1995

Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition

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YOUTH JUSTICE IN A UNIFIED COURT: RESPONSE TO CRITICS OF JUVENILE COURT ABOLITION†

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I. INTRODUCTION

The juvenile court has been a part of the American institutional landscape for nearly a century.[1] Born of the redemptive ideology of Progressivism, the juvenile justice system promised to divert youthful offenders from the rigors of the criminal justice system, both at adjudication and for disposition, and its advocates claimed that in doing so, the juvenile justice system would be able to rehabilitate young lawbreakers and derail their incipient criminal careers. As it reaches its hundredth birthday, however, the juvenile court has come under serious attack. Even its staunchest supporters acknowledge that, as it currently functions, the juvenile justice system is deeply flawed.[2]

The unhappy truth is that we as a society do not particularly value young people,[3] and inequities in the current juvenile justice system

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[1] Illinois is credited with founding the first juvenile court in the United States through its Juvenile Court Act of 1899. Act of April 21, 1899, ILL. LAWS 131–32.

[2] These commentators agree that the current juvenile justice system deserves criticism, although they differ as to specifics of their objections to the system. *See, e.g.*, Travis Hirschi & Michael Gottfredson, *Rethinking the Juvenile Justice System*, 39 CRIME & DELINQ. 262, 264-68 (1993) (arguing that the juvenile justice system is based on false premises regarding young offenders' malleability and criminal responsibility); Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 165 (condemning juvenile courts for providing neither adequate procedural protections nor appropriate dispositional programs to accused juveniles); Mark I. Soler, *Re-imagining the Juvenile Court*, *in* CHILD, PARENT, AND STATE 596 (S. Randall Humm et al. eds., 1994) (criticizing juvenile courts for offering inadequate and uncoordinated social services to juveniles in their jurisdiction); Charles E. Springer, *Rehabilitating the Juvenile Court*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 405 n.36 (1991) (arguing that the presence of lawyers and emphasis on due process of law has a negative impact on juvenile justice system).

[3] Although American public rhetoric may suggest that we cherish the young, the minuscule amount of government resources dedicated to programs dealing with children's issues demonstrates that the problems of the young are a low social priority. Americans may deplore child abuse, child poverty, and high rates of infant mortality, but we are unwilling to pay for programs to effectively combat these problems, and the meagerly funded programs that do exist are among

betray that lack of regard. In exchange for being spared from formal criminal prosecution, juveniles accused of law violations receive procedurally and substantively inferior adjudication in comparison to that accorded adult defendants. Notwithstanding the efforts of a handful of exemplary public defender offices who strive to zealously represent their juvenile clients,[4] most of the advocacy on behalf of juvenile defendants is only a pale shadow of that received by adults charged with crimes. Indigent juvenile defendants are frequently represented by lawyers who are less experienced and who carry heavier caseloads than their counterparts who represent adult defendants.[5] Even those lawyers willing and able to provide vigorous advocacy for their clients are hamstrung in their ability to do so because, in most jurisdictions by law and in the rest by practice, juvenile defendants are deprived of jury trials.[6] The trials that juveniles accused of crimes do receive are all too often perfunctory and barely contested.[7]

The traditional rationale for a separate and unequal juvenile court system justified its procedural inadequacies on the grounds that juveniles receive in exchange the benefit of nonpunitive, individualized dispositions in place of the criminal sanctions that would otherwise be imposed. Whatever euphemistic label is applied to institutions of incarceration for juveniles, however, being ordered to undergo such incarceration is unmistakably experienced as punishment.[8] Furthermore, the promise of individualized dispositions crafted with attention to the social needs of the juvenile offender can only be described as a cruel hoax. Despite the earnest endeavors of many well-intentioned and hard-working juvenile court judges and lawyers, young offenders

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the first targets for budget cuts. *See* Bob Herbert, *What Special Interest?*, N.Y. TIMES, Mar. 22, 1995, at A19 (deploring congressional proposals to slash funding for children's needs, proposals that would "throw poor children off the welfare rolls, . . . eliminate Federal nutritional standards for school meals, . . . cut benefits for handicapped children, . . . [and] reduce protection for abused and neglected children"). Legal doctrine has been no more attentive to children's needs than have government bureaucrats. *See* Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 35, 52–53 (1994) (demonstrating that child support provisions and child custody law are more responsive to the interests of adults and legal institutions than to the needs of the children involved).

[4] In addition, there are an even smaller number of private and public interest lawyers who specialize in defending juveniles and who vigorously and effectively represent their clients. Such lawyers are, unfortunately, very much the exception rather than the rule.

[5] Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1128 (1991).

[6] *Id.* at 1121–22.

[7] *Id.* at 1127–29.

[8] This fact was recognized by the Supreme Court in its landmark case *In re Gault*, when the Court affirmatively acknowledged for the first time that forcible detention of juveniles in state institutions constituted incarceration. 387 U.S. 1, 27 (1967).

do not, and in many jurisdictions now, cannot receive dispositions tailored to address their social needs.[9] Never has the juvenile justice system been accorded the resources necessary to supply the kind of social services that might provide meaningful intervention in the lives of young offenders. Given this depressing assessment, should the juvenile court survive beyond its centenary? The severe shortcomings of the juvenile justice system and its intractability to meaningful reform[10] have led a number of commentators, myself included, to press for its total abolition, replacing it with a unified criminal justice system.[11]

A counterattack upon the advocates of a unified court system has not been long in coming.[12] Although the defenders of the separate juvenile justice system acknowledge the existence of the procedural and substantive deficiencies of the juvenile court system and agree with the abolitionists that the juvenile court has failed to live up to its institutional mandate,[13] nevertheless they advocate the continuation of the two-tiered juvenile-adult criminal justice system. Supporters of the juvenile court argue that abolitionists have an unrealistically romanticized perception of the procedural protections of the adult criminal justice system, so that theoretically desirable features of the criminal process such as trial by jury are really relatively unimportant in the actual day-to-day workings of the adult criminal courts.[14]

The emotional heart of the argument against abolition of the juvenile court, however, is that the existence of the juvenile court system shields at least some younger offenders from the draconian penalties of the criminal justice system.[15] This justification for the

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[9] A growing number of states have adopted explicitly punitive juvenile court sentencing policies that prohibit taking the social needs of the young offender into account in disposition. For example, Washington's Juvenile Justice Act forbids prosecutors from considering the social needs of the offender in making the charging decision and forbids judges from doing so in sentencing. WASH. REV. CODE ANN. §§ 13.40.070(3), -.070(7), -.150(4)(e) (West 1993 & Supp. 1995).

[10] Professor Barry Feld, who has written extensively on nearly every aspect of the contemporary juvenile justice system, concluded recently that, "[a]fter more than two decades of constitutional and legislative reform, juvenile courts continue to deflect, co-opt, ignore, or absorb ameliorative tinkering with minimal institutional change[,] . . . remain[ing] essentially unreformed." Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 723 (1991).

[11] Ainsworth, *supra* note 5, at 1085; Katherine H. Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 25 (1990); Feld, *supra* note 10, at 723.

[12] *See, e.g.*, Rosenberg, *supra* note 2, at 163; Soler, *supra* note 2, at 596.

[13] Rosenberg, *supra* note 2, at 165.

[14] *Id.* at 171–74. For my response to this argument, see *infra* notes 68–81 and accompanying text.

[15] Professor Irene Rosenberg considers shorter sentences to be one of the primary virtues of the current juvenile justice system. Rosenberg, *supra* note 2, at 184. She expresses skepticism that,

continued existence of a separate juvenile court must be given serious consideration. In recent years, both state and federal lawmakers have enacted legislation dramatically increasing the severity of criminal sanctions,[16] including statutes requiring mandatory incarceration and mandatory minimum terms for a variety of offenses.[17] As a result, the United States now has the dubious distinction of having the highest rate of incarceration in the world,[18] and has seen its prison population nearly quadruple since 1976.[19] With no end in sight to the clamor for harsher criminal penalties, it is tempting for those of us who are appalled at the cruelty and waste in such policies to join with those who gloss over the shortcomings of the juvenile court system and recommend the continued existence of a two-tiered criminal justice system as the only politically practical way to spare some young offenders from the full impact of current inhumane sentencing policies.

