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Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails

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INTRODUCTION

When thirteen-year-old Tommy C. was abandoned by his parents, the juvenile court placed him in a juvenile detention facility so that he would be kept off the streets and would receive rehabilitative treatment and counseling. Frightened and unhappy in one of the facility’s cottages, Tommy C. tried to leave the grounds. As a result, he was transferred to Block 2, a closed-off wing of the minimum security building of an adult correctional institution, used primarily for disciplinary and escape problems. In Block 2, Tommy C. and another boy were placed in a room secured by a locked door and barred windows with broken panes. Meals were eaten in the adult cafeteria where contact with convicted adults was inevitable. Recreational, medical and educational programs were virtually nonexistent.

Tommy C. was never accused or convicted of a crime. Instead, he was victimized by his parents and the juvenile court system, the two entities whose purpose was to provide him with the care and protection essential for any child.¹

Tommy C. is a fictional character, yet real children have suffered similar experiences. In 1972, five juveniles committed to Rhode Island’s Boys’ Training School (the “School”) filed a civil rights class action seeking a preliminary injunction against the institution to prevent further confinement in the maximum security Adult Correctional Institution, in solitary confinement cells located in a wing of the adult minimum security building, and in the cold, poorly furnished and unsanitary, steel cellblocks of a dilapidated former women’s reformatory.² Some of the plaintiffs had been confined for their own protection; these were victims of parental neglect or abandonment. Others were wayward children, pretrial detainees or delinquents;³ none was a chronic, hard-core offender.

Holding that the existing conditions of confinement constituted cruel and unusual punishment and violated the plaintiffs’ due process and equal protection rights, the district court pointed to a lack of trained personnel and regular medical treatment, inadequate facilities, virtually nonexistent

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2. Id. at 1357.
3. Id. at 1369.
educational, recreational and counseling programs, and continual contact with adult inmates from whom the plaintiffs and class members learned "tricks of the trade" or were subjected to threats. The court considered the solitary confinement cells "inhuman" and "deplorable." The court considered the solitary confinement cells "inhuman" and "deplorable."

Juveniles who presented escape and disciplinary problems could be transferred from School grounds, without notice or a hearing, into solitary or maximum security confinement. There were no specific criteria used to determine which offenses would result in the juvenile's transfer to the maximum security building. Thus, a victim of parental neglect was as likely to be transferred as a convicted delinquent. The seriousness of this situation was compounded by the fact that juveniles confined to maximum security were subjected to the same rules and punishments as were adult prisoners.

The court concluded that the School failed in its parens patriae capacity to meet even minimal requirements necessary to rehabilitate, rather than to punish, its juvenile inmates:

4. Id. at 1362.
5. Id. at 1365. In one typical case, a juvenile inmate who had been assigned to a solitary confinement cell in "Annex B" for seven to ten days testified that the cell was completely dark and was cold because of the winter air that blew in through a broken window. He wore only his underwear and was refused a change of clothes. He did not receive soap, toilet paper, sheets or a blanket. Because the mattress covering was worn-out, he was forced to sleep on the springs. He was never allowed to leave the cell. Id. at 1362-63. Annex B was considered less severe confinement than the other annex cells. Id. at 1360.
6. Id. at 1359.
7. Id. at 1362.
8. See id. Parens patriae, literally "parent of the country," refers to the state's protective role as sovereign and guardian of persons under a legal disability, BLACK'S LAW DICTIONARY 1114 (6th ed. 1990), suggesting that a child is not the absolute property of the parents, but rather, is entrusted to the parents by the parens patriae state. It is the state's ultimate duty, however, to ensure the safety and care of the helpless and incompetent child, and when that child is deemed a delinquent, it is the state's responsibility to "treat" or "rehabilitate" rather than to punish. In re Gault, 387 U.S. 1, 15-16 (1967). The juvenile judge's responsibility is to determine "'[w]hat [he is], how [he has] become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'" Id. at 15 (quoting Mack, The Juvenile Court, 23 HARV L. REV 104, 119-20 (1909)).

Over the years, the state's scope and nature of responsibility over a child has been subjected to vast reinterpretation. In the 1989 eyebrow-raising opinion DeShaney v. Winnebago County Department of Social Services, 109 S. Ct. 998 (1989), the Supreme Court held that the due process clause did not impose an affirmative duty on the state to provide protection to a child from private violence. In DeShaney, the mother of a four-year-old boy brought a § 1983 action against social workers and local officials who had received numerous complaints of child abuse by the father but failed to remove the child from his custody. Id. at 1001. The child subsequently suffered permanent brain damage and became profoundly retarded as a result of the severe beatings. Id. at 1002. While the Court sympathized with the child's plight, it distinguished DeShaney from the situation in which the state takes an individual into custody against his will (thereby depriving him of life, liberty or property); only the latter imposes a duty on the state to provide treatment and protection. Id. at 1003.

The DeShaney case should be contrasted with K.H. ex rel Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990), in which the court refused to grant qualified immunity from liability to social workers who had removed a seventeen-month-old girl from the custody of her parents after
and unusual punishment has any meaning, the evidence in this case shows that it has been violated. The cruelty is a refined sort, much more comparable to the Chinese water torture than to such crudities as breaking on the wheel.\footnote{9}

Ten years later, in D.B. v. Tewksbury,\footnote{10} an Oregon district court held that confining status offenders and juvenile pretrial detainees\footnote{11} in adult correctional facilities violated their due process rights and constituted pretrial punishments.\footnote{12} The Columbia County Correctional Facility (CCCF) housed both convicted adult prisoners and children between the ages of twelve and eighteen who were primarily status offenders awaiting adjudication.\footnote{13} Children could be placed in CCCF for shelter and care as well; thus, child-rape victims could become inmates.\footnote{14} Although these children were not detained in CCCF for inordinate periods of time,\footnote{15} physical and psychological harms were likely to result from confinement under less-than-acceptable conditions.\footnote{16} The state's need to shelter juvenile victims and hold status offenders

learning she had contracted gonorrhea from vaginal intercourse. They placed her in foster homes nine times before she had reached the age of six; these transfers included one return to her natural parents (from whom she was subsequently removed on grounds of parental neglect) and to at least two other foster homes in which she was physically or sexually abused.\footnote{17} The court held that while the state had no constitutional obligation to protect the child from her parents' abuse per DeShaney, the state assumed responsibility for her safety and care once it had removed her from her parents' custody: "Once the state assumes custody of a person, it owes [her] a rudimentary duty of safekeeping no matter how perilous [her] circumstances when [she] was free. \textit{[T]he absence of a duty to rescue does not entitle a rescuer to harm the person whom he has rescued.}\" \footnote{18} Id. at 849.


10. Tewksbury, 545 F Supp. at 904-07.

11. Tewksbury, 545 F Supp. at 904-07.

12. Id. at 908.

13. Id.

14. Id.

15. Id.

16. See id. at 905 (listing "extraordinary" conditions). Children held in CCCF did not receive mattress covers, pillows or sheets; they slept on mattresses covered with urethane and were given a wool blanket. If no mattresses were available (as was the case in isolation cells), they slept on the concrete floor. All personal clothing was confiscated and replaced with CCCF clothing; no underwear was allowed. Female children had to make personal requests for sanitary napkins or tampons from a male corrections officer who, in turn, contacted a matron, since matrons were not stationed in the detention area. Because toilet and shower facilities were not screened from view, users were visible to others, including members of the opposite
and pretrial detainees did not constitute a legitimate governmental purpose sufficient to override CCCF's rehabilitative duty. The court ruled that it was "fundamentally fair" to deny children charged with crimes the same rights made available to adults, but only if that denial were offset by a "special solitude" rather than simply lodging them in adult prisons under the guise of *parens patriae*.

A recent case reveals that juveniles continue to be subjected to similar problems. In September of 1990, the federal district court in Maine held that a juvenile who had been incarcerated for four days in a county jail for alleged unauthorized use of a motor vehicle could bring a section 1983 action to seek relief for infringement of his constitutional rights. After his arrest, for a violation that only would have been treated as a misdemeanor if committed by an adult, the fifteen-year-old plaintiff was allegedly strip searched during the "processing" phase at which time he allegedly heard comments from the prison staff implying the threat of sexual attack by adult prisoners. He allegedly was confined to a cell within sight and sound of adult prisoners, denied the opportunity to speak to an attorney or to family members and deprived of counseling and outdoor exercise. The court held that the facility used to confine the plaintiff and the alleged circumstances surrounding that confinement constituted a clear violation of the requirements of the Juvenile Justice Act, thus leaving county commissioners vulnerable to potential liability under section 1983.

It is an unfortunate fact that many juveniles in today's society commit crimes of such a heinous nature that punishment is easily justified as the proper response. The widespread distribution and use of drugs, combined with the alarming growth of local gangs, have contributed to the rise in

sex. Sometimes, children were placed in isolation cells—eight-by-eight foot windowless concrete rooms containing nothing but a sewer hole near the center of the cell which served as a toilet. Corrections officers controlled the flushing mechanism which they used at random. When the sewer hole was "flushed," water and sewage splashed several inches above the cell floor. Children shared the same passageways with adult prisoners and were able to communicate with them in both the regular and isolation cells. Some were subjected to verbal threats and sexually explicit gestures. There were no educational, recreational or exercise programs available for children. There were no formal, written policies or criteria addressing the care and treatment of juveniles. *Id.* at 898-902.

17 *Id.* at 905-06.
18 *Id.* at 906-07.
19 Grenier v. Kennebec County, 748 F Supp. 908 (D. Me. 1990). Since this case came before the court on separate motions to dismiss by the defendants, the court did not rule explicitly on the veracity of the facts. However, because the plaintiff was seeking damages for psychological and emotional duress, and because the court did find that his incarceration was "wholly inconsistent" with the requirements of the Juvenile Justice Act, *id.* at 915, the case is pertinent to this discussion.
20 *Id.* at 910.
21 *Id.* at 910-11.
22 *Id.* at 915, 918.
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violent criminal behavior by juveniles. While the immediacy of this problem is certain, this Note does not address the *parens patriae* doctrine within that context. Rather, it focuses primarily on those youths who are considered "nonviolent": minor delinquency offenders, status offenders and neglected or abandoned children, whose real need for protection is overlooked by lawmakers and law enforcers concentrating on severe juvenile violence.

