

Jeffrey Fagan

*The contradictions of  
juvenile crime & punishment*

Juvenile incarceration in the United States is, at first glance, distinctly different from its adult counterpart. While some juvenile facilities retain the iconic aesthetic of adult incarceration<sup>1</sup> – orange jumpsuits, large cellblocks, uniformed guards, barbed wire, and similar heavy-security measures – others have trappings and atmospherics more reminiscent of boarding schools, therapeutic communities, or small college campuses. These compact, benign settings avoid the physical stigmata of institutional life and accord some autonomy of movement and intimacy in relations with staff. They also give primacy to developmentally appropriate and therapeutic interventions.

However, like its adult counterpart, juvenile corrections, whether located in a human warehouse or a therapeutic community, is designed mainly to control its residents and restrict their personal freedoms. Movement and association are intensively regulated; outside contact with family, friends, and intimate partners is attenuated and used as an incentive for good behavior; access to media and culture is restricted; privacy is nonexistent; and choice of clothing, language, and other modes of personal expression is

off-limits. Whatever developmental importance these forms of self-expression and self-determination may have for adolescents, it is sacrificed to the primary goals of security, control, discipline, and punishment. Most important, at either end of the continuum of institutional climate, the options of solitary confinement, physical restraint, or other forms of extreme deprivation exist to control the defiant and unruly or to punish wrongdoing. Accordingly, the naming conventions for these juvenile facilities are deceptive: these are not “training schools” or “centers” or any other kind of school or academy, nor are they “homes.” These are correctional facilities whose primary purpose is to punish.

One would expect such institutions to be reserved for those who are most deserving of punishment or those who pose a nontrivial risk to public safety. But under the enduring doctrine of *parens patriae*,<sup>2</sup> we incarcerate children for a mixed bag of rationales, ones that do not always comport with the punitive dimensions of juvenile incarceration. *Parens patriae* obligates the court to act beyond the need simply to protect children from the harms of noxious social circumstances or to avail them of developmental and material supports that their families have failed to provide. The doctrine allows –

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even mandates – juvenile courts to protect children from themselves: from their associations with antisocial peers, from poor decision-making with respect to crime, and from harms to their physical and mental health to which they expose themselves.<sup>3</sup> As a result, we incarcerate children because their homes are too dangerous or criminogenic; because they are both delinquent and mentally ill or addicted to intoxicants and there are no other appropriate placements; because they need therapies that are unavailable elsewhere, even though they pose no security risks; because they are homeless; because they are sexually active at young ages; or because we think they may commit some crime in the near future.<sup>4</sup>

The resulting landscape of juvenile incarceration has been, not surprisingly, complex and shifting since the 1970s, the decade when adult incarceration trends began their robust increase. Since that time, juvenile incarceration, and juvenile justice itself, has been situated in a space bounded by the transcendent nineteenth-century child-saving movement, the procedural rights movement of the 1960s, and the raw emotional politics of violent crime and punishment in the past three decades. Accordingly, we see contradictions everywhere in this terrain. Growth in the incarcerated population since the 1970s has been restrained, even in the face of a youth violence epidemic,<sup>5</sup> and even as rhetoric has grown harsher and statutes have been revised to express the language of retribution and incapacitation.<sup>6</sup> States, for the most part, have acknowledged the advantages of small facilities to advance the core rehabilitative and therapeutic projects that informed the creation of separate institutions for juveniles nearly two centuries ago, even if they have not necessarily acted on those ideas and instincts.<sup>7</sup> At the same time, the conditions in juvenile corrections often

remain harsh, a sign of both cynicism about rehabilitation and institutional self-interest, as well as neglect.<sup>8</sup> States have quickened the pace of expulsions of juvenile offenders to the criminal courts and prisons as a way to “get tough,”<sup>9</sup> even as they refuse to lower the age of majority and fundamentally alter eligibility for the protections of juvenile institutions. Racial disparities remain durable and defy explicit legislative and policy efforts to reduce them.

These contradictions and puzzles inform this essay on juvenile incarceration. The patterns of growth in juvenile corrections suggest ambivalence about the reform and rehabilitation of juvenile offenders, notions that have been battered by three successive waves of high crime over the past thirty years. On the one hand, courts and legislatures want to be tough; on the other hand, there are strong preservationist instincts at play that have muted the growth in incarceration of minors. “Getting tough” on juvenile offenders has thus been assigned to the criminal courts and adult correctional institutions. But there are signs of ambivalence there, with relatively short sentences and a responsiveness to crime rates in new admissions (flow) and total population (stock) that is the opposite of what we see for adults. States have demonstrated their ambivalence by avoiding change to the age of majority, the last resort in increasing punitiveness for juveniles. Such a step would be a poison pill for the doctrine of *parens patriae* in which juvenile corrections is steeped. Racial disparity pervades juvenile incarceration, yet Congress attempted remedial steps never contemplated for adults, by engaging states in a collaborative project to reduce racial inequalities in juvenile detention and corrections. What this all adds up to is an institutional landscape that at once fears child criminals and wants

to punish them harshly, but at the same time adheres to the transcendent philosophy of child-saving.

Beginning in the 1970s, the traditional discretion of juvenile court judges to place youths in correctional confinement was contested, as was the discretion of corrections officials to determine how long youths would remain in placement. On balance, discretion lost. The introduction of mandatory minimum sentences for juveniles in New York and elsewhere in the 1970s was followed in subsequent decades by new laws mandating waiver to adult court and mandatory placement in a secure facility.<sup>10</sup> In this hardening political atmosphere, fueled by rising juvenile arrest rates and a punitive drift toward more formal processing and less diversion, one might have predicted rapid and persistent growth in the rate of juvenile imprisonment starting in the 1970s. By the 1990s, when a moral panic over a new species of juvenile offenders known as “superpredators”<sup>11</sup> and the spread of violent youth gangs further animated legislatures to pass tougher sentencing laws for juveniles,<sup>12</sup> the conditions seemed ripe for the juvenile court to follow a trajectory of incarceration growth similar to the rise in adult rates.

But it didn’t happen, at least not in juvenile corrections. Growth in juvenile incarceration in both public and private facilities was only a fraction of the growth in adult incarceration. Juvenile incarceration – both in short-term detention and longer-term correctional placements – rose from 73,023 youths in public institutions and private residential facilities in 1977 to 95,818 in 1992, the year preceding the modern peak in juvenile arrests for felony crimes.<sup>13</sup> Juvenile incarceration peaked in 2000 at 108,802, a rate of 356 per 100,000 youths ages ten to seventeen. The placement rate declined by more

