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Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"

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> [C]onsiderations of race are now deeply imbedded in the strategy and tactics of politics, in competing concepts of the function and responsibility of government, and in each voter's conceptual structure of moral and partisan identity. Race helps define liberal and conservative ideologies, shapes the presidential coalitions of the Democratic and Republican parties, provides a harsh new dimension to concern over taxes and crime .... In terms of policy, race has played a critical role in the creation of a political system that has tolerated, if not supported, the growth of the disparity between rich and poor over the past fifteen years. Race-coded images and language changed the course of the 1980, 1984, and 1988 presidential elections ....
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> — *Thomas Byrne Edsall & Mary D. Edsall*[1]

INTRODUCTION

A century ago, the Progressive reformers who created the juvenile court embraced a particular ideological construction of childhood as one of innocence and vulnerability. They also adopted a scientific conception of social control—positive criminology—that attempted to identify the causes of criminality and purported to treat, rather than to punish, offenders. The juvenile court combined the new conception of childhood with the new strategies of positive criminology to create a judicial-welfare alternative to the adult criminal process for juveniles. The juvenile court affirmed the responsibility of families to raise their children while expanding the state's prerogative to act as parens patriae, or "super-parent," and to exercise flexible social control in the

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1. Thomas Byrne Edsall & Mary D. Edsall, *Race*, THE ATLANTIC MONTHLY, May 1991, at 53.

"best interests" of young people. Because of some parents' perceived limitations, the social control of ethnic and racial minority offenders was one of the juvenile court's most important functions.[2] From its inception, the juvenile court sought to assimilate, integrate, "Americanize," and control the children of the southern and eastern European immigrants pouring into the cities of the East and Midwest.[3] A century later, the social control of young black males in the devastated cores of America's post-industrial cities has emerged as one of the juvenile court's primary functions.

Despite the juvenile court's enormous powers, for the first two-thirds of the twentieth century, few people questioned the *idea* of an informal, therapeutic agency of social control or its discriminatory implementation. Systematic and critical re-examination of the juvenile court's cultural and legal premises emerged only in the 1960s, and culminated in the Supreme Court's *In re Gault*[4] decision in 1967. By the time of *Gault* and the Warren Court's "Due Process Revolution," the Progressive Era consensus about state benevolence, the legitimacy of imposing certain values on others, and what rehabilitation entailed had become matters of intense dispute. Pluralism, racial diversity, and cultural conflicts challenged the consensus about the goals of rehabilitation. Empirical evaluations of rehabilitation programs undermined Progressives' assumptions that correctional personnel possessed the technical ability to treat offenders effectively. Civil rights advocates questioned the benevolence of justice system officials and objected to the invidious and discriminatory consequences of discretionary decision making. In the face of these criticisms, the Supreme Court increasingly emphasized procedural formality and the rule of law to regulate administrative decision making. In the ensuing decades, the Court's procedural decisions provided the

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2. *See, e.g.*, BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 55-60 (1999); W. NORTON GRUBB & MARVIN LAZERSON, BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN 173-82 (1982).

3. *See, e.g.*, ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 75-83 (2d ed. 1977); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVE IN PROGRESSIVE AMERICA 221-22 (1980); STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF PROGRESSIVE JUVENILE JUSTICE, 1825-1920, at 57-58 (1977); JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640-1981, at 122 (1988).

4. 387 U.S. 1, 12-59 (1967).

political and legislative impetus to transform the juvenile court from a nominally rehabilitative social welfare agency into a formal legal institution and fostered a convergence between the juvenile and criminal justice systems.[5]

This Article analyzes the social context and changing jurisprudence of juvenile justice over the past half-century through the prism of race to provide a "history of the present"—a historical examination of the recent past to illuminate contemporary social policies and institutional arrangements.[6] Race and race relations are socially constructed in a dynamic legal and socio-historical context. They are shaped through political processes that interpret and explain variations associated with race and allocate power and resources along racial lines.[7] The changing role of race in law and politics is

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

6. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 2 (2001). Garland describes a "history of the present" as an historical, sociological, and penological effort to understand how contemporary practices acquired their current characteristics.

> It is a genealogical account that aims to trace the forces that gave birth to our present-day practices and to identify the historical and social conditions upon which they still depend. The point is not to think historically about the past but rather to use that history to rethink the present.

Id.

7. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S, at 55-56 (1994). Omi and Winant argue that gender represents a distinction with an objective biological basis, whereas race is a social construct "which signifies and symbolizes social conflicts and interests by referring to different types of human bodies." *Id.* at 55-56. Because racial identity is a social construct designed to differentiate among human groups based on certain characteristics, the formation of racial identity is a "sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed." *Id.* at 55. The construction of racial identity is implicated both in social structure and in cultural representation. *Id.* at 56. Historically and presently, the state and individuals have treated people differently and structured social inequality in the distribution of wealth, power, status, and resources, based on ascriptions of race. *See id.* at 57. At the same time, culture provides an interpretation and explanation of the social inequalities that exist around the dimensions of race. "[A] racialized social structure shapes racial experience and conditions meaning." *Id.* at 59. "Analysis of such stereotypes reveals the always present already active link

the organizing principle for this analysis of the changes in juvenile justice policies.

This Article argues that during the second half of the twentieth century the issue of race had two distinct and contradictory influences on juvenile justice policy in particular and on criminal justice policy in general. The Article's thesis can be summarized succinctly—first the North went south, and then the South went north. During the 1950s and 1960s, the Supreme Court imposed national legal and equality norms on the recalcitrant Southern states that still adhered to a "separate but equal" Jim Crow legal regime.[8] The social-structural changes that began several decades earlier

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between our view of the social structure—its demography, its laws, its customs, its threats—and our conception of what race means." *Id.* at 59-60. Because the significance of race is endemic in social structure and in cultural interpretation,

> [e]verybody learns some combination, some version, of the rules of racial classification, and of her own racial identity, often without obvious teaching or conscious inculcation. Thus are we inserted in a comprehensively racialized social structure. Race becomes "common sense"—a way of comprehending, explaining, and acting in the world. A vast web of racial projects mediates between the discursive or representational means in which race is identified and signified on the one hand, and the institutional and organizational forms in which it is routinized and standardized on the other. These projects are the heart of the racial formation process.

Id. at 60.

8. *See generally* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 490 (2000) (stating that beginning with *Brown v. Board of Education,* and reinforced by the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the Court 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 not a national one. It was directed exclusively at the South and was designed to force the South to conform to northern—that is, national—norms." *Id.*

> Omi and Winant argue that
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> [i]n the 1960s, race occupied the center stage of American politics in a manner unprecedented since the Civil War era a century earlier. Civil rights struggles and ghetto revolts, as well as controversies over state policies of reform and repression, highlighted a period of intense conflict in which the very *meaning* of race was politically contested. . . .
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> Issues of race have once again been dramatically revived in the 1980s, this time in the form of a "backlash" to the political gains of racial minority movements of the past. Conservative popular movements, academics, and the Reagan administration have joined hands to attack the legacy and logic of earlier movement achievements. They have done this, moreover, in a way which escapes obvious charges of "racism."

OMI & WINANT, *supra* note 7, at 2.

motivated the Supreme Court to critically reassess criminal and juvenile justice practices in response to concerns about racial discrimination and civil rights. The migration of Blacks from the rural South to the industrial North and West increased the urbanization of Blacks and placed the issues of racial equality and civil rights on the national political agenda. The Warren Court's school desegregation, criminal procedure, and juvenile justice "due process" decisions, such as *In re Gault*,[9] reflected a broader shift in constitutional jurisprudence to protect individual rights—especially the civil rights of racial minorities.

The second period of juvenile justice policy changes emerged in response to *Gault*'s formalization of juvenile court procedures in 1967 and culminated in the "get tough" legislation of the late 1980s and early 1990s. Although the Court focused on juveniles' rights to protect minorities' liberty interests, its granting of procedural safeguards facilitated the increased severity of delinquency sanctions, precipitated the transformation of the juvenile court into a "wholly-owned subsidiary" of the criminal justice system, and legitimated the imposition of the punitive sentences that now fall most heavily on minority offenders. In the mid-1960s, *Gault* and the Supreme Court's "Due Process Revolution" coincided with campus disorders, escalating "baby boom" crime rates, and urban racial rebellions, which national Republican politicians characterized as a crisis of "law and order."[10] They pursued an electoral strategy to appeal to white southern voters' racial antipathy and resistance to school integration and engineered a conservative "backlash" to foster a political realignment around issues of race and public policy.[11]

During the 1970s-1990s, conservative Republican politicians pursued a "southern strategy," exploited "crime" and "welfare" as code words for race, and advocated "get tough" policies that ultimately affected juvenile and criminal justice policies throughout the nation. National and political divisions about race enabled conservative Republican politicians to advocate particular crime and welfare policies for electoral advantage. During this period, news media coverage put a

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9. 387 U.S. at 12-59.
10. *See* FELD, *supra* note 2, at 88-90.
11. THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 7-14 (1992); KEVIN P. PHILLIPS, THE EMERGING REPUBLICAN MAJORITY 204-08 (1969).

black face on youth crime, and political campaigns to "crack down" on youth violence turned juveniles into symbolic "Willie Hortons."[12] The trend toward punitiveness in juvenile justice, which began in the 1970s with the politicization of crime policies, peaked in the early 1990s when increases in black youth homicide rates provided further political incentive to "get tough" on youth crime through modification of juvenile court's transfer and sentencing laws.[13]

Part I of this Article provides a brief overview of the historical origins of the juvenile court, explores the discriminatory premises embedded in its processes, and provides context against which to measure subsequent changes in juvenile law and policy. Part II assays the macro-structural, demographic, and racial changes; the constitutional context; and the political forces that shaped the Supreme Court's juvenile court decisions in the 1960s. More generally, this Part addresses why the Warren Court's constitutional "Due Process Revolution" happened when it did and as it did. It puts juvenile justice and criminal procedural reforms in the broader context of the civil rights movement and the quest for racial equality. Part III analyzes subsequent sociological, criminological, racial, media, and political dynamics that led to the "get tough" legislative reformulation of juvenile justice policies in the 1980s and 1990s. Again, at a more general level, it asks and answers why the conservative "backlash" that successfully advocated policies to "get tough" and "crack down" on crime, drugs, and youth occurred when it did and as it did.[14]

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12. *See* TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY 135-65 (2001); KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY (1992).

13. Feld, *Transformation—Part II*, *supra* note 5, at 357-69.

14. Garland observes that

[t]he last three decades have seen an accelerating movement away from the assumptions that shaped crime control and criminal justice for most of the twentieth century. The central agencies of the modern criminal justice state have undergone quite radical shifts in their working practices and organizational missions. . . . "[P]enal welfarism"—the institutional arrangements that increasingly characterized the field from the 1890s to the 1970s, and which shaped the common sense of generations of policy-makers, academics, and practitioners—has recently been shaken to its roots.

Garland, *supra* note 6, at 3; *see also* FELD, *supra* note 2, at 189-91 (war on juveniles); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 81-123 (1995) (war on drugs).

2003] *RACE, POLITICS, AND JUVENILE JUSTICE*   1453

I. THE PROGRESSIVE JUVENILE COURT

The juvenile court emerged at the beginning of the twentieth century in conjunction with a host of social changes. Economic modernization fostered rapid industrialization, immigration, and urbanization. It also forced changes in family structure and function that allowed a new cultural perception of childhood to take hold.   The rationalizing forces of modernization also contributed to the ascendance of positivist criminology. The Progressive movement addressed many of the problems associated with this social upheaval by applying the principles of positive criminology to its criminal justice policies and incorporating a child-centered theme into many of its programs.   This Part explores how these factors shaped the character of the juvenile court.

A century ago, economic modernization transformed America from a rural agrarian, Anglo-Protestant society into an ethnically diverse, urban industrial one.[15] Industrialization also altered the social organization of cities.   Previously, residential areas were socially and economically heterogeneous; most people lived within walking distance of where they worked; and social, economic, and ethnic residential segregation did not separate the rich and the poor.[16] Industrial growth altered the urban landscape.   Population density increased as immigrants from southern and eastern Europe crowded into urban ghettos surrounding the manufacturing core to take the newly available jobs in the industrial

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15. MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY 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."); PLATT, *supra* note 3, at 75-83 (discussing the role of women child-savers in promoting the nation's first juvenile court in Cook County, Illinois in 1899); ROTHMAN, *supra* note 3 (discussing the social structural changes associated with modernization and implications for systems of social control).   See *generally* ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978) (analyzing the influence of social science research on formulation of juvenile court's treatment ideology); ROBERT H. WIEBE, THE SEARCH FOR ORDER: 1877-1920 (1967) (discussing the impact of industrialization on social organization and growth of bureaucracy).

16. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 19-20 (1994); SAM B. WARNER, JR., STREETCAR SUBURBS: THE PROCESS OF GROWTH IN BOSTON, 1870-1900, at 15-21 (1974).

factories.[17] The overwhelming number of immigrants and their ethnic, language, religious, and cultural differences from the settled Anglo-Protestant western Europeans combined to hinder their ability to assimilate.[18]

The transition from an agricultural to an industrial society shifted work from the home economy to other work environments and modified the roles of women and children in the family.[19] The idea of childhood is socially constructed, and during this period the upper and middle classes promoted an image of children as vulnerable, fragile, and dependent innocents who required special protection and supervision.[20]

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17. *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 . . . ."); MASSEY & DENTON, *supra* note 16, at 26 ("Dense clusters of tenements and row houses were constructed . . . to house the burgeoning work force.").

18. *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 (2d ed. 1988) (noting that "new immigrants" differed in language, religion, political heritage, and culture from the dominant Anglo-Protestant American and that these differences from the dominant society 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, at 20-30 (1980) (discussing the changing patterns of European immigration and difficulties of assimilation because of religious, linguistic, and cultural differences). The deindustrialization of the urban core during the last third of the twentieth century had profound implications for the black internal migrants who had succeeded the earlier European immigrants in the manufacturing sectors in the city centers. *See infra* Part III.A.

19. Because children have less economic value in an industrial than in an agricultural economy, the shift of economic functions from the family farm to industrial environments encouraged a reduction in the number and change in the spacing of children. *See generally* CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 178-209 (1980) (women's changing conception of themselves led to increased control of reproduction and decline in fertility); JOSEPH F. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT 114-16 (1977) (noting that modernization modified the roles of women and children).

20. The idea of *childhood* is socially constructed and specifies the social, cultural, and physical characteristics that distinguish children from adults. DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 16-17 (1993); 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." (citations omitted)). Western societies only began to distinguish the period between infancy and adulthood and to evidence greater concern for the welfare and rearing of children within the

The Progressive movement emerged in response to the forces of modernization and industrialization and addressed social problems ranging from economic regulation to criminal justice and political reform.[21]   Progressives believed that professionals and experts could develop rational and scientific solutions to social problems and that public authority could intervene to solve them.[22]   Progressives attempted to

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past few centuries. The "modern" view of childhood is that children are not miniature adults, and that childhood is a separate stage of development. PHILLIPPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 365-404 (Robert Baldick trans., Vintage Books 1962) (1960), traced the modernizing conception of childhood to the upper bourgeois and nobility in the sixteenth and seventeenth centuries.   These changing views of children gradually diffused downward through the social class structure over time. 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 invested far greater efforts to prepare their children for adult roles and to restrict their autonomous departures from home. One commentator has written that during this time

> [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.

DEGLER, *supra* note 19, at 66; KETT, *supra* note 19, at 111-43.   Women, especially in the middle and upper classes, assumed a greater role in supervising the child's moral and social development. PLATT, *supra* note 3, at 75-83.

21.   At the turn of the century, social structural changes associated with modernization sparked the Progressive Movement. HOFSTADTER, *supra* note 18; WIEBE, *supra* note 15.   Progressivism addressed a broad spectrum of social, political, and economic issues. *See, e.g.*, GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM 195-99 (1963) (economic regulation); ROTHMAN, *supra* note 3, at 5-13 (criminal and juvenile justice).   Progressive reformers legislated for public health and welfare reform, and embraced many "child-saving" programs to respond to myriad threats to child development: inadequate and broken families, dependency and neglect, poverty and welfare, education and work, crime and delinquency. *See, e.g.*, WALTER I. 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).

22.   Progressives invoked science, rationality, and expertise to legitimate their programs and to expand their professional authority.   BURTON J. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM 85-92 (1976).   Progressives believed that they could solve contentious social problems with rational and scientific methods, and attempted to transform political and moral conflicts into technical managerial decisions made by experts in administrative agencies insulated from partisan strife. SUTTON, *supra* note 3, at 124 ("[A] characteristic feature of Progressive movements was their tendency to see

"Americanize" the immigrants and poor through a variety of agencies of assimilation and acculturation to become sober, virtuous, middle-class Americans like themselves.[23] Progressives combined their belief in state power with the new cultural conception of childhood and enacted a number of child-centered reforms—the juvenile court, child labor laws, social welfare laws, and compulsory school attendance laws— that both reflected and advanced the changing imagery of childhood.[24]

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social control not as a moral or political problem, but primarily as an administrative problem.").

23. Progressives sought to use the state to inculcate their values in others. *See, e.g.*, ROTHMAN, *supra* note 3, at 60 ("The most distinguishing characteristic of Progressivism was its fundamental trust in the power of the state to do good."). Because Progressives viewed individual and social welfare as co-extensive, they saw no need to interpose procedural safeguards to protect individuals from state benevolence. *See also* FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY 129-30 (1964).

Lieberson makes the important point that the Progressives' assimilationist agenda for southern and eastern European immigrants entering the cities of the North differed sharply from the exclusionary and segregated experiences of rural Blacks in the South:

> Faced with a substantial flow of immigration from new sources, the educational institutions of the urban North were expected to provide a central mechanism for assimilation. Universal education, which admittedly owed its impetus to earlier forces, was to provide the means for teaching the English language, develop loyalty to the new nation through an understanding of its history and opportunities, create the habits of dress, cleanliness, and demeanor that were desired, and generate a literate population that could vote wisely and also contribute productively to the labor force.

> By contrast, the provision of education for blacks in the South was made reluctantly and was of relatively poor quality. Preparation for good citizenship was largely irrelevant as blacks were disenfranchised and, moreover, the "place" envisioned for blacks in the economic and social structure of the South was hardly compatible with a classical education.

LIEBERSON, *supra* note 18, at 135. Lieberson argues that these differences in policies of inclusion versus exclusion helped to shape the differences in the subsequent experiences of Blacks when they moved to the North during the "great migration" around World War II. *Id.* at 136.

24. A child-centered theme pervaded many Progressive programs that were designed to structure child development and to control and mold them while protecting them from exploitation. *See, e.g.*, WIEBE, *supra* note 15, 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."); *see also* LAWRENCE A. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957, at 127-28 (1961) (compulsory school attendance laws);

Positive criminology supplanted the classical formulation of crime as the product of free-will choices, provided a more modern and scientific conception of social control, and attempted to identify the forces that caused criminality.[25] Because Progressive reformers attributed criminal behavior to external and deterministic forces, they de-emphasized individual moral responsibility for crime, employed medical analogies to "treat" offenders, and focused on efforts to reform rather than to punish them.[26]   Criminal justice personnel

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TIFFIN, *supra* note 21, at 141-61 (child welfare legislation); WALTER I. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA 119-42 (1970) (child labor laws).

25. Criminal justice policies reflect underlying ideological assumptions about the causes of crime and the appropriate tactics and strategies to reduce it. FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 36-42 (1982). 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. Cultural patterns also structure the ways in which we feel about offenders . . . ." DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 195 (1990). The classical criminal law assumed free-willed actors made blameworthy choices to commit crimes and that they deserved prescribed consequences for their acts.

At the turn of the century, new theories about human behavior and social deviance caused Progressives to reformulate the ideology of crime and 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. Reflecting the modern rationalizing tendencies, they sought scientifically to identify the causes of crime and delinquency in order to prescribe an appropriate remedy. FRANCIS A. ALLEN, *Legal Values and the Rehabilitative Ideal*, *in* THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY 26 (1964) [hereinafter ALLEN, *Legal Values*]; DAVID MATZA, DELINQUENCY AND DRIFT 6-7 (Transaction Publishers 1990) (1964). Positivism attributed criminal behavior to deterministic forces that compelled the offender to act as he did, rather than to a deliberate choice or exercise of "free will." Determinism reduced offenders' responsibility for their crimes, and penologists attempted to reform them rather than to punish them for their offenses. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 3-7 (1981) [hereinafter ALLEN, REHABILITATIVE IDEAL].   Katherine Beckett describes the ideology of "penological modernism" as the foundation for both criminal justice and social welfare practices: "[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." KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 8 (1997).

26. MATZA, *supra* note 25, at 12-21; ROTHMAN, *supra* note 3, at 50-52; RYERSON, *supra* note 15, at 22.

MINNESOTA LAW REVIEW   [Vol 87:1447

analogized their practices to the medical profession.[27] They embraced the "Rehabilitative Ideal," which included both a belief in human malleability and a consensus about the appropriate directions of personal change.[28]

The juvenile court melded the new ideology of childhood with the new conceptions of social control, introduced a judicial-welfare alternative to the criminal justice system, and provided the organizational mechanism to substitute the state as parens patriae.[29] Progressive "child-savers" described juvenile courts as a benign, non-punitive, and therapeutic agency.[30] The legal doctrine of parens patriae legitimated state intervention on the rationale that the juvenile court was a civil rather than

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27. MATZA, *supra* note 25, at 12-21; ROTHMAN, *supra* note 3, at 293-323; RYERSON, *supra* note 15, at 105-24.

28. 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 interest of his own happiness, health, and satisfaction and in the interest of social defense.

ALLEN, *Legal Values*, *supra* note 25, at 26. A flourishing "Rehabilitative Ideal" requires a cultural consensus about means and ends, agreement about the goals of change and the strategies necessary to achieve them. Progressives believed that the new social and behavioral sciences provided the necessary means with which to systematically change people. *Id.* at 26-27. They also believed in the virtues of their social order and the propriety of imposing their middle-class values on immigrants and the poor. ROTHMAN, *supra* note 3, at 48-49 ("Progressives were equally convinced of the viability of cultural uplift and of the supreme desirability of middle-class life in cultural as well as material terms. . . . The model was clear: all Americans were to become middle-class Americans.").

In Part III, this Article will argue that some of the recent "get tough" juvenile justice policies reflect a repudiation of the assumptions of positivism and the "Rehabilitative Ideal" in favor of classical ideas of crime as the product of rational choice by responsible individuals who deserve punishment. *See infra* notes 487-90 and accompanying text; *see also* Feld, *Transformation—Part II*, *supra* note 5, at 328-29 (arguing that the juvenile court is premised on two competing and contradictory legal conceptions of juveniles and adolescent criminal responsibility; one "views young people as innocent, vulnerable, fragile, and dependent *children*," and the other "perceives young people as vigorous, autonomous, and responsible almost *adult-like* people from whose criminal behavior the public needs protection").

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

30. PLATT, *supra* note 3, at 176-81; SCHLOSSMAN, *supra* note 3, at 58; SUTTON, *supra* note 3, at 232-58.

criminal agency. Because reformers characterized the court's intervention as a civil welfare proceeding, they enjoyed greater flexibility to supervise and treat children. The juvenile court's "status jurisdiction" enabled them to respond to non-criminal behavior such as smoking, sexual activity, truancy, immorality, or living a wayward, idle, and dissolute life.[31]

An inextricable relationship exists between procedure and substance in the juvenile court. Because the Progressives' juvenile courts separated children from adults and provided a rehabilitative alternative to punishment, they also rejected the criminal law's procedural safeguards.[32] Juvenile courts employed informal procedures, excluded lawyers and juries, conducted confidential hearings, and adopted a euphemistic vocabulary to obscure the reality of criminal social control.[33] Juvenile courts imposed indeterminate and non-proportional sentences which they characterized as treatment and supervision rather than punishment; the sentences reflected

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31. Reformers conceived juvenile courts as a system of social welfare that controlled young peoples' behaviors that criminal courts previously ignored or handled informally. PLATT, *supra* note 3, at 46-74; SUTTON, *supra* note 3, at 121-53. This broader jurisdiction included not only criminal *acts* but also a child's *status* or life circumstances. *See, e.g.*, RYERSON, *supra* note 15, at 47 ("[T]he juvenile court reformers were placing their movement among a number of others which were, in the progressive period, sending numerous missionaries from the dominant culture to the lower classes to acculturate immigrants, to teach mothers household management, and to supervise the recipients of charity."); SCHLOSSMAN, *supra* note 3, at 151-53. The "status jurisdiction" embodied the newer conception of childhood, furthered the legal differentiation between children and adults, and expanded state authority over child-rearing and family functions. PLATT, *supra* note 3, at 134-36 (noting that the juvenile court simultaneously affirmed the primacy of nuclear family and expanded the power of the state to intervene in instances of parental inadequacy).

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

33. *See, e.g.*, NAT'L RESEARCH COUNCIL, PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT AND CONTROL, JUVENILE CRIME, JUVENILE JUSTICE 154 (Joan McCord et al. eds., 2001), which summarizes 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.

the offenders' "best interests" and future welfare rather than past offenses.[34]   This juvenile court model required a specialized judge trained in social sciences and child development. The judge would be assisted by social service personnel, clinicians, and probation officers to make individualized dispositions in the child's "best interests." Progressives believed that by scientifically analyzing the facts of a child's circumstances, the proper diagnosis and prescription would emerge.[35] Because they acted benevolently, individualized their solicitude, and intervened scientifically, the court's Progressive creators saw no reason to circumscribe the power of the state.[36] Instead, they granted judges broad discretion to diagnose and treat the child based on her character and lifestyle rather than on the crime.[37]

Despite their benevolent rhetoric, Progressive reformers intended the juvenile court to discriminate. They deliberately designed it to control the poor and immigrant children and to distinguish between "our children" and "other people's

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34. *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909). "Juvenile court judges imposed indeterminate and non-proportional dispositions that could continue for the duration of minority." FELD, *supra* note 2, at 70. "Indeterminate" meant that the dispositions had no set limit and could continue indefinitely until adulthood. *Id.* "Non-proportional" meant that no relationship existed between what the child allegedly did and the length of disposition; the trivial or serious nature of the offense imposed no limits in advance." *Id.* The particular "reason or offense 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." *Id.* Juvenile courts rejected notions of blameworthiness and deserved punishment for *past offenses* in favor of a utilitarian strategy of *future-oriented* social welfare dispositions. *Id.* In theory, judges decided why the child appeared in court and what the court could do to change the character, attitude, and behavior of the youth to prevent a reappearance. THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 83 (1992) ("[The juvenile court] 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."). Judges decided each case individually on the basis of unspecified "clinical" factors that did not necessarily apply to the next. MATZA, *supra* note 25, at 111-36.

35. MATZA, *supra* note 25, at 111-36; ROTHMAN, *supra* note 3, at 242-43; RYERSON, *supra* note 15, at 42-43.

36. *See* MATZA, *supra* note 25, at 111-36; ROTHMAN, *supra* note 3, at 215-16; RYERSON, *supra* note 15, at 42-43.

37. ROTHMAN, *supra* note 3, at 238; RYERSON, *supra* note 15, at 40-41; SCHLOSSMAN, *supra* note 3, at 157-80.

children."[38]   Their pursuit of the "Rehabilitative Ideal" caused Progressives to locate the juvenile court on several cultural, legal, and criminological fault-lines.   They created binary distinctions between the juvenile and criminal justice systems: either child or adult; either determinism or free will; either dependent or responsible; either treatment or punishment; either welfare or deserts; either procedural informality or formality; and either discretion or the rule of law. As the next Part explains, during the past three decades, as a result of structural and racial demographic changes in cities, the Supreme Court's "constitutional domestication of the juvenile court," the rise in serious youth crime, and the erosion of the juvenile court's rehabilitative assumptions, a fundamental shift has occurred from the former to the latter of each binary pair.

II. THE WARREN COURT AND THE "DUE PROCESS REVOLUTION" IN JUVENILE JUSTICE

In the decades prior to and after World War II, black migration from the rural South to the urban North increased minority concentrations in urban ghettos, made race a national rather than a regional issue, and provided the political and legal impetus for the civil rights movement.[39]   Broader structural and demographic changes taking place in American society, particularly those associated with race and youth crime, impelled the Warren Court's civil rights decisions, criminal procedure rulings, and "constitutional domestication" of the juvenile court during the 1960s.[40] The constitutional and statutory recognition of Blacks' civil rights in the mid-1960s coincided with the "baby boom" escalation in youth crime and urban racial disorders. By the end of the decade, conservative politicians began to exploit the issues of crime and race for electoral advantage.

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38.   FELD, *supra* note 2, at 75-76; GRUBB & LAZERSON, *supra* note 2, at 69 (discussing the selective application of parens patriae ideology in a class-based society); NAT'L RESEARCH COUNCIL, *supra* note 33, at 154-55 (discussing the tension between social control and social welfare and balancing the best interest of the child with the protection of society); ROTHMAN, *supra* note 3, at 222.

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

40.   *See* FELD, *supra* note 2, at 97-106; POWE, *supra* note 8, at 437-39.

A. RACE AND SOCIAL STRUCTURAL CHANGES

The "great migration" of Blacks from the rural South to the industrial North and West in the decades before and during World War II increased the urbanization of Blacks and placed the issues of racial equality and civil rights on the national political agenda.[41] The outbreak of World War I in 1914 curtailed European immigration to the United States and created a demand for black southern laborers to work in northern industrial factories.[42] Because World War I increased demand for industrial production and reduced the flow of European immigrants to work in northern factories, labor recruiters solicited rural southern Blacks.[43] Between 1910 and 1920, more than 500,000 Blacks migrated to non-southern states, followed by more than 875,000 in the 1920s.[44] During the period between the World Wars, the mechanization of cotton-picking and the devastation to cotton production caused by the Mexican boll weevil combined to decrease southern demand for black workers.[45] An additional 400,000 Blacks left

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41. LEMANN, *supra* note 39, at 5-7.

42. MASSEY & DENTON, *supra* note 16, at 27-29.

43. *See, e.g.*, LEMANN, *supra* note 39, at 5-6; MASSEY & DENTON, *supra* note 16, at 28-29 ("The event that transformed the stream into a flood, however, was the outbreak of World War I in 1914.").

44. MASSEY & DENTON, *supra* note 16, at 29.

45. *See, e.g.*, LEMANN, *supra* note 39, at 5-6 (noting that in the nineteenth 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 twentieth century, the mechanical cotton picker dramatically reduced the need for cheap, black laborers and the share-cropping economy that succeeded slavery); MASSEY & DENTON, *supra* note 16, at 29 (stating that boll weevil devastated cotton crops and contributed to a shift in southern agriculture from cotton to food and livestock, which were less labor intensive); 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."). As recently as 1940, more than three-quarters of Blacks lived in the South and half resided in the rural South. LEMANN, *supra* note 39, at 6. The mechanization of cotton picking spurred the great migration from rural to urban areas and from the South to the North and West:

> Between 1910 and 1970, six and a half million black Americans moved from the South to the North; five million of them moved after 1940, during the time of the mechanization of cotton farming. In 1970, when the migration ended, black America was only half Southern, and less than a quarter rural; "urban" had become a euphemism for "black."

Id. at 6.

the south for northern cities during the Great Depression as a result of worsening economic conditions.[46]   Southern racial hostility, Jim Crow laws, Ku Klux Klan violence, lynchings, poor segregated schools, and job discrimination provided additional incentives for many Blacks to join the exodus.[47] Following the Great Depression, opportunities to work in industries associated with war production during World War II induced more than 1,500,000 Blacks to leave their rural southern homes.[48] During World War II, 12,000,000 men and women entered the armed forces, and another 15,000,000 civilians relocated for new defense jobs.[49] Between 1940 and 1944, wartime defense contractors integrated their work forces and the black population in urban areas increased dramatically.[50] From 1940 to 1970, an additional five million Blacks migrated from the South and reduced the proportion of Blacks who lived in the South from three-quarters of the black population to about half.[51]

Blacks almost always moved to cities when they left the rural South.[52] In 1910, less than one-quarter of Blacks lived in

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46. *See* FELD, *supra* note 2, at 84; MASSEY & DENTON, *supra* note 16, at 43.

47. *See* FELD, *supra* note 2, at 84; *see also* MASSEY & DENTON, *supra* note 16, at 28-29 (indicating that "push" factors as well as "pull" factors motivated black migration).

48. *See, e.g.*, GILENS, *supra* note 15, 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."); *see also* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 18 (1992) ("The real change 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, *supra* note 18, at 9. Lieberson notes,

> In 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.

Id.

49. FELD, *supra* note 2, at 85.

50. MASSEY & DENTON, *supra* note 16, at 43.

51. LEMANN, *supra* note 39, at 6; MASSEY & DENTON, *supra* note at 16, at 45 (noting that 1,500,000 blacks migrated during the 1950s, and 1,400,000 migrated during the 1960s).

52. *See* MASSEY & DENTON, *supra* note 16, at 18 (noting that during the "great migration," southern blacks flooded Chicago, Detroit, Philadelphia, and

MINNESOTA LAW REVIEW   [Vol 87:1447

cities.[53] By 1940, half of Blacks lived in cities, and by 1960, more than three-quarters did.[54] 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.[55] Southern Blacks poured into New York, Chicago, Los Angeles, Philadelphia, and other northern, midwestern, and western urban centers during this massive migration.[56]

When Blacks moved to cities, they lived almost exclusively in urban ghettos.[57] 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.[58] With the increase in racial diversity outside the South, northern Whites reacted to the rural southern black migrants in their midst with fear and hostility.[59] Violence, arson, and bombings reinforced racial discrimination and segregation in housing, education, and employment; so black concentration and racial isolation increased even as their urban population grew.[60] Residential segregation created and perpetuated the black ghettos that now exist in virtually every major city.[61]

Coinciding with the "great migration," Whites began to move from cities to suburbs in ever larger numbers during the post-World War II era, leaving Blacks isolated in blighted

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other northern and midwestern industrial centers); *see also* Trotter, *supra* note 39 (analyzing the causes and impact of great migration in different regions of the country).

53. FELD, *supra* note 2, at 85 fig.3.2.

54. *Id.*

55. *See* MASSEY & DENTON, *supra* note 16, at 18; *see also* GILENS, *supra* note 15, at 104-05.

56. FELD, *supra* note 2, at 85; MASSEY & DENTON, *supra* note 16, at 45.

57. MASSEY & DENTON, *supra* note 16, at 45-46.

58. *See* GILENS, *supra* note 15, at 105 ("As a consequence of this migration, African Americans, who accounted for only 2 percent of all northerners in 1910, comprised 7 percent by 1960, and, perhaps more importantly, made up 12 percent of the population in urban areas.").

59. *See* HACKER, *supra* note 48, at 19; MASSEY & DENTON, *supra* note 16, at 30 (describing an upsurge of racial violence in northern cities between 1900 and 1920 and attacks on individual Blacks).

60. *See* MASSEY & DENTON, *supra* note 16, at 33-35; *see also* LIEBERSON, *supra* note 18, 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.").

61. FELD, *supra* note 2, at 85-86; MASSEY & DENTON, *supra* note 16, at 17-59.

inner-city ghettos.[62]   Federal mortgage, housing, and tax policies subsidized the construction of privately owned single-family homes in the almost exclusively white suburbs.[63] The federal interstate road-building program facilitated suburban expansion even as easy credit enabled more suburban commuters to purchase automobiles.[64] The combination of federal housing and highway policies contributed to the development of predominantly white suburbs that isolated urban poor and minority residents within the major cities.[65] The federal government simultaneously cut mortgage subsidies for the construction of urban rental units, and the Federal Housing Administration reduced the availability of mortgage and home improvement loans in the sections of cities into which Blacks were moving.[66] Even as federal highway policy subsidized white suburban dispersal, the location of interstate highways and housing projects disrupted many black urban communities and created physical barriers to contain their expansion.[67] As Whites moved to the suburbs, industry and employment opportunities began to move from the urban centers as well.

Despite general post-War affluence and growth, the disadvantaged status of Blacks called for fundamental social

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62. MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 133-37 (1989); MASSEY & DENTON, *supra* note 16, at 45-46.

63. KATZ, *supra* note 62, at 134-35 (noting that in the period after 1945, suburbs grew rapidly as federal mortgages subsidized privately-owned, single-family homes and building contractors applied mass production techniques to residential construction and built suburban housing tracts).

64. *See* MASSEY & DENTON, *supra* note 16, at 44-45.

65. *See* KATZ, *supra* note 62, at 134-35 ("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."); MASSEY & DENTON, *supra* note 16, 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.").

66. *See* KATZ, *supra* note 62, at 134-35.

