

THEY DREAM OF GROWING OLDER: ON KIDS AND CRIME

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*Pedro lives out of the Wilshire Hotel
He looks out a window without glass
The walls are made of cardboard
newspapers on his feet
His father beats him 'cause he's too tired to beg
He's got 9 brothers and sisters
They're brought up on their knees
It's hard to run when a coat hanger beats you on the thighs
Pedro dreams of being older and killing the old man
but that's a slim chance he's going to the boulevard . . .
No one here dreams of being a doctor or a lawyer or anything
they dream of dealing on the dirty boulevard*

—Lou Reed, "Dirty Blvd."¹

I. INTRODUCTION

Kenny was tall and lanky, the kind of tall that just keeps outgrowing shoes and pants. At last the baggy-jeans-hanging-off-the-butt fashion made sense; those big pants allow for adolescent development. Kenny had enormous hair piled on top of a kid's face, like the Jackson 5 meets Eraserhead. He didn't show too much emotion because he was busy looking cool, but his eyes had the trace of a smile.

Kenny was charged with dealing crack cocaine and possessing marijuana. Though he was seventeen years old, he was being arraigned in adult criminal court,² waiting to have his case called from a range

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¹ LOU REED, *Dirty Blvd.*, on NEW YORK (Sire Records 1989).

² Though the most common age for juvenile court jurisdiction is 18, in Massachusetts, where Kenny was prosecuted, the juvenile court has jurisdiction over children between the ages of seven and 17, who are accused of violating a city ordinance, town by-law, or state statute. Seventeen-

of cases from shoplifting to homicide. Many of the other defendants were old enough to be his mom or dad.

Kenny denied the drug dealing charge, but admitted to having bought marijuana for his own use. He had no prior record in juvenile or adult court. His only other arrest was for shoplifting when he was sixteen and the case had been dismissed. He went to Quincy High School (by bus from Roxbury, a remnant of busing in Boston³) and had a job lined up for the summer as a lifeguard for the city. He said he was on his way to play basketball with friends when he was arrested.

Kenny had one overriding concern: he didn't want his mother to find out he had been arrested. Because he was an adult in the eyes of the criminal justice system in Massachusetts, the police had not contacted his mother when they arrested him. My student and I were his court-appointed counsel.⁴ The only time Kenny broke into a wide grin was when I suggested his mother might kill him if she found out he'd been charged with drug dealing. He seemed to agree.

Kenny was also more concerned about a friend who had been arrested with him than he seemed to be for himself. He insisted his friend was innocent and had nothing to do with selling or buying drugs. He worried that his friend didn't have a very good court-appointed lawyer; he wondered whether I could represent him too. When I explained why I could not,⁵ he asked whether I might at least give his friend's lawyer a little advice.

year-olds and older are considered adults for purposes of criminal prosecution. MASS. GEN. L. ch. 119, § 52 (1995). A few states set the age of juvenile jurisdiction even lower. *See, e.g.*, N.Y. PENAL LAW § 30.00 (Consol. 1993) (setting age 16 as the limit for juvenile court jurisdiction for most crimes).

³ *See generally* J. ANTHONY LUCAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* (1985) (exploring school integration and related social upheaval in Boston in the late 1960s and 1970s).

⁴ The Criminal Justice Institute ("CJI") is Harvard Law School's curriculum-based (for academic credit) clinical program in criminal law. CJI receives court appointments to represent indigent criminal defendants and juveniles primarily in the Roxbury District Court, the busiest criminal court in Massachusetts, situated in one of the poorest and most segregated neighborhoods. Law students in the program generally function as lead counsel under the supervision of clinical instructors, who are counsel of record. *See generally* MASS. SUP. JUD. CT. R. 3:03 (third-year law students in accredited law schools who have fulfilled certain course requirements and have the dean's approval may represent indigent defendants in criminal and juvenile proceedings under the general supervision of a member of the bar through a law school clinical instruction program). As Kenny's case was picked up late in the spring semester and lingered into the summer, I had more contact with the client and involvement in the case than I ordinarily do.

⁵ *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1969) (a lawyer may represent multiple clients despite a likelihood of adverse effect only "if it is obvious that he can adequately represent the interest of each and . . . if each consents to the representation"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983) (where there is a possibility that a client's representation will be "materially limited" by a lawyer's responsibilities to another client or third person, a lawyer may represent multiple clients if the lawyer "reasonably believes the repre-

There was much that marked Kenny as a kid, notwithstanding his seventeen years and the law of Massachusetts. In my experience as a public defender representing largely adult criminal defendants and as a clinical teacher in a program that also represents mostly adults, Kenny was different from my adult clients. He looked different. He sounded different. His worries were different. Though the drug charges against him were run-of-the-mill for a big-city courthouse, Kenny seemed out of place in adult criminal court.

The judge didn't help. At one court appearance, when I requested that a seventy-five dollar counsel fee⁶ be waived, the judge ordered Kenny to come from behind counsel table so the judge could take a good look at him. Kenny was dressed in jeans and a tee-shirt. He wore no gold, no designer leather jacket, no "gang-wear"—items many judges routinely use against defendants in setting bail, making a determination about court-appointed counsel, and assessing "court costs." Not finding any of the offending attire, the judge looked down at Kenny's shoes and bellowed, "How much did you pay for those sneakers?" Though I had to restrain myself from objecting to the public humiliation of a presumptively innocent—and modestly dressed—client, Kenny responded calmly, "Forty dollars."

Here was Kenny's double-bind: despite being treated like a child, he was being prosecuted as an adult. On the one hand, the judge acted the part of a principal bawling out an errant schoolboy. On the other, the criminal charges against Kenny carried serious adult consequences. If convicted of selling crack, Kenny faced a lengthy state prison sentence⁷ and a criminal record for life.

There is an increasing—and increasingly wide—demand across the nation to treat children who are Kenny's age and younger as adults

sentation will not be adversely affected" and if the client consents). Kenny and his friend may well have had inconsistent defenses, such as each's claiming to be the buyer and accusing the other of being the seller.

⁶ See MASS. GEN. L. ch. 211D, § 2A (1995) ("Any person provided counsel under the provisions of this chapter shall be assessed a legal counsel fee of seventy-five dollars, which may be waived at the discretion of the court."). Unlike other court-appointed counsel, the law school clinic receives no money from the Commonwealth of Massachusetts for the representation of indigent clients. Accordingly, we routinely request fee waivers for our clients. The statute has since been amended and now authorizes a counsel fee of \$100. See *id.* (amended 1994). Section 2A now also provides that if the fee is unpaid, it may be deducted from public assistance payments or state tax refunds.

⁷ See MASS. GEN. L. ch. 94C, § 32A(a) (1995) (first-time offender faces up to 10 years in state prison or up to two-and-a-half years in the House of Correction); see also *id.* § 32A(b) (second and subsequent offender faces mandatory minimum sentence of three to 15 years in state prison); *id.* § 32F(b) (providing for a sentence of three to five years in state prison, with a mandatory minimum of three years, for distributing a Class B [cocaine derivative] controlled substance to a person under 18).

for purposes of criminal prosecution.⁸ Though the demand is most vociferous when a brutal homicide or other violent crime is committed

⁸ See Wendy Kaminer, *Crime and Community*, THE ATLANTIC, May 1994, at 116 ("Amendments passed hastily by the Senate, without hearings, required that juveniles over the age of thirteen be federally prosecuted as adults for certain crimes . . ."); Alex Kotlowitz, *Their Crimes Don't Make Them Adults*, N.Y. TIMES, Feb. 13, 1994, § 6 (Magazine), at 40 ("It is a frenzy that child advocates have labeled the 'adulthoodification' of children. Last year alone, the Colorado, Utah and Florida Legislatures passed laws making it easier to try certain youth offenders as adults. A number of other states are considering similar legislation.").

For an example of a court contemplating the abolition of juvenile court, see *In re K.B.*, 639 A.2d 798, 807 (Pa. Super. Ct. 1994) (denying interlocutory relief to juvenile whose suppression motion was denied by lower court). Expressing growing public sentiment, the Pennsylvania Superior Court noted:

Perhaps the time has come for the legislature to do away with the Juvenile Act. If we continue to permit young offenders to flout its purpose, neither the juveniles nor society benefit from its benevolent offerings. Let us not forget that these juveniles are not simply skipping school or otherwise performing childish pranks, they are committing adult crimes and are injuring innocent victims. If these young miscreants want all the adult rights, perhaps we should give them all the adult punishments concomitant with them.

Id. at 806.

Yet, polls of the general public reveal a range of feelings, depending upon the question asked. Compare Sam Vincent Meddis, *Poll: Treat Juveniles the Same as Adult Offenders*, USA TODAY, Oct. 29, 1993, at 1A (reporting about a USA Today/CNN/Gallop poll which found that 73% of those surveyed said that "violent juveniles should be treated as adults rather than as defendants in lenient juvenile courts") (emphasis added) with Toni Locy, *Poll Says Help Favored for Young Offenders*, BOSTON GLOBE, Feb. 15, 1994, at 16 ("Nearly 70 percent of state voters consider the Massachusetts juvenile justice system too lenient, but continue to cling to hope that even violent youths can be rehabilitated, a recent poll has shown. . . . [T]he poll showed [that] voters want to maintain a separate juvenile system that is firm but compassionate.") (emphasis added).

Over the years, there has been a wealth of legal and other scholarship from various perspectives urging the abolition of the juvenile court. As Irene Merker Rosenberg has noted in her excellent article, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 164, the abolitionist proposal makes for "strange but powerful bedfellows." See also Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991); Michael J. Dale, *Children Before the Supreme Court: In Whose Best Interests?*, 53 ALB. L. REV. 513, 517-23 (1989); Robert O. Dawson, *The Future of Juvenile Justice: Is It Time to Abolish the System?*, 81 J. CRIM. L. & CRIMINOLOGY 136 (1990); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991); Francis Barry McCarthy, *Should Juvenile Delinquency Be Abolished?*, 23 CRIME & DELINQ. 196 (1977) [hereinafter McCarthy, *Abolish Delinquency?*]; Gary B. Melton, *Taking Cault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 150 (1989) (not quite embracing abolition, but calling for a "truly new juvenile court"); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977); Marvin Wolfgang, *The Violent Juvenile: A Philadelphia Profile*, in *Violent Crime in America* (National Policy Exchange ed., 1983); Martin Guggenheim, *A Call to Abolish the Juvenile Justice System*, CHILDREN'S RTS. REP., June 1978, at 1, 3; Alfred S. Regnery, *Getting Away With Murder: Why the Juvenile Justice System Needs an Overhaul*, POL'Y REV., Fall 1985, at 65 (former administrator of the Office of Juvenile Justice and Delinquency Prevention ("OJJDP") under the Reagan administration arguing for abolition); see generally Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629 (1994) [hereinafter McCarthy, *The Serious*

by a juvenile,⁹ drug-related crimes, weapons possession, and a range of property crimes may well be part of the package.¹⁰ And, if the so-called "war on drugs" continues at its current pace,¹¹ cases like Kenny's will continue to dominate court dockets.¹²

Unfortunately, the popular image of the juvenile who commits crime is not Kenny—who, in many ways, is a typical teenager accused of crime or delinquency¹³—but rather a cold-blooded, heavily armed

Offender] (essentially calling for abolition in proposing that prosecutors decide whether to prosecute a child in juvenile or criminal court).

Martin Guggenheim has since reversed his position. See Rosenberg, *supra* at 164, n.1. Stephen Wizner has also changed his mind. Telephone Interview with Stephen Wizner (Aug. 12, 1994); see also Stephen Wizner, *On Youth Crime and the Juvenile Court*, *post*.

⁹ See BARRY KRISBERG & JAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE* 6 (1993) ("[T]he question of transferring juveniles to adult courts remains an ongoing 'hot button' issue, especially after notorious crimes committed by very young persons."); see also Jan Hoffman, *Quirks in Juvenile Offender Law Stir Calls for Change*, N.Y. TIMES, July 12, 1994, at B1 (examining the evolution of the New York juvenile offender law, which has sent juveniles as young as 13 to criminal court since 15-year-old Willie Bosket killed two men on the subway in 1978).

For examples of particularly brutal cases that caused the public—or at least the media—to re-examine the juvenile justice system, see Lynette Holloway, *4 Youths Arrested in Killing of Bicyclist in Park*, N.Y. TIMES, June 5, 1993, at 23 (reporting the arrest of two 14-year-olds and two 16-year-olds, for the fatal shooting of a drama teacher in order to steal his bicycle in Prospect Park, Brooklyn); John Kifner, *3 Teen-Agers Held in Killings of 2 in Brooklyn and Queens*, N.Y. TIMES, July 2, 1994, at 21 (reporting the killings of a Consolidated Edison worker and a visiting California college student by three 15-year-olds); Elizabeth Neuffer, *Detention vs. Incarceration: Rise in Murders Renews Call to Classify Youths as Adults*, BOSTON GLOBE, Nov. 23, 1990, at 1 (discussing the brutal rape of Kimberly Rae Harbour by five juveniles and three adults).

¹⁰ See, e.g., Kotlowitz, *supra* note 8, at 40 (noting Senator Carol Moseley-Braun's proposal to treat as adults all juveniles who are charged with federal offenses); Pierre Thomas, *U.S. Acts to Curb Youth Handgun Use*, WASH. POST, Nov. 18, 1994, at A4 (reporting efforts to expand federal prosecution of juveniles caught carrying guns without adult supervision). As most federal district court judges and lawyers will attest, the federal criminal docket is increasingly drug-related.

¹¹ See ELLIOTT CURRIE, *RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE* 3 (1993) [hereinafter CURRIE, *RECKONING*]. As Currie notes:

Twenty years of the "war" on drugs have jammed our jails and prisons, immobilized the criminal justice system in many cities, swollen the ranks of the criminalized and unemployable minority poor, and diverted desperately needed resources from other social needs. Yet the drug crisis is still very much with us.

Id.

¹² See *id.* ("The rise in the sheer numbers of people arrested, coupled with increasingly harsh sentences, has flooded the courts, jails, and prisons with drug offenders."). For a description of how crack has changed the urban landscape, see generally CHRISTOPHER JENCKS, *THE HOMELESS* 41–42 (1994) ("When [crack] arrived on the streets in the mid-1980s, a single hit typically cost \$10. Today the price is often \$5 and sometimes as low as \$3. . . . [C]rack made the pleasure of cocaine available to people who had very little cash and were likely to spend it on the first high they could afford.").

¹³ See ELLIOTT CURRIE, *DOPE AND TROUBLE: PORTRAITS OF DELINQUENT YOUTH* 3–4 (1991) [hereinafter CURRIE, *DOPE AND TROUBLE*] ("The drug trade is so pervasive in the poorer communities . . . that the majority of kids I got to know in the [juvenile facility], whether black, white, or Latino, have sold some drugs at some point in their adolescence."); Isabel Wilkerson, *Crack's Legacy of Guns and Death Lives On*, N.Y. TIMES, Dec. 13, 1994, at 1. Wilkerson writes:

predator.¹⁴ This is the image that sells newspapers,¹⁵ spreads fear,¹⁶ and drives social policy.¹⁷ The call for the adult criminal prosecution of

On a spring morning four years ago in a dead-end neighborhood in Chicago, it was Jovan Roger's turn to sell a little bag of crack that, added to the bags that he figured were sure to follow, could buy him gym shoes and girlfriends and maybe keep the electric company from turning off the lights at his mother's apartment again. He was 14 . . .

Wilkinson, *supra*, at 1; see also Malcolm W. Klein et al., "Crack," *Street Gangs, and Violence*, 29 *CRIMINOLOGY* 623 (1991) (discussing the influx of crack into most American cities in 1987 and how it has changed the nature of urban crime); McCarthy, *The Serious Offender*, *supra* note 8, at 638 (citing the FBI's Uniform Crime Reports and statistics from the National Center for Juvenile Justice, both of which reveal "dramatic" changes in juvenile crime with the appearance of crack cocaine); cf. Mercer L. Sullivan, *Youth Crime: New York's Two Varieties*, *NEW YORK AFFAIRS*, No. 1 1983, 31, 34-36 (finding that in 1983, the most common crimes committed by youths in three low-income Brooklyn neighborhoods were "peer-recruited" theft crimes, followed by "adult-recruited" drug selling, organized gambling, and auto theft).

For an accurate though fictitious portrayal of a kid caught up in drugs, see RICHARD PRICE, *CLOCKERS* (1992). For two excellent nonfiction counterparts, see CURRIE, *DOPE AND TROUBLE*, *supra*, and TERRY WILLIAMS, *THE COCAINE KIDS: THE INSIDE STORY OF A TEENAGE DRUG RING* (1989).

¹⁴ The archetypal juvenile predator of the 1980s and 1990s might be the young Kody (Monster) Scott, whose gang-related exploits are recounted in brutal detail by the now adult, black nationalist Sanyika Shakur, who is serving a life sentence in a maximum security prison in California. See SANYIKA SHAKUR, *MONSTER: THE AUTOBIOGRAPHY OF AN L.A. GANG MEMBER* (1993); see also PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* 204 (1993) ("The stereotypical images of youths from the inner city 'urban jungle' are teenage welfare mothers, savage gang members and wannabes. . . . They are all suspect.").

For an example of the sort of violent crime that perpetuates the popular image of juvenile crime, see Mike Barnicle, *Crime Turns to Child's Play*, *BOSTON GLOBE*, Nov. 3, 1994, at 29 (commenting on the "dreary" nature of youthful drive-by shootings); Indira A.R. Lakshmanan, *Boy, 9, Dies; Youth Held in Killing*, *BOSTON GLOBE*, Nov. 2, 1994, at 1 (reporting the arrest of a 16-year-old gang member for killing a 9-year-old boy who was caught in gang-related gunfire minutes after celebrating his birthday at his grandmother's home on Halloween night in the Roxbury neighborhood of Boston).

¹⁵ See, e.g., Barnicle, *supra* note 14 ("If bad kids and their evil, often thoughtless, crimes were ever covered the way papers and TV cover the Patriots or the Red Sox, there would be a revolution in the land. Judges would hide. Prosecutors would be embarrassed.").

¹⁶ See Marcus Mabry & Evan Thomas, *Crime: A Conspiracy of Silence*, *NEWSWEEK*, May 18, 1992, at 37 ("The fear of young black men. It's not something most people like to talk about, at least not in public. . . . But left unspoken is the fact that, for most Americans, crime has a black face. . . . The fear is greatest of inner-city youths, in high tops and gang colors.").

¹⁷ See PETER PRESCOTT, *THE CHILD SAVERS: JUVENILE JUSTICE OBSERVED* 3, 9-10 (1981). As Prescott notes:

What the press doesn't tell us, however, is how few of these sensational cases there really are, what a small percentage they represent among the hundreds of thousands of children who run afoul of the law. If the violent children were the only ones we had to think about, our task would be easy. It is the presence of other children . . . that tests our social conscience. The press rarely speaks of them, and they have no way to speak to us. But they are there, and they are in terrible trouble, and even if we don't want to think about them, even if we find it convenient to lump them together with . . . children [who commit violent crime], their presence poses a mute question: What kind of society do we think we are?

juveniles is not about a preference for one set of legal processes over another; it is about a desire to punish the "bad seed."¹⁸

The problem is there are no clear lines between "good" and "bad" kids anymore—if there ever were. Good kids like Kenny—and he is a basically good, caring, intelligent kid—sell drugs. Good kids like Kenny might even have guns. As John Silva, the director of safety and security for the Cambridge, Massachusetts public schools has observed:

Good kids have guns From a district attorney's perspective, a good kid would never carry a gun, but the DAs don't live in the projects. There's so much fear. Good kids who want to go to school and do the right thing—they're afraid of the gangs and the drug dealers; they want to protect themselves and their families. Good kids, bad kids—the categories don't apply anymore.¹⁹

As this article will show, criminalizing juvenile delinquency is the wrong approach both as a matter of principle and as a matter of policy. It ignores the nature of most youthful offenders and youthful offenses.²⁰ It ignores the complexity of juvenile delinquency in a chaotic,

Id.; see also CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* (1992) [hereinafter JENCKS, *RETHINKING SOCIAL POLICY*]. Jencks observes:

Like rain on election day, crime is good for the Republicans. Whenever crime seems to be increasing, significant numbers of Americans tend to blame liberal permissiveness and turn to conservative political candidates. . . . While orthodox liberals answer that "getting tough" won't really help and that the way to reduce crime is to make society more just and opportunity more equal, this response to crime has seldom moved the electorate.

JENCKS, *RETHINKING SOCIAL POLICY*, *supra*, at 92.

¹⁸ See *THE BAD SEED* (Warner Brothers 1956) (a film about the child descendant of a cold-blooded multiple murderer); MAXWELL ANDERSON, *THE BAD SEED* (1955) (the novel on which the film is based). See also CURRIE, *DOPE AND TROUBLE*, *supra* note 13, at xiii ("[O]ur typical approach to delinquent youth is reactive and punitive . . .").

There are a number of conservative American scholars who share this "bad seed" view of criminals, and who invariably support punishment—especially imprisonment—as the only policy response. See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) [hereinafter HERRNSTEIN & MURRAY, *THE BELL CURVE*] (claiming that heredity plays a primary role in determining intelligence, economic success, and crime); JAMES Q. WILSON, *THINKING ABOUT CRIME* 209 (1975) [hereinafter WILSON, *THINKING ABOUT CRIME*] ("Wicked people exist. Nothing avails except to set them apart from innocent people."); JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* (1985) [hereinafter WILSON & HERRNSTEIN, *CRIME AND HUMAN NATURE*] (arguing that genetic variation helps to explain why some people commit crime and others do not); see also ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION* (1975) (arguing that increased punishment is the only way to reduce crime).

¹⁹ Kaminer, *Crime and Community*, *supra* note 8, at 120.

²⁰ See CURRIE, *DOPE AND TROUBLE*, *supra* note 13, at xii (describing the way we stereotype troubled and delinquent kids as "thugs" or as "damaged goods"). As Currie notes:

Like most stereotypes, those are not always entirely wrong. In any juvenile institu-

violent time.²¹ It overlooks the possibility for creative reform of the juvenile justice system for a clearly worse alternative.²² It adopts punishment—often violent punishment²³—as the single method of addressing crimes committed by the most marginalized members of society. It heralds social control over social justice.²⁴

tion in the United States, you can find thugs, and you can find some who are emotionally damaged beyond hope of repair. But the stereotypes also mislead us and hobble a rational approach to the problems of troubled kids. They obscure the complexity of the forces that influence the paths young people take for better or for worse, and, even more importantly, the considerable strengths and constructive potentials most of them possess. . . . Many of the young people [incarcerated in juvenile institutions] have suffered from extraordinary neglect, some from fearsome brutality; but they are also capable of extraordinary attachments to others, deep loyalties, and stubborn optimism.

Id.

²¹ See JAMES GARBARINO ET AL., *CHILDREN IN DANGER: COPING WITH THE CONSEQUENCES OF COMMUNITY VIOLENCE* at xii-xiii (1992) [hereinafter GARBARINO ET AL., *CHILDREN IN DANGER*] (exploring what it means for children to grow up in an "urban war zone" and developing strategies to help children cope with "complex feelings about violence in the community"); Carl C. Bell and Ester J. Jenkins, *Community Violence and Children on Chicago's Southside*, 56 *PSYCHIATRY* 46, 46-53 (1993) (examining the impact of rampant violence on inner-city children in Chicago); see also Kotlowitz, *supra* note 8, at 41 ("The debate over treating juvenile offenders as adults is more than a debate over youth crime; it gets to the fundamental question of what it means to be a child, particularly in an increasingly violent world.").

²² See Rosenberg, *supra* note 8, at 165-66 ("[A]s much as I agree . . . that the juvenile courts impose punishment in the name of treatment and give reduced constitutional and procedural protection to children, . . . [t]he proposed alternative of trial in the adult criminal courts, where I also have practiced, is even worse than what we now have."); see also Mark Soler, *Re-Imagining the Juvenile Court*, in *CHILD, PARENT, AND STATE: LAW AND POLICY READER* 600, 601 (S. Randall Humm ed., 1994) ("Processing juveniles in the adult courts would not trigger meaningful reform. The physical environment of many adult criminal courts, particularly in major metropolitan areas, is as oppressive and depressing as that of juvenile courts."); Bob Herbert, *Of Proms and Prisons*, *N.Y. TIMES*, June 12, 1994, at E17 ("Most of the young men and women growing up in the nation's inner cities . . . need quality education and training. . . . They need guidance. . . . What they don't need is exactly what we're giving them—a cold shoulder and a prison cell.").

²³ See MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 15-16 (Alan Sheridan trans., 1977) ("[P]unishment like forced labour or even imprisonment . . . has never functioned without a certain additional element of punishment that certainly concerns the body itself: rationing of food, sexual deprivation, corporal punishment, solitary confinement. . . . There remains, therefore, a trace of "torture" in the modern mechanisms of criminal justice . . ."); see also ROBERT COVER, *Nomos and Narrative*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 95, 155 (Martha Minow et al. eds., 1992) ("Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. . . ."); ROBERT COVER, *Violence and the Word*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 203, 225 (Martha Minow et al. eds., 1992) (describing a convicted defendant about to be sentenced as a "prospective victim of state violence").

²⁴ See generally WALLACE STEVENS, *Connoisseur of Chaos*, in *THE COLLECTED POEMS OF WALLACE STEVENS* 215 (1954). Stevens wrote:

This article will explore the nature of crime and punishment in a juvenile context, arguing against the dismantling of a separate juvenile justice system as a misguided reaction to a number of social problems we have not begun to meaningfully address. In an attempt to discredit the basis for maintaining separate juvenile and adult criminal systems, some legal scholars have suggested that children are less childlike now than they were at the turn of the century when the separate juvenile justice system was developed.²⁵ I will suggest that, to the contrary, many of the kids who end up in the juvenile and criminal courts are *more childlike*—having been deprived of anything resembling a real childhood—and more in need of individual attention than ever before.

I will explore society's motivations to punish and control youthful wrongdoers and, in so doing, will argue that a purely punitive response to juvenile crime is both individually and socially destructive. I will also offer suggestions for reforming the current juvenile justice system in a way that more fairly addresses both the needs and rights of the children accused, as well as the protection of society from violent crime. Within this discussion, I will address whether we should treat juveniles who commit serious violent crimes, such as homicide and rape, differently from other juvenile offenders.

II. WHY DO KIDS COMMIT CRIME?

Strike started thinking about his own mother . . . He had said to her that his dealing was short term and that he'd end it quick, coming back to her rich and on the level, but now look what he was up to, sitting here outside this sinkhole with a .25 on his lap. . . .

Strike drifted off, thinking about making it in this life, how hard it would be to draw a picture of himself entitled "Making It." He couldn't imagine what he would be doing in that picture, what he

A. A violent order is disorder; and

B. A great disorder is an order. These

Two things are one.

Id.; see also JOHN EDGAR WIDEMAN, *BROTHERS AND KEEPERS* 45 (1984) [hereinafter WIDEMAN, *BROTHERS AND KEEPERS*] ("Another prisoner leans on a push broom. The asphalt walks are spotless, but every minute or so he advances the broom another foot, pushing its bristles in the gray surface as if his job is not to keep the path clean but punish it for unmentionable crimes against humanity."); Bob Morris, *At Lunch with Fran Lebowitz: Words Are Easy, Books Are Not*, N.Y. TIMES, Aug. 10, 1994, at C1 (writer Lebowitz quips, "Did it ever occur to anyone that if you put nice libraries in public schools you wouldn't have to put them in prisons?").

²⁵ See Ainsworth, *supra* note 8, at 1101-04 ("Just as the turn of the century Progressives reconstructed childhood and adolescence, so too Americans in the last half of the twentieth century have linn'd a new refiguration of the human life cycle in which childhood and adolescence have been re-imagined.").

would be holding, wearing, even what the expression on his face would be.

—Richard Price, *Clockers*²⁶

I remember a few days after hearing you were missing and a boy was found dead in the room the two of you had been sharing. I remember walking down toward the lake to be alone, because I felt myself coming apart . . . I found myself on my knees, praying . . .

I was praying to join you. Offering myself in exchange for you. Take me. Take me. Free my son from the terrible things happening to him.

—John Edgar Wideman, "Father Stories"²⁷

So much has been written exploring the nature and causes of delinquency in so many disciplines that it would be impossible to try to summarize the various views or even cite the major works.²⁸ Remark-

²⁶ PRICE, *supra* note 13, at 105.

²⁷ John Edgar Wideman, *Father Stories*, THE NEW YORKER, Aug. 1, 1994, at 40 [hereinafter Wideman, *Father Stories*]. The article is a letter from Wideman, a highly acclaimed writer and teacher and a Rhodes Scholar, to his son, who is serving a life sentence for murdering a bunkmate at summer camp eight years ago. There is a tragic irony in this, as Wideman's 1984 award-winning book, *Brothers and Keepers*, is a searching examination of the different paths taken by Wideman, whose younger brother is also serving a life sentence for murder. See WIDEMAN, *BROTHERS AND KEEPERS*, *supra* note 24.

