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Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences

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I. INTRODUCTION

For more than a century, youth crime policies have oscillated between periods of more lenient treatment and harsher punishment. Justice officials and the public alternatively attributed high crime rates either to "soft" rehabilitative policies and advocated "tougher" sanctions, or to excessively harsh penalties that failed adequately to treat youths.[1] A century ago, Progressive reformers combined a more modern construction of childhood with a more scientific conception of social control to create a judicial-welfare alternative and to remove children from the adult criminal process.[2] They used juvenile courts to assimilate, "Americanize," and control "other people's" children.[3]

The Supreme Court in *In re Gault* in 1967 recognized that delinquents received neither the rehabilitative treatment Progressives envisioned, nor adult criminal procedural safeguards, and granted them some due process rights.[4] The Court's due process decisions, in turn, fostered a convergence between the juvenile and criminal justice systems.[5] During the 1980s and 1990s, a sharp increase in homicides committed by young black men provided political incentives to "get tough" on youth crime and produced an unprecedented paroxysm of punitiveness.[6] States enacted harsher punishment for children in both the criminal and juvenile justice systems—more youths were tried as adults and exposed to draconian penalties such as Life Without Parole (LWOP) sentences, and longer terms in youth prisons for the disproportionate numbers of minority youths sentenced as delinquents.

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[1] *See generally* THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE (1992) (arguing that a cyclical pattern to juvenile justice policy has been evident for the last 200 years and proposing how to break the cycle).

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

[3] *See, e.g.*, BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 55–60 (1999); ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 75–83 (2d ed. 1977); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVE IN PROGRESSIVE AMERICA 221–22 (1980); STEVEN SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF PROGRESSIVE JUVENILE JUSTICE 58 (1977); JOHN SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES 122 (1988); TANENHAUS, *supra* note 2, at ix. *See generally*, W. NORTON GRUBB & MARVIN LAZERSON, BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN (1982) (challenging traditional government assumptions on how to assist children and their families).

[4] In re Gault, 387 U.S. 1, 72 (1967).

[5] *See, e.g.*, Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 718–22 (1991) (summarizing the procedural and substantive convergence between juvenile and criminal courts); Barry C. Feld, *The Transformation of the Juvenile Court-Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 347–69 (1999) (arguing that social structural changes and race account for adoption of more punitive juvenile justice policies).

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

Within the past decade, researchers, scholars, policy makers, the public, and even some state officials have recognized that many legislatures overreacted in adopting excessively harsh and counter-productive policies. Despite political "sound-bites" that equate even young children with adults—"old enough to do the crime, old enough to do the time"—developmental psychological research identifies the many ways in which youths differ from adults. The neuroscience of adolescent brain development provides a deeper understanding of why children's decisions and judgment differ from adults. More recently, the Supreme Court and a few states have taken tentative steps to adopt policies to reverse the punitive trend and to restore a semblance of rationality to youth crime policies. The Court in *Roper v. Simmons* barred the death penalty for children.[7] A few states have mitigated the harshest penalties imposed on youths, such as life without parole (LWOP).[8] Others have considered increasing the ages of juvenile court jurisdiction and waiver to criminal court.[9] Despite these hopeful signs, states must do much more to formally recognize youthfulness as a mitigating factor.

This article analyzes the role of race in shaping punitive youth crime policies, describes the first positive developments in more than two decades, and proposes a way to incorporate developmental differences into youth sentencing policies. Part II provides an overview of the juvenile court and its historic mission to discriminate between "our children" and "other people's children." Part III places the Supreme Court's juvenile court due process decisions in the broader context of the quest for civil rights and racial equality. Part IV attributes the "get tough" policies of the 1980s and 1990s to the politics of race and crime, and examines their impact on disproportionate minority confinement, waiver of juveniles to criminal court, and their sentencing as adults, which generated a punitive paroxysm. Part V examines adolescent criminal responsibility and the Supreme Court's recent decision in *Roper v. Simmons* to abolish the death penalty for juveniles. The developmental psychological research that underlay *Roper*'s assessment of juveniles' diminished responsibility has wider implications for youth sentencing policy. I argue that *Roper*'s proportionality rationale precludes sentencing juveniles to Life Without Parole (LWOP) and propose giving a "youth discount" to formally recognize youthfulness as a mitigating factor.

II. THE JUVENILE COURT

For more than a century after the founding of the United States, no separate court or justice system existed for young offenders.[10] States tried youths who

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[7] Roper v. Simmons, 543 U.S. 551, 578 (2005).

[8] *See infra* notes 371–76 and accompanying text.

[9] *See infra* notes 377–90 and accompanying text.

[10] *See, e.g.*, FELD, *supra* note 3, at 17–22 (describing prosecution and sentencing of children prior to the creation of the juvenile court); *cf.* Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After Roper*, 47 B.C. L. REV. 1083, 1086 (2006) ("[I]n the early days of the American justice system, children were tried as adults and could be put to death.").

committed crimes as adults and the common law infancy defense provided the only substantive protection for very young offenders.[11] Prior to the creation of juvenile courts, "adult crime" meant "adult time," therefore states tried and sentenced children as adults, and imprisoned and executed them for crimes committed as young as ten, eleven, or twelve years of age.[12]

A century ago, industrialization and modernization transformed America from a country of rural, agricultural communities into an urban, ethnically diverse society with a growing manufacturing base.[13] Industrialization attracted hordes of southern and eastern European immigrants who crowded into urban ghettos that sprung-up around factories and transportation hubs.[14] Industrialization shifted work from farms and family shops to large factories, and these economic changes altered how women and children fit in the larger social order.[15]

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[11] The common law infancy defense recognized that young people may lack criminal capacity. It recognized and excused or mitigated the punishments of actors who lacked the requisite moral and criminal responsibility, for example, the very young and immature. Sanford J. Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659 (1970). It conclusively presumed that children less than seven years old lacked criminal capacity, and treated those fourteen years of age and older as fully responsible. It created a rebuttable presumption that youth between the ages of seven and fourteen years lacked criminal capacity. Francis Barry McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REFORM 181, 184–85 (1977); Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 5110–11 (1984); *see also* Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 168–70 (2000) (summarizing role of infancy defense prior to adoption of juvenile court legislation); Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KANSAS L. REV. 687, 710 (2006) (arguing to reinvigorate the infancy defense to protect the youngest juveniles tried as adults); James C. Weissman, *Toward an Integrated Theory of Delinquency Responsibility*, 60 DENV. L.J. 485, 490 (1983).

[12] VICTOR STREIB, DEATH PENALTY FOR JUVENILES 57 (1987).

[13] MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTI-POVERTY POLICY 14 (1999) ("In the span of seventy years, an economy dominated by agriculture was transformed into a modern industrial economy in which a majority of workers were employed in manufacturing, mining, construction, trade, finance, and transportation."). *See generally* ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877–1920 (1967) (impact of industrialization on growth of bureaucracy).

[14] *See, e.g.*, FELD, *supra* note 3, at 27 ("Industrial growth spurred population increases and altered the urban landscape. The immigrant poor crowded into the urban center surrounding the industrial core. . . ."); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 26 (1993) ("Dense clusters of tenements and row houses were constructed. . . to house the burgeoning work force."). On the impact of immigration on Progressive American society, *see generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925 (2d ed. 1988) (noting that the southern and eastern European immigrants differed in language, religion, and culture from the Anglo-Protestant American who preceded them and these differences hindered their assimilation); RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 178–86 (1955).

[15] *See, e.g.*, CARL DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 178–209 (1980); JOSEPH KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICAN 1790 TO THE PRESENT 114–16 (1977) (noting that modernization modified the roles of women and children); TANENHAUS, *supra* note 2, at 58 ("Progressive reformers were concerned about whether the family could survive in the modern world. The expansion of the wage economy and the spread of market processes, the rise of large-scale industrialization, rapid urbanization, and mass

The idea of childhood is socially constructed and reflects its cultural context.[16] During the late-nineteenth century, upper- and middle-class women promoted a more modern vision of children as vulnerable and innocent people who required close attention and control during their transition to adulthood.[17] Progressives created and expanded public agencies and private organizations to "Americanize" immigrants and their children. They assumed that children were malleable and established programs—juvenile courts, child labor laws, social welfare laws, and compulsory school attendance laws—that reflected the new social construction of childhood.[18] Progressives found the presence of children in police stations, jails,

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immigration were all radically transforming American life. The family, symbolized by the image of the home, appeared to be fracturing under these new pressures.").

[16] Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1091, 1093 (1991) ("[T]he life-stage we call 'childhood' is likewise a culturally and historically situated social construction. . . . The definition of childhood—who is classified as a child, and what emotional, intellectual, and moral properties children are assumed to possess—has changed over time in response to changes in other facets of society."); *cf.* DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 16–17 (1993). The modern construction of childhood views the period between infancy and adulthood as a separate stage of development and does not perceive children as miniature adults. *See generally* PHILLIPPE ARIES, CENTURY OF CHILDHOOD: A SOCIAL HISTORY OF THE FAMILY 365–404 (Robert Baldick trans., Vintage Books 1962) (tracing the modernizing conception of childhood to the upper classes in the sixteenth and seventeenth centuries).

[17] By the end of the nineteenth century, urban upper and middle-class parents restricted children's autonomy to prepare them for adult roles. DEGLER, *supra* note 15, at 66 (1980).

> [C]hildren began to be seen as different from adults; among other things they were considered now more innocent; childhood itself was perceived as it is today, as a period of life not only worth recognizing and cherishing but extending. Moreover, simply because children were being seen for the first time as special, the family's reason for being, its justification as it were, was increasingly related to the proper rearing of children.

Id. Middle and upper class women assumed a greater role in supervising children's moral and social development. *Id.*; David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 46 (Margaret K. Rosenheim et al. eds., 2002) ("The inventors of the juvenile court considered themselves part of a humanitarian movement which, in the nineteenth century, had transformed the status of children from the sole property of their fathers into a dependent class in need of state protection.").

[18] *See, e.g.*, LAWRENCE CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION 1876–1957 (1961) (attributing compulsory school attendance laws to changing social construction of childhood); ROTHMAN, *supra* note 3, at 5–7 (creating juvenile justice to reform young offenders); SUSAN TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 141–61 (1982); WALTER TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN NEW YORK STATE, 108–54 (1965) (attributing child labor laws to protection of children); WIEBE, *supra* note 13, at 169 ("The child was the carrier of tomorrow's hope whose innocence and freedom made him singularly receptive to education in rational, humane behavior. Protect him, nurture him, and in his manhood he would create the bright new world of the progressives' vision.").

criminal courts and prisons appalling and fashioned an alternative justice system for misbehaving youths.[19]

Positive criminology provided a rationale to treat children differently from adults. Positivism attributed crime to deterministic forces for which the individual was not responsible and suggested a more scientific approach to social control.[20] Progressives used medical analogies to treat rather than to punish offenders.[21] The "Rehabilitative Ideal" that underlies the juvenile court viewed children as objects to be shaped, molded and formed.[22] The new ideologies of childhood and positive criminology combined to create "an institution that would intervene forcefully in the lives of all children at risk to effect a rescue."[23]

Despite standard historical accounts,[24] the juvenile court did not emerge fully-formed in Cook County, Illinois, in 1899, but rather constituted a "work-in-progress."[25] The ideology, structure, and practices of juvenile justice evolved over

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[19] TANENHAUS, *supra* note 2, at 6; Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477, 2481 (2000) (arguing that diversion from the criminal process constituted an improvement per se in the handling of children).

[20] Progressives adopted new theories about human behavior and criminality, reformulated the ideology of crime, and modified criminal justice administration. *See, e.g.*, ROTHMAN, *supra* note 3, at 50–52; Francis A. Allen, *Legal Values and the Rehabilitative Ideal, in* THE BORDERLAND OF THE CRIMINAL LAW: ESSAYS IN LAW AND CRIMINOLOGY 26 (1964). Positivism tried to discover the causes of crime—structural and deterministic forces that compelled offenders to act as they did. Because larger forces controlled their behavior, offenders were less responsible for their crimes and justice system agencies tried to reform them. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 8 (1997) ("[D]eviant behavior is at least partially caused (rather than freely chosen). Progressive reformers therefore identified rehabilitation—operationally defined as the use of 'individualized corrective measures adapted to the specific case or the particular problem'—as the appropriate response to deviant behavior.").

[21] ROTHMAN, *supra* note 3, at 50–52; ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 22 (1978).

[22] Francis Allen describes the diagnostic and treatment implications of positivism and the 'Rehabilitative Ideal':

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

Allen, *supra* note 20, at 26.

[23] Zimring, *supra* note 19, at 2480.

[24] *See, e.g.*, PLATT, *supra* note 3, at 101–36 (discussing role of women child-savers in promoting first juvenile court in Cook County, Illinois in 1899). *See generally* ROTHMAN, *supra* note 3 (discussing social structural changes associated with modernization); RYERSON, *supra* note 21 (analyzing the influence of social science on juvenile courts' treatment ideology).

[25] *See, e.g.*, Tanenhaus, *supra* note 17, at 42–43.

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

time in a politically contested context.[26] From its inception, political interests have contended over juvenile court's structure, functions, and jurisdiction.[27] *Gault*'s "due process revolution" in the 1960s and the "get tough" policies of the 1990s reflect continuing political disputes about the juvenile courts' jurisdiction, role, and functions.

The juvenile court provided a judicial-welfare alternative to the criminal justice system and embodied the state as *parens patriae*.[28] Juvenile courts' jurisdiction over both delinquent and dependent children melded child welfare and crime control and buttressed its depiction as a benign, non-punitive, and therapeutic agency.[29] Juvenile courts extended child-welfare proceedings to encompass "status offenses"—non-criminal behavior such as "sexual precocity," "truancy," and "immorality."[30]

As a judicial-welfare alternative to the criminal justice system, juvenile courts rejected criminal procedures, employed informal methods, excluded lawyers and juries, and used euphemisms to disavow any suggestion of a criminal proceedings.[31] Judges acted in offenders' "best interests" and imposed indeterminate and non-proportional dispositions to enhance their future well-being rather than to punish them for past offenses.[32] Child-savers medicalized deviance,

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system), and without public funds to pay either the salaries of probation officers or to maintain a detention home for children.

Id.

[26] TANENHAUS, *supra* note 2, at xxvii.

[27] *See id.* at xxix.

[28] FELD, *supra* note 3, at 55–57; ROTHMAN, *supra* note 3, at 212–20.

[29] FELD, *supra* note 3, at 62–63; PLATT, *supra* note 3, at 176; TANENHAUS, *supra* note 2; at 22. Tanenhaus argues that "progressive child savers conceived of all children as being different from adults and, accordingly, did not draw sharp distinctions between dependents and delinquents and believed that a unified children's court could serve both." *Id.* at 59; SCHLOSSMAN, *supra* note 3, at 58; SUTTON, *supra* note 3, at 232–58.

[30] Reformers viewed juvenile courts as a social welfare system to control problem behaviors that criminal courts ignored. PLATT, *supra* note 3, at 46–74; SUTTON, *supra* note 3, at 121–53. Status jurisdiction reflected the newer conception of childhood. TANENHAUS, *supra* note 2, at 61 ("Through truancy, compulsory education, and child labor laws aimed to keep children off the streets, in school, and out of the labor market, progressives attempted to prolong youth dependency."); *see also* RYERSON, *supra* note 21, at 47; SCHLOSSMAN, *supra* note 3, 151–53.

[31] *See, e.g.*, JUVENILE CRIME, JUVENILE JUSTICE 154 (Joan McCord et al. eds., 2001). JUVENILE CRIME, JUVENILE JUSTICE summarizes the Progressive's conception of juvenile court procedures:

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

Id; see also FELD, *supra* note 3, at 60–63; ROTHMAN, *supra* note 3, at 212–20.

[32] *See* BERNARD, *supra* note 1, at 83.

> 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

emphasized the determined quality of youthful misconduct, and gave judges wide latitude to treat the whole child rather than to focus simply on her crime.[33]

Progressives recognized that children's lives and circumstances differed, and they expected and intended juvenile courts to exercise greater control over poor and immigrant children.[34] They did not regard racial and ethnic discrimination as invidious, but rather as an opportunity to make "other peoples' children" more like "our children." Because poor and immigrant children had greater needs, they required more control and supervision and quickly filtered through the benevolent system into its more punitive institutions.[35]

III. THE JUVENILE COURT "DUE PROCESS REVOLUTION" IN CONTEXT

In the decades before and after World War II, the "Great Migration" of Blacks from the rural south to the urban north fostered a more assertive civil rights movement.[36] These racial-demographic and political changes pressured the Warren Court to address issues of civil rights and criminal procedure during the 1950s and 1960s.[37] During the 1960s, the Court's criminal procedure decisions coincided

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court, where their troubles would be diagnosed and the services they needed provided by court workers or obtained from other agencies.

Id. Juvenile court judges imposed indeterminate and non-proportional dispositions that could continue for the duration of minority. FELD, *supra* note 3, at 69–74. Each child's circumstances differed and judges based dispositions on their future "needs" rather than their past "deeds." RYERSON, *supra* note 21, at 40; Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

[33] ROTHMAN, *supra* note 3, at 238; RYERSON, *supra* note 21, at 40–41; *see also* SCHLOSSMAN, *supra* note 3, at 157–80.

[34] *See* FELD, *supra* note 3, at 75–76; GRUBB & LAZERSON, *supra* note 3, at 69 (describing selective application of *parens patriae* ideology in a class-based society); JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 154–155 (discussing the tension between social control and social welfare and balancing the best interest of the child with protection of society); PLATT, *supra* note 3, at 36–39; ROTHMAN, *supra* note 3, at 222.

[35] ROTHMAN, *supra* note 3, at 71 ("The exercise of judicial discretion helped to effect a dual system of criminal justice: one brand for the poor, another for the middle and upper classes. Judicial discretion may well have promoted judicial discrimination."); TANENHAUS, *supra* note 2, at 37–39 (arguing that the unwillingness of private institutions to accept dependent and delinquent black children caused juvenile courts to commit them to institutions more quickly and for less serious offenses than they did their white counterparts); Steven Schlossman & Stephanie Wallach, *The Crime of Sexual Precocity: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. ED. REV. 65, 66 (1978).

[36] *See generally* NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1992) (discussing the flight of African Americans from the South to the North between 1940 and 1970); THE GREAT MIGRATION IN HISTORICAL PERSPECTIVE: NEW DIMENSIONS OF RACE, CLASS & GENDER (Joe William Trotter, Jr. ed.,1991) (analyzing the similarities and differences between Europeans and African Americans as "immigrants").

[37] FELD, *supra* note 3, at 97–106; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 231–32 (2004); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLICITICS 437–39 (2000).

with increases in youth crime and urban racial riots and conservative politicians began to exploit white voters' apprehensions about race and crime for political advantage.

A. Racial Demographics and Legal Change

Black migration from the rural South to northern industrial cities in the decades before and during World War II added urgency to efforts to secure racial equality and civil rights. Between World Wars I and II, more than one and one-half million southern Blacks migrated to northern cities.[38] During World War II, another one and one-half million Blacks moved north to work in defense industries,[39] and during the 1950s, another one and one-half million followed.[40] When Blacks migrated to northern cities, they experienced segregation in housing, education, and employment.[41] After World War II, public and private policies—federal mortgage, insurance, housing, tax, and highway construction—enabled Whites to move to predominantly affluent suburbs and to isolate Blacks in poor, inner-city ghettos.[42]

During the 1950s and 1960s, the Civil Rights movement challenged southern racism and segregation and demanded legal equality and social justice. Until the 1960s, Jim Crow laws and southern sheriffs enforced an apartheid system of racial inequality.[43] The Warren Court decision in *Brown vs. Board of Education*

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[38] *See* FELD, *supra* note 3, at 84; MASSEY & DENTON, *supra* note 14, at 29–38.

[39] *See, e.g.*, THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 31 (1991); GILENS, *supra* note 13, at 104–05 ("The average black out-migration from the South between 1910 and 1939 was only 55,000 people per year. But during the 1940s, it increased to 160,000 per year, during the 1950s it declined slightly (to 146,000 per year), and between 1960 and 1966 it fell to 102,000 per year."); LEMANN, *supra* note 36, at 5–7 (noting that manufacturers courted black workers because "[a] shortage of civilian labor forced employers to offer jobs to workers who previously had been excluded.").

[40] MASSEY & DENTON, *supra* note 14, at 45 (noting that 1,500,000 Blacks moved to northern cities during the 1950s, and another 1,400,000 moved north during the 1960s); LEMANN, *supra* note 36, at 6 (noting that between 1940 and 1970, 5 million Blacks moved out of the South and reduced the proportion of Blacks remaining in the South from three-quarters to half).

[41] By 1940, half of Blacks lived in cities, and by 1960, more than three-quarters did. FELD, *supra* note 3, at 85. In 1870, 80% of black Americans lived in the rural south; by 1970, 80% of black Americans resided in urban locales, half in the North and West. *See* MASSEY & DENTON, *supra* note 14, at 18; *see also* GILENS, *supra* note 13, at 105. Although African-Americans comprised only 2% of northerners in 1910, by 1960, they accounted for 7% of the northern population and 12% of urban residents. *Id.*

[42] Federal mortgage, housing, and tax policies subsidized construction of privately-owned single-family homes in almost exclusively white suburbs. The federal interstate highway program facilitated suburban expansion. MASSEY & DENTON, *supra* note 14, at 44–45; MICHAEL B. KATZ, UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 13 (1989). Interstate highways and housing projects disrupted many black urban communities and created physical barriers to contain their expansion. *Id. at* 135; *see also* MASSEY & DENTON, *supra* note 14, at 55–56.

[43] POWE, *supra* note 37, at 490. Powe concludes that the Warren Court explicitly intended to change southern legal and cultural traditions.

> By 1953, the South had created, by law and custom (backed by whatever force necessary), a caste system based on white supremacy. From laws against miscegenation,

repudiated separate but equal public schools and required states to begin to desegregate them.[44] Within a decade, the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 established a national standard of racial equality to which it required the South to adhere.[45] Although most Whites formally subscribe to legal and social norms of racial equality, American society remains racially divided and debates over welfare and crime policies often serve as proxies for matters of race.[46] Southern opposition to desegregation in the 1950s and Republican presidential campaigns of Barry Goldwater in 1964 and Richard Nixon in 1968 underscored the political value of appeals to white voters' racial antipathy.[47]

B. Civil Rights as Impetus for Juvenile Justice Decisions

During the 1960s, the Warren Court expanded its civil rights agenda to include criminal procedure and juvenile justice because poor, minority, and young people disproportionately comprised those accused of crimes.[48] The Court adopted constitutional rules to limit police discretion and endorsed adversarial procedures

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> to laws mandating segregation, to subterfuges maintaining a basically all-white electorate, to the use of peremptory challenges to ban African-Americans from juries, to the enforced customs of better jobs for whites, to mandating social deference. . . the southerners lived in a society that told all whites, no matter how poor, ignorant, or illiterate, that they were better than any African-American.

Id.

[44] Brown v. Board of Education, 347 U.S. 483, 495 (1954); *see* G. Edward White, *Warren Court (1953–1969), in* AMERICAN CONSTITUTIONAL HISTORY 279, 280 (Leonard W. Levy et al. eds., 1986) (The context of the Warren Court's first momentous decisions was decisive in shaping the Court's character as a branch of government that was not disinclined to resolve difficult social issues, not hesitant to foster social change, not reluctant to involve itself in controversy).

[45] *See* GILENS, *supra* note 13, at 108 (noting that passage of the Voting Rights Act led to increased registration of Blacks nationwide from twenty-nine percent in 1962 to sixty-seven percent in 1970); TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY 18 (2001) (arguing that the norm of racial equality emerged in the United States during the 1950s and 1960s as cultural leaders and influential elites attacked segregation, lynching and brutality, and denial of the right to vote); POWE, *supra* note 37, at 232 (noting that 104 of the 130 congressional votes cast against the Civil Rights Act were by southern Democrats "who fully understood that this bill was aimed directly at the white South.").

[46] MENDELBERG, *supra* note 45, at 19 ("Because the civil rights era came and went without fully resolving the problems of racial inequality, individuals and institutions are forced to continue to reach decisions about racial matter, matters that count among the most difficult of our national problems.").

[47] *See* EDSALL & EDSALL, *supra* note 39, at 76; POWE, *supra* note 37, at 60–62 (describing southern congressional Democrats drafting the "Southern Manifesto," which denounced *Brown* as an abuse of judicial power and advocated non-compliance with an unlawful decision). In the aftermath of *Brown*, Southern racial moderates virtually disappeared under the pressure of more hard-line racists. *Id.* at 62.

[48] *See, e.g.*, POWE, *supra* note 37, at 386 ("African-Americans were disproportionately affected by whatever abuses or inequities there were in the criminal justice system."); Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. FORUM 518 *passim* (1975) (discussing the Warren Court's contributions to the criminal justice system).

to protect defendants' rights.[49] The Court broadly interpreted the Fourteenth Amendment and the Bill of Rights to control criminal justice decision-making, to protect minorities from state officials, and to expand equality.[50]

For the first time, the Supreme Court closely scrutinized juvenile justice administration.[51] In 1966, in *Kent v. United States*, the Court required procedural safeguards in judicial waiver proceedings.[52] In 1967, the Court in *In re Gault*[53] emphasized the differences between the procedural safeguards adult defendants enjoyed and those used for juvenile delinquents. *Gault* focused on the stigma of delinquency labels, high recidivism rates, and arbitrary decision-making, and rejected claims that proceedings were civil, non-adversarial, and rehabilitative.[54] Although *Gault* viewed delinquents as a subset of criminal defendants, it only required states to adopt "watered-down" criminal procedures for juveniles charged

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[49] *See, e.g.*, GARLAND, *supra* note 6, at 57 ("In effect, the new critique of rehabilitation was the extension of civil rights claims to the field of criminal justice, a process that had already begun with the Warren Court of the 1960s and its extension of due process protections to suspects and juveniles."); FRED P. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW 41–66 (1970); Note, *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1488–94 (1988) (describing the equality principle in reform of criminal procedures after *Brown v. Board of Education*); POWE, *supra* note 37, at 386 ("African-Americans were disproportionately affected by whatever abuses or inequities there were in the criminal justice system."); White, *supra* note 44, at 288 ("By intervening in law enforcement proceedings to protect the rights of allegedly disadvantaged persons—a high percentage of criminals in the 1960s were poor and black—the Warren Court Justices were acting as liberal policymakers."); *see also* Miranda v. Arizona, 384 U.S. 436 (1966) (protection of privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule).

[50] *See, e.g.*, GRAHAM, *supra* note 49, at 41–66 (1970); POWE, *supra* note 37, at 412 ("[T]he Court recognized that the Bill of Rights offered national standards for criminal procedure regardless of how the states wished to conduct trials, and it quickly applied all the relevant provisions of the Bill of Rights to the states to create minimum national guarantees of fairness in criminal trials."); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1324–25 (1977) (noting that three themes of the Warren Court's "due process revolution" were: selective incorporation of Bill of Rights guarantees; equality; and expansive interpretations of constitutional rights that protect the accused).

