

2019

The Cost of Racial Innocence in Kent v. United States and In re Gault: How Liberals Created America's Juvenile "Superpredator"

Greer Levin

Recommended Citation

Levin, Greer, "The Cost of Racial Innocence in Kent v. United States and In re Gault: How Liberals Created America's Juvenile "Superpredator"" (2019). *Scripps Senior Theses*. 1354.
https://scholarship.claremont.edu/scripps_theses/1354

This Open Access Senior Thesis is brought to you for free and open access by the Scripps Student Scholarship at Scholarship @ Claremont. It has been accepted for inclusion in Scripps Senior Theses by an authorized administrator of Scholarship @ Claremont. For more information, please contact scholarship@cuc.claremont.edu.

**THE COST OF RACIAL INNOCENCE IN
KENT V. UNITED STATES AND IN RE GAULT:
HOW LIBERALS CREATED AMERICA'S JUVENILE "SUPERPREDATOR"**

By

GREER LEVIN

**SUBMITTED TO SCRIPPS COLLEGE IN PARTIAL FULFILLMENT OF THE
DEGREE OF BACHELOR OF ARTS**

**PROFESSOR MARK GOLUB
PROFESSOR SUSAN CASTAGNETTO**

APRIL 26, 2019

Thank you to Professor Golub and Professor Castagnetto, who have both changed the way I see the world and given me so much to think about. Thank you to my family and friends for loving, supporting, and humoring me — without them, this thesis would not have been possible.

Abstract

Juvenile justice reforms in America today closely resemble the ones that occurred over a century ago. The reforms of both eras aim to separate juveniles from adults and emphasize rehabilitation over punishment. Why is policy repeating itself? In search of an answer, I look to a monumental series of liberal Supreme Court decisions made in the 1960s that constituted what is now known as the Civil Rights Era's "due process revolution." In these cases, the Supreme Court provided juveniles with procedural protections in attempt to prevent the manifestation of racial bias in the juvenile court. It is commonly agreed upon that the due process revolution failed in its mission to protect minority youth. However, scholars are divided on *why* it failed. Some claim that states simply did not implement the protections properly. Others argue that a conservative backlash obstructed their proper implementation. In this thesis, I put forth that the decisions themselves — specifically, *Kent v. United States* and *In Re Gault* — criminalized youth by mistakenly presuming that racism could be regulated out of the court by enhanced procedures of due process. The liberal decisions made in *Kent* and *Gault* ultimately paved the way for the conservative carceral agenda of the late twentieth century and subjected minority youth to unprecedented punitive policy. I refer to Naomi Murakawa's "racial innocence" theory to illuminate this interpretation of events and suggest that communities look inwards for alternatives to institutional reform.

Introduction: Today's Reforms

This past summer, while working at a nonprofit organization based in Washington, D.C. whose purpose is to educate and lobby for criminal justice reform, I learned of a supposedly ground-breaking juvenile justice reform that was about to be enacted in my home state of New York. Governor Cuomo had signed a bill called “Raise the Age” on April 10, 2017, and the first phase of its implementation was set to begin over a year later, in October of 2018. The provision of the bill that first caught my attention — probably because it *shocked* me — stated that it would transfer juveniles housed at Rikers Island to smaller facilities better tailored to the needs of youth. Juveniles were housed at Rikers Island, a prison complex in New York City, notorious for its heinous living conditions and deep culture of human rights violations. The abuse, neglect, and violence against the people at the infamous jail has been the focus of such increased scrutiny in recent years that current New York City Mayor, Bill de Blasio, has announced a plan to shutter the complex forever.¹ I was stunned that *children* were housed in such a brutal and notorious place. The Raise the Age law states that adolescents younger than eighteen must be housed in “specialized juvenile detention facilit[ies]” rather than adult jails.² How could this reform have only *just* occurred? The bill also commits to providing “[a]ll 16- and 17-year-olds who commit non-violent crimes... the intervention and evidence-based treatment they need.”³ The treatment program that New York adopted in order to follow through with this provision borrows from what is known as the “Missouri

¹ De Blasio Administration Unveils Plans for Borough-Based Jails to Replace Facilities on Rikers. (2018, August 15).

² New York State. (n.d.). Raise the Age. Retrieved April 25, 2019, from <https://www.nycourts.gov/ip/oji/raisetheage.shtml>.

³ Ibid.

Model,” a rehabilitation and relationship-based method that originated at the Missouri Division of Youth Services in 1975,⁴ seemingly far ahead of the curve. The model uses “a therapeutic... approach focused on prevention and early intervention” for youth who have come into contact with the juvenile justice system more recently, and “a comprehensive and fully integrated treatment approach” for youth who are “at greater risk of reoffending.”⁵ This approach – treatment, rather than punishment – aligns with today’s more progressive values. Proponents of the bill herald it as momentous and indicative of substantial social change, “transforming New York City into a nationwide leader in juvenile justice.”⁶ Advocates for youth and public officials even “hailed the beginning of a new era in juvenile justice” in New York.⁷

In fact, this “new era” is taking place across the country. Vermont, Connecticut, and Missouri have each passed their own Raise the Age laws in the past decade,⁸ and other states have passed other kinds of juvenile justice reforms, such as laws pertaining to youth detention or transfer. It is easy to read the news and feel good about the progress states are making in juvenile justice. However, as I read about these reforms, my enthusiasm turned into skepticism. Many of these changes seemed *so* overdue. Why did juvenile courts even exist before if, until now, youth were housed in adult facilities,

⁴ The Missouri Approach - About Our History. (n.d.). Retrieved April 25, 2019, from <http://missouriapproach.org/history/>.

⁵ Ibid.

⁶ Williams, Z. (2018, August 01). New York City could be a leader in juvenile justice reform. Retrieved April 25, 2019, from <https://nynmedia.com/content/new-york-city-could-be-leader-juvenile-justice-reform>.

⁷ Is New York ready for Andrew Cuomo's Raise the Age law? (2019, April 18). Retrieved April 25, 2019, from <https://chronicleofsocialchange.org/justice/juvenile-justice-2/new-york-raise-the-age-browder-rikers>.

⁸ Baron, D. (n.d.). Retrieved April 25, 2019, from <http://campaignforyouthjustice.org/state-work/state-snapshot>.

treated similarly to adults in prison, and received similarly harsh sentences? Until 2012, when the Supreme Court ruled it unconstitutional in *Miller v. Alabama*, juveniles could be sentenced to life in prison without the possibility of parole.⁹

Origins of the Juvenile Court

In 1899, the Illinois Legislature passed the Juvenile Court Act, which removed jurisdiction over juveniles from the criminal court and established the first juvenile court in the United States.¹⁰ The Court functioned according to a *parens patriae* legal philosophy, meaning that it aimed to care for indigent children rather than punish them. As juvenile justice scholar Barry Feld explains it, *parens patriae* can be defined as “the right and responsibility of the state to substitute its own control over children for that of the natural parents when the latter appeared unable or unwilling to meet their responsibilities or when the child posed a problem for the community.”¹¹ The invention of the juvenile court came about as a result of both evolving social science and the increasing crowdedness of industrial cities. Social scientists came to realize that “children are less culpable for misconduct and more amenable to rehabilitation.”¹² The juvenile court resembled a progressive project that embodied what scholars refer to as the “rehabilitative ideal.” Law Professor Francis Allen characterizes the rehabilitative ideal in this way, illustrating that the rehabilitative ideal which shaped the very first Juvenile Court Act was focused on causation, treatment, and therapy:

⁹ *Miller v. Alabama* (June 25, 2012) (Westlaw, Dist. file).

