HB

109

COMMITTEE REPORT

SENATE

FURTHER: JUDICIARY
Science

5/2/83

Date: June 24, 1983

Mr. President:

The Committee on HESS has had CSHB 109(Jud) am

Relating to persons 16 or 17 years of age who are charged with unclassified or class A felonies; and amending the children's proceedings waiver provisions.

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[✓] replace with CS for CSHB 109(Jud)am [ ] same title [ ] new title

and recommends do pass

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

Joe Josephson

Joe Josephson
CHAIRMAN

CSHB 109 (JUD) - JUVENILE WAIVER

IN YOUR FOLDER:

1. Letter of intent and fiscal note from House Finance.

2. Position paper from the Department of Health & Social Services.

3. Letters to Senate Judiciary from:
   Pudge Kleinkauf
   Judge Victor Carlson
   Judge Thomas Schultz

4. Department of Law crime statistics, 1981.

5. Legal opinion from Jim Lear, LAA Legal.

6. Copies of the current statutes from:
   California
   Idaho
   Alaska

7. Article from the Vanderbilt Law Review on Punishment and Juvenile Justice.

8. A paper on challenges to the Imprisonment of Juvenile Offenders from the state of Wyoming.

9. Exerpts from the Third and Fourth Reports of the Judicial Council on juvenile jurisdiction.

10. A copy of the Judiciary Committee CS for SB 127

LETTER OF INTENT
FOR
CSHB 109 (Judiciary)

The legislature expressly acknowledges that the enactment of this legislation may likely result in the need for additional correctional facilities in future years.

However, it is also clear, as evidenced by the rapid and unpredictable growth in the state's prisoner population, that an accurate assessment of the need for these facilities is not possible at this time.

At the same time, the legislature believes that cost estimates for these facilities can best be determined by detailed planning, analysis, and design of specific facilities in identified locations.

Therefore, the legislature has approved a fiscal note that grants ten per cent of the funds requested by the Division of Adult Corrections for new facilities. These funds shall only be used for planning and detailed design of necessary correctional facilities which are the direct result of the passage of CSHB 109 (Judiciary).

Following the completion of this work, the agency may present to the legislature a capital budget request for these facilities.

Respectfully Submitted,

Al Adams

Al Adams, Chairman
House Finance Committee

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. CSHB 109 (Judiciary)
Title...Persons 16 or 17 yrs. charged with majro felonies...& Waiver proceedings
Requested by House Finance Committee Date April 26, 1983

II. FISCAL DETAIL
Agency Affected Department of H & SS--Division of Adult Corrections
Program Category Affected Administration of Justice
SRU, Program, Or Subprogram(s) Affected Adult Confinement
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES		1008.4	*			
700 GRANTS,CLAIMS,ETC.						
TOTAL		1008.4	*	**	**	**

FUNDING (Thousands of Dollars)

GENERAL FUND		1008.4	*	**	**	**
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME				**	**	**
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

The 1008.4 shall be appropriated and expended in compliance with a letter of intent to be adopted by the legislature. As provided for in the letter of intent, these funds represent 10 per cent of the funds initially estimated by the Division of Adult Corrections for the construction of new correctional facilities and are to be used for detailed planning and design of those facilities. The legislature acknowledges that additional bed space may be necessary if this measure is approved, but would prefer to appropriate funds for capital improvments on the basis of clearly delineated plans and cost estimates.

*As noted, the legislature acknowledges that additional funds for capital construction may be necessary in FY 85 but prefers to address the need for and extent of those appropriations at that time.

**Inasmuch as operational costs in the form of additional personnel, contractural services, commodities and the like are closely linked to decisions on capital construction, the legislature declines to endorse any estimates of those costs at this time. When capital construction plans are known, these additional costs will be addressed.

IV. DATE April 26, 1983 PREPARED BY Albert R. Adams
AGENCY House Finance Committee
PHONE 465-3706

Original: Legislative Finance
cc: Budget and Management

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No.: House Bill No. 109 No. 2 Date on Bill: January 24, 1983
Title: "An Act relating to the criminal prosecution of minors."
Sponsor: Representatives Pestinger, Furnace, Uehling, Flood, Barnes, and Bussell
Requestor:

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

			FY 83	FY 84	FY 85	FY 86		
Capital				15,714.0	-0-	-0-	-0-	-0-
Operating				-0-	-0-	3,389.7	3,563.0	3,776.7
Total				15,714.0	-0-	3,389.7	3,563.0	3,776.7

b. Revenues:

Revenue				-0-	-0-	-0-	-0-	-0-

2. Source of funds to offset fiscal impact of Bill:

Funding source not identified by Bill author.

3. Assumptions:

Available statistical data indicates there would be 31 juveniles arrested annually for unclassified or class A felonies. This would represent an increase of 28 in the number of juveniles subjected yearly to prosecution as adults. An average of 3 juveniles are waived from juvenile court jurisdiction each year under the existing judicial waiver mechanism. Of the additional 28 juveniles subjected to adult prosecution, 18 would be convicted and sentenced to imprisonment for periods of up to 20 years if adult prosecution and conviction rates are assumed. The first two years of the sentence would be served in a juvenile facility with up to 13 years served in an adult facility if it is assumed all offenders earn their maximum good time based on a formula of one day good time for three days served.

4. Disclaimer:
This statement has not been reviewed by the OMB in the Office of the Governor. It does not represent the policy of the Sheffield Administration or the final estimate of fiscal impact.

Roger C. Lange

Prepared By: Roger C. Lange and Michael L. Price Phone: 465-3376 & 465-3170
Division: Adult Corrections and Family and Youth Services Date: February 22, 1983

Approved by Commissioner: Robert Loken Smith Ph.D. Date: 3/4/83
Department: Health & Social Services

5. Distribution:
Original to Legislative Finance
Copy to OMB
Copy to Sponsor
Copy to Requestor

2/8/83

"An Act relating to criminal prosecution of minors."

COST ESTIMATES

A. Enactment of House Bill No. 109 will have a significant fiscal impact on the Department of Health and Social Services, both in juvenile and adult corrections. Since the new language would class individuals sixteen years and older as adults for unclassified and class A felonies, the time served by convicted sixteen and seventeen year-olds would increase substantially.

It is the estimate of the Department of Health and Social Services that ultimately an additional 97 beds will be needed to care for this group of individuals in a secure setting. Details of this estimate follow.

B. Youth Services Impact

1. FY 84 Capital Expenses: The construction of facilities to house 40 juveniles sentenced as adult prisoners is based upon the most recent available arrest data (1981).

2. This data shows that approximately 28 additional juveniles would annually be subject to prosecution under adult criminal statutes for unclassified and class A felony offenses. Assuming a conviction rate equal to the conviction rate for adult offenders similarly accused it might be expected that 18 juveniles would be convicted of such offenses annually and sentenced as adults under the provisions of House Bill No. 109.

Analysis of the arrest data yields expected frequency of convictions and sentences which would result in all juveniles sentenced as adults serving at least two years in the juvenile facility prior to transferring to an adult facility and two youths expected to serve their entire sentence of 3.75 years in a juvenile facility. Within two years 36 juveniles would then be serving adult sentences of at least two years in juvenile facilities. This population would stabilize after two years at approximately 38-40 because of the transfer of prisoners to adult facilities.

The FY 84 estimate is based upon 464 square feet for each of 40 maximum security cells; plus 1 station for each of the 2 detention units: one to accommodate 5 staff and 1 to accommodate 6 staff including the typist; and 1 common day room that can be utilized for meals, a rehabilitative program (counseling and education), and recreation. (No costs are included for a kitchen, as meals would be prepared in the existing facilities at McLaughlin and carried to the units.) It is also assumed that the Department's major study for

expansion would be revised to accommodate construction of the two units to connect with the existing building.

DOT/PF cost estimates for 464 square feet in a maximum security facility during the FY 85 construction season is $162.0. This includes design and planning costs which would begin in FY 84. The remaining funds would be carried over into FY 85 for construction and equipping the units.

$162.0 x 40 cells = $6,480.0

3. FY 860perating Costs and Juvenile Expenses

June 30, 1985 would be the estimated completion date. Operating costs are estimated as follows:

100 Personal Services	$1,391.6
200 Travel	24.5
300 Contractual Services	119.0
400 Commodities	131.6
500 Equipment	22.6
700 Benefits to Individuals	109.4
	$1,798.7

The above estimates are based upon 30% of the related costs for the McLaughlin Youth Center's FY 84 Governor's Budget, with 6% added for FY 85 and FY 86.

Personal Services includes 1 Unit Leader, 3 Youth Counselor III's, 5 Youth Counselor II's, and 4 Youth Counselor I's for each unit. The staffing pattern is based on the necessity of operating the units as maximum security facilities. This level of security is required due to the high escape risk presented by those juveniles to be housed and upon the nature of the offenses for which they are sentenced. An Assistant Cook will serve in the existing kitchen, and a Clerk Typist III will provide all clerical support for both units.

Travel of staff to meetings, conferences, courses, and for transportation of new hires is included.

Contractual Services are estimated for the additional costs for communications, utilities, copier usage, equipment rental, inmate laundry, and fire, accident, and liability insurance.

Commodities include purchase of food, replacement of tableware, glassware, bedding, janitorial and cleaning supplies, and general office supplies.

Equipment items necessary for on-duty staff, closed circuit TV monitor of units and a camera for inmate ID are included.

Benefits to Individuals includes costs for medical and dental care, and a work program for 20 inmates.

C. Adult Confinement

It is assumed that no appreciable bed impact will be experienced by the Division of Adult Corrections until FY 1986. This is based on the assumption that the average age of offenders affected by legislation will be 17 years, and that they will serve two years in a juvenile facility prior to transfer to an adult facility. This fiscal note identifies a need for 57 additional beds in an adult facility.

Based on arrest data indicating 28 additional persons 16 and 17 years of age being subject to adult prosecution annually for crimes in the unclassified or class A felony categories, and using conviction rates and average sentence lengths for adult offenders, the following is predicted:

1. Unclassified Felony

   One conviction per year with an average sentence of 15 years to serve (20 years less good time) will require 13 additional beds.

2. Sexual Assault I (Rape) With Gun, Dangerous Weapon, and/or Caused Serious Physical Injury

   One conviction per year with a sentence of 7.5 years to serve (10 years less good time) will require 5.5 beds.

3. Sexual Assault I (Rape) Without Weapon/Injury

   Three convictions per year with a sentence to serve of 6 years (8 years less good time) will require 12 beds.

4. Class A Felony With Gun

   Five convictions per year with a sentence to serve of 5.25 years (7 years less good time) will require 16.25 beds.

5. Class A Felony Without Gun

   Eight convictions per year and two sentenced so as to serve all time in a juvenile facility. Therefore, 6 individuals will serve an average of 1.75 years in an adult facility.

   $6 \times 1.75 = 10.5$ beds

6. Total beds required is 57 (rounded).

7. Cost Estimates

a. Capital Expenditures: Because of the serious nature of the offenses, construction of maximum security beds was considered appropriate at $162,000 per bed.

57 beds @ $162,000 per bed
57 x $162,000 = $9,234,000

b. Operating Expenditures: It is estimated that 23 positions will be required to provide security and support for these 57 beds: 1 Correctional Officer III, 20 Correctional Officer II's, and 2 Institutional Counselors. Costs for these positions will not occur until FY 1985, the anticipated opening data for the new beds.

FY 1986 Costs - Adult Confinement

Personal Services	$1,177,700
Travel	6,400
Contractual Services	184,000
Commodities	187,000
Equipment	5,900
Inmate Gratuities	30,000
TOTAL	$1,591,000

Inflation of 6% for all expenditure object groups was assumed calculating subsequent fiscal years.

"An Act relating to criminal prosecution of minors."

House Bill No. 109 would add additional provisions to AS 12.55 and AS 47.10 to accomplish two major purposes. The Act would: 1) alter and further define the process by which a determination is made to waive juvenile court jurisdiction over certain minors and subject them to prosecution as adults; and 2) define the type of facility in which minors who have been prosecuted and sentenced as adults are to serve their terms of imprisonment.

Section 2 of HB 109 would maintain the existing judicial waiver mechanism and mandate waiver of juveniles 16 years old or older upon a court finding of probable cause to believe they had committed an unclassified or class A felony. This Bill would embody in statute the presumption that older youths accused of serious violent crimes are responsible and should be held accountable for their acts as would adults similarly accused. The focus in dealing with such youth under the adult criminal code would be primarily upon retribution and deterrence rather than upon the equal balancing of the interests of the public and the youth under the juvenile code.

The effect of Section 2 of the Bill would be to increase the number of juveniles subject to prosecution under the adult criminal statutes and to increase the liability of such juveniles to sanctions more severe, both in nature and duration, than those to which they would have been liable under the juvenile code. Based on Calendar Year 1981 arrest data, it can be estimated that approximately 31 persons 16 and 17 years of age are arrested annually for crimes in the unclassified and Class A felony categories and would be, therefore, subject to prosecution as adults under the provisions of House Bill No. 109. This would represent an approximate increase of 28 in the number of juveniles prosecuted each year as adults.

The Department supports the conceptual basis for the alteration of AS 47.10.060 proposed in House Bill No. 109 - the presumption that older juvenile offenders accused of serious and violent crimes should be held accountable as adults. It is the Department's position that, though few in number, older youths accused of heinous violent crimes require sanctions qualitatively and quantitatively different from those available under the jurisdiction of the juvenile court. An additional provision is suggested, however, to protect the interests of those juveniles who, though accused of offenses which would require their waiver to adult jurisdiction, are ultimately acquitted or convicted only of lesser included offenses which would not mandate waiver of the juvenile. Such a provision could be added as AS 47.10.060(f) and be worded as follows:

> (f) Any person over whom jurisdiction is waived under (a)(1) of this section who is prosecuted as an adult but is acquitted or convicted of a lesser included offense which would not make him eligible for waiver under (a)(1) shall be subject to juvenile court

jurisdiction for disposition and for subsequent unlawful conduct other than that governed under (a)(1) or (a)(2).

In addition, the Department supports maintaining the existing judicial waiver allowing for adult prosecution of those persistent, repetitive juvenile offenders who have not or are unlikely to respond to treatment within the juvenile justice system. A discretionary waiver mechanism also allows for the prosecution as an adult for the rare juvenile below the age of 16 who has committed an egregious violent crime and is not amenable to rehabilitative treatment within the juvenile justice system.

Section 1 of House Bill No. 109 would provide statutory definition of the type of facility in which minors who have been sentenced as adults are to serve their terms of imprisonment. The Bill would add provisions to AS 12.55.015 to require that those juvenile defendants who had been prosecuted and convicted as adults would, if sentenced to a term of imprisonment, be confined in a juvenile correctional facility until reaching age 19, after which they would be transferred to an adult facility if more than one year remained on their terms of imprisonment. The Department opposes this provision.

It is expected that youth receiving substantial adult sentences for serious crimes would require a much greater level of security than would be provided in juvenile institutions. In addition, administrative prudence would also require that such youths be separated from other less sophisticated juveniles and be provided with rehabilitative programs differing markedly from those designed for younger juvenile offenders. Older youths convicted of serious, violent crimes would best be dealt with in a system designed to provide a continuum of security and rehabilitative program levels to address the range of maturity and sophistication of young adult offenders. Such a continuum could best be provided within the adult correctional system.

Housing juvenile offenders convicted as adults in juvenile facilities on an interim basis would tend to make rehabilitative programs within those facilities less effective. The interim nature of programs designed for juveniles sentenced as adult offenders would render the programs less effective and decrease the level of motivation of those offenders involved in them. In addition, the presence within a juvenile facility of a group of older, more sophisticated, violent offenders would be a disruptive influence on treatment programs for younger offenders. Finally, it is the position of the Department that the protection of sentenced juvenile offenders from abuse or exploitation by adult prisoners within the adult correctional framework would be best achieved administratively rather than through legislation such as Section 1 of HB 109. A classification system assessing each individual offender's characteristics and circumstances and assigning the offender to a facility and program which provides adequate security and appropriate rehabilitative programming is a more appropriate method of providing necessary protection and a decidedly more flexible mechanism for managing prisoner populations.

In summary, the Department is supportive of the concept of holding older juveniles accused of serious, violent crimes accountable within the adult criminal system. However, the Department suggests an additional provision which would preclude any inequities for those juveniles ultimately acquitted after prosecution in the adult system for waivable offenses or after having been convicted of lesser offenses which would not make them eligible for mandatory waiver. The Department opposes the provision requiring juveniles convicted and sentenced under the adult criminal statutes to be housed in juvenile facilities.

RECOMMENDED BY: Yvonne Elder Walker
Yvonne Elder Walker
Acting Director
Division of Family and
Youth Services

DATE: February 3, 1983

RECOMMENDED BY: for Roger C. Lange
Roger Endell, Director
Division of Adult
Corrections

DATE: February 14, 1983

APPROVED BY: for John R. Bay
Robert London Smith, Ph.D.
Commissioner

DATE: 2/18/83

—AEK – send to Gabrielle—

March 17, 1983

Senator Bill Ray
Pouch V
Juneau, Alaska 99811
(Mail Stop 3100)

Dear Senator Ray: Bill

Thank you for taking the time to talk with me recently about Senate Bill 127 relating to juvenile prosecution.

As you requested I am sending you the references for recent research on the effects of legislation in Minnesota and New York which provides for the prosecution of juveniles by the adult courts. That research revealed that instead of increasing the incarceration of juveniles, conviction rates for serious crimes were often lower - than would have been the case in juvenile court. That research is referred to in these articles -

[1]Kiersh, Edward, "Minnesota Cracks Down on Chronic Juvenile Offenders," Correction Magazine, (New York) 7 (6) 21-28, 1981

Roysher, Martin; Edelman, Peter, Treating Juveniles as Adults in New York: What Does it Mean & How Is It Working? Albany, New York State Division for Youth 1980

Sobie, Merrie, The Juvenile Offender Act: A Study of the Acts' Effectiveness & Impact on the New York Juvenile Justice System, New York Foundation for Child Development, 1981

Senate Bill 127 does provide for a hearing in juvenile court and also provides a set of criteria for the judge to use in deciding whether the juvenile shall be prosecuted as an adult. That approach is preferrable to an automatic waiver and also to the wide latitude now available to the courts. It is interesting to note, however, that Mr. John Pugh, Dept. Commissioner, Dept. of Health & Social Services testified recently before House Judiciary Committee that 16 waiver petitions were filed in juvenile court last year and 12 of them were granted. So it seems the courts are waiving most of the serious juvenile offenders to adult court. Alaska Chapter, National Association of Social Workers has requested statistical information from the court system to verify this or to provide actual data on the use of the waiver. We will share that info with you when we receive it.

I would appreciate being notified of future hearings on SB 127 and perhaps provided an opportunity via a telephone speaker system to give testimony.

Sincerely,

Cecilia Kleinkauf
Assoc Prof/Chairperson

CK:par

cc: Senator Pat Rodey

ACK - COPY RODEY THEN SB 127

Superior Court
State of Alaska
THIRD JUDICIAL DISTRICT
303 K Street
Anchorage, Alaska 99501

Chambers of
VICTOR D. CARLSON, Judge

March 14, 1983

The Honorable Bill Ray
Alaska State Senate
Pouch V
Juneau, Alaska 99811

RE: Senate Bill No. 127

Dear Senator Ray:

This letter is written to convey my concerns about the changes which the bill introduced by you and Senator Rodey would create in children's proceedings.

Of major concern is the mixing of criminals (those minors who are waived to adult court) with the run-of-the-mill delinquent. The likelihood of a minor who is waived to adult court receiving a sentence which can be served by the time he becomes 19 is remote. This means a minor who receives at a minimum a 20-year sentence for first degree murder, AS 12.55.125(a), or seven years for an armed robbery, AS 12.55.125(c)(2), will spend the first part of his incarceration in the relative benign environment of the McLaughlin Youth Center and the remainder at a relatively harder institution like Lemon Creek.

The program at McLaughlin Youth Center is effective both on account of the highly motivated personnel and the incentive minors have to change. The addition of persons with long sentences who know they are going to prison at age 18 will disrupt the program and make the job of the McLaughlin Youth Center staff more difficult.

I request that you consider the impact of mixing persons with long sentences into the McLaughlin Youth Center population.

The whole area of vicariously liability for torts committed by another has problems not yet addressed in Alaska. I question if the impression left by proposed AS 34.50.020(d) is intended,

ie. that only emancipated minors can be sued for their torts. It is my understanding of the current law that a person regardless of age is responsible for his actions so long as he possesses the capacity to control and understand his actions.

Proposed AS 04.10.060(a)(1) provides that "... the court may retain jurisdiction if ...". The "court" is the superior court whether the minor is being sentenced as an adult or being treated a delinquent. I understand what is being proposed but find the language to be ambiguous and ambiguities in criminal statutes present problems for all concerned.

Thank you for considering this letter. I am

Very truly yours,

Victor D. Carlson
Superior Court Judge

VDC:gp

cc: Senator Rodey
Karla Forsythe
William Hitchcock, Esq.

FILE WITH SB127

1408 West Tenth Avenue
Anchorage, Alaska 99501

March 18, 1983

The Honorable Bill Ray
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Re: Senate Bill No. 127

Dear Senator Ray:

This letter is to explain that my letter of March 14, 1983 was written in my capacity as a private citizen who has had personal experience with the juvenile justice system over the past 14 years.

Sincerely,

Victor D. Carlson

VDC:gp

cc: Senator Rodey
Arthur H. Snowden, II

Superior Court
State of Alaska
THIRD JUDICIAL DISTRICT
303 K Street
Anchorage, Alaska 99501

Chambers of
VICTOR D. CARLSON, Judge

April 11, 1983

John C. Gabrielli, Esq.
Counsel
Senate Committee on the Judiciary
Pouch V
Juneau, Alaska 99811

Re: Proposed Judiciary Committee Substitute for SB 127, Juvenile Waiver

Dear Mr. Gabrielli:

This is in response to your letter of March 22, 1983. As I understand the intent of the drafters of the proposed bill, any person 16 years of age or older who is charged with an unclassified or class A felony is to be treated as an adult.

It appears as if this objective can be accomplished by amending AS 47.10.010(b) to read:

> A minor is unamenable to treatment under this chapter <u>if he is charged with violating a criminal law of the state designated as an unclassified felony or class A felony and he was 16 years of age or older when the alleged crime was committed or if he has been found to be unamenable to treatment under this chapter before or</u> if he probably cannot be rehabilitated by treatment under this chapter before he reaches 20 years of age. . . .

I strongly support section two which lifts the requirements of presumptive sentencing for persons who are less than 18 years old when they commit a crime.

Section three which specifically states that a criminal conviction of a person who committed his crime while under 18 is a prior conviction appears to be redundant.

Section five sets forth several factors to be considered in deciding amenability. The Alaska Supreme Court has interpreted the existing waiver standards to include substantially the proposed factors. The proposed factors will result in additional litigation which would be unnecessary if the factors were not changed.

Thanking you for giving me an opportunity to comment, I am

Very truly yours,

Vic

Victor D. Carlson
Superior Court Judge

VDC:rw

California

§ 705. Holding minor in psychopathic ward of county hospital

Whenever the court, before or during the hearing on the petition, is of the opinion that the minor is mentally * * * disordered or if the court is in doubt concerning the mental health of any such person, the court may * * * proceed as provided in Section 6550 of this code or Section 4011.6 of the Penal Code.

(Amended by Stats.1970, c. 445, p. 1178, § 3, urgency, eff. July 10, 1970.)

The subject matter of this section insofar as it related to dependent children is now contained in section 357.

Library References
Infants ⇐16.9.
C.J.S. Infants § 99.

1. In general
In absence of any statutory procedure for so doing, the juvenile court has inherent power to hold hearing to determine minor's mental competence to understand nature of juvenile court fitness hearing and to assist counsel in rational manner at hearing. James Paul H. v. Superior Court of Riverside County (1978) 143 Cal.Rptr. 398, 77 C.A.3d 169.

§ 706. Evidence as to proper disposition of minor; reception of social study in evidence

After finding that a minor is a person described in * * * Section 601 or 602, the court shall hear evidence on the question of the proper disposition to be made of the minor. The court shall receive in evidence the social study of the minor made by the probation officer and such other relevant and material evidence as may be offered, and in any judgment and order of disposition, shall state the social study made by the probation officer has been read and considered by the court.
(Amended by Stats.1976, c. 1068, p. 4700, § 50.)

The subject matter of this section insofar as it related to dependent children is now contained in section 358.
1976 Amendment. Deleted reference to section 600.

Law Review Commentaries
Parents' rights at dependency hearings. (1973) 6 U.C.D.Law Rev. 240.

1. Construction and application
In respect to a petition to adjudge a child dependent and to award physical custody to a nonparent, a finding of juvenile court jurisdiction does not necessarily require the removal of the child from the then existing custodial circumstance. In re Randy B. (1976) 132 Cal.Rptr. 720, 62 C.A.3d 89.

3. Procedure
Trial court's order committing minor who had pleaded guilty to rape and kidnapping to Youth Authority was improper, where decision to commit was made prior to determination of jurisdictional and dispositional phases of juvenile proceedings and was made after minor had been given alternative of being treated as juvenile and committed to Youth Authority or of being prosecuted as an adult and minor chose to be treated as juvenile. In the Matter of J. L. P. (1972) 100 Cal.Rptr. 001, 25 C.A.3d 80.

§ 707. Fitness hearing

(a) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any criminal statute or ordinance except those listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit, the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria:

(1) The degree of criminal sophistication exhibited by the minor.

(2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

(3) The minor's previous delinquent history.

(4) Success of previous attempts by the juvenile court to rehabilitate the minor.

(5) The circumstances and gravity of the offense alleged to have been committed by the minor.

Underline indicates changes or additions by amendment

A determination that th
under the juvenile court l
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hearing.

(b) The provisions of s
minor is alleged to be a
when he or she was 16 y

(1) Murder;

(2) Arson of an inhabit

(3) Robbery while arme

(4) Rape with force or

(5) Sodomy by force, vi

(6) Lewd or lascivious
nal Code;

(7) Oral copulation by
harm;

(8) Any offense specifi

(9) Kidnapping for ran

(10) Kidnapping for p

(11) Kidnapping with

(12) Assault with inte

(13) Assault with a fi

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(15) Discharge of a fi

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(c) With regard to a
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Asterisks * * * indic

A determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one or a combination of the factors set forth above, which shall be recited in the order of unfitness. In any case in which a hearing has been noticed pursuant to this section the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing, and no plea which may already have been entered shall constitute evidence at such hearing.

(b) The provisions of subdivision (c) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of one of the following offenses:

(1) Murder;

(2) Arson of an inhabited building;

(3) Robbery while armed with a dangerous or deadly weapon;

(4) Rape with force or violence or threat of great bodily harm;

(5) Sodomy by force, violence, duress, menace, or threat of great bodily harm;

(6) Lewd or lascivious act as provided in subdivision (b) of Section 288 of the Penal Code;

(7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm;

(8) Any offense specified in Section 289 of the Penal Code;

(9) Kidnapping for ransom;

(10) Kidnapping for purpose of robbery;

(11) Kidnapping with bodily harm;

(12) Assault with intent to murder or attempted murder;

(13) Assault with a firearm or destructive device;

(14) Assault by any means of force likely to produce great bodily injury;

(15) Discharge of a firearm into an inhabited or occupied building;

(16) Any offense described in Section 1203.09 of the Penal Code.

(c) With regard to a minor alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any of the offenses listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the * * * minor shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law unless * * * the juvenile court concludes, based upon evidence, which evidence may be of extenuating or mitigating circumstances, that the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court based upon an evaluation of each of the following criteria:

* * * (1) The degree of criminal sophistication exhibited by the minor. * * *

* * * (2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction. * * *

* * * (3) The minor's previous delinquent history. * * *

* * * (4) Success of previous attempts by the juvenile court to rehabilitate the minor. * * *

Asterisks * * * indicate deletions by amendment

IDAHO 1982 COMM. S.

v. Violent offenses and offenders. Apprehension and release of children — Detention. Appeals.

in: State v. Linquist, 99 Idaho 766, 101 (1979).

ior jurisdiction of the United il jurisdiction over any child of any act, omission or status, the cou y in which the act, : follow cases: ibited b, ederal, state, local minority only, regardless of

of any federal, state, local or a crime if committed by an except traffic, watercraft and hat the prosecuting attorney ation of a motor vehicle while suspended or revoked; the hile under the influence of gs; the operation of a motor f a watercraft in a careless watercraft, or fish and game victed of any combination of ame violations, regardless of or suspension occurred; of the interstate compact on daho Code. olators of beer, wine or other lded by 1976, ch. 233, § 2, p. 1. 222, § 6, p. 412; am. 1982,

took place" for "found or living county."
nendment by ch. 222 added n (4).
cketed "a" in clause 2 was inserted npiler.
5 of S.L 1981, ch. 222 is compiled as

16-1804. Transfer from other courts. — If during the pendency of a criminal or quasi-criminal charge against any minor in any other court, it shall be ascertained that the child was under the age of eighteen (18) years at the time of committing the alleged offense, except where such child has left the state, or where said charge is that such child is a juvenile traffic, beer, wine or other alcohol or tobacco violator, or is within the purview of section 16-1806(1)(a) or (1)(b), Idaho Code, it shall be the duty of such court forthwith to transfer the case, together with all the papers, documents and testimony connected therewith, to the court. The magistrate, justice of the peace or district court making such transfer shall order the child to be taken forthwith to the court or place of detention designated by the court or shall release such child to the custody of some suitable person to be brought before the court at a time designated. The court shall then proceed as provided in this act. [1963, ch. 319, § 4, p. 876; am. 1981, ch. 222, § 7, p. 412; am. 1982, ch. 110, § 2, p. 311.]

Compiler's notes. Section 3 of S.L. 1982, ch. 110 is compiled as § 18-1502.

16-1805. Retention of jurisdiction.

Cited in: In re Wolf, 99 Idaho 476, 583 P.2d 1011 (1978).

16-1806. Waiver of jurisdiction and transfer to other courts. — (1) After the filing of a petition and after full investigation and hearing, the court may waive jurisdiction under the youth rehabilitation act over the child and order that the child be held for adult criminal proceedings when:

(a) A child is alleged to have committed an act after he or she became fourteen (14) years of age which would be a crime if committed by an adult; or

(b) An adult at the time of the filing of the petition is alleged to have committed an act prior to his having become eighteen (18) years of age which would be a felony if committed by an adult, and the court finds that the adult is not committable to an institution for the mentally deficient or mentally ill, is not treatable in any available institution or facility available to the state designed for the care and treatment of children, or that the safety of the community requires the adult continue under restraint; or

(c) An adult already under the jurisdiction of the court is alleged to have committed a crime while an adult.

(2) A motion to waive jurisdiction under the youth rehabilitation act and prosecute a child under the criminal law may be made by the prosecuting attorney, the child, or by motion of the court upon its own initiative. The motion shall be in writing and contain the grounds and reasons in support thereof.

(3) Upon the filing of a motion to waive jurisdiction under the youth rehabilitation act, the court shall enter an order setting the motion for

hearing at a time and date certain and shall order a full and complete investigation of the circumstances of the alleged offense to be conducted by the board, or such other state agency or investigation officer designated by the court.

(4) Upon setting the time for the hearing upon the motion to waive jurisdiction, the court shall give written notice of said hearing to the child, and the parents, guardian or custodian of the child, and the prosecuting attorney, at least ten (10) days before the date of the hearing, or a lesser period stipulated by the parties, and such notice shall inform the child and the parents, guardian or custodian of the child of their right to court appointed counsel in accordance with these rules. Service of the notice shall be made in the manner prescribed for service of a summons under section 16-1809, Idaho Code

(5) The hearing upon the notice to waive jurisdiction shall be held in the same manner as an evidentiary hearing upon the original petition and shall be made part of the record.

(6) If as a result of the hearing on the motion to waive jurisdiction the court shall determine that jurisdiction should not be waived, the petition shall be processed in the customary manner as a youth rehabilitation act proceeding. However, in the event the court determines, as a result of the hearing, that youth rehabilitation act jurisdiction should be waived and the child should be prosecuted under the criminal laws of the state of Idaho, the court shall enter findings of fact and conclusions of law upon which it bases such decision together with a decree waiving youth rehabilitation act jurisdiction and binding the child over to the authorities for prosecution under the criminal laws of the state of Idaho.

(7) No motion to waive youth rehabilitation act jurisdiction shall be recognized, considered, or heard by the court in the same case once the court has entered an order or decree in that case that said child has come within the purview of the youth rehabilitation act, and all subsequent proceedings after the decree finding the child within the purview of the youth rehabilitation act must be under and pursuant to the youth rehabilitation act and not as a criminal proceeding.

(8) In considering whether or not to waive juvenile court jurisdiction over the child, the juvenile court shall consider the following factors:

(a) The seriousness of the offense and whether the protection of the community requires isolation of the child beyond that afforded by juvenile facilities;

(b) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;

(c) Whether the alleged offense was against persons or property, greater weight being given to offenses against persons;

(d) The maturity of the child as determined by considerations of his home, environment, emotional attitude, and pattern of living;

(e) The child's record and previous history of contacts with the juvenile justice system;

(f) The likelihood of rehabilitation of the child by use of facilities available to the court;

(g) The amount of weight to be given to each of the factors listed in subsection (8) of this section is discretionary with the court, and a determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one or a combination of the factors set forth above, which shall be recited in the order of waiver.

(9) If the court does not waive jurisdiction and order a child or adult held for criminal proceedings, the court in a county other than the child's or adult's home county, after entering a decree that the child or adult is within the purview of this chapter, may certify the case for disposition to the court of the county in which the child or adult resides upon being notified the receiving court is willing to accept transfer. In the event of a transfer, which should be made unless the court finds it contrary to the interest of the child or adult, the jurisdiction of the receiving court shall attach to the same extent as if the court had original jurisdiction. [I.C., § 16-1806, as added by 1977, ch. 165, § 2, p. 427; am. 1981, ch. 162, § 1, p. 284.]

Sec. to sec. ref. This section is referred to in §§ 16-1804 and 16-1819.

ANALYSIS

Application.
Discretion of court.
Double jeopardy.
Legislative intent.
Purpose.
Waiver.
— Criteria.
— Procedural requirements.
— Review.

Application.

This section and § 18-216 make it clear that not all chronological age juveniles will receive treatment as juveniles. In re Wolf, 99 Idaho 476, 583 P.2d 1011 (1978).

Discretion of Court.

The magistrate did not abuse his discretion in waiving Youth Rehabilitation Act jurisdiction, where there was ample competent evidence in the record from which the magistrate reasonably concluded that defendant was a dangerous individual; that a real possibility existed that he would not be rehabilitated before he reached the age of 21; and that protection of the community required his isolation beyond that afforded by the juvenile facilities. State v. Christensen, 100 Idaho 631, 603 P.2d 586 (1979).

Double Jeopardy.

This section does not authorize an adjudication or determination of facts beyond the existence of probable cause to believe that a particular crime was committed and that a particular juvenile committed it; it merely authorizes the trial court to consider circumstances in aggravation as bearing on the question of whether juvenile jurisdiction should be retained and a determination which exceeds that narrow scope could result in the attachment of double jeopardy and a plea in bar to any proceedings in an adult court. In re Wolf, 99 Idaho 476, 583 P.2d 1011 (1978).

Legislative Intent.

It was entirely proper for the magistrate, in considering defendant's record and history of previous contacts with the juvenile justice system, to allow testimony concerning his misdemeanor offenses and dismissed felony charges, inasmuch as there is nothing in the Youth Rehabilitation Act to indicate the legislature, in referring to a child's "record" and "contacts with the juvenile justice system," intended to limit the magistrate's consideration to felony type conduct only. State v. Christensen, 100 Idaho 631, 603 P.2d 586 (1979).

Purpose.

This section and its antecedents were intended to implement the statutory provisions of § 18-216 and to the extent of the conflict, § 18-216 controls. In re Wolf, 99 Idaho 476, 583 P.2d 1011 (1978).

The sole function of the transfer hearing is to determine whether the interests of the child and society are best served by Youth Rehabilitation Act proceedings or by adult proceedings, and the hearings upon which the determination is made are to be informal in nature. State v. Christensen, 100 Idaho 631, 603 P.2d 586 (1979).

Waiver.

— Criteria.

A probable cause finding in conjunction with the procedure of waiving juvenile

(b) The sale shall be conducted and the proceeds of the sale shall be applied in the manner provided in §§ 10 — 90 of this chapter, except that property in a state of decay, or that is plainly subject to immediate decay, may be summarily sold by order of a district judge or magistrate, after inspection of it, as provided in this chapter.

(c) The return of the sale shall be made and the proceeds derived from it shall be applied in the manner provided in §§ 60 and 70 of this chapter. (§ 22-7-8 ACLA 1949; am § 3 ch 24 SLA 1966)

Sec. 34.45.090. Fees of officers. The fees allowed to the district judge or magistrate under this chapter are $3 and to the peace officer the same fees as are allowed by law for sales upon execution and 10 cents a folio for making an inventory of property. (§ 22-7-9 ACLA 1949; am § 3 ch 24 SLA 1966)

Chapter 50. Actions for Injuries to Property Interests.

Section
10. Action for injury to the inheritance
20. Liability for destruction of property by minors

Sec. 34.50.010. Action for injury to the inheritance. A person seized of an estate in remainder or reversion may maintain a civil action for an injury done to the inheritance, notwithstanding an intervening estate for life or years. (§ 22-1-5 ACLA 1949)

Am. Jur. reference. — 35 Am. Jur., Marriage, § 148 et seq.

Sec. 34.50.020. Liability for destruction of property by minors. (a) A person, municipal corporation, association, village, school district or religious or charitable organization, incorporated or unincorporated, may recover damages in a civil action in an amount not to exceed $2,000 and court costs, from either parent or both parents or the legal guardian or person having the legal custody of an unemancipated minor under the age of 18 years, who maliciously or wilfully destroys real or personal property belonging to the person, municipal corporation, association, village, school district or religious or charitable organization.

(b) A state agency or its agents, including a person working in or responsible for the operation of a foster, receiving, or detention home, or children's institution, is not liable for the acts of unemancipated minors in its charge or custody. (§ 1 ch 98 SLA 1957; am § 1 ch 107 SLA 1967)

Ct. Op. No. 628 (File No. 1144), 471 P.2d 367 (1970).

Privilege against self-incrimination. — See E.L.L. v. State, Sup. Ct. Op. No. 1540 (File No. 3374), 572 P.2d 786 (1977), decided prior to the 1977 amendment to this section.

Violation of former law relating to purchase of intoxicating liquors by minors. — See Purdy v. United States, 16 Alaska 173, 146 F. Supp. 762 (D. Alas. 1956).

Prosecution for joyriding. — Subsection (b) of this section and AS 28.35.010(d) demonstrate a clear legislative intent to exclude from the coverage and requirements of the juvenile code those cases involving alleged misdemeanor violations of Alaska's "joyriding" statute by persons under 18 years of age. State v. G.L.P., Sup. Ct. Op. No. 1786 (File No. 2978), 590 P.2d 65 (1979).

One under 18 years of age can be charged, prosecuted and sentenced in the district court, as an adult, for a misdemeanor violation of Alaska's "joyriding" statute, AS 28.35.010(a), before there has been an order by the superior court waiving the latter court's juvenile jurisdiction. State v. G.L.P., Sup. Ct. Op. No. 1786 (File No. 2978), 590 P.2d 65 (1979).

Appeal after serving sentence. — If there remain collateral legal disabilities apart from the sentence, an appeal is not mooted even though the sentence has been served. E.J. v. State, Sup. Ct. Op. No. 628 (File No. 1144), 471 P.2d 367 (1970).

Applied in In re S.D., Sup. Ct. Op. No. 1255 (File No. 2530), 549 P.2d 1190 (1976).

Quoted in In re P.N., Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975); R.D.S.M. v. Intake Officer, Sup. Ct. Op. No. 1449 (File No. 2821), 565 P.2d 855 (1977).

Am. Jur., ALR and C.J.S. references. — 27 Am. Jur., Infants, §§ 101 to 112; 31 Am. Jur., Juvenile Courts and Delinquents, Dependent and Neglected Children, §§ 13 to 50.

Another court's jurisdiction over a child as affected by assumption of jurisdiction by juvenile court, 11 ALR 147; 78 ALR 317; 146 ALR 1311.

Vagrancy of minors, 14 ALR 1507.

Constitutionality of statute which, for reformatory purposes, deprives parent of custody or control of child, 60 ALR 1342.

Power of juvenile court to exercise continuing jurisdiction over infant delinquent or offender, 76 ALR 657.

Age of child at time of alleged offense or delinquency, or at time legal proceedings are commenced, as criterion of jurisdiction of juvenile court, 89 ALR2d 506.

Marriage as affecting jurisdiction of juvenile court over delinquents or dependents, 14 ALR2d 336.

Homicide by juvenile as within jurisdiction of juvenile court, 48 ALR2d 662.

43 C.J.S. Infants, §§ 6, 93 et seq.

Sec. 47.10.020. Investigation and petition. (a) Whenever a person informs the court of the facts which bring a minor within this chapter, the court shall appoint a competent person or agency to make a preliminary inquiry and report for the information of the court to determine whether the interests of the public or of the minor require that further action be taken. Upon the receipt of the report, the court may informally adjust or dispose of the matter without a hearing, or it may authorize the person having knowledge of the facts of the case to file with the court a petition setting out the facts. Where the court informally adjusts or disposes of the matter, the minor may not be detained or taken into the custody of the court, and the matter shall be closed by the court upon adjustment or disposition.

(b) The petition and all subsequent pleadings shall be styled as follows: "In the matter of ....., a minor under 18 years of age." The petition may be executed upon the petitioner's information and belief, and shall be verified. It shall include the following information:

(1) the name, address and occupation of the petitioner, together with his relationship to the minor, and his interest in the matter;

(2) the name, age and address of the minor;

(3) a brief statement of the facts which bring the minor within this chapter;

(4) the names and addresses of the minor's parents;

(5) the name and address of the minor's guardian, or of the person having control or custody of the minor.

(c) If any of the facts required in this section are not known by the petitioner, he shall state in his petition that those facts are unknown to him. (§ 5 art I ch 145 SLA 1957)

Sec. 47.10.030. Summons and custody of minor. (a) After a petition is filed and after further investigation which the court directs, if the person having custody or control of the minor has not appeared voluntarily, the court shall issue a summons which (1) recites briefly the substance of the petition; (2) clearly states that at the hearing it is possible that parental rights and responsibilities may be terminated forever and that the minor may at the hearing be committed to the Department of Health and Social Services for possible adoption; and (3) directs the person having custody or control of the minor to appear personally in court with the minor at the place and at the time set forth in the summons.

(b) In all cases under this chapter the minor, each parent of the minor and the guardian of the minor shall be given notice adequate to give actual notice of the proceedings and the possibility of termination of parental rights and responsibilities, taking into account education and language differences which are known or reasonably ascertainable by the petitioner or the department. The notice of the hearing shall contain all names by which the minor has been identified. Notice shall be given in the manner appropriate under rules of civil procedure for the service of process in a civil action under Alaska law or in any manner the court by order directs. Proof of the giving of the notice shall be filed with the court before the petition is heard. The court may also subpoena the parent of the minor, or any other person whose testimony may be necessary at the hearing. A subpoena or other process may be served by a person authorized by law to make the service, and where personal service cannot be made, the court may direct that service of process be in a manner appropriate under rules of civil procedure for the service of process in a civil action under Alaska law or in any manner the court directs.

(c) If the minor is in such condition or surroundings that his welfare requires the immediate assumption of his custody by the court, the court may order, by endorsement upon the summons, that the officer serving the summons shall at once take the minor into custody and make the temporary placement of the minor which the court directs. (§ 6 art I ch 145 SLA 1957; am § 1 ch 110 SLA 1960; am § 6 ch 104 SLA 1971; am § 9 ch 63 SLA 1977)

Sec. 47.10.050. Appointment of guardian ad litem or attorney. (a) Whenever in the course of proceedings instituted under this chapter it appears to the court that the welfare of a minor will be promoted by the appointment of an attorney to represent the minor or an attorney or other person to serve as guardian ad litem, the court may make the appointment. Appointment of a guardian ad litem or attorney shall be made under the terms of AS 09.65.130.

(b) In all proceedings initiated under a petition for delinquency, a minor shall have the right to be represented by counsel and if indigent have counsel appointed for him by the court. The court shall appoint counsel in such cases unless it makes a finding on the record that the minor has made a voluntary, knowing, and intelligent waiver of the right to counsel and a parent or guardian with whom the child resides or resided before the filing of the petition concurs with the waiver. In cases in which it has been alleged that the minor has committed an act which would be a felony if he were an adult, waiver of counsel shall not be accepted unless the court is satisfied that the minor has consulted with an attorney before his waiver of counsel. (§ 8 art I ch 145 SLA 1957; am § 5 ch 167 SLA 1975; am §§ 11, 12 ch 63 SLA 1977)

Effect of amendments. — The 1975 amendment, in present subsection (a), inserted "or attorney" in the first sentence and added the second sentence.

The 1977 amendment designated the provisions of this section as subsection (a), substituted "an attorney to represent the minor or an attorney or other person to serve as guardian ad litem" for "a guardian ad litem or attorney" in the first sentence of that subsection, and added subsection (b).

Editor's note. — Section 33, ch. 63, SLA 1977, provides: "Section 12 of this Act has the effect of adding to the court's responsibilities under Rules 14 and 15, Alaska Rules of Children's Procedure, by requiring the court to appoint counsel for an indigent minor unless the minor has made a voluntary, knowing and intelligent waiver, and in certain cases of delinquency where there has been a waiver of counsel to appoint counsel for the minor unless the court is satisfied that the minor consulted with an attorney before his waiver of counsel."

Cited in RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Under Rule of Children's Procedure 12(c)(3), the presence of the guardian ad litem is required at a child hearing. In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), P.2d (1979).

Failure to conduct hearing in presence of child's counsel and guardian ad litem held harmless error. — See In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), P.2d (1979).

Sec. 47.10.060. Waiver of jurisdiction. (a) If the court finds at a hearing on a petition that there is probable cause for believing that a minor is delinquent and finds that the minor is not amenable to treatment under this chapter, it shall order the case closed. After a case is closed under this subsection, the minor may be prosecuted as if he were an adult.

(b) Repealed by § 8 ch 110 SLA 1967.

(c) Repealed by § 8 ch 110 SLA 1967.

(d) A minor is unamenable to treatment under this chapter if he probably cannot be rehabilitated by treatment under this chapter before he reaches 20 years of age. In determining whether a minor is

unamenable to treatment, the court may consider the seriousness of the offense the minor is alleged to have committed, the minor's history of delinquency, the probable cause of the minor's delinquent behavior, and the facilities available to the division of youth and adult authority for treating the minor.

(e) If a person who has been tried as an adult under this section has completed his sentence and five years have elapsed, he may petition (or the Department of Health and Social Services may petition for him) the superior court to seal the records of all criminal proceedings against him and all punishments assessed against him, except for traffic offenses, while he was a minor. If the superior court finds that the punishment assessed against the person has had its intended rehabilitative effect, the superior court shall order the record of proceedings and the record of punishments sealed. Sealing the records restores civil rights removed because of a conviction. No person may use records so sealed for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

(§ 9 art I ch 145 SLA 1957; am § 1 ch 118 SLA 1962; am §§ 3, 8 ch 110 SLA 1967; am § 6 ch 104 SLA 1971; am § 13 ch 63 SLA 1977)

Cross reference. — As to hearings before the juvenile court, see AS 47.10.070.

Effect of amendment. — The 1977 amendment substituted "20 years of age" for "21 years of age" at the end of the first sentence of subsection (d), and in the fourth sentence of subsection (e), deleted "ever" following "No person may" and added the language beginning "except that the court may order" to the end.

Non-criminal treatment of child offenders is to be rule. — The statutory framework for dealing with child offenders contemplates that non-criminal treatment is to be the rule and adult criminal disposition the exception. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Section provides means to determine amenability to treatment available for child offenders. — The waiver procedure set out in this section and in Rule of Children's Procedure 3 provides the means by which the children's court judge determines, prior to adjudicating the delinquency petition, that an accused child is not a suitable subject for the treatment available for child offenders. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The court's authority to impose a penal sentence on a juvenile is limited under the strict procedures of subsections (a) and (d) and Children's Rule 3. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Where no waiver hearing has been conducted, the court has no authority to sentence a delinquent child as an adult. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Before treating a juvenile as an adult, the court must first conduct a waiver hearing. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Findings necessary to justify waiver. — To justify waiver, the children's court judge must find, on sufficient evidence, that probable cause is established at the hearing for believing that the child committed the act with which he was charged in the petition and which if committed by an adult would constitute a crime and the child is not amenable to the treatment provided under this article. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

As a prerequisite to criminal prosecution, the children's court must find not only that the child is properly accused but also that he would not be receptive to the rehabilitative programs available to the court. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The inability to predicate a plan for a defendant during the short time remaining before his 19th birthday coupled with the obvious need of treatment as disclosed by the record may be sufficient to justify a

Sec. 47.10.080. Judgments and orders. (a) The court, at the conclusion of the hearing, or thereafter as the circumstances of the case may require, shall find and enter a judgment that the minor is or is not a delinquent or a child in need of aid.

(b) If the court finds that the minor is delinquent, it shall

(1) order the minor committed to the Department of Health and Social Services for a period of time not to exceed two years or in any event extend past the day the minor becomes 19, except that the department may petition for and the court may grant in a hearing (A) two-year extensions of commitment which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and (B) an additional one-year period of supervision past age 19 if continued supervision is in the best interests of the person and the person consents to it; the department shall place the minor in the juvenile facility which the department considers appropriate and which may include a juvenile correctional school, detention home, or detention facility; the minor may be released from placement or detention and placed on probation on order of the court and may also be released by the department, in its discretion, under AS 47.10.200;

(2) order the minor placed on probation, to be supervised by the department, and release him to his parents, guardian, or a suitable person; if the court orders the minor placed on probation, it may specify the terms and conditions of probation; the probation may be for a period of time, not to exceed two years and in no event extend past the day the minor becomes 19, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of supervision which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it;

(3) order the minor committed to the department and placed on probation, to be supervised by the department, and release him to his parents, guardian, other suitable person, or suitable nondetention setting such as a family home, group care facility, or child care facility, whichever the department considers appropriate to implement the treatment plan of the predisposition report; if the court orders the minor placed on probation, it may specify the terms and conditions of probation; the department may transfer the minor, in his best interests, from one of the probationary placement settings listed in this paragraph to another, and the minor, his parents or guardian and attorney are entitled to reasonable notice of the transfer; the probation may be for a period of time, not to exceed two years and in no event extend past the day the minor becomes 19, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of commitment which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; or

(4) order the minor to make suitable restitution in lieu of or in addition to the court's order under (1), (2) or (3) of this subsection.

(5) order the minor committed to the Department of Health and Social Services for placement in an adventure-based education program established under AS 47.21.020 with conditions the court considers appropriate concerning release upon satisfactory completion of the program or commitment under (1) of this subsection if the program is not satisfactorily completed.

(c) If the court finds that the minor is a child in need of aid, it shall

(1) order the minor committed to the department for placement in an appropriate setting for a period of time not to exceed two years or in any event past the date the minor becomes 19 years of age, except that the department may petition for and the court may grant in a hearing (A) two-year extensions of commitment which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and (B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; the department may transfer the minor, in his best interests, from one placement setting to another, and the minor, his parents or guardian and attorney are entitled to reasonable notice of the transfer;

(2) order the minor released to his parents, guardian, or some other suitable person, and, in appropriate cases, order the parents, guardian, or other person to provide medical or other care and treatment; if the court releases the minor, it shall direct the department to supervise the care and treatment given to the minor, but the court may dispense with the department's supervision if the court finds that the adult to whom the minor is released will adequately care for the minor without supervision; the department's supervision may not exceed two years or in any event extend past the date the minor reaches age 19, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of supervision which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; or

(3) by order, upon a showing in the adjudication by clear and convincing evidence that there is a child in need of aid under AS 47.10.010(a)(2) as a result of parental conduct and upon a showing in the

disposition by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights, terminate parental rights and responsibilities of one or both parents and commit the child to the department or to a legally appointed guardian of the person of the child, and the department or guardian shall report annually to the court on efforts being made to find a permanent placement for the child.

(d) An order issued under (c) (3) of this section authorizes the commissioner of health and social services or his designee or the guardian of the person of the child to consent to the adoption of the child.

(e) If the court finds that the minor is not delinquent or a child in need of aid, it shall immediately order his release from the department's custody and his return to his parents, guardian, or custodian, and dismiss the case.

(f) A minor found to be delinquent or a child in need of aid is a ward of the state as long as he is committed to the department or the department has the power to supervise his actions. The court shall review an order made under (b) or (c)(1) or (2) of this section annually, and may review the order more frequently to determine if continued placement, probation, or supervision, as it is being provided, is in the best interest of the minor and the public. The department, the minor, the minor's parents, guardian, or custodian are entitled, when good cause is shown, to a review on application. If the application is granted, the court shall afford these parties and their counsel reasonable notice in advance of the review and hold a hearing where these parties and their counsel shall be afforded an opportunity to be heard. The minor shall be afforded the opportunity to be present at the review.

(g) No adjudication under this chapter upon the status of a child may operate to impose any of the civil disabilities ordinarily imposed by conviction upon a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction, nor may a minor be charged with or convicted of a crime in a court, except as provided in this chapter. The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court, nor does the commitment and placement or evidence operate to disqualify a minor in a future civil service examination or appointment in the state.

(h) The department shall pay all court costs incurred in all proceedings in connection with the adjudication of delinquency under this chapter, including hearings which result in the release of the minor.

(i) A minor, his parents or guardian acting on his behalf, or the department may appeal a judgment or order, or the stay, modification, setting aside, revocation, or enlargement of a judgment or order issued by the court under this chapter.

(j) Repealed by § 29 ch 63 SLA 1977.

(k) In making its order under (c) of this section, the court shall consider the fact, if it is a fact, that the minor was being provided treatment by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination. (§ 10(2) art I ch 145 SLA 1957; am § 2 ch 110 SLA 1960; am § 2 ch 118 SLA 1962; am § 1 ch 40 SLA 1967; am §§ 1—4 ch 27 SLA 1970; am §§ 12—15 ch 245 SLA 1970; am § 6 ch 104 SLA 1971; am §§ 6, 7 ch 1 SLA 1972; am §§ 1, 2 ch 125 SLA 1974; am §§ 14-18, 29 ch 63 SLA 1977; am § 6 ch 86 SLA 1979)

Effect of amendments. — The 1977 amendment substituted "delinquent or a child in need of aid" for "delinquent, or a child in need of supervision, or dependent minor" at the end of subsection (a), rewrote subsections (b) and (c), and in subsection (e), substituted "delinquent or a child in need of aid" for "delinquent, a child in need of supervision, or dependent," "the department's custody" for "its custody," and "dismiss" for "close." In subsection (f), the amendment substituted "delinquent or a child in need of aid" for "delinquent, a child in need of supervision, or dependent" in the first sentence, deleted "or (j)" following "under (b) or (c)(1) or (2)" and "and to determine if the minor is being treated fairly" following "and the public" in the second sentence, inserted "as it is being provided" in the second sentence, rewrote the third sentence, and inserted the present fourth sentence. The amendment also repealed subsection (j), which provided for orders of disposition when the minor was a child in need of supervision.

The 1979 amendment added paragraph (5) to subsection (b).

Editor's note. — Section 31, ch. 63, SLA 1977, provides: "Section 18 of this Act has the effect of adding to the court's responsibilities when holding a review under Rule 28, Alaska Rules of Children's Procedure, by requiring the court to hold a hearing upon a showing of good cause, give notice, and afford an opportunity to be heard."

Section 34, ch. 63, SLA 1977, in the first sentence provides: "The portions of AS 47.10.080(b) and (c) in secs. 15 and 16 of this Act which specify the length of commitment to the department or probation or supervision by the department are applicable to those minors affected under former AS 47.10.080(b), (c) and (j) before the effective date of this Act (August 26, 1977) so that the commitment, probation or supervision of minors by the department before the effective date of this Act (August 26, 1977) shall continue, but may not exceed two years from the effective date of this Act (August 26, 1977) unless two-year extensions have been granted by the court under this Act." Subsection (j) of AS 47.10.080 was repealed by § 29, ch. 63, SLA 1977.

Legislative history reports. — For report on amending bill, see 1960 House Journal, p. 494. For report on ch. 40, SLA 1967 (HB 131), see 1967 House Journal, p 339. Chapter 245, SLA 1970 (HCSSB 399 am H), was identical to CSHB 406 (Jud.). For report on CSHB 406 (Jud.), see 1970 House Journal Supplement No. 6.

Each category of children mandates differences regarding content of dispositional orders. — Alaska's pertinent statutory provisions and procedural rules distinguish between categories of children for purposes of administering Alaska children's laws. Of controlling significance is that each class or category mandates distinct differences regarding the permissible content of any dispositional order the trial court can enter. In re A Minor Child, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Where a delinquent child was sentenced for a fixed time period and ordered to an adult institution, this amounted to a penal sentence as opposed to the juvenile disposition required under subsection (b)(1). B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Court cannot place child in particular institution. — Under this section as amended, the court no longer has discretion to order the delinquent child placed in a particular institution. The court only has authority to commit the child to the department, which then places the child. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974); A.A. v. State,

responsibilities of legal custody include those in (b) and (c) of this section. The department or person having legal custody of the child may delegate any of the responsibilities under this section, except authority to consent to marriage, adoption, and military enlistment may not be delegated. For purposes of this chapter a person in charge of a placement setting is an agent of the department.

(b) When a guardian is appointed for the child, the court shall specify in its order the rights and responsibilities of the guardian. The guardian shall be removed only by court order. The rights and responsibilities may include, but are not limited to, having the right and responsibility of reasonable visitation, consenting to marriage, consenting to military enlistment, consenting to major medical treatment, obtaining representation for the child in legal actions, and making decisions of legal or financial significance concerning the child.

(c) When there has been transfer of legal custody or appointment of a guardian and parental rights have not been terminated by court decree, the parents shall have residual rights and responsibilities. These residual rights and responsibilities of the parent include, but are not limited to, the right and responsibility of reasonable visitation, consent to adoption, consent to marriage, consent to military enlistment, consent to major medical treatment except in cases of emergency or cases falling under AS 09.65.100, and the responsibility for support, except if by court order any residual right and responsibility has been delegated to a guardian under (b) of this section. (§ 26 ch 63 SLA 1977)

Sec. 47.10.085. Child in need of aid; religious treatment. In a case in which the minor's status as a child in need of aid is sought to be based on his need for medical care, the court may, upon consideration of the health of the minor and the fact, if it is a fact, that the minor is being provided treatment by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination, dismiss the proceedings and thereby close the matter. This may be done, in the interests of justice and religious freedom, on the court's own motion or upon the application of a party to the proceedings, at any stage of the proceedings after information is given to the court under AS 47.10.020(a). (§ 8 ch 1 SLA 1972; am § 19 ch 63 SLA 1977)

Effect of amendment. — The 1977 amendment substituted "child in need of aid" for "dependent minor" near the beginning of the first sentence.

Sec. 47.10.090. Records. (a) The court shall make and keep records of all cases brought before it. The court's official records may be inspected only with the court's permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared in the discharge of his official duty by an employee of the

court or by a federal, state or city agency are privileged and may not be disclosed directly or indirectly to anyone without the court's permission. However, a state or city law-enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with making a preliminary investigation for the information of the court. Within 30 days of the date on which a minor reaches his 18th birthday or, if the court retains jurisdiction of a minor past his 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records, information and social records pertaining to that minor, as well as records of all criminal proceedings against him and punishments assessed against him, except for traffic offenses. No person may use records so sealed for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

(b) The name or picture of a minor under the jurisdiction of the court may not be made public in connection with the minor's status as a delinquent child or a child in need of aid unless authorized by order of the court, except that the name of a minor who is found for the second time to have violated a law, which if committed by an adult would be a felony, shall be made public unless the court, for good cause, in certain individual cases, enters an order prohibiting the disclosure.

(c) A person who violates a provision of this section is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $500 or by imprisonment for not more than one year, or by both. (§ 10(3)(4) art I ch 145 SLA 1957; am § 1 ch 124 SLA 1972; am § 1 ch 90 SLA 1975; am § 20 ch 63 SLA 1977)

Effect of amendments. — The 197 amendment, in subsection (b), deleted "by a newspaper, radio, or television station" following "may not be made public" substituted "unless" for "except as," and added the language beginning "except that" to the end.

The 1977 amendment substituted "delinquent child or a child in need of aid" for "delinquent or dependent child" in subsection (b).

Editor's note. — Section 2, ch. 90, SLA 1975, provides: "Section 1 of this Act changes Rule 26 of the Supreme Court Rules of Children's Procedure in that the rule now provides that the names and pictures of minors under the jurisdiction of the children's court are not to be made available to the public unless authorized by a court order which is accompanied by a written statement supporting the authorization, and sec. 1 provides that for a minor who is found for the second time to have violated a law, which if committed by an adult would be a felony, the minor's name must be made public unless the court, for good cause, in certain individual cases, enters an order prohibiting the disclosure."

Purpose for enacting subsection (a). — Reading this section together with other sections of the laws relating to children's proceedings leads one to believe that subsection (a) was enacted principally for the purpose of protecting the child against the possible adverse effects an unauthorized revelation of his social record would have. In re P.N., Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975).

There is no indication that subsection (a) was intended to authorize the granting of testimonial use immunity to parents. In re P.N., Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975).

The supreme court could not say with certainty that this section would be construed to forbid the use, in a subsequent criminal action against a parent, of testimony that the parent gave at a

(c) The sum collected from a parent under this section shall be directly credited to the general fund of the state. (§ 13 art I ch 145 SLA 1957; am § 1 ch 31 SLA 1959; am § 1 ch 141 SLA 1959; am § 23 ch 63 SLA 1977)

Effect of amendment. — The 1977 amendment substituted "child in need of aid" for "dependent minor" in two places in the first sentence of subsection (a).

Sec. 47.10.130. Detention. No minor under 18 years of age who is detained pending hearing may be incarcerated in a jail unless assigned to separate quarters so that the minor cannot communicate with or view adult prisoners convicted of, under arrest for, or charged with a crime. When a minor is detained pending hearing, his parent, guardian, or custodian shall be notified immediately. (§ 14 art I ch 145 SLA 1957)

A detention which was twice continued by the master of the children's court for a total period of six days exemplifies a usurpation of judicial power. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Sec. 47.10.140. Temporary detention and detention hearing. (a) A peace officer may arrest a minor who violates a law or ordinance in his presence, or who he reasonably believes is a fugitive from justice. A peace officer may continue a lawful arrest made by a citizen. He may have the minor detained in a juvenile detention facility if in his opinion it is necessary to do so to protect the minor or the community.

(b) A peace officer who has a minor detained under (a) of this section shall immediately, and in no event more than 12 hours later, notify the court, the minor's parents or guardian, and the Department of Health and Social Services of the officer's action. The department may file with the court a petition alleging delinquency before the detention hearing.

(c) The court shall immediately, and in no event more than 48 hours later, hold a hearing at which the minor and his parents or guardian if they can be found shall be present. The court shall determine whether probable cause exists for believing the minor to be delinquent. The court shall inform the minor of the reasons alleged to constitute probable cause and the reasons alleged to authorize his detention. The minor is entitled to counsel and to confrontation of the witnesses against him.

(d) If the court finds that probable cause exists, it shall determine whether the minor should be detained pending the hearing on the petition or released. It may either order the minor held in detention or order him to be released to the custody of a suitable person pending the hearing on the petition. If the court finds no probable cause, it shall order the minor released and close the case.

(e) Except for temporary detention pending a detention hearing or temporary detention under (f) of this section, no minor may be detained except by court order.

(f) A peace officer may detain a minor who is evading the person having legal custody of him if the minor is not otherwise subject to arrest or detention under (a) of this section, for the sole purpose of either (1) returning the minor to the person having legal custody of him or (2) if the minor prefers, taking him to an office specified by the Department of Health and Social Services, facility or contract agency of the Department of Health and Social Services where such exists in the community. Immediately upon detaining a minor under this provision, the peace officer shall advise him of his right to social services under AS 47.10.142(b), and, if known, the peace officer shall advise the person having the legal custody of the minor of his detention.

(g) No minor who is detained under (f) of this section may be detained in a jail or other facility unless kept out of contact with adult persons convicted or accused of a crime. No minor may be detained in a jail or other detention facility which has not been approved by the Department of Health and Social Services before detention of the minor. (§ 15 art I ch 145 SLA 1957; am § 3 ch 118 SLA 1962; am § 2 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am §§ 1, 2 ch 128 SLA 1972)

Detention orders neither based on competent testimony nor accompanied by the required statement of facts are invalid. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Sec. 47.10.142. Emergency custody and temporary placement hearing. (a) The Department of Health and Social Services may take emergency custody of a minor upon discovering any of the following circumstances:

(1) the minor has been abandoned;

(2) the minor has been grossly neglected by his parents or guardian, as "neglect" is defined in AS 47.17.070(5), so that immediate removal from his surroundings is, in the determination of the department, necessary to protect his life;

(3) the minor has been abused, as "abuse" is defined in AS 47.17.070(1), so that immediate medical attention is necessary, in the determination of the department.

(b) A minor who has left home and is evading the person having legal custody of him may obtain the services of the department. The department shall assess the situation and furnish the minor with the social services it considers appropriate to protect the well-being of the minor and to preserve his family life if preserving it is considered desirable under the circumstances. If, after assessing the situation, considering the wishes of the minor, and furnishing appropriate social services, the department considers it necessary, the department may take emergency custody of the minor.