As tempting as that option is, however, I am still convinced that a unified criminal justice system is preferable to our present two-tiered adult-juvenile court system. In fact, I contend that the cultural and ideological assumptions that underpin the current two-tiered justice system not only engender many of the serious shortcomings of the juvenile justice system, but also serve to exacerbate the very policies and practices of the adult criminal justice system that make it so abhorrent to defenders of the juvenile court. Critics of juvenile court abolitionists thus miss the point when they argue that juveniles would be worse off than they are at present if they were to be tried as adults

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if juvenile court were abolished, state legislatures would be "less Draconian" in sentencing juveniles than they have been in sentencing adult offenders. *Id.* at 182.

[16] As a result, the average length of incarceration upon conviction of a violent crime tripled between 1975 and 1989. MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 174 (1995). By international standards, "American punishments are all but incomparably harsher than those in other countries." *Id.* at 196.

[17] For an excellent analysis of these recent trends in sentencing, see Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993) (discussing recently enacted state and federal sentencing statutes requiring mandatory incarceration, mandatory sentence enhancements, and mandatory minimum terms).

[18] As of 1989, the rate of incarceration in the United States stood at 426 per 100,000 persons. MARC MAUER, THE SENTENCING PROJECT, AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION 3, 17 (1991). In comparison, the next highest rates were in premajority rule South Africa, which incarcerated 333 per 100,000, and in the Soviet Union, with an incarceration rate of 268 per 100,000. *Id.* at 3, 17–18. No other nations for which statistics are available come even close to matching this rate; incarceration rates in Western Europe range from 35 to 100 per 100,000, and Asian rates run from 21 to 140 per 100,000. *Id.* at 3, 5.

[19] TONRY, *supra* note 16, at 173–74. The escalating increase in per capita rates of incarceration in the United States is unprecedented. Historically, rates of incarceration remained relatively stable from the 1920's to the mid-1970's. Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 743–45 (1993).

in "adult court."[20] What I am advocating is, in fact, the abolition of "adult court" with all the assumptions entailed by its necessary contrast with juvenile court. In proposing the abolition of a separate juvenile court and its replacement with a unified criminal court system, I plead for a radical rethinking of the entire criminal justice system, making it more responsive to the characteristics of all those it touches, regardless of age.

II. THE ESSENTIALIST IDEOLOGY OF THE JUVENILE COURT

In order to understand the problems of today's two-tiered justice system, it is necessary first to understand how it came into existence.[21] The juvenile court was the product of larger social and cultural forces at work in the late nineteenth century and early twentieth century.[22] Although the social and cultural landscape of contemporary America has changed markedly since then, the ideological assumptions that made the concept of the juvenile court appear so attractive at the turn of the century still live on today in both the juvenile court and in the "adult" criminal justice system, and these assumptions help to reinforce many of the most deleterious aspects of both halves of the two-tiered criminal justice system.

The turn of the century was marked by sweeping sociological changes in the American way of life, as an America predominantly made up of rural and agrarian communities gave way to an urban, industrialized America with changing demands on its labor force. As small-scale farming and handicraft production were overtaken in the labor economy by industrial mass production, fewer and fewer jobs could be performed efficiently by the young, who lacked the skills and

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[20] *See* Rosenberg, *supra* note 2, at 166.

[21] Much has been written analyzing the historical development of the juvenile court in the context of the Progressive movement of the early part of this century. *See, e.g.*, ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 3–152 (2d ed. 1977); ELLEN RYERSON, THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 16–56 (1978); STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825–1920, at 55–156 (1977); JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES 1640–1981 (1988); Ainsworth, *supra* note 5, at 1094–1101; Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1221–30 (1970).

[22] I have written elsewhere at greater length about the social and cultural factors that led to a reconfiguration of childhood and the evolution of adolescence during this period in American history. Ainsworth, *supra* note 5, at 1093–96; *see also* JOHN DEMOS, PAST, PRESENT AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY (1986); JOSEPH F. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA—1790 TO THE PRESENT 111–264 (1977); David Bakan, *Adolescence in America: From Idea to Social Fact*, 100 DAEDALUS 979, 979–84 (1971); John Demos & Virginia Demos, *Adolescence in Historical Perspective*, 31 J. MARRIAGE & FAM. 632, 636–37 (1969).

strength of older workers. In addition, the potential labor pool included a large proportion of recent immigrants from Southern and Eastern Europe, who were believed to be resistant to the cultural assimilation necessary for their incorporation into the industrial labor force. These factors combined to make it both possible and desirable to delay the entry of teenagers into the work force and to impose instead a longer period of formal education and cultural socialization. The Progressive Era heralded the enactment of a multitude of laws to facilitate the changing needs of an industrial society, including laws requiring compulsory school attendance, limiting the hours and conditions of employment, and raising the legal age of marriage.[23] Thus, one byproduct of the industrial metamorphosis of American life was the prolongation of the period of economic dependency of young people and a consequent postponement of their attainment of full personhood within society.

At the same time that economic and social factors provided the impetus for a legally enforced prolongation of preadulthood and dependency, the cultural understanding of what it meant to be a child was undergoing an equally dramatic change. The socially shared meaning of childhood—both who is classified as a child and what are assumed to be the essential attributes of the child—has changed radically throughout history.[24] Although the medieval world barely recognized childhood as a significant phase of human development,[25] in later centuries, the stage of life between infancy and sexual maturity came to be invested with a set of specific qualities that served to distinguish children from adults.[26] Children were seen as dependent

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[23] Ainsworth, *supra* note 5, at 1094–96.

[24] The belief that children differ in an essential sense from adults is of comparatively modern vintage. For further historical overviews of the history of childhood in Europe and America, see PHILIPPE ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (1962); CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY (Robert Bremner ed., 1970) (five volume collection of primary source materials on American childhood); NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD (1982) (childhood from the European middle ages to present-day America); C. JOHN SOMMERVILLE, THE RISE AND FALL OF CHILDHOOD (1982) (childhood from ancient Greece to twentieth century); David J. Rothman, *Documents in Search of a Historian: Toward a History of Childhood and Youth in America*, 2 J. OF INTERDISCIPLINARY HIST. 367 (1971). *See generally* LaMar T. Empey, *Introduction: The Social Construction of Childhood and Juvenile Justice*, *in* THE FUTURE OF CHILDHOOD AND JUVENILE JUSTICE 1, 7–15 (LaMar T. Empey ed., 1979); Miles F. Shore, *The Child and Historiography*, 6 J. OF INTERDISCIPLINARY HIST. 495 (1976).

[25] In medieval Europe, the "awareness of the particular nature of childhood . . . which distinguishes the child from the adult . . . was lacking." ARIÈS, *supra* note 24, at 128.