67. *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 16, 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. . . . [Housing] projects were typically built on cleared land within or adjacent to existing black neighborhoods.").

and legal reforms. The decades of the 1950s and 1960s witnessed a basic shift in the understanding of race and racial identities and the emergence of a more assertive civil rights movement that initially challenged segregation in the South and subsequently emerged as a social movement against racism throughout the nation.[68] Demands for racial equality and social justice confronted the racist ideology of segregation, contested the social construction of race, and ultimately transformed racial politics.[69]

In 1948, the Democratic Party convention platform included a strong civil rights plank in response to northern Blacks' growing political influence and white liberals' opposition to segregation.[70] In reaction, Strom Thurmond ran as a segregationist "Dixiecrat" in the 1948 presidential election.[71] He carried Alabama, Louisiana, Mississippi, and

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68. *See, e.g.*, OMI & WINANT, *supra* note 7, at 95-100.

69. *See id.* at 96. The authors argue that during the 1950s, the race-based Civil Rights movements contested the social construction of race:

> It was this process which created what we call "the great transformation" of racial awareness, racial meaning, racial subjectivity. Race is not only a matter of politics, economics, or culture, but of all these "levels" of lived experience simultaneously. It is a pre-eminently *social* phenomenon, something which suffuses each individual identity, each family and community, yet equally penetrates state institutions and market relationships. The racial minority movements of the period were the first *new social movements*—the first to expand the concerns of politics to the social, to the terrain of everyday life.

Id.

70. *See* BECKETT, *supra* note 25, at 40 ("As a result of black migration to the North, this [New Deal] alliance included more and more blacks—a trend that marked a dramatic break from the post-Civil War partisan configuration and created quite a dilemma for those interested in maintaining white southern allegiance to the Democratic party."); EDSALL & EDSALL, *supra* note 11, at 33 ("By 1948, black political muscle, growing opposition to segregation among white liberals, and the increased dependence of northern city political bosses on black votes produced the first Democratic convention platform to include a strong civil rights plank."); LIEBERSON, *supra* note 18, at 101 ("Growing black voting strength in the North, coupled with the concerns of liberal white voters, to an increasing degree meant that politicians aspiring to national office could not overlook the implications of their policies toward the South."); OMI & WINANT, *supra* note 7, at 16 ("[T]he 1948 confrontation between integrationists and segregationists within the Democratic Party—a battle won decisively if not absolutely by the integrationists—symbolized the consensual shift [toward the desirability of integration]."); POWE, *supra* note 8, at 9-10 ("These intellectual, social, and political currents led the 1948 Democratic convention to adopt a civil rights plank and caused a Dixiecrat revolt, sealing the southern position as narrowly sectional.").

71. *See* EDSALL & EDSALL, *supra* note 11, at 34.

South Carolina, and demonstrated the powerful salience of race as a basis for political realignment in the South and throughout the nation.[72] Although Presidents Truman and Eisenhower took some steps to address racial inequality, Congress resisted adoption of anti-discrimination laws, open housing laws, federal aid to education, or national health insurance.[73] Even as the nation became more urbanized and racially disparate, racist southern Democrats in Congress occupied chairmanships of pivotal committees and blocked legislative initiatives for racial equality, social justice, and urban programs.[74] During the McCarthy era and Cold War, advocates for civil rights and racial reform were put on the defensive by conservative Congressmen.[75] At the same time, however, the legacy of Hitler's racist crimes and the international competition between capitalism and communism for the allegiance of the decolonizing nations of the third world required a national response to southern racial violence and segregation.[76] During the 1950s and 1960s, the Warren Court's constitutional agenda on desegregation, civil rights, and criminal procedure aimed to dismantle the southern caste system of white supremacy and impose national legal norms on the region.[77] It was only during the decade between *Brown v. Board of Education* in 1954 and the passage of the Civil Rights Act in 1964 that the Court and Congress adopted national equality norms and eliminated the legal foundations of racial separation.[78]

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72. *See* BECKETT, *supra* note 25, at 40 (noting the 1948 election and describing the effect of the Democrats' later attempts to appease the Dixiecrats); EDSALL & EDSALL, *supra* note 11, at 34 ("The 1948 Thurmond campaign . . . demonstrated the power of the issue of race to break the lock of the national Democratic party on the South, a step of critical consequence in a thirty-two-year long process that would produce a regional realignment in presidential elections by 1980.").

73. FELD, *supra* note 2, at 86-87.

74. *Id.* at 87; *see also* LEMANN, *supra* note 39, at 111.

75. FELD, *supra* note 2, at 87.

76. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 59-60 (1997) (stating that internationalists "perceived the importance of the newly emerging colored nations to the struggle between the capitalist nations and the communist nations for global supremacy; unredressed lynchings, after all, fit poorly into America's portrayal of itself as the virtuous leader of the Free World").

77. *See* POWE, *supra* note 8, at 490-92.

78. *See* MENDELBERG, *supra* note 12, at 79-93; POWE, *supra* note 8, at 490.

B. CONSTITUTIONAL JURISPRUDENCE AND THE PROTECTION OF "DISCRETE AND INSULAR" MINORITIES

The "great migration" made race a national rather than a regional issue because it increased the visibility and awareness of the "American dilemma."[79] It moved racial inequality to the center of the nation's and the Warren Court's concerns about civil rights, crime policy, and social justice. The population shifts made Blacks an important electoral force in several swing states, altering the balance of political power, the constituencies of the respective political parties, and the characteristics of the justices appointed to the Supreme Court in the 1950s and 1960s.[80]

During the 1937-1938 term, the Supreme Court reviewed the constitutionality of New Deal laws and distinguished between the scope of judicial review of economic legislation— where it gave the legislative branch and the states almost unlimited authority—and its scrutiny of laws that affected "personal" rights. In the famous "Footnote Four" of *United States v. Carolene Products Co.*, the Court announced that, while it would defer to legislative regulation of economic matters, it would review more closely legislation affecting rights enumerated in the Constitution.[81] In addition, the Court

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79. *See, e.g.*, LEMANN, *supra* note 39, at 7 ("The great black migration made race a national issue in the second half of the century—an integral part of the politics, the social thought, and the organization of ordinary life in the United States."); GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1008-11 (2d ed. 1962) (arguing that biological theories of black racial inferiority, racial prejudice, and Southern practices of segregation and enforced inequality conflicted with the "American Creed" of democracy, equality, and justice under law and ultimately required assimilation and integration of Blacks into the mainstream of American society); POWE, *supra* note 8, at 44-45 ("The continuing migration of African-Americans out of the South to the economic opportunities in the North away from state-mandated segregation made African-Americans a newly potent electoral force in a number of key states.").

80. *See* POWE, *supra* note 8, at 44-49.

81. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). The Supreme Court in Footnote Four stated that

[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the

announced that it would strive to assure fairness in the political process through "exacting judicial scrutiny" of laws affecting racial minorities and other "discrete and insular minorities" who might suffer from majoritarian legal domination of the political processes.[82] The Court recognized that those in power might pervert the political process in order to entrench themselves.[83] Its emerging individual rights agenda also recognized that "discrete and insular" racial minorities could be perpetual losers in the political process because of their vulnerability to scapegoating and race-baiting.[84]

The Warren Court increased judicial activism to protect minority civil rights because "the questions associated with the black experience in America raised, as no others could, the spectre of internal conflict between the values of a free and open political life ... and of fair treatment of 'minorities.'"[85] Until the 1960s, law, custom, and extra-legal violence in the

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Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. (citations omitted).

82. *Id.; see also, e.g.,* POWE, *supra* note 8, at 214-15 ("The theory of Footnote Four suggests that even if African-Americans in the South could vote, they could not win elections and might be subject to such prejudice that legislation hostile to them would be forthcoming."); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities,* 91 YALE L.J. 1287, 1294-97 (1982).

83. Cover, *supra* note 82, at 1300.

84. *See id.* Cover notes that

"[d]iscrete and insular" minorities are not simply losers in the political arena, they are perpetual losers. Indeed, to say that they lose in the majoritarian political process is seriously to distort the facts: they are scapegoats in the real political struggles between other groups. Moreover, in their "insularity" such groups may be characteristically helpless, passive victims of the political process. It is, therefore, because of the discreteness and insularity of certain minorities (objects of prejudice) that we cannot trust "the operation of those political processes ordinarily to be relied upon to protect minorities."

Id. (citation omitted in original); *see also* LIEBERSON, *supra* note 18, at 51 ("Because about 90 percent of all blacks were living in the South at the turn of the century, and because they could not vote, blacks were more or less wiped out as a political force in the United States.").

85. *See* Cover, *supra* note 82, at 1300.

South combined to create and enforce a caste system of white supremacy.[86]   Blacks were the victims of extreme racial domination through duly enacted "Jim Crow" laws as well as extra-legal violence.[87]   Southern terrorism flourished because "law enforcement was almost exclusively local, political, and non-professional," and because Whites readily resorted to organized violence when actions to change prevailing racial mores were threatened.[88]   The combination of private terror, formal legal discrimination, and political exclusion assured that southern Blacks would remain disenfranchised and subordinated without national legal intervention.

In 1955, the modern civil rights movement for equal rights, the right to vote, and the end of legally sanctioned racial segregation gained national prominence with the Montgomery bus boycott led by Reverend Martin Luther King, Jr.[89] The movement continued throughout the South for the next decade with a series of protests, demonstrations, sit-ins, and violent clashes with the defenders of segregation.[90]

Because southern domination of Congress in the 1950s

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86. POWE, *supra* note 8, at 490. Powe concludes that the Warren Court explicitly intended an assault on 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.

Id.

87. *See, e.g.*, GILENS, *supra* note 15, at 107. During the 1950s southern Blacks attended segregated schools, rode segregated buses, and used segregated bathrooms. *Id.*   Blacks could not drink from "white" water fountains, eat in "white" restaurants, or sleep in "white" hotels. *Id.* African-Americans had little voice in government and little hope for fair treatment from the white police or the white judiciary. *Id.*; *see also* HACKER, *supra* note 48, at 17 ("In the South, physical force was blatant and unabashed. The whims of a sheriff, an employer, even the driver of a bus, could hold black lives in thrall.").

88. Cover, *supra* note 82, at 1303. Cover contends that the southern political process failed emancipated Blacks because no white groups would form political alliances with them. *Id.* at 1302-03. Potential allies were forestalled because "racist domination required that the politics of the region be violent and extreme. . . . [T]error has always been part of southern regional politics." *Id.* at 1303.

89. *See* GILENS, *supra* note 15, at 108.

90. POWE, *supra* note 8, at 171-75.

prevented the adoption of federal remedial legislation, the task fell to the Supreme Court to pursue racial equality by dismantling the "separate but equal" doctrine of *Plessy v. Ferguson*.[91] In the 1950s and 1960s, racial justice and urban social problems presented volatile political issues that the legislative branch was unable or unwilling to address, and the Warren Court, of necessity, filled the public policy void.[92] The Court embarked on a course of judicial activism to protect individual rights, civil liberties, and minorities' interests from majoritarian impositions. The disadvantaged status of racial minorities in a society formally committed to legal equality posed a constitutional dilemma with international ramifications. The aftermath of World War II and the consequences of Nazi racist ideology rendered racial segregation and southern white supremacy inconsistent with more egalitarian national values.[93] In the Cold War competition with communism for dominance in the decolonizing countries of the Third World, America's domestic racial

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91. *See, e.g.*, Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 94 (2000) (arguing that "the 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"); *see also* Plessy v. Ferguson, 163 U.S. 537, 550-52 (1896) (validating the "separate but equal" doctrine); POWE, *supra* note 8, at 21 (noting that the *Plessy* Court upheld the constitutionality of "separate but equal" as consistent with equal protection, left racial issues to the state, and denied the law a role in changing racial attitudes). The implications for the Court of overruling Plessy were profound. *See, e.g.*, G. Edward White, *Warren Court, 1953-1969, in* AMERICAN CONSTITUTIONAL HISTORY 280 (L. Levy et al. eds., 2d ed. 1989). White notes,

> *Brown* involved a major social problem, racial discrimination, translated into a legal question, the constitutionality of separate but equal public schools. It posed an issue that no other branch of government was anxious to address. It raised questions that had distinctively moral implications: in invalidating racial segregation the Court was condemning the idea of racial supremacy. And it affected the lives of ordinary citizens, not merely in the South, not merely in public education, for the Court's series of per curiam decisions after *Brown* revealed that it did not consider racial segregation any more valid in other public facilities than it had in schools. The Warren Court had significantly altered race relations in America.

Id. (emphasis omitted).

92. *See* White, *supra* note 91; POWE, *supra* note 8, at 39-41.

93. *See* POWE, *supra* note 8, at 47 (noting that the *Brown v. Board of Education* Justices "understood, although they did not say so, that segregation subjugated African-Americans because as practiced in the South its only meaning was white supremacy, an idea that, at a minimum, World War II had put to rest as incompatible with what the United States stands for"); *supra* note 76.

relations belied the values of liberty, equality, and democracy it promoted so vigorously abroad.

Although the NAACP Legal Defense Fund attacked the "separate but equal" doctrine in a variety of fora, the crucial battle in the struggle for racial justice and the dismantling of de jure segregation occurred in the effort to desegregate schools. In *Brown v. Board of Education*, the Warren Court concluded that separate no longer could be equal.[94] Although *Brown* ordered states to desegregate with "all deliberate speed,"[95] southern political leaders challenged the "lawfulness" of the Court's decision and urged "massive resistance" to judicial usurpation.[96] Despite the Court's efforts to end segregation in education, massive southern resistance to court-ordered desegregation in the 1950s, along with the Goldwater Republican presidential campaign of 1964 and the Wallace and Nixon campaigns of 1968, demonstrated the salience of race and "right-wing populism" as political organizing principles.[97]

During the initial phases of the civil rights movement, the goals were to end segregation, to secure equal rights, and to protect the right to vote.[98] The political pressure generated by

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94. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); *see also* White, *supra* note 91, at 280 ("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.").

95. *Brown*, 349 U.S. at 301.

96. *See* POWE, *supra* note 8, at 46-47 (indicating that 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").

97. *See* EDSALL & EDSALL, *supra* note 11, at 76-79; POWE, *supra* note 8, at 60-62 (describing how southern congressional Democrats drafted the "Southern Manifesto" which denounced *Brown* as an abuse of judicial power and advocated non-compliance with an unlawful decision and noting that several of those southern congressmen who declined to endorse the Manifesto were defeated in the next democratic primary). In the aftermath of *Brown*, southern racial moderates virtually disappeared under the pressure of more hard-line racists. *Id.* at 162. After George Wallace lost the 1958 Alabama governor's race to an avowed racist, he vowed that he was "not goin' to be out-niggahed again," a strategy he refined in subsequent national presidential campaigns. *See id.* at 162.

98. TALI MENDELBERG, *supra* note 12, at 18 (2001). Mendelberg argues 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 the denial of the right to vote:

Cultural leaders increasingly communicated the notion that racial inequality was an immoral principle. The norm of racial equality

the civil rights movement and the nationally televised violent southern reactions to black protests led to the enactment of the Civil Rights Act of 1964, banning discrimination in schools, employment, and public accommodations; the Voting Rights Act of 1965, prohibiting voting procedures designed to impede black exercise of the franchise, was passed soon thereafter.[99] The passage of these Acts formally ended the "southern way of life" and created a national, in other words, northern, legal standard on matters of race to which Congress and the Court forced the South to conform.[100] The norm of racial equality became the dominant cultural value, and the vast majority of Americans aligned against formal segregation and racist expressions.[101] The formal norm of racial equality belied a racially divided society, however, and allowed implicit appeals to Whites' racial resentments to foster a political realignment.[102]

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gained momentum through landmark legislation and court rulings that signaled that racial equality should now be the injunctive norm. The norm of racial equality was also furthered by the civil rights movement, through its moral rhetoric and through actions that prodded and enabled landmark legislation and discredited the white southern adherents of the old inegalitarian norm.

Id.

99. *See, e.g.*, GILENS, *supra* note 15, at 108 (stating that, as a result of passage of the Voting Rights Act, voter registration of Blacks nationwide increased from 29% in 1962 to 67% in 1970); POWE, *supra* note 8, at 174 ("The Freedom Rides provided the northern public with the initial shocking pictures of brutality from the South, pictures that would be repeated for the next four years.").

100. *See* POWE, *supra* note 8, at 232 (noting that 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"). According to Powe, "[t]he principle of equality in *Brown* and subsequent cases was not only the law as declared by nine men, it was also the law as adopted by 70-percent votes in both houses of Congress and enthusiastically signed by the president of the United States." *Id.* at 234.

101. MENDELBERG, *supra* note 12, at 18-19 ("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.").

102. MENDELBERG, *supra* note 12, at 19 (arguing that "[b]ecause 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").

MINNESOTA LAW REVIEW [Vol 87:1447

C. "DUE PROCESS REVOLUTION" IN CRIMINAL PROCEDURE

Beginning in the 1920s and 1930s, the Supreme Court sporadically used the Fourteenth Amendment Due Process Clause to protect Blacks against racist southern justice in criminal cases like *Moore v. Dempsey*,[103] *Powell v. Alabama*,[104] and *Brown v. Mississippi*.[105] These earliest criminal procedure decisions involved egregious southern injustice, mob-dominated proceedings, race, and the death penalty.[106] The southern courts regarded the formality of any trial, regardless of its procedural deficiencies, as preferable to an extra-legal lynching, whereas the Supreme Court believed that a criminal trial actually should determine the merits of a defendant's guilt or innocence.[107] The Supreme Court's oversight of the "fundamental fairness" of southern states' criminal proceedings became especially important in cases that "were perceived to

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103. 261 U.S. 86, 90-91 (1923) (holding that the Fourteenth Amendment Due Process Clause forbids state criminal convictions obtained through mob-dominated sham trials); KENNEDY, *supra* note 76, at 94-100.

104. 287 U.S. 45, 71 (1932) (applying a constitutional right to counsel for defendants in some state cases on the basis of the Fourteenth Amendment Due Process Clause); *see also* Norris v. Alabama, 294 U.S. 587, 589-90 (1935) (finding a violation of the Due Process Clause for improper and deliberate exclusion of black jurors from venire). *See generally* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1979); KENNEDY, *supra* note 76, at 100-04.

105. 297 U.S. 278, 279, 287 (1936) (using the Fourteenth Amendment Due Process Clause to exclude coerced confessions extracted by torture in state criminal prosecutions); KENNEDY, *supra* note 76, at 104-07.

106. *See* KENNEDY, *supra* note 76, at 92-94; *see also* Cover, *supra* note 82, at 1305 (arguing that "[a]lthough the Court never treated them as race cases, there can be little doubt that the decisions in *Moore v. Dempsey, Powell v. Alabama,* and *Brown v. Mississippi* made new criminal procedure law in part because the notorious facts of each case exemplified the national scandal of racist southern justice"); Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda, Furman *and Beyond,* 54 VAND. L. REV. 359, 377 (2001) (stating that the Court's decisions in *Powell v. Alabama* and *Brown v. Mississippi* "responded in part to the perception of discrimination against poor and African-American defendants").

107. Klarman, *supra* note 91, at 69. In explaining the Supreme Court's willingness to intrude into matters of state criminal procedure, Klarman argues that

> the state-imposed death penalty in these cases was little more than a formalization of the lynching process. . . . Because these mob-dominated trials were more about preventing lynchings than reaching just verdicts, they represented appealing cases for the intervention of a legal tribunal that thought the purpose of criminal trials should be to determine factual guilt or innocence.

Id. at 57.

implicate broader challenges to white supremacy or that generated national criticism of the white South's treatment of black criminal defendants."[108] The Court's limited role in reviewing southern criminal justice marked the beginning of its efforts to prevent regional deviation from elementary procedural expectations.[109]

Although these decisions had limited practical effects on the routine administration of southern criminal justice, they served important non-legal purposes. For example, they offered Blacks the hope that progress was possible. They also provided cases around which to organize protests and educated Blacks about their rights. Finally, they exposed northern Whites to the oppressive nature of the Jim Crow regime.[110]

The Warren Court's criminal procedure decisions were a response to the structural and racial demographic changes taking place at the time.[111] They were an attempt to protect minority citizens and to limit the authority of the states in the criminal justice arena.[112] The Supreme Court's "rights revolution" was part of a broader human rights orientation emerging in Western industrialized countries. It emphasized civil rights for previously stigmatized groups with few political

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108. *Id.* at 71.
109. According to Klarman,
> the Supreme Court's race-related criminal procedure decisions of the interwar period almost certainly were consonant with dominant national opinion. Most of the country was appalled by these farcical proceedings in which southern black defendants, quite plausibly innocent of the offenses charged, were tortured into confessing and then rushed to the death penalty in mob-dominated trials without effective assistance of counsel. Black criminal defendants certainly were not treated this way in the North. While northern blacks were segregated in ghetto neighborhoods and discriminated against in employment and public accommodations, the administration of justice in northern courts was relatively nondiscriminatory.

Id. at 75.

110. *See id.* at 88. "[L]itigation taught blacks suffering under the oppressive weight of Jim Crow that they had rights, though they must fight for their enforcement." *Id.* at 89. Such litigation also helped to educate at least some Whites about the nature of the racist southern regime.
> By publicizing the worst excesses of Jim Crow, such litigation may have inspired something of a backlash against the system as a whole, in the same way that millions of white Americans turned against segregation and disfranchisement in the 1960s after witnessing the barbarities of the white supremacy system on display at Birmingham and Selma.

Id. at 92.

111. *See supra* notes 42-76 and accompanying text.
112. *See supra* notes 103-09 and accompanying text.

supporters, such as "criminal defendants, women, the poor, non-European ethnic minorities, students, homosexuals, prisoners, the handicapped, and the mentally ill."[113] Beginning with the Court's *Brown v. Board of Education*[114] decision in 1954 and culminating in the civil rights movement in the 1960s, equality became the watchword of constitutional and legislative reform.[115] The feminist, gay and lesbian, and anti-war political movements drew ideological support from the Blacks' struggle for justice, adopted similar strategies and rhetoric, and shared a common critique of dominant cultural values and power arrangements.

During the "Due Process Revolution" of the 1960s, the Supreme Court resorted to adversarial procedural safeguards and judicially created per se rules to limit the state, to constrain police discretion, to protect peoples' freedom, and to preserve criminal defendants' liberties.[116] Several threads weave through the fabric of the Supreme Court's "due process" jurisprudence: an increased emphasis on individual liberty and equality, a distrust of state power, an unwillingness to rely solely on good intentions and benevolent motives, and skepticism about the exercises of discretion in the treatment of deviants.[117]

The Warren Court used the Fourteenth Amendment of the Constitution and the Bill of Rights to restrict governmental

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113. *See* EDSALL & EDSALL, *supra* note 11, at 4; *see also* White, *supra* note 91, at 282-83 ("Race relations were the initial context in which the Court attempted to refine the meaning of equal justice in America.... The conception of equality embodied by these decisions was that of equality of opportunity: blacks could not be denied the opportunity of access to public places.").

114. 347 U.S. 483 (1954).

115. *See, e.g.*, ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 103 (1970) ("[A] broadly conceived egalitarianism was the main theme in the music to which the Warren Court marched."); Howe, *supra* note 106, at 376-77 (noting that the equality principle reached its peak in the mid-1960s as part of Court's criminal procedure reforms); White, *supra* note 91, at 282 ("The Warren Court will be best known for its identification with three themes: egalitarianism, liberalism, and activism.... [T]he Court demonstrated a dedication to the principle of equality, a principle that... 'once loosed ... is not easily cabined.'").

116. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (protection of privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule).

117. FRED P. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW (1970).

intervention in citizens' lives, to extend equality to minorities and the disenfranchised, and to regularize administrative and criminal justice decision making.[118] The Court's criminal procedure decisions followed closely upon its civil rights opinions because those accused of crimes consisted disproportionately of the poor, minorities, and the young.[119] The Court's criminal procedure decisions redefined the relationship between individuals and the State, endorsed the adversarial model to resolve disputes, and reflected the crucial link between race, civil rights, and criminal justice policies.[120]

The Warren Court's "Due Process Revolution" was part of a judicial effort to protect minorities from state officials, to impose procedural restraints on official discretion, and to infuse governmental services with greater equality.[121] It completed the Court's shift from using the Commerce, Contracts, and Due Process clauses to protect private property and economic interests to using the Bill of Rights and the Fourteenth Amendment to protect civil liberties against governmental encroachment and to provide criminal suspects with procedural protections.

The Supreme Court used three interrelated constitutional strategies to decide criminal procedure cases.[122] First, it

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118. *See id.*; EDSALL & EDSALL, *supra* note 11, at 110-11.

119. *See* POWE, *supra* note 8; Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 525-26.

120. Allen, *supra* note 119, at 525-31.

121. *See, e.g.*, GARLAND, *supra* note 6, 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 8, at 386 ("African-Americans were disproportionately affected by whatever abuses or inequities there were in the criminal justice system."); White, *supra* note 91, 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."); Note, *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1488-94 (1988) (describing the equality principle in reform of criminal procedures after *Brown v. Board of Education*).

122. *See, e.g.*, GRAHAM, *supra* note 117, at 41-66; POWE, *supra* note 8, at 412 ("[T]he Court recognized that the Bill of Rights offered national standards for criminal procedure regardless of 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."); White, *supra* note 91, at 287 ("The most important series of criminal procedure decisions, from a doctrinal perspective, were the incorporation doctrine cases,

"incorporated" many of the provisions of the Bill of Rights into
the Fourteenth Amendment's Due Process clause and applied
them to the states.[123] This redefined the relationship between
federal constitutional authority and state police practices and
criminal justice administration. Second, it "reinterpreted"
those provisions, by expanding the meanings of those
constitutional rights.[124] Finally, the Court expanded the
principles of Equal Protection to extend to constitutional
oversight of administrative officials previously immune from
judicial scrutiny. The Court used Equal Protection to redress
imbalances between white and non-white, and rich and poor
defendants in the administration of criminal justice.[125]
Promoting equality and protecting minorities from arbitrary
governmental action was a central theme in the Court's
decisions.[126]

    Unfortunately, the Supreme Court's constitutional
decisions extending procedural rights to criminal defendants,
many of whom were clearly guilty, coincided with the increase
in crime rates in the 1960s.[127] The Supreme Court's decisions
in cases such as *Mapp v. Ohio*,[128] *Escobedo v. Illinois*,[129] and
Miranda v. Arizona,[130] expanded the rights of defendants and

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where the Court struggled with the question of whether, and to what extent,
the due process clause of the Fourteenth Amendment incorporates procedural
protections in the Bill of Rights, making those protections applicable against
the states."); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the
Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1324-25 (1977) (noting
that 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").

    123. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, CRIMINAL
PROCEDURE 48-68 (3d ed. 2000).

    124. *See id.*

    125. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963) (holding that the
Equal Protection Clause grants a right to appellate counsel for indigent
defendants in state criminal cases); Griffin v. Illinois, 351 U.S. 12 (1956)
(finding a violation of the Equal Protection Clause where a state statute
essentially denied appellate review for poor criminal defendants).

    126. *See supra* notes 121-22.

    127. FELD, *supra* note 2, at 86-88 (describing the increased crime rates
associated with the demographics of the "baby boom" generation and increased
urbanization of Blacks); GRAHAM, *supra* note 117, at 67-85.

    128. 367 U.S. 643 (1961) (applying the Fourth Amendment exclusionary
rule to the states).

    129. 378 U.S. 478 (1964) (finding a Sixth and Fourteenth Amendment right
to counsel at pre-indictment police interrogation).

    130. 384 U.S. 436 (1966) (requiring police to provide a warning of rights
prior to police interrogation).

restricted the authority of police. This elicited criticism from the public.[131]   While earlier criminal procedure cases like *Powell*, *Moore*, and *Brown*, were disguised cases about race, by the mid-1960s, many Whites viewed the Court's decisions as overtly about race because of their association in the public consciousness with urban riots and rising crime rates.[132]

Youth crime increased dramatically in the 1960s as the children of the baby boom reached adolescence and, by their sheer numbers, overwhelmed many agencies of social control.[133] Higher rates of crime generally occur in urban environments, so the "great migration" that substantially increased the urbanization of Blacks led to higher rates of crime in minority areas.[134] The Supreme Court's due process decisions occurred against the backdrop of rising youth crime rates, urban racial disorders, calls for "law and order," and concern about the discriminatory impact of discretionary decisions by criminal justice and social service personnel. The issue of race linked all of these factors.

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131. *See* EDSALL & EDSALL, *supra* note 11, at 111 ("The reaction of much of the public, of the law enforcement community, and of a host of moderate to conservative politicians was intense—and almost invariably hostile.").

132. GILENS, *supra* note 15, at 107-10; EDSALL & EDSALL, *supra* note 11, at 74-77 (Richard Nixon's "law and order" presidential campaign in 1968 focused on Supreme Court decisions that he contended "handcuffed" the police and made the racial connections more explicit.).

133. The number of young persons aged fourteen to twenty-four years increased by half during this period. *See, e.g.,* JAMES Q. WILSON, THINKING ABOUT CRIME 12 (1975). 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 substantially. *Id.* at 5-7. The simple changes in the composition of the age structure of the population accounted for most of that rise. POWE, *supra* note 8, at 408 (between 1963 and 1970, the homicide rate doubled from 4.6 to 9.2 per 100,000); WILSON, *supra*, at 15-20. "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."   ALLEN, REHABILITATIVE IDEAL, *supra* note 25, at 30.

134. *See, e.g.,* MAUER, *supra* note 45, at 51-52 ("[U]rbanization is generally equated with higher rates of crime."); 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.").

D. "DUE PROCESS REVOLUTION" IN JUVENILE JUSTICE AND *IN RE GAULT*

From its Progressive origins until the early 1970s, the "Rehabilitative Ideal" and "penal-welfarism" defined the criminal and juvenile justice systems' policies and practices.[135] 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.[136] It presumes a general cultural agreement about the appropriate goals of change and the intervention strategies necessary to achieve them.[137] Progressives believed that they could change people and that they knew how people should be changed.[138] They felt that the new behavioral sciences provided them with the necessary tools to intervene and change people

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135. "Penal welfarism" refers to a "correctionalist commitment to rehabilitation, welfare and criminological expertise." GARLAND, *supra* note 6, at 27. From its Progressive foundations until the early 1970s, penal welfarism provided the intellectual framework, cultural vocabulary, and the shared professional understandings that defined the criminal justice policy and practices:

> Its basic axiom—that penal measures ought, where possible, to be rehabilitative interventions rather than negative, retributive punishments—gave rise to a whole new network of interlocking principles and practices. These included sentencing laws that allowed indeterminate sentences linked to early release and parole supervision; the juvenile court with its child welfare philosophy; the use of social inquiry and psychiatric reports; the individualization of treatment based upon expert assessment and classification; criminological research focusing upon etiological issues and treatment effectiveness; social work with offenders and their families; and custodial regimes that stressed the re-educative purposes of imprisonment and the importance of re-integrative support upon release. . . .
>
> In the penal-welfare framework, the rehabilitative ideal was not just one element among others. Rather it was the hegemonic, organizing principle, the intellectual framework and value system that bound together the whole structure and made sense of it for practitioners. It provided an all-embracing conceptual net that could be cast over each and every activity in the penal field, allowing practitioners to render their world coherent and meaningful, and to give otherwise unpleasant, troublesome practices something of a benign, scientific gloss.

Id. at 34-35.

136. *See* ALLEN, *supra* note 23, at 44-61; ROTHMAN, *supra* note 3, at 53-61.

137. *See* ALLEN, *supra* note 23, at 26-27; *see also* ALLEN, REHABILITATIVE IDEAL, *supra* note 25, at 25-41.

138. *See, e.g.*, ALLEN, REHABILITATIVE IDEAL, *supra* note 25, at 25-41.

systematically.[139] They assumed the virtues of their social order and the propriety of imposing their middle-class values on immigrants and the poor.[140] They expected that social intervention, reform, and rising affluence eventually would reduce crime and asserted that the State had an affirmative responsibility to care for and control offenders.[141]

Several forces combined in the 1960s to erode support for the "Rehabilitative Ideal." Left-wing critics of rehabilitation characterized penal programs as coercive instruments of social control that oppressed the poor and minorities.[142] Liberals believed that treatment personnel's exercise of clinical discretion resulted in the unequal and disparate treatment of similarly situated offenders.[143] Conservatives advocated "law

139. RYERSON, *supra* note 15, at 42-43; *see also* ROTHMAN, *supra* note 3, at 242-43.

140. ROTHMAN, *supra* note 3, at 48 ("Progressives were equally convinced of the viability of cultural uplift and of the supreme desirability of middle class life in cultural as well as in material terms. . . . The model was clear: all Americans were to become middle class Americans.").

141. For example, Garland explains that

the state was increasingly assumed to be responsible for the reform and welfare of offenders. *The state was to be an agent of reform as well as of repression, of care as well as control, of welfare as well as punishment.* . . . [T]he criminal justice state became, in part, a welfare state, and the criminal subject, especially one who was young, or disadvantaged, or female, came to be seen as a subject of need as well as guilt, a "client" as well as an offender.

GARLAND, *supra* note 6, at 39.

142. *See* AMER. FRIENDS SERVICE COMM., STRUGGLE FOR JUSTICE 83-99 (1971). Radical critics emphasized that no criminal justice programs or reforms could ameliorate or avoid the inevitable consequences that flowed from racial inequality and economic and social injustice in the larger society. CULLEN & GILBERT, *supra* note 25, at 39-40. Moreover, "discriminatory use of state power was masked by the operation of the individualized treatment model, which legitimated and extended these abuses, while simultaneously glossing the harsh realities of punishment with a benign, paternalistic veneer." GARLAND, *supra* note 6, at 55; *see also* MAUER, *supra* note 45, at 44 (noting that rehabilitation is incompatible with coercive institutions, such as prison, and that personal change requires voluntary involvement which cannot be compelled).

143. *See* ALLEN, REHABILITATIVE IDEAL, *supra* note 25, at 87-88. The grant of discretionary power to professionals who made their decisions without explanation or judicial review reflected the degree of trust the justice system vested in psychologists and social workers. Despite their coercive authority, the justice system viewed them in a "more benign, apolitical light. Their views on normal psychology, on the sources of anti-social behavior, on how families should function and how individuals should behave, were assumed to be neutral, clinical judgments based upon scientific understanding and empirical research." GARLAND, *supra* note 6, at 36. Liberal disenchantment with the "Rehabilitative Ideal" reflected a broader disillusionment about the ability of

and order" and favored punishment over rehabilitation in response to what they perceived as a breakdown of the social and legal order.[144]   They attributed crime and disorder to a permissive society and advocated firm discipline for the young, restoration of patriarchy in the family, respect for authority, and an end to the "coddling" of criminals.[145]   The combined critique of the rehabilitative model from the Left, Right, and Center produced a narrowing of sentencing factors—from individualized considerations of the offender to uniform and proportional sentences based on the nature of the offense.[146] The critique also revived abandoned modes of public and political penal discourse about retribution and punishment, the expression of vengeful sentiments, and the imposition of draconian sanctions.[147]

Despite occasional challenges and criticism of some aspects of juvenile justice, no sustained and systematic examination of the juvenile court occurred until the 1960s.[148]   The Supreme Court, encouraged by the persuasive critique of the "Rehabilitative Ideal," began the expansion of procedural

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the State to "do good" and its failure to deal justly with its most vulnerable citizens. *See* ROTHMAN, *supra* note 3, at 82-84.

144. *See* discussion *infra* Part III.C. Efforts to "get tough" included a succession of "wars" on crime and later on drugs, longer criminal sentences, increased prison population; and disproportional incarceration of racial minority offenders. *See* TONRY, *supra* note 14, 94-95. For conservatives, the confluence of rising youth crime rates, civil rights marches and civil disobedience, students' protests against the war in Vietnam, and urban and campus turmoil indicated an even deeper moral crisis and breakdown of traditional society. EDSALL & EDSALL, *supra* note 11, at 49-52; HACKER, *supra* note 48, at 22.

145. *See* CULLEN & GILBERT, *supra* note 25, at 12-13.

146. *See, e.g.*, GARLAND, *supra* note 6, at 56; *see also infra* Part III.D (describing changes in the juvenile justice system).

147.   Garland notes
   a noticeable change in the tone of official discourse. Punishment—in the sense of expressive punishment, conveying public sentiment—is once again a respectable, openly embraced, penal purpose and has come to affect not just high-end sentences for the most heinous offences but even juvenile justice and community penalties.
GARLAND, *supra* note 6, at 9.