²⁸ For an abbreviated sample, reflecting the author's taste and perspective, see generally ROBERT SAM ANSON, *BEST INTENTIONS: THE EDUCATION AND KILLING OF EDMUND PERRY* (1987); ROSELLEN BROWN, *BEFORE AND AFTER* (1992); FOX BUTTERFIELD, *ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE* (1995); COMMISSION ON VIOLENCE AND YOUTH, *AM. PSYCHOL. ASS'N, 1 VIOLENCE & YOUTH: PSYCHOLOGY'S RESPONSE, SUMMARY* (1993) [hereinafter REPORT OF THE AMERICAN PSYCHOLOGICAL COMMISSION]; ELLIOTT CURRIE, *CONFRONTING CRIME: AN AMERICAN CHALLENGE* (1985) [hereinafter CURRIE, *CONFRONTING CRIME*]; CURRIE, *DOPE AND TROUBLE*, *supra* note 13; CURRIE, *RECKONING*, *supra* note 11; CLARENCE DARROW, *CRIME: ITS CAUSE AND TREATMENT* (1922); CHARLES DICKENS, *OLIVER TWIST* (Penguin Books, 1966) (1837); DARCY FREY, *THE LAST SHOT: CITY STREETS, BASKETBALL DREAMS* (1994); ERNEST J. GAINES, *A LESSON BEFORE DYING* (1993); GARBARINO ET AL., *CHILDREN IN DANGER*, *supra* note 21; JAMES GARBARINO ET AL., *NO PLACE TO BE A CHILD: GROWING UP IN A WAR ZONE* (1991) [hereinafter GARBARINO ET AL., *NO PLACE TO BE A CHILD*]; MIKAL GILMORE, *SHOT IN THE HEART* (1994); SHELDON GLUECK & ELEANOR GLUECK, *ONE THOUSAND JUVENILE DELINQUENTS: THEIR TREATMENT BY COURT AND CLINIC* (1934); SHELDON GLUECK & ELEANOR GLUECK, *UNRAVELING JUVENILE DELINQUENCY* (1950) [hereinafter GLUECK & GLUECK, *UNRAVELING JUVENILE DELINQUENCY*]; MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* (1990); JENCKS, *RETHINKING SOCIAL POLICY*, *supra* note 17, at 92-142; ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA* (1991) [hereinafter KOTLOWITZ, *THERE ARE NO CHILDREN HERE*]; JONATHAN KOZOL, *AMAZING GRACE: THE LIVES OF CHILDREN AND THE CONSCIENCE OF A NATION* (1995); JONATHAN KOZOL, *ILLITERATE AMERICA* 13-14, 17 (1985); MYRIAM MIEDZIAN, *BOYS WILL BE BOYS: BREAKING THE LINK BETWEEN MASCULINITY AND VIOLENCE* (1991); ALICE MILLER, *FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE* (Hildegard & Hunter Hannum trans.,

ably, very little of this sort of exploration appears in recent legal scholarship on juvenile justice.²⁹

1983); JOYCE CAROL OATES, *FOXFIRE: CONFESSIONS OF A GIRL GANG* (1993); PRICE, *supra* note 13; DEBORAH PROTHROW-STITH, *DEADLY CONSEQUENCES* (1991); LUIS J. RODRIGUEZ, *ALWAYS RUNNING: LA VIDA LOCA: GANG DAYS IN L.A.* (1993); ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* (1993) [hereinafter SAMPSON & LAUB, *CRIME IN THE MAKING*]; EDWIN M. SCHUR, *RADICAL NONINTERVENTION: RETHINKING THE DELINQUENCY PROBLEM* (1973); VICTOR L. STREIB, *DEATH PENALTY FOR JUVENILES* 72-183 (1987); MERCER SULLIVAN, "GETTING PAID": YOUTH CRIME AND WORK IN THE INNER CITY (1989) [hereinafter SULLIVAN, *GETTING PAID*]; WIDEMAN, *BROTHERS AND KEEPERS*, *supra* note 24; WILLIAMS, *supra* note 13; MARVIN E. WOLFGANG ET AL., *DELINQUENCY IN A BIRTH COHORT* (1972); Anne Campbell, *Friendship as a Factor in Male and Female Delinquency*, in *FRIENDSHIP AND SOCIAL RELATIONS IN CHILDREN* (Hugh C. Foot et al. eds., 1980) [hereinafter Campbell, *Friendship as a Factor*]; Audrey K. Gordon, *The Tattered Cloak of Immortality*, in *ADOLESCENCE AND DEATH* (Charles A. Carr & Joan N. McNeil eds., 1986); Barry Krisberg, *Are You Now or Have You Ever Been a Sociologist?*, 82 J. CRIM. L. & CRIMINOLOGY 141 (1991) [hereinafter Krisberg, *Ever Been a Sociologist?*]; Robert J. Sampson & John H. Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, 27 LAW & SOC'Y REV. 285 (1993) [hereinafter Sampson & Laub, *Inequality, the Underclass, and Social Control*]; Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867 (1981) [hereinafter Zimring, *Kids, Groups and Crime*]; Adrian Nicole LeBlanc, *While Manny's Locked Up*, N.Y. TIMES, Aug. 14, 1994, § 6 (Magazine), at 26.

²⁹ See, e.g., Ainsworth, *supra* note 8, at 1085-1104 (exploring the nature of adolescence but not the nature of delinquency); Barry C. Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 MINN. L. REV. 167, 170 (1980) [hereinafter Feld, *Dismantling the "Rehabilitative Ideal"*] (examining the impact of "sophisticated, persistent, or violent juvenile offenders" on the juvenile system without examining who these offenders are and why they have become this way); Feld, *supra* note 8 (discussing the changing conception of children but not specifically troubled children); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970) (examining juvenile justice reform but not juvenile delinquency); Hon. Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57 (1992) (examining the notion of juvenile rehabilitation but not what causes a youth to need it); Rosenberg, *supra* note 8, at 175 (referring to Janet Ainsworth's use of "social science research" to support the argument that the law should treat children and adults alike without citing contrary research about the developmental impairment of troubled children). But see Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943 (1993) (exploring the nature of youth gangs in critically examining anti-gang legal initiatives); Wizner & Keller, *supra* note 8, at 1122 ("The causes of youth crime are so deeply rooted in the poverty and the social disorganization of urban communities, in the family, and in the individual personality . . ."); Geoffrey C. Hazard, Jr., *The Jurisprudence of Juvenile Deviance*, in *PURSuing JUSTICE FOR THE CHILD* 3, 18 (Margaret Rosenheim ed., 1976) (commenting on the complex causes of delinquency and the difficulty of effective government intervention). Hazard muses:

Perhaps we should begin by recognizing that most of the deviance that the law seeks to control is simply inaccessible from any external position. To the extent it is caused by psychological factors in the individual, we now know those factors are hard to identify and harder to modify through legal and governmental processes. To the extent it is caused by the actor's immediate social environment (family, peers, neighborhood), we now know such environments are largely impervious to the intervention of planners. To the extent it is caused by breakdown of self-control, we now recognize that inculcating self-control through legal compulsion is essen-

For some reason, the "why" questions have not merited serious legal inquiry; apparently such questions are for sociologists and social workers, not legal scholars and lawyers.³⁰ But, as any lawyer who has set foot in juvenile court will attest, understanding the causes of a child's delinquent conduct is essential to good representation: the causes of delinquency may bear on both a child's culpability and the disposition of the case. Furthermore, legal and social policy makers ought to have an understanding of the social problem their policies seek to address.

If the juvenile justice system is to provide effective intervention into juvenile crime, it must understand the children who come before it. Sometimes these children seem unfathomable. John Edgar Wideman may search a lifetime to fathom the violent crimes of both his brother and his son.³¹ We may never fully understand what caused two eleven-year-olds to lure a two-year-old from a shopping mall and beat him to death in Liverpool.³² We may never fully understand why a

tially a contradiction in terms. . . . Put differently, it is possible for society to create government of sorts, but it has proved impossible for government to create society.

Hazard, *supra*, at 18.

For an example of legal scholarship not specifically about juvenile justice, but which relies extensively on research into the causes of crime and delinquency in arguing for mitigated criminal responsibility for the severely deprived, see Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQUALITY 9 (1985) [hereinafter Delgado, "Rotten Social Background"].

³⁰ But see Krisberg, *Ever Been a Sociologist?*, *supra* note 28, at 141 ("At the recent National Crime Summit, Attorney General Dick Thornburgh declared, 'We are not here to search for the root causes of crime or to discuss sociological theory.'").

³¹ See Wideman, *Father Stories*, *supra* note 27. For a provocative fictional exploration of what happens to a family when a son kills, see BROWN, *supra* note 28.

³² See Blake Morrison, *Letter from Liverpool: Children of Circumstance*, THE NEW YORKER, Feb. 14, 1994, at 48 (examining the 1993 killing of two-year-old Jamie Bulger by 11-year-olds Jon Venables and Robert Thompson in Liverpool); see also Gitta Sereny, *Re-examining the Evidence*, THE INDEPENDENT, Feb. 6, 1994, at 4 (Sunday Review) (examining the lives of Jon Venables and Robert Thompson and their families to try to uncover the motivation for the killing); Gitta Sereny, *Approaching the Truth*, THE INDEPENDENT, Feb. 13, 1994, at 5 (Sunday Review) (second article in two-part series). In conversations with the solicitors who represented the two convicted boys, one described his client as "a lovely little kid." Telephone Interview with Laurence Lee (June 20, 1994). The other described his client as "a very childlike boy." Telephone Interview with Dominic Lloyd (June 8, 1994). Each put the primary blame on the other boy. Cf. CLARENCE DARROW, *The Crime of Compulsion*, in ATTORNEY FOR THE DAMNED 19-87 (Arthur Weinberg ed., 1957) (Clarence Darrow making his closing argument on behalf of Richard Loeb, age 17, and Nathan Leopold, age 18, charged with the kidnapping and murder of 14-year-old Bobby Franks). Leopold and Loeb were both convicted of the charges, but received sentences of life in prison instead of the death penalty. See also HEAVENLY CREATURES (Miramax Films 1994) (recounting the story of two young girls in New Zealand in the 1950s who kill one girl's mother); *Turning Point: Death of Innocence: The Eric Smith Story* (ABC television broadcast, Dec. 14, 1994) (exploring why 13-year-old Eric Smith beat four-year-old Derrick Robey to death in upstate New York in 1993); GITTA

seventeen-year-old honors student from Harlem who graduated from Phillips Exeter Academy might turn to drugs and robbery.³³

Sometimes, scholars and policy makers seem to grab at easy answers. There is the perennial claim that I.Q. and other genetic traits are reliable predictors of criminality.³⁴ Some experts have looked for chemical links to crime.³⁵ Some experts have charted a connection between certain kinds of weather and crime;³⁶ apparently, some like it hot.

Unfortunately, there are no easy answers. Crime is a social problem, not solely an individual malady.³⁷ Eventually we are going to have

SERENY, *THE CASE OF MARY BELL* (1972) (examining the 1968 killing of four-year-old Martin Brown and three-year-old Brian Howe by 10-year-old Mary Bell in Newcastle, England).

³³ See ANSON, *supra* note 28 (exploring the life of teenager Edmund Perry, who, soon after graduating from Phillips Exeter Academy, was killed by a young police officer whom he and a companion allegedly tried to rob).

³⁴ See HERRNSTEIN & MURRAY, *THE BELL CURVE*, *supra* note 18 (claiming there is a direct correlation between I.Q. and social status, crime, and welfare dependency); WILSON & HERRNSTEIN, *CRIME AND HUMAN NATURE*, *supra* note 18 (arguing that genetic traits such as temperament and intelligence lead people to commit crime); *A Conversation with James Q. Wilson: "Genetic Traits Predispose Some to Criminality"*, U.S. NEWS & WORLD REP., Sept. 30, 1985, at 54 (noting that criminals tend toward athletic build, running to fatness, and "the average criminal tends to have an IQ of about 92—eight to 10 points below the average person—and scores most poorly on verbal fluency. . . . Studies have also found that criminals tend to have low regard for the feelings . . . of others . . ."); Anthony Flint, *IQ fight renewed*, BOSTON GLOBE, Aug. 9, 1994, at 1 (reporting the publication of *The Bell Curve* and discussing the controversy that has always surrounded scholarly assertions about heredity); Richard Herrnstein & Charles Murray, *Race, Genes and I.Q.—An Apologia*, NEW REPUBLIC, Oct. 31, 1994, at 27 (discussing their conclusions about race and I.Q.); see also Robert Wright, *The Biology of Violence*, THE NEW YORKER, Mar. 13, 1995, at 68 (examining the work of Frederick Goodwin and others on the "biology" of urban violence). But see JENCKS, *RETHINKING SOCIAL POLICY*, *supra* note 17, at 92–119 (critically examining the work of Wilson and Herrnstein); CURRIE, *CONFRONTING CRIME*, *supra* note 28, at 40, n.* ("We are not offered evidence for that suggestion [that 'constitutional factors' play a prominent role in crime]—nor even an argument, however speculative, about why those concentrations of constitutional predispositions to crime should turn up when and where they do."); Bruce Bower, *Delinquent Developments: Career Criminals and Temporary Lawbreakers May Cross Paths as Teenagers*, SCI. NEWS, May 1, 1993, at 282 ("Nearly all criminologists, psychologists, sociologists, and other investigators . . . routinely reject the idea of a 'crime gene' . . ."); Wright, *supra*, at 71–77 (discussing the work of Peter Breggin, Martin Daly and Margo Wilson on violence as a "functional" response to environmental factors).

³⁵ See Peter M. Jones, *What Forces Create a Criminal?*, SCHOLASTIC UPDATE, Dec. 4, 1987, at 8 ("One study found that an imbalance of metals—cadmium, magnesium, copper, and zinc—in the body can trigger violent behavior."); see also Wright, *supra* note 34, at 70 (referring to Frederick Goodwin's research into the influence of lead poisoning, head injuries, poor prenatal nutrition, and abuse on the "biochemistry" of violence).

³⁶ See Jones, *supra* note 35, at 8 (describing a study by Stephen Lab, of the University of Alabama, and J. David Hirschel, of the University of North Carolina, which found a connection between criminal violence and rising temperatures, though high humidity was found to diminish violence).

³⁷ See CURRIE, *CONFRONTING CRIME*, *supra* note 28, at 13 ("[I]f we want . . . to deal with crime in America in other than marginal ways, we [will] have to move beyond the level of merely patching up, punishing, or quarantining individuals who ha[ve] gone wrong to confront a range

to untangle the other social problems knotted up with the crime problem. Our future as a society depends on it.³⁸

Though we Americans continue to wring our hands over juvenile crime and violence, we *do know something* about what causes it. We have long known about the role that inequality, community breakdown, and broken social promises play in fostering crime.³⁹ We also know something about the important role of peer influence in juvenile delinquency.⁴⁰ We have finally begun to recognize the connection between family violence and crime and delinquency.⁴¹

A. *Inequality, Community Breakdown, Broken Social Promises*

Money make a lot of difference, man.

I wish it could be like this, man. Wasn't no bums on the street. . . . This what I dream of, everybody be peaceful, man! Nobody would have to sell dope! You know? Just think if cocaine wasn't here how many kids would be alive, how many homies would be alive right now.

—Blaster, age fifteen, a small-time crack dealer⁴²

I looked out and saw Shavon lying curled up on the sidewalk . . . I knew she was dead. I broke out hollering so God could hear me and stop this craziness.

—Felicia Falls, age eighteen, cousin of fourteen-year-old Shavon Dean, who was killed by a spray of bullets fifty yards from her doorstep in Chicago⁴³

of deep and longstanding social and economic problems.”); cf. DARROW, *supra* note 28, at 80 (“[C]rimes of children are really the crimes of the State and society which by neglect and active participation have made him what he is.”).

³⁸ See PROTHROW-STITH, *supra* note 28, at 80–93 (quoting from Boston high school student essays on how it feels to live in a violent world). One student, Mukiya Adams wrote:

Tomorrow is another day. And I wonder what it will bring. But deep down inside I already know that it will be another day of trying to find a safe route home from school, seeing the kids on the street trying to be bad, seeing some old person walking in fear, seeing the police cars, with their lights flashing, and their sirens on, seeing the ambulance coming and going, and seeing the youth of America being shot down, and killed, before they even had a chance to live.

Id. at 80; see also Don Terry, *One Family's Cursed Heirloom: Homicide*, N.Y. TIMES, Dec. 12, 1994, at A1, B7 [hereinafter Terry, *Cursed Heirloom*] (citing Dr. Bruce Perry, chief of psychiatry at the Texas Children's Hospital in Houston, on the plight of children raised amidst violence: “These kids are really left adrift. The truth is we made these kids. Our culture is reaping what it sowed.”).

³⁹ See discussion *infra* part II.A.

⁴⁰ See discussion *infra* part II.B.

⁴¹ See discussion *infra* part II.C.

⁴² CURRIE, DOPE AND TROUBLE, *supra* note 13, at 15.

⁴³ Don Terry, *When Children Kill Children: Boy, 11, Is Wanted in Chicago*, N.Y. TIMES, Sept. 1, 1994, at A1 (describing the shooting of Shavon Dean by 11-year-old Robert Sandifer, who was apparently aiming for someone else).

Strike had seen his brother on the job at Hambone's, seen him striding from griddle to ice chest to deep fryer to dishwasher, barking out orders with a crisp Please and Thank You in every command. And it wasn't just Victor who talked that way. He had made it a commandment in the Hambone's kitchen that nobody could ask anybody for anything, no matter how frantic it got, without putting Please and Thank You on each end of the sentence. So maybe he was doing OK in jail after all.

—Richard Price, *Clockers*⁴⁴

As Geoffrey Hazard noted nearly twenty years ago, "It often seems that juvenile law is operating on an unarticulated wish that young people would behave as though they were members of an integrated and static society living in untroubled times."⁴⁵ But, the lives of juveniles caught up in the law are almost always troubled, reflecting the troubled families and communities from which they come.⁴⁶

There can be no question that much of the trouble comes from economic and racial inequality.⁴⁷ Aside from various studies which point to inequality as a strong indicator of crime,⁴⁸ one need only recognize

⁴⁴ PRICE, *supra* note 13, at 304.

⁴⁵ Hazard, *supra* note 29, at 8.

⁴⁶ See Joe Sexton & Lynette Holloway, *Murder and Troubled Young Lives*, N.Y. TIMES, Dec. 9, 1994, at B1 (describing the wretched childhood of three teenagers charged with murdering a police officer in a gunfight arising out of an attempted hold-up of a Brooklyn bicycle store); Don Terry, *Boy's Short, Troubled Life Ends with Deadly Violence in Chicago*, N.Y. TIMES, Sept. 2, 1994, at A1 [hereinafter Terry, *Boy's Short Troubled Life*] (reporting the death of 11-year-old Robert Sandifer, who was found in a "dank, graffiti-scarred pedestrian underpass . . . shot at least once in the back of the head, apparently, the police said, by the same street gang that put a gun in his small hands and shoved him into the grown-up world of violence and death"); see also GARBARINO ET AL., NO PLACE TO BE A CHILD, *supra* note 28, at 130-49 (describing the chaotic life of children in the Taylor Homes, Chicago's largest public housing project); PROTHROW-STITH, *supra* note 28, at 111-30 (exploring the role of urban life—"drugs, gangs, guns and cops"—on youth violence); cf. DARROW, *supra* note 28, at 78-79 ("[T]he child criminal . . . is always poor. Generally he has lost one or both parents in youth and has lived in the crowded districts where the home was congested. He has no adequate playground and he runs the streets or vacant, waste places. He associates . . . with others of his kind."). But see MEDOFF & SKLAR, *supra* note 14, at 204 (quoting Carline Dorcea, a Boston high school student, "Most of my friends from around here, from this community, are . . . positive people. There are some people who I would say are kind of falling through the cracks and, I mean, society had a big part in that.").

⁴⁷ See CURRIE, CONFRONTING CRIME, *supra* note 28, at 171 ("It isn't accidental . . . that among developed countries, the United States is afflicted simultaneously with the worst rates of violent crime, the widest spread of income inequality, and the most severe public policies toward the disadvantaged."); Philippe Bourgois, *In Search of Horatio Alger: Culture and Ideology in the Crack Economy*, 16 CONTEMP. DRUG PROBS. 619, 627 (1990) ("In the day-to-day experience of the street-bound inner-city resident, unemployment and personal anxiety over the inability to provide one's family with a minimal standard of living translate themselves into intra-community crime, intra-community drug abuse, and intra-community violence.").

⁴⁸ See generally CURRIE, CONFRONTING CRIME, *supra* note 28, at 144-79 (discussing economic and racial inequality and the breakdown of community as causes of delinquency and crime);

that the most visible symbol of inequality, impoverishment, and despair—the urban ghetto—is the national definition of a high crime area.⁴⁹

An increasing number of children—especially black children—are born into poverty and have an increasingly hard time finding a way out.⁵⁰ As of 1990, 44.8% of black children live below the poverty line,

JENCKS, *RETHINKING SOCIAL POLICY*, *supra* note 17, at 114–19 (exploring the connection between inequality or “relative deprivation” and crime); Judith Blau & Peter Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 121 (Feb. 1982) (finding that greater inequality of incomes and a greater proportion of blacks in the population raises the rate of criminal violence); *see also* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 6, 10 (1968) [hereinafter KERNER COMMISSION REPORT] (finding that inner-city violence is the product of poverty, frustration and neglect).

For an analysis of the disproportionate number of poor minority children arrested, prosecuted, and confined in secure juvenile institutions, *see generally* KRISBERG & AUSTIN, *supra* note 9, at 116–32. *See also infra* notes 61–62.

⁴⁹ *See generally* ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* 190–206 (1990) (exploring the way the police and public regard young black males in the inner city); CURRIE, *CONFRONTING CRIME*, *supra* note 28, at 144–46 (discussing the difference in violent crime rates between poverty-stricken, mostly black neighborhoods and their affluent, mostly white counterparts, including violent Highland Park, Michigan and peaceful Highland Park, Illinois).

The best support for the point that ghettos and high crime areas are considered one and the same can be found in police testimony at suppression hearings in urban courtrooms across the country. Typical police testimony in support of a warrantless search or seizure inevitably includes an assertion that the neighborhood in which the police conduct occurred—usually a poor, minority neighborhood—is a “high crime area.” *See, e.g.,* Commonwealth v. Fraser, 573 N.E.2d 979, 980 (Mass. 1991) (officer testified that one of the factors causing him to frisk the defendant was that the encounter occurred in a “high crime area”); Commonwealth v. Almeida, 366 N.E.2d 756, 758 (Mass. 1977) (arresting officer testified that he “knew from his own personal knowledge” that the site of the encounter with the defendant was “a high crime rate area”). *But see* Commonwealth v. Cheek, 597 N.E.2d 1029, 1032 (Mass. 1992). The Cheek court noted:

[T]hat the area where the police observed the defendant was a “high crime area” is not persuasive. This factor contributes nothing to the officers’ ability to distinguish the defendant from any other black male in the Grove Hall section of Roxbury. . . . Where there is a report of a crime in a neighborhood which police consider to be a “high crime area,” law enforcement officials may not conduct a broad sweep of that neighborhood stopping individuals who happen to live in the area and be about, hoping to apprehend a suspect. To permit police investigative stops under the sparse facts present in this case would be to encourage unduly intrusive police practices. The problems that may face the Grove Hall section of Roxbury or any other similar “high crime area” will not be resolved any more readily by excluding the individuals who live there from the protections afforded by our Constitution.

Id.; *see also* MEDOFF & SKLAR, *supra* note 14, at 207 (discussing the negative stereotype of inner-city dwellers).

⁵⁰ *See* CHILDREN’S DEFENSE FUND, *THE STATE OF AMERICA’S CHILDREN* 1992, at x, 35 (1993) (noting that a fifth of all our children subsist in poverty, five million are chronically hungry, and 100,000 are homeless); *see also id.* at ix (“Every fifth child and every fourth preschooler is poor. Every third black and brown child is poor, and every second black preschooler is poor. Two out of every three preschoolers of any background are poor if they live in a female-headed family in the richest nation on earth.”).

compared with 15.9% of white kids.⁵¹ African-American children are almost three times as likely as their white counterparts to grow up in poverty.⁵²

It is difficult to separate racial and economic inequality when it comes to crime.⁵³ Though poverty and related problems⁵⁴ are clearly conducive to crime,⁵⁵ race may have a separate effect.⁵⁶ Continuing

⁵¹ See ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 99-100 (1992); see also JENCKS, *RETHINKING SOCIAL POLICY*, *supra* note 17, at 148 ("The estimated incidence of long-term poverty in 1967-72 was 30 percent for black children compared to only 4.4 percent for white children. In 1981-86, the figures were 38 percent for African Americans and 5 percent for whites." (citing GREG DUNCAN & WILLARD ROGERS, *THE PERSISTENCE OF POVERTY* (Ann Arbor: University of Michigan, Institute for Social Research, 1991))).

⁵² See HACKER, *supra* note 51, at 99.

⁵³ See CURRIE, *CONFRONTING CRIME*, *supra* note 28, at 149 ("Given America's racial history, it is difficult to sort out exactly how much of the variations in rates of serious crime reflect inequalities of class versus those of race.").

⁵⁴ For examples of problems related to poverty, see GARBARINO ET AL., *CHILDREN IN DANGER*, *supra* note 21, at 52 ("[The] risks of living in poverty . . . include malnutrition, unsuitable housing, inferior medical care, inadequate schools, family disruption, family violence, and maladaptive child-rearing patterns."); Susan Chira, *Study Confirms Worst Fears on U.S. Children*, N.Y. TIMES, Apr. 15, 1994, at A1 (wide-ranging three-year study of American children "paints a bleak picture of disintegrating families, persistent poverty, high levels of child abuse, inadequate health care, and child care of such poor quality that it threatens youngsters' intellectual and emotional development").

⁵⁵ See SAMPSON & LAUB, *CRIME IN THE MAKING*, *supra* note 28, at 26-28 (noting that neighborhoods of delinquents studied were "lower-class neighborhoods"); WOLFGANG ET AL., *supra* note 28 (noting connection between socioeconomic status and delinquency throughout the study); Sampson & Laub, *Inequality, the Underclass, and Social Control*, *supra* note 28, at 305 (concluding that the "structural contexts of 'underclass' poverty and racial inequality are significantly related to increased juvenile justice processing"); see also Sexton & Holloway, *supra* note 46, at B1 (describing the conditions at the Brownsville Houses, a public housing project in which three teens accused of murder grew up). Two of the teens are brothers, raised by a single mother with seven other children who "did the best she could" with limited means:

Teachers, administrators and therapists at Public School 284 remember the Smith boys as troubled children with an unpredictable mother. Vernon came to school dirty, when he did at all, and could sometimes be found seated in hallways refusing to enter classrooms. . . .

"It was heartbreaking because we had no idea what was going on at home," said one school official who refused to be identified. "When I saw their faces on television, I said to my wife, 'Remember, I used to send you to the store to buy underwear?'"

Sexton & Holloway, *supra* note 46, at B6.

⁵⁶ See Sampson & Laub, *Inequality, the Underclass, and Social Control*, *supra* note 28, at 297-307 (finding a connection between race and juvenile justice processing); *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1495-96 (1988) [hereinafter *Race and the Criminal Process*] ("One might surmise . . . that racially disproportionate arrest patterns stem purely from social disadvantages . . . that disparately burden racial minorities In fact . . . most studies . . . reveal what many police officers freely admit: that police use race as an independently significant, if not determinative, factor in deciding whom to follow, detain, search, or arrest."); see also CURRIE, *CONFRONTING CRIME*, *supra* note 28, at 149 ("[T]he evidence suggests that in the United States the effects of class and race on criminal violence . . . are inextricably

racial inequality in many aspects of American life⁵⁷ may fuel frustration, bitterness, and marginalization, which in turn fuels crime.⁵⁸

Racism in the criminal justice system further compounds things. Race-based law enforcement is very much a part of the war on crime.⁵⁹

intertwined—but that race probably does have an independent effect.”); CORNEL WEST, *RACE MATTERS* (1993) (discussing the unique role of race in American life).

⁵⁷ Compare DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 83–114 (1993) (examining continued racial segregation in the United States and its relationship to the persistence of black poverty) with KERNER COMMISSION REPORT, *supra* note 48 (noting the growing gap between white and black and rich and poor in 1968). For a gripping tale of racism in America in the 1990s, see Howard Kohn, *Service With a Sneer*, N.Y. TIMES, Nov. 6, 1994, § 6 (Magazine), at 43 (exploring the recently uncovered pattern of discrimination by Denny's Restaurants against African-American customers).

⁵⁸ See Bourgois, *supra* note 47, at 628 (“[T]he ‘personal failure’ of those who survive on the street is articulated in the idiom of race. The racism imposed by the larger society becomes internalized on a personal level.”); see also HACKER, *supra* note 51, at 187 (“Very many blacks who are young and poor feel they have never had a fair chance, nor is that prospect likely. . . . Through crime, blacks are paying whites back in the most ominous way they can. That they harm themselves as much if not more compounds the tragedy.”); MASSEY & DENTON, *supra* note 57, at 138–39 (“Because of racial segregation . . . poor blacks experience a 17% greater chance of becoming victims of a major crime. . . . Under conditions of racial segregation, a simple increase in the rate of black poverty is likely to ignite a cycle of escalating crime and disorder . . .”); WIDEMAN, BROTHERS AND KEEPERS, *supra* note 24, at 57 (“[W]e can’t help but feel some satisfaction seeing a brother, a black man, get over. . . . So this hip guy, this gangster or player or whatever label you give these brothers . . . we . . . still look at them with some sense of pride and admiration. . . . We know they represent rebellion—what little is left in us.”). But see Regina Austin, *The Black Community, Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992) (discussing the complex nature of black lawbreaking in the eyes of “the black community”).

