496, 2003 WL 22026043, at 59 (Ala. Crim. App. Aug. 29, 2003) (refusing to grant weight as a factor mitigating against execution to the fact that defendant was seventeen years old at the time he committed the crime leading to his death sentence).

303. *See, e.g.*, Hawkins v. Hargett, 200 F.3d 1279, 1284 (10th Cir. 1999) (recognizing that "age is a relevant factor to consider in a proportionality analysis"); State v. Green, 502 S.E.2d 819, 832 (N.C. 1998) (upholding life imprisonment sentence for thirteen-year-old convicted of rape, recognizing that "the chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime," but emphasizing that Green was morally responsible for the crime because he possessed sufficient mental capacity to form criminal intent).

304. *Tate*, 864 So. 2d at 54. *Tate* cited other recent Florida cases approving LWOP sentences imposed on young offenders, including Blackshear v. State, 771 So. 2d 1199, 1200-02 (Fla. Dist. Ct. App. 2000) (approving three consecutive life sentences imposed for three robberies committed when Blackshear was thirteen years of age and noting that "[s]entences imposed on juveniles of life imprisonment are not uncommon in Florida Courts") and Phillips v. State, 807 So. 2d 713, 714 and 717-18 (Fla. Dist. Ct. App. 2002) (approving LWOP sentence imposed on fourteen-year-old convicted of murder and rejecting the idea that an LWOP sentence for first-degree murder could ever be so "grossly disproportionate" as to require a finding of unconstitutionality). *Tate*, 864 So. 2d at 54-55.

305. *Green,* 502 S.E.2d. at 827-28; *see also* Paul G. Morrissey, *Do the Adult Crime, Do the Adult Time: Due Process and Cruel and Unusual Implications for a 13-Year-Old Sex Offender Sentenced to Life Imprisonment in* State v. Green, 44 VILL. L. REV. 707, 738 (1999) ("Green's young age does not lend itself to a per se ruling of unconstitutionality. Once a juvenile of any age is transferred to superior court, charged with a violation of state law and convicted, the juvenile must be 'handled in every respect as an adult.'" (footnote omitted)).

306. *See Green*, 502 S.E.2d at 831 (finding that because at least 18 other states permit waiver of offenders thirteen or younger to criminal court, the North Carolina practice did not violate "evolving standards of decency").

307. *Id.* at 832.

308. *See id.* at 833 (emphasizing the judicial deference to legislative sentencing policy

Appeals upheld an LWOP sentence for a youth who was thirteen years of age at the time of his crime.[309] In *Hawkins v. Hargett*, the Tenth Circuit Court of Appeals approved sentences totaling 100 years for burglary, rape, and robbery imposed for crimes committed when a juvenile was thirteen years of age.[310] Around the nation, appellate courts regularly uphold sentences of life with or without possibility of parole and for extremely long terms imposed on thirteen-, fourteen-, or fifteen-year-old youths.[311] Few courts find such sentences imposed on young offenders disproportional.[312] In contrast with the Court's juvenile

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judgments and concluding that "the adult justice system, with its primary goals of incapacitation and retribution, is the appropriate place for violent youthful offenders, such as defendant.").

309. Edmonds v. Mississippi, No. 2004-KA-02081-COA, 2006 WL 1073460, at ¶¶ 1, 4 (Miss. App. April 25, 2006). The court rejected the juvenile's request for a jury instruction as to sentencing consequences if convicted and found that LWOP sentence does not need to take account of the degree of culpability of the actor. *Id.* at ¶¶ 86-90, 95-98.

310. *Hawkins*, 200 F.3d. at 1285 (rejecting, on habeas appeal of state conviction, argument that imposing consecutive sentences for crimes committed as a thirteen-year-old constituted cruel and unusual punishment).

311. HUMAN RIGHTS WATCH – AMNESTY INTERNATIONAL, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES, 1, 7 (2005) (criticizing states for incarcerating at least 2,225 youths with LWOP sentences for crimes committed prior to their 18th birthday and advocating abolition of LWOP sentences for juveniles and legislative changes to allow states retroactively to resentence them). *See, e.g.*, People v. Moya, 899 P.2d 212, 219-20 (Colo. Ct. App. 1994) (holding that sentence of life imprisonment with possibility of parole after forty years was not cruel and unusual punishment when imposed on juvenile convicted of robbery and murder); Brennan v. State, 754 So. 2d 1, 5 (Fla. 1999) (vacating death penalty imposed on sixteen-year-old convicted of murder and reducing sentence to life imprisonment without a possibility of parole); State v. Broadhead, 814 P.2d 401 (Idaho 1991) (overruled on other grounds) (affirming life sentence with fixed minimum of fifteen years imposed on fourteen-year-old convicted of murdering his father); State v. Shanahan, 994 P.2d 1059, 1061-63 & n.1 (Idaho Ct. App. 1999) (holding that life sentence for murder imposed on fifteen-year-old did not constitute cruel and unusual punishment); State v. Mitchell, 577 N.W.2d 481, 488-91 (Minn. 1998) (holding that mandatory life imprisonment for fifteen-year-old convicted of first-degree murder was not cruel and unusual punishment); State v. Ira, 43 P.3d 359, 361 (N.M. Ct. App. 2002) (approving sentence of ninety-one years imposed on fifteen-year-old for rape); State v. Jensen, 579 N.W.2d 613, 623-25 (S.D. 1998) (holding that life imprisonment without possibility of parole for fourteen-year-old convicted of murder is not cruel and unusual punishment); State v. Massey, 803 P.2d 340, 348 (Wash. Ct. App. 1990) (approving mandatory LWOP sentence imposed on youth convicted of committing murder at thirteen years of age).