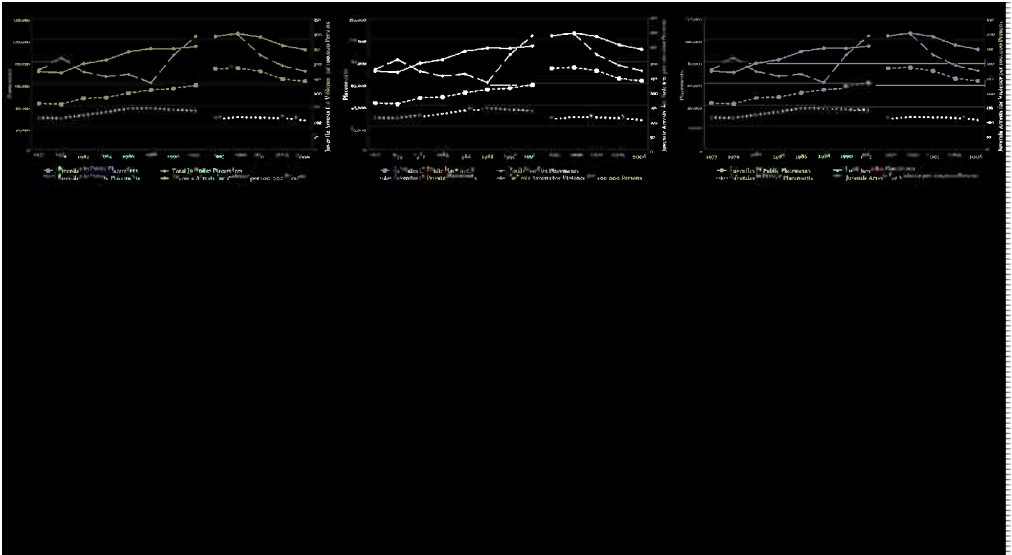
than 20 percent by 2008, to approximately 81,000 children living in either state-operated facilities or privately operated group homes, or 263 youths per 100,000 persons ages ten to seventeen.<sup>14</sup> This juvenile placement rate today pales in comparison to the adult incarceration rate of 762.<sup>15</sup>

Figure 1 shows that placements in public facilities accounted for most of the rise and fall in juvenile incarceration, and that these were somewhat responsive to the rise and subsequent fall in juvenile arrests. Between 1997 and 2008, juvenile arrests declined by 33 percent, while the overall correctional placement of youths declined by 26 percent.<sup>16</sup> Placement in private facilities rose more slowly and was fairly stable over time.

About 70 percent were committed following an adjudication of delinquency, and 28 percent were detained prior to the resolution of their case.<sup>17</sup> They were incarcerated on a variety of offenses, with the greatest number placed for person offenses (34 percent) followed by property offenses (25 percent). Drug offenses accounted for 9 percent of the incarcerated population, but more were placed for “public order” offenses such as alcohol or disorderly conduct (11 percent) than were placed for drugs. As with their adult counterparts, many (16 percent) were placed for technical violations of probation or juvenile parole. One in twenty was placed for any of several “status offenses”: social behaviors that do not violate any criminal code but that capture the court’s attention due to the risk of danger to the child’s well-being.<sup>18</sup>

The area that grew most, however, was the number of juveniles below age eighteen in state prisons. The pattern in Figure 2 shows a rise in the number of persons below age eighteen incarcerated in state prisons from 1985 to 2004, as well as new admissions for that same group.

Figure 1  
Juvenile Placements in Public and Private Facilities and Juvenile Arrests for Violence, 1977 – 2006



Source: Melissa Sickmund et al., *Easy Access to the Census of Juveniles in Residential Placement* (National Center for Juvenile Justice, 2008), <http://ojjdp.ncjrs.gov/ojstatbb/ezacjrp>; Steven D. Levitt, “Juvenile Crime and Punishment,” *Journal of Political Economy* 106 (1998): 1156 – 1185.

The patterns reflect broader trends in juvenile crime and arrest, especially the spike in juvenile violence from 1987 to 1996. The census population of minors in prison peaked at 5,400 in 1996 and declined by nearly half, to 2,477, in 2004.<sup>19</sup> The population remained stable through 2007, when 2,283 youths were in state prisons or privately operated correctional facilities programmed for adults.<sup>20</sup>

Two trends in Figure 2 are notable and suggest conflicting instincts.

One is the rapid growth in the number of youths sentenced as adults. This trend is responsive to crime trends and also reflects a growing punitiveness toward youth crime that was structured into sentencing statutes. (The “get tough” trend for juveniles is discussed later in this essay.) But the sentences seem to be attenuated, suggesting that the legislatures were tempered in setting tariffs for minors. Figure 2 shows that the number of new admissions of minors to adult

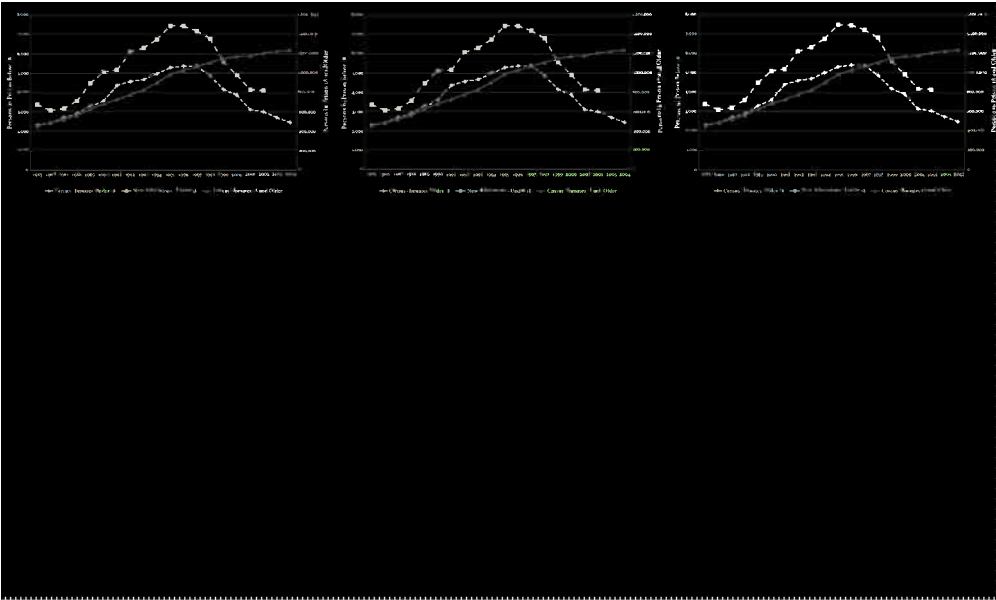
prisons tracks the trend for the one-day census. There is no buildup of “stock” for this population, unlike the steady growth for adults.

The similar trend lines for the population census and the new admissions suggest that the sentences for this population were shorter and releases were quicker, reflecting a de facto youth discount that many states structure into sentencing statutes under “youthful offender” or “juvenile offender” provisions.<sup>21</sup> The responsiveness in the decline of juveniles in adult prisons beginning in 2000 shows a sensitivity to declining crime rates that is not evident for the adult population.

Nevertheless, even short-term exposure for youths to adult prisons has risks for youths and for public safety. To the extent that legislators ignored these risks, the wholesale transfer of minors to the criminal courts was a reckless experiment. A robust body of research shows that recidivism rates are in fact higher for youths

Figure 2  
Inmates under Eighteen in State Prisons, 1985 – 2004

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Source: Howard Snyder and Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report* (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 2006), 236 – 238, <http://ojjdp.ncjrs.gov/ojstatbb/nr2006>.

sentenced as adults, after controlling for relevant offender and offense characteristics.<sup>22</sup> There appears to be no marginal deterrent effect from incarcerating minors as adults, which was a cornerstone of youth policy in the 1990s. One explanation for the elevated recidivism rates may be the effects of adolescents' exposure to prison life and adult convicts. While likely to be separated physically from older inmates, the institutional climate on the youth side may hardly differ from other blocks in the prison: the separation may be one of degree rather than kind. Indeed, it may even worsen the chaos and violence of correctional confinement by concentrating youths who are at their peak ages of criminality and diminished self-control.<sup>23</sup> Only a few studies have compared the correctional experiences of youths in prisons and juvenile incarceration, but all agree that placing youths in prisons comes at a cost: they are less like-

ly to receive education and other essential services, they are more likely to be victims of physical violence, and they manifest a variety of psychological symptoms.<sup>24</sup>

The residual consequences of adolescents' exposure to violence in adult prisons are uncertain. But as a matter of principle, it is not easy to reconcile this particular harm with the diminished blameworthiness and culpability of adolescents. Social and behavioral science informed recent Supreme Court jurisprudence on youth crime and punishment,<sup>25</sup> but criminal court sentencing policies more generally are hostile to the new cognitive science of diminished culpability of adolescents.<sup>26</sup> Potentially disfiguring punishments seem disproportionate, if not cynical, in the context of this new evidence about the blameworthiness of adolescents, especially if criminal justice goals are not well served by transfer and subsequent incarceration.<sup>27</sup>



There are puzzles and contradictions behind these trends. While American lawmakers exponentially expanded prison capacities for adults starting in the 1980s, there was – with rare exceptions – no expansion of the capacities to incarcerate minors. This was one of two non-events in modern juvenile justice that illustrate the dissonance in thinking about responses to serious youth crime. Figure 1 shows that the rate of increase in juvenile confinement was a fraction of the rate of increase in juvenile arrests; as crime declined, juvenile courts responded quickly by decelerating the rate of placements.

