1999

The Transformation of the Juvenile Court--Part II: Social Structure, Race, and the "Crack Down" on Youth Crime

Barry C. Feld
University of Minnesota Law School, feldx001@umn.edu

The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime

Barry C. Feld†

The public and politicians perceive a significant and frightening increase in youth crime and violence. Concern about the inability of juvenile courts to rehabilitate chronic and violent young offenders while simultaneously protecting public safety accompanies the growing fear of youth crime. Sensational media depictions of young criminals as a different breed of "superpredators" further heighten public anxiety.[1] Frustration with the intractability of youth crime fuels a desire to "get tough" and provides the political impetus to "crack down," to transfer some young offenders to criminal courts for prosecution as adults, and to strengthen the sentences that juvenile court judges impose on the remaining delinquents.[2] Cumulatively, these legal reforms have fostered a procedural and substantive convergence between juvenile and criminal courts.

---

† Centennial Professor of Law, University of Minnesota. B.A., University of Pennsylvania; J.D., University of Minnesota Law School; Ph.D., Harvard University. This Article was originally presented at the Re-inaugural Lecture as Centennial Professor of Law on September 8, 1998. I am grateful to our former Dean, Bob Stein, who took a courageous administrative risk a decade ago and enabled me to grow personally and professionally in ways that neither of us could have anticipated. I want to thank Tom Sullivan for his extraordinary support and encouragement since he became Dean. Although the faculty had very high expectations for Tom when he assumed the helm four years ago, his efforts on behalf of the Law School and the University have far surpassed even our most wildly optimistic predictions. Finally, my wife, Patty, brings joy, meaning, and purpose to my life. Her unconditional love provides the foundation that makes all else possible.

1. *See* FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 3-16 (1998); *see also* JAMES ALAN FOX, U.S. DEP'T OF JUSTICE, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING 2 (1996).

2. *See* Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 194-220 (1998) (analyzing recent changes in juvenile court waiver and sentencing laws).

In my inaugural chair lecture eight years ago, I identified several then-emerging punitive policy trends that now have come to fruition.[3] These trends included procedural, jurisdictional, and jurisprudential modifications of the juvenile court. We have since witnessed further procedural convergence between juvenile and criminal courts; jurisdictional reforms that divert noncriminal status offenders away from the juvenile court and transfer increasing numbers of serious young offenders to criminal court; and jurisprudential changes that deemphasize rehabilitation and escalate punitive sanctions for ordinary delinquents.

Within the past three decades, judicial decisions, legislative amendments, and administrative changes have transformed the juvenile court from a nominally rehabilitative social welfare agency into a scaled-down, second-class criminal court for young offenders that provides neither therapy nor justice.[4] The great migration of African-Americans from the rural south to the urban north that began more than three-quarters of a century ago, the macro-structural transformation of American cities and the economy over the past quarter of a century, and the current linkages in popular and political minds between race and serious youth crime provided the stimulus for recent punitive juvenile justice policies.[5] Two competing cultural and legal conceptions of young people have facilitated the juvenile court's transformation from a welfare into a penal organization. On the one hand, legal culture views young people as innocent, vulnerable, fragile, and dependent *children* whom their parents

3. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 700-22 (1991) (summarizing the procedural and substantive convergence between juvenile and criminal courts).

4. This Article continues that analysis and builds on my growing body of research, including *Criminalizing the American Juvenile Court*, 17 CRIME & JUST. 197 (1993) (analyzing changes in procedure, jurisdiction, and jurisprudence of juvenile courts) [hereinafter Feld, *Criminalizing the American Juvenile Court*]; *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141 (1984) (analyzing the procedural convergence between juvenile and criminal courts) [hereinafter Feld, *Criminalizing Juvenile Justice*]; *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987) (discussing punitive policies in waiver statutes) [hereinafter Feld, *Juvenile Waiver Statutes*]; and *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821 (1988) (discussing punitive juvenile court sentencing practices) [hereinafter Feld, *Punishment, Treatment*].

5. *See generally* BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 189-224 (1999).

and the state should protect and nurture. On the other hand, legal culture perceives young people as vigorous, autonomous and responsible almost *adult-like* people from whose criminal behavior the public needs protection.

The ambivalent and conflicted "jurisprudence of youth" enables policy makers selectively to manipulate the competing social constructs of *innocence* and *responsibility* to maximize the social control of young people. Over the past three decades, the intersections of race and crime have provided the catalyst for juvenile justice policy-makers to use these alternative constructs of youth to conduct a form of "criminological 'triage.'"[6] At the "soft-end," juvenile court reforms have shifted noncriminal status offenders, primarily female and white, out of the juvenile justice system into a "hidden system" of social control in the private sector mental health and chemical dependency industries. At the "hard end," states transfer increasing numbers of youths, disproportionately minority, into the criminal justice system for prosecution as adults. In the "middle," juvenile courts' sentencing policies and practices escalate the punishment imposed on those delinquents, again disproportionately minority, who remain in an increasingly criminalized juvenile justice system.

The relationships between social structural changes, race, and crime account for many of the recent punitive changes in juvenile justice policies.[7] In the language of the social sciences, the juvenile court constitutes the dependent variable and various social structural, economic, racial, demographic, and legal changes comprise independent variables. This Article analyzes the transformation of the juvenile court from a social welfare agency into a deficient criminal court. It links these legal modifications to broader social structural changes and, especially, the racial-demographic changes and patterns of youth crime that occurred in cities in post-industrial America.

A century ago, the processes of modernization and industrialization fostered a particular ideological conception of *childhood* and *positive criminology* which, in turn, encouraged

---

6. *Id.* at 7; *see* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 74 (1997).

7. *See generally* FELD, *supra* note 5, at 189-244 (arguing that macrostructural changes associated with deindustrialization of the inner city led to the crack cocaine epidemic and increases in young black males' homicide rates which, in turn, fostered punitive juvenile and criminal justice policies).

the creation of the "rehabilitative" juvenile court. More recent social structural and macro-economic changes provide the catalyst to transform the juvenile court into a more punitive agency. From its inception, the social control of ethnic and racial minority offenders has constituted one of the juvenile courts' most important functions. At the turn of the century, the Progressives created the juvenile court to assimilate, integrate and control the children of the Eastern European immigrants pouring into cities of the East and Midwest. In post-industrial American cities today, juvenile courts function to maintain social control of minority youths, predominantly young black males. Current punitive juvenile justice policies reflect the changing character and complexion of juvenile courts' clientele. Fear of "other peoples' children," especially minority youths, motivates the transformation of the juvenile court from a welfare agency into a second-class criminal court for young offenders.[8]

The juvenile court's metamorphosis into a second-rate penal agency occurred so readily because of a fundamental flaw in the underlying *idea* of the juvenile court. Juvenile courts attempt to combine social welfare and social control functions in one organization, but inevitably pursue both missions badly because welfare and crime control embody inherent and irreconcilable contradictions. If a state separates social welfare goals from criminal social control functions, then no need remains for a separate juvenile court. Rather, a state could try all offenders in one integrated criminal justice system. But children do not possess the same degree of criminal responsibility as adults. Adolescent developmental psychology, criminal law jurisprudence, and sentencing policy provide rationales to recognize youthfulness formally as a mitigating factor when judges sentence younger offenders. A "youth discount" provides a sliding scale of criminal responsibility for younger offenders who have not quite learned to be responsible or developed fully their capacity for self-control.[9] Formally recognizing "youthfulness" as a mitigating factor in sentencing will provide youths with greater protections and justice than they currently receive in either the juvenile or criminal justice systems. Uncoupling social control from social welfare also would enable public poli-

8. *See infra* note 33 and accompanying text.

9. *See* Feld, *supra* note 6, at 115-16.

cies to address directly the "real needs" of all children regardless of their criminality.

This Article analyzes why and how the juvenile court has changed so profoundly during the first century of its existence and explains what sensible youth crime policies should be. Part I briefly analyzes the social history of the juvenile court and argues that the Progressive reformers who created the juvenile court deliberately designed it to discriminate against "other peoples' children," a feature that carries over into contemporary juvenile justice administration. Part II analyzes the "constitutional domestication" of the juvenile court. It places the Supreme Court's juvenile court "due process" decisions in a broader social structural context and argues that the Court emphasized procedural safeguards as part of its broader agenda to protect the civil rights and liberty interests of minorities. Part III analyzes the impact of the juvenile court's procedural revolution on its substantive authority. Policy makers have conducted a form of jurisdictional "triage," shedding youths at both the "soft" and "hard" ends, and punishing more severely those delinquents who remain within its contracted authority. Part IV examines why the juvenile court's transformation occurred so readily. It contends that the juvenile court's fundamental flaw is not simply a century-long failure of implementation, but a failure of conception. The juvenile court's effort to combine social welfare and criminal social control in one agency simply assures that it pursues both missions badly. Finally, Part V contends that once a state uncouples social welfare from social control, then no need remains for a separate juvenile court. It explores, on the one hand, how a criminal justice system should respond to the youthfulness of some offenders. It analyzes, on the other, how public policies might more appropriately address the "real needs" of all youths, regardless of their criminality.

I. THE ORIGINS OF THE JUVENILE COURT

The juvenile court is the byproduct of changes in two cultural ideas—*childhood* and *social control*—that accompanied modernization and industrialization a century ago.[10] Economic

10. *See generally* JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640-1981 (1988) (discussing the impact of changing social construction of childhood on juvenile justice policies); Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1085-

modernization transformed America from a rural agrarian society into an urban industrial one.[11] Immigrants from southern and eastern Europe and from rural America flooded into the burgeoning cities to take advantage of new economic opportunities and crowded into ethnic enclaves and urban ghettoes. The "new" immigrants' sheer numbers and their cultural, religious, and linguistic differences hindered their assimilation and acculturation, and posed a significant nation-building challenge for the dominant Anglo-Protestant Western Europeans who had arrived a few generations earlier.[12]

Changes in family structure and function accompanied the economic transformation from an agricultural to an urban industrial society, and the separation of work from the home produced a new social construction of children.[13] A reduction in the number and spacing of children, a shift of economic functions from the family to other work environments, and a modernizing and privatizing of the family substantially modified the roles of women and children.[14] The idea of childhood is so-

1101 (1991) (analyzing the social construction of childhood and its impact on juvenile justice treatment ideology).

11. *See generally* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 101-36 (2d ed. 1977) (discussing the origins of the Cook County Juvenile Court); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVE IN PROGRESSIVE AMERICA (1980) (discussing the social structural context of the Progressives' building of social welfare and social control institutions); ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877-1920 (1967) (discussing the impact of industrialization on social institutions). On the role of developing social theories on criminal justice and juveniles, see also FRANCIS A. ALLEN, THE BORDERLAND OF THE CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY 25-41 (1964) and ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978) (analyzing the impact of social sciences on juvenile courts "rehabilitative" ideology).

12. *See* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925, at 87 (2d ed. 1988); RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 8 (1955).

13. *See* Ainsworth, *supra* note 10, at 1094 n.68. Professor Ainsworth explains that a society is a composite of humanly constructed social artifacts, one of which is the idea of "childhood." *See id.* at 1085-91. "[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." *Id.* at 1091, 1093.

14. *See* CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 9, 178-209 (1980); JOSEPH F. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA, 1790 TO THE PRESENT 114-15 (1977); CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY

cially constructed, and during this modernizing era the upper and middle classes promoted a new ideology of children as vulnerable, fragile and dependent innocents who required special attention and preparation for life.[15]

Modernization and industrialization sparked the Progressive movement which addressed a host of social problems ranging from economic regulation to criminal justice to political reform.[16] Progressives believed that professionals and experts

---

BESIEGED 6-10 (1977) (analyzing the effects on family life of the nineteenth-century emancipation of women and the growth of industrialization).

15. The idea of *childhood* specifies the social, cultural, and physical characteristics that distinguish children from adults. *See* DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 16-17 (1993). Within the past couple of centuries, western societies began to differentiate the period between infancy and adulthood, and to evidence greater concern for the welfare and rearing of children. In CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 365-404 (1962), Philippe Aries traced the modernizing of the family and childhood to the upper bourgeois and nobility in the sixteenth and seventeenth centuries when their indifference to their offspring began to diminish. Neil Postman in THE DISAPPEARANCE OF CHILDHOOD 37-51 (Vintage Books 1994) (1982) noted that churchmen and moralists in the seventeenth and eighteenth centuries advocated greater parental responsibility to raise their own children, to oversee their education, to restrict their indiscriminate contact with non-family members, and to protect their innocence. These changing views of children and parental responsibility gradually diffused downward through the social class structure over time.

In 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. Degler called the nineteenth century the "Century of the child," and attributed change in child-rearing methods to the emerging perception of children. DEGLER, *supra* note 14, at 71-72. Degler observes:

> Children 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.

Id. at 66; *see also* KETT, *supra* note 14, at 111-43; Ainsworth, *supra* note 10, at 1091-96.

16. *See generally* HOFSTADTER, *supra* note 12; WIEBE, *supra* note 11. Progressivism encompassed a host of ideologies and addressed a broad spectrum of issues. *See generally, e.g.*, GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916, at 195-99 (1963) (economic regulation) [hereinafter TRIUMPH OF CONSERVATISM]; ROTHMAN, *supra* note 11, at 5-13 (criminal justice); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1954) (antitrust). Progressives sponsored laws to regulate railroads, to restrict corporate trusts and economic abuses, and to reform business practices. *See gen-*

could develop rational and scientific solutions and that benevolent government officials could intervene to remedy social and economic problems.[17] Progressives attempted to "Americanize" the immigrants and poor through a variety of agencies of assimilation and acculturation to become sober, virtuous, middle-class Americans like themselves.[18] The Progressives

---

erally BRUCE BRINGHURST, ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES, 1890-1911 (1979) (antitrust); GABRIEL KOLKO, RAILROADS AND REGULATION 1877-1916 (1965) (railroad regulation); ROBERT H. WIEBE, BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT (1962) (business regulation). They legislated for urban public health and welfare reform and to improve child welfare. *See generally* SUTTON, *supra* note 10, at 130-32; SUSAN TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 141-61 (1982); WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 108-54 (3d ed. 1984). They introduced civil service and "good government" reforms to limit the power of corrupt urban ethnic political bosses. *See generally* SAMUEL HAYES, THE RESPONSE TO INDUSTRIALISM, 1885-1914 (Daniel J. Boorstin ed., 1957). For our purposes, Progressive reformers embraced many "child-saving" programs to respond to the myriad of threats to child development: inadequate and broken families, dependency and neglect, poverty and welfare, education and work, crime and delinquency, recreation and play.

17. Progressives invoked scientific rationality and claimed special expertise to legitimate their programs and to expand their professional authority. *See* BURTON J. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION OF AMERICA 85-92 (1976). Sutton states that:

> [A] characteristic feature of Progressive movements was their tendency to see social control not as a moral or political problem, but primarily as an administrative problem. Progressives sought to depoliticize the growing demands for the protections of a welfare state by promoting reforms that emphasized administrative efficiency and professional expertise rather than substantive changes in the allocation of rights and economic resources.

SUTTON, *supra* note 10, at 124. 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. *See* TRIUMPH OF CONSERVATISM, *supra* note 16, at 2-3; ROTHMAN, *supra* note 11, at 45-50. Progressives believed that neutral, detached experts could apply knowledge rationally to formulate public policy without political distraction. *See* SUTTON, *supra* note 10, at 127. They created governmental agencies to implement their economic and social reforms, and enlarged and expanded the power of the State. *See supra* note 16 and accompanying text. They felt that benevolent public governmental action could ameliorate the dislocations of social change and provide a necessary counterbalance to the power of private corporations.

18. Progressives sought to use the state to inculcate their values in others. *See* ROTHMAN, *supra* note 11, at 45-50; *cf.* ALLEN, *supra* note 11, at 129-30. Rothman notes that:

> The most distinguishing characteristic of Progressivism was its fun-

coupled their trust of state power with the changing cultural conception of children and entered the realm of "child-saving."[19] Child-centered reforms, such as the juvenile court, child labor laws, social welfare legislation, and compulsory school attendance laws both reflected and advanced the changing imagery of childhood.[20]

A more modern, scientific conception of social control—positive criminology—attempted to identify the antecedent variables that caused criminality and challenged the classic formulation of crime as the product of blameworthy, free-will choices.[21] By attributing criminal behavior to external and de-

---

damental trust in the power of the state to do good. The state was not the enemy of liberty, but the friend of equality—and to expand its domain and increase its power was to be in harmony with the spirit of the age.... The state was not a behemoth to be chained and fettered, but an agent capable of fulfilling an ambitious program.

ROTHMAN, *supra* note 11, at 60. They viewed individual and social welfare as co-extensive and saw no need to interpose procedural safeguards to protect individuals from state benevolence. *See id.* Although Progressives used modern managerial techniques and organizational strategies, they derived their vision for social reforms from an earlier, more homogenous and traditional society. *See id.* at 9. A shared moral consensus and supreme confidence in their own values sustained them. *See id.* at 60-61. They used governmental agencies to assimilate and acculturate immigrants and the poor to become more like themselves. *See* David Rothman, *The State as Parent: Social Policy in the Progressive Era, in* DOING GOOD: THE LIMITS OF BENEVOLENCE 67, 79-82 (Willard Gaylin et. al. eds., 1981).

19. *See* ROTHMAN, *supra* note 11, at 205-12; *see also* PLATT, *supra* note 11, at 43.

20. Many Progressive programs shared a unifying child-centered theme. "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." WIEBE, *supra* note 11, at 169; *see also* LAWRENCE A. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957, at 127-28 (1961) (compulsory school attendance laws); KETT, *supra* note 14, at 215-44; TIFFIN, *supra* note 16, at 187-214 (child welfare legislation); WALTER I. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA 120-21 (1970) (child labor laws).

21. Criminal justice and social control policies reflect underlying ideological assumptions—unstated presuppositions, values, and beliefs—about causes of crime and appropriate tactics and strategies to reduce it. *See* FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 27 (1982). "These cultural patterns 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). Classical criminal law assumed that

terministic forces, Progressive reformers reduced actors' moral responsibility for their crimes, employed medical analogies to "treat" offenders, and focused on efforts to reform rather than to punish them. A growing class of social science professionals fostered the "rehabilitative ideal," which requires a belief in human malleability and a consensus about the appropriate directions of personal change.[22]

---

rational, free-willed moral actors made voluntary choices to commit crimes, and that they deserved prescribed consequences for their acts. *See, e.g., id.* at 28-35. The criminal law reflected a retributivist jurisprudence that blamed and punished offenders for the quality of their choices, or the mens rea, rather than attempting to affect their morality according to social utility. *See id.* at 61-66, 74-76.