This Note will analyze the constitutional, statutory and civil wrongs involved with the incarceration of juveniles in adult prisons which obstruct the administration of the *parens patriae* doctrine. Part I provides an overview of the problems facing juveniles confined in adult institutions. Part II discusses how the shortcomings of the juvenile justice system violate the legal rights of juveniles. Reformers' efforts to change existing conditions in

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23. According to the Federal Bureau of Investigation, 1.4 of the estimated 14.3 million arrests for 1989 directly involved drug abuse. *Uniform Crime Reports 1989: Crime in the United States* 171 [hereinafter *Uniform Crime Reports*]. For arrests involving people under the age of 18, approximately 90,000 were for drug abuse violations. *Id.* at 188. Overall, the drug abuse violation arrest total for 1989 was 20% higher than in 1988, 55% higher than in 1985 and 126% higher than in 1980. *Id.* at 171. In Los Angeles County alone, cocaine deaths increased 208% between 1984 and 1987. *Organized Criminal Activity by Youth Gangs: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess.* 56 (1988) [hereinafter *Hearings*] (statement of Los Angeles County Assistant Sheriff Jerry Harper).

Los Angeles, considered the "Gang Capital of the United States," is home to more than 650 gangs with a reported membership of 70,000. *Id.* at 59. While street gangs have been in existence since the 1920s, two highly aggressive and violent gangs—the Crips and the Pirus, or Bloods—surfaced in 1970 and turned the processing and marketing of crack (raw cocaine) into an extremely lucrative business. *Id.* at 41 (statement of Chief of Police Ivory Webb, Compton Police Department, Los Angeles). Approximately 275 active sects of the Crips and the Bloods in Los Angeles help to maintain drug trafficking through the use of crack distribution outlets in dozens of United States cities. *Id.* at 20-21 (statement of Robert C. Bonner, U.S. Attorney for Central District of California).

In 1987, the number of gang-related murders in Los Angeles was almost four times the number of those reported in New York, Chicago, Philadelphia and San Diego combined. *Id.* at 112 (statement of Richard Alarcon, Gang/Drug Programs Coordinator for Los Angeles Mayor's Office of Criminal Justice Planning). From 1986 to 1987, crime between gangs rose 88%. Gang homicides increased by 33%, violent felonies by 11% and gang-related weapon seizures by 80.3%. *Id.* at 59 (statement of Los Angeles County Assistant Sheriff Jerry Harper). Contrary to popular belief, gangs attack the public more than they do each other. Of the 3,992 gang-related violent felonies reported within the Los Angeles County Sheriff's Department's jurisdiction in 1987, over 3,000 of those victims were innocent citizens. *Id.* at 62; see also Bryant, *Communitywide Responses Crucial for Dealing with Youth Gangs*, OJJDP Juv. Just. Bull., Sept. 1989, at 2-3 (maintaining that the increased demand for drugs (in particular, crack cocaine) has contributed to the rise in gang membership, although drug trafficking by gangs is not as organized or sophisticated as once presumed); McKinney, *Juvenile Gangs: Crime and Drug Trafficking*, OJJDP Juv. Just. Bull., Sept. 1988, at 3 (quoting a Chicago Deputy Police Chief who believes that the lenient juvenile justice system, which attempts to avoid punishment for youth offenders, only serves to further encourage juvenile recruitment in gangs, since penalties for juveniles who commit crimes are almost nonexistent and adult gang members are insulated from arrest).

24. However, because of the nature of the topic and the close relationship between the two categories of juvenile offenders, this Note will refer to the problems that affect "violent" youths as well.
the system will be analyzed in light of recent court decisions and governmental actions, including the federal Juvenile Justice and Delinquency Prevention Act (JJDPA) and the expansion of liability claims and recovery measures. Part III addresses alternative rehabilitation programs that reformers have implemented as contemporary solutions to some of the inadequacies plaguing the juvenile justice system. Finally, Part IV proposes drafting and implementing a comprehensive model juvenile code and calls for revamping the juvenile justice system to emphasize increased regulatory control by the states.

I. PROBLEMS FACING JUVENILES IN ADULT JAILS

Juvenile crime is on the rise, and the brutality and severity of the acts committed have lawmakers and law enforcers concerned with curbing, if not eliminating, the wave of violence that has marked the past decade. Undoubtedly, drugs have greatly contributed to the problem, especially with the introduction of popular substances like "crack," an inexpensive and almost instantaneously addictive form of cocaine that has created a huge market of desperate buyers, thus providing a lucrative commodity for young entrepreneurs.

Contributing to the expanding drug problem is the alarming increase in the popularity of gangs, whose sustenance often largely depends on the illegal sale and distribution of drugs. Gang membership is attracting a larger number of children who are joining at younger ages, thus increasing the

25. One of the more shocking examples of juvenile violence made "wilding" a household term after the brutal rape of a female jogger in Central Park by members of a New York gang. The crime made national headlines in April 1989. The perpetrators of the attack ranged in age from fourteen to sixteen-years-old. The reasons given for the attack: "[i]t was fun" and "[i]t was something to do." Gibbs, Wilding in the Night, TIME, May 8, 1989, at 20-21.

26. See "Crack Cocaine": Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 99th Cong., 2d Sess. 1-4 (1986) (opening statement of subcommittee chairman William Roth) [hereinafter "Crack Cocaine"]). Not only does the demand for crack cocaine provide business opportunities for children, but the one-unit dosage packaging price of approximately ten dollars makes the drug affordable for their own consumption. Id. at 9 (prepared statement of Sen. Lawton Chiles); id. at 15-16 (testimony of Charles Schuster, director of the National Institute on Drug Abuse); id. at 87-88 (statement by Dr. Robert Byck, professor, Yale University School of Medicine).

27. As one chief of police stated:
Youths as young as 8 and 10 years old are accepted into gangs now, where their utility is not their warrior skills, but their ability to serve as lookouts, and to escape the harsher criminal penalties generally reserved for veteran "home boys." These kids are soon sucked into the drug selling machinery and take their place in a sales pyramid where kingpins can rake in as much as $2,000 a week. 

Hearings, supra note 23, at 49 (testimony of Inglewood, California Chief of Police Raymond Johnson); see also "Crack Cocaine," supra note 26, at 10 (prepared statement of Sen. Lawton Chiles) ("Crack is spreading, it is affecting our children and grandchildren, and it is igniting a crime wave."); id. at 43-44 (testimony of Michael Taylor, former employee of a "crack house") (juveniles as young as ten years old are employed at crack houses; they can make as much as one hundred dollars per night).
possibility that they will commit delinquent acts before reaching adulthood.28

As lawmakers struggle to combat these problems, they are faced with the additional dilemma of prosecuting violent, chronic offenders within the confines of the parens patriae doctrine. Responding to a political climate that advocates a "get tough" attitude, legislative and judicial bodies are reluctant to prescribe rehabilitative and treatment-oriented measures for these youths for fear they will appear too lenient on juvenile crime.

Yet, in the process of cracking down on violent, hard-core juvenile delinquents, lawmakers—and law enforcers generally—fail to separate a surprisingly large group of juveniles who commit only minor crimes or status offenses.29 Many are no more than victims of parental abuse or neglect who are incarcerated for their own protection.30 A 1985 study found that of the approximately 479,000 juveniles locked in adult jails throughout the United States, only ten percent were held for serious offenses. Twenty percent were jailed for status offenses, and four percent—more than 19,000—were detained without having committed any offense. This latter group included neglected, handicapped and retarded children as well as "throwaways," juveniles forced from their homes by parental abuse or economic reasons.31 Over nine percent of those juveniles were thirteen years old or younger.32 Nonoffenders, status offenders, pretrial detainees and minor delinquents are incarcerated for various reasons: to ease the burden of the juvenile courts, to protect the community, to reduce the child's potential for hurting himself, to protect the child from a dangerous home environment, to deter the child from further criminal acts, to ensure the child's appearance at court hearings, to provide temporary detention until placement in another facility or to hold an uncontrollable child at a parent's request.33 The result is that those in need of the state's parens patriae protection are treated in too similar a manner to their more violent counterparts. The physical, mental and psychological harms inflicted on these youths make their incarceration "the most insidious form of child abuse, because it is state-sanctioned."34

28. See Plummer, The Crack Kid, PEOPLE (EXTRA), Fall 1989, at 73. Since crack first appeared in the early 1980s, juvenile arrests across the United States have tripled. Id., see also UNIFORM CRIME REPORTS, supra note 23, at 171 (from 1980 to 1989, the total number of arrests for drug abuse violations increased 126%).
30. See Press, When Children Go to Jail, NEWSWEEK, May 27, 1985, at 87.
31. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILES IN ADULT JAILS AND LOCKUPS: IT'S YOUR MOVE 1 (Feb. 1985) [hereinafter JUVENILES IN ADULT JAILS] (copy on file with the Indiana Law Journal). The study was conducted by the Community Research Center of the University of Illinois at Urbana-Champaign under a grant awarded by the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention.
32. Id.
33. See id. at 2.
34. Press, supra note 30, at 87 (quoting Paul Mones, legal director of the Public Justice Foundation, Santa Monica, California).
The study showed that even short periods of incarceration can cause severe and irreparable damage. The data revealed that the suicide rate among juveniles incarcerated in adult prisons was five times higher than the rate among youths in the general population\textsuperscript{35} and eight times higher than the rate among those committed to juvenile detention centers.\textsuperscript{36} The hostile environment, lack of privacy and unsanitary conditions intensify feelings of fear and anxiety among youths,\textsuperscript{37} regardless of the amount of time they are forced to spend in jail. In fact, the first few hours of confinement can be the most dangerous;\textsuperscript{38} if feelings of hopelessness and despair feed on the fear of being trapped in a locked cell, the terrified youth may opt for an extreme response as the only available solution to escape his immediate situation.\textsuperscript{39} Furthermore, juveniles under the influence of drugs or alcohol can experience a heightened sense of confusion, loneliness and abandonment;\textsuperscript{40} and, as corrections officers often do not have the training necessary to meet the needs of a drugged or intoxicated child, these youths are even more likely to harm themselves.\textsuperscript{41} In addition, countless incarcerated juveniles fall victim to sexual assault, exploitation and other physical injury at the hands of guards, adult prisoners and even other juvenile inmates,\textsuperscript{42} thereby exposing juveniles to physical and psychological harm.\textsuperscript{43}

Because adult prisons are rarely equipped with educational and recreational facilities for children,\textsuperscript{44} confinement in these institutions may lend