¹⁰ Bernard, T. J., & Kurlychek, M. C. (2010). *The cycle of juvenile justice*. Oxford: Oxford Univ. Press.:76.

¹¹ Feld, B. C. (1999). *Bad kids race and the transformation of the juvenile court*. New York: Oxford University Press.:52.

¹² Markman, J. S. (2007). In re Gault: Retrospective in 2007: Is It Working Can It Work. *Barry Law Review* 9:126.

“It is assumed, first, that human behavior is the product of antecedent causes. These causes can be identified as part of the physical universe, and it is the obligation of the scientist to discover and to describe them with all possible exactitude. Knowledge of the antecedents of human behavior makes possible an approach to the scientific control of human behavior. Finally, and of primary significance for the purposes at hand, it is assumed that measures employed to treat the convicted offender should serve a therapeutic function, that such measures should be designed to effect changes in the behavior of the convicted person in the interests of his own happiness, health, and satisfactions and in the interest of social defense.”¹³

At the same time, economic modernization transformed America from a “rural, agricultural, Anglo-Protestant society” into an “ethnically diverse, urban and industrial” one.¹⁴ The number of homeless children increased in industrial cities, and “As families migrated to urban areas seeking employment and parents began working long hours outside the home, children were left to their own devices.”¹⁵ The juvenile court was a response to the notion that juveniles should receive care from the state, rather than punishment, and the recognition that increasing numbers of juveniles needed care.

The Juvenile Court Act granted the court a vast amount of discretion in order to determine treatment and disciplinary decisions for juveniles. The judges of the juvenile court were “not overly concerned with whether the juvenile really committed the offense,” and they made decisions based on the needs of the child.¹⁶ The decision-making process in the juvenile court was informal, and court records were kept confidential in

¹³ Allen, F. (1959). Criminal justice, legal values and the rehabilitative ideal. *The Journal of Criminal Law, Criminology, and Police Science*, 50(3), 226-226. doi:10.2307/1141037:226.

¹⁴ Feld, B. (2007). A century of juvenile justice: A work in progress or a revolution that failed? *Northern Kentucky Law Review*, 34(2):191.

¹⁵ Markman, J. S. (2007). In re Gault: Retrospective in 2007: Is It Working Can It Work. *Barry Law Review* 9:125.

¹⁶ Bernard, T. J., & Kurlychek, M. C. (2010). *The cycle of juvenile justice*. Oxford: Oxford Univ. Press.:125

order to avoid stigma.¹⁷ The Act also mandated the separation of juveniles from adults while incarcerated and barred jail detention for children under the age of twelve. The idea of a juvenile court spread throughout the United States. By 1925, every state had one except for Wyoming and Maine.

Why Has Juvenile Justice Reform Repeated Itself?

It appears that today's state-level reforms – particularly the provisions of Raise the Age laws – are not merely overdue; they echo reforms made at the very birth of the juvenile justice system, over a century ago. Specifically, today's state-level initiatives to separate children from adults in prisons and detention centers, and to provide treatment and rehabilitation to children instead of punishing them, resemble the characteristics of the original Juvenile Courts Act. The initial aim of this thesis is to investigate why current reforms sound so much like those of the 19th century. Why is juvenile justice policy repeating itself? What has occurred between then and now?

The Due Process Revolution

In the first half of the twentieth century, prompted by increasing demand for labor in northern factories and racist “laws, customs, and extra-legal violence in the South,”¹⁸ millions of African Americans migrated from the rural South to industrial cities in the North and West. The resulting social and demographic changes put racial equality and civil rights on the national political agenda. During the 1950s and 1960s, “the Civil Rights movement confronted racism and segregation in the South and demanded things

¹⁷ McCord, J., Widom, C., & Crowell, N. (2001). *Juvenile crime, juvenile justice*. Washington, D.C.: National Academy Press. (2001). Retrieved April 26, 2019, from EBSCO:157

¹⁸ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):51

like racial equality and social justice.”¹⁹ At the same time, due to the growing Civil Rights Era awareness and desire to protect the civil rights of minority groups, “optimism about the juvenile court had broken down and a more realistic view... began to emerge. This view was based on an assessment of the actual performance of the juvenile court rather than on the good intentions of its founders.”²⁰ For the first time in half a century, it became apparent that all the discretion and power granted to officials of the juvenile court were no longer serving their rehabilitative, problem-solving purpose.

The juvenile court’s unchecked discretionary freedom allowed room for racially biased decisions. Specifically, “juvenile courts more often referred Black juveniles for formal processing and committed them to institutions than they did whites with similar crimes and prior records.”²¹ The juvenile court had begun to lose its unique qualities that were designed to protect and help indigent or troubled children. “Left-wing critics characterized individualized treatment as a paternalistic veneer that masked coercive social control and oppressed the poor, the young, and minorities... Liberals criticized judges and social workers whose discretionary decisions did not rely on science or evidence, but which resulted in unequal treatment of similarly situated offenders...”²² And, in the words of Justice Fortas in *Kent v. United States* -- the first juvenile justice

¹⁹ Ibid, 200.

²⁰ Bernard, T. J., & Kurlychek, M. C. (2010). *The cycle of juvenile justice*. Oxford: Oxford Univ. Press.:95

²¹ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):60.

²² Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):58.

case to ever reach the Supreme Court -- the “admonition to function in a ‘parental’ relationship [should] not [be] an invitation to procedural arbitrariness.”²³

This realization that, often times, “juvenile courts... lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity”²⁴ laid the foundation for the introduction of due process protections in the juvenile court. In *Kent v. United States*, the Supreme Court concluded that if juveniles were going to be subject to punishment, they should receive at least some of the protections provided in criminal court.²⁵ The Supreme Court acknowledged the reality that the juvenile court provided children with “neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”²⁶

Between 1966 and 1975, the Supreme Court made four more key decisions that changed the face of juvenile justice by establishing formal due process protections for juveniles. The result was a new, “constitutional” juvenile court that was intended to provide juveniles with the best of both worlds: due process protections of the criminal court and the rehabilitative mission of the juvenile court. In making these decisions, the Court aimed to “pursue racial equality and dismantle segregation.”²⁷ However, these efforts to expand and protect juveniles’ civil rights ultimately failed, and actually resulted in increased criminalization of youth in later decades. My thesis will specifically focus on the most significant of the five juvenile due process revolution cases: *Kent v. United*

²³ In *Re Gault* (May 15, 1967). Par. 4.

²⁴ Bernard, T. J., & Kurlychek, M. C. (2010). *The cycle of juvenile justice*. Oxford: Oxford Univ. Press.: 100.

²⁵ *Kent v. United States* (March 21, 1966) Par. 27.

²⁶ *Ibid*, Par. 14.

²⁷ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):51.

States and *In re Gault*. These decisions played the most crucial role in laying the groundwork for legal mechanisms that would bring increasing harm to juveniles in the following decades. While scholars have blamed the failure of the due process revolution on inconsistent reform implementation and on a conservative backlash, I argue that its failure (to protect minority youth and amend anti-black practices) was a result of these liberal decisions themselves. These Supreme Court cases established mechanisms in the juvenile court that subjected youth to punitive sentencing policies driven by conservatives who portrayed them as potential “superpredators,” a phrase coined by political scientist John Dilulio in the nineties, used by conservatives to scare the public into voting for law and order policies. Without these liberal reforms, which effectively cleared the way for such conservative policy, the “superpredator” caricature could not have driven policymaking as it did.