[51] *See, e.g.*, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY (1967) [hereinafter TASK FORCE REPORT]; Joel Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 8; Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 775–76 (1966).

[52] Kent v. United States, 383 U.S. 541, 556 (1966) (observing critically that that "the child receives the worst of both worlds: he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."). Because a waiver decision was a "critically important" action which could deny a youth the special protections of the juvenile court—closed proceedings, confidential records, and protection from a criminal conviction—the Court required a hearing, assistance of counsel, access to social investigations, and written findings and conclusions that an appellate court could review. *Id.* at 553–63. *See generally*, Monrad Paulsen, Kent v. United States: *The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167.

[53] In re Gault, 387 U.S. 1 (1967).

[54] *See id.* at 21–24.

with crimes.[55] These protections included notice,[56] a fair hearing,[57] assistance of counsel,[58] opportunity to confront and cross-examine witnesses,[59] and the privilege against self-incrimination.[60] The Court grounded delinquents' procedural rights on generic notions of due process and "fundamental fairness" rather than specific provisions of the Sixth Amendment.[61] It asserted that "fundamentally fair" procedures to find facts would not impair juvenile courts' ability to treat juveniles.[62]

Gault embodied contradictory cultural conceptions of youths. On the one hand, granting juveniles rights suggest that they can be autonomous and self-determining.[63] On the other hand, providing procedural protection from the state

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

[56] *Gault*, 387 U.S. at 33.

[57] *Id.* at 36.

[58] *Id.* at 41.

[59] *Id.* at 57.

[60] *Id.* at 31–57; *see id.* at 22, 24, 27 (discussing whether juveniles should be afforded constitutional protection through procedural safeguards); Irene Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 U.C.L.A. L. REV. 656, 662–63 (1980) (arguing that constitutional protections should attach in proceedings that may result in the incarceration of a child); *see also* Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 154–57 (1984).

[61] *See* U.S. CONST. amend. VI. *Gault* made no reference to the Sixth Amendment's provision for notice; rather, the Court held that "due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding." *Gault*, 387 U.S. at 33. Similarly, although the Court described a delinquency proceeding as "comparable in seriousness to a felony prosecution," *id.* at 36, the Court grounded the right to counsel in a delinquency proceeding in the "due process clause of the fourteenth amendment" rather than the Sixth Amendment's right to counsel. *Id.* at 41. Finally, the Court's analysis of the right to confront and examine witnesses rested on "our law and constitutional requirements" rather than the language of the Sixth Amendment. *Id.* at 57.

When the Court granted delinquents the Fifth Amendment privilege against self-incrimination, however, the majority used an analytical strategy akin to selective incorporation, finding a "functional equivalence" between a delinquency proceeding and a criminal trial. *See id.* at 50; *see also* Louis Henkin, *Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L. J. 74 *passim* (1963) (discussing the doctrine of "selective incorporation" and the Supreme Court's use of the doctrine with the Fourteenth Amendment); Sanford Kadish, *Methodology and Criteria in Due Process Adjudication—Survey and Criticism*, 66 YALE L. J. 319, 327–33 (1957) (analyzing historical constitutional debate between proponents of selective incorporation and proponents of fundamental fairness and total incorporation of provisions of the Bill of Rights). *Gault* relied explicitly on the Fifth Amendment to grant juveniles the privilege against self-incrimination, *Gault*, 387 U.S. at 49–50, and effectively rejected claims that delinquency proceedings were "noncriminal" or "nonadversarial." *Id.*

[62] *See Gault*, 387 U.S. at 21.

[63] BERNARD, *supra* note 1, at 132.

emphasizes their dependency and vulnerability. Many of the Court's due process decisions of the 1960s viewed offenders as victims of deterministic social forces, minimized their personal responsibility, and granted procedural safeguards to protect them from an over-reaching state.[64]

Subsequent decisions further highlighted the quasi-criminal nature of delinquency proceedings. *In re Winship* required states to prove a delinquent's guilt by the criminal standard—"beyond a reasonable doubt"—rather than by the lower civil standard—"preponderance of evidence."[65] *Winship* concluded that the dangers of factually erroneous convictions outweighed concerns that procedural safeguards would impair juvenile courts' ability to rehabilitate delinquents.[66] The Court in *Breed v. Jones* posited a functional equivalence between delinquency and criminal trials and barred criminal prosecution after a delinquency adjudication.[67]

The Court in *McKeiver v. Pennsylvania* relied on the Fourteenth Amendment rather than the Sixth Amendment to deny juveniles a constitutional right to a jury trial.[68] The Court reasoned that due process and "fundamental fairness" required only "accurate fact finding," which a judge could do as well as a jury.[69] *McKeiver* emphasized "rehabilitative rhetoric" rather than the reality of delinquency "treatment" and ignored juvenile courts' structural impediments to accurate fact-

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[64] *See, e.g.*, Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1472 (1985) (arguing that during the 1960s, the Court's decisions viewed "the criminal as a type of victim; he was caught in the role assigned to persons in his circumstances, a member of the underclass. . . The idea of individual guilt and remorse for wrongful deeds was out of fashion. The causal factors of criminality were thought to lie outside the individual, in the deeper, corrupt foundation of society—the so-called 'root causes'."); George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: "Embedded" in Our National Culture*, 29 CRIME & JUST. 203, 218 (2002).

[65] *See In re* Winship, 397 U.S. 358, 368 (1970). *Winship* first held that the constitution requires proof beyond a reasonable doubt in adult criminal proceedings as a matter of due process, *id.* at 361–64, and then extended the same standard of proof to delinquency proceedings. *Id.* at 365–67.

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

[67] Breed v. Jones, 421 U.S. 519, 528–29 (1975) (holding that double jeopardy precludes delinquency adjudication and criminal prosecution). With respect to the risks against which double jeopardy protected, the Court found "no persuasive distinction in that regard between the [juvenile] proceeding. . . and a criminal prosecution, each of which is designed to 'vindicate [the] very vital interest in enforcement of criminal laws.'" *Id.* at 531 (quotations omitted).

[68] McKeiver v. Pennsylvania, 403 U.S. 528, 540–41 (1971). *See generally* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (right to jury trial). *McKeiver* relied solely on Fourteenth Amendment due process and "fundamental fairness." *See McKeiver*, 403 U.S. at 540. The Court insisted that "the juvenile court proceeding has not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment," *id.* at 541, and cautioned that to constitutionally require a jury trial "will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *Id.* at 545.

[69] *See McKeiver*, 403 U.S. at 543. In concluding that due process required only accurate fact finding, however, the Court departed significantly from its prior emphasis on the dual rationales of accurate fact finding and protection against governmental oppression. *Cf.* In re Winship, 397 U.S. 358, 364 (1970); In re Gault, 387 U.S. 1, 47 (1967).

finding.[70] In denying procedural parity, the Court emphasized the determined rather than freely-chosen nature of youthful offending.

> The criminal law proceeds on the theory that defendants have a will and are responsible for their actions . . .[T]he juvenile justice system rests on more deterministic assumptions. Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control.[71]

McKeiver and *Gault* used deterministic images to depict delinquents and to justify their holdings. Nevertheless, the Court's decisions transformed juvenile courts into scaled-down criminal courts. Delinquency trials used adversarial procedural safeguards—attorneys, cross-examination, privilege against self-incrimination, and the criminal standard of proof—to decide whether a youth committed a crime. By making explicit the connection between delinquency and criminality, the Court placed the sub-group of delinquents within the larger social problem of criminals. This functional equivalency increased the likelihood that harsher policies aimed at criminals would spill over onto delinquents as well.

During the 1960s, the Court's criminal and juvenile procedure coincided with rising youth crime rates and urban race riots.[72] Crime rates rose as "baby boom" youths reached adolescence[73] and increased even more so in urban areas with a predominantly black population[74] Race riots erupted in urban ghettoes across the

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[70] *McKeiver*, 403 U.S. at 547 (criticizing advocates of procedural formality and jury trials). Reasons exist to question the accuracy of fact-finding made by a single judge in closed and confidential delinquency proceedings. *See* FELD, *supra* note 3, at 153–57 (describing the inherently prejudicial nature of juvenile court fact-finding); Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1140–60 (2003) (analyzing the differences between judge and jury application of "beyond a reasonable doubt" burden of proof).

[71] *McKeiver*, 403 U.S. at 551 (White, J., concurring).

[72] *See* FELD, *supra* note 3, at 87–88 (noting that increased crime rates are associated with increased urbanization of Blacks); GRAHAM, *supra* note 49, at 26–66 (discussing political reactions to the Supreme Court's decisions); Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1480–1501 (2003) (analyzing the political backlash that followed the Supreme Court's criminal procedure and juvenile decisions); *see also* Miranda v. Arizona, 384 U.S. 436 (1966) (requiring police to provide suspects with a statement of rights prior to police interrogation); Escobedo v. Illinois, 378 U.S. 478 (1964) (holding that there is a right to counsel at pre-indictment police interrogation); Mapp v. Ohio, 367 U.S. 643 (1961) (extending the application of the Fourth Amendment exclusionary rule to the states).

[73] Changes in the age structure of the population accounted for most of the rise in youth crime that began in the mid-1960s. *See, e.g.*, FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 30 (1981) ("Perceptions of increasing crime in the late 1960s. . . were based in part on demographic realities."); POWE, *supra* note 37, at 408 (noting that between 1963 and 1970, the homicide rate doubled from 4.6 to 9.2 per 100,000); JAMES Q. WILSON, THINKING ABOUT CRIME 20 (1975).

[74] *See, e.g.*, MARK MAUER ET AL., THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 17, 51–52 (2004), *available at* http://www.sentencingproject.org/pdfs/lifers.pdf ("[U]rbanization is generally equated with higher rates of crime."); FRANKLIN E. ZIMRING & GORDON

nation in the mid-1960s.[75] The National Advisory Commission on Civil Disorders—the Kerner Commission—attributed the riots to discrimination in employment, education, social services, and housing[76] and warned that America was moving "toward two societies, one black, one white—separate and unequal."[77]

IV. THE "GET TOUGH" ERA AND THE POLITICS OF RACE AND CRIME

Race and crime policy issues became highly politicized in the 1960s and have remained so ever since. Liberals attributed crime and riots to deterministic, social-structural conditions—"root causes"—and advocated policies to reduce racial, social, and economic inequality.[78] Conservatives emphasized individual choices and personal responsibility for bad behavior and minimized the contributory role of poverty, unemployment, and limited educational opportunities.[79] Race riots and crime negatively affected many Whites' perceptions of Blacks' grievances and inclined Whites to ascribe them to personal choices rather than to structural forces.[80] Conservative politicians exploited the association between increasing

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HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 66 (1997) ("Homicide rates are highest in the slum neighborhood of big cities that exclusively house the black poor. The race of the residents, the socioeconomic status of the neighborhood, and city size are all associated with elevated rates of homicide victimization.").

[75] *See, e.g.*, ANDREW HACKER, TWO NATIONS 19 (1992); LEMANN, *supra* note 36 at 190 ("[I]t seemed at least possible that a full-scale national race war might break out."); NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS REPORT (1967) [hereinafter KERNER COMMISSION]; POWE, *supra* note 37, at 276 (noting that three years of riots left more than 200 dead, thousands wounded, and property damage in the tens of billions of dollars and that the assassination of Martin Luther King, Jr., in 1968 provoked hundreds more urban riots).

[76] *See* Introduction to KERNER COMMISSION, *supra* note 75.

[77] *See id.*; *see also id.* at ch. 16. (It cautioned that if current policies that contributed to segregation and poverty continued, then the social divisions would become permanent and American would become two nations, "one, largely Negro and poor, located in the central cities; the other predominantly white and affluent, located in the suburbs. . .").

[78] *See, e.g.*, POWE, *supra* note 37, at 495; *see also* KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 53–54 (2000).

[79] *See, e.g.*, BECKETT, *supra* note 20, at 10 ("The conservative view that the causes of crime lie in the human 'propensity to evil,' rests on a pessimistic vision of human nature, one that clearly calls for the expansion of the social control apparatus."); BECKETT & SASSON, *supra* note 78, at 53–54 (2000); POWE, *supra* note 37, at 495.

[80] *See, e.g.*, GARLAND, *supra* note 6, at 97 ("Televised images of urban race riots, violent civil rights struggles, anti-war demonstrations, political assassinations, and worsening street crime reshaped the attitudes of the middle-American public in the late 1960s."); HACKER, *supra* note 75, at 2 ("As the 1970s started, so came a rise in crime, all too many of them with black perpetrators. . . Worsening relations between the races were seen as largely due to the behavior of blacks, who had abused the invitations to equal citizenship white America had been tendering."); LEMANN, *supra* note 36, at 200 ("The beginning of the modern rise of conservatism coincides exactly with the country's beginning to realize the true magnitude and consequences of the black migration, and the government's response to the migration provided the conservative movement with many of its issues.").

crime and urban disorder, blamed both on the Warren Court's criminal procedure decisions, and appealed to white voters' racial resentments and fears.[81]

Positive criminology and the rehabilitative ideal provided the dominant criminal and juvenile justice paradigm until the late-1960s.[82] By the early 1970s, support for indeterminate sentences and rehabilitation programs declined and, for different reasons, both liberals and conservatives endorsed principles of classical criminal law—"just deserts", penal proportionality, and determinate sentences.[83] Liberal critics characterized rehabilitation programs as disguised instruments of social control and objected that dissimilar treatment of similarly-situated offenders discriminated against minorities.[84] Evaluations of correctional programs

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[81] *See, e.g.*, EDSALL & EDSALL, *supra* note 39, at 74–77 (noting that Richard Nixon's "law and order" presidential campaign in 1968 focused on Supreme Court decisions that "handcuffed" the police, and made the racial connections more explicit); GILENS, *supra* note 13, at 107–10; GRAHAM, *supra* note 49, at 71–85; HACKER, *supra* note 75, at 50–51 ("Conservatives believe that for at least a generation, black people have been given plenty of opportunities, so they have no one but themselves to blame for whatever difficulties they face.").

[82] From its Progressive foundations until the early 1970s, rehabilitation, welfare and criminological expertise provided the intellectual framework, cultural vocabulary, and the shared professional understandings that defined criminal justice policy and practices. *See* GARLAND, *supra* note 6, at 27. The central tenets of the "Rehabilitative Ideal" include a focus on the individual offender, justice administration by expert professionals, and the use of welfare-oriented, indeterminate and discretionary decision-making practices. *See* Allen, *supra* note 20, at 44–61; ROTHMAN, *supra* note 3, at 53–61.

[83] GARLAND, *supra* note 6, at 60 ("The movement for determinate sentencing reform created an unusually broad and influential alliance of forces. The campaign included not only radical supporters of the prisoners' movement, liberal lawyers and reforming judges, but also retributivist philosophers, disillusioned criminologists and hard-line conservatives."). During the 1970s, empirical evaluation studies questioned both the effectiveness of rehabilitative programs and the scientific expertise of those who administered the enterprise. Allen, *supra* note 20, at 33–59. In the 1970s, determinate sentences based on present offense and prior record increasingly supplanted indeterminate sentences for adults as "just deserts" and retribution displaced rehabilitation as the underlying rationale for criminal sentencing. AMERICAN FRIENDS SERVICE COMM., STRUGGLE FOR JUSTICE 83–97 (1971); ANDREW VON HIRSCH, DOING JUSTICE 31–39 (1976). By the mid-1980s, about half the states enacted determinate sentencing laws, ten eliminated parole boards, and many more used guidelines to structure sentence decisions. *See, e.g.*, MICHAEL TONRY, SENTENCING MATTERS 6–13 (1996).

The just deserts framework spilled-over into juvenile justice and affected the laws and practices of sentencing delinquents and waiving youths to criminal court. *See, e.g.*, FELD, *supra* note 3, at 208–31; Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 483–87 (1987) [hereinafter Feld, *Juvenile Waiver Statutes*]; Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUSTICE 189, 220–22 (1998) [hereinafter Feld, *Responses to Youth Violence*]; Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 835–36 (1988); Julianne P. Sheffer, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation within the Juvenile Justice System*, 48 VAND. L. REV. 479, 487–89 (1995).

[84] *See* AMERICAN FRIENDS SERVICE COMM., *supra* note 83 (arguing that no criminal justice programs or reforms could ameliorate or avoid the consequences of racial inequality and economic and social injustice in the larger society); FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 39–40 (1982); GARLAND, *supra* note 6, at 36, 55; MAUER ET AL., *supra* note 74, at 44 (noting that rehabilitation is incompatible with coercive institution such as prison because personal change requires voluntary involvement, which cannot be compelled); Allen, *supra* note 20, at 87–88.

disparaged the ability of clinicians to coerce positive changes.[85] Conservatives attributed youth crime and race riots to a breakdown of "law and order" and advocated more punitive policies.[86] Increases in serious and violent crimes, especially by Blacks, pushed public opinion in a markedly more conservative direction.[87] The erosion of cultural and criminological support for the "Rehabilitative Ideal" led to a return to classical principles of criminal law and shifted sentencing decisions from individualized consideration of each offender to narrower, offense-based factors. By calling for "law and order," a "war on drugs," or a "crack down" on crime, politicians discovered a coded method by which to discuss legitimate issues of criminal policy and simultaneously to exploit Whites' racial fears.[88]

A. De-Industrialization and the Black Underclass

Macro-structural changes in American cities during the 1970s and 1980s contributed to an escalation in black youth homicide rates in the late 1980s.[89] The de-industrialization of the urban core economically devastated black communities. The "crack cocaine" drug industry that emerged in blighted areas spurred an increase in violence and homicides.[90] Conservative politicians pledged to "get tough" on youth crime and exploited youth violence as a way to evoke anti-black animus.[91]

During the post-World War II period, Whites increasingly moved from cities to the suburbs as Blacks migrated to urban ghettoes.[92] Until the early 1970s, urban

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[85] *See, e.g.*, MAUER ET AL., *supra* note 74, at 48–49; Allen, *supra* note 20, at 57–58; Robert Martison, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 25 (1974) ("[W]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on rehabilitation.").

[86] Conservatives' efforts to "get tough" have produced a succession of "wars" on crime and later on drugs, longer criminal sentences, increased prison populations and disproportional incarceration of racial minority offenders. *See* TONRY, *supra* note 6, at 94–94. For conservatives, the confluence of rising youth crime rates, civil rights marches and civil disobedience, students' protests against the war in Viet Nam, and urban and campus turmoil indicated an even deeper moral crisis and breakdown of traditional society. CULLEN & GILBERT, *supra* note 84, at 4; EDSALL & EDSALL, *supra* note 39, at 49–52; HACKER, *supra* note 75, at 22.

[87] *See* EDSALL & EDSALL, *supra* note 39, at 111–12 ("By 1977, the percentage describing court treatment of criminals as too harsh or about right had fallen to a minimal 11 percent, and those who said the courts were not harsh enough had risen to 83 percent.").

[88] *Id.* at 69–73; MENDELBERG, *supra* note 45, at 90–98.

[89] *See infra* notes 101–10 and accompanying text.

[90] *Id.*

[91] *See, e.g.*, FELD, *supra* note 3, at 206–07; Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. OF CRIM. L. AND CRIMINOLOGY 10, 36 (1995).

[92] *See supra* note 42 and accompanying text; *see also* GARLAND, *supra* note 6, at 84 (noting that the automobile and the accompanying construction of highways and the large-scale migration of whites from cities to suburbs constitute major developments in post-War urban social ecology); KATZ, *supra* note 42, at 134 ("After 1945, suburbanization accelerated. Massive increases in automobile ownership, the federal highway program, and federal housing policies that underwrote suburban mortgages and redlined cities composed one set of factors speeding its development.");

men with only a high school degree found good jobs in the automobile, steel, and manufacturing industries.[93] The transition to a post-industrial economy badly affected workers in the manufacturing sectors.[94] The globalizing economy produced severe losses in the automobile and steel industries and disproportionately affected minority workers who filled those higher-paying, lower-skilled manufacturing jobs.[95] Within two decades, the economic and racial reconfiguration of cities produced an urban black underclass living in concentrated poverty.[96]

B. Crack Cocaine, Firearms, and Black Youth Homicide

In the mid-1980s, the crack cocaine drug trade produced a sharp escalation in homicides in devastated urban areas.[97] Youths involved in the drug industry carry

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LEMANN, *supra* note 36, at 118 ("The interstate highway program was encouraging the flight of the white middle class to the new, sterile, soulless suburbs. . .").

[93] KATZ, *supra* note 42, at 128–29; WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS 25–34 (1996).

[94] The transition to a post-modern society produced a bifurcation of economic opportunities based on education and training. GARLAND, *supra* note 6, at 78 (noting that the revolution in technology "gave rise to the 'information society' that we now inhabit; made possible the cities and suburbs in which we dwell; linked the four corners of the globe into a single accessible world; and created new social divisions between those who have access to the high-tech world and those who do not"); KATZ, *supra* note 42, at 124–25 (describing the post-industrial city as a study in contrasts—the shiny towers of revitalized commercial centers near the closed factories of the industrial districts, wealthy "yuppies" living in gentrified older neighborhoods and impoverished minorities living in concentrated poverty).

[95] *See* EDSALL & EDSALL, *supra* note 39, at 27 (noting that the "political consequences of a globalized economy provide a case study of how race interacts catalytically with seemingly race-neutral development to produce a powerful reaction"). The effects of declining industrial productivity and global competition eroded jobs, wages, and employment security. *Id.* at 201–02. *See, e.g.*, KATZ, *supra* note 42, at 130 ("Economic stagnation, the disproportionate growth of low-wage jobs, the declining minimum wage, the mismatch between better jobs and the education of the urban poor, and shifts in occupational structure have worsened poverty within America's cities."); WILSON, *supra* note 93, at 25–100.

[96] *See generally,* EDSALL & EDSALL, *supra* note 39, at 244.

> The concentration among the black poor of single motherhood, crime and withdrawal from the labor market—combined with an intensified geographic isolation—has made it possible to partially segregate this segment of the population from the political, social, and economic mainstream. The emergence of the underclass and of an expanding body of the black urban poor has created a growing perception of a society in which the poor are no longer linked to the larger social network.

Id.; CHRISTOPHER JENCKS & PAUL E. PETERSON, THE URBAN UNDERCLASS *passim* (1991) (discussing the truth and myths aboutpoverty, social dislocation, and changes in American family life); MICHAEL B. KATZ, THE UNDERCLASS DEBATE: VIEWS FROM HISTORY 3 (1993); KATZ, *supra* note 42, at 199 ("Blacks' detachment from 'the standardized institutions' feeding the primary labor market reinforced their entrapment in the underclass.").

[97] *See, e.g.,* BECKETT & SASSON, *supra* note 78, at 8, 28 (noting that a high homicide rate is attributable to the interaction of numerous factors—prevalence of guns, economic and racial inequality reflected in concentrated poverty, traffic in illegal drugs such as crack, and a "code of the streets" that encourages violent responses to disrespect); Alfred Blumstein, *Disaggregating the Violence Trends* in ALFRED BLUMSTEIN & JOEL WALLMAN, THE CRIME DROP IN AMERICA 13 (2000);

firearms for self-defense and the presence of guns during illegal transactions quickly escalates to lethal violence.[98] The confluence of crack and guns amplified racial differences in juvenile arrest rates for violent crimes. Police typically arrest black youths for violent index crimes—murder, rape, robbery, and assault—about five times more frequently than they do white juveniles.[99] A sharp spike in juvenile arrests for violence and homicide occurred between 1986 and 1994.[100] The overall arrest rates of all youths for violent index crimes increased nearly two-thirds (66%).[101] Arrest rates of youths for homicide rose even more sharply: arrest rates of white juveniles increased about 65% and those of black youths more than doubled (233%).[102]

FELD, *supra* note 3, at 197–202; MAUER ET AL., *supra* note 74, at 97 (noting that as many as half of murders may be drug-related, so changes in drug markets affect homicide rates); HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 13 (1999); Blumstein, *supra* note 91, at 39 (describing the devastating confluence of the "introduction of crack in the mid-1980s; recruitment of young minority males to sell the drugs in street markets; arming of the drug sellers with handguns for self-protection; diffusion of guns to peers; irresponsible and excessively casual use of guns by young people, leading to a 'contagious' growth in homicide. . ."); Alfred Blumstein & Daniel Cork, *Linking Gun Availability to Youth Gun Violence,* 79 LAW AND CONTEMP. PROBS. 5, 9–10 (1996); Phillip J. Cook & John H. Laub, *The Role of Youth in Violent Crime and Victimization,* 24 CRIME AND JUSTICE: A REV. OF RES. 27, 53–54 (1998) ("The leading explanation for why youth-homicide rates began increasing in the mid-1980s is the introduction of crack cocaine and, in particular, the conflict that attended its marketing. . . . [f]or many youths, the response to the increased threat of violence was to carry a gun or join a gang for self-protection, while adopting a more aggressive interpersonal style.").

[98] *See* NATIONAL RESEARCH COUNCIL, UNDERSTANDING AND PREVENTING VIOLENCE 256–60 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993).

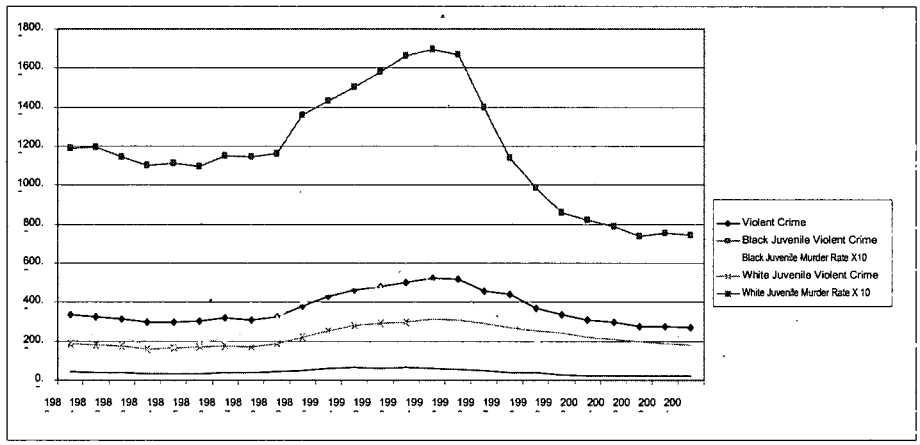
[99] *See, e.g.*, FELD, *supra* note 3, at 197–206; NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE ARREST RATES BY OFFENSE, SEX, AND RACE (1980–2004), *available at* http://ojjdp.ncjrs.org/ojstatbb/crime/excel/jar_20060908.xls (showing arrests rates of juveniles age 10 to 17 for various offenses); ZIMRING & HAWKINS, *supra* note 74, at 76 (noting that blacks are about seven times as likely as whites to be arrested for violent crimes and eight times as likely to be arrested for homicide); Cook & Laub, *supra* note 97, at 42–43 (noting that "half of all juvenile violence arrests were of blacks, implying an arrest rate over five times as high as for whites.").