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  \item \textsuperscript{35} \textit{Juveniles in Adult Jails}, \textit{supra} note 31, at 3.
  \item \textsuperscript{36} \textit{Id.}
  \item \textsuperscript{37} See Note, \textit{supra} note 29, at 50; see also Lollis v. New York State Dep't of Social Servs., 322 F Supp. 473, 480-82 (S.D.N.Y. 1970) (testimony of psychiatrists in which they unanimously condemned isolation practices for juveniles due to their destructive effects).
  \item \textsuperscript{38} Press, \textit{supra} note 30, at 89.
  \item \textsuperscript{39} See, e.g., Long v. Collins, No. 89-0901 (E.D. Pa. May 18, 1991) (WESTLAW, Allfeds library) (a seventeen-year-old, jailed for intoxication and uncooperative behavior, hanged himself after learning that his mother declined to pick him up until the following morning); Press, \textit{supra} note 30, at 89 (a fifteen-year-old hanged himself after spending thirty minutes in a Kentucky jail for arguing with his mother).
  \item \textsuperscript{40} Note, \textit{supra} note 29, at 51.
  \item \textsuperscript{41} In D.B. v. Tewksbury, 545 F Supp. 896, 900 (D. Or. 1982), one of the plaintiffs who was arrested while intoxicated was placed in isolation for being uncooperative. He did not receive any medical treatment until after he shattered a finger and broke several teeth. Another intoxicated juvenile who acted belligerently was left in his cell in handcuffs. He received no medical attention or assistance and was later found in his cell in a pool of vomit and urine. \textit{Id.}
  \item \textsuperscript{42} Soler, Dale \& Flake, \textit{Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails}, 1980 B.Y.U. L. Rev \textbf{1}, 5-6; see also Doe v. McFaul, 599 F Supp. 1421, 1427 (D. Ohio 1984) (male juvenile plaintiffs were sexually attacked by other male juvenile inmates who were incarcerated in the same cell).
  \item \textsuperscript{43} Although the actual physical and psychological effects of detention on juveniles are uncertain, the continual output of reports, studies and literature suggests that the issue has far from being resolved. A. Roberts, \textit{Juvenile Justice: Policies, Programs, and Services} 157-58 (1989).
  \item \textsuperscript{44} \textit{Child Client}, \textit{supra} note 11, ¶ 2.02, at 2-72.
\end{itemize}
itself to idleness, boredom and depression among juvenile inmates. The one area in which juveniles do receive schooling is crime; association with adult offenders who teach them advanced criminal techniques and provide criminal contacts encourages delinquent behavior.\textsuperscript{45} As high rates of recidivism belie the belief that incarceration has a deterrent effect on future delinquency,\textsuperscript{46} the notion that a child can be "scared straight" by detaining him for any length of time is a dangerous misconception and an unrealistic proposition.\textsuperscript{47}

Furthermore, while federal and state statutes prohibit the incarceration of juveniles with adult inmates, no existing laws mandate the separation of nonviolent delinquents, status offenders or nonoffenders from chronic, hard-core juvenile offenders.\textsuperscript{48} Considering the nature and extent of the crimes committed by the latter, it is likely that incarcerating these two groups together would have detrimental effects similar to those caused by incarceration with adults.

The juvenile court system itself is also responsible for the ineffectiveness of its deterrence measures, because vague statutes and arbitrary methods of assigning punishment fail to reflect any sense of justice that might otherwise inspire remorse in the juvenile offender.\textsuperscript{49} If the juvenile cannot perceive his punishment as appropriate or reasonable, it is more likely that he will view the risk and severity of punishment as a gamble rather than as an absolute certainty.\textsuperscript{50} If "nonviolent" juveniles are incarcerated, they are more likely to view the justice system as unfair for doling out arbitrary and exorbitant punishments, thus undermining the rehabilitative purpose of confinement. The only real guarantee is that by placing a child in jail, he is made to feel like a prisoner. If a juvenile feels like a prisoner, he will begin to act like one which frustrates the purpose most judges cite for ordering confinement in an adult facility: to frighten juveniles away from a future life of crime.\textsuperscript{51}

\textsuperscript{45} Soler, Dale & Flake, supra note 42, at 6-7.
\textsuperscript{46} Id.
\textsuperscript{47} Unaware of the dangers that exist in prison settings, parents of a seventeen-year-old Idaho boy supported the idea of incarcerating their son for nonpayment of $73 worth of traffic tickets in the hopes that the "taste of jail" would dissuade him from further delinquency. He was tortured and then beaten to death by his cellmates, prompting a 1982 ruling that prohibited all but the most violent juveniles from being jailed in Boise. Press, supra note 30, at 87, 89. Furthermore, in the case of an Ohio juvenile court judge who implemented a program based on the philosophy behind the "Scared Straight" television movie, the district court held that this practice violated the juvenile inmates' due process and eighth amendment rights. McFaul, 599 F Supp. 1421.
\textsuperscript{48} Even in those facilities that separate the more dangerous juvenile offenders from the rest of the prison population, there often is opportunity for contact with one another. See infra notes 103-115 and accompanying text.
\textsuperscript{49} Note, supra note 29, at 65.
\textsuperscript{50} Note, Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine, 95 YALE L.J. 174, 191 n.70 (1985).
\textsuperscript{51} Note, supra note 29, at 65 (citations omitted).
Under such conditions, it is unlikely that incarceration will forestall future delinquent behavior.

In a sense, a juvenile's experience in prison can be likened to a product's development in a factory: the juvenile may enter as a rough delinquent and exit as a polished criminal. During his confinement he may endure physical, mental and psychological abuse by adult and other juvenile inmates which destroys his self-esteem and reinforces a negative self-image. He may learn to view the outside world with cynicism, distrust and cautious apprehension, an attitude which is reinforced by the criminal stigma that society attaches to him and which interferes with family and community relationships and precludes him from emerging as a "law-abiding productive adult[]." In the best of situations, the juvenile will not suffer so much as to handicap all future rehabilitative efforts.

Aside from a moral standpoint, there are legal implications to consider; in fact, neglected or abandoned children are deprived of their legal rights because of their status, which is constitutionally forbidden. Many of the practices involved in the incarceration of juveniles in adult jails violate general principles of constitutional law as well as federal and state statutes.

II. A History of Inadequate Procedural and Substantive Protections

Anglo-American law has historically provided minimal protection for juvenile offenders, whose status as minors precludes them from receiving the same rights and procedures afforded adults. While a growing awareness of the need to expand juvenile protections to fit society's expectations has led to increased legislation, the primary obstacle to protecting juvenile rights in practice is the failure of both courts and detention facilities to apply specific criteria to the cases before them. Although professional standards committees and legal organizations have offered guidelines, state governments have either failed to adopt or to comply with them. As a result, arbitrary and capricious rulings often govern the treatment and care of juveniles detained in correctional facilities.

A. The Common Law Rights of a Juvenile

The concept of parens patriae originated in the early fifteenth century with the King's Court in England, which made it a practice to assume

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52. Soler, Dale & Flake, supra note 42, at 7
53. Tewksbury, 545 F Supp. at 903 (emphasis in original).
54. Inmates of Boys' Training School v. Affleck, 346 F Supp. 1354, 1371-72 (D.R.I. 1972). See generally Robinson v. California, 370 U.S. 660 (1962) (while the possession or use of an illegal substance may be a criminal offense, it is unconstitutional to convict an individual for being a drug addict; one cannot be punished for mere status or chronic condition).
responsibility over neglected and abandoned children.\textsuperscript{55} The \textit{parens patriae} doctrine originally emphasized the importance of maintaining the family unit by allowing parents to raise their children as they saw fit without interference by the state.\textsuperscript{56} The state's role was supplementary and was justified only when there was a compelling reason, such as protecting the child from parental abuse.\textsuperscript{57}

Yet, when a benevolent court was precluded from acting in its \textit{parens patriae} role, juvenile offenders faced punishment akin to hardened criminals. Reformers' efforts to change this practice resulted in the establishment of a separate court system that replaced traditional notions of punishment with a "clinical" approach emphasizing rehabilitation and treatment.\textsuperscript{58}

\textsuperscript{55} Note, supra note 29, at 46.


\textsuperscript{57} Id. When the state seeks permanent termination of parental rights in their natural child, it must support allegations of parental abuse by at least "clear and convincing evidence." Santosky v. Kramer, 455 U.S. 745, 769 (1982). The Court replaced the "fair preponderance of the evidence" standard usually applied in juvenile proceedings with a higher burden of proof due to the severity of private interests affected and the high risk of error created by the state's chosen procedure. Id. at 758.

\textsuperscript{58} Although the historical origin of the juvenile court remains unclear, two schools of thought predominate. Founders of the orthodox interpretation identify the founding as a result of the "humane impulse merging with social science through a legal catalyst to replace the barbarous and vengeful cruelties of the criminal law with something better." F. Faust & P. Brantingham, Juvenile Justice Philosophy 550 (1974). At common law, children under the age of seven were deemed incapable of criminal intent; children between seven and fourteen were presumed incapable, but that presumption could be rebutted. If the state were successful, the child was tried by a criminal court. Children over the age of fourteen were considered adults and thus were automatically under the jurisdiction of the criminal court. Id. at 550-51. These founders sought to remove troubled children from the harsh sentences and inhumane treatment of the adult criminal courts by establishing a separate legal process that could provide a more beneficial method for controlling juvenile behavior. Id. at 551.

The orthodox followers linked causes of delinquency to problems of heredity and an unhealthy social and physical environment, but because they viewed children as "infinitely malleable" and "the best possible subjects for the new social sciences to work wonders upon," they saw a legal catalyst in the form of a benevolent court acting as \textit{parens patriae} as the appropriate mechanism to intervene and circumvent any further problems that might arise in homes marked by parental irresponsibility and urban temptation. Id. at 551-52.

In contrast, revisionists regarded the juvenile court as the product of the evolution of the criminal court system rather than a departure from it. Id. at 522. They rejected the claimed humanistic motives of the orthodox analysis; revisionists believed the orthodox interpretation served as a means for the socio-economic elite to manipulate the lower class while establishing a "socially acceptable" means of expanding their political power and improving their careers. Id. at 555.