⁵⁹ See John A. Powell & Eileen B. Hershenov, *Hostages to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 559 (1991) (asserting that the “war on drugs” could “more aptly be called a war on the minority populations”); Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2231 (1993) (“No fancy theoretical conceptualization is necessary to explain how race figures in police brutality, in prosecutorial decisions, in jury selection, conviction rates, and in the incarceration and capital sentencing of people of color in America.”); see also ANDERSON, *supra* note 49, at 190–206 (exploring the relationship between the police and black males); THE NATIONAL ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE & THE CRIMINAL JUSTICE INST., *BEYOND RODNEY KING: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES* (1994) [hereinafter NAACP & CJI] (examining police misconduct in minority communities); Charles J. Ogletree, *Does Race Matter in Criminal Prosecutions?*, THE CHAMPION, July 1991, at 7, 10–13 (discussing racism in the exercise of police discretion); *Race and the Criminal Process*, *supra* note 56, at 1494–1520 (exploring racism in policing); Peter Schoenburg & Risa Evans, *The Racist Consensual Encounter*, THE CHAMPION, Nov. 1993, at 4 (describing how police officers target members of minority groups for “consensual” encounters).

For a more literary depiction of racist law enforcement, see FREY, *supra* note 28, at 35 (recounting an incident in which several African-American high school basketball players were confronted by a suburban police officer). Frey writes:

After a tournament game in upstate New York, Tchaka was strolling with his teammates through a suburban neighborhood when a policeman suddenly materialized from behind a hedge.

Unfortunately, many African Americans experience racially motivated police encounters as part of their daily life.⁶⁰ The disproportionate number of African-American males arrested⁶¹ and behind bars⁶² is a

"Looking for trouble?"

Tchaka and his friends came to a halt. . . . Tchaka reached forward with his hand.

The cop moved toward his nightstick. Tchaka patted the policeman's shoulder.

"Relax, Officer," he said. "*Ree-laax*. We're just going for a walk."

Id.; see also PRICE, *supra* note 13, at 12 (describing in grueling detail a routine encounter between narcotics officers and young African-American males suspected of drug dealing). In Price's novel, the routine humiliation inflicted by white narcs upon the young African American, Strike, is palpable:

"OK," Big Chief looked right, left, then moved close. "Drop your drawers there, Strike. Dicky check."

Strike hesitated as always, holding it in, weighing his options, finally unzipping and pulling down, some of the tenants in the crowd looking away and talking under their breath, some cursing out the Fury, some cursing out Strike.

"Drop your drawers, bend over, say ah-h-h," Thumper said, getting in on it now.

Strike held his underwear band out so Big Chief could look in.

"Short and sweet there, Strike," Big Chief frowned. "Let's see under your balls, there. See what you got taped under your balls."

"Strike's balls," Thumper drawled. "Strikes and balls, three and two, full count."

Strike pulled up his scrotum

PRICE, *supra* note 13, at 12. *But see* John J. Dilulio, Jr., *The Question of Black Crime*, THE PUB. INTEREST, Fall 1994, at 3, 3-4 (arguing that "America does not have a crime problem; inner-city America does," and calling for more police in inner-city neighborhoods, longer terms of imprisonment for black wrongdoers, and removing at-risk children from inner-city homes); Randall Kennedy, *Blacks and Crime*, WALL ST. J., Apr. 8, 1994, at A14 (arguing that efforts to address the dangers crime poses to minority communities are too often hobbled by reflexive charges of racism).

⁶⁰ See NAACP & CJI, *supra* note 59; see also ANDERSON, *supra* note 49, at 197 ("[W]hen I was younger, they could just stop me, carte blanche, any old time. Name taken, searched, and this went on endlessly. From the time I was about twelve until I was sixteen or seventeen, endlessly, endlessly."); Gary Witherspoon, *Man Alleges Racial Motive in Arrest*, NEWSDAY, Sept. 29, 1994, at A19 (reporting the arrest of a dreadlocked Jamaican disc jockey for "obstructing governmental administration," which apparently consisted of withdrawing \$20 from an automatic teller machine in Patchogue, New York, and not complying with a police order to remain in the booth).

⁶¹ In 1984, almost 46% of those arrested for violent crime were black, even though blacks constituted only slightly more than 12% of the national population. See FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS 1984, at 180 (1985). More disturbingly, studies have shown that black citizens are far more likely than nonblack citizens to be killed or seriously injured by a police officer. See James J. Fyfe, *Race and Extreme Police-Citizen Violence*, in RACE, CRIME, AND CRIMINAL JUSTICE 98 (R.L. McNeely & Carl E. Pope eds., 1981) (finding that blacks are six times more likely to be shot by the police than are white or Hispanic males); James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707, 718-20 (1982). *But see* Dilulio, *supra* note 59, at 12 (arguing that an "incredibly thin blue line" separates black lawbreakers from black crime victims and that there is too little law enforcement in the inner-city).

⁶² See MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* (1995) (finding that one in three black men between ages 20 and 29

further reflection of the influence of race on the administration of criminal justice.⁶³ In 1990, the incarceration rate for black males in the United States was five times higher than the rate of incarceration of black males in South Africa.⁶⁴

Unemployment goes hand in hand with poverty. Today, a greater proportion of African Americans is unemployed—or lacks regular employment—than at any time since the Great Depression.⁶⁵ The connection between crime and the lack of any regular means of earning a living is well-documented.⁶⁶

is either in jail or prison or under supervision by the criminal justice system); MARC MAUER, *YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* 3 (1990) [hereinafter MAUER, *YOUNG BLACK MEN*] (finding that one in four black men between ages 20 and 29 is either in jail, in prison, on probation, or on parole on any given day); MARC MAUER, *AMERICANS BEHIND BARS: THE INTERNATIONAL USE OF INCARCERATION, 1992-1993*, at 18 (1994) [hereinafter MAUER, *AMERICANS BEHIND BARS*] (indicating a widening gap between African-American males enrolled in higher education—537,000 in 1992—and in prison—583,000 in the same year); KRISBERG & AUSTIN, *supra* note 9, at 112-41 (analyzing the influence of race and gender on the decision to take a youth into custody); Sampson & Laub, *Inequality, the Underclass, and Social Control*, *supra* note 28, at 303 (noting the racial inequality reflected in black juvenile detention for drug and property offenses); Barry Krisberg et al., *The Incarceration of Minority Youth*, 33 *CRIME & DELINQ.*, Apr. 1987, at 173 (exploring the disproportionate incarceration of minority youth in juvenile institutions).

⁶³ See Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) (exploring the racist construction of crime). But see Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1255-56 (1994) ("Many of those who seek to champion the interests of African-Americans . . . They charge that the state, at least in its role as administrator of criminal justice, is . . . an instrument of racist oppression. In all too many instances, these allegations are overblown and counterproductive . . .").

⁶⁴ See MAUER, *YOUNG BLACK MEN*, *supra* note 62, at 3 (reporting that the rate of incarceration of black males in the United States is 3370 per 100,000 compared with 681 per 100,000 in South Africa); Fox Butterfield, *U.S. Expands Its Lead in the Rate of Imprisonment*, N.Y. TIMES, Feb. 11, 1992, at A16 (reporting about the United State's high incarceration rate).

⁶⁵ See HACKER, *supra* note 51, at 105.

⁶⁶ See CURRIE, *CONFRONTING CRIME*, *supra* note 28, at 104-41 (exploring the relationship between unemployment and crime); SULLIVAN, *GETTING PAID*, *supra* note 28, at 4-5 ("[R]ecent studies of the relationship between crime and employment rates have showed a stronger relationship since unemployment began to rise in the 1970s.") (citation omitted); see also JOAN PETERSILIA ET AL., RAND CORPORATION, *CRIMINAL CAREERS OF HABITUAL FELONS* (1978); Michael E. Smith & James W. Thompson, *Employment, Youth, and Violence Crime*, in *VIOLENT CRIME IN AMERICA* (Kenneth R. Reinberg ed., National Policy Exchange, 1983); Michelle Sviridoff & James W. Thompson, *Links Between Employment and Crime: A Qualitative Study of Riker's Island Releasees*, 29 *CRIME & DELINQ.* 195, 195-212 (1983).

A visit to the arraignment session of any urban criminal courthouse also demonstrates the connection between unemployment and crime. Almost everyone being arraigned is "currently unemployed but looking for work."

It is difficult to find anything resembling "community" in many impoverished urban areas.⁶⁷ The ravages of violence, crime, and drugs overwhelm even the most community-spirited residents.⁶⁸

⁶⁷ See ANDERSON, *supra* note 49, at 66–69 (1990) (exploring life in an impoverished inner-city neighborhood); see also FREY, *supra* note 28, at 3–4 (describing the bleak conditions in Coney Island's public housing projects). Though Coney Island is more isolated than many impoverished areas, Frey's description of the Coney Island projects is a familiar portrait of urban poverty:

On this peninsula, at the southern tip of Brooklyn, there are almost no stores, no trees, no police; nothing, in fact, but block after block of gray-cement projects—hulking, prisonlike, and jutting straight into the sea. Most summer nights now, an amorphous unease settles over Coney Island, as apartments become stifling and the streets fall prey to the gangs and drug dealers. Options are limited . . . [O]n a night like this, as the dealers set up their drug marts in the streets and alleyways, and the sounds of sirens and gunfire keep pace with the darkening sky, it feels like the end of the world.

FREY, *supra* note 28, at 3–4; cf. TOM WOLFE, *THE BONFIRE OF THE VANITIES* 80–88 (1987) (Bantam 1988) (describing a desolate stretch of the South Bronx). Wolfe depicts this world beneath the highway as a middle-class nightmare:

A vague smokey abysmal uneasiness was seeping into Sherman's skull. The Bronx. . .

. . . All at once there was no more ramp, no more clean cordoned expressway. He was at ground level. It was as if he had fallen into a junkyard. He seemed to be underneath the expressway. In the blackness he could make out a cyclone fence over to the left . . . something caught in it . . . A woman's head! . . . No, it was a chair with three legs and a burnt seat with the charred stuffing hanging out in great wads, rammed halfway through a cyclone fence . . .

. . . .

. . . He keeps going, hugs the right side of the right lane, ready for the turn . . .

. . . .

. . . The buildings appeared to be abandoned. . . . A narrow street lined with seven- or eight-story apartment buildings; no sign of people; not a light in a window. The next block, the same. . . .

. . . Utterly empty, a vast open terrain. Block after block—how many?—six? eight? a dozen?—entire blocks of the city without a building left standing. . . . Here and there were traces of rubble and slag.

WOLFE, *supra*, at 81, 84–85.

⁶⁸ See, e.g., KOTLOWITZ, *THERE ARE NO CHILDREN HERE*, *supra* note 28, at 10; Rick Bragg, *Children Strike Fear Into Grown-Up Hearts*, N.Y. TIMES, Dec. 2, 1994, at A1. Kotlowitz writes about one such resident:

A shy, soft-spoken woman, LaJoe was known for her warmth and generosity, not only to her own children but to her children's friends. Though she received Aid to Families with Dependent Children, neighbors frequently knocked on her door to borrow a can of soup or a cup of flour. She always obliged. LaJoe had often mothered children who needed advice or comforting. Many young men and women still called her "Mom." She let so many people through her apartment, sometimes just to use the bathroom, that she hid the toilet paper in the kitchen because it had often been stolen.

But the neighborhood, which hungrily devoured its children, had taken its toll of LaJoe as well. In recent years, she had become more tired as she questioned her ability to raise her children here.

KOTLOWITZ, *supra*, at 10. Bragg writes about another:

The nexus between community breakdown and crime—perhaps especially juvenile crime—seems obvious. When a child grows up amidst violence,⁶⁹ when prison is just another rite of passage,⁷⁰ when the most

Once, before the children had guns, she could send them running from her stoop as if her voice were thunder and her accusing finger were lightning. Louise Layton and other old women in the St. Thomas housing project held power and respect, keeping watch on the courtyard from their high windows and rusted screen doors.

....

Mrs. Layton, who is nearing 90, said things started to change in the mid-1980's. Now the windows the women watched from are punctured with bullet holes and patched with cardboard. The young people they watched over now frighten them so much that they refuse to go outside even in daylight, and at night the gunfire flashes like fireflies through this barren, crumbling place.

Bragg, *supra*, at A1.

⁶⁹ See REPORT OF THE AMERICAN PSYCHOLOGICAL COMMISSION, *supra* note 28, at 42 ("In a study of 8th graders in Chicago, for example, it was found that 73% had seen someone shot, stabbed, robbed or killed. . . . [W]itnessing shooting and killing in the community is highly disturbing to children."); see also KOTLOWITZ, *THERE ARE NO CHILDREN HERE*, *supra* note 28, at 9 (depicting the sudden eruption of gunfire and the shaky survival instincts of two children caught in its midst); Bob Herbert, *The Embarrassing Collapse of the Crime Bill*, N.Y. TIMES, Aug. 14, 1994, at E15 (quoting Mariano Esquelin, the "bearer of hair-raising stories delivered in a matter-of-fact tone": "Last year I got shot. . . . A young kid on a bicycle, no older than 15 or 16, pulled a .380 automatic from his waist and began shooting. I don't know why. Nobody said nothing to him. Maybe somebody stared at him.").

Studies reveal that youthful victims of violence are disproportionately black. See Joe Sexton, *Young Criminals' Prey: Usually Young*, N.Y. TIMES, Dec. 1, 1994, at 1 ("In 1992; according to the Federal Bureau of Investigation, 1,240 blacks under the age of 18 were murdered nationwide, as compared with 1,103 whites in that age group, and blacks make up only about 12 percent of the population.").

Of course, violence is a problem not only for poor urban youth. See REPORT OF THE AMERICAN PSYCHOLOGICAL COMMISSION, *supra* note 28; see also David Gelman, *The Violence in Our Heads*, NEWSWEEK, Aug. 2, 1993, at 48 ("Teenagers don't invent violence, they learn it. Thus any study of the causes of teen crime might look first at the violence grown-ups have been carrying in their heads. In the last 30 years, Americans have developed a culture of violence surpassing in its pervasiveness anything we experienced before."); Charisse Jones, *An Act of Youthful Savagery Stuns a Suburb*, N.Y. TIMES, Nov. 19, 1994, at 1 (reporting the fatal beating of a 16-year-old boy from the Fox Chase neighborhood of northeast Philadelphia by two dozen teenage boys from the nearby suburb of Abington).

⁷⁰ See Wendy Kaminer, *Federal Offense*, THE ATLANTIC, June 1994, at 102, 104. Kaminer writes: [T]he prospect of a prison sentence [would not] necessarily deter a young male for whom imprisonment has become a rite of passage or a haven from the street: "three hots and a cot." A [prison] sentence might not even distress his parents. One Boston defense attorney remembers the first time the mother of a client encouraged her not to free him from prison. "At least I'll know where he is," she said.

Id.; see also Barbara Kantrowitz, *Wild in the Streets*, NEWSWEEK, Aug. 2, 1993, at 46 (quoting a 15-year-old who lives in Boston's Roxbury neighborhood, whose friends think of jail as a kind of sleep-away camp: "The boys I know think it's fun to be in jail because other boys they know are in jail, too . . ."); see also Howard Manly, *Where Prison Is 'A Fact of Life'*, BOSTON GLOBE, July 7, 1993, at 1 (describing life in the Roxbury section of Boston, where everyone knows someone who's doing time and there is a booming market for small televisions allowed in prison).

visibly successful are drug dealers,⁷¹ when the lawful alternatives seem few and far between,⁷² it's not hard to see why kids are tempted by lawbreaking.⁷³

Especially where there has been abuse or neglect in the family, a stable community is essential to a developing child,⁷⁴ as is a positive

⁷¹ See, e.g., ANDERSON, *supra* note 49, at 243 (describing the attention paid to a 21-year-old drug dealer, "dripping in gold" and driving a big, expensive car); Bourgois, *supra* note 47, at 639-40 (describing the autonomy and dignity of drug dealers); Felicia R. Lee, *A Drug Dealer's Rapid Rise and Ugly Fall*, N.Y. TIMES, Sept. 10, 1994, at 1, 22 ("I had a Isuzu and a Mazda 626, a Nissan Sentra and a custom-made van. . . . I had clothes at Sherri's house, my grandmother's house. . . . It was so much money I was nervous. . . . I was coming home with \$20,000 in my pocket.").

⁷² See, e.g., Peter T. Kilborn, *Finding a Way: The Quest of Derrick, 19*, N.Y. TIMES, Apr. 22, 1993, at 1 (exploring the life of a 19-year-old high school graduate from the Memphis projects, who has found only sporadic, menial jobs since leaving college because of financial and family problems); see also FREY, *supra* note 28, at 226-27 ("They stay in school—though their school hardly keeps its end of the bargain. They say no to drugs—though it's the only fully employed industry around. . . . But they operate in an environment that forgives none of the inevitable transgressions of adolescence and bestows few second chances.").

⁷³ For two insightful explorations of the forces drawing kids to engage in violent crime, see Elijah Anderson, *The Code of the Streets*, ATLANTIC MONTHLY, May 1994, at 81 [hereinafter Anderson, *The Code of the Streets*] (noting that the "inclination to violence springs from the circumstances of life among the ghetto poor—the lack of jobs that pay a living wage, the stigma of race, the fallout from rampant drug use and drug trafficking, and the resulting alienation and lack of hope for the future" and exploring inner-city violence from the perspective of young men seeking "respect"); LeBlanc, *supra* note 28 (examining violent crime from the perspective of a deprived but resourceful teenage "gang girl"). In a bold attempt to look at violence from the inside out, LeBlanc observes:

It's useful to look at violence from the other side, to suspend morality and, for a moment, fear. Imagine you are 15. Your stepfather has raped you, and the only thing keeping you from another year in foster care is your sinking mom. You have learned that the only way to keep your mother away from liquor is to beat her. It takes 20 minutes to subdue her. After you do this, you must calm your little sister. This private weekend life makes it easier to mug a stranger for money that you need, especially when a mugging lasts no more than two minutes. The money means you do not have to ask your overwhelmed mom, who hates you when she's sober. Or the money is for your mom or your little sister, people for whom you hold much shame, obligation, and guilt.

LeBlanc, *supra* note 28, at 28.

For two powerful accounts of what draws kids to commit drug-related crime, see John Tierney, *Fernando, 16, Finds Refuge in a Life of Crime*, N.Y. TIMES, Apr. 13, 1993, at 1 (reporting about a teenage drug dealer, whose mother left him shortly after his birth because of beatings by his father and who had basically been raised on the rough streets of Bridgeport, Conn. after his paternal grandmother died); Lee, *supra* note 71, at 1 (recounting how brothers, ages 10 and 13, began to sell drugs); see also Kantrowitz, *supra* note 70, at 44 (quoting from a Los Angeles prosecutor, "The kids that are selling crack when they're in the fifth grade are not the dumb kids. . . . They're the smart kids. They're the ambitious kids . . . trying to climb up their own corporate ladder. And the only corporate ladder they see has to do with gangs and drugs.").

⁷⁴ See PROTHROW-STITH, *supra* note 28, at 75 ("Poverty alone does not destroy a child. A poor

school experience.⁷⁵ Unfortunately, for many troubled kids, the street is all they get.⁷⁶

The easy availability and proliferation of handguns and other more sophisticated firearms⁷⁷ contributes mightily to the escalation of

child growing up in a stable family has a fighting chance in life. So does a child from a troubled family who grows up in a stable community.").

⁷⁵ See GARBARINO ET AL., *CHILDREN IN DANGER*, *supra* note 28, at 115-33 (exploring the school's important role in ameliorating outcomes for disadvantaged children); SAMPSON & LAUB, *CRIME IN THE MAKING*, *supra* note 28, at 99-104 (discussing the school as an important social institution in the prevention of delinquency); see also FREY, *supra* note 28, at 14 (describing the feeling of "malaise" at Lincoln High School on Coney Island, where security guards seem to outnumber students); JENCKS, *RETHINKING SOCIAL POLICY*, *supra* note 28, at 170-81 (exploring the "educational underclass" created by high drop-out rates and low test scores in the inner-city); Karl Zinsmeister, *Growing Up Scared: Spurred on By Family Instability, Violent Crime Now Touches Millions of Young Lives*, *THE ATLANTIC*, June 1990, at 49, 64 (noting that eight percent of junior and senior high school students in cities miss at least one day a month of school because of fear and "[m]ore than a third of these students report that someone threatened to hurt them in school and 13 percent report actually having been attacked on the premises or on a school bus at least once during the past year."); cf. KOZOL, *supra* note 28, at 13-14 (linking illiteracy with criminality, Kozol notes that 60% of prison inmates cannot read above the grade school level); Bob Herbert, *Of Proms and Prisons*, *N.Y. TIMES*, June 12, 1994, at E17 (citing an Illinois report which indicates that 72% of the men jailed in the state are high school dropouts, as are 80% of the men jailed in the city of Chicago).

A cartoon by Etta Hulme makes the point about the social cost of sinking resources into prisons instead of schools. In the cartoon, two police officers survey an endless row of enormous concrete buildings, each equipped with bars, prison guard towers, and search lights. Written on each building is the word, "JALE." One officer says to the other, "In hindsight, maybe they should have spent more of the state budget on education." See Etta Hulme, Editorial Cartoon, *FORT WORTH STAR-TELEGRAM*, Apr. 28, 1994, at A32.

⁷⁶ See Kantrowitz, *supra* note 70, at 44 (quoting from an Indianapolis prosecutor, who says, "It takes an entire village to raise a child, but the village isn't there for the children anymore. . . . The only direction these kids receive is from their peers on the street, the local drug dealers and other role models who engage in criminal conduct.").

⁷⁷ See David C. Anderson, *Street Guns: A Consumer Guide*, *N.Y. TIMES*, Feb. 14, 1993, § 6 (Magazine), at 20-21 (exploring the vast range of street guns which have appeared on American streets in a "wave . . . of crime, fear and drug money," many of which are popular with young drug dealers); see also MEDOFF & SKLAR, *supra* note 14, at 211-12 (describing the marketing of guns to children); Bob Herbert, *Targeting Women For Guns*, *N.Y. TIMES*, Dec. 7, 1994, at A23 (examining how gun manufacturers are focusing on women and children as part of a new marketing strategy); Bob Herbert, *The "Elegant" Handgun*, *N.Y. TIMES*, Dec. 4, 1994, at E19 (examining the marketing of guns to women). One advertisement by gun manufacturers urges parents to consider buying guns for kids as young as age 10:

Age is not the major yardstick. Some youngsters are ready to start at 10, others at 14. The only real measures are those of maturity and individual responsibility. Does your youngster follow directions well? Is he conscientious and reliable? Would you send him to the grocery store with a list and a \$20 bill? If the answers to these questions or similar ones are "yes" then the answer can also be "yes" when your child asks for his first gun.

Reprinted in MEDOFF & SKLAR, *supra* note 14, at 212. Cf. ILENE COHN & GUY GOODWIN-GILL, *CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT* 23 (1994) ("[Y]outh have trained for battle throughout history, but the weight of the weapons often limited their actual involve-

violence and the break-down of community.⁷⁸ When a gun is present, every angry encounter is potentially fatal.⁷⁹ Children or adolescents with guns are even more dangerous than adults; they are simply not able to exercise sound judgment.⁸⁰

ment. Today, arms technology is so advanced that even small boys and girls can handle common weapons like M16 and AK47 assault rifles.").

⁷⁸ See ANNE C. CAMPBELL, *MEN, WOMEN AND AGGRESSION* 127 (1993) [hereinafter CAMPBELL, *MEN, WOMEN AND AGGRESSION*] ("The increasingly lethal nature of gang violence is associated with the easy availability of guns."); REPORT OF THE AMERICAN PSYCHOLOGICAL COMMISSION, *supra* note 28, at 12 (noting that homicide is the most common cause of death for young African-American females as well as for young African-American males); *Homicide Rate in Young Men Studied*, BOSTON GLOBE, Oct. 14, 1994, at 23 ("The homicide rate among young men 15 to 19 years old more than doubled between 1985 and 1991, and researchers attribute the rise to drug gangs' recruiting of younger members and increased use of guns.").

According to a study by the Centers for Disease Prevention and Control, guns claimed the lives of 88% of the 15- to 19-year-olds killed in 1991. Homicide is the number two cause of death among males in that age group. See *Homicide Rate in Young Men Studied*, *supra*, at 23; see also Fox Butterfield, *Cities Finding a New Policy Limits Guns*, N.Y. TIMES, Nov. 20, 1994, at 22 (reporting the success of a number of police departments in reducing gun-related crime and violence by focusing on getting illegal guns off the street).

⁷⁹ See *Homicide Rate in Young Men Studied*, *supra* note 78 ("When it comes to violence, in the past what may have led to fistfights now leads to gunfire," Dr. David Satcher, director of the Centers for Disease Prevention and Control, said yesterday."); see also Editorial, *Guns, Grown-ups and Kids*, ATLANTA J. & CONST., Apr. 18, 1994, at A10. The editorial describes an increasingly common tragedy and comments upon it:

They were all friends. Good kids, for the most part. Just hanging out, like kids do. But in this case, a gun was in their midst.

The next thing these boys knew, 11-year-old Jason Christopher Wells lay dead on the living room floor from a bullet wound to the head. The remorse of the 14-year-old who shot him was evident even to police. . . .

This case as well as any underscores the hypocrisy of a society that punishes children who misuse firearms, while refusing to punish the adults who supply them. . . .

. . . .

In this state, it is up to children, not adults, to avoid the dangers of guns. Toddlers are expected to distinguish between a real gun and a toy one. They are supposed to know that real guns shoot with less trigger pressure than toy guns. They are expected to appreciate the death and destruction that guns inflict and the ease with which they do it.

Editorial, *supra*.

⁸⁰ See PRICE, *supra* note 13, at 21. Price writes:

Strike hated having a gun, only got it because Rodney had told him he was too little and skinny to get anybody to toe the line just on say-so, that he had to have a piece to do the job. But the truth of it was, he was scared of the gun once he got it—not scared of shooting somebody, but scared of his own anger and what trouble he could get into for shooting somebody.

Id.; see also PROTHROW-STITH, *supra* note 28, at 121 (quoting George, a young gang member in Boston, "I was carrying the gun just to be carrying it. . . . I wanted to be someone big. . . . Sometimes, I would go on the roof and shoot in the air. I felt like . . . Hercules. . . . I even said, 'let a cop come. I'll get 'em.'"). But see Kaminer, *supra* note 8, at 118 (referring to a recent National Institute of Justice study of male juvenile offenders and students in inner-city high

Too many children in our poorest urban areas grow up without hope. When asked what they want to be when they grow up, they will often replace the word "when" with "if."⁸¹ Some kids answer simply, "Dead or in jail."⁸²

There is a pervasive sense of broken promises among our poorest youth. Equal opportunity seems to stop at the ghetto wall.⁸³ Equal justice is a myth.⁸⁴ Even the kids' dreams are defined in relation to the

schools, which found that "self-protection in a hostile and violent world was the chief reason to own and carry a gun").

⁸¹ See KOTLOWITZ, *THERE ARE NO CHILDREN HERE*, *supra* note 28, at x ("And then I asked Lafayette what he wanted to be. 'If I grow up, I'd like to be a bus driver,' he told me. *If*, not *when*. At the age of ten, Lafayette wasn't sure he'd make it to adulthood.'").

⁸² Tierney, *supra* note 73, at B6. There is strong support for this young man's answer. See MAUER & HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM*, *supra* note 62 (finding that one out of three young black men is either locked up or under court supervision); Bob Herbert et al., *The Black Man in America*, N.Y. TIMES, Dec. 4, 1994, § 6 (Magazine), at 75 ("Two Harlem Hospital doctors have calculated that the life expectancy of black men in central Harlem is shorter than that of men in Bangladesh. In America, the leading cause of death among black males between the ages of 15 and 24 is homicide.").

⁸³ See generally JENCKS, *RETHINKING SOCIAL POLICY*, *supra* note 17, at 120-203 (examining the ghetto and the "underclass"); NAACP & CJI, *supra* note 59, at 16 ("These are the people who are the most policed in our society. They are the children who grow up with nothing, believing they are nobody, who know more police officers than teachers . . ."); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 22 n.49 (1986) (referring to the "mutual social pact," which "maintains that if the individual obeys the law, the individual will be accepted by the society, yet no such acceptance has been guaranteed for poor, minority youth").