I will use Naomi Murakawa’s theory of “racial innocence” in order to illuminate the ways in which liberals can be held responsible for the retrogression of the treatment of juveniles in the juvenile justice system back to where it started a century ago. The addition of due process rights to the juvenile court has subjected juveniles to harsher punishments and created a procedural system that only renders legal institutions more difficult for them to navigate and more likely to decrease their life chances. It is important to realize that the punitive policies of the “get tough” era were a consequence reforms driven by well-intentioned, though misguided, liberals. No scholarship currently exists that investigates the reasons why juvenile justice reforms of today attempt to make the same changes as that of a century ago. If we view the failure of the due process revolution through the lens of Murakawa’s “racial innocence” theory, we can better

understand why it failed juveniles—particularly juveniles of color—and, in some ways, brought us back to where we started in 1899.

Explanation One: Exemption from the Usual Cycle

One camp of literature attributes the due process reform’s failure to its perceived exemption from the typical, inevitable cycle of reform. Thomas Bernard and Megan Kurlychek explain that this cycle begins with a widespread public perception that juvenile crime rates are unusually high, and that these rates can be lowered by more lenient juvenile justice policies. This results in a major reform to establish lenient policy. Officials subsequently toughen back up over time, as the public perception gradually shifts to view lenient policy as the cause of crime. Eventually, after punishments have grown too harsh, the public advocates for lenient policies again, and the cycle repeats.

According to some scholars, the due process reform failed because it “fell outside the expected cycle of juvenile justice” – it did not conform with the conventional categories of either toughening or softening policy, which were the prominent political ways of discussing justice reform at the time. Because the application of due process did not clearly fit into the agendas of that political moment, it would “largely fail to be implemented.”²⁸ For the public, expanding juveniles’ due process rights did not particularly relate to liberal nor conservative ideology, and so it fell flat; “most commentators shared the view of Justices Fortas and Brennan that the decisions would not drastically alter the basic nature of juvenile courts.”²⁹ This theory is insufficient

²⁸ Bernard, T. J., & Kurlychek, M. C. (2010). *The cycle of juvenile justice*. Oxford: Oxford Univ. Press.: 132.

²⁹ Manfredi, C. (1998). *The supreme court and juvenile justice*. Lawrence, Kan.: University Press of Kansas:156.

because it entirely overlooks the political and legal developments that did indeed occur in the decades following the due process revolution. There is much more to the story.

Explanation Two: A Conservative Backlash

Another argument, by renowned juvenile justice scholar Barry Feld, cites a conservative backlash to the Civil Rights Era as the reason the due process reforms did not succeed. According to this theory, conservatives interpreted the social unrest characteristic of the Civil Rights Era as an indication of deteriorating “law and order,” and advocated more punitive policies.³⁰ Liberals lacked a coherent policy alternative or political response to conservative proposals to “toughen up” on crime. Ultimately, this inability of liberals to produce a policy alternative gave way to policies that aimed to “crack down” on juvenile crime. Liberals who were opposed to “tough on crime” lacked alternatives and the public opinion held that tough on crime policies would address the breakdown of law and order. The due process protections did nothing to prevent the escalation of punitive conservative policy. As Berry Feld puts it, “Liberals had criticized rehabilitation as ineffective and discriminatory, lacked coherent alternatives to proposals to crack down on criminals, and eventually joined the law-and-order bandwagon to avoid being labeled soft on crime.”³¹ Conservatives were able to push for tough-on-crime policy because there was nothing to stop them. The flaw in this explanation is that it portrays liberals as a passive party that played no role in the formation of punitive juvenile justice policies; it conveys that liberals simply did not intervene.

³⁰ Feld, B. C. (2003). Race, politics, and juvenile justice: the Warren Court and the conservative “backlash.” *Minnesota Law Review*, 87(5), 1447–1577.:1451.

³¹ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):107.

Explanation Three: Racial Innocence

Scholars such as Naomi Murakawa argue that liberals participated actively in the creation of carceral law and order policies in the 1970s and 1980s. In her book, *The First Civil Right*, Murakawa describes the nature of this sort of participation. She starts by explaining that liberals during the civil rights period emphasized the ways society had wronged black people – that blacks had been denied rights that the government owed them for centuries. As a consequence of this effort to perhaps sympathize and create a relatable perspective, liberals ultimately portrayed black people as hurt and angry, and therefore potentially retaliatory or violent. Conservatives feared such retaliation, which on its own surely contributed to calls for law and order and tough policing. At the same time, liberals proposed a de-racialized justice system and stronger administrative procedures in efforts to make a good, color-blind criminal justice system by virtue of uniformity and procedural fairness. This liberal “presumption that criminal justice is innocent of racial power until proven otherwise” is what Murakawa calls the penology of “racial innocence.”³² It is what led liberals to believe they could create an unbiased and smart-on-crime juvenile justice system by strengthening procedures and granting juveniles protective rights. This administrative growth, however, would ultimately only strengthen and empower law enforcement and punitive court actors and, “taken together, the liberals’ brand of racial criminalization and administrative deracialization legitimized extreme penal harm to African Americans...”³³ In the end, liberal demands during the Civil Rights Era played a significant role in justifying law and order policies that are

³² Murakawa, N., & Beckett, K. (2010). The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment. *Law & Society Review*, 44(3/4), 695-730.

³³ Murakawa, N. (2014). *The First Civil Right : How Liberals Built Prison America*. [N.p.]: Oxford University Press.:18.

infamous for their racism today. It is crucial that we consider the susceptibility of liberal arguments to political cooptation, and realize the potential for well-meaning policy to do the opposite of what it intends or appears to do at face-value. As Murakawa puts it, “Aspirations and good intentions [can] not contain carceral machinery.”³⁴ Even Bernard and Kurlycheck echo this sentiment, observing the effects of the new “constitutional” juvenile court:

“The redefinition of delinquents as “modified” criminal defendants ultimately undermined the second part of the Supreme Court’s decision, which was to maintain the focus on care and treatment as ‘the best’ of the original juvenile court. Indeed, this very redefinition of the juvenile delinquent as a ‘small criminal defendant’ implies that juvenile justice practice should mirror the policies and practice of the adult criminal system – ideas that were much more in tune with the political agenda of the 1980s than were the notions of care and treatment.”³⁵

In other words, the decision by liberals to grant juveniles due process protections actually *reframed* juveniles as a sub-group of criminals. This was not the Supreme Court’s intention, but a product of racial innocence. In *The Black Silent Majority*, Michael Fortner “exposes how a network of liberal white do-gooders and bureaucrats, guided by professional expertise and moral indignation and aided by their reputations and organizational capacities, instituted and faithfully guarded”³⁶ policies that the black community itself did not want; racial innocence —the assumption that the justice system can be improved, or made color-blind, led liberals to institute reforms that would ultimately hurt the people for whom they intended to expand individual rights and

³⁴ Murakawa, N. (2014). *The First Civil Right : How Liberals Built Prison America*. [N.p.]: Oxford University Press.:22.