Yet in the juvenile system, even as states made the choice not to build new juvenile space and not to dramatically increase youth confinement, every state toughened its juvenile delinquency codes rhetorically to deemphasize rehabilitation and focus on punishment, retribution, and incapacitation.<sup>28</sup> Thus, “getting tough” in the juvenile system was not an institutional project, but a statutory one. Programming was largely unaffected, as the locus of effects of these new measures was on court decisions. The changes took several forms, but all had the combined effect of marginally increasing the likelihood of juvenile correctional confinement or lengthening the time spent in placement.

The harder work of “getting tough” was outsourced to the criminal justice system, with states more often than not using “regular” criminal law for juveniles. Statutes were amended to ease and expand the number of youths transferred to the criminal courts for sentencing as an adult.<sup>29</sup> The results are evident in Figure 2, as the number of youths confined in adult prisons rose (and fell) sharply. The “get tough” measures took several forms. Between 1990 and 1997, every state in America modified both its juvenile and criminal codes to expand

the number of youths eligible for transfer to the criminal courts.<sup>30</sup> In 1995 alone, nineteen states amended their criminal codes to facilitate the discretionary transfer of delinquents to the criminal court or the wholesale exclusion of youths from the juvenile court.<sup>31</sup> Each strategy was designed to increase punishment in numbers and in severity. Several states adopted mandatory minimum sentences for youths committed to state juvenile corrections authorities. Others adopted sentencing guidelines that fixed sentences in the juvenile system based on a grid of offense, offender characteristics, and victim characteristics. Still other states expanded eligibility for sentencing minors to life without parole, or death in prison, and made those sentences automatic upon conviction for enumerated crimes.<sup>32</sup> Prior to the 2010 U.S. Supreme Court ruling in *Graham v. Florida* that banned life-without-parole sentences for juveniles who did not commit murder,<sup>33</sup> approximately 2,484 youths were serving such sentences in 2008, many as young as thirteen, and many others for crimes other than murder or manslaughter.<sup>34</sup>

But these developments point to the second non-event in the toughening of juvenile justice and juvenile incarceration. Certainly, a state that truly wanted to crack down on juveniles and make incarceration harsher could simply have lowered its age of majority and sent all its older juvenile offenders to adult prisons. Only two did so: Wisconsin and New Hampshire lowered the age of majority from seventeen to sixteen in the 1990s.<sup>35</sup> In fact, one state, Connecticut, has begun a process to incrementally raise its age of majority from sixteen to eighteen.<sup>36</sup> New York and North Carolina maintain the age of majority at sixteen; in most states, it is still eighteen.

Stopping short of the more obvious and expedient step of lowering the age

of majority, states have instead used an incremental and piecemeal legislative strategy to criminalize delinquency and thereby allow them to sentence adolescents to adult punishment for crimes committed as minors. But despite the wave of transfer legislation, the current statutory landscape is an elaborate game of chutes and ladders, with some youths automatically transferred to the criminal courts only to be “reverse waived” back to the juvenile courts. As a result, many adolescent offenders (though no one knows exactly how many) escape the reach of the criminal law and its harsher punishments. Nevertheless, a large number are removed from the juvenile to the criminal courts by statutory exclusion, judicial discretion, or the administrative practices and preferences of prosecutors.<sup>37</sup>

Viewed in this way, legislators appear ambivalent, refusing to abandon completely the principles of juvenile justice, yet seeking to divide delinquents into two categories: those worthy of the remedial and therapeutic interventions of the juvenile court and those who should be abandoned to the punitive regime of criminal justice in the name of retribution and public safety. The complexity of state laws, the piecemeal character of the statutory landscape, and the fact that most states have overlapping transfer mechanisms suggest a philosophical duality. The punitive and child-saver instincts for youth crime coexist uneasily in the current statutory environment, forcing a binary choice between criminal and juvenile court jurisdiction – a choice that is not well suited to reconcile these tensions.<sup>38</sup>

On balance, the business of getting tough on juvenile offenders was assigned to the criminal justice system, while the juvenile system remained relatively small and still wrapped, however thinly, in its

rehabilitative and child-saver clothing. Why did juvenile corrections expand so little during a time of unprecedented and unrestrained growth in adult corrections? And why did it transform from warehousing to embracing smaller, more therapeutically grounded facilities?<sup>39</sup> The numbers reveal the tension between two features of American jurisprudence surrounding juvenile offenders. We believe deeply in child-saving, yet we are quick to expose violent children to the harshest punishments in service to the same punitive instincts that drive mass incarceration of adults. But even there, we pull our punches. We pull back from the brink of fully embracing punitiveness toward juveniles, reserving it instead for adults. Not only is the philosophy of child-saving an important normative modifier of these instincts, it is also deeply embedded in the institutions of juvenile justice and juvenile corrections.

One episode illustrates the connections between the visceral push for punitiveness and political culture. In 1996, former U.S. Secretary of Education William Bennett and two colleagues published *Body Count*.<sup>40</sup> The book offered a “moral poverty” theory of youth crime, rejecting social theories of juvenile crime causation that focused on economic poverty, discrimination, family dysfunction, or savage levels of inequality. Instead, for Bennett and his coauthors, it was moral poverty that characterized a coming wave of “superpredators” who would commit extremely violent crimes and be immune to rehabilitative interventions. They characterized this new breed of young offenders as impulsive and remorseless, fearing not “the stigma of arrest, the pains of imprisonment, [or] the pangs of conscience.” These (predicted) young criminals were portrayed nearly as a separate species. The authors’ predictions were based on

data that were compiled through 1993, the peak year of juvenile crime and violence in the United States.<sup>41</sup> Their predictions turned out to be horribly wrong.<sup>42</sup>

But the damage was done. The book supplied strong and scary rhetoric to fuel the legislative panic that, in general, produced a wave of get-tough legislation across the country. So strong and persuasive was this rhetoric that it led one state (Pennsylvania) to build a youth prison in anticipation of a surge of superpredators, not a juvenile center that emphasized rehabilitation and other services. The State Correctional Institute at Pine Grove opened in 2000, its plan and design based on population projections from the superpredator era and with that profile of the young offender in mind. At its opening, the prison housed 178 young offenders, well below its capacity of 1,000.<sup>43</sup> By that time, youth crime had fallen in Pennsylvania, and the number of youths below eighteen in adult prisons had fallen to sixty-six.

To fill this new youth prison, the state moved young offenders from some traditional correctional settings to Pine Grove, and the state's juvenile court judges made good use of the new placement option. Pine Grove today is well occupied, housing approximately one thousand inmates below the age of twenty-one. Built to house the expected wave of superpredators, today it is filled with a heterogeneous group of adolescent offenders whose profiles are more typical of the variety of youth crimes that characterize contemporary youth dockets.