(c) When a child is taken into custody under (a) or (b) of this section, the department shall immediately, and in no event more than 12 hours later unless prevented by lack of communication facilities, notify the

NOTES TO DECISIONS

AS 17.12.110(d)(4) is not in conflict with paragraph (a)(1) of this section and AS 47.10.080(b)(1). M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

There is no statute authorizing awards of attorney's fees in child in need of aid proceedings, nor has any rule or order authorizing such an award been promulgated. Cooper v. State, Sup. Ct. Op. No. 2453 (File Nos. 4906, 4970), 638 P.2d 174 (1981).

Quoted in N.P.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979); E.A. v. State, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Stated in D.R.C. v. State, Ct. App. Op. No. 94 (File No. 4905), 646 P.2d 252 (1982).

Cited in Granato v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979).

Sec. 47.10.020. Investigation and petition.

NOTES TO DECISIONS

Distinctions between this section and AS 09.65.130. — See Granato v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979).

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Sec. 47.10.030. Summons and custody of minor.

NOTES TO DECISIONS

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Sec. 47.10.040. Release of minor.

NOTES TO DECISIONS

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Sec. 47.10.050. Appointment of guardian ad litem or attorney.

NOTES TO DECISIONS

Cited in Cooper v. State, Sup. Ct. Op. No. 2453 (File Nos. 4906, 4970), 638 P.2d 174 (1981); M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Sec. 47.10.060. Waiver of jurisdiction.

NOTES TO DECISIONS

A waiver hearing is not criminal in nature and is dispositional, rather than adjudicatory. N.P.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979).

Waiver of right to attend hearing. — Although a minor had a constitutional right to attend her waiver hearing, she waived that right when she voluntarily failed to appear at the hearing by refusing to waive extradition from another state. N.P.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979).

Binding advance consent to treatment. — In order to give effect of the legislature's intent that a court may consider treatment until age 20 in determining waiver of juvenile jurisdiction, it is necessary that the judge be able to evaluate at the time of the waiver hearing whether the juvenile will in fact be available for treatment. It is not possible for the judge to know this unless the child can give binding consent at the time of the hearing. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

The portion of the opinion in In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978) that held that a minor in a waiver hearing could not give a binding advance consent to treatment beyond age 19 was mistaken. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

Waiver decision without testimony of psychologist or psychiatrist. — A waiver of juvenile jurisdiction decision can be made without the testimony of a psychologist or psychiatrist, since such testimony is germane to at most two of the four factors set out in subsection (d) of this section, and not all four of those facts need be determined adversely to the youth to warrant waiver of juvenile jurisdiction. In re J.R., Sup. Ct. Op. No. 2165 (File No. 5194), 616 P.2d 865 (1980).

A minor may move to waive children's court jurisdiction pursuant to subsection (a). M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

A minor under the age of 18 cannot "elect" to be tried as an adult. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Option available to prosecution absent waiver. — A proceeding in children's court, which is limited to the dispositions set forth in AS 47.10.080(b), is the only option available to the prosecution absent waiver under subsection (a) of this section, and the standards established in subsection (a) are sufficiently clear to prevent arbitrary enforcement. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Sec. 47.10.070. Hearings.

NOTES TO DECISIONS

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Sec. 47.10.080. Judgments and orders.

NOTES TO DECISIONS

Binding advance consent to treatment. — In order to give effect to the legislature's intent that a court may consider treatment until age 20 in determining waiver of juvenile jurisdiction, it is necessary that the judge be able to evaluate at the time of the waiver hearing whether the juvenile will in fact be available for treatment. It is not possible for the judge to know this unless the child can give binding consent at the time of the hearing. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

A minor may bindingly consent to an additional period of supervision as pro-

vided by subsection (b)(1) of this section. In determining the effect to be given to such consent, the court should consider the age and maturity of the juvenile and whether he has the advice of counsel. To protect a minor from making a decision adverse to his own interests, a guardian ad litem may be appointed. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

The portion of the opinion in In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978) that held that a minor in a waiver hearing could not give a binding advance consent to treatment beyond age 19 was mistaken. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

While it is true, as indicated in In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978), that the statute contemplates that the determination of the additional period of treatment be made after the initial hearing, such an intent does not mandate that an advance consent to treatment given by the minor may not be regarded as binding. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

Court-ordered probation. — Probation cannot be deemed court-ordered under subsection (b) of this section unless it is directly ordered. It cannot be "triggered" by a decision of the department that the juvenile has successfully completed a rehabilitation program, even if the court judgment states that institutionalization will end upon such successful completion. In re L.C. v. State, Sup. Ct. Op. No. 2277 (File Nos. 4401, 4411), 625 P.2d 839 (1981).

Protection provided by Indian Child Welfare Act. — The Indian Child Welfare Act, 25 U.S.C. §§ 1901 — 1963, enacted in 1978, provides a higher standard of protection to the rights of parents in termination proceedings involving Indians and Native Alaskans than that provided in this section. E.A. v. State, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Statutory provisions governing judgments and orders, etc.

In order to terminate parental rights under this section, the court must find by clear and convincing evidence (1) that there is a child in need of aid under AS 47.10.010(a)(2) as a result of parental conduct, and (2) that the parental conduct is likely to continue. E.A. v. State, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Findings. — A finding that the parental conduct is likely to continue must be made expressly on the record prior to ordering the termination of parental rights. E.A. v. State, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Review of orders terminating parental rights. — Orders made under subsection (c)(3) of this section are not entitled to automatic review, inasmuch as subsection (f) of this section specifies which orders are entitled to this review and orders under subsection (c)(3) of this section are not included within the list. Rita T. v. State, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

All orders made pursuant to this section, including orders under subsection (c)(3) of this section, are to be reviewed upon application of an interested party if the party establishes good cause for the review, and if the child is still a ward of the court. Rita T. v. State, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

As long as a child remains the ward of the court, under subsection (f) of this section his or her natural parents are entitled to a review of the order terminating their parental rights upon a showing of good cause for the hearing. Rita T. v. State, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

Good cause could be established if the parents showed that it would be in the best interests of the child to resume living with them because they have sufficiently rehabilitated themselves so that they can provide proper guidance and care for the child. Rita T. v. State, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

Where, when a mother applied for a hearing before the superior court, she indicated that as a result of a 14-month rehabilitation program she had overcome the problems that had led to the termination of her parental rights and also indicated that professional counselors, social workers and others would be able to establish that she was now capable of providing a warm and loving home for the child, this was a sufficient showing of good cause to entitle her to a review of the order terminating her parental rights if the child had not yet been adopted. Rita T. v. State, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

AS 17.12.110(d)(4) is not in conflict with AS 47.10.010(a)(1) and paragraph (b)(1) of this section. M.O.V. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Option available to prosecution absent waiver under AS 47.10.060(a). — A proceeding in children's court, which is limited to the dispositions set forth in AS 47.10.080(b), is the only option available to the prosecution absent waiver under AS 47.10.060(a), and the standards established in that section are sufficiently clear to prevent arbitrary enforcement. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Cited in D.L.J. v. W.D.R., Sup. Ct. Op. No. 2433 (File No. 5411), 635 P.2d 834 (1981); S.O. v. W.S., Sup. Ct. Op. No. 2491 (File No. 5856), P.2d (1982).

Sec. 47.10.081. Predisposition hearing reports.

NOTES TO DECISIONS

Applied in Granato v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979).

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Sec. 47.10.082. Best interests of the child.

NOTES TO DECISIONS

Cited in Granato v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979); M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Sec. 47.10.083. Review hearing information.

NOTES TO DECISIONS

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Sec. 47.10.084. Legal custody, guardianship, and residual parental rights and responsibilities.

NOTES TO DECISIONS

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Sec. 47.10.085. Child in need of aid; religious treatment.

NOTES TO DECISIONS

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Sec. 47.10.090. Records.

NOTES TO DECISIONS

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), P.2d (1982).

Sec. 47.10.142. Emergency custody and temporary placement hearing. (a) The Department of Health and Social Services may take emergency custody of a minor upon discovering any of the following circumstances:

(1) the minor has been abandoned;

(2) the minor has been grossly neglected by his parents or guardian as "neglect" is defined in AS 47.17.070(5), so that immediate removal from his surroundings is, in the determination of the department, necessary to protect his life;

(3) the minor has been abused, as "abuse" is defined in AS 47.17.070(1), so that immediate medical attention is necessary, in the determination of the department;

(4) the minor has been sexually abused under circumstances listed in AS 47.10.010(a)(2)(D).

(b) A minor who has left home and is evading the person having legal custody of him may obtain the services of the department. The department shall assess the situation and furnish the minor with the social services it considers appropriate to protect the well-being of the minor and to preserve his family life if preserving it is considered desirable under the circumstances. If, after assessing the situation, considering the wishes of the minor, and furnishing appropriate social services, the department considers it necessary, the department may take emergency custody of the minor.

(c) When a child is taken into custody under (a) or (b) of this section, the department shall immediately, and in no event more than 12 hours later unless prevented by lack of communication facilities, notify the parents or the person or persons having custody of the child and the court of the action and file with the court a petition alleging that the child is a child in need of aid.

(d) The court shall immediately, and in no event more than 48 hours after being notified unless prevented by lack of transportation, hold a hearing at which the minor, if his health permits, and his parents or guardian, if they can be found, shall be permitted to be present. The court shall determine whether probable cause exists for believing the minor to be a child in need of aid, as defined in AS 47.10.290(8). The court shall inform the minor, and his parents or guardian if they can be found, of the reasons given as constituting probable cause and the reasons given as authorizing his temporary placement.

(e) If the court finds that probable cause exists it shall order the minor committed to the department for temporary placement, or order him returned to the custody of his parents or guardian subject to the department's supervision of his care and treatment. If the court finds no probable cause it shall order the minor returned to the custody of his parents or guardian. (§ 3 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am § 24 ch 63 SLA 1977; am § 2 ch 104 SLA 1982)

Effect of amendments. — The 1982 amendment, effective July 1, 1982, added paragraph (4) to subsection (a).

Article 2. Juvenile Institutions.

Sec. 47.10.200. Releasing juveniles after commitment.

NOTES TO DECISIONS

Jurisdiction over probation revocation proceedings. — The Department of Health and Social Services has the authority to conduct revocation proceedings when it has granted the probation allegedly violated, as a corollary to its power under this section to grant probation. However, until such time as the department chooses to establish procedures regarding probation revocation, jurisdiction over such cases will remain in the superior court. In re L.C. v. State, Sup. Ct. Op. No. 2277 (File Nos. 4401, 4411), 625 P.2d 839 (1981).

Hearing. — The requirement in Children's Rule 12(a) of a disposition hearing applies to a court-ordered revocation of a juvenile delinquent's administratively granted probation. In re L.C. v. State, Sup. Ct. Op. No. 2277 (File Nos. 4401, 4411), 625 P.2d 839 (1981).

The hearing in connection with a juvenile delinquent's probation revocation must be broader than merely determining probable cause that probation conditions are violated. In re L.C. v. State, Sup. Ct. Op. No. 2277 (File Nos. 4401, 4411), 625 P.2d 839 (1981).

Article 3. Care of Children.

Sec. 47.10.230. Powers and duties of department over care of child.

NOTES TO DECISIONS

Quoted in E.A. v. State, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Article 4. General Provisions.

Sec. 47.10.290. Definitions.

NOTES TO DECISIONS

Quoted in N.P.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979).

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Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders

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I. INTRODUCTION

In his dissenting opinion in *In re Gault*,[1] Justice Stewart articulated the traditionally accepted distinction between the juvenile justice system and the criminal justice system as follows: "[A] juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act."[2] Juvenile justice descends from the therapeutic tradition. Thus, the interventions of the juvenile system into youthful lives supposedly represent benign *parens patriae* attempts to cure undesirable or unhealthy states of being. Unlike the criminal law, juvenile justice responds to the status of children in need, treating them for what they are rather than punishing them for what they have done.[3]

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1. 387 U.S. 1, 78 (1967) (Stewart, J., dissenting).

2. *Id.* at 78-79; *see also* United States *ex rel.* Stinnett v. Hegstrom, 178 F. Supp. 17, 18 (D. Conn. 1959); White v. Reid, 125 F. Supp. 647, 650 (D.D.C. 1954); State *ex rel.* Lenderholm v. Owens, 197 Kan. 212, 223, 416 P.2d 269, 269 (1966) ("[t]he validity of the whole juvenile system is dependent upon its adherence to its protective, rather than its penal, aspects"); *In re* Rich, 125 Vt. 373, 377, 216 A.2d 266, 269 (1966).

3. For a discussion of some of the philosophical consequences of therapeutic versus punitive models of dealing with social deviancy, see generally Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224 (1952-54); Morris, *Persons and Punishment*, in

Apart from its obvious importance in shaping decisions and actions of policymakers, Justice Stewart's punishment/therapy distinction[4] also carries important legal consequences. Punished persons are entitled to certain rights, both procedural[5] and substantive,[6] which are not necessarily available to persons receiving nonpunitive dispositions.[7]

The therapeutic model, however, probably never provided a totally accurate description of juvenile justice.[8] In any event, by

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PHILOSOPHY OF LAW 572 (J. Feinberg & H. Gross eds. 1975).

4. Whether to abandon systems of punishment in favor of therapeutic models was not only an issue of fundamental significance in the evolution of juvenile justice legislation, *see, e.g., Gault*, 387 U.S. at 14-30; Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 169-71, but also a lively subject of debate among scholars concerned with how best to control undesirable adult conduct. *Compare* M. MENNINGER, THE CRIME OF PUNISHMENT (1966) *and* B. WOOTON, CRIME AND THE CRIMINAL LAW (1963) *with* A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976) *and* J. WILSON, THINKING ABOUT CRIME (1975).

5. Criminal defendants are afforded special procedural protections under the United States Constitution such as the right to counsel and the right to jury trials. U.S. CONST. amends. V and VI. The United States Supreme Court traditionally has employed the concept of punishment as the relevant criterion for determining when procedures are "criminal." G. FLETCHER, RETHINKING CRIMINAL LAW 409 (1978); *see infra* notes 76-80 and accompanying text.

6. The presence of punishment is a necessary predicate for relief under the bill of attainder and ex post facto clause. U.S. CONST. art. I, § 9, cl. 3. *See* United States v. Brown, 381 U.S. 437, 445, 447, 456-57 (1965); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319 (1866); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810); Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 477-82 (1978). For a more detailed discussion of *Brown*, see *infra* notes 104-12 and accompanying text. For a more detailed discussion of *Cummings*, see *infra* notes 41-56 and accompanying text.

Punishment is of course a necessary prerequisite for a finding of cruel and unusual punishment. U.S. CONST. amend. VIII. In applying the eighth amendment, the Supreme Court has struggled with the problem of determining whether a given sanction constitutes punishment. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 94-99 (plurality opinion), 124-26 (dissenting opinion) (1958). For a more detailed discussion of *Trop*, see *infra* notes 65-73 and accompanying text.

The Court recently has articulated a due process right to be free from punishment prior to conviction or plea. Bell v. Wolfish, 441 U.S. 520 (1979). For a more detailed discussion of *Wolfish*, see *infra* notes 114-43.

Courts distinguish foreign penal laws, imposing punishment, from nonpenal laws and refuse to enforce the former. *See* Huntington v. Attrill, 146 U.S. 657 (1892); Kutner, *Judicial Identification of "Penal Laws" in the Conflict of Laws*, 31 OKLA. L. REV. 596 (1978).

7. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 428 (1979) (civil commitment proceedings not "punitive" in purpose, hence, they are not "criminal prosecutions," and, therefore, reasonable doubt standard of proof need not be applied); Flemming v. Nestor, 363 U.S. 603, 612-620 (1960) (summary termination of social security benefits for deported aliens not punishment, therefore, no violation of the sixth amendment, the ex post facto clause, or the bill of attainder clause). For a comprehensive discussion of a variety of the legal consequences of the punitive/nonpunitive distinction, see generally Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

8. *See* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV.

the time that *Gault* was decided, a majority of the United States Supreme Court acknowledged that juvenile law could not be conceptualized entirely in terms of rehabilitative considerations.[9] Indeed, although Justice Stewart saw no constitutional need to criminalize the nonpunitive juvenile system by requiring the system to provide the same procedural protections to juveniles as the criminal law provides to criminal defendants,[10] the *Gault* majority held that the actual dispositions of juvenile delinquents often have little, if anything, to do with therapy.[11] The majority further held that these dispositions constitute such severe restrictions of liberty that many of the procedural protections required in criminal trials also are necessary in delinquency adjudications.[12] *Gault*, however, does not stand for the proposition that juvenile justice schemes are systematically nontherapeutic. Indeed, the Court in *McKeiver v. Pennsylvania*[13] later denied juveniles the right to jury trials in delinquency proceedings in part on the theory that the presence of juries might interfere with the rehabilitative goal of the juvenile system.[14] Thus, *McKeiver* specifically recognizes the therapeutic potential of juvenile court dispositions.

The Supreme Court cases suggest that juvenile justice systems are often hybrids, sometimes punitive—or so like punitive models to require procedural protections unique to the criminal law—sometimes therapeutic, and often both punitive and therapeutic. As a consequence, courts that have addressed the constitutionality of the juvenile justice system since *Gault* have done so with the understanding that the system reflects a mixture of theoretical underpinnings. Not surprisingly, the courts have had difficulty defining the constitutional rights of juveniles[15] who are thrust into a system that is simultaneously punitive and therapeutic.[16]

1187, 1103-1230 (1970).

9. For a discussion of *Gault*, see *infra* notes 178-205 and accompanying text.

10. 387 U.S. at 78-79 (Stewart, J., dissenting).

11. The *Gault* Court did not discuss directly the concept of punishment in its analysis. The opinion, however, seems to imply that juvenile dispositions are tantamount to punishment for purposes of certain constitutional provisions. *See infra* notes 189-93 and accompanying text.

12. *See infra* notes 178-216 & 229-40 and accompanying text.

13. 403 U.S. 523 (1970); *see infra* notes 217-28 and accompanying text.

14. 403 U.S. at 541-51. For a discussion of the perceived virtues of informal proceedings in general in furthering the therapeutic aims of the juvenile courts, see Paulsen, *supra* note 4, at 170-72.

15. *See, e.g., infra* notes 241-63 and accompanying text.

16. Punishment and therapy often seem to be mutually exclusive goals because of the backward-looking nature of punishment as contrasted with forward-looking emphasis of

The difficult task facing the courts ultimately is assessing the extent to which the juvenile system is punitive in nature.[17] Because the concept of punishment includes a discrete set of constitutional protections,[18] Justice Stewart's punishment/therapy distinction, although not utilized explicitly by the *Gault* majority[19]—and perhaps even misapplied by Justice Stewart himself[20]—remains a useful analytical device for developing a coherent constitutional framework for juvenile law.[21] Judicial attention to the concept of

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therapy. Punishment imposes unpleasant restraints upon offenders because of their past offenses, but therapy seeks to alleviate undesirable conditions and thereby improve the patient's life. For a more detailed explication of punishment and therapy, see *infra* notes 144-50 and accompanying text.

17. Commentators describe the problematic state of juvenile justice as follows:

> While the *Gault* opinion purports to give no definition of punishment, it is evident that the justices were concerned about the confusion which arises over a use of related terms, such as punishment, treatment, sanction, and the like. Until clarification of terminology can catch up with practical techniques of handling those whose conduct is a threat to the community, we are likely to continue to have specific cases litigated in terms of constitutional guarantees. A serious discussion is needed, such as has taken place among philosophers, on the meaning of punishment in terms of current practice. There is an appreciable gap between what we traditionally have called punishment and what we currently use as methods for coercing conformity. The change in public sentiment, the progress in science, the advent of a full-fledged police force, all have contributed to an adaptation of methods of punishment. We can no longer speak of the simple process of punishing a man by putting him in prison. The least reflection will indicate that we punish by a wide variety of deprivations, including the trial process itself. Thus we must attempt to move toward an agreement of what punishment is by way of general definition before we can hope to put order into the welter of different applications of public coercion to the individual in the name of health, education, and general welfare.

Gerber & McAnany, *Punishment: Current Survey of Philosophy and Law*, 11 ST. LOUIS U.L.J. 491, 520 (1967). *See generally In re* Felder, 93 Misc. 2d 369, 402 N.Y.S.2d 528 (1978) (whether New York juvenile statutes impose punishment for purposes of sixth amendment jury trials); State *ex rel.* Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1977) (whether confinement of status offenders with delinquents in forestry camps constitutes disproportionate punishment in violation of the eighth amendment). For a detailed discussion of *Felder*, see *infra* notes 256-64 and accompanying text. *See generally* cases cited *infra* note 21.

One leading commentator welcomes the movement toward a punitive model of juvenile justice and suggests that juveniles soon may assert the "right to be punished for what they have done, not to be treated for what someone else thinks they are." Fox, *The Reform of Juvenile Justice: The Child's Right to Punishment*, JUV. JUST., Aug. 1974, at 2, 6; *see also* Fox, *Philosophy and the Principles of Punishment in the Juvenile Court*, 8 FAM. L.Q. 373 (1974). This Article's author extolls the virtues of a "right to be punished" in certain nonjuvenile situations. *See* Gardner, *The Right to be Punished—A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838 (1981).

18. *See supra* notes 5-7.

19. *But see supra* note 11.

20. The disposition of Gerald Gault's case may have constituted "punishment" under the definition employed by the Court at the time that *Gault* was decided. *See infra* notes 194-97 and accompanying text.

21. *See, e.g.*, Morgan v. Sproat, 432 F. Supp. 1130, 1136 (S.D. Miss. 1977) (confine-

punishment and its relationship to juvenile justice will be increasingly necessary in light of recent legislative trends toward punitive sanctions for certain youthful offenders.[22] Moreover, the Supreme Court, in dicta accompanying its recent holding that eighth amendment considerations are inapplicable to corporal punishment of public school children,[23] specifically left open the question whether the eighth amendment's protection against cruel and unusual punishment applies to juvenile justice dispositions.[24] The Court, thus, invited inquiry into whether, and to what extent, these dispositions constitute punishment.

For punishment to provide a useful framework, courts must have a clear understanding of the concept of punishment. This understanding is difficult, however, since punishment, in addition to being a legal term of art, is also a moral notion characterizing an area of responsible human activity not definable in terms of necessary and sufficient conditions.[25]

In light of the inability of the Supreme Court[26] and leading philosophical writers[27] to articulate a precise definition of punish-

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ment without full panoply of due process safeguards unconatitutional if done for "punitive" purposes, constitutionally permissible if serving "beneficent" purposes); Pena v. New York Div. for Youth, 419 F. Supp. 203, 207 (S.D.N.Y. 1976) ("[t]he court . . . finds itself in the very difficult position of evaluating the punitive and therapeutic components of defendants' practices"); *In re* Felder, 93 Misc. 2d 369, 377, 402 N.Y.S.2d 528, 533 (Fam. Ct. 1978) (citing Justice Stewart's punishment/therapy distinction as analytical tool for determining sixth amendment jury trial rights). For a further discussion of *Felder*, see *infra* notes 256-64 and accompanying text. *See also* R.R. v. Texas, 448 S.W.2d 187, 189 (Tex. Civ. App. 1969) (eighth amendment applicable to juvenile confinements only if the confinements are punitive rather than therapeutic), *appeal dismissed*, 400 U.S. 808 (1970).

22. *See, e.g.*, State v. J.K., 383 A.2d 283 (Del. 1977); *In re* Felder, 93 Misc. 2d 369, 402 N.Y.S.2d 528 (Fam. Ct. 1978).

23. Ingraham v. Wright, 430 U.S. 651 (1977).

24. *Id.* at 669 n.37 (dictum). The Court stated,

> Some punishments, though not labeled "criminal" by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment. . . . We have no occasion in this case, for example, to consider whether or under what circumstances persons involuntarily confined in . . . juvenile institutions can claim the protection of the Eighth Amendment.

25. *See* J. KLEINIG, PUNISHMENT AND DESERT 15 (1973).

26. Consider, for example, the Supreme Court's failure to distinguish clearly punishment from regulation. *See infra* note 33.

27. Perhaps the most widely accepted chacterization of legal punishment within the philosophical literature is that of H.L.A. Hart:

> (i) [Punishment] must involve pain or other consequences normally considered unpleasant.
>
> (ii) It must be for an offense against legal rules.
>
> (iii) It must be of an actual or supposed offender for his offence.
>
> (iv) It must be intentionally administered by human beings other than the offender.

ment, the difficulty encountered by lower courts that have attempted to delimit the constitutional protections available to juveniles is understandable. In general, these courts have tended to adopt one of two approaches: either courts assume, without attempting to provide definitions, that punishment is or is not manifested by the facts of the particular case,[28] or they seek a definition of punishment by relying solely on the Supreme Court's juvenile cases.[29] Both of these approaches are unsatisfactory—the first because it begs a crucially important question, and the second because it relies upon cases that do not utilize or define explicitly the

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(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

H. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 4-5 (1968). Hart borrows from Anthony Flew and S.I. Benn in formulating his definition. *Id.* at 4.

A variety of commentators would add to Hart's list of punishment characteristics. *See, e.g.*, J. FEINBERG, *The Excessive Function of Punishment*, in DOING AND DESERVING 95, 98 (1970) (punishment by definition expresses social disapprobation); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 310, 318 (2d ed. 1960) (punishment is logically related to harmful conduct and moral culpability).

Other critics focus on internal inconsistencies within Hart's definition. *See, e.g.*, Wasserstrom, *Some Problems with Theories of Punishment*, in JUSTICE AND PUNISHMENT 173, 176 (J. Cederblom & W. Blizek eds. 1977) (Hart's theory tends toward circularity. Clearly, not all "inflictions of unpleasant consequences for offenses against legal rules" constitute punishment, *e.g.*, tort liability for negligence per se, based on violation of a statutory norm. Only "criminal offenses" seem to generate punishment. Hart, however, provides no basis for distinguishing criminal and noncriminal offenses, apart from the circular path of appealing to the concept of punishment.

28. For example, many courts equate confinement of juveniles in jail-like facilities with punishment. *See, e.g.*, Cox v. Turley, 506 F.2d 1347, 1352-53 (6th Cir. 1974) (five days confinement of youth with general jail population prior to initial hearing on a charge of curfew violation constitutes cruel and unusual punishment); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1366 (D.R.I. 1972) ("[t]he reality of confinement in Annex B is that it is punishment"); *In re* Rich, 125 Vt. 373, 378, 216 A.2d 266, 269 (1966) ("[c]onfinement in a penal institution will convert the proceedings from juvenile to criminal and require the observance of constitutional criminal safeguards").

The Supreme Court has held, however, that all jail confinements are not punitive. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979) (pretrial detention of persons accused of crime is not punishment due to an absence of punitive intent); Shillitani v. United States, 384 U.S. 364, 370 (1966) (jailing for civil contempt is remedial rather than punitive). For a more detailed discussion of *Wolfish*, see *infra* notes 313-43 and accompanying text.

Other courts, without attempting to define punishment or distinguish it from therapy, have found punishment in the administration of potentially dangerous or painful drugs to juveniles confined in state facilities. *See, e.g.*, Nelson v. Heyne, 491 F.2d 352, 357 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). For a more detailed discussion of *Nelson*, see *infra* notes 307-24 and accompanying text.

29. *See, e.g.*, R.R. v. Texas, 448 S.W.2d 187, 189-90 (Tex. Civ. App. 1969) (punishment implicitly defined in terms of the "dismal picture" of the conditions within juvenile institutions painted in *Gault*), *appeal dismissed*, 400 U.S. 808 (1970).

concept of punishment.[30]

This Article attempts to provide an analytical framework for identifying the punitive aspects of the juvenile justice system. The Article proposes a framework that is extrapolated from Supreme Court cases which define punishment in contexts outside the juvenile area. Several commentators have criticized the Court's definitional efforts, some because of perceived inadequacies in the developed definitions,[31] others because of the belief that the very enterprise of defining constitutional rights in terms of the presence or absence of punishment is misguided.[32] Although many of these criticisms of the Court's record are understandable,[33] the alleged defects are less detrimental to an effective analysis of certain juvenile rights cases than they might be in other areas. Indeed, this Article argues that the Court's definitional framework is especially useful in the juvenile justice context.

II. The Concept of Punishment: Nonjuvenile Supreme Court Cases

For more than a century, the United States Supreme Court has attempted to provide a workable definition of punishment.[34] The Court has addressed a number of cases. Each case has turned on whether a litigant has been, or is being, punished. Punishment is a necessary predicate for relief under the bill of attainder and ex post facto law clauses,[35] and under the eighth amendment ban on cruel and unusual punishment.[36] The fifth and sixth amendment protections granted to persons charged with criminal offenses during criminal prosecutions are contingent upon a showing that the

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30. *See infra* notes 193-97 and accompanying text. For a leading commentator's view that *Gault* offers a definition of punishment, see G. Fletcher, *supra* note 5, at 409-14.

31. *See generally* Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 Cornell L. Rev. 478 (1974); Note, *Toward a Constitutional Definition of Punishment*, 80 Colum. L. Rev. 1667 (1980).

32. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 563-64 (1979) (Marshall, J., dissenting); Comment, *The Availability of Criminal Jury Trials Under the Sixth Amendment*, 32 U. Chi. L. Rev. 311, 327-30 (1965).

33. The Court's attempt to distinguish criminal punishment from civil regulation has been especially disappointing. *See* Charney, *supra* note 31, at 491-506; Clark, *supra* note 7, at 475-89.

34. The struggle began in earnest with Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) and its companion case, *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866). For a more detailed discussion of *Cummings*, see *infra* notes 41-56 and accompanying text.

35. *See supra* note 6.

36. *See id.*

sanction for the offense constitutes punishment.[37] Moreover, the Court has stated recently that governmentally imposed punishment prior to conviction or plea violates an accused's due process rights.[38] In addition, the Court has suggested that a person may be "treated" involuntarily, but never "punished," for undesirable status conditions.[39]

A. A Preliminary Concept of Punishment

The Court first attempted to define punishment in the mid-nineteenth century cases arising under the Constitution's proscriptions against bills of attainder and ex post facto laws.[40] In *Cummings v. Missouri*[41] the Court struck down as violative of the bill of attainder and ex post facto law clauses a provision of the Missouri Constitution that required teachers and priests to take an oath of noninvolvement and nonsympathy with "armed hostility to the United States."[42] The provision, a post-Civil War amendment, also required the affiant to pledge that he had never been in the service of the Confederate States of America nor "desir[ed] their triumph over the arms of the United States."[43] Cummings continued to perform his duties as a teacher and priest without taking the oath. He was convicted, fined $500, and sentenced to jail until the fine was paid. Noting that Cummings was punished "for a past act which was not punishable at the time it was committed,"[44] the Court stated that the oath requirement bore no rational relationship to the legitimate state interest in regulating Cummings' fitness as an educator[45] or to his qualifications as a religious minister.[46] The Court found the measure to be a punitive restraint[47]

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37. *See supra* note 5.

38. Bell v. Wolfish, 441 U.S. 520 (1979); *see infra* notes 113-41 and accompanying text.

39. Robinson v. California, 370 U.S. 660, 666-68 (1962) (state may require drug addict to undergo compulsory treatment, but may not punish him for the status of drug addiction).

40. U.S. CONST. art. I, § 9, cl. 3.

41. 71 U.S. (4 Wall.) 277 (1866).

42. *Id.* at 279.

43. *Id.*

44. *Id.* at 319.

45. *Id.*

46. *Id.*

47. The Court specifically rejected as too narrow the State's argument that the concept of punishment is limited to deprivations of legal rights, specifically restraints on "life, liberty, or property." *Id.* at 320, 322. In addition to denials of legal entitlements, punishment also may result through denials of a variety of moral and political rights not specifically embodied in positive law. Thus, interference with such interests as the "freedom from outrage on the feelings" or hindrance of one's "pursuit of happiness" may trigger a finding of punishment. *Id.* at 320-22. Under this view, any unpleasant restraint—such as interfer-

upon persons who had been sympathetic to the Confederacy.[48] Although this amendment did not refer specifically to crime or punishment,[49] the purpose clearly was punitive.[50] The enforcement of the amendment constituted punishment not only because the state subjected Cummings to unpleasant restraints for his failure to take the oath, but also because the sole purpose of the restraints was to mete out deserts for perceived wrongful acts committed in the past.[51] Because the wrongful acts—sympathizing with the Confederacy—were not crimes in Missouri at the time that Cummings might have committed them, the state could not constitutionally punish him for their commission.[52]

Although some theorists have argued that punishment in its legal context "must [necessarily] be for an offence against legal rules,"[53] *Cummings* demonstrates that the relationship between punishment and legal rules is not a logical one. Although punishment may exist independent of legal rules, the principle of legality,[54] as reflected in such constitutional provisions as the ex post facto law and bill of attainder clauses, justifies the imposition of punishment only when legal rules articulate the conduct and the degree of punishment for its commission prior to the occurrence of the offense.[55] Thus, *Cummings* establishes that punishment is the intentional imposition by the state of unpleasant restraints[56] upon offenders solely because of past wrongful acts. The Court's conception of punishment turns heavily on an examination of legislative

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ence with happiness or well-being—can constitute punishment. Thus, the views of a recent commentator, who would link the notion of punishment to "deprivations of legal rights," should be rejected. Note, *supra* note 31, at 1680-81.

48. 71 U.S. (4 Wall.) at 320, 327. The Court found that the oath "reach[ed] the person, not the calling." *Id.* at 320.

49. *See id.* at 279-81.

50. The Court focused on the notion of punitive motivation as a necessary element of its finding of punishment. Punishment is determined by the "causes of deprivation." *Id.* at 320.

51. *Id.* at 320, 327.

52. The Court found the Missouri constitutional clauses violative of both the bill of attainder clause, *id.* at 323-25, and ex post facto clause, *id.* at 327-28.

53. H. HART, *supra* note 27, at 5.

54. The principle of legality may be expressed in a variety of ways: no person may be punished except pursuant to a statute which prescribes a penalty; no conduct may be criminal unless it is precisely defined by a rule; no penal statute may be given retroactive effect. The principle is a limitation on the power of the state to punish. The definition of punishment, therefore, does not include the principle of legality. *See* J. HALL, *supra* note 27, at 27-28.

55. *Id.*

56. *See supra* note 47.

purpose, derived in *Cummings* from an independent judicial inquiry into the possible functions of the oath-taking provision, with virtually no deference to legislative history or characterizations.

B. Punishment v. Regulation

Dicta in *Cummings* suggest that the Supreme Court might have concluded that the Missouri amendment was a permissible state regulation, rather than punishment, if the oath requirement had been less retributive.[57] Thus, if the state had offered a forward-looking sanction that was rationally related to effectuating genuine state policy goals, then the Court may have sustained the Missouri amendment.[58] The Court intimated that punishment is conceptually distinct from sanctions whose sole purpose is to shape future states of affairs. Indeed, shortly after *Cummings* the Court, in *Dent v. West Virginia*[59] and *Hawker v. New York*,[60] sustained statutes that altered the requirements for practicing medicine in West Virginia and New York. These provisions denied continued practice to those physicians who failed to meet the new statutory requirements.[61] In both *Dent* and *Hawker* the Court rejected claims by the physicians that the statutes inflicted unconstitutional punishment under the bill of attainder and ex post facto law clauses. The Court found the statutes to be reasonable regulations of the medical profession under the state police power. Unlike the situation in *Cummings*, the statutes in *Dent* and *Hawker* reflected no attempt by the legislature to impose restraints upon the claimants because of their past wrongful actions.[62] Thus, regulation may be distinguished from punishment in that regulation controls future conduct for general purposes[63] without any attention necessa-

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57. 71 U.S. (4 Wall.) at 320 (dictum).

58. *Id.*

59. 129 U.S. 114 (1889).

60. 170 U.S. 189 (1898).

61. In *Dent* the Court unanimously upheld a West Virginia statute requiring doctors either to have graduated from medical school or to have passed a special examination as a valid exercise of state police power. In *Hawker* the Court upheld the retroactive application of a New York statute that prohibited convicted felons from practicing medicine.

62. Although the statute in *Hawker* affected persons who had been convicted of crimes, the Court stated that the state was "not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character." 170 U.S. at 196. While the Court granted that not all convicted criminals possess bad character, the state "has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist." *Id.* at 197.

63. Such a distinction in punishments and regulations is consistent with H. PACKER,

rily directed to one's past actions. Punishment, on the other hand, is always backward-looking in the sense that it is imposed because of some past action.

If, however, *Cummings* and *Dent/Hawker* represent cases of pure punishment and pure regulation, then the state's imposition of sanctions often will reflect attempts both to impose restraints upon offenders because of past actions and to shape future conduct for general purposes. Courts, therefore, encounter great difficulty when attempting to draw bright-line distinctions between punishments and regulations.[64]

The *Cummings* definition of punishment lay virtually unaltered for almost 100 years[65] until the Supreme Court's 1958 decision in *Trop v. Dulles*[66] that addressed the problem whether denationalization of persons convicted by court-martial for wartime desertion constituted punishment under the eighth amendment. The Government argued that the sanction was not punitive, but rather was a regulatory exercise under the congressional war power that was necessary to maintain military discipline.[67] The Court rejected the Government's argument and found that the sanction was not only punitive,[68] but also cruel and unusual punishment in

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THE LIMITS OF THE CRIMINAL SANCTION 23-26 (1968).

64. *See* H. PACKER, *supra* note 63, at 21-31; Charney, *supra* note 31, at 491-506; Clark, *supra* note 7, at 475-89; *infra* notes 101-03 and accompanying text.

65. This is not to say, however, that the Court did not have occasion to consider the problem of determining when sanctions are punitive. *See, e.g.*, Galvan v. Press, 347 U.S. 522, 531 (1954) (although deportation is "close to punishment," ex post facto clause inapplicable); United States v. Lovett, 328 U.S. 303, 313-18 (1946) (statutory denial of salary or other compensation to certain named governmental employees constitutes punishment without judicial trial in violation of the bill of attainder clause); Helvering v. Mitchell, 303 U.S. 391, 398-99 (1938) (tax assessment of 50% of total amount of fraudulently deficient taxes is not punishment barred by double jeopardy clause when defendant was acquitted previously of criminal fraud); Lipke v. Lederer, 259 U.S. 557, 561-62 (1922) (taxes upon trafficking in illegal liquor are in reality punishments which cannot be enforced by incarceration without hearing); Boyd v. United States, 116 U.S. 616, 633-35 (1886) (forfeiture proceedings under customs laws are criminal for purposes of fifth amendment privilege against self-incrimination).

66. 356 U.S. 86 (1958).

67. Although the *Trop* Court was sharply divided, four Justices in the plurality and four in dissent suggested that the definition of punishment should be analyzed separate from and prior to the issue of cruelty under the eighth amendment. Four Justices found punishment under the eighth amendment. *Id.* at 94-100, 124. The ninth Justice, Justice Brennan, did not utilize the eighth amendment in his analysis of the problem in *Trop*, but relied instead upon a theory of congressional abuse of the war power. Brennan agreed with the plurality that denationalization was punitive and found that it constituted an unnecessarily harsh exercise of Congress' war power. *Id.* at 105-14.

68. *Id.* at 94-95.

violation of the eighth amendment.[69] The Court relied primarily upon the presence of a punitive legislative motivation underlying the denationalization provision. A plurality of the Court found this motivation[70] by applying a more refined test than that articulated in *Cummings*: "If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose."[71] *Trop*, therefore, suggests that penal purpose is not defined solely in terms of retributive considerations. A legislature's attempts to achieve general deterrence also may reveal punitive motivation. Moreover, the plurality's "etc."[72] implies that punishment is determined by indicia other than the considerations provided by the *Trop* Court.

The *Trop* plurality offered additional insight into the nature of punishment by noting that penal laws characteristically define the consequences which will befall wrongdoers prior to any particular instance of wrongdoing. "[A] statute that prescribes the consequence that will befall one who fails to abide by [rules governing the proper performance of military obligations] is a penal law."[73]

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69. A four Justice plurality found an eighth amendment violation. A fifth Justice concurred with the result on other grounds. *See supra* note 67.

70. *See supra* note 69.

71. 356 U.S. at 96. The Court found that expatriation constituted punishment. The plurality rejected claims that the sanction reflected a mere regulation governing the proper performance of military obligations. "[A] statute that prescribes the consequence that will befall one who fails to abide by these [obligations] is a penal law." *Id.* at 97.

The Court, in a companion case to *Trop*, however, upheld a statutory provision imposing denationalization for the act of voting in a foreign election. Perez v. Brownell, 356 U.S. 44 (1958). Unlike *Trop*, the *Perez* Court found no retributive purpose. The sanction constituted a purely foward-looking exercise of Congress' power to regulate foreign affairs. *Id.* at 57-62. The expatriation sanction evidenced a reasonable method of avoiding embarrassing disputes with foreign nations. "The termination of citizenship terminates the problem." *Id.* at 60.

Although the Court did not apply the *Trop* definition of punishment to the expatriation sanction in *Perez*, this analysis yields interesting results. Unlike the situation in *Trop*, no attempt was made to "reprimand a wrongdoer" in *Perez*, because voting in a foreign election is neither reprehensible nor wrong. While voting in a foreign election may be interpreted as an act that indicates a lack of allegiance to the United States, American citizens may freely and without censure disassociate themselves from their country whenever they wish. The absence of perceived wrongful conduct in *Perez* eliminates the possibility of punitive motivation. Thus, while expatriation for the offense of desertion constitutes punishment in *Trop*, application of the very same sanction for the legally and morally neutral conduct of voting in a foreign election is nonpunitive in *Perez*.

72. *Trop*, 356 U.S. at 96.

73. *Id.* at 97.

Thus, unlike sanctions such as compensatory damages, the measure of punishment in any given case usually is legislatively predetermined[74] and is imposed following a showing by the state that certain proscribed conduct has occurred. Moreover, the state is not required to show that harm was actually suffered by any particular victim.[75]

The Court in *Kennedy v. Mendoza-Martinez*[76] again struggled with the punishment-regulation distinction in ruling that the procedural protections of the fifth and sixth amendments must be given to persons who have forfeited their United States citizenship by fleeing the country to evade the military draft. Unlike *Trop*, in which citizenship was forfeited after conviction by court-martial, the statute in *Mendoza-Martinez* automatically imposed forfeiture of citizenship, without prior court or administrative proceedings, upon any person fleeing the country to evade military service.[77] The issue in the case hinged on whether the forfeiture constituted punishment impermissibly imposed in the absence of criminal process protections,[78] or whether the forfeiture was a form of noncriminal regulation under Congress' war and foreign affairs powers.[79] Consistent with its decision in *Trop*, the Court in *Mendoza-Martinez* found that the forfeiture constituted punishment and, therefore, was constitutionally permissible only after a "criminal trial [with] all its incidents."[80] The Court determined that the sanction was punitive by relying on cases such as *Cummings* and *Trop* that set forth "the tests traditionally applied to determine whether an

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74. *But see supra* notes 53-55 and accompanying text.

75. The aim of the criminal law . . . is to protect the public against harm, by punishing harmful results of conduct or at least situations (not yet resulting in actual harm) which are likely to result in harm if allowed to proceed further. The function of tort law is to compensate someone who is injured for the harm he has suffered. With crimes, the state itself brings criminal proceedings to protect the public interest but not to compensate the victim; with torts, the injured party himself institutes proceedings to recover damages.

W. LaFave & A. Scott, Criminal Law 11 (1972); *see also* H. Packer, *supra* note 63, at 23-24.

76. 372 U.S. 144 (1963).

77. *Id.* at 164-66. Although no hearing on the issue of flight to evade the draft was held, the government uncovered the flight in a variety of ways. *See, e.g., id.* at 147 (admission by defendant); *id.* at 151 (defendant remained outside the United States after being ordered to report for military induction).

78. *Id.* at 164. A finding of punishment would require that defendant be afforded fifth amendment and sixth amendment rights to notice, confrontation, compulsory process for obtaining witnesses, trial by jury, and assistance of counsel.

79. *Id.* at 159-60, 164.

80. *Id.* at 167.

Act . . . is penal or regulatory."[81] The tests according to the *Mendoza-Martinez* Court include the following:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[82]

In the absence of "conclusive evidence of congressional intent as to the penal nature of a statute," courts must weigh these considerations in relation to the language of the statute.[83] The Court admitted that the listed elements "often point in different directions,"[84] but offered no method for weighing the various considerations when they conflict with one another. Moreover, the *Mendoza-Martinez* Court did not explain how these criteria would apply to the forfeiture statute "because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive."[85] Thus, the Court found that the clear legislative purpose of the statute was to provide an especially severe penalty, in addition to other penalties imposed for draft evasion, to a particularly reprehensible category of draft evaders.[86]

Two of the *Mendoza-Martinez* tests for punishment are especially useful in analyzing possible punishment cases.[87] The first

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81. *Id.* at 168.
82. *Id.* at 168-69.
83. *Id.* at 169.
84. *Id.*
85. *Id.*
86. *See id.* at 169-70, 180-84. The Court found no legislative intent to effectuate affirmative social goals through the sanction. Instead, the sanction was imposed only for retribution and for deterrence of draft evasion. For an insightful comment on the *Mendoza-Martinez* opinion, see Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at* Kennedy v. Mendoza-Martinez, 32 U. CHI. L. REV. 290 (1965).
87. Most of the *Mendoza-Martinez* tests add little to existing doctrine. The requirement of an "affirmative disability or restraint" seems merely to reflect the *Cummings-Trop* view that punishment entails the purposeful imposition of unpleasant restraints. Scrutiny of the historic characterization of the behavior and sanction in question is also of little utility. Whether the sanction historically has been regarded as punitive seems simply to rephrase the punitive motivation question rather than to provide a means for its answer. Similarly, the very question in many cases is whether the conduct to which a sanction applies is criminal for fifth and sixth amendment purposes. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). The answer to that question depends on whether the sanction is punishment. Defining punishment by reference to criminality does not answer the question. Finally, the Court's citation of retribution and deterrence as the traditional aims of punishment adds nothing to the criteria that were articulated in *Trop*.

test—whether the sanction is excessive in relation to assigned nonpunitive purposes—is a particularly promising analytical standard that will be discussed in detail later in this Article.[88] The second test, which focuses upon scienter as a characteristic precondition of punishment, deserves only brief attention. Under this approach, the Court seems to focus upon the nexus between punishment and blame. Indeed, some theorists have argued that the power of punishment to express social disapprobation toward morally blameworthy offenders is the central characteristic that distinguishes punishment from nonpunitive sanctions.[89] Since, however, the Court has sustained the validity of strict liability crimes,[90] moral blame does not seem to be a necessary characteristic for either the definition or the justification of the criminal sanction. Thus, the scienter test of *Mendoza-Martinez* is probably no more than a recognition that findings of personal responsibility often precede the imposition of punishment.[91]

1. Definition v. Justification

Trop and *Mendoza-Martinez* indicate a desire by the Court to incorporate traditional *justifications* of punishment—such as deterrence of undesirable conduct[92] and the dispensing of deserts to blameworthy offenders[93]—into the *definition* of punishment. On a

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88. *See infra* notes 123-40 and accompanying text.

89. *See, e.g.*, J. FEINBERG, *supra* note 27; Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("[w]hat distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition").

90. *See, e.g.*, United States v. Balint, 258 U.S. 250 (1922).

91. The relationship, however, between punishment and responsibility does not appear to be a logical one. Thus, the state could punish knowingly—although probably not justifiably—a person who is not responsible and known not to be responsible for the action for which he is being punished. *See* H. HART, *supra* note 27, at 4-6; J. KLEINIG, *supra* note 25, at 12-13.

92. For a classical statement of deterrence theory, see Bentham, *Utility and Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 56 (G. Ezorsky ed. 1972). For a more modern view of deterrence, see generally J. ANDENAES, PUNISHMENT AND DETERRENCE (1974).

93. Kant spoke in these terms:

> Judicial Punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of Real Right. Against such treatment his Inborn Personality has a Right to protect him, even although he may be condemned to lose his Civil Personality. He must first be found guilty and *punishable*, before there can be any thought of drawing from his Punishment any benefit for himself or his fellow-citizens. The Penal Law is a Categorical Imperative; and woe to him

philosophical level, the blurring of definitional and justificational issues is undesirable because definitions that emerge exclude from the range of possible justifications the considerations that are contained within the definition.[94] For example, if punishment is defined as "the purposeful infliction of suffering upon offenders because of their offense in order to deter others from committing similar offenses,"[95] then one encounters difficulty in utilizing the deterrence theory to justify punishment.[96] Although the justification for punishment is—or at least should be—of vital significance to theorists and policymakers,[97] it is perhaps of less concern to courts. Judicial inquiry generally focuses upon whether particular

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who creeps through the serpentwindings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it.

I. KANT, THE PHILOSOPHY OF LAW 195 (W. Hastie trans. 1887) (1st ed. 1796).

94. *See* J. FEINBERG, *supra* note 27, at 95; J. KLEINIG, *supra* note 25, at 10-13; E. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 56 (1966) ("[W]e want to avoid allowing any part of the justification (or d[i]sjustification) of punishment to creep into its definition, so that a case for acceptance or rejection or reform can seem to turn on 'the very meaning' of punishment.").

95. Thomas Hobbes offered a similar definition:

> A punishment, is an Evill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience.
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> . . . .
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> . . . [A]ll evill which is inflicted without intention, or possibility of disposing the Delinquent, or (by his example) other men, to obey the Lawes, is not Punishment; but an act of hostility; because without such an end, no hurt done is contained under that name.

T. HOBBES, LEVIATHAN §§ 161-62.

96. *See* J. KLEINIG, *supra* note 25, at 11.

Another commentator has argued that the purpose of punishment must be distinguished from the justification of punishment.

> The purpose of punishment must be distinguished from its justification. A justification is a morally acceptable purpose. Thus, it represents a second level of analysis, beyond mere purpose. As such, it does not define punishment, but rather defines morally defensible punishment. Mere purpose, on the other hand, is directly relevant to the broader definitional inquiry, to the extent that punishment may be described as conduct engaged in for a certain purpose. It should be noted, however, that in inquiries involving justification for punishment, punishment is assumed to be already defined. Where purpose is being examined, the concern is, strictly speaking, with the purpose of the conduct that has not yet been defined as punishment.

Note, *supra* note 31, at 1679 n.83.

97. Because punishment is the intentional infliction of suffering upon persons, it is morally and politically controversial. For some recent examples of the controversy, see generally AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS (1969); REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); Morris, *supra* note 3; Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973). *See also supra* note 4.

restraints constitute punishment as a matter of constitutional fact notwithstanding the general desirability of imposing the restraint.[98] If, however, punitive intent is to be a defining characteristic of punishment, the Court inevitably must appeal to justificatory theories of punishment in fashioning its definition.[99] This approach is not problematic if only those justifications that are unique to punishment are included in the definition. Thus, the Court would have been on firmer ground if it had included in the definition of punishment only retributive considerations such as "the judgment of community condemnation which accompanies [punishment] and justifies its imposition."[100] The Court, however, also includes considerations of deterrence in the definition. The deterrence of undesirable states of affairs is certainly not unique to the criminal sanction.[101] Indeed, deterrence is also a central feature of governmental regulation. Thus, if punitive purpose is defined as unpleasant restraints imposed to deter undesirable conduct or to achieve desirable consequences,[102] then the concepts of punishment and regulation may be indistinguishable.[103]

2. *United States v. Brown*: An Aberration

In *United States v. Brown*[104] the Court further blurred the definition and justification issues. The Court in *Brown* invoked the bill of attainder clause to strike down section 504 of the Labor-Management Reporting and Disclosure Act of 1959, which prohib-

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98. Courts are unlikely to encounter problems with defining punishment in terms of its traditional justifications, for these justifications—or at least the utilitarian ones—tend to relate to issues of the justification of punishment in general, which is an issue that seldom concerns the courts. *See* H. HART, *supra* note 27, at 8-12; Rawls, *Two Concepts of Rules*, in THE PHILOSOPHY OF PUNISHMENT 105 (H. Acton ed. 1969). Even the retributive purposes of punishment may be viewed as nonjudicial issues of general justification. *See* Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 797-99.

Courts, however, do agonize over whether punishment in a given case is justified. *See, e.g.*, United States v. Bergman, 416 F. Supp. 496 (S.D.N.Y. 1976). Unlike the question of whether punishment in general is justified, however, judicial problems of justification focus narrowly on decisions concerning the punishment of particular persons. Often the judicial problem of justifying punishment is solved once the defendant is found to have violated a law imposing punishment.

99. *See* H. PACKER, *supra* note 63, at 21-23.

100. Hart, *supra* note 89, at 404.

101. *See id.* at 403-04.

102. The law often attempts to achieve desirable consequences by penalizing omissions to act. *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 75, 182-91.

103. *See supra* note 64 and accompanying text.

104. 381 U.S. 437 (1965).

ited past members of the Communist Party from serving in leadership positions of labor organizations.[105] Brown, who had been a member of the Party long before the enactment of the 1959 provision, was convicted of violating the statute despite the failure of the Government to show that he advocated or suggested any illegal or undesirable union activity. The Court rejected the Government's argument that section 504 was a nonpunitive regulatory attempt to prevent Communists from gaining positions of union influence from which they might encourage political strikes.[106] Although the Court found no retributive legislative motivation underlying section 504, the Court, nevertheless, satisfied itself that the provision constituted punishment. "It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."[107] Because section 504 inflicted punishment upon a specified group without a trial, the Court concluded that the provision clearly constituted a bill of attainder.[108] The *Brown* Court, however, did not explain why defining punishment solely in terms of retributive considerations would be "archaic." Indeed, defining punishment entirely in backward-looking terms hardly seems archaic.[109] By contrast, however, to attempt justifications for punishment, once defined, solely in retributive terms[110] clearly would be archaic to most modern minds.

The *Brown* Court's confusion of the definition and justification issues is more than a philosophical mistake. This confusion frustrates the legally necessary task of distinguishing punishment from other types of coercive sanctions.[111] If one defines punitive purpose as the imposition of restraints to achieve rehabilitation or incapacitation, then the definition provides no basis for differenti-

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105. *Id.* at 449.

106. *Id.* at 439-40, 456-57.

107. *Id.* at 458.

108. *Id.* at 456-62.

109. *See* J. KLEINIG, *supra* note 25, at 17-22; E. PINCOFFS, *supra* note 94, at 56-57; *cf.* Wasserstrom, *supra* note 27, at 178-79 (considerations of deterrence are relevant but not necessary to the definition of punishment).

110. Even the most retributively oriented modern theories of punishment appeal in some manner to utilitarian considerations for justification. *See, e.g.*, A. VON HIRSCH, *supra* note 4, at 47.

111. *See infra* notes 114-50 and accompanying text.

ating punishment from therapy or preventive detention. The Court, however, requires the drawing of just such distinctions.[112]

C. Punishment v. Preventive Detention

Although some commentators would welcome the characterization of all coercive therapy and preventive detention as punishment for purposes of the fifth, sixth, and eighth amendments,[113] the Supreme Court has not adopted this view. The Court in *Bell v. Wolfish*[114] implicitly turned from the *Brown* approach and made a sharp distinction between punishment and preventive detention for purposes of due process analysis. The *Wolfish* Court rejected the argument that the confinement of pretrial detainees violated the due process clause because it constituted punishment in the absence of adjudication of guilt.[116] The Court found the detainees' confinement to be nonpunitive and, therefore, consistent with due process.[116] The Court noted, however, that the due process clause would have been violated if punishment were imposed without a prior adjudication of guilt.[117] After resorting to the "useful guideposts" of *Mendoza-Martinez* and its emphasis upon punitive motivation, the Court held that since the pretrial confinement reasonably promoted the nonpunitive aim of assuring presence at trial, no punitive intent existed.[118] Rather than punishment, the confinement reflected "a legitimate nonpunitive . . . objective."[119] The

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112. *See supra* note 39 and accompanying text; *see also infra* notes 114-50 and accompanying text.

113. *See, e.g.*, Coleman & Solomon, *Parens Patriae "Treatment": Legal Punishment in Disguise*, 3 HASTINGS CONST. L.Q. 345 (1976); Opton, *Psychiatric Violence Against Prisoners: When Therapy is Punishment*, 45 MISS. L.J. 605 (1974).

114. 441 U.S. 520 (1979).

115. *Id.* at 535-41. The inmates raised a variety of constitutional challenges to the conditions and practices at the Metropolitan Correctional Center. These complaints included confinement of two inmates in cells built for one, visual genital and anal searches by jail staff after all "contact" visits with outsiders, unobserved spot searches of cells, prohibition of the receipt of packages except at Christmas, and bans on hardcover books unless sent directly from the publisher or a book club.

116. *Id.* at 541.

117. "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535.

118. *Id.* at 538-41.

119. *Id.* at 539 n.20. The Court fashioned the following test for punishment: "[I]f a restriction or condition [of pretrial detention] is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id.* at 539. The Court then expanded its reasoning in a footnote:

> [I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may *on its face appear* to be punishment, is instead

Wolfish outcome, however, might have been different if the motivation for confinement had been to effectuate the objectives of retribution or deterrence—objectives that were viewed by the Court as "not legitimate nonpunitive governmental objectives."[120] Moreover, the Court suggested that punitive intent might have been inferred if the liberty restrictions had not been "reasonably related" to legitimate governmental aims.[121] *Wolfish*, therefore, seems to have abandoned the use of rehabilitative and preventive detention guidelines to assess punitive intent. Instead, the Court now apparently discerns punitive intent solely in terms of deterrence and retribution.[122]

Wolfish adds an important gloss to the problem of discovering punitive intent. In addition to actual and explicit expressions of intent, courts may infer punitive intent from pretrial restraints on liberty, or other restrictions which "on their face appear to be punishment,"[123] but are unreasonably harsh in relation to legitimate, nonpenal objectives.[124] Thus, pretrial preventive detention of an accused is permissible if the confinement is not unduly restrictive in relation to the nonpenal objective of assuring presence at trial.[125] If, however, the detainee can show that his confinement is unnecessarily harsh in relation to the state's nonpenal interests, then the detainee could argue that the conditions of confinement reflect an intent to punish. In this situation, preventive detention would become punishment.[126]

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but an incident of a legitimate nonpunitive governmental objective . . . . Retribution and deterrence are not legitimate nonpunitive governmental objectives.

Id. at 539 n.20 (emphasis added).

120. *Id.*

121. *Id.* at 539. For a criticism of *Wolfish*, see *The Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 99-108 (1979).

122. In a vigorous dissent, Justice Marshall criticized the majority's utilization of the concept of punishment as an "empty semantic exercise." 441 U.S. at 560 n.7. (Marshall, J., dissenting). Rather than invoke the concept of punishment, Justice Marshall advocated the application of a straight balancing test that weighed the detainees' liberty interests against the state's asserted interests. *Id.* at 569-70. Under this test, the government would be required to show that a restriction was "substantially necessary" to jail administration in order for it to outweigh the detainees' liberty interest. *Id.* at 570.

123. *See supra* note 119.

124. *Id.*

125. The Court also noted the interest in maintaining security within the jail as a nonpenal objective requiring restraints on liberty. *See* 441 U.S. at 539-40.

126. The Court offered the following illustration:

[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods,

Judicial scrutiny of the reasonableness of restraints that appear on their face to be punishment is both laudable and problematic. The use of a rationality standard for assessing punishment frees the inquiry from a rigid conceptual exegesis and creates possibilities for analysis enriched by considerations of underlying constitutional values. Unreasonable governmental restraints of liberty that appear to be punishment trigger the arsenal of constitutional protections traditionally attending that concept. At the same time this requirement—that the restraint "appear on its face to be punitive"—introduces a problem of circularity: What test determines punitive restraint? The Court's traditional test—whether the legislature enacted the law with a punitive motivation—is inapposite. Indeed, the Court seeks to infer punitive motivation once it discovers restraints that are punitive on their face and excessively harsh in relation to nonpunitive aims. In addition, the punitive-on-its-face rubric could result in an inference of punitive intent in situations in which the alleged punishers in fact intended no such thing. The courts may view the test as an abandonment of the inquiry into subjective punitive intent in favor of a more objective effect theory of punishment.[127] The effect theory defines punishment solely in terms of the impact of an alleged punisher's actions regardless of the punisher's purposes.[128] Thus, even if the state could

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would not support a conclusion that the purpose for which they were imposed was to punish.

Id. at 539 n.20.

127. Justice Stevens has advocated this view:

> I believe the Court improperly attaches significance to the subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted. Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.

Estelle v. Gamble, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting).

Chief Judge Coffin has expressed a similar view: "It would be impossible, without playing fast and loose with the English language, for a court to examine the conditions of confinement under which detainees are incarcerated, . . . and conclude that their custody was not punitive in effect if not in intent." Feeley v. Sampson, 570 F.2d 364, 380 (1st Cir. 1978) (Coffin, C.J., dissenting); *see also* Lieggi v. INS, 389 F. Supp. 12, 21 (N.D. Ill. 1975) ("the overall effect, the reality of the situation, is that petitioner . . . and his family will suffer severe punishment in relation to the offense unless this Court grants him some form of relief"), *rev'd mem.*, 529 F.2d 530 (7th Cir. 1976). *See generally* Note, *A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition*, 90 YALE L.J. 632 (1981) (intent of a challenged practice is irrelevant in defining punishment).

128. Thus, if the state subjects an individual to unpleasant restrictions similar to those restraints experienced by persons who are punished, similar for example to depriva-

show that it actually intended nonpunitive detention, the confinement would nonetheless be punishment, albeit accidental, if the effects of detention were perceived by the inmates as punitive and if the confinement, for whatever reason, was excessive in light of its nonpenal purposes.[129]

Although confinement under these circumstances may be unconstitutional on other grounds,[130] the Supreme Court would probably decline to characterize the confinement as impermissible pretrial punishment. The philosophical literature and the Court's opinions clearly indicate that punishment is an activity concept that requires purposeful action and not just punitive effect.[131] "Punishments do not happen to or befall people. Rather, they are treatments to be understood within the context of responsible—or intentional—activity."[132] Accidental punishment, therefore, is logi-

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tions existing in prisons, then the sanction is considered to be "punishment" regardless of the state's purpose in administering it. *See Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1331 (1974) [hereinafter cited as *Developments*].

129. Suppose, for example, that the state implemented a drug treatment program for pretrial detainees awaiting trial on drug related charges. Suppose further that the therapy included a painful treatment regimen that was perceived by the detainees as a form of corporal punishment. Imagine that responsible state authorities genuinely believed that that form of therapy was the least drastic means of effectively treating drug addiction. Assuming the existence of a legitimate state interest in treating drug addiction in the context of pretrial detention, if the detainees could show that less drastic means were in fact available to achieve the state's therapeutic interest, the treatment program would, under the effect theory, appear to be punishment, notwithstanding the state's admittedly nonpunitive intent.

130. Doctrinal grounds for the constitutional invalidation of confinement exist under concepts of due process not necessarily linked to punishment and also under the equal protection clause. If the state deliberately inflicts "appreciable physical pain," then the confinement may violate the fourteenth amendment due process clause. Ingraham v. Wright, 430 U.S. 651, 672-74 (1977). Although *Ingraham* was a punishment case, the Court's due process language is not limited necessarily to a punitive context. Indeed, the Court specifically held the cruel and unusual punishment clause to be inapplicable to the case. *Id.* at 664; *see also* Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir.) (brutal treatment of pretrial detainees, although not punishment, is nevertheless unconstitutional under the due process clause), *cert. denied*, 414 U.S. 1033 (1973). The *Ingraham* Court further stated that "[t]he liberty preserved from deprivation without due process [includes] . . . a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." 430 U.S. at 673.

A finding that the confinement is nonpunitive would not insulate the detention from attack under the equal protection clause. *See, e.g.*, Brenneman v. Madigan, 343 F. Supp. 128, 138, 142 (N.D. Cal. 1972) ("[w]hether onerous prison conditions are imposed on pretrial detainees under the shibboleth of 'punishment' or 'security,' the constitutionality of those conditions is always a proper subject of judicial inquiry" under the equal protection clause); *see also* Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 947-50 (1970) (to classify detainees with convicts for purposes of determining conditions is unreasonable).

131. *See* J. KLEINIG, *supra* note 25, at 17-22.

132. *Id.* at 17. The recognition of intentional activity as a necessary aspect of the concept of punishment does not require "an intentional activity engaged in for the purpose of

cally impossible.[133] Thus, the Court probably would reject any reading of *Wolfish* that found punishment in cases in which alleged punishers genuinely intended nonpunitive treatment. Indeed, an effect theory interpretation of *Wolfish* would commit the Court to a metaphorical conception of punishment[134] that would threaten to engulf virtually all legal sanctions within its definition.[135]

A more modest and plausible reading of *Wolfish* would save the Court from the effect theory and permit findings of punishment through the punitive-on-its-face criterion only when circumstances justify the conclusion that punitive intent actually exists. In cases of sanctions that suspiciously resemble punishment, a court would scrutinize the rationale underlying the sanctions. If the sanctions were unreasonably excessive in relation to articulated nonpunitive purposes, then a court would justifiably infer that the sanction reflected an actual intent to punish. The use of objective rationality standards to infer a subjective state of mind is not new to the law.[136] A problem arises, however, when determining which

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punishing." Indeed, the Court has recognized "deliberate or intentional indifference" to the medical needs of prisoners as a basis for invoking the cruel and unusual punishment clause. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). Such indifference leads directly to "unnecessary and wanton infliction of pain" proscribed by the eighth amendment. *Id.* at 104. Under such circumstances, a showing of direct intent to punish is not required since the alleged punisher knowingly and responsibly causes the prisoner to suffer by restricting his liberty and denying him the means to alleviate his pain.

133. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (second attempt to execute offender after first attempt failed due to mechanical malfunction of the electric chair did not violate cruel and unusual punishment's proscription against inflicting unnecessary pain because the first attempt was an unforeseeable accident). The Supreme Court has addressed this problem in the medical malpractice context:

> In the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Estelle v. Gamble, 429 U.S. 97, 105-06 (1976).

134. *See, e.g.*, J. KLEINIG, *supra* note 25, at 17.

