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THE CHILD AS OTHER: RACE AND DIFFERENTIAL TREATMENT IN THE JUVENILE JUSTICE SYSTEM

*Kenneth B. Nunn**

INTRODUCTION

Adolescence may be described as a period of transition from child-hood to adulthood, when those yet to become adults gain greater physical and mental abilities than children, but continue to lack the wisdom and judgment possessed by mature adults. This symposium has been given the title *The End of Adolescence.* Many of the articles in this volume focus on a growing trend to shorten the period of ado-lescence, or to eliminate it entirely. But insofar as African American boys and girls are concerned, it is somewhat inaccurate to speak of an "end of adolescence." For to have an "end" suggests there was a "be-ginning," and there was no beginning of adolescence for African American youth. The concept of a group of young people who were entitled to special treatment because they were impetuous and imma-ture was never extensive enough to include African American children.

Indeed, there was no "adolescence" as such in the United States until about 1830.[1] Prior to that time, children were viewed as the property of their parents and were mainly valued as a source of cheap labor.[2] One historian claims that "[i]n labor scarce America the ser-vices or wages of a child over ten was one of the most valuable assets a man could have."[3] While adolescent children were valued, and per-haps even loved by their families, there was no social category that recognized their existence, and they had no political or social rights.[4] This predominately materialistic view of childhood began to change in the early nineteenth century. Due to a variety of factors—increased wealth for the American white middle-class, increased urbanization,

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1. Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law,* 108 YALE L.J. 1123, 1129 (1999).
2. *Id.*
3. MARY ANN MASON, FROM FATHERS PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 5, 6 (1994).
4. *See* VIVIANA A ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985).

greater industrialization, and the rise of transcendentalist thought—
new attitudes about children and society's obligation to them began to
arise. By 1830, the view that childhood was a distinct stage of life
committed to learning and development had come into vogue.[5] As a
consequence, white child labor became disfavored, and the first child
labor laws were enacted.[6]

When adolescence began for white children in 1830, African Ameri-
can children remained slaves.[7] They, like African American adults,
were property, and a much lower class of property than that to which
white children were relegated prior to 1830.[8] "[T]he idealization of
white children that occurred in the 1830s did not affect [B]lack chil-
dren at all."[9] Black[10] children who were living in slavery had no legal
rights.[11] Their connection to their family was not even respected.
They could be separated from their parents and sold away whenever
the slaveholder so desired.[12] African American children's only so-
cially recognized function was to work at hard labor for the economic
benefit of whites. Even after the end of slavery, the social distinction
between white and Black children remained. In fact, within a few
years of the Civil War, Southern legislatures enacted "apprenticeship"
statutes that allowed former slaveholders to force African American
children back into virtual slavery.[13] Although most apprenticeship
statutes were repealed by the 1870s, African American children con-
tinued to work on farms and in factories in much greater numbers and
at much greater risks than white children.

The different perception and treatment of African American chil-
dren thus has deep historical roots in the United States. Indeed, the

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5. *Id.*; JACQUELINE S. REINIER, FROM VIRTUE TO CHARACTER: AMERICAN CHILDHOOD, 1775-1850 72-73, 134-38 (1996); Hansen, *supra* note 1, at 1129.

6. Hansen, *supra* note 1, at 1130.

7. For treatments of the conditions of Black children during slavery, see generally, WILMA KING, STOLEN CHILDHOOD (1997) and MARIE JENKINS SCHWARTZ, BORN IN BONDAGE: GROW-ING UP ENSLAVED IN THE ANTEBELLUM SOUTH (2000).

8. Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. J. 187, 208, 211 (1987).

9. Hansen, *supra* note 1, at 1142-43.

10. I use "Black" and "African" interchangeably throughout this article to refer to persons who are of African descent. "Black" denotes racial and cultural identity rather than mere physi-cal appearance and is, therefore, capitalized. *See* Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology, and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 64 n.7 (1993). When it is necessary to distinguish African people resident in the United States from African people elsewhere, I will use the term "African American." I utilize this convention to emphasize the connectedness of all members of the African diaspora.

11. Burnham, *supra* note 8, at 204.

12. *Id.* at 203-04.

13. Hansen, *supra* note 1, at 1143.

racial disparities in the vision of childhood is so glaringly apparent
that it changes the nature of the research hypothesis of this sympo-
sium. The question for children of African descent in the United
States is not "why the end of adolescence," but rather "why never the
beginning?" In this Article, I will address this revised research ques-
tion by analyzing the way African American children are perceived in
American culture at large. I argue that African American children
are not afforded the same treatment as European American children,
and consequently never enjoyed the benefits of adolescence because
they are viewed differently by white society.[14] African American chil-
dren are viewed as children of "the other," and as "others," they may
be treated in ways that would be unthinkable if white children were
involved.[15]

The "other" is a concept that has been addressed in a variety of
sources, but it is most commonly associated with postmodern thinking
and analysis.[16] As I explain elsewhere in this Article, the "other" is
the reflection or antithesis of the self.[17] Whatever qualities the self is
thought to have, the "other" has the opposite. In this way, the
"other" is a tool for defining the self and the reality with which the
self engages. The quality of otherness that engulfs African American
children is such that African American children define the boundaries
of childhood, adulthood, delinquency, and crime.

The juvenile justice system is rife with racial disparities between
white and non-white children.[18] By virtually every means of measure-
ment, African American, Latino, and Native American children re-
ceive much harsher treatment than do European American children.[19]
They are more likely to be arrested, charged, to receive more severe

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14. *See infra* notes 119-130 and accompanying text.

15. *See infra* notes 122-128 and accompanying text.

16. *See infra* notes 80-85 and accompanying text.

17. *See infra* note 130 and accompanying text.

18. *See generally* JANICE JOSEPH, BLACK YOUTHS, DELINQUENCY AND JUVENILE JUSTICE
(1995); MINORITIES IN JUVENILE JUSTICE (Kimberly Kempf Leonard, Carl E. Pope & William H.
Feyerham, eds., 1995); Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice
Decision-Making: Findings of a State-Wide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 405
(1996) (finding "clear disadvantages for nonwhites at multiples stages" of Florida's juvenile jus-
tice system); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of
Overenforcement*, 34 U.C. DAVIS L. REV. 1005, 1020-27 (2001) (discussing various studies finding
race discrimination in the juvenile justice system); Eileen Poe-Yamagata & Michael A. Jones,
And Justice for Some: Differential Treatment of Minority Youth in the Justice System (Building
Blocks for Youth, 2000), *reprinted in* 8 KY. CHILDREN'S RTS. J. (2000), (concluding that
"[m]inority youth are more likely than White youth to become involved in the system with their
overrepresentation increasing at each stage of the process").

19. *See* Poe-Yamagata & Jones, *supra* note 18, at 4.

sentences, and to stand trial as adults.[20] I trace this disparate treatment to the process of "othering," which has deep historic and cultural roots.[21] When children in the juvenile justice system are viewed as the children of the "other," the juvenile justice system is employed as an instrument of repression and control. Viewing the juvenile justice system as a means of repression and control provides a greater explanation for the racial disparities that exist within it than can be provided by theories of either retribution or rehabilitation.

In this Article, I will focus on the treatment of African American children as the "other" in the juvenile justice system. As previously stated, African American children are not the only ones who may be treated as the "other." Latino, Native American, Asian, and even white children may be "othered" in the appropriate social context. My concern here, however, is with African American children. I focus on their condition because I believe it is exemplary of how all children who are perceived as children of the "other" are treated and because, in some ways, the treatment of African American children, in a bipolar racial hierarchy, is unique.[22]

In Part I of this Article, I will describe the extent and nature of the racial disparities that exist in the juvenile justice system. Next, I will discuss the concept of "otherness" in Part II. In Part III, I will discuss the child as "other," which will be followed by a discussion in Part IV of the impact of the "other" in the juvenile justice system. Finally, I conclude that if white children were its predominant subjects, the juvenile justice system would look entirely different. It would focus on rehabilitation and reeducation rather than its present emphasis on repression, isolation, and control.[23]

II. RACIAL DISPARITIES IN THE JUVENILE JUSTICE SYSTEM

The juvenile justice system is organized as a modified version of the criminal justice system. Originally, juvenile courts were conceived of as an alternative to criminal prosecution. The intent was to provide a means to keep youthful offenders out of the criminal justice system, which was thought to exert inappropriate influences over juveniles and potentially endanger them.[24] In addition, the purpose of the juvenile justice system was explicitly rehabilitative and reformative unlike

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20. *Id.* at 1-3.

21. *See infra* notes 80-130 and accompanying text.

22. *See infra* notes 116-130 and accompanying text.

23. *See infra* sec. IV.

24. *See* MARY J. CLEMENT, THE JUVENILE JUSTICE SYSTEM: LAW AND PROCESS 10-22 (2d ed. 2002).

the criminal justice system, which had a predominately punitive purpose.[25]

Actual juvenile court procedures vary from state to state, but in general, the juvenile justice system can be said to involve six steps: intake, detention, petitioning, waiver, adjudication, and disposition.[26] At the intake stage, juvenile offenders are referred to the juvenile justice system instead of being directed to social service, medical, or family interventions.[27] While most cases are referred by law enforcement, referrals may also be made by parents, victims, schools, social workers, and probation officers.[28] At the detention stage, the initial decision to detain the child in a secure facility pending adjudication is made by the court. The decision to file either formal charges or a delinquency petition is the next step in the process, followed by an adjudicatory hearing. At the adjudicatory hearing, a juvenile court judge acts as the finder of fact and renders a decision as to the child's involvement in the alleged offense following the presentation of witnesses and evidence. At any time prior to a finding of delinquency, a waiver petition may be filed, requiring a hearing to determine whether juvenile court jurisdiction may be waived and the child may be transferred to an adult court for prosecution. At the disposition stage, a judge determines the appropriate mix of services and sanctions to address the child's adjudication of delinquency. Typical disposition orders include placement in a secure facility, residential placement, probation, counseling, drug abuse treatment, or restitution.