The character of juvenile incarceration has also changed dramatically over three decades. Beginning in the 1970s, as adult correctional populations surged, large juvenile corrections facilities in several states were replaced by smaller facilities housing fewer than thirty children per

center, sometimes in community-based residential programs but other times in "campuses" that included cluster or residential "pods."<sup>44</sup> Jerome Miller, architect of the Massachusetts reforms, showed that scandals involving staff abuse of youth residents, as well as youth suicides and uncontrolled violence, often sparked these changes. Massachusetts, Pennsylvania, Utah, and Florida, among others, moved from large, toxic warehouses to these smaller, disaggregated dormitory-like units.<sup>45</sup> In effect, the capacities of these systems were capped, and any expansion required the participation of the private sector.<sup>46</sup>

Yet noxious conditions still prevail in many juvenile corrections facilities and systems, and litigation is not uncommon. In *Galloway v. Texas*,<sup>47</sup> for example, plaintiff Galloway was placed in detention at fourteen and held until he reached nineteen, the maximum age of juvenile jurisdiction, based on unreviewable administrative decisions by facility staff. The trial record showed that Galloway and many others had been physically and sexually abused, subjected to physical punishment, abused by other inmates (abuse that was often sanctioned by staff), and denied access to counsel. Essential services – medical care, education, psychiatric treatment – were found to be substandard. More than five hundred children were released from unlawful juvenile corrections confinement in Texas as a result of the ruling.

Conditions in New York State juvenile corrections facilities were investigated recently by the Civil Rights Division of the U.S. Department of Justice, which reported similar problems.<sup>48</sup> And in California, the state was ordered back to court for failure to comply with the terms of a consent decree that committed the juvenile corrections authority, the Division of Juvenile Justice of the California



Department of Corrections and Rehabilitation (formerly the Youth Authority), to conform to professional and legal standards for essential services and the safety of its wards.<sup>49</sup> These cases are not isolated instances; litigation to remedy violent, abusive, and other substandard conditions in juvenile incarceration and detention has been repeated across the country for decades.

Structurally, federal civil rights litigation in these instances is constrained in its force and reach by the Prison Litigation Reform Act (PLRA).<sup>50</sup> In *Galloway*, for instance, relief was limited by the PLRA's constraints on which conditions can be litigated, its short paths to termination of existing remedial decrees, and its restrictions on the authority of federal judges to order future remedies. The PLRA applies fully to juvenile corrections and detention facilities: Congress classified juvenile facilities as "prisons" and their occupants "prisoners." In doing so, it erected tall and robust barriers to children's assertion of their rights: in effect, they face the same hurdles that adult prisoners do. For children, the problem is compounded because they cannot sue in their own name, and also by the fact that Federal Rule of Civil Procedure 17 relegates the question of capacity and overcrowding to state law. Under these conditions, children cannot get to court without a guardian, and most lack the social capital and experience to activate those resources. Furthermore, there simply are no local enforcement mechanisms to ensure compliance with federal litigation. It is up to local district attorneys to enforce the law when abuses are revealed. The political complications are obvious.

Again, we see very different visions of juvenile justice and incarceration. One is represented by the development of new models and institutional designs for the rehabilitation of serious juvenile offend-

ers. This vision includes attention not just to basics such as education, but to new models for working with children and their families to sustain therapeutic successes beyond the time of correctional confinement.<sup>51</sup> The other vision is typified by institutions that are violent, abusive, and indifferent to the essential developmental interventions for adolescent offenders. Attorney and legal scholar Michael Tigar characterizes these as places where juvenile punishment has taken on the distorted values of criminal law and correctional institutions, where intervention is secondary to security and punishment, and where indifference tolerates abuse and violence.<sup>52</sup> In these places, services are thin and differ little from ordinary jails, only that the residents are younger, smaller, and more easily exploited. Between these poles are the institutions that struggle to mount effective programs with a population of difficult children who pose security as well as therapeutic challenges.

Racial disparities in juvenile detention and incarceration closely resemble racial disparities in the imprisonment and jailing of adults. Considering the negative consequences of incarceration on crime and social well-being, these disparities unfortunately may multiply the effects of other forms of disadvantage and may become an endogenous form of inequality that is difficult to escape. Social scientists call this a "poverty trap."<sup>53</sup>

In the 2006 census of juveniles in residential placement, 40.2 percent of residents were African American and 20.5 percent were Hispanic, compared to 35 percent white.<sup>54</sup> These disparities were greater for person crimes and drug offenses (44 percent were African American in each category) and less for technical violations (37 percent were African American) and status offenses (33 per-

cent were African American). In fact, 50 percent of incarcerated status offenders counted in the 2006 juvenile corrections census were white.

Racial disparities are far worse for pre-trial detention, compared to those who are incarcerated following a finding of delinquency. Nearly half (48 percent) of those detained for person crimes, 45 percent detained on drug offenses, and 46 percent detained for public order offenses were African Americans, compared to less than 30 percent whites in each of these categories.<sup>55</sup> (Public order offenses include weapons offenses as well as public drinking and a range of low level – and high police-discretion – misdemeanor offenses.)

These disparities are not well explained by differences in crime rates.<sup>56</sup> Studies using several designs and analytic strategies conclude that racial disparities in the decision to detain and incarcerate youths are influenced by race and risk factors such as family structure that are correlated with race more than criminal behavior.<sup>57</sup>

Other research implicates fundamental cognitive and unconscious processes in the production of disparities. Two studies based on observations of decisions by police or probation officers illustrate the role of race in the attribution of blameworthiness, risk of future crime, and recommendations for punishment. Sociologists George Bridges and Sara Steen, analyzing narratives of presentence reports by probation officers in three counties in Washington State, showed that probation officers were more likely to attribute the causes of crime for African American youths to internal character and personality attributes rather than external factors such as family, neighborhood, or school. These internal attributions led to conclusions about “responsibility,” whereas external attributions tended to reduce culpability by externalizing the or-

igins of crime (and its severity) for white youths to the defendant’s social surroundings. These internal attributions in turn led to racially disparate attributions of risk of future offending and harsher sentencing recommendations. Bridges and Steen also noted that a criminal history tends to multiply these effects.

Educational psychologist Sandra Graham and organizational behavior scholar Brian Lowery produced similar results using an experimental paradigm in which police and probation officers made judgments about culpability and predictions of future crime following exposure to race-specific or race-neutral subliminal primes. Compared to officers given a race-neutral prime, police and probation officers given race-specific primes rated a hypothetical offender with more negative traits such as hostility and immaturity, attributed greater culpability, had higher expectations of recidivism, and endorsed harsher punishment. These results were robust to controls for consciously expressed beliefs about African Americans.

Studies based on case-processing data also reach the same conclusions, as does a research summary prepared for the Department of Justice. This is true both in criminal court and for juveniles who are transferred to criminal court.<sup>58</sup>

The policy studies raise two difficult questions. First, are the effects of disparate outcomes at early stages predictive of outcomes – including the decision to detain or incarcerate a young offender – at later stages? Researchers disagree on this point. Some suggest that disadvantage at early decision points, such as the decision to detain or to treat a case formally instead of using a diversionary alternative, at a minimum carries forward and perhaps multiplies across decision points. Others suggest that disparities at each stage are unique to decisions at that

stage, net of filtering at each stage. In either case, there is a unique additive component for race that seems to produce disparate outcomes overall, including correctional placements.<sup>59</sup>

Second, and more fundamentally, does the combined evidence from experimental and observational studies suggest that racial bias is present in the juvenile justice system with sufficient salience to produce disparities? It is always difficult to identify and control for all the counterfactuals that would have to be defeated in order to make such a claim. At the least, these would include a set of institutional preferences and norms that are difficult to measure and that are likely to vary widely across locales. But what is important to note is that the two most likely counterfactuals – differences in criminal behavior and differences in social risk indicia – are not significant producers of racial disparities.