⁸⁴ Consider, for example, Lafayette Rivers's experience in juvenile court when he was accused of breaking into a truck with four other boys at the Chicago Bulls Stadium. Lafayette denied the charges; though he was present when the incident happened and had run when the police came "for fear of getting blamed," he had not been involved in any crime. KOTLOWITZ, *THERE ARE NO CHILDREN HERE*, *supra* note 28, at 266. He had been at the stadium to try to get a glimpse at the players—especially Michael Jordan—when they arrived for a game. Notwithstanding the presumption of innocence, no one connected with the juvenile system seemed to even consider that Lafayette might be innocent. See *id.* at 271, 291.

Lafayette and his mother clearly got poor people's justice. At arraignment, he and his mother sat in court all day until his case was called at six p.m. The court staff and the judge paid little or no attention.

"What's the name again?" [the judge] asked of Lafayette, who had been before him only minutes earlier. "Lafayette Rivers."

The judge looked bewildered. "Did we have a case by that name?" Someone in the courtroom stifled a giggle. Three minutes had passed and he didn't even remember Lafayette. LaJoe felt as if no one cared. It was as if they were invisible.

No one saw them or cared enough to treat them like human beings.

Id. at 274. One public defender, with a caseload of 400 active cases, was appointed to represent all five juveniles. *Id.* at 290. She had five minutes to prepare for trial after her clients turned down the prosecutor's offer of "supervision"—probation without a finding of guilt—and \$100 restitution, because the mothers didn't have the money. *Id.* at 293.

The trial was quick, Lafayette was not called to testify, and the judge ruled swiftly, "I have no doubt whatsoever but that these minors broke into the car and took all of those things. . . . I am

harshness of daily life, as a passage from Alex Kotlowitz's powerful book, *There are No Children Here*, illustrates:

"I'm gonna have my own condominium in Calumet Park," James told the others, referring to a Chicago suburb. "It's nice out there. You could sit outside all night and nothing would happen."

"They have flowers this tall," said Lafayette, holding his hand four feet off the ground.

James laughed and hurled an empty bottle of Canadian Mist onto the playground's concrete, where it shattered, adding to the hundreds of shards of glass already on the ground. "If I had one wish I'd wish to separate all the good from the bad and send them to another planet so they could battle it out and no innocent people would get hurt," James mused.

"That's two wishes," asserted Lafayette. "I wish to go to heaven."

"I'd wish there be no gangbangers," piped up Pharoah, wishing out of existence those who fought for the gangs.

"Wherever you go there be gangbangers," replied Lafayette.

"Not in Mississippi," Pharoah assured him.⁸⁵

Although not every poor, black child who grows up in the city is a lawbreaker,⁸⁶ we should wonder more about those who manage to avoid lawbreaking than those who give in to the temptations of the street. We certainly do not give these kids many alternatives.

going to enter a finding of delinquency that is against all five of them on the case." *Id.* at 296. Lafayette struggled to understand what had happened:

"Mama, I got a case, don't I?" he repeated.

"You don't have a case. You have a record," she explained.

"For what?"

"For breaking into a truck."

"But I didn't do it," he insisted.

"They found everybody guilty."

"Ain't nothing you can do?" he pleaded.

"No."

Id. at 297.

⁸⁵ *Id.* at 31-32. As Kotlowitz notes, the children's focus on violence at the Henry Horner projects, where they lived, was well-founded. "By season's end, the police would record that one person every three days had been beaten, shot at, or stabbed at Horner. In just one week, they confiscated twenty-two guns and 330 grams of cocaine." *Id.*

⁸⁶ See Austin, *supra* note 58, at 1773 ("[B]ased on the behavior of a few, street crime is wrongly thought to be the near exclusive . . . domain of black males; as a result, black men of all sorts encounter an almost hysterical suspicion as they negotiate public spaces in urban environments . . ."); Delgado, *Rotten Social Background*, *supra* note 29, at 10 ("Of course, not all poor persons violate the law. . .").

B. Peer Influence

My homeboys became my family—the older ones were father figures. Each time I shot someone, each time I put another gun on the set, each time I successfully recruited a combat soldier, I was congratulated by my older homeboys.

—Sanyka Shakur, *Monster*⁸⁷

[T]hat's why people rob because, like, one day we hang out about six of us on the corner, seven, or nine, whatever. From all of us probably three got money. So like they would say, "Let's chip in for somethin'," and I would say, "I don't got no money," and they would like push you aside and say, "You don't got no money, you can't get high with us." So you would say, "Ah, fuck that, I'm getting money to hang out." And that's why people got to get money. They go to do crime to hang out with the group that got money.

—Jorge Padilla, a teen in a poor neighborhood in Brooklyn⁸⁸

He stood there gaping at the old man slumped against the bottom shelf of gallons and half gallons of wine. He didn't know whether he should go to him or whether he should run out of there. The old man continued to call: "Boy? Boy? Boy?" Jefferson became frightened. The old man was still alive. He had seen him. He would tell on him. Now he started babbling. "It wasn't me. It wasn't, me Mr. Gropé. It was Brother and Bear. Brother shot you. It wasn't me. They made me come with them. You got to tell the law that, Mr. Gropé. You hear me, Mr. Gropé.

But he was talking to a dead man.

—Ernest J. Gaines, *A Lesson Before Dying*⁸⁹

The nature of youthful offenses is different from that of adults.⁹⁰ A chief difference is that kids commit crimes in groups.⁹¹ We know this not merely anecdotally, from stories like Kenny's, but also from considerable research and scholarship over the years.⁹²

⁸⁷ SHAKUR, *supra* note 14, at 25.

⁸⁸ Sullivan, *supra* note 13, at 37.

⁸⁹ GAINES, *supra* note 28, at 5–6.

⁹⁰ See Zimring, *Kids, Groups, and Crime*, *supra* note 28, at 883 ("[T]he offenses committed in early and middle adolescence . . . differ qualitatively from the criminal activity characteristic of older offender populations.").

⁹¹ See *id.* at 867 ("[A]dolescents commit crimes, as they live their lives, in groups.").

⁹² See *id.*; see also GLUECK & GLUECK, *UNRAVELING JUVENILE DELINQUENCY*, *supra* note 28, at 164 (concluding from data that 98% of delinquents had delinquent friends while only 7% of nondelinquents had delinquent friends that "birds of a feather flock together"); SAMPSON & LAUB, *CRIME IN THE MAKING*, *supra* note 28, at 99–122 (exploring the role of school, peers, and

Franklin Zimring calls the phenomenon that juvenile lawbreaking occurs in groups a "well-known secret, an obvious fact we ignore."⁹³ He accuses policy-makers of failing to ask the right questions and failing to incorporate what we know when we answer the questions posed.⁹⁴ He argues that an understanding of this "secret" ought to influence the way we measure juvenile crime, the way we think about it, and the way we address it.⁹⁵

The problem is that the public—influenced by the hysterical anti-crime rhetoric of politicians and endless news stories about youth gangs mugging, raping, and "wilding"⁹⁶—sees the group nature of youth crime only in mythic proportion. The function of the group—and even the gang—is more complicated than the nightmarish images portrayed in the media.⁹⁷

siblings on delinquency); Campbell, *Friendship as a Factor*, *supra* note 28 (discussing the connection between peer group influence, "friendship," and delinquency); Clifford R. Shaw & Henry D. McKay, *Male Juvenile Delinquency as Group Behavior*, in *THE SOCIAL FABRIC OF THE METROPOLIS* 252–82 (James F. Short ed., 1971) (reprinted from *NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT REPORTS, REPORT ON THE CAUSES OF CRIME*, 191–99, 222–57 (1931)); Paul A. Strasburg, *Recent National Trends in Serious Juvenile Crime*, in *SERIOUS JUVENILE OFFENDERS: AN ANTHOLOGY* 22 (Robert A. Mathias et al., 1984) ("The younger the offender, the higher the proportion of offenses that are committed in concert with others.").

⁹³ Zimring, *Kids, Groups and Crime*, *supra* note 28, at 867.

⁹⁴ See *id.*

⁹⁵ See *id.* at 869–75, 879–85 (arguing that juvenile crime statistics are distorted because of the group nature of juvenile wrongdoing and the adolescent flavor of the crime—like school-yard extortions as robberies—and suggesting that the degree of individual involvement in a group crime ought to be considered at sentencing); see also Campbell, *Friendship as a Factor*, *supra* note 28, at 372 ("It is now accepted that official crime statistics give an incomplete if not distorted view of delinquent activity."); Strasburg, *supra* note 92, at 22 ("The impact of group offending by juveniles on official statistics is not trivial.").

⁹⁶ See GARBARINO ET AL., *NO PLACE TO BE A CHILD*, *supra* note 28, at 141 ("The attack on a woman jogger in New York's Central Park by a gang of youth was an incident of 'wilding,' or violence as a planned activity.").

⁹⁷ See CAMPBELL, *MEN, WOMEN AND AGGRESSION*, *supra* note 78, at 125–40 (discussing why boys and girls join street gangs and what they get from them); Campbell, *Friendship as a Factor*, *supra* note 28, at 385 ("During the last 20 years . . . [t]he dynamics of male groups have been investigated and the value of such gangs to boys growing up in disorganized social areas has been realized."); Hazard, *supra* note 29, at 7 ("What distinguishes being in a gang from belonging to a group, loitering from hanging around with nothing to do, acquiescing from participating, knowing from misprisioning—particularly in the fluid social relationships typical of young people?"); LeBlanc, *supra* note 28 (exploring the way a girl creates family through gang life); Luis J. Rodriguez, *Turning Youth Gangs Around*, *THE NATION*, Nov. 21, 1994, at 605 ("For many, a gang embraces who they are, gives them the initiatory community they seek and the incipient authority they need to eventually control their own lives. These are things other institutions, including schools and families, often fail to provide."); Don Terry, *Gangs: Machiavelli's Descendants*, *N.Y. TIMES*, Sept. 18, 1994, at 26 ("Children join [gangs] for a variety of reasons: fear, money, lack of jobs, protection, recreation, excitement or because a big sister or brother belongs."); see also DANIEL J. MONTI, *WANNABE: GANGS IN SUBURBS AND SCHOOLS* (1994) (exploring suburban youth

An unusual New York Times article about a fifteen-year-old who participated in the brutal rape and beating of a Russian immigrant under the Coney Island boardwalk with four other teenagers depicts the complexity of group crime.⁹⁸ In the article, the youth, now sixteen, speaks frankly about the crime and attempts to explain what motivated it. He says that the crime "did not make sense then, and does not now."⁹⁹ He also admits that "he could find no words to explain himself adequately . . . [and] he realized how empty any words of regret both sound and feel."¹⁰⁰

The young man, who had no criminal or juvenile record before the Coney Island attack, had agreed—somewhat ambivalently—to participate in a robbery. The attack "wasn't really supposed to happen like that," he said.¹⁰¹ But when the group confronted the victim and discovered she had no money, everything suddenly escalated. Though the fifteen-year-old said he was "embarrassed and sickened by what he and the others did," he admitted that he had held the woman down as the others assaulted her.¹⁰² Though he agreed that there were "numerous opportunities for any of them to stop and walk away," he never did.¹⁰³ He could not account for why he stayed, except to shamefully say, "I probably just wanted to be down with the crowd."¹⁰⁴

Kids and adolescents need to develop a sense of identity.¹⁰⁵ In order to do this, they often find a group with whom they can identify.¹⁰⁶ This tendency for adolescents to seek group attachment applies across

gangs); Evan Stark, *Gangs and Progress: The Contribution of Delinquency to Progressive Reform*, in *CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY* 599 (David F. Greenberg ed., 1993) (exploring how youth gangs have contributed to social change).

For an insightful fictitious account of a girl gang in the 1950s, see Joyce Carol Oates' haunting novel, *FOXFIRE: CONFESSIONS OF A GIRL GANG*, *supra* note 28. For a personal account of an Hispanic boy coming of age in a gang, see Luis J. Rodriguez, *ALWAYS RUNNING: LA VIDA LOCA: GANG DAYS IN L.A.*, *supra* note 28. For a movie depicting life for hispanic teenage girls in a gang, see *MI VIDA LOCA* (Cineville Partners, Ltd. 1994).

⁹⁸ See Joe Sexton, *Jailed Youth Recalls Whim That Led to Robbery and Rape*, N.Y. TIMES, May 14, 1995, at 29.

⁹⁹ *Id.* at 29.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Sexton, *supra* note 98, at 29.

¹⁰⁴ *Id.*

¹⁰⁵ See generally ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* (1950) (examining the central role of identity in child development).

¹⁰⁶ See Zimring, *Kids, Groups and Crime*, *supra* note 28; see also Eliot Hartstone & Karen V. Hansen, *The Violent Juvenile Offender: An Empirical Portrait*, in *VIOLENT JUVENILE OFFENDERS: AN ANTHOLOGY* 100 (Robert A. Mathias et al. eds., 1984) ("The peer group serves as a powerful reference group influencing an individual's behavior.").

the board, regardless of class or race. This does not mean that all kids who hang out in a group are about to commit some kind of "pack" crime;¹⁰⁷ it suggests that there is something natural about kids hanging out together. It suggests that kids tend to do things together, that kids are susceptible to peer pressure, and that kids get caught up in things they might not do on their own.¹⁰⁸

The group nature of juvenile delinquency raises questions about the "bad seed" theory of crime.¹⁰⁹ It also raises questions about relative culpability, a concept the criminal law does not recognize.¹¹⁰

C. Family Violence

Instead of spankings, my father now administered fierce beatings, by means of razor straps and belts, and sometimes with his bare, clenched fists. With each blow that was thrown, my father was

¹⁰⁷ See Jennifer Steinhauer, *Killing of Immigrant Stuns a Brooklyn Area*, N.Y. TIMES, Oct. 16, 1994, at 39 (reporting the neighborhood reaction to the killing of a sometimes homeless Hispanic man by a group of Italian-American teenagers, who, according to a police captain, set upon the man "like a pack of animals"); Barbara Nevins Taylor, *Nothing Will Happen. I'm Lucky*, N.Y. TIMES, Apr. 30, 1994, at 23 (examining the participation of a 15-year-old African-American boy in a "wolf pack" robbery" on a train platform in Queens).

¹⁰⁸ See, e.g., Sexton & Holloway, *supra* note 46, at B1 (reporting the indictment for murder of two brothers, ages 15 and 17, and a 15-year-old friend, relating to the shooting of a police officer during a robbery which was planned by the brothers' uncle, who also died in the incident). The brothers' mother blames the uncle for their trouble: "They weren't the best kids, but they are not killers," said Mrs. Smith. "When kids are being pressured by someone who is older to do wrong, they tend to follow, especially if they admire that person." *Id.* at B6.

¹⁰⁹ See *supra* note 18.

¹¹⁰ See Zimring, *Kids, Groups and Crime*, *supra*, note 28, at 883 (arguing that "[i]n any system of justice that considers the magnitude of the harm done and the degree of the individual offender's involvement" there ought to be an attempt to fashion an individualized sanction). As Zimring elaborates:

[P]rosecutorial discretion in selecting cases for prosecution, determining charges, and pressing for punishment combined with judicial discretion in determining sentences in both juvenile and criminal courts creates ample opportunity for differences in punishment policy that are not reflected in the formal substantive law of either crime or delinquency.

Id. at 884; cf. George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 427-29 (1981) (examining the injustice of the felony-murder rule, which holds all participants in an underlying felony culpable of murder if one of the co-felons kills). Examples of the application of the felony-murder rule illustrate this point. See, e.g., *Tison v. Arizona*, 481 U.S. 137 (1987) (upholding the death penalty for two brothers who helped their father and his cellmate escape from prison, in the course of which the father suddenly shot four people to death); *Commonwealth v. Power*, 650 N.E.2d 87 (Mass. 1995) (defendant, a former anti-war activist, plead guilty to manslaughter charges and was found guilty for her role as "switch car driver" in a 1970 bank robbery during which another person killed a police officer); see also Lucinda Franks, *Return of the Fugitive*, THE NEW YORKER, June 13, 1994, at 40, 51 (recounting Katherine Power's ambivalent participation in "revolutionary actions," including the time she vomited all over her gun when she was keeping watch, which resulted in her being given the lowly task of driving the "switch

issuing the command that his children love him. With each blow that landed they learned instead to hate, and to annihilate their own faith in love.

—Mikal Gilmore, *Shot in the Heart*¹¹¹

My mother she had whupped me bad once and they called Child Protective Service and had took me to the shelter over there. I was about fifteen. And so we called my house, and my stepfather he said, "Keep her there till she good." And he hung up the phone. And I was there about two weeks, and my mother said she didn't want me. . . .

. . . .

. . . I'd rather live on the streets . . . than have to sit at home and get abused by my parent. . . .

. . . .

. . . I figured it this way. My father beat my mother so she takes it out on us. Whatever.

—Shaniqua Brown, age seventeen, who sells cocaine for her twenty-nine-year-old boyfriend¹¹²

"David," he said, making his lips thin by pressing them together, "if I have an obstinate horse or dog to deal with, what do you think I do?"

"I don't know."

"I beat him."

I had answered in a kind of breathless whisper, but I felt, in my silence, that my breath was shorter now.

"I make him wince and smart. I say to myself, 'I'll conquer that fellow,' and if it were to cost him all the blood he had, I should do it."

—Charles Dickens, *David Copperfield*¹¹³

Shot in the Heart, Mikal Gilmore's haunting memoir about his brother, Gary Gilmore, who was executed in 1977 for murdering two men, is a powerful testament to the role of family violence in violent crime. What is extraordinary about Gary Gilmore's story is the explicit connection between the frequent, random brutality he endured as a child and the brutality he later inflicted upon others—and ultimately upon himself.¹¹⁴ Gilmore's father apparently suspected that Gary was

car" six blocks from the bank when William Gilday suddenly and "for no apparent reason" shot police officer Walter Shroeder).

¹¹¹ GILMORE, *supra* note 28, at 123.

¹¹² CURRIE, DOPE AND TROUBLE, *supra* note 13, at 38, 60–61.

¹¹³ CHARLES DICKENS, DAVID COPPERFIELD 95–96 (Penguin Classics 1985) (1850).

¹¹⁴ See NORMAN MAILER, THE EXECUTIONER'S SONG (1978); see also GILMORE, *supra* note 28, at xi. Gilmore writes:

another man's son and took it out on him with a particular vengeance.¹¹⁵

The main premise of *Shot in the Heart*, that violence begets violence and crime, is well-supported by what Mikal Gilmore reveals about his brother's upbringing and by what social science research has long shown: children who experience violence in the home are likely to have a range of emotional and behavioral problems, including a tendency to engage in violent conduct themselves.¹¹⁶

It is important to note that family violence need not be directed at children in order to create emotional upheaval in them; studies have

On November 1, 1976, Gary refused his right to appeal his sentence and insisted that the state go ahead and meet the date it had set for his death. . . . Gary seemed to be saying: *There's really nothing you can do to punish me, because this is precisely what I want, this is my will. You will help me with my final murder.*

Id.; see also *id.* at 143 ("[O]n the last day of his life, Gary's final comment about his father said much regarding the cost he had paid for being Frank Gilmore's son. 'My father was the first person I ever wanted to murder,' Gary [said] . . .").

¹¹⁵ See GILMORE, *supra* note 28, at 87-90. Though Frank Gilmore also beat his other sons, Gary apparently got the worst of it. See *id.* at 125, 202.

¹¹⁶ See CURRIE, *CONFRONTING CRIME*, *supra* note 28, at 203 ("[V]iolent homes breed violent children."); see also MILLER, *supra* note 28 (exploring the link between abuse and neglect of young children and later violence); REPORT OF THE AMERICAN PSYCHOLOGICAL COMMISSION, *supra* note 28, at 19 ("Harsh and continual physical punishment by parents has been implicated in the development of aggressive behavior patterns. . . . Abuse at the hands of parents leads children to think and solve problems in ways that later lead to their developing aggressive behavior patterns and to their continuing the cycle of violence."); Dilulio, *supra* note 59, at 25. Dilulio notes:

A study that compared the family experiences of more violent and less violent incarcerated juveniles found that 75 percent of the former group had suffered serious abuse by a family member, while "only" 33 percent of the latter group had been abused. Likewise, 78 percent of the more violent group had been witnesses to extreme violence, while 20 percent of the less violent group had been witnesses.

Dilulio, *supra* note 59, at 25; see also Arthur H. Green, *Dimensions of Psychological Trauma in Abused Children*, 22 J. AM. ACAD. CHILD PSYCHIATRY 231, 234-35 (1983) (concluding that for severely abused children "aggressive and assaultive behavior become the primary vehicles" for making connections with others); Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 585-87 (1988) [hereinafter Lewis et al., *Family Characteristics of 14 Juveniles Condemned to Death*] (finding extensive physical and sexual abuse of the child as well as violence between parents in the families of 14 children on death row); Dorothy Otnow Lewis et al., *Homicidally Aggressive Young Children: Neuropsychiatric and Experiential Correlates*, in *Violent Juvenile Offenders: An Anthology* 71-82 (Robert A. Mathias et al., eds. 1984) (finding that "homicidally aggressive" children in a psychiatric hospital were significantly more likely to have a father who behaved violently, among other factors); Dorothy Otnow Lewis et al., *Violent Juvenile Delinquents: Psychiatric, Neurological, Psychological, and Abuse Factors*, 137 AM. J. PSYCHIATRY 1211 (1980) [hereinafter Lewis et al., *Violent Juvenile Delinquents*] (finding that 75% of violent juveniles had a history of abuse by parents or parent substitutes which "was often extraordinary"); Joan McCord, *A Forty Year Perspective on Effects of Child Abuse and Neglect*, 7 CHILD ABUSE & NEGLECT 265, 269-70 (1983) (finding that rates of delinquency were much greater for abused and neglected children in a 40-year follow-up study of youth in Massachusetts).

shown that violence by a male in the household against the mother can engender a rage in children that is both inward (leading to suicidal tendencies) and outward (leading to violence against others).¹¹⁷ Gary Gilmore often witnessed his father physically abusing his mother.¹¹⁸

It is true that not every child who experiences or witnesses violence will become a violent criminal. Just as all poor people do not commit property crime, all victims and witnesses of violence do not become violent.¹¹⁹ However, all children who grow up in violent families are harmed.¹²⁰ While none of the other Gilmore brothers was as violent as Gary, three of the four brothers spent time in jail or prison, and two died violently.¹²¹ The two remaining brothers are still struggling with the emotional damage of their upbringing.¹²²

¹¹⁷ See Lewis et al., *Family Characteristics of 14 Juveniles Condemned to Death*, *supra* note 116, at 588 (finding violence between parents in families of 11 out of 14 juveniles on death row); Lewis et al., *Violent Juvenile Delinquents*, *supra* note 116 (finding parental violence as well as child abuse in the families of violent delinquents); Jane H. Pfouts et al., *Deviant Behaviors of Child Victims and Bystanders in Violent Families*, in *EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND JUVENILE DELINQUENCY* 79-99 (Robert J. Hunner & Yvonne Elder Walker eds., 1981); Debra Kalmuss, *The Intergenerational Transmission of Marital Aggression*, 46 J. MARRIAGE & FAM. 11 (1984).

¹¹⁸ See, e.g., GILMORE, *supra* note 28, at 88 ("Frank hit her, hard, in the face. 'Don't lie to me, you python-spitting she-devil straight from hell. I've been lied to enough.' He kept hitting her until she lay on the floor, her face bloodied all over, while the children cried."); see also *id.* at 241-42.

¹¹⁹ See Delgado, "Rotten Social Background", *supra* note 29, at 19-37 (describing the social and economic disadvantage which creates criminal propensity, while noting that not all disadvantaged persons commit crime).

¹²⁰ See generally MILLER, *supra* note 28; Tierney, *supra* note 73, at 1 (reporting about the harsh life of an inner-city teen whose father would get drunk and beat him, and who once threatened to cut the boy's penis off with scissors).

For a song that raises questions about the personal and social cost of child abuse, see (and hear) 10,000 MANIACS, *What's the Matter Here, on IN MY TRIBE* (Electra/Asylum Records 1987). In the song, a neighbor despairs about the fate of a child being abused by his parents:

Seen him run outside looking for a place to hide from his father, the kid half naked
and said to myself, "O, what's the matter here?" I'm tired of the excuses everybody
uses, he's their kid I stay out of it, but who gave you the right to do this?

....

Answer me and take your time, what could be the awful crime he could do at so
young an age? If I'm the only witness to your madness offer me some words to
balance out what I see and what I hear. All these cold and rude things that you do
I suppose you do because he belongs to you and instead of love, the feel of warmth
you've given him these cuts and sores that don't heal with time or with age.

Id.; cf. SUZANNE VEGA, *Luka, on SOLITUDE STANDING* (A&M Records, Inc. 1987) (a song depicting child abuse from the perspective of the child).

¹²¹ See GILMORE, *supra* note 28, at 204, 257, 264-65, 268, 289-97. Aside from Gilmore's *Shot in the Heart*, there are a number of insightful explorations of families in which one brother ended up dead or in prison and the other did well. See BRENT A. STAPLES, *PARALLEL TIME: GROWING UP IN BLACK AND WHITE* (1994); WIDEMAN, *BROTHERS AND KEEPERS*, *supra* note 24.

¹²² See, e.g., GILMORE, *supra* note 28, at 243. Gilmore complains:

Often parental violence directed at a child is in the name of "discipline," as it was in Gilmore's case.¹²³ Although Gilmore's father clearly crossed the line between acceptable discipline and serious child abuse,¹²⁴ there is a large body of research which suggests that punitive and authoritarian child-rearing which does not rise to the level of child abuse creates children who are emotionally detached and incapable of empathy.¹²⁵ These are essential qualities for a career in criminal violence.¹²⁶

God, I hate families. I see them walking in their clean clusters in a shopping mall, or I hear friends talking about family get-togethers and family problems, or I visit families in their homes, and I inevitably resent them. I resent them for whatever real happiness they may have achieved and because I didn't have such a family in my life.

Id.

¹²³ GILMORE, *supra* note 28, at 123.

¹²⁴ See CURRIE, *CONFRONTING CRIME*, *supra* note 28, at 199 (discussing the thin line between acceptable discipline and abuse); see also Lewis et al., *Family Characteristics of 14 Juveniles Condemned to Death*, *supra* note 116, at 588 (describing the range of serious physical abuse experienced by 12 out of 14 juveniles on death row, including being whipped, stomped, burned, kicked, and punched and being hit in the head with a plate, a board, and a hammer).

¹²⁵ See CURRIE, *CONFRONTING CRIME*, *supra* note 28, at 199-201. Currie notes:

Punitive, harsh discipline does not prevent crime: it *breeds* crime. . . . The link between punitive, harsh, or rejecting discipline and a variety of later behavioral problems has been apparent for decades. . . . But it is in their close connection with child abuse that punitive child-rearing practices are most directly linked to crime and delinquency—and particularly to the kind of severe criminal violence we rightly fear the most.

Id.; see also MIEDZIAN, *supra* note 28, at 58-61 (exploring the connection between early neglect, humiliation, or physical abuse and later violence); SAMPSON & LAUB, *CRIME IN THE MAKING*, *supra* note 28, at 64-98 (finding that parental supervision, attachment, and discipline are the most powerful predictors of delinquency). See generally Lewis et al., *Family Characteristics of 14 Juveniles Condemned to Death*, *supra* note 116 (exploring the neurological, psychological, educational, and familial factors leading 14 juveniles to end up on death row).

¹²⁶ I have seen children with serious deficiencies in their capacity for empathy many times in juvenile and adult court. For example, I once represented a 12-year-old African-American boy, who snatched a purse from an older woman waiting at a bus stop early in the morning and then shoved her to the pavement. The woman, who was also African American, was on her way to her job in the suburbs, where she did domestic work for a white family in order to support the grandchildren who lived with her. The gratuitous violence inflicted upon this particular victim was painful to me and prompted me to ask my client how he would feel if some kid did that to his grandma (with whom the client was particularly close). My client quickly responded, "I'd get that kid."

For an explanation of what might underlie my young client's response, see KOTLOWITZ, *THERE ARE NO CHILDREN HERE*, *supra* note 28, at 73 (describing what happens to a child who witnesses the violent death of a loved one). Kotlowitz describes the child's evolution from a caring child to a child who seems heartless. It turns out the child is actually heartbroken:

[Rickey] had heard the lone gunshot and watched his cousin stumble and fall by the cottonwood and die. He then sat on a nearby bench and wept. For the next two days, Rickey stayed in his apartment, refusing to talk or eat. . . . It was two years before he talked to anyone about watching his cousin die.

Meanwhile, notwithstanding what has been suggested about the causal relationship between harsh childhood punishment and abuse and later delinquency,¹²⁷ lawmakers, egged on by the perception of a public bent on blame, continue to call for greater punishment as the *solution* to delinquency. Sometimes they specifically urge a "return" to corporal punishment.¹²⁸ Most often, because the problem with bad kids is they haven't been punished enough—and we must get them off the streets—they call for more prisons.¹²⁹

"I felt like I lost a big brother. . . . Seem like I don't care no more. I don't feel sorry for people no more 'cause when they killed Bird Leg, the peoples who shot him mustn't of felt sorry for him. . . .

....

"Now, it seems like if I get in a fight, I don't care if I kill or something. I don't even care. It be like, we be fighting, we be fighting other people. Someone be telling me in my mind, 'Hurt him, just don't worry about it.'"