Revisionists believed that the existing biases against pauper families served as an impetus to use the civil poor laws to disrupt the lower income family nucleus by placing its children in reformatories, and that throughout the nineteenth century, the courts continued to blur the distinction between dependent and delinquent children by using the informal procedures of the poor laws to deal with both types of children. Id. at 555. This progression culminated in the founding of the juvenile court. The juvenile court was thus a means of justifying the earlier destruction of the lower class family and replacing less desirable environments with healthier ones. Id. at 557.
Furthermore, while exemption from criminal law did not impute immunity from punishment, juvenile proceedings became primarily civil in nature, rather than criminal or adversarial.59

Nonetheless, problems with the interpretation and application of the parens patriae doctrine throughout the late 1960s and early 1970s resulted in the formulation—and subsequent violation—of juveniles' constitutional rights. Because the philosophy of parens patriae allowed for substantial differences between juvenile and adult proceedings, it was possible to imprison juveniles under the guise of the parens patriae doctrine without affording them the same rights as adults.60 As a result, "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."61 In response to this concern, the courts began to create constitutional safeguards against violations of juvenile rights.

B. The Due Process Rights of a Juvenile

In 1966, the Supreme Court established the foundation for the expansion of juvenile rights in Kent v. United States.62 In Kent, the Court held that a "full investigation" would be required in all future proceedings before waiver of jurisdiction to an adult court could be considered.63 A year later, in its landmark decision In re Gault,64 the Court used the fourteenth amendment's due process clause to make applicable to juveniles certain basic constitutional protections already enjoyed by adults accused of crimes. These included the right to sufficient notice of charges, the right to counsel, the right to be informed of the right to counsel, the right to invoke the

59. "Because the State is supposed to proceed in respect of the child as parens patriae and not as adversary, courts have relied on the premise that the proceedings are 'civil' in nature and not 'criminal'"; Kent v. United States, 383 U.S. 541, 555 (1966); see Pee v. United States, 274 F.2d 556, 561-62 (D.C. Cir. 1959) (containing a list of cases for fifty-one jurisdictions, which hold that juvenile cases are not considered criminal proceedings).

60. See Doe v. McFaul, 599 F. Supp. 1421, 1428 (D. Ohio 1984) ("[J]uveniles who are deprived of the liberty without the full due process rights enjoyed by adults receive in return rehabilitative and individual treatment rather than mere punitive incarceration."); D.B. v. Tewksbury, 545 F. Supp. 896, 906 (D. Or. 1982) ("It is, then, fundamentally fair—constitutional—to deny children charged with crimes rights available to adults charged with crimes if that denial is offset by a special solicitude designed for children.").

61. Kent, 383 U.S. at 556.


63. A "full investigation" includes the right to assistance by counsel, the right of counsel to access to the juvenile's social records, a requirement that the court give reasons for allowing or denying waiver (thus granting judges discretionary but not arbitrary decision-making power), and the right to a hearing that complied with at least minimal standards of due process and fair treatment. Id. at 560-63.

64. 387 U.S. 1 (1967).
privilege against self-incrimination and the right to confrontation and cross-examination. Subsequent rulings provided juveniles the right to be tried for criminal acts under a "proof beyond reasonable doubt" standard and the right against double jeopardy.

However, the state has "a parens patriae interest in preserving and promoting the welfare of the child." Acknowledging this fundamental difference between adult and juvenile proceedings, the Court's interpretation of the Constitution does not require elimination of all differences between the treatment of adult and juvenile offenders. Furthermore, because the state's role as parens patriae is that of protector rather than punisher, the incarceration of children is allowed only for rehabilitation and treatment purposes. Because there is "no legitimate interest in punishing such juveniles as retribution for past misdeeds . . . restrictions on their liberty must be justified on the basis of other objectives—rehabilitation, safety, or internal order and security." Such broadly defined goals, based on inexact criteria, grant substantial leeway to officials in the judicial system to justify their determination of what constitutes rehabilitation or treatment. The Supreme Court further encourages arbitrary decisionmaking by the balancing test it sets forth, because it allows judges wide discretion when weighing the child's private liberty interests against society's interest in protecting itself and the government's fiscal and administrative integrity.

In addition, the juvenile court system today faces huge problems with conditions at facilities in which juveniles are confined. Regardless of past reforms and present legislation, the theory behind parens patriae, and the reality of its practice, fail to further the purpose of the system. As a result,

65. Id. at 33-34, 41-42, 47-56.
69. For example, although a juvenile court judge may, at his discretion, use an advisory jury, no constitutional right to a jury trial exists in juvenile proceedings. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). More recently, the Court's determination in a fourth amendment search and seizure claim brought by a juvenile against public school authorities replaced "probable cause" with a lesser standard of "reasonableness," depending on the context within which the search took place. New Jersey v. T.L.O., 469 U.S. 325 (1985).
70. See supra note 8.
71. Santana v. Collazo, 793 F.2d 41, 43 (1st Cir. 1986). The same court had previously permitted the limited use of isolation to maintain institutional order and safety, but because of a "due process interest in freedom from unnecessary bodily restraint," the decision to use isolation deserves close scrutiny by the court. Santana v. Collazo, 714 F.2d 1172, 1181 (1st Cir. 1983), cert. denied, 466 U.S. 974 (1984). The states also exercise parental control over juveniles in the belief that children lack the necessary "experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Bellotti v. Baird, 443 U.S. 622, 635 (1979).
C. The Eighth Amendment Rights of a Juvenile

The eighth amendment to the Constitution reads, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." While it is true that juvenile offenders are tried under different standards and receive different rights than their adult counterparts, the eighth amendment still entitles them to most of the protections set forth in the Constitution. Juveniles are deprived of many of the benefits of the law of this state, merely because of their immaturity. They are not permitted to vote, to contract, to purchase alcoholic beverages or to marry without the consent of their parents. It seems inconsistent that one be denied the fruits of the tree of the law, yet subjected to all of its thorns.

Yet, the concept of "cruel and unusual punishment" has always been vaguely defined and broadly applied, because it "changes with the continual development of society and with sociological views concerning the punishment for crime." Courts have held that cruel and unusual punishment includes many forms of prisoner treatment, from intentional humiliation and psychological abuse to physical beatings. For example, in Nelson v

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73. U.S. Const. amend. VIII.
75. Workman v. Commonwealth, 429 S.W.2d 374, 377 (Ky. 1968).
76. Id., see also Weems v. United States, 217 U.S. 349, 378 (1910) (the concept of cruel and unusual punishment is not concrete "but may acquire meaning as public opinion becomes enlightened by a humane justice"); Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). At common law, capital punishment could theoretically apply to anyone over the age of seven, Stanford v. Kentucky, 492 U.S. 361, reh'g denied, 110 S. Ct. 23 (1989), and while imposing the death penalty is not absolutely forbidden, "individualized consideration [is] a constitutional requirement," id. (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)), and the juvenile's age is an individualized mitigating factor that must be taken into consideration. Id. The death penalty is used sparingly though, so while a fifteen-year-old could be transferred to an adult court for an offense deemed more appropriate for determination using adult standards, a general prohibition on the death penalty for juveniles still remains in effect. See, e.g., Cooper v. State, 540 N.E.2d 1216 (Ind. 1989) (the Indiana Supreme Court overturned a death penalty sentence for a minor, who was convicted of murder for stabbing a 78-year-old Bible-studies teacher thirty-three times, because the sentence constituted cruel and unusual punishment under both federal and state law); Thompson v. Oklahoma, 487 U.S. 815 (1988) (the Supreme Court prohibited the use of capital punishment for a fifteen-year-old who participated in the brutal murder of his former brother-in-law and disposed of the body by chaining it to a cement block and throwing it into a river).
Heyne,78 the Court of Appeals for the Seventh Circuit looked to Furman v. Georgia79 in its holding that the correctional institution's practice of disciplining juvenile inmates with a "fraternity paddle" up to two inches thick violated the juveniles' eighth and fourteenth amendment rights.80 The beatings only increased hostilities in the school and "substantially frustrated its rehabilitative purpose."81 Furthermore, because punishment should conform to the degree of the offender's culpability,82 the beatings constituted an excessive form of discipline for approximately one-third of the juveniles who were noncriminal offenders.83 Similarly, the court held that indiscriminate and unsupervised use of tranquilizing drugs to control "excited" behavior constituted cruel and unusual punishment and would not be condoned unless authorized by a physician for medical reasons.84

The courts have also placed limits on the widespread use of physical restraints, allowing their use only under very specific circumstances.85 In particular, the practice of hogtying juveniles is "degrading, dangerous, and unconstitutional."86 Thus, even when it is necessary to restrain an inmate, that inmate retains a liberty interest in freedom of movement, depending on the extent to which the restraint violates his constitutional rights to personal safety and due process of law.87

Correctional institutions also use isolation cells as a method of restraint. In Lollis v. New York Department of Social Services,88 a fourteen-year-old

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78. 491 F.2d 352 (7th Cir.), cert. denied, 417 U.S. 976 (1974).
79. 408 U.S. 238 (1971). In Furman, Justice Brennan attempted to define the boundaries of the use of punishment: "If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive." Id. at 279 (citations omitted) (Brennan, J., concurring).
80. Staff members, some weighing as much as 285 pounds, would beat juveniles weighing 160 pounds on their clothed buttocks, causing severe pain, blisters, bruises and even bleeding. Nelson, 491 F.2d at 354 & n.3.
81. Id. at 356.
83. Nelson, 491 F.2d at 353.
84. Id. at 357.
85. CHILD CLIENT, supra note 11, ¶ 2.01[7], at 2-59 to 2-61. Courts have held that physical restraints could be used only when absolutely necessary to prevent injury to the child or to others—when used for specified periods of time, in a manner that would inflict the least amount of physical discomfort, when the child is monitored, and written records of when the restraints were used are kept. They may not be used as a form of punishment, as a convenience to the correctional officers or in place of programming. The underlying rationale is that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Youngberg v. Romeo, 457 U.S. 307, 316 (1982) (quoting Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part)).
86. CHILD CLIENT, supra note 11, ¶ 2.01[7], at 2-59 (footnote omitted). "Hogtying" is a form of restraint in which the child lies on his stomach while his wrists are handcuffed and his ankles shackled, and the handcuffs and shackles are then bound together.
87. Youngberg, 457 U.S. at 320.
status offender, incarcerated as a "Person in Need of Supervision," was confined without notice or a hearing to an isolation cell after fighting with a matron and another inmate. The six-by-nine foot room was bare except for a wooden bench, and the only window was blocked, preventing outside visibility. She remained in isolation for several days, where all she could do was sit on the bench and stare at the wall. The district court ruled that the extended solitary confinement and the conditions under which it took place constituted cruel and unusual punishment. As they have with the use of physical restraints, subsequent court decisions have required specific procedures and protections before a juvenile may be placed in isolation.