312. *See e.g.*, Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) (holding that life sentence for fourteen-year-old convicted of rape violated Eighth Amendment); *Naovarath*, 779 P.2d at 948-49 (Nev. 1989) (finding that LWOP sentence imposed on thirteen-year-old convicted of murder constitute cruel and unusual punishment, but granting only limited right to be considered for parole eligibility at some point). The Court in *Naovarath* did not necessarily endorse a categorical prohibition and emphasized the youth's mental and emotional disabilities as well:

> To say that a thirteen-year-old deserves a fifty or sixty year long sentence, imprisonment until he dies, is a grave judgment indeed if not Draconian. To the make the judgment that a thirteen-year-old must be punished with this severity and that he can never be reformed, is the kind of judgment that, if it can be made at all, must be made rarely and only on the surest and soundest of grounds.

Id. at 947.

A few courts have reduced youths' lengthy sentences because of their age or immaturity. *See, e.g.*,

death penalty jurisprudence, trial judges perversely may regard youthfulness as an aggravating factor and sentence juveniles more severely than their similarly situated adult counterparts.[313]

Although the Constitution does not *require* state legislators to enact or courts to formally recognize youthfulness as a mitigating factor in sentencing, they *should* explicitly adopt and apply such a principle as part of a fair and just youth sentencing policy. Mitigating punishment because of youthfulness is a principle that applies equally to capital and non-capital sentences and recognizes reduced culpability without excusing criminal conduct.[314] The criminal choices that children make are not the moral equivalents of those of adults.[315] A youth sentencing policy can simultaneously hold them accountable and yet mitigate the severity of sanctions because of diminished culpability.[316]

People v. Dillon, 668 P.2d 697, 726-27 (Cal. 1983) (reducing life sentence imposed on seventeen-year-old convicted of felony murder because he "was an unusually immature youth"); People v. Miller, 781 N.E.2d 300, 308 (Ill. 2002) (rejecting as disproportional an LWOP sentence imposed on a fifteen-year-old, passive accessory to a felony-murder and holding that "a mandatory sentence of natural life in prison with no possibility of parole grossly distorts the factual realities of the case and does not accurately represent defendant's personal culpability such that it shocks the moral sense of the community").

313. *See* SNYDER & SICKMUND, *supra* note 124, at 178 (reporting that "juvenile transfers convicted of murder received longer sentences than their adult counterparts. On average, the maximum prison sentence imposed on transferred juveniles convicted of murder in 1994 was 23 years 11 months. This was 2 years and 5 months longer than the average maximum prison sentence for adults age 18 or older, and 8 months longer than the average maximum sentence for under-18 adults convicted of murder."); Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 227, 236-37 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (comparing the sentences imposed on youths transferred to criminal courts with those of adults and reporting that "transferred youths are sentenced *more* harshly, both in terms of the probability of receiving a prison sentence and the length of the sentences they receive. In other words, we see no evidence that criminal courts recognize a need to mitigate sentences based on considerations of age and immaturity."); Tanenhaus & Drizin, *supra* note 283, at 665 (citing the impact of "get tough" politics and arguing that "[b]y the mid-1990's [sic], youth had ceased to be a mitigating factor in adult court, and instead had become a liability").

314. Zimring, *supra* note 274, at 278 (arguing that "even after a youth passes the minimum threshold of competence that leads to a finding of capacity to commit crime, the barely competent youth is not as culpable and therefore not as deserving of a full measure of punishment as a fully qualified adult offender"); Scott & Grisso, *supra* note 217, at 174 (arguing that youthfulness does not excuse criminal liability, but "the evidence disputes the conclusion that most delinquents are indistinguishable from adults in any way that is relevant to culpability, and supports the creation of two distinct culpability categories—although, of course, there will be outlyers [sic] in both groups. In short, the predispositions and behavioral characteristics that are associated with the developmental stage of adolescence support a policy of reduced culpability for this category of offenders.").

315. *See* ZIMRING, *supra* note 124, at 144 ("[W]henever a young offender's need for protection, education, and skill development can be accommodated without frustrating community security, there is a government obligation to do so."); Feld, *supra* note 276, at 99; Scott & Grisso, *supra* note 217, at 182 ("Subjecting thirteen-year-old offenders to the same criminal punishment that is imposed on adults offends the principles that define the boundaries of criminal responsibility.").

316. *See, e.g.*, Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE

Adolescents are "works in progress"[317] who make mistakes as they gain experience and who need some protection from the consequences of their immature judgment.[318] Adolescence is the period during which youths learn to exercise self-control and to make responsible choices.[319] Most adolescent criminality is transitional and does not indicate a serious commitment to a criminal career.[320] In the interim, their poor decisions reveal less about their character and blameworthiness than do the criminal choices that adults make.[321]

A youth sentencing policy must manage the risks that juveniles pose to themselves and to others, preserve their life chances for a future in which they will learn to make more responsible choices, avoid life destructive consequences, and provide them with "room to reform."[322] As the Supreme Court repeatedly has recognized,

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JUSTICE 291, 309 (arguing that adolescents' choices "reflect immaturity and inexperience and are driven by developmental factors that will change in predictable and systemic ways. A legal response that holds young offenders accountable, while recognizing that they are less culpable than their adult counterparts, serves the purposes of criminal punishment without violating the underlying principle of proportionality.").

317. *See* David E. Arredondo, M.D., *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making,* 14 STAN. L. & POL'Y REV. 13, 14 (2003) ("Other than infancy, no stage in human development results in such rapid or dramatic change as adolescence."). Youth is a time of experimentation and exploration. *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 23 (Thomas Grisso & Robert G. Schwartz eds., 2000) (arguing that adolescence "is an inherently transitional time during which there are rapid and dramatic changes in physical, intellectual, emotional, and social capabilities," as well as "a period of tremendous malleability, during which experiences in the family, peer group, school, and other settings have a great deal of influence over the course of development.").

318. Professor Franklin Zimring long has argued that adolescence is a time of semi-autonomy, a "learner's permit" on the road to adulthood, and that young people require special dispensations in order to learn to be responsible adults. *See, e.g.*, FRANKLIN ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENTS 89-96 (arguing that adolescents require a "learner's permit" to become responsible); Zimring, *supra* note 274, at 283 ("At the heart of this process is a notion of adolescence as a period of 'learning by doing' in which the only way competence in decision making can be achieved is by making decisions and making mistakes.").