[26] Beginning in the sixteenth century, economic and technological changes in European society combined with new philosophical attitudes about human nature to create a perception of childhood as a separate stage of human development with specific characteristics. POSTMAN,

and vulnerable creatures, lacking the capacity to appreciate the future consequences of their actions or to control their behavior. Children's characters were thought to be not yet fixed, but rather were malleable, necessitating close adult training, supervision, and control for the children to become competent and virtuous adults. Because the attributes of children were considered to be biologically rooted, and thus intrinsic and invariant, these essential characteristics of children justified, indeed demanded, that as a class they be treated differently from adults in almost every aspect of their lives.[27]

The historical trend toward greater and greater age segregation and age-specific treatment of the young reached its zenith during the period between 1850 and 1950, which has been called "the high watermark of childhood" as a separate, cognizable stage of life.[28] Moreover, by the turn of the century, the perceived attributes of childhood were being applied to young people who would have been considered adults in an earlier era, but who were now classified as a new subclass of child—the adolescent.[29] Given the social construction of childhood prevalent during the Progressive Era, it is unsurprising that the legal status and treatment of young people in this period reflected these assumptions about their inherent characteristics.[30]

This, then, was the cultural context in which the juvenile court was created and flourished.[31] Juveniles were thought to be so intrinsically different from adults as to inescapably compel the creation for them of an entirely separate and independent justice system. The juvenile court was distinguished from the criminal justice system by its refusal to confine its jurisdiction to the adjudication and punishment

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supra note 24, at 20–51; Arlene Skolnick, *Children's Rights, Children's Development, in* THE FUTURE OF CHILDHOOD AND JUVENILE JUSTICE 138, 150 (LaMar T. Empey ed., 1979).

[27] Arlene Skolnick has traced the connection between early twentieth-century beliefs about the psychological development of the child and the evolution of social and legal practices befitting those beliefs. Arlene Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, LAW & CONTEMP. PROBS., Summer 1975, at 38.

[28] POSTMAN, *supra* note 24, at 67.

[29] John and Virginia Demos have noted that "[a]dolescence, as we know it, was barely recognized before the end of the last century." Demos & Demos, *supra* note 22, at 632. As described at the turn of the century, the adolescent was "vulnerable," "pliant," "impressionable" and subject to a "lack of emotional steadiness [and] violent impulses." *Id.* at 634–35. For an extensive social history tracing the development of adolescence in America as a culturally recognized stage of human development, see KETT, *supra* note 22, at 111–264 (1977); *see also* Bakan, *supra* note 22, at 979–84; Skolnick, *supra* note 27, at 61–64.

[30] As Neil Postman observed, "In a hundred laws children were classified as qualitatively different from adults . . . ." POSTMAN, *supra* note 24, at 67.

[31] Twenty years after the founding of the first juvenile court system in Illinois, nearly every state had enacted legislation establishing similar juvenile courts. PLATT, *supra* note 21, at 9–10.

of violations of the criminal code. Rather, the juvenile court used the occasion of an allegation of criminal behavior as an opportunity to impose on the young offender a rehabilitative program designed to correct the socially deviant tendencies that caused the particular law violation.[32]

In contrast to the criminal court, juvenile court jurisdiction and sanctioning power could be validly triggered by any kind of behavior considered to be anti-social or inappropriate, regardless of whether it involved the violation of a criminal law. Young people who smoked, cursed, stayed away from school, or whose parents found them insufficiently controllable were as subject to the full coercive authority of the juvenile court as were those accused of crime.[33] Violating the criminal law was seen as just another item in the catalog of socially deviant behaviors that warranted coercive correction. In fact, advocates of the juvenile court system insisted that young people were literally incapable of committing crimes in that they lacked the moral and cognitive capacity necessary for criminal liability.[34] To that end, juvenile judges did not preside over criminal trials in which defendants were found guilty and sentenced to prison; rather they held "adjudicatory hearings" at which "respondents" were found "delinquent," resulting in a "disposition" that sent them to "training school." Today, such terms may strike us as mere euphemisms, but in the cultural and ideological context of the world that spawned the juvenile court, such language exposed the central role in Progressive ideology of the essential otherness of the young.

Today our world is as different from that of the Progressives as theirs was from the agrarian society of the early American republic. Just as the social, economic, and technological conditions of the Progressive era created the turn-of-the-century concept of childhood, so, too, our own era has in turn created a different concept of the nature of childhood.[35] As many sociologists and historians have noted, the contemporary understanding of childhood views that stage of life as

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[32] One of the most articulate expositions of the theory underlying the juvenile justice system was written by Judge Julian Mack, a juvenile court judge in Chicago who became an influential advocate for separate juvenile courts. *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

[33] For female adolescents, one could add sexual activity to the list of behaviors that often resulted in lengthy incarceration in juvenile detention facilities. Steven Schlossman & Stephanie Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65 (1978).

[34] RYERSON, *supra* note 21, at 75.

[35] I have written elsewhere in more detail about the reconfiguration of life stages, including childhood, in contemporary American culture. Ainsworth, *supra* note 5, at 1101–04.

far less intrinsically different from adulthood than did those holding the prevalent beliefs of the turn of the century.[36] Children seem to us to grow up faster these days, adopting adult mannerisms, perspectives, and activities at an early age.[37] At the same time, adults indulge in styles and behaviors that would once have earned them ridicule for aping the young. The strict demarcation between childhood and adulthood has blurred in contemporary culture.

Despite the changes in the social construction of childhood in contemporary America, we still maintain a two-tiered justice system of juvenile and adult criminal courts. Today's juvenile court, however, would be unrecognizable to the Progressive architects of the juvenile justice system. The Progressive juvenile court shrugged off due process concerns as irrelevant to the primary mission of the court, which was not the fair adjudication of guilt or innocence, but rather the crafting of dispositions to address the social needs of the offending youth.[38] The contemporary juvenile court, by contrast, has been forced to curtail its former freewheeling informality of process as a result of Supreme Court decisions according certain fundamental due process rights to juveniles accused of criminal conduct.[39] Moreover, the basic concept that the juvenile court was not punitive but rehabilitative, premised on the idea that punishment was inappropriate for children who were inherently incapable of criminal wrongdoing, has been increasingly rejected. More and more jurisdictions are adopting frankly retributive juvenile justice systems, emphasizing punishment and accountability as the basis for juvenile court sanctions.[40]

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[36] *See, e.g.*, POSTMAN, *supra* note 24, at 120–34; MARIE WINN, CHILDREN WITHOUT CHILDHOOD 3–7 (1983); Skolnick, *supra* note 26, at 164–65.

[37] POSTMAN, *supra* note 24, at 120–42.

[38] RYERSON, *supra* note 21, at 38–39; Mack, *supra* note 32, at 119–20.

[39] *See, e.g.*, *In re* Gault, 387 U.S. 1 (1967) (holding that due process in juvenile court required notice of the charges, the right to be represented by counsel, the right to confront adverse witnesses, the right to exercise the privilege against self-incrimination, and the right to appellate review). *But see* McKeiver v. Pennsylvania, 403 U.S. 528, 545–50 (1971) (plurality opinion) (holding that juveniles accused of criminal law violations are not entitled to jury trial under either the Sixth Amendment or the due process clause of the Fourteenth Amendment).

[40] For more detailed discussions of the recent shift in juvenile justice philosophy from rehabilitation to a more punitive 'just deserts' model, see Ainsworth, *supra* note 5, at 1104–12; Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 822–96 (1988); Feld, *supra* note 10, at 717–18; Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323 (1991); Martin R. Gardner, *Punitive Juvenile Justice: Some Observations on a Recent Trend*, 10 INT'L J.L. & PSYCHIATRY 129, 131–47 (1987); Martin L. Forst & Martha-Elin Blomquist, *Punishment, Accountability, and the New Juvenile Justice*, 43 JUV. & FAM. CT. J., No. 1 1992, at 1.

Given the increased procedural formality and punitive sanctioning of the current juvenile court system, the traditional distinctions between the juvenile and criminal justice systems no longer hold. The continued existence of a separate juvenile court system would be difficult, perhaps impossible, to sustain absent an essentialist ideology about the nature of childhood that justified the system from its inception. Despite the changes in our society and culture that have altered our current cultural construction of childhood from that held by the Progressives, the juvenile justice system nevertheless has clung to the view that young people are so essentially different from adults as to necessitate a separate justice system.