A. *Racial Disparities and the Stages of the Juvenile Process*

Racial disparities have been found at each stage of the juvenile justice system.[29] Indeed, researchers have demonstrated that racial disparities actually intensify with each successive stage of the juvenile justice system.[30] The overrepresentation of African American youth in the juvenile justice system begins with the decision to arrest. The Office of Juvenile Justice and Delinquency Prevention reported that 2,603,300 juvenile arrests were made by state and federal authorities in 1998.[31] African American youth were overrepresented in the num-

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25. *Id.* at 19.

26. *Id.* at 130.

27. *See* Poe-Yamagata & Jones, *supra* note 18, at 4.

28. *Id.* at 8.

29. *Id.* at 1.

30. *Id.* at 4.

31. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *Juvenile Arrests 1998* (1999).

ber of arrests, at 26% of the total.[32] African American youth were also overrepresented in the referral population.[33] Of 1,755,100 delinquency cases referred for prosecution in 1997, 66% were white, 31% were African American, and 3% were members of other groups.[34] Because African American youth only account for 15% of the country's population under the age of eighteen, the proportion of Black youth shunted into the juvenile justice system is more than twice the percentage of African American youth in the population.[35]

African Americans are overrepresented, as well, at the next stage in the juvenile justice process—the decision to detain. Figures show that African American children are detained in locked facilities at a greater rate than they are present in the referral population. In 1997, 44% of African American children referred to juvenile court were detained, while only 31% of the referral population was African American.[36] The treatment of African American detainees may be contrasted to the treatment of white detainees. While Black children are overrepresented among detainees in respect to their proportion of the referral population, white children are underrepresented.[37] This pattern of disparity is repeated across all offense categories, but it is most extreme in drug cases.[38] In drug offense cases, African Americans amounted to 55% of those detained, but only 32% of the referral population.[39] The disparate treatment of African American youth at the detention stage is pervasive and readily apparent. Even when charged with the same offense, African American youth are more likely to be detained pretrial than white youth. In summary, "for youth charged with comparable offenses—whether person, property, drug, or public order offenses—minority youth, especially African American youth, were locked up in detention more often than white youth."[40]

Following intake and the decision whether to detain a juvenile suspect, a decision must be made whether to formally charge the youth with the commission of a delinquent act.[41] This charging decision is

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32. *See* FEDERAL BUREAU OF INVESTIGATION, *Crime in the U.S. 1998*, Table 43 (1998).

33. Poe-Yamagata & Jones, *supra* note 18, at 8.

34. *Id.*

35. *Id.*

36. *Id.* at 9.

37. White youth were 66% of those referred and only 53% of these cases were detained across all offense categories. *Id.*

38. *Id.*

39. *Id.*

40. Poe-Yamagata & Jones, *supra* note 18, at 10.

41. *See generally*, SANFORD J. FOX, JUVENILE COURTS IN A NUTSHELL § 32, 153-59 (3d ed. 1984).

typically made by a prosecuting attorney.[42] In 1997, statistics revealed that prosecuting attorneys were more likely to file formal delinquency petitions against African American youth than against white youth.[43] White youth were involved in 66% of juvenile court referrals and 63% of petitioned cases.[44] This means that cases involving white youth were less likely to be petitioned than they were to be referred. African American youths, on the other hand, were involved in 31% of referrals and 34% of petitioned cases.[45] This means there is a greater probability that African Americans will be formally petitioned than referred.

Another point of significant disparity in the juvenile justice system involves the critical decision of whether or not the jurisdiction of the juvenile court will be waived and youthful offenders will be prosecuted in adult court. Prosecution in adult court leads to harsher overall treatment and more punitive sanctions than are available in juvenile court. About 8,400 petitioned delinquency cases, or about 1% of all petitioned cases, were waived from juvenile court to adult court in 1997.[46] Cases involving African American youth were disproportionately waived to adult court.[47] Almost half (46%) of waived cases involved African Americans, compared to 34% of petitioned cases.[48] Half of the cases (50%) waived to adult court were brought against white offenders, a lower proportion than the 63% of petitioned cases that involved white youth.[49] African American youth were substantially more likely to be waived in cases involving drug offenses and public order offenses. While 39% of petitioned drug cases involved African Americans, 63% of waived drug cases involved

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42. Some jurisdictions allow juvenile petitions to be filed by probation officers, or even by any adult person. *Id.* at 154-55. However, the better practice reflected in most model provisions to restrict charging decisions to prosecuting attorneys. *Id.* at 155. *See also* ISA-ABA JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCE APPROACH 244 (Robert E. Sheppard ed., 1996) (petitions alleging delinquency should be prepared and signed by the prosecuting attorney).

43. Poe-Yamagata & Jones, *supra* note 18, at 11.

44. *Id.*

45. *Id.*

46. *Id.* at 12.

47. *Id.* The proportion of Blacks, Hispanics, Native Americans, or Asians transferred to criminal court was five times or more the proportion of these groups in the general population in Connecticut, Massachusetts, Pennsylvania, and Rhode Island and more than twice the proportion in the general population in the additional states of Arkansas, Florida, Maryland, and New Jersey. *Id.* at 17.

48. Poe-Yamagata & Jones, *supra* note 18, at 17.

49. *Id.*

African Americans.[50] For public order offenses, African Americans were charged in 33% of petitioned cases and 56% of waived cases.[51]

Racial disparities are also evident at the disposition, or juvenile sentencing stage, of the juvenile justice system. Juvenile court judges are more likely to place African American youth in residential placement facilities, and less likely to place African American youth on probation in comparison to similarly situated white youth.[52] Although 32% of cases adjudicated delinquent involved African Americans, a larger proportion of those cases (36%) were ordered into residential placement facilities than received probation (31%).[53] Overall, white youth were underrepresented among cases receiving residential placement and overrepresented among cases receiving probation.[54] The disparity between white and Black children is present across all offense categories, but is even more substantial in the case of drug offenses.[55] In cases where juveniles were adjudicated delinquent due to drugs, African Americans made up 53% of those placed in residential facilities and only 34% of those placed on probation.[56] By contrast, white youth comprised 45% of those placed in residential facilities and 64% of those placed on probation.[57]

The cumulative affect of racially disparate treatment throughout the juvenile justice system becomes clear upon entry into practically any secure juvenile housing facility in the United States.[58] The vast majority of those housed in these facilities are persons of color. Youth of color represented almost two-thirds of the detained and committed youth held in 1997.[59] More African American youth are in secure residential placements than are juveniles from any other racial or ethnic group.[60] In 1997, 40% of the juveniles in locked residential facilities were African American, a percentage that is almost three times the percentage of African American youth in the population.[61] As is the

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50. *Id.*

51. *Id.* at 13 (Figure 5b).

52. Poe-Yamagata & Jones, *supra* note 18, at 14.

53. *Id.* (Figure 7).

54. *Id.* White youth made up 64% of adjudicated cases, 60% of residential placements, and 66% of cases receiving probation.

55. *Id.*

56. *Id.* at 15.

57. *Id.*

58. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, MINORITIES IN THE JUVENILE JUSTICE SYSTEM 4 (1999) (showing a disproportionate number of children of color were in residential placement in nearly all states in 1997).

59. Poe-Yamagata & Jones, *supra* note 18, at 18.

60. *Id.* (Table 9, showing comparisons).

61. *Id.*

case throughout the juvenile justice system, the racial disparity in se-
cure housing is driven by drug offenses. African Americans constitute
the vast majority, that is 56%, of the juveniles in custody for drug
crimes.[62]

One reason for the large number of African American youth in se-
cure facilities is that the admission rate for African American youth is
substantially higher than it is for white youth. African American
youth with no prior placements are admitted to state public institu-
tions at a rate six times higher than that for similarly situated white
youth.[63] African American youth with one to two prior admissions
are seven times more likely to be placed in state public institutions.[64]
This means that African American youth are much more likely to be
placed in residential placements than similarly situated white youth.

In addition to making up a disproportionate number of juveniles in
custody, African American youth are also held in custody longer than
white youth. On average, African American youth remain in custody
sixty-one days longer than white youth.[65] For drug offenses, the aver-
age stay of African American juveniles was ninety-one days longer
than the average stay of white juveniles.[66] This disparity in the length
of stay strongly suggests that African American youth are punished
more severely than white youth for similar crimes.[67]

These racial disparities begin early in the juvenile justice process
and build as the process continues.[68] Because African American chil-
dren are more likely to be arrested, more likely to be detained, more
likely to have their cases petitioned, less likely to be placed on proba-
tion, more likely to be ordered into secure facilities, and more likely
to receive longer commitments, it can be no surprise that African
Americans are found in juvenile facilities in such large numbers. The
stark racial disparities that are evident in juvenile detention and resi-
dential housing facilities may be traced to discretionary decisions
made at early stages in the juvenile justice process.[69]

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62. *Id.* at 19 (Table 10).

63. *Id.* at 20 (Table 12).

64. *Id.*

65. Poe-Yamagata & Jones, *supra* note 18, at 21.

66. *Id.*

67. *Id.* Using length of stay as the measure of punishment, Latino youth appear to be pun-
ished even more severely than African American youth. Overall, the average length of stay for
Latino youth in 1993 was 306 days, 162 days more than white youth and 71 days longer than
African American youth. *Id.* at 21.

68. *Id.* at 4.

69. *Id.*

B. Making Meaning of Juvenile Injustice

Why are these discretionary decisions made in such a way that is so plainly adverse to the interests of African American youth? Why are there so many examples of racial disparities throughout the juvenile justice system that negatively impact African Americans? While racial disparities and differential outcomes are clearly evident, it is more difficult to attribute the cause of these disparities to racial discrimination or to the racial bias of particular actors in the juvenile justice system.