[100] NAT'L CTR. FOR JUVENILE JUSTICE, *supra* note 99.

[101] *Id.*

[102] *See* MELISSA SICKMUND ET AL., JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 13 (1997); *see also* MAUER ET AL., *supra* note 74, at 84 (noting that between 1984 and 1993, homicide rate for white males ages 14 to 17 doubled from 6.9 to 14.4 per 100,000, while black male homicide rate quadrupled from 33.4 to 151.6 per 100,000); NAT'L CTR. FOR JUVENILE JUSTICE, *supra* note 99 (reporting increase in black juvenile homicide arrest rate per 100,000 juveniles ages 10 to 17); ZIMRING & HAWKINS, *supra* note 74, at 66 ("Homicide rates are highest in the slum neighborhoods of big cities that exclusively house the black poor. The race of the residents, the socioeconomic status of the neighborhood, and city size are all associated with elevated rates of homicide victimization.").

Figure 1
Juvenile Arrest Rates per 100,000 ages 10–17
(Homicide X 10)



Source: National Center for Juvenile Justice (2006).
Juvenile Arrest Rates by Offense, Sex, and Race.
Available: htt://ojjdp.ncjrs.org/ojstatbb/crime/excel/JAR_20070222.xls.

Figure 1 shows the overall arrest rates of juveniles per 100,000 juveniles ages 10 to 17 for violent index crimes and separate arrest rates of white and black juveniles for violent crimes and homicide. I multiplied homicide arrest rates by 10 to show them on the same scale with violent index arrests. As can be seen, police arrested black juveniles for violence index offenses at a rate about five times that of white juveniles and trends for both races followed similar patterns—spiking in the mid-1990s and then declining sharply by 2004. Although police arrested black juveniles for homicide at a rate of about five times that of white youths, in the mid-1990s, that ratio increased to about 8 to 1. Murders committed with hand-guns accounted for most of the increase as well as for the racial differences in youth

homicide arrests.[103] Between 1984 and 1994, the juvenile homicide rate nearly tripled[104] and the use of guns by juveniles to kill their victims quadrupled.[105] Because of the nexus between the crack industry and inner cities, almost all of the increases in homicides involved urban black males.[106]

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

Against a backdrop of escalating youth violence and homicide in the early-1990s, policies to "get tough" disproportionately affected young black men. Daily media depictions of gang violence and drive-by shootings shaped public perceptions that urban black males committed all the violent crime.[107] Conservative politicians warned of a coming generation of "super-predators," encouraged and exploited public fears of a juvenile-crime "blood-bath," and reinforced punitive attitudes with pledges to "get tough," which everyone understood as a "code word" applying to black males.[108] In the mid-1990s, virtually all states changed their laws to make it easier to transfer more and younger youths to criminal court for prosecution as adults.[109]

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[103] The number of deaths that juveniles caused by means other than firearms averaged about 570 per year and fluctuated within a "normal range" of about 10 percent. *See, e.g.*, FELD, *supra* note 3, at 207–08; ZIMRING & HAWKINS, *supra* note 74, at 106–23 (1997); Franklin E. Zimring, *Kids, Guns, and Homicide: Policy Notes on an Age-Specific Epidemic*, 59 LAW & CONTEMP. PROBS. 25, 29 (1996).

[104] *See* ZIMRING & HAWKINS, *supra* note 74, at 89 (stating that the rate of homicide arrests for offenders under eighteen for gun killings more than tripled between 1985 and 1994); Zimring, *supra* note 103, at 29.

[105] Zimring, *supra* note 103, at 29; *see also* ZIMRING & HAWKINS, *supra* note 74, at 108 (noting that guns account for more than twice as many murders as all other methods combined); Blumstein, *supra* note 91, at 29–30, 32 (noting that weapons involved in adolescent conflict shifted to handguns and semi-automatic weapons; between 1985 and 1993, juveniles' use of guns nearly quadrupled).

[106] *See* Blumstein, *supra* note 91, at 16–22; Blumstein & Cork, *supra* note 97, at 15–16; Cook & Laub, *supra* note 97.

[107] *See* Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 441–461 (2006) (describing how media depictions reinforce public fear and prime racial animus); Feld, *supra* note 72, at 1523–38 (describing the role of media in creating a skewed misperception of youth violence and black juvenile perpetrators).

[108] *See, e.g.*, WILLIAM J. BENNETT ET AL., BODY COUNT 13–14 (1996) (characterizing young offenders as suffering from moral poverty which rendered them "super-predators"); JAMES ALAN FOX, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING (1996) (warning of demographic "time-bomb" of future youth violence); MAUER ET AL., *supra* note 74, at 12 ("As the image of the criminal as an urban black male has hardened into public consciousness, so too, has support for punitive approaches to social problems been enhanced."); JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); Zimring, *supra* note 103, at 63 ("To talk of a 'coming storm' creates a riskless environment for getting tough in advance of the future threat. If the crime rate rises, the prediction has been validated. If the crime rate does not rise, the policies that the alarmists put in place can be credited with avoiding the bloodbath. The prediction cannot be falsified, currently or ever.").

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

The politics of crime that led to harsher juvenile waiver and criminal sentencing laws culminated a process that began decades earlier. In the 1950s, southern politicians and sheriffs equated political dissent with criminality, predicated a relationship between race and crime, and described civil rights protesters as "criminals," "outside agitators," and "mobs."[110] During the 1960s, Republican politicians characterized rising crime rates and urban riots as a breakdown of "law and order" and attributed the social turmoil to Warren Court decisions and liberal Democratic policies.[111]

Political differences about race-related policy issues emerged clearly during the 1964 presidential race when Democrats' support for civil rights alienated white southerner voters.[112] By 1968, Republicans used race-related "wedge issues"—crime, affirmative action, and welfare—to distinguish themselves from Democrats and Richard Nixon blamed rising crime rates and urban riots on permissive liberal policies and Court decisions "coddling criminals."[113] Against this backdrop,

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[110] *See, e.g.*, BECKETT, *supra* note 20, at 28 (stating that the "discourse of law and order was initially mobilized by southern officials in their effort to discredit the civil rights movement."); BECKETT & SASSON, *supra* note 78, at 82 (noting that Southern officials called for a crackdown on "'hoodlums,' 'agitators,' 'street mobs,' and 'lawbreakers' who challenged segregation and Black disenfranchisement, [and] these officials made rhetoric about crime a key component of political discourse on race relations."); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 98 (2d ed., 1994); Feld, *supra* note 72, at 1538–52 (analyzing the politicization of crime policies and the political exploitation of those differences).

[111] BECKETT, *supra* note 20, at 87 ("By attributing the very real economic plight of 'taxpayers' and 'working persons' to the behavior of the 'underclass,' conservatives diminish the likelihood that these grievances will give rise to policies aimed at redistributing opportunities and resources in a more egalitarian fashion."); BECKETT & SASSON, *supra* note 78, at 10 ("In response to the civil rights movement and the expansion of the War on Poverty programs of the 1960s, conservative politicians highlighted the problem of 'street crime' and argued that this problem was caused by an excessively lenient welfare and justice system that encouraged bad people to make bad choices."); EDSALL & EDSALL, *supra* note 39, at 51–73; GILENS, *supra* note 13, at 116–23; HACKER, *supra* note 75, at 210 ("[P]laying on white fears of 'black crime' has moved to the center of political campaigns. Even though most white Americans do not live in or near areas where violence stalks the streets, the issue crops up in every poll and has become a conversational staple."); MENDELBERG, *supra* note 45, at 93–98.

[112] Lyndon Johnson's presidential leadership led to passage of the 1964 Civil Rights Act, which Barry Goldwater, a staunch conservative, opposed. *See* BECKETT & SASSON, *supra* note 78, at 52–58; EDSALL & EDSALL, *supra* note 39, at 35; GILENS, *supra* note 13, at 116–22; MENDELBERG, *supra* note 45, at 81–93. The 1964 Republican party convention rejected a party platform in favor of civil rights by a two-to-one margin. EDSALL & EDSALL, *supra* note 39, at 44.

[113] *See, e.g.*, BECKETT, *supra* note 20, at 30–43; EDSALL & EDSALL, *supra* note 39, at 4 ("[R]ace has become a powerful wedge, breaking up what had been the majoritarian economic interests of the poor, working, and lower-middle classes in the traditional liberal coalition."); GILENS, *supra* note 13, at 4–8. In the pre-civil rights era, poor southern whites supported liberal policies on a host of economic issues and a larger governmental role in medical care, education, and employment. *Id.* at 41–42. Southern populism and economic liberalism foundered on their hostility to blacks and the perception that federal programs primarily benefited blacks. *Id.* at 41; *see also* OMI & WINANT, *supra* note 110, at 149 (describing racial politics as a powerful wedge issue that fractured the New Deal economic coalition of the poor, working, and middle-classes). Nixon exploited crime issues for partisan advantage. BECKETT, *supra* note 20, at 38 (noting that as a result of political and media attention to crime during the 1968 campaign, by 1969, 81 percent of poll respondents asserted a breakdown in law and order had occurred and attributed it to communists and Negroes who start

conservatives' calls for "law and order" became "code words" with a racial subtext that enabled Republican politicians to invoke racial stereotypes without appearing racist.[114] Conservative politicians could talk about crime and simultaneously activate white voters' negative views of Blacks without explicitly playing the "race card."[115] Republicans pursued a "southern strategy" and appealed to white southern and suburban constituencies with code words like "law and order" to realign the political parties around issues of race.[116] They conflated race and crime, associated both with the Democrats, and turned crime policies into partisan issues.[117] Over the next two decades, Republicans reinforced the relationship between race and crime with campaigns that focused on drugs, the death penalty, youth crime, and "Willie Horton."[118] With the increase in youth violence in the early-1990s, voters

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riots); TED GEST, CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIN FOR LAW AND ORDER 14 (2001) (noting that during the 1968 presidential campaign, Nixon gave seventeen speeches on law and order); POWE, *supra* note 37, at 399 (asserting that Nixon's domestic policy stump speech emphasized "crime in the streets" and urban riots).

[114] After three years of urban riots, rising youth crime rates, anti-Vietnam protests, and the assassinations of Robert F. Kennedy and Martin Luther King, Jr., a climate of fear and anger produced political demands for "law and order." BECKETT & SASSON, *supra* note 78, at 51 ("The racial subtext of these arguments was not lost on the public: Those most opposed to social and racial reform were also most receptive to calls for law and order."). *See, e.g.*, OMI & WINANT, *supra* note 110, at 123 (explaining that code words are "phrases and symbols which refer indirectly to racial themes, but do not directly challenge popular democratic or egalitarian ideals"); Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 615 (2000) ("[L]egislators can appeal to racist sentiments without appearing racist."); Martin Gilens, *'Race Coding' and White Opposition to Welfare*, 90 AM. POL. SCI. REV. 593, 595 (1996), ("Although political elites typically use race-neutral language in discussion poverty and welfare, it is now widely believed that welfare is a 'race-coded' topic that evokes racial imagery and attitudes even when racial minorities are note explicitly mentioned.").

[115] *See* OMI & WINANT, *supra* note 110, at 123 (defining racial "code words" as "phrases and symbols which refer indirectly to racial themes, but do not directly challenge popular democratic or egalitarian ideals (e.g., justice, equal opportunity)."); *see also* ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND 20 (2000) ("Whites whose animosity is inflamed—including ambivalent Whites responding to specific situations and stimuli—become receptive to coded campaign appeals designed to mobilize them into coalitions with traditional racists."); Dvorak, *supra* note 114, at 615; Gilens, *supra* note 114, at 595.

[116] *See, e.g.*, EDSALL & EDSALL, *supra* note 39, at 98 ("Race was central. . . to the fundamental conservative strategy of establishing a new, non-economic polarization of the electorate, a polarization isolating a liberal, activist, culturally-permissive, rights-oriented, and pro-black Democratic Party against those unwilling to pay the financial and social costs of this reconfigured social order."); OMI & WINANT, *supra* note 110, at 124 (noting that Phillips suggested a "coded" strategy of anti-black rhetoric to appeal to conservative blue-collar and southern voters); KEVIN P. PHILLIPS, THE EMERGING REPUBLICAN MAJORITY 22 (1969).

[117] GARLAND, *supra* note 6, at 153 (arguing that "anxieties about crime on top of the more inchoate insecurities prompted by rapid social change and economic recession, paved the way for a politics of reaction in the late 1970s."); TONRY, *supra* note 83, at 10.

[118] The 1988 Bush campaign used symbols and images—ACLU, Willie Horton, the death penalty—to appeal to white voters' concerns about race and crime to associate Democratic candidate Michael Dukakis with criminal defendants' rights and black crime. DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE 224 (1995); BECKETT & SASSON, *supra* note 78 at 68 (noting that the Bush campaign director described Horton as "a wonderful mix of liberalism and a big black rapist"); EDSALL & EDSALL, *supra* note 39,

understood campaigns to "get tough" as policy to harshly punish young black males.[119]

By the mid-1990s, nearly every state adopted punitive laws to transfer more and younger offenders to criminal courts and to punish them more severely.[120] A few states actually lowered the age of juvenile court jurisdiction from eighteen to seventeen years of age and transformed youths into adults on a wholesale basis.[121] Changes in juvenile sentencing and waiver laws reflected the cultural and criminological shift from determinism to responsibility; emphasized punishment based on present offense and prior record rather than the juvenile courts' previous rehabilitative mission; and have had a disproportionate impact on minority offenders.[122]

1. Racial Disparities and Cumulative Disadvantage

From their inception, juvenile courts have discriminated between "our children" and "other peoples' children."[123] Every state defines juvenile courts' delinquency jurisdiction based on a youth committing a criminal act.[124] Judges

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at 215–16; ENTMAN & ROJECKI, *supra* note 115, at 92 (arguing that Bush's blatant anti-Black Horton advertisements deliberately raised the crime issue to arouse Whites' fear of dangerous Blacks).

[119] *See* BECKETT, *supra* note 20; HACKER, *supra* note 75, at 57 ("[W]hen crime rates rise, conservatives do not call for confronting basic causes—unemployment, for example, or inferior education—but rather invoke a firmer use of force."); MILLER, *supra* note 108, at 149 ("[W]elfare and crime have never been far from the reach of any politician who wishes to posture on race without ever having actually to mention it"). Gilens argues that public officials who use crime and welfare as "code" to mobilize anti-black sentiments for electoral advantage among white voters practice a politics of division. GILENS, *supra* note 13, at 602.

[120] *See, e.g.*, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 223 (reporting that punitive policies toward delinquents "include easier waivers to adult court, excluding certain offenses from juvenile court jurisdiction, blended juvenile and adult sentences, increased authority to prosecutors to decide to file cases in adult court, and more frequent custodial placement of adjudicated delinquents."); TORBET ET AL., *supra* note 109 (documenting changes in juvenile court waiver laws); Feld, *Responses to Youth Violence*, *supra* note 83, at 189–261.

[121] *See, e.g.*, WIS. STAT. ANN. § 48.44 (1996) (lowering the age of juvenile court jurisdiction from 18 to 17); N.H. REV. STAT. ANN. § 619:B2 (IV) (1995) (defining delinquent as "a person who has committed an offense before reaching the age of <<-18->> <<+17+>> years which would be a felony or misdemeanor under the criminal code of this state if committed by an adult. . .").

[122] *See, e.g.*, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 210 ("State legislative changes in recent years have moved the court away from its rehabilitative goals and toward punishment and accountability. . . include[ing] blended sentences, mandatory minimum sentences, and extended jurisdiction."); MAUER ET AL., *supra* note 74, at 137–38 (noting that sentencing discretion shifted from judges to prosecutors and "judicial discretion is exercised in an open courtroom subject to public scrutiny, but the exercise of prosecutorial discretion is conducted behind closed doors with little accountability."); TORBET ET AL., *supra* note 109; Massey, *supra* note 10, at 47 (arguing that the impact of waiver changes was to "emphasize punishment and deterrence, rather than focusing on rehabilitation.").

[123] *See* FELD, *supra* note 3, at 4. *See generally* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

[124] HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 93–120 (2006) (describing juvenile court jurisdiction based on the type of crime

primarily consider the seriousness of the offense and prior record when they sentence delinquents.[125] Real racial differences in rates of criminal behavior account for some of the racial disparities in juvenile justice administration. Various measures of delinquency—arrest data, self-report surveys, and crime victim surveys—report that black youths commit violent crimes at higher rates than do white juveniles.[126] We should expect black youths to offend at higher rates than do white youths because of their differential exposure to multiple risk factors associated with criminality—for example, poverty, isolation in crime-ridden neighborhoods, single-parent households, deficient schools, and poor health care.[127] In addition, other factors such as differences in police practices, location of

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committed), *available at* http://ojj-dp.nc-jrs.org/oj-statbb-/nr-2006/-down-loads-/NR2006.pdf; Feld, *Transformation of Juvenile Court-Pt. II*, *supra* note 5, at 383 ("[S]tates define juvenile court jurisdiction based on a youth committing a crime, a prerequisite that detracts from a compassionate response. . . . Juvenile courts' defining characteristic strengthens public antipathy to 'other people's children' by emphasizing primarily that they are law violators.").

[125] *See* PETER GREENWOOD ET AL., YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA 53 (1983) (comparing juvenile and criminal court sentencing practices and concluding that "juvenile and criminal courts. . . 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."); Donna M. Bishop & Charles Frazier, *Race Effects in Juvenile Justice Decision-making: Findings of a Statewide Analysis,* 86 J. CRIM. L. & CRIMINOLOGY 392, 409 (1996); Jeffrey Fagan et al., *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224 *passim* (1987); Belinda R. McCarthy & Brent L. Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41 *passim* (1986).

[126] *See supra* notes 74, 97–103 and accompanying text; *see also* JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 235–38; Janet L. Lauritsen, *Racial and Ethnic Differences in Juvenile Offending, in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 87 (2005) (analyzing arrest data and reporting that "black youth are disproportionately arrested for violent index crimes and drug and weapons violations. . .").

[127] *See supra* notes 94–97 and accompanying text. *See, e.g.*, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 238, reporting that:

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

Id.; see also JESSICA SHORT & CHRISTY SHARP, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 14–15 (2005), *available at* http://www.cwla.org-/programs/juvenile-justice/disproportionate-.pdf (describing broader exposure of minority youths to "societal risk factors, such as living below the poverty line; having higher rates of infant mortality, lower birth weights, and greater exposure to lead; and fewer mothers receiving early prenatal care."); Kimberly Kempf-Leonard, *Minority Youths and Juvenile Justice: Disproportionate Minority Contact After Nearly 20 Years of Reform Efforts*, 5 YOUTH VIOLENCE & JUVENILE JUSTICE 71, 73 (2006) (identifying contributions of poverty, "underclass" status, targeted police patrol, and subcultural values to disproportionate minority involvement in juvenile justice system).

crime, and differences in victims' reactions also contribute to racial disparities in arrest rates.[128]

After researchers control for present offense and prior record, however, studies consistently report additional racial disparities when judges sentence black youths.[129] Juvenile courts' *parens patriae* ideology legitimizes individualized discretion and discrimination. In a society in which economic and racial inequality highly correlate, minority youths have greater needs which exposes them to more extensive juvenile court intervention.[130] The structural context of juvenile courts also puts minority youths at greater risk than white youths of receiving punitive sentences. Urban courts sentence all delinquents more severely.[131] Urban courts detain all youths at higher rates and detained youths receive more severe sentences.[132] Most minority youths live in urban settings and their geographic locale interacts with race to increase disproportionate minority confinement.[133]

The juvenile justice system entails successive decisions—intake, petition, detention, adjudication or waiver, and disposition—and the compound effects of

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[128] NAT'L COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 6 (2007) (describing other factors besides differences in rates of offending that contribute to racial differences in arrest rates).

[129] *See, e.g.*, FELD, *supra* note 3, at 267–72; KIMBERLY KEMPF-LEONARD, CARL POPE & WILLIAM FEYERHERM, MINORITIES IN JUVENILE JUSTICE 23–27 (1995); BARRY KRISBERG & JAMES AUSTIN, REINVENTING JUVENILE JUSTICE 116–34 (1993) (arguing that discretionary decisions at various stages of the juvenile process amplify racial disparities and produce more severe dispositions for minorities than for white youths); CARL POPE, RICK LOVELL & HEIDI M. HSIA, DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001 5 (2002), *available at* http://ojjdp.ncjrs.org/dmc/pdf/dmc89_01.pdf (reporting that 25 of 34 published studies reported race effects in processing youths); Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Process, in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 61 (D. Hawkins & K. Kempf-Leonard eds., 2005) (reviewing literature and reporting that "disparities that cannot be explained by race differences in offending are apparent at nearly every stage in the juvenile justice process.").

[130] *See, e.g.*, FELD, *supra* note 3, at 271–72 (arguing that more affluent white parents can purchase private services for their troubled children, whereas poorer minority juveniles proceed by default through the juvenile justice system).

[131] BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURT 158–62 (1993); Bishop, *supra* note 129, at 62–65 (attributing some racial disparities in juvenile justice administration to class differences and social structural factors that place minority youths at greater risk of formal processing); Barry C. Feld, *Justice By Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Aministration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 156 (1991).

[132] *See, e.g.*, Steven H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW AND SOC'Y REV. 263, 294 (1980) (noting that "being detained before adjudication had an independent effect on the likelihood of commitment, entirely apart from the facts that both detention and commitment had common antecedents."); Barry C. Feld, *The Right to Counsel in Juvenile Court*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1337–39 (1989) ("[N]egative effects of pretrial detention on subsequent sentencing.").

[133] *See generally*, FELD, *supra* note 3, at 271–72; SNYDER & SICKMUND, *supra* note 97, at 154–55; EILEEN POE-YAMAGATA & MICHAEL A. JONES, AND JUSTICE FOR SOME 12–14 (2000), *available at* http://buildingblocksforyouth.org/justiceforsome/jfs.pdf (summarizing racial differences in rates of detention). The authors report that "[i]n every offense category, a substantially greater percentage of African American youth were detained than White youth." *Id.* at 9.

even small disparities produce larger cumulative differences.[134] Black youths comprised about 15% of the population aged ten to seventeen, 26% of juvenile arrests, 30% of delinquency referrals, one-third of the petitioned delinquency cases, and 40% of the inmates in long-term public institutions.[135] These cumulative disparities persist and continue to increase.[136] Although minority youths are overrepresented at each successive step, the greatest disparities occur in the initial stages.[137] A recent analysis reported that "at almost every stage in the juvenile justice process the racial disparity is clear, but not extreme. Because the system operates cumulatively, however, the risk is compounded and the end result is that black juveniles are three times as likely as white juveniles to end up in residential placement."[138]

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[134] NAT'L COUNCIL ON CRIME AND DELINQUENCY, *supra* note 128, at 4 (summarizing the decision points—arrest, intake, detention, adjudication, and disposition—that produce cumulative disadvantages as black youths move through the juvenile justice system). *But see* Kempf-Leonard, *supra* note 127, at 70–82 (describing the complexity of attributing disproportionate minority involvement to system bias per se in a multi-stage, cumulative decision-making process).

[135] JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 231; *see also* POE-YAMAGATA & JONES, *supra* note 133 at 1–3.

[136] HEIDI M. HSIA, GEORGE S. BRIDGES & ROSALIE MCHALE, DISPROPORTIONATE MINORITY CONFINEMENT: 2002 UPDATE 1 (2004) (reporting growth in proportion of minority offenders in secure detention and correctional facilities); NAT'L COUNCIL ON CRIME AND DELINQUENCY, *supra* note 128, at 3 (citing cumulating inequality); SHORT & SHARP, *supra* note 127, at 7–10; Kempf-Leonard, *supra* note 127, at 73.

[137] MILLER, *supra* note 108, at 69–72 (reporting that racial disparities occur most often in the early and latest stages of juvenile justice processing); POE-YAMAGATA & JONES, *supra* note 133, at 16 (noting that an index constructed by dividing minority youth proportion in pretrial detention by minority proportion in the youth population at risk indicated that in 43 of 44 states, the proportion of minority youths in detention was 2.8 times (280%) higher than their makeup in the general population); SNYDER & SICKMUND, *supra* note 97, at 3; Bishop, *supra* note 129, at 66 (reporting that race effects are more pronounced at earlier stages of juvenile justice decision-making); Edmund F. McGarrell, *Trends in Racial Disproportionality in Juvenile Court Processing: 1985–1989*, 39 CRIME & DELINQ. 29, 46 (1993) (noting that disproportionate referral of minority youths results in corresponding increases in pre-trial detention).

Probation officers who decide whether or not to file a formal delinquency petition often perceive minority juveniles as more threatening and more likely to offend in the future than similarly-situated white juveniles. *See* JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 251 (finding "pronounced differences in officers' attributions about the causes of crime committed by white and minority youth"); George S. Bridges and S. Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 555 (1998); *see also* Bishop & Frazier, *supra* note 125, at 392; Sara Steen et al., *Explaining Assessments of Future Risk: Race and Attributions of Juvenile Offenders in Presentencing Reports, in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 245 *passim* (D. Hawkins & K. Kempf-Leonard eds., 2005).

[138] JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 257; *see also* POE-YAMAGATA & JONES, *supra* note 133, at 18, 20 (noting that the minority proportion of youths in public correctional facilities is about double that of whites (66% vs. 34%) black youths with no prior admissions were six times more likely than white youths to be confined); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST.: A REV. OF RES. 311, 362 (1997) (reporting that minority youths "are more likely to be detained and receive out-of-home placements than whites regardless of 'legal' considerations" and that these disparities also contribute to the construction of a prior record that, in turn, affects future processing).

Recent "get tough" changes have exacerbated disproportionate minority confinement. The numbers of youths in custody increased almost 40% between 1985 and 1995, and while white juveniles comprised 32% of all incarcerated delinquents, black youths comprised 43% and Hispanics 21% of all confined youths.[139] Within the past decade, these disparities have increased further and minority youth, who make-up 34% of the juvenile population, comprise 62% of youths in detention and 66% of youths in correctional facilities.[140]

Decades ago, Congress recognized the prevalence of disproportionate minority confinement and amended the Juvenile Justice and Delinquency Prevention (JJDP) Act to require states to identify sources of minority overrepresentation and to develop mechanisms to assure equality of treatment.[141] Twenty five of twenty six states found disproportionate minority overrepresentation with disparities in some jurisdiction by a factor of three or more.[142] More recent studies document continuing disparities and the "cumulative disadvantage" as minority youths penetrate more deeply the justice system.[143]

2. *Waiver to Criminal Court and Sentencing as Adult*

The most severe sanction a state can impose is waiver of a youth to criminal court for sentencing as an adult. Waiver of juvenile court jurisdiction presents the stark choice between treating a youth in the juvenile system and punishing him in the criminal justice system.[144] The details of transfer laws vary extensively, but

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[139] *See* FELD, *supra* note 3, at 270–71.