However, eighth amendment application is not restricted solely to punishment actually inflicted on the individual but also applies to confinement "characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people." Furthermore, if the right to treatment is required as a quid pro quo for the state's exercise of parens patriae, any incarceration of juveniles for punitive purposes may well violate the eighth amendment prohibition against cruel and unusual punishment.

When the state acts as parens patriae, it assumes parental duties that amount to ordinary proper parental care. These duties should entail "minimum acceptable standards of care and treatment for juveniles and the

89. Id. at 475 (Antonette Lollis was never accused or convicted of a crime. Her mother was later accused of neglecting her seven brothers and sisters.).
90. Id. at 476.
91. Id.
92. Lollis, 328 F Supp. at 1118.
93. CHILD CLIENT, supra note 11, ¶ 2.01[7], at 2-62 to 2-65.
95. Id. at 585. The court cites numerous examples in Supreme Court decisions, lower federal court cases and scholarly works to justify its assertion that such treatment is a constitutional right. Id. at 598-602. But cf. Santana, 793 F.2d 41 (the court held that there is no constitutional right to rehabilitative treatment, although it noted that any alternatives employed must be sufficiently related to the state's legitimate interests and objectives); DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989) (the Court held that when a state takes an individual into custody and holds him against his will, it is the state's duty to provide treatment and protection, but the scope and nature of that duty is still subject to considerable discretion).
96. Inmates of Boys' Training School v. Affleck, 346 F Supp. 1354, 1366 (D.R.I. 1972). Because the parens patriae doctrine emphasizes rehabilitation and community readjustment measures rather than punishment, it seems ironic that "cruel and unusual punishment" would be an issue with regard to the incarceration of juvenile offenders. It seems logical that if the state would intervene when parents confine their child indoors, provide no education, recreation or exercise, allow no visitors and refuse to provide medical treatment, then the state may not act in a similar manner when fulfilling its parens patriae role. Id. at 1367. It is bitterly ironic that a child may be incarcerated for truancy and then be denied proper education by institutions that are incapable or unwilling to provide it. Id. at 1369.
97 Nelson, 491 F.2d at 360.
right to *individualized* care and treatment." Some courts have ruled that failure to provide minimum health care, adequate educational programs, minimum regular exercise and recreation and appropriate or therapeutic work programs violates the juvenile offender's constitutional rights. Refusal to adhere to every one of these requirements constitutes a denial of those rights. However, most guidelines that exist lack specificity, making it difficult to interpret the courts' expectations. Furthermore, the problem of enforcing these guidelines is exacerbated by a shortage of policing agencies to monitor correctional institutions. Thus, even though courts are expanding the definition of "cruel and unusual punishment" to include a wider array of punitive measures, many juveniles' eighth amendment rights are still frequently violated.

**D. The Statutory Rights of a Juvenile**

Federal law and many state statutes require authorities to segregate juvenile offenders from adult inmates. In particular, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDPA) in 1974 to improve the juvenile justice court system by regulating federal funds to the individual states.

Under the JJDPA, participating states submit a three-year plan to remove juveniles from adult institutions and provide appropriate alternative programs that cater to the needs of juveniles. The JJDPA mandates removal of all status offenders and nonoffenders from secure detention facilities and requires that delinquent youths "shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges." Although the latter provision does not demand complete segregation from adult inmates, it does require that there be "no more than haphazard or accidental contact."

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98. *Id.* (emphasis in original).
99. *Child Client*, supra note 11, ¶ 2.01[2], at 2-13 to 2-14.
100. *Id.,* ¶ 2.01[4], at 2-35.
101. *Id.,* ¶ 2.01[4], at 2-37.
102. See *id.,* ¶ 2.01[4], at 2-39.
107. 28 C.F.R. § 31.303(d)(3) (1989). Likewise, the State of Indiana does not prohibit incarceration of juveniles in adult facilities, although it allows only incidental contact between juvenile and adult inmates. *Ind. Code* § 31-6-4-6.5(d) (Supp. 1990).
The Federal Juvenile Delinquency Act\textsuperscript{108} and almost every state code also require separation of juveniles from adult prisoners in detention facilities.\textsuperscript{109} So do the primary professional standards promulgated by such groups as the Institute of Judicial Administration/American Bar Association, the American Correctional Association, the National Advisory Committee for Juvenile Justice and Delinquency Prevention and the National Council on Crime and Delinquency.\textsuperscript{110} Furthermore, the courts have held that unless there is a legitimate governmental purpose for holding pretrial detainees, such detention violates the fundamental fairness doctrine of due process.\textsuperscript{111}

Courts also have condemned juvenile incarceration in facilities where there is opportunity for contact between juvenile and adult inmates.\textsuperscript{112}

The significant drop in the number of juveniles incarcerated in adult facilities since the JJDPA's inception attests to the success of the program.\textsuperscript{113} Nonetheless, a considerable number of violations continue to plague the system, thus warranting increased supervision and strict enforcement. For example, states may continue to receive federal funding if they submit a plan that demonstrates a consistent attempt to assign at least seventy-five percent of the grant to develop programs designed to prevent juvenile delinquency, remove juveniles from adult institutions and form alternative community-based facilities in place of secure detention centers.\textsuperscript{114} Meanwhile, violations of the JJDPA prohibition against incarceration of children with

\begin{itemize}
\item \textsuperscript{108} 18 U.S.C. § 5035 (1988).
\item \textsuperscript{109} CHILD CLIENT, supra note 11, ¶ 2.01[1], at 2-5.
\item \textsuperscript{110} Id., ¶ 2.01[1], at 2-6 n.14.
\item \textsuperscript{111} In \textit{Schall}, 467 U.S. 253, the Court held that the preventive detention of a juvenile is compatible with the fundamental fairness doctrine required by due process only when it serves a legitimate state objective and there are adequate procedural safeguards. However, this practice does not justify restrictions and conditions of confinement constituting punishment. \textit{Id.} at 269. Determining whether constitutional rights have been violated depends on the balancing of liberty interests against relevant state interests. \textit{Youngberg}, 457 U.S. 307 (reasonable physical restraints used on a mentally retarded person for the protection of himself and other residents of the institution may override his liberty interests when professional judgment deems the use of such restraints as necessary); \textit{Bell v. Wolfish}, 441 U.S. 520 (1979) (absent a showing of intent to punish, the restrictions of pretrial detention do not violate the detainee's liberty interest if that detention is reasonably related to a legitimate governmental purpose—in this case, insuring the detainee's presence at trial and maintaining effective management of the facility). For a general discussion outlining the problems with pretrial detention, see Note, supra note 50.
\item \textsuperscript{112} CHILD CLIENT, supra note 11, ¶ 2.01[1], at 2-5.
\item \textsuperscript{113} According to the 1986 compliance report, the number of status offenders and nonoffenders in adult jails decreased 96.5% over a seven-year period, and the number of juveniles in adult jails decreased 64.7% over the previous three to six years. \textit{Juvenile Justice and Delinquency Prevention Amendments of 1988}, H.R. 605, 100th Cong., 2d Sess., at 6 (1988) [hereinafter \textit{JJDP Amendments}].
\item \textsuperscript{114} 42 U.S.C. § 5633(a)(10). However, the 1988 amendments to the JJDPA allow the administrator to base his assessment and determination of a state's "substantial compliance" with the Act's requirement by reviewing four criteria, one of which is review of the state's "meaningful progress in removing other juveniles from jails and lockups for adults." \textit{JJDP Amendments}, supra note 113, at 11.
\end{itemize}
adults may continue during the three-year time limitation, and states may remain in violation even when that funding is withheld.\textsuperscript{115} Perhaps most importantly, the JJDPA does not require authorities to separate status offenders, nonoffenders or juveniles convicted of minor crimes from violent, hard-core juvenile offenders. Such segregation is justified for reasons similar to those that justify segregating juveniles from inmates: Even if juveniles were held in separate facilities from adults, it would defeat the purpose of that separation if status and nonoffenders still were exposed to juveniles whose criminal behavior resembled that of their adult counterparts.

Model rules and ethical codes provide numerous criteria regarding the care and treatment of juveniles, but unfortunately, they are merely suggested guidelines and are treated accordingly. Court decisions, while given more authority, tend to be vague. In both cases, decision makers often interpret these guidelines in an arbitrary and capricious manner.

\textbf{E. The Recovery Rights of a Juvenile}

Within the past ten years, the juvenile justice system has witnessed a number of changes in the enforcement of juvenile rights, including the imposition of liability on those who violate juvenile rights and an expansion of the remedies available to victims. For instance, under the JJDPA, a state that fails to adhere to the Act’s requirements may lose its federal funding unless the state can commit to achieving full compliance within a three-year period.\textsuperscript{116} In addition, while the JJDPA does not specifically allow civil actions by individuals, a 1979 Supreme Court interpretation of a similar funding statute to allow such actions implies that this may be a possibility under the JJDPA.\textsuperscript{117}

Recent case law also has enabled juveniles to bring a private cause of action for enforcement of their rights. For example, in 1988, the Court of Appeals for the Eighth Circuit allowed a claim brought by a class of

\textsuperscript{115} For example, Indiana’s 1989 funding was withheld for failure to adhere to the provisions of the JJDPA, particularly removal of juvenile offenders from adult correctional institutions. Bercovitz, \textit{Juveniles in Indiana’s Jails}, RES GESTAE, Aug. 1989, at 58-59. See generally \textit{State Under Fire to Remove Juveniles from Jails}, Indianapolis Star, Feb. 5, 1989, at 1, col. 1.

\textsuperscript{116} 42 U.S.C. § 5633(c). In accordance with the JJDPA amendments of 1988, the administrator may now, at his discretion, waive termination of a noncomplying state’s eligibility on the condition that the state applies all of its federal funding to the removal of juveniles from its jails. \textit{JJDP Amendments, supra} note 113, at 11.