In part, this is due to the standard of proof required to ascertain racial bias and the quality of available evidence to support a claim of racial bias. As white Americans are increasingly reluctant to admit and address claims of bias, a high burden of proof is required for both formal and informal bias claims.[70] In general, individuals raising claims of racial bias must identify a "smoking gun," either an admission of bias or a clear cut example of race discrimination with no reasonable explanation.[71] This high burden of proof requires relatively specific evidentiary support.[72] To establish racial bias as the cause of the racial disparities in the juvenile justice system under such standards "requires analysis of detailed data providing information on specific offense classifications, criminal history, and other factors used in decision making."[73] This magnitude of proof is not yet available in regard to the discretionary decisions of individual actors in the juvenile justice system.

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70. *See* Girardeau Spaun, *Pure Politics*, 88 MICH. L. REV. 1971, 1973 (1990) (arguing that the Supreme Court had responded to a conservative shift in majoritarian attitudes about race discrimination by subtly incorporating contemporary attitudes into the constitutional & statutory provisions that govern discrimination claims). *See also* Jody David Armour, *Hype and Reality in Affirmative Action*, 68 U. COLO. L. REV. 1173 (1997) (showing how affirmative action policies revolve around knowledge claims of conservatives that discrimination no longer exists).

71. Julian Abele Cook, Jr. & Tracey Denise Weaver, *Closing Their Eyes to the Constitution: The Declining Role of the Supreme Court in the Protection of Civil Rights*, 1996 DET. C.L. MICH. ST. U.L. REV. 541, 565 (1996) (claiming Supreme Court decisions have imposed burden of producing a "smoking gun" and left "no effective way . . . to combat subtle racial discrimination through the judicial process.").

72. As Professor Laurence Tribe has described,

> [the Supreme Court's approach to race discrimination] sees contemporary racial discrimination not as a social phenomenon—the historical legacy of centuries of slavery and subjugation—but as the misguided, retrograde . . . behavior of individual actors in an enlightened, egalitarian society. If such actors cannot be found—and the standards for finding them are tough indeed—then there has been no violation of the equal protection clause.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1509 (2d ed. 1988).

73. *Id.* at 4. The authors of this report point out, however, that many studies, including their own, "suggest that processing decisions in many states and local juvenile justice systems are not racially neutral." *Id.*

The racial disparities alone are disturbing and shocking. When African American youth represent 40% of the incarcerated youth nationwide and in some areas almost 90% of incarcerated youth are children of color, something is seriously wrong.[74] When African American boys consistently receive worse treatment at the hands of police, counselors, psychologists, probation officers, and judges, something is seriously wrong. As juvenile justice advocate James Bell states, "the nexus of color and adolescence have converged in a way that have juveniles being confined in numbers that cannot be accounted for by criminal activity alone and should give pause to any civil society."[75]

Some have argued that a great degree of racial disparities may be traced to the shift toward more punitive sanctions in the juvenile justice system.[76] They argue that the target of the juvenile justice system is not so much African American youth as it is that African Americans have become unintended victims—the collateral damage—of the war on crime.[77] The real target, they claim, is the rising violence and threat to property that has become endemic to American streets.[78] This threat has led to more punitive sanctions, less focus on rehabilitation, and consequently greater numbers of delinquent youth being detained.[79]

But the question remains: Why is it acceptable for African American youth to be viewed as merely collateral damage? Why is the cost of requiring the mass incarceration of African American children not considered too high a price to pay for the safety and security of the

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74. *See* James Bell, *Throwaway Children: Conditions of Confinement and Incarceration, in* THE PUBLIC ASSAULT ON AMERICA'S CHILDREN: POVERTY, VIOLENCE AND JUVENILE INJUSTICE 189 (Valerie Polakow ed., 2000) (reporting percentage of minority youth incarcerated in California as 86%, and in Texas as 76%).

75. *Id.* at 188-89.

76. Barry Feld makes a version of this argument in at least two places. He argues that courts and legislatures have been legitimately concerned with rising levels of juvenile violence, particularly homicide. Because African American youth disproportionately commit violent crimes, tougher measures that focus on these crimes are likely to have an unfortunate, but unintentional, racially disproportionate effect. *See* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 978 (1995). *See also* Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver, Policy and Practice: Persistence, Seriousness and Race*, 14 LAW AND INEQ. 73, 106 (1995).

77. *See* Podkopacz & Feld, *supra* note 76.

78. Feld and Rasmussen detail the concerns that motivated tougher juvenile justice policy, notwithstanding its disproportionate impact on African American youth. They claim that "the proliferation of firearms and the corresponding dramatic rise in homicide by mid- to late-adolescents, the disproportionate overrepresentation of minority youth as perpetrators and victims of violence, and increasing arrests of younger juveniles for violent crimes certainly justify public concerns." *Id.* at 105.

79. *See infra* notes 153-160 and accompanying text.

socially significant and the politically connected? Why is it that African American youth can be so easily sacrificed, predominately for the benefit of communities in which they do not live? The answer is not simply racism. Even a racist conspiracy by thousands of well-placed and well-organized agents in the juvenile justice system could not accomplish the level of oppression that currently exists without the complicity of the society as a whole.

The critical question, then, is not who or what is responsible for the racial inequities in the juvenile justice system, but why so little is being done about them? Why do the disparities look so normal, so unremarkable, as if it is entirely plausible that African American youth would need to be incarcerated at a rate that is six times greater than that for white youth? Why is it that we can look at Black oppression and subjugation and fail collectively to be moved? This level of social invisibility is only possible through a cultural process that affects the perceptions of the entire society. The oppression of African children appears normal because we have been socialized to undervalue the lives and realities of African people. Consequently, white children are more highly valued than Black children, and the disparities in the juvenile justice system reflect this differential value. In the next section of this Article, I argue that this differential value can be explained by a socially constructed process of "othering."

III. THE CONCEPT OF "OTHERNESS"

"Otherness," the concept that some human beings are different, other, or alien, has been the subject of rigorous analysis and critique in many different genres. Here, I will discuss four disparate sources that have contributed to my understanding of the concept of otherness: the literature of poststructuralism/postmodernism and critical theory, feminist theory, anticolonialist studies, and what may be called African-centered scholarship. Each of these schools of thought provides important perspectives on otherness, yet none can claim to have originated the idea.

One of the first articulations of otherness was W.E.B. DuBois' notion of "double-consciousness." In an oft-cited passage of his 1903 classic, *Souls of Black Folk*, DuBois wrote,

> It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity.[80]

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80. W.E.B. DuBois, THE SOULS OF BLACK FOLK 8 (Vintage Books ed. 1990) (1903).

Here, DuBois speaks of difference, but double-consciousness for DuBois is not simply awareness that difference exists but the recognition that difference is *despised*. This passage also makes clear that DuBois understood the other as a creation that arises out of a relationship of domination and subordination. The other is projected by those who would want to dominate on a frame provided by those they would want to subjugate. Thus, the African who is treated as the other in America must view him or herself "through the eye's of others" who have the power to set the standards by which "one's soul," or one's worth may be measured.[81] The basic themes that Du-Bois identified as central to the concept of double-consciousness—conscious awareness of difference, a hierarchically ordered bipolar relationship, contempt for the subordinate party in the relationship, and projection of qualities onto the subordinate party by the dominate party—have been followed by later scholars who have also addressed the question of otherness.

A. Structuralists, Crits, and Postmodernists

The concept of the other became popular chiefly through the work of early structuralists and later poststructuralists, critical theorists, and postmodernists. Structuralists, mainly through their interventions with language and linguistics, observed a polarized duality to Western thought that shaped all aspects of culture and society. Structuralist linguists identified terms of opposition within languages that provided a structure within which meaning could be assessed.[82] This theme of structural duality was picked up by later intellectual movements, which uncovered dichotomies in Western thought as well. Writing in the late 1970s, Jacques Derrida picked up the structuralist theme. In Derrida's critique of the structuralist view,

> Western thought has always been structured in terms of dichotomies or polarities: good v. evil, truth v. terror, identity v. difference . . . . These polar opposites do not, however, stand as independent and equal entities. The second term in each pair is considered the negative, corrupt, undesirable version of the first . . . . In other words, the oppositional categories are arranged in a hierarchical order.[83]

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81. *Id.* DuBois wrote powerfully of the effect that this conscious awareness of difference has on the psyche of those marked as other. According to DuBois, dissidence occurs as the other seeks to maintain both his humanity and his difference: "One ever feels his two-ness–an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder." *Id.* at 8-9.

82. *See* Ferdinand de Saussure, *Course in General Linguistics, in* CRITICAL THEORY SINCE PLATO 718-26 (Hazard Adams ed., rev. ed., 1992).

83. JACQUES DERRIDA, DESSEMINATION viii (B. Johnson trans., 1981).

For Derrida, Western philosophy reifies sameness, and the agenda of the entirety of Western thought—all philosophy, science, and law—is "to reveal the essential characteristics that two things hold in common."[84] In its very difference, the other subverts the perceived or desired sameness that Western civilization takes as its foundation. In the Western worldview then, the other is a thing to be feared. According to Derrida,

> Absolute fear would then be the first encounter of the other as *other*: as other than I and as other than itself. I can answer the threat of the other as other (than I) only by transforming it into another (than itself), through altering it in my imagination, my fear, or my desire.[85]

Postmodernists who rejected the structuralist supposition that a fundamental order underlay all perceived reality also spoke of dualities and polarities. Postmodern intellectuals, Foucault in particular, envisioned a dialectical process of identity creation involving the other that borrowed many features of the structuralist pairs of opposition. Foucault argued that the Western world constructed categories of undesirables, such as criminals, the insane, and the sexually depraved, "in order to normalize persons who are not constructed as members of these categories."[86] According to Foucault, the other is created through a process of social construction in which the other takes its form through the normalization of behaviors and practices that are desirable and thereby looked upon as unremarkable. Postmodernists view the other as inextricably linked to the self, or that which is normal.[87] The self is defined through the other; indeed, the self cannot exist without the other.[88] More precisely,

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84. JOHN McGOWAN, POSTMODERNISM AND ITS CRITICS 89 (1991)

85. JACQUES DERRIDA, OF GRAMMATOLOGY 277 (Gayatri Spivak trans., The John Hopkins University Press 1976) (1967) (citations omitted).