[140] NAT'L COUNCIL ON CRIME AND DELINQUENCY, *supra* note 128, at 30.

[141] *See* 42 U.S.C. § 5633(a)(16) (1994); 42 U.S.C. § 5633(a)(16) (2004) (encouraging states to develop prevention programs to reduce disproportionate minority contact with as well as confinement in the juvenile justice system); JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 228–29; NAT'L COUNCIL ON CRIME AND DELINQUENCY , *supra* note 128, at 4; Kempf-Leonard, *supra* note 127, at 71–72.

[142] *See, e.g.*, DONNA HAMPARIAN & MICHAEL LIEBER, DISPROPORTIONATE CONFINEMENT OF MINORITY JUVENILES IN SECURITY FACILITIES: 1996 NATIONAL REPORT (1997) (constructing index of disproportionality and reporting overrepresentation of African American youths in 25 of 26 states); Kempf-Leonard, *supra* note 127, at 71, 73–74; Carl E. Pope, *Racial Disparities in Juvenile Justice System,* 5 OVERCROWDED TIMES 1, 4 (1994) (reporting disproportionate minority over-representation of juveniles in forty-one of forty-two states in secure detention facilities and in all thirteen states that analyzed institutional commitments).

[143] NAT'L COUNCIL ON CRIME AND DELINQUENCY, *supra* note 128, at 4; SHORT & SHARP, *supra* note 127; Kempf-Leonard, *supra* note 127, at 73–74 (reporting that at each successive stage of juvenile justice administration "the level of over-representation escalates. . . [and] is even more pronounced among juveniles referrals that are specifically for violent delinquent offenses."). Judges sentence disproportionately more minority delinquents to out-of-home placements than they do white youths, and provide white juveniles proportionately more probationary dispositions than they do black youths. POE-YAMAGATA & JONES, *supra* note 133, at 14–15. Moreover, incarcerated black juveniles spend more time in custody than do white youths convicted of similar offenses. *Id.* at 18–21.

[144] Jurisdictional waiver refers to the process by which states transfer youths to criminal court for prosecution as an adult. *See, e.g.*, PATRICIA GRIFFIN ET AL., TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 3–10 (1998); SNYDER & SICKMUND,

three generic strategies—judicial waiver, legislative offense exclusion, and prosecutorial direct-file—represent the approaches that states use.[145] Judicial waiver is the most common transfer strategy.[146] Juvenile court judges may waive jurisdiction after conducting a hearing to determine whether a youth is amenable to treatment or poses a danger to public safety.[147] Judicial waiver reflects juvenile courts' individualized sentencing processes.[148] By contrast, legislatures possess wide latitude to define juvenile courts' jurisdiction and to exclude youths based on age and offense.[149] By excluding serious offenses from juvenile court jurisdiction, these laws eliminate any need for a judicial hearing.[150] A third and increasingly popular legislative strategy is to allow prosecutors to decide in which justice system to try some young offenders. In the dozen or more "direct file" states, juvenile and criminal courts share concurrent jurisdiction over older youths charged with serious crimes and prosecutors can select either forum.[151]

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supra note 124, at 112–14 (discussing judicial waiver, concurrent jurisdiction, statutory offense exclusion as three legislative methods to transfer juveniles for criminal prosecution).

[145] *See generally* FELD, *supra* note 3, at 208–19; GRIFFIN ET AL., *supra* note 144, at 3–7; SNYDER & SICKMUND, *supra* note 124, at 112–14; Feld, *Juvenile Waiver Statutes*, *supra* note 83, at 488.

[146] SNYDER & SICKMUND, *supra* note 97, at 110; U.S. GENERAL ACCOUNTING OFFICE, JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS 7 (1995), *available at* http://www.gao.gov/archive/1995/gg95170.pdf.

[147] *See* Feld, *Juvenile Waiver Statutes*, *supra* note 83, at 487–94. *See generally* Kent v. United States, 383 U.S. 541 (1966) (discussing procedural due process in judicial waiver hearings).

[148] Proponents of judicial waiver endorse the juvenile court's rehabilitative philosophy and argue that individualized decisions provide an appropriate balance of flexibility and severity. *See, e.g.*, Franklin E. Zimring, *The Punitive Necessity of Waiver, in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 207 *passim* (Jeffrey Fagan & Franklin E. Zimring ed., 2000) [hereinafter Zimring, *Punitive Necessity*]; Franklin E. Zimring & Jeffrey Fagan, *Transfer Policy and Law Reform, in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 407 *passim* (Jeffrey Fagan and Franklin E. Zimring, eds. 2000). Critics object that judges lack clinical tools with which to assess amenability to treatment or to predict dangerousness and that their exercise of discretion results in abuses and inequalities. *See, e.g.*, Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique, in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 83–98 (Jeffrey Fagan & Franklin E. Zimring, eds., 2000); Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinates of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM L. & CRIMINOLOGY 314, 324–28 (1990).

[149] *See generally* Feld, *supra* note 148.

[150] *See, e.g.*, Benjamin Steiner et al., *Legislative Waiver Reconsidered: General Deterrent Effects of Statutory Exclusion Laws Enacted Post-1979*, 23 JUSTICE Q. 34, 49–51 (2006) (describing the deterrent rationale of legislative offense exclusion and reporting that adoption of such laws have no effects). Proponents of offense exclusion favor "just deserts" sentencing policies. They advocate sanctions based on relatively objective factors such as seriousness of the crime, culpability, and criminal history, and they value uniform treatment of similarly situated offenders. *See e.g.*, Feld, *supra* note 148, at 102–03. Critics question whether legislators can remove discretion without making the process excessively rigid and over-inclusive. *See generally* Zimring, *Punitive Necessity*, *supra* note 148 (discussing the transfer of juvenile offenders into criminal court).

[151] *See* Manduley v. Superior Court of San Diego, 27 Cal. 4th 537, 555 (Cal. 2002); SNYDER & SICKMUND, *supra* note 97, at 99; Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L. J. 629, 632–33 (1994); Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File*

The increase in youth violence and homicide rates in the late 1980s and early 1990s caused almost every state to revise its laws to transfer more juveniles in criminal court.[152] These changes lowered the minimum age for transfer, increased the number of offenses excluded from juvenile court jurisdiction, and shifted waiver discretion from the judicial branch—judges in a waiver hearing—to the executive branch—prosecutors who make charging decisions.[153] The shift of *de facto* sentencing discretion from judges to prosecutors has had a major impact on the numbers and characteristics of youths tried in criminal court.

States try more than 200,000 juveniles as adults each year simply because their juvenile court jurisdiction ends at sixteen or fifteen years of age, rather than at seventeen.[154] States tried an additional 55,000 youths in criminal court who were within the age jurisdiction of juvenile courts.[155] Even though most states have judicial waiver statutes, prosecutors transfer the vast majority of these youths without any hearing.[156] Although we lack good data on the number of juveniles

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Waiver Laws on Violence Juvenile Crime: Deterrence or Irrelevance?, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1467–68 (2006) (reporting states that adopted prosecutorial direct file laws, analyzing juvenile arrest rates before and after adoption, and concluding that such laws have no deterrent effect). Proponents of prosecutorial waiver claim that prosecutors can act as more objective gatekeepers than either "soft" judges or "get tough" legislators. *See, e.g.*, McCarthy, at 656–59. Critics observe that prosecutors often succumb to political pressures on crime issues, exercise their discretion just as subjectively and idiosyncratically as judges, and create extensive geographic variability in the administration of juvenile justice. *See, e.g.*, Donna M. Bishop & Charles S. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 281, 285 (1991); Feld, *supra* note 148, at 85.

[152] *See, e.g.*, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 204–09, 214–18; SHORT & SHARP, *supra* note 127, at 7 (reporting that "between 1992 and 1999, 49 states and the District of Columbia passed laws making it easier for juveniles to be tried as adults through statutory exclusion, mandatory waiver, direct file by prosecutors, or presumptive waiver legislation."); TORBET ET AL., *supra* note 109, at 3–8; Feld, *Responses to Youth Violence*, *supra* note 83, at 194; Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 966–97 (1995) [hereinafter Feld, *Violent Youth*].

[153] *See* HUMAN RIGHTS WATCH, AMNESTY INT'L, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 3 (2005), *available at* http://www.amnestyusa.org/countries/usa/clwop/report.pdf (arguing that politicians sought electoral advantage by "lowering the minimum age for criminal court jurisdiction, authorizing automatic transfers from juvenile to adult courts, and increasing the authority of prosecutors to file charges against children directly in criminal court rather than proceeding in the juvenile justice system. The United States thus abandoned its commitment to a juvenile justice system and the youth rehabilitation principles embedded in it."); JOLANTA JUSZKIEWICZ, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED 1 *available at* http://www.buildingblocksforyouth.org/ycat/ycat.html; Feld, *supra* note 148.

[154] *See* NAT'L COUNCIL ON CRIME AND DELINQUENCY, *supra* note 128, at 5 (reporting that in thirteen states, juveniles sixteen and seventeen years of age automatically are in criminal court because of jurisdictional age thresholds); SNYDER & SICKMUND, *supra* note 124 (summarizing states' age jurisdiction of juvenile courts).

[155] HUMAN RIGHTS WATCH, *supra* note 153 (estimating that states tried 55,000 waived juveniles as adults in 2000, of whom 7100 had been transferred).

[156] HUMAN RIGHTS WATCH, *supra* note 153 (estimating that of the 55,000 waived juveniles tried as adults in 1996, about 36% had a judicial transfer hearing compared with only 13% in 2000); SNYDER & SICKMUND, *supra* note 124, at 110–14 (summarizing statutory waiver mechanisms and processes).

waived, tried or sentenced as adults, the shift of discretion from judges to prosecutors has had a profoundly negative impact on youths. Two decades ago, studies reported that prosecutors in some states charged as many as ten percent of chronological juveniles as adults.[157] Prosecutors in Florida "direct filed" as many juveniles into criminal courts as judges waived via transfer hearings in the entire country.[158] A recent study of transfer practices in 18 large counties in eleven states reported that judicial waiver hearings are the exception rather than the rule.[159] Prosecutors determined the adult status of 85% of the youths tried as adults.[160] In 45% of cases, they simply direct-filed youths in criminal court, a rate three times that of judicial waiver.[161] In another 40% of cases, prosecutors charged youths with statutorily excluded offenses.[162]

Even before the recent "crack down," studies consistently reported racial disparities in waiver decisions by juvenile court judges.[163] As a result of "get

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[157] *See, e.g.*, U.S. GENERAL ACCOUNTING OFFICE, *supra* note 146; Feld, *Responses to Youth Violence supra* note 83, at 208.

[158] *See, e.g.*, Bishop & Frazier, *supra* note 151, at 286–87; Vincent Schiraldi and Jason Ziedenberg, *The Florida Experiment: Transferring Power From Judges to Prosecutors*, 15 CRIM. JUST. 46, 46 (2000) ("Florida is leading the nation in using prosecutors to make the decision to try children as adults. In 1995 alone, the Urban Institute in Washington, D.C., reported that Florida prosecutors sent 7,000 cases to adult court, nearly matching the number of cases judges sent to the criminal justice system nationwide that year."); Charles E. Frazier et al., *Juveniles in Criminal Court: Past and Current Research in Florida*, 18 QLR 573, 579 (1999). Frazier reports that

> [t]he number of juveniles transferred to criminal court in Florida grew dramatically from several hundred cases per year prior to the introduction of prosecutor direct file provisions, to several thousand per year today. Transfers increased from roughly 1.3% of the total juvenile filings per year prior to 1979 to a high of 9.6% in 1993. However, our most recent research indicates that statewide rates have leveled off since 1993 to between 7% and 8%. The method by which transfer is accomplished in Florida has moved steadily from judicial waiver as the primary means to direct file as the almost exclusive means.

Id.

[159] JUSZKIEWICZ, *supra* note 153, at 16–18.

[160] *Id.* at 20 (reporting many significant research findings, including that "85% of determinations of whether to charge a juvenile as an adult were not made by judges, but by prosecutors or by legislatures through statutory exclusions from juvenile court.").

[161] *Id.* at 36.

[162] *Id.* at 37.

[163] *See, e.g.*, DONNA M. HAMPARIAN ET AL., YOUTH IN ADULT COURT: BETWEEN TWO WORLDS 104–05 (1982) (reporting that nationally, 39% of all youths transferred in 1978 were black, and in eleven states, minority youths constituted the majority of juveniles waived); HUMAN RIGHTS WATCH, *supra* note 153, at 16 (reporting that since 1984, black juveniles have comprised the majority of juveniles admitted to prison); Joel Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia, in* READINGS IN PUBLIC POLICY 339–40 (John C. Hall et al. eds., 1981) (noting the interracial effect in transfers in which black youths who murder white victims are significantly more at risk for waiver). *But cf.* Jeffrey Fagan, Martin Forst & Scott Vivona, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQUENCY 259, 276 (1987) ("[I]t appears that the effects of race are indirect, but visible nonetheless."). *See generally* M. A. Bortner et al., *Race and Transfer: Empirical Research and Social Context, in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 277, 278 (J. Fagan & F. Zimring, eds., 2000) (analyzing racial disparity in juvenile transfer proceedings); U.S. GENERAL ACCOUNTING OFFICE, *supra* note 146, at 59 (examining the effects of race on judicial waiver decisions).

tough" statutory reforms, judges and prosecutors now transfer even more minority youths to criminal courts and the greatest disparities occur for youths charged with violent and drug offenses.[164] In nearly every jurisdiction, the proportion of minority youths transferred to criminal court exceeds their make-up of the youth population and of felony arrestees.[165] As a result of successive screenings, differential processing, and cumulative disadvantage, minority youths comprise the majority of juveniles transferred to criminal court and sentenced to prison.[166] One study reported that criminal court judges imprisoned transferred black youths at a rate eighteen times greater than that of white offenders and Hispanic youth at seven times the rate of white youths.[167] Another study of waiver practices in eighteen urban counties in eleven states reported that minority youths comprised 81% of all juveniles tried in criminal courts and white juveniles only 19%.[168] Because of urban demographics, in many of the sites, African-American youths comprised between three-quarters and 90% of all transferred youths.[169] As a result of cumulative racial disparities in prosecutorial filings, judicial waivers, and criminal court sentencing practices, minority offenders comprise three-quarters of all youths under age eighteen who enter prisons.[170]

V. ADOLESCENT CRIMINAL RESPONSIBILITY AND REDUCED CULPABILITY

Once states convict youths in criminal court, judges sentence them as if they were adults, send them to prison with adults, and, until the Supreme Court's recent decision in *Roper v. Simmons*, executed them for the crimes they committed when

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[164] JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 216 ("A high proportion of the juveniles transferred to adult court are minorities... The preponderance of minorities among transferred juveniles may be explained in part by the fact that minorities are disproportionately arrested for serious crimes."); NAT'L COUNCIL ON CRIME AND DELINQUENCY , *supra* note 128, at 16–19; POE-YAMAGATA & JONES, *supra* note 133 at 13; Bortner et al., *supra* note 163, at 277.

[165] *See, e.g.*, JUSZKIEWICZ, *supra* note 153, at 37; IKE MALES & DAN MACALLAIR, THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA 7–8 (2000) (studying juvenile transfer and criminal court sentencing practices in Los Angeles and reporting that "[c]ompared to white youths, minority youths are 2.8 times as likely to be arrested for a violent crime, 6.2 times as likely to wind up in adult court, and 7 times as likely to be sent to prison by adult courts."), *available at* www.buildingblocksforyouth.org/colorofjustice/coj.pdf; POE-YAMAGATA & JONES, *supra* note 133, at 17 (noting that the minority proportion of youths transferred to criminal court was five times their makeup of the general population in Connecticut, Massachusetts, Pennsylvania and Rhode Island).

[166] *See, e.g.*, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 220 ("In 1997, minorities made up three-quarters of juveniles admitted to adult state prisons, with blacks accounting for 58 percent, Hispanics 15 percent, and Asians and American Indians 2 percent."). *See generally* Bortner et al., *supra* note 163, at 277 (analyzing cumulative consequences of racial disparities in transfer decisions).

[167] MALES & MACALLAIR, *supra* note 165, at 9.

[168] JUSZKIEWICZ, *supra* note 153, at 21.

[169] *Id.* at 22.

[170] POE-YAMAGATA & JONES, *supra* note 133, at 25–26.

they were children.[171] Most states provide no formal recognition of youthfulness as a mitigating factor in sentencing, some states explicitly deny very young juveniles the protection of the common law infancy defense, and many states require judges to impose mandatory sentences of life without parole on children as young as twelve or thirteen years of age.[172]

A. Death Penalty for Juveniles

In several decisions prior to *Roper v. Simmons*, the Court considered whether the Eighth Amendment prohibited states from executing offenders for crimes they committed as juveniles.[173] In 1988, a plurality of justices in *Thompson v. Oklahoma*[174] concluded that fifteen-year-old offenders lacked the requisite culpability to impose the death penalty.[175] The next year, the Court in *Stanford v. Kentucky*[176] upheld the death penalty for offenders who were sixteen or seventeen years of age when they committed a capital offense.[177] Although it recognized that juveniles generally were less culpable than adults, *Stanford* rejected a categorical

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[171] *See, e.g.*, MAUER ET AL., *supra* 74, at 17 ("A life sentence mandated for any *adult* defendant who committed a particular crime applied in full force to *juveniles* convicted in adult court for that crime."); Feld, *Responses to Youth Violence*, *supra* note 83, at 212–20.

[172] *See infra* notes 264–69, 283–310 and accompanying text.

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

[174] 487 U.S. 815, 837 (1988) (plurality opinion).

[175] *See id.* at 822–23. The *Thompson* plurality's proportionality analysis considered both objective indicators of "evolving standards of decency"—e.g. state statutes, jury practices, and the views of national and international organizations—and the Justices' own subjective sense of "civilized standards of decency." *Id.* at 830. The *Thompson* Court emphasized that deserved punishment must reflect individual culpability and concluded that "[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." *Id.* at 834. The Justices asserted that:

> [L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. . . .Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Id. at 835.

[176] 492 U.S. 361 (1989).

[177] *See id.* at 371–72.

ban and instead allowed juries to decide whether a particular youth possessed sufficient culpability to warrant execution.[178]

In 2005, the Court in *Roper v. Simmons* overruled *Stanford* and categorically barred states from executing youths for crimes committed prior to eighteen years of age.[179] Both empirical and normative factors informed the Court's assessment of "the evolving standards of decency that mark the progress of a maturing society."[180] State legislation and jury sentencing decisions provided compelling evidence of a national consensus against executing juveniles.[181] For example, after *Stanford* allowed states to execute sixteen- and seventeen-year old juveniles, no capital states lowered the age of death-eligibility and five states raised it.[182] Similarly, in the decade prior to *Roper*, only three states had executed offenders for crimes committed as juveniles.[183] National and international legal, professional, religious, and social organizations universally opposed executing juveniles.[184]

The Justices also evaluated adolescents' culpability to decide whether the death penalty ever could be a proportional punishment for juveniles. *Roper* offered three reasons why states could not punish as severely as adults even youths whom they found criminally responsible, simply because of their age.[185] First, states could not equate juveniles' culpability with adults because their immaturity and lack of judgment caused them to commit acts impulsively and without full appreciation of the consequences.[186] Second, juveniles' greater susceptibility than adults to negative peer influences[187] and dependence on parents and community diminished their responsibility.[188] Third, juveniles' personalities are more

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

[179] 543 U.S. 551 (2005) (prohibiting execution of youths for crimes committed when seventeen years of age or younger).

[180] *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–101 (1958)).

[181] *Id.* at 564–66 (noting that legislative trends prohibiting executing children corresponded with those in Atkins v. Virginia, in which the Court held that the Eighth Amendment barred execution of defendants with mental retardation); *see also* Barry C. Feld, *Competence, Culpability, and Punishment*, 32 HOFSTRA L. REV. 463, 463–64 (2003) (analogizing between state laws and jury practices in executing defendants with mental retardation and juveniles).

[182] *Roper*, 543 U.S. at 565.

[183] *Id.* at 564–65.

[184] *Id.* at 575–78.

[185] *Id.* at 569–72.

[186] *Id.* at 569 (finding that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often that in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."); Feld, *supra* note 181, at 466 (analyzing developmental psychological and neuroscience research on juveniles' diminished responsibility).

[187] *Roper*, 543 U.S. at 569 (emphasizing that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.").

[188] *Id.* (noting that juveniles may be more susceptible to negative influences because they "have less control, or less experience with control, over their own environment."). The Court explained that "[t]heir own vulnerability and comparative lack of control over their immediate surroundings means

transitory and less well-formed than those of adults and their crimes provide less reliable evidence of depraved character.[189] Juveniles' immature judgment, susceptibility to negative influence, and transitory character also negated the retributive and deterrent justifications for the death penalty.[190]

Although *Roper's* conclusions seem intuitively obvious,[191] the Court provided surprisingly little scientific evidence to support its assertions.[192] Despite substantial research summarized in sixteen *amicus* briefs, the Court neither presented nor analyzed the social science evidence of juveniles' diminished responsibility and reduced culpability.[193] We know much more about adolescents' judgment and its implications for criminal responsibility and sentencing policy than the Court offered.

B. Adolescent Criminal Responsibility and the Developmental Psychology of Reduced Culpability

The criminal law proportions punishment to the seriousness of the offense.[194] Two elements define the seriousness of a crime—harm and culpability.[195] An

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juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* (citing *Stanford*, 492 U.S. at 395 (Brennan, dissenting)).

[189] *Id.* at 570 ("[T]he character of a juvenile is not as well formed as that of an adult.").

[190] *Id.* at 571. Roper rejected retribution or deterrence as justification for execution and noted that:

> [o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: 'retribution and deterrence of capital crimes by prospective offenders.

Id. The Court asserted that "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.* at 571 ("Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult."). Similarly, the Court concluded that juveniles' immaturity of judgment decreased the likelihood that the threat of execution would deter them. *Id.* ("the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.").

[191] *Id.* at 569 (observing summarily that "as any parent knows," juveniles are immature and irresponsible).

[192] *See* Deborah W. Denno, *The Scientific Shortcomings of Roper v. Simmons*, 3 OHIO ST. J. CRIM. L. 379, 396 (2006) ("[A]lthough Roper was correct in its result, the Court's use of social science research was, at times, limited and flawed. Even when the Court attempts to examine research that is widely accepted and highly regarded, the Court does not always appear to have the tools necessary to provide a sufficiently firm social sciences foundation.").

[193] *Id.* at 381–87 (arguing that the Court's reliance on the "scientific and sociological studies respondent and his *amici* cite" fails to identify which studies or data supported its conclusions about the differences between adolescents and adults).

[194] *See* HIRSCH, *supra* note 83, at 48 ("[P]unishing someone conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it."); *see also* ANDREW VON HIRSCH, CENSURE AND SANCTIONS 15 (1993); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 31 (1985).

offender's age has little bearing on the amount of harm caused.[196] Culpability reflects the actor's ability to appreciate the wrongfulness of her actions and to control her behavior.[197] Youthfulness and immaturity directly affects culpability and the seriousness of the crime.[198] As *Roper* noted, youthfulness affects judgment, reasoning ability, and self-control and diminishes the criminal responsibility of juveniles who fail to exercise it.[199] Although states may hold youth accountable, a

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[195] *See* Stanford v. Kentucky, 492 U.S. 361, 393 (1989) (Brennan, J., dissenting) ("[T]he proportionality principle takes account not only of the 'injury to the person and to the public' caused by a crime, but also of the 'moral depravity' of the offender."); Enmund v. Florida, 458 U.S. 782, 815 (1982) (O'Connor, J., dissenting) (arguing that the offender's culpability—"the degree of the defendant's blameworthiness"—is central to determining the penalty); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 707 (1998) ("[A] sentence must correspond to the crime—not just to the harm caused by the offense, but also to the culpability of the offender."); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 822 (2003) ("Only a blameworthy moral agent deserves punishment at all, and blameworthiness (and the amount of punishment deserved) can vary depending on the attributes of the actor or the circumstances of the offense."); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility, in* YOUTH ON TRIAL: DEVELOPMENTAL PERSPECTIVES ON JUVENILE JUSTICE 271 (Thomas Grisso & Robert Schwartz eds., 2000) ("But desert is a measure of fault that will attach very different punishment to criminal acts that cause similar amounts of harm.").

[196] *See. e.g.*, ERNEST VAN DEN HAAG, PUNISHING CRIMINALS 174 (1975) (arguing that the victim of a crime is just as victimized, regardless of the age of the perpetrator, and that the need for social defense is the same).

[197] David O. Brink, *Immaturity, Normative Competence and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1557 (2004) ("[J]uveniles tend to be less competent in discriminating right from wrong and in being able to regulate successfully their actions in accord with these discriminations. If they are less competent, then they are less responsible."); Zimring, *supra* note 195, at 389–93.

[198] Just deserts theory and criminal law grading principles base the degree of deserved punishment on the actor's culpability. For example, a person may cause the death of another individual with premeditation and deliberation, intentionally, "in the heat of passion," recklessly, negligently or accidentally. *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 105–45 (2d ed. 1960). The criminal law treats the same objective harm—for example, the death of a person—quite differently depending on the actor's culpability. It would be unjust to impose the same penalty on offenders whose culpability differs substantially.

[199] HUMAN RIGHTS WATCH, *supra* note 153, at 113 (arguing that penal proportionality requires consideration of both the nature of the offense and the culpability of the offender).

> Children can commit the same acts as adults, but by virtue of their immaturity, they cannot be as blameworthy or as culpable. They do not have adults' developed abilities to think, to weigh consequences, to make sound decisions, to control their impulses, and to resist group pressures; their brains are anatomically different, still evolving into the brains of adults.

Id.; Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, SOC. PHIL. & POL'Y, Spring 1990, at 67–68, argues that the criminal law treats children differently than adults because it recognizes that they only gradually will

> develop the capacity to understand their normative significance and abide by their dictates. And when they make a rational and voluntary choice to engage in morally objectionable conduct . . ., we may hold them accountable to some sanction to teach them the significance of the rule they have broken.
>
> But we do not treat young children as full moral agents, despite their capacity for practical reason and their freedom to act on the basis of their reasoned choices. . . .

youth sentencing policy also should recognize adolescents' diminished responsibility.[200] Young offenders *deserve* less severe penalties than adults because of their diminished responsibility.[201] Even youth who can distinguish right from wrong lack the moral capacity and self-control to equate their criminal responsibility with that of adults.[202]

Developmental psychology studies physical, social, intellectual, and emotional changes across the life-cycle.[203] By mid-adolescence, most youths'

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

[200] *See* Scott & Steinberg, *supra* note 195, at 830.

> [Y]ouths are likely to act more impulsively and to weigh the consequences of their options differently from adults, discounting risks and future consequences, and over-valuing (by adult standards) peer approval, immediate consequences, and the excitement of risk taking. These influences are predictable, systematic and developmental in nature (rather than simply an expression of personal values and preferences), and they undermine decision-making capacity in ways that are accepted as mitigating culpability.