³⁵ Bernard, T. J., & Kurlychek, M. C. (2010). *The cycle of juvenile justice*. Oxford: Oxford Univ. Press.:133.

³⁶ Fortner, M. (2015). *Black silent majority : The rockefeller drug laws and the politics of punishment*. Cambridge, Massachusetts: Harvard University Press.
doi:10.4159/9780674496088:21.

protections. Murakawa explains: “Seen as an administrative deficiency, racial violence could be corrected through the establishment of well-defined, rule-bound, and rights-laden uniform state processes.” We can apply this understanding of carceral expansion specifically to what occurred in the juvenile justice system as a result of decisions made by the Supreme Court during the due process revolution:

“As a methodology for ‘finding racism’ in the criminal justice system, liberal law and order reinforced the common sense that racism is a ghost in the machine... the liberal’s brand of racial criminalization and administrative deracialization legitimized extreme penal harm to African Americans: the more carceral machinery was rights-based and rule-bound, the more racial disparity was isolatable to ‘real’ black criminality.”³⁷

As Murakawa describes, the Supreme Court made its decisions based on the liberal intention to increase fairness through the vigilant and uniform administration of procedural rights. Justice Fortas expresses this explicitly in *In re Gault*, stating that “[f]ailure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.” These due process reforms align definitively with Murakawa’s characterization of liberals’ racial innocence mentality.

The Landmark Cases

Kent v. United States (1966)

The first juvenile case ever to reach the Supreme Court, *Kent v. United States*, laid the groundwork for the escalation of punitive juvenile justice policy by solidifying the process by which juvenile cases could be transferred to criminal court. In this case, the Court had to answer the question of whether the juvenile court of Arizona had

³⁷ Murakawa, N. (2014). *The First Civil Right : How Liberals Built Prison America*. [N.p.]: Oxford University Press.:18.

rightfully waived its jurisdiction over a case involving 16-year-old Morris Kent, who had committed “housebreaking, robbery, and rape.”³⁸ Before *Kent*, in cases where juveniles had committed especially heinous crimes, the juvenile court could waive its jurisdiction in order to send those cases to criminal court. However, *Kent* brought to light that the juvenile court sometimes waived cases without first conducting thorough investigations or hearings to inquire whether those cases could be waived on legitimate grounds. In attempt to prevent juveniles from being transferred arbitrarily, the Supreme Court ruled in *Kent* that juvenile court judges must provide a “statement of the reasons or considerations... sufficient to demonstrate that the statutory requirement of ‘full investigation’ has been met... with sufficient specificity to permit meaningful review.”³⁹ It also required that children receive a hearing, as part of a “full investigation,” in order to determine the validity of a waiver that would send them to criminal court to face criminal charges.

In re Gault (1967)

The next year, another juvenile case reached the Supreme Court and similarly defined due process rights for juveniles in juvenile court that, contrary to the Court’s intentions, would only position them to receive sanctions similar to those in the criminal court. As Barry Feld states, “Gault triggered a procedural revolution that transformed juvenile courts from welfare agencies into scaled-down criminal courts”⁴⁰ Drawing from the Fourteenth Amendment, the justices ruled that juveniles had the rights to notice of

³⁸ *Kent v. United States* (March 21, 1966) Par. 1.

³⁹ *Ibid*, Par. 19.

⁴⁰ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):66.

charges, to legal counsel, and against self-incrimination. Justice Fortas writes in the majority opinion: “It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data.” *Kent v. United States* and *In re Gault* were “part of the Warren Court’s larger project to expand civil rights, reform states’ criminal procedures, and protect minorities.”⁴¹

Instead of attributing issues of unfairness in the juvenile court to its racism inherent to American legal institutions, the Supreme Court justices attributed it to a lack of thoroughness in the court’s truth-seeking process. According to Murakawa’s racial innocence theory, the Court’s remedy for racial bias will result in mechanisms that strengthen and formalize a carceral state. The liberalism that propels these reforms function as a stepping stone toward racial subordination. Mark Golub writes that “The problem... is that racial inequality is quite often advanced through mechanisms that neither violate market rationality nor require any discernible racial intent. The wrongness of racist policies and practices, in other words, lies not in their deviation from individualist ideals (discrimination), but in the systemic advantaging of one group relative to another (subordination).”⁴² The Court views racism as a problem that can be filtered out of legal institutions, rather than one that is inevitably entangled with those institutions. Liberals celebrated the due process revolution as a major milestone in the direction of procedural protections for vulnerable youth, not realizing how these decisions would criminalize and harm youth not far down the road.

⁴¹ Ibid, 44.

⁴² Golub, M. (2018). *Is racial equality unconstitutional?* New York, NY: Oxford University Press.:11.

The Court's Miscalculations

Adolescents' Competence to Exercise Procedural Rights

These two decisions resulted in the application of criminal rights to juveniles in juvenile court processes without first ensuring that those rights functioned in the same ways for juveniles. Specifically, *Gault* assumed juveniles to be “competent to exercise rights in an adversarial process,”⁴³ and “made delinquency hearings more formal, complex, and legalistic and required youths to participate in and make difficult decisions.”⁴⁴ Despite these significant changes, the Court did not anticipate that it should grant juveniles protections to compensate for their developmental differences from adults. It failed to consider the additional safeguards juveniles might require in order to successfully exercise their new procedural rights.

For instance, most states use adult standards to gauge the validity of juveniles' waivers of their Miranda rights, such as the right to remain silent or the right to speak with a lawyer before answering questions.⁴⁵ Only about ten states recognize that most juveniles lack the capacity to waive their Miranda rights.⁴⁶ However, “many juveniles cannot define critical words in the [Miranda] warning”⁴⁷ and many only claim to understand their rights in order to avoid admitting that they do not.⁴⁸ Officials such as police and judges are not required to probe further in order to ensure that juveniles do

⁴³ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):225.

⁴⁴ Ibid, 227.

⁴⁵ Ibid, 233.

⁴⁶ Ibid, 232.

⁴⁷ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):233.

⁴⁸ Ibid, 231.

indeed understand the meaning of the words and concepts in the waiver before they sign it. Studies conducted by Psychologist Thomas Grisso report that “many, if not most” juveniles do not understand the Miranda warning well enough to make a valid waiver.”⁴⁹ Despite these issues that make juveniles likely to waive their Miranda rights without understanding or intending to, “appellate courts can only overrule [waivers] if the decision was clearly erroneous or an abuse of discretion.”⁵⁰ This is a very high standard to reverse a decision made by a juvenile who is likely to have made it by mistake. Juveniles end up making false or coerced confessions and losing their access to legal representation as a consequence of the Supreme Court’s assumption that they would benefit the same safeguards as adults.

Rights Drawn from the Wrong Source

In an article written shortly after the *Kent* and *Gault* decisions, in 1967, Thomas Welch argues that the Court should have first ascertained the *needs* of juveniles in the juvenile court instead of determining simply which due process rights could be applied. Or, as he puts it, the Court did not ask whether differences between the juvenile court system “might call for the application of different standards of ‘due process’ from those heretofore applied in criminal cases.”⁵¹ Welch writes that the Supreme Court “without having yet addressed itself to what is the content of due process required in juvenile delinquency proceedings... undertook to discuss whether some due process requirements were applicable.”⁵² This approach normalized criminal procedure and assumed that it

⁴⁹ Ibid, 233.

⁵⁰ Ibid, 323.