86. Deborah Ahrens, *Not in Front of the Children: Prohibition of Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737, 738 n.2 (2000).

87. One postmodern scholar describes the interconnectedness of the self and the other in this way: "The included and the excluded, the same and its other, are revealed as dependent on one another within the larger dynamics of the constitution of identities within a social whole that privileges some identities over others." McGOWAN, *supra* note 84, at 121. Elsewhere, McGowan remarks on Foucault's refusal to erect a new totality of otherness, a structure based on the opposition of the other to the self. In this way, Foucault goes beyond structuralism. McGowan states, "Foucault . . . points us beyond the binary opposition of the same and its other toward the larger economy of the discursive and social practices that create and enforce the distinctions of (and hierarchies that stem from) the binary opposition." *Id.*

88. The self "is known as self only by its distinction from the other, which as other is unknown." THOMAS McEVILLEY, ART AND OTHERNESS: CRISIS IN CULTURAL IDENTITY 148 (1992).

> [t]he self is created by its *apprehension* of an other. The other is created by its *distinction* from a self. They create each other and sustain each other's existence. Each makes the other what it is.[89]

In political terms, postmodernists see the other as existing on the margins of society, excluded from positions of power, and placed in a subordinate position.[90] The center is an invariable "presence," in Derrida's terms, and a point of reference or authority from which norms are established. Although the other, in the postmodern conception, retains agency and the ability to impact the shape of society.[91] The other is "other" because it is viewed by the self as a field in which the self's agency can work. The other is the servant to authority, and it is to be dominated and controlled.

B. Feminism and the Other

Feminist scholars have produced a separate, although similar, treatment of otherness than that of the postmodernists. The feminist conception of the other may be traced to the mid-twentieth century writings of Simone de Beauvoir. De Beauvoir observed that men were represented as the norm in virtually every aspect of Western society.[92] Women, if they were considered at all, were described only in comparison to males. That is to say, women were viewed as deficient in the qualities that men had in the abundance. "He," de Beauvoir wrote, "is the universal, he is the absolute. She is the other."[93] As others, women were subjugated by men and excluded from the center. Men accomplished this exclusion, and indeed justified it, through the claim that women were mysterious and unknowable.[94] As mysteries, women were the opposite of rationality and, thus, were others. Women were also others because of their biological characteristics and their social role as mothers and nurturers.

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89. *Id.* at 147.

90. *See* Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 190 (1996) (describing focus on the other as a "political act" which "uncovers the hidden, the oppressed, the violated, the denied").

91. For postmodernists, the center is not all powerful, nor is the margin without power. The postmodern conception of power is fluid and relational, rather than linear and hierarchical. Thus, "power is not simply the imposition of one party's will over another; it is not simply domination. Instead, [postmodern] scholars see power relations as constituted simultaneously by both domination and resistance, with power frequently shifting as parties contest the terms of the relationship." Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 440 (2000).

92. SIMONE DE BEAUVOIR, THE SECOND SEX xix-xx (H.N. Parshley trans., 1993) (1952).

93. *Id.* at xvi.

94. *Id.* at 257.

De Beauvoir viewed the women's state of otherness as a deficiency to be overcome.[95] She believed that women should embrace the standards of the male center to become full human beings. According to de Beauvoir, "if a woman seems to be the inessential which never becomes the essential, it is because she fails to bring about the change."[96] For de Beauvoir, the assertion that there were essential differences between men and women was based on an illusion.

Other feminist thinkers rejected the notion that women should strive to become more like men.[97] Rather than seek to erase differences, these feminists embrace otherness. Luce Irigaray, a psychoanalyst, argues that women speak from a unique subject position and develop a distinct consciousness and awareness. Irigaray has found meaningful differences in men's and women's approaches to each other and to the world. Specifically, she states that "women privilege relationships between subjects while men give priority to relations to the object."[98] Irigaray urges women not to retreat from their otherness, but to use it as a foundation for a new paradigm for social relationships that would not produce the same anti-human effects that are caused by the dominant patriarchy. Irigaray advocates the creation of a new set of "intersubjective relations between the genders" that reflects a "just and communicative microsociety."[99]

Carol Gilligan also traces women's otherness to fundamental differences in psychology. She argues that women are more caring, nurturing, and creative in their relationships, while men are more individualistic, violent, and logic-centered.[100] For women to create a meaningful self, Gilligan believes that they should adhere to an "ethic of care" grounded in the nurturing female subject and modeled after the mother's role.[101] Women's different values enable them to speak

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95. *Id.* at xix.

96. *Id.*

97. *See* Kathleen Mahoney, *Theoretical Perspectives on Women's Human Rights and Strategies for their Implementation*, 21 BROOK. J. INT'L. L. 799, 826 (1996).

98. Linda G. Mills, *Feminist Phallacies: The Politics of Prenatal Drug Exposure and the Power of Law*, 25 LAW & SOC. INQUIRY 1215, 1222 (2000) (citing LUCE IRIGARAY, I LOVE TO YOU: SKETCH OF A POSSIBLE FELICITY IN HISTORY 130 (1996)).

99. Mills, *supra* note 98, at 1222.

100. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE 21-23 (1982).

101. *Id.* at 98. Although the ethic of care is a moral perspective that some feminists consciously embrace, Gilligan does not claim that it is a form of moral reasoning that is unique to women and not accessible to men. *See id.* at 2. *See also* Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 978 (1999) (stating "Gilligan premised her analysis with the proviso that the gendered associations were not absolute and that the contrasts were presented to demonstrate the distinctions between two modes of thought rather than to represent generalizations about either sex").

in a "different voice" and contribute something to Western political and moral discourse that would otherwise be lost.[102]

C.   Otherness in Postcolonial Studies

The other is also addressed within the genre of literary and theoretical criticism that is known as postcolonial studies.[103] Postcolonial studies confront the other within the borders of a number of dichotomies, including colonial/postcolonial, metropole/colony, white/colored, and civilized/savage.[104] Postcolonial studies arguably originated in the anticolonialist writings of Frantz Fanon.[105] In *Black Skins, White Masks*, Fanon asserted that "Negroes" were the other of the white man.[106] That is to say, people of color were not viewed as real human beings. They had no thoughts, no joys, and no historical presence.[107] This reality, originally imposed by white invaders, was internalized by the colonized, so much so that the colonized suffered from an inferiority complex. According to Fanon,

> [e]very colonized people—in other words, every people in whose soul an inferiority complex has been created by the death and burial of its local cultural originality—finds itself face to face with the language of the civilizing nation; that is with the culture of the mother country. The colonized is elevated above his jungle status in pro-

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102. Gilligan's thesis has generated significant controversy, both within feminist scholarship and within developmental psychology. For a concise treatment of Gilligan's conclusions and the objections to them, see generally Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L. J. 2665 (1993).

103. Postcolonial studies or postcolonial theory is a school of cultural interpretation and critique that has developed with in the last twenty years, chiefly as a result of the work of Edward Said, Homi Bhabha, and Gayatri Spivak. *See* LEELA GANDHI, POSTCOLONIAL THEORY: A CRITICAL INTRODUCTION 64-81 (1998). For background and analysis of postcolonial studies, see generally, *id.*; A COMPANION TO POSTCOLONIAL STUDIES (Henry Schwarz & Sangeeta Ray eds., 2000); LAWS OF THE POSTCOLONIAL (Darrien Smith & Peter Fitzpatrick eds., 1999); THE POSTCOLONIAL STUDIES READER (Bill Ashcroft *et. al.* eds., 1995); COLONIAL DISCOURSE AND POSTCOLONIAL THEORY: A READER (Patrick Williams & Laura Chrisman eds., 1994); and COLONIAL DISCOURSE/POSTCOLONIAL THEORY (Peter Hulme *et. al.* eds., 1994).

104. GANDHI, *supra* note 103, at 32.

105. *See* FRANTZ FANON, A DYING COLONIALISM (1965); FRANTZ FANON, BLACK SKIN, WHITE MASKS (1967); FRANTZ FANON, THE WRETCHED OF THE EARTH (1963); FRANTZ FANON, TOWARD THE AFRICAN REVOLUTION (1967).

106. FANON, BLACK SKINS, WHITE MASKS, *supra* note 105, at 17, 188-89 (describing the Black man as the representation of evil in the white mind).