Id.

[201] Zimring uses the term "diminished responsibility" to refer to adolescents who possess "the minimum abilities for blameworthiness and thus for punishment. . . [whose immaturity] still suggests that less punishment is justified." Zimring, *supra* note 195, at 273.

[202] Brink, *supra* note 197, at 1570 (2004). Brink emphasizes both cognitive and volitional aspects of responsibility: "Normative competence involves the cognitive ability to discriminate right from wrong, but also the affective and cognitive abilities to regulate one's emotions, appetites, and actions in accordance with this normative knowledge. One central ingredient in normative competence is impulse control . ." *Id.*

[203] Steinberg & Cauffman, *supra* note 199, at 391.

> Developmental psychology, broadly defined, concerns the scientific study of changes in physical, intellectual, emotional, and social development over the life cycle. Developmental psychologists are mainly interested in the study of 'normative' development (i.e., patterns of behavior, cognition, and emotion that are regular and predictable within the vast majority of the population of individuals of a given chronological age), but they are also interested in understanding normal individual differences in development (i.e., common variations within the range of what is considered normative for a given chronological age) as well as the causes and consequences of atypical or pathological development (i.e., development that departs significantly from accepted norms).

Id.; *see also* JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 26–28 (Marjorie Gabain trans., First Free Press 1965) (1932) (describing four stages of development); JEAN PIAGET & BÄRBEL INHELDER, THE PSYCHOLOGY OF THE CHILD 152 (Helen Weaver trans., 1969) (1966) ("[T]he mental development of the child appears as a succession of three great periods."); Lawrence Kohlberg, *Development of Moral Character and Moral Ideology, in* 1 REVIEW OF CHILD DEVELOPMENT RESEARCH 383, 394–409 (Martin L. Hoffman & Lois Wladis Hoffman eds., 1964); Lawrence Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization, in* HANDBOOK OF SOCIALIZATION THEORY

possess basic reasoning ability comparable with adults.[204] For example, youths and adults use similar information and employ comparable reasoning processes when they make informed consent medical decisions.[205] But the ability to make appropriate decisions when provided with complete information under structured conditions differs significantly from the ability to exercise judgment under stressful conditions and with incomplete information.[206] Because emotions play a

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AND RESEARCH 347, 347–472 (David A. Goslin ed., 1969); Lawrence Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 VITA HUMANA 11, 11–14 (1963); June Louin Tapp & Lawrence Kohlberg, *Developing Senses of Law and Legal Justice*, *in* LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY 89, 90 (June Louin Tapp & Felice J. Levine eds., 1977); June Louin Tapp & Felice J. Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1, 12–15 (1974). *But see* Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decision Making*, 37 VILL. L. REV. 1607, 1632 (1992) (summarizing criticisms of the early research on stage and sequence of development and arguing that "recent research has revealed that similar skills develop at different rates in different task domains").

[204] Developmental psychological research on adolescents' cognitive decisionmaking ability suggests that "for most purposes, adolescents cannot be distinguished from adults on the ground of competence in decisionmaking alone." Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOLOGIST 99, 100 (1983). When youths solve problems or make informed consent decisions, social psychologists find the quality of judgments made by adolescents fourteen years of age or older comparable to that of adults' judgments. *See id.* at 100–01; *see also* Gary B. Melton, *Children's Competence to Consent: A Problem in Law and Social Science, in* CHILDREN'S COMPETENCE TO CONSENT 1, 15 (Gary B. Melton et al. eds., 1983). *But see* Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 406–07 (1999) (criticizing cognitive studies as methodologically limited and relying on "small, unrepresentative, usually white, middle class samples of youth taking part in laboratory studies rather than in studies that compare adolescent and adult performance under conditions that adequately resemble daily life"); Scott, *supra* note 203, at 1609 (criticizing researchers who contend that "no differences distinguish adults and adolescents in their capacity for rational decisionmaking" and arguing that they focus too narrowly on cognitive as opposed to judgmental factors); Cynthia V. Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 434–36 (2006) (arguing that the cognitive competence of adolescents enables them to form the *mens rea* to commit a crime and essentially refutes claims that the criminal law should treat them differently than adults).

[205] Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 52–53 (1998) (concluding that cognitive capacity and formal reasoning ability of mid-adolescents does not differ significantly from that of adults). Research on young peoples' ability to make informed medical decisions tends to support equating adolescents' and adults' cognitive abilities. *See* Thomas Grisso & Linda Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOL. 412, 423 (1978) (finding that little evidence exists that adolescents aged fifteen or older possess less competence than adults to provide knowing, intelligent, and voluntary informed consent); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1595 (1982) (reporting that fourteen-year-olds' choices did not differ significantly from those of adults in terms of "evidence of choice, reasonable[ness of] outcome, rational[ity of] reason[ing], and understanding" when responding to medical and psychological treatment hypotheticals). A review of several psychological studies of adolescents' reasoning processes, and understanding and use of medical information about their conditions and treatment options, found that adolescents and adults generally made qualitatively comparable decisions. *See* Scott, *supra* note 203, at 1627–30.

[206] *See* Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1770 (1995) [hereinafter Cauffman & Steinberg, *Cognitive and Affective Influences*]; Scott & Steinberg, *supra* note 195, at 812–13 ("These

significant role in decision-making, researchers distinguish between "cold cognition" and "hot cognition."[207] For adolescents, in particular, physiological changes and mood volatility adversely affect judgment and decision-making.[208]

For the past decade, the John D. and Catherine T. MacArthur Foundation sponsored a network on Adolescent Development and Juvenile Justice (ADJJ) to conduct research on juveniles' competence and culpability. This research culminated in the publication of a series of books, articles, and a conference that addressed the "state of knowledge" on adolescent development and the implications of developmental characteristics for juvenile and criminal system

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findings from laboratory studies are only modestly useful, however, in understanding how youths compare to adults in making choices that have salience to their lives or that are presented in stressful unstructured settings (such as the street) in which decisionmakers must rely on personal experience and knowledge."); L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 423 (2000).

> Given the only small differences in decision making capacity between individuals from mid-adolescence onward, the question arises as to why the decision making efforts of adolescents result in substantially more risk-taking behavior than is characteristics of adults. . . . [O]ne little explored possibility is that the decision making capacity of adolescents may be more vulnerable to disruption by the stresses and stains of everyday living than that of adults. That is, unlike adults, adolescents may exhibit considerably poorer cognitive performance under circumstances involving everyday stress and time-limited situations than under optimal test conditions.

Id.; Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 250 (1996) [hereinafter Steinberg & Cauffman, *Maturity of Judgment*].

> [T]he informed consent model is too narrow in scope to adequately illuminate differences between adolescents' and adults' decision making, because it overemphasizes cognitive functioning. (e.g., capacity for thinking, reasoning, understanding) and minimizes the importance of noncognitive, psychosocial, [sic] variables that influence the decision-making process (i.e., aspects of development and behavior that involve personality traits, interpersonal relations, and affective experience).

Id. (citation omitted).

[207] Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 60, 61 (2001) (distinguishing cold and hot cognition and arguing that "*[c]old cognition* refers to thinking under conditions of low emotion and/or arousal, whereas *hot cognition* refers to thinking under conditions of strong feelings or high arousal. The cognitive processes involved in hot cognition may, in fact, be much more important for understanding why people [especially youths] make risky choices in real-life situations.").

[208] *See, e.g.*, Cauffman & Steinberg, *Cognitive and Affective Influences*, *supra* note 206, at 1780; Dahl, *supra* note 207, at 62 ("[D]ecision-making sequences regarding risky behavior in adolescence cannot be fully understood without considering the role of emotions, with key aspects of these 'decision' processes involving interactions between thinking and feeling processes."); Scott, *supra* note 203, at 1645 (suggesting that youths' impulsiveness "might affect decisionmaking competence, if impulsiveness disables the young individual from considering alternatives or weighing and comparing consequences according to his or her subjective utility. More likely, impulsiveness might simply affect the care with which actual decisions are made. . . ."); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 206, at 259 (suggesting that "sensation seeking increases during adolescence, leading to increased risk taking as a means of achieving excitement. Another viewpoint posits that hormonal and physiological changes that accompany puberty result in higher levels of impulsivity and recklessness. Finally, a third perspective emphasizes the influence of emotion and mood on decision making.").

policies.[209] The MacArthur ADJJ research reports a disjunction between youths' cognitive abilities and qualities of judgment.[210] Even though adolescents, by age sixteen, exhibit intellectual abilities comparable with adults,[211] they do not develop the psycho-social maturity, ability to exercise self-control, and competence to make adult-quality choices until their early-twenties.[212] The ADJJ research identified an "Immaturity Gap"—a disjunction between adolescents' intellectual maturity, which reaches near-adult levels by age sixteen, and psycho-social maturity of judgment that does not emerge for nearly another decade.[213]

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[209] *See generally* THE CHANGING BORDERS OF JUVENILE JUSTICE (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (analyzing culpability of juveniles and transfer to criminal court); PETER W. GREENWOOD, DELINQUENCY PREVENTION AS CRIME-CONTROL POLICY (2006) (describing successful intervention programs to reduce delinquency); THOMAS GRISSO, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS (2004) (examining the extent of mental disorders among delinquent populations and its implications for competency, court processing, and dispositions); THOMAS GRISSO & ROBERT G. SCHWARTZ, YOUTH ON TRIAL (2000) (analyzing adjudicative competencies of adolescents and their implications for juvenile justice administration); DARNELL F. HAWKINS & KIMBERLY KEMPF-LEONARD, OUR CHILDREN, THEIR CHILDREN (2005) (examining racial disparities in juvenile justice administration); FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING (2004) (describing irrationality of criminal justice policies that treat adult and adolescent sexual offenses the same); MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT & JUVENILE JUSTICE, *available at* http:www.adjj.org/downloads/552network_overview.pdf.

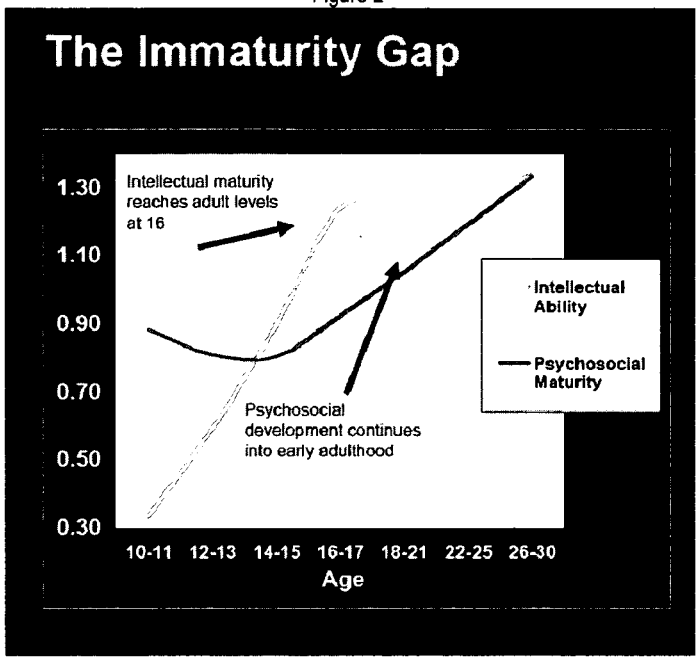
[210] MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT & JUVENILE JUSTICE 27, *available at* http://www.adjj.org/downloads/3030PPT-%20Adolescent%20Development%20and%20Criminal%20Blameworthiness.pdf (reporting inconsistency between cognitive ability and mature judgment: "By age 16, individuals show adult levels of performance on tasks of basic information processing and logical reasoning. Yet in the real world, adolescents show poorer judgment than adults.").

[211] *Id.* at 28 (summarizing results of graph on "Basic Intellectual Abilities Are Mature By Age 16").

[212] Many developmental psychologists question the appropriateness of advocating for legal equality based on adolescents' cognitive parity with adults to make informed medical decisions. *See* William Gardner et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOLOGIST 895, 897–98 (1989); Scott, *supra* note 203, at 1631–36; Elizabeth Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 224 (1995); Scott & Steinberg, *supra* note 195, at 813 ("Psycho-social development proceeds more slowly than cognitive development. As a consequence, even when adolescent cognitive capacities approximate those of adults, youthful decisionmaking may still differ due to immature judgment."); Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 152 (2003) ("[F]or all the importance of cognitive development, aspects of behavior that involve interpersonal and affective experience may offer even more information about an adolescent's decision-making processes."). *But see* Ward, *supra* note 204, at 446–56 (arguing that even very young children possess sufficient rationality to act instrumentally and therefore no reasons exist to punish them differently than adults).

[213] MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT & JUVENILE JUSTICE, *supra* note 210, at 29 (summarizing results of graph on "The Immaturity Gap").

Figure 2



Source: http://www.adjj.org/downloads/3030PPT-%20Adolescent%20Development%20and%20Criminal%20Blameworthiness.pdf at 29.

Roper attributed youths' and adolescents' diminished culpability to a "lack of maturity and . . .underdeveloped sense of responsibility. . . [that] often result in impetuous and ill considered actions and decisions."[214] Focusing on maturity of judgment, rather than simple cognitive ability, provides a more appropriate framework through which to assess adolescents' culpability.[215] Youths' immature judgment occurs across several domains—perceptions of risk, appreciation of future consequences, capacity for self-management, and ability to make autonomous choices—and distinguishes them from adults.[216] Youths differ in

[214] *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

[215] *See* Cauffman & Steinberg, *Cognitive and Affective Influences*, *supra* note 206, at 1765; Scott et al., *supra* note 212, at 227; Scott & Grisso, *supra* note 199, at 157 (arguing that psycho-social factors affecting adolescents' decisions to engage in crime include "peer influence, temporal perspective (a tendency to focus on short-term versus long-term consequences), and risk perception and preference. . . . We designate these psychosocial influences as 'judgment' factors, and argue that immature judgment in adolescence may contribute to choices about involvement in crime."); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 206, at 252; Steinberg & Cauffman, *supra* note 199, at 407–08 (explaining that the quality of adolescent decision-making subsumes three categories of psycho-social factors: "responsibility (the capacity to make a decision in an independent, self-reliant fashion), perspective (the capacity to place a decision within a broader temporal and interpersonal context), and temperance (the capacity to exercise self-restraint and control one's impulses).").

[216] *See, e.g.*, Morse, *supra* note 205, at 53 (describing characteristics of youth that distinguish their decision-making capabilities from those of adults); Scott et al., *supra* note 212, at 229–35

breadth of experience, short-term versus long-term time perspective, attitude toward risk, impulsivity, and vulnerability to peer influence reflect normal developmental processes that make the quality of their choices less blameworthy.[217]

1. Immature Judgment, Risk, and Impulsivity

A person must be able to think ahead, delay gratification, and restrain impulses in order to exercise self-control. Young people act more impulsively, fail adequately to calculate long-term consequences, and engage in risky behavior more commonly than do adults.[218] For example, when adolescents and adults confront problems, the amount of time they required to solve simple problems did not differ, but increased with age as they ponder solutions to complex problems.[219] The ADJJ research measured juveniles' ability to plan, delay gratification, process risks, and exercise self-control and when they acquired adult-level

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(describing psycho-social and developmental factors that contribute to juveniles' immature judgment); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 206, at 252 (emphasizing temperance, perspective and judgment as ways in which adolescents' thinking diverges from adults); Taylor-Thompson, *supra* note 212, at 144.

> [A]dolescents think differently than mature adults. Adolescents may, for example, perceive and calculate the probability of risk differently than adults do, or be less aware of—and less alert to—information. In any event, adolescents use what information they have less effectively in making choices: They fixate on an initial possibility in the decision-making process and fail to adjust as new information becomes available.

Id.; Scott & Steinberg, *supra* note 195, at 813.

> Even when adolescent cognitive capacities approximate those of adults, youthful decisionmaking may still differ due to immature judgment. The psycho-social factors most relevant to differences in judgment include: (a) peer orientation, (b) attitudes toward and perception of risk, (c) temporal perspectives, and (d) capacity for self-management. While cognitive capacities shape the process of decisionmaking, immature judgment can affect outcomes because these developmental factors influence adolescent values and preferences that drive the cost-benefit calculus in the making of choices.

Id.

[217] *See* Scott, *supra* note 212, at 1610; Scott & Grisso, *supra* note 199, at 160–61 (noting that psycho-social developmental factors affecting judgment and criminal responsibility in adolescents include "(1) conformity and compliance in relation to peers, (2) attitude toward and perception of risk, and (3) temporal perspective"); Scott et al., *supra* note 212, at 227 (proposing "judgment" framework to evaluate quality of adolescent decisionmaking that includes not only cognitive capacity, but also the influence of factors such as "conformity and compliance in relation to peers and parents, attitude toward and perception of risk, and temporal perspective"); Scott & Steinberg, *supra* note 195, at 813; Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 206, at 258–62.

[218] *See* Scott & Steinberg, *supra* note 195, at 814 ("Future orientation, the capacity and inclination to project events into the future, may also influence judgment, since it will affect the extent to which individuals consider the long-term consequences of their actions in making choices. Over an extended period between childhood and young adulthood, individuals become more future-oriented.").

[219] MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, *supra* note 210, at 18 (reporting results of graph, "With Age, Longer Time Spent Thinking Before Acting").

competencies.[220] It reported that juveniles fifteen years of age and younger were more impulsive than older adolescents, but even youths sixteen and seventeen years of age fell far short of adult self-control.[221]

To calculate risk, one must identify possible outcomes, evaluate the positive or negative consequences of each option, estimate their likelihood, and make a choice to optimize outcomes.[222] Compared with adults, adolescents underestimate the magnitude or probability of risks, use a shorter time-frame, and focus more on potential gains rather than losses.[223] The higher prevalence of accidents, suicides, and homicides reflect youths' greater involvement in risky behavior.[224] By virtue of youth and inexperience, adolescents simply may possess less information[225] or

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[220] *See generally id.*

[221] *Id.* at 15 (reporting results from graph "Impulsivity Declines With Age").

[222] *See generally* GRISSO, *supra* note 209, at 241 ("We need to examine the extent to which midadolescents typically might not yet have achieved adultlike ways of framing problems. . . and generating alternative responses to stressful situations or weighing the potential consequences of their alternatives."); Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 3–4 (1992).

[223] Lita Furby and Ruth Beyth-Marom speculate that "adolescents [may] judge some negative consequences in the distant future to be of lower probability than do adults or to be of less importance than adults do." Furby & Beyth-Marom, *supra* note 222, at 19; *see also* GRISSO, *supra* note 209, at 161 ("[A]dolescents on average may differ from adults in the weights that they give to potential positive and negative outcomes . . .[and] are more likely than adults to give greater weight to anticipated gains than to possible losses or negative risks."); Scott, *supra* note 212, at 305–06 ("[A]dolescents, for developmental reasons, could differ from adults in the subjective value that is assigned to perceived consequences. . . [and] may weigh costs and benefits differently, sometimes even viewing as a benefit what adults would consider to be a cost."); Spear, *supra* note 206, at 446 ("In terms of their expectations for future rewards, adolescents (12–18 years of age) are less optimistically biased when compared with either college students or adults (18–65 years of age).").

[224] *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). Teenagers' greater proclivity to engage in unprotected sex and to speed and drive recklessly reflect various forms of risk taking with respect to health and safety. *See* Scott et al., *supra* note 212, at 230; Spear, *supra* note 206, at 421 ("[W]ith half or more of adolescents exhibiting drunk driving, sex without contraception, use of illegal drugs, and minor criminal activities, 'reckless behavior becomes virtually a normative characteristic of adolescent development.'") (citations omitted).

Criminal behavior is a particularly risky form of behavior, and every theory of crime attempts to account for its greater prevalence during adolescence. *See, e.g.*, MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 123–44 (1990); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 38–48 (2001) (summarizing criminological research reporting peak of criminal involvement in mid-to-late adolescence with sharp desistance thereafter and attributing youthful involvement to normal developmental transition to adulthood); Scott, *supra* note 212, at 300–01 ("Many adolescents become involved in criminal activity in their teens and desist by the time they reach young adulthood. . . leading criminologists to conclude that participation in delinquency is 'a normal part of teen life.' For most adolescent delinquents, desistance from antisocial behavior also seems to be a predictable part of the maturation process.").

[225] *See* Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) ("Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."); Scott, *supra* note 212, at 304 ("Adolescents, perhaps because they have less knowledge and experience, are less aware of risks than are adults." (citation omitted)); *id.* at 305 ("[T]he fact that adolescents have less experience and knowledge than adults seems likely to affect their decision

they may consider fewer alternatives than adults when they make decisions.[226] The ADJJ research reported that perceptions of risks decline during mid-adolescence and then gradually increase into adulthood and that sixteen and seventeen year old youths perceive fewer risks than do either their younger or older counterparts.[227] Similarly, future orientation increases gradually with age into the early twenties and mid-adolescents are the most "present-oriented" of any age group.[228] The widest gap between preference for risk and perception of risk occurs during mid-adolescence. Youths engage in risky behavior because they seek novel sensations, excitement, and an "adrenaline rush."[229] Adolescents' preference for risk[230] and sensation-seeking[231] peaks at sixteen and seventeen-years of age and then sharply declines with adulthood.

Even when adolescents have the same information as adults, they may weigh costs and benefits differently or assign different subjective values to consequences in ways that skew the quality of their choices.[232] An ADJJ study of ability to delay

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making in tangible and intangible ways."); Taylor-Thompson, *supra* note 212, at 153 (arguing that adolescents approach risky decisions differently than adults because of youths "being unaware of risks that adults typically perceive, having incorrect information about risks, or calculating the probability or magnitude of the risk in ways that adults would not").

[226] *See* Taylor-Thompson, *supra* note 212, at 153 ("In situations where adults will likely perceive and weigh multiple alternatives as part of rational decision-making, adolescents typically see only one option. This inflexible 'either-or-mentality' becomes especially acute under stressful conditions.").

[227] MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, *supra* note 210, at 22 (summarizing results of graph on "Risk Perception Declines and Then Increases After Mid-Adolescence").

[228] *Id.*

[229] *See* Grisso, *supra* note 209, at 163 (arguing that adolescents are "more willing to take physical and social risks for the sake of experiencing novel and complex sensations."); Spear, *supra* note 206, at 422.

> Individuals engaging in risk taking may do so to attain the positive arousal produced by the sensations of novelty, complexity, change or intensity of experience. . . . Perceived risks of risk taking decline with age during adolescence, so it is possible that the level of risk taking necessary to attain an 'adrenaline rush' of danger may rise as well, perhaps leading to an escalation of risk-taking behaviors in certain individuals, particularly those with poor prospects for attaining other reinforcers.

Id.; Taylor-Thompson, *supra* note 212, at 153 (arguing that sensation-seeking activity increases for youths between sixteen and nineteen years of age).

[230] MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, *supra* note 210, at 17 (summarizing results of graph depicting "Preference for Risk Peaks in Mid-Adolescence").

[231] *Id.* at 16 (summarizing graph reporting that "Sensation-Seeking Declines With Age").

[232] *See also* Scott, *supra* note 212, at 1645–47 (discussing how youths' perceptions of and preferences for risk differ from those of adults). Rational choice theory helps to explain adolescents' greater propensity for risk-taking. People make utility-maximizing choices within a context of constraints, and people at different stages of their lives assign different valuations to uncertain future events. Knowledge about one's self, social environment, and life-course trajectory increase with age and affect a person's short-term versus long-term calculus. Youths' "focus on the immediate rather than the long-term consequences of a decision is a rational response to uncertainty about the future." Gardner, *supra* note 224, at 77. As a result, young people may discount the negative value of future consequences because they have more difficulty than adults in integrating a future consequence into their more limited experiential baseline. Thus, adolescents may discount the cost of longer-term

gratification gave subjects the option to receive $1,000 in one year or a discounted sum the next day. Adolescents more often opted for an immediate, but much smaller payout, whereas adults delayed gratification and only chose an immediate reward if it was discounted slightly.[233] The subjective values youth assign to risks and outcomes and the consequences of *not* engaging in risky behaviors consequences may produce different choices than adults make.[234] Youths' feelings of "invulnerability" and "immortality" may also contribute to risk-taking.[235]

2. Peer Group and Community Influences

Roper ascribed juveniles' diminished responsibility, in part, to adolescents' greater susceptibility than adults to negative peer group influences.[236] Adolescents commit their crimes in groups to a greater extent than do adults and group-offending increases the risks of accessorial criminal liability for normally law-abiding youths.[237] Adolescents' inclination to take risks and their susceptibility to peer

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future consequences and weigh shorter-term benefits more heavily than adults. *See* William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, *in* ADOLESCENTS AND THE AIDS EPIDEMIC 17, 17–19 (William Gardner et al. eds., 1990); Taylor-Thompson, *supra* note 212, at 154 ("Adolescents, more than adults, tend to discount the future and to afford greater weight to short-term consequences of decisions.").

[233] MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, *supra* note 210, at 21 (summarizing results of graph "Older Individuals Are More Willing to Delay Gratification.").

[234] *See* Scott & Grisso, *supra* note 199, at 163; Scott & Steinberg, *supra* note 195, at 815 ("[A]dolescents are less risk-averse than adults, generally weighing rewards more heavily than risks in making choices. In part, this may be due to limits on youthful time perspective; taking risks is more costly for those who focus on the future."); Taylor-Thompson, *supra* note 212, at 153 ("[A]dolescents experience greater concern—and anxiety—over the consequences of refusing to engage in risky conduct than adults do, thanks to greater fear of being socially ostracized.").

[235] *See* Lawrence D. Cohn et al., *Risk-Perception: Differences Between Adolescents and Adults*, 14 HEALTH PSYCHOL. 217, 221 (1995) (arguing that adolescents engage in "health-threatening activities" because they "do not regard [such] behavior as extremely risky or unsafe," rather than because of "unique feelings of invulnerability"); Furby & Beyth-Marom, *supra* note 222, at 19–21.

[236] *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (noting adolescent susceptibility to negative peer influences). Scott, *supra* note 212, at 1643–44 (describing adolescent responsiveness to peer influences); Scott & Steinberg, *supra* note 195, at 813 ("[T]eens are more responsive to peer influence than are adults. Susceptibility to peer influence increases between childhood and early adolescence as adolescents begin to individuate from parental control. This susceptibility peaks around age fourteen and declines slowly during the high-school years."); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 206, at 253–54.