⁵¹ Welch, T. (1967). *Kent v. United States and In re Gault: Two Decisions in Search of a Theory.* *Hastings Law Journal*, 29-45. Retrieved April 25, 2019.:30.

⁵² Ibid, 32.

would play the same protective role in juvenile court as it did in criminal court; “criminal procedure ‘norms’ became the model”⁵³ for juvenile court, despite the potential irrelevance of those norms in the juveniles court. He predicts that the “wholesale importation of the Miranda case's rationale demonstrate that if the latter is literally applied in juvenile proceedings, the *Gault* decision’s premise of ‘criminal’ treatment will have become, without exception, a permanent fact of life as a direct result of the Court's pressures to conform to the criminal law model.”⁵⁴ In other words, the application of these due process rights in juvenile court implies that juveniles will indeed be subject to criminal punishments, and that this conformity to criminal court procedures will imply the new standard for the treatment of juveniles as criminals even in juvenile court.

In an article written nearly five decades later, Robin Sterling takes this notion another step further. She implicitly agrees that the Court did not sufficiently consider which rights children might benefit from most - especially black children - and she argues that instead of rooting procedural rights for juveniles in the Fourteenth Amendment, the Court should have looked to the Bill of Rights for procedural protections. She writes, “if the Court had been more attentive to the disparate treatment of black children in the juvenile justice system, then it would have been more likely to root juvenile court protections in the Bill of Rights.”⁵⁵ She describes the racist history of the juvenile court, explaining that black children have been disproportionately involved in the juvenile court since its birth as a result of black children’s exclusion from rehabilitative agencies and

⁵³ Ibid, 33.

⁵⁴ Ibid, 43.

⁵⁵ Sterling, R. (2013). Fundamental Unfairness: In Re *Gault* and the Road Not Taken. *Maryland Law Review*, 72(3), 607-681. Retrieved April 25, 2019:608.

services.⁵⁶ This was largely due to the fact that “Subjective factors like the child’s attitude and cooperativeness became part of the arrest decision. In 1926, juvenile court complaints against black children were filed more than twice as often as such complaints were filed against white children.”⁵⁷ With this knowledge in mind - that black children were particularly vulnerable to biased decision-making by state officials, the Court should have chosen a legal mechanism that would have most effectively protected juveniles’ rights. Sterling states that *In re Gault* virtually condemned juveniles to a fate of further vulnerability to bias when it chose Fourteenth Amendment fundamental fairness, “consign[ing] the juvenile justice system to second-class status.”⁵⁸

This is because Bill of Rights protections entail “no balancing of the equities... In criminal cases, clad in the protections enumerated in the Bill of Rights, the Court does not try to divine what process is due, because the Bill of Rights prescribes it plainly enough.”⁵⁹ While adults in criminal court benefitted from both the Bill of Rights *and* the Fourteenth Amendment, *Gault* only granted children in juvenile court Fourteenth Amendment protections as the analysis for minimum due process protections. She writes that “*Gault*’s great deficiency is that it erected a flawed prototype that allowed future courts to turn a blind eye to race disparities in juvenile delinquency proceedings.”⁶⁰ This is particularly problematic because the Fourteenth Amendment calls for balancing tests - determinations of which rights trump others. This leaves room for racial bias in the juvenile court, as “all the factors of the Court’s due process test are subjective,

⁵⁶ Ibid, 627.

⁵⁷ Ibid, 632.

⁵⁸ Ibid, 638.

⁵⁹ Ibid, 638-640.

⁶⁰ Ibid, 609.

unquantifiable, and difficult to prioritize”⁶¹ The application of the Fourteenth Amendment only “exacerbated disparate treatment of children of color in the juvenile justice system.”⁶²

“Get Tough” Cooptation

While the *Kent* and *Gault* decisions themselves did not intend to trigger decades of increasingly punitive juvenile justice policy, they cleared a path for such policies by establishing mechanisms that were susceptible to co-optation by conservative “get tough” politicians. In the 1960s, while the Supreme Court made the decisions that would constitute its due process revolution, “conservative Republicans decried crime in the streets and advocated law and order.”⁶³ This “law and order” mentality meant that the more social unrest conservatives perceived, the more they campaigned for harsher penal policies. By the 1970s, Republicans supported a war on crime, and the 1980s brought their war on drugs both of which used coded language to “convey a message that its recipients readily understood as a racial appeal while allowing them to deny its racist content.”⁶⁴ Many of the changes brought by modernization that “contributed to escalating youth violence” in a newly urban, industrial society also “provided [Republicans] political impetus for get tough policies that transformed criminal and juvenile justice.”⁶⁵

Barry Feld writes that “Black youth homicide provided the nexus between race, crime, and fear that enabled the politics of crime and set the stage for... harsher

⁶¹ Ibid, 642.

⁶² Ibid, 660.

⁶³ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):99.

⁶⁴ Ibid, 90.

⁶⁵ Ibid, 71.

punishment of juveniles.”⁶⁶ However, what he does not recognize is that *Kent* and *Gault* played a crucial role in setting that stage by introducing harsh, “get tough” era prosecutors to the juvenile court and by making juvenile transfer to criminal court easier and more common, made dispositions “offense based as opposed to offender based,” and imposed “blended sentences that mixed adult and juvenile sanctions.”⁶⁷ In the 1990s, Republicans “waged a war on youth.”⁶⁸ This “war” could not have occurred without the liberal due process reforms the Supreme Court made three decades earlier.

The Introduction of Prosecutors

In Re Gault gave juveniles the right to legal representation in court. This decision was made with good intentions—the justices believed juveniles should not have to navigate the court on their own and should have access to legal counsel. Some scholars even thought it was particularly important that juveniles have access to a lawyer, claiming that “the role of defense counsel in juvenile delinquency proceedings must be strengthened”⁶⁹ in light of increasingly harsh sentencing practices and frequent transfers to criminal court. However, the implementation of defense lawyers for juveniles only backfired: “After *Gault* gave delinquents a right to counsel, states introduced prosecutors to offset the lawyers’ presence. Prosecutors socialized in criminal courts to maximize convictions and punishment began to import those norms into

⁶⁶ Ibid.

⁶⁷ Torbet, P., National Center for Juvenile Justice, & United States. Office of Juvenile Justice and Delinquency Prevention. (1996). *State responses to serious and violent juvenile crime : Research report*. Washington, D.C.: U.S. Dept. of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.:11.

⁶⁸ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):99.

⁶⁹ Cooper, N.; Puritz, P.; Shang, W. (1998). Fulfilling the promise of in re gault: Advancing the role of lawyers for children. *Wake Forest Law Review* 33(3):651

juvenile courts.”⁷⁰ For every defense lawyer assigned to defend a juvenile, a prosecutor was assigned to convince the court of that juvenile’s suitability for punishment. While “The explicit impact of *In Re Gault* was to make an attorney for the accused delinquent a much more important part of the system... this also almost immediately made public prosecutors much more numerous and much more important in the juvenile court”⁷¹ These prosecutors were not necessarily familiar with the goals or culture of the juvenile court. As Franklin Zimring states, “There is a basic conflict between injecting the same strategic priorities from criminal justice into juvenile court practice and defining the prosecutor’s professional role as helping to achieve the distinctive missions of juvenile court in a cooperative venture.”⁷² Oftentimes, these prosecutors were already trained and socialized to pursue the harshest sentences due to their preceding work in the criminal court.