107. Fanon cogently describes the privileging function of this otherness:
    I meet a Russian or German who speaks French badly. With gestures I try to give him the information that he requests, but at the same time I can hardly forget that he has a language of his own, a country, and that perhaps he is a lawyer or an engineer there. In any case, he is foreign to my group, and his standards must be different.
       When it comes to the case of the Negro, nothing of the kind. He has no culture, no civilization, no "long historical past."
    Id. at 34.

portion to his adoption of the mother country's cultural standards. He becomes whiter as he renounces his blackness, his jungle.[108]

Following Fanon, Edward Said's classic work, *Orientalism*, was the catalyst for the establishment of postcolonial studies as a discipline.[109] Said analyzed the construction of the Orient in the colonial and imperialist discourse of the West. This social construction is what Said referred to as "Orientalism," a type of otherness "based upon an ontological and epistemological distinction made between 'the Orient' and . . . 'the Occident.'"[110] According to Said, Orientalism possesses four main characteristics, or dogmas: (1) "the absolute and systematic difference between the West, which is rational, developed, humane, superior, and the Orient, which is aberrant, undeveloped, inferior";[111] (2) "abstractions about the Orient . . . are always preferable to direct evidence";[112] (3) "the Orient is eternal, uniform, and incapable of defining itself";[113] and (4) "the Orient is . . . something either to be feared . . . or to be controlled."[114] The othering process that Said describes may be extended to other binary relationships between the West and colonized, or formerly colonized, people, and his method has been adopted as a centerpiece of postcolonial theory.[115]

D. The Other in African-Centered Scholarship

African-centered scholars use their own concept of otherness to depict the reality of the African condition worldwide.[116] Otherness figures prominently in African-centered scholarship as an heuristic device to explain the cultural and political subjugation of African people.[117] Cheikh Anta Diop, the Senagalese intellectual and one of the most important African-centered scholars, argued that Europeans and Africans possessed distinctive cultural personalities.[118] While Afri-

108. *Id.* at 18.
109. GANDHI, *supra* note 103, at 64.
110. EDWARD W. SAID, ORIENTALISM 2 (1978).
111. *Id.* at 300.
112. *Id.*
113. *Id.* at 300-01.
114. *Id.* at 301.
115. GANDHI, *supra* note 103, at 64-65.
116. I identify African-centered scholars and describe their work in Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323, 328 n.18 (1997).
117. For an overview of African-centered scholarship and its treatment of the concept of otherness, see *id.* at 329-338.
118. This was Diop's "two cradle" theory. *See* CHEIKH ANTA DIOP, THE CULTURAL UNITY OF BLACK AFRICA: THE DOMAINS OF PATRIARCHY AND MATRIARCHY IN CLASSICAL ANTIQUITY 28 (English trans., 1963, reprinted 1978) [hereinafter DIOP, CULTURAL]; CHEIKH ANTA DIOP, CIVILIZATION OR BARBARISM: AN AUTHENTIC ANTHROPOLOGY 112-13 (Yaa-Lengi Meema Ngemi trans., 1991) [hereinafter DIOP, CIVILIZATION OR BARBARISM].

cans were generally oriented to communalism and xenophilia,
Europeans were generally predisposed to individualism and xenopho-
bia.[119] The cultural personality of Europeans, according to Diop, led
to the development of totalitarian states, misogyny, conquest, and
war.[120] African-centered scholars believe that European cultures en-
gender a particular psychology in those who live in those societies,
which produces "insecurity . . . an incessant need to control, dominate,
or *be better than* others."[121] This psychology, which Linda James Mey-
ers refers to as "sub-optimal," is an outgrowth of the materialistic fo-
cus of Western culture.[122] According to Meyers, the creation of others
has less to do with the essential or perceived characteristics of the
other, and more to do with underlying cultural dynamics:

> Although two external criteria automatically make one "better" in
> this system, white skin color and male sex characteristics, as long as
> the conceptual system is intact, if it were not these particular exter-
> nalisms, others would be found. The system by its nature inherently
> leads to some form of societal "ism," or hierarchical valuing of the
> material.[123]

Marimba Ani has produced a sophisticated and detailed African-
centered analysis of the process of othering in European civiliza-
tion.[124] Ani argues that the othering process derives from the reason-
ing style that is embedded in European culture.[125] European cultures
employ a dichotomous reasoning style that divides objects into oppos-
ing parts in order to perceive them.[126] According to Ani, this dichoto-
mous epistemology "begins with the separation of the self from
'other,' and is followed by the separation of self into various dichoto-

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119. DIOP, *supra* note 118, at 28-33, 144-46.

120. *Id.* at 139, 148, 195.

121. LINDA JAMES MYERS, UNDERSTANDING AN AFROCENTRIC WORLD VIEW: AN INTRO-
DUCTION TO AN OPTIMAL PSYCHOLOGY 10 (1988).

122. *Id.*

123. *Id.* Meyers explains that the psychological dependence on material things is the conse-
quence of a cultural process:

> Starting with the basic ontological assumption that the nature of reality is principally
> material, we are set up for a world view in which the resources necessary for survival
> exist in only a finite and limited amount (the pie is only so big). The process of life is
> portrayed such that we must compete for the limited resources (aggress) to survive.
> Highest value is placed on their acquisition. If we accept the materialist perspective,
> even our worth as human beings becomes fragile and and diminished, for it teaches that
> one's worth is equal to what one owns, how one looks, the kind of car, house, education
> one has, and so on.

Id.

124. *See* MARIMBA ANI, YURUGU: AN AFRICAN-CENTERED CRITIQUE OF EUROPEAN CUL-
TURAL THOUGHT AND BEHAVIOR 29-108, 279-310 (1994).

125. *Id.* at 104-08.

126. *Id.* at 33.

mies (reason/emotion, mind/body, intellect/nature)."[127] Within the Eurocentric mindset, "[t]he original splitting and separating mental process assigns qualitatively different (unequal) value to the opposing realities of the dichotomies."[128] Ani views this conceptual process as culturally distinct with an emphasis on opposition. In her words,

> First the dichotomy is presented, then the process of valuation occurs in which one term is valued and the other is devalued . . . . [U]nlike the Eastern (Zen) conception of the Yin and the Yang or the African principle of "twinness". . . these contrasting terms are not conceived as complementary and necessary parts of a whole. They are, instead, conflicting and "threatening" to one another.[129]

The Eurocentric mindset that Ani describes is pivotal in the establishment of relationships based on domination and power, "for it is this dichotomized perception of reality on which the controlling presence (imperialistic behavior) depends."[130]

E. Synthesis

The other owes its existence to a quirk of European culture: Eurocentric, or Western, epistemology structures all knowledge into oppositional categories, such as reason/emotion, mind/body, intellect/ nature, and white/black. These categories, as Ani, Derrida, and others have emphasized, are arranged hierarchically so that one pole of the dichotomy is "better" than its opposite. The other, then, is constructed from the lesser pair of the hierarchical categories that are perceived in Western industrialized cultures. There are many additional features of otherness that are analyzed to differing degrees within different intellectual traditions. However, the features of otherness that are most important to my analysis and deserve emphasis here are the following: (1) the other is a means of defining the self; (2) the other is an abstraction; (3) the other cannot define itself; and (4) the other is to be feared and controlled.

1. The Other Defines the Self

We must emphasize that the other is a means of conceptualizing the Western self and that the dichotomies the othering process creates are, thus, necessary and essential. The other, through opposition, defines the self and makes knowledge of the self possible. In political terms, the other makes the constitution of community possible and,

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127. *Id.* at 105.

128. *Id.* at 106.

129. *Id.* at 33.

130. ANI, *supra* note 124, at 33.

indeed, makes the solidarity of the dominant racial group a reality. As Crenshaw writes,

> Racism does not support the dominant order simply because all whites want to maintain their privilege at the expense of Blacks, or because Blacks sometime serve as convenient political scapegoats . . . . The establishment of an "other" creates a bond, a burgeoning common identity of all non-stigmatized parties—whose identity and interests are defined in opposition to the "other."[131]

2. The Other Is an Abstraction

Abstractions are the preferred form of knowledge of the other. Those who conceive of the other have no interest in obtaining concrete knowledge about the other. The other is a social construction that is necessary to serve the political function of organizing society. Accurate information about the other is not necessary to serve this political function. The "reality" of the other, to the extent it exists, lies within the self and not within any external experiential world.

3. The Other Cannot Define Itself

The other, as a social construct, does change, but it changes at the behest of the self. When the self changes, the other changes. The other is an object acted on by the center/self. It is fixed vis-a-vis the self. The other cannot define itself. It is defined by the self. This is what makes the act of self-definition by outsider communities so destabilizing to the existing order. Those who exist in the subordinate position of the hierarchy cannot name and define for themselves without usurping the power of the dominant and ripping the hierarchical structure of self and other apart.

4. The Other Is To Be Feared and Controlled

As a manifestation of difference, the other is perceived as a threat. As a threat, the other must be controlled. The establishment of an elaborate structure of control then becomes a necessity. It is necessary because the very concept of otherness symbolically demands it, even if the individual or group marked as other poses no real threat at all.

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131. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1372 (1988).

IV. The Child as Other

The vast majority of the children in the juvenile justice system—those that are Black or Brown—may be treated as others in two ways. They may be othered as a result of their status as children, and they may be othered because they are not white. Otherness derived from both binaries contributes to the functioning of the juvenile justice system and contributes to the increased harshness of that system.

A. The Adult-Other Binary

Children are other than adult, and by their construction, they also produce the meaning of adulthood. Children are small, weak, immature, trusting, playful, and physically undeveloped, while adults are big, strong, mature, skeptical, serious, and physically developed. Because children differ from adults, they are treated differently. How they are treated, however, turns on how their otherness is constructed. The child as other has two aspects, one positive and one negative. In the positive conception of children's otherness, children are valued. In the negative, they are not. Both negative and positive interpretations of the child as other exhibit the typical features of otherness. As others, children define the adult self, are abstractions, cannot define themselves, and are controlled.

1. The Positive Conception of the Child as Other

In the positive expression of children's otherness, children are treated as inchoate adults, as beings with great potential that should be nurtured and developed.[132] Children are represented as sweet, kind, vulnerable, and, at least in theory, as special objects of attention, love, and care.[133] They are valued for what they are, as well as for what they can become. Children are to be protected from potential harm and from negative influences on their emotional, moral, and physical development.

As children are represented with these positive qualities, they are represented as having qualities that adults do not have, qualities that are transient and ephemeral; indeed, that is one reason why children are viewed as special. In this way, children construct the meaning of adulthood. If children are trusting, loving, malleable, and dependent, then adults ought not retain these qualities. Clearly, these positive

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132. *See* Janet L. Dolgin, *The Age of Autonomy: Legal Reconceptualizations of Childhood*, 18 QRL 421 (1999) (describing children as "innocent, fragile, and precious").