[237] *See, e.g.*, FRANICIS ZIMRING, AMERICAN YOUTH VIOLENCE 152 (1998) ("Accessorial liability can interact with the vulnerability of adolescents to group pressure to create very marginal conditions for extensive criminal sanctions."). Youths adjust their behavior and attitudes to conform to those of their contemporaries to garner greater acceptance and approval. *See* Scott & Grisso, *supra* note 199, at 162 ("Peer influence seems to operate through two means: social comparison and conformity. Through social comparison, adolescents measure their own behavior by comparing it to others. Social conformity... influences adolescents to adapt their behavior and attitudes to that [sic] of their peers."); Scott et al., *supra* note 212, at 230; Taylor-Thompson, *supra* note 212, at 153–54 ("The choice to engage in antisocial conduct is often linked to the adolescent's desire for peer approval.

influences interact and produce riskier behavior when youths are in groups than they would engage in alone.[238] Subcultural norms in some urban areas locales expose minority youths to much more powerful pressures to engage in criminal activity than most youths confront.[239] Adolescents' ability to resist negative peer influences emerges gradually and does not approach adult-levels until the late-teens and early-twenties.[240] While succumbing to peer pressure does not excuse criminal liability, youths who fail to resist are not as responsible for their behavior as we expect adults to be.[241]

Prodding by peers can substitute for, and even overwhelm, an adolescent's own 'better' judgment about whether to engage in certain conduct.").

Police arrest a larger proportion of two or more juveniles for involvement in a single criminal event than they do adults. *See, e.g.*, SNYDER & SICKMUND, *supra* note 97, at 77 (showing percentages of various crimes committed by juveniles that were committed in groups from 1973 to 1997); Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 870 tbl.1 (1981) (noting that 64% of robberies committed by people under age twenty-one were committed in groups while only 39% of robberies committed by people twenty-one and older were committed in groups); *see also id.* at 867 (arguing that young people "commit crimes, as they live their lives, in groups.").

[238] *See* Scott & Steinberg, *supra* note 195, at 815 ("[A] synergy likely exists between adolescent peer orientation and risk-taking; considerable evidence indicates that people generally make riskier decisions in groups than they do alone."); Zimring, *supra* note 195, at 282 ("That social settings account for the majority of all youth crime suggests that the capacity to deflect or resist peer pressure is a crucially necessary dimension of being law-abiding in adolescence. . . . Kids who do not know how to deal with such pressure lack effective control of the situations that place them most at risk of crime in their teens.").

[239] *See, e.g.*, Elijah Anderson, *The Social Ecology of Youth Violence*, 24 CRIME & JUST. 65, 82–85 (1998) (describing the "code of the street" that requires youths to respond violently to disrespect, or suffer loss of face); Jeffrey Fagan, *Context and Culpability of Adolescent Crime*, 6 VA. J. SOC. POL'Y & L. 507, 537–40 (1999) [hereinafter Fagan, *Context and Culpability*]; Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 371, 374 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Fagan, *Choices by Adolescents*] (using a social context framework "to show how the unique demands of adolescence interact with social contexts to motivate decisions to engage in crime and violence"); Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence and Social Identity*, 24 CRIME & JUST. 105, 124 (1998) ("Violence 'scripts,' developed in a neighborhood context that values toughness and displays of violence,. . . may limit the behavioral and strategic options for resolving disputes. . ."). *See generally* ELIJAH ANDERSON, STREETWISE (1990) (describing subcultural norms sustaining violence).

[240] MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT & JUVENILE JUSTICE, *supra* note 210, at 25 (summarizing results of graph on "With Age, Individuals Become More Resistant to Peer Influence."); Zimring, *supra* note 195, at 280 ("A teen may know right from wrong and may even have developed the capacity to control his or her impulses while alone, but resisting temptation while alone is a different task than resisting the pressure to commit an offense when adolescent peers are pushing for misbehavior and waiting to see whether or not the outcome they desire will occur.").

[241] *See, e.g.*, Zimring, *supra* note 195, at 282 ("But if social experience in matters such as anger and impulse-management also counts, and a fair opportunity to learn to deal with peer pressures is regarded as important, expecting the experienced-based ability to resist impulses and peers to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking.").

Children depend on their families, schools, and communities to learn positive behavior and to develop the ability to exercise self-control.[242] Successful development is socially constructed and the communities in which children live affect their life chances and their risks of criminal involvement.[243] Community structure affects youths' opportunities to learn and practice responsible behavior[244] and contributes to higher crime rates in impoverished urban centers.[245] Unlike adults, juveniles' dependency on their family prevents them from escaping criminogenic environments.[246]

In summary, *Roper* correctly identified the characteristics of adolescents that impair their judgment, reduce their culpability, and diminish their criminal responsibility. Youths are more impulsive and seek novel and exciting experiences. They are short-sighted and prefer immediate rewards to delayed gratification. They misperceive and miscalculate risks and discount the likelihood of adverse consequences. They are more vulnerable and susceptible to negative peer and environmental influences. Although adolescents' cognitive abilities compare

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[242] *See* Arenella, *supra* note 199, at 82 (emphasizing that children depend on others to develop and exercise their moral capacities and that "[t]he capacities of critical self-reflection and self-revision are not simply some individual *properties* that some individuals have the moral luck to possess. Their acquisition and development depend on an interpersonal process between the agent and other human beings. The ability to control one's character is a process that often requires some form of socially created *transformational opportunity* being made available to an individual who has the capacity to take advantage of it."); David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL'Y REV. 13, 16–17 (2003) (arguing that children require attention as part of normal brain development and that if they become attention-deprived, they will engage in both positive and negative behaviors to satisfy their needs).

[243] *See, e.g.*, Fagan, *Choices by Adolescents*, *supra* note 239, at 376–77 (noting that social context contributes to adolescents' violent behavior); Fagan, *Context and Culpability*, *supra* note 239, at 535–39 (suggesting that criminogenic social context contributes to young gang members' criminal behavior); Deanna L. Wilkinson & Jeffrey Fagan, *The Role of Firearms in Violence "Scripts": The Dynamics of Gun Events Among Adolescent Males*, 59 LAW & CONTEMP. PROBS. 55, 63–66 (1996) (describing how peer interactions create "scripts" that prescribe how youths should respond to disrespect and that lead to violent confrontations).

[244] *See* Arredondo, *supra* note 242, at 16 (arguing that delinquent youths typically come from chaotic homes and unresponsive neighborhoods and that as a result "he has not had the necessary developmental opportunity of internalizing [lessons learned from] consistently benevolent, reliable, and fair adult authority figures").

[245] *See* ROBERT J. BURSIK, JR. & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME 29–59 (1993) ("[L]ow levels of systemic control increase the likelihood of crime, high levels of crime decrease the effectiveness of systemic control, and the entire process spirals onward"); Cook & Laub, *supra* note 97, at 51, 53–58 (1998) (attributing increase in adolescent homicide rates to increased gun use associated with crack cocaine industry in urban, inner-city neighborhoods).

[246] *See* Scott & Steinberg, *supra* note 195, at 818.

> [A]dolescents are subject to legal and practical restrictions on their ability to escape these criminogenic settings. Financially dependent on their parents or guardians and subject to their legal authority, adolescents cannot escape their homes, schools, and neighborhoods. . . . Because adolescents lack legal and practical autonomy, they are in a real sense trapped in whatever social setting they occupy and are more restricted in their capacity to avoid coercive criminogenic influences than are adults.

Id.

favorably with adults', they do not develop mature judgment and self-control until early adulthood.

3. Neuroscience, the Adolescent Brain, and Impulse Control

Neuroscience research suggests that the differences in thinking and behavior between adolescents and adults reflect basic biological differences in brain development and neuro-physiological maturation.[247] The human brain does not achieve physiological maturity until the early twenties.[248] As a result, adolescents simply do not have the same biological ability as adults to make mature decisions, to regulate emotions, or to control impulsive behavior.[249] In short, the problem is one of hardware, as well as software.

The prefrontal cortex (PFC) of the frontal lobe of the brain functions as the "chief executive officer" and controls most advanced cerebral functions.[250]

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[247] *See* NAT'L INST. OF MENTAL HEALTH, TEENAGE BRAIN: A WORK IN PROGRESS 2 (2001), *available at* http://www.nimh.nih.gov/publicat/teen-brain.cfm; Tomáš Paus et al., *Structural Maturation of Neural Pathways in Children and Adolescents:* In Vivo *Study*, 283 SCIENCE 1908, 1908 (1999); Elizabeth R. Sowell et al., In Vivo *Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 859 (1999) [hereinafter Sowell et al., In Vivo *Evidence*]; Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE. 8819, 8819 (2001) [hereinafter Sowell et al., *Mapping Continued Brain Growth*] (discussing significant changes in brain structure prior to adulthood); Spear, *supra* note 206, at 438 ("[T]he adolescent brain is a brain in flux, undergoing numerous regressive and progressive changes in mesocorticolimbic regions.").

[248] Scott & Steinberg, *supra* note 195, at 816 summarizes some of the preliminary research on brain development and its implications for adolescent self-control.

> [R]egions of the brain implicated in processes of long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward continue to mature over the course of adolescence, and perhaps well into young adulthood. At puberty, changes in the limbic system—a part of the brain that is central in the processing and regulation of emotion—may stimulate adolescents to seek higher levels of novelty and to take more risks; these changes also may contribute to increased emotionality and vulnerability to stress. At the same time, patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving planning and decisionmaking, suggest that these higher-order cognitive capacities may be immature well into middle adolescence.

Id.; *see also* Dahl, *supra* note 207, at 69 ("Regions in the PFC [prefrontal cortex] that underpin higher cognitive-executive functions mature slowly, showing functional changes that continue well into late adolescence/adulthood.").

[249] *See* Dahl, *supra* note 207, at 60 (arguing that affect regulation relates to the control of feelings and behavior and "involves some inhibition, delay, or intentional change of emotional expression or behavior to conform with learned social rules, to meet long-term goals, or to avoid future negative consequences."); Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?*, 3 OHIO ST. J. CRIM. L. 321, 330 (2006) ("An adolescent's level of cortical development may therefore be directly related to her or his ability to perform well in situations requiring executive cognitive skills. Younger, less cortically mature adolescents may be more at risk for engaging in impulsive behavior than their older peers. . .").

[250] PRINCIPLES OF NEURAL SCIENCE 9 (Eric R. Kandel et al. eds., 4th ed. 2000) (describing specialized functions of lobes of the brain and reporting that "[t]he frontal lobe is largely concerned with planning future action and with the control of movement"); Sowell et al., *Mapping Continued*

Executive functions include impulse control, reasoning, abstract thinking, imagining, planning behavior, and anticipating consequences.[251] The brain transmits electrochemical impulses, and myelin[252]—a white, fatty sheath—functions like the insulation of a wire to increase the speed of electro-conductivity.[253] In early childhood, the portions of the brain associated with

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Brain Growth, supra note 247, at 8819 (mapping the distribution of cortical gray matter in post-adolescents and reporting "an inverse relationship between cortical gray matter density reduction and brain growth primarily in the superior frontal regions that control executive cognitive functioning."); Gruber & Yurgelun-Todd, *supra* note 249, at 323 ("[T]he frontal cortex has been shown to play a major role in the performance of executive functions including short term or working memory, motor set and planning, attention, inhibitory control and decision making."); *Frontline: Inside the Teenage Brain* (PBS television broadcast 2002), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html ("The frontal lobe is often called the CEO, or the executive of the brain. It's involved in things like planning and strategizing and organizing, initiating attention and stopping and starting and shifting attention.").

[251] *See* Sarah Spinks, *Frontline: Inside the Teenage Brain, Adolescent Brains Are Works in Progress* (PBS television broadcast 2000), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html ("The prefrontal cortex sits just behind the forehead. It is particularly interesting to scientists because it acts as the CEO of the brain, controlling planning, working memory, organization, and modulating mood. As the prefrontal cortex matures, teenagers can reason better, develop more control over impulses and make judgments better. In fact, this part of the brain has been dubbed 'the area of sober second thought.'").

[252] A process of myelination occurs in which the myelin, a fatty white substance, forms a sheath that surrounds and insulates the axons of certain neurons, gives it a white appearance, and allows for more rapid and efficient neurotransmission. The organic changes in brain maturation and function during adolescence include a density reduction in the gray matter and an increase in myelination and brain growth in the frontal cortex. *See* NAT'L INST. OF MENTAL HEALTH, *supra* note 247, at 2 ("Unlike gray matter, the brain's white matter—wire-like fibers that establish neurons' long-distance connections between brain regions—thickens progressively from birth in humans. A layer of insulation called myelin progressively envelops these nerve fibers, making them more efficient, just like insulation on electric wires improves their conductivity."); Sowell et al., *Mapping Continued Brain Growth, supra* note 247, at 8826 ("The strong correspondence in the age effects for gray matter density reduction and increased brain growth in frontal cortex may provide new insight for making inferences about the cellular processes contributing to postadolescent brain maturation. Regressive (i.e., synaptic pruning) and progressive (i.e. myelination) cellular events are known to occur simultaneously in the brain during childhood, adolescence, and young adulthood. . . .").

[253] *See, e.g.*, PRINCIPLES OF NEURAL SCIENCE, *supra* note 250, at 18–34; Paus et al., *supra* note 247, at 1908.

> Structural maturation of individual brain regions and their connecting pathways is a condition *sine qua non* for the successful development of cognitive, motor, and sensory functions. The smooth flow of neural impulses throughout the brain allows for information to be integrated across the many spatially segregated brain regions involved in these functions. The speed of neural transmission depends not only on the synapse, but also on structural properties of the connecting fibers, including the axon diameter and the thickness of the insulating myelin sheath.

Id.; Gruber & Yurgelun-Todd, *supra* note 249, at 325.

> The significant correlation between white matter volume and processing speed are consistent with evidence suggesting that increased myelination of axons produces faster conduction velocity of neural signals and more efficient processing of information, and further suggest that some of the increased cognitive abilities characteristic of adult maturation may be associated with developmental increases in relative white matter volume.

Id.

perception—the occipital and parietal lobes—myelinate first to transmit sensory information more efficiently.[254] During adolescence, further myelination of the PFC improves cognitive function, reasoning ability, and the rapidity of brain activity.[255] Myelination proceeds approximately from the back of the brain to the front and neurobiological maturity does not occur before the late-teens or early-twenties.[256] Thus, adolescents do not have the same biological ability as adults to process information quickly, to control behavior, and to suppress impulses.

The part of the brain called the amygdala—the lymbic system located at the base of the brain—controls instinctual behavior or "gut reactions," such as the

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[254] *See* NAT'L INST. OF MENTAL HEALTH, *supra* note 247, at 1; PRINCIPLES OF NEURAL SCIENCE, *supra* note 250, at 349–66 (describing location and functional specialization of sensory, motor, and cognitive capabilities in the brain); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 862 (1999) ("[C]hanges in primary visual and auditory cortex occur[] before those in frontal cortex").

[255] *See* PRINCIPLES OF NEURAL SCIENCE, *supra* note 250, at 147–48 (describing the role of myelination of axons in speeding conduction velocity and noting that "conduction in myelinated axons is typically faster than in nonmyelinated axons of the same diameter"); Paus et al., *supra* note 247, at 1908 ("[S]peed of neural transmission depends. . . on structural properties of the connecting fibers, including. . . the thickness of the insulating myelin sheath."); Sowell et al., *Mapping Continued Brain Growth*, *supra* note 247, at 8828.

> [I]t is likely that the visuospatial functions typically associated with parietal lobes are operating at a more mature level earlier than the executive functions typically associated with frontal brain regions. The new findings described here may suggest that cortical thinning or reduction in gray matter density is first accompanied by growth (as seen in the frontal lobes in the postadolescent years) and later by brain shrinkage as the regressive changes overtake the progressive changes (as seen earlier on in the parietal lobes). Perhaps gray matter density reduction associated with growth (presumably increased myelination) is associated with different aspects of improved cognitive functioning than the cortical thinning associated with brain surface contraction (presumably synaptic pruning). It may not be unreasonable to hypothesize that improved accuracy (i.e., improved cognitive task performance) may result from regressive changes such as synaptic pruning, given that unused or less efficient synaptic connections are being pruned away during this age range. On the other hand, increased efficiency (i.e., reduced reaction times) might result from increased myelination observed as brain growth, given that myelinated fibers improve the conduction speed of electrical impulses between various brain regions.

Id.

[256] *See* NAT'L INST. OF MENTAL HEALTH, *supra* note 247, at 2 (noting that MRI image analyses of brain development "suggest[] a wave of brain white matter development that flows from front to back, [while] animal, functional brain imaging and postmortem studies have suggested that gray matter maturation flows in the opposite direction, with the frontal lobes not fully maturing until young adulthood"); Adolf Pfefferbaum et al., *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 511 ARCHIVES NEUROLOGY 874, 884–85 (1994) (reporting steady rise in myelination from birth to about twenty years of age); Sowell et al., In Vivo *Evidence*, *supra* note 247, at 859.

> Post-mortem studies show that myelination, a cellular maturational event, begins near the end of the second trimester of fetal development and extends well into the third decade of life and beyond. Such autopsy studies reveal a temporally and spatially systematic sequence of myelination, progressing from inferior to superior and from posterior to anterior; that is brain stem and cerebellar regions myelinate before cerebral hemispheres, and frontal lobes myelinate last.

Id.

"fight or flight" response.[257] Teenagers rely more heavily on the amygdala and less heavily on the prefrontal cortex than do adults when they respond to stressful stimuli.[258] Many adolescents' reckless or impulsive behavior reflects more instinctual, "gut reactions" reactions to fear-evoking stimuli than their "rational" thought processes.[259] Youths simply do not have all the neural hardware necessary to make adult-quality decisions or to exhibit adult-like behavior.[260] Novel situations and emotional arousal especially challenge adolescents' ability to exercise judgment and self-control and contribute to short-sighted, impulsive decisions and risky behavior. In short, the neuroscience of the brain provides a "hard-science" explanation for the "soft-science" observations that social scientists have made for generations about adolescents' behavior.[261]

C. Adolescent Culpability and Life without Parole (LWOP) Sentences

Roper categorically barred the death penalty for juveniles because of their diminished responsibility. However, *Roper*'s rationale of reduced culpability has much broader applicability for sentencing youths. The reduced criminal responsibility of adolescents is equally diminished when states sentence juveniles to Life Without Parole (LWOP) and the functional equivalents of "virtual life." Although the Supreme Court's capital punishment jurisprudence insists that "death

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[257] *See, e.g.*, PRINCIPLES OF NEURAL SCIENCE *supra* note 250, at 986–93 (describing role of amygdala in mediating between emotions and cognition).

[258] *See* NAT'L INST. OF MENTAL HEALTH, *supra* note 247, at 2 (noting that processing of emotions shifted from the amygdala to the frontal lobe over the course of the teenage years and that "areas of the frontal lobe showed the largest differences between young adults and teens. This increased myelination in the adult frontal cortex likely relates to the maturation of cognitive processing and other 'executive' functions."); Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 195, 198 (1999).

[259] *See* Arredondo, *supra* note 242, at 15 ("Adolescents tend to process emotionally charged decisions in the limbic system, the part of the brain charged with instinctive (and often impulsive) reactions. Most adults use more of their frontal cortex, the part of the brain responsible for reasoned and thoughtful responses. This is one reason why adolescents tend to be more intensely emotional, impulsive, and wiling to take risks than their adult counterparts." (footnote omitted)); Dahl, *supra* note 207, at 64.

> These affective influences are relevant. . . to many day-to-day 'decisions' that are made at the level of gut feelings about what to do in a particular situation (rather than any conscious computation of probabilities and risk value). These gut feelings appear to be the products of affective systems in the brain that are performing computations that are largely outside conscious awareness (except for the feelings they evoke).

Id.

[260] *See* Spear, *supra* note 206, at 447 ("To the extent that transformations occurring in adolescent brain contribute to the characteristic behavioral predispositions of adolescence, adolescent behavior is in part biologically determined.").

[261] *But see* Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 405–06 (2006) (arguing that the simple fact of neuron-anatomical differences between adolescent and adult brains does not compel differences in how the law responds to them); Ward, *supra* note 204, at 460–65 (arguing that neurobiological explanations for adolescent behavior do not provide a basis for punishing them differently than adults).

is different,"[262] no principled bases exist by which to distinguish the diminished responsibility that bars the death penalty from adolescents equally reduced culpability that warrants shorter sentences for all serious crimes.[263]

Lionel Tate graphically illustrates the hazards of disproportionate sentences when states try young offenders in criminal court. A grand jury indicted twelve-year-old Tate for first-degree murder for brutal injuries he inflicted on a six-year-old girl.[264] Once Tate was indicted for a capital crime, Florida law required the state to prosecute him as an adult.[265] Moreover, Florida, like several other states, barred Tate from asserting the common law infancy defense.[266] After conviction of first-degree murder, Florida law required the judge to impose a mandatory sentence of life without parole.[267] Although the Court of Appeals subsequently reversed his conviction because he was not competent to stand trial,[268] it rejected his argument that imposing a mandatory LWOP sentence on a twelve-year-old child was disproportionate or "cruel and unusual punishment."[269]

For decades, the Court has vacillated about whether the Eighth Amendment contains a "narrow proportionality principle" that "applies to non-capital

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[262] *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994 (1991) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

[263] Professor Zimring argues that:

> [d]octrines of diminished responsibility have their greatest impact when large injuries have been caused by actors not fully capable of understanding and self-control. The visible importance of diminished responsibility in these cases arises because the punishments provided for the fully culpable are quite severe, and the reductive impact of mitigating punishment is correspondingly large. But if the doctrine of diminished responsibility means anything in relation to the punishment of immature offenders, its impact cannot be limited to trivial cases. Diminished responsibility is either generally applicable or generally unpersuasive as a mitigating principle.

ZIMRING, *supra* note 237, at 84 (1998).

[264] *See* Tate v. State, 864 So.2d 44, 47 (Fla. Ct. App. 2003).

[265] FLA. STAT. ANN. § 985.225 (LexisNexis 2001 & 2004).

[266] *Tate*, 864 So.2d at 53; *see also* Carter, *supra* note 11, at 688–89 (reporting that several jurisdictions, including Florida, abrogated the common law infancy defense and required criminal courts to sentence twelve and thirteen year old defendants as if they were thirty-five year olds).

[267] FLA. STAT. ANN. § 985.225(1) (LexisNexis 2001 & 2004 Supp.); *see also Tate*, 864 So.2d. at 48; David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 678–81 (2002) (summarizing waiver procedures, rejected plea offers, and failed defense strategy that ultimately led both the prosecutor and judge to recommend that Governor Jeb Bush commute Tate's mandatory LWOP sentence imposed following conviction for murder as manifestly unjust for a twelve-year-old).

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

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

sentences."[270] *Rummel v. Estelle,*[271] held that the Eighth Amendment does not prevent a state from sentencing a three-time property offender to life in prison with the possibility of parole.[272] *Solem v. Helms*[273] held that a sentence of life without possibility of parole for a recidivist convicted of a minor property crime violated the Eighth Amendment.[274] Subsequently, in *Harmelin v. Michigan*[275] a fractured Court rejected a proportionality challenge and upheld a sentence of life without parole for a first-time drug offender.[276]

Justice Kennedy's *Harmelin* concurrence asserted that "[t]he Eighth Amendment proportionality principle also applies to non-capital sentences"[277] and provided the operative test for disproportionate sentence.[278] Four factors determine whether a penalty is "grossly disproportionate"—the primacy of legislative judgments about penalties, the multiplicity of legitimate penal goals, the limited federal judicial role to oversee state criminal sentences, and the importance of objective factors to inform proportionality review.[279] The Court applied those

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[270] *See, e.g.,* Harmelin v. Michigan, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in judgment).

[271] 445 U.S. 263 (1980).

[272] *See id.* at 284–85 (approving Rummel's sentence under a recidivism statute for his third conviction for relatively minor property crimes).

[273] 463 U.S. 277 (1983).

[274] *See id.* at 303. The Court noted that the Eighth Amendment's ban on cruel and unusual punishments "prohibits. . . sentences that are disproportionate to the crime committed," and that the "constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." *Id.* at 284, 286. *Solem* identified three factors that a court must consider to determine whether a sentence is so disproportionate that it violates the Eighth Amendment: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292. Despite the elements of recidivism, the distinguishing factor in *Solem* was the imposition of an LWOP sentence for a minor property crime. *See id.* at 296–97.

[275] 501 U.S. 957 (1991).

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

[277] *Id.* at 997.

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

[279] *See id.* at 998–1001 (Kennedy J., concurring). According to Justice Kennedy,

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

Id. at 1001.

factors in *Ewing v.California*[280] and upheld a sentence of twenty-five years to life for the theft of three golf clubs under California's "three-strike" sentencing law.[281]

Although *Roper* barred the death penalty juveniles, the Court has never addressed the constitutional question of a minimum age for imposing LWOP sentences on children.[282] As a result, lower courts consistently refuse to apply proportionality principles to juvenile LWOP sentences.[283] Although penal proportionality requires a principled relationship between the seriousness of a crime—harm and culpability—and the sentence imposed, courts focus exclusively on the gravity of the crime—harm—rather than the culpability of the actor when they conduct proportionality analyses.[284] A serious crime is serious because of the harm caused, regardless of the culpability of the actor. The Ninth Circuit court in *Harris v. Wright*[285] rejected a constitutional challenge to a mandatory LWOP sentence imposed on a fifteen-year-old convicted of murder.[286] *Harris* held that the Eighth Amendment bars only grossly disproportionate sentences[287] and insisted that:

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

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[280] 538 U.S. 11 (2003).

[281] *See id.* at 30–31 ("We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments.").

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

[283] *See generally* Logan, *supra* note 195, at 703–09 (reviewing cases upholding LWOP sentences on juveniles).

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

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

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

[285] 93 F.3d 581 (9th Cir. 1996).

[286] *See id.* at 584–85.

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

> prison sentence, it raises no inference of disproportionality when imposed on a murderer.[288]

Similarly, the Seventh Circuit court in *Rice v. Cooper* affirmed a mandatory LWOP sentence imposed on an illiterate, mildly retarded sixteen-year-old murderer, even though the statute excluded consideration of any mitigating factors, including youthfulness.[289] The court found no constitutional barrier to imposing a mandatory LWOP sentence as long as the youth possessed the capacity to intend to commit the crime.[290] Defining the seriousness of an offense solely by the harm that was caused excludes any meaningful consideration of reduced culpability or diminished responsibility from a proportionality inquiry.[291]

The adoption of *mandatory* LWOP statutes in many states precludes any consideration of youthfulness as a mitigating factor at sentencing. Several states have abrogated the common-law infancy defense for very young children and removed the only substantive consideration of youthfulness prior to conviction.[292]

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[288] *Id.* at 585 (citation omitted).

[289] Rice v. Cooper, 148 F.3d 747, 752 (7th Cir. 1998).

> A sentence of natural life in prison. . . is exceptionally severe when the defendant is a minor and suffers from deficits of understanding, even if they are not such deficits as would preclude him from being forced to stand trial and from being convicted. But we cannot find any basis in decisions interpreting the Eighth Amendment, or in any other sources of guidance to the meaning of 'cruel and unusual punishments,' for concluding that the sentence in this case was unconstitutionally severe.

Id.

[290] *Id.*

> Rice was morally responsible in the further sense of having sufficient mental capacity to form the intent required to be found guilty of the crime. When the severity of the sentence is not disproportionate to the gravity of the crime, and. . . the defendant is fully responsible in both the moral and the legal sense for the crime, there is no basis for deeming the sentence unconstitutionally severe.