148. *See, e.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967) [hereinafter TASK FORCE REPORT]; Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 12-26; David R. Barrett et al., Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 775-76 (1966).

safeguards to the juvenile court in *Kent v. United States*.[149] Justice Fortas wrote 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."[150] Some procedural due process in judicial waiver hearings was therefore required.[151]

The following year, in *In re Gault*,[152] Fortas concluded that the entire juvenile justice process violated the Constitution and required a complete overhaul.[153] *Gault* identified two crucial differences between juvenile justice rhetoric and reality: the theory versus the practice of "rehabilitation" and the differences between the procedural safeguards afforded adult criminal defendants and those available to juvenile delinquents.[154]   Although the Progressive juvenile court

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149. *See* Kent v. United States, 383 U.S. 541, 561-62 (1966).

150. *Id.* at 556.

151. In *Kent*, the Court concluded that the loss of the special protections of the juvenile court—closed proceedings, confidential records, and protection from the stigma of 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 other records, and written findings and conclusions that an appellate court could review. *Id.* at 553-63. "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Id.* at 554. *See generally* Monrad G. Paulsen, Kent v. United States: *The Constitutional Context of Juvenile Cases, in* 1966 SUP. CT. REV. 167, 167-78.

152. 387 U.S. 1 (1967).

153. *Gault* involved the delinquency adjudication and institutional commitment of a boy who allegedly made a telephone call of the "irritatingly offensive, adolescent, sex variety" to a neighbor. *Id.* at 4. Fifteen-year-old Gerald Gault was taken into custody, detained overnight without notice to his parents, and required to appear at a hearing the next day. *Id.* at 4-5. A probation officer filed a petition, which simply alleged that he was a delinquent minor in need of the care and custody of the court. *Id.* at 5. No complaining witness appeared and the juvenile court judge did not hear any sworn testimony or prepare any record of the proceedings. At the hearing, the judge questioned Gault about the phone call and he apparently made some incriminating responses. *Id.* at 5-6. Gault was not advised of his right to remain silent or his right to counsel, and he was not provided with an attorney by the court. *See id.* at 5-7, 10. Following his hearing, the judge returned Gault to a detention cell. *Id.* at 6. At his dispositional hearing a week later, the judge committed Gault to the State Industrial School "for the period of his minority [that is, until 21], unless sooner discharged by due process of law." *Id.* at 7-8 (brackets in original). If Gault had been an adult, his offense could have resulted in no more than a $50 fine or two months' imprisonment; as a juvenile, however, he was subject to a period of incarceration of up to six years, the duration of his minority. *Id.* at 29.

154. *See id.* at 18-25.

embraced a relationship of paternalism and informality, the Warren Court viewed the adversarial process and procedural safeguards as the appropriate way to structure the relationship between the individual and the State.[155] Moreover, *Gault's* "Due Process Revolution" demonstrated the link between procedure and substance, because once the Court required some procedural safeguards at trial, state laws and practices began to transform the juvenile court from the social welfare agency that the Progressives intended it to be into a formal legal institution.[156] This "constitutional domestication"[157] was the first step in the procedural and substantive convergence between the juvenile and the adult criminal justice systems.[158]

The Court perceived a clear need for some procedures to protect minority offenders. A survey conducted contemporaneously with *Gault* reported some limited data about the 207 larger juvenile courts serving populations of 100,000 or more.[159] Seventy-four percent of those courts that reported the racial characteristics of delinquents responded that non-white juveniles comprised up to 40% of those against whom petitions were filed.[160] Five percent of these largest urban courts reported that non-Whites comprised up to 60% of their delinquency populations.[161] Nearly all of the delinquents charged in juvenile courts appeared without counsel.[162] Other analyses of juvenile justice administration from mid-century

155. *E.g.*, Allen, *supra* note 119, at 530-31.

156. *E.g.*, Feld, *Transformation—Part I*, *supra* note 5, at 691-92, 695-96; Barry C. Feld, *Criminalizing the American Juvenile Court*, *in* 17 CRIME AND JUSTICE 197, 197-98 (Michael Tonry ed., 1993).

157. *Gault*, 387 U.S. at 22.

158. On the "criminalization" of the juvenile court, *see, e.g.*, Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 272-76 (1984). On the "Due Process Revolution" in the juvenile court, see, for example, Monrad G. Paulsen, *The Constitutional Domestication of the Juvenile Court*, *in* 1967 SUP. CT. REV. 233, 236-42, and Paulsen, *supra* note 151, at 168.

159. TASK FORCE REPORT, *supra* note 148, at 80.

160. *Id.*

161. *Id.*

162. *Id.* Only 3% of the courts reported that lawyers accompanied delinquents in 40% or more of cases, and only one-tenth (10.8%) reported that counsel appeared in more than 20% of delinquency cases. TASK FORCE REPORT, *supra* note 148, at 82; *see also* BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 54-56 (1993) (analyzing states' implementation of *Gault's* right to counsel and reporting that two decades later, juveniles in most states still appeared in delinquency proceedings without the assistance of counsel).

also provide evidence of racial bias in the handling of black juveniles compared with Whites. A study of juvenile court disposition practices in 1964 reported that black juveniles were more likely to be referred for formal processing and more likely to be committed to the state youth authority than white juveniles who were charged with similar offenses and had similar prior records.[163] Juvenile court practices were biased in favor of white, middle-class youths and skewed against lower socio-economic status and minority youths.[164] Another earlier study found that, of those committed to a state institution, the black youths were younger, had fewer prior court appearances or institutional commitments, committed fewer and less serious offenses, and received fewer probationary sentences than white youths.[165] Although the confined black youths appeared to be less seriously delinquent than their white counterparts, a lack of placement options other than state institutions accounted for the differences in patterns of commitments.[166] These issues of race and fairness in justice administration provided part of the context for the *Gault* Court's reappraisal of delinquency procedures.

In *Gault*, the Court examined the realities of juvenile incarceration rather than accepting the rehabilitative rhetoric of progressive juvenile jurisprudence. In reviewing the history of the juvenile court, the Court noted that the traditional rationales for denying procedural safeguards to juveniles included the belief that the proceedings were neither adversarial nor criminal and that, because the State acted as parens patriae, the child was entitled to custody rather than liberty.[167] The Court rejected these assertions and noted that the denial of procedural safeguards frequently resulted in arbitrariness rather than "careful, compassionate, individualized treatment."[168] Although the Court hoped to retain the rehabilitative benefits of the juvenile process, it candidly appraised the claims of the juvenile court in light of the realities of recidivism, the failures of rehabilitation, the

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163. TASK FORCE REPORT, *supra* note 148, at 82.

164. *See* William R. Arnold, *Race and Ethnicity Relative to Other Factors in Juvenile Court Dispositions*, 77 AM. J. SOC. 211, 211-12 (1971-72).

165. Sidney Axelrad, *Negro and White Male Institutionalized Delinquents*, 57 AM. J. SOC. 569, 570-71 (1951-52).

166. *See id.* at 571.

167. *See In re* Gault, 387 U.S. 1, 14-17 (1967).

168. *Id.* at 18-19.

stigma of a "delinquency" label, the breaches of confidentiality, and the arbitrariness of the process.[169] The Court noted that a juvenile system free of constitutional safeguards had not abated recidivism or lowered juvenile crime rates.[170] The Court concluded that, regardless of its therapeutic rhetoric, the reality of juvenile institutional confinement required "fundamentally fair" procedural safeguards.[171] These protections included advance notice of charges,[172] a fair and impartial hearing,[173] the assistance of counsel,[174] an opportunity to confront and cross-examine witnesses,[175] and the privilege against self-incrimination.[176] The Court limited its holding to the adjudicatory hearing at which the state determines that a child is delinquent.[177] It asserted that

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169. *See id.* at 21-27.

170. *Id.* at 22.

171. *See id.* at 25-28. In examining the "reality" rather than the "rhetoric" of institutional confinement, the Supreme Court noted the following:

> The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours . . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide. . . . Under our Constitution, the condition of being a [child] does not justify a kangaroo court.

Id. at 27-28 (quoting Holmes' Appeal, 379 Pa. 599, 616 (1954) (Musmanno, J., dissenting)). *See generally* CLEMENS BARTOLLAS ET AL., JUVENILE VICTIMIZATION: THE INSTITUTIONAL PARADOX 17-47, 259-73 (1976) (empirical study of punitive juvenile correctional facility); BARRY C. FELD, NEUTRALIZING INMATE VIOLENCE: JUVENILE OFFENDERS IN INSTITUTIONS 1-38, 131-46, 189-205 (1977) (empirical evaluation of ten institutional programs for confined juveniles reporting substantial staff and inmate violence).

172. *See Gault*, 387 U.S. at 33-34.

173. *See id.* at 36

174. *See id.* at 34-42.

175. *See id.* at 42-57.

176. *See id.*; *see also id.* at 22-28 (discussing whether juveniles should be afforded constitutional protection through procedural safeguards); Irene Merker 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) (discussing *Gault*'s holding that constitutional protections should attach in proceedings that may result in incarceration of a child); Feld, *Criminalizing Juvenile Justice, supra* note 158, at 154-57 (discussing *Gault*'s expansion of constitutional rights for juveniles).

177. *See Gault*, 387 U.S. at 13, 31 n.48. 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.

adversarial procedural safeguards were essential in juvenile proceedings both to determine the truth—"factual accuracy"— and to preserve individual freedom by limiting the power of the state—"prevent governmental oppression"—and that its decision would not impair the juvenile court's ability to treat juveniles.[178]

The Court based its holdings to grant delinquents the rights to notice, counsel, and confrontation on the generic notions of "fundamental fairness" required by Fourteenth Amendment due process rather than the specific requirements of the Sixth Amendment.[179] The Court explicitly relied upon

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We do not even consider the entire process relating to juvenile 'delinquents.'" *Id.*; *see also* Francis 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 Gault*, 387 U.S. at 13, 31 n.48.

178. *See Gault*, 387 U.S. at 18-21. In its subsequent delinquency decisions, the Court balanced the particular function that a constitutional right served against its impact on the unique processes of the juvenile court and used the degree of impairment of the traditional juvenile court's functions as one of the criteria in determining whether a right would be afforded to juveniles. *See, e.g.*, Breed v. Jones, 421 U.S. 519, 535-41 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 547-50 (1971).

179. The Sixth Amendment provides,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The discussion of the notice requirement in *Gault* made no reference to the Sixth Amendment's provision for notice; rather, the Court held that "[d]ue 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." *Gault*, 387 U.S. at 32-34. Similarly, although the Court described a delinquency proceeding as "comparable in seriousness to a felony prosecution," 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 36, 41. Finally, the Court's analysis of the right to confront and examine witnesses rested on "our law and constitutional requirements" rather than the specific language of the Sixth Amendment. *Id.* at 57. In deciding the applicability of the Fifth Amendment privilege against self-incrimination, the majority resorted to an analytical strategy akin to selective incorporation, finding a "functional equivalence" between a delinquency proceeding and an adult criminal trial.

MINNESOTA LAW REVIEW   [Vol 87:1447

the Fifth Amendment, however, to provide juveniles the privilege against self-incrimination in delinquency proceedings.[180] In granting delinquents the privilege against

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See id. at 49-50; *see, e.g.,* Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment,* 73 YALE L.J. 74, 74-88 (1963); Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism,* 66 YALE L.J. 319, 327-33 (1957) (discussing the historical constitutional debate between proponents of "selective incorporation" and proponents of "fundamental fairness" and "total incorporation" of provisions of the Bill of Rights).

    The irony of the "fundamental fairness" strategy employed by the Court in *Gault* to provide procedural safeguards is that this same strategy later permitted the Court to deny juveniles a jury trial by finding that the right was not fundamental. *See McKeiver,* 403 U.S. at 547-50 (1971); *see also infra* notes 192-99 and accompanying text. The irony stems from the fact that in the years between *Gault* and *McKeiver,* the Supreme Court decided *Duncan v. Louisiana,* which held that the Sixth Amendment right to a jury trial was applicable to the states via the Fourteenth Amendment Due Process Clause because it was "fundamental to the American scheme of justice." 391 U.S. 145, 149 (1968).

    180. *Gault,* 387 U.S. at 49-50. The Court stated that
    [i]t 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. In the first place, juvenile 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. . . . [C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil."
Id.; see also Addington v. Texas, 441 U.S. 418, 428-29 (1979) (holding that criminal and delinquency proceedings are distinguishable from involuntary civil commitment because the former are punitive). As a consequence of *Gault*'s application of the privilege against self-incrimination to delinquency proceedings, juvenile adjudications no longer could be characterized as either "noncriminal" or as "nonadversarial" because the Fifth Amendment privilege, more than any other provision of the Bill of Rights, is the fundamental guarantor of an adversarial process and the primary mechanism for maintaining a balance between the state and the individual. The Court, in *Murphy v. Waterfront Commission,* described the multiple policies embedded in the Fifth Amendment:
    The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

self-incrimination, *Gault* exemplified the dual functions that constitutional procedural safeguards perform in juvenile adjudications: assuring accurate fact finding and protecting against governmental oppression.[181] *Gault* is an example of the Warren Court's general strategy of extending constitutional rights and using the adversary process to limit the State's coercive powers, to assure the regularity of law enforcement, and to reduce the need for constant judicial oversight.[182]

In subsequent juvenile court "due process" decisions, the Court further elaborated on the criminal nature of delinquency proceedings. In *In re Winship*,[183] the Court held that proof of delinquency must be established beyond a reasonable doubt,

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378 U.S. 52, 55 (1964) (citations omitted). *See generally* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 405-32 (1968) (analyzing the Fifth Amendment as a limitation on state power over the individual).

181. If *Gault* only had been concerned with the reliability of juvenile confessions and accurate fact finding, the Court could have relied on safeguards other than the Fifth Amendment privilege, such as the requirement that any confession be made "voluntarily." In both *Gallegos v. Colorado*, 370 U.S. 49 (1962), and *Haley v. Ohio*, 332 U.S. 596 (1948), the Court considered the admissibility of confessions made by juveniles, used the Fourteenth Amendment "voluntariness" test, and concluded that youthfulness was a special circumstance that required close judicial scrutiny. *See Gallegos*, 370 U.S. at 54-55; *Haley*, 332 U.S. at 599-601. In *Gault*, however, the Court recognized that Fifth Amendment safeguards are not required simply because they ensure accurate fact finding or reliable confessions, but also because they serve as a means of maintaining a proper balance between the individual and the state and prevent governmental oppression:

> The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state. In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.

Gault, 387 U.S. at 47 (footnotes omitted); *see also* Rosenberg, *supra* note 176, at 666-68 (discussing the *Gault* Court's argument that a juvenile proceeding may be "functionally equivalent" to an adult criminal proceeding).

182. *See* Allen, *supra* note 119, at 530-31.

183. 397 U.S. 358 (1970).

rather than by lower civil standards of proof.[184] Because the Bill of Rights does not define the standard of proof in criminal cases, *Winship* first held that the Constitution requires proof beyond a reasonable doubt in adult criminal proceedings as a matter of "due process."[185] The Court then extended the same standard of proof to juvenile proceedings for the same reason.[186] According to *Winship*, preventing unwarranted convictions and limiting governmental power outweighed the dissent's concern that "criminalizing" the juvenile court would impair its therapeutic functions and erode the "differences between juvenile courts and traditional criminal courts."[187]

    In *Breed v. Jones*,[188] the Court held that the double jeopardy protections of the Fifth Amendment precluded criminal reprosecution of a youth as an adult after adjudication as a delinquent in juvenile court for the same offense.[189] Although the Court framed the issue in terms of the applicability of the "double jeopardy" provision of the Bill of

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184. *See id.* at 368.

185. *Id.* at 364.

186. *Id.* at 365-67. The *Winship* Court's requirement of the standard of proof in delinquency cases differed from that demanded for involuntary civil commitment of the mentally ill for purposes of treatment, which only calls for "clear and convincing" evidence. Addington v. Texas, 441 U.S. 418, 433 (1979). In *Addington*, Chief Justice Burger distinguished between criminal and delinquency prosecutions, on the one hand, and involuntary civil commitments on the other, and posited a functional equivalency between criminal trials and delinquency proceedings:

> The Court [in *Winship*] saw no controlling difference in loss of liberty and stigma between a conviction for an adult and a delinquency adjudication for a juvenile. *Winship* recognized that the basic issue— whether the individual in fact committed a criminal act—was the same in both proceedings. There being no meaningful distinctions between the two proceedings, we required the state to prove the juvenile's act and intent beyond a reasonable doubt. . . . Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution.

Id. at 427-28. Chief Justice Burger also noted that proof "beyond a reasonable doubt" is a critical component of criminal cases because it helps to preserve the "'moral force of the criminal law,' . . . and we should hesitate to apply it too broadly or casually in noncriminal cases." *Id.* at 428 (citation omitted).

187. *Winship*, 397 U.S. at 375-76 (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.

188. 421 U.S. 519 (1975).

189. *Id.* at 541.

Rights to state delinquency proceedings,[190] it answered the question by positing a functional equivalence of defendants' interests in delinquency and criminal trials.[191]

In *McKeiver v. Pennsylvania*,[192] the Court declined to extend to juvenile hearings all of the procedural safeguards of adult criminal prosecutions.[193] *McKeiver* held that the constitution did not require jury trials in state delinquency trials because "due process" required only "accurate factfinding," which a judge could provide as well as a jury.[194] 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.[195] In addition,

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190. *See id.* at 520.

191. The Court emphasized,

Although the juvenile-court system had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by antisocial conduct, our decisions in recent years have recognized that there is a gap between the originally benign conception of the system and its realities.

. . . [I]t is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.

Id. at 528-29. 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 (quoting United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion) (alterations in original)).

192. 403 U.S. 528 (1971).

193. 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, the Court decided *McKeiver* solely on the basis of Fourteenth Amendment Due Process and "fundamental fairness." *See id.* at 543. 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.

194. *See id.* at 543.

195. *See, e.g., In re* Winship, 397 U.S. 358, 363-64 (1970); *In re* Gault, 387 U.S. 1, 42-57 (1967). *McKeiver* is a "peculiar" decision because it required the Court both to misread its own precedents regarding the dual functions of

McKeiver ignored the earlier analyses in *Gault* that applied the Fifth Amendment privilege against self-incrimination to prevent governmental oppression even though it might impede accurate fact finding.[196] The *McKeiver* plurality, however, denied that delinquents required protection against governmental oppression,[197] invoked the mythology of the paternalistic juvenile court judge, and rejected the concern that closed juvenile court hearings could prejudice the accuracy of fact finding.[198] *McKeiver* emphasized the adverse impact that a

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procedural safeguards and the appropriate method of constitutional adjudication and to ignore its own legal premises in *Winship* regarding the standard of proof beyond a reasonable doubt. *See, e.g.,* FELD, *supra* note 2, at 154-57 (arguing that the jury is an instrument to uphold the "proof beyond a reasonable doubt" standard in ensuring factual accuracy); FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 82-83 (1982).

196. *See supra* notes 179-82 and accompanying text. Justice Brennan's concurring and dissenting opinion in *McKeiver* recognized the need for protection from governmental oppression but noted that it should be secured by some alternative procedural method such as a public trial that would render the adjudicative process visible and accountable to the community. *See McKeiver,* 403 U.S. at 553-55 (Brennan, J., concurring and dissenting). The *McKeiver* decision involved two cases, one arising in Pennsylvania and the other in North Carolina, which raised the issue of jury trials in juvenile proceedings. Although Justice Brennan concluded that delinquency prosecutions required only the "essentials of due process and fair treatment," he distinguished between the Pennsylvania and North Carolina cases. *Id.* at 553. Justice Brennan noted that "the States are not bound to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve." *Id.* at 554. He noted that a jury trial protects the individual against governmental oppression by providing a mechanism to appeal to the conscience of the community. *Id.* at 554-55. Because Pennsylvania permitted a public trial in delinquency proceedings, Justice Brennan regarded that as providing a functionally equivalent safeguard for the core values protected by the jury trial rights. *See id.* Because North Carolina juvenile procedures, by contrast, either permitted or required the public to be excluded from these proceedings, which arose out of demonstrations by black students and adults against public school discrimination, he dissented. *Id.* at 556-57.

197. *Cf. id.* at 547-48 (noting the negative effects of imposing the jury trial on the juvenile court system and arguing that the defects of the current system did not raise constitutional issues) (plurality opinion).

198. *See id.* at 550-51. As the plurality wrote,

Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of pre-judgment—chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.

Id. at 550. There are many reasons for concern about the accuracy of fact

constitutional right to jury trials would have on the informality, flexibility, and confidentiality of juvenile court proceedings.[199]

Gault and its progeny precipitated a procedural revolution in the juvenile justice system that transformed its original Progressive conception as a social welfare agency. Progressive reformers intervened on the basis of the "real needs" of a child—her social circumstances, environment, and need for rehabilitation—and viewed formal proof of a crime as secondary.[200]   Although *McKeiver* declined to extend delinquents the right to a jury trial, *Gault* and *Winship* already had imported the adversarial model, attorneys, the privilege against self-incrimination, the criminal standard of proof, and the primacy of factual and legal guilt as a constitutional prerequisite to intervention.[201]   By adopting some criminal procedures to determine delinquency, the Court shifted the focus of the juvenile court from the Progressive emphasis on "real needs" to proof of criminal acts; it formalized the connection between criminal conduct and coercive intervention and effectively transformed juvenile proceedings into criminal prosecutions.   Although the Court did not intend its "Due Process" decisions to obviate the juvenile court's rehabilitative agenda, in the aftermath of *Gault*, judicial, legislative, and administrative changes have fostered a procedural and substantive convergence with criminal courts.[202]   For most purposes, contemporary juvenile courts have become a wholly

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finding in a justice system in which the same police and probation officers testify regularly, and the same child appears repeatedly before the same judge, who has access to the minor's social history and prior delinquency record in the course of deciding different aspects of the case at different stages. *See* FELD, *supra* note 2, at 153-57 (describing the inherently prejudicial nature of such repeated contacts and excessive familiarity).

199.   The result clearly was dictated by the Court's concern that the right to a trial by jury would be the one procedural safeguard most disruptive of the traditional juvenile court and would require substantial alteration of traditional juvenile court practices because "it would bring with it . . . the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial." *McKeiver*, 403 U.S. at 550. Ultimately, the Court realized that such an imposition would render the juvenile court virtually indistinguishable from a criminal court and would raise the more basic question of whether there is any need for a separate juvenile court at all. *See id.* at 551.

200.   *See supra* notes 29-37 and accompanying text.

201.   *See supra* notes 152-87 and accompanying text.

202.   *See infra* Part III.D.1.

owned subsidiary of the criminal justice system.[203] Providing a
modicum of procedural justice legitimated greater punitiveness
in juvenile courts because once states granted even a
semblance of procedural justice, however inadequate, they
more readily departed from a purely "rehabilitative" model of
juvenile justice.[204] It is an historical irony that concern about
racial inequality provided the initial impetus for the Supreme
Court's focus on procedural rights in states' juvenile justice
systems, because it was the existence of those procedural rights
that rationalized increasingly punitive penalties that fall most
heavily on minority juvenile offenders.

E. AFTERMATH OF THE "DUE PROCESS REVOLUTION"—RIGHTS, RACE RIOTS, AND THE CONSERVATIVE RESPONSE

In 1965, the prescient Moynihan Report argued that urban
black male unemployment threatened the social fabric of the
black community.[205] The rapid transition from a rural agrarian
to an urban industrial life disrupted black families, and many
unskilled or semi-skilled black males were left unemployed.[206]
Without the economic ability to head their families, fathers
deserted their wives and children, illegitimacy and welfare
dependency increased, and youth crime surged.[207]

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203. *See* FELD, *supra* note 2, at 162-65; Feld, *Transformation—Part I*,
supra note 5, at 722-25; Feld, *Transformation—Part II, supra* note 5, at 350.

204. *See* FELD, *supra* note 2, 106-08.

205. U.S. DEP'T OF LABOR, OFFICE OF POLICY PLANNING AND RESEARCH,
THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965), *reprinted in* LEE
RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS
OF CONTROVERSY 51, 65-67 (1967) [hereinafter MOYNIHAN REPORT] (warning
that black male unemployment threatened the black community and proposed
economic and job training policies to reduce black joblessness).

206. *See* KATZ, *supra* note 62, at 26 (noting that the rapid transition of
Blacks from rural agricultural to urban industrial life accelerated
deterioration of the black family); LEMANN, *supra* note 39, at 172-76.

207. *See, e.g.,* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE
INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 20-62 (1987) [hereinafter
WILSON, THE TRULY DISADVANTAGED]; GILENS, *supra* note 15, at 19-22. The
Moynihan Report noted that
   [a]t the heart of the deterioration of the fabric of Negro society is the
   deterioration of the Negro family.
       It is the fundamental source of the weakness of the Negro
   community at the present time. . . .
       . . . [U]nless this damage is repaired, all the efforts to end
   discrimination and poverty and injustice will come to little.
MOYNIHAN REPORT, *supra* note 205, at 51. At the time it was issued, both
black and liberal critics attacked the Moynihan Report for "blaming the
victims," but three decades later, the structural and economic problems

Liberals and conservatives interpreted the increases in crime, welfare, and social activism very differently. Liberals focused on the social-structural conditions of racial and economic inequality to explain crime and poverty.[208] Conservatives rejected the causal roles of inadequate housing, education, job training, and income and argued that people became criminal or were poor because of their own bad choices.[209] Despite the underlying structural, racial, demographic, and political complexities of the 1960s, many conservative critics of the Warren Court simplistically attributed campus turmoil, rising crime rates, and urban racial disorders to the Court's decisions that expanded rights for criminal defendants and put a moratorium on the death penalty.[210] The public increasingly associated the Democratic

Moynihan identified—black male unemployment, out-of-wedlock childbirth, racial isolation, concentrated poverty, and violent crime—remain among the primary issues of urban, welfare, and criminal justice policy. KATZ, *supra* note 62, at 185-235; WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1997); *see also infra* Part III.A (discussing the macro-structural, economic, and racial changes in American cities).

208. *See, e.g.*, POWE, *supra* note 8, at 495; *see also* KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 51-54 (2000).

209. *See, e.g.*, POWE, *supra* note 8, at 495. Powe notes that
[t]elevision brought into every home the senseless violence, the wanton looting, the buildings burning. Liberal Democrats held with the Kerner Commission that the riots were symptomatic of America's developing into two societies, one white and one black, separate and unequal. Republicans, joined by southern Democrats, blamed the riots on the rioters and liberals, especially judges, who excused the criminal behavior.
Id.; *see also* BECKETT & SASSON, *supra* note 208, at 52-54.

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 25, at 10.

210. *See* Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam) (holding that the imposition of the death penalty in certain cases is unconstitutional); MAUER, *supra* note 45, at 53 (noting that according to George Wallace, the Supreme Court ordered integration, encouraged civil rights, and bent over backwards to help criminals).

party with the interests of Blacks and with the Warren Court's "rights revolution."[211] By the early 1970s, this confluence had important implications for race relations, domestic politics, and crime and welfare policy.

During the second half of the 1960s, the focus of the civil rights movement shifted from southern segregation and legally sanctioned inequality to even more difficult issues of structural, economic, and social inequality nationwide.[212] By the late 1960s, the Court and federal judges began to prescribe remedies for racial inequality that had far-reaching impacts on local schools, housing, and jobs.[213] By pitting the interests of Blacks and working-class Whites against each other, however, the Supreme Court's "rights revolution" also set in motion the forces that would erode the political foundation for federal intervention to protect civil rights.[214] In addition, the Court's "rights" decisions in the 1960s addressed a host of other contentious issues about sexual privacy, contraception, defendants' rights, the death penalty, and school prayer.[215]

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211. *See* EDSALL & EDSALL, *supra* note 11, at 55-56.

212. *See, e.g.*, KATZ, *supra* note 62, at 53 (noting that the civil rights struggle became a "quest for economic justice and political power"). Lieberson argues that until the mid-1960s, Blacks and white liberal members of the civil rights coalition could overlook some of the injustices and potential conflicts in the North because of the conditions in the South:

> With such dramatic events as lynchings, poll taxes, legally enforced Jim Crow policies, and the like, attention could be diverted to issues that did not create any splits within a coalition between white liberals and blacks. It was possible for northern whites to advance the black position by vigorously assaulting the treatment of blacks in the South. These issues posed no danger to the coalition because they had essentially no impact on their northern white constituency.

LIEBERSON, *supra* note 18, at 116.

213. EDSALL & EDSALL, *supra* note 11, at 55-110.

214. *See id.* at 7. Edsall and Edsall note that the changing agenda of the civil rights movement polarized the two political parties over matters of race:

> That [civil rights] agenda shifted away from an initial, pre-1964 focus on government guarantees of fundamental citizenship rights for blacks (such as the right to vote and the right to equal opportunity), and shifted toward a post-1964 focus on broader goals emphasizing equal outcomes or results for blacks, often achieved through racial preferences. These broader objectives were strenuously opposed by conservatives and by the Republican party. Opposition from the right intensified insofar as such objectives required government action to forcibly redistribute private and public goods—goods ranging, on the one hand, from jobs to education to housing, and extending, on the other, to valued intangibles such as cultural authority, prestige, and social space.

Id.

215. *Id.* at 44-46.

These decisions coincided with mounting opposition to the war in Vietnam and the claims for rights by gays, lesbians, feminists, and other activists groups.[216] Beginning in the mid-1960s, under pressure of federal mandates, AFDC welfare rolls expanded and the proportion of black recipients increased.[217] Poverty, welfare dependency, and race thus became closely linked in the minds of politicians and the public.[218]

America was racked with discord in the 1960s. The "baby boom" generation born after World War II had created a demographic bulge. As a result, rates of crime and juvenile delinquency began to escalate as the cohort moved through the age structure.[219] Moreover, urban riots rocked American cities

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216. *See id.* at 48. The authors discuss a powerful chain of events linking race, Court decisions, and an ensuing white conservative "backlash"—urban riots, the black power movement, increases in black crime, an upsurge in illegitimacy and black applicants for welfare, the shift of civil rights enforcement over housing and school busing from the South to the North, the anti-war movement and the counter-culture lifestyle, the rise of the women's movement, conflicts between black demands for jobs and white-controlled unions and city government, and the like. *Id.* In addition, "[t]he Supreme Court was forcing to the forefront the whole set of highly controversial issues which would become the topic of the intensely politicized social/moral 'values' debate—sexual privacy, birth control, criminal defendants' rights, school prayer, obscenity—and eventually, abortion and the death penalty." *Id.* at 69.

217. GILENS, *supra* note 15, at 18-19.

218. *See, e.g., id.* at 104-11. The great migration of Blacks from the rural South swelled the urban northern black population in the post-war decades. Originally, the federal Aid to Families with Dependent Children (AFDC) welfare program granted states considerable latitude in setting the benefit levels and determining who met eligibility requirements, and southern states with larger black populations typically provided very low benefits and excluded many black mothers from receiving even these meager benefits. *Id.* at 17-19. Changes in the legislation and the amount of the federal matching grant increased the percentage of African-American AFDC recipients from 14% in 1936 to 46% in 1973. *Id.* at 106; *see also* EDSALL & EDSALL, *supra* note 11, at 106 (between 1965 and 1975, the number of families receiving AFDC welfare benefits increased 237%); KATZ, *supra* note 62, at 23 ("[P]overty appeared as an urban problem that most seriously afflicted blacks. The fusion of race, poverty, and cities became the tacitly accepted starting point among radicals, liberals, and conservatives for debates about policy and reform."). Among the political parties, the public increasingly associated Democrats with the new liberal and rights agenda, which included matters of race. *See* EDSALL & EDSALL, *supra* note 11, at 94-98.

219. *See* EDSALL & EDSALL, *supra* note 11 at 52 (observing that between 1960 and 1966, crime increased 60%; that between 1966 and 1971, it increased an additional 83%; and that between 1960 and 1970, the black homicide arrest rate increased 130%); FELD, *supra* note 2, at 81-83; POWE, *supra* note 8, at 275 ("In the summer of 1966, thirty-eight riots destroyed ghetto neighborhoods from Providence to Cleveland to San Francisco although none approached the scale of Watts. That would wait a year for the 'long hot summer' of 1967

as Blacks reacted violently to decades of segregation, deprivation, and alienation.[220] In 1964, a white police officer in Harlem shot and killed a fifteen-year-old black youth and set off the largest race riot since World War II.[221] The following summer, five days after President Johnson signed the 1965 Voting Rights Act, Watts exploded in riot and television viewers watched Blacks battle police, shout "Burn, Baby, Burn," and loot stores.[222] Thirty-eight riots erupted in 1966, and during the first nine months of 1967, 164 urban race riots occurred and augured the possibility of a national race war.[223] The National Advisory Commission on Civil Disorders, popularly known as the Kerner Commission, attributed the riots to a legacy of racial discrimination in employment, education, social services, and housing.[224] Established in the aftermath of the riots, the Kerner Commission warned that the United States was moving "toward two societies, one black, one white—separate and unequal."[225] Because of the history of black segregation, discrimination, and poverty, the Commission cautioned that continuing current policies would "make permanent the division of our country into two societies; one, largely Negro and poor, located in the central cities; the other, predominantly white and affluent, located in the suburbs."[226] Finally, the Kerner Commission noted that the news media's routine failure to report positively about Blacks exacerbated divisions between the races.[227]

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where by the end of September there had been 164 riots, a fifth of them large enough to bring in state troopers."); FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 8-10 (1998).

220. *See* HACKER, *supra* note 48, at 22; NAT'L ADVISORY COMM'N ON CIVIL DISORDERS (KERNER COMMISSION), REPORT OF THE NATIONAL ADVISORY COMMISSION OF CIVIL DISORDERS 109-12, 203-06 (1968) [hereinafter KERNER COMMISSION].

221. *See, e.g.*, POWE, *supra* note 8, at 274-75.

222. *See* EDSALL & EDSALL, *supra* note 11, at 48-50.

223. *See, e.g.*, LEMANN, *supra* note 39, at 190 ("[I]t seemed at least possible that a full-scale national race war might break out."); POWE, *supra* note 8, at 275-76 (observing that three years of riots left more than 200 dead, thousands wounded, and property damage in the tens of billions of dollars and the assassination of Martin Luther King, Jr., in 1968, provoked more than a hundred urban riots).

224. KERNER COMMISSION, *supra* note 220, at 203-06.

225. *Id.* at 1.

226. *Id.* at 22.

227. *Id.* at 383 ("By failing to portray the Negro as a matter of routine and in the context of the total society, the news media have, we believe, contributed to the black-white schism in this country.").

Despite the Kerner Commission's sympathetic findings about the structural "root causes" of urban crime and racial disorder, crime and welfare emerged as potent political issues in the 1960s. The riots changed many Whites' perceptions of the legitimacy of Blacks' grievances, enabling Whites to attribute crime and welfare dependency to individual choices rather than to structural forces.[228] This provided the context for subsequent political appeals based on race in public policies—a context that led to a strengthened conservative opposition.[229]

A similar negative shift occurred in Whites' perceptions of poverty, welfare, and race during the 1960s, as circumstances converged to sour the public mood.[230] Violent race riots replaced the non-violent southern civil rights movement.[231]

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228.   HACKER, *supra* note 48, at 22. Hacker notes,

Whites ceased to identify black protests with a civil rights movement led by students and ministers. Rather, they saw a resentful and rebellious multitude, intent on imposing its presence on the rest of the society. . . . As the 1970s started, so came a rise in crimes, all too many of them with black perpetrators. By that point, many white Americans felt they had been misused or betrayed. Worsening relations between the races were seen as largely due to the behavior of blacks, who had abused the invitations to equal citizenship white America had been tendering.

Id.; *cf.* GILENS, *supra* note 15, at 109-10 (arguing that "the impact of the riots on white Americans' attitudes toward blacks remains subject to debate").

229.   EDSALL & EDSALL, *supra* note 11, at 144-48; OMI & WINANT, *supra* note 7, at 114-32.

230.   *Cf.* GILENS, *supra* note 15, at 116-21 (discussing the "racialization" of poverty in the news in the mid-1960s).

231.   *See* GARLAND, *supra* note 6, 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 8, at 277-78 (observing that "black power" advocates frightened white voters).

Lemann describes the magnitude of the structural and social changes associated with the great migration and the political implications associated with the racial transformation of the cities:

[T]he migration hardly created a harmonious, racially synthesized country. It was disruptive; it engendered hostility. The fabric of city life in the United States changed forever. Some of the bitterness of race relations leached into city politics. The ideal of high-quality universal public education began to disappear. Street crime became an obsessive concern for the first time in decades. 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.

LEMANN, *supra* note 39, at 200.