Based on the research of Graham and Lowery, conscious bias is not a significant producer of racial disparity either, but subconscious bias may be, as well as racial differences in punitiveness and racial stereotypes. Sociologist Lawrence Bobo and Victor Thompson, for example, summarize public opinion research to show that negative racial stereotypes, antiblack affect, and collective racial resentments translate into increased punitiveness.<sup>60</sup> We have no reason to believe that this might not apply to probation workers and police officers who produce a supply of cases for the juvenile court. Research on “colorism” shows that both African Americans and white Americans associate skin tone with criminality and deserved punishment.<sup>61</sup> In a series of tests on implicit bias, every population group except African Americans unconsciously associates “African American” with crime or danger and reacts accordingly.<sup>62</sup> Tests include recognition of African American

faces in crime situations (including possession of weapons)<sup>63</sup> and whether to shoot unarmed suspects when they are shown holding ambiguous objects other than guns.<sup>64</sup> Confirming what Bridges and Steen and Graham and Lowery reported, the Plant and Peruche tests given to police officers produced the same results.

The impacts of racially disparate decisions in juvenile detention and incarceration go beyond the loss of liberty and exposure to socially and emotionally disfiguring punishments. Juvenile incarceration attenuates the accumulation of social capital to access job networks and other supports; instead – at a developmentally sensitive and strategic period of transition from adolescence to adulthood – it leads to the accrual of criminal capital that sustains delinquency beyond the time of placement.<sup>65</sup> In this way, incarceration compounds social and racial disadvantage to sustain inequalities over the life course,<sup>66</sup> with crime itself only a partial explanation of the sources of that disadvantage. For minors, developmental trajectories following incarceration suggest that crime is less a factor than cascading social disadvantage. Studies of criminality over the life course show the unique and lasting disadvantage that accrues from an early incarceration experience, no matter the behavior that led to the period of incarceration.<sup>67</sup> Incarceration at a young age not only increases the risk of future incarceration, it mortgages the long-term prospects of young males for marriage, employment, and social stability over a lifetime. Even a short spell in detention adversely influences the outcomes of cases once they get to court, tipping the odds toward harsher punishment instead of diversion or probation.<sup>68</sup> Young offenders who are detained in jails or group homes while their cases work their way through court

are more likely to be placed in a correctional institution at the conclusion of the case than those who return home or to school as their cases are resolved. Early correctional placement has a multiplier effect on the prospects of future imprisonment. To the extent that incarceration effects carry forward, we might ask whether the social harms of incarceration on young people are simply those of their parents revisited on them – and whether the harms to them will be revisited on their children.<sup>69</sup>

In the political economy of incarceration, it is remarkable that either a legislative or executive branch would acknowledge racial disparity much less seek remedies to it. Thus, the efforts of the Department of Justice and Congress to reduce racial disparities in juvenile confinement through public interventions are courageous and noteworthy. Because this step was reserved for minors, it again signals the special place child-saving holds as a normative imperative and policy preference in the culture of crime and punishment.

To regulate public sector practices that might lead to racial disparities, Congress took a rare step in 1992, passing legislation requiring states that receive federal juvenile-justice funds to implement strategies to reduce disparities (where those disparities exist) in the confinement rates of minority juveniles. This provision, known as the disproportionate minority contact statute (DMC),<sup>70</sup> seems modest in comparison to Title VII of the Civil Rights Act: it applies only to state-run juvenile justice programs receiving federal funds. Failure to comply can cost an agency at least 25 percent of its federal juvenile-justice support.

Legal scholar Olatunde Johnson<sup>71</sup> describes the DMC provision as unique in

several ways. First, it calls on public actors to reduce disparities no matter what the cause, no matter whether intentional or reflective of the types of passive discrimination that characterize everyday institutional business, even if these practices advance the criminal justice interests of the public agency. Action requires only that there be a showing that the agency was complicit in producing disparity. Second, the statute requires states to gather analytic data to diagnose the institutional practices or public policies that produce racial disparities, and to identify appropriate steps to change those practices. In effect, the statute requires states to look beyond “invidious bias” to discover and remedy the sources of disparity. States were tasked with submitting intervention plans that reflected their analysis of the sources of disparity, developing interventions, and assessing the success of their efforts. In 2002, Congress broadened the mandate of DMC to look not just at confinement, but also at any type of contact. This expansion recognized the role that police and early-stage juvenile justice decisions play in producing disparities.

There are stories of both success and failure under DMC. Johnson notes that when DMC succeeds, it is because it leveraged the power of internal and external local advocates to design measures to reduce disparity. The data analytic component has also produced informational transparency that levels the playing field between advocates and government officials. It is a process of what legal scholar Heather Gerken calls “federalism all the way down,” in part localizing solutions and also developing local expertise that competes with interior institutional logic and norms.<sup>72</sup>

Johnson suggests that failures under DMC reflect the weakness of local enforcement and ambivalence, if not resistance, that are, in turn, reflections of the

local political structure. It requires internal change agents within agencies as well as external agents, especially advocacy groups. Localities could be exposed to lawsuits based on the information developed through the data analytic process, creating an untenable political tension. A set of political scripts that invokes public safety concerns in the face of systemic reform efforts is a blunt instrument to neutralize reform.<sup>73</sup> Thus, the recurring renewal of political support – based on research – is essential to sustain the reform. And this, as Johnson points out, is hardly a sure bet, since radically disparate treatment is not a strong motivation to expend political capital. The counterargument is that revelations of the connection between public policy and racially disparate treatment leading to incarceration make a strong normative argument that political actors ignore at their own risk. Perhaps the current low-crime era affords a moment to push ahead with this project.

The opposing, if not contradictory, trends in the philosophy and practice of juvenile incarceration can be observed empirically in states' variations in the practice and reach of juvenile incarceration. At the peak of juvenile incarceration, states varied in their incarceration populations from a low of 70 per 100,000 juveniles in Vermont to a high of 583 in Louisiana.<sup>74</sup> Explanations for variation are themselves varied: from racial threat and symbolic threats to public order, to violent crime rates, to loose couplings between juvenile and adult correctional systems, to variation in the political traction of “get tough” policies.<sup>75</sup> These diverse explanations matter because they speak to different strains in the political culture of crime and punishment – in particular about whether *juvenile* crime and punishment is itself a symbolic or substantive concern.

Symbolic threats are sociologically connected to structural conditions, including minority threat, inequality, and public manifestations of crime such as gangs. When professor of law Jonathan Simon speaks about “governing through crime,” he portrays a discourse and subsequent political mobilization built on crime fears that translate into legislative action. These threats create emotions beyond the facts of crime itself by imparting social meaning to crime: gang violence signals the rise of an enemy, for example, and the trifecta of gangs, guns, and drugs signals a very particular and urgent threat to social order. Even property crime can translate into a threat through its spurious connection to violent crime. If crime itself is racially skewed, whether among juveniles or adults, then disconnecting symbolic threats from the real fears of crime becomes more difficult.

Sorting out these threats is a difficult empirical task. An analysis by criminologist Daniel Mears of state variation in juvenile incarceration suggests that it is not just the threat of violent crime that explains differences between states, but a combination of adult crime rates, adult incarceration rates, and juvenile property crime rates. What happened to the super-predator discourse about juvenile violence? Why was it not a more powerful predictor of juvenile incarceration? Quite likely, the discourse was already incorporated into other “get tough” measures, including adult incarceration rates and policies, as well as adult crime.