319. *See* Zimring, *supra* note 274, at 279 ("[S]elf-control is a habit of behavior developed over a period of time—a habit dependent on the experience of successfully exercising self-control. This particular type of maturity, like so many others, takes practice.").

320. Franklin E. Zimring argues that most youthful criminality is a relatively normal adolescent phenomenon that youths will outgrow without the necessity of major intervention; formal social control may cause more harm than good. *See id.* at 284; *see also* Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy,* 100 PSYCHOL. REV. 674, 675-77 (1993) (arguing that most youthful offending is "adolescence-limited," that most delinquents mature into law-abiding adults, and only a relatively small group become life-course-persistent offenders).

321. *See* Scott & Steinberg, *supra* note 274, at 801 ("Youthful involvement in crime is often a part of this [developmental] process, and, as such, it reflects the values and preferences of a transitory stage, rather than those of an individual with a settled identity."). An adolescent's criminal act may not be as indicative of "bad moral character" as an adult's because youths, "whose identity is in flux and character unformed, are less culpable than typical adult criminals." *Id.* at 825.

322. *See* ZIMRING, *supra* note 124, at 81-83; Zimring, *supra* note 274, at 283-84.

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.[323]

A youth sentencing policy that recognizes this simple, developmental truism would protect young people from the full penal consequences of their bad decisions.[324]

Simmons hinged, in part, on whether to evaluate juveniles' culpability on an individualized or categorical basis. Although the Court's death penalty jurisprudence consistently emphasizes the importance of individualized assessments of culpability, *Simmons* adopted a categorical prohibition because "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[325] The Court feared that the impact of a heinous crime on a jury would overpower the mitigating force of youthfulness and immaturity.[326] Moreover, *Simmons* concluded that clinicians could not assist jurors to distinguish between the vast majority of immature juveniles and the rare youth who might be sufficiently culpable to be death-eligible.[327]

Simmons' categorical treatment of youthfulness as a mitigating factor has broader implications for youth sentencing policy. Courts typically reject categorical bright-lines and consider youthfulness as part of a broader inquiry into culpability and blameworthiness.[328] However, in *Bryant v. State*, the Court

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323. *Thompson*, 487 U.S. at 834 (citation omitted) (quoting *Eddings* 455 U.S. at 115-16).

324. *See* Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking,* 37 VILL. L. REV. 1607, 1656 (1992) ("[I]f the values that drive risky choices are associated with youth, and predictably will change with maturity, then our paternalistic inclination is to protect the young decisionmaker . . . from his or her bad judgment."); *see also* ZIMRING, *supra* note 318, at 96; ZIMRING, *supra* note 124, at 142-45.

325. *Simmons*, 543 U.S. at 572-73.

326. *Id.* at 553-54 (reasoning that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death").

327. *Id.* at 573 (noting that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption").

328. *See, e.g., Eddings*, 455 U.S. at 116 (defining youthful age to include more than chronological age and requiring evaluation of "the background and mental and emotional development of a youthful defendant"); Graham v. Collins, 950 F.2d 1009, 1030 & n.25 (5th Cir. 1992), *aff'd*, 506 U.S. 461, (1993) (finding youthful mitigation even for a twenty-two-year-old defendant and noting that chronological age provides an indicator of maturity and stated observing that "inexperience with resultant diminished judgment and self-control" are salient mitigating factors); Giles v. State, 549 S.W.2d 479, 483 (Ark. 1977) (recognizing particular importance of chronological age in determining youthfulness, stating that although "chronological age does not

of Appeals of Maryland concluded that while non-chronological factors are relevant to an adult defendant's maturity and blameworthiness,

> the closer his or her chronological age is to the eighteen year old baseline . . . [the more] such factor alone tends to support the establishment of immaturity and inexperience and, hence, triggers the need to consider youthful age as a mitigator. Thus, youthful age as a mitigating circumstance is determined, in the first instance, by the chronological age of the defendant, abiding evidence of atypical or unusual maturity and experience that bears on the weight to be accorded that mitigator in the ultimate weighing.[329]

A bright-line rule that categorically treats youthfulness as a mitigating factor based on age alone is preferable to a system of guided discretion because a rule that occasionally under-punishes the rare, fully-culpable "adolescent still will produce less aggregate injustice than a discretionary system that improperly[, harshly sentences many] more undeserving youths."[330] Even though *Simmons* recognized individual variability in culpability, the Court nevertheless endorsed a categorical bright-line.[331]

> The qualities that distinguish juvenile from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.[332]

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necessarily control in the jury's determination whether a defendant's youth is a mitigating circumstance, nevertheless, it is certainly an important factor," but further stating that "[a]ny hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances"); Hurst v. State, 819 So.2d 689, 698 (Fla. 2002) (concluding that in order "to give a non-minor defendant's age significant weight as a mitigating circumstance, the defendant's age must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems"); Foster v. State, 778 So.2d 906, 920 (Fla. 2000) (stating that there is no bright-line, chronological rule for applying youthfulness as a mitigating factor, and the inquiry "entails an analysis of factors which, when placed against the chronological age of the defendant, might reveal a much more immature individual than the age might have initially indicated"); State v. Bey, 610 A.2d 814, 842 (N.J. 1992) (finding that determinations of youthful age require consideration of both chronological age and other indicators of maturity, but stating that "juries should give greater weight to a defendant's chronological age").

329. Bryant v. State, 824 A.2d 60, 84-85 (Md. 2003).

330. Feld, *supra* note 261, at 547.

331. *Simmons*, 543 U.S. at 573 (arguing that "[i]f trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation – that a juvenile offender merits the death penalty").

332. *Simmons*, 543 U.S. at 574.