Id.; see also CURRIE, DOPE AND TROUBLE, *supra* note 13, at 6. Currie quotes a teen discussing why he "jumps" people:

Just to *do* something, man, you get a kick out of it! . . . But when it's *you*, you know, you don't think that way. What you think about sometimes. . . . Doin' this stuff, beatin' 'em up, I think, "Damn, man! What if that was *me* be down there, you know? Around twenty niggers stompin' my head to the ground, brother? Shit ain't cool." You know? That's later. Then I say, "Motherfucker, now you don't let that get to you, man."

CURRIE, DOPE AND TROUBLE, *supra* note 13, at 6; cf. James Bennet, *Sadness and Anger After a Legend is Mugged*, N.Y. TIMES, Sept. 1, 1994, at A16 (reporting about a man who broke into 81-year-old Rosa Parks's home in Detroit and beat her up in the course of robbing her).

Of course, a certain level of self-preoccupation is natural in adolescents and doesn't necessarily mean a deficiency in capacity for empathy. See PROTHROW-STITH, *supra* note 28, at 50-53 (describing adolescence and the "intense emotional struggle" that accompanies it as a "normal phase of life, not a form of pathology").

¹²⁷ See CURRIE, CONFRONTING CRIME, *supra* note 28, at 198-210; see also LITTLE WOMEN (Columbia Pictures, Inc. 1994) (Susan Sarandon as Marmee, responding to the bruising corporal punishment of young Amy by her schoolteacher, "If you hit and humiliate a child the only lesson she will learn is to hit and humiliate.").

¹²⁸ Consider, for example, the apparent widespread support for the caning of 18-year-old Michael Fay by Singapore authorities for committing petty vandalism. See Editorial, *No Mercy*, THE NATION, Apr. 25, 1994, at 543 ("The case of the American teenager sentenced in Singapore to six lashes of a brine-soaked rattan cane for crimes of spray-painting and petty vandalism reveals more about American attitudes than about Singapore justice. . . . What has been eye-opening is the approval rating Singapore-style fascism gets from the American public."); Philip Shenon, *Overlooked Question in Singapore Caning Debate: Is the Teen-Ager Guilty?*, N.Y. TIMES, Apr. 17, 1994, at 10 ("Lost in the trans-Pacific debate about crime and punishment over the proposed caning of an 18-year-old American . . . [is whether] Michael Peter Fay really commit[ted] the crimes . . ."); see also Jane Gross, *California Contemplates Paddling Graffiti Vandals*, N.Y. TIMES, Aug. 7, 1994, at A22 (reporting the public's embrace of an Orange County bill authorizing judges to punish graffiti vandals by whacking them 10 times with a hardwood paddle).

¹²⁹ See generally Elliott Currie, *What's Wrong with the Crime Bill?*, THE NATION, Jan. 31, 1994, at 118 [hereinafter Currie, *What's Wrong with the Crime Bill?*] ("It gets worse. Snuck into a single paragraph [in the 1993 federal Crime Bill] is a proposal authorizing \$100 million each year for

Clarence Darrow, writing in 1920, reminds us that this "solution" is hardly new:

[O]rganized government . . . spends its millions on prosecutions, reformatories, jails, penitentiaries and the like, [yet] has scarcely raised its hand or spent a dollar to remove the cause of a disease that brings misery and despair to millions and threatens the destruction of all social organization! To the [scientists and students of crime] and the recommendations of the humane the mob answers back: "Give us more victims, bigger jails, stronger prisons, more scaffolds!"¹³⁰

III. THE DEMONIZATION OF CHILDREN AND THE DEMAND FOR PUNISHMENT

[T]here are some impossible young beasts who have to be manacled. . . . Semi-equipped young savage[s] . . .

—Newspaper tycoon Hargraves in *Boys Town*¹³¹

What are we going to do about these kids (monsters) who kill with guns??? Line them up against the wall and get a firing squad and pull, pull, pull. I am volunteering to pull, pull, pull.

—Anonymous letter to a judge in Dade County, Florida¹³²

Kids who commit crime are kids. The mere fact that an eleven-year-old—or even a seventeen-year-old—commits a crime does not suddenly transform that child into an adult.¹³³ It doesn't matter what the crime is. There are too many circumstances under which teenagers and children end up committing crimes—even violent

fiscal years 1994 through 1998 to fund prisons for 'violent and chronic' juvenile offenders. But who now seriously believes we need half a billion worth of new prisons for kids?").

¹³⁰ DARROW, *supra* note 28, at 141.

¹³¹ *BOYS TOWN* (Metro-Goldwyn-Mayer 1938). It's interesting to note that the "semi-equipped" savage Hargraves points to in support of his opposition to the creation of "Boys Town" is an 11-year-old boy who is convicted of murder and sentenced to life imprisonment for killing his drunken father to stop him from beating his mother. This classic film, which is a must-see for anyone interested in the popular culture of juvenile delinquency, was a tribute to the founder of Boys Town (which is a real place), Reverend Edward J. Flanagan, and was dedicated to "homeless and abandoned boys, regardless of race, creed, or color."

¹³² Richard Lacayo, *Lock 'Em Up!*, *TIME*, Feb. 7, 1994, at 50.

¹³³ See Kotlowitz, *supra* note 8, at 40 (arguing against treating children who commit crimes as adults). But see Joseph B. Treaster, *Hard Time for Hard Youths: A Battle Producing Few Winners*, *N.Y. TIMES*, Dec. 28, 1994, at A12 (quoting Dr. Howard N. Snyder, research director at the National Center for Juvenile Justice, who estimates that 23,000 juvenile cases were transferred to criminal court in 1992).

crimes—to allow the event of lawbreaking to trigger adulthood for purposes of criminal punishment.¹³⁴ Especially in these days of guideline and mandatory minimum sentencing,¹³⁵ three-strikes-and-you're-

¹³⁴ See, e.g., Brian Jackson & John H. White, *Only a Child, but Robert Endured a Cruel Existence*, CHI. SUN-TIMES, Sept. 2, 1994, at 5 (describing the circumstances under which Robert Sandifer, an 11-year-old who accidentally killed a 14-year-old girl in a shooting spree, grew up in Chicago). The article includes a description of the horrifying upbringing of a child killer:

He was born into meanness and died in horror and, in between, lived a short and miserable life of cruelty

The whippings and beatings in Robert's life began early. At 22 months, he was treated at Jackson Park Hospital for scratches on his neck and bruises on his arms and torso. His mother said his father had beaten him.

Less than a year later . . . the police found him home alone with his two older brothers, ages 3 and 5. He had scars, bruises or burns on his face, neck, shoulders and abdomen. He had what appeared to be cigarette burns on his buttocks.

It was not unusual for Robert and his siblings to be left alone His mother left in the morning and returned at night and the children—barely old enough to open the refrigerator—fended for themselves.

Id.; see also Terry, *Boy's Short Troubled Life*, *supra* note 46, at A1 (reporting the death of 11-year-old Robert Sandifer); Terry, *Cursed Heirloom*, *supra* note 38, at 1, B7 ("But America is full of children who have seen so many fathers beating up mothers, so many playground gang fights and so many years of bloodletting on the big and small screen, that they could easily think that violence is the norm, that everybody does it.").

¹³⁵ See LOIS G. FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING* (1994) (critically examining mandatory sentencing laws, sentencing guidelines and capital punishment from a judicial perspective and arguing against the trend to imprisonment—or execute—all lawbreakers); see also Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992) (finding that federal sentencing guidelines have created too much uniformity and not enough individuation); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433 (1994) [hereinafter Smith, *Reflections of a Feminist Criminal Defense Lawyer*] (describing the way in which sentencing guidelines and mandatory minimum sentencing schemes have led to increased punishment for criminal defendants); Gerald F. Uelman, *Federal Sentencing Guidelines: A Cure Worse than the Disease*, 29 AM. CRIM. L. REV. 899 (1992) (arguing that sentencing guidelines institutionalize greater injustice by shifting sentencing power away from the judiciary into the hands of prosecutors with a political agenda).

Lois Forer, a Philadelphia trial court judge who left the bench rather than impose a mandatory five-year sentence on an unemployed first-offender who committed a toy-gun robbery for \$50 out of desperation, describes the reality of mandatory and guideline sentencing laws:

Mandatory sentencing laws and guideline sentencing laws enacted in the late 1970s and 1980s have transmogrified the criminal law from a justice system to a crime control system. . . .

. . . [T]hese laws drastically increased the number of prisoners and the length of prison sentences. They also exacerbated the disparities in treatment between the affluent and the indigent, women and men, whites and nonwhites, young offenders and older persons.

FORER, *supra*, at 9.

out laws,¹³⁶ and the rise of the death penalty,¹³⁷ to dismiss kids in trouble as "criminals" is literally to throw the baby out with the bathwater.

Kenny, the seventeen-year-old alleged drug dealer, is a kid. It doesn't matter that he is considered an adult under Massachusetts law.¹³⁸ It doesn't matter that since the clinic was appointed to Kenny's first drug case—which had been resolved by a six-month "continuance without a finding"¹³⁹—he has picked up two other cases—one for smoking a marijuana cigarette in broad daylight near Government Center in Boston (you'd think he'd figure out that police officers tend to hang around a place called "Government Center") and one for selling crack in Roxbury. A new conviction would cause a judge to rescind the continuance without a finding on the original case.

Although not quite as sophisticated a drug dealer—and nowhere near as successful—Kenny could be friends with Strike, the young drug dealer in Richard Price's astute novel, *Clockers*.¹⁴⁰ Strike is young and old at the same time, a teenager who worries so much he develops a perforated ulcer, drinking vanilla Yoo Hoos to sooth his aching gut.¹⁴¹

¹³⁶ See Anthony Lewis, *Abroad at Home: Crime and Politics*, N.Y. TIMES, Sept. 16, 1994, at A31 (examining the "flaw[ed]" and "misbegotten" three-strikes-you're-out provision of the 1994 Crime Bill).

¹³⁷ See generally Tom Kuntz, *Killings, Legal and Otherwise, Around the U.S.*, N.Y. TIMES, Dec. 4, 1994, at E3 (providing a state-by-state review of murder rates when death penalty statutes were in effect); Tom Kuntz, *The Rage to Kill Those Who Kill*, N.Y. TIMES, Dec. 4, 1994, at E1 (describing the "sentiment in favor of capital punishment [which] is sweeping the land.").

¹³⁸ See *supra* note 2. For a compilation of state law on juvenile court jurisdiction and the process under which a child may be transferred to criminal court for prosecution as an adult see generally NATIONAL CTR. FOR JUVENILE JUSTICE, STATUTORY EXCLUSION OF CRIMES FROM JUVENILE COURT JURISDICTION (1992 UPDATE) (1994) (listing the crime restrictions, age restrictions, and relevant statutory provisions for juvenile court jurisdiction in most of the 50 states); NATIONAL CTR. FOR JUVENILE JUSTICE, WAIVER/TRANSFER/CERTIFICATION OF JUVENILES TO CRIMINAL COURT: AGE RESTRICTIONS—CRIME RESTRICTIONS (1993 UPDATE) (1994) (listing the age restrictions, crime restrictions, and relevant statutory provisions for transfer of a child to criminal court in all 50 states).

¹³⁹ See *Commonwealth v. Duquette*, 438 N.E.2d 334, 338 (Mass. 1982); *Rosenberg v. Commonwealth*, 360 N.E.2d 333, 335–36 n.5 (Mass. 1977). This disposition has no statutory basis and is a matter of judicial discretion. When a judge continues a case without a finding, no verdict is imposed and the case will be dismissed if the defendant stays out of trouble for whatever time period has been set. See J.W. Carney, Jr., *Dispositions and Sentencing Advocacy*, in 2 MASSACHUSETTS CRIMINAL DEFENSE § 39.1 (Eric D. Blumenson ed., 1990).

¹⁴⁰ See PRICE, *supra* note 13. Strike doesn't intend to deal drugs forever, he just wants to make enough money to get out of the ghetto and get his family out too: "Mommy, next time I come into this house, I'm gonna be rich and I'm gonna be out of it. I'm gonna be flush and legitimate. I'm gonna come up and take you away from here, take *all* a you, and Victor's still gonna be counting his pennies." *Id.* at 480–81.

¹⁴¹ See *id.* at 4, 22, 26, 458–60.

Kenny worries too. He called me when he got arrested in Government Center, doing the responsible thing ("You said I should call you if I ever needed to"), though at the same time he tried to minimize the trouble he was in. "But it was only reefer," he said. I asked what he had been charged with and it turned out he'd had a nickel bag of marijuana on top of the joint. The good news was that he hadn't been locked up; he'd received a summons to appear in court in a few weeks. I told him the clinic would represent him and that he should set up an appointment to come in for an interview. He seemed relieved.

Unfortunately, he wasn't as forthright about the more serious crack case. In fact, though he had been arrested for selling crack weeks before, he said nothing about it. He had been locked up, released, appointed counsel, and given a pretrial hearing date on the crack case and hadn't said a word to me or the student representing him.

We found out about it at arraignment, to our surprise. The judge had a fit about the number of open drug cases on Kenny's record and dismissed out of hand the student's argument about Kenny's "potential." We were lucky the judge didn't impose cash bail. I was angry. I growled at Kenny, "You set us up." "I didn't mean to," he meekly replied. "And, dammit, you're dealing now, Kenny." He hung his head and stammered something like, "Not really."

Strike stuttered too.¹⁴²

But there are many—from the right and from the left—who would dismiss Kenny, Strike, and others like them as inappropriate for the juvenile court because they are "chronic juvenile offenders"¹⁴³ or "serious habitual offenders,"¹⁴⁴ apparently on the road to being career

¹⁴² See *id.* at 27 ("[H]is stammer had made each school day hell. Nobody ever made fun of him directly, but they always watched him talk, and usually the teachers wouldn't call on him if the answer required more than one word."); cf. KOTLOWITZ, *THERE ARE NO CHILDREN HERE*, *supra* note 28, at 15 ("Now, at the age of nine, [Pharoah] giggled at the slightest joke; he cried at the smallest of tragedies. He had recently developed a slight stutter, which made him seem even more vulnerable.").

¹⁴³ See CAL. WELF. & INST. CODE §§ 500-01 (Deering 1994) (California's juvenile court law providing increased support for the identification and aggressive prosecution of "chronic juvenile offenders"); see also 1994 Minn. Laws 576 (requiring that the department of corrections provide programming for "serious and repeat juvenile offenders").

¹⁴⁴ See, e.g., CAL. WELF. & INST. CODE §§ 500-01 (Deering 1994) (referring to "serious habitual offenders"); 705 ILCS 405/1-8.2 (West Supp. 1995) (Illinois Juvenile Court Act, "Serious Habitual Offender Comprehensive Action Program," authorizing vigorous, multi-disciplinary intervention for juveniles who "repeatedly commit serious delinquent acts," defined as two prior adjudications of delinquency for felonies).

criminals. This is a bad trend and one with which I strongly disagree.¹⁴⁵ We call kids adults or criminals in order to throw them away.¹⁴⁶

A. *Why Do We Seem to Hate Them?*

"You know what I'd like to be?" I said. "You know what I'd like to be? I mean if I had my goddam choice?"

"What? Stop swearing."

"You know that song 'If a body catch a body comin' through the rye'? I'd like—"

"It's 'If a body meet a body coming through the rye!'" old Phoebe said. "It's a poem. By Robert Burns." . . .

"I thought it was 'If a body catch a body,'" I said.

. . . .
 "Anyway, I keep picturing all these little kids playing some game in this big field of rye and all. Thousands of little kids, and nobody's around—nobody big, I mean—except me. And I'm standing on the edge of some crazy cliff. What I have to do, I have to catch everybody if they start to go over the cliff—I mean if they're running and they don't look where they're going I have to come

¹⁴⁵ Professor Barry Feld, a prolific writer on juvenile justice, recently argued at a conference on youth violence and youth justice that there is a clear difference between "persistent offenders" and other less delinquent youth and to treat them otherwise would be "socially irresponsible." He also endorsed enhanced adult sentencing when there is a juvenile record. Barry Feld, Address at *Struggling For a Future: Youth Violence, Youth Justice*, Boston College Law School and the Criminal Justice Institute of Harvard Law School (Dec. 3, 1994); see also Barry Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 MINN. L. REV. 167, 230-39 (1980) [hereinafter Feld, *Dismantling the "Rehabilitative Ideal"*] (discussing appropriate dispositions for "persistent" or "serious" young offenders and applauding the Sentencing Guidelines Commission for including juvenile felony convictions as part of a defendant's criminal history). I disagree with this sort of facile labeling. One person's drug dealer—so long as there is a record of more than one arrest—is another's persistent offender. As Robert Sampson and John Laub have established, children who commit crime—even if they do so repeatedly—often become law-abiding adults. See SAMPSON & LAUB, *CRIME IN THE MAKING*, *supra* note 28, at 204-42 (exploring the "turning points" in the lives of former juvenile delinquents who become law-abiding adults); see also CURRIE, *CONFRONTING CRIME*, *supra* note 28, at 57 ("Most young Americans do things in the course of growing up that could land them in court, but most don't go on to a deepening criminal 'career' . . .").

¹⁴⁶ See Jan Hoffman, *Felon vs. Youth*, N.Y. TIMES, June 25, 1994, at 27 (quoting Ellen Schall, a former New York City commissioner of juvenile justice, "The majority of these kids are poor and Latino or African-American, and we're prepared to say it doesn't matter that they walk around with a criminal record for the rest of their lives," she said. "We've given up on them."); Taylor, *supra* note 107, at 23 ("Call him rotten and dismiss him as a criminal in the making. But that would be forgetting that once, not long ago, he was a decent boy who wanted to be a scientist.").

out from somewhere and catch them. That's all I'd do all day. I'd just be the catcher in the rye and all."

—J.D. Salinger, *The Catcher in the Rye*¹⁴⁷

I was trying to be a rebel but back then the most important thing was what the grown-ups thought about me. How they felt meant everything. . . .

See, in my mind I was Superfly. I'd drive up slow to the curb. My hog be half a block long and these fine foxes in the back. Everybody looking when I ease out the door clean and mean. Got a check in my pocket to give to Mom. Buy her a new house with everything in it new. Pay her back for the hard times. . . . Wasn't no way it wasn't gon happen. Rob was gon make it big. I'd be at the door, smiling with the check in my hand and Mommy'd be so happy she'd be crying.

Well, it's a different story ain't it. Turned out different from how I used to think it would.

—John Edgar Wideman, *Brothers and Keepers*¹⁴⁸

*Little Julie
Says she don't care!
What she means is:
Nobody cares
Anywhere.*

—Langston Hughes, "Delinquent"¹⁴⁹

In a cartoon by Dan Wasserman, a couple of schoolchildren, books in hand, are walking to school. The girl says: "They gave up on the war on poverty. . . . Turned to the war on crime. . . . Then tried a war on drugs." The boy inquires, "What now?" To which the girl responds, "A war on children."¹⁵⁰

This is the setting in which the debate on juvenile justice is taking place. There's a war out there. The war on children includes widespread attacks on welfare,¹⁵¹ the Republican plan to place poor chil-

¹⁴⁷ J.D. SALINGER, *THE CATCHER IN THE RYE* 172-73 (Bantam Books 1964) (1951).

¹⁴⁸ WIDEMAN, *BROTHERS AND KEEPERS*, *supra* note 24, at 89-90.

¹⁴⁹ LANGSTON HUGHES, *Delinquent*, in *THE COLLECTED POEMS OF LANGSTON HUGHES* 447, 448 (Arnold Rampersad ed., 1994).

¹⁵⁰ Dan Wasserman, Editorial Cartoon, *BOSTON GLOBE*, Nov. 29, 1994, at 22.

¹⁵¹ See Jason DeParle, *House G.O.P. Would Replace Scores of Programs for the Poor*, *N.Y. TIMES*, Dec. 9, 1994, at 1 (reporting the plan of House Republican leaders to abolish more than a hundred social programs for the poor and replacing them with grants to state governments, stripping the programs of their protected, "entitlement" status); Jason DeParle, *The 1994 Election: Momentum Builds for Cutting Back Welfare System*, *N.Y. TIMES*, Nov. 13, 1994, at 1 ("After a campaign in which voters rewarded a barrage of anti-welfare attacks, both parties are now calling the issue a top priority . . ."); see also Bob Herbert, *In America: A Simple Case of Fraud*, *N.Y.*

dren in state-run orphanages,¹⁵² the call for prosecution of kids as adults,¹⁵³ and the demand for more juvenile prisons.¹⁵⁴

TIMES, Nov. 13, 1994, at 15 ("When the next Congress is sworn in the Republicans will resume their war on urban America with a vengeance, targeting especially the elderly, the poor and the very young."). *But see* Jason DeParle, *Despising Welfare, Pitying Its Young*, N.Y. TIMES, Dec. 18, 1994, at E5 (analyzing the competing impulses beneath the debate over public assistance—disdain for welfare, and, in particular, welfare moms, and concern for poor children).

It is interesting that the haunting photograph by Shelby Lee Adams which accompanies Jason DeParle's article, "Despising Welfare, Pitying Its Young," *supra*, is one which depicts *white rural poverty* rather than black urban poverty. The photograph is of "a woman and nine of her 13 grandchildren at home in Knott County, Ky." *Id.* No doubt these raggedy, innocent-looking white children are the sort that engender concern and sympathy and might even make people think twice about welfare. However, the public image of welfare is black, not white, and "innocence" is not a word most people attach to black kids. *See generally* Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 4 (1988) ("The overwhelming majority of marginalized poor, who stay poor and whose children likely will stay poor, are members of racial or ethnic minorities, or women heading single parent homes, or both. The picture of the poor as the Other, who do not really belong, is thus intensified."); *cf.* Jason DeParle, *Better Work than Welfare. But What if There's Neither?*, N.Y. TIMES, Dec. 18, 1994, § 6 (Magazine), at 42, 44 [hereinafter DeParle, *Better Work than Welfare*] (describing the struggles of Mary Ann Moore, an African-American mother of four, who has been on drugs and on welfare and now works, but is "a sick child or ailing car away from disaster").

¹⁵² *See* Tom Morganthau et al., *The Orphanage*, NEWSWEEK, Dec. 12, 1994, at 28 (exploring the resurrection of the orphanage as the answer to the growing population of poor children in America); *see also* Ronald A. Feldman, *What You Can't Learn From 'Boys Town'*, N.Y. TIMES, Dec. 13, 1994, at A29 (the former deputy director of Boys Town arguing against large orphanages in favor of rearing children in "supportive, family-like environments"); Martin F. Nolan, *Would Gingrich Have Been a Villain in 'Boys Town'?*, BOSTON GLOBE, Dec. 6, 1994, at 20 (examining the proposal of House Speaker Newt Gingrich to put poor children in state-run orphanages from the New Deal perspective of the 1938 movie, "Boys Town"); Anna Quindlen, *Lead Us Not*, N.Y. TIMES, Dec. 7, 1994, at A23 ("It's not surprising that when Newt Gingrich, the new Speaker of the House, was trumpeting the virtues of orphanages for poor kids, he didn't illustrate his point with the group homes operating today, the arduous actual, the real thing."). *But see* Robert Pear, *The New Congress: Democrats Vow to Oppose Part of Gingrich's Agenda*, N.Y. TIMES, Nov. 18, 1994, at A31 (reporting Representative David E. Bonior's reaction to Gingrich's plan to have states build and operate orphanages instead of providing welfare payments to unwed women under 21: "We are not going back to Nixonian orphanages. We will fight this as hard as we can. We are not for tearing babies away from their mothers.").

Perhaps the best exposition of House Speaker Newt Gingrich's trumpeting of orphanages for poor children is contained in Lenore Skenazy's parody of Dr. Seuss's *How the Grinch Stole Christmas*:

But he hated the people on Welfare much more. He hated the way they were POOR
POOR POOR!

He hated the way they had no jobs at all! This struck him as heaploads of GALL
GALL GALL! They also lacked training and day care. So what? The Gingrichin
announced he'd come up with a plot: "Get off of Welfare! Get off today! Or we will
take all of your children AWAY!"

Lenore Skenazy, *How the Gingrichin Stole Congress*, THE NATION, Dec. 26, 1994, at 803.

For a scholarly call for orphanages—also called "boarding schools" and "residential homes"—for inner-city kids, see Dilulio, *supra* note 59, at 29–30.

¹⁵³ *See supra* note 8 and accompanying text.

¹⁵⁴ *See* Currie, *What's Wrong With the Crime Bill?*, *supra* note 129, at 118 (discussing the new

The debate over the abolition of juvenile court and the prosecution of juvenile offenders as adults is more than a debate over youth crime. As Alex Kotlowitz has noted, the call to treat kids as adults goes "to the fundamental question of what it means to be a child, particularly in an increasingly violent world."¹⁵⁵ What drives the call to define childhood at a younger and younger age is a combination of widespread fear of crime and widespread ambivalence about adolescence.

We have a long history of ambivalence toward adolescence in this country.¹⁵⁶ While the classic white, middle-class portrait of an adolescent is a difficult teen, like Holden Caulfield in J.D. Salinger's *The Catcher in the Rye*¹⁵⁷—or the updated female version, Angela Chase, in the highly acclaimed but short-lived television show, "My So-Called Life"¹⁵⁸—the classic image of the nonwhite adolescent is dangerous, not difficult.¹⁵⁹ The stereotypical adolescent of color is either pregnant or a gang

emphasis on locking up juvenile offenders); Bob Herbert, *Of Proms and Prisons*, N.Y. TIMES, June 12, 1994, at E17 ("How did we come to decide that our dominant approach to the future of kids in America's inner cities would be to allocate ever-increasing sums to build ever-stronger cages to lock them in?").

¹⁵⁵ Kotlowitz, *supra* note 8, at 41.

¹⁵⁶ See MONTI, *supra* note 97, at 1 ("It really helps to like young people when you do research on a subject like gangs, because sometimes teenagers are little shits. They can work hard at making themselves unlikable and succeed handsomely at it."); PROTHROW-STITH, *supra* note 28, at 48–49 (discussing adult ambivalence toward adolescence).

This ambivalence is reflected in the juvenile justice system. See CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 313 (1978) ("[P]ublic policy toward youth is inherently ambivalent, at times almost schizophrenic. Ambivalence is built into the very marrow of the juvenile court, which is expected both to nurture and protect the young . . . and to protect society against the misbehaving young."); cf. Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 14–15 (1994) ("Our political choices reveal societal hostility to children"); Minow, *supra* note 83, at 6 (1986) (discussing the "societal neglect of children" and the submergence of children's needs and interests below other interests).

¹⁵⁷ SALINGER, *supra* note 147. While Holden Caulfield has an "attitude," he is in no way a juvenile delinquent. See *id.* at 1 ("[T]he first thing you'll probably want to know is where I was born, and what my lousy childhood was like . . . and all that David Copperfield kind of crap, but I don't feel like going into it, if you want to know the truth."). Holden Caulfield's description of what he'd like to be—a "catcher in the rye," see *supra* text accompanying note 147—also matches my vision of what it means to represent kids accused of crime.

¹⁵⁸ See John Koch, *TV and Radio: 'Life' on Hold*, BOSTON GLOBE, Dec. 9, 1994, at 70 (reporting the cancellation in the 1994 television season of the highly praised show, "My So-Called Life," ABC television, Thursday nights, 8 p.m., which is described as "a hyper-realistic look at the joys and traumas of adolescence"). Again, the teenager who is at the center of the show engages in occasional adolescent rebellion, but not delinquency; see also REALITY BITES (Universal 1994) (depicting life in the 1990s for several recent college graduates, including the rebellious Ethan Hawke and the not-as-rebellious Wynona Ryder); PRETTY IN PINK (Paramount 1986) (depicting a high-school student, played by Molly Ringwald, and her struggles with family, love, class and social convention).

¹⁵⁹ See MEDOFF & SKLAR, *supra* note 14, at 204 ("In shorthand stereotype, boys mean danger, girls mean welfare, they all mean drugs.").

member.¹⁶⁰ For many Americans, this image of adolescence engenders not merely ambivalence, but also hostility and fear.

Take Halloween, for example. Though Halloween is regarded by some as a fun, fanciful, "community-centered holiday,"¹⁶¹ many others experience Halloween as "a night that used to be a scary fantasy but has turned into scary reality."¹⁶² While most people are probably still happy to open their doors to youngsters in cute costumes with trick-or-treat bags, the youngsters better really be *young*, and, even better, they should be recognizable beneath the costume.¹⁶³ Of course, a *white youngster probably has the best chance for a warm Halloween reception*.¹⁶⁴

¹⁶⁰ See *id.* (elaborating on the different adolescent stereotypes for boys and girls in Dorchester, Mass., one high-school student says that boys "are stereotyped as 'gangbangers, as in gang members and drug dealers. The big gold chains, the fresh sneakers.' Girls are stereotyped as 'being on welfare and . . . getting pregnant' and 'walking around in Spandex and saying, 'Yo! What's up!'"").

¹⁶¹ Carin Rubenstein, *Halloween: A Big Boom in Boos*, N.Y. TIMES, Oct. 27, 1994, at C1.