In the late nineteenth and early twentieth centuries, Progressives reformulated their ideology of crime, modified criminal justice administration, and based social control practices on new theories about human behavior and social deviance. *See* ROTHMAN, *supra* note 11, at 52-61. Positive criminology asserted that antecedent forces—biological, psychological, social, or environmental—"determined" or caused criminal behavior. *See id.* 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. *See* ALLEN, *supra* note 11, at 26; DAVID MATZA, DELINQUENCY AND DRIFT 5-11 (1964). Positivism attributed criminal behavior to deterministic forces that compelled the offender to act as he did, rather than to a deliberate exercise of "malicious" free will. *See* MATZA, *supra*, at 12-21. Determinism reduced offenders' moral responsibility for their crimes, and penologists attempted to reform them rather than to punish them for their offenses. *See* FRANCES ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 3-7 (1981). "The positivist model demanded consideration of each criminal's background and personal traits as part of an intelligent disposition. It demanded a system of individualized justice in which punishment and deterrence were of limited relevance." RYERSON, *supra* note 11, at 22.

At the turn of the century, Progressive criminal justice reformers aspired to scientific status and sought to strengthen the similarities between the causal determinism of the natural sciences and those of the social sciences. *See id.* at 101 (noting Progressives "helped open the way to a . . . 'more scientific approach'"). In its quest for scientific legitimacy, criminology borrowed both its methodology and vocabulary from the increasingly scientific medical profession. *See id.* at 105-24. Just as germs caused diseases, deterministic assumptions redirected criminological research scientifically to study offenders in order to identify the causes of crime. *See id.* The ability to identify the causes of crime implied the correlative ability to "cure" it through appropriate interventions. *See id.* Medical metaphors—pathology, infection, diagnosis, and treatment—provided popular analogues for criminal justice professionals. *See* ROTHMAN, *supra* note 11, at 293-323. The medical model of criminality emphasized diagnosis, prescription, and intervention to cure the problems of each offender. *See id.*; *see also* RYERSON, *supra* note 11, at 105-24.

22. For example, Francis Allen has written eloquently of the ascendance and decline of the "Rehabilitative Ideal" and noted its central assumptions:

> The rehabilitative ideal . . . assumed; first, that human behavior is the product of antecedent causes. These causes can be identified. . . .

The juvenile court combined the new conception of children with the new strategies of social control to produce a judicial-welfare alternative to criminal justice, to remove children from the adult process, to enforce the newer conception of children's dependency, and to substitute the state as *parens patriae*.[23] The juvenile court's rehabilitative ideal rested on several sets of assumptions about positive criminology, children's malleability, and the availability of effective intervention strategies to act in the child's "best interests." Progressive "child-savers" described the juvenile court as a benign, non-punitive, and therapeutic agency, although modern writers question whether we should view the movement primarily as a humanitarian attempt to save poor and immigrant children, or as an effort to expand state social control over them.[24] The legal doctrine of *parens patriae*, or the State as "super-parent," legitimated intervention and supported the view that juvenile courts conducted civil rather than criminal proceedings.[25] Characterizing intervention as a civil or welfare proceeding, rather than a criminal prosecution, fulfilled the reformers' desire to remove children from the adult justice system and allowed greater flexibility to supervise and treat children. Because reformers eschewed punishment, the juvenile court's "status jurisdiction"

> 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, *supra* note 11, at 26.

A flourishing rehabilitative ideal requires both a belief in the malleability of human behavior, and a basic moral consensus about the appropriate directions of human change. *See id.* at 26-27. It requires a cultural consensus about means and ends and an agreement about the goals of change and the strategies necessary to achieve them. *See id.* Progressives believed that the new human behavioral sciences provided them with the necessary "technology," the tools with which to systematically change people. *See* RYERSON, *supra* note 11, at 99-136. They also believed in the virtues of their social order and the propriety of imposing their middle-class values on immigrants and the poor: "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." ROTHMAN, *supra* note 11, at 48-49.

23. *See id.* at 205-35.

24. *See, e.g.*, PLATT, *supra* note 11, at 176-81; ROTHMAN, *supra* note 11, at 234-35; SUTTON, *supra* note 10, at 232-58.

25. *See* ROTHMAN, *supra* note 11, at 212.

enabled them to respond to noncriminal behavior such as smoking, sexual activity, truancy, immorality, or living a wayward, idle, and dissolute life.[26] Juvenile courts' status jurisdiction reflected the social construction of childhood and adolescence that emerged during the nineteenth century, and authorized pre-delinquent intervention to forestall premature adult autonomy and enforce the dependent position of youth.

Procedure and substance intertwine in the juvenile court. By separating children from adults and providing a rehabilitative alternative to punishment, juvenile courts rejected the criminal law's jurisprudence and procedural safeguards. Procedurally, juvenile courts used informal processes, excluded lawyers and juries, conducted confidential hearings, and employed a euphemistic vocabulary to obscure and disguise the reality of coercive social control. Substantively, juvenile courts imposed indeterminate and non-proportional sentences, emphasized treatment and supervision rather than punishment, and focused on offenders' "real needs" and future welfare rather than past offenses. Theoretically, a child's "best interests," background, and welfare guided dispositions, and a youth's offense constituted only a symptom of those "real" needs.[27] The

---

26. Conceived as a system of social welfare rather than punishment, juvenile courts brought within their ambit of control young peoples' behavior that criminal courts previously ignored or handled informally. *See* PLATT, *supra* note 11, at 46-74; SUTTON, *supra* note 10, at 121-53. This broader jurisdictional definition included not only a child's criminal *acts* but her *status* or condition of being, indeed, her entire lifestyle. Progressives used the status jurisdiction to legislate and regulate:

> their preferences in the realm of manners and morals. . . . [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.

RYERSON, *supra* note 11, at 47. Thus, the status jurisdiction embodied the newer cultural conception of childhood, further legally separated youths from adults, and expanded state authority over child-rearing and family functions.

27. *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. *See* THOMAS BERNARD, THE CYCLE OF JUVENILE JUSTICE 90-96 (1992). "Indeterminate" meant that the judge set no specific limit to the length of sentence; it could continue indefinitely until adulthood. *See* Feld, *Punishment, Treatment*, *supra* note 4, at 848-50. "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. *See* BERNARD, *supra*, at 90-96. The particular reason or offense that brought a child before the court affected neither the degree, the duration, nor the intensity of interven-

juvenile court's rehabilitative ideal envisioned a specialized judge trained in social sciences and child development whose empathic qualities and insight would aid in making individualized dispositions.[28] Social service personnel, clinicians, and probation officers would assist the judge to decide the child's "best interests."[29] Progressives assumed that a rational, scientific analysis of facts would reveal the proper diagnosis and prescribe the cure.[30] Because the reformers acted benevolently, individualized their solicitude, and intervened scientifically, they saw no reason to circumscribe narrowly the power of the state.[31] Rather, they maximized discretion to diagnose and treat and focused on the child's character and lifestyle rather than on the crime.[32]

Despite their benevolent rhetoric and aspirations, however, the Progressive "child-savers" deliberately designed the juvenile court to discriminate—to "Americanize" immigrants, to control the poor, and to provide a coercive mechanism to distinguish between "our children" and "other people's children."[33] In their pursuit of the rehabilitative ideal, the Progressives situated the juvenile court on a number of cultural, legal, and criminological fault-lines. They created several binary conceptions for the respective juvenile and criminal justice systems:

---

tion. *See* RYERSON, *supra* note 11, at 40. Each child's circumstances differed and judges responded to "needs" rather than "deeds." *Id.* at 40-41. In theory, every youth held the key to their own release from confinement or supervision simply by reforming. Juvenile court jurisprudence rejected blameworthiness and deserved punishment for *past offenses* in favor of a utilitarian strategy of *future-oriented* social welfare dispositions. 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. *See id.*

> It was a social welfare agency, the central processing unit of the entire child welfare system. Children who had needs of any kind could be brought into the juvenile court, where their troubles would be diagnosed and the services they needed provided by court workers or obtained from other agencies.

BERNARD, *supra*, at 83. Courts decided each case on the basis of unspecified "clinical" considerations that did not necessarily control the disposition of the next case.

28. *See* RYERSON, *supra* note 11, at 39-40.

29. *See id.*

30. *See* ROTHMAN, *supra* note 11, at 56-57.

31. *See id.* at 59-61.

32. *See* RYERSON, *supra* note 11, at 42-43.

33. W. NORTON GRUBB & MARVIN LAZERSON, BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN 69 (1982) (describing the impact of selective application of *parens patriae* ideology in a class-based society); *see also* PLATT, *supra* note 11, at 36-39; ROTHMAN, *supra* note 11, at 222-23.

either child or adult; either determinism or freewill; either dependent or responsible; either treatment or punishment; either welfare or deserts; either procedural informality or formality; either discretion or the rule of law. The past three decades have witnessed a tectonic shift from the former to the latter of each pairs in response to the structural and racial transformation of cities, the rise in serious youth crime, and the erosion of the rehabilitative assumptions of the juvenile court.

II. THE TRANSFORMATION OF THE JUVENILE COURT

A. RACE, THE WARREN COURT, AND THE "DUE PROCESS" REVOLUTION

During the 1960s, the Warren Court's civil rights decisions, criminal procedure and due process rulings, and "constitutional domestication" of the juvenile court responded to the broader structural and demographic changes taking place in America, particularly those associated with race and youth crime.[34] 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 inspired the political and legal movements for Civil Rights.[35] The "baby boom" generation born after World War II created a demographic bulge; rates of crime and juvenile delinquency began to escalate in the 1960s as the cohort moved through the age structure.[36] During the turbulent 1960s, increases in youth crime and in urban racial disorders provoked politicians' cries for "law and order" and encouraged adoption of measures to "get tough" and to repress, rather than rehabilitate, young offenders.[37]

The migration of African-Americans from the rural South to the urban 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. More than three-quarters of a century ago, World War I curtailed European immigration and created a demand for black southern laborers to work in north-

34. *See* FELD, *supra* note 5, at 80-81.

35. *See id.* at 94-97. *See generally* NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1992).

36. *See* FELD, *supra* note 5, at 80-81.

37. *See id.*

ern industrial factories.[38] During this same period, the mechanization of cotton-picking and the Mexican boll weevil decreased southern demand for black workers.[39] Because of the historical relationship between blacks and cotton-picking both during slavery and, subsequently, the mechanization of the cotton industry constitutes one of the epochal events in American social history. As indicated in Figure 1, between 1910 and 1920, more than a half-million blacks migrated to non-southern states, followed by more than three-quarters of a million in the 1920s.[40] Following the Depression and in response to rapid economic growth following World War II, black migration from the South soared.[41]

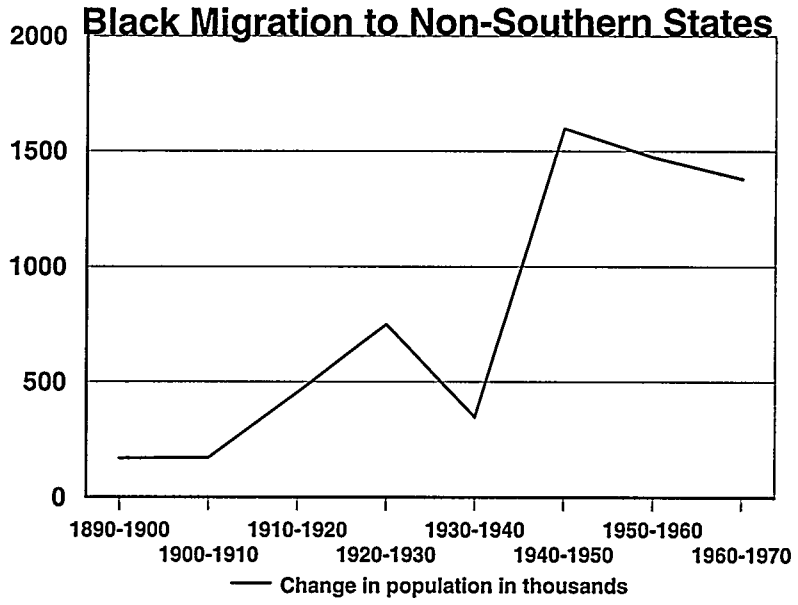
38. The outbreak of World War I in 1914 simultaneously increased the demand for U.S. industrial production and reduced the availability of European immigrants to work in northern factories. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 18, 26-28 (1993). Northern labor recruiters importuned rural southern blacks to migrate at the same time that the Mexican boll weevil invaded the South and devastated cotton production, and the mechanical cotton picker decreased the demand for black tenant and share-cropping farmers. *See* LEMANN, *supra* note 35, at 5-7; MASSEY & DENTON, *supra*, at 27-29. Worsening economic conditions during the Great Depression impelled an additional 400,000 blacks to leave the South for northern cities. *See* MASSEY & DENTON, *supra*, at 43. "Push" factors, as well as "pull" factors, motivated the black exodus: southern racial hostility, Jim Crow laws, Ku Klux Klan violence, lynchings, poor segregated schools, and job discrimination provided incentives to migrate. *See* LEMANN, *supra* note 35, at 14-15. Although the Great Depression temporarily depressed the net emigration of blacks from southern states, the opportunities to work in industries associated with war production during the 1940s induced more than 1.5 million blacks to leave their rural homes. *See* MASSEY & DENTON, *supra*, at 45.

39. *See* LEMANN, *supra* note 35, at 14-15; *see also* MASSEY & DENTON, *supra* note 38, at 27-29.

40. *See also* MASSEY & DENTON, *supra* note 38, at 29.

41. *See* LEMANN, *supra* note 35, at 16-17; MASSEY & DENTON, *supra* note 38, at 45 (noting that postwar economic growth encouraged "extensive black out-migration . . . totaling 1.5 million during the 1950s and 1.4 million during the 1960s").

Figure 1



Source: BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790-1978, at 15 (1980).

When blacks left the rural South, they moved primarily to cities.[42] In the span of half a century, blacks shifted from about three-quarters living in rural environments to three-quarters residing in urban settings.[43] As indicated in Figure 2, in 1910, less than one-quarter of blacks lived in cities. By 1940, half of blacks lived in cities, and by 1960, more than three-quarters did. 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.[44] When blacks moved to cities, they

42. *See* MASSEY & DENTON, *supra* note 38, at 18.

43. *See id.*

44. *See id.* at 18. During this massive migration, southern blacks poured into Chicago, Detroit, Philadelphia, Newark, and other northern, midwestern, and western urban centers. *See id.* at 21, 45; *see also* LEMANN, *supra* note 35, at 16. By World War II, the majority of blacks lived in urban America. *See* LEMANN, *supra* note 35, at 6. During the War, twelve million men and women entered the armed forces, and fifteen million civilians relocated for new defense jobs. *See* FELD, *supra* note 5, at 85. From 1940 to 1944, war-time defense contractors integrated their work forces and the black population in ur-

lived almost exclusively in urban ghettos.[45] As racial diversity increased outside the South, northern whites reacted to the flood of rural southern black migrants with alarm and hostility.[46] Threats, bombings, and violence reinforced racial discrimination and segregation in housing, education, and employment.[47] Enforced residential segregation laid the foundation for the black ghettos that now exist in virtually every major city.[48]

---

ban areas increased dramatically. *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 18 (1992).

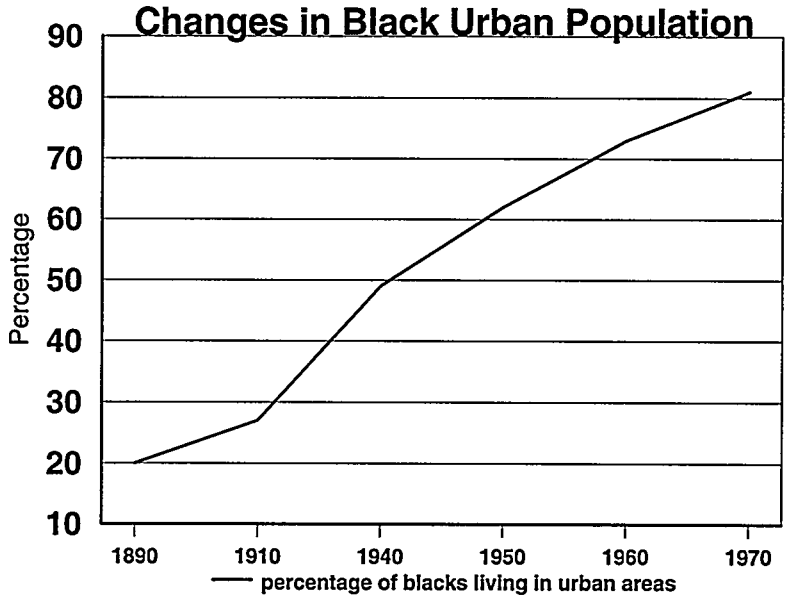
45. *See* MASSEY & DENTON, *supra* note 38, at 44-45.

46. *See id.* at 29, 34.

47. *See id.* at 32-33. The black urban residential experience differed from that of preceding generations of ethnic immigrants for whom ghettos provided way-stations, places to adapt and adjust before moving into mainstream society. *See id.* The black ghetto remained more racially homogeneous, concentrated, and impermeable.

48. *See id.* at 17-59.

Figure 2



Source: BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790-1978, at 14 (1980).

The post-World War II-era witnessed the suburbanization of America, as whites simultaneously moved from cities to suburbs and isolated blacks in blighted inner-city ghettos. Federal housing and mortgage policies subsidized privately owned single-family suburban homes.[49] Housing contractors applied

49. In the period after 1945, suburbs surrounding major cities grew rapidly as federal housing policies and mortgages subsidized privately-owned single-family homes. *See* MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 134-35 (1989). While the prosperity that fostered the baby-boom also sustained suburban growth, "[g]overnment-guaranteed mortgages and tax deductions for mortgage interest payments made new homes available to millions with little or nothing down and low monthly payments. . . . Prosperity, easy credit, and a massive road-building program also increased the number of automobiles," without which the suburban lifestyle would not have been possible. Charles E. Strickland & Andrew M. Ambrose, *The Baby Boom, Prosperity, and the Changing Worlds of Children, 1945-1963*, *in* AMERICAN CHILDHOOD 533, 541 (Joseph M. Hawes & N. Ray Hiner eds., 1985). The federal government cut mortgage subsidies for the construction of rental units and the Federal Housing Administration "red-lined" sections of cities threatened by the "Negro invasion" and reduced the

mass production techniques to residential construction and spawned "Levittowns"—suburban tract housing projects—as they struggled to satisfy pent-up housing demand deferred during the Depression and World War II.[50] Federal housing and highway policies contributed to and favored the development of predominantly white suburbs around the major cities and encircled urban poor and minority residents.[51] Industry and employment opportunities began to move with the whites on the highways and expressways to the readily accessible suburbs.[52]

The great black migration increased the visibility and awareness of the "American dilemma," and moved matters of race to the center of the nation's and the Warren Court's concerns about civil rights, crime policy, social welfare, and social justice.[53] Criminal justice reforms constituted part of the Supreme Court's broader constitutional program to protect the rights of racial minorities.[54] The synergy of campus youth rebellions, "baby boom" increases in crime rates, and urban racial disorders in the 1960s precipitated a crisis of "law and order" and brought issues of criminal justice administration and civil rights to the legal forefront.[55] During the 1960s, the rise in

availability of mortgage and home improvement loans there. *See* KATZ, *supra*, at 135. Even as federal highway policy subsidized white dispersal, the location of interstate highways disrupted many black communities and created physical barriers to contain their expansion. *See id.* at 135-36.