\textsuperscript{117} Soler, Dale & Flake, \textit{supra} note 42, at 12-15. The authors compare the JJDPA to Title IX of the Education Amendments of 1972, under which the Supreme Court granted a private civil remedy when certain conditions were satisfied. See Cannon v. University of Chicago, 441 U.S. 677 (1979) (the Court granted the plaintiff the right to bring a private lawsuit under Title IX against two medical schools, which had allegedly denied her admission based on her sex, because she had satisfied four factors set out by the Court to allow such actions).
juveniles for violation of their rights under the JJDPA and section 1983 seeking declaratory, compensatory and equitable relief;\textsuperscript{118} in 1989, the Court of Appeals for the Eleventh Circuit ruled that a section 1983 cause of action brought against a prison official by the estate of an incarcerated juvenile who committed suicide was appropriate;\textsuperscript{119} and in 1990, the Court of Appeals for the Seventh Circuit imposed section 1983 damages against state social workers for failing to provide proper treatment and care to a juvenile under their care.\textsuperscript{120} Claims under section 1983 are becoming particularly attractive due to extensive federal case law involving civil rights litigation dealing with conditions of confinement in mental hospitals and prison facilities.\textsuperscript{121} A further attraction is the possibility of recovering attorney’s fees and expenses under section 1988.\textsuperscript{122}

There is some difficulty in imposing liability on federal, state and county officials. By tradition, judicial officers are granted absolute immunity, allowing them to be “free to act upon [their] own convictions, without apprehension of personal consequences to [themselves].”\textsuperscript{123} Furthermore, all jail personnel who follow judicial orders are likewise shielded from liability,\textsuperscript{124} unless it can be clearly established that the alleged misconduct amounted

\textsuperscript{118} Hendrickson v. Griggs, 856 F.2d 1041 (8th Cir. 1988).

\textsuperscript{119} Edwards v. Gilbert, 867 F.2d 1271 (11th Cir. 1989) (the court held that the jail officials’ behavior did not constitute “deliberate indifference” to the juvenile’s safety from self-harm, thus entitling the officials to immunity).

\textsuperscript{120} K.H. v. Morgan, 914 F.2d 846 (7th Cir. 1990).

\textsuperscript{121} See CHILD CLIENT, supra note 11, ¶ 1.01, at 1-2.

\textsuperscript{122} Id., ¶ 2.03[8], at 2-89. “In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.” 42 U.S.C. § 1988; see, e.g., Hendrickson v. Branstad, 740 F Supp. 636 (N.D. Iowa 1990) (subsequent action to Hendrickson v. Griggs, 856 F.2d 1041 (8th Cir. 1988) in which the court held that the plaintiffs were entitled to a 90% recovery of attorney’s fees from the state defendants, because the plaintiffs were “catalysts” in forcing the state into compliance with JJDPA); Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897 (3d Cir. 1985) (the court ordered reimbursement of attorney’s fees to institutionalized juveniles who alleged their constitutional rights to procedural safeguards had been violated, because parents and guardians could have them admitted to mental health facilities without the juveniles’ consent).

The purpose of § 1988 is to provide a federal remedy when current federal law is inadequate by incorporating the law of the state in which the federal court is located into federal law. This allows individuals access to federal courts when their civil rights are recognized by state law but not federal law. Soler, Dale & Flake, supra note 42, at 29. For a general overview regarding the collection of attorney’s fees, see CHILD CLIENT, supra note 11, ¶ 2.03[8], at 2-89 to 2-101.

\textsuperscript{123} McFaul, 599 F Supp. at 1430 (citations omitted). Stump v. Sparkman, 435 U.S. 349, 

\textsuperscript{124} McFaul, 599 F Supp. at 1431.
to "deliberate indifference" to the claimant's constitutional rights.\textsuperscript{125}

Though state officials are shielded from liability by the eleventh amendment,\textsuperscript{126} the amendment only bars money awards paid from the state treasury.\textsuperscript{127} Therefore, judgments in lawsuits naming a public official in his individual capacity will not be constitutionally barred, because it must be paid by the individual himself.\textsuperscript{128} Immunity also does not extend to lawsuits for declaratory and injunctive relief.\textsuperscript{129} Additionally, the Supreme Court has held that punitive damages may be recovered in civil rights actions when public officials exhibited "callous or reckless indifference" to the rights and safety of others.\textsuperscript{130}

Reaching elected officials may be even more difficult. Because county officials do not exercise direct authority over incarcerated juveniles, proximate cause may be established only if the juvenile's injuries were a foreseeable result of failure to provide adequate detention facilities.\textsuperscript{131} Though establishing a negligence claim may be more difficult, the courts have imposed liability on county commissioners as members of the county's governing board.\textsuperscript{132}

\textsuperscript{125} Id. at 1435; \textit{Edwards}, 867 F.2d 1271 (the court held that the jail official's behavior did not constitute "deliberate indifference" to the juvenile's safety from self-harm, since the juvenile's request to see a psychiatrist was not unusual, and he had not previously shown any indication of suicide). While forfeiture of judicial immunity is possible in cases of "clear abuse of all jurisdiction over the subject-matter," \textit{McFaul}, 599 F. Supp. at 1431, such cases are construed narrowly. See \textit{Edwards}, 867 F.2d at 1277; \textit{McFaul}, 599 F. Supp. at 1435. However, when judges, legislators and prosecutors act outside of their official capacity, they are granted only qualified or "good faith" immunity rather than absolute immunity. Soler, Dale & Flake, \textit{supra} note 42, at 35. Official immunity is less encompassing than judicial immunity and requires that the actions being examined were within the sphere of the individual's authority and were performed in good faith. Lynch v. Johnson, 420 F.2d 818, 821 (6th Cir. 1970). Thus, for example, judges have been held liable for participating in hearings after being disqualified, assaulting an individual in the courtroom and performing legislative and executive (instead of judicial) duties. Soler, Dale & Flake, \textit{supra} note 42, at 35.

\textsuperscript{126} "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI; see \textit{Hans v. Louisiana}, 134 U.S. 1 (1890).

\textsuperscript{127} \textit{Edelman v. Jordan}, 415 U.S. 651, 663 (1974) (the Court held that the eleventh amendment barred the retroactive payment of benefits that were wrongfully withheld by a "nonconsenting" state), \textit{reh'g denied}, 416 U.S. 1000 (1974).

\textsuperscript{128} Soler, Dale & Flake, \textit{supra} note 42, at 40.

\textsuperscript{129} Id. at 34.

\textsuperscript{130} \textit{Smith v. Wade}, 461 U.S. 30 (1983). The \textit{Smith} standard was applied in \textit{Stokes v. Delcambre}, 710 F.2d 1120 (5th Cir. 1983), in which the jury awarded $70,000 in compensatory damages against a sheriff and deputy, $105,000 in punitive damages against the deputy and $205,000 in punitive damages against the sheriff for ignoring the plaintiff's cries for help while he was repeatedly physically and sexually assaulted by his cellmates.

\textsuperscript{131} \textit{Smith}, 461 U.S. at 32.

\textsuperscript{132} \textit{Grenier v. Kennebec County}, 748 F Supp. 908 (D. Me. 1990) (commissioners held liable because their responsibilities included administration and maintenance of county jail); \textit{see Child Client, supra} note 11, ¶ 2.03[5], at 2-79.
Finally, in *Monell v Department of Social Services*, the Supreme Court rejected a municipality's assertion of absolute immunity, thus exposing all local governmental entities to civil rights actions for money damages and declaratory or injunctive relief. The Court specified that a municipality could incur liability only for its own harmful policy, practice or custom; municipalities may *not* be held liable for their employees' actions under the *respondeat superior* doctrine. While *Monell* left untouched the issue of qualified immunity as an alternative defense to a section 1983 action, the Court held in a subsequent decision that a municipality could not assert the good faith of its officers or agents as a defense, thereby revoking any immunity to a section 1983 action for damages resulting from constitutional violations. However, this decision does not affect the status of states, which the Court still refuses to include in its interpretation of "person" within the meaning of section 1983. Thus, even when a juvenile's rights are violated, the officials whose actions led to those violations may not necessarily be reached for damages.

### III. Current Reform Movements in the Juvenile Justice System

Despite the nature and extent of the problems facing juvenile justice departments, reformers have managed to implement a variety of programs to reduce the system's inadequacies. Yet, due to common restraints such as lack of funding, inadequate supervision and organization, and deficient enforcement measures, these programs still fall short of parens patriae goals. Thus, while such efforts are laudable, they do not compensate for the fact that many juveniles in correctional facilities continue to be mistreated by the state.

Since its inception, the JJDPA has played a major role in reducing the number of juveniles in secure confinement. By 1989, fifty-one states and territories had complied with JJDPA provisions mandating deinstitutionalization of status offenders (DSO) since passage of the Act in 1974.

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134. From the Latin meaning "let the master answer," the theory of *respondeat superior* projects liability on one entity for the harm done by its employee. Black's Law Dictionary 1311-12 (6th ed. 1990).
137. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). The Court's ruling in *Will* did not contradict its earlier holding in *Monell*, since the eleventh amendment's protection extends to states but not municipalities.
139. *Id.*. Note that compliance by the states is voluntary and thus may be revoked at any time.
Office of Juvenile Justice and Delinquency Prevention (OJJDP)\textsuperscript{140} has conducted numerous studies to examine, alter and monitor specific programs and services that have emerged as a result of DSO.\textsuperscript{141} Recently it awarded a research grant for a three-year project to analyze state legislation concerning DSO and the effects that DSO has had on juveniles, the juvenile justice system and the public.\textsuperscript{142} However, on November 18, 1988, Congress passed new amendments as part of the Anti-Drug Abuse Act of 1988 which cut back discretionary funds and increased formula grant funds.\textsuperscript{143} As a result, the OJJDP has been forced to reduce funding for continuation programs and cannot finance new programs beyond those mandated by the new amendments.\textsuperscript{144}

As an alternative to juvenile detention facilities, both residential and nonresidential diversion programs have gained popularity as a means of effectively providing dependency recovery services, individual and family counseling, crisis intervention, dispute mediation, and vocational and educational training.\textsuperscript{145} Likewise, probation officers, assigned to troubled youths for supervision and counseling, may become role models and confidantes in a manner similar to the Big Brother/Big Sister program philosophy as each relationship matures.\textsuperscript{146}

Inevitably, critics have identified problems with the expanding use of diversion programs in lieu of secure detention. For example, net-widening is said to occur when the creation of programs results in more control over juveniles who might otherwise be handled less intrusively (if not completely ignored and returned to their parents).\textsuperscript{147} Yet, the opportunity to help troubled children by granting access to programs and services that can provide needed treatment would seem to legitimize their increased use. This

\textsuperscript{140} The OJJDP is an agency of the Department of Justice which monitors the JJDPA.
\textsuperscript{141} Speirs, \textit{supra} note 138.
\textsuperscript{142} \textit{Id.} The agency awarded the grant to the Social Science Research Institute of the University of Southern California in Los Angeles.
\textsuperscript{143} Munson, \textit{OJJDP Fiscal Year 1989 Program Plan}, OJJDP \textit{UPDATE ON PROGRAMS}, May 1989, at 1.
\textsuperscript{144} \textit{Id.} at 2. Of the seven programs instituted in fiscal year 1989, four focus on the research and development of strategies aimed at prevention, diversion and reintegration programs for juveniles. These four studies are: (1) the \textit{Research Program on Juveniles Taken into Custody} (data analysis of the type of juvenile taken into custody and statistics on the number of juvenile deaths while in custody); (2) \textit{Minority Youth in the Juvenile Justice System} (study on the disproportionality of minority juveniles confined in secure detention facilities and suggested strategies for treatment and community readjustment); (3) the \textit{Study to Evaluate Conditions in Juvenile Detention and Correctional Facilities} (research program to determine whether facilities meet national standards); and (4) \textit{Nonparticipating States Initiative} (providing resources to those states which do not participate in the JJDPA to separate juveniles from adults in institutions and remove status offenders from secure detention facilities). \textit{Id.} at 2-3.
\textsuperscript{145} C. SHIREMAN \& F. REAMER, \textit{REHABILITATING JUVENILE JUSTICE} 132 (1986).
\textsuperscript{146} A. ROBERTS, \textit{supra} note 43, at 132-33.
\textsuperscript{147} \textit{Id.} at 183; C. SHIREMAN \& F. REAMER, \textit{supra} note 145, at 134.
is especially true for juveniles who instead would be sent back to their original environments without receiving any care.