¹⁶² James Barron, *Another Halloween Clash Ends in Death in Brooklyn*, N.Y. TIMES, Nov. 2, 1994, at B3 (reporting the second death in three days in violent confrontations that began with egg throwing prior to Halloween); see also Lynda Gorov, *Community Speaks up After Death of a Child*, BOSTON GLOBE, Nov. 6, 1994, at 33 (reporting the community reaction to the gang-related accidental killing of a boy on his ninth birthday on Halloween in Boston's Roxbury neighborhood); Vicki Torres, *Fears Haunt Pasadena on Anniversary of Shootings*, N.Y. TIMES, Oct. 30, 1994, at B1 (reporting that in Pasadena, California there will be no trick-or-treating a year after three teenagers were accidentally gunned down by gang members who thought they were rival gang members).

¹⁶³ See Barron, *supra* note 162, at B3 ("In suburban communities, many homeowners decided once again that they were safer behind locked doors than doling out candy to trick-or-treaters. In high-rise buildings, tenants did not answer their doorbells although the only ghosts and goblins were neighbors' children, screened in advance by the superintendent.").

¹⁶⁴ See *id.*; see also *Japanese Youth Killed Seeking Costume Party*, L.A. TIMES, Oct. 20, 1992, at A18 (reporting the fatal shooting in Louisiana of a 16-year-old Japanese exchange student, dressed as John Travolta in "Saturday Night Fever" in a white tuxedo jacket, who went to the wrong house while looking for a Halloween party); Peter Applebome, *Handguns and the Home: Acquittal in Baton Rouge, But Not for America*, N.Y. TIMES, May 30, 1993, at D2 (commenting on the acquittal of manslaughter charges of Rodney Peairs, the suburban Louisiana homeowner who shot Japanese exchange student Yoshihiro Hattori); Adam Nossiter, *Judge Awards Damages in Japanese Youth's Death*, N.Y. TIMES, Sept. 16, 1994, at A12 (reporting a judge's award of more than \$650,000 in damages and funeral costs to the parents of exchange student Yoshihiro Hattori, saying there was "no justification whatsoever" for Peairs to shoot the 16-year-old boy who apparently did not "freeze" when told to do so because he did not understand the word).

As the shooting of Yoshihiro Hattori illustrates, there is a racial component to the need to distinguish the "young" from the not-so-young and the "known" from the not-so-known. To white suburban-dweller, Rodney Peairs, the appearance of an unarmed, 16-year-old Asian male, dressed in a white tuxedo, was threatening. Apparently this race-based fear crosses gender and class lines. Consider the experience of Rashida Ogletree, a 14-year-old African-American girl who is the daughter of my colleague, Professor Charles Ogletree. Rashida reported that she was coldly received by households in Cambridge, Massachusetts, a liberal university town, when, dressed in a costume inspired by Little Orphan Annie—pigtails, bright red cheeks and lipstick, bobbie socks,

Maybe there is a deep dissonance in all of us about our own adolescence and the difficult passage from childhood to adulthood.¹⁶⁵ No period in life has as much *Sturm und Drang*.¹⁶⁶ Maybe there is something complicated about adolescents being different from children and different from adults.¹⁶⁷

and sneakers—she trick-or-treated with a school friend. Is a 14-year-old (dressed in a costume underscoring her innocence and youth) too old to participate in Halloween? Telephone Interview with Rashida Ogletree (Nov. 17, 1994); cf. PROTHROW-STITH, *supra* note 28, at 49 (suggesting that adult ambivalence toward adolescence is expressed most strongly in relation to young males).

¹⁶⁵ See, e.g., NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* 98-142 (1982) (discussing the "adult-child" and the "disappearing child"); Audrey K. Gordon, *The Tattered Cloak of Immortality*, in *ADOLESCENCE AND DEATH* 18-19 (Charles C. Carr & Joan N. McNeil eds., 1986) (discussing the way in which adults remember their own adolescence and "project" about adolescence generally); see also PROTHROW-STITH, *supra* note 28, at 48-63 (exploring "the dangerous passage" of adolescence).

¹⁶⁶ The psychoanalytic term "*Sturm und Drang*" connotes intense psychological turmoil. See ERIK ERIKSON, *CHILDHOOD AND SOCIETY* (1963) (exploring child development from a psychoanalytic perspective); ERIK ERIKSON, *IDENTITY, YOUTH, AND CRISIS* (1968) (examining the psychology of "identity crisis"); 1 & 2 G. STANLEY HALL, *ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION* (1904) (exploring adolescence, which Hall characterized as stormy and stressful); DANIEL OFFER ET AL., *THE ADOLESCENT: A PSYCHOLOGICAL SELF-PORTRAIT* (1981) (examining adolescence from the perspective of adolescents themselves); *THE CHALLENGE OF YOUTH* (Erik Erikson ed., 1963) (essays exploring youth and adolescence in the United States); *TWELVE TO SIXTEEN: EARLY ADOLESCENCE* (Jerome Kagan & Robert Coles eds., 1972) (essays exploring early adolescence); *YOUTH: CHANGE AND CHALLENGE* (Erik Erikson ed., 1963) (essays exploring the special challenges of adolescence); see also FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* at x-xi (1982) [hereinafter ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE*] ("Adolescence, in my view, is both a period in itself and a transition. It is a term of years when those not yet adult are engaged in the process of becoming adult, a rich but often stressful period of trial and error."); Gordon, *supra* note 165, at 18 ("Adolescence seems to straddle two worlds, that of child and adult, and to be secure in neither. . . . [It is] a time of disruption and turmoil.").

Despite writing nearly a hundred years ago, G. Stanley Hall's description of adolescence sounds remarkably contemporary:

Youth awakes to a new world and understands neither it nor himself. . . .

Never has youth been exposed to such dangers of both perversion and arrest as in our land and day. . . . [U]rban life . . . [has increased] temptations, prematurities, sedentary occupations, and passive stimuli just when an active, objective life is most needed. . . .

1 HALL, *supra*, at xv.

¹⁶⁷ See PROTHROW-STITH, *supra* note 28, at 49 ("Adolescence itself is like a long tunnel connecting two quite disparate phases of life. A child enters one end. An adult exits the other."); see also MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 283-311 (1990) [hereinafter MINOW, *MAKING ALL THE DIFFERENCE*] (examining the legal status of children and adolescence from the perspective of "difference"); ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE*, *supra* note 166 (examining the question, "Are Kids Different?"). But see Fitzgerald, *supra* note 156, at 17-19 ("As a society we may ignore children's claims in part because, different from us as they are, we simply do not like children.").

And maybe there is envy. Whether they're Holden Caulfield or James Dean or, more currently, River Phoenix,¹⁶⁸ Boyz II Men¹⁶⁹ or M.C. Lyte¹⁷⁰ there's something wild and free and rebellious about adolescents in the popular culture.¹⁷¹ In contrast, there is nothing very wild about adulthood. The impulsiveness and spontaneity and *anxiety* that are hallmarks of adolescence are supposed to be cast off by adulthood.¹⁷²

Our feelings about adolescent lawbreaking are equally conflicted.¹⁷³ We are afraid of youthful lawbreaking, and yet, at the same

¹⁶⁸ See Editorial, *The Young Prove Mortal Again*, N.Y. TIMES, Nov. 3, 1993, at A26 ("Every generation faces moments when the myth of its own immortality is shattered. Somebody young and beautiful dies, somebody who, like them, was going to live forever. . . . For today's teen-agers death claimed its first victim this week, an intense young actor named River Phoenix . . ."). But see Brian C. Zumhagen, *One Generation's Icons*, N.Y. TIMES, Nov. 11, 1993, at A26 (Letter-to-the-Editor stating that the New York Times editorial on the death of River Phoenix was an "inappropriate projection of baby boomer sensibilities, complete with embarrassingly forced comparisons to the big J's of youth culture (James Dean, Jim Morrison, Janis and Jimi).").

¹⁶⁹ See Stephen Holden, *Breakup of Pop Music Audience Leaves Top 40 Radio Tuned Out*, N.Y. TIMES, Mar. 23, 1993, at C13 (reporting the decline of the Top 40 hit-radio format due to the fragmentation of musical tastes, but referring to Boyz II Men as a popular selection on "Adult Contemporary Hit Radio").

¹⁷⁰ See Michelle Wallace, *Sexist Beat: Time to Move Rap Out of the Locker Room*, CHI. TRIB., Sept. 16, 1990, at 4 (examining sexism in rap and pointing to M.C. Lyte, among other women rappers, as part of the new breed).

¹⁷¹ See Stephen Holden, *After the War, the Time of the Teen-Ager*, N.Y. TIMES, May 7, 1995, at E4 (describing the sexuality and rebelliousness that has characterized American teenage culture since World War II). But see Daniel Goleman, *New Study Portrays the Young as More and More Troubled*, N.Y. TIMES, Dec. 8, 1993, at C16 (reporting on a study of American children by the Center for Children, Youth and Families at the University of Vermont which reveals that emotional and behavioral problems for children and adolescents are increasing and cut across race, ethnicity, and gender lines).

¹⁷² See PROTHROW-STITH, *supra* note 28, at 62-63 (discussing risk-taking by adolescents); Gordon, *supra* note 165, at 18 ("Most adults remember their adolescence as a time fraught with anxiety, rebellion, and indecision."). But see Steve Stark, *Where the Boys Are*, ATLANTIC MONTHLY, Sept. 1994, at 18 (exploring the way in which men cling to early adolescence through the popular culture). As Stark notes in examples from comedians Jerry Seinfeld and David Letterman, to radio talk-show hosts Howard Stern and Don Imus, to cartoon series "Beavis and Butt-head" and "The Simpsons," the "unspoken premise of much of American pop culture today is that a large group of men would like nothing better than to go back to their junior high school locker rooms and stay there." *Id.* at 18.

¹⁷³ See Jon Pareles, *How Real is 'REALness' in Rap?*, N.Y. TIMES, Dec. 11, 1994, § 6 (Magazine), at H34 ("The image of black outlaws—living fast, sowing mayhem and dying young—is a hot property, especially if they're on the boom box rather than at the door."); Stark, *supra* note 172, at 20 ("There are, of course, antecedents in our cultural life for this veneration of male early adolescence. The western often celebrated the young cowboy or outlaw like Billy the Kid, who, surrounded by his loyal gang in a world without commitment to women, broke the rules."); see also E. ANTHONY ROTUNDO, *AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA* (1993) (revealing how American culture celebrates the misbehavior of boys as a way of idolizing childishness without idolizing children); Martha Grace Duncan, "A Strange Liking": *Our Admiration for Criminals*, 1991 U. ILL. L. REV. 1 (exploring the admiration of criminals in American culture); Teresa Godwin Phelps, *The Criminal as Hero in*

time, we idealize it. On some level, we find bad kids—especially bad boys—sexy.¹⁷⁴

But the problem is that when our complicated feelings about adolescent lawbreaking meet mounting anti-crime hysteria,¹⁷⁵ fear and anger overcome our ability to connect.¹⁷⁶ Instead, we distance ourselves from these “bad kids,”¹⁷⁷ dismissing them as “beasts,”¹⁷⁸ “savages,”¹⁷⁹ and “monsters.”¹⁸⁰ Gone are the days when, at least as a matter of popular

American Fiction, 1983 Wis. L. REV. 1427 (considering the literary antecedents of Jack Henry Abbott, author of *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* (1981)); cf. Austin, *supra* note 58, at 1776–87 (examining the “romance and the reality” of young black male lawbreaking).

¹⁷⁴ See Anthony J. Lemelle, Jr., *Killing the Author of Life, or Decimating “Bad Niggers”*, 19 J. BLACK STUD. 216, 220 (1988) (arguing that the bad black boy is a hero because he “seek[s] joy and fulfillment through expression”). But see BELL HOOKS, *OUTLAW CULTURE: RESISTING REPRESENTATIONS* 115–23 (1994) (arguing that “gangsta rap” is sexist, not sexy, and is part of the anti-feminist backlash happening in the larger society rather than a unique black cultural experience); cf. Austin, *supra* note 58, at 1791–99 (discussing the way in which black female lawbreaking is considered neither heroic nor sexy); Pareles, *supra* note 173 (examining whether gangster rap, in view of Tupac Shakur’s conviction for sexual assault and the legal problems of other rappers, exploits real suffering).

¹⁷⁵ See Martin Garbus, *Executioner’s Song*, THE NATION, Dec. 19, 1994, at 748, 749 (“A terrible rage has been loosed amongst us.”).

¹⁷⁶ For a wonderful example of the importance of finding a way to connect with young lawbreakers, see Wolfgang Saxon, *Amelia Lewis, 91, Victor in Case That Changed Juvenile Justice*, N.Y. TIMES, Nov. 19, 1994, at 31 (reporting the death of Amelia Dietrich Lewis, the lawyer who argued *In re Gault*, 387 U.S. 1 (1967), the case which granted juveniles accused of delinquency many of the same procedural protections as adults charged with crimes). The obituary describes the circumstances under which Amelia Lewis came to represent the 15-year-old accused of making a lewd telephone call to a woman in his neighborhood:

Mrs. Lewis took the case after the family of the boy, Gerald Gault, had virtually exhausted its appeals. The American Civil Liberties Union and its Arizona affiliate underwrote the effort, but Mrs. Lewis paid her way to Washington and her expenses there. She later said she had been drawn to the case because “I have raised three healthy sons, and I wanted to give something back.”

Id.; see also Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993) (arguing that empathy and heroism are the guiding forces in sustaining lawyers who represent people accused of crime); cf. MINOW, *MAKING ALL THE DIFFERENCE*, *supra* note 167, at 66 (“When judges consider the situation of someone they think is very much unlike themselves, there is a risk that they will not only view that person’s plight from their own vantage point but also fail to imagine that there might be another vantage point.”).

¹⁷⁷ See Kantrowitz, *supra* note 70, at 45–46 (discussing the “new and dangerous breed” of “bad kids” and what makes them so bad); see also Bragg, *supra* note 68, at A1 (describing the way in which a 14-year-old boy stealing a car pointed his gun at his victims—a witness said, “There was evil in that boy’s eyes. . . . I hope they don’t let him out anytime soon.”).

¹⁷⁸ BOYS TOWN, *supra* note 131. See also John E. Coons et al., *Puzzling Over Children’s Rights*, 1991 B.Y.U. L. REV. 307, 315 (1991) (describing one view of childhood as “a period when the little beast must be tamed and shaped for the future”).

¹⁷⁹ BOYS TOWN, *supra* note 131.

¹⁸⁰ See SHAKUR, *supra* note 14, at 13 (describing the circumstances under which the author was given the nickname “Monster”). As Shakur recounts:

culture, we believed that "there's no such thing in the world as a bad boy."¹⁸¹

There is no question that racism helps to fuel the anti-crime hysteria.¹⁸² Racism also enables white middle-class America to distance itself from growing numbers of poor, nonwhite kids in trouble in order to demonize them.¹⁸³ When most people think of juvenile crime, they

In 1977, when I was thirteen, while robbing a man I turned my head and was hit in the face. The man tried to run, but was tripped by Tray Ball, who then held him for me. I stomped him for twenty minutes before leaving him unconscious in an alley. Later that night, I learned that the man had lapsed into a coma and was disfigured from my stomping. The police told bystanders that the person responsible for this was a "monster." The name stuck, and I took that as a moniker over my birth name.

Id.; see also *supra* text accompanying note 133.

¹⁸¹ See Boys Town, *supra* note 131 (Father Flanagan stating his philosophy about the nature of children). But see Minow, *supra* note 83, at 9 (referring to Freudian theory about "the child who seethed with tensions and impulses, and lacked moral sensibility"); Arlene Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, LAW & CONTEMP. PROBS., Summer 1975, at 38, 38 (contrasting ideas of children as innocent and children as evil).

¹⁸² See Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1947 (1993) (arguing that the white power structure "constructs crime in terms of race and race in terms of crime," and thereby creates a "racial ideology of crime that sustains continued white domination of blacks in the guise of crime control"); NAACP & CJI, *supra* note 59, at 10 ("Race, police, and violence are as one in this country. Images of crime are inextricably connected to images of African Americans. The desire for police protection is tied to the fear of who might wander into the neighborhood with it.").

¹⁸³ As the anti-crime fever mounts, it is not only the white community that recoils from lawless black kids. For example, Austin notes:

"Difference" is as much a source of contention within "the [black] community" as it is the factor marking the boundary between "the community" and everyone else. . . .

....

... [There is a] difference . . . between the "better" elements of "the [black] community" and the stereotypical "lowlifes" who richly merit the bad reputations the dominant society accords them.

Austin, *supra* note 58, at 1770, 1772; see Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1259 (1994) ("The most lethal danger facing African-Americans in their day-to-day lives is not white, racist officials of the state, but private, violent criminals (typically black) who attack those most vulnerable to them without regard to racial identity."); see also Vincent Lane, *Fields of Battle: Rights vs. Guns: We Search to Save Lives*, N.Y. TIMES, May 7, 1994, at 23 (op-ed piece discussing the conflict between law-abiding public housing tenants' constitutional rights to be free of warrantless searches and their right to live free of the "threat of gunfire and other violence every day" by the lawless living among them); Dilulio, *supra* note 59, at 3-12 (arguing that no group of Americans suffers more from violent criminals than law-abiding African Americans living in the inner-city).

In the above-cited article, Randall Kennedy argues for a "politics of distinction," in which one aligns oneself with one side of the black community or another. Kennedy, *supra*, at 1260 n.20. Kennedy chooses the law-abiders over the lawbreakers and criticizes those who focus too much on the racial injustices done to lawbreakers. *Id.*; see also Austin, *supra* note 58, at 1772. Austin comments:

According to the politics of distinction, little enough attention is being paid to the law-abiding people who are the lawbreakers' victims. Drive-by shootings and random street crime have replaced lynchings as a source of intimidation, and the

think of young, African-American males.¹⁸⁴ Increasingly, the face of violent crime in America is Willie Bosket¹⁸⁵ and Willie Horton.¹⁸⁶

We can't believe we can't control them.¹⁸⁷ If we can't control our kids, then who can we control?¹⁸⁸ So we say they're too old and too

"culture of terror" practiced by armed crack dealers and warring adolescents has turned them into the urban equivalents of the Ku Klux Klan.

Id. But see David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547, 2547-48 (1995) (disagreeing with Randall Kennedy's argument that law-abiding black citizens "are benefited by the incarceration of large numbers of black criminals" and offering a different perspective on the "paradox of race and crime").

¹⁸⁴ See Austin, *supra* note 58, at 1773 ("[B]ased on the behavior of a few, street crime is wrongly thought to be the near exclusive domain of black males . . ."); see also Robert M. Entman, *African Americans According to TV News*, MEDIA STUD. J., Summer 1994, at 29 (exploring racial stereotypes in crime reporting on television news). As Entman notes:

A steady drumbeat of frightening information dominates local news. And there's a racial skew to this scary stuff. For example black defendants were more likely to be shown in still photos or mug shots, with no name appearing on the screen. White defendants, on the other hand, were more frequently named, and were represented through a variety of visual images, particularly, still photos and motion video. . . . At the same time, blacks are significantly more likely to appear in the physical custody of police officials than are whites. The symbolic message is that, even when accused of similar crimes, blacks are more dangerous than whites.

Id.

¹⁸⁵ See Hoffman, *supra* note 9 (referring to 15-year-old Willie Bosket, who killed two men on the New York subway in 1978 and forever changed juvenile justice in that state); see also BUTTERFIELD, *supra* note 28 (examining generations of crime and violence in the Bosket family).

¹⁸⁶ See generally Jennifer Vogel, *Throw Away the Key: Juvenile Offenders Are the Willie Hortons of the '90s*, THE UTNE READER, July-Aug. 1994, at 56 ("Politicians and the major media, having discovered a boom market in the public frenzy for bigger jails and longer sentences, have made juvenile offenders the Willie Hortons of the '90s."); see also NAACP & CJI, *supra* note 59, at 11 (arguing that the embrace of police in America is in response to the fear of violent black men, personified by Willie Horton); Anthony Lewis, *The Dirty Little Secret*, N.Y. TIMES, Oct. 20, 1988, at A27 (writing about the Republican Party's exploitation of racial fear in the 1988 presidential campaign by repeated use of television ads attacking Michael Dukakis on the furlough of convicted murderer Willie Horton, during which Horton raped a woman in Maryland); Anthony Lewis, *The Slime-Slinger*, N.Y. TIMES, June 8, 1989, at A31 (quoting Republican National Committee chair, Lee Atwater, who told a group of Republicans prior to the 1988 presidential election, "If I can make Willie Horton a household name, we'll win the election").

¹⁸⁷ See Sexton & Holloway, *supra* note 46, at B1 (reporting the indictment of three teenagers for the murder of a police officer). Consider the out-of-control feeling in the way many people talk about juvenile crime:

"Who knows these kids?" said Harvey Greenberg, a senior deputy to the Brooklyn District Attorney, Charles J. Hynes. "We don't really know them. Everybody always says they are shocked when kids like this do something like this.

"But ordinary people, shopkeepers, delivery drivers are being killed by juveniles and guns everyday in Brooklyn. There's nothing extraordinary about these three or the circumstances they find themselves in. They are part of a group of lost people who are running amok."

Id.; see also Bragg, *supra* note 68, at 1 ("But there is a sense of sanity to the crimes of adults, say the people who live in the deadliest neighborhoods. . . . The childlike criminals chill them.").

¹⁸⁸ See generally BROWN, *supra* note 28 (exploring the impact of a teenage son's killing on

hardened and too sophisticated and not "amenable to treatment"¹⁸⁹ and it's all too costly.¹⁹⁰ And we turn to punishment.

B. *The Call for Punishment*

You want to know what I believe in? I believe in punishment, I believe in fear, and I believe in revenge.

—Officer Mazilli in *Clockers*¹⁹¹

My debt to the State? Is that what this is all about? You're gonna take my life because I owe the State something? . . . When I was a

the rest of his family, especially his parents); Morrison, *supra* note 32 (examining the lives of two 11-year-olds who killed a two-year-old in Liverpool in 1993). In a passage from her compelling novel, *Before and After*, Rosellen Brown writes of a mother's struggle to accept that she could raise a son who kills:

Motherhood didn't keep. Why didn't more people admit it, that each phase was succeeded so totally by the next (if you were concentrating as hard as you had to) that sometimes she had trouble believing she'd *been* there. Their infancy was a rumor, distant, prodded by photographs and a few tapes—Judith had a lisp, Jacob giggled incessantly, gulping breath; he hiccuped a lot, she used to worry about him, because he took in so much air. She was astonished to hear them talking to each other on the tapes, singing their songs: these were the voices of someone else's children.

. . . .

Carolyn reached behind her like a blind woman to find a chair. How did she know him? How do you think you know your son? Up to a certain age, everything he does is visible to you. And gradually he walks away. She cried, she remembered, when she put his first tiny shoes on his feet, shoes no bigger than leaves . . .

BROWN, *supra* note 28, at 69, 117.

¹⁸⁹ See, e.g., MASS. GEN. L. ch. 119, § 61 (1995) (detailing the Massachusetts provisions for transfer of juveniles to criminal court, which includes a judicial determination that the child is not "amenable to rehabilitation" within the juvenile justice system and whether the child "presents danger to the public"); cf. IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, *Transfer Between Courts* 2, 6, 7, 11 (1982) ("Only extraordinary juveniles in extraordinary factual situations should be transferred to the criminal court and then only in accordance with procedures designed to accord maximum procedural protections to the juvenile and in compliance with precise and exacting behavioral standards."). See generally *Breed v. Jones*, 421 U.S. 519, 540 (1975) (holding that, under the double jeopardy clause, a state must make its dispositional determination—whether to proceed against an alleged offender in juvenile or criminal court—before reaching the merits of the case); *Kent v. United States*, 383 U.S. 541 (1966) (requiring that procedural due process be observed in transfer proceedings); Barry Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987) (exploring juvenile transfer statutes in a time when policy-makers are looking increasingly to offense-based punishment rather than offender-based treatment).

¹⁹⁰ See Hoffman, *supra* note 146, at 27 ("But if . . . the state should incarcerate more young offenders for longer periods, New York will have to face the same towering problem it confronts in the adult correctional system: cost."); Treaster, *supra* note 133, at A12 ("But any serious effort at rehabilitation is expensive—up to \$100,000 per teen-ager . . .").

¹⁹¹ PRICE, *supra* note 13, at 95.

kid, 12-years-old, my mother died. Did I go on the cuff to the State for the gutters I slept in, is that it? . . . When I went in [to the reformatory], copping a loaf of bread was the job. When I come out I could rob a bank. . . . Where was the State when a lonely, starving kid cried himself to sleep in a flop-house with a bunch of drunks, tramps, and hobos? Is that when this debt started? The only pals I had a chance at were the kids in the alley. I had to be tough to string along. . . . One friend, one friend when I am 12-years-old and I don't stand here like this.

—Man on Death Row in *Boys Town*¹⁹²

I suppose it is natural to want to punish—or banish—those whom we consider evil.¹⁹³ And God knows, it would be easy to compile a Most-Evil list of juvenile offenders if we had to.¹⁹⁴ A couple of weeks of local television news would do it.

¹⁹² *BOYS TOWN*, *supra* note 131 (a death-row inmate on the eve of his execution responding to the suggestion that his death was a debt he owed society—the scene with which the movie begins and which prompts Father Flanagan to create Boys Town).

¹⁹³ See generally SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* (1983) (exploring the role of revenge in the criminal justice system); Angela Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77 (discussing the role of the victim in criminal trials). But see FORER, *supra* note 135, at 10 (referring to “the rage to punish” as an “American obsession”).

Prison accomplishes both banishment—by sending wrongdoers away from the rest of us—and punishment—by forcing wrongdoers to endure the conditions of confinement. See generally FOUCAULT, *supra* note 23 (examining the birth of the prison); ERVING GOFFMAN, *ASYLUMS: ESSAYS IN THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* at xiii, 3–124 (1961) (describing life in “total institutions,” which is defined as a place where inmates are regimented, surrounded by others like themselves, and are unable to leave the premises).

Notwithstanding the fact that juvenile prisons are not called “prisons,” they have many of the same features. See JEROME MILLER, *LAST ONE OVER THE WALL* (1991) (describing conditions in Massachusetts juvenile institutions); see also GOFFMAN, *supra*, at 38–39 (portraying the regimentation of life in a jail for youthful offenders).

There is no question that prison, perhaps the least changed social institution in 300 years of American life, is punishment. See FORER, *supra* note 135, at 69; see also DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* (1990) (critiquing a range of social thought on punishment).

¹⁹⁴ See RITA KRAMER, *AT A TENDER AGE: VIOLENT YOUTH AND JUVENILE JUSTICE* 7 (1988) (referring to the growing incidence of “brutal crimes of random violence by younger and younger criminals” and the inadequate response of the juvenile justice system). Kramer shares a number of horrifying stories about youth crime in *At a Tender Age*, which tends to focus on the most vicious cases. Though Kramer describes her book as the product of three years of objectively “observing” New York’s Family Court, *id.* at 5, her heart is clearly with the victims of crime. See *id.* at 7 (referring to the lack of attention paid to “the sufferings of the victims” in the introduction); see also *id.* at 86 (“The Legal Aid staff soon perceived that I was more searching than right-minded, and eventually, by mutual tacit agreement, our contacts became less frequent. I belonged to the ‘other side.’”). The book also has a decidedly hostile tone toward criminal defense attorneys who represent juveniles accused of crime. See *id.* at 4, 87 (discussing with disdain the conduct of one Legal Aid lawyer who rejoiced when a complainant could not pick out his client at a lineup, and the nonjudgmental stance of another, who said, referring to the question

Who can deny that the crimes can be frightening—sometimes bone-chilling? But simplistic answers aren't buying victims any more security. In fact, they all but guarantee more violent crime. So why do we insist on more and more punishment?

There is a lot of rage behind our desire to punish juveniles.¹⁹⁵ It's a rage that is both collective and individual; though egged on by the angry political rhetoric of the 1990s,¹⁹⁶ our lashing out at "bad kids" springs from a deeper place. The societal rage to punish is not unlike the rage that happens between parent and child in the privacy of so many American homes when children transgress.¹⁹⁷ We strike back because we don't know what else to do; we lose control of ourselves because we have lost control of our kids.¹⁹⁸

Although the desire for revenge might be an understandable *emotional* response to serious crime,¹⁹⁹ it is troubling that, more and

of guilt, "Whether he did it or not is not the point."). The book begins with a story that sets the tone and provides an example of an evil crime:

At twelve years of age, Billy L. stands five feet eight and weighs 128 pounds. In the early morning hours of a Friday late in August 1984, Billy and two companions, sixteen-year-old Frankie W. and thirteen-year-old Jimmy P., came on a bag lady asleep on a bench in Central Park. According to Frankie's later account, Billy hit her on the head with a piece of pipe, saying, "Give me some pussy," and told the others to hold her legs. They took turns holding her down and repeatedly raping and sodomizing her. Later they reported dispassionately that she kept crying out, "Oh, God, please help me," and that afterward they beat her with their fists and kicked her on the body and the face, and that then Billy found a stick in the bushes with which he hit her, stopping only when a light scared them off and the boys ran out of the park.

Id. at 1.