As a philosophical stance, essentialism can be defined as the belief that a type of person or thing has a true, intrinsic, and invariant nature, a nature that is constant over time and across cultures and that consequently defines and constitutes it.[41] Essentialism is thus ahistorical and culturally universalistic in its insistence that essences precede cultural and historical interpretation.[42] In looking at classes of persons, essentialism often credits biology as the source of the natural essences in question. An essentialist view of the child, then, posits the existence of innate and uniquely differentiating characteristics of children which invariably distinguish them from adults. This essentialism accords primacy to that aspect of identity that it calls "child," and in highlighting those attributes, it necessarily shrouds other aspects of identity that are at least equally constitutive of identity,[43] such as race,[44] gen-

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[41] DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE, AND DIFFERENCE 2 (1989).

[42] In contrast, social constructivism posits that the seemingly natural categories of essentialism are themselves historically and culturally contingent artifacts. A social constructivist perspective focuses on the interrelationship of complex cultural and ideological practices that together produce systems of classification. Thus, a constructivist denies that innate and invariant essences exist prior to their contingent social production. For a fuller treatment of social constructivism, see Ainsworth, *supra* note 5, at 1085–90.

[43] In focusing on one attribute as primary in the constitution of identity, essentialism brackets other attributes as secondary. Many critics have pointed out that gender essentialism in feminist theory obscures differences among women such as race, class, sexual orientation, etc. *See, e.g.*, ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988).

[44] At every level of the process—from the initial police decision to cite or arrest, to pretrial detention determinations, to the prosecutorial choice of charge, to the adjudication of delinquency, through to disposition and ultimate release from supervision—race plays a critical role in the functioning of the juvenile justice system, with African Americans consistently overrepresented in the system and subjected to more severe sanctioning than juveniles of other races. *See, e.g.*, Dale Dannefer & Russell K. Schutt, *Race and Juvenile Justice Processing in Court and Police Agencies*, 87 AM. J. SOC. 1113 (1982); Jeffrey Fagan et al., *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224 (1987); Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259 (1987); Barry Krisberg et al., *The Incarceration of Minority Youth*, 33 CRIME & DELINQ. 173

der,[45] and class.[46] Since essentialism maintains that the unique essence of the child exists universally, then this intrinsic nature of the child must by necessity constrain humanly created social institutions dealing with the young.

Examples of this lingering essentialism can be found in language used by children's advocates. For example, a recent law review article by Professor Wendy Anton Fitzgerald[47] relies heavily on the assumption that children are so unlike adults that adults can never achieve an understanding of what she calls the "mystery that is childhood."[48] She maintains that "a deep gulf divide[s] [adults] from children and childhood. . . . Children and childhood appear across the divide, not as comprehensible lesser versions of adults, but as mysteriously different from us."[49] Because this difference is incommensurate with adult understanding, she exhorts us to "craft legal personhood and the law . . . to accept and even admire the mysteries of childhood forever beyond our adult apprehension."[50] Although Professor Fitzgerald is not primarily addressing the juvenile justice system in her article,[51] such assump-

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(1987); Belinda R. McCarthy & Brent L. Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions in Juvenile Court Dispositions*, 24 CRIMINOLOGY 41 (1986); Terence P. Thornberry, *Race, Socioeconomic Status and Sentencing in the Juvenile Justice System*, 64 J. CRIM. L. & CRIMINOLOGY 90 (1973); Richard Sutphen et al., *The Influence of Juveniles' Race on Police Decision-Making*, 44 JUV. & FAM. CT. J., No. 2 1993, at 69. In this regard, unfortunately, the juvenile justice system mirrors the adult criminal justice system in the disproportionate presence of racial minorities among accused offenders. *See generally* CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR (1993).

[45] Historically, gender played a significant role in the decision to invoke jurisdiction over offenses unique to the juvenile court system such as stubbornness, sexual activity, and being a runaway. Female adolescents were far more likely than their male counterparts to be charged with these status offenses and incarcerated for long periods as a result. Meda Chesney-Lind, *Guilty by Reason of Sex: Young Women and the Juvenile Justice System*, *in* THE CRIMINAL JUSTICE SYSTEM AND WOMEN 77 (Barbara R. Price & Natalie J. Sokoloff eds., 1982). This form of gender bias is less overt today, but can still be found in differential treatment of male and female offenders. Donna M. Bishop & Charles E. Frazier, *Gender Bias in Juvenile Justice Processing: Implications of the JJDP Act*, 82 J. CRIM. L. & CRIMINOLOGY 1162, 1183–85 (1992) (finding that males are somewhat more likely to be incarcerated for criminal violations than similarly offending females, but females held in contempt of court for repeat status offenses are sharply more likely to be incarcerated than similarly offending males); *see also* MEDA CHESNEY-LIND & RANDALL SHELDEN, GIRLS, DELINQUENCY, AND JUVENILE JUSTICE (1992); Daniel J. Curran, *The Myth of the "New" Female Delinquent*, 30 CRIME & DELINQ. 386 (1984).

[46] While it may appear so obvious as to go without saying, the socioeconomic status of the accused is a key variable at every level of discretion in charging, adjudication, and dispositions in juvenile court. Robert J. Sampson & John H. Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, 27 LAW. & SOC'Y REV. 285 (1993).

[47] Fitzgerald, *supra* note 3, at 11.

[48] *Id.* at 22.

[49] *Id.* at 19.

[50] *Id.* at 98.

[51] The article in question does touch upon the juvenile justice system, but mainly focuses on

tions about the inherent nature of childhood typify the essentialism that still guides the advocates of a separate juvenile court system.[52]

The appeal of essentialism to advocates of a separate juvenile justice system is obvious, for it provides an ideological justification for disparate treatment of young persons accused of criminal violations. Essentialism, however, does more than merely rationalize a two-tiered justice system. Conceiving of young offenders as essentially different from adult offenders supports certain attitudes and practices within the juvenile justice system that constitute some of its most criticized aspects. The deleterious impact of essentialist ideology is compounded in this case by the categorization of older adolescents, who make up the vast majority of juvenile offenders, as children. In considering the sixteen-year-old juvenile as more like a ten-year-old than a twenty-two-year-old, the essential attributes ascribed to the child are imposed upon the adolescent, whether they truly fit or not. Is it any wonder that the juvenile court, an institution consciously shaped to fit the perceived essential attributes of the child, seems so ill-suited to the actual characteristics of those most often subject to its jurisdiction?[53]

That juvenile court's essentialist ideology classifies adolescents as a subclass of child rather than as a subclass of adult has far-reaching consequences, as can be seen by considering psycholinguistic research on how the creation and use of categories structures human thought and engenders inferences.[54] George Lakoff, a linguist who incorporates the findings of cognitive research in his work on semantics, found that this psychological research supports the conclusion that certain categories, which he calls basic-level idealized cognitive models ("ICM"), are more basic to human thought than others.[55] These ICM categories

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the legal doctrines governing child custody and child welfare as its vehicle for discussing the legal status of children.

[52] Professor Fitzgerald was not unaware that her analysis could be seen as essentialist. She further recognized that essentialism tends to mask differences among members of the class in question, so that an essentialist perspective on childhood masks differences among children based on race, class, gender, and so forth. *Id.* at 98 n.548. Notwithstanding her disclaimer, however, her repeated insistence throughout the article on the absolute incommensurability between the adult's and child's world views warrants considering her analysis as an example of essentialism.

[53] The mismatch between the assumed attributes of the child and the perceived characteristics of some young offenders often leads to their expulsion from the juvenile justice system for being insufficiently "childlike." *See infra* notes 89–92 and accompanying text.

[54] *See generally* GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987).