Id. Even though the sentencing judge indicated that he would have preferred to impose a less severe sentence: "The Supreme Court has rejected the argument that mandatory penalties, including life imprisonment without parole. . . are unconstitutional just because. . . they prevent the consideration of mitigating factors." *Id.*

[291] *See* Logan, *supra* note 195, at 703 ("By divorcing 'crime' from offender culpability in proportionality analysis, these courts subscribe to an essentially circular inquiry: because murder, for instance, is a very 'serious' crime in the eyes of the legislature, it can be met with a very 'serious' statutory punishment."); Brink, *supra* note 197, at 1576 ("[E]ven if juveniles cause the same harm as their adult counterparts, they are less culpable, because less responsible, because less normatively competent."). Advocating proportionality analyses that include an evaluation of culpability, Justice Stevens has argued that:

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

In re Stanford, 537 U.S. 968, 969 (2002) (Stevens, J., dissenting).

[292] Carter, *supra* note 11, at 689–92, 696 (reporting that several states—Washington, Florida, North Carolina, Illinois, and Colorado—expressly bar consideration of infancy defense and deem twelve- and thirteen-year old defendants the moral and legal equivalents of adults). Carter reports that

Appellate courts routinely uphold LWOP sentences,[293] reject juveniles' pleas to consider youthfulness as a mitigating factor, and very rarely find such sentences disproportional.[294] The Florida appellate court in *Tate v. State* "reject[ed] the argument that a life sentence without the possibility of parole is cruel or unusual punishment on a twelve-year-old child."[295] The North Carolina Supreme Court in *State v. Green* [296] approved a mandatory LWOP sentence imposed on a thirteen-

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in four of these states, sentencing statutes require judges to impose mandatory sentences without regard to the age of the defendant even if the child was less than fourteen years of age at the time of the crime. *Id.* at 740–41.

[293] *See* Hawkins v. Hargett, 200 F.3d 1279, 1284 (10th Cir. 1999) (recognizing that "age is a relevant factor to consider in a proportionality analysis."); State v. Green, 502 S.E.2d 819, 832 (N.C. 1998) (upholding a life imprisonment sentence for a thirteen-year-old convicted of rape, recognizing that "the chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime," but emphasizing that Green was morally responsible for the crime because he possess sufficient mental capacity to form criminal intent); State v. Pilcher, 655 So.2d 636, 644 (La. Ct. App. 1995) (upholding a LWOP sentence imposed on a fifteen-year-old); Swinford v. State, 653 So.2d 912, 918 (Miss. 1995) (upholding a LWOP sentence imposed on a fourteen-year-old convicted of aiding and abetting murder); State v. Foley, 456 So.2d 979, 984 (La. 1984) (affirming a LWOP sentence imposed on a fifteen-year-old juvenile convicted of rape); HUMAN RIGHTS WATCH, *supra* note 153 (noting that when courts sentence children as adults, "the punishment is all too often no different from that given to adults."); Massey, *supra* note 10, at 1089 (decrying that "once children are prosecuted as adults, they become subject to the same penalties as adults, including life without the possibility of parole.").

[294] *See* Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) (holding that a life sentence for a fourteen-year-old convicted of rape violated the Eighth Amendment); Naovarath v. State, 779 P.2d 944 (Nev. 1989) (finding that a LWOP sentence imposed on a thirteen-year-old convicted of murder constituted cruel and unusual punishment, and granting the right to be considered for parole eligibility at some point). The Court in *Naovarath* did not necessarily endorse a categorical prohibition and emphasized the youth's mental and emotional disabilities as well:

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

Id. at 947. A few courts have reduced youths' lengthy sentences because of their age or immaturity. *See* People v. Dillon, 668 P.2d 697, 726–27 (Cal. 1983) (reducing life sentence imposed on seventeen-year-old convicted of felony murder because he "was an unusually immature youth"); People v. Miller, 781 N.E.2d 300, 308 (Ill. 2002) (rejecting as disproportional an LWOP sentencing imposed on a fifteen-year-old, passive accessory to a felony-murder and holding that "a mandatory sentence of natural life in prison with no possibility of parole grossly distorts the factual realities of the case and does not accurately represent defendant's personal culpability such that it shocks the moral sense of the community.").

[295] Tate, 864 So.2d 44, 54–55 (Fla. Ct. App. 2003). *Tate* cited other recent Florida cases approving LWOP sentences imposed on young offenders, including Phillips v. State, 807 So.2d 713, 717–18 (Fla. Ct. App. 2002) (approving LWOP sentence imposed on fourteen-year-old convicted of murder and rejecting the idea that an LWOP sentence for first-degree murder could ever be so "grossly disproportionate" as to require a finding of unconstitutionality) and Blackshear v. State, 771 So.2d 1199, 1200–02 (Fla. Ct. App. 2000) (approving three consecutive life sentences imposed for three robberies committed when Blackshear was thirteen years of age and noting that "[s]entences imposed on juveniles of life imprisonment are not uncommon in Florida Courts").

[296] 502 S.E.2d 819 (N.C. 1998).

year-old convicted of a first-degree sexual offense.[297] *Green* reasoned that many states transfer young offenders to criminal court,[298] that age and reduced culpability do not bear on "whether a punishment is grossly disproportionate to the crime,"[299] and that the penal purposes of retribution and incapacitation apply even to young offenders.[300] The Mississippi Court of Appeals in *Edmonds v. State* upheld a LWOP sentence imposed on a child for a crime he committed at thirteen years of age.[301] Courts point to the increased use of LWOP sentences for children as evidence that they do "not offend evolving standards of decency so as to constitute cruel and unusual punishment."[302]

Even states that do not formally impose LWOP sentences on juveniles allow judges to accomplish the functional equivalent and create "virtual lifers." After the California Court of Appeal overturned a fifteen-year-old juvenile's invalid LWOP sentence, the trial judge in *People v. Demirdjian* simply resentenced him to two consecutive life sentences.[303] The Tenth Circuit Court in *Hawkins v. Hargett* upheld a sentence totaling 100 years for burglary, rape, and robbery committed by a thirteen year old juvenile.[304]

Courts regularly uphold LWOP sentences and extremely long terms of imprisonment imposed on twelve-, thirteen-, fourteen-, or fifteen-year-old youths.[305] Sixteen percent of juveniles were fifteen years of age or younger when

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[297] *See id.* at 827–28, 831; *see also* Paul G. Morrissey, *Do the Adult Crime, Do the Adult Time: Due Process and Cruel and Unusual Implications for a 13-Year-Old Sex Offender Sentenced to Life Imprisonment in* State v. Green, 44 VILL. L. REV. 707, 738 (1999) ("Green's young age does not lend itself to a per se ruling of unconstitutionality. Once a juvenile of any age is transferred to superior court, charged with a violation of state law and convicted, the juvenile must be 'handled in every respect as an adult.'" (footnote omitted)).

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

[299] *Id.* at 832.

[300] *See id.* at 833 (emphasizing judicial deference to legislative sentencing policy judgments and concluding that "the adult justice system, with its primary goals of incapacitation and retribution, is the appropriate place for violent youthful offenders, such as defendant.").

[301] Edmonds v. Mississippi, 955 So. 2d 864, 895 (Miss. Ct. App. 2006) (rejecting juvenile's request for jury instruction as to sentencing consequences if convicted and finding that LWOP sentence does not need to take account of the degree of culpability of the actor).

[302] State v. Standard, 569 S.E.2d 325, 329 (S.C. 2002); Hawkins v. Hargett, 200 F.3d at 1285 (arguing that "sentencing a thirteen-year-old defendant to mandatory life imprisonment. . . is within the bounds of society's current and evolving standards of decency" and concluding that "modern society apparently condones the severe punishment of individuals who commit serious crimes at young ages.").

[303] 50 Cal. Rptr. 3d 184, 186–89 (Cal. Ct. App. 2006) (noting that California law prohibits sentencing juveniles under sixteen years of age to Life Without Parole, but dismissing the juvenile's reliance on *Roper v. Simmons* and emphasizing the clear difference between death and lesser sentences).

[304] *See* 200 F.3d 1279, 1285 (10th Cir. 1999) (rejecting, on habeas appeal of state conviction, the argument that imposing consecutive sentences for crimes committed as a thirteen-year-old constituted cruel and unusual punishment).

[305] HUMAN RIGHTS WATCH, *supra* note 153, at 1, 7 (criticizing states for incarcerating at least 2,225 youths with LWOP sentences for crimes committed prior to their 18th birthday and advocating abolition of LWOP sentences for juveniles and legislative changes to allow states retroactively to

they committed the crimes for which they received LWOP sentences; among these juveniles, more than half (59%) received an LWOP sentence for their first-ever criminal convictions, and more than one quarter (26%) received an LWOP sentence for a felony murder in which they were a participant, but not the principal.[306] In contrast with the Supreme Court's death penalty jurisprudence, which treats youthfulness as a mitigating factor, trial judges perversely treat youthfulness as an aggravating factor and sentence juveniles more severely than their adult counterparts.[307] Youths convicted of murder are more likely to enter prison with LWOP sentences than are adults convicted of murder.[308]

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resentence them); *see, e.g.*, People v. Moya, 899 P.2d 212, 219–20 (Colo. Ct. App. 1994) (holding that sentence of life imprisonment with possibility of parole after forty years was not cruel and unusual punishment when imposed on juvenile who did not directly cause the death of another, but was convicted of robbery and murder); Brennan v. State, 754 So. 2d 1, 5 (Fla. 1999) (vacating death penalty imposed on sixteen-year-old convicted of murder and reducing sentence to life imprisonment without a possibility of parole); State v. Broadhead, 814 P.2d 401, 402–11 (Idaho 1991) (overruled on other grounds) (affirming life sentence with fixed minimum of fifteen years imposed on fourteen-year-old convicted of murdering his father); State v. Shanahan, 994 P.2d 1059, 1063 (Idaho Ct. App. 1999) (holding that life sentence for murder imposed on fifteen-year-old did not constitute cruel and unusual punishment); State v. Mitchell, 577 N.W.2d 481, 490 (Minn. 1998) (holding that mandatory life imprisonment for fifteen-year-old convicted of first-degree murder was not cruel and unusual punishment); State v. Ira, 43 P.3d 359, 368 (N.M. Ct. App. 2002) (approving sentence of ninety-one and one-half years imposed on fifteen-year-old for rape); State v. Jensen, 579 N.W.2d 613, 624–25 (S.D. 1998) (holding that life imprisonment without possibility of parole for fourteen-year-old convicted of murder is not cruel and unusual punishment); State v. Massey, 803 P.2d 340, 348 (Wash. Ct. App. 1990) (overruled on other grounds) (approving LWOP sentence imposed on youth convicted of committing murder at thirteen years of age).

[306] HUMAN RIGHTS WATCH, *supra* note 153, at 2–3.

[307] For example, in Roper v. Simmons, defense counsel urged the jury to consider his client's youthfulness as a mitigating factor "in deciding just exactly what sort of punishment to make." 543 U.S. 551, 556–58 (2005). In rebuttal, the prosecutor responded: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." *Id.* The prosecutors' view of youthfulness as an aggravating factor is reflected in sentencing practices. *See* SNYDER & SICKMUND, *supra* note 97, at 178 ("[J]uvenile transfers convicted of murder received longer sentences than their adult counterparts. On average, the maximum prison sentence imposed on transferred juveniles convicted of murder in 1994 was 23 years 11 months. This was 2 years and 5 months longer than the average maximum prison sentence for adults age 18 or older, and 8 months longer than the average maximum sentence for under-18 adults convicted of murder."); Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 227, 237 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (comparing the sentences imposed on youths transferred to criminal courts with those of adults and reporting that "transferred youths are sentenced *more* harshly, both in terms of the probability of receiving a prison sentence and the length of the sentences they receive. In other words, we see no evidence that criminal courts recognize a need to mitigate sentences based on considerations of age and immaturity."); Tanenhaus & Drizin, *supra* note 267, at 665 (citing the impact of "get tough" politics and arguing that "[b]y the mid-1990's [sic], youth had ceased to be a mitigating factor in adult court, and instead had become a liability").

[308] HUMAN RIGHTS WATCH, *supra* note 153, at 33 (reporting that judges imposed LWOP sentences on juveniles convicted of murder more frequently than they did adults and concluding that "states have often been more punitive toward children who commit murder than adults. . . [and] age has not been much of a mitigating factor in the sentencing of youth convicted of murder.").

Appellate courts' refusal to conduct proportionality analyses of non-capital sentences poses an even greater challenge than the death penalty for those seeking justice for children.[309] Prior to the 1970s, virtually no states imposed LWOP sentences and most used indeterminate sentencing systems.[310] The "get tough" policies that gathered momentum in the 1970s included both the resumption of capital punishment *and* the adoption of LWOP sentences.[311] During the 1980s and 1990s, states limited judicial sentencing discretion, imposed mandatory minimum sentences, restricted parole eligibility, and adopted LWOP sentences.[312] By 2005, forty-eight states and the District of Columbia had enacted LWOP sentences.[313] Ironically, death penalty abolitionists provided bipartisan support for LWOP statutes as an alternative to capital punishment.[314] The number of people executed has remained relatively constant despite the near-universal adoption of LWOP sentences and judges impose LWOP sentences on many more defendants against whom prosecutors did not seek the death penalty.[315] Thus, LWOP statutes have had a substantial "net-widening" affect that extends well beyond the narrow category of death-eligible defendants.[316] Between 1992 and 2003, the number of inmates on death row increased from 2,575 to 3,374, a thirty-one percent rise, while the number of prisoners serving life without parole sentences grew from 12,453 to 33,633, a 170% increase.[317]

By 2004, 2,225 people were serving LWOP sentences for crimes they committed as children and more youths join those ranks every year.[318] Prior to

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[309] MAUER ET AL., *supra* note 74, at 5–8 (arguing that LWOP defendants do not receive close appellate scrutiny or automatic appointment of counsel on appeal as do those who receive capital sentences: "Unlike defendants in capital cases, persons sentenced to life have no right to post-conviction counsel in most cases."); Massey, *supra* note 10, at 1100–04 (describing courts nearly universal rejection of juveniles' constitutional challenges to LWOP sentences).

[310] MAUER ET AL., *supra* note 74, at 5–8.

[311] *See supra* notes 78–88 and accompanying text (describing politics of "get tough" on crime); Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (reauthorizing the death penalty after the Court's earlier decision in Furman v. Georgia, 408 U.S. 238, 239–40 (1972), which invalidated state death penalty statutes).

[312] *See generally* MAUER ET AL., *supra* note 74, at 1 (attributing the increase in length of prisoners' sentences since the 1970s to policy changes such as "mandatory sentencing, 'truth in sentencing' and cutbacks in parole release."); TONRY, *supra* note 83, at 6–13 (summarizing the rapidity and enormity of changes in sentencing laws beginning in the early 1970s).

[313] Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1842 (2006) [hereinafter *Life and Death*].

[314] *Id.* at 1838 (arguing that death penalty abolitionists promoted life without parole sentences as an alternative to executions); *see also* MAUER ET AL., *supra* note 74, at 5 (discussing the increased imposition of LWOP sentences as an alternative to the death penalty).

[315] *Life and Death*, *supra* note 313, at 1845–51 (attributing the decline in capital sentences to decreased public and jury support for the death penalty because of greater sense of safety associated with a reduction in violent crime).

[316] *Id.* at 1839 ("Twenty years of experience with life-without-parole statutes shows that although they have only a small effect on reducing executions, they have doubled and tripled the lengths of sentences for offenders who never would have been sentenced to death or even been eligible for the death penalty.").

[317] *Id.* at 1839, 1851–52.

[318] HUMAN RIGHTS WATCH, *supra* note 153, at 1.

1980, children rarely received LWOP sentences; judges now sentence youths to LWOP three times as frequently as they did in 1990.[319] The average age at which juveniles committed the crimes for which courts impose LWOP sentences is sixteen years, but children as young as thirteen years of age receive such sentences.[320] A much larger, but unknown, number of convicted juveniles serve the functional equivalent of "virtual life" sentences. The vast majority of juveniles who received an LWOP sentence had no prior adult or juvenile convictions.[321] Significantly, states may not impose the death penalty on felony-murderers who did not intend to kill or actually participate in the killing.[322] By contrast, states convicted about one-quarter or more of juveniles who received an LWOP sentence for felony-murder.[323] A survey in Michigan reported that nearly half the juveniles serving LWOP sentences were convicted for aiding-and-abetting their crimes, rather than as principals.[324]

Judges impose LWOP sentences on black juveniles at a rate about ten times greater than they do white youths, and Blacks comprise a substantial majority of all youths serving LWOP sentences.[325] In Michigan, more than two-thirds (69%) of all juveniles serving LWOP sentences are Black, despite comprising only fifteen percent of the youth population.[326] The racial disparity is the cumulative consequence of discretionary decisions at every stage of the juvenile and criminal justice systems that treat black youths more harshly.[327]

D. Youthfulness as a Mitigating Factor— A "Youth Discount" at Sentencing

The Constitution does not *require* state legislators to enact or courts to formally recognize youthfulness as a mitigating factor in sentencing. But, they *should* explicitly adopt and apply such a principle as part of a fair and just youth

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[319] *Id.* at 2.

[320] *Id.* at 25 (extrapolating that about 354 youths are serving LWOP sentences for crimes committed at age fifteen or younger).

[321] *Id.* at 28.

[322] Enmund v. Florida, 458 U.S. 782, 788 (1982) (holding the death penalty unconstitutional when imposed on a felony murder defendant who did not kill, attempt to kill or intend to kill).

[323] HUMAN RIGHTS WATCH, *supra* note 153, at 27–28 (reporting that other studies of juveniles sentenced to LWOP found that thirty-three to fifty percent were convicted of felony murder).

[324] AM. CIVIL LIBERTIES UNION OF MICHIGAN, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 4 (2004), *available at* http://www.aclumich.org/pubs/juvenile lifers.pdf [hereinafter ACLU].

[325] HUMAN RIGHTS WATCH, *supra* note 153, at 29 (reporting that sixty percent of youths serving life without parole sentences are black, twenty-nine percent are white, and "black youth nationwide are serving life without parole sentences at a rate that is ten times higher than white youth. . .").

[326] ACLU, *supra* note 324, at 10.

[327] *See supra* notes 129–43 and accompanying text; MALES & MACALLAIR, *supra* note 165, at 7–8 (reporting that judges are eight times more likely to sentence black youths than white youths to imprisonment); JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 31, at 12–14 (documenting the cumulative effect of racially disparate decisions at each stage of the juvenile justice system); POE-YAMAGATA & JONES, *supra* note 133, at 16–25 (finding disproportionate minority overrepresentation at each stage of the juvenile justice system).

sentencing policy. The principle of "youthfulness as a mitigating factor" applies equally to capital and non-capital sentences. It acknowledges adolescents' reduced culpability without excusing their criminal conduct.[328] It holds adolescents accountable yet imposes sentences proportional to their diminished responsibility. Children's crimes are not the moral equivalents of those of adults, even if they produce the same harms.[329] A sentencing policy that holds juveniles accountable, manages the risks they pose to others, and provides them with "room to reform," does not irredeemably destroy their lives.[330] As the Supreme Court repeatedly has recognized,

> Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.[331]

Consequently, sentencing policies should recognize this simple, developmental truism and protect young people from the full penal consequences of their bad decisions.[332]

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[328] Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 291, 309 (Tomas Grisso & Robert G. Schwartz eds., 2000) (arguing that adolescents' choices "reflect immaturity and inexperience and are driven by developmental factors that will change in predictable and systemic ways. A legal response that holds young offenders accountable, while recognizing that they are less culpable than their adult counterparts, serves the purposes of criminal punishment without violating the underlying principle of proportionality."); Scott & Grisso, *supra* note 199, at 174 (arguing that youthfulness does not excuse criminal liability, but "the evidence disputes the conclusion that most delinquents are indistinguishable from adults in any way that is relevant to culpability, and supports the creation of two distinct culpability categories—although, of course, there will be outlyers [sic] in both groups. In short, the predispositions and behavioral characteristics that are associated with the developmental stage of adolescence support a policy of reduced culpability for this category of offenders."); Zimring, *supra* note 195, at 278 ("[E]ven after a youth passes the minimum threshold of competence that leads to a finding of capacity to commit crime, the barely competent youth is not as culpable and therefore not as deserving of a full measure of punishment as a fully qualified adult offender").

[329] *See* ZIMRING, *supra* note 237, at 144 ("[W]henever a young offender's need for protection, education, and skill development can be accommodated without frustrating community security, there is a government obligation to do so."); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 99 (1997); Scott & Grisso, *supra* note 199, at 182 ("Subjecting thirteen-year-old offenders to the same criminal punishment that is imposed on adults offends the principles that define the boundaries of criminal responsibility.").

[330] *See* ZIMRING, *supra* note 237, at 81–83, 142–45; Zimring, *supra* note 195, at 283–84.

[331] Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (citation omitted) (quoting Eddings v. Oklahoma 455 U.S. 104, 115–16 (1982)).

[332] *See* Scott, *supra* note 212, at 1656 ("[I]f the values that drive risky choices are associated with youth, and predictably will change with maturity, then our paternalistic inclination is to protect

Roper decided adolescents' diminished responsibility on a categorical basis rather than try to assess each juvenile's culpability individually. Despite the Court's general preference for individualized culpability assessments, *Roper* adopted a categorical prohibition because "the differences between juvenile and adult offenders are too well marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[333] The Court feared that a heinous crime would overwhelm a jury's ability to consider youthfulness as a mitigating factor.[334] *Roper* also concluded that neither clinicians nor jurors could reasonably distinguish between the vast majority of immature juveniles who deserved leniency and the very rare youth who might be sufficiently culpable to be death-eligible.[335]

Accordingly, a bright-line rule that categorically treats youthfulness as a mitigating factor is preferable to a system of guided discretion. A rule that occasionally "under-punishes the rare, fully-culpable adolescent still will produce less aggregate injustice than a discretionary system that improperly and harshly sentences many more undeserving youths."[336] *Roper* endorsed a categorical bright-line rule even though it recognized individual variability in culpability:

> The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude the age at which the line for death eligibility ought to rest.[337]

A decision to treat adolescents' reduced criminal responsibility categorically represents a normative judgment about deserved punishment and rests on a moral foundation, not a scientific one.[338] Immature judgment, impulsiveness, and lack of

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the young decisionmaker . . .from his or her bad judgment."); *see also* ZIMRING, *supra* note 237, at 96; ZIMRING, *supra* note 195, at 142–45.

[333] Roper v. Simmons, 543 U.S. 551, 553–54 (2005).

[334] *Id.* at 572–73 (reasoning that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating argument based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.").

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

[336] *Id.* ("If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty.").

[337] *Id.* at 574.

[338] *See, e.g.*, Scott & Steinberg, *supra* note 195, at 800–02, 813 (arguing that in contemporary criminal law theory, penal proportionality may reflect either the quality of an actor's choice or what that choice indicates about the actor's moral character; the former focuses on the blameworthiness of the quality of choices made, while the latter focuses on what that choice indicates about the actor's bad character.); *see also* R. A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345,

self-control are normal developmental characteristics of adolescents that reduce criminal responsibility. Because youthfulness systematically reduces culpability, all young offenders should receive categorical reductions of adult sentences.[339] Formalizing youthfulness as a mitigating factor represents a social, moral, and criminal policy judgment about diminished responsibility and asserts that *no* adolescent *deserves* to be sentenced as severely as an adult convicted of a comparable crime.[340]

A categorical bright-line rule for mitigation is preferable to individualized sentencing decisions for two reasons.[341] The first is the inability either to define or identify qualities of adult-like culpability among offending youths.[342] Development is highly variable; a few youths may be mature prior to reaching eighteen years of age while others do not attain maturity even as adults.[343] Despite developmental differences, clinicians lack the tools to assess an offender's impulsivity, foresight, and preference for risk in ways that relate to maturity of judgment and criminal

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367–68 (1993); Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note,* 3 OHIO ST. J. CRIM. L. 397, 405 (2006) ("The criteria for responsibility are behavioral and normative, not empirically demonstrable states of the brain."); MICHAEL MOORE, *Choice, Character, and Excuse*, *in* PLACING BLAME 548, 574–92 (1997); Ward, *supra* note 204, at 461.

[339] *See* Morse, *supra* note 338, at 15; Scott & Steinberg, *supra* note 195, at 801 ("Because these developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults under conventional criminal law conceptions of mitigation.").

[340] *See, e.g.*, Jeffrey Fagan, Atkins, *Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. Rev. 207, 242 (2003) (arguing that adolescence, per se, is a mitigating status because youths' developmental deficits "are not the deficits of an atypical adolescent but are 'normal' developmental processes common to all adolescents. To the degree that there is variation among adolescents, whether offenders or not, these differences are predictable and subject to a variety of contextual, circumstantial, and intra-individual factors. In this jurisprudence, the crimes of adolescents are a function of immaturity, compared to the crimes of adults, which are the acts of morally responsible, yet possibly cognitively and emotionally deficient, actors.").

[341] Brink, *supra* note 197 at 1578 (arguing that age provides an imperfect boundary marker of immaturity and proposing the use of age as a rebuttable presumption of incapacity to achieve individualized justice).

[342] *See* Stanford v. Kentucky, 492 U.S. 361, 396–99 (1989) (overruled on unrelated grounds) (Brennan, J., dissenting); HUMAN RIGHTS WATCH, *supra* note 153, at 48 (summarizing research that concludes that while "the rate at which the adolescent brain acquires adult capabilities differs from individual to individual. . . researchers have identified broad patterns of changes in adolescents that begin with puberty and continue into young adulthood."); Morse, *supra* note 338, at 62 (observing that "there are no reliable and valid measures" of culpability that can accurately distinguish adolescents from adults).

[343] *See* Brink, *supra* note 197, at 1570 (2004) (arguing that the development of normative competence is part of the maturation process from childhood to adulthood and that "[t]hough not all individuals mature at the same rate, and some individuals never mature, this sort of normative maturation is strongly correlated with age. The reduced normative competence of juveniles provides a retributive justification for reduced punishment for juveniles."); Fagan, *supra* note 340, at 209 ("[T]he age at which adolescents realize the developmental competencies that constitute culpability will vary: a significant number of juveniles will be immature and lacking in the developmental attributes of culpability well before age eighteen, and some may still lack these competencies after age eighteen. . ."); Zimring, *supra* note 237, at 241 ("[T]he range of individual variation among youths of the same age is notoriously large.").

responsibility.[344] Because the vast majority of juveniles are less culpable than adults, the inability to define and measure immaturity or validly identify the few responsible ones would introduce a systematic bias toward punishing less-culpable youths.[345] A categorical approach reduces the risk of error or bias.[346] Every other area of law use age-based lines to approximate the level of maturity required for particular activities—e.g., voting, driving, and consuming alcohol—and restricts youths because of their immaturity and inability to make competent decision.[347]

The second reason to treat youthfulness categorically is the decision-maker's inability to weigh fairly the abstract consideration of immaturity against the reality of a horrific crime.[348] *Roper* recognized that "the brutality or cold-blooded nature

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[344] Roper v. Simmons, 543 U.S. 551, 573 (2005) (emphasizing that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."); Zimring, *supra* note 237, at 241 (noting that we lack "good data on the social skills and social experience of adolescent offenders. The important elements of penal maturity have yet to be agreed upon, let alone assessed in large numbers of cases.").