Any Most-Evil list would have to include the members of the "Spur Posse" in suburban Lakewood, California. See Joan Didion, *Trouble in Lakewood*, THE NEW YORKER, July 26, 1993, at 46 (exploring the setting in which nine male high school students, all members of a sort of "fraternity" called the "Spur Posse," were charged with a number of rapes and sexual assaults).

¹⁹⁵ See generally FORER, *supra* note 135.

¹⁹⁶ See *supra* notes 151-54 and accompanying text.

¹⁹⁷ See generally MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY (1980); Murray A. Straus, *Discipline and Deviance: Physical Punishment of Children and Violence and Other Crime in Adulthood*, 38 SOC. PROBS. 133-54 (1991).

¹⁹⁸ See *supra* notes 187-88 and accompanying text; see also Robert Coles, *Race and Crime Control*, 51 KY. L.J. 451 (1965) ("I agree that prosecution must be vigorous. I only ask that punishment be neglected in favor of control. . . . Crime in America today needs every bit of control we can arrange, control of our own passions and confusions as well as those of our criminal.").

¹⁹⁹ See, e.g., Tom Coakley, *Judge Gives Rapist Suspended Sentence*, BOSTON GLOBE, June 23, 1993, at 29 (quoting a rape victim pleading for a prison sentence for her attacker: "I'm not heartless . . . but I want [the defendant] to look at four walls in jail and realize the conduct that got him there."). But see Claudia Dreifus, *Joycelyn Elders*, N.Y. TIMES, Jan. 30, 1994, § 6 (Magazine), at H16 (former Surgeon General Joycelyn Elders denied a wish for vengeance against the man who killed her brother, saying "[M]y brother was always so kind . . . we felt strongly that he

more, vengeance seems to be the only driving force behind social policy relating to juvenile crime.²⁰⁰ Out of anger and frustration, we throw up our hands and say these kids are just too bad to help.

The truth is juvenile crime is not an easy social problem. There is no question that many people—and increasing numbers of African Americans and other minorities²⁰¹—have been victims of youth crime and continue to live in fear of it.²⁰² Crime is a terrible thing, which, aside from doing material harm, seems to chip away at our humanity each time it occurs.²⁰³

The complicated part of the juvenile crime equation is that the perpetrators may be just as scared as the victims. Garland Hampton, a fifteen-year-old awaiting trial for murder in Milwaukee, is the kind of teenager to whom most prosecutors would point as evil incarnate.²⁰⁴ But Garland has lived his short life more out of fear than meanness:

“I guess I been scared all my life,” said Garland, a stocky boy with a hint of a 70’s-style Afro, who cried as he talked about his life. “For me, living has been the same as running through hell with a gasoline suit on. I don’t want people

would never want anybody put to death. Never!”); David Gonzalez, *In the Cherish Life Circle, Revenge Is No Sweet Thing*, N.Y. TIMES, Dec. 24, 1994, at 8 (reporting about a Catholic discussion group which is promoting the signing of pledge cards which state that, if the bearer of the card is killed during a violent crime, his or her killer should be spared the death penalty).

²⁰⁰ See Jill Smolowe, *Going Soft on Crime: While California’s Tough Three-Strike Law Falters, Prevention Programs Are Keeping Kids in Line*, TIME, Nov. 14, 1994, at 63 (quoting a judge on the Ventura County Superior Court in California—“The punitive messages seem to be the only ones that get out to the public . . . and that is a problem. . . . As long as the community’s attitude toward juveniles is “punish,” we all lose. There is a large segment here that is salvageable.”).

²⁰¹ See Kennedy, *supra* note 183, at 1255 (noting that African Americans are four times as likely as whites to be raped, three times as likely to be robbed, twice as likely to be assaulted, and seven times as likely to be murdered) (citing Hanna Rosin, *Action Jackson: Jesse’s Volte-face on Crime*, NEW REPUBLIC, Mar. 24, 1994, at 17); see also HACKER, *supra* note 51 (detailing the demographics of crime victimization); Dilulio, *supra* note 59, at 4–7 (discussing the growing “crime gap” between blacks and whites); powell & Hershenov, *supra* note 59, at 609 (“Before the age of twenty-five, a black man is today more likely to die in the street than a United States soldier was to perish in Vietnam—or in the Persian Gulf War.”).

²⁰² See, e.g., Bragg, *supra* note 68, at A1 (describing the elderly tenants in a public housing project in New Orleans, who are too afraid to go outside during the day and sleep under their beds at night, because “children of 11 tote guns too big for their hands, and . . . fire [them] indiscriminately just to hear them go ‘bang’”).

²⁰³ See Kennedy, *supra* note 183, at 1255 (“Crime is widely perceived as a major blight that decreases happiness, productivity, and security in the United States”); see also Bragg, *supra* note 68, at A1, A28 (“It’s a shame when the grown people have to hide,” she said. “But when you’re poor, you got to act like you’re poor.”).

²⁰⁴ See Terry, *Cursed Heirloom*, *supra* note 38, at 1 (“Prosecutors say he is an adolescent menace to society . . . who must pay for his sins like a man.”).

feeling sorry for me, but I really ain't had nothing good happen to me. The ax fell heavy on my head."²⁰⁵

Garland signed a confession, saying he was sorry for shooting Donnell, the boy he killed, that he was sorry for everything.²⁰⁶ Garland says that his confession did not contain the whole story, about how scared he was that night, how he wet his pants, how he shot Donnell to defend himself after Donnell pulled his gun, "like a wild West gunfighter."²⁰⁷

Suggesting that we should resist the temptation to demonize young lawbreakers and resist the temptation to impose greater punishment as the only means of addressing their crimes does not mean that we must forget about victims or tolerate criminal activity.²⁰⁸ Although some commentators have suggested that those who champion the rights of the accused, young and old, do not believe in law enforcement and care only for criminal defendants,²⁰⁹ that has not been my experience as a criminal defense lawyer, nor is it my view as someone who has studied this issue for a number of years.²¹⁰

Contrary to what the general public seems to think, criminal defense lawyers are not "pro-crime."²¹¹ They share the same vulnerabil-

²⁰⁵ *Id.* at B7.

²⁰⁶ *See id.*

²⁰⁷ *Id.*

²⁰⁸ *See* Cole, *supra* note 183, at 2548 (arguing that an insoluble dichotomy of race and crime "is inevitable if the only alternatives are punishing or tolerating criminal activity" and suggesting that these are not the only choices we have); *see also* Treaster, *supra* note 133 (quoting Barry Krisberg of the National Council on Crime and Delinquency, "[I]n the current political climate, treatment and rehabilitation have become the equivalent of condoning crime.").

²⁰⁹ *See* Kennedy, *supra* note 183, at 1258 (referring to a "distinctive stance characterized by hostility toward the agencies of crime control, sympathetic identification with defendants and convicts, and a commitment to policies aimed at narrowly constraining the powers of law enforcement authorities"); *cf.* ALICE S. VACHSS, *SEX CRIMES* 30, 109 (1993) (a prosecutor referring disparagingly to criminal defense lawyers as "collaborators" and "worms").

²¹⁰ *See, e.g.,* NAACP & CJI, *supra* note 59, at 8, 9, 16 (noting the taxing work of police officers in an increasingly violent time and acknowledging that many police officers do the job with dignity); Smith, *Reflections of a Feminist Criminal Defense Lawyer*, *supra* note 135, at 491-92 (describing the pull of victims); Abbe Smith, *Where Angels Fear to Tread*, in *WAR STORIES* (Martha Minow & Gary Bellow eds., forthcoming 1995) (recounting the author's representation of would-be homicide victim in a capital murder trial in central Pennsylvania).

²¹¹ *See* Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 45-50 (1993) [hereinafter Smith, *Rosie O'Neill Goes to Law School*] (discussing the criminal defense lawyer's complex and sometimes painful relationship to victims). *But see* KRAMER, *supra* note 194, at 87 ("Legal Aid wants the child to get away with it, not learn to change his ways.").

The problem is that most of the public does not know (and apparently Rita Kramer, cited above, is similarly ignorant) that criminal defense lawyers are *required* to give their "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and

ity to crime as others and are sometimes victims of crime. Likewise, those who call for addressing the causes of juvenile crime and for tailoring justice to fit individual offenders instead of locking everybody up are not blind to the harm done.²¹²

The problem is that, though there seems to be a universal demand for "getting tough on juvenile crime"²¹³—which means prosecuting younger kids as adults, prosecuting kids in federal court, increasing sentences, and building more prisons—addressing crime by simply increasing punishment simply doesn't work.²¹⁴ Though we are now

the exertion of [the lawyer's] utmost learning and ability." ABA CANONS OF PROFESSIONAL ETHICS 15 (1908); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1969) ("A Lawyer Should Represent a Client Zealously Within the Bounds of Law."). In addition, consider Lord Brougham's statement:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing his duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 65-66 (1990) (quoting TRIAL OF QUEEN CAROLINE 8 (1821)).

²¹² See FORER, *supra* note 135, at 10 (a judge pondering what we should do with those who violate the law—"What is a moral and humane response to crime and criminals for civilized individuals and a democratic government based on a rule of law? What can the law itself reasonably be expected to do to reduce crime and to promote a decent, democratic social order?").

²¹³ See Dan Wasserman, Editorial Cartoon, BOSTON GLOBE, Oct. 31, 1994, at 14 (poking fun at the "tough on crime" rhetoric of politicians in the 1994 elections). In the cartoon, two political candidates are debating. The first proclaims, "I'm tough on crime—I support *executions!*" The second replies, "Oh, yeah? Well, I support executions of *juveniles!*" The first, even more emphatic, responds, "Well, I support *preventive* executions of *juveniles!*" The second candidate, visibly puzzled, inquires, "Preventive executions?"—to which the first, sensing victory, tells the audience, "See—my opponent would wait until a crime had *already been committed!*"

²¹⁴ See generally MAUER, AMERICANS BEHIND BARS, *supra* note 62, at 14 (finding that from 1986 to 1991, despite the fact that the rate of imprisonment rose 51%, violent crime also increased by 15%); CURRIE, CONFRONTING CRIME, *supra* note 28, at 52-74, 75-81 (discussing the limits of imprisonment as an instrument of crime control, and suggesting that prison may create *more crime*); see also WIDEMAN, BROTHERS AND KEEPERS, *supra* note 24, at 243 ("Inside here they're . . . tightening things up even more. . . . [T]he joint is busting at the seams with cons and they're sending more every day. Two men to a cell . . . Big time, no rehabilitation, lock 'em up like animals—then let them out on society crazed and angry."); Molly Ivins, *Cheering for a Regulated Militia*, Hous. Post, May 6, 1994, at A37 ("The chief problems with responding to crime only with punishment are . . . it costs the Earth, and . . . it doesn't stop crime. . . . As juvenile crime soars, the futility of the punishment-only argument becomes even clearer."); Sonya Rudenstine, *Spare the Rod When Treating Troubled Youth*, N.Y. TIMES, Nov. 4, 1994, at A34 (Letter-to-the-Editor from research associate at the National Council on Crime and Delinquency asserting that as punishment of youthful offenders has gotten tougher in California—its juvenile incarceration

locking more kids up than ever before and are doing so for longer and longer periods, the juvenile crime rate has not been affected.²¹⁵

Indeed, studies reveal that locking up some offenders "makes them worse."²¹⁶ As Marvin Wolfgang, Robert Figglio, and Thorsten Sellin demonstrated in the early 1970s, youthful offenders who are punished by detention in juvenile institutions—prisons—not only continue to violate the law, "but they also commit more serious crimes with greater rapidity than those who experience a less constraining contact with the judicial and correctional systems."²¹⁷

There are a number of reasons why imprisonment has a negative effect on juvenile crime. The chief reason is that prison is a purely *reactive* response to crime: "[U]nless the factors leading to high crime

rate is double the national average—California's juvenile crime rates are rising at rates higher than any other state).

²¹⁵ See *supra* note 95. Though crime statistics are problematic, it appears that violent juvenile crime may be on the rise. See FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES IN 1991, UNIFORM CRIME REPORTS 279-89 (1992) (indicating that violent crime by juveniles is increasing). As Franklin Zimring has noted, however, the group nature of juvenile crime distorts crime statistics—especially if based on arrests rather than criminal incidents. See Zimring, *Kids, Groups and Crime*, *supra* note 28, at 869-75. This is also true for serious violent crime, including armed robbery, rape, and homicide. *Id.* at 869, 871.

For support for the assertion that violent crime is not increasing, see Neil A. Lewis, *Crime Rates Decline; Outrage Hasn't*, N.Y. TIMES, Dec. 8, 1993, at B6 (reporting that "America's crime rate, for violent and nonviolent offenses alike, has actually fallen a little in the last two years."); Bill Rankin, *Reno Urges More Focus on Juveniles*, ATLANTA J. & CONST., Feb. 9, 1994, at A5 (reporting remarks by United States Attorney General Janet Reno to the chief justices of the nation's state supreme courts, in which she notes that violent crime is *not* increasing); see also BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1992: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT (1992) (indicating that generally crime is decreasing and violent crime has remained relatively steady since 1973).

²¹⁶ CURRIE, CONFRONTING CRIME, *supra* note 28, at 75; see also JOHN EDGAR WIDEMAN, *All Stories Are True*, in THE STORIES OF JOHN EDGAR WIDEMAN 3, 13 (1992). Wideman writes:

My own fault I'm in here. I know I done some bad things. I'm in here, man, doing my time. Uh huh. Hard time. Lots of time for doing wrong. But they treat us like dogshit in here and that's wrong too. . . . Guys get meaner and crazier in here. Every day you see the ones can't take it slipping further and further off. Distance in their eyes, bro. Ain't nobody home in them eyes.

Id.; see also Jerome G. Miller, *The Issue of Violent Juvenile Crime*, in VIOLENT JUVENILE OFFENDERS: AN ANTHOLOGY 379, 381-82 (Robert A. Mathias et al. eds., 1984) ("[I]ncarceration is itself criminogenic, and therefore should be resorted to only as a last resort."); Treaster, *supra* note 133 (quoting Mark Soler of the Youth Law Center, "The state legislatures are all moving to try juveniles in adult court, which is really a move to lock up more kids in big institutions. . . . But those institutions are . . . schools for crime. The kids come out as very tough, hardened criminals.").

²¹⁷ WOLFGANG ET AL., *supra* note 28, at 252; see also Simon Dinitz & John P. Conrad, *The Dangerous Two Per Cent*, in CRITICAL ISSUES IN JUVENILE DELINQUENCY 149 (David Shichor & Delos H. Kelly eds., 1980) ("[C]ommitment to a state facility or other formal control agency will increase the speed with which individuals return to serious delinquency.").

rates in the 15–18 year age range are addressed, incarceration will remain an ‘after the fact’ response that fails to address the new annual cohort of potential offenders.”²¹⁸

Although the call for tougher and tougher punishment may broadcast a “message,” that message is counter-productive for the many kids who have already had more than enough authoritarian punishment in their lives.²¹⁹ That message may be lost on kids who live moment to moment, *expecting* either death or prison.²²⁰ Prison is a *dehumanizing* place. For troubled youth, this harsh environment takes a particular toll.²²¹

What if we returned to the original idea of the juvenile court and truly attempted to live up to it?²²² What if we poured resources into treatment and rehabilitation instead of prison cells and prison guards? What if our social policy reflected our understanding that crime is as much the product of long-standing social neglect as individual wrongdoing?²²³ What if we employed all of our knowledge and resources and focused on the real culprits: family violence, poverty and inequality?²²⁴

²¹⁸ MAUER, AMERICANS BEHIND BARS, *supra* note 62, at 17. Marc Mauer, Assistant Director of the Sentencing Project, notes that the efficacy of prison as a mechanism of crime control is limited by the impact of demographics. Though a disproportionate number of crimes is committed by males between ages 15 and 18, the peak age of crime commission is 18. After age 18, the rate of criminal activity falls substantially. *See id.* (citing FEDERAL BUREAU OF INVESTIGATION, AGE-SPECIFIC ARREST RATES AND RACE-SPECIFIC ARREST RATES FOR SELECTED OFFENSES, 1965–1992 (1993)).

²¹⁹ *See supra* notes 123–25 and accompanying text; *see also* Treaster, *supra* note 133 (Edward J. Loughran, Director of the Robert F. Kennedy Memorial Juvenile Justice Project, commenting that prison-like juvenile institutions “reinforce all the aggression that the kids went in with”).

²²⁰ *See* Tierney, *supra* note 73, at 1, B6.

²²¹ *See* Treaster, *supra* note 133 (describing the sterile physical plant of a New Jersey juvenile prison and the endless regimentation of daily life). In the article, a young car thief and drug dealer talks about solitary confinement, which is the punishment for any of 79 prohibited acts: “It makes me crazy. . . . I start to hit on the walls, start to yell. Sometimes I just blank out. I feel like crying, but I don’t.” *Id.*

²²² For expositions of the original beneficent idea of the juvenile court, *see generally* KRISBERG & AUSTIN, *supra* note 9, at 8–52; PRESCOTT, *supra* note 17, at 51–58; ELLEN RYERSON, *THE BEST LAID PLANS: AMERICA’S JUVENILE COURT EXPERIMENT* (1978); *THE CHILD, THE CLINIC AND THE COURT* (Jane Addams ed., 1925); Fox, *supra* note 29, at 1187–1230; Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 104–10; Wizner & Keller, *supra* note 8, at 1120–21 (“It is now commonly agreed that the juvenile court has failed to achieve its objectives.”). *But see* ANTHONY PLATT, *THE CHILD SAVERS* (1969) (arguing that the juvenile court was a paternalistic instrument of social control); Ainsworth, *supra* note 8, at 1096–1101 (offering a similar critique to Platt’s). For me, living up to the original idea of the juvenile court includes enhanced procedural rights for juveniles, enforced by zealous defense counsel.

²²³ For an interesting philosophical treatment of individual and social responsibility, *see generally* MARION SMILEY, *MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY: POWER AND ACCOUNTABILITY FROM A PRAGMATIC POINT OF VIEW* (1992) (arguing that our conception of blameworthiness as rooted in individual failure of will is flawed).

²²⁴ *See supra* notes 46–86, 112–34 and accompanying text.

The concept of "rehabilitation" has taken such a beating in recent years, it makes the word "liberal" look unscathed.²²⁵ In the adult criminal court, rehabilitation is all but dead.²²⁶ In juvenile courts across the nation, it hangs by a thread.²²⁷

²²⁵ It is strange that there can be so much talk of retribution, a religious term that often accompanies the call for punishment, but so little talk of *redemption*, the religious term that goes hand in hand with the notion of rehabilitation. See David Chanoff, *Street Redeemer: James Galipeau*, N.Y. TIMES, Nov. 13, 1994, at F44 (describing the work of Los Angeles probation officer James Galipeau, who "believes firmly in the possibility of redemption" for all but a very small number of the "hard-core gangsters" he supervises); cf. David Remnick, *The Situationist*, THE NEW YORKER, Sept. 5, 1994, at 87 (examining Washington, D.C., Mayor Marion Barry's fall from power and his "redemption" as a born-again mayoral candidate). It's too bad child advocates have not made better use of religion to counter the angry, anti-child talk of the religious right.

²²⁶ See WILSON, THINKING ABOUT CRIME, *supra* note 18, at 163 (referring to politicians and scholars concluding at the end of the 1970s that "nothing works" and stating that there was no program demonstrating "any clear and consistent rehabilitative effect on which a public policy might be based" (citing Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, THE PUB. INTEREST, Spring 1974, at 22)); Martin, *supra* note 29, at 58–60 (discussing the abandonment of the concept of rehabilitation in the criminal justice system).

²²⁷ See CHARLES SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 326, 335 n.* (1978) (discussing the disproportionate focus on punishment over rehabilitation in the juvenile system, which is calculated at "100 times as much punishment as . . . treatment"); Martin, *supra* note 29, at 70–82 (discussing the changes in the transfer laws in Massachusetts, California, and the District of Columbia).

For an example of a formerly progressive, rehabilitation-oriented transfer law which has since been changed to make it easier to prosecute certain children as adults and thus to write them off as incapable of rehabilitation, see MASS. GEN. L. ch. 119, §§ 61, 72 (1995). Prior to December 5, 1990, a juvenile transfer hearing could occur in Massachusetts only when the accused was between the ages of 14 and 17, had previously been committed to the Department of Youth Services as a delinquent, and was charged with an offense punishable by state imprisonment if committed by an adult or with an offense involving the infliction or threat of serious bodily harm. See MASS. GEN. L. ANN. ch. 119, § 61 (West 1993) (historical and statutory notes). Since then, the law has been amended so that transfer hearings are required in cases of alleged murder, manslaughter, rape, kidnapping, and armed burglary, and the commonwealth has the power to determine whether a transfer hearing is held in all other cases. 1990 Mass Acts 267 § 3 (codified at MASS. GEN. L. ch. 119 § 61 (1995)). The probable cause hearing (the first part of the transfer proceeding which determines whether a crime has been committed) can now be replaced by a grand jury indictment. 1991 Mass. Acts 488, § 3 (codified at MASS. GEN. L. ch. 119, § 61 (1995)). In addition, and perhaps most importantly, Massachusetts has abandoned the previous "clear and convincing evidence" standard of proof in transfer hearings, and now the Commonwealth must merely show that the juvenile "presents a significant danger to the public and . . . is not amenable to rehabilitation within the juvenile justice system" by a "preponderance of evidence." 1990 Mass Acts 267 § 3 (codified at MASS. GEN. L. ch. 119 § 61 (1995)). When the charge is murder, manslaughter, rape, kidnapping, or armed burglary, there is a "rebuttable presumption" that the juvenile should be tried in criminal court. *Id.* The Commonwealth also now has the right to appeal a transfer decision. *Id.* Juveniles charged with murder who prevail at the transfer hearing and are subsequently found delinquent of murder in the first degree will be confined for a minimum of 15 years—in a juvenile facility until age 18, but, thereafter, the juvenile can be confined in the adult correctional system. MASS. GEN. L. ch. 119 § 72 (1995); see also Martin, *supra* note 29, at 70–74, 80–82.

What does it mean for a juvenile not to be "amenable to rehabilitation within the juvenile justice system?"²²⁸ Why don't we ask ourselves that question from the perspective of *social* accountability before we wash our hands of a child, calling it a matter of *individual* accountability.²²⁹ There is no question that a young wrongdoer's capacity for rehabilitation in the juvenile system is inextricably tied to our desire to work with the child and to providing sufficient resources for the endeavor.²³⁰

The instinct to punish is not about the failure of rehabilitation after years of experience.²³¹ We have never made a serious, nationwide attempt to rehabilitate juvenile offenders, and the few successful state-wide rehabilitation programs have since lost their funding.²³² The social policy that heralds punishment over rehabilitation is a deliberate decision not to spend the time and resources required to provide kids who break the law with the means to make different choices. Especially given the kids we continue to punish, it is a cruel and ineffective social policy that will result in far more public expenditures now and in the long run.²³³

Continued legislative and judicial support for the execution of juveniles underscores the fragile state of rehabilitation in the juvenile justice system. See VICTOR L. STREIB, *DEATH PENALTY FOR JUVENILES* (1987); see also *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that the imposition of capital punishment on an individual who committed a crime at age 16 or 17 does not constitute cruel and unusual punishment under the Eighth Amendment); STREIB, *supra*, at 37 (noting that "execution irreversibly abandons all hope of reforming a teenager and thus is squarely in opposition to the fundamental premises of juvenile justice").

²²⁸ See MASS. GEN. L. ch. 119, § 61 (1995).

²²⁹ See Andrew Roth, *An Examination of Whether Incarcerated Juveniles are Entitled by the Constitution to Rehabilitative Treatment*, 84 MICH. L. REV. 286 (1985) (arguing that if juveniles are deprived of their liberty based on the state's *parens patriae* powers then the state is constitutionally required to provide rehabilitative treatment); see also SMILEY, *supra* note 223; Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992) (exploring the notion of moral accountability in the criminal law).

²³⁰ See Jeffrey A. Fagan et al., *Intervening with Violent Juvenile Offenders: A Community Reintegration Model*, in *Violent Juvenile Offenders: An Anthology* 207, 208 (Robert A. Mathias et al. eds., 1984) (arguing that it is "premature to dismiss the rehabilitative ideals of the juvenile court without a thorough attempt to treat offenders and measure the impact of that treatment").

²³¹ See generally WILSON, *THINKING ABOUT CRIME*, *supra* note 18, at 162-77 (discussing the failure of rehabilitation).

²³² See KRISBERG & AUSTIN, *supra* note 9, at 142-70 (examining the "Massachusetts Experiment" in community-based juvenile corrections).

²³³ See generally LISBETH B. SCHORR, *WITHIN OUR REACH: BREAKING THE CYCLE OF DISADVANTAGE* 1-22 (1988) (discussing the "high cost of rotten outcomes" for disadvantaged children and arguing, "If we fail to respond, much that we care about will get worse."); see also *id.* (quoting former Pennsylvania Congressman William H. Gray III, who warned that time was running out for the nation to respond to the needs of the growing underclass: "We're building social nitroglycerin that is going to explode, and the country is going to pay for it one way or another.").

C. Where Children Can Have a Childhood

I've been shot at, I've been shot in the legs a few times, I've had knife cuts. I've got scars on me, I've seen a lot of bad things, people getting blown to pieces, people getting cut up, you know. I've seen just about everything in front of my eyes. . . . If I was any younger, it would have left a scar on me, but now I'm at the age I was able to handle it, you know.

—Belinda Ramirez, age fifteen, locked up for fighting and drug use²³⁴

I been dead since I was 12, so I'm not afraid of dying. I'm just waiting to get kicked into the grave.

—Unnamed seventeen-year-old on his way into court²³⁵

What is truly needed in America's urban war zones is restoration of a safe environment where children can have a childhood . . .

—James Garbarino et al., *No Place to be a Child*²³⁶

In many ways, Kenny is lucky. He has a concerned, hard-working mom, who believes that there is more than the streets for her son.²³⁷ He made it through high school in a neighborhood that is not quite as ravaged as his own.²³⁸ Although he has engaged in criminal activity, it apparently consists only of low-level, sporadic drug peddling, almost always in a peer-related context. He lacks the ambition to become a major drug dealer; like a lot of teenagers, he'd just as soon hang out at home and watch television.

Once we wrap up all of his cases, Kenny has a plan to move to San Diego. His mom has a brother there with a good job as a corrections officer, lives in a nice neighborhood, and is willing to take Kenny. Kenny likes the idea, because it's getting harder and harder to avoid trouble in Boston—especially if he keeps hanging around his childhood friends. He talks about going to college in California. He still has dreams and hopes.

²³⁴ CURRIE, DOPE AND TROUBLE, *supra* note 13, at 220.

²³⁵ Vogel, *supra* note 186, at 56.

²³⁶ GARBARINO ET AL., *NO PLACE TO BE A CHILD*, *supra* note 28, at 148.

²³⁷ Cf. DeParle, *Better Work Than Welfare*, *supra* note 151 (depicting the struggles of a devoted, working mother in a Chicago housing project, who must rise at 3:30 every morning to get her kids off to school and herself off to work); *HOOP DREAMS* (Orion Pictures 1994) (documentary film about two African-American high school basketball players growing up on Chicago's inner-city streets, who, buoyed by strong, supportive mothers, pursue college scholarships and dream of successful careers in professional basketball).

²³⁸ See *supra* text accompanying note 3.

Yet, Kenny has seen his share of shootings. He's gone to his share of funerals. He knows a lot of people who are locked up and whenever we go to court he seems to run into someone he knows. Though he is still a kid in a million ways—so proud when I compliment him on his timely court appearances, bashful when I tell him he's looking good in a new jacket, sheepish when I ask how his preparation for the college boards is going—Kenny has had to grow up fast.

The chief problem with the argument that the juvenile court should be abolished because the nature of "childhood" has changed²³⁹ is that it doesn't take into account the *loss* of childhood experienced by many of the kids who live in our inner-cities and encounter the juvenile court.²⁴⁰ As Garland Hampton, a fifteen-year-old child facing a life sentence for murder put it, "I feel like I been grown my whole life."²⁴¹

²³⁹ See, e.g., Ainsworth, *supra* note 8, at 1085-1104 (arguing that childhood is a "social construction" which has changed such that the "child-adult distinction" is now a "false dichotomy").

²⁴⁰ See Bragg, *supra* note 68 (exploring violence in a public housing project in New Orleans). The children growing up in this housing project—and many others like it—have never been allowed to be children:

Every Saturday at 10 A.M., a missionary group takes children in the Cooper apartments into the project meeting room, to teach them songs and let them play games and slip in a little prayer. The oldest are 8 and 9, the youngest 3. The missionaries tell the children that God loves them and is watching over them, that they should not live in fear and should never give up hope.

When the missionary, a young white woman from the suburbs, asks what they worry about, one child says, "Eating."

The missionary says God will provide.

Another little girl says, "Dying."

The missionary says God will shield them.

Then everyone sings a song.

The missionaries are barely out of the parking lot when the sound of an automatic weapon booms through the dusty courtyard. The children, who had gone outside to play, scramble for their homes to hide under their beds and inside bathtubs, the way their parents taught them. They say it happens every day.