50. *See* KATZ, *supra* note 49 at 134.

51. *See* LEMANN, *supra* note 35, at 118-19; *see also* MASSEY & DENTON, *supra* note 38, at 186-216.

52. *See* LEMANN, *supra* note 35, at 118-19.

53. *See id.* at 6-7.

54. *See infra* note 63 and accompanying text.

55. During the 1960s, urban riots rocked American cities as black Americans reacted violently to decades of segregation, deprivation, social isolation, and alienation. *See* MASSEY & DENTON, *supra* note 38, at 190. In the first nine months of 1967 alone, 164 urban race riots occurred and augured the possibility of a national race war. *See* LEMANN, *supra* note 35, at 190. 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. *See* NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968). Established in the aftermath of the mid-1960s urban race riots, the Kerner Commission warned that the United States "[was] moving toward two societies, one black, one white—separate and unequal." *Id.* Despite the historical prevalence and persistence of black segregation and poverty, the Commission cautioned that continuing existing policies would "make permanent the division of our country into two societies; one, largely Negro and poor, located in the central cities; the other pre-

youth crime and urban rebellion evoked fears of "crime in the streets." Republican politicians seized crime control and welfare as wedge issues with which to distinguish themselves from Democrats, and crime policies for the first time became a central issue in partisan politics.[56]

The macro-structural, demographic, and political changes eroded support for the juvenile court's rehabilitative ideal. A flourishing rehabilitative ideal assumes human malleability, the existence of effective techniques to change people, and a general consensus about what it means to be rehabilitated.[57]

---

dominantly white and affluent, located in the suburbs." *Id.* at 22. The Commission rejected a strategy of "ghetto enrichment" as a policy of "separate but equal" that would institutionalize and make permanent racial divisions in American society. *Id.* It proposed instead "a policy which combined ghetto enrichment with programs designed to encourage integration of substantial numbers of Negroes into the society outside the ghetto." *Id.* In AMERICAN APARTHEID, Massey and Denton contend that public policies created and foster persisting residential racial segregation, perpetuate high levels of black poverty, exacerbate the social and economic harms associated with racial isolation and concentrated poverty, and maintain the urban underclass. MASSEY & DENTON, *supra* note 38, at 9. In many respects, contemporary urban poverty, youth crime and violence represent the culmination of social structural processes predicted by the Kerner Commission.

56. Despite the sympathetic findings of the Kerner Commission, *see supra* note 55, Andrew Hacker argues that the riots changed many whites' perceptions of the legitimacy of blacks' grievances and provided the context for racism in subsequent public policies:

> 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 crime, 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.

HACKER, *supra* note 44, at 22.

The increased punitiveness of juvenile courts and the disproportionate minority over-representation in the juvenile justice system constitute one manifestation of these processes. The public and politicians support harsh, "get tough" policies because they perceive young, urban black males as *the* juvenile crime problem. Similarly, Katherine Beckett argues in MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 83-88 (1997) that race provides the subtext of the politicization of crime policies.

57. During the 1960s, a number of political and cultural forces combined to undermine the Progressives' consensus about state benevolence, to erode support for imposing middle-class values on others, and to question the desirability of rehabilitation as a criminal justice goal and policy. *See* ALLEN, *supra* note 21, at 25-41. *See generally* CULLEN & GILBERT, *supra* note 21. In turn, the popular and political unraveling of support for rehabilitation and conservative support for a "crack down" on crime and racial minorities encouraged

Progressives believed that the new social sciences and the "medical model" of deviance provided them with the tools with which to reform, socialize, and acculturate the delinquent children of the poor and immigrants to become middle-class Americans like themselves. By the time of the Supreme Court's decision in *In re Gault*,[58] the Progressives' consensus about state benevolence, the legitimacy of imposing certain values on others, and what rehabilitation entailed and when it had occurred had all become matters of intense dispute.[59] The decline in deference to professionals and concerns about the benevolence of experts led to increased emphases on procedural formality, administrative regularity, and the rule of law.

During the turbulent 1960s, several forces combined to erode support for "state benevolence" and encouraged the Supreme Court to require more procedural safeguards in criminal and juvenile justice administration: left-wing critics of rehabilitation characterized governmental and penal programs as coercive instruments of social control through which the state oppressed the poor and minorities;[60] liberals became disenchanted

---

the Supreme Court to impose due process safeguards in juvenile and criminal justice to protect people from the State. *See* RYERSON, *supra* note 11, at 147.

58. 387 U.S. 1 (1967).

59. The decline of support for rehabilitation mirrored a broader decline in the legitimacy of public authority. *See, e.g.*, ALLEN, *supra* note 21, at 34 (discussing the lack of political analysis in penal rehabilitation). In TWILIGHT OF AUTHORITY 14 (1975), Robert Nisbet identified many social indicators of the "crisis of legitimacy," including increased public hostility toward government; the decline of political parties and public participation in the political process; the erosion of patriotism; increased criminality and lawlessness. "I know of no major poll that has not shown, over the past two decades, almost continuous decline in popular trust of government and its leaders, in expressed confidence in the political process, and in desire or willingness to participate directly in this political process." *Id.* Although a decline in a sense of public purpose pervaded many political and legal institutions, criminal and juvenile justice systems experienced a precipitous loss of public and self-confidence because Progressives had such high aspirations for them. *See generally* ALLEN, *supra* note 21 (discussing the rehabilitative ideal and the decline and criticism of social purpose). Whereas a Progressive's claim of compassion legitimated a program, by the 1960s, a bureaucrat's claim to act benevolently on behalf of a client elicited primarily skepticism and closer scrutiny for self-serving interests: "To announce that you are prepared to intervene for the best interest of some other person or party is guaranteed to provoke the quick, even knee-jerk, response that you are masking your true, self-interested motives." *See* Rothman, *supra* note 18, at 82.

60. *See generally* AMERICAN FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE (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.

with the unequal and disparate treatment of similarly-situated offenders that resulted from treatment personnel's exercise of clinical discretion;[61] and conservatives advocated a "war on crime" and favored repression over rehabilitation.[62] In the 1960s, the issue of race provided the crucial linkage between distrust of governmental benevolence, concern about social service personnel's discretionary decision-making, rising crime rates and urban disorders, the crisis of "law and order," and the Supreme Court's due process jurisprudence.

The Warren Court's criminal procedure and due process decisions responded to these ideological, structural, and racial demographic changes, and attempted to guarantee civil rights, protect minority citizens, and limit the authority of the state.[63]

See CULLEN & GILBERT, *supra* note 21, at 21.

61. Liberal disenchantment with the rehabilitative ideal reflected a broader disillusionment with the ability of the State to "do good." *See* Rothman, *supra* note 18, at 82-84. Rothman also emphasized the "limits of benevolence" and the failure of a paternalistic state to deal justly with its most vulnerable citizens. *Id.* at 83-84. Liberals criticized correctional personnel's exercise of clinical discretion, emphasized the unequal consequences received by similarly-situated offenders, and questioned the scientific foundations of "penal treatment." *See* AMERICAN FRIENDS SERV. COMM., *supra* note 60, at 34-47 (discussing problems with the individualized treatment model).

62. Conservative critics advocated "law and order" and supported a "war on crime." *See* FELD, *supra* note 5, at 106-07. They perceived a fundamental breakdown of the moral and legal order in rising crime rates, civil rights marches and civil disobedience for racial justice, students' protests against the war in Vietnam, and urban and campus turmoil. *See id.* Conservatives attributed crime and social 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 "coddling" criminals. *See* CULLEN & GILBERT, *supra* note 21, at 12-13. Their efforts to "get tough" supported a succession of "wars" on crime and later on drugs; longer criminal sentences; increased prison populations; and disproportional incarceration of racial minority offenders. *See* MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 94-95 (1995). Political efforts to "get tough" on youth crime provide the impetus to transform the juvenile court into an explicitly punitive extension of criminal justice policies. *See supra* notes 34-37 and accompanying text.

63. During the 1960s "Due Process Revolution," the Supreme Court resorted to adversarial procedural safeguards and other judicial rules to limit the state, to constrain discretion, and to protect peoples' freedom and liberties. *See* FRED P. GRAHAM, THE SELF-INFLICTED WOUND 26-66 (1970). 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 criticisms of discretion in the treatment of deviants. *See* FELD, *supra* note 5, at 94-97. The question of race unified all of these separate strands. *See id.*

In the juvenile justice arena, the Supreme Court's *In re Gault*[64] decision mandated procedural safeguards in delinquency proceedings, such as notice, a hearing, the right to counsel, the right to confront and cross examine witnesses, and the privilege against self-incrimination.[65] *Gault* identified two crucial disjunctions between juvenile justice rhetoric and reality: the theory versus the practice of "rehabilitation,"[66] and the differences between the procedural safeguards afforded adult criminal defendants and those available to juvenile delinquents.[67] *Gault* demonstrated the linkage between procedure and substance in the juvenile court, because engrafting some procedural requirements at trial began to transform the court into a very dif-

64. 387 U.S. 1 (1967). *In re Gault* involved the delinquency adjudication and institutional confinement of a youth who allegedly made a lewd telephone call of the "irritatingly offensive, adolescent, sex variety" to a neighbor woman. *Id.* at 4. Police took fifteen-year-old Gerald Gault into custody, detained him overnight without notifying his parents, and required him to appear at a juvenile court hearing the following day. *See id.* at 5. A probation officer filed a pro forma petition that alleged simply that Gault was a delinquent minor in need of the care and custody of the court. *See id.* No complaining witnesses appeared and the juvenile court neither took sworn testimony nor prepared a transcript or written memorandum of the proceedings. *See id.* At the hearing, the juvenile court judge interrogated Gault about the alleged telephone call and he apparently made some incriminating responses. *See id.* at 6. The judge did not advise Gault of the right to remain silent, the right to counsel, or provide him with the assistance of an attorney. *See id.* at 10. Following his hearing, the judge returned Gault to a detention cell for several more days. *See id.* at 6. At his dispositional hearing the following week, the judge committed Gault as a juvenile delinquent 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. If a criminal court judge had convicted Gault as an adult, it could have only sentenced him to a $50 fine or two months imprisonment for his offense. *See id.* at 29. Gault, however, faced the possibility of incarceration for up to six years, the duration of his minority because a juvenile court adjudicated him as a delinquent. *See id.*

65. *See id.* at 31-57; *see also id.* at 22, 24, 27 (discussing whether juveniles should be afforded constitutional protection through procedural safeguards); Feld, *Criminalizing Juvenile Justice*, *supra* note 4, at 169-90 (comparing and contrasting the procedural rights available to delinquents and to adult criminal defendants); 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); 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) (stating that constitutional protections should attach in proceedings that may result in incarceration of a child).

66. *See Gault*, 387 U.S. at 14-17.

67. *See id.* at 15-31.

ferent institution than the Progressives contemplated.[68] Although the Court did not intend its decisions to alter juvenile courts' therapeutic mission, in the aftermath of *Gault*, judicial, legislative, and administrative changes have fostered a procedural and substantive convergence with criminal courts.[69]

For most purposes, contemporary juvenile courts constitute a wholly-owned subsidiary of the criminal justice system.[70] *Gault* shifted the focus of delinquency hearings from a child's "real needs" to proof of legal guilt and formalized the connection between criminal conduct and coercive intervention. Providing a modicum of procedural justice also legitimated greater punitiveness in juvenile courts. It is an historical irony that race provided the initial impetus for the Supreme Court to focus on procedural rights in states' justice systems to protect minorities' liberty interests, those procedural rights escalated the severity of sanctions, and now juvenile courts' increasingly punitive sanctions fall disproportionately heavily on minority offenders.

B. JUVENILE COURTS' PROCEDURAL DEFICIENCIES AFTER *IN RE GAULT*

The *Gault* decision represents a procedural revolution that failed *and* that produced unintended negative consequences. Delinquents, then and now, continue to receive the "worst of both worlds,"[71] neither the care and treatment juvenile courts promise for children nor the criminal procedural rights provided adults. Shortly after *Gault*, the Supreme Court in *McKeiver v. Pennsylvania*[72] denied juveniles the constitutional right to jury trials in delinquency hearings.[73] Although the

68. *See* Feld, *Criminalizing Juvenile Justice*, *supra* note 4, at 161-63.

69. *See infra* text accompanying notes 71-77.

70. *See* Feld, *supra* note 6, at 90-95; Feld, *Criminalizing the American Juvenile Court*, *supra* note 4, at 254-55; Feld, *Criminalizing Juvenile Justice*, *supra* note 4, at 272-76. For example, in *In re Winship*, the Court required states to prove juvenile delinquency by the criminal law's standard of proof "beyond a reasonable doubt." 397 U.S. 358, 368 (1970).

71. Kent v. United States, 383 U.S. 541, 566 (1966) (stating 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").

72. 403 U.S. 528 (1971) (plurality opinion).

73. *See id.* at 550. The *McKeiver* Court departed significantly from its own prior analyses in *Gault* and *Winship* which emphasized the *dual* functions of constitutional criminal procedures to assure accurate fact finding *and* to protect against governmental oppression. The *McKeiver* Court plurality de-

McKeiver Court could deny delinquents criminal procedural equality with adults, it could not compel states to deliver social welfare services. As a result, delinquents experience punishment without the customary criminal procedural safeguards. Moreover, once states grant even a semblance of procedural justice, however inadequate, they more readily depart from a purely "rehabilitative" model of juvenile justice.

Procedurally, a substantial gulf still remains between the "law on the books" and the "law in action" in juvenile courts. States continue to manipulate the fluid concepts of children and adults or treatment and punishment in order to maximize the social control of young people. On the one hand, states'

---

nied that juveniles required protection against government oppression, rejected the argument that the inbred, closed nature of the juvenile court could prejudice the accuracy of fact finding, and invoked the mythology of the sympathetic, paternalistic juvenile court judge:

> 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 prejudgment—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.

Rather than identifying the affirmative protections that procedural safeguards provide, the Court in *McKeiver* emphasized the adverse impact that a constitutional right to a jury trial would have on the flexibility and confidentiality of juvenile court proceedings. *See id.* The Court feared that a jury trial right would disrupt juvenile courts, substantially alter their informal practices, and bring "the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial." *Id.* The Court realized that the right to a jury would render juvenile courts procedurally indistinguishable from criminal courts and raise the question whether any need remained for a separate juvenile court. *See id.* at 550-51.

Ultimately, the *McKeiver* Court denied young offenders the right to a jury trial in juvenile court because it adhered to the ideal of *treatment* of *children* in a separate justice system. While the Court acknowledged the deficiencies and disappointments of the rehabilitative ideal, *see id.* at 543-45, it did not want to express its "ultimate disillusionment," abandon those concepts, and return young offenders to the criminal justice system. *Id.* at 546. Critically, however, the *McKeiver* Court did not analyze either the constitutional differences between *treatment* and *punishment*, or between youths and adults that justified a different form of procedural justice for delinquents. Several recent juvenile justice legislative reforms provide some youths with a statutory right to a jury in order to expand the punitive sentencing options available to juvenile court judges. *See* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1039 (1995) (analyzing states providing juveniles with right to jury trial in order to enhance the punishment capacities of juvenile courts).

laws and policies treat juveniles just like adults when formal equality results in practical inequality. For example, almost all states use the adult standard of "knowing, intelligent, and voluntary waiver" under the "totality of the circumstances" to gauge juveniles' waivers of rights,[74] even though juveniles lack the legal competence of adults. Research on juveniles' waivers of *Miranda* rights[75] and waivers of their right to counsel pro-

74. Fare v. Michael C., 442 U.S. 707, 725 (1979) (discussing the need to determine whether the accused gave a "knowing[]," "intelligent[]," and "voluntar[y]" waiver of *Miranda* rights under the "totality of the circumstances"); *see also* Barry C. Feld, *The Right to Counsel in Juvenile Courts: An Empirical Study of When Lawyers Appear and the Differences They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1201-03 (1989).

75. Empirical studies of juveniles' comprehension of *Miranda* rights indicated that most youths who received the warnings did not understand them well enough to waive them in a "knowing and intelligent" manner. *See* Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1160 (1980) [hereinafter Grisso, *Juveniles' Capacities to Waive*]; *see also* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981); Thomas Grisso, *Juveniles' Consent in Delinquency Proceedings*, *in* CHILDREN'S COMPETENCE TO CONSENT 131 (Gary B. Melton et al. eds., 1983) [hereinafter Grisso, *Juveniles' Consent*]. Younger juveniles exhibited even greater difficulties understanding their rights:

> As a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for comprehension .... The vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights.

Grisso, *Juveniles' Capacities to Waive*, *supra*, at 1160; *see also* Rona Abramovitch et al., *Young Persons' Comprehension of Waivers in Criminal Proceedings*, 35 CANADIAN J. CRIMINOLOGY 309, 318 (1993) (replicating Grisso's study in Canada and finding that very few juveniles fully understood the warnings and that the youths who lacked comprehension waived their rights more readily); A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 54 (1970) (finding that over 90% of the juveniles whom police interrogated waived their rights, an equal number did not understand the rights they waived, and even a simplified *Miranda* warning failed to increase understanding). In sum, juveniles simply lack the competence of adults to understand and therefore to waive constitutional rights in a "knowing and intelligent" manner. Moreover, Grisso cautions that research conducted under "ideal" laboratory conditions may fail to capture sufficiently the individual characteristics, social context, and stressful coercive conditions associated with actual police interrogation. *See* Grisso, *Juveniles' Consent*, *supra*, at 141. Children's responses to hypothetical questions in a relaxed atmosphere do not replicate adequately the conditions created by police who "can be gentle or tough, can explain the rights well or poorly, and in many ways can exert varying amounts of pressure to comply." Abramovitch et al., *supra*, at 319. Typically, delinquents come from lower income households and may possess less verbal skills or capacity to understand legal abstractions

vide compelling evidence of the persisting procedural deficiencies of the juvenile court.[76] On the other hand, even as juvenile

---

than those in these studies. *See* GRISSO, *supra*, at 193-96. Children from poorer and ethnic-minority backgrounds often express doubt that law enforcement officials will not punish them for exercising legal rights. *See generally* Gary B. Melton, *Taking* Gault *Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146 (1989). Immaturity, inexperience, and lower verbal competence than adults make youths especially vulnerable to police interrogation tactics.