"Black power" activists supplanted the clergy and ministers who had led the movement.[232] Crime rates soared just as the Supreme Court extended constitutional rights to criminal defendants.[233] Increased illegitimacy rates of Blacks coincided with the expansion of the welfare rolls.[234] Student protesters against the Vietnam War began a broader political and social revolution in sexual mores and drug use that threatened traditional middle-class values.[235] All this turmoil left white voters vulnerable to appeals to racial resentments, exploitation, and demagoguery.[236] So it was no coincidence that, in 1966, Republicans made electoral gains after blaming liberals' "soft social programs" and the Warren Court for the rise in racial radicalism, urban riots, and rising crime rates.[237]

The post-War decades of rapid social change paved the way for a reactionary political response. The deep anxieties about the breakdown of the family, gender roles, and other institutions created a longing for discipline, formal social controls, and "traditional values."[238] The mantra of the 1960s

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232. *See* HACKER, *supra* note 48, at 68-69.

233. GRAHAM, *supra* note 117, at 71-85.

234. GILENS, *supra* note 15, at 104-11.

235. *See* EDSALL & EDSALL, *supra* note 11, at 38.

236. *Cf. id.* at 72. The authors note that

[t]he riots, the welfare rights movement, the black power movement, student disorders, the sexual revolution, radical feminism, recreational use of drugs such as marijuana and LSD, pornographic magazines and movies, and higher taxes merged in varying degrees in the minds of many voters with liberalism and with the Left. . . .

. . . It was, however, the *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 . . . .

Id.

237. *See* HACKER, *supra* note 48, 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."); POWE, *supra* note 8, at 278 (noting that in the 1966 election, Republicans gained forty-seven House seats and three Senate seats and that California voters elected Ronald Reagan governor by a landslide).

238. *See* GARLAND, *supra* note 6, at 195. Garland notes that

a reactionary politics has used this underlying disquiet to create a powerful narrative of moral decline in which *crime* has come to feature—together with teenage pregnancies, single parent families, welfare dependency, and drug abuse—as the chief symptom of the supposed malaise. This call for a return to order has led to the

youth culture—"sex, drugs, and rock and roll"—and the anti-war, civil rights, and feminist movements all challenged authority and the status quo. By contrast, proponents of "traditional values" asserted the primacy of family, country, work, sexual restraint, rigid gender roles, authority, and social stability.[239] Because the conservative emphasis on "traditional values" arose in reaction to the movements for civil rights and gender equity, it acquired a racial connotation and appeared hostile to claims for minority rights.[240] As a result, for decades, liberal Democrats could not credibly discuss many moral and social issues that concerned the national electorate without fear of offending their civil rights constituencies. This reluctance created a "values barrier" with large segments of the population and ceded to the right a host of policy issues that implicated race.

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imposition of extensive new disciplines and controls, though it has been a feature of these developments that they have been targeted against particular social groups rather than universally imposed. . . . [T]he individual freedoms granted by late modern morals and markets . . . have been shored up by a new structure of controls and exclusions, directed against those groups most adversely affected by the dynamics of economic and social change—the urban poor, welfare claimants, and minority communities.

Id.; *see also* EDSALL & EDSALL, *supra* note 11, at 71 (arguing that "[g]hetto riots, campus riots, street crime, anti-Vietnam marches, poor people's marches, drugs, pornography, welfarism, rising taxes, all had a common thread: the breakdown of family and social discipline, of order, of concepts of duty, of respect for law, of public and private morality"); OMI & WINANT, *supra* note 7, at 121-24 (suggesting that the cultural upheavals of the 1960s elicited fear in many Americans—those whom Nixon dubbed the "silent majority"—about the imminent collapse of the "American Dream," a loss of military hegemony, economic prosperity, and cultural dominance). The New Right's aggressive assertion of religious and cultural traditionalism provided a reassuring verity in a time of uncertainty. *Id.*

239. *See* EDSALL & EDSALL, *supra* note 11, at 262-63.

240. *See id.* at 258-59. The authors note that

[i]n the late 1960s and early 1970s, the raising of the "traditional values" banner over such issues as law and order, the family, sexual conduct, joblessness, welfare fraud, and patriotism was seen by liberals, and by blacks—with some accuracy—as an appeal to racist, narrow-minded, or xenophobic instincts, an appeal designed to marshal support for reactionary social policies. The conflation by the political right of values issues with attempts to resist racial integration, with attempts to exclude women from public life, and with attempts to discredit the expansion of constitutional rights to disadvantaged minorities, fueled an often bitter resistance by the left and by blacks to the whole package of traditional values.

Id. at 259.

III. THE CONSERVATIVE BACKLASH: STRUCTURAL CHANGE, MEDIA SENSATIONALISM, "GET TOUGH" POLITICS, AND THE REFORMULATION OF JUVENILE JUSTICE

By the early 1970s, urban riots, escalating rates of "baby boom" crime, dissatisfaction with the "treatment model" in penology, and the emerging "politics of crime" prompted calls for a return to classical principles of criminal law.[241] Between 1964 and 1974, the number of homicides doubled,[242] and produced a markedly more conservative public opinion about punishment and the response to crime.[243] During this period, conservative politicians discovered the salience of "law and order" and other racially coded phrases as a way of describing social issues with racial implications.[244] By the early 1970s, both liberal and conservative critics of rehabilitation and indeterminate sentencing began to swing the penal policy pendulum toward retribution, determinate sentences, and principles of "just deserts."[245] Research on career criminals

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241. BECKETT & SASSON, *supra* note 208, at 10-11; GARLAND, *supra* note 6, at 195.

242. *See* ZIMRING & HAWKINS, *supra* note 134, at 58.

243. *See* EDSALL & EDSALL, *supra* note 11, 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.").

244. *Id.* at 69-73; MENDELBERG, *supra* note 12, at 90-98.

245. *See* ANDREW VON HIRSCH, DOING JUSTICE 4-6 (1976). During the 1970s, Progressives' optimistic assumptions about human malleability and the efficacy of rehabilitation foundered on empirical evaluation studies that questioned both the effectiveness of rehabilitative programs and the scientific expertise of those who administered the enterprise. ALLEN, REHABILITATIVE IDEAL, *supra* note 25, at 33-59. In the 1970s, determinate sentences based on present offense and prior record increasingly supplanted indeterminate 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 length and in/out confinement decisions, levels of supervision for probationers and parole release decisions. MICHAEL TONRY, SENTENCING MATTERS 6-13 (1996).

Proponents of "just deserts" reject rehabilitation as a justification for sentencing because criminal justice practitioners lack the technical ability either to implement the treatment model successfully and consistently, or to predict recidivism accurately and reliably. *See, e.g.*, STRUGGLE FOR JUSTICE, *supra* note 142, at 34-47; VON HIRSCH, *supra*, at 27-32; ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 3-18 (1985) [hereinafter VON HIRSCH, PAST OR FUTURE CRIMES]. Proponents of "just deserts" objected that indeterminate sentences vest too much discretionary power in presumed clinical experts who

2003] *RACE, POLITICS, AND JUVENILE JUSTICE* 1503

provided an empirical rationale for "selective incapacitation" and an additional reason to base sentencing decisions on the seriousness of offenses and criminal history rather than the characteristics of the offender.[246] Evaluations of treatment

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cannot justify their differential treatment of similarly-situated offenders based on either validated classification schemes with objective indicators or consistently successful outcomes. Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 835-36 (1988) [hereinafter Feld, *Punishment, Treatment*]. Therapeutically individualized sentences result in inequalities and racial disparities among those who commit the same offenses. STRUGGLE FOR JUSTICE, *supra* note 142, at 83-96. Individualized and disparate sentences for similarly situated offenders violate fundamental norms of distributive justice and penal proportionality. GARLAND, *supra* note 6, at 59. Just deserts sentencing, with its strong retributive foundation, punishes offenders proportionally according to their past behavior rather than on the basis of who they are or whom clinicians predict they may become. HIRSCH, PAST OR FUTURE CRIMES, *supra*, at 31-39. Determinate and presumptive sentencing laws assert the moral superiority of backward-looking penalties and define and sanction similarly situated offenders based on relatively objective and legally relevant characteristics such as seriousness of the offense, culpability, or prior criminal history. *Id.*

Similar jurisprudential changes occurred in sentencing and waiving delinquents, as "just deserts" concerns spilled-over into the juvenile justice system as well. *See infra* Part III.D. In the context of waiver decisions, assessments of individual offender's "amenability to treatment" or dangerousness historically predominated. *See* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 484-85 (1987) [hereinafter Feld, *Juvenile Waiver Statutes*]. As a result of the influence of "just deserts" jurisprudence, increasingly, the present offense and prior record came to control these decisions. *See, e.g.*, FELD, *supra* note 2, at 208-35; Feld, *Juvenile Waiver Statutes, supra*, at 486-87; Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 213-15 (1998) [hereinafter Feld, *Responses to Youth Violence*]. Similar changes also occurred in the sentencing of ordinary delinquents as state laws and judicial practices emphasized offense criteria rather than a child's "best interests." *See, e.g.*, FELD, *supra* note 2, at 245-86; Feld, *Punishment, Treatment, supra*, at 835-36; Feld, *Responses to Youth Violence, supra*, at 220-43; Julianne P. Sheffer, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 484-86 (1995).

246. *See generally*, 1 CRIMINAL CAREERS AND "CAREER CRIMINALS" (Alfred Blumstein et al. eds., 1986). Beginning in the 1970s, longitudinal research focused on the development of delinquent and criminal careers. *See, e.g.*, MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT (1972). Many youths engage simultaneously in both trivial and serious law violations, and police arrest and process them primarily as a function of the frequency, rather than the seriousness, of their delinquency. *See* DONNA M. HAMPARIAN ET AL., THE VIOLENT FEW: A STUDY OF DANGEROUS JUVENILE OFFENDERS 128-30 (1978). Career offenders do not specialize in particular types of crime; serious crime occurs within an essentially random pattern of delinquent

effectiveness raised substantial doubts about clinicians' abilities to coerce behavioral changes, highlighted the subjectivity inherent in therapeutic justice, and called into question "what works" in correctional reform.[247]

The shift of sentencing policy to emphasize offense criteria and the "just deserts" critique of rehabilitation produced strange philosophical and political bedfellows: liberals

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behavior. Joan Petersilia, *Criminal Career Research: A Review of Recent Evidence*, 2 CRIME & JUST. 321, 350-53 (1980). The small group of chronic offenders commits many of the offenses, however, and most of the violent crimes perpetrated by juveniles. *Id.* at 345-46. For virtually all purposes, most of the significant differences in frequency and seriousness of delinquency occur between those juveniles with one or two delinquent contacts and those with five or more offenses. *Id.* at 343-44. Chronic offenders' probabilities of subsequent criminal activity remained quite high and continued into adulthood. *Id.* at 349-53. A number of subsequent longitudinal cohort studies confirm the relationships between chronic, serious, and life-course persistent career offending. *See, e.g.*, BLUMSTEIN ET AL., *supra*, at 55-95; HAMPARIAN ET AL., *supra*, at 128-30; PAUL E. TRACY ET AL., DELINQUENCY CAREERS IN TWO BIRTH COHORTS 273-98 (1990). The research on criminal careers reports that while most youths desist after one or two contacts, chronic offenders exhibit a substantial probability (between .70 and .80) of continuing to commit crimes into adulthood. WOLFGANG ET AL., *supra*, at 161-63. These studies suggest that sentencing policies can better identify serious offenders by their cumulative persistence rather than by the nature of their initial offense; the number of contacts a youth has with the justice system provides the most reliable indicator of future criminality.

The criminal career research initially offered the prospect that sentencing policies might significantly reduce or prevent crime through "selective incapacitation" of the most active career offenders. BLUMSTEIN ET AL., *supra*, at 195-97. Unfortunately, selective incapacitation strategies founder on the inability prospectively to predict whom the high base-rate offenders will be. Jan Chaiken et al., *Predicting Violent Behavior and Classifying Violent Offenders, in* 4 UNDERSTANDING AND PREVENTING VIOLENCE: CONSEQUENCES AND CONTROLS 217, 281 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1994); Jacqueline Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls*, 5 CRIME & JUST. 1, 37-42 (1983). Although longitudinal studies can identify career offenders retrospectively within the heterogeneous mass of young offenders based on their persistence, we lack the indicators or ability to predict in advance which youths will become career criminals. *See* Chaiken et al., *supra*, at 281. Moreover, given the likelihood of errors, overprediction, and "false positives," to preventively incarcerate people on the basis of what they might do in the future rather than for what they already have done poses extraordinary ethical and legal problems. FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND RESTRAINT OF CRIME 60-70 (1995).

247. *See, e.g.*, ALLEN, REHABILITATIVE IDEAL, *supra* note 25, at 57-58; MAUER, *supra* note 45, at 48-49; Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974) ("With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.").

concerned about excessive discretion and discriminatory decisions, civil libertarians concerned about individual liberty and autonomy, and conservatives who denounced treatment as "soft on crime."[248]   Conservatives questioned the practical feasibility of rehabilitation and argued that indeterminate sentences released dangerous offenders who deserved lengthier sentences.[249]   Because liberals had criticized the failures of rehabilitation and indeterminate sentences as arbitrary and discriminatory criminal justice policies, they lacked a coherent alternative to conservative proposals to "crack down" on criminals.[250]

The period between the 1960s and the 1980s also marked an upsurge in the role of race in domestic politics—starting with the civil rights movement's struggle for equality and culminating in the conservative reaction embodied by the Reagan administration.[251]   In the contested politics of race,

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248. *See supra* notes 142-47 and accompanying text. Garland observes that "[t]he 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." GARLAND, *supra* note 6, at 60. Left-wing critics rejected prisons and the entire apparatus of the criminal justice system as a repressive institution to maintain the status quo. *See, e.g.,* MAUER, *supra* note 45, at 45. On the other hand, 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 208, at 4.

249. *See supra* notes 142-47 and accompanying text.

250. GARLAND, *supra* note 6, at 61 ("Over time, the liberal concern with just deserts, proportionality and minimizing penal coercion gave way to more hard-line policies of deterrence, predictive restraint and incapacitation, and eventually to expressive, exemplary sentencing and mass imprisonment— policies that were completely at odds with principles and intentions of the original liberal reformers."); *see also* BECKETT & SASSON, *supra* note 208, at 55 (arguing that rehabilitation fell into disfavor because conservatives advocated punishment to deter crime, while liberals criticized it as discriminatory and abusive).

251. *See, e.g.,* OMI & WINANT, *supra* note 7, at 5. Beckett argues that "the New Right wed traditional conservative economic policies and anticommunism to a conservative stance on contemporary 'social issues,' especially those with racial implications." BECKETT, *supra* note 25, at 42. Part of the New Right's anti-state populism aimed to dismantle programs designed to reduce racial, economic, and gender inequalities and to strengthen the state's power of social control. *Id.* at 42-43.

racial ideologies affect public policies and social structures that, in turn, influence the social organization of communities and the distribution of economic opportunities.[252] Social inequalities affect behavior and the prevalence of crime.[253] Because social inequalities are structured around race, they shape Whites' attitudes and beliefs about racial minorities.[254] By the 1980s, the structural transformation of cities, increases in youth homicide and gun violence, and news media depictions of violent black youths fueled political calls to "get tough" on youth crime.

Doubts about the ability of juvenile courts either to rehabilitate chronic and violent young offenders or to protect public safety bolstered policies to "crack down" on youth crime and to prosecute larger numbers of youths as adults. In the 1980s and early 1990s, most states amended their juvenile codes either to simplify the transfer of young offenders to criminal courts, or to require juvenile court judges to impose longer, determinate, or mandatory sentences on those youths who remained within an increasingly punitive juvenile system.[255] Both strategies de-emphasize rehabilitation and the circumstances of the offender, stress personal and justice system accountability and punishment, and base decisions on the seriousness of the present offense and prior record.[256] Cumulatively, these changes reflect a fundamental inversion of juvenile justice jurisprudence and sentencing policies—from rehabilitation to retribution, from an emphasis on the offender to the seriousness of the offense, from a focus on a youth's "amenability to treatment" to punishment, and a transfer of sentencing discretion from the judicial to the legislative and executive branches.

A. MACRO-STRUCTURAL TRANSFORMATION OF THE ECONOMY AND CITIES

Macro-structural, economic, and racial demographic changes that occurred in American cities during the 1970s and

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252. OMI & WINANT, *supra* note 7, at 74-76.

253. ZIMRING & HAWKINS, *supra* note 134, at 79-87.

254. *See, e.g.*, OMI & WINANT, *supra* note 7, at 74-75.

255. *See infra* Part III.D.

256. *See, e.g.*, PATRICIA TORBET ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT 59-61 (1996); Feld, *Responses to Youth Violence, supra* note 245, at 189-261.

1980s and the escalation in black youth homicide rates at the end of the 1980s facilitated the politics of crime that produced the "get-tough" juvenile justice policies of the early 1990s. In wealthy and democratic countries, a correlation exists between homicide rates and social and economic inequality—the greater the income and wealth disparities, the higher the rates of killings—and the United States is among the most economically stratified in western society.[257] One factor contributing to "get tough" policies was the epidemic of crack cocaine, which spurred gun violence and youth homicides.[258] A second factor was media coverage that disproportionately put a black face on young criminals and reinforced the white public's fear and animus.[259] The proximate cause of "get tough" legislative changes was the success of conservative politicians who used crime as a "code word" to make racial appeals for electoral advantage.[260]

Between the prosperous post-War years and the early 1970s, employment in the automobile, steel, construction, and manufacturing industries provided semi-skilled high school graduates with good-paying jobs.[261] These opportunities proved especially beneficial for black men who moved to northern cities and provided the foundations of stable, two-parent, black,

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257. BECKETT & SASSON, *supra* note 208, at 33. Not only does a relationship exist between inequality and homicide rates, but the relationship is even stronger "between economic discrimination and the homicide rate: countries that practice 'deliberate, invidious exclusion' on the basis of ascribed characteristics such as race have the highest rates of killings." *Id.* The high homicide rates in the United States reflect, in part, the country's pronounced inequalities in wealth distribution and historical racial discrimination. *Id.* People who aspire to the cultural goals but who experience blocked access to the means to achieve those goals "experience bouts of frustration, despair, and outright anger and become more prone to destruction of both self and other." *Id.* at 34; *see also,* ZIMRING & HAWKINS, *supra* note 134, at 34-50 (comparing transnational crime rates and discussing the singularity of U.S. homicide rates among comparable countries).

258. *See, e.g.,* FELD, *supra* note 2, at 206-07; MASSEY & DENTON, *supra* note 16, at 174; Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry,* 86 J. OF CRIM. L. AND CRIMINOLOGY 10, 34-35 (1995) [hereinafter Blumstein, *Youth Violence*].

259. ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND 81-84 (2000); LORI DORFMAN & VINCENT SCHIRALDI, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 4-5 (2001), *available at* http://www.buildingblocksforyouth.org/media/media.pdf (last visited Feb. 13, 2003).

260. MENDELBERG, *supra* note 12, at 134-65.

261. KATZ, *supra* note 62, at 128-29; WILSON, *supra* note 207, at 25-34.

working-class communities.[262] Mass production techniques, consumer demand, and low energy costs produced more than a quarter-century long period of sustained economic expansion and prosperity.[263] The post-War period of material well being, economic growth, and public confidence supported social policies of inclusion, social welfare, and indirectly sustained support for the "Rehabilitative Ideal."[264] As long as economic growth expanded the size of the "pie" and members of the middle class felt that they received their share of the benefits, the general public supported the social and penal welfare policies adopted by liberal elites.[265]

Starting in the early 1970s, the transition from an industrial to an information and service economy reduced job prospects for semi-skilled workers in the manufacturing sectors, and economic opportunities in the post-industrial city increasingly depended on skills and education.[266] Moreover, because of differences in the timing of the "great migration," the experiences of urban Blacks differed from those of earlier European immigrants and placed them at a significant economic and structural disadvantage during the post-

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262. *See, e.g.*, HACKER, *supra* note 48, at 101 ("This period saw the emergence of a stable black working class, under-pinned by two-parent families and orderly neighborhoods.").

263. FELD, *supra* note 2, at 192-94.

264. GARLAND, *supra* note 6, at 49 (noting the relationship between material conditions and public support for rehabilitative programs).

265. *Id.* at 51 ("If the general public was more punitive than its representatives and less convinced by correctionalism than were liberal elites, it was, nevertheless, not especially excited about the issue."); EDSALL & EDSALL, *supra* note 11, at 105 (noting that economic contraction undermined popular support for governmental intervention, because "[s]teady economic growth, which had made redistributive government policies tolerable to the majority of the electorate, came to a halt in the mid-1970s, and, with stagnation, the threat to Democratic liberalism intensified").

266. The transition to a post-modern society produced a bifurcation of economic opportunities based on education and training. GARLAND, *supra* note 6, at 78 (noting that the revolution in technology "gave 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"); KATZ, *supra* note 62, 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). The post-industrial city reflected a "transformation of the economy, of demography, and of space. Each had profound consequences for the nature and extent of poverty." *Id.* at 128.

industrial transition.[267]   Between 1969 and 1984, employment in the manufacturing sectors of the economy decreased from 26% to 19% of the workforce, while full-time employment in the service sectors—e.g., finance, insurance, and real estate—increased from 13% to 28% and surpassed manufacturing employment.[268]   Beginning in 1973, and for the first time since the post-World War II period of sustained growth, inflation-adjusted real hourly wages stagnated and then declined—by

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267. *See, e.g.*, KATZ, *supra* note 62, at 51 (summarizing the differences in experiences for the immigrants from southern and eastern Europe and those of southern Blacks). Katz notes that

> blacks faced circumstances that differed fundamentally from those found earlier by European immigrants. They entered cities in large numbers as unskilled and semiskilled as manufacturing jobs were leaving, not growing. The discrimination they encountered kept them out of the manufacturing jobs into which earlier immigrants had been recruited.   One important goal of public schools had been the assimilation and "Americanization" of immigrant children; by contrast, they excluded and segregated blacks.   Racism enforced housing segregation and residential concentration among blacks increased at the same time it lessened among immigrants and their children.   Political machines had embraced earlier immigrants and incorporated them into the system of "city trenches" by which American cities were governed; they excluded blacks from effective political power until cities had been so abandoned by industry and deserted by whites that resistance to black political participation no longer mattered.

Id.; *see also* LEMANN, *supra* note 39, at 103 (summarizing differences in urban racial transition and "the deterioration of education, law enforcement, and other essential institutions, and then the exodus of the black middle class and the descent into real disorganization"); LIEBERSON, *supra* note 18, at xi (arguing that the immigrants from South, Central, and Eastern Europe faced different and less severe impediments to their upward mobility than did the subsequent black migrants from the rural South). Lieberson emphasizes the role that segregation has played in affecting the life-chances of Blacks versus the European immigrants:

> [B]lack residential segregation is very high, much higher than that experienced by various white groups in the same cities.   This is extremely important because residential isolation is of consequence for a wide variety of other events, such as school isolation, restriction of opportunities because of minimal contacts with whites, marking the black population as distinctive and different, and the restricted opportunities to live near all sorts of employment found at greater distances from the black ghettos.

LIEBERSON, *supra* note 18, at 10-11; *see also* MASSEY & DENTON, *supra* note 16, at 2 ("[B]lack segregation is not comparable to the limited and transient segregation experienced by other racial and ethnic groups, now or in the past.").

268. KATZ, *supra* note 62, at 128; *see also* LEMANN, *supra* note 39, at 201-02 ("The economic base of black America, which had switched from agriculture to unskilled industrial labor in the 1940s, switched again in the sixties . . . the industrial age for African-Americans lasted for not even a full generation.").

2.8% in 1974 and 0.7% in 1975.[269]   The "rights revolution" included women under the employment provisions of the 1964 Civil Rights Act, and the women's movement increased the entry of women into the workforce that further eroded the traditional hierarchy and the economic position of white men.[270]   Moreover, the globalized economy and the overseas challenge to the domestic automobile and steel industries constituted a race-neutral development with profound racial consequences.[271]   Under the pressures of a globalizing economy, low-skill, entry-level jobs began to migrate overseas.

The post-industrial transition to a service and information economy impeded the ability of semi-skilled high-school graduates to achieve the "American Dream."[272]   The domestic automobile and steel industries where working-class Americans and unions had previously experienced their strongest gains were among the primary victims of the economic deterioration of the late 1970s and 1980s.   Blue-collar white workers who saw their own high wages, benefits, and middle-class status eroded strongly resented liberal affirmative action programs to expand apprenticeships, jobs, and seniority to Blacks.[273]   White

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269. EDSALL & EDSALL, *supra* note 11, at 105.

270. *Id.* at 108 ("[T]he women's movement—in combination with financial pressures making the one-earner family increasingly untenable—produced a major alteration in family structure, as labor force participation among married women grew steadily from 35.7% in 1965, to 41.4% in 1970, to 45.1 percent in 1975, to 50.7% in 1980.").

271. *See id.* at 27 (noting that the "political consequences of a globalized economy provide a case study of how race interacts catalytically with seemingly race-neutral development to produce a powerful reaction").   The effects of declining industrial productivity and global competition eroded jobs, wages, and employment security. *Id.* at 201-02.

272. *See* GARLAND, *supra* note 6, at 81-82 (noting the development of "a different kind of employment pattern: one that leaned towards low-paid, part-time, usually female workers, or else highly skilled, highly trained graduate employees"); OMI & WINANT, *supra* note 7, at 114-15 ("The issue of 'deindustrialization' gradually moved to the center of economic debates, as workers faced plant shut-downs, redundancy, and limited high-tech occupational opportunities.").

273. EDSALL & EDSALL, *supra* note 11, at 199 (noting that "[b]lue-collar workers who had been under pressure by the civil rights movement to share the benefits of high wages and middle-class status felt that they had less and less to give to their own families, let alone to new groups seeking apprenticeships, jobs, and seniority"); GARLAND, *supra* note 6, at 76 (observing that changing material conditions affected blue-collar and middle-class support for generous welfare and rehabilitative criminal justice policies); OMI & WINANT, *supra* note 7, at 116 (noting that the conservative attack on affirmative action policies and the charges that the state engaged in "reverse discrimination" were understood in terms of racial competition).

workers' anxiety and anger over their economic vulnerability and the perceived inability of government policies to address their concerns made them receptive to politicians who scapegoated Blacks.[274]

The new economy placed a premium on education and produced a widening earnings gap between high school and college graduates.[275] In 1975, a college graduate only earned about 25% more than did a high-school graduate.[276] Two decades later, the income differential was almost 100%, because college graduates' earning capacity increased substantially while high-school graduates' earning capacity decreased about 25%.[277] Significantly, between 1975 and 1988, the average earnings of entry-level college educated workers increased from 132% to 180% of those of high-school graduates, but only 13.2% of Blacks aged twenty-five to thirty-four had

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274. For example, Entman and Rojecki argue that Whites' economic uncertainties and alienation provided political incentives to make racial appeals and increased the salience of such campaigns:

> First, they bolstered Whites' susceptibility to anti-Black political appeals. Without a sophisticated understanding of such topics as labor economics, class mobility patterns, and public finance, the potential salience and apparent reasonableness of coded racial claims about wasteful welfare spending, high taxes, and threatening crime grew.
>
> Second, White anxiety encouraged certain elites to mount an active racial project scapegoating Blacks (and, in some cases, other out-groups like immigrants). Here capital punishment and longer prison terms were cases in point. Whatever the effect of death penalties and stricter sentencing on Black crime rates, the crucial impacts of global competition, economic growth, and other such forces on employment opportunities and thus crime cannot easily be controlled or even discussed. And the mainstream culture provides such a plentiful stock of myths, symbols, and homilies about individual responsibility. In this context, it made sense for some political leaders to craft a racial project emphasizing capital punishment and longer sentences, along with cutting welfare, affirmative action, and related policies that disproportionately affect Blacks—remedies conveniently congruent with some of the most vivid images on the nightly news.

ENTMAN & ROJECKI, *supra* note 259, at 76.

275. *See* KATZ, *supra* note 62, at 128-29 (the number of jobs which employed people with less than a high school education declined between 52 and 219% in cities in the 1970s).

276. *See* NAT'L RESEARCH COUNCIL, LOSING GENERATIONS: ADOLESCENTS IN HIGH-RISK SETTINGS 26 (1993) (noting earning differentials by race, gender, and education); *see also* WILSON, WHEN WORK DISAPPEARS, *supra* note 207, at 25-34 (1996).

277. *See, e.g.*, CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 126 (1992); NAT'L RESEARCH COUNCIL, *supra* note 276, at 25-26.

college degrees, compared with 24.5% of Whites, and the gap was widening.[278]   Those better paying jobs that employ disproportionately   more   white   workers—professional, technical, and managerial—grew at a faster rate than those that employ proportionately more black workers—machine operators, service, clerical, and household workers.[279]   These economic   dislocations   also   had   regional   and   political ramifications.   Jobs and industries declined in the Northeast and Midwestern "frostbelt" industries—steel, rubber, and automobile—while the emergent high-technology industries expanded in the more conservative "sunbelt" states of the South and West.[280]

During the post-World War II period, government highway, housing, and mortgage policies encouraged suburban expansion around urban centers.[281] This spatially transformed many cities, and contributed to the growth of predominantly white suburbs around increasingly poor and minority urban cores.[282] As black migration from the rural South to the urban North   transformed   the   larger   older   cities,   Whites simultaneously began to move from cities to the suburbs.[283] Between the end of World War II and 1960, about one-third of all Blacks who had remained in the South migrated to other parts of the country; by 1960, the majority of all Blacks lived in central cities.[284]   Federal housing policies and interstate

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278.   EDSALL & EDSALL, *supra* note 11, at 245; Edsall & Edsall, *supra* note 1, at 81 ("From 1976 to 1988 the percentage of blacks aged eighteen to twenty-four enrolled in college fell from 22.6 to 21.1, while the percentage of whites rose from 27.1 to 31.3.").

279.   EDSALL & EDSALL, *supra* note 11, at 231-36.

280.   OMI & WINANT, *supra* note 7, at 114.

281.   *See supra* notes 63-67 and accompanying text.

282.   *See supra* notes 63-67 and accompanying text; *see also* GARLAND, *supra* note 6, at 84 (noting that the 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 62, 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 39, at 118 ("The interstate highway program was encouraging the flight of the white middle class to the new, sterile, soulless suburbs . . . .").

283.   *See supra* notes 52-65 and accompanying text.

284.   KATZ, *supra* note 62, at 131 ("From the end of World War II to 1960, one-third of the southern black population moved to other regions. During the 1950s, the proportion of blacks residing in central cities grew from 41 percent to 51 percent."); MASSEY & DENTON, *supra* note 16, at 18.

highway construction, combined with bank mortgage and real estate sales practices, spurred the growth of predominantly white suburbs ringing the poor and minority urban cores.[285] In the 1950s and 1960s, urban renewal and highway construction disrupted and destroyed many urban black communities.[286]

The isolation of Blacks in urban ghettos did not happen by chance or simply reflect their housing preferences. To the contrary, public policies and private institutional arrangements created racial segregation, and they continue to exacerbate the harmful consequences of concentrated poverty to the detriment of the economic and social welfare of black Americans.[287] The prevalence of concentrated poverty among Blacks can be attributed to deliberate public policies to "contain" and isolate them.[288] For example in 1980, 70% of poor Whites lived in non-poverty areas compared with only 16% of poor Blacks.[289] Conversely, fewer than 7% of poor Whites lived in areas of concentrated poverty compared with 38% of poor Blacks.[290]

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285. *See* MASSEY & DENTON, *supra* note 16, 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 208, at 39; *see also* MAUER, *supra* note 45, at 123 (noting that social interactions between the races in the North was even more limited than occurred in the South where, despite the caste system, there was contact within communities).

286. KATZ, *supra* note 62, at 136.

287. *See* MASSEY & DENTON, *supra* note 16, at 8; WILSON, THE TRULY DISADVANTAGED, *supra* note 207, at 20-62. Massey and Denton note that

> residential segregation has been instrumental in creating a structural niche within which a deleterious set of attitudes and behaviors—a culture of segregation—has arisen and flourished. Segregation created the structural conditions for the emergence of an oppositional culture that devalues work, schooling, and marriage and that stresses attitudes and behaviors that are antithetical and often hostile to success in the larger economy. . . . Residential segregation is the institutional apparatus that supports other racially discriminatory processes and binds them together into a coherent and uniquely effective system of racial subordination.

MASSEY & DENTON, *supra* note 16, at 8; *see also* Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST.: A REV. OF RES. 311, 338 (1997) (noting that "even given the same objective socioeconomic status, blacks and whites face vastly different environments in which to live, work, and raise their children").

288. *See* Sampson & Lauritsen, *supra* note 287, at 338 ("Opposition from organized community groups to the building of public housing in 'their' neighborhoods, de facto federal policy to tolerate extensive segregation against blacks in urban housing markets, and the decision by local governments to neglect the rehabilitation of existing residential units . . . have led to massive, segregated housing projects . . . .").

289. *See* MAUER, *supra* note 45, at 168-69.

290. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 37 (noting that in

MINNESOTA LAW REVIEW   [Vol 87:1447

Moreover, as a result of deindustrialization during the 1970s and 1980s, economic inequality increased as black family income dropped from being 61% of white family income in 1970 to 54% in 1992.[291] In short, Blacks are far more likely than Whites to be poor and, if they are poor, to be forced to live in areas of concentrated poverty. Whites' perceptions of Blacks sustain housing, education, and welfare policies that facilitate the growth of urban slums and, in turn, the adaptive behaviors of these "undeserving" poor reinforce Whites' apprehension of minorities as dangerous and threatening.[292] Thus, racial segregation, cultural isolation, and concentration of poverty are the results of a host of disparate public policy decisions that then reinforce the appeal of these policies for many voters and politicians.

The structural changes in the economy and the changing demographics of the nation altered the political balance during this time. Between 1970 and 1986, the suburban population, which is overwhelmingly white, grew from 40% to 45% of the nation's total population.[293] Because the majority of black voters are highly concentrated in urban areas, they have relatively limited influence over politicians who represent predominantly white districts.[294] The emergence of the

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New York City, 70% of poor Blacks and Hispanics live in high-poverty neighborhoods, whereas 70% of poor Whites live in non-poor neighborhoods); KATZ, *supra* note 62, at 207 (noting that during the 1970s, "[t]he total black population in 'extreme-poverty' areas soared by 148 percent during these years, compared to a 24 percent rise among whites").

291. BECKETT & SASSON, *supra* note 208, at 33-34 (reporting on the racial and ethnic nature of class inequality and the effects of inequality in democratic and wealthy countries on homicide rates).

292. *See, e.g.*, KATZ, *supra* note 62, at 125 ("[C]hildren of the urban poor attended decaying public schools whose corridors sometimes required police patrols; many escaped as soon as the law allowed and most of the rest left with minimal skills, unprepared for either higher education or the better jobs offered by the new economy."); KENNEDY, *supra* note 76, at 14 ("A substantial number of voters both fear and resent the so-called 'undeserving' poor, particularly those among them who are colored, a sector of the population that many perceive as especially dangerous and unworthy."); MASSEY & DENTON, *supra* note 16, at 13 ("By building physical decay, crime, and social disorder into the residential structure of black communities, segregation creates a harsh and extremely disadvantaged environment to which ghetto blacks must adapt.").

293. EDSALL & EDSALL, *supra* note 11, at 227. As a result of "white-flight" from the central cities, where most poor Blacks live, the urban proportion of the total population decreased from 35.2% to 31.6%. *Id.*

294. *See* HACKER, *supra* note 48, at 211 (noting that "black voters tend to be concentrated in segregated areas, which means they have little sway over

suburban population as a virtual electoral majority enables the predominantly white voters to address their own public sector service needs—schools, parks, police, and roads—through local and county government while weakening their ties to the increasingly black cities.[295] Suburban Whites' ability to satisfy their public service needs through local tax expenditures and the division between urban and suburban municipalities has reduced the incentives for Whites to contribute to the governmental largesse that sustains programs for Blacks and the poor at the state or federal levels.[296]

1. Deindustrialization and the Black "Underclass"

Macro-structural economic changes associated with the

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politicians in other districts," and that "the majority of lawmakers in the United States have few if any black residents in their constituencies").

295. *See* EDSALL & EDSALL, *supra* note 11, at 29 (noting that "the growth of suburbia and of suburban government provides a means to address public concerns, while confining services and benefits to local residents"). While voters support public funding for education, recreation, health, and safety, many Whites discovered that

> they can become fiscal liberals at the local level. They can satisfy these demands through increased suburban and county expenditures, guaranteeing the highest possible return to themselves on their tax dollars, while continuing to maintain policies of fiscal conservativism at the federal level. Suburbanization has permitted whites to satisfy liberal ideals revolving around activist government, while keeping to a minimum the number of blacks and the poor who share in government largess.

Id. at 228. *See also* PHILLIPS, *supra* note 11, at 467 ("All across the nation, the fastest growing urban areas are steadily increasing their *Republican* pluralities, while the old central cities—seat of the New Deal era—are casting steadily fewer votes for Democratic liberalism.").