Adolescents' reduced criminal responsibility represents a normative judgment about deserved punishment.[333] A sentencing policy that integrates youthfulness and reduced culpability with penal proportionality *should provide* all young offenders with categorical reductions of adult sentences.[334] Formalizing youthfulness as a mitigating factor represents a social, moral, and criminal policy judgment about diminished responsibility and asserts that *no* adolescent *deserves* to be sentenced as severely as an adult convicted of a comparable crime.[335]

There are two reasons to prefer categorical bright-lines to individualized discretionary sentencing decisions. The first is the inability to define or identify qualities of adult-like culpability among offending youths.[336] The second is the inevitable tendency to subordinate abstract consideration of youthfulness to the reality of a horrific crime.[337] Development is highly variable and a few youths may be mature and blameworthy prior to becoming eighteen years of age while many others may not attain maturity even as adults.[338] Because the vast majority of juveniles lack the culpability of adults, efforts to identify those few who might be as responsible as adults will founder on the difficulties of defining and

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333. *See e.g.*, *Enmund*, 458 U.S. at 825 (O'Connor, J., dissenting) ("[P]roportionality requires a nexus between the punishment imposed and the defendant's blameworthiness . . . ."). Scott and Steinberg, argue that in contemporary criminal law theory, penal proportionality may reflect either the quality of an actor's choice or what that choice indicates about the actor's moral character. The former focuses on the blameworthiness of the quality of choices made, while the latter focuses on what that choice indicates about the actor's bad character. *See* Scott & Steinberg, *supra* note 274, at 801-02; *see also* R. A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345, 367-68 (1993); MICHAEL MOORE, *Choice, Character, and Excuse*, *in* PLACING BLAME 548, 574-92 (1997).

334. *See* Scott & Steinberg, *supra* note 274, at 801 ("Because these developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults under conventional criminal law conceptions of mitigation.").

335. *See, e.g.,* Fagan, *supra* note 344, at 242 (arguing that adolescence, per se, is a mitigating status because youths' developmental deficits "are not the deficits of an atypical adolescent but are 'normal' developmental processes common to all adolescents. To the degree that there is variation among adolescents, whether offenders or not, these differences are predictable and subject to a variety of contextual, circumstantial, and intra-individual factors. In this jurisprudence, the crimes of adolescents are a function of immaturity, compared to the crimes of adults, which are the acts of morally responsible, yet possibly cognitively and emotionally deficient, actors.").

336. *See Stanford*, 492 U.S. at 396-99 (1989) (Brennan, J., dissenting).

337. *Id.* at 397-98 (Brennan, J., dissenting) (arguing that "[i]t is thus unsurprising that individualized consideration at transfer and sentencing has not in fact ensured that juvenile offenders lacking an adult's culpability are not sentenced to die").

338. Jeffrey Fagan notes that:

> [t]he age at which adolescents realize the developmental competencies that constitute culpability will vary: a significant number of juveniles will be immature and lacking in the developmental attributes of culpability well before age eighteen, and some may still lack these competencies after age eighteen: a few may have attained full maturity by the age threshold of sixteen set by the U.S. Supreme Court in *Stanford v. Kentucky*, but most will not. (footnote omitted).

Fagan, *supra* note 344, at 209.

measuring immaturity and will introduce a systematic bias that will redound to the disadvantage of the less-culpable youths.[339]

A categorical approach avoids the risk of error inherent in discretionary culpability assessments.[340] Recognizing youthfulness as a mitigating factor constitutes a normative judgment about deserved punishment, rather than a clinical assessment of diminished responsibility about which an expert could usefully testify.[341] It conclusively presumes that youths' criminal choices differ qualitatively from those of adults. A "youth discount" provides fractional reductions of sentences based on age-as-a-proxy-for culpability.[342] A youth could establish eligibility for categorical mitigation – a "youth discount" – with only a birth certificate. Shorter sentences enable young offenders to survive serious mistakes with their life chances intact.[343] Such a policy recognizes that same-length sentences impose a greater "penal bite" on younger offenders than they do on their older counterparts.[344]

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339. *See, e.g., id.* at 248 (arguing that "[t]he difficulties and statistical error rates in measuring immaturity for juveniles invite complexity in the consistent application of the law"). Fagan contends that:

> [e]ven when individualized assessments are conducted using modern scientific and clinical tools, the risks of error due to measurement and diagnostic limitations suggest that it is neither reliable nor efficient for each court to assess the competency of each juvenile individually. The precise conditions of immaturity, incapacity, and incompetency are difficult to consistently and fairly express in a capital sentencing context. Further, cognitive and volitional immaturity might be easily concealed by demeanor or physical appearance and, more importantly, obscured by the gruesome details of a murder and its emotional impact on the victim's family.

Id. at 253. *See also* Robin M.A. Weeks, Note, *Comparing Children to the Mentally Retarded: How the Decision in* Atkins v. Virginia *Will Affect the Execution of Juvenile Offenders*, 17 BYU J. PUB. L. 451, 479 (2003) (noting that when the Court requires individualized culpability assessments it raises difficult definitional questions: "What is the 'normal' adult level of culpability? How do we measure it?").

340. Elizabeth Scott and Laurence Steinberg note that:

> we currently lack the diagnostic tools to evaluate psycho-social maturity reliably on an individualized basis or to distinguish young career criminals from ordinary adolescents who, as adults, will repudiate their reckless experimentation. Litigating maturity on a case-by-case basis is likely to be an error-prone undertaking, with the outcomes determined by factors other than immaturity.

Scott & Steinberg, *supra* note 274, at 836-37.

341. *Cf.* Fagan, *supra* note 344, at 247 ("[I]ndividualized assessments leave triers of fact at the mercy of imperfect diagnostic assessments to determine which adolescents are 'mature' and which are not."); Scott & Steinberg, *supra* note 274, at 836-37.