Youths' social status relative to authority figures and police also renders them more susceptible than adults to the coercive pressures of interrogation. *See* GRISSO, *supra*, at 18-19. Most people believe that answering the police in a respectful and cooperative manner will benefit them, at least in the short run. *Cf.* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 319 (1993). Inexperienced youths may waive their rights and talk in the short-sighted and unrealistic belief that their interrogation will end more quickly and secure their release. *See* GRISSO, *supra*, at 154-56. Many people from traditionally disempowered communities, such as females, African-Americans, and youths, pragmatically use indirect patterns of speech in order to avoid conflict in their dealings with authority figures. *See* Ainsworth, *supra*, at 263-64. People with lower social status than their interrogators typically respond more passively, "talk" more readily, acquiesce to police suggestions more easily, and speak less assertively or aggressively. *See id.* at 286-88. Thus, *Fare*'s requirement that youths invoke *Miranda* rights forthrightly and with adult-like precision runs contrary to the normal and predictable social reactions and verbal styles of most delinquents.

76. In the three decades since *Gault*, the promise of representation and effective assistance of counsel still remains unrealized. *See generally* BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS (1993) (analyzing the impact of counsel in juvenile courts). In many states, half or less of all juveniles receive the assistance of counsel to which the law entitles them. *See, e.g.*, AMERICAN BAR ASS'N, A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 19-27 (1995) (reviewing literature on access to counsel and quality of representation) [hereinafter A CALL FOR JUSTICE]; KIMBERLY L. KEMPF ET AL., AN ANALYSIS OF APPARENT DISPARITIES IN THE HANDLING OF BLACK YOUTH WITHIN MISSOURI'S JUVENILE JUSTICE SYSTEMS 95 (1990) (finding that lawyers represented only 39.6% of urban youths and 5.3% of rural juveniles); *see also id.* at 148-87 (noting that rates of representation differed substantially among judicial circuits and that judges removed a significant proportion of youths who appeared without counsel from their homes); Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 L. & SOC'Y REV. 263, 297 (1980) (finding that juvenile defender project represented only 22.3% of juveniles in Winston-Salem, N.C., and only 45.8% in Charlotte, N.C., in 1978); Barry C. Feld, In re Gault *Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393, 399-403 (1988) (finding that in three of the seven states surveyed in the mid-1980s, lawyers represented only 37.5%, 47.7%, and 52.7% of juveniles charged with delinquency and status offenses); Feld, *supra* note 74, at 81 (noting that in Minnesota in 1986, a majority of all juveniles appeared without counsel). In 1995, the United States General Accounting Office analyzed rates of representation in

courts have become more punitive, most states continue to deny juveniles access to jury trials and to other procedural rights guaranteed to adults.[77] Juvenile courts provide a procedural regime in which few adults charged with crimes and facing the prospect of confinement would consent to be tried.

---

certain counties in three states and found that rates of representation varied among the states, within each state, and across offense and offense histories within each state. *See* U.S. GEN. ACCOUNTING OFFICE, JUVENILE JUSTICE: REPRESENTATION RATES VARIED AS DID COUNSEL'S IMPACT ON COURT OUTCOMES 11-13 (1995).

The American Bar Association published two reports on the legal needs of young people. In AMERICA'S CHILDREN AT RISK 60 (1993), the American Bar Association reported that "[m]any children go through the juvenile justice system without the benefit of legal counsel. Among those who do have counsel, some are represented by counsel who are untrained in the complexities of representing juveniles and fail to provide 'competent' representation." In a second study, A CALL FOR JUSTICE, *supra*, at 22-23, the American Bar Association focused on the quality of lawyers in juvenile courts and reported that the conditions under which lawyers worked in juvenile courts often significantly compromised youths' interests and left many of them literally defenseless. Defense lawyer-respondents also reported that many youths waived counsel and appeared in juvenile courts without representation. *See id.* at 7.

Whatever the reasons and despite *Gault*'s promise of counsel, many juveniles never see a lawyer, waive their right to counsel without consulting with an attorney, fail to appreciate the legal consequences of relinquishing counsel, and face the power of the State without professional assistance. *See* FELD, *Criminalizing Juvenile Justice*, *supra* note 4, at 190. Waiver of counsel constitutes the most common explanation why so many youths appear without a lawyer. *See generally* GRISSO, *supra* note 75, at 131-60. As with waivers of *Miranda* rights, most jurisdictions use the adult legal standard to assess whether a juvenile "knowingly and voluntarily" decided to waive counsel under the "totality-of-the-circumstances." *See Fare*, 442 U.S. at 725; *see also* Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938) (requiring that the accused prove that he did not "competently and intelligently" waive counsel to meet the burden of proof in a habeas corpus action). In *Faretta v. California*, the Supreme Court held that an adult defendant in a state criminal trial had a constitutional right to proceed without counsel if he or she voluntarily and intelligently elects to do so. 422 U.S. 806 (1975). By endorsing the adult "totality" test as the standard by which to evaluate juveniles' waivers of rights, *Fare* eroded Progressives' "protectionist" assumption that children differ from adults and that courts should treat them more solicitously. *Fare*, 442 U.S. at 725. *Faretta* and *Fare* allow juveniles to waive counsel, presume that youths possess the same degree of autonomy and competence as adult defendants, and permit and encourage youths to make legal decisions that ultimately redound to their detriment.

77. *See* Feld, *Punishment, Treatment*, *supra* note 4, at 903-07 (discussing the issues surrounding allowing jury trials in delinquency proceedings); Feld, *supra* note 73, at 1099-1108 (discussing the right to a jury trial and surrounding case precedents).

III. CRIMINOLOGICAL TRIAGE

Despite their continuing procedural deficiencies, juvenile courts' increased formality have provided the impetus to adopt substantive "criminological triage" policies. This process entails diverting status offenders out of the juvenile system at the "soft" end, waiving serious young offenders for adult criminal prosecution at the "hard" end, and punishing more severely the residual, middle-range of ordinary delinquent offenders.

A. STATUS OFFENSES

At the "soft" end, critics of juvenile court's status jurisdiction focused on its adverse impact on children, its disabling effects on the families, schools, and other agencies that referred noncriminal offenders to court, and the legal and administrative issues it raised for juvenile courts.[78] Judicial and legisla-

78. Beginning in the 1970s, many professional groups re-examined juvenile courts' status jurisdiction and most recommended limitations on the grounds for and intensity of judicial intervention, administrative reforms, or its elimination. *See generally* NATIONAL RESEARCH COUNCIL, NEITHER ANGELS NOR THIEVES: STUDIES IN DEINSTITUTIONALIZATION OF STATUS OFFENDERS (Joel F. Handler & Julie Zatz eds., 1982) [hereinafter NEITHER ANGELS NOR THIEVES]; National Council on Crime and Delinquency, *Jurisdiction over Status Offenses Should be Removed from the Juvenile Court: A Policy Statement*, 21 CRIME & DELINQ. 97 (1975). A joint commission of the Institute of Judicial Administration and the American Bar Association, for example, proposed that "the present jurisdiction of the juvenile court over noncriminal behavior—the status offense jurisdiction—should be cut short and a system of voluntary referral to services provided outside the juvenile justice system adopted in its stead." INSTITUTE OF JUDICIAL ADMIN. & AMERICAN BAR ASS'N, JUVENILE JUSTICE STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR 2 (1982). Most reform proposals emphasized youths' voluntary participation in programs and services provided by personnel who are not associated with the juvenile justice process.

Critics of status jurisdiction emphasize the negative effects of coercive intervention on noncriminal youths, their families, and the juvenile court itself. *See, e.g.*, H. TED RUBIN, JUVENILE JUSTICE: POLICY, PRACTICE, AND LAW 56-58 (2d ed. 1985); Al Katz & Lee E. Teitelbaum, *PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law*, 53 IND. L.J. 1, 27-33 (1977-1978); Irene Merker Rosenberg, *Juvenile Status Offender Statutes—New Perspectives on an Old Problem*, 16 U.C. DAVIS L. REV. 283, 283-85 (1982); R. Hale Andrews, Jr. & Andrew H. Cohn, Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383, 1405-07 (1974). Some critics argue that status intervention is a one-sided effort by parents and courts to impose a particular standard of behavior on young people, especially young women. *See, e.g.*, MEDA CHESNEY-LIND & RANDALL G. SHELDEN, GIRLS, DELINQUENCY, AND JUVENILE JUSTICE 124-91 (2d ed. 1998); Irene M. Rosenberg & Yale L. Rosenberg, *The Legacy of the Stubborn and Rebellious Son*, 74 MICH. L. REV. 1097, 1128-29 (1976). Others characterize it as a chimera of assistance that promises impoverished

tive disillusionment with juvenile courts' responses to noncriminal youths have led to diversion, deinstitutionalization, and decriminalization reforms.[79] Deinstitutionalization re-

---

parents access to social and clinical resources but consigns problem children to custodial institutions. *See* Andrews & Cohn, *supra*, at 1393-97. On the other hand, defenders of juvenile courts' jurisdiction over noncriminal youths' misconduct emphasize that the state cannot remain indifferent to family dysfunction, truancy, or premature and self-injurious autonomy, and that the community needs some mechanism to intervene authoritatively when a child is "out of control." *See* Lindsay G. Arthur, *Status Offenders Need a Court of Last Resort*, 57 B.U. L. REV. 631, 631-38 (1977); Judge Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J., Spring 1992, at 20-21. The vigorous debate about the scope of status jurisdiction reflects competing cultural and legal visions of young people as vulnerable and dependent or as autonomous and responsible.

79. The re-examination of status offenses accompanied the decline of the rehabilitative ideal and the increased procedural formality associated with delinquency proceedings, and reflected disillusionment with juvenile courts' treatment of noncriminal youths. *See, e.g.*, DAVID P. FARRINGTON ET AL., UNDERSTANDING AND CONTROLLING CRIME: TOWARD A NEW RESEARCH STRATEGY 127-29 (1986) ("[I]t no longer appeared justifiable to include status offenders in the same process as those whose delinquent acts were also crimes for adults"); LaMar T. Empey, *Juvenile Justice Reforms: Diversion, Due Process, and Deinstitutionalization, in* PRISONERS IN AMERICA 13 (Lloyd E. Ohlin ed., 1973); Frank Hellum, *Juvenile Justice: The Second Revolution*, 25 CRIME & DELINQ. 299, 300-05 (1979). Congress passed the Federal Juvenile Justice and Delinquency Prevention (JJDP) Act, 42 U.S.C. §§ 5601-67 (1994), in 1974 that required states, as a condition of receiving federal formula grants, to initiate a process to remove noncriminal offenders from secure detention and correctional facilities and to submit a plan designed to ensure that "within three years . . . juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult . . . shall not be placed in secure detention facilities or secure correctional facilities." 42 U.S.C. § 5633(a)(12)(A) (1994). Legal restrictions on the co-mingling of status with delinquent offenders in secure detention and correctional facilities provided the impetus to divert some status offenders from juvenile courts and to decarcerate those who remained in the system. *See, e.g.*, Michael Sosin, *Deinstitutionalization of Status Offenders and Dependent and Neglected Youth in Wisconsin, in* NEITHER ANGELS NOR THIEVES, *supra* note 78, at 513, 515-18.

Ironically, although reformers intended diversion to enhance youths' autonomy and to reduce state intervention, instead the innovation provided a mechanism to extend informal supervision further into the normal adolescent population and to widen the nets of social control. *See generally* Malcolm W. Klein, *Deinstitutionalization and Diversion of Juvenile Offenders: A Litany of Impediments*, 1 CRIME & JUST. 145 (1979) (discussing the "net-widening" impact of diversion reforms); Kenneth Polk, *Juvenile Diversion: A Look at the Record*, 30 CRIME & DELINQ. 648 (1984). Diversion provided a rationale to shift discretion from the core of the juvenile justice process to its periphery. In his comprehensive study of the history of regulating "stubborn children," Sutton concludes that diversion "sanctified and encouraged a strategy for circumventing due process, assured that programs would stay in the discretionary hands of local officials, and encouraged the privatization of long-term social

duced access to secure public facilities for noncriminal offenders and provided the impetus to transfer many white, female and middle-class youths whom juvenile courts formerly handled as status offenders into the private sector system of mental health and chemical dependency treatment and confinement.[80] Historically, the child welfare, mental health, and juvenile justice systems dealt with relatively interchangeable youths whom staff could shift from one agency to another depending upon social attitudes, available funds, and imprecise legal definitions. Currently, the private sector mental health and chemical dependency industries serve as institutional successors to the juvenile justice system for the care and control of problematic youths. Whether states or parents incarcerate juveniles in public or private institutions for their "best interests," for "adjustment reactions" symptomatic of adolescence, or for "chemical dependency," they rely upon the imagery of diagnosis and treatment on a discretionary basis without regard to formal procedures.

B. WAIVER OF SERIOUS OFFENDERS

At the "hard" end, as a result of recent statutory amendments to "get tough" on crime, judges, prosecutors, and legislators transfer increasing numbers of younger offenders to criminal courts for prosecution as adults. The rate of judicial waiver increased 68% between 1988 and 1992.[81] By some estimates, prosecutors in Florida alone transfer more juveniles to criminal

---

control." SUTTON, *supra* note 10, at 215.

80. The JJDP mandate to deinstitutionalize status offenders made it more difficult to confine noncriminal youths in traditional delinquency institutions. *See supra* note 79. As a result, courts may divert or refer and parents "voluntarily" may commit many troublesome youths to psychiatric and chemical dependency facilities in the private sector with fewer procedural safeguards available than to youths charged with delinquency. *See* Parham v. J.R., 442 U.S. 584, 620 (1979). These private treatment facilities comprise a parallel, "hidden system" of social control for youths, and a growth industry for service providers. *See* Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 808-13 (1988). Many troublesome youths—especially females and children of middle-class families with mental health or chemical dependency medical insurance benefits—whom juvenile courts previously dealt with as status offenders now enter private mental health or substance abuse treatment facilities, which can provide levels of security comparable to those in public institutions. *See* IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES 136-39 (1989); *see also* Weithorn, *supra*, at 814-20.

81. *See* HOWARD SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 154 (1995).

court than do all of the juvenile court judges in the country together.[82] In an effort to "crack down" on youth crime, legislators exclude various combinations of age and offenses from juvenile courts' jurisdiction, and then further expand the lists of excluded offenses and reduce the age of criminal responsibility.[83] The pace of legal changes to prosecute more juveniles as adults escalated sharply in the early 1990s.[84] Cumulatively, these changes reflect fundamental sentencing policy shifts—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 public safety, and a transfer of discretion from the judicial to the legislative or executive branches. These changes in youth crime policy and practice responded to more fundamental social structural changes.

The "get tough" juvenile justice policies of the early-1990s reflect the influences of macro-structural, economic, and racial demographic changes that occurred in cities during the 1970s and 1980s, the emergence of the urban black underclass, and the epidemic of "crack" cocaine and the associated escalation in gun violence and youth homicides.[85] Between World War II and the early-1970s, semi-skilled high school graduates could get good-paying union jobs in the automobile, steel, construction, and manufacturing industries. Beginning in the 1970s, the transition from an industrial to an information and service economy reduced employment opportunities in the manufacturing sectors, and produced a bifurcation of economic opportunities based on skills and education.[86] Between 1969 and 1984,

82. *Compare id.* at (noting that juvenile court judges nationally transferred about 11,700 juveniles) *and* U.S. GEN. ACCOUNTING OFFICE, JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS 10 (1995) (same) *with* 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, 288 (1991) (noting annual rise in number of prosecutorial waivers).

83. PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT 3-9 (1996).

84. *See generally id.*; Feld, *supra* note 2.

85. *See* FELD, *supra* note 5, at 106-07; Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10, 26-29 (1995); *see also* MASSEY & DENTON, *supra* note 38, at 174.

86. The post-industrial transition from a manufacturing to a service and information economy adversely affected the ability of semi-skilled high school graduates economically to sustain "the American Dream." *See* KATZ, *supra* note 49, at 128-29. The emphasis on knowledge and information produced a

full time employment in manufacturing decreased from 26% to 19%, while employment in the service sectors—for example, finance, insurance, real estate—increased from 13% to 28% and surpassed manufacturing employment.[87] During the post-World War II period, public policies and private institutional arrangements contributed to the growth of predominantly white suburbs surrounding increasingly poor and minority urban cores.[88] The migration of whites to the suburbs, the growth

---

widening earnings gap between high school and college graduates as the better-educated got richer and the less well-educated got poorer. *See id.* at 129-31. In less than 20 years, as a result of structural economic changes, the gap between high school and college graduates' earnings widened both because the educated earn more and the uneducated earn less. *See* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 25-34 (1996). As recently as 1975, college graduates earned only about 25% more than did high school graduates. *See* NATIONAL RESEARCH COUNCIL, LOSING GENERATIONS: ADOLESCENTS IN HIGH-RISK SETTINGS 26 (1993) (noting differences by race, gender, and education level). Two decades later, the average earning difference was almost 100%, both because college graduates' earning capacity increased and high school graduates' real earning capacity decreased about 25%. *See* CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 126 (1992); NATIONAL RESEARCH COUNCIL, *supra*, at 25.

87. *See* KATZ, *supra* note 49, at 128.

88. Black migration from the rural South to the urban North in the 1920s and 1930s began to transform the larger older cities. *See* MASSEY & DENTON, *supra* note 38, at 21; *see also id.* at 19-59. Black Americans became increasingly urban, and whites simultaneously began to move from cities to the suburbs. Between the end of World War II and 1960, about one-third of all African-Americans who remained in the South migrated to other parts of the country and the majority of all blacks lived in central cities. *See id.* at 18. In the 1950s and 1960s, urban renewal and highway construction disrupted and destroyed many urban black communities. *See supra* notes 49-52 and accompanying text.

Massey and Denton argue that public policies and private institutional arrangements—federal highway, mortgage, and housing policies, real estate sales practices, bank mortgage loan practices, and insurance industry decisions—created and sustain racial segregation, amplify and exacerbate the harmful consequences of concentrated poverty, and adversely affect the economic and social welfare of black Americans. *See* MASSEY & DENTON, *supra* note 38, at 8. They argue:

> 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.

of information, service, and technology jobs in the suburbs, the bifurcation of the economy based on education, and the deindustrialization of the urban core increased racial segregation and the concentration of poverty among blacks in the major cities.[89]

Id. at 8. Similarly, Robert J. Sampson and Janet L. Lauritsen attribute the negative effects of concentrated poverty to deliberate public policies to "contain" and isolate minorities.

> 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 which have become ghettos for minorities and the disadvantaged. The cumulative result is that even given the same objective socioeconomic status, blacks and whites face vastly different environments in which to live, work, and raise their children.

Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 338 (1997). Thus, racial segregation, cultural isolation, and concentration of poverty constitute the cumulative community structural consequences of a host of disparate public policy decisions.