[55] Basic-level categories have simpler names, greater cultural salience, and are learned earlier by children than higher- or lower-level categories. For example, "tree" is a basic-level category, as compared with the higher-level category "plant" and the lower-level category "sugar maple." *Id.* at 31–38.

serve as templates for thought, influencing the inferences that we draw when we include something as a member of the category in question.[56] Lakoff noted that researchers have observed certain "prototype effects" in the use of categories, in which some members of a category are thought of as better representatives of that category than other members. For instance, people rank robins and sparrows as better examples of the "bird" ICM than owls and eagles, who likewise are thought of as better examples than emus or penguins. Even though all of these examples in fact fully qualify as members of the "bird" ICM, the category has within it an internal logic that makes some of its members seem to us more "bird-ish" than others.[57] Moreover, this psycholinguistic research shows that when we make use of an ICM category, we tend to take attributes characteristic of the "prototype" members of the category and by extrapolation apply them to other, non-"prototype" category members.[58] This means that "new information about a representative category member is more likely to be generalized to non-representative members than the reverse."[59] Thus, information learned about "prototype" birds like robins is more likely to be inferred as true about less "prototype" birds such as ducks, while information about ducks is less likely to be attributed to robins.[60]

The category "child" functions as a basic-level idealized cognitive model, and prototype effects can be seen in its usage. That is, if someone were to say, "Look at those children," without any additional qualifying information, the image conjured up is not of a group of infants or teenagers, but of preadolescents. Even though babies, toddlers, elementary school-aged students, teenagers, and adult offspring are all members of the ICM "child," the most "childish" prototypical members are those who are postinfancy and prepuberty. Since these children represent the prototype "child," then the classification of the adolescent as a member of the ICM "child" results in unconsciously adopted inferences derived from our knowledge and beliefs about the prototype "child" being applied to adolescents. In other words, by

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[56] *Id.* at 68–154 (1987). See especially Lakoff's analysis of the inferences entailed in the use of the category "mother" as a basic-level idealized cognitive model. *Id.* at 74–85.

[57] *Id.* at 44–45.

[58] Lakoff asserts that "prototypes act as *cognitive reference points* of various sorts and form the basis for inferences." *Id.* at 45 (citations omitted).

[59] LAKOFF, *supra* note 54, at 42.

[60] This particular prototype effect, called asymmetry in generalization, is most clearly demonstrated in empirical research done by Lance Rips. *Id.* at 42, 45 (discussing Lance J. Rips, *Inductive Judgments About Natural Categories*, 14 J. VERBAL LEARNING & VERBAL BEHAV. 665 (1975)).

calling adolescents "children," our perceptions of specific adolescents will be affected by what we expect and know is true of prototypical "children." Characteristics of the prototype "child" thus are exaggerated in our perceptions of the adolescent, and characteristics that are inconsistent with the prototype "child" are minimized, trivialized, or even completely denied.

In this way, the impact of the essentialist ideology of the juvenile court is compounded by the prototype effect involved in classifying its adolescent subjects as "children." Those in the juvenile justice system who give credence to this ideology expect to see—and so will tend to see—in adolescents the prototypical childlike qualities of dependency, vulnerability, and malleability. Similarly, because prototypical children are said to lack the judgment and experience to understand the future consequences of their actions and to make wise decisions in important matters, adolescents will be assumed to share these deficiencies as well. Having defined the subject of the juvenile justice system as the "child," juvenile court ideology constructs the juvenile accused as "childlike."

Many of the most criticized aspects of juvenile court—the frequency of grossly ineffective assistance of defense counsel[61] and general procedural inferiority to the criminal justice system[62]—are directly related to the construction of young offenders as "children." Because "children" are incapable of understanding what is in their best interests, many defense lawyers in the juvenile justice system come to think that they need not listen to the voice of the juvenile accused when he attempts to articulate what he wants to happen in his case. Instead defense counsel is encouraged to adopt a guardian ad litem-like role,[63]

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[61] Observers of the juvenile justice system have been virtually unanimous in their condemnation of the system's tolerance of seriously inadequate defense lawyering. *See, e.g.*, M.A. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE 136–39 (1982); M. MARVIN FINKELSTEIN ET AL., PROSECUTION IN THE JUVENILE COURTS: GUIDELINES FOR THE FUTURE, 40–42, 51–62 (1973) (describing Boston Juvenile Court); BARBARA FLICKER, PROVIDING COUNSEL FOR ACCUSED JUVENILES 2 (1983); JANE KNITZER & MERRILL SOBIE, LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN 8–9 (1984); EDWIN M. LEMERT, SOCIAL ACTION AND LEGAL CHANGE: REVOLUTION WITHIN THE JUVENILE COURT 178 (1970); PLATT, *supra* note 21, at 163–75; Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263, 297–300 (1980); David Duffee & Larry Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 7 CRIM. L. BULL. 544, 548–49 (1971); Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1207–08 (1989); Elyce Z. Ferster et al., *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375, 398–99, 412 (1971); FOX, *supra* note 21, at 1236–37; Anthony Platt & Ruth Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1168–81 (1968).

[62] *See infra* notes 66–81 and accompanying text.

[63] In response to a survey undertaken in the mid-1980's in New York state, 85% of the juvenile defense lawyers described their role as a guardian *ad litem*. KNITZER & SOBIE, *supra* note 61, at

in which rigorous case preparation and zealous defense advocacy can be eschewed in favor of collaborating with the state in imposing a corrective disposition. In fact, defense counsel who buy into the essentialist ideology of the juvenile court may be persuaded that vigorous defense would be counterproductive to the juvenile's true best interests,[64] which can only be realized with the help of the coercive supervision of the state.[65]

Indeed, the very concept that juvenile offenders possess and can effectively exercise rights becomes problematic given the essentialist ideology of the juvenile court. American rights jurisprudence is based upon the premise that to be a legitimate rights-bearer, one must be an autonomous individual.[66] Because "children" are dependent and not autonomous, actors in the juvenile justice system can ignore the possibility of the effective agency of accused juveniles in exercising their legal rights.[67] Therefore, we need not trouble ourselves over procedural deficiencies in the juvenile justice system that would be intolerable if its subjects were deemed to be rights-bearing actors with true agency.

8–9. *See generally* Ferster et al., *supra* note 61, at 398–401 (discussing the tendency of defense counsel in juvenile court to adopt a nonadversarial guardianlike stance).

[64] *See* BORTNER, *supra* note 61, at 138–39; *see also* David Bogen, *Beating the Rap in Juvenile Court*, JUV. & FAM. CT. J., Aug. 1980, at 19 (criticizing those defense lawyers who value acquittals over ensuring that the juvenile court retains the authority to correct the social deviance of the juvenile offender).

[65] Another rationalization for less-than-vigorous advocacy is that the typical length of confinement for juveniles is much shorter than the adult sentence imposed for the equivalent offense; lower stakes are thought to justify lesser standards in defense advocacy. This rationale for substandard lawyering should be rejected. Although exceptionally severe sanctions—the death penalty and life imprisonment without parole—may justify an extraordinary effort on the part of defense counsel, this should not legitimize providing inadequate defense simply because the penalties in a case are perceived as light. In any event, it is not necessarily true that juvenile sentences are invariably shorter than those in the adult criminal justice system. *See* Hirschi & Gottfredson, *supra* note 2, at 270 (noting studies that show that juveniles sometimes are incarcerated for longer periods than similarly offending adults); *see also* Susan K. Knipps, *What is a "Fair" Response to Juvenile Crime?*, 20 FORDHAM URB. L.J. 455, 460 (1993) (citing recent New York study showing that only four percent of juveniles waived into the criminal courts received longer sentences than they might have received if jurisdiction had been retained by juvenile court).

[66] MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 299–300 (1990). Professor Mary Ann Glendon notes in her communitarian critique of contemporary American legal culture that American rights discourse presumes that the rights-bearer is "a lone autonomous individual." MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 45 (1991). Feminist legal theorists have similarly criticized legal doctrine for privileging the autonomous individual as the legal norm, to the disadvantage of those who place greater value on relationships than on independence. *See* Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987) (analyzing the influence of assumptions about autonomy and independence in search and seizure law and suggesting that these norms represent male values).