342. *See* Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 233 (describing age as an imperfect "proxy" for a complex of factors, "includ[ing] maturity, judgment, responsibility, and the capability to assess the possible consequences of one's conduct," that constitute culpability); Feld, *supra* note 276, at 121-23.

343. *See* ZIMRING, *supra* note 318, at 89-96; Franklin E. Zimring, *Background Paper*, *in* CONFRONTING YOUTH CRIME: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS 27, 66-69 (1978).

344. *See* Andrew von Hirsch, *Proportionate Sentences for Juveniles: How Different than for*

States should adopt a categorical "youth discount" and sentence youths based on a sliding scale of criminal responsibility.[345] The "maturity of judgment and adjudicative competence of the youngest adolescents is qualitatively lower" than that of older youths or adult offenders.[346] When sentencing youths according to a sliding scale of diminished responsibility, a fourteen-year-old offender, for example, might receive a sentence twenty-five percent of the length of the adult penalty and a sixteen-year-old defendant might receive a sentence half the length of the adult sentence. And, of course, the "youth discount" precludes LWOP and other draconian sentences. The deeper discounts for younger offenders correspond with their developmental differences in culpability and self-control.[347] Younger adolescents are less responsible and deserve proportionally shorter sentences than do older youths or than adults.

C. *Racial Disparities and Disproportionate Minority Confinement*

From its inceptions, juvenile courts have used their discretion to discriminate between "our children" and "other peoples' children."[348] Evaluations of juvenile

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Adults?, 3 PUNISHMENT & SOC'Y 221, 227 (2001) (arguing that "[a] given penalty is said to be more onerous when suffered by a child than by an adult. Young people, assertedly, are psychologically less resilient, and the punishments they suffer interfere more with opportunities for education and personal development."(citation omitted)); *see also* Arredondo, *supra* note 317, at 19 (arguing that "[b]ecause of differences in the experience of time, any given duration of sanction will be experienced subjectively as longer by younger children"); Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 21-22 (2002) (describing the substantive quality of punishment that adolescents experience in adult incarceration as far harsher than the sanctions they experience as delinquents); Feld, *supra* note 16, at 112-13 (contending that "youths experience objectively equal punishment subjectively as more severe").

345. Feld, *supra* note 276, at 118-21. *See also* Scott & Steinberg, *supra* note 274, at 837 ("[A] systematic sentencing discount for young offenders in adult court, might satisfy the demands of proportionality."); Tanenhaus & Drizin, *supra* note 283, at 697-98 ("We endorse Feld's proposals [for a youth discount] because they respect the notion that juveniles are developmentally different than adults and that these differences make juveniles both less culpable for their crimes and less deserving of the harsh sanctions, which now must be imposed on serious and violent adult offenders."); von Hirsch, *supra* note 344, at 226 (arguing for categorical penalty reductions based on juveniles' reduced culpability: "While actual appreciation of consequences varies highly among youths of the same age, the degree of appreciation we should demand depends on age: we may rightly expect more comprehension and self-control from the 17-year-old than a 14-year-old, so that the 17-year-old's penalty reduction should be smaller. Assessing culpability on the basis of individualized determinations of a youth's degree of moral development would be neither feasible nor desirable."); Zimring, *supra* note 274, at 288 (arguing that the penal law of youth crime should develop "a sliding scale of responsibility based on both judgment and the practical experience of impulse management and peer control").

346. *See* Feld, *supra* note 261, at 552.

347. Zimring, *supra* note 274, at 288 ("[A]dolescents learn their way toward adult levels of responsibility gradually. This notion is also consistent with . . . long periods of diminished responsibility that incrementally approach adult standards in the late teens . . . [and with] less-than-adult punishments that gradually approach adult levels during the late teen years.").

348. FELD, *supra* note 2, at 75-76; Darnell F. Hawkins and Kimberly Kempf-Leonard, *Introduction in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES

court sentencing practices report two consistent findings. First, the ordinary principles of the criminal law – present offense and prior record – explain most of the variance in juvenile court sentencing practices. Because every state defines juvenile courts' delinquency jurisdiction based on the commission of a criminal act,[349] juvenile court judges focus primarily on the seriousness of the present offense and prior record when they sentence delinquents.[350] Because judges emphasize legal variables when they process youths, real differences in rates of criminal behavior by black youths account for part of the racial differences in justice administration. Various measures of delinquency – official arrest and conviction data, self-report surveys, and surveys of crime victims – indicate that black youths engage in higher rates of violent offending than do white juveniles.[351] Part of the real differences in black youths' rates of offending reflect differential exposure to a host of risk factors associated with crime and violence – for example, poverty, segregation and isolation in crime-ridden neighborhoods, single-parent households, unsafe and deficient schools, and poor health care – as a result of the structural changes described earlier.[352]

IN AMERICAN JUVENILE JUSTICE 1-16 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

349. Feld, *Race and the "Crack Down", supra* note 5, at 382 ("[S]tates define juvenile court jurisdiction based on a youth committing a crime, a prerequisite that detracts from a compassionate response. . . . Juvenile courts' defining characteristic strengthens public antipathy to 'other people's children' by emphasizing primarily that they are law violators.").

350. *See* Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. OF CRIM. L. & CRIMINOLOGY 392 (1996); Jeffrey Fagan, et al., *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224 (1987); Belinda R. McCarthy & Brent L. Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41 (1986); PETER W. GREENWOOD, ALBERT J. LIPSON, ALLAN ABRAHAMSE, & FRANKLIN ZIMRING, YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA: A REPORT TO THE LEGISLATURE 51 (June 1983) ("[C]omparisons of juvenile and adult sentencing practices suggest that juvenile and criminal courts in California are much more alike than statutory language would suggest, in the degree to which they focus on aggravating circumstances of the charged offense and the defendant's prior record in determining the degree of confinement that will be imposed.").

351. *See. e.g.*, Janet L. Lauritsen, *Racial and Ethnic Differences in Juvenile Offending in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 83, 87 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (analyzing arrest data and reporting that "black youth are disproportionately arrested for violent index crimes and drug and weapons violations . . . "); NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 235-38; *see also supra* text accompanying notes 129 & 130.