89. Macro-structural economic changes have had a cumulative, deleterious impact on urban minority residents. *See* WILSON, *supra* note 86, at 25-100. Job losses have occurred primarily in those higher-paying lower-skilled manufacturing industries to which urban minorities previously had greater access, and job growth has occurred in the suburbs and in sectors of the economy that require levels of education beyond that possessed by many urban minority workers. *See* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 100-02 (1987). As a result of the economic, spatial, and racial reorganization of cities, the past several decades have witnessed the emergence of an urban "underclass" living in concentrated poverty and in racial, social, and cultural isolation. *See generally* CHRISTOPHER JENCKS & PAUL E. PETERSON, THE URBAN UNDERCLASS (1991); WILSON, *supra*, at 3; Michael B. Katz, *The Urban "Underclass" as a Metaphor of Social Transformation*, *in* THE "UNDERCLASS" DEBATE: VIEWS FROM HISTORY 3 (Michael B. Katz ed., 1993). Three decades ago, then-Assistant Secretary of Labor Daniel Patrick Moynihan warned in *The Negro Family* of the adverse impact of male unemployment in the urban African-American community. U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965), *reprinted in* THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 39-124 (Lee Rainwater & William L. Yancey eds., 1967). 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 38, at 117-18; WILSON, *supra*, at 90-92. Wilson attributes the decline of two-parent black families to the structural transformation of inner cities that reduced young black males' employment prospects and increased rates of out-of-wedlock childbirth among poor black women. *See* WILSON, *supra*, at 72-84; WILSON, *supra* note 86, at 87-110.

Since the mid-1960s, the passage of civil rights legislation enabled many middle-class blacks to take advantage of increased economic opportunities and

The age-offense-race-specific increase in youth homicide triggered by the crack epidemic and the proliferation of guns among youth in the mid-1980s provided the immediate political catalyst to "get tough" and to "crack down" on youth crime generally.[90] In this context, because of differences in rates of offending by race, "getting tough" on violence meant targeting young black men. As a result of the connection between race and youth crime, juveniles have become the symbolic "Willie Horton" of the 1990s.[91]

The "Baby Boom" escalation in youth crime that began in the mid-1960s and peaked in the late-1970s provided an additional strong political impetus for "get tough" criminal sentencing and waiver policies.[92] 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 that de-emphasized youths' "amenability to treatment" and instead focused almost exclusively on "public safety."[93] These statutory changes coincided with escalating youth crime rates and violence in the late-1970s and again in the late-1980s and early-1990s, and with public and political perception of youth crime primarily as an urban black male phenomenon.[94]

---

to leave the ghettoes. *See* MASSEY & DENTON, *supra* note 38, at 7-9. Their mobility deprived the urban minority communities of the human resources necessary for social stability and amplified the effects of concentrated poverty and racial isolation among the "truly disadvantaged" who remained. *See* WILSON, *supra*, at 56-57. Simultaneously, structural changes decreased the demands for unskilled and semi-skilled labor in the manufacturing sectors that previously provided black men with little formal education with access to higher wage jobs. *See id.* at 39-46. The deindustrialization of the inner urban core reduced the pool of "marriageable" black men who could support a family. MARIAN WRIGHT EDELMAN, FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE 13-14 (1987). As marriage to unemployed or unemployable black males became less attractive, unwed child-bearing and female-headed families proliferated among poor black women. *See id.* at 14. The decisions by young black women not to marry the fathers of their children account for virtually all the increase in the number of children in female-headed households and in poverty. *See id.* at 10-16.

90. *See* ZIMRING, *supra* note 1, at 3-16; Blumstein, *supra* note 85, at 13-20; *see also* Alfred Blumstein & Daniel Cork, *Linking Gun Availability to Youth Gun Violence*, 59 LAW & CONTEMP. PROBS. 5, 6-12 (1996); Philip J. Cook & John H. Laub, *The Unprecedented Epidemic in Youth Violence*, 24 CRIME & JUST. 27, 51-58 (1998); *infra* note 107.

91. *Cf.* BECKETT, *supra* note 56, at 58, 84-85.

92. *See* ZIMRING, *supra* note 1, at 3-4.

93. *See* BECKETT, *supra* note 56, at 58, 84-85.

94. *See id.* at 31-43; *see also* FELD, *supra* note 5, at 197-202.

The Federal Bureau of Investigation's Index Crime rates, juvenile crime rates, and violent juvenile crime rates followed roughly similar patterns—increasing from the mid-1960s until 1980, declining during the mid-1980s, and then rebounding to another peak in the early-1990s, since which time they have declined again.[95] Between 1965 and 1980, the overall juvenile Index Violent Crime and homicide rates doubled, followed by a second, sharp upsurge between 1986 and 1994.[96] 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 provide the backdrop for public and political concerns about youth crime and subsequent legal changes.[97]

Two aspects of youth crime and violence have special relevance for understanding the legislative changes in juvenile court waiver and sentencing policies during this period. Differences in arrest rates for violent crimes committed by juveniles of difference races and the unique role of guns in the dramatic surge in homicides since the late-1980s account for most of the changes in patterns of youth crime and violence in the past decades. As Figure 3 indicates, since the mid-1960s, police have arrested black juveniles under eighteen years of age for all violent offenses—murder, rape, robbery, and assault—at a rate about five times greater than that of white youths, [98] and for homicide at a rate more than seven times greater than that of white youths.[99] Beginning in 1986, when the youth homicide rates began to escalate sharply again, the arrest rates of black and white juveniles diverged abruptly. Between 1986 and 1993, arrests of white juveniles for homicide increased about 40%, while those of black youths jumped by 278%.[100]

95. *See* FELD, *supra* note 5, at 197-202.

96. *See id.*

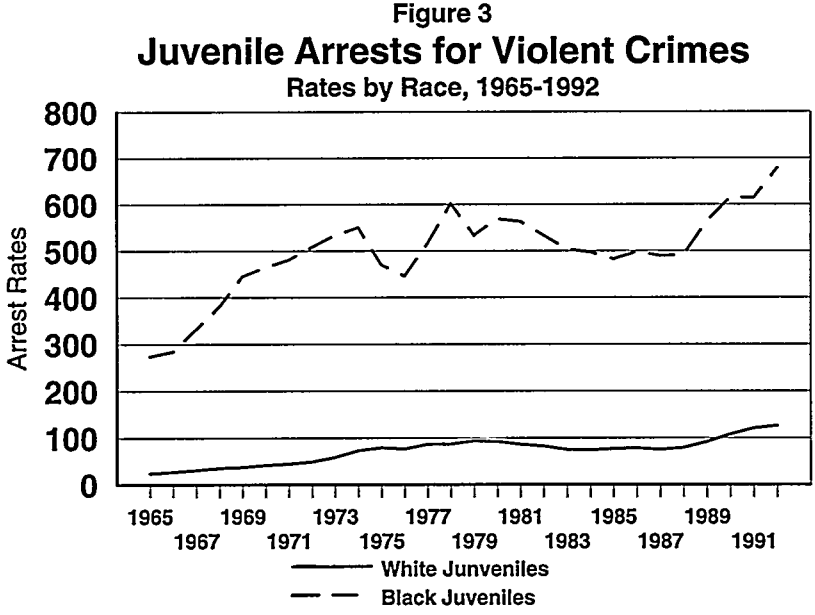
97. *See* TORBET ET AL., *supra* note 83, at 59-61; Blumstein, *supra* note 85, at 32-36; Feld, *supra* note 2, at 192-95.

98. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 1993, at 447 (Kathleen Maguire & Ann L. Pastore eds., 1994).

99. *See* MELISSA SICKMUND ET AL., U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 13 (1997).

100. *See id.*

Figure 3



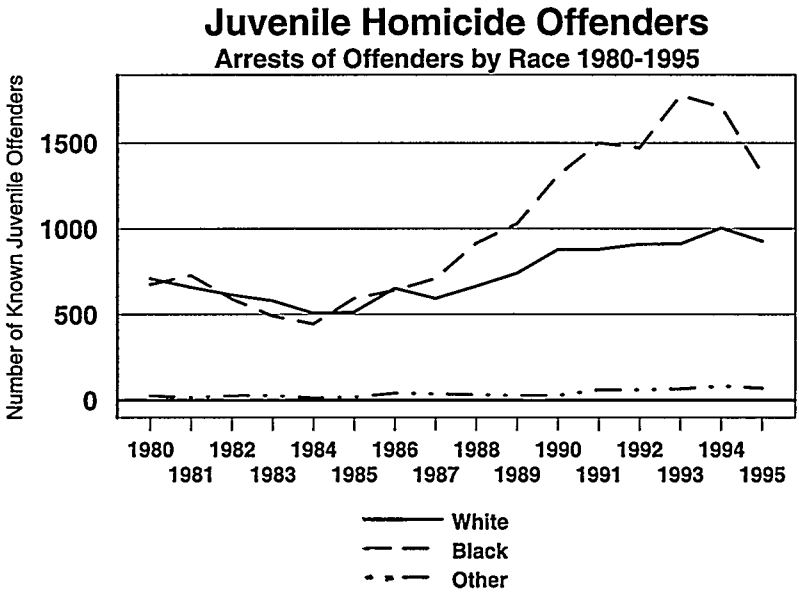
Source: BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 1993, at 447 (Kathleen Maguire & Ann L. Pastore eds., 1994).

Figure 4 shows the actual numbers, rather than the rates, of juveniles arrested for homicide by race. For example, in 1995, the FBI estimated that 21,600 people were murdered; law enforcement agencies "cleared" about two-thirds (62%) of those cases with arrests of one or more offenders.[101] Police identified a juvenile as an offender in about 14% (1,900) of all homicides and implicated about 2,300 juveniles for those deaths.[102] And, in 1995, police arrested black juveniles for more than half of those murders.[103] As Figure 4 illustrates, during the early to mid-1980s, police arrested roughly equal numbers of black and white juveniles for homicide. Beginning in 1986, when the youth homicide rates began to escalate, arrests of black and white juveniles also began to diverge sharply. Although frightening, these changes reveal the "tyranny of small numbers." When dealing with a rare event, like homi-

101. *See id.* at 12.
102. *See id.*
103. *See id.* at 13.

cide, even small increases in the absolute number of cases yield much larger percentage changes. Despite the popular imagery of youthful murderers, police arrested chronological juveniles only for one homicide in seven. But these small numbers produced substantial percentage increases in homicide rates and provoked strong legislative reactions.[104]

Figure 4



Source: MELISSA SICKMUND ET AL., U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 13 (1997).

Finally, Figure 5 identifies the role of guns as the proximate cause of the sharp escalation of youth homicide that began in the mid-1980s. Figure 5 reflects the number of juvenile offenders implicated in homicides over the sixteen-year time span and the cause of their victims' deaths. The number of homicide deaths that juveniles caused by means other than firearms averaged about 570 per year and fluctuated within a "normal range" of about ten percent. In short, juveniles continued to kill people with knives, blunt objects, and hands and feet just as they always did. By contrast, between 1984 and 1994, the number of deaths caused by firearms increased 412%.

104. *See supra* notes 90-100 and accompanying text.

Thus, in the span of a decade, arrests of adolescents for killing nearly tripled *and* the availability and use of firearms by juveniles account for almost the *entire* increase in youth homicide.[105] Because of the relative stability of the number of non-gun homicides, virtually all of the variance in homicides reflects changes in the gun component of murders. Thus, "fluctuations in the proportion of youth homicide committed with guns might explain eighty percent of the variation in total homicide rates."[106] Because of the disproportionate involvement of black youths in violence and homicide, both as perpetrators and as victims, almost all of these "excess homicides" involving guns occurred within the urban young black male population.[107] The intersections of race, guns, and homicide

105. *See* FELD, *supra* note 5, at 207-08; ZIMRING, *supra* note 1, at 89-106; FRANKLIN ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 106-23 (1997); Franklin Zimring, *Kids, Guns, and Homicide: Policy Notes on an Age-Specific Epidemic*, 59 LAW & CONTEMP. PROBS. 25, 29 (1996) [hereinafter Zimring, *Kids, Guns*].

106. Zimring, *Kids, Guns*, *supra* note 105, at 29.

107. *See* ZIMRING, *supra* note 1, at 17-30; *see also* Blumstein, *supra* note 85, at 16-22; Blumstein & Cork, *supra* note 90, at 15-16.

Alfred Blumstein, *supra* note 85, at 29-32, analyzed these changing patterns of age- and race-specific homicide rates and attributed the dramatic increase in youth homicides to the crack cocaine drug industry that emerged in large cities during the mid- to late-1980s. The low price and addictive properties of "crack" increased the numbers of buyers and weekly transactions, and thereby increased the number of sellers to accommodate the demand. *See id.* at 29-30. Drug distribution attracted youths because juveniles faced lower risks of severe penalties than do adults, and especially induced young urban, African-American males who lacked alternative economic opportunities. *See* Blumstein & Cork, *supra* note 90, at 9-10. Youths in the drug industry take more risks than would adults and arm themselves for self-protection and to resolve disputes. The ready availability of guns abets the prevalence of lethal violence because those involved in illegal markets cannot resolve their disputes through formal mechanisms. *See* NATIONAL RESEARCH COUNCIL, UNDERSTANDING AND PREVENTING VIOLENCE 256-60 (Albert J. Reiss & Jeffrey A. Roth eds., 1993). Although guns constitute a "tool of the trade" in the drug industry, their proliferation and diffusion within the wider youth population for self-defense and status also has contributed to the escalation of homicides. *See* Blumstein & Cork, *supra* note 90, at 11-12. As more young men become increasingly fearful of each other and arm themselves defensively, both the killings and the fear expands. *See* Cook & Laub, *supra* note 90, at 58. The increased use of guns to commit murders accounted for virtually all of the increase in the homicide rate for older youths in the past decade. *See* ZIMRING & HAWKINS, *supra* note 105, at 107-10. The lucrative and violent drug industry, in turn, further accelerated the deterioration of urban neighborhoods, hastened "the exodus of stable families," undermined the authority of community leaders, "weakened inhibitions against violence," and provided illicit role models to attract children and adolescents into crime. NATIONAL RESEARCH COUNCIL, *supra* note 86, at 67-68.

fanned the public "panic" and political "crack down" that, in turn, led to the recent "get tough" reformulation of juvenile waiver policies.

Figure 5

Source: MELISSA SICKMUND ET AL., U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 13 (1997).

Within the past decade, the prevalence of guns in the hands of children, the apparent randomness of gang violence and drive-by shootings, the disproportional racial minority involvement in homicides, and media depictions of callous youths' gratuitous violence have inflamed public fear. Politicians have promoted and exploited those fears for electoral advantage, decried a coming generation of "super-predators" suffering from "moral poverty," and demonized young people to muster support for policies to transfer youths to criminal court and to incarcerate them.[108] Some analysts predict a demographic "time bomb" of youth violence in the near future to which minority juveniles are expected to contribute disproportionately.[109] Thus, the increase in gun homicide by young black males in the

108. FELD, *supra* note 5, at 208.

109. *See* FOX, *supra* note 1, at 3, 15; ZIMRING, *supra* note 1, at 60-65.

late-1980s provided a much broader political impetus to crack down on all young offenders in general and violent minority offenders in particular.

The widespread crack down on youth crime in the early-1990s culminates the politicization of crime and juvenile justice policies that actually began several decades earlier. In the 1960s, the Civil Rights Movement created divisions within the Democratic Party between racial and social policy liberals and conservatives, Northerners and Southerners.[110] Republican politicians seized crime control, affirmative action, and public welfare as racially-tinged "wedge issues" with which to distinguish themselves from Democrats in order to woo southern white voters; crime policies for the first time became a central issue in partisan politics.[111] Beginning in the 1960s, conservative Republicans advocated "law and order," supported a "war on crime," and favored repression over rehabilitation in response to rising "baby boom" crime rates, civil rights marches, students' protests against the war in Vietnam, and urban and campus turmoil.[112] As a result of "sound-bite" politics, symbols and rhetoric have shaped penal policies more than knowledge, social science research, or substance.[113] "Since the 1960s, politicians' fear of being labeled 'soft-on-crime' has led to a constant ratcheting-up of punitiveness."[114] Efforts to "get tough" have supported a succession of "wars" on crime and, later on drugs, longer criminal sentences, increased prison populations, and disproportional incarceration of racial minority offenders.[115] As a result of demagogic appeals, no candidate dares to run on a platform that her opponent can characterize as "soft on crime"; politicians avoid thoughtful discussions of complex crime policy issues in an era of 30-second commercials.[116] The mass media depict and the public perceive the "crime problem" and juvenile courts' clientele primarily as poor, urban black males.[117] Politicians manipulate and exploit these racially-tinged perceptions for political advantage with demagogic pledges to "get tough"

110. *See* BECKETT, *supra* note 56, at 40-43.
111. *See id.* at 30-43.
112. *See* BECKETT, *supra* note 56, at 25; FELD, *supra* note 5, at 90.
113. *See* FELD, *supra* note 5, at 90.
114. *Id.*
115. *See id.* at 89-90; TONRY, *supra* note 62, at 94-95.
116. *See* BECKETT, *supra* note 56, at 83-88.
117. *See id.* at 62-78.

and "crack down" on youth crime, which has become a "code word" for young black males.[118]

Coinciding with the escalation of youth crime in the late-1970s and again in the late-1980s, waiver policies underwent a jurisprudential change from rehabilitation to retribution.[119] The overarching themes of these legislative amendments include a shift from individualized justice to just deserts, and from offender to offense.[120] The changes in waiver policy reflect a fundamental cultural and legal reconceptualization of youth from innocent and dependent children to responsible and autonomous adult-like offenders.[121] Politicians' sound bites—"adult crime, adult time" or "old enough to do the crime, old enough to do the time"—exemplify the reformulation of adolescence and represent crime policies that provide no formal recognition of youthfulness as a mitigating factor in sentencing.[122] 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.[123] Once youths make the transition to the adult system, criminal court judges sentence them as if they are adults, impose the same sentences, send them to the same prisons, and even execute them for the crimes they committed as children.[124]

State legislators adopt social control policies within a binary framework—either child or adult, either treatment or punishment, either juvenile court or criminal court. Unfortunately, jurisdictional bifurcation frustrates effective and rational social control and often results in a "punishment gap" when youths make the transition between the two systems. While violent young offenders receive dramatically more severe sentences as adults than they would have received as delinquents, chronic property offenders, who constitute the bulk of youths whom juvenile court judges transfer to criminal court,

118. *See id.*

119. *See* TORBET ET AL., *supra* note 83, at 60.

120. *See id.*; *see also* Feld, *Juvenile Waiver Statutes*, *supra* note 4, at 75-81.

121. *See* Feld, *Juvenile Waiver Statutes*, *supra* note 4, at 79.

122. *See id.* at 80.

123. *See* TORBET ET AL., *supra* note 83, at 59-61; Feld, *Juvenile Waiver Statutes*, *supra* note 4, at 503-19; Feld, *supra* note 73, at 1024-34.