135. If punishment is defined solely in terms of effect, without regard to questions of motivation, virtually no basis exists for distinguishing punishment from treatment, compensation, or regulation. *See* H. PACKER, *supra* note 63, at 19-31. Moreover, the distinction between punishment and taxes also will be blurred, *see* Clark, *supra* note 7, at 463-79, as will the distinction between punishment and preventive detention. *See infra* notes 138-43 and accompanying text. For a discussion of reasons for rejecting the effect theory, see *infra* notes 158-77 and accompanying text.

136. Precise discovery of a person's state of mind is impossible. When subjective mat-

sanctions constitute punishment on its face or, as here conceptualized, cases which suspiciously resemble punishment,[137] and therefore activate the Court's rational basis scrutiny. *Wolfish* offers no solution apart from intimating that its context triggers this scrutiny. Indeed, the traditional pretrial detention setting reflects many of the earmarks of punishment. For example, a person is incarcerated before trial only after the state establishes probable cause to believe that he has committed a crime. As a consequence of that belief, the state purposely imposes highly unpleasant restraints upon the accused, who is often housed in the same jail and subjected to the same conditions of confinement as convicted offenders.[138] Thus, a court reasonably could infer that a pretrial detainee was intentionally punished when the state subjects the detainee to unnecessarily harsh treatment.[139] The inference of punishment is more difficult to draw in situations in which restraints are not triggered by criminal conduct, or for that matter by any conduct at all. In these cases the "earmarks of punishment" begin to dissipate.[140] Therefore, the *Wolfish* "punishment on its face" standard may be of little utility outside the suspiciously punitive context of pretrial detention. *Wolfish*, however, is useful in analyzing certain additional areas of juvenile justice, which will be examined below.[141]

The above discussion of *Wolfish* suggests that the pretrial confinement in that case reflected preventive detention and not punishment. Distinguishing preventive detention from punishment is useful not only to understand the abstract contours of the concept of punishment but also to further the analysis of juvenile cases.[142] Preventive detention is defined as the restriction of liberty of persons whose present status poses a perceived danger to society. The danger in *Wolfish* was the risk that the suspect would abscond

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ters are legally relevant, they are inferred through objective appraisals of external evidence. These inferences are generally made by appeal, either consciously or unconsciously, to a standard of rationality. The question asked is "what would a 'reasonable person' have been thinking in these circumstances?" *See* J. HALL, *supra* note 27, at 121, 163.

137. The author prefers the "suspiciously resembling punishment" characterizations to the *Wolfish* Court's "punishment on its face" language because the former does not explicitly beg the question of punishment.

138. *See, e.g.*, Johnson v. Lark, 365 F. Supp. 289, 301 (E.D. Mo. 1973); Collins v. Schoonfield, 344 F. Supp. 257, 267 (D. Md. 1972).

139. *See supra* notes 132 & 136.

140. Consider, for example, the whole range of involuntary mental health commitments as well as preventive detention settings such as quarantines and protective custody.

141. *See infra* notes 178-240 and accompanying text.

142. *See infra* notes 241-324 and accompanying text.

before trial.[143] While the state looks backward when punishing offenders for their past conduct, the government preventively detains a suspect based on his present and future dangerousness. Past conduct may provide useful evidence in assessing the suspect's dangerousness—and in the pretrial confinement context actually triggers the inquiry into present status—but preventive detention is inherently forward-looking in its efforts to avert the occurrence of undesirable future events.

D. Punishment v. Therapy

Therapeutic dispositions, like preventive detentions, sometimes display punitive characteristics. Involuntary therapy often entails not only a stigma to the patient and severe restriction of his liberty, but also painful and unpleasant treatment.[144] Despite its similarity to punishment, however, therapy is a concept analytically distinct from punishment.[145] Thus, the Supreme Court suggested in *Robinson v. California*[146] that while the Constitution may allow the state to subject drug addicts to involuntary therapy,[147] the state violates the eighth amendment when it punishes addicts for their addiction.[148] Although the Court frequently has discussed

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143. *See* 441 U.S. at 528, 534.

144. *See generally*, Gobert, *Psychosurgery, Conditioning, and the Prisoner's Right to Refuse "Rehabilitation,"* 61 VA. L. REV. 155 (1975); Symonds, *Mental Patients' Rights to Refuse Drugs: Involuntary Medication as Cruel and Unusual Punishment*, 7 HASTINGS CONST. L.Q. 701 (1980); Comment, *Right to Treatment for the Civilly Committed: A New Eighth Amendment Basis*, 45 U. CHI. L. REV. 731 (1978); *Developments*, *supra* note 128, at 1344-50.

145. A variety of theorists distinguish punishment from therapy. *See, e.g.*, T. HONDERICH, *supra* note 97, at 1; H. PACKER, *supra* note 63, at 25-28; Morris, *supra* note 3; Wasserstrom, *supra* note 27, at 179. For a view that involuntary therapy is logically impossible, see Coleman & Solomon, *supra* note 113, at 350-51.

146. 370 U.S. 660 (1962).

147. "[A] State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement." *Id.* at 665 (dicta).

148. *Id.* at 667. The *Robinson* Court utilized the cruel and unusual punishment clause to strike down a California statute that punished persons adjudged to be drug addicts with a sentence of ninety days in the county jail. The eighth amendment violation occurred because the statute punished the status of drug addiction rather than a specific criminal act. *Id.* at 666-67.

The majority of the *Robinson* Court simply assumed that the jail term constituted punishment. The Court said, "To be sure, imprisonment for ninety days is not in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667. Justice Clark argued in dissent that the confinement may have constituted therapy rather than punishment. *Id.* at 679-81 (Clark, J., dissenting).

Interesting conceptual problems arise when one speaks of punishing a status. If punish-

the concept of punishment, it has never directed much attention to defining therapy and to distinguishing it from punishment. Fortunately, commentators have provided valuable insights into this distinction by describing therapy as purposeful behavior toward another person that is intended to alter that person's condition in a manner beneficial to him. This purportedly beneficial behavior is always subject to revision upon a showing that a different mode of behavior would produce more beneficial results, or that a change in the person's condition has eliminated the need for further therapy.[149]

Examination of the role of offensive conduct illustrates the essential difference between coercive therapy and punishment. The distinction is similar to that between preventive detention and punishment. In cases of punishment, the state imposes restraints upon persons because they have committed offenses. Cases of therapy, however, do not involve necessarily a relation between the restraints imposed upon the person and his past conduct.[150] Therapy—like preventive detention and unlike punishment—is a forward-looking response to a person's present undesirable status. Unlike preventive detention, which merely incapacitates, therapy seeks to alleviate the undesirable status conditions.

E. Summary

The Supreme Court's approach to defining punishment includes the following three characteristics. First, *Wolfish* suggests that the Court will use its definitional approach to assess all claims of governmental punishment, regardless of whether the claims present a direct constitutional attack upon a specified statute—as in *Trop* and *Mendoza-Martinez*—or an allegation that the restraints constitute nonstatutorily imposed punishments. Second, from its earliest views in *Cummings* to its most recent opinion in *Wolfish*, the Court consistently has focused upon the intent of the alleged punisher as an essential element to determine the presence or ab-

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ment is necessarily linked to actions, *see* H. HART, *supra* note 27, then it appears logically impossible to punish a status. Perhaps for this reason some commentators see *Robinson* not as a problem of cruel punishment, but rather as one of irrational state action. *See, e.g.*, Robinson v. California, 370 U.S. 660, 689 (1962) (White, J., dissenting) (suggests a substantive due process rather than eighth amendment basis for the case); Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 147-48 n.144 (*Robinson* is substantive due process masquerading in eighth amendment garb).

149. *See* Wasserstrom, *supra* note 27, at 179.

150. *See* H. PACKER, *supra* note 63, at 25-26.

sence of punishment. Last, the Court does not seem to alter its definition of punishment to fit the particular constitutional problem at issue. Substantive and procedural constitutional rights are included in the same punishment analysis. Thus, the Court follows the same approach in defining punishment in the ex post facto law, bill of attainder, and cruel and unusual punishment cases as it does when determining the punishment concept that triggers the procedural protections required in criminal cases.[151]

In summary, the surveyed cases reveal the following punishment framework:

(1) Punishment is the purposeful imposition of unpleasant restraints by one person or authority upon another person.
(2) Punishment is a sanction imposed upon a person for his offense or alleged offense against social or moral norms of conduct that also are usually, but not always, the subject of a preexisting legal rule that defines the offense and sets the amount of penalty for its commission.[152]
(3) Punishment is imposed to exact retribution[153] and may also operate to deter undesirable conduct.[154]
(4) Punishment is often imposed upon offenders who, in addition to violating legal rules, are (or are believed to be) morally culpable.

Courts may discern punitive purpose from either the express words or actions of the alleged punisher or from independent inquiries

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151. Some commentators have criticized this aspect of the Court's performance.

> The bill of attainder clause, as it functions in *Cummings*, and the eighth amendment, as it was applied in *Trop*, each provide a medium for analysis and judgment on the issue of congressional authority to enact a particular sanction. This synonymity of purpose permits breeding the *Cummings* approach to punishment with the doctrine of cruel and unusual punishments. But the gulf between the bill of attainder clause and the sixth amendment is not so easily bridged. The former focuses on the scope of legislative competence, the latter on the requirements of procedure. Each has its domain. Questions of procedural adequacy arise only on the assumption that Congress has the authority to enact a sanction. One clause is concerned with the question whether, the other, with the question how. Transferring criteria for punishment from one clause to the other produces strange results. It produced the result in *Mendoza-Martinez* of a decision formally based on the sixth amendment, but whose rationale bespeaks a concern for the issue of congressional authority.

Comment, *supra* note 86, at 309.

152. *See* Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Locke *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 901 (1977) (eighth amendment punishment applies not only to statutorily imposed sanctions but also to ad hoc restraints meted out by state officials).

153. The Court nowhere defines precisely what "retribution" means. Supposedly it entails such things as meting out just deserts and expressing reprobative sentiments towards blameworthy offenders.

154. The Court does not define deterrence. Presumably, the Court uses the word in both its general—punishment meant to deter persons other than the one being punished—and special—punishment of an offender to deter that offender—senses.

into the possible functions of an allegedly punitive sanction. When the state imposes restraints that suspiciously resemble punishment, courts may infer a punitive purpose if the restraints are unreasonably harsh in relation to articulated nonpenal objectives. Punishment is a concept analytically distinct from regulation, preventive detention, and therapy. Regulation is the imposition of sanctions to control future conduct without necessarily attending to anyone's past wrongdoing. Preventive detention is the purposeful restriction of liberty of a person, who because of his present status, may pose a danger. Unlike punishment, which is generally determinate[155] —that is, knowable in kind and duration at the time the triggering offense is committed—preventive detention is indeterminate—that is, unknowable in duration at the time of imposition. Therapy is the alteration of a person's undesirable physical or mental condition in a manner beneficial to the person until the undesirable condition no longer exists. Therapy is characteristically indeterminate because its effectiveness is generally unknown in advance.[156]

In practice, the distinctions noted above may be difficult to make. This Article already has discussed some of the problems with the punishment-regulation distinction. Because the status-act distinction is sometimes unclear,[157] the distinctions between punishment and therapy, and punishment and preventive detention also may be difficult to draw.

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155. *See* Wasserstrom, *supra* note 27, at 179. The widespread use of indeterminate sentencing precludes knowledge of the exact term to be served by the offender at the time of sentencing. *See* Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 298-99 (1974). Even under indeterminate sentencing, however, the legislature generally sets maximum sentences for given offenses.

156. *See* Wasserstrom, *supra* note 27, at 179.

157. The *Robinson* Court did not discuss the problem of distinguishing status and act. In his dissenting opinion in *Robinson*, however, Justice White faulted the act/status distinction, and argued that the conviction rested upon the act of using drugs, an act that was subsumed necessarily in the subject's status as an addict. Robinson v. California, 370 U.S. 660, 686 (1962) (White, J., dissenting). Similarly, in Powell v. TEXAS, 392 U.S. 514 (1968), which addressed the issue of whether the eighth amendment prevents the conviction of a chronic alcoholic for being drunk in public, Justice White said, "Analysis of this difficult case is not advanced by preoccupation with the label 'condition.'. . . 'Being' drunk in public is not far removed in time from the acts of 'getting' drunk and 'going' into public." 392 U.S. at 550 n.2 (White, J., concurring); *see also* H. PACKER, *supra* note 63, at 28: "Treatment, like punishment, is triggered by conduct. A decision for treatment is determined almost invariably by observing conduct that is thought to indicate a need for treatment. However, the conduct need not constitute an offense, and often does not." Similarly, preventive detention is often triggered by conduct evincing a dangerous status. The conduct, however, need not constitute an offense. Consider, for example, the protective confinement of a person who threatens to kill himself.

F. *In Defense of Assessing Individual Rights in Terms of the Concept of Punishment*

In light of the inexact definition of punishment, questions may arise about a system that hinges vital constitutional rights upon such a vague concept. Punishment is a severe legal sanction that tends to stigmatize persons who receive it.[158] Understandably, these grave consequences require that punishment be contained by special safeguards. All punishment, however, is not especially severe.[159] Indeed, some nonpunitive sanctions are more severe than some punishments.[160] Moreover, stigma is not unique to punishment,[161] nor is it inherent in minor punishments such as fines or strict liability offenses in which offenders are not assumed necessarily to be blameworthy. At best, then, severity of treatment and imposition of stigma provide only a rough explanation for the use of punishment as a determinant of constitutional rights.

Because of the Court's failure to formulate a definition of punishment that encompasses all instances of severe and stigmatizing sanctions, critics have argued that the concept is too narrowly defined and should, therefore, either be abandoned as a means for assessing legal rights[162] or expanded to avoid the injustice of failure to protect all persons who are stigmatized by severe governmental sanctions.[163] Many theorists who advocate an expansion of the definition of punishment reject punitive motivation as a necessary condition for the concept and argue instead for an effect the-

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158. Some forms of punishment—the death penalty for example—have no comparable analogues in terms of their severity among nonpunitive sanctions. Moreover, other forms of punishment, specifically imprisonment, are often extremely severe and, when joined by the accompanying stigma, become sui generis. "[T]he combination of stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets that sanction apart from anything else the law imposes." H. PACKER, *supra* note 63, at 131. For views of the significance of the stigmatizing effect of punishment, see J. FEINBERG, *supra* note 27, at 95-118. *See also* Breed v. Jones, 421 U.S. 519, 529 (1975) (proceeding is essentially criminal if possible consequences include stigma and loss of liberty for several years).

159. Consider, for example, the common employment of money fines as a criminal sanction. Such sanctions are hardly severe to offenders of substantial economic means.

160. Compare, for example, the severity of a criminal fine of $100 to a damage award for thousands of dollars. Indeed, "with the possible exception of death, exactly the same kinds of unpleasant consequences, objectively considered, can be and are imposed upon unsuccessful defendants in civil proceedings." Hart, *supra* note 38, at 404.

161. For example, damage awards may entail stigmatization. *See* Clark, *supra* note 7, at 408. Mental health commitments may also entail stigmatizations. Addington v. Texas, 441 U.S. 418, 425-26 (1979).

162. *See supra* note 32 and accompanying text.

163. *See supra* note 31 and accompanying text.

ory of punishment as described earlier in this Article.[164]

The Supreme Court's concept of punishment, however, is not indefensible. First, the Court's theory of punishment, with its punitive motivation requirement, is far from arbitrary. Rather, the theory clearly agrees with much of the philosophical literature treating the concept of punishment.[165] Additionally, the effect theory fails to recognize that punishment is essentially an activity concept.[166] To the extent that the Court's definitional task is to articulate the meaning of a term of ordinary language it has done so remarkably well.[167] Of course, the Court's work extends beyond a mere formulation of an abstract definition. The Court's definitions must promote underlying constitutional values and avoid injustice. These interests need not be offended by the Court's definitional scheme, even in cases in which the Court concludes that a given restraint is nonpunitive and, thus, not governed automatically by the constitutional considerations applicable in cases of punishment. The Court has never held that the concept of punishment is the *sole* determinant of constitutional rights of persons subjected to highly coercive governmental sanctions. Nonpunitive treatment of a cruel, unreasonably harsh, or stigmatizing nature can and should be subjected to scrutiny under a variety of constitutional doctrines that are not logically tied to the concept of punishment.[168] Moreover, persons placed in jeopardy of receiving such treatment can and should receive procedural protections approach-

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164. *See supra* notes 127-29 and accompanying text.

165. *See, e.g.*, H. HART, *supra* note 27; J. KLEINIG, *supra* note 25, at 41-42; Wasserstrom, *supra* note 27, at 179.

166. *See supra* notes 131-32 and accompanying text.

167. Judicial attention to ordinary language contexts is certainly not inappropriate. Indeed, while

> [t]he central concern in any definitional inquiry should be the purpose for which the definition is sought. Ordinary usage . . . must serve as at least a starting point. A concept cannot be defined in a vacuum; before one asks how a concept should be construed so as to be consonant with certain policies or purposes, one must determine the general contours of the concept. Examination of ordinary usage elucidates these contours.

Note, *supra* note 31, at 1678 n.80.

168. The Court in Jackson v. Indiana, 406 U.S. 715, 719, 723-39 (1972) eschewed a cruel and unusual punishment analysis in favor of equal protection and due process doctrines and invalidated the involuntary pretrial hospitalization of a criminal defendant found incompetent to stand trial under statutes which resulted in a more restrictive confinement than that imposed upon persons involuntarily hospitalized through other statutes. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (state "cannot [consistent with every man's right to liberty] confine [in hospital] without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible [others]"); *see also supra* note 130 and accompanying text.

ing those provided to criminal defendants.[169]

Adoption of the effect theory of punishment would effectively eliminate the punishment/therapy and punishment/preventive detention distinctions that the Court has painstakingly drawn. Under the effect theory, any involuntary therapy of an unpleasant nature arguably could be punitive.[170] Once characterized as punitive, the treatment seemingly would become unconstitutional under *Robinson v. California* as punishment for a status.[171] This reasoning would render the whole institution of civil commitment constitutionally suspect. By the same analysis, varieties of preventive detention—even in such relatively benign forms as quarantines for control of infectious disease—would look suspiciously like punishment for a status if the detention should be labeled punishment under the effect theory. Similarly, a variety of procedural consequences would follow if the concept of punishment were substituted for present notions of therapy and preventive detention. If not rendered altogether unconstitutional under *Robinson*, detentions that are presently characterized as therapeutic or preventive seemingly could occur only after the provision of the full panoply of protections presently available to criminal defendants. The wisdom of such an innovation is debatable.[172]

While effect theorists chide the Court for generating too narrow a concept of punishment, others may object to the definition for being too broad. If some punishments entail little or no stigma-

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169. Due process concepts that are not logically tied to punishment or criminal proceedings may be utilized to achieve similar procedural effects as those resulting when punishment exists. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 431-33 (1979) (elevated standard of proof approaching that utilized in "criminal" cases required by due process in civil commitment proceedings); *In re* Gault, 387 U.S. 1 (1967) (rights to notice, counsel, confrontation, etc. required under due process clause); *see also* Rossman, *The Scope of the Sixth Amendment: Who Is a Criminal Defendant?*, 12 AM. CRIM. L. REV. 633, 650 (1975) (due process considerations require appointment of counsel in certain civil proceedings).

170. Coleman & Solomon, *supra* note 113, at 350-53 (defining all involuntary therapy as punishment).

171. *See Developments*, *supra* note 128, at 1331.

172. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 429-30 (1979) (discussion of the impossibility of applying the criminal standard of proof to the evaluations of status inherent in mental health commitments). The Court's present rejection of the effect theory of punishment in favor of a requirement of punitive intent, when considered in conjunction with the Court's flexible use of due process, permits the transplanting of appropriate aspects of criminal procedure into civil proceedings without inappropriately criminalizing such proceedings. *Compare In re* Gault, 387 U.S. 1 (1967) (holding fifth amendment privilege against self-incrimination applicable to delinquency adjudications) *with* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding sixth amendment right to jury trial not applicable to delinquency adjudications).

tization and are of minor severity, why impose all the expensive and time-consuming procedures of the criminal process? The Court has answered, at least partially, these objections in decisions limiting sixth amendment rights to counsel and jury trials to situations in which defendants risk substantial punishment and stigmatization.[173]

Critics frequently raise two other objections to the use of punishment as a standard for constitutional rights. First, they underscore the difficulty a court encounters when ascertaining whether a legislature had a punitive motivation. Although all assessments of subjective states of mind are difficult,[174] the punitive motivation requirement is especially problematic because it often entails an assessment of collective legislative intent. Commentators have examined this problem in depth,[175] reducing the necessity for a similar examination here. The collective intent problem is not unique to the Court's concept of punishment and has proven to be relatively manageable in other doctrinal areas.[176] Moreover, to the extent that *Wolfish* permits inferences of punitive intent, the collective intent problem is avoided altogether. Last, some critics advocate the abandonment of punishment as an analytical standard because of its vagueness. Although punishment admittedly is an inexact notion, the concept seems more precise than alternatives such as "fundamental fairness," which would likely replace the punishment concept as an analytical vehicle.[177]

The concept of punishment, however inexact its definition, and rough the explanation for its use, is firmly entrenched in the legal system as a mechanism for defining the reach of the Constitution. The concept's recent employment in *Wolfish* suggests that the Court is likely to continue to analyze a variety of rights in terms of the presence or absence of punishment.

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173. *See, e.g.*, Scott v. Illinois, 440 U.S. 367 (1979) (sixth amendment right to counsel limited to cases where imprisonment occurs). Of course this right also exists in capital cases. *See* Bute v. Illinois, 333 U.S. 640, 676 (1948). The Court has held that the right to trial by jury exists only in cases involving potential imprisonment of more than six months. Baldwin v. New York, 399 U.S. 66 (1970).

174. *See supra* note 136.

175. *See* Clark, *supra* note 7, at 435-91.

176. *See generally* Gardner, *Illicit Legislative Motivation as a Sufficient Condition for Unconstitutionality Under the Establishment Clause—A Case for Consideration: The Utah Firing Squad*, 1979 WASH. U.L.Q. 435.

177. For a discussion of the employment of the fundamental fairness test as an alternative analysis, see *infra* notes 180-88 and accompanying text.

III. Juvenile Justice and the Supreme Court

A. *In re Gault*

Although earlier doctrinal development existed,[178] *In re Gault*[179] marked the first major effort by the United States Supreme Court to relate constitutional principles to the juvenile justice system. The Court reviewed the constitutionality of the commitment of fifteen-year-old Gerald Gault to the Arizona State Industrial School for a period not to exceed Gault's twenty-first birthday. Gerald's commitment was the result of a delinquency adjudication, conducted without procedural formality,[180] at which it was determined that he had made an obscene phone call. The Court held that Gerald and others in similar situations who risk incarceration in state correction facilities if found to be delinquents are constitutionally entitled to the following rights in their adjudication proceedings: Notice of the charges, assistance of counsel, rights of confrontation and cross-examination, and the privilege against self-incrimination.[181] The *Gault* Court rejected the view that the juvenile justice system is an entirely benign dispenser of *parens patriae* therapy and rehabilitation to youths who deviate from socially accepted norms of conduct. The juvenile system, which was historically characterized by a procedural informality that was intended to protect youthful offenders from the harshness of criminal proceedings,[182] began with high motives and

178. *See* Kent v. United States, 383 U.S. 541 (1966) (enumeration of procedural rights under the District of Columbia Code in proceedings waiving juvenile court jurisdiction to the adult criminal process). *See generally* Paulsen, *supra* note 4.

179. 387 U.S. 1 (1967).

180. After a complaint by a neighbor that Gerald Gault had made an obscene phone call, Gault was taken into custody by police. The arresting officer initiated the adjudication proceeding by filing a petition in juvenile court alleging only that Gerald Gault was " 'under the age of eighteen years, and is in need of the protection of this Honorable Court; [and that] said minor is a delinquent minor.' " *Id.* at 5. The petition alleged no factual basis for the judicial action proposed and was never served on Gerald or his parents. Gerald appeared without counsel at a hearing that was held on the petition. The complaining neighbor did not attend and no record of the proceedings was prepared. The juvenile judge questioned Gerald about the neighbor's complaint as related to the judge by the arresting officer to whom Gault apparently had admitted making the obscene call. Six days later, at a hearing at which Gault was again unrepresented by counsel, the judge sentenced Gault to the State Industrial School " 'for the period of his minority [until 21], unless sooner discharged by due process of law.' " *Id.* at 7-8.

181. *Id.* at 31-57. The Court chose not to rule on whether juvenile courts are required to provide transcripts of their proceedings to appealing litigants or whether juvenile proceedings are subject to appellate review. *Id.* at 57-58.

182. The supposed virtues of procedural informality in the juvenile system are explained by one commentator a follows:

enlightened goals. In reality, however, the system had failed to attain its rehabilitative goals and often was nothing more than a mechanism that stigmatized youths as delinquents[183] and restricted their liberty.[184] Thus, the *Gault* Court found that the essentials of due process and fair treatment under the fourteenth amendment entitled juveniles to increased procedural protections.[185]

By relying upon the concept of fundamental fairness under the due process clause for these procedural protections, the Court did not specifically find that juvenile sanctions such as those imposed upon Gerald Gault were punitive—even though such a finding would have provided an alternative basis for engrafting the *Gault* protections upon the juvenile system.[186] The Court averted

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Not only was the aim of a court for children to differ from that of the criminal court; its way of going about things was to be changed as well. Procedure had to be "socialized." "The purpose of the juvenile court is to prevent the child's being tried and treated as a criminal; all means should be taken to prevent the child and his parents from forming the conception that the child is being tried for a crime." The respondent to a petition filed in his own interest replaced the defendant to a criminal charge filed in the interest of the state. Trials by jury should be permitted "under no circumstances," because "they are inconsistent with both the law and the theory upon which children's codes are founded." Hearings were not to be "public trials" lest youngsters be damaged by publicity. Little or no need would be found for the respondent to have a lawyer; "the judge represents both parties and the law." . . .

Not to be overlooked is another aspect of the insistence on informality in court. The community has never been much concerned with the impact of criminal procedure on the feelings of an accused. If he is terrified by the courtroom scene, so much the better. A malefactor might thus be convicted never to return. The reformers, on the other hand, sought to dispel the fear that can accompany a child's day in court. They perceived the appearance before the juvenile court judge as the beginning of the treatment process, a beginning that should not make the total job of serving a child's needs more difficult. If the state is to act like a father, its representative, the judge, should act like one at the hearing. The respondent child . . . should "be made to feel that he is the object of [the court's] care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work."

Paulsen, *supra* note 4, at 170-72 (footnotes omitted).

183. "[Supposedly,] one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a 'criminal.' The juvenile offender is now classed as a 'delinquent.' . . . [T]his term has to come to involve only slightly less stigma than the term 'criminal' applied to adults." 387 U.S. at 23-24 (footnote omitted).

184. *See infra* note 195 and accompanying text.

185. The Court found that the due process protections would not detract from the rehabilitative mission—to the extent that this actually exists—of the juvenile courts. In fact, the protections might even promote rehabilitation. 387 U.S. at 26-27.

186. *See supra* note 5.

the complete criminalization of delinquency adjudications by avoiding a specific finding that confinement of juvenile delinquents constitutes punishment.[187] The more flexible fundamental fairness standard permitted the Court to impose certain procedural requirements upon the juvenile system without stating that juveniles are entitled to the full panoply of fifth, sixth, and eighth amendment rights available to criminal defendants.[188] The *Gault* Court, however, deviated from the fundamental fairness approach by relying directly upon the fifth amendment and its specific application to criminal cases[189] in holding that the privilege against self-incrimination applied to state delinquency adjudications.[190] The Court based its analysis of the applicability of the privilege on the view that the juvenile system is the functional equivalent of the criminal system.[191] Thus, the Court's position seems to be not so much that due process fairness requires the application of the privilege, but that juvenile proceedings are essentially "criminal" proceedings for purposes of the privilege.[192] Because the Court consistently has viewed the dispensation of punishment as the defining characteristic of criminal law, the conclusion that the Court saw the sanction imposed in *Gault* as punitive is difficult to avoid.[193]

Although the *Gault* Court may have implicitly held that the juvenile system is in some aspects and for some purposes punitive, the Court failed expressly to provide a useful standard for identifying juvenile punishment in future cases. At several points in its opinion, however, the Court intimated that the unpleasantness ex-

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187. *See id.*

188. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (no right to jury trials for juveniles in delinquency adjudications). For a more detailed discussion of *McKeiver*, see *infra* notes 217-28 and accompanying text.

189. 387 U.S. at 47-49.

190. "[J]uvenile proceedings to determine 'delinquency,' which may lead to commitment in a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination." *Id.* at 49.

191. Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 U.C.L.A. L. Rev. 656, 665-71 (1980).

192. The *Gault* Court specifically noted that the privilege against self-incrimination protects values other than those values protected by due process fundamental fairness. While the latter generally speak to accurate factfinding in legal proceedings, *see* Rosenberg, *supra* note 191, at 677, "[t]he roots of the privilege are . . . far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state." 387 U.S. at 47 (footnote omitted); *see also supra* notes 190-91 and accompanying text.

193. *See supra* note 5.

perienced by involuntarily confined juveniles is itself sufficient to constitute a finding of punishment. Because adjudications favorable to the state often result in significant restrictions of liberty in both juvenile and adult criminal proceedings, the Court equated the two proceedings. "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[194] In the same vein, the Court stated,

> Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours. . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.[195]

To the extent that such language provides a definitional approach to punishment, it focuses entirely on the effect of the alleged punishment upon its subject. On its face, the Court's opinion suggests an effect theory of punishment and has been so read by some courts and commentators.[196] Nevertheless, when one reads *Gault* in conjunction with other Supreme Court cases, the conclusion that the Court intended to espouse the effect theory seems unlikely.[197]

The *Gault* Court could have avoided these confusions by analyzing the case explicitly in terms of the concept of punishment. Because of the expressed skepticism concerning the adequacy of the avowed nonpunitive purposes of delinquency dispositions, the Court easily could have found the dispositions punitive under its traditional punishment definition. Offenders receive unpleasant restraints because of their offenses against the criminal law. Juvenile dispositions suspiciously resemble punishment,[198] which triggers

194. 387 U.S. at 36.

195. *Id.* at 27 (footnotes omitted).

196. *See* authorities cited *supra* notes 29-30.

197. *See supra* notes 127-35 and accompanying text.

198. Compare the "suspiciously punitive" setting of pretrial detention, *supra* notes 137-40 and accompanying text, with that depicted by the *Gault* Court. While juveniles, unlike pretrial detainees, may not be housed routinely in the same facility with convicted offenders, the *Gault* Court's description of juvenile confinement, *see supra* note 195, suggests

inquiry into the reasonableness of the restraints in relation to their nonpunitive purposes. If this inquiry revealed that the restraints were excessive, then punitive intent would be inferred and the disposition would be labeled punishment. Although this approach is aided by the *Wolfish* test for inferring punitive intent—a test not yet fully developed at the time of *Gault*—the *Gault* Court could have employed the similar *Mendoza-Martinez* excessiveness standard to reach the same result obtained through *Wolfish*.[199] Other aspects of *Gault* deserve brief attention. The Court's attempts to narrow the scope of the opinion to the delinquency adjudication stage diminishes *Gault*'s usefulness as a basis for assessing the constitutional rights of juveniles. Thus, whether the *Gault* protections extend to pre-or post-adjudication problems or to such nondelinquency situations as PINS[200] or neglect proceedings is uncertain.[201] Moreover, *Gault*'s applicability to delinquency adjudications in which the petition, unlike that in Gerald Gault's case, is premised upon an act or upon a finding of a status[202] that would not be a crime if committed by an adult is not clear.[203] Finally, the *Gault* Court did not specify the types of deprivations of liberty that are sufficient to trigger the procedural protections. The risk of "incarceration against one's will" clearly suffices,[204] but the Court also

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a prison-like atmosphere similar to that experienced by pretrial detainees.

199. As one of its tests for punishment *Mendoza-Martinez* asks "whether the sanction . . . appears excessive in relation to . . . alternative [nonpunitive] purpose[s] assigned." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); *see supra* text accompanying note 82. Indeed, without specifically relying upon any of the Court's cases defining punishment, Justice Black in his concurring opinion in *Gault* found delinquency proceedings to be criminal for purposes of the fifth and sixth amendment:

> [I]n a juvenile system designed to lighten or avoid punishment for criminality, [Gault] was ordered by the State to six years' confinement in what is in all but name a penitentiary or jail.
>
> Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights . . . .

387 U.S. at 61 (Black, J., concurring).

200. The acronym stands for "persons in need of supervision."

201. 387 U.S. at 13 (pre-judicial and dispositional stages of juvenile proceedings not necessarily touched by *Gault*).

202. As defined under most statutes delinquency is a concept that is not limited to the commission of acts that would be crimes if committed by adults, but includes as well a variety of status conditions such as "being disobedient to parents" or "truanting from school." *See* S. Fox, Juvenile Courts 40 (2d ed. 1977).

203. The *Gault* Court appears to limit its holding to situations of misconduct, perhaps excluding delinquency adjudications based on status. *See* 387 U.S. at 13.

204. *Id.* at 50.

suggested that any "threatened . . . deprivation of . . . liberty" may also be enough to entitle the juvenile to the *Gault* protections.[205]

B. Gault's *Progeny*

The Court continued to expand the protections applicable to delinquency adjudications in *In re Winship*.[206] In *Winship* the Court held that juveniles charged in delinquency proceedings with acts that would be crimes if committed by adults are entitled as a matter of due process right to the reasonable doubt standard of proof. The Court noted that the reasonable doubt standard is constitutionally required in adult criminal cases to minimize the risks of subjecting innocent persons to the stigma and loss of liberty inherent in criminal conviction and punishment.[207] Similar risks require that the same standard be applied in delinquency proceedings. "[Judicial] intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult."[208] As in *Gault*, the *Winship* Court avoided any explicit finding that the juvenile process was punitive and, therefore, governed by procedural protections unique to the criminal system. Instead, the Court focused on two aspects of juvenile dispositions—the potential for stigma and the potential for severely restricting liberty—as the reasons for requiring the reasonable doubt standard.

The juvenile justice system's potential for stigmatizing and denying liberty, however, was not the *Winship* Court's sole motivating force. Indeed, nine years later in *Addington v. Texas*[209] the Supreme Court rejected the argument, based upon *Winship*, that the loss of liberty and the stigma that occurred through involuntary hospitalization of the mentally ill constituted sufficient grounds for requiring the reasonable doubt standard in civil commitment proceedings. Acknowledging that significant stigma and loss of liberty are inherent in mental health commitments,[210] the *Addington* Court, nevertheless, distinguished the civil commitment process from the procedures in *Winship*. Unlike the juvenile system, which

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205. *Id.*
206. 397 U.S. 358 (1970).
207. *Id.* at 363.
208. *Id.* at 367 (footnote omitted).
209. 441 U.S. 418 (1979).
210. *See id.* at 425-26.

imposes its stigma and restriction of liberty upon offenders because of their past offenses, the commitment process focuses on present status of the defendant and attempts to determine his present dangerousnees and need for confinement and therapy.[211] Therefore, the central issue in *Winship* was "a straight forward factual question—did the accused commit the act alleged"[212]—but in *Addington* the Court grappled with an evaluation of the patient's mental health, a difficult subjective judgment of an inherently doubtful nature.[213] The Court concluded that the reasonable doubt standard would frustrate the purposes of commitment proceedings and, therefore, ought not be required.

The *Winship/Addington* distinction may be understood through the punishment/therapy distinction. The state imposes unpleasant sanctions upon juvenile offenders only after it has shown that offenses have been committed. Obviously, the sanction necessarily is related to a showing of past conduct of a wrongful nature. Thus, punishment accurately describes the sanction.[214] Hence, since offenders in *Winship* situations risk punishment at the hands of the state, the protections afforded criminal defendants must be provided. This conclusion, however, does not follow in *Addington*. In civil commitment proceedings the inquiry focuses upon the defendant's status. His past actions are either irrelevant or only incidentally relevant. Therefore, punishment does not result from decisions unfavorable to defendants in commitment proceedings.[215] The procedural protections unique to the criminal process are inapplicable to these therapeutic contexts.[216]

One year after *Winship*, the Court in *McKeiver v. Pennsylvania*[217] held that juveniles were not entitled to jury trials in adjudication hearings even though the underlying offenses would be criminal offenses if committed by adults[218] and the consequences

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211. *Id.* at 428-29.

212. *Id.* at 429.

213. *Id.* at 429-30.

214. *See supra* notes 152-55 and accompanying text.

215. See *supra* notes 155-56 and accompanying text, for a definition of therapy.

216. The conclusion does not mean that litigants in civil commitment proceedings should go without procedural protections. Indeed, due process consideration should provide these protections. *See Developments*, *supra* note 128, at 1271-1316. When protections are provided, however, they arise from due process considerations and not because the proceedings are criminal under the fifth and sixth amendments. *See supra* note 5.

217. 403 U.S. 528 (1971).

218. *McKeiver* and the companion cases concerned a variety of criminal conduct ranging from robbery and assault to willfully impeding traffic and making riotous noise. *Id.* at 534-36.

of adjudications unfavorable to the juveniles entailed possible confinement in state institutions. Reasoning that neither *Gault* nor *Winship* compelled the conclusion that delinquency proceedings are criminal prosecutions for purposes of the sixth amendment right to jury trial,[219] a plurality of the Court concluded that due process concerns for fundamental fairness would not be offended if juries were excluded from the adjudication process.[220] Unlike the *Gault/Winship* rights of notice, counsel, confrontation, cross-examination and proof beyond a reasonable doubt, which all emphasize accurate factfinding, the plurality found that juries are not necessary to achieve that interest.[221] Moreover, juries in juvenile cases might actually be counterproductive. "If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it the traditional delay, the formality, and the clamor of the public trial."[222] If these consequences were to befall the juvenile courts "there [would be] little need for [their] separate existence."[223]

Noticeably absent from the *McKeiver* plurality's discussion was any attempt to explain *Gault*'s application of the privilege against self-incrimination to delinquency adjudications.[224] By failing to list the privilege among the other *Gault/Winship* rights, all of which were fundamental fairness requirements to achieve "accurate factfinding," the plurality apparently recognized that the theoretical underpinnings of the privilege rested neither in a concern

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219. "[T]he juvenile court proceeding has not yet been held to be a 'criminal prosecution' within the meaning of the Sixth Amendment." *Id.* at 541.

220. Justices Blackmun, Stewart, White, and Chief Justice Burger comprised the plurality. Justice Harlan concurred in the judgment and filed a separate opinion. Justice Brennan concurred in part and dissented in part. Justices Douglas, Black, and Marshall dissented.

221. 403 U.S. at 543.

222. *Id.* at 550.

223. *Id.* at 551. The dissent pointed out that juries in juvenile cases might actually promote the system's rehabilitative aims. "The child who feels that he has been dealt with fairly and not merely expediently or as speedily as possible will be a better prospect for rehabilitation." *Id.* at 566 (dissenting opinion).

224. The plurality apparently did not see *Gault*'s inclusion of the privilege against self-incrimination as grounded in due process. "Due process [in *Gault*] was held to embrace adequate written notice; advice as to the right to counsel, retained or appointed; confrontation; and cross-examination. The privilege against self-incrimination was also held available to the juvenile." *Id.* at 532. At another point in the opinion, the plurality excludes mention of the privilege entirely when discussing the due process dimensions of *Gault* and *Winship*. "As that standard [fundamental fairness] was applied in those two cases, we have an emphasis on factfinding procedures. The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis." *Id.* at 543.

for accurate factfinding nor in a notion of fundamental fairness.[225] The *McKeiver* plurality, like the *Gault* majority, appears to see juvenile adjudications as functionally equivalent to criminal cases within the meaning of the fifth amendment itself. Apart from suggestions that juries might be counterproductive in the juvenile system—an argument which one could make with similar force against *Gault*'s extension of the privilege against self-incrimination to juvenile defendants[226]—the plurality left unexplained why the system is characterized as criminal for purposes of the fifth amendment privilege but not for the sixth amendment right to jury trial. Indeed, if the issue in *McKeiver* had been framed in terms of whether the juvenile sanction constituted punishment,[227] the plurality might have recognized delinquency adjudications as criminal prosecutions within the meaning of the sixth amendment and thereby have entitled juveniles to the right to trial by jury.[228]

Although *McKeiver*, like *Gault* and *Winship* before it, avoided explicit reference to the concept of punishment as a measure of constitutional rights, the Court's unanimous opinion in *Breed v. Jones*[229] openly alluded to such an analytical framework. The Court held that the double jeopardy clause prohibits the trial of juveniles as adults if they have been subjected previously to a delinquency hearing on the same charge. Jeopardy describes "the risk that is traditionally associated with a criminal prosecution."[230] Indeed, "the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment.' "[231] In assessing delinquency adjudications in terms of such risks, the Court stated,

> [I]t is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.[232]

Thus, "in terms of potential consequences, there is little to distin-

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225. *See supra* notes 192 & 224.

226. Justice Harlan made these arguments in his concurring opinion in *In re Gault*, 387 U.S. 1, 74-77 (1967) (Harlan, J., concurring).

227. Each of the litigants in *McKeiver* agreed that fundamental fairness was the basis for *Gault* and *Winship*, 403 U.S. at 543.

228. *See supra* notes 5 & 196-97 and accompanying text.

229. 421 U.S. 519 (1975).

230. *Id.* at 528.

231. *Id.* at 529 (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 548-49 (1943)).

232. *Id.*

guish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution."[233] Both proceedings are designed "to vindicate [the] very vital interest in enforcement of criminal laws."[234] The Court concluded, therefore, that the juvenile respondent was put in jeopardy at the delinquency adjudication hearing.[235]

The Court's analysis in *Breed* does not refer to the fundamental fairness standard employed in *Gault*, *Winship*, and *McKeiver*. Instead, the case rests entirely on the conclusion that delinquency dispositions are the functional equivalents of criminal punishments. Although delinquency dispositions seem to be tantamount to punishment, the *Breed* Court made no attempt to show the presence of punitive motivation in juvenile dispositions and seemed content instead to rest its conclusion upon the stigma and incapacitating effects of these dispositions. This analysis, however, which was also suggested in *Gault*, is misleading. It implies the effect theory of punishment, a doctrine clearly antithetical to the Court's cases from *Cummings* to *Wolfish*. Again, as in *Gault*, punishment probably could have been found in *Breed* if the Court had applied its traditional punitive intent framework[236] instead of appearing to adopt the effect theory.

Breed poses a problem for the continued vitality of *McKeiver*. If juvenile dispositions are punishment for fifth amendment double jeopardy purposes, why not also for purposes of sixth amendment jury trial rights? *McKeiver* and *Breed*, however, are distinguishable on two grounds. First, the *McKeiver* Court opined that jury trials may frustrate whatever rehabilitative potential the juvenile system possesses. The *Breed* Court, however, found no similar effect when applying double jeopardy principles to the system.[237] Second, since *Breed* arose through a federal habeas corpus petition challenging a state criminal conviction, it may no longer be a true "delinquency case" because the juvenile court had abandoned its rehabilitative efforts and had relinquished the child to the adult criminal system.[238] *McKeiver*, on the other hand, takes place entirely within the "therapeutic" context of the juvenile setting. Al-

233. *Id.* at 530.

234. *Id.* at 531 (quoting United States v. Jorn, 400 U.S. 470, 479 (1971)).

235. *Id.*

236. *See supra* notes 198-99 and accompanying text.

237. 421 U.S. at 535-41 (double jeopardy protections will not diminish desired flexibility and informality and may even promote the objectives of the juvenile justice system).

238. Rosenberg, *supra* note 191, at 681.

though *parens patriae* assertions might have provided some basis for preventing application of the constitutional guarantee in *McKeiver*,[239] these assertions were inapposite in *Breed*.[240]

C. Summary

Gault, *Winship*, *McKeiver*, and *Breed* illustrate three manifestations of punishment's analytical role in juvenile cases. In some instances, as in *Gault* and *Winship*, the concept may operate merely as an alternative means to obtain the same results yielded by the fundamental fairness standard. In other cases, however, as exemplified by *McKeiver*, different outcomes may result depending upon whether fundamental fairness or the concept of punishment is applied. Finally, *Breed* suggests that certain issues are properly analyzed entirely in terms of the concept of punishment without reference to fundamental fairness.

The Court's cases from *Gault* to *Breed* demonstrate clearly that the juvenile justice system reflects a mixture of therapeutic and punitive concerns. To the extent that the system is punitive, important constitutional consequences follow. Yet, apart from misleading reliance upon the effect theory, the Court's juvenile cases provide no definition of punishment— much less a standard for distinguishing punishment from therapy. Therefore, those attempting to draw such a distinction must look beyond the juvenile cases to discover the proper analytical framework necessary for conducting the inquiry.

IV. The Concept of Punishment Applied: Some Cases for Illustration

The preceding sections have defined the concept of punishment and suggested that it provides a useful and sometimes even necessary means for analyzing juvenile problems. Nevertheless, an examination of the cases reveals that the analytical potential of the concept remains largely untapped. Indeed, several cases reach questionable results simply because the courts have failed to utilize the concept of punishment as a basis for decision.

A. Fixed Confinement: Rights to Jury Trials Reconsidered

The 1977 Delaware Supreme Court opinion in *State v. J.K.*[241]

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239. *See supra* note 182.
240. Rosenberg, *supra* note 191, at 681.
241. 383 A.2d 283 (Del. 1977), *cert. denied*, 435 U.S. 1009 (1978).

upheld the constitutionality of the recently enacted Juvenile Mandatory Commitment Act.[242] The statute, among other things, required institutional confinement for one year, subject to judicial discretion to suspend confinement in excess of six months, of any juvenile adjudged to be a delinquent based on the commission of two or more burglaries within a one-year period.[243] The juveniles who were sentenced to mandatory confinement under the statute alleged that they were denied both equal protection of the laws and sixth amendment rights to trial by jury. The youths premised the equal protection issue upon the disparate treatment afforded youthful burglars under the juvenile and adult systems. While juvenile burglars found "not amenable to the rehabilitative processes of the [Juvenile] Court" were tried as adults and were eligible for probation upon conviction, those found "amenable" to rehabilitation were retained within the juvenile system and subjected to at least six months mandatory confinement under the statute.[244] The jury trial claim was based on the theory that potential incarceration in excess of sixth months triggered the sixth amendment

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242. DEL. CODE ANN. tit. 10, § 937 (1980 Cum. Supp.) (enacted July 30, 1976).

243. The entire text of the statute stated as follows:

(c) Subject to the provisions governing amenability pursuant to Section 938 of this Chapter, the court shall commit a delinquent child to the custody of the Department of Correction under such circumstances and for such periods of time as hereinafter provided:

(1) Where he has been once or more than once adjudicated delinquent for committing separate and distinct acts or courses of conduct, not arising from the same transaction or occurrence, committed within any one-year period, which said acts, when aggregated, would constitute two offenses designated as felonies under Subchapter 11, Chapter 5, Title 11; or attempts to commit any such felonies, or which would constitute burglaries in any degree involving a dwelling house pursuant to Subpart B, Subchapter III, Chapter 5, Title 11, or attempts thereof, or any combination thereof, then custody shall be awarded for one year;

. . . .

(6) Where a child is adjudicated a delinquent based upon the conditions outlined in (c)(1), (2), (3), (4) or (5) of this Section, the Court may, at the time of sentencing or upon subsequent hearing initiated by the filing of a petition by the Department of its duly authorized representative, due notice of which has been given to the Attorney General, suspend all of the commitment in excess of six months, when it determines by a preponderance of the evidence before it that such lesser period of commitment; (1) would best serve the needs of the child; and (2) would pose no probable threat to property or person upon his earlier release. In the event that the Court should determine that all or a portion of the commitment in excess of six months should be suspended as hereinbefore provided, then it shall set forth with particularity the reasons relied upon in so doing in its order or disposition.

60 Del. Laws 2125 (1975). The statute has since been amended removing judicial discretion to suspend mandatory commitments, which presently are fixed at six months. DEL. CODE ANN. tit. 10, § 937(c) (1980 Cum. Supp.).

244. 383 A.2d at 287-89.

right.[245]

Notwithstanding the possibility of different treatment for "amenable" and "nonamenable" juveniles, the court found these differences to be permissible under the equal protection clause. The court held that the classification drawn by the amenability analysis constituted reasonable statutory attempts to promote the compelling state interest in rehabilitating "amenable" youthful burglars while excluding those not susceptible to the juvenile court's rehabilitative potential.[246] The Delaware court, however, never addressed the possibility that the mandatory confinement might be punitive in nature, and simply assumed that it was rehabilitative.

The court declined to rule on the right of juveniles to jury trials under the mandatory commitment statute because the issue had not been adequately briefed by counsel. The court, however, strongly suggested that no such right exists, "invit[ing] the attention of the Trial Courts"[247] to a series of cases—including *McKeiver v. Pennsylvania*—that denied the right to a jury in juvenile cases.[248]

If the *J.K.* court had utilized the concept of punishment in analyzing its facts, the outcome might have been different. The mandatory confinement of the "amenable" burglars seems clearly to constitute punishment.[249] The state is imposing unpleasant restraints to answer a specific kind of criminal conduct. The determinate nature of the restraint—a mandatory term fixed for at least six months—strongly suggests a legislative intent to punish while belying a rehabilitative purpose.[250] The statute did not provide an indeterminate disposition, which is characteristic of therapeutic attempts to alter undesirable status conditions,[251] but rather fixed a term of confinement based solely upon the offenses committed by youthful burglars. The punitive purposes of retribution and deter-

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245. *Id.* at 285; *see supra* note 173.

246. 383 A.2d at 289.

247. *Id.* at 292.

248. In addition to *McKeiver* the court cited Raines v. Alabama, 552 F.2d 660 (5th Cir. 1977), United States v. Hill, 538 F.2d 1072 (4th Cir. 1976), and United States v. Torres, 500 F.2d 944 (2d Cir. 1974). The court also cited 100 A.L.R.2d 1241 (1965) which provides, "[I]t is now almost universally held that . . individual[s] charged with being . . . delinquent[s] [have] no right, under the . . . federal constitution, to demand that the [delinquence] issue . . . be determined by a jury." *Id.* at 1242-43.

249. *See supra* notes 152-55 and accompanying text.

250. *See supra* notes 155-56 and accompanying text.

251. *See id.*

rence are evident. Indeed, the Delaware Legislature would later describe the purpose of the statute before the *J.K.* court as follows: "[T]he general intention behind the enactment of a mandatory commitment law for juveniles adjudicated delinquet [sic] for certain delineated offenses was to serve as a warning to a first offender of the consequences of a second conviction."[252] Even without an express statement of punitive intent, the *J.K.* court easily could have inferred punitive intent by applying the excessiveness test of *Mendoza-Martinez*. Six months confinement clearly would be excessive for "amenable" juveniles who became rehabilitated prior to the expiration of the six-month period. Thus, the confinement in these cases would constitute punishment because it is clearly "excessive in relation to the [therapeutic] purpose assigned."[253]

Once the confinement of the "amenable" juveniles becomes punitive rather than therapeutic, the distinction between "amenable" and "nonamenable" juveniles becomes untenable. The state subjects both classes to punishment and the denial of the possibility of probation to the "amenable" class would constitute an arbitrary and irrational exercise of state power.[254] Moreover, the court's suggestion that the right to a jury trial does not attach under the mandatory commitment statute also appears unsound. Because punishment is inflicted for violation of the statute, the proceedings become criminal prosecutions under the sixth amendment and, thus, entitle juveniles to jury trials.[255]

A New York family court reached this conclusion in *In re Felder*.[256] The *Felder* court found a sixth amendment right to jury trials under the "designated felony" provisions of the Juvenile Justice Reform Act of 1976.[257] While labeling proceedings under the

252. 62 Del. Laws 749 (1979) (act amending the statutory provision before the *J.K.* court).

253. *See supra* note 82 and accompanying text. Similar conclusions may be derived from the *Wolfish* test. The confinement in *J.K.* would appear to be punitive on its face since it imposes unpleasant restraints because of criminal conduct. *See supra* notes 123-26, 137-39 & 197-99 and accompanying text. Thus, an inquiry into the reasonableness of the confinement in relation to its nonpunitive purposes is appropriate. Under this inquiry, the confinement would clearly be excessive in cases in which the burglars were rehabilitated prior to the expiration of the six month period of confinement.

254. An equal protection violation also may be present. For a discussion of the applicability of the equal protection clause to similar situations, see Rosenberg, *supra* note 191, at 712-13.

255. *See infra* notes 256-63 and accompanying text.

256. 93 Misc. 2d 369, 402 N.Y.S.2d 528 (Fam. Ct. 1978).

257. Juvenile Justice Reform Act of 1976, ch. 878 (codified at N.Y. FAM. CT. ACT. §§

statute "juvenile proceedings," the New York State Legislature imposed fixed periods of confinement, either for six month or twelve month intervals, for juveniles who commit certain enumerated offenses and who were found to be in need of restrictive placement.[258] The *Felder* court analyzed the confinement issue by utilizing the punishment/therapy distinction. The court cited *McKeiver* and concluded that there is no requirement of jury trials in juvenile proceedings in which the disposition is "rehabilitative and nonpenal."[259] "When, however, . . . what is actually a punishment is characterized as a treatment, an abuse of constitutional dimension has occurred, and, a jury trial is required before punishment, although appropriate, may be inflicted."[260] Without relying directly upon the Supreme Court's cases defining punishment, the *Felder* court found that the New York provisions were punitive because they premised the length of confinement upon "the act committed rather than [upon] the needs of the child."[261] Moreover, the court found the mandatory nature of the confinement to be inconsistent with the "philosophy of treatment," which requires that juveniles be released when rehabilitation occurs.[262] "Indeterminate sentencing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution or punishment."[263] This analysis by the *Felder* court closely reflects the concept of punishment developed earlier in this Article.[264]

The concept of punishment may be helpful in analyzing the sixth amendment consequences of fixed confinement statutes such as those discussed in *J.K.* and *Felder*, but a punishment theory is also useful in less blantantly punitive contexts. Indeed, whenever the state imposes "suspiciously punitive"[265] restraints preceded by criminal conduct, the court should scrutinize the sanction under the *Wolfish* excessiveness test.[266] The result of this scrutiny may

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711-67 (Consol. 1977)).

258. 93 Misc. 2d at 376, 402 N.Y.S.2d at 532. The statute in *Felder* differed somewhat from that in *J.K.* The confinement in *Felder* was not mandatory, but was discretionary with the court. *Id.* The period of confinement, however, was fixed by the statute, once the court determined that confinement was appropriate. *J.K.* on the other hand, dealt with a statute that imposed both mandatory and fixed confinement. *See supra* note 243.

259. 93 Misc. 2d at 374-75, 402 N.Y.S.2d at 531.

260. *Id.* at 375, 402 N.Y.S.2d at 531.

261. *Id.* at 376, 402 N.Y.S.2d at 533.

262. *Id.* at 377, 402 N.Y.S.2d at 533.

263. *Id.*

264. *See supra* notes 34-177 and accompanying text.

265. *See supra* notes 123-26, 137-40 & 197-99 and accompanying text.

266. *See id.*

reveal wholesale inflictions of punishment within the juvenile justice system.

B. *"Status Offenders" and the Applicability of* Gault

In addition to fixed confinement delinquency cases, the concept of punishment may play a significant role in assessing the rights of status offenders. Status offenses include noncriminal juvenile misbehavior that is handled through the juvenile justice system.[267] Sometimes the attention to status relates to conditions and states of being. For example, juvenile courts often have jurisdiction over "incorrigible" children[268] or those children "who, by reason of being wayward or habitually disobedient, [are] uncontrolled by . . . parent[s], guardian[s], or custodian[s]."[269] In other instances, however, status offenses describe conduct that is proscribed for children but not for adults such as disobeying curfew or school attendance rules.[270] Status offenses in either the pure status or conduct form often are included with criminal offenses in the definition of delinquency.[271] In these situations, often no attempt is made to differentiate the dispositions of status delinquents from those of criminal delinquents.[272] Some states, however, segregate status offenders from nonstatus delinquents and place them in less restrictive confinements.[273] Many recent statutory provisions further distinguish status offenders from delinquent offenders who commit offenses that would be criminal if committed by adults.[274] Under these schemes, status offenders often are called "persons in need of supervision" (PINS).[275] The restraints on PINS children are characteristically less severe than those on "delinquents."[276]

Because the scope of *Gault* is uncertain outside the context of delinquency adjudications based on conduct of a criminal nature,[277] the courts have encountered difficulty in assessing the rights of status offenders. The concept of punishment is helpful in resolving these difficulties. The *Gault* protections have been con-

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267. *See* S. Fox, *supra* note 202, at 39-40.
268. *See* S. Davis, Rights of Juveniles (2d ed. 1980).
269. Neb. Rev. Stat. § 43-247(3) (Supp. 1980).
270. *See* S. Fox, Modern Juvenile Justice 512-17 (2d ed. 1981).
271. *See* S. Davis, *supra* note 268, at 6-13.
272. *See id.*
273. *See In re* Ellery C., 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973).
274. *See, e.g.*, 29A N.Y. Jud. Law § 712 (McKinney Supp. 1976-80).
275. *See* S. Fox, *supra* note 202, at 40.
276. *See* S. Davis, *supra* note 268, at 6-7.
277. *See supra* notes 200-02 and accompanying text.

stricted unnecessarily by judicial insensitivity to the relationship between punishment and status offenses. For example, the Maryland Court of Appeals in *In re Spalding*[278] limited *Gault* to situations in which the juvenile is "charged with an act which . . . would constitute a crime if committed by an adult."[279] Noncriminal adjudications such as those conducted in Maryland against juveniles "who [have] committed . . . offense[s] applicable only to children" were untouched by the *Gault* line of cases, even though confinement in a state institution is a possible consequence of being found guilty of these offenses.[280] Indeed, the *Spalding* court saw no need to address the constitutional implications of restricting juvenile liberty in cases where criminal conduct is absent.

> [W]e need not decide whether the second prong of the *Gault* test, i.e., potential confinement of the child to a state institution, mandated an application of the privilege against self-incrimination in this case. We reach this conclusion because, in any event, we think that appellant was not *charged* in this proceeding with an act which would constitute a crime if committed by an adult.[281]

This interpretation assumes that the *Gault* protections are premised on the concept of criminality. If, however, the earlier analysis in this Article is correct, *punishment*, with its attendant stigma and restriction of liberty, is the proper analytical standard.[282] The concept of punishment defines criminality and not vice versa.[283] Punishment is a concept more extensive than criminality and may exist in a variety of noncriminal settings.[284] Therefore, a proper reading of *Gault* should not limit the case to delinquency actions triggered by "criminal" conduct.

Hence, the *Gault* protections should not be excluded from status offense adjudications, especially those which entail *conduct* as opposed to pure status determinations.[285] Dispositions in these cases could entail punishment because the state often imposes unpleasant restraints upon youthful offenders who are guilty of mis-

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278. 273 Md. 690, 332 A.2d 246 (1975).

279. *Id.* at 709, 332 A.2d at 257. *Spalding* concerned a delinquency action that was initiated against a minor but later dropped in favor of a PINS (also called CINS—children in need of supervision) proceeding when it was discovered that the minor was the victim of a series of sexual perversions rather than a culpable actor in the affairs.

280. *Id.* at 698-99, 713, 332 A.2d at 251, 259 (dissenting opinion).

281. 273 Md. at 708, 332 A.2d at 256.

282. *See supra* notes 183-85, 189-93, 207-16 & 229-35 and accompanying text.

283. *See supra* note 5. *But see supra* note 27 (problems with generating the concept of "criminality" from the concept of "punishment").

284. *See, e.g., supra* notes 52-55 and accompanying text.

285. *See infra* text accompanying notes 295-96 & 301-02.

conduct. Because punishment is the traditional response to criminal conduct, a court may have more difficulty in discovering punitive intent in the status cases than in cases such as *J.K.* and *Felder* that, because they were based upon criminal conduct, are likely to reflect "punishment on their face" under *Wolfish*.[286] Punitive intent, however, may be readily apparent in some status cases. But even if a court has difficulty discerning punitive intent, severe restrictions of liberty in status cases may still look "suspiciously like punishment" and thereby trigger the *Wolfish* excessiveness test.[287] Precluding these inquiries altogether by *Spalding*'s wooden reading of *Gault* seems clearly unsound.

Apart from conceptual niceties, policy reasons dictate an extension of *Gault* to status offense adjudications in which conduct of a noncriminal nature is at issue. Significant liberty interests turn on the finding of specific facts. To the extent that *Gault* and its progeny express an interest in protecting the fairness and integrity of judicial factfinding, that same interest exists in status offense cases. In both status and criminal offenses, the state has accused a juvenile of misconduct and has assumed an adversarial position in relation to the juvenile. Hence, the *Gault* protections are equally applicable to both contexts. Moreover, little likelihood exists that the juvenile justice system's goal of rehabilitation—to the extent that it actually is attainable— would be sacrificed by extending the *Gault* protections[288] to noncriminal misconduct.[289]

The relationship between the concept of punishment and status adjudications that are not premised on particular actions or conduct presents a more difficult problem. Some courts have applied the concept of punishment to these pure status cases. For

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286. *See supra* notes 123-26 & 137-40 and accompanying text.

287. *See id.*

288. Whether the *Gault* protections should be extended to pre or postadjudication stages is a problem not addressed in this Article.

289. The rehabilitative value of due process protections at delinquency adjucications was noted by the *Gault* Court:

> [R]ecent studies . . . suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned. For example, in a recent study . . . sociologist[s] . . . observe that when procedural laxness of the "*parens patriae*" attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed. They conclude as follows: "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."

In re Gault, 387 U.S. 1, 26 (1967); *see also* Paulsen, *supra* note 4, at 186.

example, the district court in *Gesicki v. Oswald*[290] held that incarceration in adult penal institutions of "wayward minors" found to be "morally depraved or in danger of becoming morally depraved" constituted punishment for a status contrary to *Robinson v. California*.[291] The soundness of the *Gesicki* result, however, is questionable because of the court's failure to establish that the disposition was in fact punitive. The court made no attempt to establish punitive intent and failed to scrutinize the actual conditions within the penal institution. In fact, the court intimated that even if the juveniles were receiving meaningful rehabilitation, their confinement would still be punitive.

> [I]t is not an acceptable answer to say that some minors . . . are in fact treated appropriately for medical, psychological, or social disorders. Such instances of effective treatment, if they exist, would fail to distinguish the Wayward Minor statute from criminal legislation generally. It is safe to say that few if any prison administrators today would describe the function of the institutions they direct as entirely punitive, and most would undoubtedly cite "rehabilitation" or the equivalent as their most important goal.[292]

Thus, the *Gesicki* court seemed content to equate imprisonment with punishment regardless of whether rehabilitation actually occurred within the prison. The *Gesicki* court's analysis is suspect in light of *Wolfish*, which implied that a single jailhouse may be simultaneously a place of punishment for convicted offenders and a center of nonpunitive detention for pretrial detainees.[293] Assessments of punitive intent are necessary to distinguish the jail's punishment from its preventive detention.[294]

More problems arise upon examination of the meaning of "punishing a status." The definition of punishment is linked to the occurance of an offense,[295] but this factor is not present when the state imposes restraints in response to status conditions. Thus, punishment of a status appears logically impossible.[296] Nevertheless, *Robinson* clearly holds that punishing status is possible and

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290. 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 913 (1972).

291. N.Y. CRIM. PROC. § 913-a(5), -a(6) (McKinney 1976). The court also found the language quoted in the text to be an "unconstitutionally vague penal law" in violation of due process. 336 F. Supp. at 377, 379.

292. 336 F. Supp. at 378.

293. Pretrial detainees are often housed in the same jails that house convicted offenders. *See supra* text accompanying note 138. There is nothing in *Wolfish* to call this practice into constitutional question so long as the restraints of the pretrial detainees are not unreasonable in light of the interests in assuring their presence at trial.

294. *See supra* notes 34-154 and accompanying text.

295. *See supra* notes 62-64, 148-50 & 152-56 and accompanying text.

296. *See supra* note 148.

unconstitutional whenever it occurs.[297] Therefore, the *Gesicki* result may be sound if punishment actually was administered. *Wolfish* itself provides an avenue for finding punishment in cases like *Gesicki* in which juveniles are housed in adult prisons. Because such facilities are the most vivid symbols of punishment in modern society,[298] confinement within them may well evidence punishment on its face under *Wolfish*—even though the incarceration is a response to a status condition rather than to specific acts of misconduct.[299] *Wolfish* would then require judicial scrutiny of the actual conditions of confinement in terms of their relationship to nonpunitive purposes. If the court found the confinement to be excessive in light of the nonpunitive purpose, the confinement would properly be labeled punitive[300] and, hence unconstitutional under *Robinson*.

Because of the conceptual anomalies inherent to an analysis of status confinements in terms of the concept of punishment,[301] soundly reasoned opinions on the punishment of status offenders will probably rarely appear. Nevertheless, courts may rely upon a variety of due process and equal protection doctrines to utilize as alternatives to punishment when assessing the constitutionality of juvenile confinements of the pure status variety.[302]

C. *Cruel and Unusual Punishment of Nonstatus Offenders*

Although some status offense cases are not easily analyzed through the concept of punishment, eighth amendment analysis of nonstatus offense cases is less difficult. Indeed, because of current

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297. *See id.*

298. *See* J. FEINBERG, *supra* note 27, at 111. "[I]mprisonment in modern times has taken on the symbolism of public reprobation. 'It is . . . imprisonment in a penitentiary, which now renders a crime infamous.'" *Id.* (quoting United States v. Moreland, 258 U.S. 433, 447-48 (1922) (Brandeis, J., dissenting)).

299. *Wolfish* intimates that excessive restrain may be "punitive" when imposed upon pretrial detainees, who are preventively detained because of their "status" as likely absconders from trial. *See* Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979); *supra* text accompanying note 141.

300. Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979).

301. *See supra* notes 295-96 and accompanying text.