The process of relabeling, that is, reclassifying a juvenile in order to qualify him for a service otherwise restricted, is also criticized.\(^{148}\) For juveniles who do not fit the clear-cut stereotype of a particular category, there is no question that problems of relabeling will continue to arise for those who fall in the gray area. This problem may be alleviated by narrowly defined standards and reference to the documented success of certain programs used for similarly situated juveniles. In any event, it is imperative that the juvenile courts err on the side of rehabilitation rather than detention.

Despite the objections, "properly implemented"\(^{149}\) diversion programs have proven quite successful; studies indicate that they reduce stigma and coerciveness often associated with the justice system, place greater emphasis on juveniles' needs, decrease recidivism and cost less than juvenile court processing.\(^{150}\) Overall, they remain a viable and refreshing alternative to juvenile incarceration.

Institutions operated by private individuals rather than municipal employees also have grown in number and popularity. Relying on the \textit{parens patriae} philosophy of rehabilitation and treatment, wilderness programs such as Outward Bound and VisionQuest use "adventure" and the "physical challenges of the outdoors" to teach personal responsibility and commitment to both first time offenders and hard-core delinquents.\(^{151}\) Juvenile participants learn to interact as a group; the physical and emotional challenges strengthen the individual's self-esteem and confidence as well as teach the importance of cooperation to survive in the outdoors.\(^{152}\) These programs boast successful results,\(^{153}\) and the cost (about $30,000 per child annually)\(^{154}\) makes them an

\(^{148}\) C. Shireman & F Reamer, \textit{supra} note 145, at 134. For example, a neglected child may be reclassified as a "person in need of supervision" to be eligible for a particular program. While this may not appear to be a problem, the dilemma arises when a juvenile charged with a delinquency offense is "relabeled" to satisfy the intake criteria of a specific detention center. \textit{Id.}


\(^{150}\) \textit{Id.} at 186-87.

\(^{151}\) See generally Scott, \textit{Wilderness Programs Rehabilitate Juvenile Delinquents}, in \textit{2 Sources in Criminal Justice (Opposing Viewpoints)} 267 (1987); Gavzer, \textit{Wilderness Camps Challenge Delinquents}, in \textit{2 Sources in Criminal Justice (Opposing Viewpoints)} 275 (1987). However, most camps refuse to admit juveniles who have committed violent offenses and instead limit participation to status offenders, substance abuse offenders and other less serious delinquency offenders. A. Roberts, \textit{supra} note 43, at 197-98. For an overview of the more prominent wilderness programs, see \textit{Id.} at 198-216.

\(^{152}\) A. Roberts, \textit{supra} note 43, at 195.

\(^{153}\) "More than 3000 boys and girls have gone through VisionQuest, and [founder] Bob Burton says only about a third return to institutions. With more traditional youth programs, at least two out of three are back in detention a year after release." Gavzer, \textit{supra} note 151, at 276.

\(^{154}\) \textit{Id.}
attractive alternative to state facilities for which taxpayers pay approximately $27,000 per child annually. However, it is debatable whether the stringent discipline associated with such programs is appropriate for status offenders and nonoffenders. Furthermore, there have been allegations of abuse and neglect at some camps; some critics claim the camps are ineffective and allege the use of inhumane, cult-like confrontational methods to humiliate the participants. Nonetheless, studies of the effectiveness of wilderness programs have generally found them to be a preferable alternative to institutional care; they tend to be more humane, less costly and more successful in reducing recidivism.

Some courts have ordered restitution in the form of either monetary compensation or unpaid community service as punishment for juvenile delinquency. Monetary compensation is usually tailored to fit the juvenile's ability to pay; the court may appoint a mediator to draw up an acceptable repayment plan or send the juvenile to court-established programs which provide training and job placement. Juveniles who are ordered to perform community service restitution must work for a specified number of hours at a private nonprofit or governmental organization under the direction of a particular supervisor. The use of restitution has become increasingly popular with juvenile courts. On a national level, the courts have received seventy-six percent of ordered repayment, and recidivism has markedly declined.

Lawmakers also have tried to curb juvenile delinquency by holding parents accountable for the actions of their children. Some states have enacted legislation subjecting parents to jail terms or monetary fines for contributing to the delinquency of their son or daughter. Legal scholars justify this

156. While it is generally true that youths involved in these programs are mainly hard-core offenders, there is proof that nonviolent offenders have been participants as well. Hurst, *Wilderness Camps Abuse Delinquents*, in 2 SOURCES IN CRIMINAL JUSTICE (OPPOSING VIEWPOINTS) 277, 279 (1987); see A. Roberts, supra note 43, at 204.
157. Hurst, supra note 156, at 279. Note that because these camps are privately-run, their activities are not prohibited by the Constitution. Thus, in order to seek relief, juveniles must rely on tort remedies.
158. Id. at 277-80.
160. Id. at 134.
161. Id.
162. Id.
163. Id. at 134-35.
164. Kantrowitz, *Now, Parents on Trial*, Newsweek, Oct. 2, 1989, at 54. Florida recently passed a bill that allows judges to impose a five-year prison term and a $5,000 fine on parents if a child uses a gun that is lying around the house. An Indiana couple was ordered to pay $30,341 to the state as reimbursement for the incarceration and treatment of their son in a juvenile detention home, because his delinquency was a direct result of their drug and alcohol abuse and marital discord. Id. By statute, an Indiana judge may assess costs of the child's expenses to his parents if they are financially able to make reimbursements to the state. IND. CODE § 31-6-4-18 (1991).
movement toward increased parental accountability as "a logical evolution in the historical relationship between the family and the courts. Traditionally, parents have had the right to raise their children pretty much as they pleased. . . . That right also means that parents may be held legally responsible if their child-rearing decisions hurt others."

Placing criminal sanctions on parents of juvenile offenders is a relatively new concept, thus making it difficult to measure its success. Nonetheless, critics have raised valid arguments in opposition to the practice: it may violate constitutional rights to punish one individual for the actions of another;\textsuperscript{166} statistics on minors arrested in 1989 indicate that they often are from lower-income families who are financially unable to pay fines;\textsuperscript{167} and it may be that only well-educated parents will increase supervision and control over their child in response to such laws.\textsuperscript{168} Considering these criticisms, it is doubtful that this movement will become standard legal practice, much less succeed as an effective deterrent to juvenile crime.

It is not uncommon for research results and program evaluations to disagree, thus increasing the difficulty of determining which alternatives to secure detention are the most effective for juveniles.\textsuperscript{169} While some programs have demonstrated a measured amount of success for certain juveniles under specific circumstances, no one program has proven effective for all juveniles under all circumstances, due primarily to the inability to predict which programs would be best suited for which juveniles.\textsuperscript{170} What is certain, however, is that institutional care fails to provide an environment conducive to actual treatment. Acts of physical and sexual violence and exploitation by prison staff and members, contributing to an already existing sense of fear and isolation, can hardly be considered an environment in which \textit{parens patriae} principles can be properly implemented.\textsuperscript{171} These problems associated with institutional care lead to the conclusion that diversion programs are considerably more successful at accomplishing the treatment and rehabilitation goals that secure detention cannot.

IV. STATE CONTROL OF A NATIONAL PROBLEM

By virtue of their juvenile status, children are denied many legal rights in return for the state's \textit{parens patriae} protection. However, the juvenile justice system does not live up to its promises: juveniles are asked to forfeit

\textsuperscript{165} Kantrowitz, \textit{supra} note 164, at 54.
\textsuperscript{166} \textit{Id.} at 55.
\textsuperscript{167} \textit{Id.} at 54.
\textsuperscript{168} \textit{Id.} at 55.
\textsuperscript{169} C. Shireman & F Reamer, \textit{supra} note 145, at 99-100.
\textsuperscript{170} \textit{Id.} at 100.
\textsuperscript{171} \textit{Id.}
their legal rights in return for rehabilitative treatment and care rather than punishment, but they do not always receive that treatment or care. Meanwhile, the irony of the situation is compounded by the fact that those most in need of protection are deprived of it by the entity that has a duty to provide for them. Of those rights that are acknowledged, many are either ignored or blatantly violated.

A. The Need for a Uniform Code

Rehabilitation and treatment may be administered by several means. The first is through the JJDPA which stands as a useful model for the states to follow in developing and maintaining a separate juvenile system. Unfortunately, its downfall lies in its lack of authoritative power, since states comply with JJDPA provisions on a voluntary basis and the only penalizing force available is monetary. Similarly, the guidelines promulgated by professional standards committees and legal organizations offer valuable insight for establishing a functional and appropriate juvenile system, but because they do not have any binding authority on the states, they are usually regarded as recommendations. Finally, while court decisions provide more concrete sources of authority, problems arise whenever courts are forced to act as the sole enforcer. Courts, as a general rule, are not effective policing forces, because aggrieved parties, rather than courts, initiate redress. Furthermore, courts are constrained by the Constitution to adjudicate concrete cases.