124. *See* Feld, *supra* note 2, at 212-29; *see also* Stanford v. Kentucky, 492 U.S. 361 (1989).

actually receive shorter sentences as adults than judges would have imposed had they remained within the juvenile system.[125]

Many of the recent changes in waiver laws represent an effort to improve the fit between juvenile waiver criteria and criminal court sentencing practices, to use juvenile prior records more extensively to enhance the sentences of young adult offenders, and systematically to respond to career offenders and career criminality that begins in early adolescence but continues into adulthood.[126] Efforts to integrate juvenile and criminal court sentencing practices represent an effort to rationalize social control of serious and chronic offenders on both sides of the juvenile and criminal court line. Recently enacted intermediate sentencing options like extended jurisdiction juvenile prosecutions and "blended" juvenile-criminal sentences provide examples of states groping toward graduated, escalating sanctions for young offenders across the adolescent and criminal career developmental continuum.[127] The amount and scope of legislative activity and the rapidity of these changes cannot be overemphasized. Since 1992, forty-seven of the fifty states and the District of Columbia have amended provisions of their juvenile codes, sentencing statutes, and transfer laws to target youths who commit serious or violent crimes.[128] Is it simply coincidental that this tidal wave of law reforms corresponds with the rise of youth homicide and disproportionately affects young black men?

C. PUNISHING ORDINARY DELINQUENTS

Finally, the "criminological triage" process has resulted in increased punishment of those ordinary delinquents who remain within the jurisdiction of the juvenile court.[129] The juris-

125. *See, e.g.*, Feld, *supra* note 2, at 202-05; Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449, 485-89 (1996); Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 LAW & INEQ. J. 73, 156-65 (1995).

126. *See* Feld, *supra* note 2, at 205-15.

127. *See, e.g.*, MINN. STAT. § 260.126 (1998), *amended by* Juvenile Court Act, ch. 139, § 12, 1999 Minn. Laws § 260B.130; TORBET ET AL., *supra* note 83, at 11-14; Feld, *supra* note 2, at 239-43; Feld, *supra* note 73, at 1038-51.

128. *See* TORBET ET AL., *supra* note 83, at 59-61; U.S. GENERAL ACCOUNTING OFFICE, *supra* note 82, at 1, 19-20.

129. *See generally* Feld, *Punishment, Treatment*, *supra* note 4 (analyzing changes in juvenile justice sentencing laws and practices); Feld, *supra* note 2, at 220-39; Julianne P. Sheffer, *Serious and Habitual Juvenile Offender Stat-*

prudential shifts from offender to offense and from treatment to punishment that inspired changes in waiver policies increasingly affect the sentences that juvenile court judges impose on delinquent offenders as well. Progressive reformers envisioned a broader and more encompassing social welfare system for youths and did not circumscribe state power narrowly.[130] Juvenile courts' *parens patriae* ideology combined social welfare with penal social control in one institution, minimized procedural safeguards, and maximized discretion to provide flexibility in diagnosis and treatment.[131] Progressive reformers focused primary attention on youths' social circumstances and accorded secondary significance either to procedural safeguards or to proof of guilt or the specific offense.[132] More recently, however, the public impetus and political pressures to waive the most serious young offenders to criminal courts also impel juvenile court judges to "get tough" and punish more severely the remaining criminal delinquents.

The assumed differences between juvenile treatment and criminal punishment provided the rationale for the Supreme Court in *McKeiver v. Pennsylvania* to deny jury trials in delinquency proceedings and, more fundamentally, for states to maintain a juvenile justice system separate from the adult one.[133] As states' juvenile sentencing laws and policies increasingly "get tough," however, the always tenuous distinctions between treatment and punishment blur even further. Despite the fundamental importance of the distinctions between rehabilitation and punishment, the *McKeiver* Court did not analyze the nature of those differences.

Several indicators reveal whether a juvenile court judge's disposition punishes a youth for his past offense or treats him for his future welfare. Legislative preambles and court opinions explicitly endorse punishment as an appropriate component of juvenile sanctions.[134] States' juvenile codes increasingly employ the rhetoric of accountability, responsibility, punish-

---

utes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System, 48 VAND. L. REV. 479 (1995).

130. *See supra* notes 16-33 and accompanying text.

131. *See supra* notes 24-33 and accompanying text.

132. *See supra* notes 24-33 and accompanying text.

133. 403 U.S. 528, 551 (1971).

134. *See, e.g.*, FLA. STAT. ANN. § 985.01(1)(b) (West Supp. 1999) (noting that "[t]o ensure the protection of society," a child should be given "the most appropriate control, discipline, punishment, and treatment . . . consistent with the seriousness of the act committed").

ment, and public safety rather than a child's welfare or "best interests."[135] States' juvenile sentencing laws increasingly emphasize individual responsibility and justice system accountability, and provide for determinate or mandatory minimum sentences keyed to the seriousness of the offense.[136] Currently, about half (22) of the states use some type of "just deserts" determinate or mandatory minimum offense-based criteria to guide judicial sentencing discretion.[137] Some states have adopted sentencing guidelines to impose presumptive, determinate and proportional sentences on delinquents based on a juvenile's age, seriousness of the offense, and prior record.[138] Other states impose mandatory minimum sentences based on age and offenses that prescribe minimum terms of confinement or youths' level of security placement.[139] "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."[140] Similarly, many states' departments of corrections administratively have adopted security classification and release guidelines that use offense criteria to specify proportional or mandatory minimum terms of institutional confinement.[141] All of these *de jure* sentencing provisions—determinate and mandatory minimum laws, and correctional and parole release guidelines—share the common feature of offense-based dispositions that explicitly link the length of time delinquents serve to

135. *See* Feld, *Punishment, Treatment, supra* note 4, at 842-47; *see also* Martin Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 793-95 (1982); Linda Giardino, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 J.L. & POL'Y 223, 228-46 (1997) (arguing that despite the punitive trend, states should be able to create an effective juvenile justice system).

136. *See* TORBET ET AL., *supra* note 83, at 14-15; Feld, *supra* note 2, at 224-28.

137. *See* TORBET ET AL., *supra* note 83, at 14-15; Sheffer, *supra* note 129, at 500-06.

138. *See, e.g.*, WASH. REV. CODE ANN. § 13.40.010(2)(d) (West 1999); Feld, *Punishment, Treatment, supra* note 4, at 850-79; Feld, *supra* note 73, at 1083-94.

139. *See* TORBET ET AL., *supra* note 83, at 14-15; Sheffer, *supra* note 129, at 489-92.

140. TORBET ET AL., *supra* note 83, at 14.

141. *See* SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, BALANCING JUVENILE JUSTICE 139-43 (1996); Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 345-50 (1991).

the seriousness of the crime they committed rather than to their "real needs." These statutory provisions use principles of proportionality and determinacy to rationalize sentencing decisions, to increase the penal bite of juvenile sanctions, and to allow legislators symbolically to demonstrate their toughness.

Empirical evaluations of juvenile court judges' sentencing practices consistently report two general findings. First, the "principle of the offense"—present offense and prior record—accounts for most of the variance in juvenile court sentences that can be explained.[142] Every methodologically rigorous study of juvenile court sentencing practices reports that judges focus primarily on the seriousness of the present offense and prior record when they sentence delinquents.[143] Practical administrative and bureaucratic considerations impel judges to give primacy to offense factors when they sentence delinquents.[144] Organizational desire to avoid unfavorable media attention and political scrutiny—"fear of scandal"—constrains judges to impose more restrictive sentences on more serious offenders.[145]

---

142. *See* Feld, *supra* note 2, at 222-32.

143. *See generally* Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392 (1996) (analyzing effects of race in juvenile justice); Jeffrey Fagan et al., *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224 (1987) (same); Belinda R. McCarthy & Brent L. Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41 (1986) (analyzing the impact of race, sex, and social class on juvenile court dispositions).

144. *See* MATZA, *supra* note 21, at 120-25.

145. *See* ROBERT EMERSON, JUDGING DELINQUENTS: CONTEXT AND PROCESS IN JUVENILE COURT 36-37 (1969); MATZA, *supra* note 21, at 120-25. *See generally* AARON CICOUREL, THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE (1968). One ethnographic study observed that:

> juvenile court decision-making comes to be pervaded by a sense of *vulnerability* to adverse public reaction for failing to control or restrain delinquent offenders.... [Fear of scrutiny and criticism increases pressures] to impose maximum restraints on the offender—in most instances, incarceration. Anything less risks immediate criticism. But more than this, it also exposes the court to the possibility of even stronger reaction in the future. For given any recurrence of serious illegal activity, former decisions that can be interpreted as "lenient" become difficult to defend.

Robert M. Emerson, *Role Determinants in Juvenile Court*, *in* HANDBOOK OF CRIMINOLOGY 621, 624 (Daniel Glaser ed., 1974).

Other court analysts emphasize that the juvenile court judge is ultimately responsible and responsive to the public:

> He will have to explain ... why the 17-year-old murderer of an innocent matron was allowed to roam the streets, on probation, when just

Moreover, complex organizations that pursue multiple goals develop bureaucratic strategies to simplify individualized assessments; the present offense and prior record provide a routine basis to rationalize decisions.[146]

Secondly, after controlling for legal and offense variables, the individualized justice of juvenile courts produces racial disparities in the sentencing of minority offenders.[147] In 1988,

---

last year he was booked for mugging. . . . Somehow, an invoking of the principle of individualized justice and a justification of mercy on the basis of accredited social-work theory hardly seems appropriate on these occasions.

MATZA, *supra* note 21, at 122. By sentencing serious juvenile offenders more formally and restrictively, judges can deflect unfavorable retrospective scrutiny and political criticism. Offense criteria provide juvenile court judges with an efficient organizational tool with which to classify the "risks" that youths pose to the public and, by way of "scandal," to the court. Because juvenile courts routinely collect information about present offense and prior records, these factors provide a simple rule-of-thumb by which to make, defend and legitimate sentencing decisions. One study reported that, despite claims of individualization, juvenile court judges appeared to base their sentencing decisions primarily on youths' present offense and prior record:

> [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.

PETER GREENWOOD ET AL., YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA 51 (1983).

146. *See generally* CICOUREL, *supra* note 145.

147. The second consistent finding from juvenile court sentencing research is that, after controlling for the present offense and prior record, individualized sentencing discretion is often synonymous with racial discrimination. *See* KIMBERLY KEMPF-LEONARD ET AL., MINORITIES IN JUVENILE JUSTICE 73 (1995); CARL POPE & WILLIAM FEYERHERM, MINORITIES IN THE JUVENILE JUSTICE SYSTEM 2-3 (1992); Barry Krisberg et al., *The Incarceration of Minority Youth*, 33 CRIME & DELINQ. 173, 185 (1987). *But see* McCarthy & Smith, *supra* note 143, at 49 (noting "[m]ost studies have concluded race is not a significant factor"). A review of earlier juvenile court sentencing studies found "clear and consistent evidence of a racial differential operating at each decision level. Moreover, the differentials operate continuously over various decision levels to produce a substantial accumulative racial differential which transforms a more or less heterogeneous racial arrest population into a homogeneous institutionalized black population." Allen E. Liska & Mark Tausig, *Theoretical Interpretations of Social Class and Racial Differentials in Legal Decision-Making for Juveniles*, 20 SOC. Q. 197, 205 (1979). A review of juvenile justice sentencing research two decades later reached the same conclusion:

> [I]t is in the juvenile justice system 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

Congress amended the Juvenile Justice and Delinquency Prevention (JJDP) Act to require states receiving federal funds to assure equitable treatment on the basis, inter alia, of race, and to assess the sources of minority over-representation in juvenile detention facilities and institutions.[148] In response to this JJDP Act mandate, a number of states examined and found racial disparities in their juvenile justice systems.[149] A review of these evaluation studies reported that, after controlling for offense variables, minority youths were over-represented in secure detention facilities in forty-one of forty-two states and in all thirteen of thirteen states that analyzed other phases of juvenile justice decision-making and institutional confinement.[150]

Most studies find evidence of discrimination against minority youths and report that cumulative decisions by court personnel amplify these racial disparities as youths moved

---

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 88, at 363.

148. 42 U.S.C. § 5633(a)(16) (1994) (requiring states receiving federal funds to ensure equitable treatment on the basis inter alia of race).

149. Discretionary decisions at various stages of the justice process amplify racial disparities as minority youths proceed through the system and result in more severe dispositions than for comparable white youths. *See* BARRY KRISBERG & JAMES AUSTIN, REINVENTING JUVENILE JUSTICE 116-34 (1993); McCarthy & Smith, *supra* note 143, at 58. The research emphasizes the importance of analyzing juvenile justice decision-making as a multi-stage process rather than focusing solely on the final dispositional decision. For example, dramatic increases in referral rates of minority youths to juvenile courts in seventeen states resulted in corresponding increases in detention and institutional placement. *See* Edmund F. McGarrell, *Trends in Racial Disproportionality in Juvenile Court Processing: 1985-1989*, 39 CRIME & DELINQ. 29, 46 (1993). Juvenile courts detain black youths at higher rates than they do white youths charged with similar offenses, and detained youths typically receive more severe sentences. *See* KRISBERG & AUSTIN, *supra*, at 125-28; M.A. Bortner & Wornie L. Reed, *The Preeminence of Process: An Example of Refocused Justice Research*, 66 SOC. SCI. Q. 413, 421 (1985); Charles E. Frazier & J.K. Cochran, *Detention of Juveniles: Its Effects on Subsequent Juvenile Court Processing Decisions*, 17 YOUTH & SOC'Y 286, 293 (1986). Most recent studies confirm that minority youths receive more severe dispositions than do white youths even after controlling for relevant legal variables. *See, e.g.*, KRISBERG & AUSTIN, *supra*, at 125-28. While offense criteria affect initial screening, detention, and charging decisions, as cases progress through the adjudicatory process, youths' race affects their dispositions and minority youths receive more severe sentences. *See, e.g., id.* at 118-34; Bishop & Frazier, *supra* note 143, at 405-06; Fagan et al., *supra* note 143, at 250-51.

150. *See* Carl E. Pope, *Racial Disparities in Juvenile Justice System*, OVERCROWDED TIMES, Dec. 1994, at 5.

through the system.[151] Two-thirds of the studies reviewed showed either direct or indirect evidence of discrimination.[152] A national study of incarceration trends reported incarceration rates for minority youths three to four times greater than those of white juveniles.[153] Moreover, judges sentenced most minority youths to public secure facilities and committed more white youths to private facilities. By 1991, juvenile courts confined less than one-third (31%) of non-Hispanic white juveniles in public long-term facilities; minority youths comprised more two-thirds (69%) of confined youths.[154] Juvenile courts committed black juveniles to training schools at a rate nearly five times higher than that of white youths, and blacks comprised (49%) of all youths in institutions.[155]

The structural context of juvenile justice decision-making also may redound to the detriment of minority youths. For example, urban courts tend to be more formal procedurally and to sentence all juveniles more severely.[156] Urban courts also have greater access to detention facilities, and youths held in pretrial detention typically receive more severe sentences than do those who remain at liberty.[157] Proportionally, more minority youths live in urban environs, and police disproportionately arrest and detain them for violent and drug crimes.[158] Thus, the geographic and structural context of juvenile justice administration, crime patterns, urbanism, "underclass threat," and race may interact to produce minority over-representation in detention facilities and correctional institutions.[159]

---

151. *See* Carl E. Pope & William H. Feyerherm, *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part 1)*, 22 CRIM. JUST. ABSTRACTS 327, 333-35 (1990); Carl E. Pope & William H. Feyerherm, *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part 2)*, 22 CRIM. JUST. ABSTRACTS 527, 528 (1990).

152. *See supra* notes 143 & 151 and accompanying text.

153. *See* Krisberg et al., *supra* note 147, at 84-90.

154. *See* SNYDER & SICKMUND, *supra* note 81, at 166.

155. *See id.*

156. *See* FELD, *supra* note 76, at 158-202; SNYDER & SICKMUND, *supra* note 81, at 136-37. *See generally* Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156 (1991).

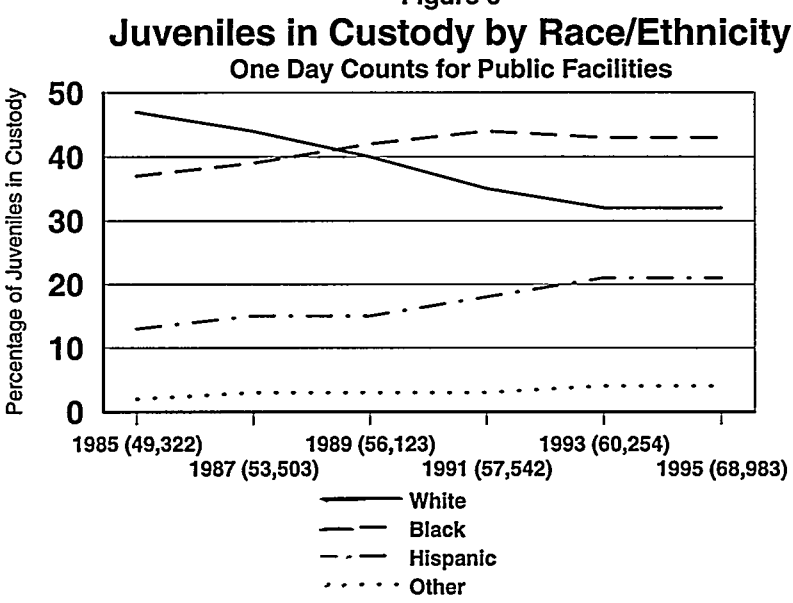
157. *See* FELD, *supra* note 76, at 198-200; Bishop & Frazier, *supra* note 143, at 404.

158. *See* SNYDER & SICKMUND, *supra* note 81, at 101.

159. *See generally* Robert J. Sampson & John H. Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, 27 L. & SOC'Y REV. 285 (1993).

Amendments to juvenile sentencing statutes associated with the "crack down" on youth crime have had a substantial impact on the proportion of minority youths in correctional confinement. Figure 6 depicts one-day counts of youths confined in public detention and correctional facilities. It provides one indicator of the proportional changes in the racial composition of institutional populations for the 1985-1995 period corresponding with the era of "get tough" legislative changes in sentencing laws. During the decade, the overall numbers of youths in custody on any given day increased almost 40%, from 49,322 to 68,983. Despite the overall increase in daily custody populations, the percentage of white juveniles confined in public facilities actually *declined* 7%, while the percentage of confined black juveniles *increased* almost 63%. Thus, the overall increases and percentage changes reflect the sharp growth in minority youth in confinement. Because of these changes in the numerical composition of confined delinquents, the proportion of white juveniles in custody declined from 44% to 32% of all youths, while the proportion of blacks increased from 37% to 43% and that of Hispanics increased from 13% to 21% of all confined youths.

Figure 6



Source: OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, CENSUS OF PUBLIC JUVENILE DETENTION, CORRECTIONAL AND SHELTER FACILITIES 1985-95, at 1 (1996).