Id. at A28; see also GARBARINO ET AL., NO PLACE TO BE A CHILD, *supra* note 28, at 141 (describing how mother living in public housing in Chicago found homemade gun—a would-be "Uzi"—her five-year-old son had fashioned from plastic and glue—"When she asked him about the gun, he said that he needed it to protect himself from the gangs."); *id.* at 149 (describing how children in Chicago public housing development afterschool program played "funeral": "They would build a casket with blocks and take turns lying in the casket. The children took on roles of preacher, family members, and mourners. They would weep and cry out for the person who died, saying, 'Don't take him!'").

²⁴¹ Terry, *Cursed Heirloom*, *supra* note 38, at B7 (quoting a 15-year-old boy, who is locked up in the Milwaukee Jail, awaiting trial on murder charges, who grew up in a family for whom "violence was like a cursed heirloom, passed from generation to generation").

That many of these kids have never had a childhood does not mean that they are not children. To the contrary, children whose development has been impaired by forces beyond their control²⁴² are starved for the stuff of childhood. When politicians and scholars talk about children being less "childlike," they don't grasp the growing violence and hardship which make many children "old" before their time.²⁴³

Legal scholar and juvenile court abolitionist Janet Ainsworth writes that "[f]rom our vantage point in the late twentieth century, the [early twentieth century] Progressives' use of the word 'child' to describe the adolescent youth accused of violating the law seems incongruous if not willfully perverse."²⁴⁴ Not to me, it doesn't. The word "child" may be incongruous with prevailing *media images* of teenage lawbreakers and may seem perverse to both the "social constructionists" whom Ainsworth so admiringly cites²⁴⁵ and the anti-child right-wing.²⁴⁶ But to those of us who work with kids in juvenile and criminal court, a "child is a child is a child."²⁴⁷

There is no question that the juvenile justice system should incorporate notions of child development,²⁴⁸ especially child development in a violent, inner-city context.²⁴⁹ However, those who study children

²⁴² See GARBARINO ET AL., *CHILDREN IN DANGER*, *supra* note 21 (examining the developmental toll of violent inner-city life); Terry, *Cursed Heirloom*, *supra* note 38, at B7 (citing Kathleen Kostelny, a senior research associate at the Erikson Institute for Advance Study in Child Development, on the harm that violence does to child development). Kostelny, one of the co-authors of *No Place to Be a Child*, *supra* note 28, and *Children in Danger*, *supra* note 21, notes that, "[k]ids who experience violence in their community and violence in their home[s] are at a greatly increased risk for a whole host of bad developmental outcomes."

²⁴³ See DeParle, *Better Work Than Welfare*, *supra* note 151, at 44, 56 (describing life at Chicago's Cabrini-Green housing project for a 14-year-old boy, who is "as much [his mother's] partner as her son," who used to quote the Bible to his mother to try to get her off cocaine, who turned down a bicycle for a birthday gift because it would be taken from him, who must "beep" his mother at work—she is not allowed phone calls—to warn her not to come home because there is shooting); *id.* at 46, 56 (describing life at Chicago's Cabrini-Green housing project for the younger brother of the 14-year-old described above, who, at age five witnessed a drive-by shooting, at age seven punched an elevator button and "watched the opening doors unveil a corpse," and had to see a United Way therapist to help with nightmares and bed-wetting).

²⁴⁴ See Ainsworth, *supra* note 8, at 1101.

²⁴⁵ See *id.* at 1091–96. Social constructionists regard the notion of childhood as a social "construct" or creation rather than as a "natural" developmental stage; see also Mark Soler, *Re-Imagining the Juvenile Court*, in *CHILD, PARENT, AND STATE* 597–98 (1993).

²⁴⁶ See Soler, *supra* note 245, at 598–99 (discussing the right-wing "political agenda in the reconstruction of childhood").

²⁴⁷ See Irene Rosenberg, Schall v. Martin: *A Child Is a Child Is a Child*, 12 AM. J. CRIM. L. 253 (1984).

²⁴⁸ See KRISBERG & AUSTIN, *supra* note 9, at 4.

²⁴⁹ See generally GARBARINO ET AL., *NO PLACE TO BE A CHILD*, *supra* note 28; GARBARINO ET AL., *CHILDREN IN DANGER*, *supra* note 21.

growing up amidst urban decay and violence—children who increasingly end up in the juvenile system—are not declaring the end of childhood. To the contrary, they call for “resources to make a *real childhood* a real possibility even for the children of the urban poor.”²⁵⁰

IV. SEARCHING FOR SOLUTIONS

He's a young man and maybe he's got to do his young man things, make his young man mistakes, and I hope one of those mistakes don't kill him.

—Strike's mother in *Clockers*²⁵¹

All investigations have arrived at the results that crime is due to causes; that man is either not morally responsible or is responsible only to a slight degree. All have doubted the efficacy of punishment. . . .

—Clarence Darrow²⁵²

I am enamored of a vision of a criminal justice system that respects the unique human quality of every person, that recognizes the limitations of the law and the importance of individualized justice.

—Lois Forer, former Philadelphia judge²⁵³

This section of the paper will only begin the discussion of solutions. Mainly, I want to propose some general directions for change, consistent with what we now know about troubled and troublesome kids. For those interested in a more detailed examination of specific ways of addressing juvenile delinquency and disadvantage, I recommend Barry Krisberg and James Austin's *Reinventing Juvenile Justice*,²⁵⁴ and Lisbeth Schorr's *Within Our Reach: Breaking the Cycle of Disadvantage*.²⁵⁵

To reduce juvenile crime and violence we must address the root causes.²⁵⁶ We must take steps to change the quality of life for so many

²⁵⁰ GARBARINO ET AL., NO PLACE TO BE A CHILD, *supra* note 28, at 148 (emphasis added).

²⁵¹ PRICE, *supra* note 13, at 481.

²⁵² DARROW, *supra* note 28, at 273.

²⁵³ FORER, *supra* note 135, at 14–15.

²⁵⁴ KRISBERG & AUSTIN, *supra* note 9. For a valuable collection of materials on violent juvenile offenders and effective treatment programs for them, see generally VIOLENT JUVENILE OFFENDERS: AN ANTHOLOGY (Robert A. Mathias et al., eds. 1984).

²⁵⁵ See *supra* note 226.

²⁵⁶ See *supra* parts II.A, II.C; see also Jeffrey A. Fagan & Sally Jo Jones, *Toward a Theoretical Model for Intervention with Violent Juvenile Offenders*, in VIOLENT JUVENILE OFFENDERS: AN ANTHOLOGY 53–69 (Robert A. Mathias et al. eds., 1984) (reviewing and assessing theories on the causes of juvenile violence toward developing a theoretical framework for effective intervention); SCHORR, *supra* note 233. Schorr writes:

kids residing in our nation's cities. We must resume the "War Against Poverty."²⁵⁷ We must insist on equal opportunity and equal justice. We must give children real alternatives to selling drugs and taking up arms.

We must have a social policy that recognizes that when evil is done to children, they may respond with evil.²⁵⁸ We must work to stop community violence and family violence, not simply by arresting and prosecuting perpetrators, but by recognizing that many *victims become perpetrators*.²⁵⁹ Too often in cases of family violence and child abuse, for example, we put all of our energies into prosecuting the adult wrongdoer and stripping the parent of parental rights, and we do nothing for the child who has been hurt. Unless we start providing meaningful treatment for the victims of family and community violence, we will never break the cycle of violence.²⁶⁰

We must recognize that kids tend to hang out in groups and that "being in the wrong place at the wrong time" is a reality for many kids who get in trouble. Our assessment of an individual's culpability must reflect our understanding of the group dynamic of juvenile crime.²⁶¹

Poverty is the greatest risk factor of all. Family poverty is relentlessly correlated with high rates of school-age childbearing, school failure, and violent crime—and with all their antecedents. Low income is an important risk factor in itself, and so is relative poverty Virtually all the other risk factors that make rotten outcomes more likely are also found disproportionately among poor children: bad health in infancy and childhood, malnutrition, having an isolated or impaired mother, being abused or neglected, not having a decent place to live, and lacking access to the services that would protect against the effects of these conditions.

. . . A better future for the families most disconnected from the nation's prosperity would require . . . policies to promote economic growth, to create more jobs and expand job training, and to assure that people who work can earn enough to support a family.

SCHORR, *supra* note 233, at xxii–xxiii.

²⁵⁷ See DeParle, *Better Work Than Welfare*, *supra* note 151, at 48 (quoting President Lyndon B. Johnson, on Jan. 8, 1964, "This Administration today, here and now, declares unconditional war on poverty.").

²⁵⁸ See *infra* note 287 and accompanying text.

²⁵⁹ See GARBARINO ET AL., NO PLACE TO BE A CHILD, *supra* note 28, at 141.

²⁶⁰ See *supra* notes 116–26 and accompanying text; cf. Bernardine Dohrn, *Juvenile Court: Crime or Punishment*, 16 HUM. RTS. J. 26 (1989) (arguing that the juvenile court consistently treats victims of abuse and neglect as criminals).

For an account of a nightmarish childhood which compared to that of Gary Gilmore, see *supra* notes 111, 114–18 and accompanying text, and led to a similar fate, see Arenella, *supra* note 229, at 1514–15 (describing the childhood of Robert Harris, who was executed in California in 1992 for brutally killing two teenage boys). Harris was born prematurely, at six and one-half months, as a result of his mother being beaten and kicked in the stomach by his father. His father was an alcoholic who was twice convicted of sexually molesting his daughters. He often viciously beat his children. Robert was subjected to particular abuse from his father, who also managed to turn his mother against him. *Id.*

²⁶¹ See *supra* part II.B.

We must reconceptualize youth crime and violence as a public health problem as well and not just a law enforcement problem.²⁶² This perspective would direct our attention to preventive strategies, would allow young offenders to be understood as both victims and perpetrators, and would make plain the link between abuse, neglect and violent youth crime.²⁶³ A public health approach would also focus greater attention on the easy availability of guns and the celebration of violence—especially male violence—in the media and the culture.²⁶⁴

Although the answer to juvenile crime cannot be found in the juvenile court, juvenile court does provide an important opportunity. This is where a child first encounters "justice."²⁶⁵ A child's appearance in juvenile court can trigger otherwise scarce social service resources.²⁶⁶ And, if a child is lucky, she may get appointed a good, caring lawyer who will champion her interests in a way she has never experienced.²⁶⁷

²⁶² See KRISBERG & AUSTIN, *supra* note 9, at 182; PROTHROW-STITH, *supra* note 28; see also Zinsmeister, *supra* note 75, at 49 ("Homicide is now the leading cause of death among children in many American inner cities, and about half the assailants are other youths.").

²⁶³ See KRISBERG & AUSTIN, *supra* note 9, at 182.

²⁶⁴ See *id.* at 182-83. On the gendered nature of violence, see generally CAMPBELL, MEN, WOMEN AND AGGRESSION, *supra* note 78; Smith, *Reflections of a Feminist Criminal Defense Lawyer*, *supra* note 135, at 470-86 (reflecting on gender and violent crime from a feminist criminal defense perspective).

²⁶⁵ See *supra* note 84.

²⁶⁶ See Soler, *supra* note 245, at 492-604; see also Chanoff, *supra* note 225, at F44 (reporting about the work of James Galipeau, "the best-known gang probation officer in Los Angeles, maybe in the country," who "straddles the worlds of law enforcement and social work"); Don Terry, *Where Santa Is a Probation Officer*, N.Y. TIMES, Dec. 24, 1994, at 6 (reporting about the work of two Chicago probation officers, Kevin McPhilliamy and Fernando D. Johnson, who provide intensive supervision—and Christmas gifts—for 13- to 17-year-olds "on the edge of going to jail or prison"). As the grandmother of "Critter," a 16-year-old gang member, said, "It's beautiful what they're doing. . . . They're treating the kids like human beings." *Id.* The teenager responded in kind:

Then Critter, his hands and arms inked with gang tattoos, came out of a back room with two gift-wrapped presents and handed the boxes to the officers.

"They my homies," Critter explained of Mr. McPhilliamy and Mr. Johnson. "They been sticking by me. They put you in the Christmas spirit all year."

Id.

²⁶⁷ For articles on what it means to be a zealous, caring defense lawyer, see Ogletree, *supra* note 176; Smith, *Rosie O'Neill Goes to Law School*, *supra* note 211. But see BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 59, 66-71 (1993) (finding that when juveniles are represented by counsel, they often receive harsher dispositions); Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1330 (1989) (noting the "complex relationships between the factors producing more severe dispositions and the factors influencing the appointment of counsel"). Feld's studies have been criticized for not evaluating a number of factors which influence the outcome of juvenile cases aside from the appointment of counsel. See Marc B. Stahl, *The Impact of Counsel on Juvenile Delinquency Proceedings*, 84 J. CRIM. L. & CRIMINOLOGY 642, 657-64 (1993).

The first substantive change in the juvenile court must be a return to age eighteen as the legal definition of adulthood and an end to juvenile transfer laws in all their peculiar diversity.²⁶⁸ Just as eighteen is the age that distinguishes children from adults as a matter of international human rights,²⁶⁹ it ought to distinguish children from adults as a matter of criminal responsibility.

I must confess that, notwithstanding the persuasive arguments that can be made on behalf of prosecuting those who are eighteen years old and older as adults—and notwithstanding the fact that I have just proposed such a cut-off—I am not entirely happy with any hard and fast jurisdictional line. I would prefer to offer *eighteen as the youngest possible age for adult prosecution*, but encourage states to allow youthful defendants older than eighteen to petition for juvenile court jurisdiction, either based on the nature and circumstances of the alleged offense or the personal history of the alleged offender.²⁷⁰

While age eighteen offers a clear line that prosecutors and judges could not go below, it is still an arbitrary line. In my experience as a defense lawyer, a teacher of students largely in their twenties, and someone who was once young myself—youth does not magically end when one reaches eighteen. Some take longer to grow up than others.

Of course, by the same token, some people are more mature at a younger age than others. And, as we know from the portrayals of youthful offenders which typically appear in the media, some young-

²⁶⁸ See KRISBERG & AUSTIN, *supra* note 9, at 5–6. States have widely different definitions of the age boundary that divides children from adults, as reflected in the varied—and increasingly complicated—transfer statutes across the nation. Though most states give the juvenile court original jurisdiction for children up to age 18, Connecticut, New York and North Carolina set the limit as low as age 14. For specific criminal charges, there are both automatic and discretionary procedures for transferring kids to adult courts. Jurisdictions also differ on how to detain juveniles who have been transferred to adult court. In California, a transferred youth is held in an adult jail, while in New York City, the youth is held in a special adolescent facility. In Illinois, when a youth is sentenced as an adult, he or she is held in a juvenile facility until the age of 17 whereas in Texas, children sentenced as adults are confined with adult prisoners. See *id.* at 5; cf. STREIB, *supra* note 227, at 39 (calling for age 18 as the constitutional line below which the death penalty would not be permitted).

²⁶⁹ See COHN & GOODWIN-GILL, *supra* note 77, at 6 (“According to the 1989 United Nations Convention on the Rights of the Child, a child ‘means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.’”); see also *id.* at 6 n.7 (“The 1990 African Charter on the Rights and Welfare of the Child likewise includes every human being to the age of 18.”); *id.* at 9 (“The idea of the child as a person under 18 . . . enjoys a wide measure of support, even if different terminology, such as ‘youth’ or ‘young persons’, may be a better phrase to describe those in the crucial 15–18 age bracket . . .”).

²⁷⁰ For a discussion of the role of a defendant’s personal history and the context of the alleged offense as they relate to a determination of criminal responsibility at trial, see generally Smith, *supra* note 135.

sters who commit crime are quite sophisticated. Still, we must draw the line somewhere, and drawing it at eighteen means that children who get in trouble while they are still in high school will mostly end up in juvenile court, not criminal court. We need to stem the tide of the movement to regard younger and younger children as adults for purposes of criminal prosecution—and *capital prosecution*.²⁷¹ We have both a social and a moral obligation to give children—even very bad children—a future that consists of more than a jail cell or a lethal injection.

Distinguishing children from adults based on the *crime alleged* is a politically driven, not child-driven, policy.²⁷² Those who argue that charging all children accused of certain crimes as adults will lead to less discretion and more uniformity are both naive and wrong.²⁷³ Discretion is simply shifted from the judge to the prosecutor.

It is odd that there is great international concern about children serving as soldiers in armed conflicts, but almost none for children who are drawn to crime for many of the same reasons.²⁷⁴ Both groups of children have suffered the ravages of violence and have experienced social and economic injustice.²⁷⁵ Both groups have lost parents, live in poverty and hunger, and struggle with feelings of helplessness and hopelessness.²⁷⁶ Both groups are exploited, maimed, and killed.²⁷⁷

The commission of violent crime, like homicide and rape, should not automatically trigger adulthood, though it might trigger longer confinement in a juvenile institution and more intensive treatment. The longer confinement would both protect the public and, given adequate resources, afford an opportunity for effective, long-term intervention.²⁷⁸ A longer period of confinement also sends a message that

²⁷¹ See generally *Stanford v. Kentucky*, 492 U.S. 361 (1989) (allowing capital punishment of juveniles sixteen and older); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (a 5-3 decision, with one Justice not participating, prohibiting the execution of 15-year-olds); STREIB, *supra* note 227 (examining the imposition of the death penalty on juveniles).

²⁷² See KRISBERG & AUSTIN, *supra* note 9, at 6.

²⁷³ We have only to look at our experience with mandatory minimum and guideline sentencing to see that this approach is problematic. See Smith, *Reflections of a Feminist Criminal Defense Lawyer*, *supra* note 135, at 454-55.

²⁷⁴ See generally COHN & GOODWIN-GILL, *supra* note 77.

²⁷⁵ See *id.* at 32.

²⁷⁶ See *id.* at 31-33, 40-41.

²⁷⁷ See *id.* at 23-24.

²⁷⁸ See Fagan et al., *supra* note 230, at 208 ("The future of the juvenile court arguably is linked to its ability to develop dispositional programs for violent youths which blend both public safety and rehabilitative concerns."). The article goes on to describe a model program developed by the Violent Juvenile Offender Research and Development Program through the Office of Juvenile Justice and Delinquency Prevention ("OJJDP") which "incorporates protection, accountability and rehabilitation in the best interests of the youths." *Id.* at 209.

homicide and rape are different because of the significance of the harm caused.

The truth is, the difference between homicide and a lesser crime is often a matter of luck and inches.²⁷⁹ Those juveniles who commit homicide are not necessarily the most serious, violent offenders.²⁸⁰

Rape may be more complicated.²⁸¹ But there is reason to believe that there can be effective therapeutic intervention with juvenile sex offenders.²⁸² Because there is a link between childhood sexual abuse and later sexual violence,²⁸³ we owe it to children under eighteen who are repeating what was done to them to try to break the cycle. Sex offender treatment is necessarily long-term and intensive.²⁸⁴

I would rather see an extension of the juvenile court's power to hold a youth adjudicated delinquent of murder or rape to age twenty-five, which would allow a seventeen-year-old offender to be held for eight years—nearly half the juvenile's life—than to send that child to adult court for a shorter sentence and no treatment.²⁸⁵

²⁷⁹ See CAMPBELL, MEN, WOMEN AND AGGRESSION, *supra* note 78, at 127 ("The dividing line between an aggravated assault and a homicide is often a matter of luck. In most cases of homicide with a gun, the killer does not intend to kill. Usually a single shot is fired, and chance decides whether it strikes the victim's chest or leg.").

²⁸⁰ See Celia W. Dugger, *Youthful, Impressionable and Accused of Murder*, N.Y. TIMES, May 17, 1994, at 1 ("The most shocking thing about them is their ordinariness. Like so many young teen-agers, they are insecure, materialistic, impressionable, not always in command of their anger and aggressiveness. . . . But what sets these few apart from other young teen-agers is that the state has called them killers."). See generally Hartstone & Hansen, *supra* note 106.

²⁸¹ See Kevin Cullen, *Sexual Offenders: No Easy Answers*, BOSTON GLOBE, Dec. 5, 1994, at 15 (examining the emotional debate over what should be done with sex offenders—incapacitation or treatment). See generally A. NICHOLAS GROTH, MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER (1979).

²⁸² See Sandy Lane & Pablo Zamora, *A Method for Treating the Adolescent Sex Offender*, in VIOLENT JUVENILE OFFENDERS: AN ANTHOLOGY 347-63 (Robert A. Mathias et al. eds., 1984) (discussing the successful treatment of juvenile sex offenders in a Colorado program); see also GROTH, *supra* note 281. Groth writes:

When one is dealing with the problem of rape, the juvenile offender needs special consideration. The possibility of effective intervention and rehabilitation appears more hopeful when one is dealing with a youngster who is still in the process of psychological growth and change than . . . an adult whose criminal sexual behavior has been established for an extended period of time.

GROTH, *supra* note 281, at 185.

²⁸³ See GROTH, *supra* note 281, at 98-103 (noting the cycle of sexual violence); Lane & Zamora, *supra* note 282, at 357 ("[T]he most critical issue for juvenile sex offenders to work with is dealing with being sexually victimized. Each of the youths in our program has at least a vague memory of [being] molested and/or raped during their early childhood years by an authority figure."); see also VACHSS, *supra* note 209, at 114-23, 205 (sex crimes prosecutor noting that sexually abused children sometimes grow up and become abusers).

²⁸⁴ See Lane & Zamora, *supra* note 282; see also GROTH, *supra* note 281, at 84-109.

²⁸⁵ Feld, *Dismantling the "Rehabilitative Ideal"*, *supra* note 145, at 236 ("When persistent juvenile offenders appear in adult criminal court for the first time, they are all too frequently

I recommend the reversal of *McKeiver v. Pennsylvania*,²⁸⁶ and would require states to provide juveniles with the right to a jury trial.²⁸⁷ Providing only bench trials for juveniles, especially those facing substantial periods of confinement if adjudicated delinquent, is unjust.²⁸⁸ The Massachusetts experience with jury trials for juveniles is instructive.²⁸⁹ The right to a jury is an important safeguard, enhancing the quality of justice for juveniles. Yet, the reality is that the dockets in Massachusetts are not jammed with juvenile jury trials.²⁹⁰

The juvenile court ought to be able to provide juveniles with the same procedural protections that adults receive in criminal court without losing its treatment orientation. Once a child has been fairly adjudicated delinquent—after either an admission of wrongdoing or an adversarial proceeding in which the child is well-represented—the juvenile court ought to have an enormous range of treatment options. The goal should be to “treat the whole child” in a multidisciplinary way.²⁹¹ The best treatment addresses the child in his or her family and community context.²⁹²

treated as ‘instant virgins’—adult first-offenders—and entitled to all of the leniency typically accorded first-offenders”); see also Jeffrey A. Fagan et al., *System Processing of Violent Juvenile Offenders: An Empirical Assessment*, in *Violent Juvenile Offenders: An Anthology* 117–36 (Robert A. Mathias et al. eds., 1984) (arguing that, with adequate resources, the juvenile justice system is more effective in addressing youth violence than the adult system).

²⁸⁶ *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (holding that there is no federal constitutional right to a jury trial in a juvenile delinquency proceeding).

²⁸⁷ See MASS. GEN. L. ch. 119, § 55A (1995) (Massachusetts statute requiring jury trial in first instance in delinquency proceedings unless waived by child); MASS. GEN. L. ch. 119, § 56 (1995) (Massachusetts statute entitling juvenile to a jury trial de novo upon adjudication of delinquency or commitment by a judge).

²⁸⁸ See SILBERMAN, *supra* note 227. Silberman writes:

The near-absence of any limits on judges’ power to “straighten out” juveniles’ thinking, along with judges’ congenital certainty about the purity of their own motives, makes them particularly susceptible to what one of the more sensitive of their members, Judge John Farr Larson of Salt Lake City, calls “the tin god complex.”

Id. at 344.

²⁸⁹ See generally RODERICK L. IRELAND, *MASSACHUSETTS PRACTICE: JUVENILE LAW* 131–40 (1993).

²⁹⁰ See Honorable Paul J. McGill, Address at *Struggling for a Future: Youth Violence, Youth Justice*, Boston College Law School and the Criminal Justice Institute at Harvard Law School (Dec. 3, 1994) (urging the right to a jury trial for all juveniles and noting that, in his years on the bench, juvenile jury trials have not unduly burdened the Massachusetts courts).

²⁹¹ See KRISBERG & AUSTIN, *supra* note 9, at 184–86.

²⁹² See *id.* at 142–70 (discussing the successful “Massachusetts Experiment” in community-based treatment, which occurred during the 1970s and early 1980s); see also David M. Altschuler & Troy L. Armstrong, *Intervening With Serious Juvenile Offenders: A Summary of a Study on Community-Based Programs*, in *Violent Juvenile Offenders: An Anthology* 187–206 (Robert A. Mathias et al. eds., 1984) (examining different community-based juvenile programs); Fagan

V. CONCLUSION

*I and the public know
 What all school children learn,
 Those to whom evil is done
 Do evil in return.*

—W.H. Auden, "September 1, 1939"²⁹³

"But even if he has been wicked," pursued Rose, "think how young he is; think that he may never have known a mother's love, or the comfort of a home; that ill-usage and blows, or the want of bread, may have driven him to herd with men who have forced him to guilt. Aunt, dear aunt, for mercy's sake, think of this, before you let them drag this sick child to a prison, which in any case must be the grave of all his chances of amendment. Oh! as you love me, and know that I have never felt the want of parents in your goodness and affection, but that I might have done so, and might have been equally helpless and unprotected with this poor child, have pity upon him before it is too late!"

—Charles Dickens, *Oliver Twist*²⁹⁴

We just like human kids.

—Blaster, age fifteen, a small-time crack dealer²⁹⁵

Since his arraignment on the marijuana possession case, Kenny has not been arrested. He says he is staying away from drugs and staying out of trouble. He has never missed a court appearance, but is getting a little tired of coming to court. He says he is planning to sign up to take the SATs, he just needs to go to his old high school to get the papers.

At the pretrial hearing on the case in which Kenny is represented by another lawyer, Kenny pled guilty to possession of crack in exchange for a dismissal of the distribution charge and a sentence of probation.

et al., *supra* note 230, at 207–30 (acknowledging that the key to effective juvenile violence intervention lies in the reintegration of delinquent youths into the communities in which they live and describing a "Community Reintegration Model"); Sister Falaka Fattah, *Call and Catalytic Response: The House of Umoja*, in *VIOLENT JUVENILE OFFENDERS: AN ANTHOLOGY* 187–206 (Robert A. Mathias et al. eds., 1984) (describing Philadelphia's House of Umoja, an effective community-based program for young gang members); Joseph B. Treaster, *Beyond Probation: Trying to Break Cycle of Arrest and Rearrest*, N.Y. TIMES, Dec. 29, 1994, at B7 (discussing the importance of "aftercare," which helps a young offender make the transition from an institution to life outside).

²⁹³ W.H. AUDEN, *September 1, 1939*, in *COLLECTED POEMS* 86, 86 (Edward Mendelson ed., 1991).

²⁹⁴ DICKENS, *supra* note 28, at 268–69.

²⁹⁵ CURRIE, *DOPE AND TROUBLE*, *supra* note 13, at 5.

Though the conviction is a violation of the terms of the continuance without a finding that Kenny received in his first case, which will result in another conviction,²⁹⁶ Kenny's probation officer seems to like him and is not urging a prison sentence.

On his remaining case, possession of marijuana, after much discussion, we turned down a plea offer and will litigate a suppression motion. We have a reasonably strong argument based on the status of a "special police officer"²⁹⁷ who stopped, searched, and held Kenny until a Boston police officer arrived. Though the plea offer was probation, even if we lose the suppression motion and Kenny is convicted, he will probably get no worse.

But Kenny now has an adult criminal record. He will have a record for life. This is so even though he never committed a crime after the age of eighteen. This will be so even if he attends and graduates from college, holds a good job, devotes himself to family and community, and never gets in trouble again.

Kenny should have been entitled to his childhood mistakes without permanent consequence, as should all kids growing up in difficult times.²⁹⁸ The point is that kids are kids and there is a difference between the decisions they make and the decisions adults make. They deserve a chance to grow up. Many of them won't. They deserve our attention, not our harshest judgment.

The last time I saw Kenny I told him I was proud of him for staying out of trouble. I told him how important it was for him to avoid being arrested again. But I also told him not to keep it from me if something happens. I said I was going down to Washington, D.C., for a few months to teach at a law school there, but he should call me collect if he ever needed me. I gave him my new number. Though I wanted to give him a hug, I shook his hand instead, because a couple of his buddies were watching. Still, he held on to my hand for a good, long time.

²⁹⁶ See *Rosenberg v. Commonwealth*, 360 N.E.2d 333, 335 n.5 (Mass. 1977).

²⁹⁷ *Commonwealth v. Leone*, 435 N.E.2d 1036, 1039-41 (Mass. 1982) (discussing the applicability of the Fourth Amendment to a privately employed "special police officer").

²⁹⁸ Cf. Fox Butterfield, *Woman Who Killed Mother Denied Harvard Admission*, N.Y. TIMES, Apr. 8, 1995, at 1 (reporting about Gina Grant, who, at age 14, killed her allegedly abusive mother, served time in a juvenile institution, and went on to become an honor student to whom Harvard offered admission—only to have that offer rescinded when Harvard learned of the killing).