The impact individual prosecutors had on the outcomes of juvenile cases would differ significantly, depending on the prosecutor’s self-conception, which was mostly shaped by the amount of experience they had in the juvenile court. As Wallace Mlyniec states, “juvenile indigent defense systems across the country are really not systems at all; instead they are, [for the most part,] chaotic, under-funded, disenfranchised, county-by-county hybrids of public defenders, appointed counsel, [and] contract attorneys,

⁷⁰ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):67.

⁷¹ Tanenhaus, D. S., & Zimring, F. E. (2014). *Choosing the Future for American Juvenile Justice*. “On Strategy and Tactics for Contemporary Reforms.” New York: NYU Press..

⁷² Zimring, Franklin E.. *American Juvenile Justice*, Oxford University Press, Incorporated, 2018. ProQuest Ebook Central.

[supplemented by] the occasional law school clinical program or nonprofit law center.”⁷³

For example, prosecutors who are more familiar with the criminal court system will be more likely to see themselves as responsible for enforcing strict punishments in order to protect the public or seek just desserts. As Franklin Zimring and David Tanenhaus put it: “Interchangeable and intermittent juvenile court duty will produce prosecutors who are socialized to adversarial criminal court norms and impose them on their juvenile court assignments.” They also note that “the years since *In Re Gault* was decided in 1967 have seen dramatic expansion in the prosecutor’s power in delinquency cases, usually at the expense of judges and probation staff.” It is clear that punitive prosecutors had increasing influence in juvenile court decisions despite that the prosecutorial role often did not align with the originally rehabilitative goals of the juvenile court. In order to address this issue, Zimring and Tanenhaus propose “the creation of long-term assignments to juvenile court, particularly if they are voluntary and career-oriented, will assure that the juvenile prosecutor is socialized into her role within the juvenile court.”⁷⁴ However, the functioning of the court should not rely on the self-conception or experience levels of the prosecutors that go through it. The proposal to create long-term juvenile court assignments is simply a band-aid fix to a structural flaw.

Increased use of the Jurisdictional Waiver

Even as juveniles faced increasingly harsh prosecutors in the juvenile court, the use of the juvenile court’s jurisdiction waiver increased and transferred more juveniles to

⁷³ Mlyniec, W. (2008). *In re Gault at 40: The Right to Counsel in Juvenile Court - A Promise Unfulfilled*. *Criminal Law Bulletin*, 1-40. Retrieved April 25, 2019, from <http://www.law.uh.edu/center4clp/events/gault-at-40/papers/44No3CrimLawBulletin5-Gault-Mlyniec.pdf>: 6.

⁷⁴ Tanenhaus, D. S., & Zimring, F. E. (2014). *Choosing the Future for American Juvenile Justice*. “On Strategy and Tactics for Contemporary Reforms.” New York: NYU Press.

trial in criminal court, exposing them to criminal sanctions. When the Supreme Court decided in *Kent* that juveniles had the right to a hearing before being waived to a criminal court, it “appended to its opinion a list of criteria for judges to consider,” which state court decisions and statutes adopted. While these criteria were meant to ensure validity of transfers to criminal court, they actually empowered judges to use their own discretion in a variety of categories. For instance, judges were meant to consider a child’s age when determining whether to send the child to criminal court. In practice, this criteria actually “provide[d] impetus to transfer older youths” to criminal court. Judges had incentive to transfer them, as transfer lessened the burden on the juvenile court. Judges could also consider “clinical evaluations and prior interventions” in their decisions of whether to waive a child to criminal court, in addition to “base threat to public safety... , prior record, gang involvement, or weapon use.” While these factors seem relevant, judges had broad discretion to interpret and analyze. Feld writes, “Lists of factors like those appended in *Kent* allowed them to emphasize different variables and justify any decision.”⁷⁵ The criteria provided by *Kent* opened the gate for judges to transfer juveniles even more arbitrarily than they did before.

The Prosecutor Can Waive

In fifteen states, prosecutors—not just judges—have the power to decide whether a juvenile will be waived to criminal court. This is due to direct-file laws which “elevate prosecutors’ power at judges’ expense and create a model typical of criminal courts.”⁷⁶ Most direct-file laws do not provide any criteria to guide the prosecutors’ choice; the

⁷⁵ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):111.

⁷⁶ Ibid, 115.

choice comes down to the prosecutor's personal beliefs. This is extremely problematic, because while prosecutors are "trained to evaluate evidence and charges, they have no professional expertise or non-offense information with which to decide to try a youth as a juvenile or adult."⁷⁷ They tend to focus on the offense, rather than the offender, and therefore shift the focus from rehabilitative options to punitive ones. For example, in Virginia, "Prosecutors... direct filed about one-quarter of eligible youths and focused on offense, weapons, and victim's injury" rather than the elements that Virginia judges tended to consider, such as "clinical information, prior record, or culpability."⁷⁸ This means that the fate of the lives of young people depend upon arbitrary personal decisions made by non-experts who in fact have *incentives* to demonstrate that they are indeed "tough" on crime. Nationally, "prosecutors determined the criminal status of 85% of youths tried as adults and acted as gatekeepers to the juvenile justice system, a role previously reserved for judges."⁷⁹

Thomas Schornhorst argues that prosecutors should not take on tasks originally reserved for judges. Not only to prevent an obvious conflict of interest at a time when prosecutors have incentive to transfer, but also because the prosecutor has no way to know how to navigate these decisions. Schornhorst writes, "The problem of *which* [juveniles] should be waived is of such breadth and complexity, that the responsibility for the waiver determination was deliberately assigned to the judge of the Juvenile Court and not to the prosecutorial arm of the government."⁸⁰ In other words, prosecutors simply are

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid, 116.

⁸⁰ Schornhorst, F. T. (1968). The Waiver of Juvenile Court Jurisdiction: Kent Revisited. *Indiana Law Journal*, 43(3), 583-613. Retrieved April 25, 2019, from <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2406&context=ilj>: 599.

not equipped to make decisions of this kind, which is why the waiver decision originally belonged to experienced judges. The potential for arbitrariness or discrimination on the part of the prosecutor render prosecutorial direct file “contrary to the principles of equal protection as well as due process of law.”⁸¹ He concludes that “the prosecutor's choice method of waiver, even if reviewed by the trial court, is unsatisfactory and probably unconstitutional.”⁸² It is ironic that *Kent v. United States*, which aimed to ensure juveniles’ fair hearing before transfer to criminal court, solidified a waiver process that would allow the courts to infringe upon their due process rights.

Blended Sentencing

States adopted blended sentences as an alternative to transfer practices, but judges simply ended up imposing them on “less serious offenders whom they previously handled as delinquents,”⁸³ not criminal court transfers. In other words, this supposedly softer alternative to criminal court sanctions exposed juveniles to those same sanctions, but in the juvenile court. This “net-widening” phenomenon occurred because “Blended sentences meld delinquency dispositions with threat of criminal sanctions and provide longer confinement options than otherwise available in juvenile court.”⁸⁴ Prosecutors actually used the threat of transfer to coerce youth to plead guilty to blended sentences, which carried harsher, criminal sanctions.⁸⁵ Franklin Zimring criticized blended sentencing, implying that it was just another way for prosecutors to gain an upper hand in

⁸¹ Ibid, 598.

⁸² Ibid, 599.

⁸³ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):117.

⁸⁴ Ibid, 116.