[67] Robert H. Mnookin, *The Enigma of Children's Interests, in* IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 16 (Robert H. Mnookin ed., 1985).

Here I want to address what I consider the single most serious procedural infirmity of the juvenile court—its lack of jury trials[68]—and to respond directly to the advocates of a separate juvenile court who downplay the significance of this deprivation.[69] Using juries as fact-finders provides a host of advantages to anyone, adult or juvenile, accused of crime.[70] For example, juries serve as a buffer for overzealous prosecutors and a check on the rogue judge who is biased or capricious.[71] Juries also protect defendants from the more commonly found juvenile court judge whose fact-finding sensibilities are blunted from the hundreds, if not thousands, of cases that she hears every year.

Choosing a jury trial over a bench trial is generally very much to the advantage of an accused who can do so. Research comparing juror fact-finding with judicial fact-finding demonstrates that a person is far more likely to be convicted if a judge hears the case than if one has a jury trial.[72] In addition to this greater likelihood of acquittal, those who have jury trials receive more meaningful appellate review than those who are tried in bench trials. Judges presiding over jury trials must articulate the law governing the case in jury instructions, which are later subject to appellate review to correct errors of law that have worked to the defendant's detriment. In the bench trials that most juveniles must receive, on the other hand, prejudicial errors of law can easily go undetected because they are not articulated. Thus: "[J]uveniles denied a jury trial lose out twice. They are more likely to be convicted in the first place, and are less likely to be able to prove an error of law which would allow them to prevail on appeal."[73]

Professor Irene Rosenberg acknowledges that this deprivation is "significant," but not "catastrophic," arguing both that state courts may

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[68] Only 13 states guarantee jury trials in juvenile court. *See* Ainsworth, *supra* note 5, at 1121–22 nn.258–61 (listing the statutes and cases in each jurisdiction regarding the right to jury trial in juvenile court).

[69] Professor Rosenberg, among all of the defenders of a separate juvenile court system, has most explicitly addressed what she sees as the relatively minimal consequences of the denial of the right to trial by jury. Rosenberg, *supra* note 2, at 169–70.

[70] For a fuller explanation of the value of jury trials and of the many ways in which juveniles are at a disadvantage because they are denied jury trials, see Ainsworth, *supra* note 5, at 1121–26.

[71] In holding the Sixth Amendment jury trial guarantee applicable to the states, the United States Supreme Court noted its importance as a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[72] The most extensive comparative study is that of Harry Kalven and Hans Zeisel, in which they compared jury verdicts in over three thousand cases with "shadow" verdicts that the judges would have given if the cases had been tried to the court. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 55–81 (1966). Overall, juries failed to convict more than twice as often as judges would have done. *Id.*

[73] Ainsworth, *supra* note 5, at 1126.

well redress this injustice through interpreting their state constitutions to grant jury trials to juveniles, and that, in any event, the right to jury trial is of little practical importance because so few adult defendants avail themselves of it.[74] As to the first point, there is no evidence whatsoever to suggest that state courts are likely in the future to hold that jury trials for juveniles are guaranteed under their state constitutions. More than twenty years have passed since the United States Supreme Court held that jury trials in juvenile court were not required under the federal constitution.[75] Since that time, despite an unprecedented expansion in the use of state constitutional interpretation to extend legal protections beyond the limits set in current Supreme Court jurisprudence,[76] not a single state appellate court has found a right to jury trials for juveniles under its state constitution.[77]

Nor can the importance of this denial to juveniles of the right to jury trial be shrugged off as insignificant merely because the majority of adult defendants do not exercise that right. The criminal justice system operates in the shadow of the jury trial, so that the potential invocation of that right affects the charging decision and plea negotiation even in cases that eventually culminate in guilty pleas. Professor Rosenberg concedes that the possibility that a defendant could demand a jury trial operates as "a chip to be used in the poker game of plea bargaining";[78] but it is often not just *a* chip, but the *only* chip that a criminal accused possesses as leverage.

Moreover, notwithstanding Professor Rosenberg's argument that the "sentencing stakes" for adult offenses are higher than for most juvenile offenses, the jury trial "chip" is not limited in usefulness to adult felony prosecutions, as Rosenberg claims.[79] Indeed, the experience in my home state of Washington demonstrates the transformative power of the right to jury trial even in courts with limited sanctioning

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[74] Rosenberg, *supra* note 2, at 169–70.

[75] *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (plurality opinion).

[76] In the last two decades, state courts have frequently resorted to state constitutional analysis as the basis for their opinions. This "new federalism" has been the subject of many law review articles, including several symposia on the topic. *See, e.g.*, Symposium, *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985); *Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 1 (1988); *Symposium on State Constitutional Jurisprudence*, 15 HASTINGS CONST. L.Q. 391 (1988). In the past few years, the momentum of the new federalism seems to be waning. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992) (taking a skeptical view of the impact of state constitutionalism on legal doctrine and of its utility and wisdom in any event).

[77] At least one state has explicitly rejected just such an appeal. *See* State v. Schaaf, 743 P.2d 240, 246–47 (Wash. 1987) (holding that Article 1, § 22 of the Washington State Constitution did not compel jury trials in juvenile delinquency adjudications).

[78] Rosenberg, *supra* note 2, at 169.

[79] *See id.*

authority. Until relatively recently, adults charged in Washington with misdemeanor offenses had no right to trial by jury. In 1982, the Washington Supreme Court held that the state constitution guaranteed jury trials in those prosecutions.[80] Notwithstanding the fact that misdemeanor sentences are statutorily limited to one year in length and are generally considerably shorter, the newly created right to jury trials for misdemeanor defendants completely changed the dynamics of practice in the municipal and district courts. None of us who practiced before and after the advent of jury trials in municipal court would deny that the change has been dramatic, and for the better. Prosecutors have become more realistic in their assessment of what charges are appropriate to file and of which cases present proof problems that jurors are unlikely to overlook. Even though municipal court sentences are far shorter than those authorized in felony cases, plea negotiations over sentencing recommendations still do take place regularly, and the jury trial "chip" is as useful there as in superior court.[81] Since sentences of juvenile confinement frequently exceed the sentences meted out in municipal court, there is every reason to expect that granting jury trials in juvenile court would have at least as great an ameliorative effect there as has been the case in the municipal courts of Washington.

III. Essentialism in the Criminal Justice System

As I have shown, the essentialist ideology that supports the juvenile justice system entails a variety of detrimental consequences for accused juveniles. The consequences of this ideology, however, are not limited to the effects on those tried in juvenile court. In constructing the "child" with its attributes, essentialism also simultaneously constructs its inverse, the "adult." Just as the "child" construct shapes the practices of the juvenile court, so, too, its necessary counterpart, the "adult" construct, shapes the practices of the "adult" criminal court.

The dichotomous relationship between the constructs of "child" and "adult" can be seen as a specific example of the more general role which binary oppositions assume in contemporary Western culture. The adult/child dichotomy represents the kind of fundamental binary opposition—man/woman, rational/irrational, nature/culture, public/ private—that characterizes post-Enlightenment Western thought and language.[82] Structuralist theory explored what it interpreted as the

[80] City of Pasco v. Mace, 653 P.2d 618 (Wash. 1982).

[81] I am basing my assessment of the impact of jury trials in municipal court on my experience and that of my colleagues at the Seattle-King County Public Defender Association, where I was first a staff attorney and later the training coordinator.