296. Edsall and Edsall argue that

> [t]he most important of these segregating forces is the ascendance of the suburban electorate to virtual majority status, empowering an overwhelmingly white segment of the voting population to address basic social service needs (schooling, recreation, libraries, roads, police and fire protection) through local suburban government and through locally generated revenues, and to further sever already weak ties to increasingly black urban constituencies.

EDSALL & EDSALL, *supra* note 11, at 217.

To the extent that investment in public services and, especially, public schools is imperative to address the circumstances of the underclass, the urban-suburban divisions reduce Whites' self-interest in making such a commitment. For example, in 1986, the twenty-five largest central-city school districts enrolled 27.5% of all black students and 30% of all Hispanic schoolchildren, but only 3.3% of all white children. Edsall & Edsall, *supra* note 1, at 85; MASSEY & DENTON, *supra* note 16, at 158 (noting that "contemporary racial segregation gives white politicians a strong interest in limiting the flow of public resources to black-controlled cities").

post-industrial transition had a deleterious impact on urban minority residents.[297] The greatest job losses occurred in those higher-paying, lower-skilled sectors of the manufacturing economy to which urban minorities previously had greatest access.[298] Job growth occurred primarily in the suburbs and in those sectors of the information and service economies that required higher levels of education than most urban minority workers possessed.[299] As a result of the economic, spatial, and racial reorganization of cities, an urban "underclass" living in concentrated poverty and in racial, social, and cultural isolation was created over several decades.[300]

The structural transformation of inner cities reduced young black males' employment prospects, increased rates of out-of-wedlock childbirths among poor black women, and precipitated the decline of two-parent black families.[301] The

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297. *See, e.g.*, KATZ, *supra* note 62, 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."); WILSON, WHEN WORK DISAPPEARS, *supra* note 207, at 25-110.

298. *See* KATZ, *supra* note 62, at 128; WILSON, THE TRULY DISADVANTAGED, *supra* note 207, at 39-46.

299. *See* WILSON, THE TRULY DISADVANTAGED, *supra* note 207, at 100-03.

300. *See generally* KATZ, *supra* note 62, at 199 ("Blacks' detachment from 'the standardized institutions' feeding the primary labor market reinforced their entrapment in the underclass."); Michael B. Katz, *The Urban "Underclass" as a Metaphor of Social Transformation, in* THE "UNDERCLASS" DEBATE: VIEWS FROM HISTORY 4 (Michael B. Katz ed., 1993) ("By the late 1970s, the specter of an emergent underclass permeated discussions of America's inner cities."). Edsall and Edsall note that

> [t]he concentration among the black poor of single motherhood, crime and withdrawal from the labor market—combined with an intensified geographic isolation—has made it possible to partially segregate this segment of the population from the political, social, and economic mainstream. Poor black urban neighborhoods . . . are avoided by whites and increasingly abandoned by middle-class blacks; the engines of the local economy in such neighborhoods are disproportionately government welfare payments and criminally generated income. Perhaps most important, the 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 11, at 244.

301. *See, e.g.*, WILSON, THE TRULY DISADVANTAGED, *supra* note 207, at 72-84; WILSON, WHEN WORK DISAPPEARS, *supra* note 207, at 87-110. More than three decades ago, then-Assistant Secretary of Labor Daniel Patrick Moynihan

deindustrialization of the urban core decreased employment opportunities for unskilled and semi-skilled workers in the manufacturing sectors and thereby reduced the pool of "marriageable" black men who could support a family.[302] Unwed childbearing and female-headed households proliferated among poor black women as marriage to unemployed or unemployable black males became less attractive.[303]

Following passage of civil rights legislation in the mid-1960s, many middle-class Blacks took advantage of their economic opportunities and left the ghettos.[304] Their absence deprived those who remained of the economic and social resources necessary for social stability, which amplified the effects of concentrated poverty and social isolation.[305]

2.   Crack Cocaine and Black Youth Homicide

By the end of the 1980s, the emergence of a black urban underclass, the introduction of crack cocaine into the inner cities, and the proliferation of guns among youths produced a

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warned of the adverse impact of male unemployment in the urban black community. *See* MOYNIHAN REPORT, *supra* note 205, at 51; *supra* notes 205, 207 and accompanying text. Since Moynihan issued his prophetic warnings, many of those dire predictions have come to pass: black male unemployment, out-of-wedlock childbirth, racial isolation, concentrated poverty, and urban violent crime have increased. *See* MASSEY & DENTON, *supra* note 16, at 118.

302. *See* WILSON, THE TRULY DISADVANTAGED, *supra* note 207, at 145-46.

303. *See* MARIAN WRIGHT EDELMAN, FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE 13-14 (1987); *see also* GARLAND, *supra* note 6, at 83 (noting that the rise in children born to single women occurred in families of all races; by the early 1990s, nearly one-third of all children were born to unmarried women, and the proportion rose to more than two-thirds among black families).

304. MASSEY & DENTON, *supra* note 16, at 7 ("The out-migration of middle-class families from ghetto areas left behind a destitute community lacking the institutions, resources, and values necessary for success in post-industrial society.").

305. *See* EDSALL & EDSALL, *supra* note 11, at 231 ("The clear majority (over 60 percent) of black Americans are living conventional work lives. Between a third and two-fifths (30 to 40 percent) of black America, however, exists at or below the margin of regular employment, minimal income, and personal security."); MASSEY & DENTON, *supra* note 16, at 7-8; WILSON, THE TRULY DISADVANTAGED, *supra* note 207, at 56-57. Because Whites generally perceive Blacks as violent, however, Whites also resist integration and thereby hinder the mobility of middle-class Blacks to escape high violence communities. *See* ZIMRING & HAWKINS, *supra* note 134, at 86 ("Black violence thus functions as a double burden on the black middle class, both a direct threat to personal security and a barrier to integration because a social reputation for violence is imputed to all men with dark skin.").

sharp escalation in black youth homicide rates.[306] The unique increase in black youth homicide provided the immediate political impetus to "get tough" and to "crack down" on youth crime.[307] Because rates of offending vary by race, the political decision to "get tough" on youth violence effectively meant targeting young black men.[308] The public perceives the "crime problem" and the juvenile court's clientele primarily as poor, urban black males.[309]   Politicians have manipulated and exploited these racially tinged perceptions for political advantage with demagogic pledges to "crack down" on youth crime, which has become a code word for harsher penalties for black males.[310]

The Federal Bureau of Investigation reports that the arrest rates for serious crime overall, juvenile crime, and violent juvenile crime have all followed roughly similar patterns— increasing from the mid-1960s until 1980, declining during the mid-1980s, and then increasing to another peak in the early 1990s, when they fell again.[311] Between 1965 and 1980, the

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306. *See, e.g.*, ZIMRING, *supra* note 219, at 3-10; Blumstein, *Youth Violence*, *supra* note 258, at 16-20, 24-29; Phillip J. Cook & John H. Laub, *The Unprecedented Epidemic in Youth Violence*, 24 CRIME & JUST.: A REV. OF RES. 27, 51-58 (1998). A number of social structural factors contributed to an overall increase in crime in the 1980s. *See* GARLAND, *supra* note 6, at 90 (citing "(i) increased opportunities for crime, (ii) reduced situational controls, (iii) an increase in the population 'at risk,' and (iv) a reduction in the efficacy of social and self controls as a consequence of shifts in social ecology and changing cultural norms" as the main factors).

307. 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. *See* FELD, *supra* note 2, at 197-218; *infra* Parts III.C-D.

308. Feld, *Transformation—Part II*, *supra* note 5, at 367-68 (noting that political efforts to "get tough" have a disproportionate impact on black male offenders).

309. *See* FELD, *supra* note 2, at 203-08 (contending that the 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).

310. *See* BECKETT, *supra* note 25, at 84-88; *see also infra* Part III.C.2.

311. *See, e.g.*, FELD, *supra* note 2, at 197-202. Blumstein notes that
      [t]he homicide rate in 1980 was at a peak value of 10.2 per 100,000
      population, and by 1985 it had fallen to a trough of 7.9. It then
      climbed a full 24% to a peak of 9.8 in 1991, and has been declining
      markedly since then, reaching a level of 6.3 in 1998, a level that is
      lower than any annual rate since 1967.
Alfred Blumstein, *Disaggregating the Violence Trends, in* ALFRED BLUMSTEIN & JOEL WALLMAN, THE CRIME DROP IN AMERICA 13 (2000) [hereinafter

overall juvenile violent crime and homicide rates doubled, followed by a second, sharp upsurge between 1986 and 1994.[312] The rapid escalation in juvenile violence in the late 1970s, and especially in the late 1980s, the arrests of increasingly younger juveniles for violence, and the dramatic rise in homicide arrests spurred public and political concerns about youth crime and subsequent legal changes.[313]

States changed their juvenile waiver and delinquency sentencing laws in the early 1990s in response to two specific changes in patterns of youth crime and violence.[314] Most of the changes since the late 1980s reflect racial differences in arrest rates for violent crimes committed by juveniles and the unique role of guns in the dramatic surge in homicides.[315] Lethal violence and victimization are highly concentrated among the socially disadvantaged, and "[v]ictimization rates for blacks are about five times those of whites . . . ."[316] Since the mid-1960s, police have arrested black juveniles for violent crimes—murder, rape, robbery, and assault—at a rate about five times greater than that of white youths, and arrested black youths for homicide at a rate about seven times greater than that of Whites.[317] Beginning in 1985, when youth homicide rates again

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Blumstein, *Disaggregating*].

312.   *See, e.g.*, FELD, *supra* note 2, at 197-202; ZIMRING & HAWKINS, *supra* note 134, at 58 ("From 1964 to 1974 the national homicide rate doubled, fell off slightly in the middle of the decade, then rose to . . . 10.7 per 100,000 population in 1980. Through the first half of the 1980s the homicide rate fell back, but it then moved up again from 1986 to 1991."); Cook & Laub, *supra* note 306, at 51-58.

313.   *See, e.g.*, FELD, *supra* note 2, at 197-208; TORBET ET AL., *supra* note 256, at 3-9 (observing that more serious juvenile offenders are being prosecuted in criminal court).

314.   *See* TORBET ET AL., *supra* note 256, at 4; Feld, *Responses to Youth Violence, supra* note 245, at 192-94.

315.   *See* FELD, *supra* note 2, at 199-205.

316.   ZIMRING & HAWKINS, *supra* note 134, at 64. Zimring and Hawkins note that "[e]very aspect of serious violence in the United States is linked with statistical and policy questions involving race. And very few of the important aspects of race relations are not connected to concerns about violence: its incidence, its consequences, and attitudes toward it." *Id.* at 73.

317.   *See, e.g.*, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 1993, at 447 (Kathleen Maguire & Ann L. Pastore eds., 1994) (chart); FELD, *supra* note 2, at 203; ZIMRING & HAWKINS, *supra* note 134, at 76-77 (observing that Blacks are about seven times as likely as Whites to be arrested for violent crimes and eight times as likely for homicide); Cook & Laub, *supra* note 306, at 42-43 ("[H]alf of all juvenile violence arrests were of blacks, implying an arrest rate over five times as high as for whites.").

Homicide is heavily concentrated in the biggest cities where Blacks live

began to spike, the arrest rates of black and white juveniles diverged abruptly.[318] Between 1986 and 1993, police arrests of white juveniles for homicide increased about 40%, while those of black youths jumped by 278%.[319]

The use of guns by juveniles was the proximate cause of this sharp increase in youth homicide. The number of deaths that juveniles caused by means other than firearms averaged just less than 500 per year and fluctuated within a "normal range" of about 10%.[320] So juveniles killed people with knives, blunt objects, and their hands and feet about as frequently as they always did. By contrast, between 1984 and 1992, homicide arrests involving firearms increased by 229%.[321] Thus, in the span of almost a decade, the juvenile homicide rate more than doubled, and the use of firearms accounted for

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disproportionately. For example, the twenty largest cities comprise slightly more than one-tenth of the nation's population but experience more than one-third of all reported homicides, with the corollary that suburban and rural areas experience much lower levels of homicide than the national average. ZIMRING & HAWKINS, *supra* note 134, at 65 (noting that the twenty largest U.S. cities have 11.5% of the total population and 34% of reported criminal homicides).

318. *See* Cook & Laub, *supra* note 306, at 39-44 (describing statistics showing that boys and Blacks were the most frequently arrested for violent crimes).

319. *See, e.g.*, MAUER, *supra* note 45, at 84 (showing that between 1984 and 1993, homicide rate for white males ages 14-17 doubled from 6.9 to 14.4 per 100,000, while black male homicide rate quadrupled from 33.4 to 151.6 per 100,000); MELISSA SICKMUND, ET AL., JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 13 (1997) (describing statistics on chart); HOWARD SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 56 (1995) ("Between 1984 and 1991, the rate at which juveniles committed murder increased by 64%, while the black juvenile murder rate increased 211%."); ZIMRING & HAWKINS, *supra* note 134, 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.").

320. *See, e.g.*, FELD, *supra* note 2, at 207; Franklin E. Zimring, *Kids, Guns, and Homicide: Policy Notes on an Age-Specific Epidemic*, 59 LAW & CONTEMP. PROBS. 25, 28 (1996).

321. Zimring, *supra* note 320, at 27; *see also* Blumstein, *Disaggregating*, *supra* note 311, at 29-30, 32 (observing that weapons involved in adolescent conflict shifted to handguns and semi-automatic weapons; between 1985 and 1993, juveniles' use of guns nearly quadrupled); ZIMRING & HAWKINS, *supra* note 134, at 108 (observing that guns account for more than twice as many murders as all other methods combined); ZIMRING, *supra* note 219, at 35 (finding that the most important reason for the sharp increase in youth homicide was escalation in assaults with firearms).

virtually the *entire* increase.[322]   Because of the disproportionate involvement of black youths in violence and homicide—as perpetrators and as victims—almost all of these "excess homicides" involving guns occurred within the black male population.[323]

The violent drug industry that crack cocaine spawned in large cities during the middle to late 1980s led to a dramatic increase in black youth homicide arrests involving guns.[324] The low price of crack increased the numbers of buyers and weekly transactions, and thereby the number of sellers to accommodate the demand.[325]   Drug distribution attracted youths because they faced lower risks of severe penalties than adults, and because, especially for black males, they lacked alternative economic opportunities.[326]   Youths in the drug industry are likely to arm themselves for self-protection and take more risks than do adults.[327] The ready availability of guns breeds lethal violence among those involved in illegal markets because they cannot resolve their disputes through

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322. *See* ZIMRING, *supra* note 219, at 89 (showing statistics that hold the rate of homicide arrests for offenders under eighteen for gun killings more than tripled between 1985 and 1994); Zimring, *supra* note 320, at 29.

323. *See* Alfred Blumstein & Daniel Cork, *Linking Gun Availability to Youth Gun Violence*, 59 LAW & CONTEMP. PROBS. 5, 15 (1996); Blumstein, *Youth Violence*, *supra* note 258, at 16-22.

324. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 8, 28 (finding the 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); Blumstein, *Disaggregating*, *supra* note 311, at 39 (observing that the prevalence 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, [led] to a 'contagious' growth in homicide"); Blumstein, *Youth Violence*, *supra* note 258, at 29-32; MAUER, *supra* note 45, at 97 (noting that as many as half of murders may be drug-related, so changes in drug markets affect homicide rates). Cook and Laub point out that

> [t]he 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 .... For 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 306, at 53-54.

325. Blumstein, *Youth Violence*, *supra* note 258, at 30.

326. Blumstein & Cork, *supra* note 323, at 10.

327. *See id.* at 10-11.

recourse to the law.[328] Although guns constitute a "tool of the trade" in the drug industry, their proliferation within the wider youth population for self-defense and status also contributed to the escalation of homicides.[329] The drug industry, in turn, contributed to the deterioration of urban neighborhoods by driving out stable families, undermining community leaders, weakening inhibitions against violence, and providing adolescents with attractive criminal role models.[330]

Although "urban," "black," and "youth" each contribute to the prevalence of crime, the elevated black youth homicide rate reflects the pernicious intersection of all three. This intersection did not occur by chance. It was the result of macroeconomic forces and a host of public policy choices that systematically disadvantaged urban minority groups.[331]

> [T]he influences that generate grossly disproportionate African-American homicide rates are broadly present in the social structure and behavior of the communities where rates are high. It is the propensity to resolve conflict with maximum personal force rather than any specific commitment to crime that is the precursor to high rates of conflict-motivated homicide.[332]

Thus, social conditions and social process create the circumstances that produce high levels of lethal violence in areas of concentrated poverty.

Despite the structural determinants of youth crime, the intersections of race, guns, and homicide fanned the flames of public "panic" and fed the fire for a political "crack down" that led to the "get tough" reformulation of juvenile justice policies. By the early 1990s, the apparent randomness of gang violence and the disproportionate minority involvement in homicides had inflamed public fears.[333] The substantial racial differences in rates of violent offenses had major implications for race

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328. *See id.* at 10 ("Because [juveniles] cannot rely on access to the police in ways that protect legitimate economic activity, they are forced to resort to their own means of protection.").

329. *See id.* at 11; Cook & Laub, *supra* note 306, at 58.

330. NAT'L RESEARCH COUNCIL, *supra* note 276, at 67-68.

331. *See supra* Part III.A.

332. ZIMRING & HAWKINS, *supra* note 134, at 78. For example, even if the homicide rate of Blacks were excluded from overall national totals, the remaining average U.S. homicide rate still would be three to five times higher than that of other western industrial democracies such as Canada, Germany, France, and Britain. *Id.* at 80-81.

333. MAUER, *supra* note 45, at 50-55; JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 149-58 (1996).

relations and the politics of crime. Violent crime, especially robbery, is the most frightening because it is common, committed by strangers, and occurs when the victim is outside of the home.[334] So the increase in violent crime left the public vulnerable to "law and order" demagoguery.

Liberal Democrats failed to respond effectively to the rising crime rates and social disorder that coincided with the passage of federal civil rights laws and programs for the poor.[335] By contrast, conservative politicians, unencumbered by racial scruples, exploited those fears for electoral advantage. They decried a coming generation of "super-predators" suffering from "moral poverty."[336] They demonized young people to muster support for "wars" on crime and drugs.[337] They called for policies to transfer youths to criminal court.[338] The success of these conservative politicians was made possible by sensationalized media coverage of the increase in gun homicide by young black males.[339] This aided calls for a "crack down" on young offenders in general and violent minority offenders in particular.[340]

B. MEDIA COVERAGE AND THE BLACK FACE OF YOUTH CRIME

As a result of the structural transformation of cities since World War II, most black and white Americans live more

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334. *See* EDSALL & EDSALL, *supra* note 11, at 113.

335. *Id.* Edsall and Edsall observe that

[t]his is a dilemma that the Democratic party and liberals have been reluctant to address, a reluctance motivated by compassion, by fear of provoking backlash, and by the desire to preserve a basis for more effective policy interventions. This reluctance, no matter how understandable, has nonetheless eroded the political credibility of liberalism and of the Democratic party.

Id.

336. WILLIAM J. BENNETT ET AL., BODY COUNT 25-34, 59, 117, 194 (1996).

337. *See* ZIMRING, *supra* note 219, at 11; MAUER, *supra* note 45, at 126.

338. MAUER, *supra* note 45, at 12 ("[A]s 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."); *cf.* MILLER, *supra* note 333, at 4-9; ZIMRING, *supra* note 219, at 63.

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, YOUTH VIOLENCE, *supra* note 219, at 63.

339. BECKETT & SASSON, *supra* note 208, at 133-36.

340. MAUER, *supra* note 45, at 132-40.

residentially segregated lives now than they did at the beginning of the century.[341] About three-quarters of all Whites live in cities and suburbs whose populations are less than 5% black.[342] While some Whites may have first-hand exposure to urban squalor and crime victimization, most Whites' knowledge about Blacks comes from the media.[343] News reports depicting the black face of illegitimacy, drugs, crime, and unemployment all tend to reinforce racial prejudices.[344]

People are "cognitive misers" and engage in habitual modes of thinking to make sense of a complex world.[345] "Stereotypes" enable people quickly to simplify and organize complex social experiences and to place people into meaningful and manageable "types." Because of individual variability, judging people by their social group membership invariably produces errors and exaggerates differences among groups.[346]

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341. ENTMAN & ROJECKI, *supra* note 259, at 1 (noting that at the end of the twentieth century, "most Blacks still lived apart from Whites and lagged seriously behind in income, housing, health, and education").

342. J. Eric Oliver & Tali Mendelberg, *Reconsidering the Environmental Determinants of White Racial Attitudes*, 44 AM. J. POL. SCI. 574, 575 (2000); ENTMAN & ROJECKI, *supra* note 259, at 2 (noting that "most Blacks and Whites in the United States continue to live their private lives apart from one another").

343. EDSALL & EDSALL, CHAIN REACTION, *supra* note 11, at 236.

344. *See id.* About three quarters (76%) of the public get their information about crime from news and media reports rather than from personal experience. DORFMAN & SCHIRALDI, *supra* note 259, at 4.

345. ENTMAN & ROJECKI, *supra* note 259, at 57-58; MENDELBERG, *supra* note 12, at 117-21.

346. GILENS, *supra* note 15, at 160; *cf.* John Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 377-78 (1997) ("[S]tereotypes bias all stages of information processing (e.g., attention, retrieval, inference), such that they become strongly determinative of relevant judgments."); Mark Peffley et al., *The Intersection of Race and Crime in Television News Stories: An Experimental Study*, 13 POL. COMM. 309, 311 (1996) [hereinafter Peffley et al., *Race and Crime*] ("[S]elf-perpetuating expectations about groups and their members, by directing attention to information that is consistent with the stereotype. Information that is inconsistent, on the other hand, tends to be ignored, discounted, or interpreted so that it confirms the initial impression."); Mark Peffley et al., *Racial Stereotypes and Whites' Political Views of Blacks in the Context of Welfare and Crime*, 41 AM. J. POL. SCI. 30, 31 (1997) [hereinafter Peffley et al., *Racial Stereotypes*] (noting that "cognitive misers develop expectations based on their impression (or theories) of others to direct their attention to information that is consistent with the theory" and to disregard information that is inconsistent or to reinterpret it to become confirmatory); ENTMAN & ROJECKI, *supra* note 259, at 14 (arguing that "people use mental shortcuts (such as stereotypes) to interpret communications," the majority of Whites hold negative racial attitudes toward Blacks which are embedded in

Stereotypes are "quick and dirty" ways of thinking, and the shorthand judgments they produce "conceal complexity and make it less likely that people will notice exceptions to culturally driven, stereotyped expectation and understanding."[347]   Stereotypes are socially constructed and help to legitimate inequalities in the social order.[348]   The stereotypes that Whites hold of Blacks function as a perceptual "screen" that accepts information that supports the stereotype and blocks evidence that contradicts it.[349]

The "subconscious stereotypes" of news reporters and editors constitute one such screen that produces racially biased news reports about crime, drugs, and welfare dependency.[350] News professionals may *unconsciously* cater to the stereotypes of their audience.[351]   For instance, they may use images, pictures, and stories with a racial content that their viewers will recognize to create stronger emotional responses to a story.[352]

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their stereotypes, and media depictions that resonate with stereotypes consciously or unconsciously affect Whites' thinking about race).

347.   ENTMAN & ROJECKI, *supra* note 259, at 60.

348.   *See* GILENS, *supra* note 15, at 161 (noting that "[s]tereotypes of social groups are shared constructs that are learned from socializing agents such as parents, schools, and the media" and "[a]s a consequence, people may hold quite detailed (and wholly erroneous) stereotypes of social groups that they have never come in contact with").

349.   EDSALL & EDSALL, *supra* note 11, at 232; ENTMAN & ROJECKI, *supra* note 259, at 61-62 (arguing that "[s]kin color is often sufficient to stimulate expectations of stereotypic behavior"); *see* GILENS, *supra* note 15, at 159 (disputing the notion that there is even a "kernel of truth" in stereotypes and emphasizing that "the longevity of a stereotype appears to be more a consequence of its attractiveness to those who hold it than of any truth that it might contain").

350.   *See, e.g.*, GILENS, *supra* note 15, at 148 (arguing that the selection, shaping, and content of news images may reflect a subconscious process rather than deliberate bias).   Gilens observes that

> [t]he psychological notion of subconscious or "implicit" stereotyping rests on the idea that people hold a variety of beliefs and perceptions that influence their behavior but of which they are normally unaware. When people act purposefully and reflectively, their conscious beliefs and perceptions guide their actions, but when they act "on impulse" their subconscious stereotypes can influence their decisions.

Id. at 150.

351.   *Id.* at 148.

352.   *Id.* at 6 (arguing that "the overly racialized images of poverty and the association of blacks with the least sympathetic subgroups of the poor reflect news professionals' own racial stereotypes, which operate as an unconscious influence on the content of the news they produce").   Gilens asserts that

> [n]ews professionals may cater to the perceived stereotypes of their

"Crime" is a socially constructed phenomenon and "frames" represent alternative interpretations or explanations of the phenomena with different policy implications.[353]   The public policy choices to "get tough" on youth crime reflect the ascendance of certain ways of framing crime.[354]   Over the past few decades, the media have reinforced conservative interpretations of crime and put a black face on it.[355]   News coverage often influences public attitudes by "priming" popular perceptions through the weight of coverage attached to an issue.[356]   Popular attitudes typically reflect the claims and

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> readers by choosing images that they think will be most easily recognized as poor people or will be most likely to tap readers' emotional connections with the topic of poverty. Such a process need not entail a conscious effort to misrepresent the racial complexion of the poor.   It is just as likely to result from a lack of conscious attention to the racial imagery that accompanies stories on poverty.

Id. at 147. Despite a lack of conscious prejudice, "[s]ocial psychologists have demonstrated that even people who explicitly reject specific stereotypes often use those same stereotypes subconsciously in evaluating members of the relevant social group." *Id.* at 148; *see also* ENTMAN & ROJECKI, *supra* note 259, at 72 ("[J]ust like the largest portion of the audience, the mostly White males who manage media organizations are themselves steeped in the tacit assumption of a dominant culture that retains vestiges of prejudice.").

353. *See* BECKETT & SASSON, *supra* note 208, at 6-7. BECKETT, *supra* note 25, at 5 (arguing that public policies represent the ascendance of certain interpretations of social phenomena over others).

> Crime-related issues, then, are socially and politically constructed; they acquire their meaning through interpretive, representational, and political processes.   Social actors—sometimes called "claimsmakers"—struggle to gain acceptance for preferred ways of framing these issues and vie for limited access to public venues in order to promote them.   In these battles over the signification of crime-related problems, claimsmakers "deploy mediated symbols and mobilize powerful cultural references."

Id. (citations omitted). Similarly to the use of stereotypes, people use mental shortcuts like *schema* and *frames* as cognitive tools to simplify thought processes. ENTMAN & ROJECKI, *supra* note 259, at 48-49 (defining schema as "a set of related concepts that allow people to make inferences about new information based on already organized prior knowledge"). A schema enables a person to abstract from a specific word or symbol to a more generic category. *Id.* at 49. A "frame" such as a news report selects out certain elements of a story to evoke the viewers' schematic understanding about the event depicted. *Id.*

354. BECKETT, *supra* note 25, at 6 (public policies represent the outcome of symbolic struggles between contending actors framing social problems and competing to establish their version); MAUER, *supra* note 45, at 54-55.

355. MENDELBERG, *supra* note 12, at 134-64; *see, e.g.*, ENTMAN & ROJECKI, *supra* note 259, at 78-93; *cf.* GARLAND, *supra* note 6, at 157-58.

356. *See* Nicholas A. Valentino, *Crime News and the Priming of Racial Attitudes During Evaluation of the President*, 63 PUB. OPINION Q. 293, 294 (1999) (noting that the "media alters the weight attached to a given criterion

narratives about crime that dominate political rhetoric and media portrayals,[357] rather than reacting to real changes in crime rates.[358]

News media coverage has systematically distorted reality by overreporting violent crime and by overemphasizing the role of minority perpetrators in the commission of violent crime.[359] The overemphases on violence and race reinforce racial prejudices that, in turn, fuel harsher policies toward criminals.[360] This distorted news coverage amplifies the claims

by 'priming' a relevant issue"); *see also* BECKETT & SASSON, *supra* note 208, at 120 (concluding that "when a crime-related issue has risen to the top of the popular agenda, the public appears to be taking its cues from politicians and the news media—not the other way around"); GILENS, *supra* note 15, at 133-34 (noting that "news coverage has a special significance as a cultural product because we know that it not only reflects, but also influences, public concerns and beliefs"); Franklin D. Gilliam, Jr. et al., *Crime in Black and White: The Violent, Scary World of Local News*, 1 HARV. INT'L J. PRESS/POLITICS 6, 7 (1996) (noting that "in general, it has been well documented that the public political agenda is heavily influenced by patterns of news coverage; as the media become preoccupied with particular issues, so too does the public" (citation omitted)). The "priming" effect of this "standard crime script" is so powerful that in video experiments which made no reference to a perpetrator, 60% of respondents erroneously recalled seeing a perpetrator and in 70% of those cases, they identified the perpetrator as black. *See* Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 564 (2000).

357. *See* Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 119-20 (1992); *see, e.g.*, BECKETT & SASSON, *supra* note 208, at 85-88; BECKETT, *supra* note 25, at 6 ("Elite claimsmaking activities do not merely express popular sentiment but also seek to shape and transform it in accordance with particular visions of state and society."). Beckett argues that "popular attitudes about crime and drugs have been shaped to an important extent by the definitional activities of political elites. These actors have drawn attention to crime and drug use and framed them as the consequence of insufficient punishment and control." *Id.* at 27.

358. *See* BECKETT, *supra* note 25, at 25 (arguing that "[t]he public's propensity to identify crime and drugs as the nation's most important problems, then, is not primarily shaped by the reported incidence of those phenomena but does appear to be consistently related to prior political initiative on them"); BECKETT & SASSON, *supra* note 208, at 89-97 (noting the political and media construction of the drug crisis to build support for the "war on drugs").

359. DORFMAN & SCHIRALDI, *supra* note 259, at 3-4. A similar distortion occurs in the depiction of poverty, race, and welfare. *See* GILENS, *supra* note 15, at 149 (finding that "news coverage of poverty not only exaggerates the percentage of blacks among the poor but consistently portrays poor blacks more negatively than poor whites"); *see also* Gilliam et al., *supra* note 356, at 8 (finding that "local news programs are significantly distorted in two respects: they disproportionately portray crimes of violence, and they overrepresent African-Americans as perpetrators of violent crime").

360. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 89-97.

of politicians about the need to "get tough" on crime and allows them to enact racial animus in the guise of crime policies.[361]

1. Media Coverage—Crime Is Violent

For most people, knowledge of the world around them comes from their local television news.[362] The "construction" of news is a complex process that reflects journalistic values, the entertainment value of the content, and the sociopolitical context of its creation.[363] In an effort to increase audience shares and advertising revenues, local news programming favors an "action news" format.[364] Crime news coverage focuses on the most frightening and sensational forms of violence

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361. *See, e.g., id.*

362. *See, e.g., id.* at 77 (reporting that crime is a primary staple of news media coverage and accounts for about one-quarter of newspaper stories and one-fifth of local television news coverage); ENTMAN & ROJECKI, *supra* note 259, at 79 (noting that 72% of Americans regularly watch local television news compared with 56% who read daily newspapers and 41% who view national network news); Robert M. Entman, *Modern Racism and the Images of Blacks in Local Television News*, 7 CRITICAL STUD. MASS COMM. 332, 334, 342-43 (1990); Mary Beth Oliver, *Caucasian Viewers' Memory of Black and White Suspects in the News*, J. COMM., Summer 1999, at 47 (noting that "most individuals report that the media serve as their primary source of crime information").

363. *See* BECKETT & SASSON, *supra* note 208, at 77; ENTMAN & ROJECKI, *supra* note 259, at 211-12; *see, e.g.,* DARNELL M. HUNT, SCREENING THE LOS ANGELES "RIOTS": RACE, SEEING, AND RESISTANCE 29-32 (1997). Journalistic values and practices prize *objectivity* as a means of legitimating content and avoiding charges of subjectivity and bias. *Id.* at 29-30. Thus, live footage creates the appearance of reality rather than the end-product of editorial selectivity. *Id.* at 30. Journalistic routines rely on official sources in order to simplify coverage. *Id.* at 31-32. At the same time, television and news is a business whose ultimate goal is to deliver audiences to advertisers and it accomplishes this by emphasizing *entertainment values* and the broadest appeal to mass viewers:

> News (and television news in particular) is a business dependent not only on the timely coverage of "newsworthy" events, but also on the *attraction* of audiences and advertisers. The program content of the television apparatus—news programming included—serves as commercials for the commercials. As such, this content must maintain the interest of the audience, whose eyeballs advertisers "rent" for the purposes of persuasion. . . . This news-as-business reality has definite consequences for the format of news narratives. News stories tend to conform to formulas, which stress action, a quick pace, completeness, clarity with parsimony and high esthetic and technical standards.

HUNT, *supra*, at 31 (citations omitted); *see also* ENTMAN & ROJECKI, *supra* note 259, at 44 (arguing that television producers respond rationally to the economic need to attract audiences in order to increase advertising revenues).

364. Gilliam et al., *supra* note 356, at 7.

because these stories are concrete, visual, and emotionally powerful.[365] Local news coverage of crime typically follows a standard script that consists of two principle elements.[366] The first element is that crime is violent—murder, rape, robbery, or gang violence.[367] The second element features the presence of the "usual suspects"—perpetrators colored with racial imagery.[368] Combining images of violence and race exerts a pervasive and cumulative effect on public opinion; viewers exposed to violent, racial imagery tend to support more punitive policies.[369]

Crime news coverage tends to amplify, rather than to challenge, the claims of politicians about the need to "get tough" on crime. By focusing on the most frightening and sensational forms of violence, it reinforces racial stereotypes. News media depictions of crime do not reflect either rates of

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365. ENTMAN & ROJECKI, *supra* note 259, at 80; Gilliam et al., *supra* note 356, at 7.

366. *See* TED GEST, CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER 266 (2001) (crime media coverage relies on "formulaic methods"); *see, e.g.*, Gilliam et al., *supra* note 356, at 8 ("[T]he typical news story on crime consists of two 'scripts': crime is violent, and criminals are nonwhite."). Gilliam and Iyengar argue that

> local news coverage of crime follows a standard script that features
> two distinct elements. First, crime is violent. Armed bank robberies,
> homicides, "home invasions," carjackings, and gang-related activities
> are now staples of local news. The second element of the crime script
> is the presence of a particular suspect. Episodic reporting requires a
> regular "cast" of characters the most prominent of which is the
> suspect. Given the visual nature of the medium, the importance of
> the suspect to the script means that crime news is often accompanied
> by racial imagery.

Gilliam & Iyengar, *supra* note 356, at 560.

367. *See* Gilliam et al., *supra* note 356, at 8.

368. *Id.*; *see* Gilliam & Iyengar, *supra* note 356, at 561 ("[W]hat viewers learn about suspects is limited to visual attributes, most notably their race or ethnicity. As depicted in the local news, crime is violent, and criminal behavior is associated with race/ethnicity."); *see also* ENTMAN & ROJECKI, *supra* note 259, at 78 ("[C]rime reporting fashions a hierarchical racial divide that stereotypes Blacks and associates them with the wrong, dangerous side of the cultural continuum.").

369. *See, e.g.*, Gilliam & Iyengar, *supra* note 356, at 561 ("Viewers exposed to the 'racialized' element of the script become more supportive of capital punishment, mandatory sentencing, and other deterrent measures. Not unexpectedly, exposure to this version of the script also serves to substantiate negative attitudes about racial minorities."); Peffley et al., *Race and Crime*, *supra* note 346, at 310; Gilliam et al., *supra* note 356, at 7 (arguing that crime news coverage highlights violence and "links the issues of race and crime by overrepresenting minorities in the role of violent criminals and by according them distinctive forms of coverage").

crime generally, the proportion of violent crime, or the proportion of crime committed by minorities.[370]   Local and network television news and news magazines devote more coverage to crimes, especially violent ones, than they do to any other subject.[371] The mass media, especially the local electronic news media, overreport on the rarest types of crime, such as murder and rape: "[I]f it bleeds, it leads."[372]

Competition in the market for viewers had placed a premium on entertaining and sensational stories rather than serious, analytical news coverage.[373] During the 1990s, overall violent crime decreased 20% while crime news coverage increased 83%, and homicides declined by one-third while network news coverage of them increased 473%.[374] Although homicide accounts for less than 1% of crime, it constitutes about one-quarter of all crime news coverage.[375] The nearly exclusive focus on violent crime coverage distorts the actual distribution of serious criminal behavior in the real world because most crimes are property crimes committed by white

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370. DORFMAN & SCHIRALDI, *supra* note 259, at 7 (noting that "depictions of crime in the news are not reflective of either the rate of crime generally, the proportion of crime which is violent, the proportion of crime committed by people of color, or the proportion of crime committed by youth"); *see* ENTMAN & ROJECKI, *supra* note 259, at 80 (reporting that a typical local news segment depicts seven violent items that consumes about one-third of the broadcast time). Local crime news systematically deviates from actual crime statistics by "overrepresenting Black perpetrators, underrepresenting Black victims, and overrepresenting White victims." *Id.* at 81.