352. *See also supra* text accompanying note 123. *See also*, NAT'L RESEARCH COUNCIL ET AL., who report that:

> from the early days of childhood, black juveniles have more experience with poor health care and health conditions and with poor economic conditions, and they are more likely to live in segregated, isolated neighborhoods with concentrated poverty than are white juveniles. Concentrated disadvantages in poor neighborhoods, with low mobility and little racial heterogeneity, have been found to be strongly correlated with [involvement in crimes].

NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 238.

Research that controls for legal variables – present offense, prior record, pretrial detention status, and the like – and thereby accounts for differences in rates of offending by race, consistently reports that individualized juvenile justice produces racial disparities in sentencing.[353] Juvenile courts' *parens patriae* ideology legitimates individualized dispositions and inevitably subjects disadvantaged youths to more extensive controls.[354] In a society marked by economic and racial inequality, minority youths are most "in need" and therefore most "at risk" of juvenile court intervention.[355] The structural context of juvenile courts also places minority youths at greater risk of intervention. Urban juvenile courts are procedurally more formal and sentence all delinquents more severely.[356] Urban courts have greater access to detention facilities and detained youths typically receive more severe sentences than those who remain at liberty.[357] Because proportionally more minority youths live in urban environments, the geographic and structural context of juvenile justice administration interacts with race to produce minority overrepresentation in detention facilities and correctional institutions.[358] The recent legislative "crack down" on delinquents disproportionately affects minority youths who experience higher rates of pretrial detention and incarceration in the more punitive juvenile system.[359]

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353. *See, e.g.*, Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 23, 61 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (reviewing literature and reporting that "disparities that cannot be explained by race differences in offending are apparent at nearly every stage in the juvenile justice process"); MINORITIES IN JUVENILE JUSTICE 23-27 (Kimberly Kempf Leonard et al., eds., 1995); FELD, *supra* note 2, at 267-72; BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 116-34 (1993) (discretionary decisions at various stages of the juvenile process amplify racial disparities as minority youths proceed through the system and produce more severe dispositions than for comparable white youths).

354. FELD, *supra* note 2, at 272.

355. *E.g., id.* at 271-272 (more affluent white parents can purchase private services for their troubled children, whereas poorer minority juveniles proceed by default through the juvenile justice system).

356. Barry C. Feld, *Justice By Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Aministration*, 82 J. CRIM. L. & CRIMINOLOGY 156 (1991); BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS, 158-162 (1993); Bishop, *supra* note 353, at 62-65 (attributing some racial disparities in juvenile justice administration to class differences and social structural factors that place minority youths at greater risk of formal processing).

357. *E.g.*, Clarke & Koch, *supra* note 173, at 263, 294 ("being detained before adjudication had an independent effect on the likelihood of commitment, entirely apart from the fact that both detention and commitment had some common causal antecedents"); Feld, *supra* note 174, at 1337-39 ("[N]egative effects of pretrial detention on subsequent sentencing.").

358. *See generally*, FELD, *supra* note 2, at 271-72; SNYDER & SICKMUND, *supra* note 124, at 154-55. POE-YAMAGATA & JONES, *supra* note 258, at 9 (summarizing racial differences in rates of detention and reporting that "In every offense category, a substantially greater percentage of African American youth were detained than White youth.").

359. *See, e.g.*, POE-YAMAGATA & JONES, *supra* note 258, at 9, 14.

The juvenile justice process entails a succession of decisions – intake, petition, detention, adjudication or waiver, and disposition – and the compound effects of even small disparities produces larger cumulative differences. In 1997, black youths comprised about 15% of the population aged ten to seventeen, 26% of juvenile arrests, 30% of delinquency referrals, one-third of the petitioned delinquency cases, and 40% of the inmates in long-term public institutions.[360] Minority youths, especially Blacks, are overrepresented at each successive step of the decision-making process, with the greatest disparities occurring in the initial stages.[361] For example, probation officers who decide whether or not to file a formal delinquency petition often perceive minority juveniles as more threatening and more likely to offend in the future than they do similarly-situated white juveniles.[362] A recent analysis of the effects of discretionary decision-making reported that "at almost every stage in the juvenile justice process the racial disparity is clear, but not extreme."[363] "However, because the system operates cumulatively the risk is compounded and the end result is that black juveniles are three times as likely as white juveniles to end up in residential placement."[364]

In 1988, Congress amended the Juvenile Justice and Delinquency Prevention (JJDP) Act and required states receiving federal juvenile justice funds to

360. NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 231. *See also*, POE-YAMAGATA & JONES, *supra* note 258.

361. SNYDER & SICKMUND, *supra* note 124; POE-YAMAGATA & JONES, *supra* note 258, at 16 (index constructed by dividing minority youth proportion in pretrial detention by minority proportion in the youth population indicated that in 43 of 44 states, proportion of minority youths in detention was 2.8 times (280%) higher than their make-up in the general population); MILLER, *supra* note 140 at 69-72 (racial disparities occur most often in the earlier and the later stages of juvenile justice processing); Edmund F. McGarrell, *Trends in Racial Disproportionality in Juvenile Court Processing: 1985-1989*, 39 CRIME & DELINQ. 29, 46 (1993) (disproportionate referral of minority youths results in corresponding increases in pre-trial detention); Bishop, *supra* note 353, at 66 (reporting that race effects are more pronounced at earlier stages of juvenile justice decision-making).