[82] Stephen K. White, Political Theory and Postmodernism 15–16 (1991); Joan W. Scott,

fundamental role of binary oppositions in the production of social meaning, with one of the paired terms serving as the preferred, primary term and the other as its subordinate negation or inverse, derivative of and dependent upon it for its meaning. Later, poststructuralists such as Jacques Derrida showed that this hierarchical relationship between the terms of a binary opposition could be reversed, with the supposed secondary, subordinate term actually serving to generate and define the ostensibly primary, privileged term.[83]

The existence of our present two-tiered justice system, with juvenile court separate from "adult" criminal court, is predicated on the adult/child binary opposition. Because being a child is seen as essentially different from being an adult, the logic and legitimacy of separate justice institutions is maintained. Once the criminal court is transformed into the "adult" court by the creation of a separate juvenile court, however, the "adult" construct that informs the practices in that institution must be given shape and content. As in other binary oppositions, the meaning of the primary term "adult" is defined as being the inverse of the "child" construct. That is, what it means to be an adult is by necessity the opposite of what it means to be a child.[84] Thus, because the "child" is seen as dependent, the "adult" must be independent; if the "child" has a malleable character, then the "adult" must have a fixed character; if the "child" is not morally responsible for his actions, then the "adult" must be fully morally responsible for her actions. In this way, the essentialism that constructs the child by necessity concomitantly constructs the adult as well.

Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism, in CONFLICTS IN FEMINISM 134, 137 (Marianne Hirsch & Evelyn Fox Keller eds., 1990).

[83] "First principles . . . are commonly defined by what they exclude . . . ." TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 132 (1983). For example, a term thought of as primary such as "man" defines what it means to be male only in contrast to the partner term of secondary status, "woman." As Professor Eagleton explains:

> Woman is the opposite, the "other" of man: she is non-man, defective man, assigned a chiefly negative value in relation to the male first principle. But equally man is what he is only by virtue of ceaselessly shutting out this other or opposite, defining himself in antithesis to it, and his whole identity is therefore caught up and put at risk in the very gesture by which he seeks to assert this unique, autonomous experience.

Id.

This reversal of the polarity of binary oppositions is the central intellectual move of deconstruction. Of course, the new hierarchical relationship resulting from the deconstructed binary opposition can itself be deconstructed, and so forth, ad infinitum. Thus, the structuralist attempt to provide a foundation for meaning is shown through deconstruction to be chimerical, as meaning so generated is inherently indeterminate. WHITE, *supra* note 82, at 15–16.

[84] *Cf.* EAGLETON, *supra* note 83, at 132–33 (describing how the "female" construct comes to define the supposedly primary "male" construct as its inverse).

Just as the "child" construct serves to define the "adult," so too the juvenile justice system defines the criminal justice system to be its complementary inverse. In fact, the criminal justice system is often referred to in this context as the "adult" court.[85] Having become the "adult" court, the criminal justice system is seen as the inversion of the juvenile court in its characteristic goals and practices. Because the juvenile court is intended to rehabilitate malleable youths, then it seems natural for the adult criminal court to eschew rehabilitation for its nonmalleable adults.[86]

Similarly, since juvenile court adjudication is intended for those who, due to cognitive immaturity, are not fully responsible for the consequences of their actions, then of necessity, adult court becomes the forum for adjudication for those who are fully responsible for their behavior. As a result, the adult criminal justice system does poorly by those past the age of majority who do not measure up to the adult paradigm, with its presumption of full cognitive abilities. Mentally retarded individuals often have developmental disabilities that render their ability to understand the consequences of their actions at least as problematic as does the cognitive immaturity imputed to young people.[87] But whereas the cognitive immaturity of those under the age of eighteen is recognized in law by the existence of the juvenile courts, the cognitive disabilities of mentally retarded offenders receive no such dispensation. After all, they are "adults," not "children," with all that these categories imply. Thus, the mentally retarded offender is liable to suffer the full measure of retributive punishment appropriate to the "adult" offender, even up to the ultimate sanction of the death penalty.[88]

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[85] *See* Rosenberg, *supra* note 2, at 163.

[86] I do not mean to suggest that the decline of rehabilitation as a goal of the criminal justice system is the sole result of the dichotomous adult/juvenile justice system. There are many reasons behind the increasingly punitive and retributive nature of American criminal justice. *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981) (discussing the disillusionment with the rehabilitative model in penology and the embrace of a more punitive criminal justice philosophy); *see also* TONRY, *supra* note 16, at 197 (contending that one factor in the increasingly harsh sentencing policies of the United States is our "remarkable ability to endure suffering by others"). What I do contend is that making the criminal justice system the complementary inverse of the juvenile justice system exacerbates these tendencies.

[87] *Cf.* Van W. Ellis, Note, *Guilty but Mentally Ill and the Death Penalty: Punishment Full of Sound and Fury, Signifying Nothing*, 43 DUKE L.J. 87 (1993) (arguing against the trend in the criminal justice system toward hostility to lack of mental capacity as excusing criminal liability, including capital punishment).

[88] The United States Supreme Court has upheld the execution of mentally retarded offenders in Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (holding that the imposition of the death penalty upon a mentally retarded defendant found competent to stand trial does not violate the Constitution). Since then, the state of Texas put to death a man with an IQ of 65. David Stout, *Texan Who Killed Ex-wife and Her Niece Is Executed*, N.Y. TIMES, Jan. 18, 1995, at A16. About three percent

Nor are the mentally retarded the only individuals under the jurisdiction of the adult criminal justice system whose classification and sentencing as "adults" ought to give us pause. Ironically, a growing number of young people under the age of eighteen now find themselves tried in criminal court as adults. Juvenile courts have always had the authority to transfer a juvenile into the criminal justice system if it was determined that the offender was not amenable to the rehabilitation of juvenile sanctions.[89] In recent years, however, greater and greater numbers of young people are being transferred into the adult criminal justice system, some through mandatory waiver provisions[90] and some through more frequent resort to discretionary waiver procedures by prosecutors and juvenile court judges.[91] Which juvenile offenders do judges and prosecutors find so unlike the prototype "child" that it justifies classifying them as "adults" and expelling from the juvenile justice system? Overwhelmingly, they are the offspring of the underclass and racial minorities—juveniles whose demeanor and behavior seem to middle-class eyes to be utterly unlike the vulnerable, dependent prototypical "child."[92] Once waived into the criminal courts, the juvenile is transformed into an "adult," with all that the designation entails. No longer deemed a vulnerable and salvageable "child," the juvenile tried as an adult is written off for rehabilitation. Instead, the criminal justice system mechanically metes out punishment for the crime in full measure, commensurate with the full moral responsibility of the "adult." Is it any wonder, then, that advocates for juveniles find abhorrent the idea of trying and sentencing young offenders within the adult criminal justice system?

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of Texas's death row population currently awaiting execution is estimated to be mentally retarded. Malissa Wilson, *Executing Retarded Convicts Fuels Moral Debate*, HOUS. POST, Mar. 17, 1995, at A25.

[89] Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 478 (1987).

[90] For a survey and analysis of the variety of statutory mechanisms for automatic waiver of certain juvenile offenders into the criminal courts, see Feld, *supra* note 89, at 471. *See also* Ainsworth, *supra* note 5, at 1110–11 nn.173–77 (collecting state statutes authorizing automatic transfer of juvenile jurisdiction into the criminal courts).

[91] Ainsworth, *supra* note 5, at 1111.

[92] Even sympathetic observers cannot see minority, inner-city youths as "children." *See, e.g.*, ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA (1991) (tellingly titled account by a middle-class white journalist of the story of two young African-American boys). Less sympathetic observers are even less likely to see such youths as redeemable "children" appropriate for treatment within the juvenile justice system. "Most middle-class parents get second chances for their kids. . . . Society is increasingly intolerant, however, of the mistakes of children from lower-class families. The popular attitude is that they're lost causes." Don Noel, *Trying 14 Year Olds As Adults: An Exercise in Frustration*, HARTFORD COURANT, Jan. 2, 1995, at A11.