302. A substantive due process "right to treatment" may provide an additional basis, *see generally supra* notes 130-55 & 309 and accompanying text, for scrutinizing conditions of confinement imposed upon juvenile status offenders. *See Developments*, *supra* note 128, at 1324-44. The right to treatment has become well established within the juvenile justice system. *See, e.g.*, S. Fox, *supra* note 202, at 228-34. Procedural protections for pure status offenders may be required by fundamental fairness under due process. *See supra* notes 180-88 and accompanying text. This Article does not consider the constitutional necessity for, or the desirability of, extending the *Gault* protections to pure status proceedings.

suspicions of nontreatment and mistreatment of youthful offenders within the juvenile justice system,[303] the ban on cruel and unusual punishment is an especially appropriate vehicle to protect constitutional interests. Unfortunately, however, as discussed earlier,[304] judicial failure to employ carefully a proper concept of punishment in eighth amendment juvenile jurisprudence often has frustrated sound analysis. Some courts simply have assumed, without question, that the eighth amendment is inapplicable to juvenile dispositions, which the courts perceive to be nonpunitive by definition.[305] Fortunately, these cases are in the minority. More often, courts recognize the applicability of the eighth amendment, but usually determine whether a given juvenile disposition is cruel and unusual without first showing whether the disposition constitutes punishment. Because the juvenile system is a hybrid that is comprised of both punitive and therapeutic aspects, a court is remiss when it fails to analyze the question whether punishment exists. Other courts have made attempts to establish the punitive nature of a given disposition, but employ inappropriate definitions of punishment in their analysis. Utilizing the effect theory of punishment, these courts have generated a body of cases inconsistent with the Supreme Court conception of punishment.[306] *Nelson v. Heyne*[307] is

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303. *See supra* text accompanying note 195. *But see infra* note 305.

304. *See supra* text accompanying notes 236-40.

305. *See, e.g.*, R.R. v. State, 448 S.W.2d 187 (Tex. Civ. App. 1969), *appeal dismissed sub nom.* Rios v. Texas, 400 U.S. 809 (1970).

> Appellant . . . takes the position that the confinement of a delinquent child must be viewed as 'punishment' for the purpose of determining the child's rights under the Eighth Amendment, even though the language of our juvenile statutes speaks in terms of treatment rather than punishment.
>
> The record before us contains no evidence concerning the conditions at the state training schools. . . . In the absence of evidence that the dismal picture painted in Gault reflects the conditions in the institutions of this State, and giving due consideration to the legislative declaration of policy and purpose, 'we are not prepared to condemn out of hand . . . the people working in this field.'

Id. at 189-90.

306. The question arises whether the eighth amendment applies at all to juvenile dispositions. The Supreme Court in Ingraham v. Wright, 430 U.S. 651 (1977), held that the cruel and unusual punishment clause was inapplicable in the context of public school punishments. The Court found that an eighth amendment remedy for school children was unnecessary because schools are traditionally "open" institutions, visible to public scrutiny, and, therefore, are able to avoid improper punishments either through self-policing or through public pressure. *Id.* at 670. The Court noted that unduly severe punishment within the context of penal incarceration would trigger eighth amendment protection. *Id.* at 669. Moreover, the Court specifically left open the possible applicability of the eighth amendment to involuntarily confined juveniles. *Id.* at 669 n.37.

This Article assumes that juvenile dispositions, at least within state institutions, more closely resemble incarceration settings than they do open schools. *Gault* also operates under

a vivid example. In *Nelson*, the Seventh Circuit considered the constitutionality of two practices prevalent within the Indiana Boy's School: corporal punishment inflicted with a "fraternity paddle"[308] and the intramuscular injections of tranquilizing drugs. The court condemned both practices under the eighth amendment. Furthermore, the court held that the due process clause of the fourteenth amendment guarantees a "right to treatment" for juveniles committed to state institutions.[309]

The analysis of the tranquilizer issue in *Nelson* is of particular interest. The court found that drugs were occasionally administered to control the excited behavior of juvenile inmates. Apart from their effects as sedatives, the drugs possessed no significant psychotherapeutic benefits.[310] Moreover, the drugs were capable of causing severe and dangerous side effects unless carefully monitored by trained medical personnel.[311] The court found that medical personnel did not monitor the administration of these drugs. At no time prior to or following the injections did medical professionals examine the youths to determine their individual tolerances for the drugs. Instead, the school administered standardized dosages pursuant to orders given by the school's only physician.[312] The *Nelson* court summarily rejected the school's claim that the use of the drugs did not constitute punishment.[313] Without mentioning punitive intent or attempting to establish the absence of therapeutic motivation,[314] the court found the injections to be cruel and unusual punishment simply because of the dangers inherent in misuse of the drugs. The court, however, suggested that the injections

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this assumption. *See supra* text accompanying note 195.

For a discussion of *Ingraham*, see Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75 (1978).

307. 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

308. As punishment for various offenses against institutional rules, juveniles were beaten with a paddle between one-half and two inches thick and twelve inches long, with a narrow handle. The beatings were apparently ungoverned by extensive formal procedures and sometimes caused painful injuries. *Id.* at 354.

309. *Id.* at 358-60.

310. *Id.* at 356.

311. *Id.* at 357. The court found that the drugs could cause "the collapse of the cardiovascular system, the closing of a patient's throat with consequent asphyxiation, a depressant effect on the production of bone marrow, jaundice from an affected liver, and drowsiness, hemotological disorders, sore throat and ocular changes." *Id.* (footnote omitted).

312. *Id.* at 354, 356.

313. "We are not persuaded by defendants' argument that the use of tranquilizing drugs is not 'punishment.'" *Id.* at 357.

314. The court recognized that the drugs were not administered "as part of an ongoing psychotherapeutic program but for the purpose of controlling excited behavior." *Id.* at 356.

may have been permissible if they had been administered more carefully.[315]

The *Nelson* court's definition of punishment appears to hinge on the objective quality of the medical care that is provided. If the care is reasonably safe, no punishment, or at least no cruel punishment, exists. If, on the other hand, the care creates unreasonable risks, it is punitive and violative of the eighth amendment. The *Nelson* approach is surely at odds with the Supreme Court's concept of punishment. Indeed, a few years after *Nelson*, the Court specifically rejected a medical malpractice conception of punishment similar to that espoused in *Nelson*. The Court said that only "*deliberate* indifference to the serious medical needs of inmates" could constitute punishment proscribed by the eighth amendment.[316] Punishment cannot be defined simply in terms of unpleasant effects upon the allegedly punished persons, no matter how threatening or unpleasant those effects might be. The effects must be caused purposely.

If the *Nelson* court had properly applied the concept of punishment, it could have prohibited the injections under the eighth amendment. If the court had found that the injections were administered to penalize misconduct by juvenile inmates,[317] the injections may have been punitive, especially in light of the physical pain inflicted by the needle. Like the fraternity paddle which the court justifiably held to violate the eighth amendment,[318] the needle could also be viewed as an instrument of punishment, purposely imposed to achieve retributive or deterrent aims. Once found to be punishment, the injections could then be proscribed under the eighth amendment if found to be cruel and unusual. On the other hand, if the court's inquiry into the purpose for the injections had revealed an intent to relieve undesirable status condi-

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315. In detailing the minimum medical safeguards that should be followed in using the drugs, the court limited its holding to the *Nelson* facts. "We do not intend that . . . reform institutional physicians cannot prescribe necessary tranquilizing drugs in appropriate cases. Our concern is with . . . potential abuses under policies where . . . drugs are administered to juveniles intramuscularly by staff, without trying medication short of drugs and without adequate medical guidance and prescription." *Id.* at 357.

316. Estelle v. Gamble, 429 U.S. 97, 104 (1976); *see supra* note 132.

317. The court said only that the injections were administered "for the purpose of controlling excited behavior." 491 F.2d at 352. The court, however, did not state whether the behavior entailed acts of misconduct by the juveniles. The court cited two examples of the use of the injections to control behavioral conditions of a morally neutral nature. *Id.* at 356 n.8 (drug used to control a "hollering juvenile" and to prevent another from escaping from the school).

318. *See supra* note 308 and accompanying text.

tions,[319] the injections could be characterized as therapy rather than as punishment.[320] The prescription of sedatives to control excited behavior, even when involuntarily administered, is sometimes unquestionably a therapeutic action.[321] But even if the *Nelson* court had found the injections to constitute therapy and not punishment, the court should not have allowed the drugs, with their attendant dangers, to be administered. Indeed, *Nelson*'s own right to treatment theory would have prohibited the injections as unreasonably risky[322] as would more general due process doctrines that protect a person from unreasonable or dangerous applications of state force.[323] If the *Nelson* court could not find the injections to be punitive under the proper definition of punishment, then the court should not have forced the case into an eighth amendment framework,[324] and thus distort the concept of punishment and restrict its analytical effectiveness.

V. Conclusion

This Article has suggested that Justice Stewart's focus upon the concept of punishment—as distinct from the notion of therapy—is a useful and sometimes necessary analytical approach to assess juvenile rights, which exist in a system that commingles punitive and therapeutic considerations. The punishment approach has to date been sporadically and ineffectively employed, in part because courts have had difficulty in formulating workable definitions of punishment and therapy. The conceptual framework suggested in this Article is proposed to lessen these difficulties. In light of the illustrative cases discussed, the concepts of punishment

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319. See *supra* note 317 for evidence that the drugs were used to relieve status conditions rather than to punish acts of misconduct.

320. *See supra* notes 144-50 and accompanying text. For a case similar to *Nelson* that struggles with the punishment/therapy distinction, see Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) (administration of drug that induces vomiting as "adversive stimuli" treatment of mental institution inmate for allegedly violating behavior rule of institution constitutes cruel and unusual punishment unless inmate consents to use of the drug).

321. *See supra* note 315.

322. "[T]he 'right to treatment' includes the right to minimum acceptable standards of care and treatment." 491 F.2d at 360; *see supra* note 315.

323. *See supra* note 168; *see also* Rochin v. California, 342 U.S. 165 (1952) (involuntarily pumping a suspect's stomach violates due process); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) (although not punishment, application of undue force by the state against a criminal suspect deprives him of liberty without due process of law).

324. One commentator has criticized the *Nelson* court's eighth amendment analysis: "It is clear that . . . the panel of the Seventh Circuit were more sure of their desire to stop the particular practice at issue than they were of the analytical basis for such a prohibition." 60 Va. L. Rev. 571 (1974).

and therapy here derived appear useful in promoting analysis of juvenile problems without abandoning established Supreme Court doctrine. If the Court's future analysis remains true to this doctrine, then a host of other juvenile rights issues may await illumination through the concept of punishment.

THE INSTITUTIONAL TRANSFER STATUTE: THREE CHALLENGES TO THE IMPRISONMENT OF JUVENILE OFFENDERS

At the regular meeting in May, 1979, the Wyoming Board of Charities and Reform voted to send a 17-year-old juvenile offender to the State Penitentiary.[1] The Board which is made up of the top executive officers of the State[2] does not regularly oversee the administration of inmates' sentences.[3] Parole is administered by the Board of Parole[4] and probation is administered by the sentencing court.[5] The decision to send Larry B. to prison was made in a few minutes without a hearing, without the presentation of evidence, without notice or representation for the juvenile who was at that time an inmate at the Wyoming Industrial Institute. The Board of Charities and Reform listened to the recommendation from the Superintendent of the Industrial Insti-

1. Because WYO. STAT. § 14-6-239 (1978) makes it unlawful to publish the name of a minor involved in a proceeding under the Juvenile Court Act, the case which is described in the opening section cannot be cited. Larry B. is, of course, a fictional name. The story as it is related is taken from court records, records of the Board of Charities and Reform and from discussions with several of the people involved in the case. It is accurate according to the records and is not a single isolated incident but rather represents a common procedure in several states. The issues discussed in this comment were raised before the Board of Charities and Reform by way of memorandum which discussed the "Larry B. case." *See* Wyoming State Tribune, July 6, 1981, at 1.

   The sections describing the various juvenile court practices are taken from court documents, records of the Board of Charities and Reform and from conversations with Wyoming attorneys and judges. The various district court judges who also sit as judges of the juvenile courts, WYO. STAT. § 14-6-202 (1978), use somewhat different approaches to the questions of the pretrial hearing to determine adult or juvenile jurisdiction and sentencing. It is beyond the scope of this comment to set out these differences and their effect. It is worth noting, however, that the Wyoming Juvenile Court Act of 1971 was passed in response to the major Supreme Court decisions discussed in this comment. It was a stopgap measure that filled the big holes in Wyoming's juvenile procedure, but it does not provide a complete logical system for handling juvenile offenders. It is not surprising then that the courts have filled the remaining gaps in a variety of ways. As a result, the individual juveniles face widely varying procedures, some of which adequately protect their rights and interests and some of which do not.

   For an illuminating review and critique of the juvenile justice system in Wyoming, see OFFICE OF THE ATTORNEY GENERAL, THE WYOMING JUVENILE JUSTICE SYSTEM, AN EVALUATION (1981) [hereinafter cited as WYOMING JUVENILE JUSTICE SYSTEM, AN EVALUATION]. The report describes the maze of courts, officials and agencies which have broad and frequently overlapping authority over juvenile matters, and concludes that "Wyoming has never had a statewide juvenile system." *Id.* at 11.
2. WYO. STAT. § 9-3-701 (1977).
3. The Board of Charities and Reform is established in WYO. CONST. art. 7, § 18, and the powers are delineated in WYO. STAT. § 9-3-706 (Supp. 1980) and WYO. STAT. § 9-3-707 (1977).
4. WYO. STAT. §§ 7-13-402 to -403 (1977).
5. *Id.* §§ 7-13-301, -304.

tute that Larry B. should be housed at the Penitentiary, then voted to approve the transfer.[6] The vote drew brief criticism from one member, but the whole business was quickly buried among budget and administrative concerns.

Larry B. had been confined to the Industrial Institute after being adjudged a "delinquent child"[7] in an informal hearing before a juvenile court judge. Once the decision had been made to try Larry as a juvenile,[8] the judge who placed

6. The superintendent's recommendation described Larry as a "management problem" and "a threat to the order in the institution." The incident which was the immediate cause of the transfer request was Larry's second escape attempt which resulted in some physical damage to the institution (no dollar amount was stated), and a tussle with a case worker, who was apparently uninjured.

7. Any minor who is found by the juvenile court to have committed any act in violation of the laws of the State of Wyoming or its political subdivisions is a "delinquent child" under the Juvenile Court Act of 1971. WYO. STAT. § 14-6-201(iii), (ix), (x) (1978).

8. As required by the United States Supreme Court in Kent v. United States, 383 U.S. 541 (1966), the Wyoming Juvenile Court Act provides for a pretrial hearing to determine whether the minor offender should be tried as a juvenile in juvenile court or as an adult in district court. WYO. STAT. § 14-6-237 (1978). If the judge determines that juvenile proceedings are inappropriate for this minor, and that there is a high likelihood that the juvenile committed the crime and the juvenile is not subject to being placed in a mental institution, then the juvenile will be tried as an adult and receive a full trial of the charges and be subject to the full legal penalty. The criteria used to determine what kind of proceedings are appropriate for any particular juvenile are not stated in the Wyoming Juvenile Court Act. In its decision in Kent v. United States, the United States Supreme Court set out a list of eight criteria for use in juvenile proceedings in the District of Columbia. 383 U.S. at 566-67. This list has become the generally accepted standard in Wyoming proceedings, although the use of the eight-point standard has never been affirmatively mandated by the United States Supreme Court:

> The determinative factors which will be considered by the judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:
>
> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
>
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
>
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
>
> 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
>
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
>
> 6. The sophistication and maturity of the Juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
>
> 7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

him in the Industrial Institute did not have authority to commit Larry to the Penitentiary.[9] Yet, the Board of Charities and Reform, relying on a confusing statute originally passed in 1909,[10] regularly transfers inmates from the Industrial Institute to the prison without any hearing.[11] In Larry's case, within six months of his placement in the Industrial Institute, he was imprisoned in the same facility, on the same floor, as Wyoming's convicted felons without having an opportunity to fully contest his imprisonment. Furthermore, he would be confined at the prison until the same Board of Charities and Reform decided to transfer him back to the Industrial Institute or to release him.[12] Since there is no maximum term set by the original judge[13] or by the Board,[14] Larry may be imprisoned in the Peniten-

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

383 U.S. at 566-67.

9. WYO. STAT. § 14-6-229 (1978) sets out the range of powers the juvenile court has over the delinquent child; confinement in prison is not included.

10. *Id.* § 9-6-311 (1977); originally 1913 Wyo. Sess. Laws ch. 63, § 10.

11. As will be seen later, there are four reparate categories of minors who are affected by the Prison Transfer Statute, WYO. STAT. § 9-6-311 (1977). In the summer of 1981 there were at least four juveniles confined at the State Penitentiary who were transferred by the Board of Charities and reform pursuant to the statute. Three of them were transferred under conditions somewhat different than Larry's but all of them were transferred without benefit of a due process hearing. *See* Wyoming State Tribune, July 6, 1981, at 1.

12. Attorneys General Opinion No. 1 (Jan. 3, 1974), in OFFICIAL OPINIONS, 1973-1976, at 81; *id.* No. 65 (June 7, 1956), in OFFICIAL OPINIONS, 1953-1956, at 547. Much of the legal analysis in these opinions do repreand is contrary to the analysis in this comment; but the opinions do represent the position of the Board of Charities and Reform in handling these types of cases. Like the original transfer decision, there are no procedures established by the Board for periodic review. This review is made by request of an interested party.

13. WYO. STAT. § 14-6-229(c)(iii) (1978). Juvenile commitments are theoretically rehabilitative in nature and not punitive. Because of this, most commitments are for whatever period it takes to rehabilitate the inmate or, as the statute puts it, "indefinitely." Practically, the two major factors in determining the length the juvenile is held seem to be: (1) the availability of space at the institution; and (2) the inmate's willingness to cooperate with the administration of the Institute.

14. WYO. STAT. § 9-6-311 (1977) makes no provision for setting a sentence once the juvenile is transferred to the Penitentiary. WYO. STAT. § 14-6-231 (a) (1978) gives the Board of Charities and Reform the power to release any juvenile committed to the Industrial Institute. Attorney General Opinion No. 1 (Jan. 3, 1974), *supra* note 12, states that this statute gives the Board the corresponding power to terminate the sentence of any juvenile transferred from the Industrial Institute to the Penitentiary. While this power may be implied by a court faced with interpreting the statute, the power is not found in the language of WYO. STAT. § 14-6-231(a) (1978). Sentencing is a judicial power and may not be delegated to an executive board. WYO. R. CRIM. P. 33; WYO. CONST. art. 5, § 1; Uram v. Roach, 47

tiary until he reaches the age of 21.[15] If Larry's original offense was a misdemeanor, he could serve four years in prison for a crime which if committed by an adult carries a maximum sentence of 90 days in a county jail.[16] Finally, Larry served time in prison without the benefit of a trial or of a judicial determination of the proper sentence.

This article will examine the many aspects of the Institutional Transfer Statute[17] and how it relates to the Juvenile Court Act of 1971.[18] Though the statute is substantially the same as when it was first adopted in 1913, it has come to be used in ways its drafters could not have foreseen. After examining its present uses, the article will

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Wyo. 335, 37 P.2d 793 (1934). While it has been held that the length of a prison term under an indeterminant sentencing statute is not required to be set by the sentencing court, *see In re* Sandel, 64 Cal.2d 412, 412 P.2d 806, 50 Cal. Rptr. 462, (1966), this differs substantially from the questions of statutory authorization raised by WYO. STAT. § 9-6-311 (1977).

15. WYO. STAT. § 14-6-231(c) (1978).
16. *Id.* §§ 6-1-102, -107 (1977).
17. In this comment the term Institutional Transfer Statute refers to WYO. STAT. § 9-6-311 (1977) which allows the Board of Charities and Reform to transfer inmates at the Industrial Institute to the Penitentiary. This statute also provides authority for transfer and return from the Industrial Institute to the State Hospital.

    Two related statutes provide for discretionary transfer from the Penitentiary to the Industrial Institute by the Board of Parole of first offenders under the age of 21, WYO. STAT. § 7-13-102 (1977), and for optional sentencing of first offenders under the age of 21 to the Industrial Institute rather than the Penitentiary when a juvenile or young adult has been convicted of a crime in district court. WYO. STAT. § 7-13-101 (1977).

    These related statutes are part of the overall scheme of inter-institutional transfer. This comment will treat these additional statutes only to the extent it is necessary in order to demonstrate the abuse of the Institutional Transfer Statute. This overall scheme of transfer among institutions arose early in the century and is not integrated into the Juvenile Court Act. There are numerous inconsistencies in the operation of these statutes. The three statutes are administered by three different agencies: the Board of Charities and Reform administers WYO. STAT. § 9-6-311 (1977); the Board of Parole administers WYO. STAT. § 7-13-102 (1977); and the district courts administer WYO. STAT. § 7-13-101 (1977).

    WYO. STAT. § 9-6-311 (1977) grants a power without any defined guidelines; WYO. STAT. § 7-13-102 (1977) is apparently to be applied within the framework of the parole process; and WYO. STAT. § 7-13-101 (1977) is an extension of the general sentencing power of the district courts. No coordinating body or procedure is provided for by the statutes. In the past, this state of affairs has led to successive attempts to transfer and re-transfer inmates who do not fit the respective administrators' criteria for confinement at the several institutions. The administration of each institution deals only with its narrow role in the disposition of the inmate, while the overall course of "rehabilitation" is lost in the shuffle.

    These are problems which require a legislative solution. During most of this comment, every attempt will be made to skirt these Byzantine complications and to focus on the major problems with WYO. STAT. § 9-6-311 (1977).
18. WYO. STAT. §§ 14-6-201 to -243 (1978) [hereinafter cited in text as the Act].

trace the tortured legislative history of the statute and of the Juvenile Court Act. The important United States Supreme Court cases of *Kent v. United States*[19] and *In Re Gault*[20] and their progeny will then be discussed. The article will show that the present uses of the statute are invalid on three counts: (1) the legislative history/statutory interpretation; (2) the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution; and (3) the equal protection requirements of the Fourteenth Amendment. The concluding section will briefly set out recommendations for correcting the unacceptable procedures currently in use.

JUVENILE OFFENDERS AND THE INSTITUTIONAL TRANSFER STATUTE

The practice of transferring juvenile offenders[21] from the Industrial Institute to the general population at the Wyoming State Penitentiary has been justified as being an administrative power necessary for the maintenance of discipline and order at the Industrial Institute. In addition, it has been suggested, in some individual cases, that the transfer is for the best interests of the incorrigible inmate for whom the Institute's rehabilitative programs have been ineffective. There can be little doubt that effective administration of a facility such as the Industrial Institute requires that there be some way to isolate and discipline disruptive inmates.[22] The Industrial Institute houses three categories of juveniles, ranging from those who have committed serious felonies to those whose only offense is

19. *Supra* note 8 [hereinafter cited in text as *Kent*].
20. 387 U.S. 1 (1967) [hereinafter cited in text as *Gault*].
21. In this article the term juvenile offender refers to a delinquent child or a child in need of supervision as defined by WYO. STAT. § 14-6-201 (1978) and not to minors tried and convicted as adults.
22. These justifications offered by juvenile administrators are grounded in the realities of an inflexible two-tiered system. When the rehabilitative institution fails to reform or restrain the juvenile, then the only other alternative is incarceration at the Penitentiary. In order to protect the treatment program at a juvenile reformatory, administrators resort to removal of disruptive inmates. *See* Pirsig, *The Constitutional Validity of Confining Disruptive Delinquents in Penal Institutions*, 54 MINN. L. REV. 101, 102-06 (1969).

truancy, unruliness or chronic disobedience.[23] Removing the serious troublemakers from the institution altogether is, of course, the easiest method of isolating them from the rest of the population.

The three categories of juveniles housed at the Industrial Institute are (1) children in need of supervision;[24] (2) juvenile delinquents;[25] and (3) young adults[26] and juveniles who have been tried and convicted as adults[27] but are serving all or part of their sentence in the Industrial Institute. The provision in the Wyoming Juvenile Court Act which allows some juveniles to be tried as adults is a common one, found in many states' laws.[28] This third category of juveniles may arrive at the juvenile facility by way of two separate procedures. A brief description of the four distinct procedural actions which may result in a juvenile being placed in the Industrial Institute follows.

(1) *Children in need of supervision* are those who have committed one of the "status offenses."[29] These offenses are not violations of the criminal code but rather violations of the moral or parental authority of the child's parents or of

23. The mixture of inmates has been resisted by the administrator of the Industrial Institute and has come under attack as being detrimental to the treatment oriented objectives of the institution. WYOMING JUVENILE JUSTICE SYSTEM, AN EVALUATION, *supra* note 1, at 78, 266.
24. WYO. STAT. § 14-6-201(iv) (1978): "'Child in need of supervision' means any child who is habitually truant, has run away from home or habitually disobeys reasonable and lawful demands of his parents, guardian, custodian or other proper authority and is ungovernable and beyond control."
25. *Id.* § 14-6-201(x), (ix). A delinquent child is a person under the age of majority who has committed "an act punishable as a criminal offense by the laws of this state or any subdivision," but who is tried under the Juvenile Court Act of 1971 and not in the adult district court proceeding. *Id.*
26. WYO. STAT. § 7-13-101 (1977) allows those persons under the age of 21 who have been convicted of their first felony to be sentenced by the sentencing judge to the Industrial Institute. Originally the age limit corresponded with the age of majority but when the age of majority was lowered to 19, *see* WYO. STAT. § 14-1-101 (1978), the sentencing statute kept the old age limit, thereby creating a class of adults ages 19-20 who may be confined at the Industrial Institute but who were not eligible to be otherwise treated as minors.

    WYO. STAT. § 7-13-102 (1977) applies to the same category of young adults and creates the power in the Board of Parole to transfer these 19-20 year old Penitentiary inmates to the Industrial Institute.
27. WYO. STAT. §§ 7-13-101, 7-13-102 (1977), also apply to minors tried as adults in district court proceedings as provided for in WYO. STAT. § 14-6-237 (1978).
28. WYO. STAT. § 14-6-237 (1978); Pirsig, *supra* note 22, at 103.
29. WYO. STAT. § 14-6-201(iv) (1978).

the State. Truancy, running away, disobedience and sexual activity are status offenses.

In the majority of cases, the Juvenile Court Act provides for an "informal but orderly" hearing to determine whether the juvenile is in need of supervision.[30] However, because of an unusual provision of the Wyoming Act, the juvenile may demand a jury trial for the determination of the facts alleged in the petition.[31] The provision is worded in such a way that it apparently covers all actions brought under the Juvenile Court Act including a petition to declare the child neglected or in need of supervision.[32] A jury trial in juvenile cases is not a constitutionally mandated right.[33] The inclusion of this right in the Wyoming Juvenile Court Act means that there are two distinct procedures that might be followed in any juvenile proceeding: an informal hearing by the juvenile court judge or a formal trial by jury. In either case, the juvenile is guaranteed the right to notice of the charges against him, to confront and cross-examine witnesses against him, to introduce evidence, to present witnesses and to speak in his own behalf.[34] These statutory rights are also constitutionally mandated.[35]

Once the determination is made that a juvenile is "in need of supervision," the juvenile court judge has broad powers to determine the custody of the child. The judge may place the child with his parents, with any relative or other interested person, with any public or private agency, or in the Industrial Institute.[36]

A "child in need of supervision" might be placed in the custody of the Industrial Institute either directly by the Juvenile Court Judge following the adjudicatory hearing, or indirectly, without court supervision or approval, by administrative transfer by the Board of Charities and Reform from one of the county homes or other court-appointed

30. *Id.* §§ 14-6-224, 226.
31. *Id.* § 14-6-223.
32. *Compare* WYO. STAT. §§ 14-6-212 (1978) *with id.* § 14-6-223.
33. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
34. WYO. STAT. § 14-6-223 (1978).
35. *In re* Gault, *supra* note 20, at 33, 36, 41, 56, 58.
36. WYO. STAT. § 14-6-229 (1978).

custodians of the child. This administrative action by the Board of Charities and Reform parallels the power the Board has in transferring inmates of the Industrial Institute to the Penitentiary.[37]

(2) *The delinquent child* is a minor who has committed an act that is a crime under Wyoming criminal laws or under the laws of the political subdivisions of the State.[38] If the offense was committed by an adult, it would be punishable either as a misdemeanor or a felony; the juvenile court does not distinguish between the grades of offenses when determining delinquency. The child charged with delinquency has the same procedural rights as a child charged with being in need of supervision, including the right to demand a jury trial. Additionally, the right against self-incrimination is also preserved by statute and by constitutional case law.[39] If the child is found to be delinquent, the court will then determine the custody and course of rehabilitation appropriate for the individual offender. The court has wide discretion to commit the delinquent child to the Industrial Institute or place him with another appropriate public or private agency or with an individual. The Act does not contain any language authorizing placement of a delinquent child in the State Penitentiary.[40]

(3) *The juvenile tried as an adult but sentenced to the Institute.* For the same crime the child may be tried as an adult if it is found at a transfer hearing that "the juvenile proceedings are inappropriate under the circumstances of the case."[41] The decision to try the minor as an adult is made by the juvenile court judge and based on a series of factors set out in an appendix to *Kent.*[42] Once the case has been

37. WYO. STAT. § 14-6-229(e) (1978) provides for the transfer of custody of a child in need of supervision or a delinquent child and gives the custodian broad powers to determine where the child lives, etc. In the institutional context, the Board of Charities and Reform becomes the child's custodian and exercises its power by administrative actions which include transfer of juveniles among the various state institutions. The Board's authority over these institutions and over the state's children in general is found in WYO. STAT. §§ 9-3-706 and 9-3-708 (1977).
38. WYO. STAT. § 14-6-201(ix), (x) (1978).
39. *Id.* § 14-6-223; *In re* Gault, *supra* note 20, at 55.
40. WYO. STAT. § 14-6-229(c), (d) (1978).
41. *Id.* § 14-6-237. The provision for trying older and/or serious offenders as adults is an important practical and theoretical bridge between the child protective philosophy of the juvenile court and the criminal court philoso-

transferred to district court, it is handled under the appropriate statutes as if the child were an adult. If the child is found guilty in the district court, he is subject to the normal range of penalties, including incarceration in the State Penitentiary, probation, and various treatment programs. In addition, the district court judge has the power to sentence a minor convicted of a felony to serve his term at the Industrial Institute, providing he has not previously been convicted of a crime punishable by imprisonment in the State Penitentiary.[43] The district courts often include a provision in the order sentencing this category of offender that provides for transfer from the Institute to the State Penitentiary if the inmate fails to obey the rules of the Institute.

(4) *Juveniles tried as adults, sentenced to the Penitentiary, and transferred to the Institute.* A juvenile who was tried as an adult and sentenced to the Penitentiary may be transferred to the Institute by the Board of Charities and Reform, providing they are under the age of 21.[44] This category of juveniles receives a full adult trial, just as do those in the third group. The transfer to the Industrial Institute is accomplished by the Board of Parole. Transfer to the Institute is an alternative form of parole. The reasons for transferring these juveniles from the prison to the Industrial Institute include considerations for the safety of the juvenile, the opportunities for his rehabilitation and administrative concerns such as the relief of overcrowding and maintenance of order at the Penitentiary.

THE TRANSFER DECISION

In Wyoming the age of majority is 19.[45] The Wyoming statutory scheme provides that a juvenile offender may be

phy which balances the rights of individuals with a search for social justice. As will be seen, the philosophies behind these two systems are in frequent conflict.

42. *See supra* note 8.
43. WYO. STAT. § 7-13-101 (1977).
44. *Id.* § 7-13-102. While this provision seems to parallel WYO. STAT. § 7-13-101 (1977), this statute does not require that the person transferred be a first-time offender, so that the class of transferees covered by the two statutes differs in this respect.
45. WYO. STAT. § 14-1-101 (1978).

held at the Industrial Institute until he reaches the age of 21.[46] Additionally, an adult under the age of 21, or a juvenile tried and convicted as an adult may be sentenced to serve their terms in the Industrial Institute or may be paroled to the custody of the Institute.[47] Thus, the legislative scheme allows for a transition age classification with discretion for disposition in the sentencing and in subsequent administrative disposition of the juvenile and young adult offenders. Yet, nowhere in this scheme is there any central authority or guiding philosophy governing the handling of these inmates.[48] The same statutes direct the Board of Charities and Reform to "make all rules and regulations necessary and proper for the employment, discipline, instruction, education, removal and return of all the convicts in said institute."[49] The institutional decision to recommend transferring an inmate is made by the Superintendent of the Industrial Institute without any hearing or opportunity by the inmate to challenge the action. The only requirement governing the removal and return of the inmates is that the institutional recommendation must be approved by the Board. No written code of disciplinary regulations exists to guide inmates at the Industrial Institute in their behavior.[50] From the inmate's point of view, transfer is an arbitrary punishment that cannot be challenged or foreseen.

There is the additional problem of notice for juvenile offenders from the first two categories. Since juvenile court

46. *Id.* § 14-6-231(c).
47. WYO. STAT. §§ 7-13-101 and 7-13-102 (1977) provide only that the terms at the Institute may not exceed the length of the Penitentiary terms set at the original sentencing. Thus, these people could properly remain at the Institute long after their twenty-first birthday. Such a situation would complicate the running of the Institute and would probably be resisted by the administration. The author knows of no such case.
48. This lack of coordination and guiding philosophy characterizes the Wyoming juvenile system. The major recommendations of the recent study of the state's juvenile justice system were centered around these issues. *See* WYOMING JUVENILE JUSTICE SYSTEM, AN EVALUATION, *supra* note 1, at 254-270.
49. WYO. STAT. § 9-6-311(b) (1977). The wording of this statute only refers to making rules for transferred convicts. It is likely a court would give a broader reading of the directive so that it covers all the inmates of the Industrial Institute. The only other authority for rulemaking is the very general supervisory authority granted the Board of Charities and Reform in WYO. STAT. §§ 9-3-706 and 9-3-707 (1977).
50. Requests for copies of disciplinary rules at the state's juvenile institutions made during August of 1981 were met with the reply that a disciplinary code was being prepared for the Children's Home but that no code existed for the Industrial Institute and none was planned.

judges have no authority to sentence delinquent children or children in need of supervision to the State Penitentiary, these juveniles are not put on notice that the proceedings against them might result in imprisonment unless the judge explains the workings of the Institutional Transfer Statute.[51] Judges frequently take the position that post-committal transfer is a wholly administrative concern beyond the powers the courts are given under the Juvenile Court Act; and, therefore, they make no mention of it.[52]

The differing methods of sentencing juveniles and adults give rise to further uncertainties and inequities. A minor who has been tried as an adult in a district court proceeding receives a sentence specifying a minimum and maximum time that may be served. Whether the time is served in the county jail, the Penitentiary or in the Industrial Institute, the time limit may not be expanded beyond the maximum by the administrators of the institution in which he is held.[53] In the case of the adults and of juveniles convicted as adults, their sentences are set by the convicting judge and, therefore, they are eligible to participate in earning good time credits and to be considered for parole once they are placed at the Penitentiary.

A delinquent child or a child in need of supervision placed in the custody of Industrial Institute normally receives an indeterminant sentence.[54] The length of confinement is determined by the Superintendent of the Industrial Institute depending on the effectiveness of rehabilitation, the juvenile's prospects if released, and the institution's need for space. If the juvenile is transferred to the State Penitentiary, he still maintains his indeterminant sentence.

51. While it may seem incredible that a child in need of supervision might end up in prison, there is at least one reported case of a neglected child who was administratively transferred to an adult reformatory. *See* Wintjen v. State, 433 S.W.2d 257 (Mo. 1968).
52. In this way, the juvenile court judges correctly interpret their own statutory authority but ignore the reality of the juveniles' predicament. Furthermore, they are turning a blind eye to the unconstitutional transfer of inmates. While it would be going beyond the case before them to attack the transfer practices, they participate in concealing the danger of imprisonment from the juvenile.
53. WYO. STAT. §§ 7-13-101 to -102 (1977).
54. *Id.* § 14-6-231 (1978).

The Board of Parole which oversees probation, parole, and good time release has no authority to set a release date for the juvenile offender transferred to the Penitentiary.[55]

The Board of Charities and Reform retains supervision of the juveniles and young adults transferred from the Industrial Institute to the Penitentiary.[56] The juvenile offender held in prison is not only excluded from early release programs but has an indefinite period of time to serve, the only terminal date coming on the inmate's twenty-first birthday.[57] Thus, a minor adjudged delinquent at the age of 16 for a misdemeanor might find himself held briefly in the Industrial Institute and then in the State Penitentiary for up to five years. The maximum sentence for a misdemeanor is 90 days in a county jail and judges frequently give lighter sentences for such a crime depending on the circumstances.[58]

Indeterminant sentences have long been upheld by courts in juvenile cases on the theory that the juvenile is not being punished for a crime but rather is being confined for rehabilitation.[59] This may make some sense when the juvenile is at a special rehabilitation facility, but once the juvenile is transferred to the general population of the State Penitentiary, the distinction loses whatever logic it might have had.[60] In order to justify these inequities, the State maintains that the transfer is not a change in the original judgment of the court but rather only a change in

55. Attorneys General Opinion No. 1 (Jan. 3, 1974), *supra* note 12, appears to be correct in respect to this question. *See also* Uram v. Roach, *supra* note 14.
56. WYO. STAT. § 9-6-311(a) (1977).
57. *Id.* § 14-6-231 (1978).
58. The very mitigating circumstances that might convince a judge to give a lighter sentence are often the indicators that would recommend treatment at a reform institution. For instance, the fact that a juvenile offender had been abused by his parents would indicate leniency if he was being sentenced to serve time in a penal institution but would indicate institutionalization in a juvenile proceeding.
59. Carter v. United States, 306 F.2d 283, 285 (D.C. Cir. 1962) (opinion of then Circuit Court Judge Warren Burger).
60. United States *ex rel.* Sero v. Preiser, 506 F.2d 1115, 1123-25 (2d Cir. 1974); *see also* Annot., 95 A.L.R.3d 568, §§ 3, 4 (1979). Generally, the cases hold that there must be express statutory authority for housing juveniles at an adult facility and that when they are housed there, they must be segregated from the general population. The cases cover a wide range of statutory schemes. Most of the cases are prior to 1966 and must be considered in light of subsequent Untied States Supreme Court decisions.

the administration of the court's judgment.[61] By this circuitous route, the juvenile's confinement at the Penitentiary becomes rehabilitative rather than penal.

It can be seen then that the process of transferring inmates between the Industrial Institute and the State Penitentiary is characterized by an informal decision on the part of the heads of the two institutions who request the Board of Charities and Reform to transfer the person in question. This request is acted on without a hearing by the Board in one of its regular business meetings. Regardless of which category of offender the inmate falls under, he has no representation at any level of the process. But in several important respects those juveniles who were tried and convicted as adults are in a better position once they are transferred to the State Penitentiary.

THE HISTORY OF WYOMING JUVENILE LAW AND W.S. 9-6-311

The juvenile court movement which swept the country at the turn of the century was one of the most immediately successful movements in the age of reform.[62] The impetus for the massive reorganization of the criminal legal system can be found in the changes in the social perspective on childhood. By the nineteenth century, America and the rest of the industrial world had discovered childhood. The development of the concept of childhood had taken over 400 years and corresponded with the radical changes in the society that had been brought about with the industrialization of the economy and the urbanization of the population. Even in the early seventeenth century children were viewed as being part of the overall economy of the society; they were

61. Attorneys General Opinion No. 1 (Jan. 3, 1974), *supra* note 12, at 82.
62. The literature on the political, philosophical and historical aspects of childhood and the development of the juvenile justice system is plentiful. The account given in this article is derived primarily from L. EMPEY, D. ROTHMAN & T. HIRSHI, JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS 3-69, 183-212 (L. Empey ed. 1979) and W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH 1-48 (1972). *See also In re* Gault, *supra note* 20; A. PLATT, THE CHILD SAVERS (1969). For those interested in a more in depth look at these subjects, each of the previously mentioned works is well documented and will provide an opening for endless study.

not segregated from adults and shared the same freedoms, rights and duties as did adults. They also were treated as equals before the law except that a very young child was presumed to be incapable of committing a crime. But although they had a full participatory role in society, children had little, if any, social status. They were dependent either on their families or on masters to whom they were apprenticed. Apprenticeship, and even slavery, were the precursers of the child labor practices which came under attack by the progressives at the turn of the century. Historically, the primary attitude toward children was one of indifference, tempered with exploitation.

The change in the social perception of childhood stretched over 400 years beginning in the Renaissance. On the eve of the twentieth century there was a firmly established idea that childhood was a period of life distinct from adulthood with its own expectations and rules. Childhood was a time of innocence, which meant a time when children must be molded into proper adults or else be lost to indolence, dishonesty, promiscuity and laziness. The ideal child was to be "submissive to authority, hard working, self-controlled, modest and chaste." Parents and schools were now considered responsible for the production of children who measured up to the new standard. It is no surprise that, when the progressive reform movement set out to attack a legal system which still treated most children as if they were adults,[63] it was able to mobilize public opinion and bring about reform in every state within 20 years.

The main instrument of reform was the juvenile court which was to have extraordinary powers to intervene in the life of the child not to punish violations of criminal laws, but to rehabilitate the child and to keep order. This new court was to direct the children to social workers and to

63. At common law a child under the age of seven was presumed to be unable to form the intent to commit a crime, and a youth over the age of 14 was presumed capable of forming criminal intent. No other doctrine existed to isolate children from the full force of the criminal justice system. *In re* Gault, *supra* note 20, at 16. Historians disagree as to the practical results of trying children as adults, but by the turn of the century the popular opinion was strongly against the practice. *See* authorities cited *supra* note 62.

the child protective institutions both public and private which would take the place of the parents who had failed. The juvenile court would operate on equitable principles rather than on the traditional tenets of the criminal law. The jury trial was deemed unnecessary as was the strict adherence to the rules of evidence and procedure. The requirement of public proceedings was deemed to leave a stigma on the child was an ongoing punishment and since the object was rehabilitation and not punishment, the proceedings were made secret. The abridgement of traditional legal rights was so drastic that the noted American legal scholar Roscoe Pound warned: "the powers of the court of the Star Chamber were a trifle in comparison with those of [the American] juvenile courts."[64]

Such a complete revision of legal institutions and rights required the support of an equally broad based legal theory. To supply the theoretic underpinnings of the new system, the progressives dusted off the medieval legal concept of *parens patriae*. *Parens patriae* originally described the right of the feudal landholder to take the children from his feudal tenants if the children failed to produce their required share due to a failure of parental supervision. This feudal economic theory was based on the supposed contract between feudal landholder and peasant. It was transformed by the reformers into a doctrine that conceived of the state as the ever present superparent, overseeing each parent-child relationship, ready to intervene at the early indications of failure. The child was the passive object of the new system and was denied any active participation in the determination of his fate. The State took on the role of the late nineteenth century parent complete with arbitrary and undisputed powers of discipline and control.[65]

64. *In re* Gault, *supra* note 20, at 18 (Quoting Roscoe Pound).
65. The fact that this paternalistic legal theory gained universal acceptance during a period when the rights of adults were being greatly expanded indicates that the new concept of childhood did not encompass a role for the child as a citizen or even as a "person" if that word is used in its constitutional sense. While the aim of the reformers was to stop exploitation, they also denied children any power to defend themselves against abuse by the new system.

The practicalities of American reform politics encouraged the reformers to portray the problems and solutions in simplified stereotypical fashion. Childhood was defined as a single period reaching from birth to the legislated age of majority. The causes of delinquency were said to be environmental and psychological, which in practice meant it was primarily understood to be a problem of the emigrant and working classes. Absolute faith was placed in the social worker, the probation officer and the child protective institutions to cure the defective conditions in the child's environment. The time was ripe for a new system and the reformers presented a daring solution in a forceful and popular manner; it is, therefore, little surprise that the movement gained immediate and nearly universal support. This enthusiastic popular perception of the juvenile court system lasted long after statistics and studies led scholars and workers in the juvenile field to criticize the juvenile system from a wide variety of political and philosophical points of view.[66]

In Wyoming reform was ushered in over a period of years beginning in 1888 when the Territorial Legislature passed a statute which provided that minors under 16 convicted of their first offense could serve their term in a reform institution in another state.[67] In 1909, the State Legislature empowered the Board of Charities and Reform to confine convicted young adults in the state "reformatory."[68]

66. The early universal success of the juvenile justice system is matched today by universal dissatisfaction. One scholar recently reviewed the history of theory on the causes and treatment of juvenile delinquency during the twentieth century. He summarized his view of 80 years of theory and practice by saying that "we are left with a choice of illusions" and by comparing the juvenile justice system with the proud but naked emperor who was "despite his posturing, pretty damned ridiculous." L. EMPEY, D. ROTHMAN & T. HIRSCHI, *supra* note 62, at 212. Another author, writing from a law enforcement perspective, acknowledges the criticisms of the liberals and conservatives, but suggest that the progressive concept of juvenile justice has never been given a fair opportunity to operate according to its principles. P. HAHN, THE JUVENILE OFFENDER AND THE LAW 319 (1978).

67. 1888 Wyo. Sess. Laws ch. 57, at 130.

68. 1909 Wyo. Sess. Laws ch. 90, at 137. This statute allowed first offenders aged 16 to 25 to serve their term at the Industrial Institute. These inmates were young adult convicts who had been given a full criminal trial. No state reformatory was created until 1927 when a separate building at the Industrial Institute was set aside for the housing of "prisoners" transferred from the Penitentiary to the Institute. 1927 Wyo. Sess. Laws ch. 49, at 48; WYO. STAT. §§ 9-6-201 to -202 (1977). Until 1927 the Industrial

In 1911, the Industrial Institute was created, apparently to handle this category of "youthful first offenders."[69] In 1913, the Institutional Transfer Statute was passed to provide a way to return inmates of the Industrial Institute to the Penitentiary if they were unruly or were found not to be first offenders.[70] It wasn't until 1915, however, that the legislature provided for a separate judicial treatment for juveniles and created a category of offenders distinct from adult felons and misdemeanants.[71] By 1945, "delinquent children" were regularly housed at the Industrial Institute along with those young adult offenders for whom the Institute was originally established.[72] Not until 1951 did the

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Institute apparently served as the reformatory but even it was not established until 1911. *See infra* note 69.

69. 1911 Wyo. Sess. Laws ch. 107, at 180. This law seems to limit the inmates of the Industrial Institute to those described in note 68, *supra*, by incorporation of the definition found in WYO. COMP. STAT. § 540 (1910). The Industrial Institute was not actually built until sometime after 1913. *See* 1913 Wyo. Sess. Laws ch. 63, at 53.

70. 1913 Wyo. Sess. Laws ch. 63, §§ 10, 11, at 56; WYO. STAT. § 9-6-311 (1977) (hereinafter referred to in the text as Institutional Transfer Statute).

71. 1915 Wyo. Sess. Laws ch. 99, at 113. The delinquent child defined by this Act included both delinquent children and children in need of supervision in current statutory terminology. The Act allowed for these children to be placed with "child-caring agencies, societies or institutions" but did not include the Industrial Institute in the definition of such agencies. The category of "delinquent children" must be carefully distinguished from "juvenile delinquents" defined in WYO. COMP. STAT. § 3127 (1910). In 1951, "juvenile delinquents" were persons under the age of 16 who had been tried and convicted in a regular adult proceeding. They were subject to the normal range of penalties given adult offenders, including imprisonment at the Penitentiary. Additionally, the trial judge could sentence them to serve their term at a reform school or the Industrial Institute.

72. *See* WYO. COMP. STAT. §§ 58-613, 19-1301 (1945) and accompanying editor's notes. No statute was ever passed that allowed the statutorily defined "delinquent children" to be housed at the Industrial Institute. *See supra* note 71. The compiler of the 1945 statute took the 1911 Act creating the Industrial Institute as authority for changing an earlier law allowing for placement of 14 year-olds in reform schools to provide for placement in the Industrial Institute. *Compare* WYO. COMP. STAT. 1945 § 58-613 *with* WYO. COMP. STAT. 1920 § 3892. A statute passed in 1913 states that "juvenile delinquents" may be housed at the Industrial Institute. 1913 Wyo. Sess. Laws ch. 63, § 8. These "juvenile delinquents" are not the "delinquent children" defined in the 1915 Act, *see supra* note 71; but, rather, they are young offenders tried and convicted in adult proceedings. *See supra* note 68. The category of "delinquent children" did not exist in 1913, while that of juvenile delinquents did. When the class of "delinquent children" was created by the legislature, no provision was made for placing them at the Institute. *See supra* note 71.

The 1945 compiler confused the two separate categories of "delinquent children" and "juvenile delinquents." *See supra* note 71. By doing so, he made imprisonment at the Industrial Institute for "delinquent children" appear to be statutorily authorized when the legislature had never acted to do so. The compiler of the 1920 statutes had not made the change even though the statute relied on by the 1945 compiler had been passed in 1911. The compiler of the 1945 statutes may have been acting to conform the statutes to the then current realities since no legislative enactment sup-

legislature finally create a separate juvenile court system with distinct powers to adjudicate the delinquency and custody of minors.[73] This system survived with some modifications until 1971, when the legislature attempted a complete overhaul of the juvenile court system.[74]

With the Juvenile Court Act of 1971 the Wyoming Legislature was responding not to a broad based political movement but, rather, to the recent United States Supreme Court rulings in *Kent*[75] and *Gault*.[76] The rulings of nine judges in 1965 and 1967 would change the course of juvenile law almost as radically as the popular movement of 65 years before.[77] In *Kent* and *Gault*, the Supreme Court attacked the theory of *parens patriae*. Juvenile proceedings no matter what their purpose frequently result in the substantial loss of freedoms and rights that the juvenile would normally have. To deny the juvenile offender the traditional constitutional protections is to deny the juvenile the due process of the laws.[78] The Court did not reject *parens patriae* altogether but rather said that some rights remained intact while others were subject to reconsideration in light of the nature of the juvenile proceedings.[79] Thus, in these decisions

ports this substantive change in the statutes. If so, this change in practice came sometime after 1934 when the Wyoming Supreme Court declared: "The Wyoming Industrial Institute is a reformatory for the custody and discipline of those persons under the age of 25 years . . . who have not theretofore been convicted of a crime punishable by imprisonment in the state penitentiary." Uram v. Roach, *supra* note 14, at 794. The Juvenile Court Act of 1951 was the first positive legislative enactment which provided for the placement of juveniles at the Industrial Institute. 1951 Wyo. Sess. Laws ch. 124, § 12, at 194.

This gradual shift in the use of the Institute, first as a penal institution and later as a juvenile reformatory, complicated the intrepretation of the statue and case law relating to the housing and transfer of inmates at the Institute.

73. 1951 Wyo. Sess. Laws ch. 125, at 190.
74. WYO. STAT. §§ 14-6-201 to -243 (1978 & Supp. 1981). *See also* Comment, *The Wyoming Juvenile Court Act of 1971*, 8 LAND & WATER L. REV. 237 (1973).
75. Kent v. United States, *supra* note 8.
76. *In re* Gault, *supra* note 20.
77. *Kent* and *Gault* attacked the foundations of the juvenile justice system but did not destroy it. There is disagreement as to whether the change has been primarily the formalities observed by the authorities or whether there is a substantive change in the way cases are handled and decided. The Supreme Court has generally adhered to the course it set in the mid-60's but has occasionally raised doubts in some subsequent decisions. N. SCHULTZ & F. COHEN, PURSUING JUSTICE FOR THE CHILD 22-29 (M. Rosenheim ed. 1976).
78. *In re* Gault, *supra* note 20, at 27-28.
79. *Id.* at 22.

and subsequent ones, the Court affirmed the juvenile's right to counsel, to present evidence and confront witnesses, and to be free from self-incrimination, but did not require the juvenile be given a jury trial in a delinquency proceeding,[80] nor hold that the rules of evidence apply in full force.[81] The result of these decisions was to force basic revisions in the juvenile laws of the 50 states. Juveniles were granted rights that had been denied them since the turn of the century. In fact, during the 65 years of the juvenile court era, the concept of adult due process rights had been expanded while the juveniles' due process rights had all but been abolished.[82]

Wyoming's legislative response[83] to these decisions seems at first glance to be an attempt at a comprehensive treatment of the State juvenile justice system.[84] But the provisions for administrative transfer to and from the Industrial Institute were never a part of the original juvenile code and were not examined or considered as part of the new Juvenile Court Act.[85] The confused language of the 1913 Institutional Transfer Statute and its companion statutes[86] remained intact and stood in strong contrast to the provi-

80. McKeiver v. Pennsylvania, *supra* note 33.

81. This appears to be an open question. The Supreme Court did constitutionalize the juvenile's right to confront and present witnesses in *In re* Gault, *supra* note 20, at 56, and cited with approval a law review casenote which called for adherence to the hearsay rules except to the extent that they are "merely technical." *Id.* at 11 n.7.

82. In describing the workings of the doctrine of *parens patriae*, Justice Fortas wrote: "[The state] does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled." *Id.* at 17. This statement was a paraphrase of an article published in the *American Bar Association Journal* in 1962. *Id.* at 17 n.21.

83. The Juvenile Court Act of 1971, WYO. STAT. §§ 14-6-201 to -234 (1978 & Supp. 1981).

84. The problems of the Juvenile Court Act of 1971 extend beyond those discussed in this comment. Because the Juvenile Courts are not given exclusive jurisdiction over juvenile matters a number of minor courts also exercise jurisdiction over juvenile matters. *See* WYOMING JUVENILE JUSTICE SYSTEM, AN EVALUATION, *supra* note 1, at 52-58, 262.

85. WYO. STAT. § 9-6-311 (1977) is located in Title 9, Administration of Government, under Chapter 6, State Institutions. WYO. STAT. §§ 7-13-101 and 7-13-102 (1977) are found in Title 7, Criminal Procedure, under Chapter 13, Sentence, Imprisonment, Parole and Pardon.

The location of these statutes under these headings is not merely accidental. It indicates that they were designed to serve the purposes of efficient penal administration and were never integrated into the Juvenile Court Act. Consequently, the legislature never addressed the problems that arise when the unrestricted transfer provisions come in conflict with the Juvenile Court Act's underlying philosophy of guaranteeing the juvenile offender his due process protections.

86. *See supra* note 17.

sions of the Juvenile Court Act which attempted to exhaustively enumerate the juvenile court's powers. Furthermore, there was no sense of the growing body of constitutional due process law governing administrative dispositions involving prisoner's liberty interests in the transfer provisions. The statutes which were originally drafted in the early days of the first wave of reform were left untouched in the second and third important revisions of the juvenile law. In practice, the application of the statute amounts to a complete grant of arbitrary power to dispose of the affected juveniles in whatever manner the administrators of the Industrial Institute and the State Penitentiary see fit.

This brings us to a consideration of the Institutional Transfer Statute itself. It was passed by the legislature in 1913 as part of the legislation which established the Industrial Institute.[87] The language of the law published in the Session Laws of Wyoming, 1913, differs only in technical details from the statute now published as W.S. 9-6-311 (1977). It now reads:

> Transfer of inmates to Penitentiary or Wyoming State Hospital; return to institute.
>
> (a) The State Board of Charities and Reform shall have the power to transfer to the State Penitentiary, or in case an inmate shall become mentally incompetent, to the Wyoming State Hospital, any inmate, who subsequent to his committal, shall be shown to have been, at the time of his conviction, an adult, or to have been previously convicted of crime, and may also so transfer any apparently incorrigible prisoner, whose presence in the institute appears to be seriously detrimental to the well-being of the institute; and said State Board of Charities and Reform, by written requisition, may require the return to the institute of any person who may have been so transferred.
>
> (b) The Board of Charities and Reform shall also have power to make all rules and regulations necessary and proper for the employment, discipline,

87. 1913 Wyo. Sess. Laws ch. 63, § 10, at 56.

> instruction, education, removal, and return as aforesaid of all the convicts in said institute.[88]

At first glance, the statute appears to authorize the administrative transfer of any juvenile inmate from the Industrial Institute to the State Penitentiary, but even this interpretation is open to question. The Industrial Transfer Statute is open to attack on at least three grounds: on the question of its correct interpretation; on the failure to conform to the requirements of constitutional due process; and because it denies the equal protection of the law.

A. *Statutory Interpretation*

The problem of legislative intent can be stated reasonably simply but the solution the courts will adopt is difficult to predict since extrinsic evidence of legislative intent is nonexistent, and the statute itself may be read in contradictory ways without doing obvious violence to the texts involved. Briefly stated, the argument is that the 1913 law was passed prior to the introduction of the current concept of juvenile delinquent to the Wyoming legal system. The section of the 1913 law entitled "Who May Be Imprisoned" defined two separate categories of inmates: those who had been "convicted" and who were to be "imprisoned," and "juvenile delinquents" who were to be "confined' at the Industrial Institute.[89] The question is to whom do these categories of inmates refer. Does the statute apply to any person legally housed at the Industrial Institute or was the intent of the legislature to single out a more restricted category of inmates, those who had been convicted of a violation of the criminal code? The problem is greatly confused by the proliferation of contradictory statutes dealing with minors and young offenders. The legislature's distressing habit of passing new statutes but never repealing or revising the outmoded ones makes the usual problems of determining the legislative intent of state statutes even more bewildering.[90]

88. WYO. STAT. § 9-6-311 (1977).
89. 1913 WYO. SESS. LAWS ch. 63, § 8, at 55.
90. *See supra* notes 68, 71-72.

The Institutional Transfer provision of the 1913 law refers variously to "any inmate," "any inmate . . . at the time of his conviction" and "any apparently incorrigible prisoner." Sorting out the various dependent clauses in the statute, a reasoned interpretation would read: (1) any inmate may be transferred to the Wyoming State Hospital if he has become insane (now mentally incompetent); (2) any convicted inmate may be transferred to the State Penitentiary if he is shown to have a previous conviction or is over the age of 25 (now 21); and (3) any incorrigible prisoner may be transferred to the State Penitentiary if he is shown to be seriously detrimental to the well being of the Institute. In 1913, all of the inmates who were statutorily authorized to be confined at the Industrial Institute had received full criminal trials as adults. In fact, the best reading of the statutes indicates that a full adult criminal adjudication existed until the creation of the juvenile court system in 1951.[91] When the juvenile court system was created, juvenile proceedings became equitable and not criminal.[92] Even today with the reassertion of constitutional due process protections in juvenile proceedings, the adjudication in most instances does not amount to a full trial.[93] Equally important, the juvenile being processed through the system

91. *See id.* In 1915 the new category of juvenile delinquent included those under the age of 21 who had been convicted of a felony after receiving a full trial. This category remained unaffected by the passage of the Juvenile Court Act of 1951 which set up the first separate juvenile court system in the state. Following the Juvenile Court Act of 1951, there were two independent and somewhat conflicting statutes defining juvenile delinquents. WYO. COMP. STAT. §§ 14-35, 14-41 (1957). When the Institutional Transfer Statute is considered, there are three separate procedural routes by which the same juvenile could be sentenced directly to the Industrial Institute. In all but one of the procedures, the inmate received a full trial. That procedure was under the Juvenile Court Act of 1951, WYO. COMP. STAT. § 14-41 (1957).

The conflicting definitions finally fell when the new Juvenile Court Act of 1971 established definitions for the delinquent child and the person in need of supervision to take the place of the old single category. WYO. STAT. § 14-6-201 (1978). Under the 1971 Act, a delinquent child was not convicted of a criminal offense and had usually bypassed the opportunity for a full trial that was an integral part of the determination of delinquency in 1913.

92. 1951 Wyo. Sess. Laws ch. 125, § 11(c), at 194; WYO. STAT. § 14-6-238 (1978).

93. WYO. STAT. § 14-6-224 (1978) provides for an informal hearing unless a trial is demanded within ten days after the accused is advised of his right to trial pursuant to WYO. STAT. § 14-6-223(c) (1978). The uninformed election of the informal hearing cannot serve as a valid waiver of the juvenile's due process rights in the same way that a plea of guilty by an informed and competent person will.

is led to believe that this is a less serious proceeding than an adult trial. The juvenile delinquent under the current law is in a significantly different position than the delinquent juvenile described in the 1913 law. Indeed, the "delinquent juvenile" of 1913 is almost identical to the minor who is tried as an adult and sentenced to the Industrial Institute under the current statutory scheme. The present day juvenile delinquent resembles more closely the "delinquent child" in the statutory language of 1909, though the comparison can be distinguished on several points.

When the legislature adopted the Juvenile Court Act of 1971, it intended to substitute a single coherent statutory scheme for the incomplete patchwork that characterized juvenile law in Wyoming up to that time.[94] The extensive enumeration of the powers of the juvenile courts did not include the power to commit the juvenile delinquent to the Penitentiary.[95] Under the Act delinquents may be held in the "county jail or another restrictive facility" for only a period of no more than ten days providing they are strictly segregated from adult prisoners.[96] The statutes state that the juvenile proceeding is equitable and not criminal and that the juvenile incurs no civil disability by operation of the Act.[97] Taken together, these provisions clearly indicate that delinquent juveniles were to be treated as a noncriminal class for whom confinement in the Penitentiary would be contrary to the intent of the Juvenile Court Act and beyond the powers vested in the juvenile courts.

When the Institutional Transfer Statute was passed, delinquent juveniles were convicted of crimes in the regular course of adult criminal proceedings. The legislature was providing a mechanism for the administrative imposition of a sentence that the judiciary had been legislatively authorized to levy.[98] In many cases, the inmate had initially been sentenced to the Penitentiary and then administratively

94. *See supra* note 1.
95. WYO. STAT. § 14-6-229 (1978).
96. *Id.* § 14-6-229(c)(ii).
97. *Id.* § 14-6-238.
98. Uram v. Roach, *supra* note 14.

transferred to "the reformatory."[99] In such a case, the administrative power to transfer the inmate back to the Penitentiary is the logical and proper corollary to the original transfer power. In both types of cases the administrative power is co-extensive with the judicial sentencing authority.

The Wyoming Supreme Court upheld this use of the statute in the 1934 case of *Uram v. Roach*.[100] The facts of the case illustrate the proper application of the statute. But while the holding in the case was substantially correct, the opinion contains misleading dicta which has been relied on by corrections administrators to justify improper transfers.

In *Uram*, a man who called himself John Spaulding was arrested, tried and convicted of burglary. When asked by the judge, Spaulding said he was 18 years old and that this was his first felony conviction. In light of this, the judge sentenced the man to an indeterminant sentence in the Wyoming Industrial Institute. Since the trip from Lincoln County Courthouse in Kemmerer to Worland was a two-day affair in 1928, he was sent to the Institute in Worland by way of the Penitentiary in Rawlins. At the Penitentiary John Spaulding was recognized to be Mike Uram, a former prisoner at the Penitentiary and a two-time felon. Without a hearing, the Board of Charities and Reform ordered Uram to serve his sentence at the State Penitentiary. Furthermore, the Board fixed a minimum and maximum sentence.

Under the committing statute, Uram could not properly be sentenced to the Industrial Institute.[101] This is one of the three express instances covered under the Institutional Transfer Statute, allowing for transfer in the case of improper sentencing.[102] Unlike the case of Larry B., Uram was tried and convicted under the criminal code and the judge was empowered to sentence him to prison.[103] If Uram

99. WYO. COMP. STAT. § 645 (1910) (current version at WYO. STAT. § 7-13-102 (1977)).
100. *Supra* note 14.
101. WYO. REV. STAT. § 80-301 (1931) (current version at WYO. STAT. § 7-13-101 (1977)).
102. *See supra* text accompanying notes 90-93.
103. Uram v. Roach, *supra* note 14, at 793-94.

was a first offender between the ages of 16 and 25, then the judge could sentence him to the Industrial Institute. By statute this last act was discretionary; it was and is within the power of the judge to sentence an 18-year-old first offender to the Penitentiary.[104]

In reviewing the case, the Wyoming Supreme Court upheld the administrative change of sentence on the theory that the published statutes of the state were incorporated into the sentence given at trial.[105] The sentence to the Industrial Institute was thereby made conditional on the existence of the statutory preconditions. The court held that the administrative determination of those facts was not a judicial act but properly within the scope of the administrative power delegated to the executive by the legislature.[106] While the last point could be quibbled with, this far into the court's opinion the theory is sound and would hold up under contemporary analysis. Unfortunately, the court went on to analyze the need for a due process hearing in a manner that can best be described as dated and misconceived. The court admitted that due process notice and hearing were sometimes required even in administrative hearings but denied that those procedures were required in Uram's case.[107]

The court offered two justifications for denying the due process hearing to Uram. First the court said the due process protections did not attach when transferring convicts from "one penal or reformatory institution to another."[108] The important question under federal constitutional analysis is whether the transferor and transferee institutions can be considered functionally similar or whether they serve distinct purposes. If the institutions are functionally distinct, then the inmate has a protectable liberty interest in the question of transfer and due process protections are mandated.[109] The court was substantially correct in saying that

104. *Id.* at 794.
105. *Id.* at 795.
106. *Id.* at 796.
107. *Id.*
108. *Id.*
109. The concept of functionally distinct institutions was first announced in Baxstrom v. Herold, 383 U.S. 107, 113-14 (1966). In *Baxstrom*, the United States Supreme Court used equal protection analysis to invalidate a New York State procedure for the administrative transfer of prisoners from

transfer from one adult penal institution to another did not give rise to a fully protectable liberty interest. The problem turns on the characterization of the Industrial Institute as an adult penal institution rather than as a juvenile reform institution. The court did not discuss this problem directly but indicated that institutions were sufficiently similar to allow for unfettered administrative transfer. Rather than analyze this issue in depth, the court confused the question of whether a substantial liberty interest against transfer existed when an offender was properly held in the Industrial

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the penitentiary to the mental hospital. The Court said New York must provide the same procedural protections to the imprisoned convict that were provided at the regular civil commitment proceeding. The court rejected the argument that the person serving a prison sentence was not entitled to the full range of civil rights because of his conviction and sentence to confinement at a penal institution. The Court held that the liberty interest at stake was different from the one that had been adjudicated at the original trial, and therefore the convict was entitled to a separate determination of his mental condition. Recently, lower courts have applied the doctrine to distinguish between juvenile reformatories and prisons. *See* Pirsig, *supra* note 22, at 136-39, and cases cited therein. When this doctrine is applied to the question of transferring juveniles to adult penal institutions, the standard is whether the juvenile transferred to prison has received substantially the same procedural rights and protections as have the adults who were convicted and sentenced directly to the Penitentiary.