133. Vivana Zelizer describes this vision of childhood as one which constructs as "economically 'worthless' but emotionally 'priceless' child." Zelizer, *supra* note 4, at 3 (1985).

qualities of childhood are socially constructed.[134] Not all children are trusting and loving. The view of children and the perceived qualities that children are thought to exhibit change over time.[135] These qualities do not change in response to quantitative research about children's lives and thoughts. Rather, the view of children changes as adult perceptions, attitudes, and consciousness change. That is, children are abstracted by adults in response to adult needs.[136]

Children cannot define themselves. Even within the positive interpretation of children's otherness, children cannot determine what it is to be a child, what qualities children must have, and what qualities children should not have. Indeed, the inability of children to define themselves or their reality is one of the things that make them children in the eyes of adults. This aspect of the treatment of children is captured in the old saying, "children are to be seen and not heard." Rarely in this society are children, even children who are loved and valued, heard.[137] Children are not allowed to vote and are not otherwise allowed representation on political issues that are of the greatest importance to them.[138] In the case of children who are part of the positive construction of childhood, this voicelessness is understood as necessary for the child's own good. It is intended to protect the child from the compromises and influences of politics and to prevent the child from making decisions that may compromise the child's best interests, as those interests are understood by adults.[139]

Although fear of the child is less important, control is an important feature of the positive interpretation of children's otherness. A child's lack of control and an adult's insistence on control is an expected part of the representation of childhood.[140] Again, this insistence on con-

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134. *Id.*

135. *Id.* Michael Grossberg details the way that courts have participated in the construction of attitudes toward children and chlidhood and how these have changed over the years. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1995).

136. Several commentators have noted that the concept of childhood appears to be undergoing change as the contemporary needs of adults are changing. *See, e.g.,* Dolgin, *supra* note 132, at 429-431; Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship,* 61 ALB. L. REV. 345, 352-370 (1997); NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD 99 (1982).

137. *See* Wendy Anton Fitzgerald, *Maturity, Difference and Mystery: Children's Perspectives and the Law,* 36 ARIZ. L. REV. 11, 84 (1994) (noting "the systematic exclusion of children from legal personhood").

138. *See id.* (claiming law "fails to serve children's tangible interests in those issues of most concern to most children, poverty and custody").

139. *Id.* at 89.

140. In *Belloti v. Baird,* 443 U.S. 622 (1979), for example, the Supreme Court justified extending less constitutional rights to children than to adults due in part to "the importance of the

DEPAUL LAW REVIEW   [Vol. 51:679

trolling the child is justified as necessary to protect the child and as a circumstance demanded by what is in the child's best interests.[141] But because children do not think like adults, behave like adults, nor value the same things as adults, children are also feared as potential agents of change. The possibility always exists that the next generation will not uphold and reproduce the institutions that adults have established. Thus, children are feared and controlled until they have been properly socialized and no longer represent a threat to adult institutions.[142]

2. The Negative Conception of the Child as Other

The positive conception of childhood is not the only way that children's otherness may be articulated. In addition to the positive conception of the child as other, which values children, there exists a negative conception that views children as a threat or burden.[143] The negative perspective of children's otherness sees children as a drain on scarce resources.[144] They are a drain because they are dependent, inexperienced, and needy. Children require attention, love, training, and material support, and although these needs may be considered as necessary investments in the negative interpretation of children's oth-

parental role in child rearing." *Id.* at 634. Thus, the court in *Bellotti* required minors seeking abortions without parental consent to first obtain court approval. *Id.* at 643. This primacy of parental authority may be a legacy of the traditional view in European cultures that children were the property of the parents, who could literally exercise the power of life and death over them. *See* Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON POVERTY LAW & POL'Y 313, 313-314 (1998).

141. *See* Bellotti v. Baird, 443 U.S. at 634 (asserting the "peculiar vulnerability" of children as reason to require judicial approval to waive parental consent to minor's abotion).

142. The potential danger posed to existing institutions by children is one reason children must remain under the tutelage of parental figures. The *Bellotti* court held parents had a "high duty" to prepare their children for their obligations as members of society, including "the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Id.* at 637-38. A similar concern motivates the establishment of public educational institutions. Indeed, "[f]or Horace Mann, the primary force behind the common school movement, schooling for the young was necessary to preserve republican institutions and create political community." Rosemary Salome, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 173-174 (1996).

143. Rochelle Jackson points out that "[p]rior to the 16th century, children were viewed as an added burden" and the "[r]eported cases of mass infanticide were not uncommon." Rochelle D. Jackson, *The War Over Children's Rights: And Justice for All? Equalizing the Rights of Children*, 5 BUFF. HUM. RTS. L. REV. 223, 226 (1999). *See also* Barbara A. Kellum, *Infanticide in England in the Later Middle Ages*, 1 HISTORY OF CHILDHOOD QTRLY. 367, 378 (1974) (showing the prevalence of infanticide in 14th and 15th century England and concluding that "the feeling that the death of an infant or a child is something less than a homicide," was characteristic of the times). Jackson reports that as late as the 19th century, children were viewed as the embodiment of evil, and "were often mistreated and abused as a result." Jackson, *supra*, at 227.

144. *See* Katharine B. Silbaugh, *Accounting for Family Change*, 89 GEO. L.J. 923, 968 (2001) (pointing out some think of children as a drain on environmental resources and an impediment to career advancement).

erness, they are simply seen as costs.[145] In addition, the negative otherness of children poses a threat. Children need to be controlled and, in the negative view of children's otherness, the child as other is uncontrollable.

The negative otherness of children also shapes the adult self, perhaps even more so than the positive interpretation of otherness. While adults may exhibit some positive traits of children, such as kindness and trust, the distinction between adults and the negative child as other is much more stark. One becomes an adult to the extent that one jettisons the negative attributes of childhood, such as lacking independence and being unable to take care of oneself.[146] Children's lower degree of intellectual development figures largely in the distinctions made between children and adults.[147] Children, unlike adults, are not able to think for themselves. Because they are not yet fully developed intellectually, children do not think in the linear, rational way that adults do, which is privileged in Western cultures.[148] Consequently, children are not trusted with important decisions.

The result of the negative otherness of children is that children are despised. Although the claim that children are valued is frequently heard, there are also indications of a "pervasive and profound prejudice against children that strongly suggests wholesale devaluation."[149] One commentator has argued that, given the treatment we afford our children, "it is not hard to conclude that our society hates kids."[150] The negative treatment that children receive is significantly connected to the perception of their otherness. All children are others, but when children are the offspring of other people then their otherness intensifies exponentially. As Professor Pamela Smith states,

> Given our nations treatment of its children, it is difficult to argue persuasively that we value children. Not "our" own children, of course, because most of us purport to value our own children. But,

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145. *See* Fitzgerald, *supra* note 137, at 92, 94 (describing children as "physically weak, economically dependent, uneducated and inexperienced" and claiming that "adult society does not really like children" because children "impede the pursuit of audlt work and play.").

146. *Id.* at 96 (arguing that "children differ from the legal model of personhood because they are dependent on others for support").

147. *Id.* at 92 (describing children as "innocent and naive, if not foolish and short sighted").

148. *See* Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323, 336-337, 367 (1997) (describing European culture and worldview as producing and privileging certain cultural constructs, including extreme rationalism, excessive abstraction, and doctrinal and analytic thought).

149. Pamela J. Smith, *Reliance on the Kindness of Strangers: The Myth of Transracial Affinity Versus the Realities of Transracial Educational Pedism*, 52 RUTGERS L. REV. 1, 8 (1999). Professor Smith refers to the profound prejudice against children as "pedism." *Id.* at 6.

150. David Nyhan, *The Measure of our Respect for Children: Schools*, Boston *Globe*, Aug. 24, 1997, at D4, *cited in* Smith, *supra* note 149 at 8, n.13.

we do not value children in the collective sense, especially other
people's children. As we move away from our personal children,
pedism increases.[151]

Children's otherness becomes negative when they are other peoples'
children. Then behavior and characteristics that would otherwise be
attractive and "cute" become frightening and threatening.[152] Re-
sources that would be readily expended as an investment in the future
are taken off the table when the beneficiaries are other people's chil-
dren.[153] Assisting other people's children, in the dominant view,
means helping to create potential competitors for your own chil-
dren.[154] Thus, when it comes to the treatment of children in this soci-
ety, there is a link between the otherness of childhood and the
otherness of race.

B.   The White-Black Binary

In the United States, with its long history of racist oppression and
color-based social hierarchy, "race presents the most serious otherness
problem."[155] The elements of otherness associated with African peo-
ple may be gleaned from the content of well-known racial stereo-
types.[156] The components of these stereotypes were developed within
a metaphysical and epistemological framework that constructed Afri-
cans as the opposing but inferior counterpart to the dominant
whites.[157] While whites "became associated with normatively positive

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151. *Id.* at 7-8.

152. *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 93 (1997) (arguing people exhibit hostility toward "other peoples' children" because "they regard [them] as a threat to themselves and their own children").

153. In a chapter entitled "Other People's Children" in his book on the American public education system, Jonathan Kozol makes the point that most Americans do not support govern-mental expenditures for the education of other people's children, even when that means that a range of social problems that could be avoided through proper education persist. *See* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 40-82 (1991).

154. *See* Feld, *supra* note 152, at 93.

155. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 707 (1989).

156. The content of this stereotype is detailed in a wide range of scholarship, but is, at least to persons familiar with American culture, virtually common knowledge. *See generally*, THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA (1997) (1963); GEORGE FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND 1817-1914 (1971); WINTHROP JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812 (1968); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1958); ST. CLAIR DRAKE, 1 BLACK FOLK HERE AND THERE 28-30 (1987); JONATHAN KOVEL, WHITE RACISM: A PSYCHOHISTORY 51-92 (1970).

157. *See supra* notes 80-86 and 116-130 and accompanying text.

characteristics; Blacks became associated with the subordinate, even aberrational characteristics."[158]

Consequently, Africans became defined as shiftless, lazy, unintelligent, savage, childlike, immoral, oversexed, docile, superstitious, and emotional.[159] While this classic stereotype has changed over time, its basic parameters remain intact.[160] The Black stereotype as other set the definition for whiteness. Whites were conceived as what Blacks were not. In contrast to Africans, Europeans were defined as responsible, industrious, intelligent, civilized, mature, moral, reserved, active, rational, and intellectual.[161] The existence of the Black stereotype and the designation of Blacks as other constructed "whiteness"[162] and allowed succeeding generations of immigrants to the United States to be designated first as "whites"[163] and later as "honorary whites."[164]

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158. Crenshaw, *supra* note 131, at 1373-74.