IV. Toward a Unified Criminal Justice System

The problems with the current juvenile justice system that its detractors decry and its supporters acknowledge represent the logical outcome of its essentialist ideology, and the consequences of having to categorize each offender as either a "child" or an "adult."[93] The choice is all or nothing; one is either a child, subject to the jurisdiction and sentencing practices of the juvenile justice system, or one is an adult, fully subject to the jurisdiction and sentencing practices of the criminal justice system. The current system admits of no middle ground, no sliding scale of responsibility and redeemability.

In reality, the characteristics and behavior of young people do not change on the eve of their eighteenth birthdays, or at any other arbitrary point. True, very young children start out life helpless, vulnerable, and utterly dependent upon the adults in their world, without the ability to understand the consequences of their actions or conform their behavior to the expectations of others; over time, they become adults with more mature cognitive abilities and moral characters. But they don't magically achieve adult competence and responsibility all at once, and still less on a predictable timetable that justifies a uniform age upon which full criminal responsibility should be imputed. Neither is it accurate to think of everyone over the age of eighteen as fully "adult," if by that we mean an independent, autonomous actor with a fixed, immutable character, acting in conscious regard for the consequences of her actions and thus fully responsible for those actions. Rather, there is a continuum of these characteristics and behaviors, both for juveniles and for adults. The two-tiered justice system, in forcing us to categorize offenders as either children or adults, exaggerates their differences and obscures their similarities.[94] Children are neither as dependent and incompetent, nor adults as autonomous and

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[93] This kind of all-or-nothing categorization is common in legal discourse, and is frequently the product of essentialism with respect to the nature of the category in question. "[L]egal reasoning . . . not only typically deploys categorical approaches that reduce a complex situation, and a multifaceted person, to a place in or out of a category but also treats the categories as natural and inevitable." Minow, *supra* note 66, at 22.

[94] Martha Minow has observed that the adult/child dichotomy in the law—constructing the adult as autonomous and powerful as opposed to the dependent, powerless child—acts to obscure the interdependence and lack of autonomy of many adults and to conceal the range of power and powerlessness in individual adult lives. Minow, *supra* note 66, at 301–06. Feminist scholars have long observed that legal doctrine and theory promotes individualism and autonomy as legal norms, at the expense of the interconnected interdependence that many people experience as central to their identity. *See, e.g.*, Coombs, *supra* note 66, at 1598; *cf.* Pierre Schlag, Fish v. Zapp*: The Case of the Relatively Autonomous Self*, 76 Geo. L.J. 37 (1987) (noting that even the socially and rhetorically constructed self constructs itself as autonomously choosing its degree of autonomy).

competent, as the essentialist ideology of the two-tiered justice system pretends.[95]

The faults inherent in the two-tiered justice system are a prime example of what Martha Minow has called the "dilemma of difference," in which

> problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently. The dilemma of difference may be posed as a choice between . . . similar treatment and special treatment, or as a choice between neutrality and accommodation.[96]

In this case, the "special treatment" of trying juvenile offenders as "children" results in giving them the second-class justice that their status as "children" logically entails, but the "similar treatment" of trying them as "adults" is equally disastrous, given our assumptions about the full criminal responsibility of "adults." Minow wisely suggests that the law should place less emphasis on the differences said to exist between children and adults,[97] and instead consider broadening the concepts embedded in our legal norms to better accommodate the actual characteristics of everyone, be they under or over the age of majority.[98]

Only a unified justice system, rejecting arbitrary all-or-nothing categorization, is capable of recognizing the continuum of our actual attributes and accounting for it in devising appropriate and fair sanctions for any individual's criminal law violations. Because there would be no necessity to decide whether individual offenders were "children" or "adults," a unified court system could be more responsive to the actual characteristics of individual actors. Freed of the requirement that an all-or-nothing determination be made, judges could recognize fine gradations in dependency, malleability, and responsibility as mitigating factors in sentencing.[99] There might well be presumptions about

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[95] After examining the work of developmental psychologists, Arlene Skolnick concluded that "[t]he overemphasis on the differences between children and adults . . . results from not only an underestimate of children's abilities, but an overestimate of that of adults." Skolnick, *supra* note 27, at 56.

[96] MINOW, *supra* note 66, at 20–21.

[97] Minow "rejects the notion that our society should answer questions about children's legal status simply by asking how children differ from adults. That inquiry wrongly suggests that such differences are real and discoverable rather than contingent upon social interpretations and choices." *Id.* at 303.

[98] *Id.* at 283–306.

[99] My vision of sentencing within a unified criminal justice system would appear to fly in the face of the current trend in criminal justice toward determinate sentencing, in which statutory

the characteristics of an accused based on age, but any such presumptions would always be rebuttable. A unified criminal justice system would contribute to easing the grip of essentialism on criminal justice policies by erasing the indelible line between the status of adult and child, and replacing it with a nuanced continuum.

There are, of course, other legal contexts in which a strict bright line is maintained distinguishing between the legal statuses of the adult and the child. Certain rights and privileges—voting, driving an automobile, purchasing and consuming alcohol and tobacco products, and the like—are granted only when an individual reaches a specified age. Although such rules defining adult status are admittedly arbitrary, the transaction costs inherent in case-by-case determinations of maturity render any approach other than the bright line rule impractical in such legal contexts where the consequences of a mismatch in categorization are less drastic for the youth and for society than in the context of the criminal justice system. That is, it is certainly true that some persons under the age of eighteen would be thoughtful, reflective voters, and that others over the age of eighteen exercise their franchise in an irresponsible manner. The personal and social consequences of such underinclusion and overinclusion in the voting age demarcation, however, hardly rise to the levels of injustice present in the two-tiered criminal justice system. It is the magnitude of that injustice that leads me to advocate the abolition of the separate juvenile court and its replacement with a single, unified criminal justice system.

Opponents of abolition of a separate juvenile court maintain that one cannot talk about abolishing the juvenile court without considering the nature of the criminal justice system,[100] and they are surely correct. They point out that, notwithstanding the conceded failings of the juvenile justice system, the criminal justice system is itself not without serious flaws.[101] Again, they are correct. The shortcomings of

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sentencing guidelines provide narrow sentencing ranges for a particular offense without regard to the characteristics of the particular offender. For a recent symposium on determinate sentencing guidelines, see Symposium, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, JUDICATURE, Jan.-Feb. 1995, at 169.

A critique of one-size-fits-all determinate sentencing policies is beyond the scope of this Article; however, such policies are not necessarily incompatible with the kind of sentencing that I advocate within a unified criminal court. Even within a strict determinate sentencing scheme, mitigating circumstances insufficient to provide a complete bar to criminal liability justify lower sentences than the standard range for an offense. Such factors as immaturity, relative lack of ability to appreciate the future consequences of one's actions, and the like could be considered as mitigating factors in sentencing.

[100] Rosenberg, *supra* note 2, at 166.

[101] *Id.* at 171–74.

the juvenile justice system cannot be overcome without addressing the critical failings of the larger American criminal justice agenda. We must show imagination and courage in considering alternatives to a failed criminal justice system that has brought us obscene levels of imprisonment and executions without making the streets feel safer.[102] Where both supporters and opponents of the abolition of the juvenile court can agree is that the only criminal justice system worthy of support is one that is capable of achieving justice for every individual entangled within it. We cannot afford to strive for less.

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[102] Among the other visions that might provide the basis of an effective, humane, anti-retributive criminal justice system are feminist theory and civic republicanism. *See* JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990) (civic republicanism); Kathleen Daly, *Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions About Justice*, 17 INT'L J. SOC. LAW 1 (1989) (feminist theory); *see also* TONRY, *supra* note 16, at 181–209 (noting that the disparate racial impact of contemporary sentencing policies must be taken into account in reforming the criminal justice system to achieve more balanced and less cruel sentencing practices).