The doctrine is closely related to the more traditional due process analysis which looks to see if the juvenile will incur a substantial loss of liberty or an additional stigma by the transfer. Once it is determined that there is a liberty interest at stake, then the juvenile is entitled to due process proceedings sufficient to protect the liberty interest. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970). While in the case of juvenile offenders transferred to penal institutions, both equal protection analysis and due process analysis mandate certain procedures be given the juvenile, there is a difference in what procedures are required by each analysis. Equal protection requires that the same procedural rights be given all people faced with the loss of the same liberty interest. Even if those procedures are granted to only a limited class of people by statute, court rule or common law, they must be given to every person in a similar situation. Due process protections are mandated by the Constitution according to the importance of the liberty interest involved. Goldberg v. Kelly, *supra*. Due process proceedings are not derived from statutes or nonconstitutionally based court rulings.

In the area of the transfer of juvenile offenders to adult penal institutions, the differences between the intended functions of the adult prison and the juvenile reformatory will trigger both equal protection analysis and due process analysis. The juvenile justice system is a rehabilitative system in which the punitive and stigmatizing aspects are minimized. The Industrial Institute is clearly a juvenile institution in 1982, regardless of its original role. *See supra* note 72. Placement in the Penitentiary involves a significant loss of liberty and an increased stigmatization. While many authorities have been critical of the apparent failure of juvenile institutions to reform delinquents and of the excessively penal nature of these institutions, *see In re* Gault, *supra* note 20, at 18-27, no court can equate a juvenile institution to an adult penal institution without granting full criminal trial rights to any juvenile. To deny that there is a functional difference between the Industrial Institute and the State Penitentiary invalidates the basic assumptions of the juvenile system. *See* Carter v. United States, *supra* note 59 and accompanying text.

Institute with the second issue, namely, that Uram never made a valid claim to that liberty interest. This second line of reasoning is the correct basis for the decision in *Uram* regardless of the result of the analysis of the liberty interest at stake in the transfer.

In making his appeal, Mike Uram admitted that he was previously convicted of a felony and that he had deceived the trial judge into the improper sentence.[110] He claimed that the transfer amounted to an administrative change of sentence which was an improper exercise of judicial power and that he could only be resentenced by the courts.[111] While the court did strike down the administrative imposition of a minimum and maximum sentence on this very theory, it upheld the transfer as being within the "conditional sentence" handed down by the judge and supplemented by the statutory transfer provision.[112] The court correctly noted that Uram was not a member of the statutorily created class of first offenders who were eligible to serve their sentence at the Industrial Institute. Uram made only a technical claim that he received an improper sentence and did not challenge his conviction or the substantive propriety of the sentence. Since he did not deny these facts, he had not placed a liberty interest in question and the Board's application of the transfer power required no judicial determination. The court noted that if Uram had denied the conditional facts that required transfer, then a due process hearing would be required.[113]

The decision was correctly founded on this reasoning and the court need never have reached the question of whether transfer from the Industrial Institute to the State Penitentiary was merely a transfer from one penal institution to another. Since the court never examined this issue, the brief statement to that effect found in *Uram* should properly be considered as dicta. Thus, the result in *Uram* can be defended under current constitutional analysis if

110. Uram v. Roach, *supra* note 14, at 794.
111. *Id.* at 795.
112. *Id.*
113. *Id.* at 796.

correctly read. Unfortunately, the current policy of the Board of Charities and Reform and the superintendent of the Industrial Institute is to deny all due process protections to prospective transferees, citing the dicta in *Uram* as supporting their actions. This reliance is without foundation in the current case law.[114]

Uram v. Roach correctly indicates that the statute will remain valid in at least three types of cases that are still likely to arise. The first is in the *Uram* fact situation where the person is convicted in a district court proceeding but is sentenced to the Industrial Institute on the basis of false information, making him ineligible in law for the less restrictive sentence. As the court noted in *Uram*, if the conditional facts are disputed by the prisoner, he must be granted a due process hearing for their determination.[115]

The second type of case includes those juveniles who were transferred from the Penitentiary to the Institute by the Board of Charities and Reform. The administrative transfer power in these cases should properly be a two-way street. Since the juveniles were originally sentenced to the Penitentiary, no challenge can be made that their sentence has been improperly altered by administrative action. This power is analogous to parole and parole revocation powers which are regularly entrusted to administrative agencies.[116] In order to transfer this class of juveniles, a due process hearing must be granted by the Board.[117]

114. In discussing due process and equal protection rights, the Wyoming court cited only WYO. CONST. art. 1, §§ 3 & 34, and the discussion of federal cases is kept to a minimum. Uram v. Roach, *supra* note 14, at 795-96.

115. Uram v. Roach, *supra* note 14, at 795-96.

116. WYO. STAT. §§ 7-13-401 to -422 (1977); *see also* Morrisey v. Brewer, 408 U.S. 471, 477 (1972).

117. Morrisey v. Brewer, *supra* note 116, at 487-88. The procedure described is initiated by the Board of Parole under WYO. STAT. § 7-13-102 (1977). There can be no doubt that this is a type of parole even if the revocation process is handled by the Board of Charities and Reform. One alternative is to allow the Board of Parole to maintain jurisdiction over this class of prisoners and to handle them through the normal parole revocation process. The power to transfer the inmate back to the Penitentiary could be found in WYO. STAT. § 7-13-403 (1977). In either case, the hearing process set out in Morrisey v. Brewer, *supra* note 116, is constitutionally mandated for all parole revocation hearings.

In Morrisey v. Brewer, *supra* note 116, at 489, the Court set out the minimum requirements of a due process hearing in the parole revocation situation, as follows:

The third category of inmate which may be properly transferred under the Institutional Transfer Statute involves the juvenile convicted as an adult in district court but sentenced initially to the Industrial Institute.[118] The theory relied on in *Uram* that the sentence is conditioned on the provisions of the Institutional Transfer Statute will support the transfer of this class of inmate, as well.[119] In this case, the conditional facts that determine the appropriate sentence occur after the sentencing rather than being in existence at the time of the sentence. This power is analogous to probation revocation which is recognized as an appropriate power for administrative disposition. Once again, this class of transferees is entitled to a due process hearing.[120] There is no problem of notice in this type of case since the juvenile is subject to the full range of statutory penalties when he is tried as an adult.

What the statute cannot properly be used for is the transfer of inmates who were originally sentenced to the Industrial Institute following a juvenile court proceeding. In these cases, there is no statutory authorization for commitment at the Penitentiary under the Juvenile Court Act.[121]

They include (a) written notice of the claimed violation of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifcially finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

In Gagnon v. Scarpelli, 411 U.S. 778 (1973), a probation revocation case, the Court said the right to counsel was dependent on whether the probationer claims that there is a question of fact at issue concerning the alleged violation or whether there are complicated mitigating circumstances which require presentation by an expert. This standard is now used in parole revocation cases. In view of the juvenile's presumed legal handicap (his minority legal status) and practical maturity, he should be provided with counsel as a matter of course in all these hearings.

118. WYO. STAT. § 7-13-101 (1977).

119. Uram v. Roach, *supra* note 14.

120. *See* Gagnon v. Scarpelli, *supra* note 117; Mason v. State, 631 P.2d 1051 (Wyo. 1981).

WYO. STAT. § 7-13-409 (1977) provides for any probation revocation hearing to be conducted by an administrative hearing officer. Weisser v. State, 600 P.2d 1320, 1324 (Wyo. 1979).

121. WYO. STAT. § 14-6-229(c), (d) (1978).

The Juvenile Court sentence cannot be characterized as conditional since there are no circumstances under which the juvenile court could sentence the juvenile delinquent to the Penitentiary. When the Board of Charities and Reform transfers the juvenile delinquent to the Penitentiary, it is not administering the sentence of the juvenile court; it is imposing a new sentence. This, unlike *Uram*, is an improper delegation of a judicial power to the executive branch.[122] The fact that this is currently done without a due process hearing highlights the problems with the procedure. But even given a proper hearing, there is no statutory authorization for the transfer.

A close reading of the legislative history makes it clear that the legislature only authorized the transfer of a class of offender who had received a full trial and had been found guilty of a criminal violation. The 1971 Juvenile Court Act provides for noncriminal proceedings that may be held in an informal manner, without notice to the accused juvenile that the proceedings may indirectly result in imprisonment at an adult penal institution. The use of the Institutional Transfer Statute to place the juvenile offenders in the general population of the Penitentiary was never authorized by the Legislature and is in clear conflict with the disposition provisions of the Juvenile Court Act of 1971.

B. *Due Process*

In deciding *In Re Gault*, the United States Supreme Court repeated Justice Frankfurter's famous phrase, "the history of individual liberty is largely the history of procedure."[123] This is the key to the attack on the juvenile justice system in the United States. The juvenile system was conceived at the outset, as being informal, personal, and paternalistic. Juveniles, too, are persons for the purposes of the constitutional protections of the Bill of Rights and the

122. WYO. CONST. art. 5, § 1 vests the judicial power of the state in "a supreme court, district courts, and such subordinate courts as the legislature may . . . establish. . . ."

123. *Supra* note 20, at 21 (Quoting Malinski v. New York, 324 U.S. 401, 414 (1945) (separate opinion)).

Fourteenth Amendment.[124] Thus, the juvenile, like anyone else, may not be deprived of life, liberty, or property without due process of the law.[125] Central to the holding in *Gault* was the declaration that a juvenile proceeding that resulted in the confinement of the juvenile involved a protected liberty interest. The restriction of the juvenile's freedom could not be wiped away in an arbitrary proceeding simply because the court's intentions were benevolent.[126]

The amount of process due in any case is dependent on the nature of the liberty interest and the extent of the restriction.[127] The Supreme Court viewed the incarceration of a juvenile in a reform school as a serious enough infringement of a protected liberty interest to grant the juveniles right to notice, the right to be represented by counsel,[128] the right to a hearing, the right to present, confront, and cross-examine witnesses and the right to be free from self-incrimination.[129] As extensive as these rights are, the Court did not mandate a strict adherence to the rules of evidence or formal trial procedures, nor did it require the right to a jury trial[130] or preliminary hearing to determine probable cause.[131] These procedural rights are all part of the guarantees accorded any adult accused of a crime where there is a possibility of imprisonment for over six months.[132] While the right to a jury trial and to an appeal on the record were provided statutorily in the Wyoming Juvenile Court Act,[133] the protections can be hollow ones.

124. Miller v. Gillis, 315 F. Supp. 94, 99 (N.D. Ill. 1969). The point is not frequently argued. The most famous United States Supreme Court opinion dealing with the definition of person under the Constitution is *Roe v. Wade*, where it was proclaimed that "'person', as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. 113, 158 (1973). The clear but unstated assumption is that a child born, even momentarily, is a person for purposes of the Fourteenth Amendment.
125. *In re* Gault, *supra* note 20, at 27-28.
126. *Id.* at 18.
127. Morrissey v. Brewer, *supra* note 116, at 481.
128. Gagnon v. Scarpelli, *supra* note 117.
129. *In re* Gault, *supra* note 20, at 33, 36, 41, 56, 58.
130. McKeiver v. Pennsylvania, *supra* note 33.
131. *In re* Gault, *supra* note 20, only required the *Kent* transfer hearing prior to the adjudicatory hearing. *See also* Kent v. United States, *supra* note 8. In Wyoming, the *Kent* transfer hearing serves as the only pre-adjudicatory hearing, if any such hearing is held at all. WYO. STAT. §§ 14-6-226, -237 (1978).
132. *In re* Gault, *supra* note 20, at 29.
133. WYO. STAT. §§ 14-6-223(c), -238 (1978).

The lack of effective notice inherent in the statutory transfer provision is at the heart of the due process challenge. Notice is the first of the essential elements comprising the modern doctrine of due process. Without notice sufficient to apprise the accused of the charges against him and the consequences involved, a person is unable to intelligently avail himself of the procedural rights guaranteed him under the doctrine.[134]

Under the present scheme a juvenile accused of delinquency is given notice of the crime he is charged with, but he will be unaware of the potential penalty attached to a determination of delinquency. The court usually does not inform the juvenile of the potential for transfer since it has no power to sentence or transfer the juvenile to the Penitentiary.[135] A careful reading of the Juvenile Court Act gives no hint of the transfer process. The common belief is that a juvenile delinquent cannot be imprisoned.[136]

In the juvenile process this lack of notice can be critical at a very early stage of the proceedings. Once a delinquency petition is filed, the accused has only ten days to demand a jury trial.[137] The transfer hearing is an optional event.[138] Without a preliminary hearing, the juvenile may not be able to evaluate the seriousness of his predicament and the need for a jury trial. Most likely, he remains unaware of the possibility of the proceeding resulting indirectly in a prison term. If the right to the jury trial is lost by failing to demand it, the delinquency hearing will be "informal," meaning the rules of evidence will not apply in full force.[139] A juvenile convinced he is faced only with the prospect of a six-month stay at the Industrial Institute or probation might well choose the informal procedure, since a full-blown trial

134. In the area of juvenile adjudications when both the juvenile's liberty and his parents' custody rights are at stake, notice must be given to both the child and the parents. *In re* Gault, *supra* note 20, at 31-34.
135. *See* WYO. STAT. § 14-6-229 (1978).
136. This statement is made after many months of discussions between the author and citizens of all stripes, including a large number of lawyers and other professionals who practice outside the field of juvenile corrections.
137. WYO. STAT. § 14-6-223(c) (1978).
138. *See supra* note 131.
139. WYO. STAT. § 14-6-224(a) (1978).

involves considerable expense and effort. Additionally, a demand for a jury trial might well antagonize the judge who has extremely broad discretion in sentencing the juvenile.[140] The same juvenile faced with the prospect of prison might well feel the full trial was a better procedure through which he may seek to protect his interest. The choice is made more problematic since it must be made within ten days after filing the petition, frequently before the juvenile has secured the advice of counsel. Taken together, the lack of notice, the possibility of administrative transfer, and the abbreviated time during which the accused may demand a trial and formal hearing procedures make the statutory protections granting a jury trial and subsequent right to appeal little more than window dressing for the discredited practices that existed in the juvenile courts before *Gault*.

A second due process challenge focuses on the transfer stage rather than the delinquency determination. While the earlier analysis only applies to those people who are processed through the juvenile courts, this challenge applies equally to juveniles found delinquent, and juveniles convicted as adults and either sentenced or subsequently transferred to the Industrial Institute. The liberty interest at issue in the transfer stage can best be understood by analogy to cases involving parole, probation, and good time release.[141] These are all statutorily created rights, which are not mandated by the Constitution. A state could choose to allow fixed sentences for a proper criminal conviction. Once a release program is legislatively authorized, however, the convicted person may not be denied due process in the administration of these programs.[142] Thus, it is unimportant what procedures led to the placement of the juvenile at the Industrial Institute; the very placement at a reform institution is a protected liberty interest, a statutorily created right.

The existence of this liberty interest triggers a balancing test which weighs the seriousness of the individual's potential loss against the State's interest in summary pro-

140. *Id.* § 14-6-229.
141. *See supra* note 117.
142. Morrisey v. Brewer, *supra* note 116, at 480-84.

ceedings.[143] Generally, the State may not use summary proceedings for its convenience or to save money; rather, an emergency situation must exist to justify summary proceedings. If immediate action is required to meet an emergency, due process may not be denied except to the extent necessary to meet the emergency. A hearing may be delayed in some cases, but it may not be denied permanently.[144] In practice, transfer from the Industrial Institute has to be approved by the Board of Charities and Reform which meets only monthly.[145] There is adequate time between monthly meetings to hold a proper hearing. *Parens patriae* is not a justification for summary proceedings, and no other serious governmental interest has been suggested for withholding a due process hearing from transferees.

The amount of process due at the transfer stage depends on the nature of the liberty interest involved. If the transferee has received a full trial in district court, the transfer hearing need not amount to a full trial; but, at the least, it must include notice, a hearing before a neutral hearing body, opportunity to be heard and present witnesses, opportunity to confront witnesses, right to representation by counsel, and a written explanation of the reasons for transfer.[146] The juvenile offender who has only had an informal hearing in a juvenile court may not be transferred to the Penitentiary by an administrative board since he has not yet been granted his full due process protections at the initial stage of commitment. It is doubtful that full trial proceedings can be constitutionally conducted by an administrative board in such a case.[147]

C. *The Equal Protection Problems*

Separate from the due process analysis, the Equal Protection Clause of the Fourteenth Amendment requires

143. *Id.*
144. The Supreme Court has held that no such state interest exists in the parole and probation situations. *Id.*; *see also* Gagnon v. Scarpelli, *supra* note 117.
145. WYO. STAT. § 9-3-702 (1977).
146. *See supra* note 117.
147. *See* WYO. CONST. art. 5, § 1; Uram v. Roach, *supra* note 14. For the juvenile offender the right to a sentence by a district court judge is an integral part of his due process rights. *See* Memphis v. Rhay, 389 U.S. 128 (1967). The indeterminate term given at juvenile court proceedings does

that each person who is imprisoned must receive the same procedural protections, whether or not they are constitutionally or statutorily required.[148] Thus, even if the present use of the transfer statute was upheld as being legislatively authorized and as meeting due process requirements, the statute would be invalid if it resulted in one class of offenders which received fewer procedural protections. The juvenile who is given an informal juvenile court delinquency hearing which results in his placement at the Industrial Institute, and who is subsequently transferred by summary administrative action, has not received the same procedural protections as one who has been tried and sentenced in a district court proceeding.[149]

A second violation of the equal protection clause occurs because the juvenile offender is denied a fixed sentence determined by a judge in an appropriate due process setting.[150] The transferred juvenile keeps the original indeterminate sentence that he received at the juvenile hearing.[151] If a juvenile is placed in the Industrial Institute for a status offense or a delinquent act amounting to a misdemeanor or a felony carrying a penalty of only a few years,[152] the juvenile faces a term at the Penitentiary that would exceed the punishment authorized for a convicted adult. Even if the delinquent act charged is a serious felony, the juvenile has not had a proper sentencing before a judicial officer to determine the mitigating and aggravating circumstances and the appropriate sentence.[153] The indeterminate sentence is valid only as the *quid pro quo* for rehabilitative treatment. Once the juvenile is transferred to the adult penal institution, he has the same right to a judicially determined minimum and maximum sentence as does the adult convict.[154]

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not meet the statutory sentencing requirements found in WYO. STAT. §§ 7-13-201 to -205 (1977). Sentencing is a judicial function under the Wyoming Constitution. Uram v. Roach, *supra* note 14.

148. *See* Pirsig, *supra* note 22.
149. *See supra* note 109; Shone v. Maine, 406 F.2d 844 (1st Cir. 1969).
150. *See supra* note 147; United States *ex rel.* Sero v. Preiser, *supra* note 60.
151. *See supra* notes 12-14.
152. *See supra* notes 29 & 36 and accompanying text, for explanation of the classifications of juvenile offenders.
153. *See supra* note 147.
154. United States *ex rel.* Sero v. Preiser, *supra* note 60, at 1123-24.

At this point, it may be useful to make a comparison of the results under the due process analysis and the equal protection analysis. Due process protections arise because a significant liberty interest is threatened. The extent of this threatened loss is the factor that determines what kind of due process procedures are necessary. The greater the difference between the liberty interests associated with confinement at the two institutions, the greater the procedural protections must be. All the procedures required by the due process analysis are constitutionally mandated. These protections attach to those tried and sentenced in district court as well as to delinquent juveniles, regardless of the nature of the proceedings that placed them at the Industrial Institute.

Under the equal protection analysis, the State must provide substantially the same protections to all. Once it is determined that the transfer involves a change in the functional conditions of the institutional confinement, then the person is entitled to the complete range of rights and protections given to others faced with a similar restriction of liberty. In the case of transfer from the Industrial Institute to the Penitentiary, a juvenile would be entitled to the equivalent of a full adult trial. Procedural protections granted by the Constitution, state laws or even the custom of the jurisdiction are all required to be provided equally to all people threatened with the loss of the same liberty interest. However, a person convicted and sentenced in a district court proceeding will have received the full range of trial rights required by the Constitution and by statute. This trial satisfies the equal protection requirements whether the convicted person is sentenced directly to the Industrial Institute or is sentenced to the Penitentiary and is administratively transferred to the Industrial Institute later. For these transferees, the only challenge that applies is based on the due process analysis. The hearing required in their case may be less stringent in its protections. The format for this type of hearing may be taken from the decisions in the probation, parole and good time release cases. The Wyoming Supreme Court has recognized this line of cases and may

be expected to follow them closely if called on to set standards for transfer of this class of transferees.[155]

CONCLUSION

The three-part analysis of the Institutional Transfer Statute leaves no doubt that the transfer of juvenile offenders from the Industrial Institute to the State Penitentiary is statutorily unauthorized and violates the due process and equal protection clauses of the Fourteenth Amendment.[156] The various challenges to the validity of the statute affects every type of potential transferee. The statute does not authorize the transfer of juveniles judged delinquent or in need of supervision in spite of claims to the contrary by current State officials. Even if it did, the statute is invalid as to these juveniles since it does not provide the procedural protections required by the Constitution. The State Board of Charities and Reform has adhered only to the minimum requirements of the statute and has done nothing to correct the defects of the statute. Those persons convicted in an adult trial in district court and placed in the Industrial Institute are also entitled to an appropriate due process hearing prior to their transfer. While the hearing need not reach the formality of a full trial, it must include the essential elements of constitutional due process.

Perhaps the most disturbing aspect of the administration of discipline at the Industrial Institute is the complete lack of standards at all levels of administration. The stan-

155. Mason v. State, *supra* note 120.

156. In Shone v. Maine, *supra* note 149, a federal district court invalidated a transfer statute similar to the one in Wyoming using a combination of all three analyses—legislative, due process, and equal protection. The federal court rejected the contention that the transfer provision was incorporated into the sentence of the original court. Similarly, the court rejected the assertion that transfer was essential to maintain order, and therefore the power to transfer represented a significant state interest that should give rise to an implied power to transfer. This interpretation was only available if the state had provided for notice and a hearing followed by state review of the decision. The court also rejected the claim that confinement in the State Penitentiary was not for the purposes of punishing the juvenile, but rather it was the only "treatment" available since the other rehabilitation prgorams had failed. The court affirmed that the two institutions were distinct and that therefore the juveniles had a right to a due process hearing. The last portion of the opinion confuses the due process analysis and the equal protection analysis at a point where they almost seem to merge. The decision reached is similar under either analysis.

dardless statute is used to justify summary action by the Board of Charities and Reform. The Board itself has no procedure for addressing transfer and disciplinary issues beyond the official approval made by motion, parlimentary discussion and summary vote. At the Industrial Institute, there is no formal institutional procedure for determining when transfer should be sought or discipline administered, and no code of disciplinary regulation exists to guide the resident juveniles in their behavior.[157] Taken together, this scheme confronts the juveniles caught in the system with a formless, arbitrary bureaucracy that can punish without warning and without heed to their protest. In the present system there is no particular standard to measure behavior which will result in punitive transfer or other discipline.

In this setting, the United States Supreme Court's warning in *Gault* should be kept in mind: the juvenile cannot be expected to respect an authority which appears secretive and arbitrary no matter how well intentioned its motivation. The delinquent juvenile will be better served by regular and orderly proceedings where the course of his rehabilitation is openly and fairly considered.[158] Finally, the juvenile, like all people, is entitled to fundamental protections of the Constitution.

DUANE M. KLINE, III

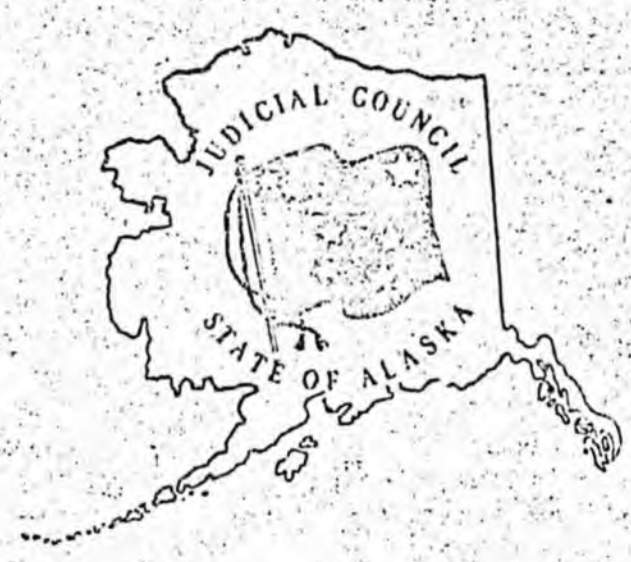
157. *See supra* note 50.
158. *In re* Gault, *supra* note 20, at 26-27.

ALASKA JUDICIAL COUNCIL

File: Juvenile Justice

THIRD REPORT

1962-1963



SECRETARY TO THE JUDICIAL COUNCIL
941 Fourth Avenue Anchorage, Alaska

court procedure by legislative act without the constitutionally required two-thirds vote to effect such purpose.

B. CURRENT PROGRAMS.

1. Juvenile Jurisdiction. The principal current project in the program of the judicial council concerns transfer of juvenile jurisdiction from the magistrate court to the superior court level. This problem was initially considered by the judicial council at its meeting at Fairbanks November 15, 1962. The council at that time rejected action recommending transfer in favor of a proposal for careful study of the problem, and requested an appropriation of $1,000 toward accomplishing this study. At the opening of the first session of the third legislature in January 1963, House Bill No. 11 was introduced on this subject at the request of the legislative council, and it proposed transfer of jurisdiction over juveniles to the superior court. The recommendation of the judicial council for a careful study of the proposal was considered by the legislature, with the result that House Bill No. 11 was held in committee for action in the second session of the third legislature in 1964, and the sum of $1,500 was provided to the judicial council to make the suggested study.

To accomplish this study the council engaged the services of the National Council on Crime and Delinquency, a principal national research agency engaged in this field. Because of the importance of the work, the NCCD agreed to undertake the

effort at a scope requiring substantial use of its own resources beyond the funds available to the judicial council.

The plan for study called for a professional consultant from the western regional office of the NCCD to travel to each principal community and to representative smaller towns in Alaska to gather basic information necessary for making recommendations on the problem.

To carry out the plan the close cooperation of the Department of Health and Welfare, including particularly the Director of the Youth and Adult Division, was obtained, and substantial advance arrangements for the consultant's visit were made. All state and local government officials associated in problems of handling juvenile delinquency cases, as well as citizens groups known to be interested in these matters, were informed of the plan for the study. A schedule was fixed for public hearings in the locations to be visited.

During the first two weeks in July 1963, the assigned consultant, Mrs. Helen D. Sumner, traveled through Alaska and conducted the survey as planned. At the conclusion of her trip, details for preparation of the NCCD report were discussed with the chairman of the council in Anchorage. In addition relevant statistical information, applicable laws and other data were furnished to the NCCD.

Early in October, 1963, the report of the NCCD was published and distributed under the auspices of the council to numerous officials of the executive branch, all members of the legislature,

local government officials and other persons interested in this topic throughout the state.

At its meeting at Ketchikan, October 17-18, 1963, members of the council received the report and resolved to fix a period of thirty days in which individual members might consider its recommendations and determine their own views.

Other materials considered by the council included a draft version of a revised House Bill No. 11, prepared to make it consistent with principal recommendations of the NCCD report. In addition a proposed rule to be added to the rules of civil procedure promulgated by the supreme court was prepared to carry out in further detail the recommendations of the NCCD report. Consideration of the problem by the judicial council included review of the proposed revised version of House Bill No. 11 and the proposed implementing rules of court procedure.

By correspondence with the chairman of the council, its members have individually endorsed the recommendations of the NCCD report and the proposed legislation and rules to effectuate its purposes.

2. Judicial Salaries. Also at its most recent meeting at Ketchikan, the council renewed its recommendation for passage of legislation to increase the salaries of justices and judges. This recommendation is intended to complete the effort, partially accomplished by establishment of the judicial retirement system, to make the salary and other benefits for state justices and judges reasonably commensurate with those currently

In addition, the bill would provide for future increases after endorsement of a justice or judge by the electorate. The legislation was initially endorsed by the council in November 1962, and this recommendation was used in obtaining introduction of the bill. The council renewed its endorsement at its meeting in Ketchikan, October 17-18, 1963. The recommendation is made in the effort to assure retention of the services of qualified judges as well as to attract well qualified candidates as future vacancies may arise.

2. Juvenile Jurisdiction. The council recommends enactment of a revised version of House Bill No. 11, which would require proceedings relating to a minor under eighteen years of age to be handled in the superior court. The revised version also authorizes district and deputy magistrates to order a minor taken into custody pending proceedings in the superior court; this provision would enable immediate handling of difficult juvenile cases in locations where a superior court judge does not reside. In its endorsement of this legislation the council also recommends adoption of a rule by the supreme court which would govern all proceedings relating to family relations problems in the superior court. In substance the proposed rule establishes a family court division of the superior court and contemplates assignment of a superior court judge solely to the function of this division. By this approach the recommendation of the report made by the National Council on Crime and Delinquency for establishment of a family court can be met with a minimum of legislative action necessary.

ALASKA JUDICIAL COUNCIL

FOURTH REPORT
1964 - 1966

SECRETARY TO THE JUDICIAL COUNCIL
941 Fourth Avenue Anchorage, Alaska

full year after the superior courts were activated. The backlog of civil cases on July 31, 1961, was at 1,548. At the end of September 1966, it was 2,011. A similar comparison exists with criminal cases. On July 31, 1961, there were 88 pending criminal cases. At the end of September 1966, there were 178 pending criminal cases. The result of these increases is that trials can no longer be set at an early date, particularly the trial of the larger cases which involve substantial trial time. This tends to make true the adage that "justice delayed is justice denied".

The situation as described in the Third District requires the appointment of an additional superior court judge in order to meet this more than 20% increase in pending cases. A second superior court judge is needed to man the family court matters that will be handled at the superior court level if jurisdiction over juveniles is transferred from the district court, pursuant to the pending recommendation of the Judicial Council. The juvenile caseload in the Third District now requires substantially the full time of a district court judge. Not only will this caseload demand an additional judge, but also the numerous other domestic relations matters that will be handled in the family court division will mean that the full time of a superior court judge must be devoted to this assignment.

D. Transfer of Juvenile Jurisdiction.

1. Recommendation. The Council recommends that

jurisdiction over juvenile cases be transferred from the district court to the superior court.

2. Justification. The recommendation for transfer of juvenile jurisdiction from the district court to the superior court is one originally made by the Alaska Judicial Council in January 1964. The sum of $1,500 had been appropriated by the third legislature, first session, in 1963, for the purpose of making a study of whether this jurisdiction should be so transferred. To accomplish the study the Council engaged the services of the National Council on Crime and Delinquency, and this organization made a thorough study of the problem, which was communicated to the legislature in the form of a printed report by the National Council on Crime and Delinquency. There is a recognized national standard requirement that juvenile jurisdiction be in the highest court of general trial jurisdiction. This provides a strength and stability in the juvenile court program and continuity and uniformity in the handling of juvenile cases. The record of turnover in personnel in the district court is alone sufficient to show there is a constant interruption of the need for continuity and stability in the handling of these cases.

The degree of training and maturity available in the superior court, with its more careful selection requirements, is obviously greater. The critical problems of the youth of this state demand this better qualified handling of their solution.

The Council accordingly renews its recommendation that the transfer of juvenile jurisdiction to the superior court be made and that funds necessary to obtain required additional judicial manpower in the superior court for this purpose be appropriated.

E. Judicial Disqualification.

1. Recommendation. The Council recommends to the superme court that a rule be adopted providing for peremptory disqualification of judges for bias or prejudice, together with a rule providing for appointment of lawyers as judges pro tempore.

2. Justification. The Judicial Council has not independently studied the question of whether there should be peremptory disqualification of judges, but the Council has received information as to work done in this area by a special advisory committee to the supreme court, appointed to consider the subject. The chief justice called for establishment of a committee upon request from the governor that a study of this subject be made. The committee was composed of representatives of counsel for plaintiffs, ccunsel for defendants, the attorney general, a judge of the superior court, and the chief justice. The special committee was composed of Mr. George Boney, Mrs. Mary Alice Miller, Mr. James Tallman, Mr. David Thorsness, Mr. Ralph Crews, Presiding Judge Ralph E. Moody and Chief Justice Buell A. Nesbett. After meeting a full day on the subject, representatives of diverse viewpoints were asked to

ALASKA JUDICIAL COUNCIL

FIFTH REPORT
1967 - 1968

SECRETARY TO THE JUDICIAL COUNCIL
941 Fourth Avenue Anchorage, Alaska

6. Judicial retirement.

7. Additional superior court judges.

8. Judicial disqualification.

All of these programs have been acted upon after a good deal of study. Some of them have since been fully implemented. Others have had further action and progress. Some projects were earmarked for further study and consideration.

1. Juvenile Jurisdiction. A proposal to transfer juvenile jurisdiction from the district court to the superior court had been under consideration by the Council since November 15, 1962. In 1963 a study of this project was made by a representative by the National Council on Crime and Delinquency, following which the necessary legislation was drafted. The legislation failed passage in the 1964, 1965 and 1966 legislative sessions. In 1967 this proposal was introduced and passed by the legislature as Ch. 110 SLA 1967. This bill repealed portions of the Alaska Statutes pertaining to proceedings related to minors and vested jurisdiction in the superior court, which was also empowered to designate district judges and magistrates as masters in this field under Civil Rule 53. The chapter also provided for emergency juvenile power for magistrates and district judges.

2. Judicial Salaries. Some steps have been taken since the Fourth Report of the Council toward the

PUBLIC SERVICE ANNOUNCEMENT

STATEWIDE TELECONFERENCE

MONDAY, JUNE 6, 1983 3:00 - 5:00 P.M. (PDT)

SUBJECT: CS HB 109 (JUD)

AN ACT RELATING TO PERSONS 16 OR 17 YEARS OF AGE WHO ARE CHARGED WITH UNCLASSIFIED OR CLASS A FELONIES; AND AMENDING THE CHILDREN'S PROCEEDINGS WAIVER PROVISIONS.

This bill, introduced by Sam Pestinger (R), Anchorage, provides that juveniles aged 16 or 17 charged with an unclassified or class A felonies must be arrested and prosecuted as an adult, and be sentenced under the presumptive provisions of law for confinement in a correctional facility for adult offenders.

Also included in the bill is a provision that the court may waive children's court jurisdiction over a person under the age of 18 if "..there is no substantial likelihood that the person can be successfully rehabilitated under children's court proceedings."

COPIES OF THE BILL CAN BE OBTAINED FROM YOUR LOCAL LEGISLATIVE INFORMATION OFFICE, WHERE YOU MAY TESTIFY BEFORE THE SENATE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE ON JUNE 6TH.

MEMBERS OF THE COMMITTEE: JOE JOSEPHSON (D), ANCHORAGE, CHAIR; VIC FISCHER (D), ANCHORAGE, VICE-CHAIR; RICK HALFORD (R), CHUGIAK; PAPPY MOSS (D), DELTA JUNCTION; AND PAUL FISCHER (R), SOLDOTNA.

**** ALL TESTIMONY IS WELCOME**********

FOR MORE INFORMATION: Contact Nancy Deitrick at 465-4907

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Alaska's Children's Code

CECILIA KLEINKAUF
BETSEY McGUIRE

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Termed "a major breakthrough in juvenile legislation" [5:1], Alaska's recently enacted Children's Code is the culmination of years of work in behalf of children, with the evolution from concern to actual statute revision a complicated and exhausting process.

Undertaking extensive juvenile law review rather than settling for a piecemeal approach had obvious advantages, but the practical realities were formidable. In the interests of having others benefit for Alaska's experiences, this paper presents an account of the process and mechanics of the work, as well as the innovative child welfare concepts embodied in the new laws.

Background

Awareness among professionals of the need to revise Alaska's children's laws also entailed awareness of the need to enter the

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legislative area, where such change would take place. In 1969 and 1970 several legislators began to consider with professionals, lay people and Region X staff (HEW) various methods of achieving law reform, and ultimately proposed creation of an Office of Child Advocacy, to carry out such a massive task as one of its many areas of concern. In 1972 this office was created by legislation in the Office of the Governor and charged with responsibilities that included providing "leadership in recommending legislative change which affects the provision of children's and child development services [12]."At the same time, the Alaska Legislative Affairs agency was directed to compile all existing laws pertaining to children to facilitate the review.

Although the Office of Child Advocacy was not funded until October 1973 and did not go into operation until January 1974, other efforts gathered support for the development of the Children's Code. Most notable was the designation in 1973, by both the League of Women Voters (LWV) of Alaska and the Alaska Chapter, National Association of Social Workers (NASW), of the Children's Code as a priority need in Alaska. From 1973 until enactment in 1977, these two groups maintained lobbying efforts for passage of the code.

In 1974 the Office of child Advocacy was functioning well and sponsored conferences on "The Child and the Law" designed to identify areas of concern about existing laws, for professionals and public. The conferences also alerted legislative and governmental leaders to the increasing need and support for both law reform and service improvement. Because of the close interrelationship between legal requirements and service delivery, the Alaska Chapter, NASW, requested of the Legislature that year a comprehensive study of Alaska's child welfare services, for recommendations that would influence future law revision. In response, the Legislative Council contracted with the Child Welfare League of America for a survey of services, the findings of which were presented to the Alaska Legislature early in 1975.

Law Revision Begins

The Legislative Council, by now accepting the need for reform, joined with the Governor's Office of Child Advocacy and interested groups to consider the best approach to law revision. A plan was devised for creation of a Task Force of professionals and citizens

representing broad social, legal and judicial interests who would work together with the legal staff of the Legislative Affairs Agency toward creation of the Children's Code. As the coordinating body, the Office of Child Advocacy provided legal staff, and its executive director served as Task Force chairperson. The Governor's Office also made travel funds available for Task Force members. By June 1975 the work began, with the Task Force stating its intention to "...determine the areas of Alaska law dealing with children which are most in need of review, look critically at Alaska's approach to the treatment of children in these areas, comparing Alaska's approach to that of other states, and to submit legislation to the Legislative Council revising the statutes which the Task Force determines to be in need of revision [6]." A report on these efforts was to be made to the Legislative Council in December 1975.

Although somewhat limited by time constraints (August-December 1975), the Task Force efforts did result in two major recommendations that were introduced in legislation in January 1976. The first was for the clarification and expansion of the "guardian ad litem" concept to provide for the representation of children's best interests as well as their preferences. The requirement that the court specify the duties and authority of the guardian was also included. The second recommendation was for the repeal of Alaska's statutes for both Dependency and Child in Need of Supervision actions, in favor of a new designation, "Child in Need of Aid"—a totally new approach to issues of children before the court.

The legislation was considered throughout the 1976 legislative session, but did not pass. It did, however, give tangible proof that the Task Force approach (when provided with sufficient legal expertise) was a feasible way to accomplish law revision. It also extended efforts to educate legislators about the need for change, and facilitated discussion and consideration of a major public policy shift away from status offenses and away from statutes that tended to place blame as part of the adjudicatory processes.

Supportive Legislation

Two other measures introduced and passed in the 1976 legislative session contributed significantly to the ultimate enactment of Alaska's Children's Code. First and foremost was a Concurrent Resolution (SCR75) directing the Legislative Council to "review the existing laws relating to children specifically and the family in

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The second piece of legislation, resulting from a recommendation in the earlier Child Welfare League of America study, established a far-reaching statement of public social policy for children in Alaska that provided a philosophical basis from which later code positions were to emanate.

> The purpose of this title as it relates to children is to secure for each child the care and guidance, preferably in his own home, that will serve the moral, emotional, mental and physical welfare of the child and the best interests of the community, to preserve and strengthen the child's family ties whenever possible, removing him from the custody of his parents only as a last resort when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and when the child is removed from his family to secure for him adequate custody and care [12].

The Code Is Drafted

Supported clearly by the Legislature and with sufficient funding from Legislative Affairs for full-time legal counsel, the Task Force, with continued support from the Governor's office, resumed work in the spring of 1976, with vastly increased capability for research and statute drafting. The procedure adopted for arriving at recommended changes was for the Task Force to identify, consider and establish priorities for issues of concern together with the staff attorney, then to research possible approaches and to suggest statutory language for various options. The possible revisions were then discussed and agreement reached on how to proceed. Specific language was then drafted and finally voted on the by Task Force. The wide variety of urban and rural, professional and lay opinions represented on the Task Force made this approach the most feasible, as the group was once again working against a year-end deadline if legislation was to be introduced in January. The proposed Children's Code was presented to the Legislative Council in November 1976, and in-

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The development of recommendations for statue changes was only half the battle; the other half was to have the recommendations become law.

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The interim between the November elections and the January opening of the Legislature was used for informing legislators of the substance of the Task Force recommendations, and for programs of public education.

Lobbying during Alaska's legislative session is both expensive and logistically complicated because Juneau, the capital, is far removed from other population centers and accessible only by air. A variety of efforts was employed, therefore to continue to gather support for the code preceding committee and floor votes. The efforts included committee testimony, letters of support, individual contacts with legislators by LWV and NASW lobbyists, Office of Child Advocacy board members, consultation of the Task Force's attorney with legislative committes and staff, constituent contacts with key legislators and often the arguments of supportive legislators themselves. The children's Code Bill passed the Alaska Legislature in May and was signed into law by the Governor on May 28, 1977. The code became effective on August 26, 1977.

Child Welfare Concepts

Many of the concepts in the new law, while important for clarifying Alaska's statutes, are not significantly new approaches to

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The code's intent was fivefold: "to clarify which children woul come under juvenile court jurisdiction; to eliminate overbroad an vague jurisdictional grounds; to specify the Department of Healt and Social Services' responsibilities in treating the child and the family; to set out certain guidelines for the court; and to clear up a number of inconsistencies in the present laws [1]."

It is in the approach to court jurisdiction over children and in specifying the Department of Health and Social Services' responsibilities that the significant concepts are found. The most important are the creation of the designation Child in Need of Aid to revise jurisdictional grounds, and the requirement for treatment planning and limitation of state custody to delineate the state's responsibility to children before the court.

Child in Need of Aid

Prior to the new law, Alaska's children were brought under the court's jurisdiction as delinquents (lawbreakers), dependents (neglected, abandoned, etc.) or children in need of supervision (runaways, truants, incorrigibles). Based upon Task Force members' intent to redirect the statute's emphasis away from the necessity for placing blame on the parent and/or child and toward assuring services for the family and child, the new law eliminates the designations Dependent Child and Child in Need of Supervision in favor of the new concept Child in Need of Aid. "It should be noted that this new jurisdictional section reasserts the primacy of the parent and child relationship and obligates the state to find specific evidence of actual or imminent harm before the courts and state agencies can intervene in family life [1:4]." The new law defines Child in Need of Aid as:

> (A) the child being habitually absent from his home or refusing to accept available care, or having no parent, guardian, custodian or relative caring or willing to care for him, including physical abandonment by (i) both parents, (ii) the surviving parent, or (iii) one parent if the

other parent's rights and responsibilities have been terminated under Sec. 80 of this chapter or voluntarily relinquished;
(B) the child being in need of medical treatment to cure, alleviate, or prevent his suffering substantial physical harm, or mental harm as evidenced by failure to thrive, severe anxiety, depression, withdrawal, or untoward aggressive behavior or hostility toward others, and his parents are unwilling to provide the medical treatment;
(C) the child having suffered substantial physical harm or if there is an imminent and substantial risk that the child will suffer such harm as a result of the actions done by or conditions created by his parent, guardian or custodian, or by the failure of his parent, guardian or custodian adequately to supervise him;
(D) the child having been sexually abused either by his parent, guardian or custodian, or as a result of conditions created by his parent, guardian, or custodian, or by the failure of his parent, guardian or custodian adequately to supervise him;
(E) the child committing delinquent acts as a result of pressure, guidance or approval from his parents, guardian or custodian. [8].

Such behaviorally descriptive standards for the state's intervention on behalf of children resulted from research into the laws of other states, as well as into current literature on children's law [2;3;4]. The philosophy and recommendations of Michael Wald, professor of law at Stanford University, coincided with the Task Force's belief that establishment of objective criteria for measuring specific harms to the child worked to prevent the subjective discretion of social workers and judges from determining custody issues. The elimination of the concept of fault finding and the redirection toward consideration of harm to the child that requires state intervention focuses the court's attention on what is to be done for the child, rather than who is to blame. The new language also eliminates "possible unconstitutionally broad and vague terms and laws" in the old statutes such as "incorrigible" and "wayward" on the part of the child and "false habits" on the part of the parents [7].

Required Treatment Planning

Probably the single most significant issue to virtually all members of the Task Force throughout their deliberations was the

frequent inability of the state to provide services to children and families that improve the situation so that children can be returned home, with the result that many children were "lost in the system" after placement.

Having addressed the jurisdictional statutes to require more specificity for adjudicating a child either deliquent or in need of aid, the Task Force turned its attention to possible statutory methods for assuring that services were delivered. Again with Wald's guidance [4], the Task Force decided to pursue service availability through: 1) the statutes governing the dispositions that could be made of children's cases; 2) the addition of a requirement for the preparation of a treatment plan; 3) the requirement for specific information to be provided in mandatory review hearings concerning the provision of services; and 4) the strengthened guardian ad litem provisions mentioned earlier.

Under Alaska law the courts hear the evidence in support of either a petition in Delinquency or Child in Need of Aid and subsequently dismiss the petition or adjudicate the child. If a child is adjudicated, various dispositions are possible. Under the new code possible dispositions for Delinquency now include: 1) commitment to the Department of Health and Social Services for institutional placement; 2) commitment to the department with probation, either living at home or in a placement facility; 3) department probation supervision with no commitment, or 4) restitution ordered in lieu of or in addition to numbers 1, 2, 3.

Dispositional alternatives for Children in Need of Aid care: 1) commitment to the department for placement (not including a correctional institution; 2) release to parent or guardian under court order to provide care or treatment supervised by the department; or 3) termination of parental rights.

Prior to any dispositional order for either Delinquents or Children in Need of Aid, the Alaska Department of Health and Social Services is now required by law to submit a "predisposition report with a recommended plan of treatment [9] ...which in the case of Child in Need of Aid" ...shall include, but is not limited to the following: 1) a statement of changes in the child's or parent's behavior, which will aid the court in determining that supervision of the family or placement is no longer necessary; 2) if removal from the home is recommended, a description of the reasons the child cannot be protected or rehabilitated adequately in the home, including a description of

any previous efforts to work with the parents and the child in the home and the parent's attitude toward placement of the child; 3) a description of the potential harm to the child that may result from removal from the home and any efforts that can be made to minimize such harm; and 4) any further information that the court may request [10].

It is evident that the reports are intended to be objective and to document the need for removal from the home in order to provide services, but even more importantly, they are required to specify behaviors that the family members must change before the return of the child or the cessation of the state's supervision. These reports are required to be made available to all parties involved 10 days before the dispositional hearing, in order that expectations are clear and that removal of the child is justified. It is hoped that, as far as possible, professionals and parents together will arrive at specifics in the treatment plan.

Additionally, the state is forced to confront the harm to the child resulting from placement and to plan for minimizing it.

Although the old law required at least yearly review hearings concerning children under the jurisdiction of the court, the code substantially strengthened this section in an effort to return children home unless specific and measurable evidence can be provided to support the need for continued placement. The law now requires that the child be returned home at the review hearing unless a preponderance of the evidence shows that the conditions under which the child was adjudicated still exist. "If the child is not returned home, the court shall establish on the record: 1) why the chld was removed from the home; 2) what services have been provided to or offered to the parents to facilitate reunion; 3) what services were utilized by the parents to facilitate runion; 4) the visitation history between the parents and the child; 5) whether additional services are needed to facilitate the return of the child to his parents; 6) when return of the child can be expected." [11]

The reporting of actual services being provided to the child and the family will increase the accountability of the state for children in its care, as well as providing a vehicle for comparing planned services at the time of adjudication with actual ones a year later. The requirement for projecting a date for return of the child to his home also is considered a worthwhile addition.

Limited Custody

The review hearing requires the projection of a date for return c the child to the home, and the state's custody of the child (excep where parental rights are severed) is now statutorily limited to years. The elimination of indeterminate commitment represents significant shift in the state's approach both to delinquent childre and to Children in Need of A . Nationwide concern over institu tionalizing children for periods far exceeding adult commitment fc a similar offense was felt strongly in Alaska, and is eased by the ne 2-year limitation. The possibility that nondelinquent childre removed from their homes will drift indefinitely in a series of foste homes should also be significantly reduced. Extensions of commi ment are possible, but they must be petitioned for by the state c the child is released. Even if petitioned for, however, extensions a not automatic. A hearing must be held in which the stat demonstrates that the extension is in the child's and the public best interests, and in no case can the extension last beyond th child's 19th birthday, unless the child himself consents.

Conclusion

Alaska's Children's Code took effect August 26, 1977, and effort toward its implementation are in an early stage. Work continue toward the passage of revised adoption statutes that were remove from the code and are still pending in the Alaska Legislature. Th eventuation of law revision in improved child welfare service however, is yet to be determined.

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7. AS 47.10.010 (a).
8. AS 47.10.010 (a) (2)
9. AS 47.10.081 (a)
10. AS 47.10.081 (b) (1) (2) (3) (4)
11. AS 47.10.083.
12. AS 47.05.060

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(D) the child having been sexually abused either by his parent, guardian or custodian, or as a result of conditions created by his parent, guardian, or custodian, or by the failure of his parent, guardian or custodian adequately to supervise him;
(E) the child committing delinquent acts as a result of pressure, guidance or approval from his parents, guardian or custodian. [8].

Such behaviorally descriptive standards for the state's intervention on behalf of children resulted from research into the laws of other states, as well as into current literature on children's law [2;3;4]. The philosophy and recommendations of Michael Wald, professor of law at Stanford University, coincided with the Task Force's belief that establishment of objective criteria for measuring specific harms to the child worked to prevent the subjective discretion of social workers and judges from determining custody issues. The elimination of the concept of fault finding and the redirection toward consideration of harm to the child that requires state intervention focuses the court's attention on what is to be done for the child, rather than who is to blame. The new language also eliminates "possible unconstitutionally broad and vague terms and laws" in the old statutes such as "incorrigible" and "wayward" on the part of the child and "false habits" on the part of the parents [7].

Required Treatment Planning

Probably the single most significant issue to virtually all members of the Task Force throughout their deliberations was the

frequent inability of the state to provide services to children and families that improve the situation so that children can be returned home, with the result that many children were "lost in the system" after placement.

Having addressed the jurisdictional statutes to require more specificity for adjudicating a child either deliquent or in need of aid, the Task Force turned its attention to possible statutory methods for assuring that services were delivered. Again with Wald's guidance [4], the Task Force decided to pursue service availability through: 1) the statutes governing the dispositions that could be made of children's cases; 2) the addition of a requirement for the preparation of a treatment plan; 3) the requirement for specific information to be provided in mandatory review hearings concerning the provision of services; and 4) the strengthened guardian ad litem provisions mentioned earlier.

Under Alaska law the courts hear the evidence in support of either a petition in Delinquency or Child in Need of Aid and subsequently dismiss the petition or adjudicate the child. If a child is adjudicated, various dispositions are possible. Under the new code possible dispositions for Delinquency now include: 1) commitment to the Department of Health and Social Services for institutional placement; 2) commitment to the department with probation, either living at home or in a placement facility; 3) department probation supervision with no commitment, or 4) restitution ordered in lieu of or in addition to numbers 1, 2, 3.

Dispositional alternatives for Children in Need of Aid care: 1) commitment to the department for placement (not including a correctional institution; 2) release to parent or guardian under court order to provide care or treatment supervised by the department; or 3) termination of parental rights.

Prior to any dispositional order for either Delinquents or Children in Need of Aid, the Alaska Department of Health and Social Services is now required by law to submit a "predisposition report with a recommended plan of treatment [9] ...which in the case of Child in Need of Aid" ...shall include, but is not limited to the following: 1) a statement of changes in the child's or parent's behavior, which will aid the court in determining that supervision of the family or placement is no longer necessary; 2) if removal from the home is recommended, a description of the reasons the child cannot be protected or rehabilitated adequately in the home, including a description of

any previous efforts to work with the parents and the child in the home and the parent's attitude toward placement of the child; 3) a description of the potential harm to the child that may result from removal from the home and any efforts that can be made to minimize such harm; and 4) any further information that the court may request [10].

It is evident that the reports are intended to be objective and to document the need for removal from the home in order to provide services, but even more importantly, they are required to specify behaviors that the family members must change before the return of the child or the cessation of the state's supervision. These reports are required to be made available to all parties involved 10 days before the dispositional hearing, in order that expectations are clear and that removal of the child is justified. It is hoped that, as far as possible, professionals and parents together will arrive at specifics in the treatment plan.

Additionally, the state is forced to confront the harm to the child resulting from placement and to plan for minimizing it.

Although the old law required at least yearly review hearings concerning children under the jurisdiction of the court, the code substantially strengthened this section in an effort to return children home unless specific and measurable evidence can be provided to support the need for continued placement. The law now requires that the child be returned home at the review hearing unless a preponderance of the evidence shows that the conditions under which the child was adjudicated still exist. "If the child is not returned home, the court shall establish on the record: 1) why the chld was removed from the home; 2) what services have been provided to or offered to the parents to facilitate reunion; 3) what services were utilized by the parents to facilitate runion; 4) the visitation history between the parents and the child; 5) whether additional services are needed to facilitate the return of the child to his parents; 6) when return of the child can be expected." [11]

The reporting of actual services being provided to the child and the family will increase the accountability of the state for children in its care, as well as providing a vehicle for comparing planned services at the time of adjudication with actual ones a year later. The requirement for projecting a date for return of the child to his home also is considered a worthwhile addition.

Limited Custody

The review hearing requires the projection of a date for return c the child to the home, and the state's custody of the child (excep where parental rights are severed) is now statutorily limited to years. The elimination of indeterminate commitment represents significant shift in the state's approach both to delinquent childre and to Children in Need of Aid. Nationwide concern over institu tionalizing children for periods far exceeding adult commitment fc a similar offense was felt strongly in Alaska, and is eased by the ne 2-year limitation. The possibility that nondelinquent childre removed from their homes will drift indefinitely in a series of foste homes should also be significantly reduced. Extensions of commi ment are possible, but they must be petitioned for by the state c the child is released. Even if petitioned for, however, extensions a not automatic. A hearing must be held in which the stat demonstrates that the extension is in the child's and the public best interests, and in no case can the extension last beyond th child's 19th birthday, unless the child himself consents.

Conclusion

Alaska's Children's Code took effect August 26, 1977, and effort toward its implementation are in an early stage. Work continue toward the passage of revised adoption statutes that were remove from the code and are still pending in the Alaska Legislature. Th eventuation of law revision in improved child welfare service however, is yet to be determined.

Reference

1. Brown, Andrew. Memorandum on the Children's Court Bill, Legislative A fairs Agency, November 8, 1976.
2. Goldstein, J., et al. Beyond the Best Interests of the Child. New York. Ma millan, 1974.
3. Katz, Sanford. When Parents Fail. Boston: Beacon Press, 1971.
4. "State Intervention on Behalf of 'Neglected' Children: A Search fc Realistic Standards," Stanford Law Review, XXVII (April 1975).
5. Gottesman, Roberta. An Evaluation of Alaska's Proposed Juvenile Justi Legislation. American Justice Institute, 1976.
6. Work Plan, Legislative Council Task Force, Children's Law Revisio August 28, 1975.

7. AS 47.10.010 (a).
8. AS 47.10.010 (a) (2).
9. AS 47.10.081 (a)
10. AS 47.10.081 (b) (1) (2) (3) (4).
11. AS 47.10.083.
12. AS 47.05.060.

(Address requests for a reprint to Cecilia Kleinkauf, 4201 McInnes Rd., Anchorage, AK 99504.)

MSG 83-00023052 PRTY 1 06/06/83 15:15:05 ORIG: LF02 IN= 0002 OUT= 0011
FROM: LYNDA/FBX TO: TOM/JNO
TARGET: LJHG SUBJ: SEN HESS T/C 6/6 HB109

FBX

FBX #2

ADDITIONAL OBSERVOR:
4. MICHAEL JEFFERY, MAY WISH TO TESTIFY LATER.

MSG 83-00023060 PRTY 1 06/06/83 15:49:26 ORIG: LL00 IN= 0006 OUT= 0015
FROM: DEE/SOLDOTNA TO: TOM/JUNEAU
TARGET: LL00 SUBJ: S.[illegible]SS HB-109

OMNI#2

JUDGE HANSON WOULD LIKE TO MAKE ADDITIONAL COMMENTS IF POSSIBLE.

THANK-YOU,
DEE/SOLDOTNA

12/8/81

MSG 83-00023096 PRTY 1 06/06/83 16:25:09 ORIG: LF02 IN= 0005 OUT= 0020
FROM: LYNDA/FBX TO: TOM/JNO
TARGET: LJHB SUBJ: SEN HESS T/C 6/6 HB109

FBX

FBX #5 OR 6

SORRY FOR ALL THESE BITS AND PIECES OF MESSAGES.

BUT.....

JAMES CANNON WOULD LIKE TO TESTIFY.

---EOM

MSG 83-00023047 PRTY 1 06/06/83 15:12:47 ORIG: LA08 IN= 0007 OUT= 0009
FROM: CANDY/ANCHORAGE TO: TOM
TARGET: LJHG SUBJ: S. HESS ON HB 109

OMNI # 3

WITNESSES:

5. DAVE RING
6. DAVID GLENDE

OBSERVERS:

2. KEN LEYBA

MSG 83-00023035 PRTY 1 06/06/83 15:01:43 ORIG: LA08 IN= 0005 OUT= 0002
FROM: BARBARA IN ANC TO: TOM IN JUN
TARGET: LJHG SJBJ: (S) HESS, T/C, 6/5

ANC

OMNI #1

IN ANCHORAGE:

TO SPEAK:

1. X DENNY PATELLA/FAMILY CONNECTION

TO OBSERVE:

1. ELIZABETH J. HICKERSON

==========

MSG 83-00023038 PRTY 1 06/06/83 15:03:43 ORIG: LF02 IN= 0001 OUT= 0003
FROM: LYNDA/FBX TO: TOM/JNO
TARGET: LJHG SJBJ: SEN HESS T/C HB109

FBX

FBX #1

TO TESTIFY:

TO OBSERVE:
1. IRENE PEYTON -- MAY WISH TO TESTIFY LATER
2. GENE SHAFER
3. STEVE WIDMER

----------EOM

MSG 83-00023036 PRTY 1 06/06/83 15:07:29 ORIG: LR00 IN= 0008 OUT= 0004
FROM: FLORENCE IN BARROW TO: TOM
TARGET: LJHG SJBJ: SEN HESS T/C ON CSHB109

BARROW

OMNI # 1

HERE TO OBSERVE ONLY:

LORI LAMOREAUX, ADULT PROBATION/PAROLE, BOX 810, BARROW 852-8700

MSG 83-0002[illegible]041 PRTY 1 06/06/83 15:06:19 ORIG: LA08 IN= 0006 OUT= 0005
FROM: CANDY/ANCHORAGE TO: TOM
TARGET: LJHS SUBJ: S. HESS JN 45 109

OMNI # 2

WITNESSES:

2. JOHN GARVIN
3. DANA FABE
4. CECILIA KLEINHAUF

MSG 83-00023064 PRTY 1 06/06/83 15:39:43 ORIG: LF02 IN= 0003 OUT= 0013
FROM: LYNDA/FBX TO: TOM/JNO
TARGET: LJHG SUBJ: SEN HESS CMTE T/C 6/6 HB109

FBX #3

PARTICIPANT #4, MICHAEL JEFFERY, HAD TO LEAVE.

TO OBSERVE:
5. MARSHA SCHNEIDER, MAY WISH TO TESTIFY LATER.

---EOM

MSG 83-00023029 PRTY 1 06/06/83 14:55:49 ORIG: LS01 IN= 0003 OUT= 0001
FROM: FALEENE, SITKA TO: TOM, MODERATOR
TARGET: LJHG SUBJ: (S)MESS / HB 109

OMNI 1

TO OBSERVE:

1. ART NIELSEN

EOM

2. Howard Groves

SENATE [illegible] COMMITTEE OBSERVER/WITNESS SIGN-UP SHEET

DATE: 6/6/83 SPONSOR: Pettinger

SUBJECT(S): CSHB 109(JUD). Juvenile Waiver

NAME	REPRESENTING	ADDRESS	PHONE	Observer	Witness		
Michael Price	DFYS		465-3170				

MSG 83-00023125 PRTY 1 06/06/83 17:01:22 ORIG: LA08 IN= 0010 OUT= 0034
FROM: BARBARA IN ANCHORAGE TO: STATS IN JNU
TARGET: LJHZ SUBJ: (S) HESS, T/C, JUNE 6, HB 109

IN ANCHORAGE:

TO SPEAK:
1. DENNY PATELLA/FAMILY CONNECTION, 1836 W. NORTHERN LIGHTS, 99503,279-0552
2. JOHN GARVIN, 1200 E. 27TH, 99504, 276-4515
3. DANA FABE, 716 W. 4TH AVENUE, #500, 279-7541
4. CECILIA KLEINHAUF, 4201 MCINNES, 99504, 563-6073/786-1714
5. DAVE RING, 9033 W. 80TH AVE, 99502 243-0737
6 DAVID GLENDE, 600 CORDOVA, #3, 99501 274-6541

TO OBSERVE:

1. ELIZABETH J. HICKERSON, 1024 W. 6TH, 99501
2. KEN LEYLSA, 600 CORDOVA, #3, 99501, 274-6541

TO SPEAK 6
OBSERVERS 2

TOTALS 8

==========

June 6, 1983

Joe, Sappy, Vic

CSHB 109 (JUD) - teleconference

Soldotna

Judge Hanson

1963-69 District Judge in Anch. - vast bulk of juvenile cases
1971-1982 - Superior Court - juvenile/Kenai
1975- Y-K Judge - juvenile
1982 - Barrow service district

— jurisdictional age be lowered to 16 for all criminal cases
— separate incarceration/treatment for 16-20 yr. olds
— McLaughlin no longer good for 13-14 yr olds because of sophistication of juveniles

Sappy - expanded prelim means expanded responsibility

Anchorage

Penny Patella - Family Connection

Strong opposition to bill.
Bits and pieces of changes to Children's Statutes.
DJC 1-7 - don't believe that categorical statements re placement in adult facilities.

John Carroll - Pres, AK Assoc. of Homes for Children

Strong opposition - bill needs further study → interim Committee on juvenile code.
if not likely, propose:
~~[illegible]~~ would provide for children in

(2)

adult system – prisons already overcrowded.
sec 1 (b) line 16 – conflicts with sec 9

pg 1 line 26 – in conflict w/ Children's Code. (sec 9)

sec 2 7 – must protect kids until proven guilty.
pg 3 – line 18 – delete "is confined ... trial."

pg 5 – line 8
"Court jurisdiction over a person 16–17 yrs of age" rather than under 18.

Age language in 47.10.060 not be repealed

sec 9 (2) – geeh.

Bill supports punishment rather than rehabilitation
juveniles (minorities) often get inadequate legal counsel. About ½ are natives they work with.
Can currently waive to adult status – is adequate when needed.
Less than 1% of juveniles find themselves in this case of being tried as an adult.

Joe provision in sec 7 seems harsh. – invasion of court discretion.
sec 9 – don't want to apply to all under 18
"no substantial likelihood" is questionable
the court needs to see factors in totality

Pappy 6,128 cases filed against juveniles (1981) etc.

Prima Facie – Pub Def.
against CSHB 109
automatic waiver past the least harsh – are

most amenable to treatment — but not in an adult facility.

Case by case is better. Senate version SB127 not including Class A.

could be equal protection problems because class A and B felonies are class → may convict of lesser charge, but they would already be in adult court.

problems w/ prosecutorial discretion.

accomplice liability —

impact will be greater numbers of juveniles classified by offense rather than age.

No treatment in pre-trial holding facilities. — they after they 4-6 months → will be exposed to dangerous adults, sexual abuse etc.

Once a juvenile is waived to adult court they should not have to serve under presumptive sentencing.

Joe in waiver proceedings — Sec 7 determinative — effect on prosecutorial stance → putting client in the stand.

Prosecutor tries to determine likelihood of waiver.

Statute works well now — they generally keep the juvenile off the stand.

Vic Has there been preliminary analysis of these groups?

not aware of any → before major revisions are made to childrens code, a study should be made.

Many may be shipped out to Fed. penitentiaries.

Pappy What about victims?
Need more communication w/ victims so that they know what's happening

Sen. Kleinkauf – AK DASW.
our society makes distinctions between child and adult by age.
waiver provision provides a mechanism for juvenile court to address situations.
Many believe that waiver is not used enough because of court discretion.
Recently, all requests have been granted.
no accurate data is kept on the state
age / types of offenses / no. of requests → granted / denied ⇒ what areas & judges.
legislation is not based on any actual data.
ANASW research – talked to courts Anch / FBKS.
FBKS:
2 petitions 1982
(homicide age 14, Burglary 17)
both waived
Anch:
12 ~~petitions~~ 16 yrs old older – class A/unclassified.
2 petitions to waive ⇒ granted
1 was granted for Class B felony

Small numbers makes it feasible for court to review case by case

AK 9 – some problems but at least provides specific criteria for waiver. Intent is laudable.

Fiscal impact – seems to change

Other options:
- require waiver petition for violent crimes
- set higher age for time ~~off~~ confined in juv. facility.
- special facilities for juvenile - especially pretrial

Reestablish Children's Code Task Force:
1. document prob. of crime / waiver
2. review / and change other States
3 present options
4. submit report to legislature

Vic How long for task force study?