One of juvenile law’s most pressing problems is the lack of an authoritative body with the power of enforcement. Although the OJJDP has proven an effective advocate of juvenile rights, it does not have the influence necessary to compel compliance from the states. Therefore, paying heed to federalism concerns, the authority and responsibility for formulating standards and fulfilling obligations for the care and protection of juveniles must lie with the states themselves. To do so, the states must re-examine their own juvenile systems and identify the funds available to stimulate reform, establish strict positive standards to avoid past problems and facilitate reform, and create state watchdog agencies to ensure compliance with these standards and monitor the systems’ progress.

To guarantee effective operation of the states’ systems, it is imperative that a model juvenile code be created to establish specific standards and procedures which the juvenile courts then must follow. In general, state bureaucracies tend to follow the path of least resistance when left without

173. *See supra* notes 103-15 and accompanying text.
proper guidance. Providing a comprehensive set of standards ensures uniform application of the law, thereby promoting fairness, efficiency and predictability for consequences of similar conduct.\textsuperscript{175}

\section*{B. The Need for a New Juvenile Justice System}

To effectuate the concepts and principles of the \textit{parens patriae} doctrine, the juvenile justice system must be completely revamped, including the process of intervention, court roles and procedures, treatment and rehabilitation, and the administration of the system.\textsuperscript{176} In addition to traditional concerns, contemporary problems must be addressed by the states' systems to comply with current societal demands and realities. For example, it is vital that states enact legislation requiring that a juvenile's status be determined at the preliminary hearing to segregate chronic, hard-core juvenile offenders from nonviolent delinquents, status offenders and nonoffenders.\textsuperscript{177} While all juveniles are entitled to the same rehabilitation and treatment rights, it is useless to advocate the separation of juvenile offenders

\textsuperscript{175} The development of the \textit{Miranda} rule may serve as a parallel example of the adoption of a concrete set of rules used to guarantee that specific procedural safeguards would be applied consistently to similar cases. Before 1966, the Supreme Court applied various tests to determine whether an accused person was adequately informed of his right to silence. After years of engaging in case-by-case analyses, which provided few general standards to guide police and the lower courts, the Court in \textit{Miranda v. Arizona}, 384 U.S. 436 (1966), established explicit rules to ensure that the defendant's fifth amendment right against self-incrimination would be protected. \textit{See generally} Lippman, \textit{Miranda v. Arizona: Twenty Years Later}, 9 CRIM. JUST. J. 241 (1987).

Massachusetts has developed an objective classification system based on levels of risk, treatment and control to produce a structured hierarchy of sanctions and programs for juvenile offenders. Although the program is still far from perfect, it remains a viable and sensible alternative. Guarino-Ghezzi & Byrne, \textit{Developing a Model of Structured Decision Making in Juvenile Corrections: The Massachusetts Experience}, 35 CRIME \& DELINQ. 270 (1989).

The success of the Uniform Commercial Code lends further support to the concept of model rules. The drafting and implementation of the U.C.C. served to maintain consistency and coordination by its orderly arrangement of rules and open-ended principles that allowed courts interpretive leeway. \textit{See Gedid, U.C.C. Methodology: Taking a Realistic Look at the Code}, 29 WM. \& MARY L. REV 341 (1988). The U.C.C. also provides a thorough, updated source of present commercial law, and simplifies the law by explaining the purpose, policy and reason for each code section. \textit{Id.} at 371-74. Interestingly, codification of existing law into the U.C.C. was initially met with staunch opposition: "A code is intended to replace the earlier common law. How can one ensure that the judges, brought up on the common law and familiar with it, will wipe out their knowledge of the cases from their memories and concentrate on the statutory words?" \textit{Id.} at 345-46 n.25 (quoting Diamond, \textit{Codification of the Law of Contract}, 31 MOD. L. REV 361, 375-76 (1968)).

\textsuperscript{176} For example, requiring a judge to justify the sanctions imposed on the juvenile offender, adopt the "least restrictive alternative," base her decision on established criteria, cite the grounds and reasons for which particular sanctions were imposed rather than a less restrictive one, and inquire into rehabilitative services available to the juvenile offender will allow for some judicial discretion without the temptation and ability to abuse it. C. SHIREMAN \& F REAMER, \textit{supra} note 145, at 119.

\textsuperscript{177} \textit{See supra} notes 29-49 and accompanying text.
from adult inmates when juvenile status offenders or nonoffenders will be similarly harmed by incarceration with those juveniles who are similar to adult convicts.

Moreover, deinstitutionalization may be self-defeating without divestiture—that is, removing status offenders and nonoffenders from the jurisdiction of the courts. Some researchers have called for the complete decriminalization of status offenses as a natural extension of the JJDPA’s philosophy regarding the incarceration of youths for behavior that is essentially noncriminal as unjust. Neither deinstitutionalization nor decriminalization, however, can be successfully pursued unless it is connected with a divestiture plan. If the courts are unable to hold juveniles against their will, they lose their stronghold positions, because they have no other way of forcing a defiant child to cooperate. Although removal from the court’s jurisdiction would mean reliance on public and private channels to control delinquent behavior, these organizations are readily available. Furthermore, returning cases to community-run shelters may be a more appropriate response, since most of the offenses stem from problems with the family and school, not with the legal system.

Legislators need to consider alternatives to secure detention facilities. Many juveniles get into trouble with the law because of their educational, familial, cultural and economic environments. Failed diversionary tactics and high recidivism may be due to the practice of sending the “rehabilitated” child back to the very environment that caused his initial downfall. Thus, short-term programs such as Outward Bound may serve only as a temporary escape. Instead, shelter centers or longer-term residential facilities may be preferable to these programs, because they are better able to provide rehabilitative treatment within a nurturing environment and can easily be funded with the money allocated to hold juveniles in secure detention centers every year. Juveniles would receive the care and treatment mandated by

178. Logan & Rausch, Why Deinstitutionalizing Status Offenders is Pointless, 31 CRIME & DELING. 501, 502 (1985). Indeed, the idea of decriminalizing status offenders dates as far back as 1966 with the Commission on Law Enforcement and the Administration of Justice, established by President Lyndon Johnson. Raley & Dean, The Juvenile Justice and Delinquency Prevention Act: Federal Leadership in State Reform, 8 LAW & POL’Y 397, 399 (1986). Although the JJDPA, enacted in 1974 and amended subsequently, embraced many of the recommendations of the Commission, it failed to address the decriminalization issue. Id. at 402.


180. Id. at 513; see also supra text accompanying notes 138-55.

181. A study conducted by the American Justice Institute estimated that incarceration in secure detention with full services averages $61 per day per child compared to alternatives such as attention homes ($17) and small group homes ($17). OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILES IN ADULT JAILS AND LOCKUPS 7 (Feb. 1985). But cf. C. SHRUMEN & F. REAMER, supra note 145, at 139-42 (some alternative programs may be as costly, if not more, than secure detention due to problems of net-widening, longer periods of
the *parens patriae* doctrine without states spending exorbitant amounts of time, money and energy only to see it wasted on another recidivism statistic.

Perhaps the most frustrating aspect of this problem is that several organizations already have undertaken the laborious task of conducting studies and analyzing data to formulate a set of standards that addresses the rights and obligations of juveniles. For instance, the Institute of Judicial Administration/American Bar Association established the Juvenile Justice Standards Project to design a new juvenile justice system. More than two hundred juvenile justice experts participated in the project, ranging from distinguished lawyers and judges to specialists in related fields of psychology, education, social work, psychiatry, sociology, law enforcement and health care. The result of their efforts is contained in a twenty-three volume set of standards and commentary completed in 1977.

Nonetheless, implementation of the proposed standards has been excruciatingly slow. Although the ABA House of Delegates has adopted them, restricted funding has prevented widespread publication, and, as active interest and participation in the field of juvenile justice is relatively new, its priority status has given way to concerns deemed more serious or immediate. Furthermore, the usual resistance to change is only exacerbated by the demands of reformers for a total overhaul of the system. It is reasonable to anticipate that drastic revision of the system could change jobs, challenge existing agency practices and curtail the level of discretion given to correctional authorities. In short, many participants in the system may feel threatened by change and may be reluctant to adopt it.

Reformers of the 1990s demand virtually the same changes sought by those in the 1970s. The Juvenile Justice Standards Project, and similar organizations which report recommendations for standards, have proposed an entirely revised system which they believe would recognize the rights of the juvenile, protect the concerns of the community and provide safeguards to ensure an equitable balance among the genuine interests of juveniles, families and the state. In addition, the federal government may offer incentives to comply with these regulations by providing funding to alleviate some of the costs of implementing the program. This proposition would be particularly attractive considering that states that refused to comply could

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183. *Id.* at 19.
184. *Id.* at 258.
185. *Id.* at 266.
still be held liable for violating juveniles' *constitutional* rights and be forced to implement most of the regulations anyway, but at their own expense. In any case, until federal and state governments commit to making such broad-based changes, the juvenile justice system will continue to exist as an ineffectual means of providing treatment and rehabilitative care to youths who have been neglected, abandoned or detained for status offenses.

**CONCLUSION**

The past fifteen years have witnessed an increase in constitutional and civil rights litigation seeking the protection, treatment and rehabilitation of juveniles as mandated by the *parens patriae* doctrine. As a result, federal and state statutes require mandatory segregation of juveniles from adult inmates, prohibition of secure detention for status offenders and nonoffenders, safe and sanitary conditions of confinement, adequate medical and psychological care, educational, recreational and exercise programs, and increased training and supervision of employees. Legal challenges over the use of physical restraints and isolation practices have allowed the courts to broadly construe their definition of corporal punishment, restricting a wide range of punitive measures. Reform movements have contributed to the establishment of regulatory agencies responsible for developing, maintaining and enforcing programs that cater to the needs of the juvenile offender. Private institutions have developed alternative approaches to the treatment and deterrence of delinquents through alternative homes and wilderness programs. Increased liability and recovery measures have provided juveniles with more adequate forms of compensation.

These advancements may be hailed as a victory in the fight for acknowledgement of juvenile rights. Yet, to revive the *parens patriae* doctrine, it is imperative that legislators and reformers focus on its original purpose while considering the changes in today's society. Establishing a model juvenile code (which the states must adopt) could reduce, if not eliminate, the disparate and indiscriminate treatment of juvenile offenders. Shelters and other community-run home programs have already proven to be inexpensive and immensely successful alternatives to incarceration. Finally, the decriminalization of status offenses would alleviate problems of inadvertently placing status offenders in jail, and divestiture would further encourage the use of alternative home programs for both status offenders and nonoffenders.

Numerous studies and literature call for the deinstitutionalization of juveniles from adult detention facilities. The burden is now on lawmakers and law enforcers to do their part, by making a full faith effort to improve the current system.