159. *See id.* at 1373.

160. A recent poll conducted by the National Opinion Research Center at the University of Chicago showed that 53.2% of white Americans polled viewed Blacks as less intelligent, 62.2% of white Americans viewed Blacks as less hard working, and 77.7 % of white Americans participating in the survey stated they believe African Americans preferred welfare over employment. *See* David K. Shipler, *Seeing through Camouflaged Racism*, WASH. POST, Oct. 15, 1997, at A21 (citing 1996 NORC survey). *See also* Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 602-609 (2000) (reviewing literature and reporting several empirical studies showing evidence of contemporary racial prejudice against Blacks); A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 155 (Gerald Jaynes & Robin Williams, Jr. eds., 1989) (finding evidence of widespread bias against African Americans in review of contemporary opinion research).

161. Crenshaw, *supra* note 131, at 1373.

162. *See* THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE 13 (1997); RICHARD DYER, WHITE (1997).

163. Harvard historian, Orlando Patterson describes how the idea of race prevented solidarity between oppressed classes of European Americans and their African American and Native American counterparts, affecting later immigrant groups in the same manner. According to Patterson,

> [the idea of race incorporated] many immigrants of Europe who originally had nothing in common with each another. An Irish potato farmer fleeing the famine, a German metal worker, a Swedish peasant and an Italian working-class person, not to mention a Sicilian, had absolutely nothing in common. But them they came to America and they discovered this thing, this incredible construction, which was "whiteness," a race, a new inclusive identity. This whiteness was of course an enormously valuable social asset, and they eagerly embraced it. This positional good of whiteness, however, required the presence of African Americans—the slave or ex-slave, the domesticated enemy, the outsider within who gave meaning to "we the white people, we the true citizens."

Orlando Patterson, *Interview with Orlando Patterson, Professor of Sociology at Harvard University*, 4 GEO. PUB. POL'Y REV. 107, 110 (1999). *See also* NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995); MATTHEW JACOBSON, WHITENESS OF A DIFFERENT CODE: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 7-8 (1998).

164. *See* Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L. J. 225, 249 (1995) (discussing "honorary white" status of Asians); George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LA-

African kids are the bearers of a dual otherness. They are others both due to their Africanness and their status as dependent, wild, and uncontrollable youth. As children of the other, they gain none of the positive benefits of childhood. They are viewed as threats, burdens, and competitors to deserving children. As children, they gain no protection from the ravages of racist oppression. They still carry the stigma associated with Blackness in American culture. As Pamela Smith surmises,

> Age or the vulnerability of youth does not shield Black children from the reach of racism. Instead, Black children are just as much the victims of racism's long-reaching effects as are adults. Indeed, racism touches nearly every aspect of the child's life through discrimination, poverty, unemployment, economics, education, and the breakdown of the Black family structure.[165]

V. OTHERNESS IN THE JUVENILE JUSTICE SYSTEM

Otherness manifests itself in the juvenile justice system both in the way that youth are treated within the system and in the way the system itself is viewed within the broader society. Perceived as others, African American youth receive harsher treatment from actors within the juvenile justice system. In addition, the way that African American youth are represented in the broader society has fueled a drive to make the juvenile justice system tougher, harder, and more punitive. This transformation of the juvenile courts has led to the observation that we have somehow reached the "end of adolescence." In the remaining sections of this Article, I will explore how otherness affects micro-level discretionary decisions made by actors in the juvenile justice system and macro-level policy decisions made concerning the overall structure and purposes of the juvenile justice system.

A. *Otherness and the Exercise of Discretion*

Motivated by a fear of the other, the juvenile justice system has always targeted other people's children. In fact, the system of juvenile justice was first developed as a measure designed to address the threat posed by poor children to propertied interests in newly urbanized American cities.[166] Confronted by lower-class children who stole from the middle and upper classes, progressive reformers developed "houses of refuge" to "rescue such children from their inferior [social]

TINO L. REV. 321, 322 (1997) (discussing classification of Mexican citizens as "white" for immigration purposes).

165. Smith, *supra* note 149, at 98.

166. THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 48 (1992).

settings and from potential pauperism by altering their 'weak moral natures.'"[167] According to some historians, juvenile courts were little more than "expansive [social service] agencies of coercive social control that used their discretionary powers primarily to impose sanctions on poor and immigrant children."[168]

The new juvenile courts meted out discriminatory sentences from their inception, "ordering more lenient treatment to children like the judges' own and sending 'foreign' or 'alien' youth to institutions."[169] This tradition of differential treatment on the basis of race and class continues today. According to Schlossman and Wallach, "from the early nineteenth century to the present, the juvenile justice system has systematically singled out lower-class children for punishment and ignored middle and upper-class youth."[170] One young scholar has argued that the current "overrepresentation of minority, particularly [B]lack, youth in the juvenile courts and the disproportionate confinement of minority youth in juvenile facilities may arguably be an extension of this process."[171] While the juvenile justice system may have embraced more enlightened policies for European immigrants as they became integrated into American life, these policies were not extended to African Americans as they replaced white ethnic groups as the urban poor.[172] Instead, "African American youth, particularly males living in poor urban areas, remain 'the ultimate out-group.'"[173]

Otherness would directly impact the racial disparities in the juvenile justice system if the social constructed perceptions of African American youth were shown to influence judicial outcomes in individual cases. The large degree of discretion granted to juvenile court officials, under the guise of *parens patriae*, provides plenty of latitude for discriminatory conduct to occur.[174] The construction of African American males as others, and the attending stereotypes that this en-

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167. Sacha M. Coupet, *What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System,* 148 U. PA. L. REV. 1303, 1338 (2000).

168. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 56 (1999).

169. Coupet, *supra* note 167, at 1339.

170. Steven Schlossman & Stephanie Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era,* 48 HARV. ED. REV. 65, 66 (1978).

171. Coupet, *supra* note 167, at 1339.

172. *Id.*

173. *Id.*

174. *See* SAMUEL WALKER, CASSIA SPOHN, & MIRIAM DELONE, THE COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA 167 (2d ed. 2000) (stating researchers have suggested *parens patriae* nature of juvenile justice system creates greater potential for racial discrimination against juveniles than against adults).

tails, may, and indeed should, cause juvenile court actors to replicate the same bipolar classifications in their decisions by privileging whites and disadvantaging Blacks. This othering of African American males would not occur because it was inevitable or necessarily intentional, but because the inferiority or deficiency (or in this case, delinquency) of the African American would appear natural and unremarkable. Barry Feld notes that "quite apart from overt discrimination, juvenile justice personnel may perceive [B]lack youth as more threatening or likely to reoffend [sic] than white youth and may process them differently."[175]

Other researchers have concluded that mechanisms similar to the othering process are at work in the juvenile justice system. Secret and Johnson, after reviewing juvenile court sentencing in Nebraska, suggested that judges "may use extra legal characteristics like race to create 'a mental map of the accused person's underlying character' and to predict his/her future behavior."[176] To date, however, there have been few attempts to empirically verify whether differential treatment is linked to racial stereotypes or racially prejudiced attitudes on the part of judges or other actors within the juvenile justice system.[177]

One empirically-based study entailed reviewing discretionary judgements of Washington state probation officers during 1990 and 1991. The researchers, George Bridges and Sara Steen, analyzed narrative reports of juvenile probation officers in 233 cases. Bridges and Steen found that the narratives painted widely divergent pictures of African American youth and white youth. Controlling for the juvenile's age, gender, prior criminal history, and seriousness of offense, the researchers found that the attitudes probation officers held toward juvenile offenders were significantly influenced by the race of the offender. According to Bridges and Steen,

> probation officers described black and white youth and their crimes differently. They tended to attribute crimes committed by whites to negative environmental factors (poor school performance, delinquent peers, dysfunctional family, use of drugs or alcohol) but to attribute crimes committed by African Americans to negative personality traits and "bad attitudes" (refusal to admit guilt, lack of remorse, failure to take offense seriously, lack of cooperation with court officials).[178]

Bridges and Steen concluded that the different perceptions that juvenile probation officers had of African American and European Amer-

175. FELD, *supra* note 168, at 265.
176. WALKER, ET AL., *supra* note 174, at 173 (citation omitted).
177. *Id.* at 173-74.
178. *Id.* at 174.

ican youth indirectly influenced juvenile court outcomes by shaping predictions of dangerousness and assessments of the need for juvenile court intervention.[179]

James Bell explains how assumptions about African American youth can result in their disproportionate arrest, detention, and incarceration in the juvenile justice system:

> [T]here are assumptions about youth of color that contribute to their overrepresentation in the system. These beliefs hold that minority youth are prone to violence and criminal activity, they are not in school or working, and worst of all they expect to be incarcerated and therefore are not uncomfortable with being securely confined. Such assumptions reflect an expectation of failure that in turn is internalized by the young people who do in fact fail.[180]

The social history of the juvenile court system challenges the notion that recent changes in the assumptions and practices of the juvenile justice system announce the end of adolescence. Rather, these changes may simply illustrate the juvenile justice system's adjustment to focus on children who were never privileged enough to be perceived as adolescents in the first place. Other people's children, African American children in particular, were always treated as dangerous and threatening to the prevailing social order.