362. *See* George S. Bridges and Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998); NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 251 (finding "pronounced differences in officers' attributions about the causes of crime committed by white and minority youth."); *see also*, Bishop & Frazier, *supra* note 350, at 399-403; Sara Steen, Christine E.W. Bond, George S. Bridges, and Charis E. Kubrin, *Explaining Assessments of Future Risk: Race and Attributions of Juvenile Offenders in Presentencing Reports, in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 245 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

363. NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 257.

364. *Id.*; *see also*, POE-YAMAGATA & JONES, *supra* note 258, at 18, 20 (minority proportion of youths in public correctional facilities about double that of whites (66% vs. 34%); black youths with no prior admissions were six times more likely than white youths to be confined); R. J. Sampson & Janet L. Lauritsen, *Violent Victimization and Offending: Individual-, Situational-, and Community-Level Risk Factors in* UNDERSTANDING AND PREVENTING VIOLENCE 362 (1994) (reporting that minority youths "are more likely to be detained and receive out-of-home placements than whites regardless of 'legal' considerations" and that these disparities also contribute to the construction of a prior record that, in turn, affects future processing).

examine the sources of minority overrepresentation in detention facilities and institutions and to develop mechanisms to assure equality of treatment.[365] A number of states responded to the JJDP Act mandate and reported racial disparities in their juvenile justice systems.[366] After controlling for legal variables, forty-one of forty-two states found minority youths overrepresented in secure detention facilities and all thirteen states that analyzed institutional commitments decisions reported disproportionate minority confinement.[367] A recent assessment of disproportionate minority confinement in Kentucky reported that in 1999 black youths comprised about 10% of the juvenile population, but 41% of those held in detention – four time greater than their proportion of the population – and one-quarter (25%) of those committed to the Department of Juvenile Justice.[368] Judges sentence disproportionately more minority delinquents to out-of-home placements than they do white youths, and provide white juveniles proportionately more probationary dispositions than they do black youths.[369] Moreover, incarcerated black juveniles spend more time in custody than do white youths convicted of similar offenses.[370]

Recent amendments to juvenile sentencing laws had a substantial negative impact on disproportionate minority confinement. The overall numbers of youths in custody on any given day increased almost 40% between 1985 and 1995, the decade of "get tough" changes in sentencing laws.[371] Despite the overall increase of youths in correctional custody, the proportion of white juveniles confined in public facilities declined 7%, while the percentage of black juveniles confined increased 63%.[372] Thus, the overall increase in the numbers and racial composition of correctional inmates reflects the sharp growth of minority youths in institutions. As a result, the proportion of white juveniles in custody declined from 47% to 32% of all incarcerated delinquents, while the proportion of black youths increased from 37% to 43% and that of Hispanics increased from 13% to 21% of all confined juveniles.[373]

365. *See* 42 U.S.C. § 5633(a)(15) (1994); NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 228-29.

366. *See* FELD, *supra* note 2, at 268.

367. *See* Carl E. Pope, *Racial Disparities in Juvenile Justice System*, OVERCROWDED TIMES, December 1994, at 1, 5.

368. *See* Building Blocks for Youth, Disproportionate Minority Confinement Factsheet at http://www.buildingblocksforyouth.org/statebystate/kydmc.html; ADVANCING JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 36 (Patricia Puritz and Kim Brooks, eds. 2002) available at http://www.childrenslawky.org/publications.html.

369. POE-YAMAGATA & JONES, *supra* note 258, at 14-15.

370. *Id.* at 21.

371. *See* FELD, *supra* note 2, at 270-71.

372. *Id.* at 271.

373. *Id.* s*ee also*, KRISBERG & AUSTIN, *supra* note 353, at 124-28 (disproportionate minority confinement in institutions).

VI. CONCLUSION

The juvenile court emerged in response to social structural changes a century ago and spread across the nation during the first two decades of the twentieth century. Economic modernization and the social construction of childhood provided the structural, political and ideological context within which Progressive policy-makers created new institutions for the social control of children. Juvenile courts did not emerge fully formed but evolved over several decades time – marked as a "work in progress." [374] The standard features of juvenile courts – separation from adults, procedural informality, confidentiality, euphemistic vocabulary, petitions, probation, and dispositions in the child's "best interests" – reflected the outcomes and accommodations to contending political, social and economic interests. The juvenile courts' broad and mutable mission and their ability to adapt to changes in their organizational environment explain their continued endurance despite persistent failure to achieve their professed rehabilitative goals.[375]

The issue of race has shaped the political and legal contours of juvenile justice policy and practice over the second half of the twentieth century and has evoked two separate and contradictory responses. Initially, racial injustice propelled the Warren Court's "due process revolution" and its myriad efforts to enhance civil rights and to protect minority citizens. *Gault* extended some procedural rights to delinquents in juvenile courts, but *McKeiver* declined to provide procedural parity with adult criminal defendants. The constitutional shift in juvenile courts' legal environment precipitated decades of judicial decisions, legislative amendments, and administrative modifications. By the 1980s and early-1990s, several decades of macro-structural, economic, and racial demographic changes led to a black underclass living in concentrated poverty and a concomitant rise in gun violence and youth homicides. Increasingly, politicians campaigned to "get tough" on youth crime, which the public understands as a code word for harsher treatment of young black males. [376] The punitive transfer laws and harsher delinquency sentences they enacted have transformed the system into a scaled-down, second-class criminal court for

374. TANENHAUS, *supra* note 1, at 54 (emphasizing that "It took more than a generation to pour form and substance into the idea of a juvenile court. . . . [I]t is much more instructive to view the juvenile court as a work in progress whose 'defining features' were a series of additions that only later became standard practices.").

375. SUTTON, *supra* note 3, at 148-53; Ira M. Schwartz et al., *Nine Lives and Then Some: Why the Juvenile Court Does Not Roll Over and Die*," 33 WAKE FOREST L. REV. 533, 550-52 (1998).

376. *See* GARLAND, *supra* note 18, at 198 (1990); *see also* BECKETT, *supra* note 18, at 107 (noting that proponents of "get tough" crime policies are "fundamentally uninterested in the social causes of criminality or in reintegrating offenders and assume instead that punishment, surveillance, and control are the best responses to deviant behavior); HACKER, *supra* note 51, at 225 (asserting that "few white Americans feel any obligation to make any sacrifices on behalf of the nation's principal minority. They see themselves as already overtaxed, feel that the fault is not theirs, and have become persuaded that public programs cannot achieve a cure. Instead, calls are heard for a tougher posture toward what is seen as the misbehavior of many blacks").

juveniles. These changes represent a cultural and legal inversion of the Progressives' conception of youths as innocent and dependent children into our contemporary perception of "super-predators" as responsible, almost adult-like offenders.