- was provided w/ legal counsel / travel, the work went quickly. an interim would be sufficient time.
- est. by leg Council / Governor allocated funds. (Child Welfare Journal) selected staff + attorney. copies for committee.

Fairbanks

Irene Peyton

opposed to bill - need to redo entire children's code.

Anch.

David Ring

support the idea of including 16-17 yrs old in adult. w/ exceptions for those whose maturity is in question.

Hope - prosecutor granted too frequently. Sentence in 2 parts with reexamination of another court.

include restitution for victims.

Parent Responsibility Law - in other States - much higher monetary charges than in Ak.
Need uniform Enforcement by the State - not lenient on natives.
one who is confined needs adequate protection from becoming a victim of another crime.
Should have a study for work schedule

David Blende - ak Youth Advocates
prosecutors can circumvent juvenile system through this bill
substantive change to evidentiary requirements. new standard is lower.

HB75
James Campbell - Attny
haven't seen an increase in no. of cases or seriousness of crimes
prosecutorial discretion okay
juvenile justice system works well.
OPPOSED
more investigation prior to revision.

Soldotna
Judge Hanson - opposed to putting juveniles in adult prisons. oppose this bill unless children are out of adult court.

Sec. 12.80.060. CONFINEMENT OF CERTAIN MINORS. (a) A person 16 or 17 years of age who is charged with an unclassified felony, and who is held in custody, shall be confined in a facility for juvenile offenders until indicted for, held to answer following a preliminary hearing on, or charged by complaint or information following a waiver of indictment or preliminary hearing for an unclassified felony offense. Following indictment, preliminary hearing, or waiver the person, if held in custody, shall be confined in a facility for adult offenders.

(b) Except as provided in (a) of this section, a person under the age of 18 who has been arrested and is being held in custody for an offense which would be a criminal offense if committed by an adult shall be confined to a facility for juvenile offenders unless children's court jurisdiction over the person has been waived under AS 47.10.060, and the person has been indicted for, held to answer following a preliminary hearing on, or charged by complaint or information following a waiver of indictment or preliminary hearing for a felony offense.

(c) If a person under the age of 18 who is subject to the jurisdiction of the court under AS 12.05.020 is confined to custody while awaiting sentencing, or is sentenced to a period of incarceration upon conviction, the person must be committed to the custody of the Department of Health and Social Services for confinement in a correctional facility for adult offenders OR for JUVENILE offenders BASED ON THE DISCRETION OF THE COURT.

Sec. 12.80.060. CONFINEMENT OF CERTAIN MINORS. (a) A person 16 or 17 years of age who is charged with an unclassified felony, and who is held in custody, shall be confined in a facility for juvenile offenders until indicted for, held to answer following a preliminary hearing on, or charged by complaint or information following a waiver of indict ent or preliminary hearing for a unclassified felony offense. Following indictment, preliminary hearing, or waiver the person, if held in custody, shall be confined in a facility for adult offenders.

(b) Except as provided in (a) of this section, a person under the age of 18 who has been arrested and is being held in custody for an offense which would be a criminal offense if committed by an adult shall be confined to a facility for juvenile offenders unless children's court jurisdiction over the person has been waived under AS 47.10.060, and the person has been indicted for, held to answer following a preliminary hearing on, or charged by complaint or information following a waiver of indictment or preliminary hearing for a felony offense.

Sec. 7. AS 12.80 is amended by adding a new section to read:

Sec. 12.80.060. CONFINEMENT OF CERTAIN MINORS. If a person under the age of 18 who is subject to the jurisdiction of the court under AS 12.05.020 is confined to custody while awaiting trial or sentencing or is sentenced to a period of incarceration upon conviction, the court shall

(1) order that the defendant be confined to an institution designated by the Department of Health and Social Services for offenders under 18 years of age; and

(2) order that the defendant be transferred to an adult correctional facility when the defendant reaches 18 years of age if more than one year remains of the defendant's term of imprisonment and there is no substantial likelihood that the defendant is amenable to treatment.

Page 6, line 12 amend to read:

decision. [A finding that there is no substantial likelihood of successful rehabilitation of the person under children's court proceedings may be based on any one or a combination of the factors.] If the...

Section 1. AS 12.05 is amended by adding a new section to read:

Sec. 12.05.020. JURISDICTION OVER CERTAIN MINORS CHARGED WITH SERIOUS FELONIES. (a) A person 16 or 17 who is charged with an offense designated as an unclassified [or Class A] felony must be arrested and presecuted as an adult.

(b) A person 16 or 17 years of age who is charged with a Class A felony is subject to AS 47.10.

(c) If the court has waived juvenile jurisdiction over a person under the age of 18 under AS 47.10.060, that person must be prosecuted as an adult.

(d) References in this section to the age of a person refers to the person's age at the time of the offense.

Sec 2. page 1, line 29:

delete "class A"

page 2, line 2:

delete "Class A"

THE LEGISLATURE OF THE STATE OF ALASKA
ELEVENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. Senate CS for CSHB 109 (HESS)

Title An Act relating to persons 16 and 17 years of age

Requested by _____ Date 6-24-83

II. FISCAL DETAIL

Agency Affected Department of Health and Social Services

Program Category Affected Division of Family and Youth Services

BRU, Program, or Subprogram(s) Affected McLaughlin Youth Center

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 80	FY 81	FY 82	FY 83	FY 84	FY 85
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL						

FUNDING (Thousands of Dollars) CAPITOL 750.0

GENERAL FUND					750.0	
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The Department assumes that 15 persons will be waived during 1984. The Division of Family and Youth Services feels that these juveniles should be housed separately and anticipate that a portion of McLaughlin would have to be remodeled.

The only other option would be to contract them out to a Federal institution for juveniles. Since ~~that~~ state does not currently do this, we are unaware of the cost factors.

Housing juveniles costs approximately $36.0 per year.

IV. DATE June 24, 1983 PREPARED BY Senate HESS Committee

AGENCY _____

PHONE 465-4907

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/79)

THE LEGISLATURE OF THE STATE OF ALASKA
ELEVENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. Senate CS for CSHB 109 (HESS)

Title An Act relating to persons 16 and 17 years of age...

Requested by _____ Date June 24, 1983

II. FISCAL DETAIL

Agency Affected Department of Health and Social Services

Program Category Affected Adult Corrections

BRU, Program, or Subprogram(s) Affected _____

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 80	FY 81	FY 82	FY 83	FY 84	FY 85
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL					14.3	
400 COMMODITIES					24.8	
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.					2.5	
TOTAL					41.7	

FUNDING (Thousands of Dollars) CAPITOL 730.0

GENERAL FUND					771.7	
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The Department of Health and Social Services assumes that 5 persons will be placed in Adult Corrections through this bill. Per bed cost is $143.0 per year.

IV. DATE June 24, 1983 PREPARED BY Senate HESS Committee

AGENCY _____

Original: Legislative Finance PHONE 465-4907

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33–001 (Rev. 12/79)

ACTIVITY SUMMARY

Youth Services Intake
vs.
Court System Intake
Aggregate Data

Activity	Youth Services	Court System
I. INTAKES:	1666	4506
A. Arrests	1558	3961
B. Other Referrals	108	545
II. OFFENSE DISTRIBUTION:		
A. Person	123	315
1. Felony	23	
2. Misdemeanor	100	
B. Property	672	2543
1. Felony	214	
2. Misdemeanor	458	
C. Alcohol/Drugs	723	1145
1. Felony	7	
2. Misdemeanor	716	
D. Other	130	782
1. Felony	2	
2. Misdemeanor	128	
Total Felonies	246	
Total Misdemeanors	1402	
III. DISPOSITION:		
A. Dismissed	94	0
B. Informal Action:	1217	3791
1. Referred	296	433
2. Warned	723	2238
3. Informal Probation	198	187
C. Formal Action:	340	713
1. Waived to Adult Court	3	3
2. Petition Filed:	337	710
a. Dismissed	23	7
b. Deferred	61	16
c. Adj./Disp.:	253	687
i. Formal Probation	193	570
ii. Institutional Order	50	117
Unduplicated Client Count	1036	

Draft
Source: Wasserman & McNabb, 1983

ACTIVITY SUMMARY

Youth Services Intake
Offense & Disposition
Aggregate Data

Activity		% Total	% Sub-Category
I. OFFENSE DISTRIBUTION			
A. Person:		7.5	
1. Felony	1.4		18.7
2. Misdemeanor	6.1		81.3
B. Property:		40.8	
1. Felony	13.0		31.8
2. Misdemeanor	27.8		68.2
C. Alcohol/Drugs:		43.9	
1. Felony	0.4		1.0
2. Misdemeanor	43.4		99.0
D. Other:		7.9	
1. Felony	0.1		1.5
2. Misdemeanor	7.8		98.5
Total Felonies		14.9	
Total Misdemeanors		85.1	
II. DISPOSITION			
A. Dismissed		5.7	
B. Informal Action:		73.7	
1. Referred	17.9		24.3
2. Warned	43.8		59.4
3. Informal Probation	12.0		16.3
C. Formal Action:		20.6	
1. Waived to Adult Court	0.2		1.0
2. Petition Filed:	20.4		99.0
a. Dismissed	1.4		6.8
b. Deferred	3.7		18.1
c. Adj./Disp.:	15.3		75.1
i. Formal Probation	11.7		76.3
ii. Institutional Order:	3.6		23.7
a. MYC	1.5		40.0
b. FYF	<0.1		1.7
c. NYF	0.4		11.7
d. Private	1.7		46.7

Draft
Source: Wasserman & McNabb, 1983

YOUTH SERVICES SAMPLE DATA SUMMARY

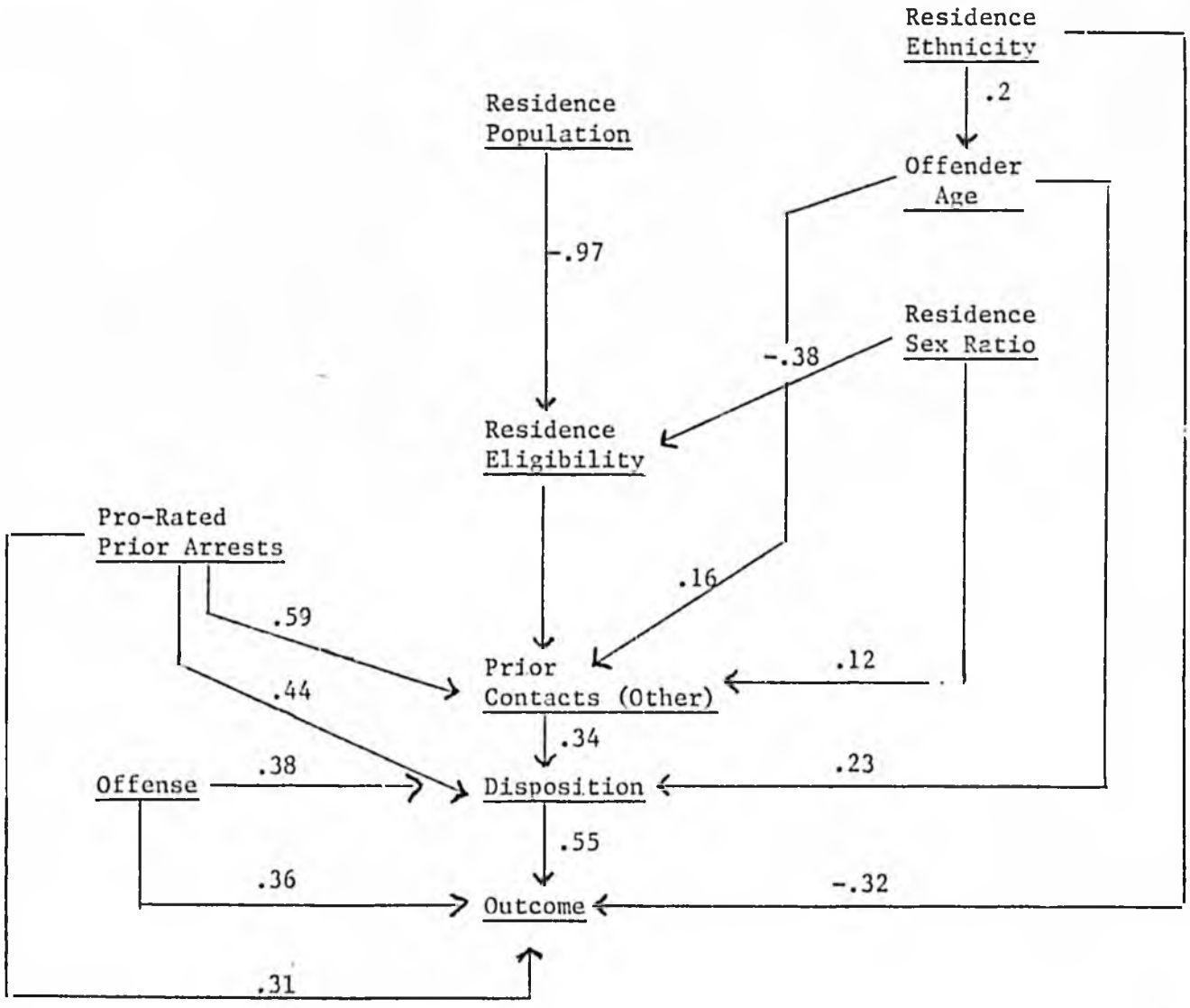
Combined Sample (N=165)
Sample Data

Item	% Total Sample
I. SEX	
A. Males	73.0
B. Females	27.0
II. ETHNICITY	
A. Caucasian	36.0
B. Native	64.0
III. PRIOR ARRESTS	
A. None	51.0
B. 1-2	28.5
C. 3+	20.5
IV. PRIOR CONTACTS (Other)	
A. None	63.6
B. 1	21.8
C. 2+	14.6
V. OFFENSE	
A. Person	10.3
B. Property	55.8
C. Alcohol/Drugs	25.4
D. Other	8.5
Misdemeanor	67.3
Felonies	32.7
VI. SCHOOL STATUS	
A. Attending	78.3
B. Dropped out	17.8
C. Graduated	2.5
D. Suspended	1.3
VII. SCHOOL LEVEL	
A. Grade School	8.0
B. Junior High School	17.3
C. Senior High School	74.7
VIII. OUTCOME	
A. Case Closed	61.8
B. Termination of Custody	7.3
C. Technical Violation	4.8
D. Re-arrest	12.1
E. (Still Active)	(12.7)

Draft
Source: Wasserman & McNabb, 1983

PATH ANALYSIS MODEL

Youth Services Sample Data
(N=165)



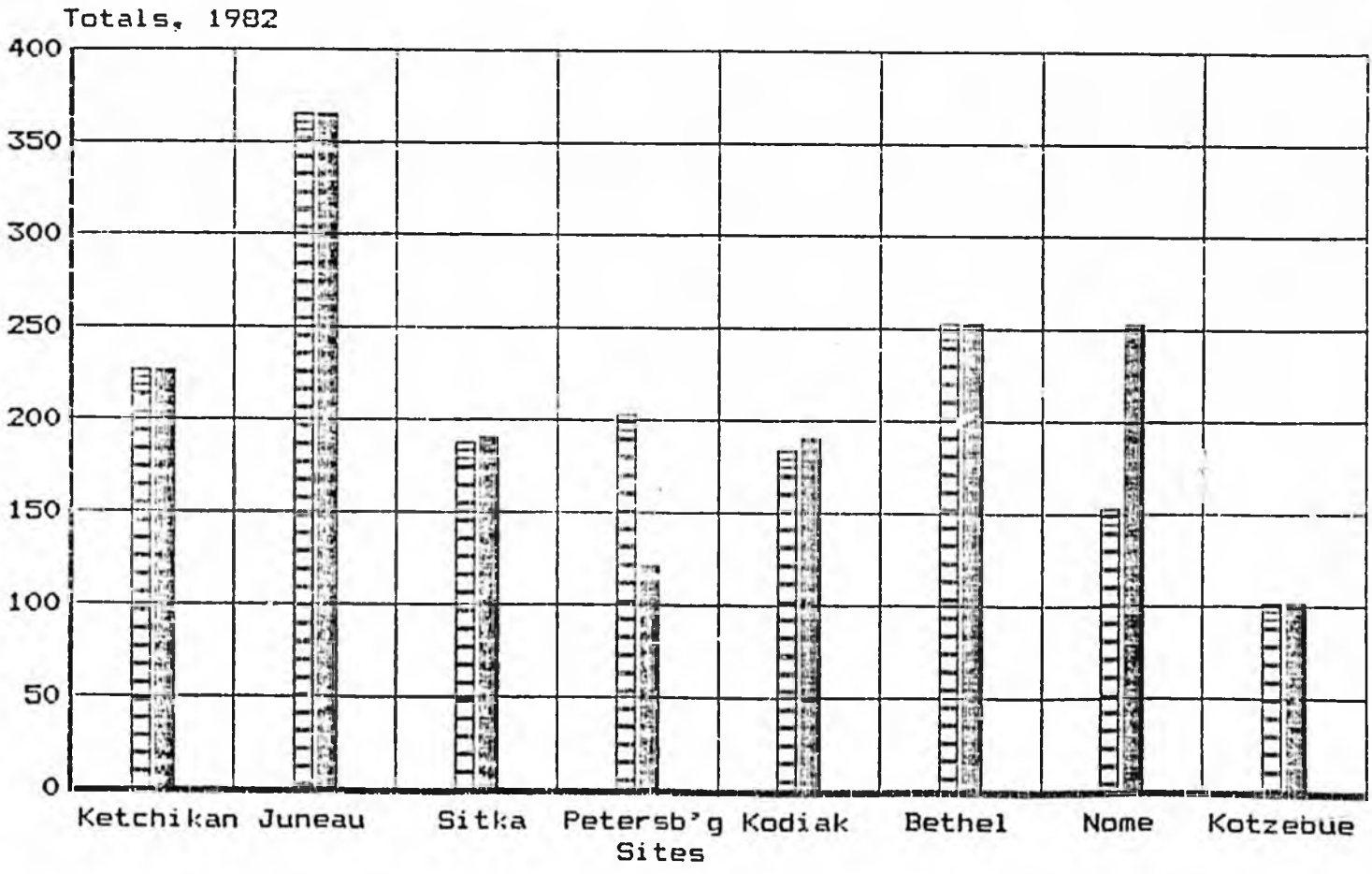
Draft
Source: Wasserman & McNabb, 1983

DYFS6/DIF

10/30/83

Arrests and Intakes: Field Sites

□ = Arrests
▩ = Intakes



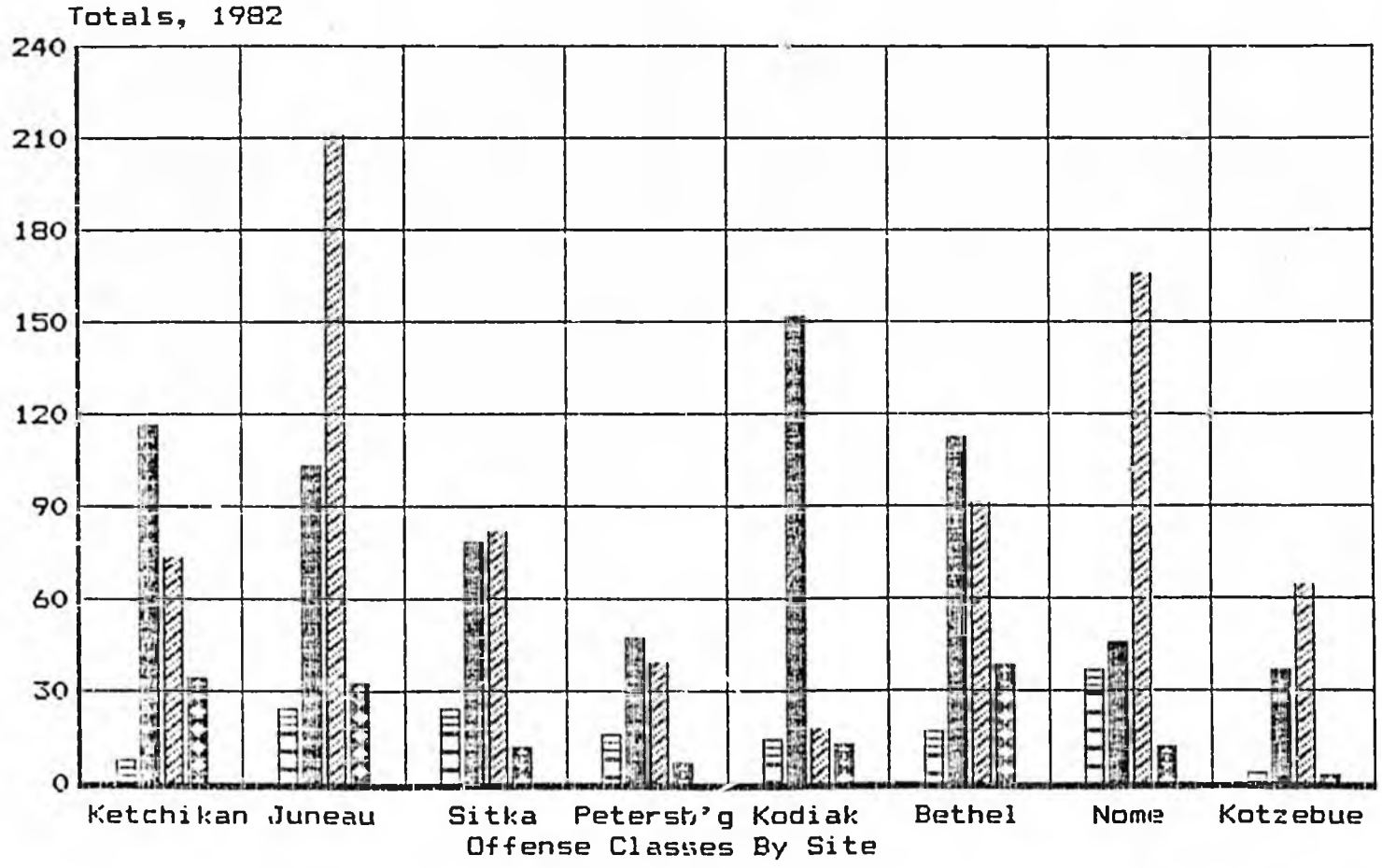
Draft
Source: Wasserman & McNabb, 1983

DYFS4/DIF

10/30/83

Offense Distribution: Field Sites

□ = Person
▨ = Property
▩ = Alcohol/Drugs
▢ = Other



Draft
Source: Wasserman & McNabb, 1983

DYFS8/DIF

10/30/83

Felonies and Misdemeanors: Field Sites

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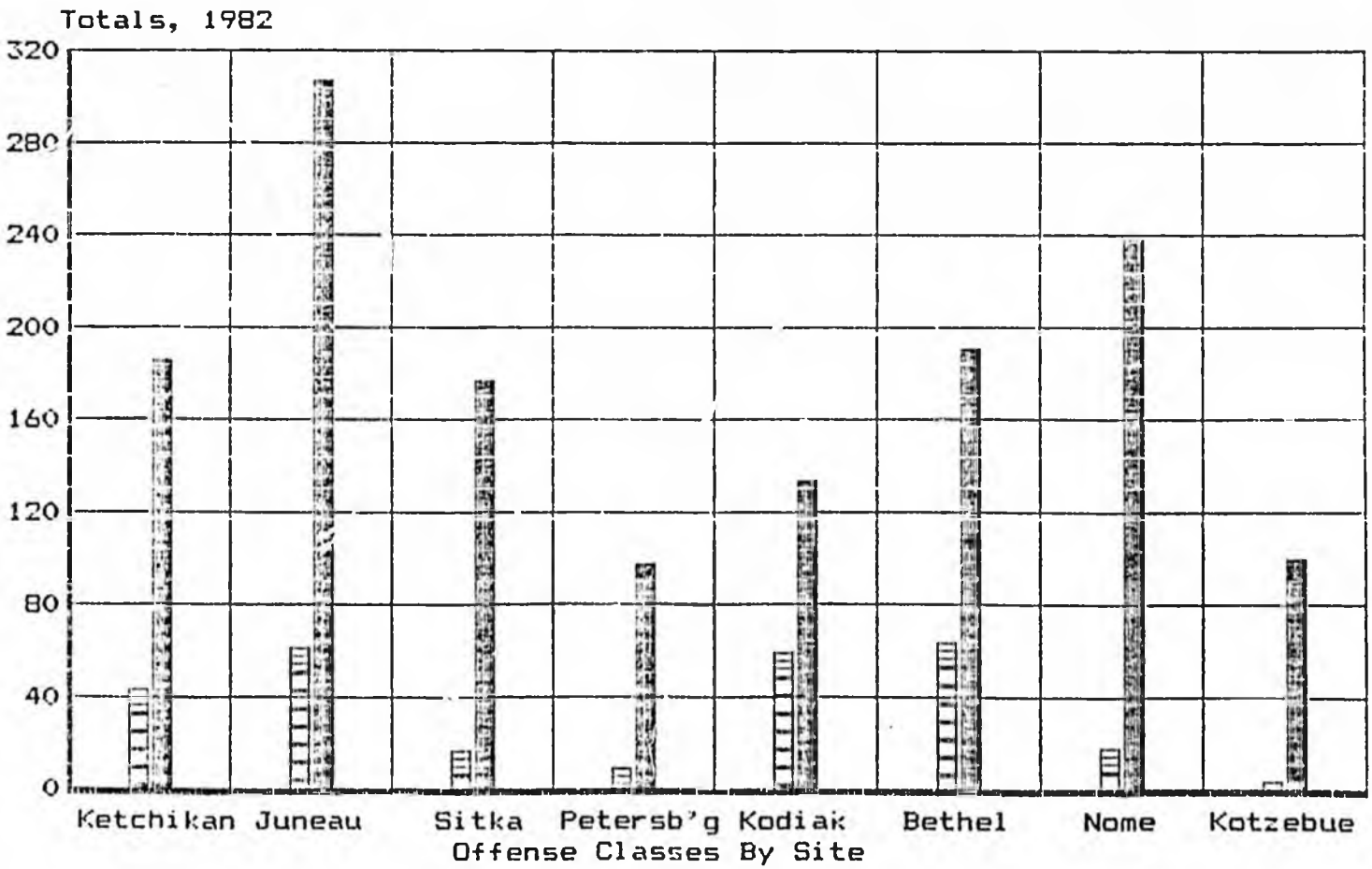
▣ = Misdemeanors



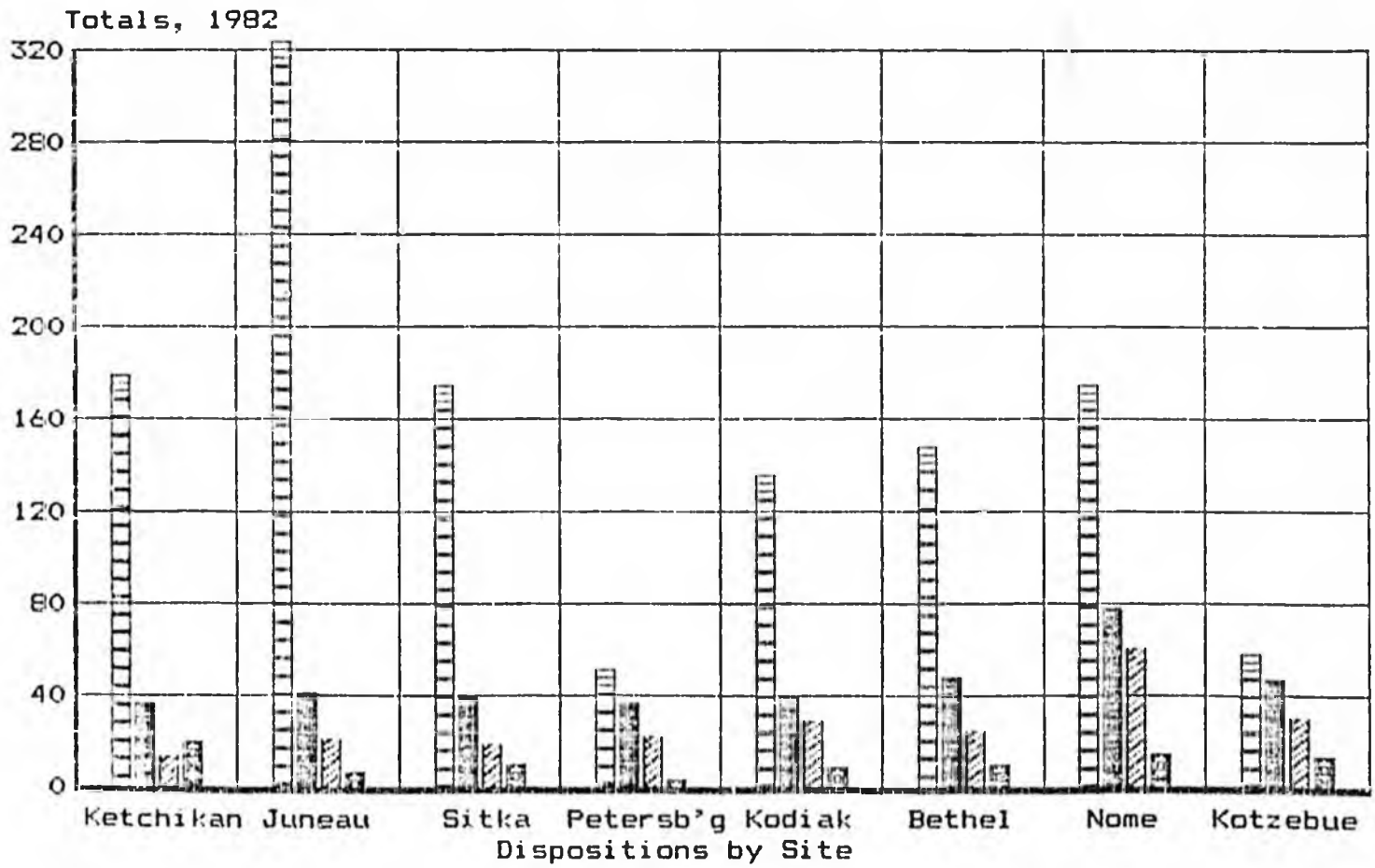
Draft
Source: Wasserman & McNabb, 1983

DYFS2/DIF

10/30/83

Selected Dispositions: Field Sites

□ = Informal Action
▩ = Formal Action
▨ = subclass: formal probation
▩ = subclass: institutional order



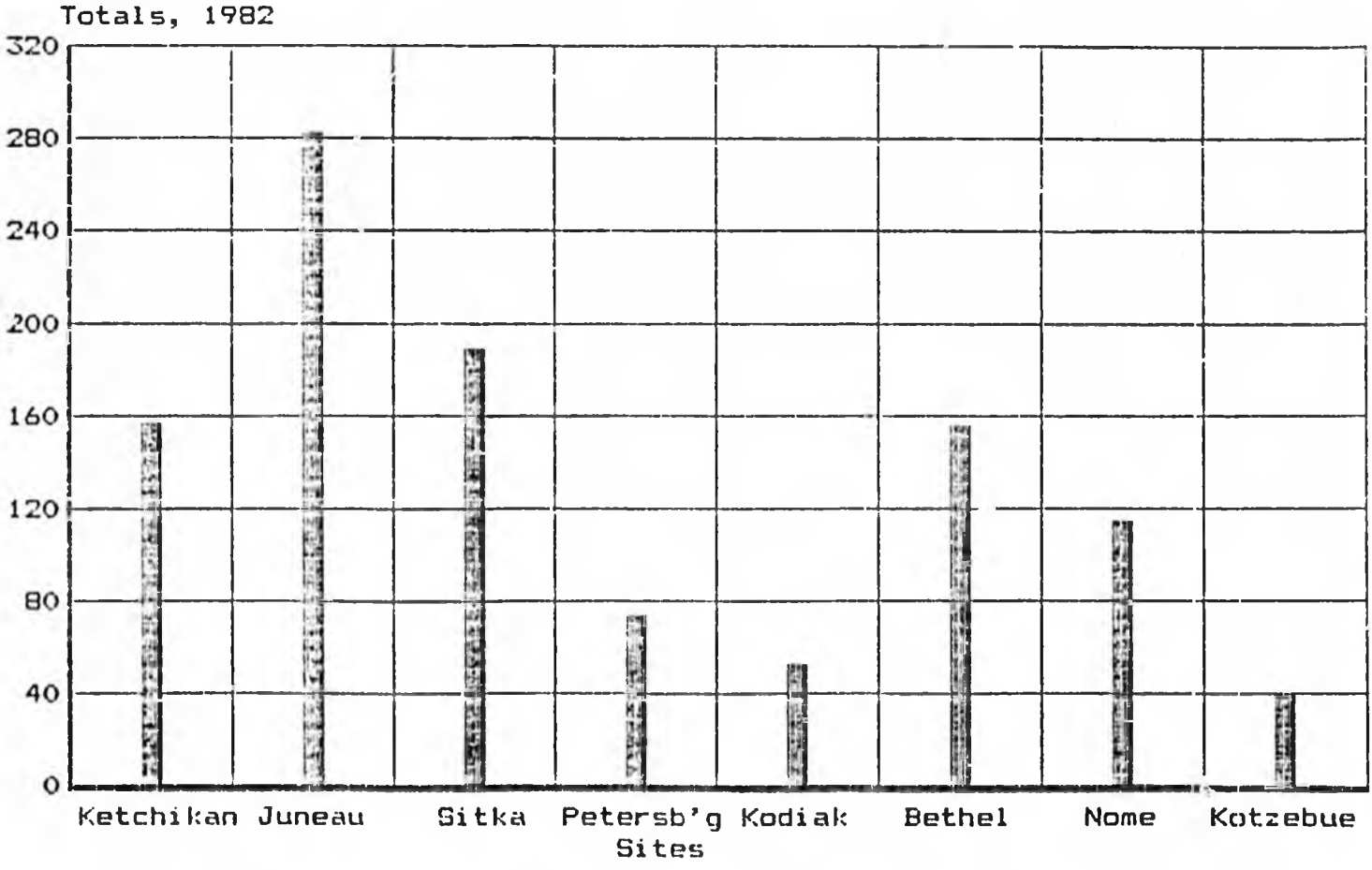
Draft
Source: Wasserman & McNabb, 1983

DYFS9/DIF

10/30/83

Unduplicated Client Count: Field Sites

▨ = Unduplicated Clients



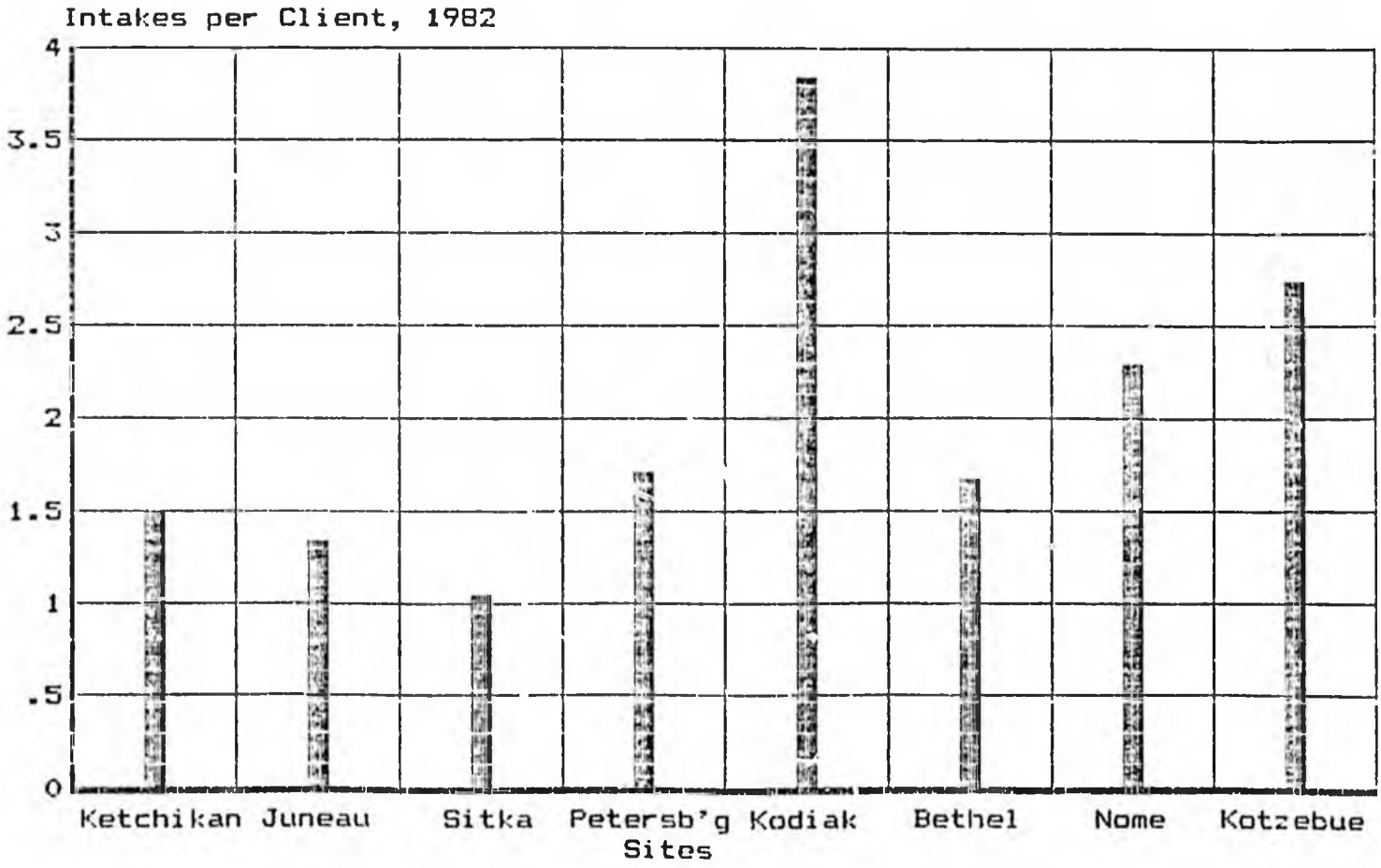
Draft
Source: Wasserman & McNabb, 1983

DYFS10/DIF

10/30/83

Intakes/Client Ratio: Field Sites

▩ = Client Ratios by Sites



Draft
Source: Wasserman & McNabb, 1983

ANNUAL REPORT

FISCAL YEAR 1983

STATE OF ALASKA

DEPARTMENT OF HEALTH & SOCIAL SERVICES

DIVISION OF FAMILY & YOUTH SERVICES

MICHAEL L. PRICE, DIRECTOR

ANNUAL STATISTICAL REPORT

TABLE OF CONTENTS

INTRODUCTION

The Division of Family and Youth Services is the State agency mandated to provide directly or to arrange through contract a wide range of client services which are designed to prevent or remedy neglect, abuse, and exploitation of children, youth, and adults, and to prevent delinquent behavior. Unless noted otherwise, the data which is contained in this report is for the period July 1, 1982 to June 30, 1983, the State 1983 Fiscal Year (hereafter "FY 83"). Statistics are divided into four categories: Social Services, Youth Services, Community Care Licensing, and Preventive Youth Services.

The information presented in this document was derived primarily from the Division's client and facility automated reporting systems. All Division social workers, probation officers, and licensing workers participate in these reporting systems.

SUMMARY OF SIGNIFICANT TRENDS AND DEVELOPMENTS

Social Services:

- The number of children and family members receiving child protection services in FY 83 increased 10% from FY 82.
- The number of adults receiving adult protective services in FY 83 decreased from FY 82, from 1,728 to 1,667.
- 249 adults were provided residential care.
- Annualized welfare grant savings realized by WIN job placement activities totalled $2,223,552.

Youth Services

- There was a 15% increase in the average caseload for probation officers as compared with the previous year.
- 1,800 youth were detained in State facilities.
- 127 youth were provided institutional treatment services.

Community Care Licensing

- The number of day care facilities, residential care facilities, and foster homes licensed by the Division rose 16% from the prior year (from 1,364 to 1,579).

SOCIAL SERVICES

Social services are provided by 114 line staff working out of 29 field offices, and supervised out of six regional offices. Regional offices are staffed by a regional manager, who is responsible for administration of the region, and by regional licensing staff (community care licensing specialists). Appendix I shows a map of the State and breaks out the six Social Services regional boundaries.

Number Of Clients Served By Region

The Western Region, with its headquarters in Bethel, served a total of 693 clients, or 5.7%, of the total clients served statewide in FY 83. Three hundred and seventy-seven (392), or 3.4%, of the statewide total, were served by the six line workers in the Bethel field office. The remaining 301 clients were served out of the six smaller field offices in the region: Kwigillingok, Alakanuk, Mountain Village, Aniak, Grayling, and Scammon Bay. Each of the six villages is served by a paraprofessional staff member who lives in the village.

The Southcentral Region, with headquarters in Anchorage, served a total of 6,147 clients, or 52.9%, of the statewide total in FY 83. These clients were served by the 51 workers assigned to this region. The 33 workers in the Anchorage field office served 4,111 clients, or 35.4%, of the statewide total for FY 83. The workers in the Mat-Su office served 436, or 3.8%, of the statewide total, while the workers in the Eagle River office served 423 clients, or 3.7% of the statewide total. The remaining 1,177 clients were served by the workers in the other 10 field office locations in this region.

The Northern Region is comprised of six field office locations (Fairbanks, Galena, Ft. Yukon, Barrow, Tok, and Healy), with the regional headquarters located in Fairbanks. The 25 line staff in the region served 2,602 clients, or 22.5%, of the statewide total in FY 83. Of that total, 1,624 clients, or 14.0%, of the statewide total were served by the 13 line staff in the Fairbanks field office.

The Northwestern Region is comprised of three field office locations, with the regional headquarters located in Nome. The total number of clients served by this region in FY 83 was 440, or 3.8%, of the statewide total. These clients were served by six line staff in the three field offices, in Nome, Kotzebue, and Unalakleet.

The nine staff in the Southeastern Region served 945 clients in the Northern Panhandle, out of its two field offices in Juneau and Sitka. The six line staff in the Juneau office served 540 clients or 4.7%, of the statewide total, while 405 clients, or 3.5%, of the statewide total, were served by the three workers in Sitka.

The eleven line staff in the Southern Region served 774 clients, or 6.7%, of the statewide total in FY 82. The Petersburg worker served

105 clients, or .9%, while the Wrangell worker served 99 clients or .9% of the total client population statewide.

Table 1 reflects the number of clients served by the Social Services section, by region, and by field offices within each region. This Table displays not only the totals for the year, but also shows client movement by showing the number of cases being served at the beginning of the year, the number of cases opened, and the number of case closures as well.

SOCIAL SERVICES CASES

FISCAL YEAR 1983
TABLE 1
CLIENT COUNT BY REGION/WITHIN REGION BY FIELD OFFICE

REGION/FIELD OFFICE	NUMBER OF CLIENTS					
	REPORTED AT START OF PERIOD	NEW THIS PERIOD	CLOSED THIS PERIOD	REPORTED AT THE END OF FY 83	TOTAL SERVED OVER YEAR	% OF STATE CLIENTS SERVED OVER YEAR
Bethel	150	242	199	193	392	3.4%
Kwigillingok	40	25	24	41	65	.6
Alakanuk	46	10	29	27	56	.5
Mt. Village	28	25	23	30	53	.5
Aniak	25	6	7	24	31	.3
Grayling	41	10	27	24	51	.4
Scammon Bay	21	24	18	27	45	
WESTERN REGION TOTAL	351	342	325	355	693	5.7
Anchorage	1,522	2,589	2,592	1,519	4,111	35.4
Valdez	24	15	15	24	39	.3
Dillingham	69	25	3	91	94	.8
Seward	56	59	42	73	115	1.0
Kodiak	64	129	115	78	193	1.6
Kenai	105	118	111	112	223	1.9
Palmer	238	198	206	230	436	3.8
Cordova	61	45	79	27	106	.9
Eagle River	121	302	294	129	423	3.7
McGrath	20	6	8	18	26	.2
Unalaska	76	49	44	81	125	1.1
Copper Center	54	80	54	80	134	1.1
Homer	76	36	41	71	112	1.0
Iliamna	10			10	10	.1
SOUTHCENTRAL REGION TOTAL	2,496	3,651	3,604	2,543	6,147	52.9
Fairbanks	673	951	975	649	1,624	14.0
Galena	98	94	54	138	192	1.7
Fort Yukon	53	51	34	70	104	.9
Barrow	206	82	120	168	288	2.5
Tok	156	120	81	225	306	2.6
Healy	47	41	15	73	88	.8
NORTHERN REGION TOTAL	1,233	1,369	1,279	1,323	2,602	22.6
Nome	157	111	88	180	268	2.3
Kotzebue	76	70	42	104	146	1.3
Unalakleet	16	10	5	21	26	.2
NORTHWESTERN REGION TOTAL	249	191	135	305	440	3.8
Juneau	272	268	202	338	540	4.7
Sitka	208	197	198	207	405	3.5
Ketchikan	343	227	203	367	570	4.9
Petersburg	68	37	30	75	105	.9
Wrangell	45	54	48	51	99	.9
SOUTHEASTERN REGION TOTAL	946	783	681	1,038	1,739	14.9
STATEWIDE TOTAL*	5,265	6,336	6,026	5,575	11,603	100.0%

*The region for two cases was unidentified.

Client Demographic Characteristics

Sex: Of the 11,567 Social Services clients served during FY 83, 4,925 were male (43% of the total clients served), and 6,615 were female (57% of the total clients served).

Ethnic Group: The largest number of clients served by Social Services in FY 83 was Caucasian: 6,137 clients, or 53%. Alaska Natives represented 38%, or 4,389. Four hundred and ninety-three blacks (4%) and 111 Asian-American (1%) were served. In addition, 473 clients (4%) of other ethnic groups were also served.

Regional variations in ethnicity are quite significant. In the Southcentral region, 65% of the clients were Caucasian, and 22% were Alaska Natives. This contrasts with the Western and Northwestern regions, where 95% of the clients served in each region were Alaska Natives. Ethnic group distribution by region is displayed in Table 2.

Age: Fifty-five percent (55%) of the clients served were 19 years of age or younger, with the largest percentage of those being teenagers and children between five and 12. Fourteen percent (14%) of the clients were four years old or younger.

Adults in the age range 20 to 59 comprised 35% of the client population, while 10% of the clients were sixty years of age or older. The regional distribution by age is shown in Table 2.

TABLE 2
SOCIAL SERVICES CLIENT DEMOGRAPHIC CHARACTERISTICS
FY 1983

REGION	SEX*		ETHNIC GROUP				
	M	F	Alaska Native	Black	Cauca-sian	Asian	Other **
Western	278	411	658	1	23	5	6
Southcentral	2,674	3,429	1,367	331	3,997	54	354
Northern	1,133	1,149	1,090	97	1,325	26	64
Northwestern	191	249	415	-0-	19	-0-	6
Southeastern	348	595	505	16	392	11	21
Southern	300	470	354	2	381	15	22
STATEWIDE TOTAL	4,925 43%	5,615 57%	4,389 38%	493 4%	6,137 53%	111 1%	473 4%

REGION	AGE ***				
	4 Yrs -Less	5-11	12-19	20-59	60 or Over
Western	85	136	119	238	115
Southcentral	884	1,294	1,295	2,245	409
Northern	385	518	403	1,024	261
Northwestern	65	102	106	58	109
Southeastern	130	187	159	344	122
Southern	115	164	201	159	133
STATEWIDE TOTAL	1,664 14%	2,401 21%	2,284 20%	4,069 35%	1,149 10%

*The sex of 63 clients was not reported.
**Includes Non-Alaskan Natives, Mexican Americans, and others.
***The age of 36 individuals was not reported.

SERVICE CATEGORIES

There are four categories of direct Social Services: Information and Referral; Individual and Family Counseling; Child Protection; and Adult Protection.

Table 3 displays the number of services opened during the year. The percentage displayed in parentheses is the percent of service in each service category by region. The number of services is not the same as the number of cases, as an individual may have received services in more than one service category during the year.

TABLE 3
CLIENTS BY SERVICE BY REGION

REGION	REFERRAL	INDIVIDUAL AND FAMILY COUNSELING	CHILD PROTECTION	ADULT PROTECTION
Western Region	208 (28%)	109 (15%)	290 (39%)	135 (18%)
Southcentral Region	588 (9%)	270 (4%)	4,870 (75%)	764 (12%)
Northern Region	478 (17%)	103 (4%)	1,851 (67%)	318 (12%)
Northwestern Region	34 (7%)	18 (4%)	287 (61%)	131 (28%)
Southeastern Region	77 (8%)	63 (6%)	701 (70%)	157 (16%)
Southern Region	84 (11%)	38 (2%)	516 (62%)	161 (20%)
STATEWIDE TOTAL *	1,180 (10%)	601 (5%)	8,515 (71%)	1,667 (14%)

* For 2 cases, the region was not reported.

SERVICES TO CHILDREN

The Social Services Section of the Division is mandated to serve children who have been, or are in danger of being, abused or neglected by their parents.

Whenever possible, the Division prefers to provide services to children while they are in their own homes, since there is often a better chance of improvement; and there is less disruption to the child. When a child must be placed away from his parent's home, placement with relatives is preferable. At the end of FY 83, 4,340 of the 6,349 children served, or 68%, were living in their own or parent's home, and 418, or 6%, were living with relatives. Ninety-seven children, 2% of the total served, were living with non-relatives. Non relatives may include family friends, school teachers or other individuals with whom the child is p[illegible] without payment occurring.

On June 30, 1983, 340 children, or 5% of the total, were in emergency shelter placement until they were able to return home or move to another placement; while 669 children, or 11% of the total, were in a foster home; and 152 children, or 2% of the total, were in either a group home or institutional placement. Children who need a group home or institutional placement generally need more specialized care and cannot live in a family setting. The majority of children in a group home or institution were adolescents (122 of the 152 children in these types of settings).

At the end of the fiscal year 127 children, or 2% of the total, were in adoptive placement. These adoptions should be finalized within the next few months to a year.

Forty-five (45) children, all but five of whom were teenagers, had run away from their home or placement on June 30, 1983.

Table 4 shows the living situation of these children by region and Table 5 shows the demographic characteristics by living situation at the end of the year.

TABLE 4

Living Situations of Children by Region

REGION	LIVING SITUATION AT END OF THE FISCAL YEAR									
	Own or Parent Home	Relative Home	Non-Relative Home	Foster Home	Emergency Shelter	Group Home	Institution	Adoptive Home	Runaway	All Other
WESTERN	197	51	9	39	25	4	2	1	0	12
SOUTHCENTRAL	2,487	162	47	359	168	30	51	59	38	72
NORTHERN	850	71	13	146	116	7	6	56	4	37
NORTHWESTERN	136	50	2	30	14	10	11	3	1	16
SOUTHEASTERN	326	48	16	50	4	5	8	4	2	13
SOUTHERN	343	36	10	45	13	8	10	4	-0-	11
STATEWIDE TOTAL	4,340	418	97	669	340	64	88	127	45	161
PERCENT	68%	6%	2%	11%	5%	1%	1%	2%	1%	3%

TABLE 5

Demographic Characteristics of Children
Served by Living Situation at the End of the Period

LIVING SITUATION	SEX*		ETHNIC GROUP					AGE		
	MALE	FEMALE	ALASKA NATIVE	BLACK	CAUCA-SIAN	ASIAN	OTHER	4 Yrs. -LESS	5-12	13-19
OWN OR PARENT HOME	1,978	2,342	1,415	215	2,482	42	186	1,179	1,823	1,338
RELATIVE HOME	178	238	276	13	108	4	17	97	163	158
NON-RELATIVE HOME	26	70	35	1	52	0	9	20	17	60
FOSTER HOME	297	370	349	27	269	4	20	157	192	320
EMERGENCY SHELTER	155	184	159	17	147	3	14	97	95	148
GROUP HOME	27	37	29	1	29	1	4	2	9	53
CHILD CARE	49	39	38	3	46	0	1	-0-	19	69
RESIDENTIAL FACILITY	60	67	57	6	58	2	4	73	36	18
ADOPTIVE HOME	12	33	4	2	36	0	3	2	3	40
RUNAWAYS	75	84	78	4	64	0	16	37	4	80
ALL OTHERS										
TOTAL	2,857	3,464	2,439	289	3,291	56	274	1,664	2,401	2,284
	45%	55%	38%	5%	52%	1%	4%	26%	38%	36%

*The sex of twenty-eight (28) individuals was not reported.

SERVICES TO ADULTS

Social work staff provide directly or arrange through contract a wide range of client services which are designed to prevent or remedy the neglect, abuse, and exploitation of adults, and to prevent or reduce unnecessary institutionalization.

Direct Services

Services include: assessment and referral activities; individual and family counseling; case work, including investigation of reported incidents of abuse and neglect; assessment of client needs; arranging for and supervising homemaker services; foster care and residential care; and initiating guardianship and conservatorship proceedings.

Purchased Services

The Division also purchases support services for adult services clients through private providers when a case assessment indicates that the services are needed and are one of the appropriate means by which the goals of the case plan can be met. The support services which may be purchased for specific clients include homemaker support, and residential care. Homemaker support includes a variety of homemaking and non-medical personal services provided to assist individuals to remain in their own or relative's homes.

TABLE 6

SUPPORT SERVICES PURCHASED FOR ADULTS

REGION	HOMEMAKER	RESIDENTIAL CARE
Western	70	15
Southcentral	336	229
Northern	244	2
Northwestern	78	2
Southeastern	124	0
Southern	122	1
Statewide Total	973	249

WIN

The Work Incentive (WIN) Program provides a wide range of employment related services for adult Aid to Families with Dependent Children (AFDC - a category of Public Assistance) applicants and recipients. The WIN Program is jointly administered by the Division of Family and Youth Services and the Employment Security Division, Department of Labor. For a number of years the program has maintained offices in Anchorage, Fairbanks, and Juneau to serve clients residing in those general areas. Early in FY 83, the program also opened new offices in Kenai and the Palmer/Wasilla areas staffed by Department of Labor employees.

In FY 83, WIN staff assisted 509 AFDC recipients to obtain unsubsidized employment. This resulted in an immediate annualized welfare grant savings of $2,223,552. The WIN program saves nearly two dollars in welfare grant reductions for every one dollar allocated to program operation, making it highly cost effective.

YOUTH SERVICES

The Youth Services component of the Division of Family and Youth Services has a total of 217 staff who operate and maintain three Youth Correctional Institutions and field services throughout the state. Field services include intake, diversion, probation investigation and supervision, placement, licensing, institutional audits and foster homes. Youth Services also administers to 70 active interstate cases and placement supervision of in excess of 85 delinquent children in in-state and out-of-state private institutional care.

Youth Services is administered through three regions--Northern, Southcentral and Southeast. With the exception of McLaughlin Youth Center, all activities are administered on a regional basis.

Intake

Intake services consist of conducting preliminary investigations concerning alleged illegal conduct of minors, determining if there is a factual basis for the allegations, and deciding if the minor should be appropriately diverted from the legal system or if formal legal action should be taken. Probations officers perform the intake function for the Superior Court in those locations where there is not a court-employed Intake Officer (court intake officers are in Anchorage, Fairbanks, Barrow, and Kenai).

Services offered by probations officers following formal disposition include supervision, counseling, referral to and arrangement of specialized services, advocacy, and other activities to aid in the successful adjustment of youth on probation.

TABLE 7

FY 83 Field Service Workload

Youth Services Probation Officers

MONTH	COURT DISPOSITION REPORTS	COURT REPORTS	COURT & CLASSIFICATION APPEARANCES	INTAKES	TRAVEL IN EXCESS OF 50 MILES	ACTIVE CASELOAD	REVOCATIONS TECH./ NEW CHARGE
JULY	43	148	328	228	59	1030	7 / 8
AUG	51	140	287	158	63	1025	11 / 4
SEPT	49	132	86	194	45	1043	18 / 8
OCT	51	154	253	213	89	1008	8 / 10
NOV	46	144	325	123	68	1056	11 / 5
DEC	68	164	323	137	52	1081	8 / 8
JAN	48	166	365	123	64	1109	11 / 11
FEB	47	123	407	211	92	1134	10 / 5
MAR	54	183	446	177	54	1105	13 / 13
APR	50	175	400	158	95	1115	14 / 10
MAY	58	226	472	191	76	1155	14 / 6
JUNE	63	354	393	204	77	1070	9 / 14
TOTALS	628	2109	4085	2117	829	12,931	134/102

The field work load table shows the statewide breakdown of the juvenile probation officers. According to monthly field action reports submitted each month by every probation officer, a typical workload per line officer per month is as follows:

TABLE 8

PROBATION OFFICER

MONTHLY AVERAGE BREAKDOWN

1.5	Investigation and Disposition Reports
5.0	Court Reports
10.0	Court or Classification Appearances
6.0	Intakes Completed
3.0	Trips in excess of 50 miles
31.0	Active Supervision of Delinquency Cases

The average caseload statewide was 1077 and average intakes was 176.4. Comparison with FY 82 figures shows a 15% increase in average caseload for probation officers with no additional staff.

Table 9 shows where the probation cases were reported, and Table 10 shows the ethnic background and sex of the children served.

TABLE 9

Juvenile Probation Clients Served by Region and Office

Juneau Regional Office	236
Ketchikan District Office	73
Sitka District Office	24
Petersburg District Office	44
Sub-Total First Judicial District	377
Anchorage Regional Office	469
Kodiak District Office	66
Kenai District Office	95
Palmer District Office	54
Sub-Total Third Judicial District	684
Fairbanks Regional Office	326
Barrow District Office	36
Nome District Office	93
Kotzebue District Office	51
Bethel District Office	110
Sub-Total Second and Fourth Judicial District	616
Unknown Regional Office	34
STATEWIDE TOTAL	1711

TABLE 10

Ethnic Background and Sex of Juvenile Probation Clients

577	(34%)	Alaska Native
59	(4%)	Black
994	(58%)	Caucasian
81	(4%)	Other or Unknown
1711		

TABLE 11

YOUTH SERVICES

Total Clients Served
By Type of Placement

	SOUTHCENTRAL	NORTHERN	SOUTHEAST	STATEWIDE
OWN HOME	459	424	303	1186
RELATIVE'S HOME	23	45	12	80
NON-RELATIVE HOME	8	2	4	14
FOSTER HOME	21	29	8	58
EMERG. SHELTER	7	10	3	20
GROUP HOME	2	20	6	28
RES. CARE FACILITY	43	14	16	73
CORRECTIONAL FACILITY	115	60	16	191
RUNAWAY/UNKNOWN	22	6	4	32
OTHER	14	10	4	28
TOTAL	714	620	376	1710

Juneau Intake-Diversion Unit

During FY 83, this unit completed its first year of operation. Unique in its operation, it is the only separate intake unit working directly out of a detention facility and covering peak periods of intake after business hours. Of the 417 Youth Services cases, over 350 (90%) were handled informally, 198 or 47% were referred to other agencies such as Municipal Social Services, Community work service, alcoholism programs or private counseling. During the year, 2127 hours of community work service were assigned. During the same period, $2,949.42 was returned to victims of property crimes.

58% of Youth Services cases were disposed of without the use of detention. Time spent in detention was reduced by 25% compared to prior years when the unit was not in existence.

McLaughlin Youth Center

McLaughlin Youth Center is one of four facilities for delinquent youths and has two distinctly different institutional components: 1) McLaughlin Youth Center Detention which serves as the detention center primarily for the Anchorage area; and 2) McLaughlin Youth Center program, which provides long-term care for delinquent youths who the court has ordered placed in an institution.

a. Detention Services

The detention and diagnostic facility houses those children, both boys and girls from ages of ten to eighteen years, that require a secure temporary residence following their arrest by a peace officer or specifically placed by a court order pending disposition. Delinquent youths who are identified as unable to remain in the community without being involved in criminal activities require a secure facility which can provide evaluation, testing, and court review as well as protection for the community. Detention Units provide a full range of services for the residents who are detained including school, recreation, counseling, diagnostic evaluation, medical evaluation, and religious services.

TABLE 12

MCLAUGHLIN YOUTH CENTER DETENTION

Admissions	1289
Average Population	52.49
Psychiatric Evaluations	80
Volunteer Contacts	400

b. Program Service Units

The McLaughlin Program Units include four twenty-bed cottages and one twelve-bed closed treatment unit. There are a number of treament services provided ot the resident and his family by the youth counselor staff in these units. These include individual, group, and family counseling. Family counseling is provided to all families who are available and desire to participate. During FY 80 and 81, criminal justice grants were secured to contract with a private agency in the community to provide family counseling and crisis services during the reintegration phase of the resident back into his home and to the community. In addition, family counseling is utilized to facilitate early releases back into the community and reduce the length of stay in the institution.

The primary function of McLaughlin Youth Center is to provide the necessary physical and program structure for delinquent youth who have exhausted all other resources in the community. It is the philosophy of McLaughlin Youth Center, and the Division, to utilize McLaughlin only after other community-based resources have been exhausted, and for only as long as the services are needed to effect a change in the resident enabling him to return to the community.

TABLE 13

MCLAUGHLIN YOUTH CENTER PROGRAM

Admissions	100
Average Population	87.59
Family Counseling Sessions	437
Volunteer Contacts	625
Average Length of Stay	11.25 Months

McLaughlin Youth Center residents educational needs are met by teachers hired by the Municipality of Anchorage School District and assigned to the McLaughlin Youth Center School. The teacher to resident ratio in most classes is less than ten to one, which provides for individualized instruction and a system which strives to correct deficiencies and bring him back to grade level.

The youth center program only accepts residents who have been adjudicated as delinquents by the court and have been classified to the youth center by a regional classification committee. The average age of residents at McLaughlin Youth Center is approximately sixteen years of age, with an effective range from thirteen to nineteen years.

Fairbanks Youth Facility

The Fairbanks Youth Facility works primarily with juveniles and their families from the Fairbanks area, as well as outlying communities in the Northern region.

The Fairbanks Youth Facility serves a dual function. It provides long-term treatment for juveniles who have been found delinquent and committed for treatment by the courts and also serves as a short-term detention facility. While both functions are housed in the same facility, they are, in essence, two entirely separate programs which share only administrative and support services.

a. Detention Program:

The Fairbanks Youth Facility detention unit has the capability to house eight juveniles. The primary responsibility of the detention unit is to provide secure care and custody of juveniles until completion of their court process and/or until their transfer to a treatment program. It is also the goal of the detention unit to provide confined juveniles with surroundings and experiences which are conducive to positive growth and rehabilitation. In order to reach these goals, both individual and group counseling are provided by the youth counselor staff.

TABLE 14

FAIRBANKS YOUTH FACILITY DETENTION

Admissions	440
Avg. Population	12.49

The detention unit provides detained juveniles with academic evaluation, as well as an educational program. Contract psychiatrists and psychologists are available to provide court ordered diagnostic evaluations and consultation with the detention staff in dealing with problem residents.

b. Treatment Programs:

The treatment unit has the capacity to treat twelve male residents. Each resident will be assigned to a treatment team that will consist of a primary counselor and group leader. The treatment team works in conjunction with probation to better develop an overall treatment plan for the resident.

There are a number of program treatment services provided to the resident and his family. These include individual, group, and family counseling. Family counseling is provided to all families who are available to participate.

A school program is provided under an agreement with the North Star School District. The District administers and supervises the program and provide services provided their regular schools. Residents are evaluated and placed in an educational program designed to fit their educational needs. Fiscal support is solicited from Title I Federal funds and from Municipal appropriations.

TABLE 15

FAIRBANKS YOUTH FACILITY PROGRAM

Admissions	17
Avg. Population	12.0
Average Length of Stay	10.3

The Fairbanks Youth Facility's program unit only accepts residents who have been adjudicated as delinquents by the court and have been classified to the facility by a regional classification committee. The average age of residents at the Fairbanks Youth Facility is approximately sixteen years of age, with an effective range from thirteen to eighteen years.

Nome Youth Facility

The overall role of the Nome Youth Facility is similar to the established structure of McLaughlin Youth Center and the Fairbanks Youth Facility. Present housing capability is for nine long-term residential and one detention unit. The Nome Youth facility is orientated toward participation in community activities and the residents attend school in the public schools. The program is directed towards providing detention services and residential care for youth offenders within the Nome/Kotzebue region.

TABLE 16

NOME YOUTH FACILITY

Detention Admissions	71
Program Admissions	10
Avg. Population (Detention)	.48
Avg. Population (Program)	8.31
Avg. Length of Stay	9.80

COMMUNITY CARE LICENSING

The Division of Family and Youth Services has been delegated responsibility for licensing non-medical community care facilities, including child day care centers and homes, child foster homes, child group homes and facilities, adult foster homes, adult residential care facilities, and child placement agencies. The purpose for licensing is to ensure a standard level of service which must be maintained in order for a program to be permitted to operate. Licensing is intended to reduce predictable harm to children and dependent adults who reside in child or adult care facilities. It also lends support to families of persons in care and provides consultation services to those providing the care or service.

Most licensing studies are performed by 13 community care licensing specialists located in the Division's six regional offices. Three Youth Services alternative care coordinators, Division field staff, and approved private agencies perform some licensing studies for home-sized facilities. Licensing is available statewide. In Anchorage, children's facilities caring for more than five children must also obtain a municipal permit. In Bethel, day care licensing is performed by the local government.

The information for the licensing section of this report is not based on the FY 83 fiscal year. Rather, it is a point-in-time report of licensed facilities. Tables 9, 10, and 11 are based on information in the system as of September 30, 1983. Tables 12, 13, and 14 are based on information available as of January, and show comparisons of figures going back to 1977. They demonstrate the growth in the number of licensed facilities in six years. Overall, the total number of facilities has increased from 895 in 1977 to 1,365 in 1983. The greatest increases came in day care centers (51%) and family day care homes (62%) with a significant growth in the last year which appears to be accelerating. Adult facilities were added in 1981 and 1982.