371. *Cf.* Gilliam & Iyengar, *supra* note 356, at 565.

372. *See, e.g.*, ENTMAN & ROJECKI, *supra* note 259, at 78 (observing that the slogan "registers the assumption that violence sells news, not just entertainment" and "[l]ocal news shows frequently broadcast more vivid images of violence than 'entertainment'—*real* blood, smashed windows, loaded guns, bodies on stretchers").

373. Gilliam et al., *supra* note 356, at 7 ("Television's insatiable demand for 'good pictures' and riveting stories means that the most gruesome or notorious episodes of crime receive extensive attention while other forms of crime are virtually ignored."); *see also* ENTMAN & ROJECKI, *supra* note 259, at 74.

374. DORFMAN & SCHIRALDI, *supra* note 259, at 10; *see* BECKETT & SASSON, *supra* note 208, at 77 (noting that the homicide rate declined 13% between 1990 and 1995, while network coverage of murder, excluding O.J. Simpson's trial, increased by 336%); MAUER, *supra* note 45, at 172-73.

375. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 78 (finding that less than 1% of crimes involve murders, but homicides comprise 26% of news stories); Gilliam & Iyengar, *supra* note 356, at 562 (finding that murder accounted for less than 1% of all crime in Los Angeles but comprised 17% of all crime news stories); Gilliam et al., *supra* note 356, at 9-10 (finding that violent crime comprised 30% of all crime but 78% of stories; homicide accounted for 2% of all felony incidents but 27% of crime news coverage).

offenders.[376] Because the violent crime depicted in the media typically involve strangers, even though acquaintances or intimates commit most violent crimes, television news coverage tends to reinforce the public perception of criminals as outsiders and predators.[377]

Crime coverage tends to focus on individual stories rather than to place crime in its social context.[378] Crime news stories focus on specific events rather than crime trends, neighborhood conditions, or the risk factors in a community that would place the criminal behavior in a broader perspective.[379] Indeed, even with additional context, concrete examples and compelling anecdotes affect public perceptions more powerfully than aggregate statistics, so simply providing accurate statistics fails to counteract the impact of vivid examples.[380]

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376. Gilliam & Iyengar, *supra* note 356, at 562; *cf.* Gilliam et al., *supra* note 356, at 15.

377. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 78-79 (finding that the media is more likely to report violent crimes committed by strangers than by acquaintances).

378. *See, e.g.*, DORFMAN & SCHIRALDI, *supra* note 259, at 7, 12 (finding that crimes are portrayed as distinct events unrelated to any broader context; crime news reporting is isolated from social, historical, or environmental contexts); *see* BECKETT & SASSON, *supra* note 208, at 80-81 (noting that crime news provides detailed accounts of individual events rather than broader trends or perspective); Gilliam et al., *supra* note 356, at 9 (finding that the overwhelming majority of crime news stories were episodic in nature). While poor black urban males commit violent crimes at higher rates than do Whites, media crime reportage omits the fact that these youths experience

> very much higher rates of discrimination, unemployment, ineffective schooling, single-parent upbringing, and other experiences that account for the differences in criminality. It is these experiences that tend not to be reported within the narrative of each specific crime. Stories that depict just the crimes themselves therefore provide a context-free version of Black crime, both in the aggregate and in the case of individual defendants (and victims).

ENTMAN & ROJECKI, *supra* note 259, at 70.

379. *See, e.g.*, ENTMAN & ROJECKI, *supra* note 259, at 72 (noting that professional norms almost militate against contextualizing crime stories or providing a broader framework within which to understand criminal behavior).

380. *See, e.g.*, GILENS, *supra* note 15, at 135-37. Gilens notes that

> [r]esearchers have shown that mass media can exert a powerful influence on public perceptions and attitudes, that concrete examples are more powerful influences on readers' beliefs than is aggregate information, that the content of news pictures is more likely to be remembered than the content of news stories, and that the race of people pictured in news stories is a salient and influential aspect of the story for many viewers.

Id. at 137.

The absence of reporting about context reinforces the interpretation of crime favored by conservatives. This happens because the missing context gives the impression that violent crime is exclusively attributable to individual offenders' bad choices rather than to structural features.[381] Because news coverage does not attend to the reality of crime rates and trends, it fails to provide sufficient context for the public to make reasoned judgments about crime and criminal justice policies.[382] News media coverage of criminal justice administration typically emphasizes the "failures"—defendants freed on legal "technicalities" and by lenient judges—and presents advocates for more severe punishment as the remedy.[383]

Several structural and economic factors distort and skew crime news coverage. "Availability"—access to news stories by journalists operating under time and logistical constraints—and "suitability"—importance, interest, and appropriateness to the intended audience—significantly determine the content of news reporting.[384] Large metropolitan media markets span

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381. ENTMAN & ROJECKI, *supra* note 259, at 72. Entman and Rojecki argue that

> [t]he idea of an in-depth report on the upbringing and experiences of even one criminal defendant, let alone on most of them would strike most journalists as inappropriate. Culture intersects with elite discourse and journalists' orientations to render such stories politically suspect; they might appear liberal to many conservative viewers, because delving into the context of crime as a way of explaining it may seem to be a way to morally excuse it. Implying that individuals are not fully in control of their destinies, that society as a whole bears some responsibility for social problems, also insults the conservative worldview.

Id.

382. *See* DORFMAN & SCHIRALDI, *supra* note 259, at 10-11 ("The repetition of the unusual has consequences for how audiences interpret crime. The steady diet of violent crime, coupled with the absence of nonviolent crime and general context, means that the rare crime looks like the normal crime; homicide is the prototypical crime in the news."); Roberts, *supra* note 357, at 119-20.

383. BECKETT & SASSON, *supra* note 208, at 81 (observing that crime is typically framed "as a consequence of the failures of the criminal justice system" and "[c]riminals escape punishment because of legal technicalities, liberal judges, and permissive laws").

384. *See* GILENS, *supra* note 15, at 140-41. News organizations and the context in which they operate affect the "availability" of news subjects. *Id.* at 141. Organizations and individuals make themselves available to journalists and the location of media producers primarily in urban centers affects the content of reportage. *Id.* Editors' judgments about "suitability" reflects their assessments of their audiences' expectations and their own conscious or

dozens of political jurisdictions and tend to focus on broad
general coverage—sports, weather, crime, disasters, and
human interest features—rather than the politics or policies of
a particular municipality.[385] Crime fascinates the public, and it
has greater "entertainment" value than longer analytical news
stories.[386] Journalists working under the pressure of deadlines
select subjects close at hand.[387] Most news media producers are
located in urban areas with large concentrations of poor Blacks
in crime-ridden neighborhoods.[388] Such neighborhoods provide
easy access to attractive and dramatic stories, which leads to
their overrepresentation in stories about crime.[389] The
resulting overrepresentation of minority suspects, in turn,
reinforces Whites' perceptions of the world and their
stereotypes about racial minorities.[390]

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subconscious valuations. *Id.* at 143-44. "While journalists' understandings of
society derive in part from their professional work, they inevitably share in
varying degrees the popular understandings, and misunderstandings, held by
the larger society in which they live." *Id.* at 144. "[A]vailability" affects
entertainment as well as new coverage of crime. MILLER, *supra* note 333, at
158-59.

385.   *See* Entman, *supra* note 362, at 338 ("In large metropolitan areas,
where the media market consists of dozens of political jurisdictions, local TV
cannot focus too much on the politics and policy of any one jurisdiction, so it
has to go with material of broader human interest . . . [such as] crime, fires,
and accidents; human interest features; sports; and weather."); Gilliam &
Iyengar, *supra* note 356, at 572 ("The commercial realities of our time dictate
that local news will continue to cultivate misperceptions and prejudice. Local
television stations reach huge audiences, but face intense economic pressures.
Crime dominates other news because its emphasis on vivid pictures and
emotional personal accounts is believed to attract viewers.").

386.   *See* GILENS, *supra* note 15, at 140-41; ENTMAN & ROJECKI, *supra* note
259, at 74; Gilliam et al., *supra* note 356, at 7; Gilliam & Iyengar, *supra* note
356, at 572.

387.   ENTMAN & ROJECKI, *supra* note 259, at 74 (contrasting the ease of
forcing a gang leader to be available for a "perp walk" with the inability to get
footage of a slumlord in violation of building codes).

388.   *See* GILENS, *supra* note 15, at 140-50.

389.   *See* ENTMAN & ROJECKI, *supra* note 259, at 73 ("[I]llustrating welfare
with a Black face, as the networks and newsmagazines do frequently and
disproportionately, also reflects unthinking habit and ready physical access
from downtown news bureaus to the Black poor."); GILENS, *supra* note 15, at
140-42; KENNEDY, *supra* note 76, at 378 ("[J]ournalists . . . gravitate toward
drug scenes that are simultaneously dramatic and accessible. It might be that
crack abuse is peculiarly concentrated and open in black neighborhoods and
that therefore they have been the locales most attractive to journalists
interested in reporting the crack story."); Valentino, *supra* note 356, at 297.

390.   *See* Valentino, *supra* note 356, at 295 ("[I]f opinions about two
substantively unrelated issues, like welfare and crime, are linked in memory
to one's racial attitudes, then exposure to crime should also activate race and

Social-structural features outside of newsrooms also affect reporters' access to sources and crime coverage. Reporters can produce crime news stories regularly and efficiently by using official sources that impart an aura of objectivity and credibility to the story.[391] This tendency to use official sources, such as law enforcement agencies, as sources for information affects the depiction, coverage, and content of crime news reporting. Police may focus on violent crimes—which they are more likely to solve—to portray themselves in a more favorable light.[392] Similarly, public officials who serve as sources of crime news may speak in populist and emotive terms and then purport to respond to the passions they cultivate in the media.[393] Politicians generate crime news stories to shape public attitudes and then promote the criminal justice policies that they believe will provide them with a political advantage.[394] Finally, because journalists and editors consume the news they produce, their systematic distortion of reality affects their own subjective perceptions, the editorial decisions they make, and the stories they subsequently present.[395]

2. Media Coverage—Violent Criminals Are Black

The media bias in coverage of violence also reinforces the connection between race and crime. The emphasis on black suspects amplifies for Whites the threat posed by "violent" and

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should subsequently activate other race-relevant issues, such as welfare.").

391. BECKETT & SASSON, *supra* note 208, at 81-82; HUNT, *supra* note 363, at 31 ("The socio-political climate is important to news selection and construction because newsworkers tend to favor 'legitimate' sources in the news gathering process. That is, newsworkers typically favor government officials or other elites as sources of 'news.'"); ENTMAN & ROJECKI, *supra* note 259, at 73 ("Professional norms demand that journalists choose conventionally credible sources, as certified by their rank and affiliation with the best-known institutions, and their ability to influence those institutions' decisions.").

392. DORFMAN & SCHIRALDI, *supra* note 259, at 28.

393. *See, e.g.,* GARLAND, *supra* note 6, at 157 ("TV has changed the rules of political speech. The TV encounter—with its soundbite rapidity, its emotional intensity, and its mass audience—has tended to push politicians to be more populist, more emotive, more evidently in tune with public feelings.").

394. For example, after Republican politicians declared a "war on drugs" during the 1980s, media coverage of drug stories increased sharply, shifted focus to crack rather than powder cocaine, increasingly depicted cocaine users and dealers as poor and non-white, participated in the creation of a "moral panic" that reinforced "get tough" rhetoric, and thereby abetted political advocacy of punitive sentencing laws. *See* BECKETT & SASSON, *supra* note 208, at 88-98.

395. *See* GILENS, *supra* note 15, at 147-50.

"aggressive" black males.[396] "Research of the Los Angeles local news revealed that when black criminal behavior was covered, black violent crime was covered disproportionately to black nonviolent crime."[397] Another study of Los Angeles local news revealed that over half of the crime stories explicitly referred to the ethnicity or race of the offender, 59% of violent crime stories implicated minority offenders, and Blacks comprised the largest group of minority offenders identified.[398] When police arrest offenders for violent crimes, media reports more frequently portray black offenders anonymously, handcuffed, spread-eagled, and poorly dressed than they do violent white offenders.[399] Such depictions create, in the minds of white

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396. *See* Valentino, *supra* note 356, at 315-16; Entman, *supra* note 362, at 336 (finding from a study of one week of local news broadcasts that in eight instances in which lead stories featured Blacks, six involved violent crimes).

397. Gilliam et al., *supra* note 356, at 12-13. "[T]he news tends to exaggerate existing racial differences in actual crime rates by disproportionately depicting blacks in the role of violent perpetrators and whites as nonviolent perpetrators." *Id.* at 15.

398. *See* Gilliam & Iyengar, *supra* note 356, at 562.

399. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 79; DORFMAN & SCHIRALDI, *supra* note 259, at 15 (reporting from Robert M. Entman's collected research that "Black suspects were less likely to be identified by name as were White suspects; were not as well dressed as White suspects on the news; and were more likely to be shown physically restrained than Whites"); MILLER, *supra* note 333, at 150 ("'[T]he suspects seen on television being arrested in muggings and shootings are almost always black men in their teens and 20's, and they figure hugely in the prevailing anxiety, among blacks as well as whites over personal safety.'" (quoting television critic Walter Goodman)); Robert M. Entman, *Blacks in the News: Television, Modern Racism and Cultural Change*, 69 JOURNALISM Q. 341, 349-53 (1992); Peffley et al., *Race and Crime*, *supra* note 346, at 310 ("[B]lacks [are] more likely than whites to be portrayed as criminal suspects . . . [and] are also more likely to be depicted as physically threatening and in ways that presume their guilt.").

In one analysis of local crime news coverage, "the accused black criminals were usually illustrated by glowering mug shots or by footage of them being led around in handcuffs, their arms held by uniformed white policemen," whereas no violent white criminal was shown in mugshots or in handcuffs during the same period. Entman, *supra* note 362, at 337; *see also* MILLER, *supra* note 333, at 174-75 ("The centerpiece of law enforcement was its preoccupation with highly visible groups who could be relatively easily and *publicly* arrested. The crown jewel was the handcuffed black youth or young man paraded before TV cameras so all might behold this symbol of lawlessness and disorder.").

Another study analyzed the differences in televised depictions of black and white defendants and found Blacks more likely to be shown in the physical control of police, dressed in street or jail clothing, depicted in unflattering mug shots, and less likely to be named and described as an individual, thereby creating a general impression of undifferentiated, generic black criminals. ENTMAN & ROJECKI, *supra* note 259, at 82-84. By contrast,

viewers, a heightened perception of threat by Blacks.[400]
Depicting black criminals as unidentified, "nameless" suspects
contributes to the racial stereotyping of Blacks.[401]

Conversely, news media disproportionately depict crime
victims as female, white, and affluent.[402] In fact, these groups
experience less victimization than other demographic groups,
especially Blacks.[403]   The newsworthiness of crime stories
increases with white victims, decreases with black victims, and
is strongest when crime is interracial.[404]

The skewed emphasis on violence, the disproportionate

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many of the accused violent Whites in the Chicago news reports were
alleged organized crime figures who had money. They could afford
bail, good legal representation, and advice on handling the press.
Since they were not in jail, these individuals naturally appeared less
often in scenes of physical custody, and they could dress more
formally.

Id. at 84-85.

400. *See* ENTMAN & ROJECKI, *supra* note 259, at 94; Gilliam et al., *supra*
note 356, at 15; Gilliam & Iyengar, *supra* note 356, at 570.

401. Entman, *supra* note 399, at 350.

Prejudice is fed by a tendency to homogenize, to assume there are no
significant differences among individual members of the outgroup. When
blacks are not given a name in a picture, it suggests the visual
representation can be assimilated to a larger, undifferentiated group, in
this case the stereotype of a dangerous black male.

Id.

402. BECKETT & SASSON, *supra* note 208, at 79; DORFMAN & SCHIRALDI,
supra note 259, at 13-14; ENTMAN & ROJECKI, *supra* note 259, at 81-84.

403. *See* DORFMAN & SCHIRALDI, *supra* note 259, at 13-14; ENTMAN &
ROJECKI, *supra* note 259, at 81-84.

404. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 79-80 (overreporting
of white, affluent, and female victims); DORFMAN & SCHIRALDI, *supra* note
259, at 13; Entman, *supra* note 362, at 337 (observing that "white
victimization by blacks appeared to have especially high priority" in crime
news reporting); *see also* ENTMAN & ROJECKI, *supra* note 259, at 81 (analyzing
the characteristics of and reporting about victims and finding that "White
victims outnumbered Blacks in news reports—even though Blacks in Chicago
and most core cities are more likely to be victimized"); GARLAND, *supra* note 6,
at 158 (contending that "[t]elevision's selective coverage of factual crime
stories and its unrealistic crime dramas tend to distort public perceptions of
the problem").   Entman's analysis of crime news coverage of an incident
between white and black girls on a Chicago bus noted that

[t]he whites' perspective on the event dominated the story. . . . [T]he
whites' version was clearly favored through the order of presentation,
the amount of time devoted to it, and the visuals. . . . Television's
class bias apparently assumes that the middle class, loyal to the
forces of law and order, presumes accused perpetrators to be guilty,
especially when the offenses are those normally associated with the
lower classes (street crime).

Entman, *supra* note 356, at 337-38.

coverage of black violent crime relative to coverage of black crime generally, and their underrepresentation as victims combine to systematically prevent public understanding of crime and justice by reinforcing the pejorative stereotypes of Blacks as dangerous and violent people.[405] Media framing, modern racism,[406] and distorted public attitudes have led to a racialization of crime and public policy.[407] Media depictions of crime in violent and racial terms activate white viewers' racial stereotypes about minorities that skew their views about crime and punishment.[408] The structure of coverage reinforces the conservative position that punishment is the most appropriate response to the crimes.[409] These portrayals reinforce racist

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405. *See* Gilliam et al., *supra* note 356, at 8 ("Exposure to criminal activity committed by nonwhites in and of itself makes viewers more concerned about crime. Most important, the media has, in effect, defined crime in racial terms, and this serves to activate widely shared stereotypes about racial minorities."); Oliver, *supra* note 362, at 46-47 (research on Whites' perceptions of and reactions to crime indicates that they associate violent crime with Blacks as opposed to Caucasians, view minority suspects as more likely to be guilty of the offenses with which they are accused than Whites, and have greater fear for their personal safety from Blacks than Whites); *see also* ENTMAN & ROJECKI, *supra* note 259, at 82 ("[T]elevised violence promotes anxiety and hostility in audiences. The racial subtexts raise the possibility that televisual violence could be focusing those anxieties and hostilities, among Whites, most intensely on Black persons.").

406. *See infra* notes 459-61 and accompanying text defining and describing "modern racism."

407. Politicians have enacted many recent "tough on crime" measures—Megan's law, Three Strikes, juvenile transfer laws, and the like—in the wake of public outrage about a sensational crime and do so as much for cathartic and expressive purposes to denounce crime and to reassure the public as for their practical impact on crime. GARLAND, *supra* note 6, at 133 ("Typically these measures are passed amidst great public outrage in the wake of sensational crimes of violence, often involving a disturbingly archetypal confrontation between a poorly controlled dangerous criminal and an innocent, defenceless middle-class victim.").

408. *See* MENDELBERG, *supra* note 12, at 120-25. Gilliam and Iyengar conclude from their survey that

> exposure to local news coverage of crime conditions attitudes toward crime and race. In particular, the racial element of the crime script (as opposed to the violent element) has the most demonstrable impact. Our experiments show that for white viewers, a brief five-second exposure to a black perpetrator in the news is sufficient to stimulate small increases in the percentage of people who believe crime is caused by individual failings and who support punitive crime policies.

Gilliam & Iyengar, *supra* note 356, at 571.

409. *See* GARLAND, *supra* note 6, at 175 ("The offenders dealt with by probation, parole, and the juvenile court are now less likely to be represented in official discourse as socially deprived citizens in need of support.").

attitudes, lend support to policies of segregation, sustain popular perceptions of Blacks as dangerous and undeserving, activate negative racial stereotypes, and foster more punitive policies.[410]

C. THE POLITICS OF CRIME: "WEDGE ISSUES" AND "CODED" RACIAL APPEALS

1. The Use of "Wedge Issues" to Form a New Conservative Coalition

The widespread adoption of laws to "crack down" on youth crime in the early 1990s culminated the politicization of crime and juvenile justice policies that actually began several decades earlier. Social problems, such as poverty or crime, may be interpreted in different ways that have distinct policy implications. Indeed, the definition of a particular condition as a social problem at all emerges in a process of "social

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410. *See, e.g.*, DORFMAN & SCHIRALDI, *supra* note 259, at 23 (reporting that "'a mere five-second exposure to a mug shot of African American and Hispanic youth offenders (in a 15-minute newscast) raises levels of fear among viewers, increases support for 'get tough' crime policies, and promotes racial stereotyping'" (quoting F.D. Gilliam and S. Iyengar, *The Superpredator Script*, 52 NIEMAN REPORTS, Winter 1998, at 46)); GILENS, *supra* note 15, at 140-53; KENNEDY, *supra* note 76, at 4-5; Gilliam & Iyengar, *supra* note 356, at 570 ("[E]xposure to the crime script significantly influences attitudes about both crime and race. . . . [I]t is the *racial* element of the crime script, however, that is the dominant cue."); Hurwitz & Peffley, *supra* note 346, at 376 (individuals link race with criminal activity and base views on crime on their judgments about Blacks).

Experimental research reports that even brief exposure to a black male in a televised crime story activates Whites' stereotypic reaction based on global stereotypes about black male violence. Experimental participants with anti-black attitudes were more likely to misidentify and recall a black subject of a crime news story than a white one, thereby sustaining their stereotype by discounting inconsistent information. *See* Oliver, *supra* note 362, at 56. Viewers of a crime story who held more negative racial stereotypes also were more likely to believe the black suspect was guilty, deserved more punishment, and was more likely to be violent in the future. *See* Peffley et al., *Race and Crime*, *supra* note 346, at 321 (observing that study participants who viewed video tapes with identical audio and visual content except for manipulation of the race of the subject and who held negative racial stereotypes of Blacks "clearly employed a racially discriminatory double standard in the viewing of the black suspect in the crime story as more guilty, more deserving of punishment, more likely to commit future violence, and with more fear and loathing than a similarly portrayed white suspect"); BECKETT, *supra* note 25, at 84 (explaining that Whites tend to be more punitive than Blacks, especially when the defendant is black or Latino).

construction."[411] "Claims-makers," such as politicians, compete for public acceptance of their preferred interpretations, or "frames."[412] The mass media play a crucial role in shaping the popular culture and creating the context within which issues involving race are framed.[413] Over the past three decades, conservative politicians have altered public perceptions about the nature and scope of crime, attributed the causes of crime to individual choices rather than to social-structural forces, assigned responsibility to excessively lenient criminal justice agencies, and promoted policies to "crack down" as part of a broader strategy for electoral advantage.[414] Since the 1970s, a reactionary quality has dominated American political discourse—not simply as a political characterization of conservatism, but also in a desire to restore a previous, more stable social order.[415]

Conservatives linked race with crime as early as the latter stages of the civil rights movement. Following *Brown v. Board of Education*, civil rights activists responded to the southern strategy of "massive resistance" with "direct action" and civil disobedience, such as sit-ins, to desegregate public facilities.[416]

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411. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 47 ("Crime-related issues are thus socially and politically constructed: they acquire their meaning through struggles over their interpretation and representation."); MILLER, *supra* note 333, at 2-3 (explaining that "social problems 'are fundamentally products of a process of collective definition' and do not exist 'as a set of objective social arrangements with an intrinsic makeup'").

412. BECKETT & SASSON, *supra* note 208, at 47-48 ("Social actors—sometimes called 'claims makers'—compete for the public's attention and attempt to gain acceptance for the frames they prefer.").

413. ENTMAN & ROJECKI, *supra* note 259, at 49 ("Lacking much opportunity for repeated close contact with a wide variety of Blacks, Whites depend heavily on cultural material, especially media images, for cataloging Blacks.").

414. *See* BECKETT, *supra* note 25, at 85-88 ("The rise of racial attitudes as the primary determinant of partisan loyalty and the association between racial attitudes and beliefs about crime and punishment help to explain the utility of crime-related issues to the Republican party.").

415. GARLAND, *supra* note 6, at 94-102; *see also* HACKER, *supra* note 48, at 209 ("Sometime during the mid-1970s, changes began to be observed in the attitudes of white citizens who had earlier been willing to support measures intended to bring black Americans to parity."); *supra* notes 238-40 and accompanying text.

416. BECKETT & SASSON, *supra* note 208, at 49; OMI & WINANT, *supra* note 7, at 98. In addition to officially sanctioned public resistance to school desegregation, in the first five years after *Brown*, white supremacists engaged in numerous racially motivated crimes including six homicides, twenty-nine armed assaults, forty-four beatings, and sixty bombings. KENNEDY, *supra*

When southern intransigence forced the civil rights movement to adopt disruptive strategies, however, southern political and law enforcement officials reacted violently to suppress protesters, and characterized them as "criminals" and "mobs" who posed a threat to the social order.[417] Subsequently, local and national conservative politicians equated political dissent with crime, identified the civil rights movement's use of civil disobedience as a cause of crime, and urged its swift and severe suppression.[418] Thus, the link between race and crime became a key element in conservative political discourse very early on.

Divisions within the Democratic Party between social policy liberals and conservative southerners first emerged in 1948.[419] By the 1960s, the civil rights movement forced the national Democratic party to choose between its white southern and black northern constituencies.[420] Although most

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note 76, at 63.

417. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 49 (asserting that southern officials called for a crackdown on the "'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 25, at 28 (noting "the discourse of law and order was initially mobilized by southern officials in their effort to discredit the civil rights movement").

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

BECKETT, *supra* note 25, at 32.

419. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 56. The Democratic New Deal coalition included white southerners, urban ethnic groups, and the recent black migrants to northern cities. In 1948, Democrats adopted a strong civil rights platform, and white voters in four southern states reacted by giving their electoral votes to the States Rights Party. *See supra* notes 70-72 and accompanying text. Subsequent Democratic efforts to win back disaffected white southern "Dixiecrats" and to appease racist sentiments enabled the Republicans to garner 21% of the black vote in 1952 and 39% in the 1956 presidential elections. BECKETT, *supra* note 25, at 40.

420. *See* EDSALL & EDSALL, *supra* note 11, at 34-35 (emphasizing that the

Americans agreed in theory with principles of equality, many disagreed with the specific mechanisms necessary to achieve it.[421] Moreover, by the 1960s, the burden of integrating schools, housing, and employment fell more heavily on blue-collar and lower middle-class white urban ethnic neighborhoods.[422] The expanding "rights revolution" and the associated social and cultural changes disturbed and angered many members of the white working and lower middle classes who bore the brunt of the changes.[423]

During the turbulent 1960s, the sharp rise in youth crime and urban racial disorders evoked fears of "crime in the streets" and provoked cries for "law and order."[424] Conservative political rhetoric framed the issue of "street crime" in terms of dangerous and undeserving individuals rather than in terms of

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reorientation of both political parties simultaneously around the issue of race in the mid-1960s put them on a collision course over issues of race). Under Presidents Kennedy and Johnson, the national Democratic party severed its bonds with its segregationist electorate and formed a party alignment with the civil rights movement and black America. *Id.* at 34-36. At the same time, conservative Republicans, drawing heavily on southern support, toppled the more liberal, pro-civil rights, eastern-establishment wing of Rockefeller Republicans. *Id.* at 35. Kennedy's initial vacillation in support of civil rights can be attributed to his hope to recapture white southern support. BECKETT & SASSON, *supra* note 208, at 56 ("Indeed, only under the extreme pressure generated by the civil rights activists did Kennedy finally declare his allegiance to the civil rights cause.").

421. MENDELBERG, *supra* note 12, at 93-98. Mendelberg notes that while Whites outside the South endorsed the norm of racial equality and repudiated the ideology of white supremacy, "[a]s soon as the civil rights agenda called for implementing change outside the South, support among whites plummeted." *Id.* at 93. With the adoption of the Civil Rights Act, white Northerners believed that racial equality of opportunity already existed and that any further remedy was a matter of black efforts rather than eliminating discrimination:

> Working for integrated schools, targeting housing discrimination, reining in the brutality of local white police forces, and examining the hiring and promotion practices of employers were salient efforts of both the southern civil rights movement and of northern activists. Whites outside the South were much more sympathetic to these efforts in the South than in their own towns and cities; the problem of civil rights, they believed, had existed in the South, but never in the North.

Id. at 94; *see also*, EDSALL & EDSALL, *supra* note 11, at 57-64, 72-73.

422. *See* EDSALL & EDSALL, *supra* note 11, at 57-61.

423. *See id.* at 71 ("Fairly or unfairly, rioting and black radicalism were seen as fusing with a white student Left . . . which championed lifestyles and rhetoric calculated to drive its most sought-after ally, the working class, into the arms of conservative Republicanism.").

424. *See id.* at 59-61; GARLAND, *supra* note 6, at 97.

criminogenic social conditions and promoted punitive criminal justice policies rather than ameliorative social welfare measures.[425] During this period, the Republican party initiated

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425. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 10 (Responding 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 25, 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 48, at 210 ("[P]laying 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.").

The increased racial polarization between Democrats and Republicans coincided with increased conservatism in public attitudes about other public policies related to issues of race. Americans value individualism, self-reliance, and personal responsibility values that tend to emphasize individual choices rather than social structural determinants of criminal behavior. *See* GARLAND, *supra* note 6, at 15; GILENS, *supra* note 15, at 5; *see also* BECKETT & SASSON, *supra* note 208, at 132-33 (noting that American political culture is rooted in values of self-reliance and individualism); BECKETT, *supra* note 25, at 12. Beckett suggests that "get-tough discourse does resonate with important sentiments and myths that characterize American political culture." *Id.* "For example, the neoclassical depiction of crime as an individual choice is consonant with the individualism that is so pronounced in American life." *Id.*; *see also* HACKER, *supra* note 48, at 55-70 (discussing differences between liberal and conservative views on the responsibility of Whites for the circumstances of Blacks, the ways in which social structures and individual choices affect the behavior of Blacks, and the appropriateness of governmental programs to alleviate past or present causes of racial inequality); MASSEY & DENTON, *supra* note 16, at 169.

The emphasis on individual responsibility and hard-work also influences American attitudes toward public welfare to strongly differentiate between the *deserving* and *undeserving* poor. *See* GILENS, *supra* note 15, at 5 (arguing that "individualism does not lead to a principled rejection of government support for the poor, but rather to a strong demand that welfare recipients, like everyone else, share a commitment to individual effort and responsibility"); *see also* BECKETT & SASSON, *supra* note 208, at 52; Donald R. Kinder & Tali Mendelberg, *Cracks in American Apartheid: The Political Impact of Prejudice Among Desegregated Whites*, 57 J. POL. 402, at 406 (analyzing survey data that show Whites' attitudes toward Blacks characterize them as lazy, lacking motivation, and preferring to live on welfare).

Ideology, media coverage, and politics interact to produce ever harsher policies toward young offenders. *See* BECKETT, *supra* note 25, at 80 ("[T]he trend toward greater public punitiveness did not precede the adoption and implementation of tough anticrime policies; officials have played a crucial role in framing the crime and drug issues in ways that imply the need for them."); Alida V. Merlo, *Juvenile Justice at the Crossroads: Presidential Address to the*

a full-scale attack on liberal social policies and ascribed escalating crime, campus disorders, urban riots, welfare dependency, and social upheavals to the permissive Warren Court and its liberal Democratic supporters.[426]

Crime and welfare policies acquired a distinctive racial coloration as conservatives cast Blacks and their Democratic allies as the villains.[427] The polarization of the two political parties on issues of race had its inception in the 1964 presidential confrontation between Lyndon Johnson, whose leadership led to the passage of the 1964 Civil Rights Act, and Barry Goldwater, a staunch conservative and ideological opponent of the Act.[428] Democratic support of the civil rights

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Academy of Criminal Justice Sciences, 17 JUSTICE Q. 639, 639-41 (2000). Since the 1960s, politicians' fear of being labeled by their opponents as "soft-on-crime" and demagogic appeals in an era of 30-second commercials have led to a constant ratcheting-up of punitiveness as politicians avoid thoughtful discussions of complex crime policy issues. *See* BECKETT, *supra* note 25, at 86. Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, 40 CRIME & DELINQ. 475, 489 (1994) (arguing that politicians quickly seize the low ground in policy debates about crime).

426.   EDSALL & EDSALL, *supra* note 11, at 51-73; GILENS, *supra* note 15, at 116-23; MENDELBERG, *supra* note 12, at 93-98.

427.   On the matter of racial animus in welfare policies and politics, see for example Gilens, who notes that

[t]he distinction between the deserving and the undeserving poor is an old one, as is the stereotype of blacks as lazy. But these two sets of attitudes became entwined in the mid-1960s when poor blacks first came to the widespread attention of the American media and the American public. The already existing belief that blacks were lazy contributed to the negative media coverage of the black poor over the ensuing decades, and this coverage has in turn helped to perpetuate the stereotype of blacks as lazy and the black poor as undeserving.

GILENS, *supra* note 15, at 205. *See generally* OMI & WINANT, *supra* note 7, at 88-89 (arguing that racial change occurs in the context of the interaction between social and political movements and the State). They argue that in the period after World War II, the civil rights movement challenged the prevailing racial ideology in which the State itself supported, or at least condoned, segregation and racial exclusion and inequality. *Id.* at 97-101. The civil rights movement destabilized the State, which maintained that racial ideology and led to a process of racial reform. *Id.* at 88. And, in response,

the reformed racial state became the target for further challenge, this time from the right. Racial politics now take place under conditions of "war of position," in which minorities have achieved significant (though by no means equal) representation in the political system, and in an ideological climate in which the *meaning* of racial equality can be debated, but the desirability of some form of equality is assumed.

Id.

428.   *See* EDSALL & EDSALL, *supra* note 11, at 35. The 1964 Republican party convention rejected a party platform in favor of civil rights by a two-to-

movement alienated white southern voters, and that presaged the racial realignment of American politics as voters began to identify clear differences between the two parties on a host of race-related issues.[429]   Republican politicians seized on this alienation by emphasizing crime, affirmative action, and welfare—racially tinged "wedge issues" that distinguished them from Democrats.[430]   Crime policies for the first time became a central issue in partisan politics.

Although the initial civil rights agenda focused on guaranteeing the fundamental rights of citizenship for Blacks, such as the right to vote and equal access to public accommodations, the post-1964 civil rights agenda focused on broader goals such as assuring equality of outcomes, often through the use of racial preferences.[431] While liberals argued that the state bore a responsibility to reduce the social-structural forces, racial inequality, and limited economic opportunity that they viewed as the "root causes" of crime and poverty, conservatives argued that social programs only encouraged poor choices by irresponsible individuals whom they believed to be solely to blame for the phenomenon of crime.[432] During the mid-1960s, the long-standing distinctions

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one margin. *Id.* at 44; *see also* Edsall & Edsall, *supra* note 1, at 62 ("By 1964 the Democrats had become the party of racial liberalism and the Republicans had become the party of racial conservatism.").

429. *See* BECKETT & SASSON, *supra* note 208, at 52-58; EDSALL & EDSALL, *supra* note 11, at 74-84; GILENS, *supra* note 15, at 116-23; MENDELBERG, *supra* note 12, at 81-93.

430. *See, e.g.*, BECKETT, *supra* note 25, at 30-43; EDSALL & EDSALL, *supra* note 11, 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 were among the most liberal constituencies on a host of economic issues, supporting government intervention in support of medical care, education, and employment. EDSALL & EDSALL, *supra* note 11, at 41. However, southern populism and economic liberalism foundered on racial hostility to Blacks and the perception that federal programs primarily benefited Blacks. *Id.* at 42; MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 149 (2d ed. 1994) (describing how racial politics served as a powerful wedge issue to fracture the liberal, New Deal economic coalition of the poor, working, and middle-classes).

431. *See* EDSALL & EDSALL, *supra* note 11, at 7; OMI & WINANT, *supra* note 430, at 106 (arguing that the state response to Civil Rights demands for reform included tactics of "absorption" and "insulation," which defused, co-opted and moderated the quest for equality).