Political leaders and policy makers have forgotten that delinquents are children and differ from adults in competence and culpability. Juveniles are substantially less competent than adults to exercise or waive their legal rights. States that use the adult waiver standard to measure juveniles' relinquishment of counsel posit a functional equality that severely disadvantages most youths. States readily allow juveniles to waive counsel in a juvenile system that has become increasingly legalistic, complex, and punitive. Even when juveniles do receive the assistance of counsel, their lawyers often fail to provide the effective advocacy that youths need and the Constitution requires. Would any adult charged with a serious crime and facing the prospect of incarceration for years consent to be tried under the conditions that routinely prevail in juvenile courts? Four decades after *Gault*, states have yet to put the *justice* in juvenile justice.

For the past two decades, states have transferred more and younger juveniles to criminal court for prosecution as adults. "Get tough" politicians' sound bites – "adult crime, adult time" or "old enough to do the crime, old enough to do the time" – characterize youths as criminally responsible and advance policies that fail to recognize youthfulness as a mitigating factor in sentencing.[377] The Court in *Simmons* finally acknowledged what every parent knows – children are different. Adolescents differ in qualities of judgment, self-control, appreciation of consequences, and preferences for risks that diminish their responsibility and reduce their culpability. These developmental differences exist whether a state tries a youth in a juvenile or criminal court. Despite these differences, politicians and policy makers enact criminal statutes that require judges to sentence children just like adults and to impose grossly disproportional and LWOP sentences on young, immature offenders.

The cumulative consequence of punitive policies inflicts the most severe adult sentences on black youths and disproportionately confines minority youths in the juvenile justice system. For a century, juvenile courts have discriminated between "our children" and "other peoples' children." Progressive reformers had to choose between initiating social structural reforms to alter conditions that contribute to criminality – poverty, inequality and discrimination – or to apply "band-aids" to children damaged by those adverse circumstances. Social class and ethnic antagonisms caused them to avoid broad social structural changes and instead to "save children." A century later, we face the same policy choices and continue to evade our responsibilities to "other peoples' children."

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377. *See e.g.*, Feld, *supra* note 276, at 113-15 (arguing that adolescent developmental psychology supports differences in culpability of juveniles and adults which require formal recognition of youthfulness as a mitigating factor in sentencing).

The prevalence of violent crime in certain urban areas is a reflection of power, politics, and social inequality. Concentrated poverty and racial isolation are the cumulative consequences of public policies that amplify crime and violence within inner-city minority communities. Political and public discussions about poverty, allocation of resources and benefits, inequality, and crime function as proxies for addressing issues associated with race. Conservative politicians exploit white voters' racial animus with coded messages to sustain a right-wing coalition.[378] As a result, Americans engage in a "subterranean discourse" about race based on misleading images and potent symbols.[379] As long as the public and politicians identify long-term poverty and its associated problems – unemployment, drug abuse, criminality, illegitimacy – as a condition of Blacks that is separate from the American mainstream, then policy makers can evade government's responsibility to address them.[380] The political and public association of urban black males with crime has fostered punitive incarceration policies rather than efforts to expand the employment and educational opportunities to prevent crime. Although public policies and political economy contribute both to racial inequality and the skewed distribution of crime, politicians manipulate and exploit racially tinged perceptions of young offenders for electoral advantage. The transformation of the juvenile court into an explicitly punitive agency to control "other people's children" is an instance of politicians' exploiting the connection between race and youth crime.[381] Politicians and the public view the juvenile courts' clients as young criminals of color and refuse to commit resources necessary to improve their life conditions or to create a juvenile system that provides real justice. After a century of change – a "work in progress" – the primary virtue of juvenile courts is simply that they are not the criminal justice system.[382] Regardless of

378. EDSALL & EDSALL, *supra* note 7, at 281 (arguing that "[r]ace will remain an exceptionally divisive force in politics as long as the debate is couched in covert language and in coded symbols—and as long as major participants fail to be explicit about their goals"); Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 396 (1997) (arguing that race contributes to irrational and divisive analyses of crime policies that reflect passion more than reason).

379. *See e.g.*, Gilens, *supra* note 153, at 602 (arguing that explicit claims associated with race can be debated and rebutted, "but when blacks are linked with crime, welfare, or drug use only implicitly, such links are less likely to be challenged"); MENDELBERG, *supra* note 63, at 268 (arguing that "racial stereotypes, fears and resentments shape our decisions most when they are least discussed. . . . It is this strong but implicit reference to race that is most effective in priming racial predispositions and racializing the political choices of white citizens.").

380. *See* EDSALL & EDSALL, *supra* note 7, at 243 (arguing that the growth of white suburbs around the deindustrialized urban core isolates poor blacks and issues of joblessness, criminality, income inequality, and welfare dependency from the concerns of mainstream voters); HACKER, *supra* note 51, at 228-29 (attributing black youth homicide, guns and drugs in the inner city to social structural inequality and arguing that "It is white America that has made being black so disconsolate an estate. Legal slavery may be in the past, but segregation and subordination have been allowed to persist. Even today, America imposes a stigma on every black child at birth.").

381. FELD, *supra* note 2, at 245-86.

382. Zimring, *supra* note 17, at 2481 (arguing that "[T]he first great virtue of the juvenile court

their ability to help or rehabilitate juveniles, they do less harm than when states process children in the adult criminal justice system.

was that it would not continue the destructive impact of the criminal justice system on children. This theory of justification for juvenile court, the diversionary rationale, argues that the new court could do good by simply doing less harm than the traditional criminal processes.").