Day Care Facilities

Of the types of care licensed by the Division, day care facilities are in greatest use by the general public. Statewide, there are 138 day care centers currently licensed by the Division; and these centers have a licensed capacity to care for a total of 6,288 children. There are 499 day care homes licensed by the Division, which have a licensed capacity to care for 2,453 children. Table 9 indicates the number of day care facilities (day care centers and day care homes) and their licensed capacity by region. Table 12 shows the growth in day care facilities from 1977 to 1983.

Residential Care Facilities

Residential care facilities include facilities caring for children and those caring for adults. Community care licensing specialists were responsible for the licensing of 38 children's residential care facilities, which have a licensed capacity of 584 children, and 26 adult residential care facilities which have a licensed capacity of 318 adults. Table 10 shows the distribution of residential care facilities and capacity by region. Table 13 shows the increases in residential facilities since 1977.

Foster Homes

There are 878 child foster homes licensed in the State, and they have a licensed capacity of 1,674 children. Of this total, 70 foster homes are reviewed for licensure by agencies other than the Division, although the Division is responsible for issuing the license and for enforcement of the licensing requirements. Table 11 shows the number of child foster homes and their capacity by region. Table 14 provides figures on foster home care from 1977 to 1983.

TABLE 17
DAY CARE FACILITIES

REGION	DAY CARE CENTERS*	LICENSED CAPACITY*	DAY CARE HOMES	LICENSED CAPACITY
WESTERN	3	136	0	0
SOUTHCENTRAL	71	3,612	268	1,281
NORTHERN	37	1,340	114	608
NORTHWESTERN	3	152	1	5
SOUTHEASTERN	15	683	74	356
SOUTHERN	9	365	42	206
STATEWIDE TOTAL	138	6,288	426	2,453

*Two day care centers are licensed by a local government

TABLE 18
RESIDENTIAL CARE FACILITIES

REGION	CHILD	LICENSED CAPACITY	ADULT	LICENSED CAPACITY
WESTERN	3	144	2	36
SOUTHCENTRAL	26	263	20	257
NORTHERN	4	46	3	20
NORTHWESTERN	3	58	0	0
SOUTHEASTERN	5	50	1	5
SOUTHERN	3	23	0	0
STATEWIDE TOTAL	38	584	26	271

TABLE 19
CHILD FOSTER HOME BY REGION

REGION	FOSTER HOMES**	LICENSED CAPACITY
WESTERN	88	155
SOUTHCENTRAL	394	769
NORTHERN	206	393
NORTHWESTERN	55	164
SOUTHEASTERN	67	136
SOUTHERN	68	117
STATEWIDE TOTAL	878	1,674

**70 foster homes are supervised by agencies other than DFYS as follows:

7 Tanana Chiefs	14 Ak. Program for the Deaf	9 Hope Cottage, Inc.
2 United Crow Band	13 Catholic Social Services	4 Fairbanks Counseling & Adoption
2 Fairbanks Native Assoc.	6 Family Focus	4 Satellite Home Program
3 3 Ak. Native Medical Ctr.	4 Family Connection	2 Alaska Baptist Family Services Center

TABLE 20
DAY CARE FACILITIES

1977 to 1983*

JANUARY	DAY CARE CENTERS	CENTER CAPACITY	DAY CARE HOMES	HOME CAPACITY
1977	63	2,782	264	1,195
1980	86	3,823	282	1,309
1981	94	4,449	278	1,290
1982	109	4,825	348	1,619
1982	123	5,554	426	2,009

TABLE 21
RESIDENTIAL CARE FACILITIES

1977 to 1983*

JANUARY	CHILD	LICENSED CAPACITY	ADULT	LICENSED CAPACITY
1977	29	550	0	0
1980	39	579	0	0
1981	37	569	0	0
1982	37	578	7	112
1983	41	580	17	271

TABLE 22
FOSTER HOMES

1977 to 1983*

JANUARY	CHILD	LICENSED CAPACITY	ADULT	LICENSED CAPACITY
1977	529	1,119	0	0
1980	632	1,331	0	0
1981	646	1,249	0	0
1982	630	1,304	0	0
1983	757	1,498	1	5

*Figures are not available for 1978 and 1979

PREVENTIVE YOUTH SERVICES

The Preventive Youth Services grant program is an outcome of a divisional task force convened in 1976 for the purpose of evaluating the need for services to youth who had not yet entered the formal social service or juvenile justice systems. Based on its findings, the task force recommended that the Division secure funds to implement youth and family serving programs which promote positive patterns of youth development and growth. Subsequent legislative action broadened the scope of the youth services program to include preventive services targeted to families and children who were at high risk for abuse, neglect, and exploitation.

In FY 83, the State Legislature appropriated $1,780,000 to purchase preventive and early intervention services. Two grants were designated by the Legislature and fifteen local agencies and organizations were selected to provide youth and family oriented services through the Department's competitive grant award process. The agencies are located in eight Alaskan communities: Anchorage, Cordova, Fairbanks, Nome, Bethel, Ketchikan, Craig, and Juneau.

The local youth services agencies address their programs to one or more of the following service areas:

I. Prevention

Primary Prevention: Preventive activities directed at the general community-at-large. The purpose of such services is to ensure suitable family functioning and to alleviate negative forces that may precipitate an incident of abuse or neglect.

Secondary Prevention: Preventive activities available for high risk parents and their children. The purpose of these educationally oriented intervention services is to provide parents effective learning skills, support, and methods for improving self-image in the early stages of child abuse and neglect.

Tertiary Prevention: Preventive services of a rehabilitative nature targeted at families in which episodic or acute abuse or neglect has occurred. Services are of a therapeutic nature, and are intended to recognize, assess, and achieve change in order to prevent a recurrence of destructive parental or delinquent behavior.

II. Early Intervention

Early intervention services generally focus on high risk, pre-delinquent youth and are designed to strengthen youth as individuals in their respective roles to enable them to manage their personal responsibilities, as well as those of family life.

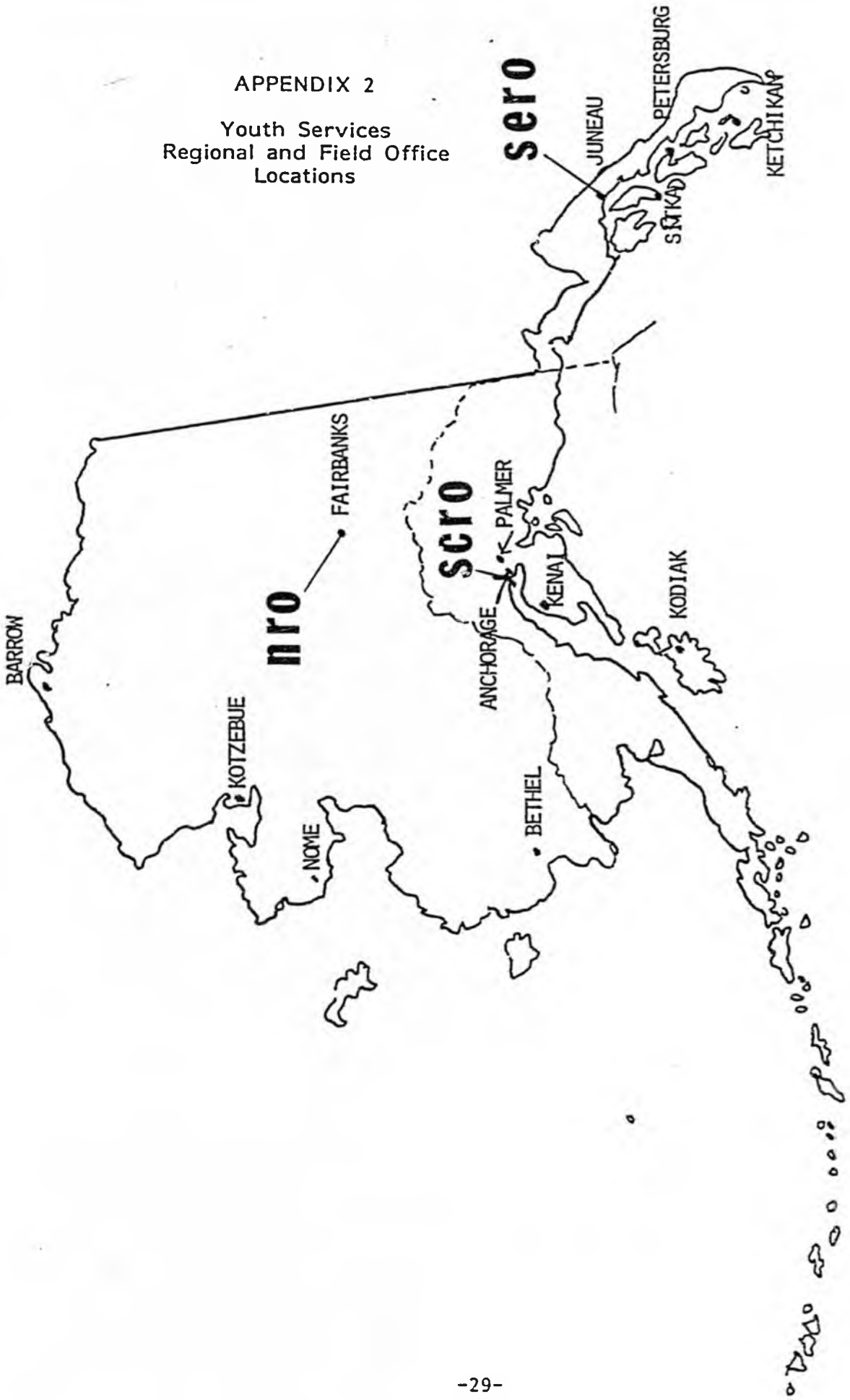
In FY 83, 9,234 individuals received preventive and early intervention services. Approximately 52% of those receiving services were under 18 years of age.

APPENDIX 1

Social Services
Regional and Field Office
Locations

APPENDIX 2

Youth Services
Regional and Field Office
Locations



Sec. 12.80.060. CONFINEMENT OF CERTAIN MINORS. (a) A person 16 or 17 years of age who is charged with an unclassified felony, and who is held in custody, shall be confined in a facility for juvenile offenders until indicted for, held to answer following a preliminary hearing on, or charged by complaint or information following a waiver of indictment or preliminary hearing for an unclassified felony offense. Following indictment, preliminary hearing, or waiver the person, if held in custody, shall be confined in a facility for adult offenders.

(b) Except as provided in (a) of this section, a person under the age of 18 who has been arrested and is being held in custody for an offense which would be a criminal offense if committed by an adult shall be confined to a facility for juvenile offenders unless children's court jurisdiction over the person has been waived under AS 47.10.060, and the person has been indicted for, held to answer following a preliminary hearing on, or charged by complaint or information following a waiver of indictment or preliminary hearing for a felony offense.

(c) If a person under the age of 18 who is subject to the jurisdiction of the court under AS 12.05.020 is confined to custody while awaiting sentencing, or is sentenced to a period of incarceration upon conviction, the person must be committed to the custody of the Department of Health and Social Services for confinement in a correctional facility for juvenile offenders, unless the person is 17 or 18 years of age and has committed an unclassified felony, in which case the person may be confined in a correctional facility for adult offenders.

Section 1. AS 12.05 is amended by adding a new section to read:

Sec. 12.05.020. JURISDICTION OVER CERTAIN MINORS CHARGED WITH SERIOUS FELONIES. (a) A person 16 or 17 who is charged with an offense designated as an unclassified [or Class A] felony must be arrested and prosecuted as an adult.

(b) A person 16 or 17 years of age who is charged with a Class A felony is subject to AS 47.10.

(c) If the court has waived juvenile jurisdiction over a person under the age of 18 under AS 47.10.060, that person must be prosecuted as an adult.

(d) References in this section to the age of a person refers to the person's age at the time of the offense.

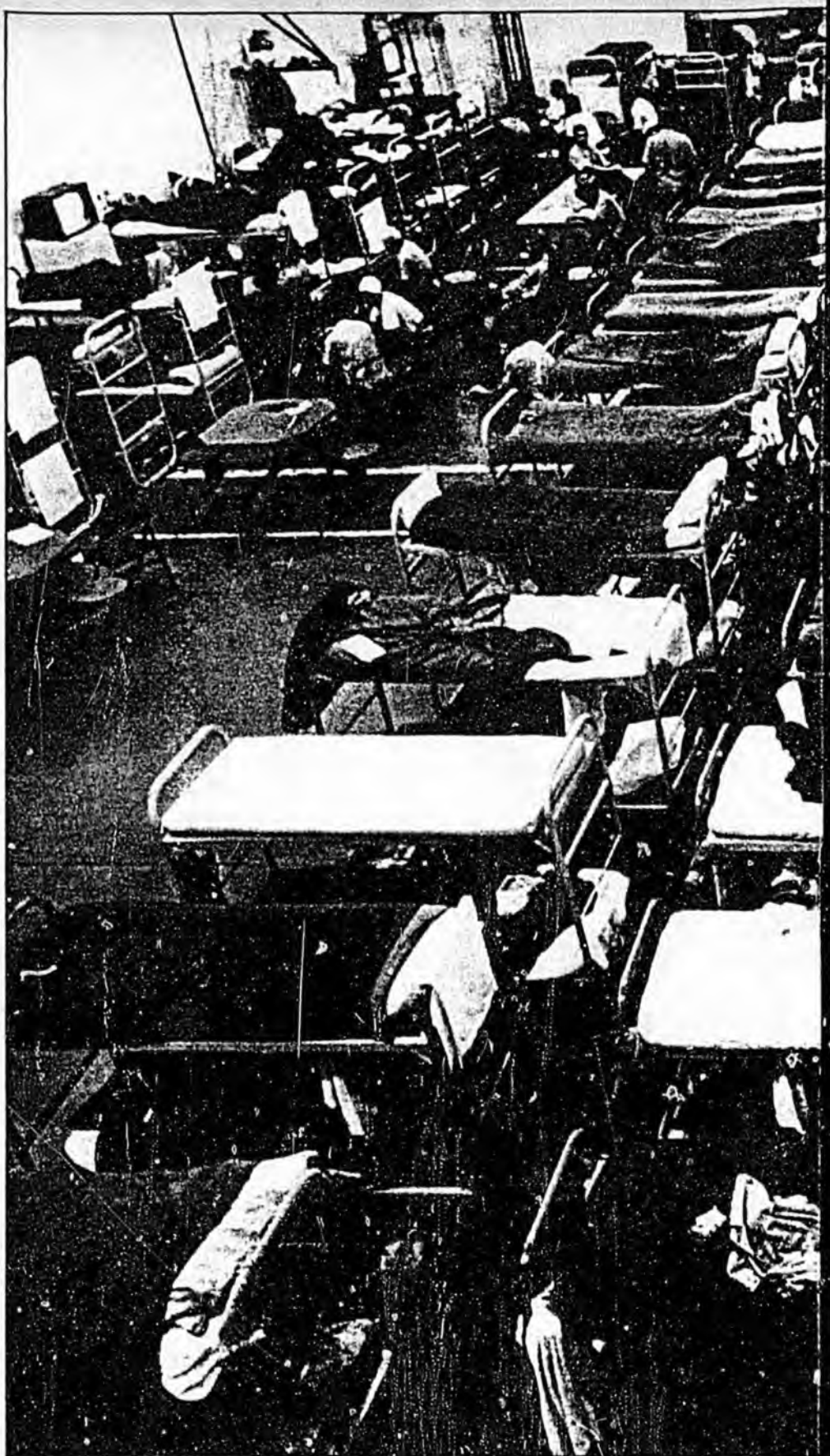
Sec 2. page 1, line 29:

delete "class A"

page 2, line 2:

delete "Class A"

by Stephen Gettinger



The Prison Population E

"FANTASTIC . . . enormous . . . terrifying," were the words chosen by Norval Morris of the University of Chicago Law School to describe last year's increase in the U.S. prison population.

"It's an astonishing increase," says Alfred Blumstein of Carnegie-Mellon University in Pittsburgh.

"I am genuinely surprised; that's stunning growth," says Franklin Zimring, director of the Center for Studies in Criminal Justice at the University of Chicago.

"It's even worse than what I had expected," says Kenneth Carlson of Abt Associates in Cambridge, Mass. "It becomes more and more frightening."

These men are among the nation's most respected criminal justice scholars; they are not given to hyperbole. Their reactions, when asked by *Corrections Magazine* to comment on the 1982 prison census of the federal Bureau of Justice Statistics (BJS), show the significance of the continuing population explosion.

On Dec. 31, 1982, there were 42,915 more inmates under the jurisdiction of state and federal prisons than the year before, the largest one-year increase in history. This 11.6 percent increase brought the nation's prison population to 412,303. When added to last year's record 12.5 percent growth, it caps a remarkable surge in imprisonment in the past decade. In that time, the nation as a whole has more than doubled its prison population; several states have tripled theirs.

In 1972, the nation's incarceration rate for sentenced offenders was 93 adults per 100,000 general population, the highest in the western world. That rate has gone up 76 percent in the past ten years to 170. It grew almost 32 percent in the past two years.

A BJS jail survey released in March reported that the nation's local jail population, at 210,000 as of June 30, 1982, had risen as fast as the prison population over the past four years. Added together the to-

CS 127 (Jud) ARGUMENT TO MONITOR JUVENILE DETENTION

The federal government has taken an affirmative step against detention of juveniles who are not fugitives or who have not been charged with serious offenses. The Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5601) established the Office of Juvenile Justice and Delinquency Prevention in the Department of Justice to provide juvenile justice and juvenile delinquency programs.

The legislative histories of the 1974 act and its subsequent amendments show that the Congress was concerned about inappropriate juvenile detention practices in the states as well as what could result -- suicide, rape, abuse and increased likelihood that children would commit criminal acts after secure detention. The Office of Juvenile Justice and Delinquency Prevention policy encourages the adoption of national standards advocating:

1. The reduction in the use of detention and incarceration for all but the most serious or violent juveniles.

2. Juveniles who commit acts that would not be considered criminal if they were committed by adults (status offenders) and non-offenders are not to be confined.

3. Juveniles are not to be confined where they would have regular contact with adults accused or convicted of criminal offenses.

4. After December 8, 1985, no juveniles will be detained in any adult jail or lock-up.

The Office's primary position is that confinement of a juvenile in an adult jail is undesirable and potentially destructive and recommends that juvenile facilities not even be located on the same grounds as adult institutions. The Office has established criteria stating that children should not be securely detained unless they:

1. are fugitives from another jurisdiction;

2. request, in writing, protection under circumstances that present an immediate threat or serious physical injury;

3. are charged with murder in the first or second degree; or

4. are charged with a serious property crime or a violent crime other than first or second degree murder which, if committed by an adult, would be a felony;

5. are already detained or on conditional release in connection with another delinquency proceeding;

6. have a demonstrable recent record of willful failure to appear at family court proceedings;

7. have a demonstrable recent record of violent conduct resulting in physical injury to another; or

8. have a demonstrable recent record of adjudications for serious property offenses.

Youths In Adult Facilities: Corrections' No-Win Situation

by
Michael Courlander
and
David E. Tracey

Courtesy of the Federal Bureau of Prisons

A classroom in the Federal Correctional Institution in Morgantown, W. Va.

About the Authors: Mr. Courlander is a case developer for the National Center on Institutions and Alternatives (NCIA) in Alexandria, Va. Mr. Tracey is a program supervisor for NCIA.

The issue of youths in adult prisons and jails is a major problem and essentially a no-win situation for all involved. One of the major concerns to be addressed is the alienation resulting from the established practice of incarcerating youths. The purpose of this article is to briefly define alienation and discuss factors and correlates of alienation. It concludes with some practical suggestions for reducing alienation within prisons and jails.

The very term "alienation" has an elusive quality about it, and much of the social science discussion surrounding it has been devoted to its definition. Alienation has been, at times, defined as detachment, estrangement, rebellion, separation, anomie, social isolation, noninvolvement, disaffection and explicit rejection of society. In this article, alienation is defined as the absence or loss and lack of connection that an individual may feel towards himself, others or society at large (Keniston, 1965: 5). Alienation is viewed here as something enduring and negative, and something that may, in the extreme case, take the form of psychosis.

Four Primary Factors

Studies have noted a number of situational and psychological factors frequently associated with alienation. Four primary factors have been identified. First, it has been observed that individuals who perceive themselves as having no control over their environment often experience alienation (Maryland State Dept. of Educ., 1972: 8). These persons feel powerless and distance themselves from others in an effort to cope.

A second correlate of alienation is that of exploitation (Pappenheim, 1967). This factor is similar to that of powerlessness, but differs in that the environment is perceived as actively manipulating the individual. Persons who find themselves constantly exploited will in all likelihood become alienated.

A third factor is that of role estrangement, defined as the inhibition of one's true feelings (Maryland State Dept. of Educ., 1972: 8). Role estrangement may be caused either by a strong psychological conflict within an individual or by living in an environment in which it is desirable or necessary to shield one's emotional reactions.

Finally, individuals may also experience alienation when they feel that the avenues to what is good in life are blocked (Maryland State Dept. of Educ., 1972: 8). Persons in this last category often have no goals or purpose in their lives and have resigned themselves to a life of non-action.

Given these factors, it is no surprise that inmates in general, and youths in particular, experience a very high degree of alienation. The nature of a jail or prison and the accompanying individualized feelings of isolation, lack of self-worth and exploitation virtually mandate that alienation will occur.

The prison setting is unequivocally society's major source of alienation.

The Major Source of Alienation

The prison setting is unequivocally society's major source of alienation (Watson,

1966: 377). In the institutional setting, prisoners are virtually powerless. They have lost the freedom to go where they please, dress as they like, eat what they want and spend their time as they wish. The institution regulates almost all aspects of the prisoners' lives. Although it is true that inmates are given and encouraged to make certain choices while confined, they remain prisoners. To the extent that the incarcerated feel powerless in the jail or prison setting, they may become alienated by a system in which they have no control.

Effects of Overcrowding

Overcrowding in institutions may also contribute to the generation of alienated prisoners. Hutt and Vaizey's study of crowding found that subjects in a high-density environment displayed significantly more aggressive behavior and showed less social interaction than did subjects in a low-density environment (1966: 1,371-72). Smith and Haythorn found that hostility was strongly associated with high-density conditions (1972: 67-79). Baum and Valins, in another crowding experiment, found that subjects in crowded conditions experienced stress (1973). The addition of crowding-induced stress and hostility to an already difficult environment is only likely to decrease an individual's ability to appropriately cope.

The underlying principle and main ingredient in all programs that affect youths positively is "unconditional care."

Life in jail or prison is also greatly affected by the prisoners within. Unfortunately for many, however, the prison environment is rife with coercion and exploitation. Often, a pecking order of inmates emerges, with weaker inmates being victimized more frequently. Even the stronger inmate will be subdued when confronted by a group of several inmates. In their 1976 study of juvenile victimization, Bartollas *et al.* stated (p.74):

> Compared to community living, institutional life represents deprivation. Subsequently the politics of scarcity becomes a way of life, and every item has a value out of proportion to its value in the community.

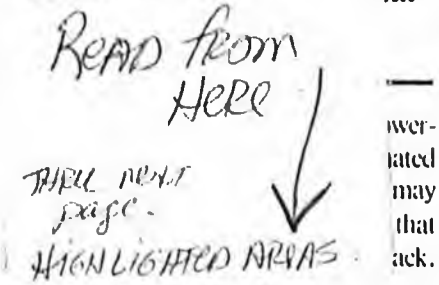
Exploitation by fellow inmates is not limited to material goods. Victimization may also include intimidation, physical beating and sexual abuse (Bartollas *et al.*, 1976: 75). Coupled with the constant fear of being victimized is the peer pressure of acting "tough." Maintaining a tough exterior has its status rewards within an institution, but also is personally dysfunctional, in that it seeks to cover up one's vulnerability. In an effort to cope with the traumatic, exploitive condition unique to jails and prisons, individuals may withdraw, experience role estrangement and become alienated.

Finally, the jail and prison experience is perceived by inmates as an additional obstacle in their attempt to reach certain desired objectives (e.g., employment, good home). This perception on the part of the offender is true—most employers prefer to hire those who have not been incarcerated. The prisoner who feels that all is futile becomes alienated.

Is alienation such a bad thing? By alienating persons, society is losing potentially productive citizens. An alienated individual is not likely to have a vested interest in society and is more likely to disregard its laws.

More tragically, however, alienation,

Alienation is clearly difficult to [illegible] revamping of the correctional sy[illegible]



Susceptibility of Youths

According to U.S. Census Bureau statistics, over 100,000 youths were incarcerated in public and private training schools in 1979 (National Center on Institutions and Alternatives, 1982). In the same NCIA study it was reported that approximately 480,000 juveniles are locked up in adult jails each year. Clearly, juveniles are being exposed to the traumas of incarceration, and there is every reason to believe that the young are undergoing an emotionally painful experience that is more intense than that of the imprisoned adult. Because of their smaller physical size and lack of institutional experience, youths are more likely to be victims of emotional and physical abuse, rape and other types of inmate exploitation. As indicated earlier, they are clearly more likely to become alienated than older offenders who have similar characteristics.

In addition, the forced separation of juveniles from their families is traumatic. Families are dominant role models and support systems for youths, and parents are important to children whether they have been living with them or not (Johnson, 1978: 461-482).

It is likely that some youths come into contact with the juvenile justice system by acting-out in order to be noticed by their family. This acting-out may lead to the juveniles' incarceration, and the youths may find themselves abandoned when they most need family support (Johnson, 1978: 472). Moreover, the youths are being placed into a setting in which it is the code to deny such feelings and where there is an emphasis on toughness. Charles E. Silberman (1978: 386-87) states:

> Indeed, status is in such short supply in prison that it can be gained only at someone else's expense...there is an exaggerated emphasis on toughness: the ability either to victimize others or to withstand victimization, especially by people who appear to be bigger and stronger. By the same token, every slight, every *presumed* slight, must be countered, lest the person being slighted be branded as a weakling or punk...the most casual interactions (brushing against someone in line, using the "wrong" tone of voice) may erupt into lethal violence. All the more so because of the inverted morality that often prevails.

Serious Internal Conflicts

The juvenile removed from his or her family has now been given new role models. Juveniles who have not resolved their identity or dependency needs (most have not) are likely to experience a serious internal conflict between being "tough" and being dependent. Consequently, in order

to cope with their personal crises, the juveniles detach themselves emotionally.

The amount of stress and trauma related to alienation that each youth experiences varies. However, incarcerating youths in adult facilities has visible, destructive effects. Despite many honest efforts by correctional officials to separate juveniles from adults, failure and alienation prevail.

Too often in "sight and sound" separation, youths experience what Toch refers to as "isolational panic." In effect, the youths dwell on the duration and/or circumstances of their situation, or their discomfort and inability to engage in prison activities and social life (Toch, 1975).

A not-so-uncommon response to this overwhelming feeling of powerlessness is to no longer cope at all, to commit suicide. Juveniles held in adult jails commit suicide at more than eight times the rate by children held in juvenile detention centers (12.3 per 100,000, versus 1.6 per 100,000), where social interaction and staff attention is more likely (Flaherty, 1980).

Reducing Youths' Alienation

Correctional officials are routinely frustrated with how to handle youthful offenders. It is not unusual for offenders to be recalcitrant and belligerent. They can be quickly labeled "management problems" and get caught up in negative institutional roles. Correspondingly, they are treated in the same fashion as other offenders. Officials are trapped with limited options and choices outside of traditional institutional modes. Institutions' limited ability to deliver and provide what is needed is a problem inherent in the system.

Although not intended, the very design of the system breeds hatred, alienation and brutality. Bureaucratic needs, by protocol, due to staff shortages, limited programs, lack of space, etc., take precedence and treatment becomes nonexistent. These system byproducts were graphically captured and demonstrated in a simulated jail experiment created by Zimbardo (1972: 4-8). This experiment revealed that:

> The prison situation, as presently arranged, is guaranteed to generate severe enough pathological reaction in both guards and prisoners as to debase their humanity, lower their feelings of self-worth, and make it difficult for them to be part of society outside of their prison.

Alienation is clearly difficult to eliminate without a total revamping of the correctional system. Recognizing the difficulty of that, given our present system, there are standard recommendations that are regularly suggested—better training of guards and institutional staff, placement of an ombudsman to serve as a liaison between inmates and staff, or promoting more community involvement through volunteers. However, these measures only serve to perpetuate what we know is ineffective. Jails and youths simply do not mix.

Use Alternatives

Instead, we suggest more systematic use of alternatives in lieu of jail placement. Communities have a responsibility to assist the corrections system to develop options and to recognize the myriad of successful programs serving as productive alternatives to jailing. The following is a brief listing of programs to consider:

- House arrest/home detention
- Day treatment programs
- Community supervisor programs
- Evening report programs
- Runaway programs
- Group homes
- Youth advocate programs

Realistically, any one of these programs could be used in conjunction with a supervisor whose sole responsibility would be to remain with youths until sentencing.

For violent youths whose behavior is considered dangerous, small secure locked treatment programs where the staff/inmate ratio is high and vocational training is required are most suitable. Although only a handful of these programs exist, their treatment programs are superior and their effectiveness is unquestioned.

The underlying principle and main ingredient in all programs that affect youths positively is "unconditional care." It is a formally accepted practice to drop, discharge or eliminate youths from programs when rules are broken. To discard and reject only creates more distance and alienation.

Unfortunately, the current correctional system was not designed nor equipped to be an option that provides care. For it is only an option that ensures isolation and warehousing. For this fact, the future is bleak unless some *major* changes occur.

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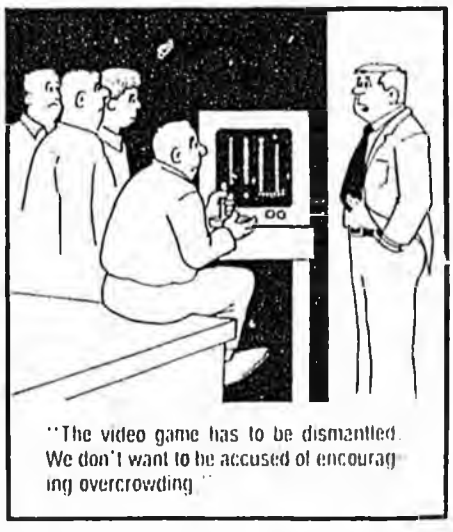

"The video game has to be dismantled. We don't want to be accused of encouraging overcrowding."

BY THE U.S. GENERAL ACCOUNTING OFFICE

Report To The Attorney General And The Secretary Of The Interior

Improved Federal Efforts Needed To Change Juvenile Detention Practices

GAO reviewed secure detention practices in five States and concluded that the Office of Juvenile Justice and Delinquency Prevention needs to assist the States in improving their detention criteria, monitoring and recordkeeping systems, and providing appropriate alternatives to detention. The States were detaining many juveniles who had not committed serious crimes under conditions that did not always meet nationally recommended standards.

GAO also reviewed the secure detention policies of five Federal agencies and found they were not always consistent with objectives of the Juvenile Justice and Delinquency Prevention Act. The Department of Justice agreed that this report accurately portrays juvenile detention practices in the States GAO reviewed and that certain policies and practices of Federal agencies were not consistent with the act's objectives. It said that its support and fulfillment of the recommendations will improve juvenile detention practices at the local, State and Federal levels.

GAO/GGD-83-23
MARCH 22, 1983

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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

ENERAL GOVERNMENT
DIVISION

B-202295

The Honorable William French Smith
The Attorney General

The Honorable James G. Watt
Secretary of the Interior

This report discusses the efforts that States, localities, and Federal agencies are making to change their juvenile detention policies and practices and identifies opportunities for further improvement.

The report makes recommendations to the Attorney General on pages 35 and 47, and the Secretary of the Interior on page 47. As you know, 31 U.S.C. §720 requires the head of a Federal agency to submit a written statement on actions taken on our recommendations to the House Committee on Government Operations and the Senate Committee on Governmental Affairs not later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of the report.

We are also sending copies of this report to the Director, Office of Management and Budget.

W.J. Anderson

William J. Anderson
Director

GENERAL ACCOUNTING OFFICE
REPORT TO THE ATTORNEY
GENERAL AND THE SECRETARY OF
THE INTERIOR

IMPROVED FEDERAL EFFORTS NEEDED TO CHANGE JUVENILE DETENTION PRACTICES

D I G E S T

Juvenile detention practices have improved since passage of the Juvenile Justice and Delinquency Prevention Act, but problems still exist. Using as criteria standards developed by the National Advisory Committee for Juvenile Justice and Delinquency Prevention to review secure detention practices in five States and five Federal agencies, GAO found that Federal and State agencies needed to establish better detention criteria, conform certain policies to the act's objectives, and establish effective monitoring systems. The Office of Juvenile Justice and Delinquency Prevention could help in implementing these improvements.

CHANGES NEEDED TO IMPROVE STATE AND LOCAL JUVENILE DETENTION PRACTICES

Although the number of juveniles admitted to detention centers appears to have decreased about 14.6 percent from 1974 to 1979, GAO found questionable detention practices in all five of the States it visited.

--The National Advisory Committee standards state that seriousness of the charge and past history of the juvenile are appropriate criteria for determining whether secure detention is warranted. However, GAO found that about 39 percent of its sample of juveniles detained in detention centers and jails in five States were not charged with a serious offense. They were accused of either nonserious offenses, acts that would not be considered offenses if they were adults, or no offenses at all. (See pp. 9 and 10.)

--The standards stress the importance of processing cases expeditiously and state that detention should be brief and play a minor role in the juvenile justice process. Out of the

876 detentions in GAO's sample, 181 lasted over 30 days. These long stays caused several problems, including increased frustration and fighting among juveniles. (See pp. 11 and 12.)

--The suggested standards for physical conditions and services were not met by many of the detention facilities GAO visited. Juvenile detention centers did not totally neglect any major service, but some did not provide the counseling, medical, or educational services recommended by the standards. These services were nonexistent or extremely limited in jails, where GAO also noted insufficient space, dim lighting, and lack of ready access to bathroom facilities. (See pp. 14 to 17.)

--The conditions of confinement in isolation cells conflict with several juvenile detention standards. Some jails GAO visited used isolation-type cells to separate juveniles from adult prisoners. (See pp. 17 to 20.)

GAO believes that, to meet the act's objectives for improving the use of detention by States and localities, the Office of Juvenile Justice and Delinquency Prevention should provide the States with technical assistance and information on detention criteria and service delivery standards, appropriate alternatives to secure detention, and monitoring and enforcement mechanisms to identify, plan, and implement appropriate reductions in secure detentions. (See pp. 22 to 33.)

GAO recommends that the Attorney General require the Office of Juvenile Justice and Delinquency Prevention to take several actions to assist the States in improving their secure detention practices. One of the most important

recommended actions is to encourage States to adopt and implement juvenile justice standards that limit the use of secure detention, including standards for specific detention criteria.

FEDERAL AGENCIES SHOULD IMPROVE THEIR DETENTION PRACTICES

GAO's review of the juvenile detention policies and practices of five Federal agencies shows they do not always adhere to the objectives of the Juvenile Justice and Delinquency Prevention Act.

--The Bureau of Indian Affairs' standards require that juveniles be held in different cells than adults but allow them to be within the sight and sound of adult prisoners. (See p. 43.)

--The Marshals Service and Immigration and Naturalization Service policies could result in juveniles being transported in the same vehicle as adults. (See pp. 43 and 44.)

--The National Park Service picks up runaways and turns them over to local authorities, possibly resulting in their detention. (See p. 44.)

Of the five Federal agencies, only the Marshals Service could provide GAO with reliable data on the number of juveniles detained. Further, the agencies' systems of inspecting law enforcement programs and detention facilities for adherence to their policies and national juvenile justice standards were not adequate. (See pp. 38 to 43.)

The Office of Juvenile Justice and Delinquency Prevention has done little to assist the other Federal agencies in conforming their policies and practices concerning juvenile detention to Office policies or the act's objectives. GAO recommends that the Office actively assist the other Federal agencies and that the Attorney General and the Secretary of the Interior require their cognizant agencies to take certain actions to improve this situation.

AGENCY AND STATE COMMENTS

The Department of Justice agreed with GAO's discussion of State juvenile detention practices and agreed that certain policies of Federal agencies were not always consistent with the act's objectives. The Department stated that its support and fulfillment of GAO's recommendations would result in improved juvenile detention practices at the local, State, and Federal levels but expressed the belief that the Office of Juvenile Justice and Delinquency Prevention has done more to assist State and Federal agencies than the draft report indicated. After reviewing the comments and obtaining additional information from the Office and other Federal agencies, GAO believes that (1) the report accurately portrays the Office's past actions and (2) planned actions will provide some of the assistance GAO is recommending.

The Department of the Interior provided comments from the National Park Service and Bureau of Indian Affairs. The Park Service stated it would take actions that would implement GAO's recommendations. The Bureau concurred with several findings but stated that some information needed clarification.

The States responding to the draft report generally agreed with its findings and conclusions. Some States said they were taking actions to improve detention practices and welcomed technical assistance from the Office of Juvenile Justice and Delinquency Prevention. Comments from the States have been incorporated into appropriate sections of the report.

Contents

ABBREVIATIONS

BIA	Bureau of Indian Affairs
FBI	Federal Bureau of Investigation
GAO	General Accounting Office
INS	Immigration and Naturalization Service
NAC	National Advisory Committee for Juvenile Justice and Delinquency Prevention
NPS	National Park Service
OJJDP	Office of Juvenile Justice and Delinquency Prevention

G L O S S A R Y

Jail	A secure facility which holds (1) adults and juveniles detained pending adjudication and (2) persons committed after adjudication (usually those sentenced to 1 year or less).
Juvenile detention center	A public or private facility used for the secure detention of juveniles.
Lockup	A secure room or facility for arrested adults who are either awaiting arraignment or being considered for pretrial release. The duration of stay in a lockup is temporary, usually limited to 2 days or until the next session of court.
Nonoffender	Youth who is before the juvenile court because of various nondelinquent circumstances (e.g., dependent, neglected, or abused child).
Secure juvenile detention	Temporary placement of a juvenile in any facility designed to physically restrict his/her movement for actions covered under a juvenile statute.
Status offender	Youth who is accused of committing or has committed an offense which would not be applicable to an adult (e.g., running away from home, truancy, curfew violation).

CHAPTER 1

INTRODUCTION

The Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5601) established the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in the Department of Justice to provide Federal resources, leadership, and coordination for juvenile justice and juvenile delinquency programs. OJJDP is required to develop objectives and priorities for all Federal juvenile delinquency programs and activities and to provide technical and training assistance concerning juvenile delinquency programs to Federal, State, and local governments, courts, public and private agencies, institutions, and individuals. The major goals and provisions of the act, as amended, include assisting State and local governments in removing juveniles from adult jails and lockups; diverting juveniles from the traditional juvenile justice system; providing alternatives to institutionalization; and improving the quality of juvenile justice in the United States.

The legislative histories of the 1974 act and its subsequent amendments show that the Congress was concerned about inappropriate juvenile detention practices in the States as well as what could result--suicide, rape, abuse, and the increased likelihood that children would commit criminal acts after secure detention. The act authorized OJJDP to use several methods to assist the State and local governments in improving their juvenile detention and juvenile justice practices. These methods included awarding formula grant funds, which are divided between the States on the basis of population under age 18; making discretionary grants for special emphasis programs; providing technical assistance; developing and supporting model State legislation for the adoption of standards that are consistent with the mandates of the act; and disseminating information.

To receive formula grants, States had to agree to restrict their secure detention or correctional facility placements to juveniles who had either been charged with or convicted of a criminal offense (delinquents). Juveniles who committed acts that would not be considered criminal if they were committed by adults (status offenders) and nonoffenders were not to be confined. Also, States had to agree not to confine juveniles where they would have regular contact with adults accused or convicted of criminal offenses. 1/ The 1980 amendments to the 1974 act require that, in order to receive formula grant funds, States

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1/OJJDP has interpreted this mandate as requiring sight and sound separation of juveniles from adults.

must comply with their own plans, which generally provide that after December 8, 1985, no juveniles will be detained in any adult jail or lockup.

SECURE JUVENILE DETENTION: THE PROBLEM

Congressional testimony, various studies, and the media have discussed the negative aspects of secure juvenile detention on both the juvenile and the public. Studies have concluded that the practice of detaining children should be severely limited for the following reasons:

--A detention center's environment may serve to promote rather than discourage future delinquency behavior.

--Secure detention is costly to the taxpayer.

--Detention may hamper the juvenile's opportunity to prepare an effective defense.

--Detention may subtly influence the court's final disposition of the case to the juvenile's detriment.

One author noted that every study of detention practices showed that too many juveniles were being detained unnecessarily, under harsh conditions, and at great expense. 1/ One study by the University of Michigan's National Assessment of Juvenile Corrections 2/ noted that:

--Up to 500,000 juveniles were held in adult jails and 494,000 juveniles were held in juvenile detention centers each year.

--Few courts had adequate information systems so that accountability for detention decisions was usually neither possible nor demanded of those in charge of detention.

--Recordkeeping in jails was practically nonexistent except for daily censuses.

The report also noted that detention of nonserious offenders and status offenders and long detention stays were major problems. Finally, the assessment reported inadequate services and conditions in local jails, such as insanitary conditions and inadequate medical services, exercise, and counseling services.

1/Sufian, J., Of the Detaining of Children, The Legal Aid Society, Brooklyn, New York, December 1978.

2/Sarri, R.C., Under Lock and Key: Juveniles In Jails and Detention, National Assessment of Juvenile Corrections, The University of Michigan, December 1974.

OJJDP'S ROLE ALSO INCLUDES WORKING WITH FEDERAL AGENCIES

In addition to providing leadership and assistance to State and local juvenile justice programs, OJJDP is responsible for implementing overall policy and developing objectives and priorities for all Federal juvenile delinquency programs and activities; assisting Federal agencies in the development and promulgation of regulations, guidelines, requirements, criteria, standards, procedures, and budget requests; and providing training and technical assistance to Federal agencies and others in planning, establishing, funding, operating, and evaluating juvenile delinquency programs.

Certain Federal agencies have specific law enforcement and detention responsibilities for Federal crimes or crimes committed on Federal land by both adults and juveniles. In the Department of Justice:

--The U.S. Marshals Service is responsible for transporting federally charged juveniles between jails, detention centers, and the courts; contracting with local sheriffs, police departments, and detention administrators for space in detention centers; and inspecting detention facilities to ensure compliance with contract provisions.

--The Immigration and Naturalization Service is responsible for administering and enforcing Federal immigration laws and can arrest and detain suspected juvenile aliens.

In the Department of the Interior:

--The U.S. Park Police has certain responsibilities for maintaining law and order on and within Federal roads, parks, and parkways in the San Francisco, New York, and Washington, D.C., areas.

--The National Park Service is responsible for maintaining law and order and protecting persons and property within the National Park System.

--The Bureau of Indian Affairs is responsible for assisting tribes in their law enforcement and detention activities. It operates some law enforcement and detention systems, contracts with the tribes to operate others, and upon tribal request, reviews and evaluates programs of tribes who independently operate their systems.

The 1974 act also established a Coordinating Council on Juvenile Justice and Delinquency Prevention made up of certain cabinet level officials and heads of Federal agencies. The function of the Council is to coordinate all Federal juvenile delinquency programs. The Council is authorized to review the programs and

practices of Federal agencies and report on the extent they conform to the act's requirements for the deinstitutionalization of status and nonoffender juveniles and the separation of juveniles from adult prisoners.

OBJECTIVES, SCOPE, AND METHODOLOGY

The Reagan Administration's budget requests recommended no funds for OJJDP in fiscal years 1982 and 1983, and Administration witnesses stated in hearings that OJJDP had accomplished its statutory objectives. OJJDP, however, received approximately $70 million for fiscal years 1982 and 1983.

We made this review to determine the extent to which the act's major objectives concerning secure detention practices have been accomplished. We studied current detention practices and focused on (1) whether the problems noted in previous studies were still occurring and (2) whether the Federal Government, primarily OJJDP, could assist States, localities, and other Federal agencies in improving detention-related problems. This review was made in accordance with generally accepted Government auditing standards.

State and local detention practices

In examining State and local programs, we compared the detention practices we observed with "Standards for the Administration of Juvenile Justice" developed by the National Advisory Committee for Juvenile Justice and Delinquency Prevention (NAC). The NAC standards we used pertained to the initial detention decision and services and conditions provided to detained juveniles. Although several national organizations have promulgated standards related to juvenile detention, we chose the NAC standards because (1) the act requires NAC to recommend juvenile justice standards and ways to facilitate their adoption, (2) OJJDP placed special attention on them because they were developed after considering the other standards, and (3) by using them, we could make consistent comparisons between the States and localities.

Our review included detailed work in Massachusetts, New Hampshire, North Carolina, Oregon, and Virginia and limited work in Rhode Island and West Virginia. In reviewing State detention practices, we interviewed State agency, local court, and detention facility officials and representatives of youth advocacy groups. We reviewed State statutes, studies concerning State detention practices, and available statewide detention statistics. We reviewed 876 case files for juveniles detained during 1 month in either 1980 or 1981 at 12 detention centers, 22 jails, and 23 lockups. A list of data elements we attempted to obtain for each detained juvenile is in appendix I.

These States were selected on the basis of their geographical location and size and not on the quality of their detention practices. Also, because the focus of this report is on identifying ways in which the Federal Government can assist States and localities, we generally have not identified States unless they showed some success in solving certain problems. This was done so that other States could contact them to obtain additional information.

Sample selection methodology

Initially, we attempted to draw a stratified random sample of detention facilities, jails, and lockups. However, in some cases, we found that an extensive statistical sample was impractical due to the travel expense and time necessary to cover the juvenile facilities dispersed throughout the State. Therefore, when necessary, we used our judgment in selecting facilities that included rural and urban localities. Because of the judgmental sampling procedure, our findings cannot be projected beyond the sample facilities.

Federal agency review

We reviewed the laws, regulations, policies, and procedures pertaining to juvenile detention and interviewed agency officials at OJJDP and the headquarters offices of the Bureau of Indian Affairs, Immigration and Naturalization Service, U.S. Marshals Service, U.S. Park Police, and National Park Service. We also contacted certain of the agencies' regional and local offices by telephone to compare their data with that provided by headquarters.

CHAPTER 2

QUESTIONABLE USES OF SECURE DETENTION STILL EXIST

Although the States report--and our review found--improved juvenile detention practices, questionable practices still exist. The national standards provide that juveniles who are not fugitives or who have not been charged with serious offenses should not be securely detained. An Office of Juvenile Justice and Delinquency Prevention (OJJDP) policy, dated November 14, 1980, encourages the adoption of national standards advocating "* * * the reduction in the use of detention and incarceration for all but the most serious or violent juvenile offenders* * *." In the five States we visited, however, between 22 and 51 percent of the detained juveniles in our sample were charged with non-serious offenses, status offenses, or no offense at all. Also, juveniles were held in secure detention for long periods of time. Finally, the services provided to detained juveniles and the physical conditions of the facilities did not always conform to national standards. In this regard, some of the methods used to separate juveniles from adults either did not achieve complete separation or created isolation-type situations. Elimination of these conditions is an objective of the Juvenile Justice and Delinquency Prevention Act.

SLIGHT PROGRESS APPEARS TO HAVE BEEN MADE IN REDUCING THE USE OF SECURE DETENTION

According to data recently developed by the Hubert Humphrey Institute of the University of Minnesota, the number of juveniles admitted to detention centers, nationwide, 1/ decreased about 14.6 percent from 1974 to 1979, as shown below.

	1974	1979	Percent decrease
Male	371,225	356,167	4.1
Female	157,850	95,643	39.4
Total	529,075	451,810	14.6

As shown in the table, most of the decrease was attributable to the drop in the number of females detained. The decrease in the total number of juveniles detained nationwide also resulted

1/Seven States did not report data for 1 or both years.

in a 12.3 percent drop in the rate of juveniles detained from 1.79 to 1.57 per 100,000. 1/

In the five States we visited, the number and rate of juveniles detained decreased in three, increased in one, and were not determined in the fifth State due to insufficient data.

One of the primary concerns addressed by the 1974 act pertains to the incarceration of status offenders. Decreases in the number of status offenders and nonoffenders placed in secure detention and correctional facilities for more than 24 hours, excluding nonjudicial days, 2/ have been reported nationally and in each State we visited. OJJDP has reported an 83.4 percent reduction in the number of status and nonoffenders held in secure facilities between 1977 and 1982. A 1982 report by the National Research Council of the National Academy of Sciences 3/ concluded that (1) most adjudicated status offenders have been removed from institutions, (2) the use of preadjudicatory detention for youth charged with status offenses has declined, and (3) fewer youth labeled as status offenders enter the juvenile justice system.

We found evidence that such progress has been made. Although 19 percent of the detentions in our sample were for status and nonoffenders, only a fourth of these were held over 24 hours, excluding nonjudicial days. Each State where we had performed detailed audit work took actions to meet the act's requirement that status offenders not be held in secure facilities and reported progress in the annual monitoring reports required by the act.

--In the early 1970s, Massachusetts decriminalized status offenses and made the Department of Public Welfare, which was not a juvenile justice agency, responsible for

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1/The rates represent the percentage of juvenile admissions per 100,000 juveniles age 10 through age of juvenile court jurisdiction. The upper age limit for jurisdiction of juvenile courts varies among States. Depending on the State, a person is considered a juvenile until he or she is 16, 17, or 18 years of age.

2/OJJDP established this time frame for the States to use when monitoring their compliance with the deinstitutionalization of status offenders mandate of the act. Nonjudicial days are days the court is not in session, usually weekends and holidays.

3/Handler, J.F., and Zatz, J., editors, Neither Angels Nor Thieves: Studies In Deinstitutionalization of Status Offenders, Panel on the Deinstitutionalization of Children and Youth, Committee on Child Development Research and Public Policy, Assembly of Behavioral and Social Sciences, National Research Council; National Academy Press, Washington, D.C., 1982.

providing services to status offenders. In the monitoring report for 1980, Massachusetts reported three status or nonoffenders held in juvenile detention facilities. Because of this low number, OJJDP found Massachusetts in full compliance with the act's status offender and nonoffender requirement. During our visits to secure detention facilities in Massachusetts, we did not identify any status or nonoffenders.

--New Hampshire reported in its 1980 monitoring report that only one status offender was detained in county jails or local lockups and one was committed to the State training school. OJJDP also found New Hampshire in full compliance with the act's status offender requirement. Again, we did not identify any status or nonoffenders in the detention center or county jails and local lockups we visited.

--In 1977, Virginia enacted an extensive juvenile code revision that

(1) required that jails be used only for adults or delinquents who are at least 15 years old and

(2) prohibited the detention of status offenders in secure detention homes for longer than 72 hours.

The 1980 monitoring report showed that status and nonoffenders held in secure facilities for periods longer than 24 hours, excluding nonjudicial days, decreased from 6,558 in fiscal year 1976 to 271 in fiscal year 1980. A State report attributed the reduction to technical assistance provided to local agencies, funding support for community-based delinquency prevention, and creation and improved utilization of nonsecure facilities. State statistics indicate that the number of complaints to the juvenile courts concerning juveniles that committed status offenses between 1977 and 1980 was also reduced by 42 percent.

--In the 1980 monitoring report, Oregon reported it had reduced the noncompliance detention of status offenders and nonoffenders by 76 percent since it enacted a law in 1975 limiting detention of runaways to 72 hours. State laws have also been revised to prohibit the holding of status offenders in training schools and to allow preadjudicatory detention if the child allegedly committed an adult violation or was a runaway. In line with these legislative initiatives, Oregon instituted a variety of programs to help reduce detention of status offenders and required its districts to develop plans to eliminate secure detention of status offenders as a condition of receiving OJJDP funds for fiscal year 1982.

--North Carolina reported that the number of accused status offenders and nonoffenders held 24 hours or more, excluding weekends and holidays, declined from 532 to 158 between 1978 and 1980. In 1975, the State prohibited the commitment of status offenders in training schools and launched a community-based alternative program to reduce the number of juveniles sent to training schools, jails, and secure detention centers. In 1979, changes in the juvenile code limited secure detention of status offenders to juveniles who either needed hospitalization or were runaways and established 24 hours as the maximum time allowed for their detention. 1/ Although about 27 percent of our sampled juveniles in North Carolina were status or nonoffenders, only three were held, without counting nonjudicial days, for a period exceeding 24 hours.

QUESTIONABLE DETENTIONS STILL OCCURRED

If the States and localities are to provide effective service to both juveniles and the community, only juveniles for whom secure detention is appropriate should be so placed. OJJDP's policy advocates reducing the use of secure detention for all but the most serious or violent juvenile offenders. NAC standards stress a combination of the seriousness of the current charge and the past history of the juvenile as appropriate criteria for securely detaining a juvenile.

We used the FBI's uniform crime reporting classifications for serious (Part I) 2/ or nonserious (Part II) offenses to determine why juveniles in our sample were detained. We believed that this would be a conservative approach, since some of the crimes listed as Part I are not considered as serious by some States. For example, Oregon considers shoplifting of property valued under $200 as a misdemeanor and some Virginia statistics show breaking or entering as a less serious crime.

Of the 876 detentions in our sample, we were able to analyze the type of offense involved for 715. 3/ Of these, 140 were for

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1/Out-of-State runaways can be detained up to 90 days.

2/Part I crimes are the Crime Index offenses consisting of criminal homicide, forcible rape, robbery, aggravated assault, burglary-breaking or entering, larceny-theft, motor vehicle theft and arson.

3/We excluded from this analysis 161 cases because (1) we could not determine an offense, (2) the juvenile was in detention for acting out in a treatment setting but not committing a new offense, or (3) the juvenile had violated probation which could have been for any delinquent offense, status offense, or nonoffense.

nonserious crimes and an additional 136 were for status offenses and nonoffenses. The percentage of these juveniles detained for reasons other than serious crimes was 39 percent and ranged from 22 percent to 51 percent in the States we reviewed. This included over 36 percent of the sampled juveniles in one State that were accused of status offenses or were not accused of any offense at all. These results cannot be compared to the statistics in State monitoring reports because we included nonserious offenses and all status offenses, regardless of length of stay.

Appendix II shows the charges for the detainees in our sample. If the juvenile was charged with more than one offense, we counted only the most serious one.

Some States and localities also provided additional information which indicated that a large portion of securely detained juveniles were not charged with serious crimes. For example, statistics supplied by one State showed that about 80 percent of the juveniles in detention centers in fiscal year 1980 had not been charged with a serious offense. Another State's statistics showed that about 33 percent of all 1979 and 1980 juvenile detainees were charged with status offenses, not with serious or nonserious delinquent offenses.

Most detained females were not charged with serious offenses

Female juveniles in our sample were detained for reasons other than serious crimes in a much higher proportion than male juveniles. Although females made up only 24 percent of the 715 cases we examined, 56 percent of the detained status offenders were females. The following table shows, for each State, the percentages of male and female juveniles in our sample that were detained for reasons other than a serious crime.

State	Male	Female
	(percent)	
Massachusetts	16	40
New Hampshire	26	44
North Carolina	31	67
Oregon	36	82
Virginia	30	84
Total for sample	29	70

State records also showed that females were detained for less serious reasons. For example, one State's statistics showed that about 91 percent of the detained females were charged with offenses other than serious crimes. One of the largest counties in another State predicted, on the basis of past practices, that 80 percent of its detained status offenders would be females. State and local juvenile justice officials gave various reasons

for these practices, including the lack of nonsecure alternatives for females and the tendency of females to run away or commit other status offenses (as compared to the tendency of males to commit a crime).

JUVENILES DETAINED FOR LONG PERIODS OF TIME

NAC standards emphasize the importance of processing cases expeditiously and assert that detention should be brief and play a minor role in the juvenile justice process. State officials said that lengthy detention stays multiply the negative effects on the child and community by increasing the child's frustrations and community's costs.

The 876 juveniles in our sample were held in secure detention for periods ranging from a few hours to 612 days with 181 stays lasting over 30 days. We selected a 30-day benchmark for discussion purposes because this time period was (1) the one most often used as an outside detention limit in the studies we reviewed and (2) recommended by juvenile justice officials we contacted as an appropriate limit to distinguish between temporary and long term detention. The following table shows the number and percent of detention stays over 30 days, in the States we visited.

State	Detained over 30 days		Longest length of stay
	No.	Percent	Days
Massachusetts	66	34	a/612
New Hampshire	18	21	77
North Carolina	10	8	143
Oregon	2	1	38
Virginia	85	49	151
Total	181	21	

a/This juvenile was charged with 14 offenses, including armed robbery and rape and was released on his 18th birthday.

Virginia's statistics showed that about 15 percent of the juveniles detained in 1980 were held for periods longer than 30 days. Our sample showed a higher percentage of juveniles with long lengths of stay because (1) Virginia's statistics cover the whole year whereas we only took a one month sample and (2) State and local statistics included several short detentions for juveniles who attended court hearings and then returned to detention and for juveniles transferred from one secure detention facility to another. Conversely, we counted the entire detention stay when all the "detentions" were for the same offense.

During our visits, State and local officials attested to the negative effects of long detention stays. According to the officials, one of the major problems associated with long stays involved the concept of "lost time"--time spent in secure detention that does not reduce the time subsequently spent in treatment programs. Juveniles realize this and become frustrated and anxious for quick resolution of their cases. The officials said that this frustration is often heightened because for many juveniles, parents, friends, and court counselors rarely visit or phone.

Detention officials said that these frustrations often lead to behavior problems, like fighting and other disruptions, and may lead to additional delinquent behavior. One case which they used to illustrate the importance of the lost time concept involved two juveniles who were arrested for the same offense. Because one had a record of prior offenses, he was quickly committed to a training school. The second juvenile was a first-time offender and remained in detention during a lengthy search for a suitable nonsecure placement. The search became so lengthy that the first juvenile was released from the training school at about the same time that an alternative placement was found for the second juvenile. We were told that the second juvenile became so frustrated when he learned of this that he deliberately committed another crime just to get committed to a training school, which had more definite time periods for release.

Several State officials also viewed long stays as being needless. For example, one official told of a juvenile who was being considered for transfer to adult court. The juvenile was scheduled for a psychological evaluation immediately prior to the quarterly grand jury meeting that heard transfer cases. However, the juvenile's court counselor reportedly forgot to take the juvenile to the scheduled testing. Consequently, the juvenile had to spend another 90 days in detention waiting for the next regularly scheduled grand jury meeting. Other officials questioned the need to hold juveniles for long periods in secure detention while they are being processed into nonsecure treatment programs.

In commenting on a draft of this report, the former Governor of Massachusetts said that some juvenile cases are not processed as expeditiously as possible thereby resulting in long detention stays. He said the Massachusetts Department of Youth Services has filed legislation seeking to establish stringent speedy trial requirements in order to reduce delays. The Governor also suggested speedy trial legislation as a partial remedy for delay in the handling of juvenile cases.

JUVENILES COMMITTED FOR TREATMENT WERE HELD IN DETENTION FACILITIES WHERE TREATMENT WAS NOT PROVIDED

Out of the 876 sampled juveniles in detention facilities, 237 had been adjudicated and committed for treatment. NAC standards allow postadjudicated juveniles to be held in detention while they await disposition or transfer to a treatment program. They state that, when postdispositional juveniles are accused of a new offense, the matter should be handled as a new delinquency offense.

One State's statistics showed that about 80 percent of the juveniles held in secure detention facilities during the last half of 1980 were already committed for treatment. About a third of these and 8 percent of our total sample from that State were awaiting placement in a treatment program or appealing their initial commitment. Another third and another 28 percent of our sample were in secure detention because they were accused of a new offense that may have occurred before or after the original commitment.

A State official who decides whether juveniles in this State will be securely detained told us that although these latter juveniles were technically awaiting a court ruling on the new charges, it was not useful to withhold treatment from them because (1) the court had already determined them to be in need of, and entitled to, treatment and (2) ultimately they will be returned to treatment regardless of the outcome of the new hearing. Another official said these juveniles could be placed in treatment programs, including secure programs, rather than detention facilities where services were limited. State officials gave several reasons for placing these juveniles in secure detention, including

--the established practice of the State agency;

--a lack of nonsecure treatment options; and

--a decision to "cool off," or calm the juvenile.

The other committed juveniles that were in secure detention had not worked out in treatment or nonsecure detention programs because they (1) had run away from the programs, (2) were considered management problems, or (3) displayed mental health problems or violent behavior. Thirty-three of the 195 detentions in our sample for this State were in these categories. Even though the NAC standard allows these juveniles to be placed in secure facilities, the standard recommends that

this be done only after a court has approved it. None of the sampled juveniles were brought before a judge for this purpose and their average detention stay was 19.5 days.

In another State, the juvenile detention and treatment cottages were all located on the same grounds. Because of a limited number of cottages, juveniles in detention and juveniles committed for treatment were commingled in all the secure cottages. For example, only one cottage was available for all females whether they were in detention or commitment status. Likewise, the secure detention and treatment cottages for males housed both committed and detained juveniles when needed. Committed juveniles were housed in the secure detention cottage every day in March 1981, including 22 days where there were more committed than detained juveniles.

Cottage officials said they were opposed to the practice of commingling detained and committed juveniles, because commingling

--mixes detained "light" offenders with committed heavy offenders and the light offenders idolize the older, tougher juveniles;

--mixes juveniles considered innocent under the law (detainees) with delinquents;

--allows detained juveniles to gain negative impressions from already committed juveniles about treatment programs which they may be committed to after adjudication; and

--detracts from efforts to treat committed juveniles.

They explained that detained juveniles in the treatment cottage spend most of their day confined in a small, partitioned area known as the "sound room" where newly committed juveniles and those that have caused problems are restricted.

STANDARDS FOR JUVENILE DETENTION FACILITIES WERE NOT MET

Many facilities used to detain juveniles, especially the jails, did not provide the physical conditions or the services called for by NAC standards which we used as a consistent basis for comparing detention practices in all the States. We reviewed facility records and used information from personal observations and interviews to concentrate on such basic conditions as cleanliness, ventilation, and lighting, and such services as educational, recreational, and medical. NAC standards state that confinement of a juvenile in an adult jail is undesirable and potentially destructive and recommends that juvenile detention facilities not be located even on the same grounds as an adult institution. To

make consistent comparisons between juvenile detention centers and the juvenile sections of jails, we compared conditions in jails to the standards for juvenile facilities.

Detention centers

The conditions and services provided in, or contracted for by, the 12 juvenile detention centers we visited exceeded NAC standards in some respects but fell short in others. Although the centers usually did not totally neglect any major service and appeared to strive to provide the detained youths with safe and sanitary living facilities, the following conditions were found in one or more of the centers.

--Only one of the detention centers provided physicals by physicians within 24 hours of admission as recommended by NAC standards. Eight centers provided physicals by physicians or nurses within the first week after admission and/or maintained medical clinics with registered nurses on the facility premises. Officials at the other centers said they provided medical services only in emergencies, when the juvenile requested medical care, or when the staff believed someone needed medical attention. As evidence of the need for medical services, one State medical team's assessment of the health needs of juveniles held in a detention center from August 1979 through July 1980 showed that 87 percent had medical problems that were not being addressed. On the average, there were two problems per child, ranging from dental problems to duodenal ulcers.

--Educational services were not consistently provided at the only detention center in one of the States, even though the standards required an educational program. An official in that State said that courses were provided during the school year in progress at the time of our visit but were not provided during the prior year.

--Four detention centers did not assess the educational level of juveniles when they were admitted and none attempted to tailor their programs to ensure that the juveniles kept up with their regular school studies. Although such programs are recommended by NAC standards, several reasons were given for not having them, including short lengths of stay, difficulty in coordinating programs with various jurisdictions and individual schools, and negative attitudes of juveniles toward a formal academic setting.

--The detention centers drew their populations from several jurisdictions. As a result, some juveniles were not located within the community from which they came, as recommended by NAC standards.

--Although the standards limit the maximum population of detention centers to 20, the population capacities at five centers exceeded this figure. Included were centers with capacities of 52, 60, and 35.

--NAC standards provide that mail should not be read or censored unless there is clear and convincing evidence that it poses a threat to the safety and security of the center's operations. One facility's policy was to read all incoming and outgoing mail.

--One detention center's case workers said they checked the juveniles' rooms every hour during the night, and the juveniles had to get a case worker's attention if they wanted to use the toilet. NAC standards recommend that each juvenile have ready access to a toilet.

--NAC standards recommend 2 hours of recreation on school days and 3 hours on nonschool days, not including such activities as watching television. The physical layout of two of the older facilities restricted recreational opportunities. For example, during the winter one facility offered only weightlifting.

Jails

None of the 22 jails we visited provided all the physical conditions and services recommended by national standards for juveniles. Several jailers and sheriffs said they did not want to hold juveniles and were not equipped to do so.

Recognizing that jails do not provide adequate facilities and services for juveniles, the Congress amended the Juvenile Justice and Delinquency Prevention Act to require that, in order to receive formula grants, States must comply with a plan for removing juveniles from adult jails and institutions by December 8, 1985, or by December 8, 1987, if in "substantial compliance" by 1985. Most of the States we visited were considering ways to remove juveniles from jails and some had taken legislative actions. North Carolina has required complete removal by July 1983 and Oregon's legislature requested information from the State Juvenile Services Commission on legislative changes needed to accomplish complete removal. In the interim, most of the States required some type of inspection or certification process before jails could hold juveniles.

Although the physical conditions and services provided in jails varied by locality, in all jails medical, dental, and educational services were nonexistent or limited. Most jails did not provide for educational assessments or medical exams but did have agreements with local doctors, dentists, and hospitals for emergency care. Two jails in one State, however, provided for screenings or physicals by physician assistants or registered

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nurses and maintained medical clinics accredited by the American Medical Association.

None of the jails provided educational programs for juveniles other than voluntary Graduate Equivalency Diploma programs. No efforts were made to coordinate with the juveniles' local school systems or evaluate their educational needs. Similarly, none of the jails was equipped to provide adequate recreation for juveniles. Only two jails had outdoor and indoor recreation equipment and facilities which officials said the juveniles could use for about an hour per day. At another jail juveniles were allowed to play ping-pong once or twice per week for 1 to 2 hours in a wide hallway. The only other physical recreation available to juveniles at that facility was self-initiated exercise in the cells or other living areas. Nonphysical recreation allowed in the cells included books, playing cards, and checkers. At one jail juveniles were also allowed to watch television.