432. *See, e.g.*, BECKETT, *supra* note 25, at 11 (asserting that movements for civil and welfare rights represented a battle over responsibility of federal

between the deserving and undeserving poor and the stereotypic belief that Blacks were lazy became intertwined when poor urban Blacks came prominently to the attention of the American media and public.[433] Conservatives strongly opposed governmental actions to redistribute public and private goods—jobs, education, housing, cultural authority, and the like—in pursuit of greater racial equality.[434] Negative media coverage only reinforced these public perceptions of Blacks as criminals and undeserving.[435]

The civil rights movement changed the meanings of liberalism and conservatism and the respective perceptions of the Democratic and Republican parties. Increasingly, "the Democratic party came to be perceived ... as promoting the establishment of new rights and government guarantees for

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government to create a more egalitarian society); ENTMAN & ROJECKI, *supra* note 259, at 43 ("Denials of these structural barriers tend to exonerate the system, assume the openness and efficiency of the economic market, and locate problems and solutions almost exclusively within the ambit of individual activity."); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980, at 38-40 (1984) (arguing that government welfare policies created the black underclass by reducing the employment incentives for poor people and decreasing women's incentives to marry by increasing the benefits they received for out-of-wedlock childbearing).

433. *See* GILENS, *supra* note 15, at 3 (asserting that Americans hate welfare because they believe that it rewards the *undeserving* poor, that the majority of welfare recipients are black, and that Blacks are undeserving because they evince less commitment to the work ethic than do other groups); *see also* BECKETT & SASSON, *supra* note 208, at 10 (observing that conservative politicians argued that immoral individuals rather than social and economic conditions produced crime and welfare dependency, redefined the poor and black population as undeserving and dangerous, and advocated crime control instead of social welfare policies).

434. *See* EDSALL & EDSALL, *supra* note 11, at 98; BECKETT & SASSON, *supra* note 208, at 10-11. Edsall and Edsall explain that

    [r]ace facilitated the beginning of an ideologically conservative conversion of the electorate, as the social costs of programs such as housing integration, busing, and affirmative action became indissolubly fused in the minds of crucial numbers of voters with steeply rising taxes, cultural metamorphosis, increases in violent crime, expanding welfare rolls, greater numbers of illegitimate children, and evidence of the deterioration of both black and white family structures.

EDSALL & EDSALL, *supra* note 11, at 98.

435. *See, e.g.*, BECKETT, *supra* note 25, at 33-34; EDSALL & EDSALL, *supra* note 11, at 151 (noting that "a wide range of social developments, including the emergence of a growing urban underclass and the associated problems of crime, joblessness, and urban school failure, were becoming, in the public mind, indelibly associated with race through the growing body of statistical information demonstrating disproportionate black involvement"); GILENS, *supra* note 15, at 3.

previously marginalized, stigmatized, or historically disenfranchised groups, often at the expense of traditional constituencies."[436]   Many of the remedies instituted by the Warren Court to end racial segregation and to grant rights to unpopular groups, such as criminal defendants, became associated in the public mind with the liberal agenda of the Democratic party.[437] Finally, structural economic changes and the expansion of the middle class encouraged many voters to reconsider their previous support for progressive social welfare policies in favor of more conservative positions.[438]

In 1968, George Wallace helped to redefine the white backlash as a Right-wing populism against moral, racial, and cultural liberalism.[439] Wallace's populist rhetoric helped to forge a coalition between working-class white voters and traditionally affluent Republican voters against "an elitist Democratic establishment intent on collecting higher taxes in order to conduct what he described as liberal social experiments."[440] Similarly, Richard Nixon's 1968 campaign

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436.   EDSALL & EDSALL, *supra* note 11, at 8. At a more theoretical level, Omi and Winant described the changing perceptions as the contest among social movements about the nature of political discourse and the role of race:

> The state reforms won by minority movements in the 1960s, and the racial definitions and meanings embodied in these reforms, provided a formidable range of targets for "counter-reformers" in the 1970s and 1980s. "New right" and neoconservative currents . . . were able to carry on their own political "project." They were able to rearticulate racial ideology and restructure racial politics once again.

OMI & WINANT, *supra* note 430, at 91.

437.   *See* EDSALL & EDSALL, *supra* note 11, at 46 (noting that "[l]argely through its commitment to civil rights—of which the rights of blacks were the primary focus—the Democratic party became the defender of an expanded network of broader rights established in a sequence of far-reaching decisions by the federal bench").

438.   EDSALL & EDSALL, *supra* note 11, at 11 (viewing "[t]he 'embourgeoisement' of working and lower-middle-class white voters" as critical to the establishment of conservative, upwardly redistributive Republican legislation); GARLAND, *supra* note 6, at 96-97 (arguing that many voters who traditionally had supported social democratic policies began to rethink their relationship to the welfare state).

439.   *See* EDSALL & EDSALL, *supra* note 11, at 77 ("Wallace portrayed the civil rights issue . . . as the imposition on working men and women of intrusive 'social' policies by an insulated, liberal, elitist cabal of lawyers, judges, editorial writers, academics, government bureaucrats, and planners . . . ."); *see also* OMI & WINANT, *supra* note 430, at 124 (calling Wallace a law and order, antistatist, southern populist who made racial appeals the centerpiece of his campaign).

440.   EDSALL & EDSALL, *supra* note 11, at 79; *see also* PHILLIPS, *supra* note 11, at 463 ("The common denominator of Wallace support, Catholic or

attributed urban riots and rising crime rates to liberal "permissiveness"[441] and criticized the Warren Court for "coddling criminals" and "handcuffing the police."[442] 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."[443] Appeals for "law and order" quickly acquired a racial subtext as conservatives equated political dissent with crime.[444] Nixon effectively straddled the conflict by professing support for the abstract principle of racial equality while simultaneously opposing government-driven enforcement mechanisms.[445] He found a message that encompassed the position of the growing majority of white Americans who had come to believe that denying basic citizenship rights to Blacks was wrong, but opposed the prospect of forced residential, economic, and educational integration.[446]

Protestant, is alienation from the Democratic Party and a strong trend . . . 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.").

441. *See* BECKETT, *supra* note 25, at 38 (finding that 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).

442. POWE, *supra* note 8, at 399 (stating that Nixon's standard domestic policy stump speech emphasized "crime in the streets" and urban riots); *see also* GEST, *supra* note 366, at 14 (noting that during the 1968 presidential campaign, Nixon gave seventeen speeches on law and order).

443. *See supra* notes 219-37 and accompanying text.

444. BECKETT & SASSON, *supra* note 208, 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.").

445. EDSALL & EDSALL, *supra* note 11, at 74-80; *see also* MENDELBERG, *supra* note 12, at 95-96 (arguing that "[a]s 1968 approached, it was clear to Richard Nixon that racial appeals should play a key, though coded, role in his campaign"). Nixon adopted his coded racial appeals from the success of Goldwater's 1964 campaign in the South and Wallace's 1968 campaign in the North, but he played the "race card" with deniability. *See* MENDELBERG, *supra* note 12, at 97 ("Law and order for Nixon boiled down to the 'damn Negroes,' but he could not say this in his ad. . . . He intended to convey racial meaning implicitly. He wanted to appeal to racial stereotypes, fears, and resentments, yet conform to the norm of racial equality.").

446. EDSALL & EDSALL, *supra* note 11, at 74-75; Edsall & Edsall, *supra* note 1, at 63; *see also* Entman, *supra* note 362, at 334 (arguing that while the overt expression of racist opinion has decreased, many Whites still oppose policies to eliminate the historical effects of racism); ENTMAN & ROJECKI, *supra* note 259, at 46-47 (arguing that over the past few decades Whites, *in*

Republican political strategists concluded that they could foster a political realignment on the basis of racial issues and "coded" anti-black rhetoric.[447] Pursuing the so-called "southern strategy" for an electoral majority, Republicans courted the new constituencies through the use of racially charged "code words," such as "law and order," that indirectly invoked racial themes without explicitly challenging egalitarian ideals.[448]

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principle, have become more tolerant and supportive of residential integration, black political participation, and equality as an abstraction, while *in practice*, they tend to resist governmental policies or interventions that might achieve those goals).

447. GARLAND, *supra* note 6, at 96-97 (arguing that "[s]ocial issues such as 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 . . . articulate"); LEMANN, *supra* note 39, 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.").

Other analysts link the changing social conditions with race and accompanying political reforms:

> [I]t was the collision of race and taxes with two additional forces over the past twenty-five years that created a *chain reaction*, a reaction forcing a realignment of the presidential electorate. These two additional forces were, first, the rights revolution, a revolution demanding statutory and constitutional protections for among others, criminal defendants, women, the poor, non-European ethnic minorities . . . and, second, the rights-related reform movement focusing on the right to guaranteed political representation that took root within the Democratic party in the late 1960s and throughout the 1970s.

EDSALL & EDSALL, *supra* note 11, at 4. It required a shift of only five percent of the electorate, mostly white working-class voters, to give either party a national presidential majority. *See* Edsall & Edsall, *supra* note 1, at 62. For example, Richard Nixon barely lost in 1960 and narrowly won the presidency in 1968 on the margin of the white backlash vote in four states. LEMANN, *supra* note 39, at 200-01.

448. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 57 (arguing that "[i]n the context of urban riots and reports that the crime rate was increasing, the capacity of conservatives to mobilize, shape, and express these racial fears and tensions became a particularly important political resource"); EDSALL & EDSALL, *supra* note 11, 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"); OMI & WINANT, *supra* note 430, at 124 (describing how Phillips's book, *supra* note 11, suggested a "coded" strategy of anti-black rhetoric to appeal to conservative blue-collar and southern voters); PHILLIPS, *supra* note 11, at 22-

This strategy allowed the Republican party to successfully convert criminal justice and social welfare "from subjects of policy to objects of politics" for the first time.[449]

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23 (1969) (arguing that the "South is turning into an important presidential base of the Republican Party" and "that this will *not* result from Republican civil rights law enforcement procedures—the laws undoubtedly will be fully enforced—but from erosion of the now meaningless Southern Democratic tradition"); Kinder & Mendelberg, *supra* note 425, at 403 (arguing "that many white Americans continue to harbor emotionally charged derogatory beliefs about blacks and that such beliefs figure prominently in whites' opposition to policies designed to narrow racial inequalities").

Mendelberg emphasizes that "coded" racial appeals must remain implicit so as not to challenge directly democratic and egalitarian values. MENDELBERG, *supra* note 12, at 95-106. She notes that the most effective ways to confront implicit racial appeals is to make them explicit. *Id.* at 183-88. As an example of the dangers of "explicit" racial appeals, on December 5, 2002, Republican Senate majority leader Trent Lott waxed nostalgic at a tribute honoring Senator Strom Thurmond's 100th birthday. Referring to Thurmond's 1948 "Dixiecrat" presidential campaign run on a platform of racial segregation, *supra* notes 65-66 and accompanying text, Lott declared, "I want to say this about my state: when Strom Thurmond ran for President, we voted for him. We're proud of it. And if the rest of the country had followed our lead, we wouldn't have had all these problems over all these years, either." Dan Goodgame & Karen Tumulty, *Tripped Up by History*, TIME, Dec. 23, 2002, at 22. Within weeks, Lott was forced to resign his Republican leadership role because his racial candor "may have tainted his party among educated suburban professionals and managers who are sympathetic to the G.O.P. on economic issues but are repulsed by any hint of coded appeals to prejudice." *Id.* Political analysts noted that Lott's "supergaffe" was saying what he really thinks. *E.g.*, Michelle Cottle, *Separate Ways*, THE NEW REPUBLIC, Dec. 23, 2002, at 14, 14 (explaining that Lott's error was "accidentally saying what he really believes"); Michael Kinsley, *Lott's Adventures in Gaffeland*, TIME, Dec. 23, 2002, at 31. Conservative political commentators denounced Lott's candor because "[f]or decades, since the Republicans became the repository for some white Southern resentment of the civil rights era, the G.O.P. has walked a delicate line between legitimate support for small government and strong defense of and illegitimate reliance on racial resentments." Andrew Sullivan, *Why Lott's a Menace to His Party*, TIME, Dec. 23, 2002, at 28. Other commentators noted the Republican's electoral strategy for decades has been to consolidate its hold on the white South and to play to the white backlash in the North. *E.g.*, Bob Herbert, *Racism and the G.O.P.*, N.Y. TIMES, Dec. 12, 2002, at A39 ("The Republican Party has become a haven for white racist attitudes and anti-black policies."). But analysts note that "[c]onservative commentators were among the first to rebuke Trent Lott, because his candor spoils the game. As they try to pry black voters away from their longstanding Democratic allegiance, Republicans still need the good old boys in their core voting base. They just don't need avowed segregationists as outspoken leaders." Robert Kuttner, *Having It Both Ways on Race*, AM. PROSPECT, Jan. 13, 2003, at 2, 2003 WL 9383592.

449. TONRY, *supra* note 14, at 10. Similarly, Garland argues that anxieties about crime, on top of the more inchoate insecurities prompted by rapid social change and economic recession, paved the

The Republican "southern strategy" ruptured the Democratic New Deal economic coalition and produced realignment along issues of race rather than socioeconomic class.[450] Political reforms introduced in the Democratic party after the 1968 convention proved more advantageous to the articulate and well-educated veterans of the civil rights, women's, and anti-war movements than to the traditional blue-collar and ward politicians in the competition for delegates.[451] As more progressive forces dominated the national Democratic party and worked to expand the rights of historically marginalized groups, conservative Republicans depicted them

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way for a politics of reaction in the late 1970s. This politics, in its turn, helped shape these diffuse middle-class anxieties into a more focused set of attitudes and understandings, identifying the culprits, naming the problem, setting up scapegoats. As the middle classes found themselves becoming regular victims of crime, they were simultaneously encouraged to view themselves as victims of big government, of tax and spend policies, of irresponsible welfare programmes . . . [and] of affirmative action programmes. All of these were said to work against the interests of "decent, hard-working middle-class people" and to benefit the undeserving and increasingly disorderly urban poor.

GARLAND, *supra* note 6, at 153; *see* Valentino, *supra* note 356, at 298 ("Coverage that directly reinforces negative stereotypes about minorities infuses the issue with racial significance. This combination of race and crime should benefit Republican candidates most since they are seen both as tough on crime and as the party that best represents whites.").

450. *See* EDSALL & EDSALL, *supra* note 11, at 5-6.

[R]ace as a national issue over the past twenty-five years has broken the Democratic New Deal "bottom-up" coalition—a coalition dependent on substantial support from all voters, white and black, at or below the median income. The fracturing of the Democrats' "bottom-up" coalition, permitted, in turn, those at the top of the "top-down" conservative coalition to encourage and to nurture, in the 1980s, what may well have been the most accelerated upwards redistribution of income in the nation's history—a redistribution fed by the tax, spending, and regulatory policies of the Reagan and Bush administrations.

Id.

451. *See* EDSALL & EDSALL, *supra* note 11, at 5 ("This intraparty reform drive, erupting in the wake of the 1968 convention in Chicago, tapped for Democratic party leadership the ranks of the civil rights, anti-war, women's, and student movements, and became a vehicle for the ascendancy of an upper-middle-class, college-educated culturally liberal elite within the Democratic party."). The Democratic party reforms, nominally designed to increase access to the process, actually served to reduce the role of white, lower-middle, and working class voters and their more conservative, ethnic, and working-class political leaders. *Id.* at 14. Activists from the civil rights, anti-war, and women's movements, who were far more liberal on a host of issues than were white working and lower-middle class voters, gained political power under the new rules at the expense of traditional, white, male Democratic political leadership. *Id.* at 80.

as liberal elitists bent on imposing an alien racial and cultural agenda.[452]   They courted the northern white blue-collar and lower middle class, and the southern and suburban voters who were alienated by redistributive national tax and welfare policies.[453]   Divisive issues such as school busing to achieve integration in northern cities brought home the implications of the liberal agenda to the lower middle-class residents of ethnic enclaves in the bigger cities.[454]   Moreover, because of the association of race with violence, disorder, crime, and illegitimacy, liberal Democrats failed to address the increasingly conservative public attitudes spurred by rising crime rates and welfare rolls.[455]   The inability of the Left to deal with these issues enabled "the political Right to profit from explicit and covert manipulation of symbols and images relying upon assumptions about black poverty and crime—as in the Republican's 1988 campaign focus on the death penalty, Willie Horton, and the 'revolving prison door' television

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452.   *See id.* at 89-98; BECKETT & SASSON, *supra* note 208, at 52-58.

453.   *See* EDSALL & EDSALL, *supra* note 11, at 5-6 ("Race has crystallized and provided a focus for values conflicts, for cultural conflicts, and for interest conflicts—conflicts over subjects as diverse as social welfare spending, neighborhood schooling, the distribution of the tax burden, criminal violence, sexual conduct, family structure, political competition, and union membership."); PHILLIPS, *supra* note 11, at 32-33.   By the 1968 presidential election,

> [n]ot only had the civil rights revolution cut the South adrift from its Democratic moorings and drawn the Northeast towards the Democrats, but it had increased the Southern and Western bias of the GOP to a point—the 1964 Goldwater nomination—where the party had decided to break with its formative antecedents and make an ideological bid for the anti-civil rights South.

Id.

454.   *See* EDSALL & EDSALL, *supra* note 11, at 87.

455.   *Id.* at 15 ("The repudiation of racist expression had an unintended consequence, however, for liberalism and for much of the Democratic party: an almost censorious set of prohibitions against discussion of family structure among the black poor, absent fathers, crime, lack of labor-force participation, welfare dependency, illegitimacy, and other contentious race-freighted issues.").   Democratic liberals' intellectual intolerance for negative information about the social circumstances of Blacks stemmed from a number of factors: concern that confronting black welfare dependency and illegitimacy would shift the policy focus from Whites' responsibility for the legacy of discrimination to blaming the victims and Blacks' responsibility for a "culture of poverty"; and fear that it would stigmatize Blacks and undermine the liberal coalition. *Id.* at 52-53. The reluctance of liberal Democrats to address crime, illegitimacy, welfare dependency and joblessness effectively conceded these issues to the Republican right. *Id.* at 258-59.

commercials."[456]   The inability of liberals to debate on issues associated with race enabled conservative Republicans to propose simplistic but politically popular policies on a host of contentious issues.[457]   Only in the early 1990s, under Bill Clinton, did national Democrats finally respond to the Republican exploitation of the crime issue—and only by capitulating and embracing an equally tough rhetoric and punitive policy.[458]   "Law and order" thus became the policy of both major parties.

2.   Political Rhetoric as "Code Words" to Appeal to Anti-Black Sentiments

Because it is "politically incorrect" to express overtly racist sentiments, research on "modern racism" attempts to identify closely intertwined sentiments such as "anti-black affect," resistance to Blacks' political demands, and denial of the

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456. EDSALL & EDSALL, *supra* note 11, at 114; *see, e.g.*, BECKETT & SASSON, *supra* note 208, at 68 (explaining that one of Bush's "political operatives" described the Horton incident as "a wonderful mix of liberalism and a big black rapist"); ENTMAN & ROJECKI, *supra* note 259, at 92 (suggesting that Bush's blatant anti-black Horton advertisements deliberately raised the crime issue to arouse the fear in many Whites of dangerous Blacks).

457. *See* EDSALL & EDSALL, *supra* note 11, at 55; Tonry, *supra* note 425, at 491 ("By presenting crime control issues only in emotional, stereotyped ways, conservative politicians have raised its salience as a political issue but made it impossible for their opponents to respond other than in the same stereotyped way.").

458. GARLAND, *supra* note 6, at 13-14 ("It is not just one party that has moved away from the old correctionalist orthodoxy: they all have."); KENNEDY, *supra* note 76, at 3-4 (stating that Clinton went to considerable lengths to demonstrate that he was as tough on crime as Republicans).   Both political parties competed to demonstrate that they were "tough on crime," concerned about public safety, and better able to impose law and order, discipline, and morality.   GARLAND, *supra* note 6, at 131.   Following Dukakis's 1988 defeat, the broad positions of the two major political parties on crime policy issues became virtually indistinguishable.   BECKETT, *supra* note 25, at 45 ("[M]any Democratic policymakers attempted to wrest control of the crime and drug issues from the Republicans by advocating stricter anticrime and antidrug laws."); BECKETT & SASSON, *supra* note 208, at 69 (observing that as a result of Clinton's support for increased police efforts and tough drug laws, "there was little about Clinton's crime control record in Arkansas that Bush could taunt him about the way he mocked Dukakis as a patsy for every dark-skinned murderer in Massachusetts" (internal quotation marks and citation omitted)); GEST, *supra* note 366, at 123; *see, e.g.*, Anthony M. Platt, *Social Insecurity: The Transformation of American Criminal Justice, 1965-2000*, 28 SOC. JUST. 138, 138 (Spring 2001) ("By 1992, the traditional liberal agenda on crime—prevention, community development, rehabilitation, and abolition of the death penalty—had, like liberalism itself, disappeared from official political discourse.").

continued existence of racism or racial discrimination as indirect indicators of racial hostility.[459] Modern racism is composed of a "general and diffuse 'anti-black affect' combined with disaffection over the continuing claims of blacks on white resources and sympathies, rancor rooted in an attachment to traditional American, individualist values, and in a conviction that racism has disappeared."[460] Modern racism perceives Blacks as overly demanding, undeserving, and threatening, and it emerges in media coverage of politics, welfare, and crime.[461]

"Code words" are symbols or phrases that indirectly implicate racial themes without directly challenging egalitarian ideals.[462] Politicians can use them to evoke modern racist

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459. Entman, *supra* note 362, at 332-33. Entman argues that "modern racism" consists of

> three closely intertwined but analytically distinct sentiments. The first component of modern racism is anti-black affect—a general emotional hostility toward blacks.... The second element of modern racism is resistance to the political demands of blacks.... The third component of modern racism is a belief that racism is dead and that racial discrimination no longer inhibits black achievement.

Id.; *see also* Gilliam & Iyengar, *supra* note 356, at 566 (contending that "modern racism" consists of four elements: 1) a denial that discrimination against Blacks persists; 2) a belief that Blacks do not subscribe to traditional American values of hard work and individual responsibility; 3) a belief that Blacks make unreasonable and excessive demands; and 4) a belief that Blacks receive benefits from the government that they do not deserve).

460. Entman, *supra* note 362, at 333 (citation omitted). Entman further argues that

> [m]odern racists express "antagonism, resentment, and anger toward blacks' wishes, and a lack of sympathy with them". [sic] They believe that "the individual black's fate is not determined by treatment of blacks as a group, and that demands for help and special favors should not be granted to blacks as a group". [sic] After all, they believe, discrimination is largely a thing of the past, and blacks have the opportunity to compete in the marketplace like everyone else.

Id. at 33 (citation omitted); *see also* ENTMAN & ROJECKI, *supra* note 259, at 19 (arguing that white racial animosity toward Blacks includes "stereotyping, denial, political rejection and demonization, and fearful, angry emotions"). Whites who harbor animus deny the continuing existence of discrimination or other structural barriers to Blacks' mobility. *Id.* In part, such denial reflects Whites' ignorance of the continuing effects of discrimination in housing and employment, and the impact of deindustrialization on Blacks' economic opportunities. *Id.* "The gap in Whites' understanding of past and present life for African Americans tends to support their beliefs that laziness and weak will are now the chief impediments to Blacks' social mobility." *Id.*

461. ENTMAN & ROJECKI, *supra* note 259, at 78-93; Entman, *supra* note 362, at 333-35.

462. *See supra* text accompanying note 448.

sentiments without seeming racist or discriminatory.[463] Talking in code allows politicians to appeal to cultural archetypes in the collective unconscious about the "alien other" who poses a fearful and menacing threat to society.[464] Crime and welfare now widely serve as "coded" issues that enable politicians to exploit white Americans' negative views about Blacks without explicitly playing the "race card."[465] By the

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463. *See, e.g.*, GILENS, *supra* note 15, at 67 ("Although political elites typically use race-neutral language in discussing 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."); OMI & WINANT, *supra* note 430, 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.").

464. For example, politicized criminological discourse evokes images and archetypes to play to public anxieties and to depict criminals as fundamentally different and threatening:

> In its deliberate echoing of public concerns and media biases, and its focus on the most worrisome threats, it is, in effect, a politicized discourse of the collective unconscious . . . . In its standard tropes and rhetorical invocations, this political discourse relies upon an archaic criminology of the criminal type, the alien other. Sometimes explicitly, more often in coded references, the problem is traced to the wanton, amoral behavior of dangerous offenders, who typically belong to racial and cultural groups bearing little resemblance to "us."

GARLAND, *supra* note 6, at 135; *see also* EDSALL & EDSALL, *supra* note 11, at 138 ("In facing an electorate with sharply divided commitments on race—theoretically in favor of egalitarian principle but hostile to many forms of implementation—the use of a race-free political language proved crucial to building a broad-based, center-right coalition."); KENNEDY, *supra* note 76, at 4 (observing that "[f]or some politicians, the law and order slogan has served as a thinly veiled code with which to signal sympathy for and solidarity with whites upset by the social, political, and cultural changes brought about by the upheavals of the 1960s, particularly the Civil Rights Revolution"); Dvorak, *supra* note 463, at 616 (arguing that "coded racist messages have served White politicians well in appealing to Whites' fears of crime and drugs, economic instability, a loss of 'values' and traditional notions of 'equality'"); Martin Gilens, *"Race Coding" and White Opposition to Welfare*, 90 AM. POL. SCI. REV. 593, 593 (1996) (arguing that "[m]any believe that by engaging such issues [as crime and welfare], politicians can exploit whites' racial animosity and resentment while diminishing the appearance of race baiting").

465. *See* OMI & WINANT, *supra* note 430, 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* ENTMAN & ROJECKI, *supra* note 259, at 20 ("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

1970s, conservative politicians appreciated that terms such as "law and order," "individual rights," and even "equality" could be deployed to invoke racial themes, and by the 1980s, "welfare," "fairness," and "groups" had acquired racial meanings in the backlash against liberal policies.[466] Politicians exploit these racially-tinged words for political advantage with demagogic pledges to "get tough" and "crack down" on youth crime, which have become "code words" for harsher treatment of young black males.[467]

In the past thirty years, conservative politicians and the mass media have pushed crime to the top of the political agenda. They have done this by exploiting the mass media and by focusing on sensational and violent crime to promote "get tough" policies.[468] Republican politicians in national elections have strategically used coded anti-crime rhetoric to appeal to white voters.[469] Moreover, they have used their positions as

racists."); Dvorak, *supra* note 463, at 615; Gilens, *supra* note 464, at 594-95.

466. *See, e.g.*, EDSALL & EDSALL, *supra* note 11, 198-216; Dvorak, *supra* note 463, at 624. Republicans successfully converted their hostility to civil rights enforcement into a principled support for fairness, equality, and opposition to special privileges for minorities and women. *See* EDSALL & EDSALL, *supra* note 11, at 183-86. This conservative egalitarianism shifted public resentment away from economic inequality and the economic exploitation of working people and toward minorities, the poor, and the federal government's redistributive efforts. *See, e.g., id.* at 144; OMI & WINANT, *supra* note 430, at 117 (arguing that the meaning of "equality" and the methods to achieve it became part of the political debate and conservatives recast the dispute not as a quest for racial equality, but as avoiding a form of "reverse discrimination" in which the state went too far in trying to eliminate discrimination).

467. *See* BECKETT, *supra* note 25, at 8-9. "Code words" convey a well-known but implicit meaning—such as an appeal to Whites' racial hostilities—while resisting any overtly racist interpretation. *See* MILLER, *supra* note 333, 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 464, 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). While the public can debate some explicitly racial issues such as school integration and affirmative action, race-coded issues are attractive to some politicians precisely because they can exploit the power of racial suspicion and animosity while insulating themselves from charges of race-baiting. *See* MENDELBERG, *supra* note 12, at 134-38.

468. *See, e.g.*, BECKETT, *supra* note 25, at 62-78; BECKETT & SASSON, *supra* note 208, at 75-98.

469. *See, e.g.*, EDSALL & EDSALL, *supra* note 11, at 224 ("Crime became a shorthand *signal*, to crucial numbers of white voters, of broader issues of social disorder, tapping powerful ideas about authority, status, morality, self-control, and race."); TONRY, *supra* note 14, at 11-12; Tonry, *supra* note 425, at

sources of crime news to shape public attitudes in favor of criminal justice policies that they advocate.[470] For example, when Republican politicians declared a "war on drugs," they volunteered for a steady stream of interviews and media coverage of drug stories increased sharply.[471] These stories focused on crack rather than powder cocaine and emphasized that crack was a drug of the black inner city.[472] Such media complicity reinforced "get tough" political rhetoric and abetted conservatives' advocacy of punitive laws, such as the differences in the Federal Sentencing Guidelines between crack and powder cocaine that had a dramatically disproportionate impact on black conviction and incarceration rates.[473]

Similarly, the 1988 Bush presidential campaign's focus on Willie Horton—a convicted black murderer released on furlough who burglarized and stabbed a white middle-class man and raped a white woman—tapped into voter anger through the threatening archetype of the black male rapist of a white woman.[474] Although the Bush campaign claimed that the

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470. GARLAND, *supra* note 6, at 13 ("The politicization of crime control has transformed the structure of relationships that connects the political process and the institutions of criminal justice. . . . This constitutes a sharp reversal of the historical process whereby the power to punish was largely delegated to professional experts and administrators.").

471. *See* BECKETT & SASSON, *supra* note 208, at 88-99; TONRY, *supra* note 14, at 83-104.

472. *See* BECKETT & SASSON, *supra* note 208, at 88-99; MAUER, *supra* note 45, at 60-63; *see also* TONRY, *supra* note 14, at 188-89 (contrasting the sentencing guidelines for powder cocaine offenses with the guidelines for crack cocaine offenses).

473. *See, e.g.*, BECKETT & SASSON, *supra* note 208, at 88 (explaining how in the 1980s, the media attributed the inner-city crack cocaine problems to "insufficient control and punishment"); KENNEDY, *supra* note 76, at 364-86; MILLER, *supra* note 333, at 82-83. The Republicans' "War on Drugs" represented a cynical political strategy to assert toughness about crime, even though it clearly would have a disproportionate and disastrous impact on the minority community and would do very little to alleviate the problems of drugs and crime. TONRY, MALIGN NEGLECT, *supra* note 14, at 104-23.

An analysis of network coverage of the "war on drugs" between 1981 and 1988 reported that as the focus of law enforcement shifted from powder to crack cocaine, "the media frame shifted dramatically from white, suburban drug users in need of therapy to riveting images of violent black drug offenders in the inner city who were beyond the point of rehabilitation." Hurwitz & Peffley, *supra* note 346, at 395; *see also* BECKETT & SASSON, *supra* note 208, at 90.

474. *See* DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE (1995); EDSALL & EDSALL, *supra* note 11, at 222-25; Dvorak, *supra* note 463, at 626 (stating that

Horton campaign commercials were about his opponent's "soft on crime" attitudes,[475] "[b]y 1988, the assumption that black men were dangerous had soaked deeply into America's urban consciousness, powerfully reinforced by the steady flow of news coverage depicting black men under arrest, in court, [and] in prison."[476] In fact, the appeal mobilized racial prejudices rather than concerns about crime.[477] This, in turn, fostered great resistance to public policy efforts to reduce racial inequality.[478]

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the Bush campaign used Horton "to appeal to Whites' fears of Black male criminals"); Tali Mendelberg, *Executing Hortons: Racial Crime in the 1988 Presidential Campaign*, 61 PUB. OPINION Q. 134, 134 (1997) (suggesting that the Horton issue is the most representative campaign tactic to demonstrate playing the "race card" in contemporary politics).

475. The 1988 Bush campaign used a variety of potent symbols and images—ACLU, Willie Horton, the death penalty—to appeal to voters' concerns about race, morality, and cultural values and to associate Dukakis with criminal defendants' rights, black crime, and the erosion of traditional values. *See* EDSALL & EDSALL, *supra* note 11, at 215-16. Because Dukakis, as Governor of Massachusetts in 1976, had vetoed a bill that would have denied furloughs to convicted murderers such as Horton, "Willie Horton represented for key sectors of the electorate the consequences of an aggressively expansive liberalism, a liberalism running up against public opinion, against 'traditional' values, and, to a certain degree, against common sense." *Id.* at 224.

476. *See* ANDERSON, *supra* note 474, at 217.

477. *See* MENDELBERG, *supra* note 12, at 178 (analyzing the Republican's successful play of the race card with the Willie Horton message during the 1988 election). *See generally* JAMIESON, *supra* note 12.

478. *See* Mendelberg, *supra* note 474, at 151. Mendelberg argues that
> [t]he Horton appeal was . . . about race rather than crime; it mobilized whites' racial prejudice, not their worries about crime. The consequences of this mobilization were greater resistance to government efforts to address racial inequality, heightened perceptions of racial conflict, and greater resistance to policies perceived as illegitimately benefiting African Americans.

Id.

As with violent crime, white American's hostility to public welfare reflects the majority's erroneous perception that most welfare recipients are black, that Blacks evince less commitment to the work ethic, and that "welfare has become a 'code word' for race." *See* GILENS, *supra* note 15, at 3; MILLER, *supra* note 333, at 1 ("[P]olitics of crime and welfare came with a decidedly racial cast."). As poor peoples' adaptations to social and economic disadvantage appeared increasingly alien to the well-to-do, economic and criminal justice policies increasingly punished the poor and minorities, and discredited social explanations of problematic behavior:
> Crime—together with associated 'underclass' behaviours such as drug abuse, teenage pregnancy, single parenthood, and welfare dependency—came to function as a rhetorical legitimation for social and economic policies that effectively punished the poor and as a justification for the development of strong disciplinary state. In the political discourse of this period, social accounts of the crime problem come to be completely discredited. Such accounts, so it was said,

There is a correlation between punitiveness and hostility toward Blacks; those who report great racial prejudice also tend to support more punitive crime control policies.[479] Conservatives' "law and order" rhetoric and other such veiled references to race support and encourage such attitudes and policies. The political success of those who practice "coded" racial appeals obviously guarantees its continued use.[480] As a result of the recent emphasis on the connection between race and youth crime, black juveniles have become the "Willie Horton" of the 1990s.[481]

D. INCREASED PUNITIVENESS IN JUVENILE JUSTICE WAIVER AND SENTENCING POLICIES

The connection in the public mind between race and rising youth crime in the 1980s provided a powerful political incentive to transform juvenile justice jurisprudence.[482] A tension has always existed between social welfare and social control; between a concern for the "best interests" of the young offender and punishment for the offense; and between safeguarding children and protecting society.[483] After the escalation of youth violence rates in the late 1970s and the early 1990s, the balance shifted sharply from rehabilitation to retribution.[484]

denied individual responsibility, excused moral fault, watered down punishment, encouraged bad behavior and in that respect were emblematic of all that was wrong with welfarism.

GARLAND, *supra* note 6, at 101-02; *see also* ENTMAN & ROJECKI, *supra* note 259, at 20 (describing how racial hostility prevents blue-collar and middle-class Whites and Blacks from forming political coalitions to support policies that would emphasize greater equality in the distribution of public goods and services).

479. *See* BECKETT & SASSON, *supra* note 208, at 135.

480. *See, e.g.,* Mendelberg, *supra* note 474, at 152 (negative racial style of the 1988 presidential campaign emulated in subsequent senatorial and gubernatorial elections).

481. *See, e.g.,* BECKETT, *supra* note 25, at 58; BECKETT & SASSON, *supra* note 208, at 184-85; Feld, *Transformation—Part II, supra* note 5, at 361.

482. *See* ZIMRING, *supra* note 219, at 12 ("Legislation becomes the result of a felt need to do something about crime, a need that may be totally external to the operations of the legal systems that respond to juvenile and late adolescent violence.").

483. *See* FELD, *supra* note 2, at 289-97; GARLAND, *supra* note 6, at 27-28 (describing some of the antinomies between welfare and control that juvenile justice practices reconciled); NAT'L RESEARCH COUNCIL, *supra* note 33, at 154 (noting the "tension between social welfare and social control—that is, focusing on the best interests of the individual child versus focusing on punishment, incapacitation, and protecting society from certain offenses").

484. *See supra* notes 314-30 and accompanying text; *see also* JEFFREY

The shift was aided by the public perception of youth crime as an urban black male phenomenon.[485]

Questions about the effectiveness and legitimacy of the "Rehabilitative Ideal" that began to emerge in the 1960s eroded the traditional rationale of the juvenile justice system.[486] Politicians amplified these criticisms by claiming that sanctions for juveniles were too lenient and did not sufficiently protect the public.[487] The growing perception that rehabilitative programs do not work fueled a greater legislative emphasis on punishment.[488] The overarching themes of these legislative amendments include a shift from individualized justice to just deserts; from rehabilitation to retribution; from offender to offense; from "amenability to treatment" to proportionality; and a shift of sentencing authority from the judicial to the legislative and executive branches.[489] The unifying theme of all these policies is *punitive segregation*—strategies to incapacitate and exclude young offenders rather than to change and reintegrate them.[490]

BUTTS & JEREMY TRAVIS, THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000, at 2-4 (2002) (discussing the sharply growing rates of youth violence during the late 1980s and early 1990s, followed by even sharper decline since 1994).