B. Otherness and the Transformation of the Juvenile Court

Within the last decade, a majority of states have moved to change their juvenile justice policies.[181] By and large, these changes have shifted the focus of juvenile courts from the rehabilitation of youthful offenders to securing retribution and imposing punishment.[182] Legislators have sought to make juvenile justice systems tougher by limiting the jurisdiction of juvenile courts and allowing juvenile courts to impose more punitive sanctions on juvenile offenders.[183] Between 1992 and 1995, forty states and the District of Columbia restricted the jurisdiction of the juvenile court by enlarging the category of cases that may be waived or transferred to adult court.[184] During the same period, thirty-one states changed sentencing laws to allow juvenile courts to impose more severe sentences.[185] In particular, legislators have enacted provisions permitting juvenile courts to impose sentences that

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179. *Id.* at 175.
180. Bell, *supra* note 74, at 189.
181. Coupet, *supra* note 167, at 1319.
182. *Id.*
183. *Id.*
184. *Id.* at 1319.
185. *Id.* at 1322.

will hold juvenile offenders beyond the age of majority, eliminating what was seen as a major loophole in the juvenile court's ability to deter older juveniles from committing offenses.[186] Additionally, forty-seven states and the District of Columbia have made juvenile court proceedings more accessible than they were previously, undermining the veil of confidentiality traditionally afforded to juvenile proceedings.[187] Since 1996, eleven states enacted new laws either allowing or requiring courts to notify school authorities of serious juvenile charges.[188]

These changes were motivated by the wide-spread public perception that the juvenile justice system, as it was traditionally organized and operated, was not protecting the public from juvenile crime.[189] The belief that a failing juvenile justice system placed the public at risk persisted, notwithstanding the fact that since 1994 juvenile crime rates have, in fact, declined.[190] This belief that the juvenile justice system was in crisis was only partially based on reality. Although violent juvenile crime remained relatively constant over the previous two decades,[191] it rose rapidly between 1986 and 1994 when it peaked at 1,230,000 reported cases.[192] Concurrent with this spike was a significant increase in juvenile homicides, located mostly in a few urban jurisdictions.[193] Sensationalized media accounts of inner-city violence played against this backdrop of a real and troubling increase in juvenile homicide to create an exaggerated threat to public safety.[194] According to Feld, "[t]he intersection of race, guns, and homicide fanned the public and political 'panic' that, in turn, led to the recent get-tough reformulation of juvenile justice waiver and sentencing policies."[195]

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186. *Id.* at 1322-23.

187. Coupet, *supra* note 167, 1323-24.

188. *Id.* at 1324 n.110.

189. FELD, *supra* note 168, at 208.

190. Statistics reported by the National Center for Juvenile Justice show a 33% drop in violent juvenile crime rates between 1993 and 1997, measured by juvenile arrests for violent index crimes. Howard N. Snyder & Melissa Sickmund, National Ctr. for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* 62 (1999). *See also* PETER J. ELIKANN, SUPER-PREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW 26 (1999) (stating juvenile violent crime "dropped more than 16 percent in 1995, 1996, and 1997").

191. *See* Snyder & Sickmund, *supra* note 190, at 75.

192. *Id.* at 62; FELD, *supra* note 168, at 200-02.

193. Peter Elikann notes that the rise in the juvenile homicide rate was not a national phenomenon and was "very highly concentrated," since a third of the killings took place in just 10 counties and "84 percent of the nation's counties had no juvenile homicides whatsoever." ELIKANN, *supra* note 190, at 26.

194. FELD, *supra* note 168, at 208.

195. *Id.* at 202-03.

Conservative politicians, pundits, policy makers, and the media con-
tributed to the myth that juvenile offenders posed an enormous threat
to the well being and safety of the community. Like all other types of
social control, the juvenile justice system is highly politicized.[196] Play-
ing to the "get tough on crime crowd" helps politicians win elec-
tions.[197] Consequently, there is great pressure to exploit juvenile
crime, and even create a crime wave where none previously existed, in
order to reap the political benefits. Feld describes how politicians and
the media manipulated public fears in order to build support for more
draconian juvenile justice measures:

> Within the past decade, the prevalence of guns in the hands of chil-
> dren, the apparent randomness of gang violence and drive-by shoot-
> ings, the disproportionate racial minority role in homicides, and
> media depictions of callous youth gratuitous violence have inflamed
> public fear. Politicians have exploited those fears, decried a coming
> generation of "superpredator"suffering from "moral poverty," and
> demonized young people in order to muster support for policies
> under which youth can be transferred to criminal court and
> incarcerated.[198]

The transformation of the juvenile justice system became possible
and more urgent through the invocation of otherness. Central to the
development of the myth of a juvenile justice system in crisis was the
concurrent development of the myth of the "superpredator." Accord-
ing to some pundits and criminologists, juvenile crime was fundamen-
tally changed in the 1990s by the arrival of a new kind of juvenile
delinquent whom they called the "superpredator." More so than ordi-
nary juvenile delinquents, the "superpredator" is characterized as im-
moral, remorseless, and violent to the extreme. Former Drug Czar
William Bennett and his coauthors described the "superpredator" in
these lurid terms:

> America is now home to thickening ranks of juvenile "super-
> predators"—radically impulsive, brutally remorseless youngsters,
> including ever more pre teenage boys, who murder, assault, rape,
> rob, burglarize, deal deadly drugs, join gun-toting gangs and create
> serious communal disorders. They do not fear the stigma of arrest,
> the pains of imprisonment, or the pangs of conscience.[199]

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196. *See* Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform,* 32 AM. CRIM. L. REV. 743, 760 (1995) (describing the criminalization of conduct as a political func-tion that determines "who shall wield state power, against whom, and for what purposes").

197. Coupet, supra note 167, at 1332.

198. FELD, *supra* note 168, at 208.

199. JOHN J. DIIULIO, JR., WILLIAM J. BENNETT & JOHN P. WATERS, BODY COUNT 27 (1996).

What is interesting about the myth of the "superpredator" is its reliance on racist imagery and stereotypes. There is little difference between the description of mainly inner city African American youth as "superpredators" and the historic representations of African Americans as violence-prone, criminal, and savage.[200] As Katheryn Russell has astutely observed, "Blacks are the repository for the American fear of crime."[201] When most Americans think of crime they think of a Black face.[202] Many white Americans believe African Americans are the cause of crime, and that when African Americans enter a neighborhood, as residents or visitors, crime will surely follow.[203] Consequently, it is not surprising that some would believe African American youth constituted a class of "superpredators," the control of which necessitated a radical transformation of the juvenile justice system. Indeed, in the minds of many, "superpredator" is simply a code word for young Black males.[204]

This outcome is precisely that which the theories of otherness would predict. Thus, otherness effects not only the perceptions that officials have within the juvenile justice system, it also effects the very structure of the system. Although Barry Feld does not employ the concept of otherness in his analysis, his description of the transformation of the juvenile court succinctly captures the role that the otherness of African Americans played in bringing about harsher juvenile justices policies. According to Feld,

> [t]he recent transformation of the juvenile court provides a graphic illustration of the conversion of public fear of and hostility toward other people's children into harsh and punitive social control practices. The mass media depict and the public perceive the "crime problem" and juvenile courts' clientele primarily as poor, urban [B]lack males. Politicians have manipulated and exploited these racially tinged perceptions for political advantage with demagogic pledges to "get tough" and "crack down" on youth crime, which has become a "code word" for [B]lack males.[205]

VI. CONCLUSION

The transformation of the juvenile courts does not signal the end of innocence. Rather it signals the continuation of historic perceptions

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200. *See* Nunn, *Rights Held Hostage, supra* note 10, at 64 n.10 and accompanying text describing stereotype of the "Black savage".

201. KATHERYN K. RUSSELL, THE COLOR OF CRIME xiii (1998).

202. *Id.*

203. *See* Nunn, *Trial as Text, supra* note 196, at 770 n.142 (citing sources).

204. *See* FELD, *supra* note 168, at 337. *See also* JEROME G. MILLER, SEARCH AND DESTROY (1996).

205. FELD, *supra* note 168, at 337.

and policies toward African American youth. African American youth never enjoyed adolescence in its full sense because they were never perceived as the social equals of white children. Consequently, African Americans in the juvenile justice system have always experienced discriminatory treatment. The changes in the juvenile court system are not changes in the way that adolescence is perceived, but changes in the perception of what class of children are serviced by the juvenile court. With the understanding that the predominate clientele of juvenile courts, at least in large urban areas, are African American males, the idea of a juvenile court focused on rehabilitation and the protection of the child became an unnecessary luxury. Driven by the image of African American "superpredators," the juvenile justice system was transformed into a harsh and punitive system of social control. For African American youth, however, this transformation only represented an intensification of the oppression that they have always endured in the juvenile justice system.

The distinctions between African American and European American children in the juvenile justice system and the subsequent change of the juvenile justice system to a retributive model can be explained by the concept of otherness, as it has been articulated by a number of intellectual traditions. The transformation of the juvenile court needed and commanded its own other, the "superpredator." The "superpredator" was constructed as the ultimate other, as possessing all the characteristics that innocent young children do not. The "superpredator" was "brutally remorseless," incorrigible, and savage. And because the "superpredator" was the antithesis of childhood, it was slyly constructed as young, Black, and male. This racially characterized "superpredator" was in fact a monster, and only the most serious and determined efforts could address the threat that the "superpredator" posed.

The transformation of the juvenile court would not have occurred were it not viewed in this way as a necessary instrument to address the threat posed by the other. If the public perceived the juvenile justice system as means of addressing the needs of white children, "our" children in the public voice, then the juvenile court would be entirely different because at some level there is an understanding that "our" children will someday grow up and become "us." But the children of the other will never become "us," they will remain "them." As a result, they will receive discriminatory treatment no matter what theoretical justification underlies the policies of the juvenile justice system.

One day, when the current crisis is over, when the public's lust for punishment has been satiated, and when the public realizes that far

too many white children have been swept along by punitive policies intended for Blacks, the rehabilitative focus of the juvenile justice system will return. When it does, African American children may benefit to some degree. But, by and large, most African American children will not notice the difference. They will still be arrested, detained, and incarcerated at higher rates. As children of the other, they will be feared and controlled, rather than valued and loved.