[345] *See, e.g.*, Fagan, *supra* note 340, at 248, 253 ("The difficulties and statistical error rates in measuring immaturity for juveniles invite complexity in the consistent application of the law"). Fagan contends that:

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

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

[346] Scott & Steinberg, *supra* note 195, at 836–37 ("[W]e currently lack the diagnostic tools to evaluate psycho-social maturity reliably on an individualized basis or to distinguish young career criminals from ordinary adolescents who, as adults, will repudiate their reckless experimentation. Litigating maturity on a case-by-case basis is likely to be an error-prone undertaking, with the outcomes determined by factors other than immaturity.").

[347] *See, e.g.*, *Roper*, 543 U.S. at 581–86 (providing statutory appendices listing limits on juveniles' rights to drink, drive, vote, marry, and contract as a result of immaturity); FRANKLIN ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENTS 35–36 (1982); Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 89–91 (1999) (analyzing the inconsistency between punishing adolescents like adults while denying their autonomy claims in areas outside of the criminal law); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying An Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1268 (2000) (arguing that presumption of decisional incapacity pervades most areas of law and conflicts with model of adolescent autonomy); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1608, 1611 (1992); Zimring, *supra* note 195 at 287.

[348] Stanford v. Kentucky, 492 U.S. at 398 (Brennan, J., dissenting) (arguing that "[i]t is thus unsurprising that individualized consideration at transfer and sentencing has not in fact ensured that juvenile offenders lacking an adult's culpability are not sentenced to die.").

of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[349] The Court rightly feared that jurors could not adequately distinguish between causing harm and the moral responsibility of the person for causing the harm and they would not weigh diminished responsibility sufficiently.[350] In surveys of jurors, the heinousness of a crime almost invariably trumped a youth's immaturity when they decided whether to impose the death penalty.[351]

We can construct a categorical response to youths' diminished responsibility by offering a "youth discount"—"fractional reductions of sentences based on age-as-a-proxy-for culpability."[352] Eligibility for the "youth discount" can be established with only a birth certificate. A "youth discount" enables young offenders to survive serious mistakes with their life chances intact.[353] It recognizes that same-length sentences exact a greater "penal bite" from younger offenders than older ones.[354]

A "youth discount" is a sliding scale of diminished responsibility that recognizes the greatest immaturity among the youngest offenders.[355] Discounts are

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[349] *Roper*, 543 U.S. at 573.

[350] *Id.* at 572–73.

[351] Brink, *supra* note 197, at 1581; Simona Ghetti & Allison Redlich, *Reactions to Youth Crime: Perceptions of Accountability and Competency*, 19 BEHAV. SCI. & L. 33, 45–47 (2001).

[352] *See* Feld, *supra* note 329, at 121–23 (1997) (providing rationales for a categorical "youth discount"); Joseph L. Hoffman, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 233 (1989) (describing age as an imperfect proxy for a complex of factors, "includ[ing] maturity, judgment, responsibility, and the capability to assess the possible consequences of one's conduct," that constitute culpability). *But see* ZIMRING, *supra* note 195, at 149–50 (objecting to categorical youth discount because "age is an incomplete proxy for levels of maturity during the years from age 12 to 18. The variation among individuals of the same age is great, and individualized determinations of immaturity are thus superior to averages based on aggregate patterns.").

[353] *See* ZIMRING, *supra* note 195, at 89–96; Franklin E. Zimring, *Background Paper*, *in* CONFRONTING YOUTH CRIME: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS 27, 66–69 (1978).

[354] *See* Andrew von Hirsch, *Proportionate Sentences for Juveniles: How Different than for Adults?*, 3 PUNISHMENT & SOC'Y 221, 227 (2001) ("A given penalty is said to be more onerous when suffered by a child than by an adult. Young people, assertedly, are psychologically less resilient, and the punishments they suffer interfere more with opportunities for education and personal development."(citation omitted)); *see also* Arredondo, *supra* note 242, at 19 ("Because of differences in the experience of time, any given duration of sanction will be experienced subjectively as longer by younger children"); Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y 1, 21–22 (2002) (describing the substantive quality of punishment adolescents experience in adult incarceration as far harsher than the sanctions they experience as delinquents); Feld, *supra* note 352, at 112–13 (contending that "youths experience objectively equal punishment subjectively as more severe").

[355] Feld, *supra* note 329, at 119–21; *see also* Scott & Steinberg, *supra* note 195, at 837 ("[A] systematic sentencing discount for young offenders in adult court[] might satisfy the demands of proportionality."); Tanenhaus & Drizin, *supra* note 267, at 698 ("We endorse Feld's proposals [for a youth discount] because they respect the notion that juveniles are developmentally different than adults and that these differences make juveniles both less culpable for their crimes and less deserving

taken from the appropriate sentence an adult offender otherwise would receive. On a sliding scale of diminished responsibility, a fourteen-year-old offender, for example, might receive a maximum sentence that is less than twenty-five percent of the adult sentence and a sixteen-year-old defendant might receive a maximum sentence no more than half the adult length. Deeper discounts for younger offenders correspond with their greater developmental differences in judgment and self-control.[356] And, of course, the rationale for a "youth discount" precludes LWOP and other "virtual life" sentences.[357] Apart from adolescents' diminished responsibility, the likelihood of recidivism decreases with age and the costs of confining geriatric inmates increase substantially.[358] States can achieve their penal goals by sentencing youths to no more than twenty-five or thirty years. Because young offenders will eventually return to the community, the state has a responsibility to provide resources for reform for youths to take advantage of as they mature.

E. Restoring Rationality after Legislative Over-Reaction

The Supreme Court's narrow proportionality review and the limits of federalism doom to failure juveniles' constitutional challenges to LWOP sentences. Legislators experienced the paroxysms of punitiveness, wrote the current harsh juvenile waiver and criminal sentencing laws, and they can change them. Public officials must restore rationality to the justice system and enact a youth discount as part of broader juvenile sentencing reforms. Public opinion

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of the harsh sanctions, which now must be imposed on serious and violent adult offenders."); von Hirsch, *supra* note 354, at 226 (arguing for categorical penalty reductions based on juveniles' reduced culpability).

> While actual appreciation of consequences varies highly among youths of the same age, the degree of appreciation we should demand depends on age: we may rightly expect more comprehension and self-control from the 17-year-old than a 14-year-old, so that the 17-year-old's penalty reduction should be smaller. Assessing culpability on the basis of individualized determinations of a youth's degree of moral development would be neither feasible nor desirable.

Id.; Zimring, *supra* note 195, at 288 (arguing that the penal law of youth crime should develop "a sliding scale of responsibility based on both judgment and the practical experience of impulse management and peer control").

[356] Brink, *supra* note 197, at 1572 (noting that "a juvenile is less responsible for her crime than her adult counterpart is for the same crime and that, all else being equal, the younger the juvenile the less responsible she is for her crime."); Zimring, *supra* note 195, at 288 ("[A]dolescents learn their way toward adult levels of responsibility gradually. This notion is also consistent with. . . long periods of diminished responsibility that incrementally approach adult standards in the late teens. . . [and with] less-than-adult punishments that gradually approach adult levels during the late teen years.").

[357] HUMAN RIGHTS WATCH, *supra* note 153, at 8 (recommending that states abolish LWOP sentences for crimes committed by juveniles); MAUER ET AL., *supra* note 74, at 32 (recommending categorical exemption of juveniles from life sentences because they "represent an entire rejection of the longstanding traditions of our treatment of juvenile offenders, which is that rehabilitation should be considered as a primary objective when sentencing children.").

[358] ACLU, *supra* note 324, at 19; HUMAN RIGHTS WATCH, *supra* note 153, at 8.

supports policies to rehabilitate serious young offenders rather than simply to incarcerate them for longer periods as a strategy to reduce future crime.[359] The combination of positive public support for less punitive policies *and* low crime rates may strengthen progressive legislators' resolve to restore rationality to youth crime policies.[360]

A few state legislatures have taken some initial steps to restore rationality to youth sentencing policy.[361] While some states continue to enact punitive provisions,[362] more states are encouraging reforms that address sentencing juveniles as adults, eliminating mandatory LWOPs for juveniles, reducing the transfer of youths to criminal court, and raising the age of juvenile court jurisdiction.

1. Sentencing Juveniles as Adults

In 2006, Colorado partially recognized adolescents' diminished responsibility and eliminated mandatory LWOP sentences for juveniles.[363] This new law is a step in the right direction, but it only makes youths eligible for parole consideration after serving a minimum term of forty years and it does not apply retroactively to the two dozen juveniles currently serving LWOP sentences, one-third of whom

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[359] BARRY KRISBERG & SUSAN MARCHIONNA, ATTITUDES OF U.S. VOTERS TOWARD YOUTH CRIME AND JUVENILE JUSTICE (2007), *available at* http://www.nccd-crc.org/nccd/pubs/zogby_feb07.pdf (reporting strong public support for rehabilitation as a strategy to prevent and reduce juvenile crime); Brink, *supra* note 197, at 1585 (noting that "there is support for treating youthful offenders as juveniles and for sentencing that is rehabilitative in nature."); Daniel S. Nagin et al., *Public Preferences for Rehabilitation versus Incarceration of Juvenile Offenders: Evidence from a Contingent Valuation Survey*, 5 CRIMINOLOGY & PUB. POL'Y 627, 644 (2006) (concluding that "members of the public are concerned about youth crime and want to reduce its incidence, but they are ready to support effective rehabilitative programs as a means of accomplishing that end—and indeed favor this response to imposing more punishment through longer sentences.").

[360] Donna M. Bishop, *Public Opinion and Juvenile Justice Policy: Myths and Misconceptions*, 5 CRIMINOLOGY & PUB. POL'Y 653, 656–57 (2006) (summarizing survey results of public opinion regarding support for rehabilitation); Francis T. Cullen, *It's Time to Reaffirm Rehabilitation*, 5 CRIMINOLOGY & PUB. POL'Y 665, 666–68 (2006) (reporting continuing public support for the idea of rehabilitation and that rehabilitation provides a cultural and criminological alternative to just locking up offenders); Nagin et al., *supra* note 359, at 645–46.

[361] *See generally* NAT'L JUVENILE DEFENDER CTR., 2006 STATE JUVENILE JUSTICE LEGISLATION (2007), *available at* ht-tp-://-www-.nj-dc-.info-/pdf-/2006-%20-State-%20-JJ-%20-Legislation-.pdf (summarizing juvenile justice legislation introduced in 2006).

[362] *See, e.g.*, H.B. 88, 24th Leg., Gen. Sess. (Alaska 2005) (providing for automatic transfer of juveniles 16 years of age or older charged with first degree weapon offense); H.B. 1372, Reg. Sess. (La. 2006) (substitute for HB 78) (amending Louisiana Statute Annotated—Children's Code Article 305 to permit prosecutors to indict and "direct file" juveniles fifteen years of age or older in criminal court and allowing judges to sentence juvenile to any punishment authorized for an adult).

[363] H.B. 06-1315, 65th Leg., Gen. Sess. (Colo. 2006) *available at* http://www.leg.-state.-com.-us/clics2006a/csl.nsf/fsbillcont3/A2B8131796BF3E39872570F900610C87?Open&file=1315_enr.pdf (findings by the legislature included that "[b]ecause of their level of physical and psychological development, juveniles who are convicted as adults may, with appropriate counseling, treatment services, and education, be rehabilitated to a greater extent than may be possible for adults. . . [and finding] that it is not in the best interests of the state to condemn juveniles. . . to a lifetime of incarceration without the possibility of parole.").

were convicted for felony-murder.[364] Pennsylvania enacted a law to prohibit courts from sentencing juveniles convicted of certain felony sex offenses to a term exceeding forty years.[365] Legislation in Florida, that failed to pass, proposed that juveniles younger than fifteen years of age who received sentences of life imprisonment would be eligible for parole release consideration after serving a minimum of eight years.[366] Legislation introduced in Michigan in 2006 would eliminate LWOP sentences for juveniles, provide for parole eligibility after serving a minimum of ten years, and require the parole authority to consider the offender's "age and maturity" and degree of participation in the offense.[367] Washington eliminated mandatory minimum sentences for youths tried as adults.[368]

2. Waiver of Jurisdiction

Some states have revised waiver provisions to reduce the scope of prosecutorial "direct file" or excluded offense laws. For example, Delaware amended an automatic waiver statute that previously excluded all youths charged with armed robbery to exclude only youths charged with armed robbery who had one or more prior felony adjudications.[369] Illinois recognized the racially disparate impact of drug offense exclusion laws, shifted drug crimes from a mandatory to a presumptive transfer process, and allowed juvenile court judges to make individualized waiver decisions.[370] The Mississippi house passed a bill to increase the minimum age at which a youth could be waived from thirteen to fifteen years

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[364] *Id.* amending COLO. REV. STAT. § 18–1.3–401 (b)(I) (providing that youths tried and convicted in criminal court shall be sentenced "to a term of life imprisonment with the possibility of parole after serving a period of forty calendar years" and remain on parole for the rest of the person's life).

[365] S.B. 944, Gen. Sess. (Pa. 2005) (prohibiting courts from sentencing a person convicted of certain felony sex offenses committed before eighteen years of age for a term of imprisonment exceeding forty years).

[366] S.B. 616, Gen. Sess. (Fla. 2006) (this bill died in the Senate before the committee on Criminal Justice).

[367] H.B. 5512–14, 94th Leg. Gen. Sess. (Mich. 2006) and S.B. 941, 942, 943, 94th Leg. Gen. Sess. (Mich. 2006). Senate bill 942 prohibits judges from imposing life without parole sentences on offenders convicted of crimes committed when less than eighteen years of age, providing for parole review after serving ten years of the sentence, and requiring parole board to consider "[t]he individual's age and level of maturity... the degree of participation in the offense... [and] prior juvenile or criminal history."

[368] H.B. 1187, 59th Leg., Reg. Sess. (Wash. 2005) (codified as WASH. REV. CODE ANN. § 9.94A.540 (2007)) (providing that the mandatory minimum sentencing provisions "shall not apply to juveniles tried as adults...").

[369] *See* DEL. CODE ANN. TIT. 10, § 921(2)(a) (2005) (amended by S.B. 200, 142nd Leg., Gen. Sess. (Del. 2005)).

[370] *See* 705 ILL. COMP. STAT. (2005) 405/5–805 (amended by S.B. 283, 93rd Leg., Gen. Sess. (Ill. 2005)). The Illinois Juvenile Justice Initiative praised the new law for granting allowing judges to make individualized waiver decisions for recognizing that minority youths comprised 99 percent of all "automatic transfers" and that two-thirds of those transfers were for low-level drug offenses. ELIZABETH CLARKE & LIZ KOOY, ILLINOIS LAW JUDGE GIVES JUDGES MORE DISCRETION OVER YOUTH CHARGED AS ADULTS 2 (Juvenile Justice Initiative), *available at* http://www.jjustice.org/pdf/Final%20Transfer%20Press%20Release%20Aug%2005.pdf.

of age.[371] Washington excludes sixteen- or seventeen-year-old youths charged with "violent offenses" from juvenile court jurisdiction.[372] A proposed law would restore juvenile court jurisdiction over youths acquitted of excluded offenses, but convicted of lesser, non-excluded offenses.[373]

3. Age of Juvenile Court Jurisdiction

State laws establish the maximum age of juvenile court jurisdiction and the vast majority extend through seventeen years of age.[374] Three states—Connecticut, New York, and North Carolina—set the maximum age of juvenile court jurisdiction at fifteen years of age, and an additional ten states set the jurisdictional maximum at sixteen years of age.[375] Significantly, several states with delinquency maximum age jurisdiction below the age of majority are considering *raising* their juvenile courts' delinquency jurisdiction.[376] A decade ago, Wisconsin lowered the age of jurisdiction from seventeen to sixteen.[377] A bill introduced in the 2005 Wisconsin legislature would undo that change, redefine an "adult" as a person eighteen years of age or older, and raise the age of juvenile court jurisdiction.[378] Legislation introduced in Illinois in 2005 to raise the age of juvenile court jurisdiction from sixteen to seventeen years of age passed in the Senate.[379]

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[371] H.B. 1090, Gen. Sess. (Miss. 2006) (proposing raising the minimum age of transfer and adult prosecution from thirteen- to fifteen, enactment of "blended sentencing" provisions, and eliminating prohibitions against parole eligibility).

[372] *See* WASH. REV. CODE ANN. § 13.04.030 (excluding sixteen and seventeen year old youths with certain prior records and charged with "violent offenses" as defined in RCWA 9.94A.030 from juvenile court jurisdiction).

[373] *See* H.B. 2061, 59th Leg., Gen. Sess. (Wash. 2005) (reinstating juvenile court jurisdiction over excluded youths acquitted of excluded offense or convicted of lesser, non-excluded offense). This type of legislation provides an important restraint on prosecutor's tendency to "over-charge" youths with excluded offenses who then are convicted or plead to lesser, non-excluded offenses. Even though the prosecutor's initial assessment of the seriousness of the youths' crime proved erroneous, most states do not return youths to juvenile court but require criminal courts to sentence them as adults. *See, e.g.*, State v. Morales, 694 A.2d 758, 763–64 (Conn. 1997) (retaining criminal court jurisdiction over excluded youth convicted of non-excluded lesser offense because "conferring postverdict benefits, such as more lenient sentencing and erasure of records, on a defendant who, in open court has been tried as an adult and convicted of a serious [albeit non-excluded] crime would damage society's perception of the fair administration of justice."); State v. Behl, 564 N.W.2d 560, 568–69 (Minn. 1997) (denying equal protection challenge to sentencing as adult after acquittal on excluded offense even though the state could assert no rational basis for continued exclusion).

[374] SNYDER & SICKMUND, *supra* note 97, at 103 (listing maximum age for juvenile court jurisdiction in each state in 2004, as well as minimum agency for delinquency jurisdiction, and maximum age of dispositional jurisdiction).

[375] *Id.*

[376] *See infra* notes 377–86 and accompanying text.

[377] WIS. STAT. § 48.44 (1996).

[378] Assemb.B. 82, Leg., Gen. Sess. (Wis. 2005) ("This bill raises from 17 to 18 the age at which a person who is alleged to have violated a criminal law is subject to the procedures specified in the Criminal Procedure Code.").

[379] S.B. 458, 94th Gen.Assem., Reg. Sess. (Ill. 2005) (changing age of juvenile court jurisdiction from under seventeen to under eighteen).

Legislators in New Hampshire[380] and Michigan[381] introduced bills to increase the age of jurisdiction. A Vermont bill would raise the age of dispositional jurisdiction from nineteen to twenty-one years of age, give juvenile courts a longer time to treat young offenders, and reduce pressures to waive them.[382]

North Carolina mandated its Sentencing and Policy Advisory Commission to study "youthful offenders" between sixteen and twenty-one years of age, to submit a report to the 2007 legislature, and to propose legislative changes.[383] The Report recommended to raise the age of juvenile court jurisdiction from those under sixteen years of age to those under eighteen years of age and to create a "youthful offender" sentencing system for young adult offenders convicted in criminal courts of misdemeanors and low-level felonies.[384] In recommending that North Carolina join the other thirty-seven jurisdictions that set the age of jurisdiction at eighteen, the Commission emphasized that:

> the slow maturation process of juveniles and the concomitant need for society to allow for some second chances for this group while providing them with a balance of punishment and treatment in a separate and more rehabilitative system. A significant volume of scientific evidence on stages of human development points to immaturity and its effect on reduced criminal culpability in youth up to age 18 and beyond, well into their 20's. At least four areas of developmental immaturity may bear directly on the criminal culpability of youth: impaired risk perception, foreshortened time perspective, greater susceptibility to peer influence, and reduced capacity for behavioral controls.[385]

Because "kids are different," the Commission proposed that juveniles receive age-appropriate programs and rehabilitation to enhance "moral reasoning, problem

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[380] H.B. 627, 159th Sess. (N.H. 2006) (changing age of minority for purposes of delinquency proceedings from seventeen to eighteen). H.R. 627 was passed and took effect on July 1, 2007. *See* N.H. REV. STAT. § 169-B:4(V)(C) (2007).

[381] H.B. 4851, 93rd Leg., Reg. Sess. (Mich. 2005) (raising the age of juvenile court jurisdiction to include persons under eighteen years of age).

[382] H.B. 52, Reg. Sess. at § 5504(b)(2) (Vt. 2007) (proposing to raise the age of jurisdiction of a delinquent "up to the age of 21 if the court finds that retaining jurisdiction would be in the best interest of the child.").

[383] H.B. 1723, Reg. Sess. at §§ 34.1, 34.2 (N.C. 2006) (requesting the North Carolina Sentencing and Policy Advisory Commission to "study issues related to the conviction and sentencing of youthful offenders aged 16 to 21 years, to determine whether the State should amend the laws concerning these offenders". . . and to submit a final report with any recommendations by March 1, 2007); *see* N.C. SENT'G AND POL'Y ADVISORY COMM'N, REPORT ON STUDY OF YOUTHFUL OFFENDERS PURSUANT TO SESSION LAW 2006-248, SECTIONS 34.1 AND 34.2 (2007) [hereinafter REPORT ON STUDY OF YOUTHFUL OFFENDERS], *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/yo_20finalreporttolegislature.pdf.

[384] REPORT ON STUDY OF YOUTHFUL OFFENDERS, *supra* note 383, at 3.

[385] *Id.* at 8.

solving, social skills, and impulse control" to enable them successfully to reintegrate into the community.[386]

VI. CONCLUSION

The juvenile court emerged in response to social structural changes a century ago and spread across the nation during the first two decades of the twentieth century. Economic modernization, the assimilation of immigrants, and the social construction of childhood provided the cultural context in which Progressives created new institutions to control children. During the second half of the twentieth century, the issue of race has shaped juvenile justice policies and evoked two contradictory responses. Initially, racial injustice impelled the Warren Court to enhance civil rights and to protect minority citizens. *Gault* gave delinquents some procedural rights but *McKeiver* forestalled procedural parity with criminal defendants.

By the 1980s and early 1990s, macro-structural, economic, and racial demographic changes led to an urban black underclass that lives in concentrated poverty and social isolation. The crack cocaine epidemic produced a sharp rise in gun violence and youth homicides among urban black males. Politicians campaigned to "get tough" on youth crime, which the public understood as a code word to treat young black males more harshly.[387] Punitive transfer laws and harsh criminal sentences reflect a cultural inversion of Progressives' conception of youths as innocent and dependent children into our contemporary vision of adult-like youthful "super-predators." Public officials have forgotten that delinquents are children and differ from adults in culpability. For two decades, states have transferred more and younger children to criminal court for prosecution as adults. Politicians' sound bites—"adult crime, adult time" or "old enough to do the crime, old enough to do the time"—characterize youths as criminally responsible, ignore

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[386] *Id.* at 8–9. The Commission concluded that:

> [t]he programming and rehabilitative needs of juveniles, including those between the ages of 16 and 18, are better met within a treatment-oriented environment. Age-specific programming tailored to identify the risk factors faced by adolescents has more evidence-based success in treating court-involved youth and reintegrating them into the community, thereby improving individual lives and reducing the future risk to public safety.

Id. at 8.

[387] *See* BECKETT, *supra* note 20, at 107 (noting that proponents of "get tough" crime policies are "fundamentally uninterested in the social causes of criminality or in reintegrating offenders and assume instead that punishment, surveillance, and control are the best responses to deviant behavior"); HACKER, *supra* note 75, at 225.

> [F]ew white Americans feel any obligation to make any sacrifices on behalf of the nation's principal minority. They see themselves as already overtaxed, feel that the fault is not theirs, and have become persuaded that public programs cannot achieve a cure. Instead, calls are heard for a tougher posture toward what is seen as the misbehavior of many blacks.

Id.

adolescents' diminished responsibility, and reject youthfulness as a mitigating factor.[388]

The Court in *Roper* finally acknowledged what every parent knows—children are different. A decade of research by the MacArthur Foundation demonstrates that adolescents differ in maturity of judgment, self-control, assessments of risk, appreciation of consequences, and susceptibility to negative peer influences in ways that reduce their culpability. These developmental differences persist whether a state tries a youth in juvenile or criminal court. Despite children's diminished responsibility, politicians enact laws that mandate criminal prosecution, require judges to sentence children as adults, and impose grossly disproportional LWOP and "virtual life" sentences on young, immature offenders.

The cumulative consequences of these punitive policies inflict the most severe sentences on black youths. For a century, juvenile courts have discriminated between "our children" and "other peoples' children." Progressive reformers had to choose between altering the social conditions like poverty, inequality, and discrimination that contribute to crime and applying "band-aids" to the children those harmful circumstances damaged. They avoided broad changes in political economy and social structure and chose instead to "save children." A century later, we face the same choices and continue to evade our responsibilities to "other peoples' children." Generations of public policy have concentrated poverty, isolated Blacks, compounded disadvantage, and amplified crime and violence in inner-city communities. Policy discussions about poverty, welfare benefits, economic inequality, taxes, and crime serve as a subterranean discourse about issues of racial and social inequality. Public officials treat concentrated poverty, unemployment, and crime as a Black condition separate from mainstream America and evade their responsibility to address them.[389] But, public policy and political economy contribute to both racial inequality and the skewed distribution of crime. Rather than address both, politicians exploit racial animus and promote punitive policies with a predictable racially disparate impact. Instead, public officials should determine the minimum level of well-being people need to lead healthy and productive lives and then create policies to enable those whose access to opportunity is blocked to achieve them. Strategies to strengthen families, improve schools and communities, provide access to health care, and expand job opportunities will do more to reduce crime and improve the lives of all of our children than savagely punishing them.[390]

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[388] *See, e.g.*, Feld, *supra* note 329, at 68 (arguing that adolescent developmental psychology supports differences in culpability of juveniles and adults which require formal recognition of youthfulness as a mitigating factor in sentencing).

[389] *See* EDSALL & EDSALL, *supra* note 39, at 243 (arguing that the growth of white suburbs around the de-industrialized urban core isolates poor blacks and issues of joblessness, criminality, income inequality, and welfare dependency from the concerns of mainstream voters); HACKER, *supra* note 75, at 228–29 (attributing black youth homicide, guns and drugs in the inner city to social structural inequality and arguing that "[i]t is white America that has made being black so disconsolate an estate. Legal slavery may be in the past, but segregation and subordination have been allowed to persist. Even today, America imposes a stigma on every black child at birth.").

[390] Kempf-Leonard, *supra* note 209, at 83.