485. BECKETT, *supra* note 25, at 62-78; Feld, *Transformation—Part II*, *supra* note 5, at 367-69.

486. *See supra* notes 142-47 and accompanying text.

487. *See, e.g.*, BERNARD, *supra* note 34, at 3-5 (noting a cyclical pattern of oscillation between severity and leniency in juvenile justice policy); GARLAND, *supra* note 6, at 108.

488. *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 33, at 223. McCord states that

> [p]olicies 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 authority to prosecutors to decide to file cases in adult court, and more frequent custodial placement of adjudicated delinquents.

Id.

489. *See, e.g.*, NAT'L RESEARCH COUNCIL, *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 . . . includ[ing] blended sentences, mandatory minimum sentences, and extended jurisdiction."); MAUER, *supra* note 45, 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"); Feld, *Responses to Youth Violence*, *supra* note 245, at 194.

490. *See* GARLAND, *supra* note 6, at 140.

1. Waiver of Juveniles to Criminal Court

Jurisdictional waiver is a type of sentencing decision.[491] Juvenile courts traditionally assign primary importance to rehabilitation and attempt to individualize treatment.[492] Criminal courts, in contrast, look to the seriousness of the offense committed and attempt to proportion punishment accordingly.[493]   All of the theoretical differences between juvenile and criminal courts' sentencing philosophies are visible in the legislative policy debates about transfer proceedings.   Transfer laws reflect both fundamental crime control concerns and the ambivalence embedded in our cultural construction of youth.   The jurisprudential conflicts reflect many current sentencing policy debates: tensions between rehabilitation or incapacitation and retribution; between focusing on characteristics of the offender and the seriousness of the offense; between discretion and rules; and between indeterminacy and determinacy.

Although the technical and administrative details of transfer legislation vary by state considerably, judicial waiver, legislative offense exclusion, and prosecutorial choice of forum are the three generic approaches employed.[494]   These laws emphasize a different balance of sentencing policy values, rely on different organizational actors and administrative processes, and elicit different information to determine whether to try and sentence a particular young offender as an adult or as a child.

Judicial waiver represents the most common transfer policy in virtually all states.[495]   A juvenile court judge may

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491.   Jurisdictional waiver refers to the process by which a youth's case can be transferred to criminal court for prosecution as an adult. *E.g.*, PATRICK GRIFFIN ET AL., TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 3-10 (1998); SNYDER & SICKMUND, *supra* note 319, at 85-89 (discussing judicial waiver, concurrent jurisdiction, and statutory offense exclusion as three legislative methods to transfer juveniles for criminal prosecution).

492.   *E.g.*, Feld, *Criminalizing American Juvenile Court, supra* note 156, at 233-43; Feld, *Responses to Youth Violence, supra* note 245, at 195-98.

493.   *E.g.*, Feld, *Criminalizing American Juvenile Court, supra* note 156, at 233-43; Feld, *Responses to Youth Violence, supra* note 245, at 195-98.

494.   *See generally* FELD, *supra* note 2, at 208-19 (describing types of waiver laws); GRIFFIN ET AL., *supra* note 491, at 2 (summarizing state transfer provisions); SNYDER & SICKMUND, *supra* note 319, at 85-89 (analyzing three main types of jurisdictional transfer statutes); Feld, *Juvenile Waiver Statutes, supra* note 245 (classifying states by judicial waiver, offense exclusion, and prosecutorial "direct file" laws).

495.   *See* U.S. GENERAL ACCOUNTING OFFICE, JUVENILE JUSTICE:

waive juvenile court 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.[496] These case-by-case clinical assessments reflect the traditional individualized sentencing discretion characteristic of juvenile courts.

Legislative offense exclusion frequently supplements judicial waiver provisions. This approach emphasizes the seriousness of the offense committed and reflects the retributive values of the criminal law.[497] Because legislatures create juvenile courts, they possess considerable latitude to define their jurisdiction and to exclude youths from juvenile court based on their age and the seriousness of their offenses.[498]

Prosecutorial waiver, the third method, is used in about a dozen states to remove some young offenders from the juvenile justice system.[499] With this strategy, juvenile and criminal courts share concurrent jurisdiction over certain ages and offenses, typically older youths and serious crimes, and prosecutors have discretion to select either forum.[500] Because of the constitutional doctrine of separation of powers, courts ordinarily do not review discretionary executive decisions, and most judicial opinions characterize prosecutorial transfer as an ordinary charging decision.[501]

Each type of waiver strategy has supporters and critics.

JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS (1995); SNYDER & SICKMUND, *supra* note 319, at 85.

496. *See* Kent v. United States, 383 U.S. 541, 553 (1966) (mandating procedural due process in judicial waiver hearings); Feld, *Juvenile Waiver Statutes, supra* note 245, at 487-94.

497. *See* SNYDER & SICKMUND, *supra* note 319, at 88; Feld, *Juvenile Waiver Statutes, supra* note 245, at 494-99.

498. *See generally* 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, 85 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter Feld, *Legislative Exclusion*].

499. *See* SNYDER & SICKMUND, *supra* note 319, at 87; Feld, *Legislative Exclusion, supra* note 498, at 98-101.

500. *See* Manduley v. Superior Court of San Diego, 2002 WL 287665 (Cal. Sup. Ct. 2002); SNYDER & SICKMUND, *supra* note 319, at 87; 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, 656-67 (1994).

501. *See* United States v. Bland, 472 F.2d 1329, 1335 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); Manduley v. Superior Court of San Diego, 41 P.3d 3, 12-13 (Cal. 2002); Feld, *Legislative Exclusion, supra* note 498, 91-101.

Proponents of judicial waiver endorse the juvenile court's rehabilitative philosophy and argue that individualized decisions provide an appropriate balance of flexibility and severity.[502] Critics object that judges lack the accurate clinical tools to assess amenability to treatment or to predict dangerousness and that their exercise of standardless discretion results in abuses and inequalities.[503] 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; and they value uniform treatment of similarly situated offenders.[504] Critics question whether legislators can remove discretion without making the process excessively rigid and overinclusive.[505] Proponents of prosecutorial waiver claim that prosecutors can act as more objective gatekeepers than either "soft" judges or "get tough" legislators.[506] 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.[507]

Within the past two decades, and particularly in reaction to the sharp increase in black youth homicides in the late 1980s and early 1990s, almost every state revised its transfer laws to facilitate the prosecution of more juveniles in adult criminal court.[508]   Juvenile justice policies have become especially

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502. *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, 216-17 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter Zimring, *Punitive Necessity*]; 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, 415-17 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

503. *See, e.g.*, Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinates of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314, 345-47 (1990); Feld, *Legislative Exclusion, supra* note 498, 89-90.

504. *See, e.g.*, Feld, *Legislative Exclusion, supra* note 498, at 102-03.

505. *See, e.g.*, Zimring, *Punitive Necessity, supra* note 502, at 217-20.

506. *See, e.g.*, McCarthy, *supra* note 500, at 658-59.

507. *See, e.g.*, Donna M. Bishop & Charles E. 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, 299 (1991); Feld, *Legislative Exclusion, supra* note 498, at 117-19.

508. *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 33, at 204-09, 214-18; TORBET ET AL., *supra* note 256, at 3-8; Feld, *Responses to Youth Violence, supra* note 245, at 194; Barry C. Feld, *Violent Youth and Public Policy: A Case*

punitive toward youths charged with violent crimes, the offense category to which black youths contribute disproportionately.[509] Statutory changes make it easier for judges to transfer youths to criminal court, exclude certain serious offenses from juvenile court jurisdiction, and increase prosecutors' discretion to file cases in adult court.[510]

These changes in waiver laws reflect a fundamental cultural and legal reconceptualization of youths from innocent and dependent children to responsible and autonomous adult-like offenders.[511] The characterization of youths as responsible

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Study of Juvenile Justice Law Reform, 79 MINN. L. REV. 965, 966-97 (1995) [hereinafter Feld, *Violent Youth*].

509. NAT'L RESEARCH COUNCIL, *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."); EILEEN POE-YAMAGATA & MICHAEL A. JONES, AND JUSTICE FOR SOME 12-14 (2000).

510. Feld, *Responses to Youth Violence*, *supra* note 245, at 205-08; *see* NAT'L RESEARCH COUNCIL, *supra* note 33, at 214-20. Traditionally, juvenile court judges and clinicians used indeterminate and discretionary processes to make predictions about offenders' future life course and criminal propensity. *See* Feld, *Juvenile Waiver Statutes*, *supra* note 245, at 494-511. By contrast, legislative offense exclusion reflects a more retributive, offense-based just deserts framework. Waiver statutes embody and attempt to resolve the same tensions between individualized evaluations of the offender and more mechanical dispositions based on the offense that animate sentencing policy debates. Feld, *Responses to Youth Violence*, *supra* note 245, at 195-98. Proponents of just deserts contend that juvenile court judges lack valid or reliable bases upon which to make accurate determinations of "amenability" or dangerousness and that standardless discretion results in inconsistent and discriminatory decisions. Feld, *Violent Youth*, *supra* note 508, at 1006-13. Legislative offense exclusion laws that define chronological juveniles as adults on the basis of a serious offense reflect a retributive, just deserts alternative to individualized, rehabilitative juvenile justice jurisprudence.

511. Garland describes the changing imagery and policy implications of the reconceptualization of youth:

Crime has been re-dramatized. The stock welfarist image of the delinquent as a disadvantaged, deserving, subject of need has now all but disappeared. Instead, the images conjured up to accompany new legislation tend to be stereotypical depictions of unruly youth, dangerous predators, and incorrigible career criminals. Accompanying these projected images, and in rhetorical response to them, the new discourse of crime policy consistently invokes an angry public, tired of living in fear, demanding strong measures of punishment and protection.

GARLAND, *supra* note 6, at 10. Public officials' statements reflected these changing perceptions. For example, Alfred Regnery, the head of the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention during the Reagan administration, described violent 16-year-olds as "criminals who happen to be young, not children who happen to commit crimes." GEST,

reflects a broader criminological reconfiguration of criminality as ordinary, routine behavior and the product of rational choice, rather than as aberrational, deviant, and determined conduct.[512] The focus on adolescent criminality as a "rational choice" has led to an emphasis on "pricing" penalties,[513] efforts to assure that penal consequences are swift and severe, and "functioned to legitimate these tougher policies and give them a gloss of respectability."[514] "Get tough" politicians' sound bites— "adult crime, adult time" or "old enough to do the crime, old enough to do the time"—exemplify the reformulation of adolescents as responsible for their actions and advance crime policies that provide no formal recognition of youthfulness as a mitigating factor in sentencing.[515]

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supra note 366, at 89.

512. *See* GARLAND, *supra* note 6, at 127-28 (describing the changing interpretation of criminal behavior). Garland further elaborates:

The new criminologies of everyday life are a set of cognate theoretical frameworks that includes routine activity theory, crime as opportunity, lifestyle analysis, situational crime prevention, and some versions of rational choice theory. The striking thing about these various criminologies is that they each begin from the premise that crime is a normal, commonplace, aspect of modern society. . . . To commit an offence thus requires no special motivation or disposition, no abnormality or pathology. In contrast to earlier criminologies, which began from the premise that crime was a deviation from normal civilized conduct and was explicable in terms of individual pathology or faulty socialization, the new criminologies see crime as *continuous* with normal social interaction and explicable by reference to *standard* motivational patterns.

Id.

513. GARLAND, *supra* note 6, at 130 (stating that the rational choice model "regards criminal acts as calculated, utility-maximizing conduct, resulting from a straightforward process of individual choice" and that "[t]his model represents the problem of crime as a matter of supply and demand, with punishment operating as a price mechanism").

514. *Id.* Garland points out the irony of contemporary criminological interpretations and criminal policy:

After more than a century of social scientific research that complicated and refined the understanding of criminal offending; after a mass of evidence has been accumulated to show that criminal acts are typically embedded in, and produced by, definite social and psychological relations; rational choice analyses have, abruptly and without ceremony, swept aside all such complexity and empirical findings. With the certainty of armchair philosophers and economic modelers they insist that crime is, after all, simply a matter of individual choice—or anyway can be treated as if it were.

Id.

515. *See, e.g.*, Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 97-107 (1997) (arguing that adolescent developmental

Even prior to the recent "crack down" on juveniles, studies consistently reported racial disparities in waiver decisions by juvenile court judges.[516]   As a result of the "get tough" reformulation, state legislatures use offense criteria in waiver laws either as dispositional guidelines to structure and limit judicial discretion, to guide prosecutorial charging decisions, or automatically to exclude certain youths from juvenile court jurisdiction.[517]   After controlling for the seriousness of the offense, juvenile court judges are more likely to transfer minority youths than white youths to criminal court; the disparities are greatest for youths charged with violent and drug offenses.[518]   In nearly every jurisdiction, the proportion of minority youths judicially transferred to criminal court greatly exceeded their proportional make-up of the general population.[519]   A study of juvenile transfer and criminal court

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psychology supports differences in culpability of juveniles and adults, which require formal recognition of youthfulness as a mitigating factor in sentencing).

516.   *See, e.g.*, DONNA M. HAMPARIAN ET AL.,   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 eleven states, minority youths constituted the majority of juveniles waived); Joel Peter Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia, in* MAJOR ISSUES IN JUVENILE JUSTICE, INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY 330, 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 et al., *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."). An analysis by the U.S. General Accounting Office in four states that examined the effects of race on judicial waiver decisions found that

> blacks were more likely than whites to have their cases waived for violent, property, and drug offenses.   For violent offenses, the differential rates are fairly consistent across states, with black juveniles having waiver rates from 1.8 times to 3.1 times higher than whites.   The differences varied more widely for drug offenses. . . . Pennsylvania black juveniles were more than twice as likely to have their cases waived than whites. . . . Arizona's waiver rates for whites were twice those of California; while for blacks, Arizona's rates were 55 times those of California.

U.S. GENERAL ACCOUNTING OFFICE, *supra* note 495, at 59.

517.   *See, e.g.*, TORBET ET AL., *supra* note 256, at 3-8; Feld, *Responses to Youth Violence, supra* note 245, at 206-12; Feld, *Violent Youth, supra* note 508, 1028-32.

518.   *See supra* note 509.

519.   *See* POE-YAMAGATA & JONES, *supra* note 509, at 17 ("The minority proportion of youth transferred to criminal court was 5 times or more their proportion in the general population in Connecticut, Massachusetts,

sentencing practices in Los Angeles reported 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."[520] Once youths make the transition to the adult system, criminal court judges sentence them as if they were adults, send them to adult prisons, and even execute them for the crimes they committed as children.[521] As a result of the successive screening and differential processing of youths by race, the vast majority of juveniles transferred to criminal court and sentenced to prison are minority youths.[522]

2. Sentencing Delinquents in Juvenile Court

The political pressures to waive more serious young offenders to criminal courts also impel juvenile court judges to "get tough" on those criminal delinquents who remain. The jurisprudential and legislative shifts in waiver policies—from offender to offense and from treatment to punishment—also affect the sentences that judges impose on these delinquent offenders. Progressive reformers envisioned the juvenile court as a social welfare system rather than as a justice system.[523] The Progressive reformers advocated that primary attention should be focused on a youth's social circumstances and "best interests" rather than on proof of guilt of a specific offense.[524] Even after *Gault*, the presumed differences between juvenile treatment and criminal punishment provided the rationale for the Court in *McKeiver* to deny a right to jury trials in delinquency proceedings.[525] As juvenile sentencing laws and judicial practices increasingly "get tough," they blur further the

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Pennsylvania, and Rhode Island.").

520. MIKE MALES & DAN MACALLAIR, THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA 7-8 (2000).

521. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (upholding the constitutionality of death penalty for juveniles sixteen- and seventeen-years of age); Feld, *Responses to Youth Violence*, *supra* note 245, at 212-20.

522. *See, e.g.*, NAT'L RESEARCH COUNCIL, *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.").

523. The juvenile court's parens patriae ideology combined social welfare and penal social control, eschewed criminal procedural safeguards, and maximized judicial discretion to diagnose and treat. *See supra* notes 29-31 and accompanying text.

524. *See supra* note 34 and accompanying text.

525. *See supra* notes 192-99 and accompanying text.

always tenuous distinctions between treatment and punishment. The "crack down" on delinquents disproportionately affects minority youths who experience higher rates of pretrial detention and post-adjudication incarceration in the more punitive juvenile system.[526]

Several indicators suggest that juvenile court judges increasingly punish youths for their past offenses rather than treat them for their future welfare. Legislative preambles and court opinions now explicitly endorse punishment as an appropriate component of juvenile sanctions.[527] Juvenile codes increasingly employ the rhetoric of accountability, responsibility, punishment, and public safety rather than a child's welfare or "best interests."[528] States' juvenile sentencing laws increasingly emphasize individual responsibility and provide for determinate or mandatory minimum sentences keyed to the seriousness of the offense.[529] Some states use sentencing guidelines to impose presumptive, determinate, and proportional sentences on delinquents based on a juvenile's age, seriousness of the offense, and prior record.[530] Other states impose mandatory minimum sentences that prescribe mandatory minimum lengths of confinement or the level of security placement based on the nature of the offense for which the youth is convicted.[531] A number of state

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526. *See, e.g.*, POE-YAMAGATA & JONES, *supra* note 509, at 9, 14.

527. *See, e.g.*, TEX. FAM. CODE ANN. § 51.012(A) (Vernon 2002) (including "to promote the concept of punishment for criminal acts" as a purpose of the title); Feld, *Responses to Youth Violence*, *supra* note 245, at 222-23; CAL. WELF. & INST. CODE § 202(b) (West 2003) (providing that minors under the jurisdiction of juvenile courts receive guidance including "punishment that is consistent with the rehabilitative objectives of this chapter").

528. *See, e.g.*, Feld, *Punishment, Treatment, supra* note 245, at 838-47; Feld, *Responses to Youth Violence, supra* note 245, at 222-23; Linda F. Giardino, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 J.L. & POL'Y 223, 238-46 (1996).

529. *See, e.g.*, TORBET ET AL., *supra* note 256, at 11-16; Feld, *Responses to Youth Violence, supra* note 245, at 220-28. About half the states use some type of determinate or mandatory minimum offense-based sentencing criteria to govern judicial dispositions. *See, e.g.*, TORBET ET AL., *supra* note 256, at 11-16; Sheffer, *supra* note 245, at 491-92.

530. *See, e.g.*, Feld, *Punishment, Treatment, supra* note 245, at 850-79; Feld, *Responses to Youth Violence, supra* note 245, at 224-28; Sheffer, *supra* note 245, at 489-91.

531. *See, e.g.*, TORBET ET AL., *supra* note 256, at 14 ("Since 1992, 15 States and the District of Columbia have added or modified statutes that provide for a mandatory minimum period of incarceration of juveniles committing certain violent or other serious crimes." (citation omitted)); Sheffer, *supra* note 245, at 491-92.

departments of corrections use administrative security classification and release guidelines that employ offense factors to determine the length or mandatory minimum term of confinement.[532] All of these provisions emphasize proportionality of sanctions and explicitly link the length of time that delinquents serve to the seriousness of their crime rather than to their "real needs."[533] These statutory provisions use principles of proportionality and determinacy to rationalize sentencing decisions, to increase the severity of delinquency sanctions, and to enable legislators to demonstrate how "tough" they are on youthful offenders.

Empirical evaluations of juvenile court sentencing practices report two consistent findings. The ordinary principles of the criminal law—present offense and prior record—explain most of the variance in juvenile court sentences. Because every state defines the juvenile court's delinquency jurisdiction based on the commission of a criminal act,[534] juvenile court judges' sentencing practices focus primarily on the seriousness of the present offense and prior record when they sentence delinquents.[535] Because juvenile

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532. *See* Feld, *Responses to Youth Violence, supra* note 245, at 227-28.

533. The recent report of the National Research Council analyzed juvenile court sentencing practices and concluded that

> State legislative changes in recent years have moved the court away from its rehabilitative goals and toward punishment and accountability. Laws have made some dispositions offense-based rather than offender-based. Offense-based sanctions are to be proportional to the offense and have retribution or deterrence as their goal. Strategies for imposing offense-based sentences in juvenile court include blended sentences, mandatory minimum sentences, and extended jurisdiction.

NAT'L RESEARCH COUNCIL, *supra* note 33, at 210.

534. Feld, *Transformation of Juvenile Court—Part. II, 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.").

535. *See* PETER GREENWOOD ET AL., YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA 53 (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.

Id.; see also Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis,* 86 J. CRIM. L. & CRIMINOLOGY 392, 401 (1996).

court 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—all indicate that black youths engage in higher rates of serious offenses than do white juveniles.[536] Part of these real differences in black youths' offense rates reflect their differential exposure to a host of risk factors associated with crime and violence—poverty, segregation and isolation in impoverished neighborhoods, and poor health care, for example—as a result of the structural changes described earlier.[537]

After controlling for variables that account for differences in rates of offending by race, the individualized justice of juvenile courts consistently produces racial disparities in sentencing.[538] To the extent that parens patriae ideology legitimates individualized dispositions, it subjects disadvantaged youths to more extensive controls. In a society marked by economic and racial inequality, minority youths are most "in need" and therefore most "at risk" for juvenile court intervention.[539] The structural context of juvenile justice administration also may place minority youths at a dispositional disadvantage. Urban juvenile courts are

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536. *See, e.g.,* NAT'L RESEARCH COUNCIL, *supra* note 33, at 235-38.

537. *See supra* Part III.A; *see also* NAT'L RESEARCH COUNCIL, *supra* note 33, at 238. The authors 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].

Id.

538. *See, e.g.,* FELD, *supra* note 2, at 267-72; ; Charles E. Frazier & Donna M. Bishop, *Reflections on Race Effects in Juvenile Justice, in* MINORITIES IN JUVENILE JUSTICE 23-27 (Kimberly Kempf Leonard et al. eds., 1995); BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 116-34 (1993) (noting that 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).

539. *E.g.,* FELD, *supra* note 2, at 271-72 (recognizing that more affluent white parents can purchase private services for their troubled children, whereas poorer minority juveniles proceed by default through the juvenile justice system).

procedurally more formal and sentence all delinquents more severely.[540] Urban courts also have greater access to detention facilities, and detained youths typically receive more severe sentences than those who remain at liberty.[541] Because proportionally more minority youths live in urban environments, the geographic and structural context of juvenile justice administration may interact with race to produce minority overrepresentation in detention facilities and correctional institutions.[542]

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 produce 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

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540. FELD, JUSTICE FOR CHILDREN, *supra* note 162, at 158-62; Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 185, 190 (1991).

541. *E.g.*, Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263, 294 (1980) ("[B]eing detained before adjudication had an independent effect on the likelihood of commitment, entirely apart from the fact that both detention and commitment had common antecedents."); 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, 1337-39 (1989) (noting additional studies finding "negative effects of pretrial detention on subsequent sentencing").

542. *See generally* FELD, *supra* note 2, 271-72 (noting that minority youths are more likely to be adjudicated and committed to state facilities than their more affluent white counterparts who can afford alternative treatment); SNYDER & SICKMUND, *supra* note 319, at 154-55 (finding that black youths were nearly twice as likely to be detained than white youths for similar offenses). Poe-Yamagata and Jones summarize the racial differentials in rates of detention:

> Of White youth referred to juvenile court, a smaller percentage were locked up in detention facilities (66% referred vs. 53% detained). Of African American youth referred to juvenile court, a larger percentage were locked up in detention facilities (31% vs. 44%). . . .
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> . . . This pattern of disproportion was across all offense categories but was most dramatic among drug offense cases. Cases involving White youth were 66% of those referred but only 44% of those detained. In contrast, drug offense cases involving African American youth were 32% of those referred but 55% of those detained. In every offense category, a substantially greater percentage of African American youth were detained than White youth.

POE-YAMAGATA & JONES, *supra* note 509, at 9.

40% of the inmates in long-term public institutions.[543] Minority youths, especially Blacks, are overrepresented at each successive step of the decision-making process, with the greatest disparities occurring in the initial stages.[544]   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.[545] 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.   Because the system operates cumulatively, however, 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."[546]

In 1988, Congress amended the Juvenile Justice and

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543. NAT'L RESEARCH COUNCIL, *supra* note 33, at 231; *see also* POE-YAMAGATA & JONES, *supra* note 509, at 9 (finding similar proportional discrepancies in 1994).

544. MILLER, *supra* note 333, at 69-72 (noting previous studies concluding that racial disparities occur most often in the earlier and latest stages of juvenile justice processing); POE-YAMAGATA & JONES, *supra* note 509, at 16 (using an index constructed by dividing minority youth proportion in pretrial detention by minority proportion in the youth population at risk indicated that in forty-three of forty-four states to determine that the proportion of minority youths in detention was 2.8 times (280%) higher than their make-up in the general population); SNYDER & SICKMUND, *supra* note 219, at 141-62. Edmund F. McGarrell, *Trends in Racial Disproportionality in Juvenile Court Processing: 1985-1989*, 39 CRIME & DELINQ. 29, 46 (1993) (concluding that disproportionate referrals of minority youths result in corresponding increases in pre-trial detention).

545. *See* NAT'L RESEARCH COUNCIL, *supra* note 33, at 251 (finding "pronounced differences in officers' attributions about the causes of crime committed by white and minority youth"); 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).

546. NAT'L RESEARCH COUNCIL, *supra* note 33, at 257;   *see also* POE-YAMAGATA & JONES, *supra* note 509, at 18, 20 (finding that the minority proportion of youths in public correctional facilities about double that of Whites (66% vs. 34%) and that black youths with no prior admissions were six times more likely than white youths to be confined). A review of juvenile court sentencing studies found that

> race discrimination appears most widespread—minorities (and youth in predominantly minority jurisdictions) are more likely to be detained and receive out-of-home placements than whites regardless of "legal" considerations. Because processing in the juvenile justice system is deeply implicated in the construction of a criminal (or "prior") record, experiences as a juvenile serve as a major predictor of future processing.

Sampson & Lauritsen, *supra* note 287, at 363.

Delinquency Prevention (JJDP) Act and required states that receive federal juvenile justice funds to assure equality of treatment on the basis of race and to examine what accounts for minority overrepresentation in detention facilities and institutions.[547] A number of states responded to the JJDP Act mandate and reported racial disparities in their juvenile justice systems.[548] After controlling for offense variables, forty-one of forty-two states found minority youths overrepresented in secure detention facilities; all of the thirteen states that analyzed other phases of juvenile justice decision making and institutional confinement reported disproportionate minority confinement.[549] When judges sentence delinquents, minority juveniles receive disproportionately more out-of-home placements than do white youths,[550] while Whites receive disproportionately more probationary dispositions than do black youths.[551] Black youths with two or fewer prior admissions have much higher rates of commitment to state institutions than do white youths. Finally, black youths confined in institutions serve longer periods in custody than do white youths committed for similar offenses.[552]

The recent "get tough" amendments to juvenile sentencing statutes have had a substantial and disproportionate impact on minority youths in correctional confinement. Examining the proportional changes in the racial composition of institutional populations for the period 1985-95, which corresponds with the era of "get tough" changes in sentencing laws, reveals that the overall numbers of youths in custody on any given day increased almost 40%.[553] 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%.[554] Thus, the overall increases in the numbers of youths confined and proportional changes in the racial composition of the correctional inmates reflect the sharp growth of minority youths in institutions. As

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547. NAT'L RESEARCH COUNCIL, *supra* note 33, at 228-29; *see* 42 U.S.C. § 5633(a)(16) (2000).

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

549. Carl E. Pope, *Racial Disparities in Juvenile Justice System*, 5 OVERCROWDED TIMES 1, 4 (1994).

550. POE-YAMAGATA & JONES, *supra* note 509, at 14-15.

551. *Id.*

552. *Id.* at 18-21.

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

554. *Id.* at 271.

a result, the proportion of white juveniles in custody declined from 44% 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 youths.[555]

CONCLUSION

The issue of race has had two distinct and contradictory influences on juvenile justice theory and practice during the second half of the twentieth century.   Initially, the Warren Court's "Due Process Revolution" attempted to enhance civil rights, protect minority citizens, and limit the coercive powers of the State. *Gault's* expansion of procedural rights to juvenile court, however, legitimated punishment and fostered a procedural and substantive convergence with criminal courts. Three decades of judicial decision, legislative amendments, and administrative changes have converted the juvenile court into a second-class criminal court for young offenders that provides neither therapy nor justice.

The second phase of juvenile justice "reform" and the adoption of "get-tough" policies in the 1980s and early 1990s reflected the confluence of macro-structural, economic, and racial demographic changes that occurred in America's cities between the 1960s and the 1980s; the emergence of a black underclass living in concentrated poverty; and the rise in gun violence and youth homicides.   Mass media portrayals and political rhetoric have established in the public mind the connection between race and youth crime.   Increasingly, political discourse and public policy depict the poor as undeserving and responsible for their own circumstances.[556] Politicians exploit these racially-tinged perceptions with

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555.   *See id.* at 270-71; *see also* KRISBERG & AUSTIN, *supra* note 538, at 125-28 (noting the disproportionate minority confinement in institutions).

556.   GARLAND, *supra* note 6, at 196; *see also* BECKETT, *supra* note 25, 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 response to deviant behavior").   It has been argued 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.

HACKER, *supra* note 48, at 225.

pledges to "get tough" on youth crime, which the public understands as a "code word" for harsher treatment of young black males.

The transformation of the juvenile court and the "crack down" on juveniles represents only one of several public policy responses to the recent social-structural changes and rise of youth crime. A century ago, Progressive reformers had to choose between undertaking social reforms that would structurally alter criminogenic forces or ministering to the people whom those adverse conditions damaged. Because of their social class and ethnic antagonisms, Progressive reformers ignored the structural implications of their delinquency theories and chose instead to "save children." A century later, the same "conservative" versus "liberal" policy choices remain—between controlling and punishing errant individuals and initiating social-structural changes to reduce the developmental risks that some young people face. Ultimately, the prevalence of violent crime in certain urban areas is about power, politics, and social inequality.[557] Concentrated poverty, racial isolation, and the ensuing youth crime are the cumulative consequences of public policies that produce patterned inequality among certain demographic sub-groups.

Unfortunately, contemporary public policy discourse about poverty, political economy, the allocation of societal resources and benefits, inequality, and crime have all become intertwined with questions of race. The mass media convey biased and misleading images that incite white viewers' fear and indignation, and activate stereotypes and prejudices. Conservative politicians exploit voters' sensitivities to matters of race with "coded" messages designed to sustain a Right-wing coalition and promote racial animus.[558] As a result, Americans

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557. EDSALL & EDSALL, *supra* note 11, at 148. According to Edsall and Edsall,

> Race was embedded in conflicts surrounding tax, spending, education, welfare, regulatory, and industrial policy. The racial consequences of policy alternatives—inescapable because of racial differences in income, in reliance on government benefits, in job and family patterns, in rates of criminality, in demographics, in suburban versus urban residential trends, as well as in a host of other measures—became integral to the structuring of the political debate, sometimes explicitly, sometimes implicitly.

Id. at 148.

558. *Id.* at 281. "Race will remain an exceptionally divisive force in politics as long as the debate is couched in covert language and in coded symbols—and

engage in a subterranean discourse on race based on misleading images and potent symbols.[559] As long as the public and politicians identify long-term poverty and its associated problems—unemployment, drug abuse, criminality, illegitimacy —as a black condition separate from the mainstream of American society, policy makers can evade a sense of governmental responsibility or public obligation.[560] The

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as long as major participants fail to be explicit about their goals." *Id.* The Edsalls further contend that the stigmatization of racism has prevented politicians from explicitly discussing the costs and benefits of various strategies to achieve equality because they implicate frank discussions of differences among the races. "To raise for public consideration not only the costs of equality, but a host of other potentially racially-tinged subjects—from street violence to illegitimacy to welfare dependency to joblessness—has come to risk, among Democrats and liberals (both white and black) accusations of racism." *Id.* at 282; *see also* Hurwitz & Peffley, *supra* note 346, at 396 (arguing that "[a] debate on crime policy which is fundamentally designed to elicit visceral and angry images of race is both irrational and divisive. . . . To the degree that political discourse is based on the unnecessary infusion of race, public anticrime policy will turn more on passion than on reason).

559. *See, e.g.*, MENDELBERG, *supra* note 12, 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"); Gilens, *supra* note 464, 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").

560. *See* EDSALL & EDSALL, *supra* note 11, at 243. The growth of white suburbs around the deindustrialized urban core isolates poor Blacks and the issues of joblessness, criminality, and welfare dependency associated with life at the bottom of the income distribution, and separates the concerns of the poor and minorities from those of mainstream voters.

> [T]hese developments further incorporate race as a pervasive factor in the public perception of the country's social and economic structure. That incorporation, in turn, establishes race as pervasive in political and public policy decisions. Long-term poverty, and all the problems associated with it, becomes identified as a black condition, increasingly separable from the mainstream of society, and, for many whites, separable from governmental and public obligation.

Id. While HACKER, *supra* note 48, at 228-29, agrees that black youth homicide results from the confluence of guns and drugs in the inner city, *see supra* notes 320-30 and accompanying text, he also argues that it is important to ask

> *why* so many young men are engaging in what amounts to a self-inflicted genocide. While in one sense these are "free" acts, performed of personal volition, when they become so widespread, they must also be seen as expressing a despair that suffuses much of their race. These are young men who do not know whether they will live another year, and many have given up caring. If they are prepared to waste the lives of others, they will hardly be surprised if their turn comes next. No other American race is wounding itself so fatally. Nor can it be said that black Americans chose this path for themselves.

political, media, and public association of urban black males with crime have fostered punitive policies rather than efforts to expand the employment and educational opportunities that prevent crime. For adult offenders, harsher policies such as those associated with the "war on drugs," have quadrupled rates of confinement and have had a disproportionate impact on Blacks.[561] The transformation of the juvenile court into a punitive agency for the social control of "other people's children" is another example of the political exploitation of the connection in the public mind between race and youth crime.[562]

The overrepresentation of minority youths in the juvenile justice system, as well as in concentrated poverty, makes imperative the pursuit of racial and social justice. Politicians and the public view youth crime, violence, and child poverty through a prism of race, as the *private* problems of minority families and children rather than as matters of *public* concern for the entire community. They do so, in part, because media depictions systematically distort the public's understanding of social reality.[563] Analysts have proposed a number of policies to reduce the distorting aspects of media coverage—analyzing crime statistics and claims of law enforcement officials more critically, broadening the scope of crime coverage, and reporting crime in a way that identifies the relationships between a single incident and the broader structural context.[564] Social-structural conditions and poverty affect the distribution of crime and violence and cause their disproportionate concentration within minority communities.[565] Unfortunately, public policy debates systematically exclude class from the agenda and thus fail to address the fundamental sources of inequality for both Blacks and Whites.[566] A variety of public policies can help to equalize opportunity for all individuals, regardless of race or ethnicity: economic policies to combine

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So, in allocating responsibility the response should be clear. 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.

HACKER, *supra* note 48, at 228-29.

561. MAUER, *supra* note 45, at 142-60; TONRY, *supra* note 14, at 113-16.
562. *See* FELD, *supra* note 2, at 245-86.
563. *See supra* Part III.B.
564. DORFMAN & SCHIRALDI, *supra* note 344, at 27-34.
565. *See supra* Part III.A.
566. *See* EDSALL & EDSALL, *supra* note 11, at 281-88.

growth and full employment with job training; education programs to enhance employment prospects of the concentrated poor;[567] raising the minimum wage; enforcing child-support orders; and enacting government-financed "fringe benefits" for all poor working men and women similar to the benefits that the tax code provides upper-income households—housing subsidies, income subsidies—or that private employers give their workers—medical insurance.[568] Rather than addressing issues of public policy and political economy that contribute both to racial inequality and the skewed distribution of crime, politicians manipulate and exploit racially tinged perceptions of young offenders for electoral advantage. Ultimately, we must recognize that for every complex problem, such as crime, there is a simplistic solution, such as "getting tough," and it is wrong.[569]

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567. *See* WILSON, THE TRULY DISADVANTAGED, *supra* note 207, at 140-64; WILSON, WHEN WORK DISAPPEARS, *supra* note 207, at 183-206.

568. *See* JENCKS, *supra* note 277, at 87-91; KATZ, *supra* note 62, at 205-15, 223-35.

569. *See* GEST, *supra* note 366, at 270 (observing that "[p]erhaps the single most important, and most difficult to achieve, reform in America's battle against crime would be a transformation of the debate over crime policy from an orgy of emotional but largely hollow and oversimplified talk into rational decisionmaking").