Juvenile courts, as extensions of criminal courts, give primacy to offense factors when they sentence youths. To the extent that *parens patriae* ideology legitimizes individualization and differential processing, it also exposes "disadvantaged" youths to the prospects of more extensive state intervention. According to juvenile courts' treatment ideology, judges' discretionary decisions *should* disproportionally affect minority youths. The Progressives intended judges to focus on youths' social circumstances rather than simply their offenses, and designed juvenile court policies to discriminate between "our" children and "other people's children."[160] In a society characterized by great inequality, those most "in need" are also those most "at risk" for juvenile court intervention. For example, the ability of parents to provide "outpatient" supervision and community controls may affect youths' dispositions.[161] The number

160. *See supra* note 33 and accompanying text.

161. In a system of individualized justice, "parental sponsorship" may qualify or modify traditional criminal sentencing principles. *See* MATZA, *supra*

of parents in a household provides juvenile justice personnel with a shorthand tool to assess the levels of supervision available, influences case processing decisions, and adversely affects black youths who live in single-parent households to an even greater extent than white delinquents.[162]

Examining juvenile correctional facilities and evaluating their effectiveness provides another indicator of the increased punitiveness of juvenile justice. Evaluations of juvenile correctional facilities in the decades following *Gault* reveal a continuing gap between the rhetoric of rehabilitation and the punitive reality.[163] Criminological research, judicial opinions, and

---

note 21, at 124-25. Juvenile court personnel whom researchers questioned about racial disparities in case processing responded that "delinquent youths from single-parent families and those from families incapable of (or perceived to be incapable of) providing good parental supervision are more likely to be referred to court and placed under state control." Bishop & Frazier, *supra* note 143, at 409. They felt that even though black youths' social circumstances placed them at a systematic disadvantage because larger proportions came from single-parent households, courts properly considered these factors when they screened and sentenced youths. *See id.* If one subscribes to a utilitarian or treatment ideology, then these kinds of variations in youths' personal backgrounds and their "real needs" *should affect* case outcomes.

162. *See* SIMON I. SINGER, RECRIMINALIZING DELINQUENCY: VIOLENT JUVENILE CRIME AND JUVENILE JUSTICE REFORM 78-79 (1996); *see also* Bishop & Frazier, *supra* note 143, at 408.

163. The Supreme Court in *Gault* noted the disjunctions between rehabilitative rhetoric and the punitive reality of delinquency confinement when it granted juveniles some procedural safeguards:

> [H]owever 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.

In re Gault, 387 U.S. 1, 27 (1967) (footnote omitted) (quoting Holmes' Appeal, 379 Pa. 599, 616 (1954)).

Since *Gault*, the titles of some of the criminological and journalistic studies of juvenile correctional facilities reveal their content: see, for example, CLEMENS BARTOLLAS ET AL., JUVENILE VICTIMIZATION: THE INSTITUTIONAL PARADOX 259 (1976) (characterizing Ohio juvenile correctional system as "anti-therapeutic, anti-rehabilitative, and as exploitative and demeaning of keepers and kept alike"); BARRY C. FELD, NEUTRALIZING INMATE VIOLENCE: JUVENILE OFFENDERS IN INSTITUTIONS 160 (1977) (describing violent and punitive facilities in which staff and other residents abused inmates); STEVEN LERNER, BODILY HARM: THE PATTERN OF FEAR AND VIOLENCE AT THE CALIFORNIA YOUTH AUTHORITY 12 (1986) (finding that "a young man convicted of a crime cannot pay his debt to society safely. The hard truth is that the CYA staff cannot protect its inmates from being beaten or intimidated by

investigative studies report staff beatings of inmates, the use of medications for social control purposes, extensive reliance on solitary confinement, and a virtual absence of meaningful rehabilitative programs.[164] A study sponsored by the Office of Juvenile Justice and Delinquency Prevention of *Conditions of Confinement* reported endemic institutional overcrowding.[165] In 1991, almost half of all long-term public institutions operated above their design capacity, as did more than three-quarters of the largest facilities, those that housed more than 350 inmates.[166] Despite "rehabilitative rhetoric" and a euphemistic vocabulary, the simple truth is that juvenile court judges increasingly consign disproportionately minority offenders to overcrowded custodial warehouses that constitute little more than youth prisons.

Evaluations of juvenile "treatment" programs provide little evidence that training schools, the most common form of institutional treatment for the largest numbers of serious and chronic delinquents, effectively treat youths or reduce their recidivism rates.[167] Despite these generally negative results,

---

other prisoners."); KENNETH WOODEN, WEEPING IN THE PLAYTIME OF OTHERS: AMERICA'S INCARCERATED CHILDREN (1976). An evaluation of Louisiana training schools described institutions populated predominantly by black juveniles whom guards regularly physically abused, kept in isolation for long periods of time, restrained with handcuffs, and confined in "punitive" facilities surrounded by high chain-link fences topped with coiled razor wire. *See* HUMAN RIGHTS WATCH, CHILDREN IN CONFINEMENT IN LOUISIANA 1, 20-23, 27-34 (1995); *see also* DALE PARENT ET AL., U.S. DEP'T OF JUSTICE, CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES 21-157 (1994) (describing endemic institutional overcrowding in larger medium or maximum security facilities which confined inmates with perimeter fences, locked internal security, or both). As states sentenced more youths to juvenile institutions, they increased their prison-like character, relied more extensively on fences and walls to maintain perimeter security, and used surveillance equipment to provide internal security. *See* SNYDER & SICKMUND, *supra* note 81, at 171-72.

164. *See* Feld, *supra* note 2, at 232-37. *See generally* PARENT ET AL., *supra* note 163.

165. *See* PARENT ET AL., *supra* note 163, at 43-63.

166. *See id.* at 61-62; *see also* SNYDER & SICKMUND, *supra* note 81, at 170.

167. States confine more than three-quarters of all delinquents in public training schools and institutions. *See* SNYDER & SICKMUND, *supra* note 81, at 165. Evaluation research indicates that incarcerating young offenders in large, congregate juvenile institutions does not effectively rehabilitate and may affirmatively harm them. *See, e.g.*, BARTOLLAS ET AL., *supra* note 163, at 261; FELD, *supra* note 163, at 196-97; PETER W. GREENWOOD & FRANKLIN E. ZIMRING, ONE MORE CHANCE: THE PURSUIT OF PROMISING INTERVENTION STRATEGIES FOR CHRONIC JUVENILE OFFENDERS 40 (1985) (noting that most training schools "fail to reform" and "make no appreciable reduction in the

proponents of the traditional juvenile court continue their quest for the elusive "rehabilitative" grail and offer literature reviews, meta-analyses, or program descriptions that report that some interventions produce positive effects on selected clients under certain conditions.[168] Typically, positive treatment effects appear in small programs that provide an intensive and integrated response to the multitude of problems that delinquent youths present. Favorable results occur primarily under optimal conditions, for example, when mental health or other non-juvenile correctional personnel provide services with high treatment integrity in well-established programs.[169] Although

---

very high recidivism rates, on the order to 70 to 80 percent"); OFFICE OF THE MINN. LEGISLATIVE AUDITOR, RESIDENTIAL FACILITIES FOR JUVENILE OFFENDERS 71-73 (1995) (reporting that the rates of recidivism at Minnesota juvenile correctional facilities in 1985 and 1991 were between 53% and 77%); JOHN C. STEIGER & CARY DIZON, REHABILITATION, RELEASE, AND REOFFENDING: A REPORT ON THE CRIMINAL CAREERS OF THE DIVISION OF JUVENILE REHABILITATION "CLASS OF 1982," at 8 (1991) (reporting that more than two thirds (67.9%) of youths released from Washington juvenile facilities in 1982 reoffended within two years).

The recent changes in juvenile court sentencing legislation exacerbate the deleterious side effects associated with institutional overcrowding. *See* Barry Krisberg et al., *The Watershed of Juvenile Justice Reform*, 32 CRIME & DELINQ. 5, 32-36 (1986). Youths confined under "get tough" sentencing laws to long terms often comprise the most serious and chronic delinquent population. *See id.* at 17-23. Yet the institutions that house them often suffer from overcrowding, limited physical mobility, and inadequate program resources. *See generally* PARENT ET AL., *supra* note 163. Overcrowding also contributes to higher rates of inmate violence and suicide. *See id.* at 93-122. These juvenile correctional "warehouses" exhibit most of the negative features of adult prisons and function as little more than youth prisons in which inmates "do time." *See* GREENWOOD & ZIMRING, *supra*, at 40. Large custodial institutions enable politicians to demonstrate their toughness, give the public a false sense of security, provide employment for correctional personnel, and minimize the demands placed on custodial staff to maintain institutional order, but they do little to improve the life-chances of troubled youths. *See* BERNARD, *supra* note 27, at 178.

168. *See, e.g.*, D.A. Andrews et al., *Does Correctional Treatment Work?: A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 384 (1990) (describing positive effects when offenders received clinically appropriate psychological treatment); Mark W. Lipsey, *Juvenile Delinquent Treatment: A Meta-Analytic Inquiry into the Variability of Effects*, *in* META-ANALYSIS FOR EXPLANATION: A CASEBOOK 97-98 (Thomas D. Cook et al. eds., 1992) (reporting positive treatment effects in intensive integrated programs); Albert R. Roberts & Michael J. Camasso, *The Effects of Juvenile Offender Treatment Programs on Recidivism: A Meta-Analysis of 46 Studies*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 421, 437 (1991) (noting positive treatment effects from family therapy).

169. *See* Mark W. Lipsey & David B. Wilson, *Effective Intervention for Serious Juvenile Offenders*, *in* SERIOUS AND VIOLENT JUVENILE OFFENDERS:

some programs appear successful for some juvenile under some circumstances and may improve the life-chances of some young offenders, most states do not routinely provide quality programs or services for delinquents generally. Rather, they confine most delinquents in euphemistically-sanitized youth prisons with fewer procedural safeguards than adults enjoy. Thus, even if some model programs can reduce recidivism rates, public officials appear unwilling to provide such treatment services when they face fiscal constraints, budget deficits, and competition from other, more politically potent interest groups. Organizational imperatives to achieve "economies of scale" mandate confining ever larger numbers of youths and thereby preclude the possibility of matching offenders with appropriate treatment programs.

IV. THE INHERENT CONTRADICTIONS OF THE JUVENILE COURT

Juvenile courts punish rather than treat young offenders and use a procedural regime under which no adult would consent to be tried. The fundamental shortcoming of the juvenile court's welfare *idea* reflects a failure of conception and not *simply* a century-long failure of implementation. The juvenile court's creators envisioned a social service agency in a judicial setting and attempted to fuse its welfare mission with the power of state coercion.[170] Combining social welfare and penal social control functions in one agency assures that juvenile courts do both badly. Providing for child welfare is a societal responsibility rather than a judicial one. Juvenile courts lack control over the resources necessary to meet child welfare needs exactly because of the social class and racial characteristics of their clients, and the public's fear of "other people's children."[171] In practice, juvenile courts almost inevitably subordinate child welfare concerns to crime control considerations.

If a state were to formulate child welfare policies writing on a clean slate, would it choose a court as the most appropriate agency through which to deliver social services and would it make criminality a condition precedent to the receipt of serv-

---

RISK FACTORS AND SUCCESSFUL INTERVENTIONS 313, 325-38 (Rolf Loeber & David Farrington eds., 1998); Jeffrey Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 CRIM. JUST. & BEHAV. 93, 96-102 (1990).

170. *See* FELD, *supra* note 5, at 294-97.

171. *See supra* notes 16-33 and accompanying text (discussing inherent discriminatory practices within the Progressive juvenile court).

ices? If a state would not initially choose a court to deliver social services, then does the fact of a youth's criminality confer upon the judiciary any special competency as a welfare agency? Many young people who do not commit crimes desperately need social services, and many youths who commit crimes do not require or will not respond to welfare programs. In short, criminality represents an inaccurate and haphazard criterion upon which to allocate social services. Because our society denies adequate help and assistance to meet the social welfare needs of all young people, juvenile courts' treatment ideology serves primarily to legitimize judicial coercion of some youths because of their criminality.

The attempt to combine social welfare and criminal social control in one agency constitutes the fundamental flaw of the juvenile court. The juvenile court subordinates social welfare concerns to criminal social control functions because of its inherently penal focus. Legislatures do not define juvenile court jurisdiction on the basis of characteristics of children for which they are not responsible and for which effective intervention could improve their lives. For example, juvenile court law does not define eligibility for welfare services or create an enforceable right or entitlement based upon young peoples' lack of access to quality education, lack of adequate housing or nutrition, unmet health needs, or impoverished families—none of which are their fault. In all of these instances, children bear the burdens of their parents' circumstances literally as innocent bystanders.[172]

Instead, states define juvenile court jurisdiction based on a youth committing a crime, a prerequisite that detracts from a compassionate response. Unlike disadvantaged social conditions that are not their fault, criminal behavior represents the one characteristic for which adolescent offenders do bear at least partial responsibility. In short, juvenile courts define eligibility for services on the basis of the feature least likely to elicit sympathy and compassion and ignore the social structural conditions or personal circumstances more likely to evoke a greater desire to help. Juvenile courts' defining characteristic strengthens public antipathy to "other people's children" by emphasizing primarily that they are law violators. The recent "criminological triage" policies that stress punishment, ac-

172. *See* GRUBB & LAZERSON, *supra* note 33, at 298-300; NATIONAL RESEARCH COUNCIL, *supra* note 86, at 48-56.

countability, and personal responsibility further reinforce juvenile courts' penal foundations and reduce the legitimacy of youths' claims to humanitarian assistance.

V. THE KID IS A CRIMINAL AND THE CRIMINAL IS A KID

The "real" reasons why states bring youths to juvenile court is because they committed crimes, not because they need social services. Accordingly, states should uncouple social welfare from social control, try all offenders in one integrated criminal justice system, and make appropriate substantive and procedural modifications to accommodate the youthfulness of some defendants. Substantive justice requires a rationale to sentence younger offenders differently, and more leniently, than older defendants, a formal recognition of youthfulness as a mitigating factor. Procedural justice requires providing youths with full procedural parity with adult defendants and additional safeguards to account for the disadvantage of youth in the justice system. These substantive and procedural modifications can avoid the "worst of both worlds," provide youths with protections functionally equivalent to those accorded adults, and do justice in sentencing.[173]

My proposal to abolish juvenile courts constitutes neither an unqualified endorsement of punishment nor a primitive throw-back to earlier centuries' vision of children as miniature adults. Rather, it honestly acknowledges that the real business of juvenile courts is criminal social control, asserts that younger offenders in a criminal justice system deserve less severe penalties for their misdeeds than do more mature offenders simply because they are young, and addresses many problems created by trying to maintain binary, dichotomous, and contradictory criminal justice systems based on an arbitrary age classification of a youth as a child or as an adult.[174]

Formulating a sentencing policy when the kid is a criminal and the criminal is a kid entails two tasks: to develop a rationale to sentence younger offenders more leniently than adult offenders and to devise a practical mechanism to implement

---

173. *See, e.g.*, FELD, *supra* note 5, at 302-27 (analyzing modifications of criminal justice system necessary to accommodate younger offenders); Feld, *supra* note 6, at 96-115 (rationalizing formal recognition of youthfulness as a mitigating factor in sentencing younger offenders); Feld, *Criminalizing Juvenile Justice*, *supra* note 4, at 272-76 (comparing and contrasting juvenile and criminal procedures and advocating greater procedural safeguards for youth).

174. *See* Feld, *supra* note 6, at 125-29.

youthfulness as a mitigating factor in sentencing. Explicitly punishing younger offenders rests on the premise that adolescents possess sufficient moral reasoning, cognitive capacity, and volitional control to hold them partially responsible for their behavior, albeit not to the same degree as adults. Developmental psychology, jurisprudence, and criminal sentencing policy provide rationale to formally recognize youthfulness as a mitigating factor in sentencing.[175] A "youth discount"—shorter sentences for reduced responsibility—provides the practical administrative mechanism to implement it.

The idea of deserved punishment entails censure and condemnation for making blameworthy choices, and imposes sanctions proportional to the seriousness of a crime.[176] Two elements—harm and culpability—define the seriousness of a crime. A perpetrator's age has relatively little bearing on assessments of harm—the nature of the injury inflicted, risk created, or value taken. But evaluations of seriousness also implicate the quality of the actor's choice to engage in the criminal conduct that produced the harm. Responsibility for choices hinges on cognitive and volitional competence. Youths differ socially, physically, and psychologically from more mature adults. They possess neither the rationality nor the self-control to equate their criminal responsibility fully with that of adults. Youths have not yet fully internalized moral norms, developed sufficient empathic identification with others, acquired adequate moral comprehension, or had sufficient opportunity to develop the ability to restrain their actions.[177] In short, their immaturity affects the quality of their judgments in ways that are relevant to criminal sentencing policy.

A. ADOLESCENCE AS A GENERIC FORM OF REDUCED CULPABILITY

Certain characteristic developmental differences distinguish the quality of decisions that young people make from those of adults, justify a somewhat more protective stance when states sentence younger offenders, and support a youth sentencing policy that enables young offenders to survive the mistakes of adolescence with their life chances intact. "Psycho-

175. *See infra* notes 178-87 and accompanying text.

176. *See generally* ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

177. *See* Feld, *supra* note 6, at 102-07.

social maturity," "judgment," and "temperance" provide conceptual prisms through which to view adolescents' decision-making competencies and to assess the quality of their choices.[178] Adolescents and adults differ in the quality of judgment and self-control they exercise because of differences in breadth of experience, short-term versus long-term temporal perspectives, attitudes toward risk, impulsivity, and the importance attached to peer influences.[179] These developmentally unique attributes affect youths' degree of criminal responsibility. Young people are more impulsive, exercise less self-control, fail adequately to calculate long-term consequences and engage in more risky behavior than do adults.[180] Adolescents may estimate the magnitude or probability of risks differently than adults, may use a shorter time-frame, or focus on opportunities for gains rather than possibilities of losses differently than adults.[181] Young people may discount the negative value of future consequences because they have more difficulty than adults integrating a future consequence into their more limited experiential baseline.[182] Adolescents' quality of judgments differ from adults because of their predisposition toward sensation-seeking, impulsivity related to hormonal or physiological changes, and mood volatility.[183] Adolescents respond to peer group influ-

178. *See generally* Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763 (1995) [hereinafter Cauffman & Steinberg, *Adolescent Decision-Making*]; Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607 (1992) [hereinafter Scott, *Judgment and Reasoning*]; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psycho-social Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249 (1996) [hereinafter Steinberg & Cauffman, *Maturity of Judgment*].

179. *See* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 3 (1992); Scott, *Judgement and Reasoning*, *supra* note 178, at 1610; Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 178, at 252.

180. *See* William Gardner, *A Life-Span Rational Choice Theory of Risk Taking*, *in* ADOLESCENT RISK TAKING 66, 67 (Nancy J. Bell & Robert W. Bell eds., 1993); Scott, *supra* note 178, at 1642-52; Steinberg & Cauffman, *supra* note 178, at 261-62.