State variation may also conceal internal systemic and political factors that bear on institutional capacities. Consider the stories told earlier about Texas, California, and Pennsylvania (and add New York to the analysis). Texas made no changes in capacity in the face of litigation and a consent decree. California's Youth Authority reduced its capacity from



ten thousand a decade ago to less than two thousand today in response to litigation. Pennsylvania built a juvenile prison that now houses nearly one thousand young offenders, but New York State is attempting to close several of its juvenile incarceration facilities, and may yet do so if the Civil Rights Division of the Justice Department proceeds from its investigation to pursue litigation. However, New York's efforts to downsize its system have been neutralized by the structure of union contracts and political constraints from local legislators fearing adverse economic impacts from the closing of institutions. There are 241 empty beds out of about 300 in the six nonsecure residential facilities targeted for closing, and 254 state employees will lose their jobs if the closings proceed.<sup>76</sup> The math suggests part of the reason why closing is so hard to achieve.

The number of minors locked up across the nation is a small fraction of the adolescents under the supervision of the juvenile and criminal justice systems, but it casts a long shadow over the principles and practice of juvenile and criminal justice. Separate institutions for juveniles, and later a separate court, served the twin goals of protecting adolescent offenders from the stigma and brutality of criminal justice and intervening in their lives to remedy the conditions that animated their antisocial behavior. Yet the punitive turn in juvenile justice increased the use of incarceration by juvenile courts and the expulsion of juvenile offenders to adult jails and prisons.<sup>77</sup> Not only are both forms of juvenile incarceration plagued by unconstitutionally cruel conditions and institutional neglect, but the emphasis on punitiveness, including the exile of juveniles to the criminal justice system, before adolescent development may do more harm than good.

Three facts suggest that the punitive turn in juvenile corrections is neither a

socially productive nor a principled path. First, new behavioral and biological research about maturity and criminal culpability, largely focused on emotional regulation, impulsivity, decision-making, and other behavioral functioning closely linked to brain development and the social psychological skills that it controls, suggests that children remain immature and therefore less culpable well into late adolescence.<sup>78</sup> Second, adolescents who are tried and punished as adults are rearrested and incarcerated more often, more quickly, and for more serious crimes.<sup>79</sup> They are more likely to suffer mental health problems, including traumatic stress reactions, and are less likely to receive effective services to overcome their developmental or other behavioral deficits. And third, lengthened sentences for juvenile offenders, whether in juvenile or adult corrections placements, are of no apparent consequence to public safety.<sup>80</sup>

These facts argue for a return to the first principles of juvenile justice: avoiding harm and stigma and building the social capital and human capacity of the child. Declining crime rates, the pervasiveness of racial disparities in detention and incarceration, the intellectual and political exhaustion of the "toughness" paradigm in juvenile justice, and new gains in the science of adolescent development have converged to create an opportunity for principled reform. More careful regulation and deliberation of the use of incarceration can lay the foundation for more effective and fair policies. While the law has moved toward increasing the incarceration of younger teens, social and biological evidence suggests moving in the other direction. Perhaps it is time for the law to change course and follow the science and the principles it evokes.

ENDNOTES

- <sup>1</sup> Sharon Dolovich, "Incarceration: American Style," *Harvard Law & Policy Review* 3 (2009): 237.
- <sup>2</sup> *Parens patriae* is a doctrine commonly associated in both policy and law with the rights and obligations of the state and courts toward children and incapacitated adults. The diminished competence and autonomy of children is the court's justification for invoking *parens patriae* to supplant parental authority and assert control over children. See Julian Mack, "The Juvenile Court," *Annual Report of the 32nd Conference of the American Bar Association* (1909), 451.
- <sup>3</sup> In *Schall v. Martin* (467 U.S. 253, 1984), Justice Rehnquist argued that preventive detention is designed to protect the child and society from the potential consequences of the child's own "folly."
- <sup>4</sup> *Ibid.* The court said that the combined interest in protecting both the community and the juvenile himself from the consequences of future criminal conduct is sufficient to justify such detention. The court rejected claims about accuracy of such predictions, stating that "from a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct" and that a prediction of future criminal conduct is "'an experienced prediction based on a host of variables' which cannot be readily codified" (citing *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16 [1979]).
- <sup>5</sup> Philip J. Cook and John H. Laub, "The Unprecedented Epidemic in Youth Violence," in *Crime and Justice: A Review of Research*, vol. 24, *Youth Violence*, ed. Michael Tonry and Mark H. Moore (Chicago: University of Chicago Press, 1998), 27.
- <sup>6</sup> Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* (New York: Oxford University Press, 1999); Franklin E. Zimring, *American Youth Violence* (New York: Oxford University Press, 1998).
- <sup>7</sup> Paul Lerman, "Twentieth-Century Developments in America's Institutional Systems for Youth in Trouble," in *A Century of Juvenile Justice*, ed. Margaret K. Rosenheim et al. (Chicago: University of Chicago Press, 2002).
- <sup>8</sup> See, for example, *Inside Out: Youth Experiences Inside New York's Juvenile Placement System* (Citizens' Committee for Children of New York, 2009), <http://www.cccnewyork.org/publications/CCCjuvenilejusticereport2009.pdf>.
- <sup>9</sup> Jeffrey Fagan, "Juvenile Crime and Criminal Justice: Resolving Border Disputes," *Future of Children* 8 (2008): 81.
- <sup>10</sup> *Ibid.*
- <sup>11</sup> William J. Bennett, John J. Dilulio, Jr., and John P. Walters, *Body Count: Moral Poverty – and How to Win America's War Against Crime and Drugs* (New York: Simon & Schuster, 1996).
- <sup>12</sup> Malcolm W. Klein, *The American Street Gang* (New York: Oxford University Press, 1995); Feld, *Bad Kids*.
- <sup>13</sup> Placement data for the years between 1993 and 1997 are not available. Prior to 1993, data were collected every three years as part of the Children in Custody (CIC) census, conducted by the Office of Juvenile Justice and Delinquency Prevention. It was based on a mail survey with response rates that varied by year. Starting in 1997, CIC was replaced by the Census of Juveniles in Residential Placement (CJRP), a one-day count conducted by the U.S. Bureau of the Census of all children placed in public and private facilities. The differences in the two data sets reflect both the types of facilities included and whether residents are counted based on the state from which they were committed or, in the newer census, the state where they were placed. When aggregated to examine national trends, any biases resulting from these differences are minimized.
- <sup>14</sup> Melissa Sickmund, *Juveniles in Residential Placement, 1997 – 2008* (Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 2010), <http://www.ncjrs.gov/pdffiles1/ojjdp/229379.pdf>.