⁸⁵ Ibid, p. 117.

the courtroom: “If the enhancement of prosecutorial power was sought and the creation of a structure of outcomes where plea bargaining was encouraged, then blended sentencing is just what the district attorney ordered.”⁸⁶

The Superpredator

By the 1990s, politicians had coined the term “superpredator” to describe youth who were particularly vulnerable to entanglement in a juvenile justice system that, at this point, closely resembled the criminal one. The media and campaigning politicians portrayed superpredators as “dangerous... cold-eyed young killers suffering from moral poverty - rather than [Progressive era] images of disadvantaged youths who needed help.”⁸⁷ Large-scale industrial change in the 1970s and 1980s that led to the loss of manufacturing jobs, coupled with the introduction of crack cocaine into inner cities, contributed to a significant rise in youth violence. However, politicians attributed the rise to a crisis of youth criminality - a “demographic crime bomb.”⁸⁸ This was a political tactic intended to exploit the public’s fears and gain electoral advantage. Demonizing youth in this way “garnered politicians support for the wars on crime, drugs, and youth.”⁸⁹ As the court paid increasing attention to crimes committed rather than youth themselves, the public eventually forgot about the original purpose of the juvenile court

⁸⁶ Ibid.

⁸⁷ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):105.

⁸⁸ DiLulio, J. (2010, January 20). The Coming of the Super-Predators. Retrieved April 25, 2019, from <https://www.weeklystandard.com/john-j-dilulio-jr/the-coming-of-the-super-predators>

⁸⁹ Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017):87.

altogether; “Defined by criminal behavior, juvenile courts highlight[ed] that their clients [were] young criminals and reinforce[d] public antipathy against other people’s children⁹⁰

America’s treatment of juveniles regressed back to standards of the 18th century, before the passing of the first Juvenile Court Act, when juveniles had no special protections at all. The goal that progressives set nearly a century earlier - a rehabilitative, *parens patriae* court - disappeared into the past. Policy no longer considered “the criminogenic conditions in which many youths live, for which they are not responsible, and from which they cannot escape - concentrated poverty, failing schools, dysfunctional families, dangerous neighborhoods, and the like - that contribute to delinquency.”⁹¹ None of these realities seemed to matter to the politicians running for election. They repurposed the juvenile court as an instrument with which to gain political support by inciting fear of black youth and as a receptacle for the children harmed by their policies. It is easy to observe conservative rhetoric of the get tough era and blame conservatives for the escalation of senseless, life-threatening punitive juvenile justice policies. But we must realize that such escalation could not have occurred without the formal administrative tools provided by *Kent* and *Gault*. Without the due process mechanisms they implemented in the juvenile court, juveniles could not have eventually been tried in court as the “superpredators” conservatives made them out to be.

Conclusion

The Temptation of Fatalism

So, if basic, liberal due process reforms such as the ones granted by *Kent* and *Gault* are susceptible to co-optation by carceral agendas, are any reforms *not* susceptible?

⁹⁰Ibid,105.

⁹¹ Ibid.

What reforms *will* work to protect minority youth and improve their life chances?

According to Murakawa's racial innocence theory, racism cannot simply be sifted out of our legal institutions by stringent process regulations or the application of constitutional rights. In light of this, perhaps all reforms - no matter how well intended - are co-optable by carceral agendas and can only exist within the context of a white supremacist society. Golub writes that "racial equality will require a more fundamental transformation than these constraints would permit, *and may in fact be unachievable within the current American constitutional order.*" Frank Wilderson also recognizes the magnitude of such a transformation, calling it the "end of the world."⁹² In this view, the juvenile court cannot be redeemed in the context of a country that has roots in white supremacy. Perhaps there is no such thing as a viable juvenile justice reform. We may be tempted to throw our hands up and surrender to the fatalism of white supremacy's omnipresence in the United States.

However, it is crucial to realize that movements of resistance to carceral, anti-black institutions in the past have indeed succeeded in exposing the illegitimacy of those institutions and creating tangible change. Jordan Camp points out that "poor and working-class people of color have resisted the imposition of the neoliberal state from below. Their efforts have had global significance. When these protests are obscured, the state's attempts to crush radical social movements are aided and abetted"⁹³ (8). If we fail to sufficiently acknowledge these efforts and "obscure" them in doing so, then we invisibilify the work that has been done to dismantle racist institutions and create an

⁹² "We're trying to destroy the world" Anti-Blackness & Police Violence After Ferguson An Interview with Frank B. Wilderson, III [Interview]. (2014, November).

⁹³ Camp, J. T. (2016). *Incarcerating the crisis: Freedom struggles and the rise of the neoliberal state*. Oakland, CA: University of California Press.: 8.

illusion that such work is either impossible or futile. Angela Davis writes that “frameworks that rely exclusively on reforms help to produce the stultifying idea that nothing lies beyond the prison.”⁹⁴ If we shift our focus beyond the bounds of our current legal institutions, we may find inspiration for systems that are less cooptable and less rooted in America’s history of white supremacy. Mimi Kim observes that “Our failure of imagination [is] not rooted in a lack of examples, but rather in the devaluing of community-based actions.”⁹⁵

Resistance through Community Agency

We may create or find the most effective systems of justice by turning inward—and away from government institutions—to build upon the work already happening in our own communities. According to INCITE!, a “network of radical feminists of color organizing to end state violence and violence in [their] homes and communities,”⁹⁶ community-based approaches “challenge us to seriously address violence and intimate harms without reproducing the technologies of individualization, pathology, penalty, protection under the authority of heteropatriarchy and white supremacy, and criminalization.”⁹⁷ This description of community-based approaches directly addresses the problems of attempting to improve our current justice systems through liberal reforms: these reforms, in efforts to de-racialize and de-weaponize the existing

⁹⁴ Davis, A. Y. (2010). *Are prisons obsolete?: An open media book*. New York: Seven Stories Press.:20.

⁹⁵ Kim, M. (2012). Moving Beyond Critique: Creative Interventions and Reconstructions of Community Accountability. *Social Justice*, 37, 4th ser., 14-35. Retrieved April 25, 2019, from <https://www.jstor.org/stable/pdf/41478931.pdf?refreqid=excelsior:27e44491d4ed98b8054aab5167cc744f>:18.

⁹⁶ INCITE! (n.d.). Retrieved April 25, 2019, from <https://incite-national.org/>

⁹⁷ Editors' Introduction. (2012, June 28). Retrieved April 25, 2019, from <https://communityaccountability.wordpress.com/social-justice-journal-issue/editors-introduction/>

institutions, will only strengthen them by increasing procedures and providing more resources. Community accountability, on the other hand, constitutes “any strategy to address violence, abuse, or harm” that “creates safety, justice, reparations, and healing without relying on police, prisons, childhood protection services, or any other state systems.”⁹⁸ It avoids state involvement altogether and “reflects everyday ways of thinking and doing that have been practiced within communities for generations.”⁹⁹ Community-based accountability practices provide an excellent starting point for alternative justice systems because they occur organically, on the terms of the community, and utilize and strengthen pre-existing relationships and support networks.