181. *See* Scott, *Judgment and Reasoning*, *supra* note 178, at 1643-47.

182. *See* William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, *in* NEW DIRECTIONS FOR CHILD DEVELOPMENT 17, 25-26 (William Gardner et al. eds., 1990).

183. *See, e.g.*, Cauffman & Steinberg, *Adolescent Decision-Making*, *supra* note 178, at 1780; Steinberg & Cauffman, *Maturity of Judgment*, *supra* note

ences more readily than do adults because of the crucial role that peer relationships play in identity formation.[184] Most adolescent crime occurs in a group context, and having delinquent friends precedes an adolescent's own criminal involvement.[185] Group-offending places normally law-abiding youth at greater risk of involvement and reduces their ability publicly to withdraw. Because of the social context of adolescent crime, young people require time, experience, and opportunities to develop the capacity for autonomous judgments and to resist peer influence.

Developmental processes affect adolescents' quality of judgment and self-control, directly influence their degree of criminal responsibility and deserved punishment, and justify a different criminal sentencing policy. While young offenders possess sufficient understanding and culpability to hold them accountable for their acts, their crimes are less blameworthy than adults' because of reduced culpability and limited appreciation of consequences *and* because their life-circumstances understandably limited their capacity to learn to make fully responsible choices.

When youths offend, the families, schools, and communities that socialize them bear some responsibility for the failures of those socializing institutions. Human beings depend upon others to nurture them and to enable them to develop and exercise the moral capacity for constructive behavior. The capacity for self-control and self-direction is not simply a matter of

---

178, at 258-62.

184. *See* ZIMRING, *supra* note 1, at 78-81; Scott, *Judgment and Reasoning*, *supra* note 178, at 1643-44. Franklin Zimring notes the crucial role of "group offending" in adolescents' decisions to engage in crime:

> The ability to resist peer pressure is yet another social skill that is a necessary part of legal obedience and is not fully developed in many adolescents.... Most adolescent decisions to break the law or not take place on a social stage where the immediate pressure of peers urging the adolescent on is often the real motive for most teenage crime.

Franklin Zimring, *Toward Jurisprudence of Youth Violence*, 24 CRIME & JUST. 477, 488 (1998).

185. *See* Delbert S. Elliott & Scott Menard, *Delinquent Friends and Delinquent Behavior: Temporal and Developmental Patterns*, *in* DELINQUENCY AND CRIME: CURRENT THEORIES (J. David Hawkins ed., 1996); *see also* Zimring, *supra* note 184, at 490 (characterizing the tendency of the "You're Chicken" or "I Dare You" reason as why "young persons who would not commit crimes alone do so in groups. 'I dare you' is the reason that 'having delinquent friends' both precedes an adolescent's own involvement in violence and is a strong predictor of future violence").

moral luck or good fortune, but a socially constructed developmental process that provides young people with the opportunity to develop a moral character.[186] Community structures affect social conditions and the contexts within which adolescents grow and interact with peers. Unlike presumptively mobile adults, because of their dependency juveniles lack the means or ability to escape from their criminogenic environments. Because the ability to make responsible choices is learned,[187] young peoples' socially constructed life situation understandably limits their capacity to develop self-control, restricts their opportunities to learn and to exercise responsibility, and supports a partial reduction of criminal responsibility.

B. "YOUTH DISCOUNT"

The binary distinctions between children and adults that provide the bases for states' legal age of majority and the jurisprudential foundation of the juvenile court ignore the reality that adolescents develop along a continuum, and create an unfortunate either-or forced choice in sentencing. By contrast, shorter sentences for reduced responsibility represent a more modest and readily attainable reason to treat young offenders differently than adults than the rehabilitative justifications advanced by Progressive "child-savers." Protecting young people from the full penal consequences of their poor decisions reflects a policy to preserve their life chances for the future when they presumably will make more mature and responsible choices.

Sentencing policy that integrates youthfulness, reduced culpability, and restricted opportunities to learn self-control with penal principles of proportionality would provide younger offenders with categorical fractional reductions of adult sentences. Because youthfulness constitutes a universal form of "reduced culpability" or "diminished responsibility," states should treat it categorically as a mitigating factor without regard to nuances of individual developmental differences. Youth development is a highly variable process, and chronological age is a crude, imprecise measure of criminal maturity and the capacity for self-control. Despite the variability of adolescence, however, a categorical "youth discount" that uses age as a con-

186. *See* NATIONAL COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 343-66 (1991).

187. *See* Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 178, at 252-67 (discussing how adolescents develop responsibility and perspective).

clusive proxy for reduced culpability and shorter sentences remains preferable to any individualized inquiry into the criminal responsibility of each young offender. Developmental psychology lacks reliable indicators of moral development that equate readily with criminal responsibility and accountability; clinical testimony to precisely tailor sanctions to culpability is not worth the burden or diversion of resources that the effort would entail.[188] Youthful mitigated criminal responsibility is a legal concept; a youth discount categorically recognizes that criminal choices that young people make differ to some degree qualitatively from those of adults.

Because adolescence constitutes a form of "reduced culpability" and young people make criminal choices that differ to some degree qualitatively from those of adults, an explicit "youth discount" at sentencing incorporates this sliding scale of criminal responsibility. A fourteen-year-old offender might receive, for example, 25% to 33% of the adult penalty; a sixteen-year-old defendant, 50% to 66%; and an eighteen-year old adult the full penalty as presently occurs.[189] The "deeper discounts" for younger offenders correspond to the developmental continuum and their more limited opportunities to learn to be responsible and to exercise self-control. Because reduced culpability provides the rationale for youthful mitigation, younger adolescents bear less responsibility and deserve proportionally shorter sentences than older youths. With the passage of time, age, and opportunities to develop the capacity for self-control, social tolerance of criminal deviance and claims for youthful mitigation decline.

Discounted sentences that preserve younger offenders' life chances require that the maximum sentences that they receive remain substantially lower than those imposed on adults. Capital sentences and draconian mandatory minimum sentences, for example, life without parole, have no place in sen-

188. I have noted that:

> [a]ttempts to integrate subjective psychological explanations of adolescent behavior and personal responsibility into a youth sentencing policy cannot be done in a way that can be administered fairly without undermining the objectivity of the law. . . . For young criminal actors who possess at least some degree of criminal responsibility, relying on inherently inconclusive or contradictory psychiatric or clinical testimony to precisely tailor sanctions hardly seems worth the judicial burden and diversion of resources that the effort would entail.

FELD, *supra* note 5, at 320.

189. *See, e.g., id.* at 315-27; Feld, *supra* note 6, at 115-23; Feld, *Punishment, Treatment, supra* note 4, at 896-902.

tencing presumptively less-blameworthy adolescents. Because of the rapidity of adolescent development and the life-course disruptive consequences of incarceration, the rationale for a "youth discount" also supports requiring a higher in/out threshold of offense seriousness and culpability as a prerequisite for imprisonment. Only states whose criminal sentencing laws provide realistic, humane, and determinate sentences that enable a judge actually to determine "real-time" sentences can readily implement a proposal for explicit fractional reductions of youths' sentences. One can only know the value of a "youth discount" in a sentencing system in which courts know in advance the standard or "going rate" for adults.

C. VIRTUES OF AN INTEGRATED CRIMINAL JUSTICE SYSTEM

A graduated age-culpability sentencing scheme in an integrated criminal justice system avoids the inconsistencies associated with the binary either-juvenile-or-adult drama currently played out in judicial waiver proceedings and in prosecutorial charging decisions and introduces proportionality to the sentences imposed on the many youths currently tried as adults. It also avoids the "punishment gap" when youths make the transition from one justice system to the other, and assures similar consequences for similarly-situated offenders. Adolescence and criminal careers develop along a continuum; the current bifurcation between the two justice systems confounds efforts to respond consistently to young career offenders. A sliding-scale of criminal sentences based on an offender's age-as-a-proxy-for-culpability accomplishes simply and directly what the various "blended jurisdiction" statutes attempt to achieve indirectly.[190] A formal policy of youthfulness as a mitigating factor avoids the undesirable forced choice between either inflicting undeservedly harsh penalties on less culpable actors or doing nothing about the manifestly guilty.

An integrated justice system also allows for integrated record-keeping and enables officials to identify and respond to career offenders more readily than the current jurisdictional bifurcation permits. Even adolescent "career offenders" deserve enhanced sentences based on an extensive record of prior offending. But an integrated justice system does not require integrated prisons. The question of "how long" differs from questions of "where" and "what." States should maintain age

190. *See* Feld, *supra* note 2, at 239-43; Feld, *supra* note 73, at 1038-51.

segregated youth correctional facilities both to protect younger offenders from adults and to protect geriatric prisoners from younger inmates. Because all young offenders eventually will return to society, a sentencing and correctional policy must offer youths "room to reform" and provide the opportunities and resources to enable them to do so.

Finally, affirming partial responsibility for youth constitutes a virtue. The idea of personal responsibility and accountability for behavior provides an important cultural counterweight to a popular culture that endorses the idea that everyone is a victim, that all behavior is determined, and that no one is responsible. The juvenile court elevated determinism over freewill, characterized delinquents as victims rather than perpetrators, and subjected them to an indeterminate quasi-civil commitment process. The juvenile court's treatment ideology denied youths' personal responsibility, reduced offenders' duty to exercise self-control, and eroded their obligations to change. If there is any silver lining in the current cloud of "get tough" policies, it is the affirmation of responsibility. A culture that values autonomous individuals must emphasize both freedom and responsibility. A criminal law that bases sentences on blameworthiness and responsibility must recognize the physical, psychological, and socially constructed differences between youths and adults. Affirming responsibility forces politicians to be honest when the kid is a criminal and the criminal is a kid. The real reason states bring young offenders to juvenile courts is not to deliver social services, but because they committed a crime.

EPILOGUE—UNCOUPLING SOCIAL WELFARE FROM SOCIAL CONTROL

A proposal to abolish the juvenile court represents an effort to uncouple social welfare and social control policies. On the one hand, such an endeavor would provoke a re-examination of criminal justice strategies when the kid is a criminal and the criminal is a kid. On the other hand, such a strategy would enable public policies to address directly the "real needs" of all children regardless of their criminality. Social structural forces, political economic arrangements, and legal policies affect the social conditions of young people. A century ago, Progressive reformers had to choose between initiating structural social reforms that would ameliorate criminogenic forces or ministering to the individuals damaged by those adverse social

conditions. Driven by class and ethnic antagonisms, they ignored the social-structural implications of their delinquency theories and chose instead to "save children" and, incidentally, to preserve their own power and privilege.[191]

A century later, we face the same choice between "rehabilitating" damaged individuals and initiating social structural changes. In making this choice, the juvenile court welfare *idea* may constitute an obstacle to child welfare reform and an alibi to avoid fundamental changes. Conservatives deprecate the juvenile court as a welfare system, albeit one that "coddles" criminals, while liberals bemoan its lack of resources and inadequate options. A society that cares for the welfare of its children does so directly by supporting families, communities, schools, and social institutions that nurture all young people, and not by cynically incarcerating its most disadvantaged children and pretending that it is "for their own good." It is unrealistic to expect juvenile courts or any other justice institutions to ameliorate the social ills that affect young people or to significantly reduce youth crime.[192]

The social order significantly determines young peoples' access to opportunities and the lives they may fashion for themselves as adults. A society committed to equality of opportunity must adopt policies to assure that all children, regardless of their parents' socio-economic circumstances, have at least a fair start and a meaningful chance to succeed. Current public policies contribute to the social isolation of many youths, the desperate poverty of more than one child in five, and the high rates of criminality that prevail among young people in general and urban black males in particular.[193] Public policies

---

191. *See* FELD, *supra* note 5, at 75-78; PLATT, *supra* note 11, at 176-81; ROTHMAN, *supra* note 11, at 10.

192. TONRY, *supra* note 62, at 163, observed that:

> [t]he resources of the criminal justice system are few. The answers to poverty, underemployment, and racial bias must be sought elsewhere, in schools and social welfare programs and broad-based social policies. To look to the criminal justice system to solve fundamental social problems would be foolish and doomed to fail.

Similarly, I have observed that:

> [s]ocial welfare and legal policies to provide all young people with a hopeful future, to reduce racial and social inequality, and to remove guns from the hands of children require a public and political commitment to the welfare of children that extends far beyond the resources and competencies of any juvenile justice system.

FELD, *supra* note 5, at 342.

193. *See* WILSON, *supra* note 89, at 91-94; *see also* DUNCAN LINDSEY, THE

can modify the social order, improve the present circumstances of young people, and better facilitate their successful transition to responsible and competent adulthood.

If states frame child welfare policies in terms of child welfare rather than crime control, then the possibilities for positive interventions for young people expand dramatically. For example, a public health approach to youth crime and violence that identified their social, environmental, community structural, and ecological correlates such as concentrated poverty, school test-scores, availability of handguns or shots-fired, or the commercialization of violence would suggest wholly different intervention strategies than simply incarcerating minority youths. Youth violence occurs as part of a social ecological structure in areas of concentrated poverty, high teenage pregnancy, and welfare dependency. Such social indicators could identify census tracts or even zip codes for community organizing, economic development, and preventive and remedial intervention.

Poverty constitutes the biggest single risk factor for the welfare of young people.[194] Family income directly affects the

---

WELFARE OF CHILDREN 185-228 (1994); NATIONAL COMM'N ON CHILDREN, *supra* note 186, at 281-309

194. "[T]he diverse ways in which poverty harms children and adolescents, inflicts lasting damage, and limits their future potential points to the reduction of poverty as a key step toward improving the condition of many of the nation's youths." NATIONAL RESEARCH COUNCIL, *supra* note 86, at 236.

More children live in poverty in the United States, one in five, than in any other western industrialized nation. *See* SYNDER & SICKMUND, *supra* note 81, at 7. Recent comparisons reveal that the rate of child poverty in the United States (20.4%) is more than double that of Canada (9.3%) and Australia (9.0%), and four to eight times greater than that of western European industrial democracies such as France (4.6%), Germany (2.8%) or Sweden (1.6%). *See* LINDSEY, *supra* note 193, at 222. According to the National Commission on Children:

> children are the poorest Americans. One in five lives in a family with an income below the federal poverty level. One in four infants and toddlers under the age of three is poor. Nearly 13 million children live in poverty, more than 2 million more than a decade ago. Many of these children are desperately poor; nearly 5 million live in families with incomes less than half the federal poverty level.

NATIONAL COMM'N ON CHILDREN, *supra* note 186, at 24. Children comprise the largest age group in poverty and, as a result of macro-structural economic changes and family demographic forces since the 1970s, their situation has worsened. *See* KATZ, *supra* note 49, at 126-27. While 15% of children lived below the poverty line in 1974, by 1986, 21% of children did, a 40% increase. *See id.* at 127. Among the impoverished young, minority children disproportionately experience the most dire penury and personal circumstances. *See id.* As the international comparisons indicate, in an affluent society like the

quality of children's lives and their social opportunities in myriad ways—the quality of their housing, neighborhoods, schools, health care, nutrition, and personal safety. Children in poverty experience malnutrition, inadequate clothing, substandard housing, lack of access to health care, deficient schools, and dangerous crime-ridden streets and neighborhoods.[195] In an affluent society, children consigned to live in prolonged poverty suffer from a form of chronic abuse. Eliminating this pervasive, undifferentiated child abuse requires far more extensive social resources and economic reforms than any juvenile justice or child welfare system possibly can muster.

The social and community structural determinants of youth crime and violence also suggest several future directions for a child welfare policy freed from the constraints of a juvenile court. Because poverty constitutes the biggest single risk factor for youth development, public policies must address directly child poverty to facilitate youths' transition to adulthood. Because minority children disproportionately bear the brunt of economic inequality, universal child welfare policies will especially enhance their life chances.[196] Because the sharp increase in homicides caused by firearms provided most of the political impetus to transform the juvenile court into a scale-down criminal court and to "crack down" on youth crime, public policies must address directly the prevalence of guns among the young.

Three aspects of youth crime and violence suggest future social welfare policy directions regardless of their immediate impact on recidivism. First, it is imperative to provide a hopeful future for all young people. As a result of structural and economic changes since the 1980s, the ability of families to raise children, to prepare them for the transition to adulthood, and to provide them with a more promising future has declined.

United States, the political economy, rather than natural scarcity, allocates resources; public policies produce social and economic inequalities and concentrated poverty. The growth in child poverty over the past two decades reflects deliberate policies to prefer certain interests groups and classes, for example, the elderly and wealthy, over others groups such as the young, the poor, or families raising children. *See* LINDSEY, *supra* note 193, at 197-228. The structure of the tax, health care, anti-discrimination, housing, minimum wage, child-care, employment, and macro-economic policies all comprise components of a child welfare and "family policy" and affect parents' ability to raise their children. *See* NATIONAL COMM'N ON CHILDREN, *supra* note 186, at 249-79.

195. *See* NATIONAL COMM'N ON CHILDREN, *supra* note 186, at 28-37.

196. *See* WILSON, *supra* note 89, at 128-39.

Many social indicators of the status of young people—poverty, homelessness, violent victimization, and crime—are negative and some of those adverse trends are accelerating. Without realistic hope for their future, young people fall into despair, nihilism, and violence. Second, the disproportionate overrepresentation of minority youths in the juvenile justice system forces us to confront the issue of race in American society and makes imperative the pursuit of racial and social justice. The increasing and explicit punitiveness of juvenile justice policies emerge against the backdrop of the structural transformation of cities, the deindustrialization of the urban core, and the emergence of a threatening black urban "underclass" living in racial isolation and concentrated poverty. A generation ago, the National Advisory Commission on Civil Disorders, The Kerner Commission, warned that the United States was "moving toward two societies, one black, one white—separate and unequal."[197] The Kerner Commission predicted that "to continue present policies [will] 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."[198] Today, we reap the bitter harvest of racial segregation, concentrated poverty, urban social disintegration, and youth violence sown by social policies and public neglect a generation ago.[199] Third, youth violence has become increasingly lethal as the proliferation of handguns transforms adolescent altercations into homicidal encounters. Only public policies that reduce and reverse the proliferation of guns among the youth population will stem the carnage.

While politicians may be unwilling to invest scarce social resources in young "criminals," particularly those of other colors or cultures, a demographic shift and an aging population give all of us a stake in young people and encourage us to invest in their human capital for their and our own future well-being and to maintain an inter-generational compact. Social welfare and legal policies to provide all young people with a hopeful future, to reduce racial and social inequality, and to reduce access to and use of firearms require a public and political

197. NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 55, at 1.

198. *Id.* at 22.

199. *See* MASSEY & DENTON, *supra* note 38, at 137-39; WILSON, *supra* note 89, at 21-26.

commitment to the welfare of children that extends far beyond the resources or competencies of any juvenile justice system.