- 15 The rate for adults is 509 per 100,000 persons in prisons and 762 per 100,000 in prisons or local jails. Heather C. West and William J. Sabol, *Prison Inmates at Mid-Year 2008 – Statistical Tables* (Bureau of Justice Statistics, U.S. Department of Justice, 2009), Table 1, <http://bjs.ojp.usdoj.gov/content/pub/pdf/pimo8st.pdf>.
- 16 Sickmund, *Juveniles in Residential Placement*.
- 17 Melissa Sickmund et al., *Census of Juveniles in Residential Placement Databook* (National Center for Juvenile Justice, 2008), <http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/>.
- 18 These offenses include running away from home, incorrigibility, truancy, curfew violation, and underage drinking.
- 19 Howard N. Snyder and Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report* (Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 2006), <http://www.ojjdp.ncjrs.gov/ojstatbb/nr2006/>.
- 20 See West and Sabol, *Prison Inmates at Mid-Year 2008*, Table 21.
- 21 See, for example, Ruth D. Peterson, “Youthful Offenders Designations and Sentencing in the New York Criminal Courts,” *Social Problems* 35 (1988): 111 – 130.
- 22 Andrea McGowan et al., “Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services,” *Morbidity and Mortality Weekly Report* 56 (RR-9) (November 30, 2007): 1 – 11; Donna Bishop, “Juvenile Offenders in the Adult Criminal System,” *Crime and Justice* 27 (2000): 81 – 167; Fagan, “Juvenile Crime and Criminal Justice.” But see Steven D. Levitt, “Juvenile Crime and Punishment,” *Journal of Political Economy* 106 (1998): 1156.
- 23 This separation, however meaningful or substantively vague, was at the heart of the earliest forms of juvenile justice in the nineteenth century, when separate institutions for youths were created to shield them from the stigma and exploitation of older convicts. The motivations, though, were not entirely benevolent. The new youth-only institutions were also accommodations to the growing tendency among judges to avoid harsh punishments by dismissing criminal cases against older children, setting child offenders free without any form of social regulation or control. See John Sutton, *Stubborn Children: Controlling Delinquency in the United States, 1640 – 1981* (Berkeley: University of California Press, 1988); and David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown, 1971). In 1851, in New York, the Children’s Aid Society opened the House of Refuge for Delinquent Children under twelve, ostensibly to separate the “older” cohort of juvenile offenders from the very young ones. This division effectively created a disputed developmental territory between early and later adolescence; reformers used the territory to contest age-based linkages between vulnerability and culpability and the appropriate institutional responses.
- 24 Martin Forst, Jeffrey Fagan, and T. Scott Vivona, “Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy,” *Juvenile & Family Court Journal* 40 (1989): 1; “The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Adult Criminal Court,” research brief no. 5 (MacArthur Research Network on Adolescent Development and Juvenile Justice), [http://www.adjj.org/downloads/3582issue\\_brief\\_5.pdf](http://www.adjj.org/downloads/3582issue_brief_5.pdf).
- 25 Two recent Supreme Court opinions cited a body of robust social and behavioral science that demonstrates the diminished culpability of adolescents with respect to regulation of emotions and impulses, capacity to foresee consequences of their actions, and susceptibility to peer influences. See *Roper v. Simmons* (543 U.S. 551 [2005]) and *Graham v. Florida* (No. 08-7412, 982 So. 2d 43, reversed and remanded [2010]).
- 26 Elizabeth S. Scott and Laurence Steinberg, *Rethinking Juvenile Justice* (Cambridge, Mass.: Harvard University Press, 2008).
- 27 Fagan, “Juvenile Crime and Criminal Justice.”

- <sup>28</sup> Feld, *Bad Kids*; Zimring, *American Youth Violence*.
- <sup>29</sup> See, for example, Patricia Torbet et al., *State Responses to Serious and Violent Juvenile Crime* (Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 1996).
- <sup>30</sup> Fagan, "Juvenile Crime and Criminal Justice"; Donna Bishop, "Juvenile Offenders in the Adult Criminal System."
- <sup>31</sup> Torbet et al., *State Responses to Serious and Violent Juvenile Crime*.
- <sup>32</sup> See *State v. Standard*, 569 S.E.2d 325, 329 (2002). In general, see *The Rest of Their Lives* and *The Rest of Their Lives, 2008 Update* (Amnesty International and Human Rights Watch, 2005 and 2008), <http://www.hrw.org/en/node/11578/section/1> and <http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf>. The fact that mandatory life-without-parole sentences require a predicate of transfer, the cumulative disadvantage of poor counsel and early-stage detention compound the risks for a life-without-parole sentence through disadvantages at the early stages of charging and plea bargaining.
- <sup>33</sup> See *Graham v. Florida*.
- <sup>34</sup> See *The Rest of Their Lives, 2008 Update*; also *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* (Equal Justice Initiative, 2008), [http://eji.org/eji/files/Cruel%20and%20Unusual%202008\\_o.pdf](http://eji.org/eji/files/Cruel%20and%20Unusual%202008_o.pdf).
- <sup>35</sup> Torbet et al., *State Responses to Serious and Violent Juvenile Crime*.
- <sup>36</sup> See *The Connecticut Juvenile Justice Strategic Plan: Building Toward a Better Future* (State of Connecticut Judicial Branch, 2006), [http://www.jud.ct.gov/external/news/JuvenileJustPlan/CJJ\\_ExecutiveSummary.pdf](http://www.jud.ct.gov/external/news/JuvenileJustPlan/CJJ_ExecutiveSummary.pdf).
- <sup>37</sup> Fagan, "Juvenile Crime and Criminal Justice."
- <sup>38</sup> A few states developed statutes to try juveniles as adults but sentence them to juvenile correctional institutions. The theory was that the determination of guilt or innocence should respond to an adult standard of culpability, and that the trial itself was a form of expressive condemnation for the minor's offense. However, the reach of these laws was narrow, affecting few youths in a small number of states. Moreover, although the laws did succeed in shielding juveniles from placements with adults, they were no more than half-measures with respect to avoiding the stigma of a criminal conviction. See Patricia Torbet et al., *Juveniles Facing Criminal Sanctions: Three States that Changed the Rules* (2000), <http://www.ncjrs.gov/pdffiles1/ojdp/181203.pdf>.
- <sup>39</sup> Even California's controversial Youth Authority has conformed to this trend; for many years it was an exception. However, the total incarcerated juvenile population declined from approximately 10,000 in 1996 to 1,568 today. See *2008 Population Report* (Division of Juvenile Justice, California Department of Corrections and Rehabilitation, 2008), [http://www.cdcr.ca.gov/reports\\_research/research\\_tips.html](http://www.cdcr.ca.gov/reports_research/research_tips.html).
- <sup>40</sup> Bennett, Dilulio, and Walters, *Body Count*.
- <sup>41</sup> Cook and Laub, "The Unprecedented Epidemic of Youth Violence."
- <sup>42</sup> Zimring, *American Youth Violence*.
- <sup>43</sup> "Pennsylvania Opens Nation's First Youth Prison," *Corrections Digest*, December 15, 2000.
- <sup>44</sup> See, for example, Jerome G. Miller, *Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools* (Columbus: Ohio State University Press, 1991).
- <sup>45</sup> See, for example, Lloyd Ohlin et al., "Radical Correctional Reform: A Case Study of the Massachusetts Youth Correctional System," *Harvard Educational Review*, special issue on The Rights of Children, 120 (1974).
- <sup>46</sup> Edmund F. McGarrell, *Juvenile Correctional Reform: Two Decades of Policy and Procedural Change* (Albany: State University of New York Press, 1988).