The Final Word

Franklin Zimring said that “standards of proof and defense lawyers are a major drawback to identifying children in need and providing them with help. If that is the mission of the juvenile court, then due process will be a major handicap to its achievement.”¹⁰⁰ While he was correct that *Kent* and *Gault* were unhelpful, what he and other scholars have not acknowledged is that due process was not a mere “handicap” in the Supreme Court’s attempt to protect minority youth. The due process revolution was not just poorly implemented, as Bernard and Kurlychek propose, nor simply sabotaged by a conservative backlash, as Barry Feld claims; the liberal reforms themselves paved the way for the demonization of youth for decades to come. Murakawa’s theory that liberals

⁹⁸ Ibid.

⁹⁹ Kim, M. (2012). Moving Beyond Critique: Creative Interventions and Reconstructions of Community Accountability. *Social Justice*, 37, 4th ser., 14-35. Retrieved April 25, 2019, from <https://www.jstor.org/stable/pdf/41478931.pdf?refreqid=excelsior:27e44491d4ed98b8054aab5167cc744f>:18

¹⁰⁰ Zimring, Franklin. “The Common Thread: Diversion in the Jurisprudence of a Century of Juvenile Justice,” Chicago university press.

built prison America helps to explain why our juvenile justice system—a too often ignored institution—regressed to the extent that states are still undoing the damage, passing reform bills today that resemble the Juvenile Court Act of 1899. This interpretation of liberalism as a tool of racial subordination can and should inform our understanding of how we can best approach juvenile justice reforms (and any reforms), and caution us to think critically about policy that claims to de-racialize state institutions. We can look to our own communities to know where to start.

Bibliography

Allen, F. (1959). Criminal justice, legal values and the rehabilitative ideal. *The Journal of Criminal Law, Criminology, and Police Science*, 50(3), 226-226. doi:10.2307/1141037.

Baron, D. (n.d.). Retrieved April 25, 2019, from <http://campaignforyouthjustice.org/state-work/state-snapshot>

Bernard, T. J., & Kurlychek, M. C. (2010). *The cycle of juvenile justice*. Oxford: Oxford Univ. Press.

Cooper, N.; Puritz, P.; Shang, W. (1998). Fulfilling the promise of in re gault: Advancing the role of lawyers for children. *Wake Forest Law Review* 33(3):651

Davis, A. Y. (2010). *Are prisons obsolete?: An open media book*. New York: Seven Stories Press.

De Blasio Administration Unveils Plans for Borough-Based Jails to Replace Facilities on Rikers. (2018, August 15). Retrieved April 25, 2019, from <https://www1.nyc.gov/office-of-the-mayor/news/413-18/de-blasio-administration-plans-borough-based-jails-replace-facilities-rikers>.

DiLulio, J. (2010, January 20). The Coming of the Super-Predators. Retrieved April 25, 2019, from <https://www.weeklystandard.com/john-j-dilulio-jr/the-coming-of-the-super-predators>

Editors' Introduction. (2012, June 28). Retrieved April 25, 2019, from <https://communityaccountability.wordpress.com/social-justice-journal-issue/editors-introduction/>

Feld, B. (2007). A century of juvenile justice: A work in progress or a revolution that failed? *Northern Kentucky Law Review*, 34(2), 189-256.

Feld, B. C. (1999). *Bad kids race and the transformation of the juvenile court*. New York: Oxford University Press.

Feld, B. C. (2003). Race, politics, and juvenile justice: the Warren Court and the conservative "backlash." *Minnesota Law Review*, 87(5), 1447-1577. Retrieved from <http://search.ebscohost.com.ccl.idm.oclc.org/login.aspx?direct=true&db=ofm&AN=502483550&site=ehost-live&scope=site>

Feld, B. (2017). *The evolution of the juvenile court : Race, politics, and the criminalizing of juvenile justice*(Youth, crime, and justice series). New York: New York University Press. (2017).

Fortner, M. (2015). *Black silent majority : The rockefeller drug laws and the politics of punishment*. Cambridge, Massachusetts: Harvard University Press.
doi:10.4159/9780674496088

Golub, M. (2018). *Is racial equality unconstitutional?* New York, NY: Oxford University Press.

In Re Gault (May 15, 1967).

INCITE! (n.d.). Retrieved April 25, 2019, from <https://incite-national.org/>

Is New York ready for Andrew Cuomo's Raise the Age law? (2019, April 18). Retrieved April 25, 2019, from <https://chronicleofsocialchange.org/justice/juvenile-justice-2/new-york-raise-the-age-browder-rikers>

Kent v. United States (March 21, 1966).

Kim, M. (2012). Moving Beyond Critique: Creative Interventions and Reconstructions of Community Accountability. *Social Justice*, 37, 4th ser., 14-35. Retrieved April 25, 2019, from <https://www.jstor.org/stable/pdf/41478931.pdf?refreqid=excelsior:27e44491d4ed98b8054aab5167cc744f:18>

Manfredi, C. (1998). *The supreme court and juvenile justice*. Lawrence, Kan.: University Press of Kansas.

Markman, J. S. (2007). In re Gault: Retrospective in 2007: Is It Working Can It Work. *Barry Law Review* 9, 123-142.

McCord, J., Widom, C., & Crowell, N. (2001). *Juvenile crime, juvenile justice*. Washington, D.C.: National Academy Press. (2001). Retrieved April 26, 2019, from EBSCO.

Mlyniec, W. (2008). In re Gault at 40: The Right to Counsel in Juvenile Court - A Promise Unfulfilled. *Criminal Law Bulletin*, 1-40. Retrieved April 25, 2019, from <http://www.law.uh.edu/center4clp/events/gault-at-40/papers/44No3CrimLawBulletin5-Gault-Mlyniec.pdf>

Murakawa, N. (2014). *The First Civil Right : How Liberals Built Prison America*. [N.p.]: Oxford University Press. Retrieved from <http://search.ebscohost.com.ccl.idm.oclc.org/login.aspx?direct=true&db=nlebk&AN=795246&site=ehost-live&scope=site>

Murakawa, N., & Beckett, K. (2010). The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment. *Law & Society Review*, 44(3/4), 695-730. Retrieved from <http://www.jstor.org/stable/40926315>

New York State. (n.d.). Raise the Age. Retrieved April 25, 2019, from <https://www.nycourts.gov/ip/oji/raisetheage.shtml>.

Tanenhaus, D. S., & Zimring, F. E. (2014). *Choosing the Future for American Juvenile Justice*. "On Strategy and Tactics for Contemporary Reforms." New York: NYU Press. Retrieved from <http://search.ebscohost.com.ccl.idm.oclc.org/login.aspx?direct=true&db=nlebk&AN=732502&site=ehost-live&scope=site>

Torbet, P., National Center for Juvenile Justice, & United States. Office of Juvenile Justice and Delinquency Prevention. (1996). *State responses to serious and violent juvenile crime : Research report*. Washington, D.C.: U.S. Dept. of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.

Welch, T. (1967). Kent v. United States and In re Gault: Two Decisions in Search of a Theory. *Hastings Law Journal*, 29-45. Retrieved April 25, 2019.

"We're trying to destroy the world" Anti-Blackness & Police Violence After Ferguson
An Interview with Frank B. Wilderson, III [Interview]. (2014, November).

Williams, Z. (2018, August 01). New York City could be a leader in juvenile justice reform. Retrieved April 25, 2019, from <https://nynmedia.com/content/new-york-city-could-be-leader-juvenile-justice-reform>.

Zimring, Franklin E.. *American Juvenile Justice*, Oxford University Press, Incorporated, 2018. ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/claremont/detail.action?docID=5614161>.