- 47 Civ No. 1:07-CA-276 (W.D. Tex.). See also Sylvia Moreno, "In Texas, Scandals Rock Juvenile Justice System," *The Washington Post*, April 5, 2007.
- 48 Letter from Loretta King, Acting Assistant Attorney General, to Governor David A. Paterson, Re: Investigation of the Lansing Residential Center, Louis Gossett, Jr. Residential Center, Tryon Residential Center, and Tryon Girls Center, August 14, 2009, [http://www.justice.gov/crt/split/documents/NY\\_juvenile\\_facilities\\_findlet\\_08-14-2009.pdf](http://www.justice.gov/crt/split/documents/NY_juvenile_facilities_findlet_08-14-2009.pdf).
- 49 *Farrell v. Gate*, RGo3-079344 (Cal. Super. Ct. 2004).
- 50 See 18 U.S.C. section 3626 (1995).
- 51 See Michelle Inderbitzin, "Reentry of Emerging Adults: Adolescent Inmates' Transition Back Into the Community," *Journal of Adolescent Research* 24 (2009): 453. Also see Scott Huey et al., "Mechanisms of Change in Multisystemic Therapy: Reducing Delinquent Behavior through Therapist Adherence and Improved Family and Peer Functioning," *Journal of Consulting and Clinical Psychology* 68 (2000): 451.
- 52 Michael E. Tigar, "What are We Doing to the Children?: An Essay on Juvenile (In)Justice," *Ohio State Journal of Criminal Law* 7 (2010): 849.
- 53 Robert J. Sampson and Jeffrey Morenoff, "Durable Inequality: Spatial Dynamics, Social Processes, and the Persistence of Poverty in Chicago Neighborhoods," in *Poverty Traps*, ed. Samuel Bowles, Steven Durlauf, and Karla Hoff (New York: Russell Sage Foundation, 2006), 176–203.
- 54 Sickmund et al., *Census of Juveniles in Residential Placement Databook*.
- 55 Juvenile arrest rates for drug offenses are strongly at odds with their involvement in drug use and drug selling. See, for example, Leonard Saxe et al., "The Visibility of Illicit Drugs: Implications for Community-Based Drug Control Strategies," *American Journal of Public Health* 91 (2001): 1987.
- 56 *Ibid.* See also, Donna M. Bishop, "The Role of Race and Ethnicity in Juvenile Justice Processing," in *Our Children, Their Children: Confronting Racial and Ethnic Differences in American Juvenile Justice*, ed. Darnell F. Hawkins and Kimberly Kempf-Leonard (Chicago: University of Chicago Press, 2005).
- 57 George S. Bridges and Sara Steen, "Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms," *American Sociological Review* 63 (1998): 554; Sandra Graham and Brian S. Lowery, "Priming Unconscious Racial Stereotypes about Adolescent Offenders," *Law & Human Behavior* 28 (2004): 483.
- 58 Kareem L. Jordan and Tina L. Freiburger, "Examining the Impact of Race and Ethnicity on the Sentencing of Juveniles in the Adult Court," *Criminal Justice Policy Review* 21 (2010): 185.
- 59 Carl E. Pope, Rick Lovell, and Heidi M. Hsia, *Disproportionate Minority Confinement: A Review of the Research Literature from 1989 through 2001* (Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 2002), [http://www.ojjdp.ncjrs.gov/dmc/pdf/dmc89\\_01.pdf](http://www.ojjdp.ncjrs.gov/dmc/pdf/dmc89_01.pdf); David Huizinga et al., *Disproportionate Minority Contact in the Juvenile Justice System: A Study of Differential Minority Arrest/Referral to Court in Three Cities* (U.S. Department of Justice, 2007), <http://www.ncjrs.gov/pdffiles1/ojjdp/grants/219743.pdf>.
- 60 Lawrence Bobo and Victor Thompson, "Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System," *Social Research* 73 (2006): 445.
- 61 See, for example, Jennifer L. Eberhardt et al., "Seeing Black: Race, Crime, and Visual Processing," *Journal of Personality and Social Psychology* 87 (2004): 876; Jennifer L. Eberhardt et al., "Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes," *Psychological Science* 17 (2006): 383.
- 62 Anthony Greenwald and Linda Hamilton Krieger, "Implicit Bias: Scientific Foundations," *California Law Review* 94 (2006): 945.
- 63 Eberhardt et al., "Seeing Black."



- <sup>64</sup> E. Ashby Plant and B. Michelle Peruche, "The Consequences of Race for Police Officers' Responses to Criminal Suspects," *Psychological Science* 16 (2005): 180.
- <sup>65</sup> Patrick Bayer, Radi Hjalmarsson, and David Pozen, "Building Criminal Capital Behind Bars: Peer Effects in Juvenile Corrections," *Quarterly Journal of Economics* 124 (2009): 105. Bayer and colleagues show that adolescents placed in correctional institutions are more likely than those in smaller residential placements to form stronger peer networks with other delinquents that lead to higher rearrest rates within two years of release.
- <sup>66</sup> Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006); Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (New York: Oxford University Press, 2007).
- <sup>67</sup> Robert J. Sampson and John H. Laub, *Crime in the Making: Pathways and Turning Points through Life* (Cambridge, Mass.: Harvard University Press, 1993); Jeffrey Fagan and Richard B. Freeman, "Crime and Work," *Crime and Justice* 25 (1999): 113.
- <sup>68</sup> Fagan and Freeman, "Crime and Work." Also see Donna M. Bishop, "The Role of Race and Ethnicity in Juvenile Justice Processing"; Rodney L. Engen, Sara Steen, and George S. Bridges, "Racial Disparities in the Punishment of Youth: A Theoretical and Empirical Assessment of the Literature," *Social Problems* 49 (2002): 194; Donna M. Bishop and Charles E. Frazier, "Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis," *Journal of Criminal Law and Criminology* 86 (1996): 415.
- <sup>69</sup> See, for example, Christopher Wildeman, "Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage," *Demography* 46 (2009): 265. Also see Bruce Western and Christopher Wildeman, "The Black Family and Mass Incarceration," *Annals of the American Academy of Political and Social Sciences* 621 (2009): 221.
- <sup>70</sup> See Act of Nov. 4, 1992, Pub. L. No. 102-586, section 2(f)(3)(A)(ii), 106 Stat. 4982, 4993-94 (codified as amended at 42 U.S.C. section 5633 [Supp. III 2005]).
- <sup>71</sup> Olatunde C.A. Johnson, "Disparity Rules," *Columbia Law Review* 107 (2005): 374.
- <sup>72</sup> Heather Gerken, "Federalism All the Way Down?" *Harvard Law Review* (forthcoming).
- <sup>73</sup> See Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007).
- <sup>74</sup> Sickmund, *Juveniles in Residential Placement*.
- <sup>75</sup> Daniel Mears, "Exploring State-Level Variation in Juvenile Incarceration Rates: Symbolic Threats and Competing Explanations," *The Prison Journal* 86 (2006): 470.
- <sup>76</sup> Matt Schwarzfeld, "Fewer Lock-Ups, Enough Money?" *City Limits Weekly*, February 25, 2008.
- <sup>77</sup> In addition to expanding the crime categories that triggered transfer to the criminal court, many states reduced the minimum age at which offenders could be sentenced by criminal courts to age ten or younger. In a few states, all barriers to criminal court were removed down to the age of infancy; Snyder and Sickmund, *Juvenile Offenders and Victims*.
- <sup>78</sup> For a discussion of this evidence, see *Roper v. Simmons* (543 U.S. 551 [2005]); and *Graham v. Florida* (560 U.S. 130 S. Ct. [2010]). See also Scott and Steinberg, *Rethinking Juvenile Justice*.
- <sup>79</sup> Andrea McGowan et al., "Effects on Violence of Laws and Policies."
- <sup>80</sup> Thomas A. Loughran et al., "Estimating a Dose-Response Relationship between Length of Stay and Future Recidivism in Serious Juvenile Offenders," *Criminology* 47 (2009): 699; Daniel Nagin, Francis T. Cullen, and Cheryl Lero Johnson, "Imprisonment and Reoffending," *Crime and Justice* 38 (2009): 115; Anthony N. Doob and Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis," *Crime and Justice* 30 (2003): 143; Emily G. Owens, "More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements," *The Journal of Law and Economics* 52 (2009): 551.