Available information showed that juvenile cells at 12 jails did not include the minimum 60 square feet per juvenile recommended by NAC standards. For example, at one facility the three cells used were each about 60 square feet in size and contained four bunks. Other physical conditions also did not meet the standards. Substandard conditions included dim lighting, lack of ready access to toilet or wash basin, and lack of varied diet. Following are practices in at least one jail that did not conform to NAC standards.

--Rules and regulations on handling juveniles were not always in writing.

--Juveniles were extremely limited in receiving phone calls and visitors.

--No shower was available in one facility and juveniles had to use a sink to bathe.

Also, the supervision of juveniles in all jails did not meet national standards because the staffs were accustomed to handling and trained to handle primarily adult prisoners. Jail staffs did not include the child care workers, recreation workers, or teachers recommended by the standards.

SOME METHODS USED TO SEPARATE JUVENILES FROM ADULTS WERE INADEQUATE OR CREATED ISOLATION

The States we visited had generally improved their practices of separating juveniles from adults through changes in laws and certification processes. We found, however, incidences of inadequate separation, separation under harsh or isolating conditions, and locations where we could not determine whether compliance was achieved.

Some problems were noted with separation

Oregon

On the basis of State reports and our review, Oregon appears to have substantially resolved its separation problems. The 1980 monitoring report showed that for that fiscal year, 8 jails did not adequately separate 867 juveniles from adults. State law had required separation of juveniles from adults since 1959 but enforcement authority was not added until July 1, 1980. Since then, all eight jails that had not adequately separated juveniles have been inspected, and the official responsible for monitoring jails said that all jails except "possibly" one were in compliance.

We visited jails and lockups that held 2,392 of the 4,486 juveniles held in 1980, including 5 of the 8 jails that had not adequately separated juveniles from adults. One lockup and one jail did not totally separate juvenile and adult prisoners. The lockup contained a juvenile holding cell that was in full view and hearing of adult prisoners, but we were told juveniles were only held for an average of about 2 hours. During our visit to the jail, three juvenile cells contained a male juvenile, an adult male, and an adult female. We easily talked to all three from any location in the cell block. When advised of this situation, the State monitoring official said he would take action to resolve the problem.

Virginia

Virginia reported that the number of separation violations decreased from 5,624 in 1976 to only 129 in 1980. The 1980 monitoring report attributes this decrease to (1) legislative changes that prohibit the jailing of status and nonoffenders and place specific restrictions on jailing delinquents, and (2) the new process of inspecting all jails and certifying those which may hold juveniles.

Even though Virginia developed standards for separation, the fiscal year 1980 monitoring report, inspection reports, and an OJJDP-sponsored study showed that some certified jails did not provide adequate separation. The 1980 monitoring report showed that 13 of 56 jails certified to hold juveniles had separation problems. State inspection reports showed that, in some jails, adult trustee inmates were allowed in the juvenile cell block, juvenile and adult inmates attended school together, and juveniles and adults conversed when moving internally in the jails. Adequate separation existed at the time of our visits to four jails. The physical layout and restricted movement at the jails prevented routine contact between juveniles and adults.

Massachusetts

Massachusetts law prohibits the incarceration of juveniles with adults and OJJDP determined Massachusetts to be in compliance with the separation requirement of the act. We did not identify any situations in the eight lockups we visited where juveniles were commingled with adults. However, local lockups were not included in the compliance determination, and local law enforcement officials told us that juveniles are, at times, incarcerated in adult cells. Documentation was not available to support this nor determine whether adults were in the same or nearby cells.

The practice of detaining juveniles in cells not approved for that purpose does not comply with State standards and was reported at four of the eight lockups we visited. One requirement for certification to hold juveniles is that they be held apart and away from adult prisoners. One police district in a large city locked juveniles in what was termed a "cage" for lengths of confinement described as ranging from a few minutes to a few hours. This "cage" was a 4-foot by 4-foot room which was separated by sight but not sound and was littered with newspapers, contained no furniture, and had a steel mesh door.

New Hampshire

The 1980 monitoring report for New Hampshire showed that total separation was not achieved because one county facility housed both juvenile and adult offenders without adequate separation. The report indicated that noncompliance should have been corrected in January 1981 when a new facility was to open. Officials at the new facility said, however, that committed juveniles are still housed with adults and commingled during delivery of services. On the other hand at 5 of 10 county jails, a sheriff's department, and 4 local lockups, we did not identify any juvenile detained in violation of the separation mandate. Inadequate records, however, precluded us from determining whether separation was in fact achieved at all facilities.

North Carolina

Although North Carolina continued to experience problems in adequately separating juveniles in jails, the State code requires that all juveniles be completely removed from jails by July 1, 1983. We were told that only jails that adequately separate by sight and sound are certified to hold juveniles. The State recently reported, however, that 51 juveniles were held in noncertified jails from July 1980 through June 1981. One of two noncertified jails we visited detained juveniles. One juvenile was detained in a cell that was separated from adults by sight but not sound.

Isolation cells used for separation

Isolation-type cells were used in some local jails and lockups to achieve separation and some services available to adults were limited or not available for juveniles. Examples of these services were training classes, formal religious services, and recreation. In one State, we did not find juveniles in isolation cells, but a 1980 monitoring report noted that juveniles were placed in isolation cells in 13 jails. In another State, isolation-type cells were used for juveniles at three of the five jails we visited. Also, these juveniles remained in their cells, which local officials in one jail called "dungeons" and "more severe" than adult cells, 24 hours per day. Local lockups in another State, especially the newer ones, were described by police officials and our auditors as isolation cells. The juvenile cell at a local lockup in another State resulted in solitary confinement, and officials at three other facilities said they have used solitary confinement cells for juveniles.

CONCLUSIONS

The States we visited have improved their juvenile detention practices in the last few years, but a great deal more could be done. Many major detention problems existing when the Juvenile Justice and Delinquency Prevention Act was passed were still prevalent. States and localities still detained nonserious offenders and status offenders in juvenile detention centers and jails. Detention facilities were also used for many purposes, such as holding juveniles before trial or while waiting for treatment, calming juveniles who misbehaved in nonsecure programs, and as a place for certain juveniles to serve their sentence. Some of these detentions were for long periods of time, while needed services and physical conditions were not always provided.

The juvenile detention centers we visited did not totally neglect any of the services recommended by NAC standards and the staffs appeared to be striving to provide the juveniles with a safe and sanitary stay in detention. However, the jails usually did not meet the standards. Many of the jailers and sheriffs did not want to hold juveniles, and their facilities were not equipped to do so.

Many problems were due to vague and judgmental detention criteria, lack of appropriate alternatives to detention, and the need for better monitoring and enforcement mechanisms to identify and help plan for improvements in detention practices. The next chapter details actions OJJDP could take, within current funding levels, to assist the States in these areas.

AGENCY COMMENTS AND OUR EVALUATION

The Department of Justice commented on a draft of this report by letter dated December 7, 1982. (See app. III.) The Department stated that we accurately described juvenile detention practices in the States we reviewed, but also identified a number of points that it believed required further review and analysis.

It appeared to us that many of the Department's comments were not relevant to the conclusions that we made, and discussion with OJJDP officials after receipt of the comments shed little additional light on the matter. For example, the Department stated that the data discussed on page 6 did not relate appropriately to the objectives of the Juvenile Justice and Delinquency Prevention Act. The Department suggested that we reconsider the use of the data and determine the appropriateness of the conclusions the data appeared to indicate.

The data in question were used as partial support for the statement that States had improved their juvenile detention practices. It was the most recent data available that indicated a national detention rate and we do not understand the basis for the comment. Moreover, work we performed in the States we visited provided further indications of progress in improving secure detention practices. The primary basis for our conclusion is the information we obtained during these visits.

Also, the Department made several references to the 1980 Valid Court Order Amendment (a portion of the Juvenile Justice Amendments of 1980), which permits the secure detention of juveniles found to be in violation of a proper court order. None of the juveniles included in our data were charged with violating a valid court order. Thus, the amendment does not change the results of our sample. Also, it is too soon to assess the impact of the amendment. Data is not available that shows how States have changed their detention practices based on the amendment.

CHAPTER 3

THE FEDERAL GOVERNMENT CAN HELP STATES IMPROVE THEIR DETENTION PRACTICES

A major goal of the Juvenile Justice and Delinquency Prevention Act is to reduce the use of secure detention for juveniles. Chapter 2 shows that although States have made progress in improving their overall detention practices, a great deal more is needed before the act's objectives will be achieved. In this regard, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) has an opportunity to help States further improve detention practices in several important areas. Specifically, OJJDP could provide the States with technical assistance and information on

--detention criteria and service delivery standards;

--availability and use of appropriate alternatives to secure detention; and

--monitoring and enforcement mechanisms to identify, plan, and implement appropriate reductions in secure detentions.

OJJDP accomplishments in assisting the States to remove status offenders from secure facilities appear noteworthy. The Office also provided assistance concerning the other detention problems discussed in chapter 2. For example, a current project called the jail removal initiative addresses comprehensively for the first time the issue of unnecessary detention. More is needed, however, to resolve these detention problems, including convincing the States to adopt appropriate national standards and to establish appropriate alternatives and improving State monitoring and recordkeeping systems. These improvements are within OJJDP's assistance role as established by the act.

The States we visited have used Federal juvenile justice funding to provide alternatives to secure detention and have revised their juvenile codes to comply with the mandates of the act. According to State officials, however, OJJDP could do a great deal more within existing funding levels to help resolve State detention problems. Officials said the States need personal assistance and advice on practical methods of solving their unique problems. They also said that OJJDP needs to take a proactive role in identifying and helping resolve problems rather than maintain its current reactive role of responding to monitoring reports or requests for assistance. One State specifically mentioned that OJJDP should help it assess its programs and then provide information on successful strategies and techniques used in other States that have similar problems.

In commenting on a draft of this report, the Governors of North Carolina and Oregon said they would welcome increased technical assistance from OJJDP. North Carolina indicated that technical assistance in developing alternatives and monitoring would be particularly helpful. Oregon indicated that assistance to help implement better standards for constructive use of detention is needed.

ADOPTION AND IMPLEMENTATION OF NATIONAL DETENTION STANDARDS COULD HELP IMPROVE DETENTION PRACTICES

State and local detention practices could be improved by adopting and adhering to appropriate national standards. The Congress recognized the importance of standards as a tool for improving practices when it required OJJDP and the National Advisory Committee (NAC) to assist in developing and implementing national standards. Now OJJDP's policy is to promote national standards, especially as they relate to the mandates and major policy thrusts of the Juvenile Justice and Delinquency Prevention Act.

In this regard, OJJDP supported and coordinated the development of national standards by NAC and other national organizations. Although implementation of these standards is voluntary, they are intended to provide direction for change and can be used as a benchmark for measuring progress toward improving the quality of juvenile justice. Several of these standards directly address detention practices. OJJDP has not endorsed any particular set of standards but has placed special attention on NAC standards.

Since NAC and other national standards were developed, OJJDP reported it has (1) disseminated copies of the standards, (2) sponsored the development of an analysis of the standards, (3) published the proceedings of a symposium on issues addressed by the standards, and (4) conducted three symposia on uses of standards for New England States. An OJJDP official told us that these symposia will not be given in other parts of the country. OJJDP also announced a demonstration program whose goals were to support the adoption of national juvenile justice standards in six to eight jurisdictions and promote national awareness of the use of standards for improving the administration of juvenile justice. Because of questions raised by NAC, however, OJJDP decided not to proceed with the program.

States need to use more specific criteria to ensure appropriate detention decisions

Because of concern about the inappropriate use of secure detention, as evidenced in several studies, NAC recommended specific criteria for use in deciding when to detain juveniles in secure facilities. A private grantee's limited field test of these criteria showed that they could be used without significantly increasing the number of juveniles who either commit new crimes or fail to appear for court hearings. However, the States we visited still used less stringent criteria that resulted in inappropriate detention of juveniles.

Historically, State detention criteria have allowed a child to be detained on the basis of risk (1) to the public safety or (2) that the child will flee from the court's jurisdiction. However, several studies conducted in the 1970's showed that detention was used unnecessarily across the country and suggested that these criteria were too broad to be meaningful. For example, a study conducted in 1979 and 1980 for OJJDP estimated that 90 percent of the juveniles charged with an offense did not require secure detention. Another study conducted in 1973 reported on an Ohio county that applied uniform detention criteria. As a result, detentions decreased by 60 percent and only 1 percent of the juveniles failed to appear in court.

Supported by various studies that showed detention practices were generally inappropriate, partially due to exercising broad discretion in detention decisions, NAC recommended pre-trial detention criteria in 1980 designed to limit secure detention to specific situations in which less restrictive alternatives are not sufficient to protect the juvenile, the community, or the jurisdiction of a court. These more specific criteria attempt to strike a balance between protecting a child's pretrial rights and freedoms and protecting the public safety and the court process.

In defining juveniles who may be securely detained prior to trial, NAC criteria state that children should not be securely detained unless they

--are fugitives from another jurisdiction;

--request, in writing, protection under circumstances that present an immediate threat of serious physical injury;

--are charged with murder in the first or second degree; or

--are charged with a serious property crime or a violent crime other than first or second degree murder which, if committed by an adult, would be a felony; and

--are already detained or on conditional release in connection with another delinquency proceeding,

--have a demonstrable recent record of willful failures to appear at family court proceedings,

--have a demonstrable recent record of violent conduct resulting in physical injury to others, or

--have a demonstrable recent record of adjudications for serious property offenses.

Even if these criteria are satisfied, the standards recommend that juveniles not be detained in a secure facility if a less restrictive alternative will reduce the risk of flight, serious harm to property, or physical safety of the juvenile or others.

A study of the effectiveness of using these criteria conducted in 1979 by the Community Research Forum showed that they can be used to decrease secure detentions without causing significantly higher rates of (1) rearrest between the time of initial arrest and final disposition of the case or (2) failure to appear for court hearings.

North Carolina was the only State we visited that had extensively revised its legislated detention criteria with the type of specificity recommended in NAC standards. Prior to a recent juvenile code revision, the State allowed the secure detention of juveniles for two very general reasons: for protection of the community or for the child's best interests. However, a State committee studying this matter noted that these criteria were too broad and recommended more specific criteria because (1) the percentage of juveniles being placed in secure custody varied widely throughout the State, (2) a large number of juveniles seemed to be unnecessarily detained, and (3) too many juveniles were being held in jails.

In deciding that more specific detention criteria were needed, the committee considered a combination of factors, including national standards and provisions of the Juvenile Justice and Delinquency Prevention Act. Drawing from a variety of sources, the State's detention criteria do not strictly duplicate NAC criteria. For example, the State's revised criteria allow secure detention of (1) status and other offenders who have attempted self-injury and are being evaluated for inpatient hospitalization, (2) runaways, and (3) juveniles accused of a single felony offense. Further, any delinquent may be sentenced to secure detention on an overnight or weekend basis.

Instead of using the child's current charge and documented history to indicate when secure detention is allowed, as recommended by NAC criteria, the other States we visited used broad overall criteria and allowed decisionmakers to use any objective or subjective indicators to determine when these criteria were met. This vague and highly judgmental system allowed the detention of almost any juvenile referred to court. The situations in the other four States we visited are described below.

Virginia

Several studies in recent years of Virginia's detention practices have shown a high potential for reducing secure detentions by using more specific detention criteria. For example, when a 1978 study applied NAC criteria to 84 juvenile detentions in 10 judicial districts it found that 55 percent did not meet the NAC criteria. The study also found that the percentage of children detained after a petition was filed against them varied from 6 percent in some judicial districts to 23 percent in others.

Past studies and our review show that other measures to reduce detentions have sometimes not been effective. For example, the State's unified court intake procedures require a detention hearing within 24 hours of arrest, or 72 hours if court is not in session. However, we found that few juveniles were released from detention after the detention hearing. A State study also found that

> "Unless question is raised by legal counsel, the youth or parents, however, some judges do not explore the possibility of release pending adjudication, relying instead on the initial judgment of the intake officer to detain."

The State is currently attempting to improve the detention decisionmaking process. However, current State criteria do not circumscribe specific situations where detention is warranted as do NAC standards.

Due, at least in part, to the lack of specific detention criteria, the local courts we visited had widely varying detention practices and procedures. Some courts relied totally on the judgment of intake officers and provided no criteria to guide detention decisions. Yet one locality gave specific examples of when secure detention was allowed, such as cases where the juvenile

--was charged with an offense indicative of violent aggressive behavior,

--had an extensive criminal record,

--was charged with many current offenses that were violent

or involved theft or destruction of large amounts of property, or

--made statements of intentions to commit further acts of violence or theft.

Oregon

Current Oregon detention criteria do not meet NAC criteria in several important respects. For example, any runaway or nonserious offender may be securely detained. The State allows juveniles to be securely detained if they are accused of only one delinquent offense or if the court believes their current behavior or release may immediately endanger their welfare or the welfare of others.

According to officials in 4 of the 10 county courts we visited, they detained juveniles for all of the above reasons. Three other county courts generally based secure detention decisions on their view of whether release of the youths would endanger their welfare or the welfare of others. The three remaining county courts used the seriousness of the current crime and whether the youth is a runaway, is considered a danger to self or others, or has a past history of delinquent offenses as predominant reasons for detention. Although seven Oregon counties participated in an OJJDP-sponsored program that included development of more specific detention criteria, implementation of the criteria was dependent on future OJJDP funding.

New Hampshire

New Hampshire recently passed laws that require written detention orders by the courts to document reasons for detention. However, the three allowable reasons are very broad and therefore decisionmakers must rely heavily on their experience and judgment in deciding whether secure detention is warranted. The New Hampshire Crime Commission had developed secure detention criteria similar to NAC criteria, but they had not been adopted by the State at the time of our review.

Local practices sometimes did not conform with requirements in the legislation. In our review of 86 detention stays involving 81 juveniles to determine the reasons for detention, 61 cases had written detention orders and 25 involved administrative decisions by correction officials. Of the 61, 10 did not conform to the legislation's requirement regarding the documentation of reasons for detention. Four of these detention orders did not state any reason for detention, and the others gave reasons other than the three listed in the legislation.

Massachusetts

Massachusetts uses a three-tier detention system involving the police, judges, and regional coordinators for the Department of Youth Services. However, none of the three tiers has secure

detention criteria that parallel NAC standards. In the first tier, the police may temporarily detain a child in a local police lockup until the arraignment hearing if the court is not in session and if

--the parents or guardians cannot be located,

--the court has issued an arrest warrant, or

--the police or court probation officer considers the juvenile to be a danger to himself/herself or the public.

The second tier of the system consists of the court arraignment. At the arraignment hearing, judges decide whether to

--send the juvenile home on personal recognizance or surety,

--levy bail, or

--remand the child directly to the Department of Youth Services in lieu of bail.

The third tier occurs if the juvenile is remanded to the Department of Youth Services or if bail is not met. At that time youth services regional coordinators must decide whether to detain a juvenile in a secure or nonsecure setting. Sometimes even "nonsecure settings" use locked doors and supervision to restrict the juvenile's freedom. The regional coordinators do not have any written standards for selecting the appropriate security level of the detention placement. Rather, a specific number of secure and nonsecure slots has been allocated to each region. In their selection, regional coordinators said they consider such things as seriousness of the offense, past problems in dealing with some of the juveniles, and court influences, but they consider the availability of allocated slots in secure and nonsecure settings as most important.

In commenting on a draft of this report, the former Governor said he agreed that States should work to develop more specific secure detention criteria. He said the Department of Youth Services has filed legislation, based on the NAC standard, designed to establish guidelines for judges to use in recommending secure detention placement to the Department.

ADDITIONAL ALTERNATIVES NEEDED TO REDUCE SECURE DETENTIONS

The need to provide appropriate nonsecure detention alternatives, such as shelter care, emergency group homes, and foster care programs, was supported by almost everyone we contacted.

Providing alternatives is a major goal of the Juvenile Justice and Delinquency Prevention Act. The organizations that established national standards also advocate that the least restrictive means be used to protect the children and the community. Further, State and national studies, as well as our review, show that alternative programs can reduce secure detentions.

Providing additional alternatives to secure detention could help alleviate the problem of questionable detentions. However, to be highly effective these alternatives must be

--used in conjunction with specific detention criteria;

--properly planned, which includes identifying the type, location, and capacity of each alternative; and

--properly coordinated with local detention decision makers.

Some States we visited had conducted surveys to identify the need for alternatives to secure detention but had not conducted comprehensive needs assessments specifying number, type, capacity, and location of needed detention alternatives. The States had funded some alternatives with OJJDP or State funds, but many communities still experienced major problems in providing additional alternatives or encountered utilization problems with the alternatives that were available. Some of these problems resulted in additional or extended detention stays.

Many programs for juveniles have reported that they successfully served as alternatives to secure detention. University of Chicago researchers recently studied 14 local alternative programs for OJJDP and reached several significant conclusions that provide a perspective of the alternatives issue. The study concluded that:

--Upwards of 90 percent of the juveniles in alternative programs did not commit new offenses or run away.

--Various program formats were about equally successful in keeping juveniles out of trouble and available to the courts.

--Residential programs, such as group homes and foster homes, were successful for both delinquents and status offenders.

Problems in providing and coordinating the use of alternatives to secure detention

Generally, the lack of alternatives was cited as a major reason for secure detention of juveniles in all the States we visited. Oregon officials in 9 of 10 jurisdictions complained about inadequate alternatives. Officials in seven Oregon counties were waiting to implement more specific detention criteria until appropriate alternatives were developed. Virginia officials said that only 2 alternatives were available to serve a 20-county area. North Carolina officials said that rural areas generally lacked alternatives. In New Hampshire and Massachusetts, the lack of alternatives was especially acute for females. For example, in New Hamsphire officials said many of the females in our sample had been detained because of a lack of alternatives. Similarly, in Massachusetts over 26 percent of the State's secure detention slots were for females, but none of the 119 shelter care slots were for females. In commenting on this report, the former Governor said that Massachusetts now has a shelter care facility for detained females.

Misallocation of slots caused one Virginia alternative program to close. Local officials said too many slots for females in a coed facility caused a low utilization rate, despite frequent overcrowding in the local jail and detention home, which often held nonserious offenders.

Coordinating the use of existing alternatives is hampered by two types of problems: (1) the alternatives themselves sometimes place restrictions on referrals or have disadvantages that discourage program use and (2) potential referral sources, such as court intake workers or judges have their own biases regarding alternatives. For example, some alternative programs

- refuse to accept certain types of offenders such as the emotionally disturbed or habitual offender;
- are located long distances from potential referral sources; and
- place other restrictions, such as limiting the time that a juvenile can stay in the alternative.

Problems with potential referral sources may occur when the use of alternatives is contrary to local judicial philosophies. For example, in one State we were told that judges use detention for punishment and will not use nonsecure alternatives. Consequently, even though the local detention home was often overcrowded and held status and nonserious offenders, available bed space in two nearby alternatives went unused. The referral source may also be restricted to only one agency when local turf

battles arise between referral sources, such as social service and court officials. Also, local officials told us they sometimes doubt the quality of the program offered by the alternative, especially if the alternative is new and needs time to establish its credibility.

In some cases, after detained juveniles were found delinquent and committed to a State agency for treatment, problems often arose for officials trying to find a nonsecure placement for the juveniles' treatment. Court officials said that, even when a nonsecure placement is decided on, juveniles sometimes must remain in secure detention because of the lengthy process in locating an appropriate placement. This process includes interviews between the juvenile and placement program officials, bed space availability, and other arrangements needed for placement. For example, in one State a local judge reported that several emotionally disturbed juveniles stayed for long periods in secure detention while an unsuccessful search was conducted for an appropriate placement.

MONITORING AND RECORDKEEPING SYSTEMS NEED IMPROVEMENTS

State monitoring and recordkeeping systems need to be improved so that States can effectively

- --monitor progress and take appropriate enforcement actions to achieve compliance with the act's goals of deinstitutionalization and separation,
- --identify needed detention system improvements, and
- --plan and address emerging issues such as the complete removal of juveniles from adult jails.

The States we visited had not established comprehensive systems to collect data and monitor detention facilities, including jails and lockups. Rather, they had established limited systems geared toward meeting the minimum OJJDP requirements to monitor compliance with the act's deinstitutionalization mandates. The States' monitoring and recordkeeping systems covering detention facilities were therefore not totally effective. For example, the data collection systems were incomplete and could not serve as a reliable basis for making detention decisions.

Community Research Center's analysis of State compliance monitoring systems

Section 223(a)(15) of the act requires as a condition for receiving formula grants that States establish an "adequate" system for monitoring jails, detention facilities, correctional facilities, and nonsecure facilities to help insure compliance with the act's mandates regarding status offenders, separation, and complete removal. The Community Research Center, under a grant from OJJDP, addressed the adequacy of State systems for monitoring compliance with the status offender and separation mandates. The Center's report, based on its review of the monitoring practices in 41 States and the District of Columbia, noted several common problems and made many recommendations to improve the monitoring systems. The report stressed that long-term improvements in due process, deinstitutionalization, quality of service, and living conditions can best be attained by a system that monitors the entire juvenile justice process as well as juvenile detention and correctional facilities. However, several States used only limited systems to monitor compliance with the act and these systems, moreover, had significant problems.

The report discussed limitations of State monitoring systems and also recommended 27 overall improvements to OJJDP. One of the most comprehensive recommendations addressed several monitoring problems that we also observed. The report recommended that OJJDP develop model legislation which States could adopt to improve their monitoring authority. The model legislation would grant the monitoring systems general authority to monitor and specific legal authority to (1) provide uniform admission/release forms, (2) require all secure facilities that might hold juveniles to maintain such records and submit duplicate copies to the monitoring agency at designated times, (3) inspect all secure facilities for compliance with the separation requirements, (4) cite facilities for noncompliance violations, and (5) enforce necessary sanctions, including closure of the facility to juveniles if violations are not corrected.

The study found that one of the most critical monitoring problems was the absence of complete and accurate data at the facility level. The report recommended that OJJDP develop a recordkeeping package to assist monitoring agencies in dealing with the "how to" of monitoring detention and maintaining facility records.

The study also produced individual reports for the States we reviewed which contained several significant findings and recommendations. For example:

--Each of the five States did not monitor all secure facilities that might hold juveniles--primarily jails and police lockups.

--Each of the five States needed to develop uniform admit/release forms and improve reporting because local facility records were often incomplete or inaccurate.

--In three of the five States the CRC monitor disagreed with State officials as to whether some jails provided adequate separation.

--Four of the five States needed to include realistic sanctions in enforcement procedures to correct or eliminate separation violations.

--Two of the States did not use a 12-month reporting period but rather used only a 3- or 6-month period for most facilities.

An OJJDP official said that the Center recommendation concerning authority to monitor had not yet been addressed and that the recordkeeping package the Center recommended would not be developed nationally. OJJDP has conducted monitoring workshops and provided for some limited technical assistance to a few States in the recordkeeping area. However, its most significant effort seems to have been the study itself.

State visits

The States we visited did not have comprehensive systems to monitor detention facilities, including jails and lockups. Without such systems, it is difficult, if not impossible, to effectively evaluate compliance with separation requirements, much less plan and review other detention related programs.

Although we did not evaluate the effectiveness of State efforts to comply with the monitoring and reporting provisions of the act, we found that many of the problems noted in the Community Research Center report persist. These problems and others seriously affect the States' ability to effectively review and improve their detention practices. For example, we were unable to obtain accurate State data on the total number of juveniles held in detention facilities--especially jails and lockups. Lockups generally did not report to the State level and the data reported by jails were highly questionable.

Further, local facilities' records were often inaccurate or incomplete. None of the States or localities summarized data on the reasons for detention or the prior offense history of detained juveniles, although individual records sometimes contained this

data. Data on the juveniles' length of stay in detention facilities were often unavailable or inaccurate. In three States, jail records were not sufficient to verify compliance with the separation requirement. In one of these States, some facilities used the same cell to hold both juveniles and adults but at different times of the day, so that separation was still supposedly achieved. However, the local records generally did not indicate the time that a juvenile was admitted or released from the cell--which prevented the verification of compliance. In another State, the statewide statistics did not indicate whether the juvenile had been transferred to adult court for trial and/or disposition.

CONCLUSIONS

The States we visited often considered the goals and objectives of the Juvenile Justice and Delinquency Prevention Act and used OJJDP funding and technical assistance to revise juvenile codes and make other improvements. However, the States and localities still detained nonserious offenders and status offenders in juvenile detention centers and jails because of (1) vague detention criteria and (2) the lack of appropriate alternatives to detention.

OJJDP efforts to reduce the use of secure detention facilities appear to have concentrated on meeting the deinstitutionalization and separation mandates of the act. OJJDP has sponsored the development of national standards that cover virtually every component of the juvenile justice system including the use of specific and objective detention criteria. While some research has been conducted, little has been done to assist States in adopting and implementing these or any other national standards. Also, the States need more help to identify, develop, and coordinate the use of appropriate detention alternatives.

Improved monitoring systems are needed if States are to effectively review juvenile detention practices and address emerging issues. States have not established comprehensive monitoring systems but rather have established only limited mechanisms to help monitor compliance with the deinstitutionalization of status offenders and separation mandates of the act. Although an OJJDP sponsored national study of State compliance monitoring systems has identified major problems and technical assistance needs, more needs to be done to help the States resolve these problems and improve their monitoring systems.

We realize that OJJDP operates under limited funding and do not suggest that it can accomplish all the act's objectives immediately. However, after recognizing these constraints, we still believe OJJDP is in a position to help the States improve

their detention practices by developing model State legislation that the States can use to conform their laws to appropriate national standards and by providing technical assistance and information to address juvenile detention problems.

RECOMMENDATIONS

We recommend that the Attorney General require the Office of Juvenile Justice and Delinquency Prevention to:

--Encourage States to adopt and implement standards that (1) provide specific detention criteria which limit the use of secure detention to appropriate purposes and (2) require adequate care and services for detained juveniles.

--Develop and support the adoption of model State legislation that would, if implemented, conform secure detention practices in the States to standards consistent with the objectives of the Juvenile Justice and Delinquency Prevention Act.

--Increase assistance to States and localities by providing technical information on how other States and localities have successfully dealt with juvenile detention problems.

--Assist States and localities in identifying areas where additional nonsecure detention alternatives are needed, developing methods of providing alternatives, and coordinating the alternatives with local detention decisionmakers.

--Assist States and localities in improving their monitoring and recordkeeping systems to adequately account for juvenile detention practices.

AGENCY COMMENTS AND OUR EVALUATION

The Department of Justice stated that its support and fulfillment of the recommendations contained in this chapter would result in improved juvenile detention practices at the State and local levels. However, the Department believed OJJDP had done more to assist the States than the report indicated and suggested that we contact OJJDP's Formula Grants and Technical Assistance Division to be briefed on past actions and future plans.

We met with officials from this division during our review and did so again at the Department's request. At this meeting, we were advised that beginning in January 1983, OJJDP

will offer suggestions to nine States and one territory concerning their plans for removing juveniles from jail and reiterate the availability of technical assistance. Appropriate technical assistance would then be provided upon request. The other States and territories are to be assisted at a later date.

These officials also expressed the view that their assistance had been proactive and that some States may not want technical assistance from OJJDP. We understand that OJJDP cannot make States accept help, but the ones we visited during our review did not fall into that category. Since these States expressed a need for additional assistance, a debate over how much OJJDP has or has not done does not appear to be relevant. The issue that should be considered is how best to provide States that want help with the information that they need.

Regarding the recordkeeping package, the Department stated that the package recommended by the Community Research Center is not being developed as a national package, it is being developed at the State and/or county level. We contacted OJJDP officials and were told that the recordkeeping assistance was only being provided to a few States and the localities included in their jail removal initiative. It appears to us that the other States and localities also need this type of assistance. The Department also said that OJJDP has addressed 20 of 27 recommendations the Center made to improve State monitoring systems. This is misleading because OJJDP addressed many of the 20 recommendations by either deciding it had already taken action or that none was needed. These steps have not resolved the problems identified in our report and, after the Department's comments were received, OJJDP officials concurred that more remains to be done.

CHAPTER 4

THE FEDERAL GOVERNMENT SHOULD IMPROVE ITS DETENTION PRACTICES

Several Federal agencies have authority to arrest and detain juveniles or are responsible for their custody under certain circumstances. These agencies could serve as a model to State and local juvenile justice agencies by adhering to the objectives of the Juvenile Justice and Delinquency Prevention Act. Under the act's Concentration of Federal Efforts provisions, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) is required to assist Federal agencies directly responsible for preventing and treating juvenile delinquency to develop and promulgate regulations, guidelines, requirements, criteria, standards, procedures, and budget requests in accordance with OJJDP policies, priorities, and objectives. However, we found that some of the policies and procedures of the U.S. Park Police, Bureau of Indian Affairs (BIA), and Immigration and Naturalization Service (INS) were not consistent with these objectives.

EFFORTS TO IMPROVE FEDERAL DETENTION PRACTICES HAVE BEEN LIMITED

Officials in the Federal agencies we reviewed said that OJJDP and the agencies have had little or no contact concerning juvenile detention policies and procedures other than through efforts of the Federal Coordinating Council on Juvenile Justice and Delinquency Prevention. OJJDP officials said their contacts concerning Federal detention practices had been limited to Coordinating Council efforts and a briefing to two of the agencies we reviewed on children in Federal custody. OJJDP sponsored two studies 1/ concerning juveniles in the custody of Federal agencies. The first identified pertinent issues involved with detaining alien juveniles and recommended further study. The second study assessed the degree to which Federal policies and practices resulted in detaining juveniles under circumstances inconsistent with certain provisions of the act. The study discussed problems and made recommendations to each of the agencies we reviewed.

1/Juvenile Illegal Aliens: Feasibility Analysis, Arthur D. Little, Cambridge, Massachusetts, May 1, 1980, and Children in Federal Custody, Community Research Forum, University of Illinois at Urbana-Champaign, July 1980.

On the basis of the second study's results, a Coordinating Council subcommittee initiated a three-phase program to address problems concerning native American youth. The first recently completed phase collected data currently available to BIA on secure incarceration of native American juveniles. In phase two, a contractor is supposed to review a sample of tribal facilities to identify actual practices and problems. The final phase will recommend solutions to the problems surfaced in the first two phases. In commenting on this report, the Department of Justice stated that, subsequent to phase three, OJJDP and BIA will develop plans for modifying practices that result in inappropriate placement of youth.

OJJDP officials said that, although the agencies disputed many of the second study's findings and recommendations, an Attorney General's order has been drafted that will address deinstitutionalization of status offenders, separation of juveniles from adult prisoners, and complete removal of juveniles from adult facilities. They said that the Attorney General's order will not address any other juvenile issue, will not be binding on Department of the Interior agencies, and is the only action currently planned addressing Federal detention policies and practices other than actions by the Coordinating Council. The Department commented that each bureau or agency will be held responsible for systems which enable it to annually measure or report to the Federal Coordinating Council on progress in meeting goals established by the order.

FEDERAL AGENCIES DO NOT ADEQUATELY ACCOUNT FOR OR MONITOR JUVENILES TAKEN INTO CUSTODY

None of the Federal agencies, except the Marshals Service, could completely account for the juveniles they had taken into custody. Officials from all agencies claimed that the number of juveniles detained was small, but only the Marshals Service had national data to support the claim. None of the agencies could provide us with information, other than averages, on the number of juveniles detained and lengths of stay. In addition, much of the data that was available had not been verified by agency officials and officials admitted that the data was inaccurate or incomplete.

Immigration and Naturalization Service

Current INS statistics combine arrest and detention data for illegal alien juveniles and female adults, making it impossible to determine how many juveniles were detained. The only national estimate of juvenile detention that INS officials could provide was the result of an informal survey of juveniles detained during the week of March 16, 1980. The survey showed

81 juveniles had been detained during the week, including 6 who had been detained over 30 days. This survey only included juveniles who were 16 years of age or younger.

Headquarters officials said that the districts prepare narrative reports each month which contain information on juvenile detentions, but overall statistics concerning juveniles are not available at the national level. Although detention data could be obtained at the district level, a regional official said that obtaining it would require a review of thousands of original documents. National data on juvenile detentions may be available in the future if a planned computerized statistical system becomes operational. In commenting on a draft of this report, the Department said that INS was making significant progress on the computerized system which had been implemented in the San Diego District and El Centro Service Processing Center.

National Park Service

Until 1981 the National Park Service maintained computerized data that included juvenile arrests, juveniles charged and referred to court, and juvenile dispositions, but not juvenile detentions. According to the NPS official in charge of the statistical system, this system was discontinued for economic reasons while a new system was being planned. He also said that the data in the old system may not be accurate because park officials did not always submit data, the coding and input of data into the computer was under contract and somewhat outside NPS's control, and verification of coded data was extremely limited.

An NPS official said that, since the old system was discontinued, data has been tabulated by hand, but it was not done in a manner that would distinguish juveniles from adults. A new computerized system is to be implemented in late 1982 or 1983, but may not include complete juvenile data because all regions will not be required to participate or collect juvenile information.

NPS officials said that most arrested juveniles are referred to State and local jurisdictions or detained in facilities under contract with the Marshals Service. Accurate statistics were not available to show the number of these juveniles or their length of detention. Officials said that the Yellowstone and Yosemite Parks, however, have facilities approved to hold juveniles. Data from a Yellowstone Park official showed that only one juvenile was held in the park facility in the last 3 years because park officials prefer to use local facilities with Marshals Service contracts. At our request, Yosemite officials provided us with the following detention data.

Year	Male	Female	Average length of stay (days)
1979	35	9	1.5
1980	38	10	1.3
1981	42	5	2.1

U.S. Park Police

The U.S. Park Police maintains statistical records for juveniles, including the number of juveniles apprehended (taken into custody but not actually arrested) and charged (arrested and charged with an offense). No information was available on the number of detentions or lengths of stay.

A Park Police summary for 1979 shows that 1,923 juveniles were apprehended, including 253 for traffic violations, and 1,874 juveniles were charged with offenses. Of these, 121 were charged with Part I (serious) offenses while 1,738 were charged with Part II (nonserious) offenses. Fifteen others were charged with status offenses.

U.S. Marshals Service

The U.S. Marshals Service maintains statistics on the number of juveniles "handled" and "received." An official explained that juveniles "handled" refers to any contact a marshal has with a juvenile including each time the juvenile is taken to court. The statistics do not distinguish detentions from other handling. In 1981, the Marshals Service handled juveniles under Federal statutes 1,976 times and juveniles under District of Columbia statutes 5,799 times. Officials further explained that juveniles "received" refers to juveniles actually processed by the Marshals Service, all of whom would be detained at least during processing. In 1981, the Marshals Service received 1,380 juveniles charged with Federal crimes, and 4,677 juveniles charged with District of Columbia offenses. Statistics were not available on individual lengths of stay.

Bureau of Indian Affairs

The Bureau of Indian Affairs compiles tribal law enforcement data, which includes juvenile arrests. This data is collected from law enforcement programs operated by BIA, programs under contract with BIA, and programs completely outside BIA's control. According to a BIA official, approximately 156 programs, run either by BIA or by the tribes under contract with BIA, are required to submit law enforcement data. Also, eight tribes which fund their own programs are encouraged to report data.

Reported data shows that 12,442 juveniles were arrested for nontraffic offenses during 1980. Of these, 204 were for major

offenses (handled by Federal court) and 12,238 were for minor tribal offenses (misdemeanors according to BIA categories). Of the tribal offenses, 2,734 were status offenses. This data may be understated, however, because BIA does not verify it and several tribes do not always report. Records for 1980 show that an average of 27, or 16 percent, of the law enforcement programs did not report each month. Data also showed that, during the first 6 months of 1981, an average of 47, or 29 percent, of the programs did not report each month. In addition, a 1981 Department of the Interior Inspector General's report stated that the BIA reporting system was unreliable and did not provide timely and accurate information. It also stated that data may be underreported by as much as 20 percent.

Information on detention and length of stay was not readily available. BIA officials told us that this information is available for the programs operated by BIA, but that the only way to obtain it for the remaining programs would be to contact the tribes.

INSPECTION OF FACILITIES USED BY THE FEDERAL AGENCIES TO DETAIN JUVENILES WAS INADEQUATE TO ENSURE STANDARDS ARE MET

To ensure that Federal agencies adhere to their prescribed detention policies and that facilities they use meet national standards, agencies could inspect and review the policies of these detention facilities. If State or local facilities are involved, an inspection report could also serve as technical assistance to the State and local officials on detention procedures that meet or exceed the standards. The level of inspection activity and assistance varies widely between Federal agencies. Conflicting demands on the inspectors often delay inspections and inadequate detention alternatives force the agencies to use facilities that may not meet standards.

Marshals Service officials said that, before contracting with a facility, the Marshals Service conducts a complete operational and management inspection on the basis of various national standards, including the "Federal Standards for Prisons and Jails" recommended by the Attorney General. These standards are intended for adult facilities, but also contain provisions for complete removal of juveniles from adult facilities, separation, and deinstitutionalization of status offenders. During the life of a contract, facilities used under 1,000 days are inspected yearly and those used over 1,000 days are inspected biannually. Officials said that, because more facilities are needed than are available they contract with facilities that do not meet standards. Although they inform the facility officials of needed improvements, the Service must use the facility when nothing else is available.

Marshals Service officials also said that when problems are noted during inspections, they can do little more than not renew a facility's contract. They said that marshals have no authority to interfere with a facility's internal operations even if problems are witnessed. Moreover, they said the contracts are more like formal agreements than contracts because the facilities do not make any profit.

INS detains juveniles in facilities under Marshals Service contracts and other State and local facilities under informal agreements with INS. According to INS officials, the facilities with informal agreements are inspected periodically by INS regional or district officers.

A BIA inspector told us that two inspectors are responsible for inspecting 125 law enforcement programs, including detention facilities, operated on the reservations. The inspections concentrate on management and administration of all aspects of the programs. An inspector said that juvenile detention practices are discussed during inspections, but actual practices are rarely observed because juveniles are usually confined on weekends and inspections normally occur on weekdays. If juveniles are in detention during inspections, the inspector said they ensure that separate cells are used but do not require sight and sound separation. Inspectors have no authority to direct changes, but can make recommendations and conduct followup inspections on their implementation. Headquarters and regional officials told us that there is an effort to encourage tribes to implement inspection recommendations, but they would be very reluctant to enforce the recommendations by withholding funds or canceling contracts because of BIA's sensitive relationship with the tribes.

A BIA official said that BIA has no formal requirement for frequency of inspections. BIA recently reported to a Senate committee that all detention facilities are inspected twice a year. A listing of inspections performed from October 1979 through July 1981, however, showed that only 44 inspections were made of the 125 programs, 23 of which were initial inspections. Another list showed that 16 initial and 4 followup inspections were made between October 1981 and July 1982. A headquarters official said that the goal of two inspections a year had not been reached because BIA does not have enough inspectors. The importance of these inspections is evident by the findings and recommendations from the inspections that have occurred. The following are only a few of the problems mentioned in the inspection reports we reviewed:

--lack of smoke and fire detection systems,

--Indian Health Service recommendations not implemented,

--isolation or maximum security cells used to detain juveniles,

--inadequate training of staff,

--jailers reporting to inspectors that juveniles and adults were placed in the same cells, and

--lack of administrative control over the facility.

According to NPS officials, overall operations of the parks are inspected periodically, including the two facilities certified to hold juveniles. Officials said there is no timeframe requirement for these inspections and that recent travel restrictions have limited inspections by both regional and headquarters staff. In addition, there is no centralized file of inspection results and officials had no idea how many inspections were conducted by the regions.

POLICIES OF SOME AGENCIES NOT ALWAYS CONSISTENT WITH FEDERAL OBJECTIVES

The policies of some agencies were not always consistent with the objectives established by the Juvenile Justice and Delinquency Prevention Act to separate juveniles from adults and remove juveniles from adult facilities.

Policies do not require sight and sound separation

BIA's Law and Order Handbook states that juveniles should not be detained in adult facilities except where there are no separate juvenile facilities and a real emergency exists. BIA statistics for November 1980 show that only 8 juveniles were held in separate juvenile facilities while 118 were held in separate cells in an adult facility. In addition, both BIA's Law and Order Handbook and its Law Enforcement Standards for Police and Detention Programs require only that juveniles be held in separate cells from adults. There is no discussion of the need for sight and sound separation.

A BIA inspector said that, although only one tribe admitted in a 1980 survey that it held juveniles and adults together in the same cell, several tribal jailers had told him that juveniles were confined with adults if separate space was not available. In addition, several BIA inspection reports cited tribal detention facilities either for no separation at all or for a lack of designated juvenile cells.

The transportation policy of the U.S. Marshals Service allowed juveniles to be transported with adult offenders if the trip could be made in a day and the juvenile was under constant

close surveillance. However, a new Marshals Service policy will allow this type of transport only as an exception to the basic policy that juvenile and adult offenders be transported separately. A Marshals Service official said that the new policy resulted from comments raised by GAO during this review and that the new policy had not yet been published or distributed to the field.

The INS transportation policy is to not mingle juveniles and male adults, but officials said juveniles and adults are sometimes transported together when they are under the direct observation of an INS officer. INS has no specific policy concerning separation of juveniles and adults during processing, and again juveniles and adults are sometimes not separated when they are under an INS officer's observation. One official said that the separation mandate would not apply during processing because at that point both juveniles and adults would be charged with violating administrative regulations and not criminal laws.

A related concern is the Marshals Service and INS policy of following the States' juvenile age limits when detaining juveniles. This policy could result in persons considered juveniles by the Federal Government being held with adults if the State's juvenile age limit is lower than 18. For example, if INS detains a 17-year-old in Texas (the State age limit for adults), officials said the individual would be held in the INS processing center, a facility that is supposed to be used only for adults.

National Park Service guidelines state that runaways may be picked up and turned over to local jurisdictions. Officials said these juveniles are processed in park facilities and turned over to local jurisdictions for possible detention. Although NPS does not detain status offenders, except during processing, the result of the arrests may be secure detention if the locality so chooses. Because NPS officials said they do not know the localities' practices regarding status offenders, we cannot conclude whether NPS policy complies with the deinstitutionalization of status offender objectives of the act.

Policies do not provide for complete removal of juveniles from adult facilities

The act's 1980 amendments established the removal of juveniles from adult jails and lockups as a national policy objective. Also, the Department of Justice's "Federal Standards For Prisons and Jails" states that juveniles do not belong in adult prisons or jails of any sort. The policies of all of the agencies we reviewed, however, allowed juveniles to be held in adult facilities and there were no current plans to require complete

removal. Likewise, several officials contacted said they were unaware of the act's complete removal mandate.

BIA officials said BIA and the tribes cannot accomplish complete removal because of a lack of available detention space. They said that dozens of new jails would have to be built because alternatives to jail would not be acceptable to the tribes. They also said that, because of the relationship between BIA and tribal organizations, BIA is limited in its enforcement power to cause changes in tribal practices.

Marshals Service officials said they were aware of the Federal objective of complete removal of juveniles from adult facilities but believed they could do little until State and local practices changed. Current policy is to follow national standards that require sight and sound separation, but officials said the Service sometimes uses facilities that do not comply with this requirement because of inadequate alternatives. In commenting on the draft report, the Department of Justice said that the policy is to detain juveniles only in a juvenile facility unless no such facility is available. In that case the marshal can detain a juvenile in an adult facility only with the court's specific knowledge and/or approval. A Marshals Service official said that this new policy resulted from the GAO review and has not yet been published or distributed to the field.

Headquarters officials of the U.S. Park Police were unaware of the act itself and hence its removal objective, and the written policy of the Park Police does not require complete removal. Nevertheless, officials said the Park Police generally uses only local juvenile detention facilities when detaining juveniles.

INS officials said they rely on the policies of the Marshals Service and States when detaining juveniles, so implementation of the complete removal objective would depend on the policies of the other agencies. These officials said INS prefers to use facilities with Marshals Service contracts because of the Service's expertise in detention and its strict standards. They said INS also uses the Marshals Service contract requirements as a basis in forming informal agreements with local facilities. Further, they said INS has no plans to require complete removal of juveniles from adult facilities unless the Marshals Service takes the lead.

ARRESTED JUVENILES ARE TURNED OVER TO LOCAL AUTHORITIES WITHOUT CONSIDERATION OF LOCAL PRACTICES

Juveniles arrested by the Park Police and NPS for delinquent and status offenses on Federal land are usually turned over to local authorities for handling. The arresting officers generally have little or no knowledge of the subsequent disposition of the matter. While this is sometimes the only choice and usually the simplest and most economical procedure for the Federal agencies, it increases the workload of local juvenile justice systems. In addition, officials said Federal agencies that refer juveniles to local authorities do not provide technical or financial assistance to help the local systems improve their detention practices. Although we did not review cases of juveniles detained under this procedure, we believe the influx of juveniles arrested by Federal agencies can only add to State and local problems of juvenile detention practices and increase the number of juveniles detained under conditions that may not meet national standards.

NPS guidelines state that, when runaways are picked up, generally they are to be turned over to local authorities. NPS officials said that NPS does not consider itself responsible for any circumstances or conditions of detention after a juvenile is turned over to a State or locality. Officials said that runaways may be held in parks for a short time after processing if the officer believes a parent can quickly take custody, but they are otherwise turned over to local authorities.

The Park Police maintains its own lockup-type holding facilities for juveniles but does not have space available for long-term detention. It uses local juvenile detention centers if detention is necessary for longer than a few hours. These facilities are not inspected by the Park Police, and officials said they do not know of actual conditions beyond the front door. According to an official from one of the local detention centers, juveniles arrested by the Park Police are not treated any differently from juveniles arrested by any other law enforcement agency.

Both the Park Police and NPS rely on "federally approved" detention facilities to ensure that juveniles are detained in accordance with Federal standards. NPS officials defined federally approved as facilities approved by the Marshals Service. Marshals Service officials said, however, the Service cannot impose Federal regulations on local facilities and cannot approve facilities. Even if a contract facility does not meet all the Federal standards, the Marshals Service may have no other alternative to using that facility.

CONCLUSIONS

Although, to receive Federal assistance, States are required to have an effective monitoring system to account for secure detention of juveniles, Federal agencies which take juveniles into secure custody for many of the same reasons as the States could not account for the detained juveniles. Certain policies and practices of some Federal agencies concerning separation of juveniles from adults, status offenders, and complete removal of juveniles from adult facilities were not always consistent with the national policy objectives of the Juvenile Justice and Delinquency Prevention Act. By arresting and referring juveniles to the local systems and using local facilities for detention of juveniles in Federal custody, these Federal agencies further aggravate problems at some State and local facilities.

OJJDP should provide Federal agencies detaining juveniles with the information necessary to conform their policies and practices regarding detention of juveniles to better meet the act's objectives. To date, however, OJJDP has done little to assist Federal agencies in meeting its policies and objectives related to juvenile detention. Its actions include two studies of children in Federal agency custody and limited efforts of the Federal Coordinating Council on Juvenile Justice and Delinquency Prevention.

RECOMMENDATIONS

We recommend that the Attorney General require OJJDP to actively promote the objectives of the Juvenile Justice and Delinquency Prevention Act by:

--adopting a strong policy formulation role and through working with the Federal Coordinating Council, identifying the policies and practices of other Federal agencies that are inconsistent with the act's objectives and

--providing technical assistance and information needed to adopt appropriate policies and practices.

We also recommend that the Attorney General and the Secretary of the Interior direct their respective agencies to:

--cooperate with OJJDP and the Coordinating Council in conforming their policies and practices to the act's objectives and

--establish recordkeeping and monitoring programs that adequately account for juvenile detention practices and

help determine whether the act's objectives are being achieved.

AGENCY COMMENTS AND OUR EVALUATION

The Department of Justice agreed with our basic conclusion that certain Federal policies are not always consistent with the act's objectives and stated that its support and fulfillment of our recommendations would result in improved juvenile detention practices at the Federal level. The Department said that OJJDP has long been concerned over whether or not Federal agencies were responsive to the act and, for that reason, had offered to fund the study of the policies and practices of Federal agencies that detain juveniles discussed on pages 37 and 38 of this report. The Department also concluded that the Federal Coordinating Council would be the natural vehicle to address the issues and concerns raised in our report and stated that OJJDP has used the Council for this purpose.

We agree that the Council is a good vehicle for stimulating change, but we believe that it is limited in what it can accomplish because of infrequent meetings, limited resources, and the collateral duties of Council members. Recognizing this, OJJDP could act as a catalyst for change under the Concentration of Federal Efforts mandates that OJJDP provide technical and training assistance to Federal agencies concerning juvenile delinquency programs. OJJDP is also required to assist operating agencies in developing their regulations and procedures concerning the prevention and treatment of juvenile delinquency. According to the Department's comments, OJJDP has already started to address these issues by taking the lead role for completing a Council work plan which calls for assistance to Federal agencies in the appropriate placement of juveniles. The first objective of this plan is to encourage Federal agencies responsible for the apprehension or detention of juveniles to do so in compliance with the deinstitutionalization, separation, and jail removal mandates of the act. The plan calls for an examination of the policies and practices of Federal agencies, development of appropriate policy statements for inclusion in the regulations of the agencies, and provision of technical assistance to those agencies that need it. The plan was adopted by the Council after our draft report was sent to the Department for comment.

The Department agreed that the policies of INS and Marshals Service should be consistent with the objectives established by the Juvenile Justice and Delinquency Prevention Act and that recordkeeping and monitoring programs should be in place. To meet GAO's recommendation to both adequately account for and monitor juvenile detention practices, the Department said that each U.S. Marshal has been directed to develop a standard

operating procedure for the custody and detention of juveniles based on that particular judicial district's resources, availability of juvenile housing, and applicable State laws. A listing of all available juvenile facilities will also be maintained to ensure that, whenever possible, juveniles will be housed in a juvenile facility.

The Department of the Interior, by letter dated December 13, 1982, provided the comments of BIA and NPS. (See app. IV.) NPS said it will work with OJJDP and the Coordinating Council at the National level to better coordinate the policies and practices of OJJDP and NPS. NPS also stated that it will instruct its parks and regions to establish a recordkeeping and monitoring program to assist in determining whether the objectives of the act are being achieved.

BIA concurred that one method of ensuring compliance with existing regulations and policies is through a regular inspection routine. BIA stated it had made an effort to increase the inspection staff, but due to program and fiscal constraints the staff had been maintained at two inspectors. BIA also reaffirmed the comments of its inspectors and the observations presented in this report that were taken from inspection reports.

BIA further stated that the findings concerning data reliability and separation policy needed clarification. After reviewing BIA's comments and supporting documentation, we clarified certain points but have not changed our conclusions and recommendations.

Data Elements GAO Attempted to Obtain for Each Sampled Juvenile

Demographic data
Dates of admittance and release
Length of stay
Reason for arrest, petition, or complaint
Reasons for detention
Detention order date and title of issuing officials
Reason for being detained over 30 days, if applicable
Prior arrests (dates, charges, and dispositions)
Family status (i.e., single parent, foster care, guardian, etc.)
Setting released to (secure or nonsecure)
Tests/evaluations conducted while in detention
Status at time of detention (preadjudicated, postdispositional, etc.)
Changes in detention status, including dates of changes
If postadjudicated, reason for detention instead of treatment
Miscellaneous comments, such as circumstances of arrest

SAMPLED JUVENILES WERE DETAINED FOR VARIOUS OFFENSE TYPES (note a)

State	Serious offenses		Non-serious offenses		Status offenses		Non-offenses		Total detentions (note b)	Percent of detentions not charged with serious offenses
	Male	Female	Male	Female	Male	Female	Male	Female		
Massachusetts c/	99	21	19	14	0	0	0	0	153	22
New Hampshire	34	5	12	4	0	0	0	0	55	29
North Carolina	51	7	7	4	16	9	0	1	95	39
Oregon d/	116	15	25	11	37	55	4	3	266	51
Virginia	88	3	34	8	3	8	0	0	144	37
Total	388	51	97	41	56	72	4	4	713	39 e/

a/Excludes detentions for which GAO could not determine the offense and excludes juveniles committed to treatment but placed in detention for reasons other than new charges or awaiting placement.

b/Does not include 72 probation violations because the probation may have resulted from any of the offense categories.

c/Includes 55 juveniles being held for a new charge but also committed to treatment.

d/The sex could not be determined for 2 nonserious offenders, making the total detentions for Oregon 268 and 715 for all States.

e/Percentage computation includes 2 nonserious offenders described in footnote "d" (276-715 = 38.6%).

APPENDIX II

APPENDIX III

U.S. Department of Justice

Washington, D.C. 20530

DEC 7 1982

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

This letter is in response to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "Improved Federal Efforts Needed to Change Juvenile Detention Practices."

The General Accounting Office (GAO) report consists of three sections, with each section focusing on a major issue related to juvenile detention practices. In addressing these issues, as well as the recommendations associated with them, the Department has identified each issue and provided its comments separately on each.

Questionable Uses of Secure Detention Still Exist

Overall, GAO's discussion of this issue accurately portrays juvenile detention practices within the several States included in the study. However, based on our review of this section, we are identifying a number of points which we believe require further review and analysis by GAO and the results thereof incorporated into their final report.

Page 6 of the draft report states that the Office of Juvenile Justice and Delinquency Prevention (OJJDP) has a policy that juveniles who have not been charged with serious offenses should not be securely detained. The Department is not aware of a specific OJJDP policy which makes this statement. We recommend the statement be modified as follows:

> The national standards, which are not mandatory on the States, provide that juveniles who have not been charged with serious offenses should not be securely detained. (See GAO note 1.)

It should also be noted that the standards preceded the valid court order amendment which permits such detention.

APPENDIX III

The data cited on page 6 do not relate appropriately to the objectives of the Juvenile Justice and Delinquency Prevention (JJDP) Act, as inferred by GAO, because the data do not separate status and nonstatus offenders from other offenders. A staff analysis of the report from which the data was excerpted is available at OJJDP. The analysis also details other deficiencies of the data and their sources. Moreover, the data are outdated and the researchers on the project told OJJDP that they were unsure as to what conclusions could be reached. We believe GAO should reconsider its use of the data excerpted from this report and determine the appropriateness of the conclusions they appear to indicate.

The data on page 9 and the top of page 10 are seriously defective if they ignore or do not reflect the 1980 Valid Court Order Amendment, which permits secure detention for nonviolent juveniles found in violation of a proper order.

The last sentence in the second full paragraph on page 10 states that ". . . about 33 percent of all 1979 and 1980 juvenile detainees were not charged with serious or nonserious offenses." An explanation is needed to identify what constitutes offenses other than "serious or nonserious offenses." (See GAO note 2.)

With regard to the issues discussed on pages 14-17, and the conclusions reached on page 20, the final version of the report should reflect four actions taken by OJJDP in the past year with respect to accreditation of juvenile detention facilities in conjunction with the Committee on Accreditation of the American Correctional Association. Formula grant funds as well as three separate categorical grants have addressed these issues. (See GAO note 3.)

The Federal Government Can Help States Improve Their Detention Practices

The last paragraph on page 22 indicates OJJDP has not taken a proactive role in identifying problems and helping States to resolve them. This is not an accurate statement. The Formula Grants and Technical Assistance Division, through technical assistance efforts and through the Jail Removal Initiative, has taken a proactive role. In fact, OJJDP is now beginning to undertake a specific effort to identify those States which are ready to move forward in planning and implementing jail removal efforts. We recommend that GAO contact the Formula Grants and Technical Assistance Division to be briefed on actions that have been taken and review OJJDP's future plans to provide proactive assistance. This data should then be incorporated into the report.

As to the material presented on pages 24 and 25 of the draft report, we consider it important to point out once again that the comments ignore the 1980 Valid Court Order Amendment relating to appropriate detention.

The third paragraph on page 33 indicates that OJJDP does not plan to develop a recordkeeping package to assist States in monitoring and data collection. Although we are not developing a generic package, we are working with individual States and localities in developing improved local and or State recordkeeping capabilities. Accordingly, it is suggested this statement be modified as follows:

APPENDIX III

> An OJJDP official told us that the overall CRC recommendation concerning authority to monitor has not yet been addressed and that the recordkeeping package CRC recommended is not being developed as a national package, but is being developed at the State and/or county level based upon specific needs, local practices and State codes.

At the bottom of page 34, the report comments that OJJDP has done little to help the States resolve problems and improve their monitoring systems. Of the 27 recommendations identified in the referenced OJJDP-sponsored national study of State compliance monitoring systems, 20 of the recommendations have been or are being addressed by OJJDP.

The Federal Government Should Improve Its Detention Practices

The Department agrees with the basic issue of this section of the report, namely, that "Certain policies and practices of some Federal agencies concerning separation of juveniles from adults, status offenders, and complete removal of juveniles from adult facilities were not always consistent with the national policy objectives of the [JJDP] act."

There is less agreement, however, with the implication that OJJDP has given scant attention to the policies and practices of Federal agencies in meeting the mandates which the JJDP Act requires of the States.

At the outset, it should be noted that the mandates of the JJDP Act regarding status offenders, separation, and jail removal are levied on the States, and it is in this realm that OJJDP is given monitoring and compliance responsibility. Page 47 of the GAO report states that OJJDP should be required to fulfill its "Concentration of Federal Efforts mandates" by identifying policies and practices of Federal agencies that do not promote implementation of the objectives of the JJDP Act. The JJDP Act does not specifically levy this responsibility on OJJDP via its concentration of Federal effort activities. Rather, it is contained in Section 206(a), which authorizes the Federal Coordinating Council "to review the program and practices of Federal agencies and report on the degrees to which Federal agency funds are used for purposes which are consistent or inconsistent with the mandates of Section 223(a)(12)(A) and (13)." OJJDP has long been concerned over whether or not Federal agencies were responsive to the JJDP Act, particularly with regard to the separation, status offender and removal mandates. It was for this reason that OJJDP brought this issue to the attention of the Council in 1979 and offered to provide the necessary funds to undertake a study of the policies and practices of Federal agencies that detain juveniles. The results of the study were published in 1981 and commenced an effort on the part of OJJDP, through the Federal Coordinating Council as the appropriate vehicle, to address the issues and concerns raised by the report, with the assistance of the other Federal agencies. Aside from the authority given to the Council in Section 206(a), OJJDP viewed the Council as the natural vehicle for collaboration among Federal agencies regarding detention of juveniles, particularly since many of the agencies affected were members of the Council.

Since bringing this issue to the attention of the Council, progress has been made toward achieving modifications in the policies and practices of Federal agencies so that they are consistent with the objectives of the JJDP Act. Please note, however, that no authority exists to force any action which is not legally required by refusing to provide funds where the agencies themselves would like to take action.

As noted in the GAO report, OJJDP has entered into an interagency agreement with the Bureau of Indian Affairs (BIA) to ascertain whether native American youth are being detained in accordance with the objectives of the Act. Subsequent to Phase III of this effort, which will be analysis and dissemination of the data to be collected under Phase II, OJJDP and BIA will develop plans for modifying those practices that are resulting in inappropriate placement of youth per the JJDP Act.

In 1982, OJJDP began development of a draft order for the Attorney General entitled "Policy and Goals Regarding the Placement of Juveniles in Federal Custody." This order, when issued, will establish goals related to the placement and conditions of custody for juveniles under the Federal jurisdiction of Department of Justice bureaus and agencies, including the Bureau of Prisons, Immigration and Naturalization Service (INS) and United States Marshals Service (USMS). The exact wording has not been agreed upon as implied on page 38 of the draft report. Each bureau or agency will be held responsible for its maintaining, monitoring, and reporting systems, which will enable it to annually measure or report to the Federal Coordinating Council on the extent of progress in meeting these goals.

Finally, the Federal Coordinating Council has adopted a long-range program plan which calls for the provision of assistance to Federal agencies in the appropriate placement of juveniles. The first objective of the plan is to encourage Federal agencies responsible for the apprehension or detention of juveniles to do so in compliance with the deinstitutionalization, separation and jail removal mandates of the JJDP Act. Unlike the Attorney General's order, this plan will extend beyond Department of Justice agencies to the other agencies which detain children. The plan calls for an examination of the policies and practices of such agencies, development of appropriate policy statements for inclusion in the regulations of Federal agencies, and provision of technical assistance to those agencies that need it. OJJDP has taken the lead responsibility for completion of this work plan.

Detention Practices--INS and USMS

The Department agrees that the policies of the INS and USMS should be consistent with the objectives established by the JJDP Act to separate juveniles from adults and remove juveniles from adult facilities. Further, the Department agrees that recordkeeping and monitoring programs should be in place which adequately account for juvenile detention practices and provide a basis for determining whether the objectives of the JJDP Act are being achieved.

With respect to INS, the GAO draft report states on page 38 that INS combines arrest data for illegal alien juvenile and female adults on the monthly G-23 statistical report. Although this statement is correct, a further explanation needs to be made pointing out that, on a separate report, INS maintains separate statistics for juveniles in detention each month. In another

statement on page 39 of the draft report, GAO indicates that a survey conducted by INS to determine the number of juveniles detained may have been inaccurate. The data INS collected in early 1980 regarding the detention of juveniles was an actual count of apprehended illegal alien juveniles placed in appropriate juvenile detention facilities.
(See GAO note 4.)
In terms of juvenile statistical data, we wish to emphasize that INS is making significant progress in computerizing the deportation docket control system. The pilot Deportable Alien Control System has been implemented in the San Diego District and in the El Centro Service Processing Center. When the entire system is in place, separate statistics on juveniles will be readily available for statistical reporting and analysis purposes.

Concerning facilities used for detention, INS policy provides that apprehended illegal alien juveniles, who are defined as persons subject to the jurisdiction of a juvenile court, are to be placed in juvenile facilities or with appropriate responsible agencies or institutions that are recognized or licensed to accommodate juveniles by the laws of the particular State. The policy further states that children who are too young to be placed in a juvenile facility or youth hall are to be placed with local youth/child services, or with relatives or friends. The above-mentioned policy is formally published in INS' Operations Instructions (O.I. 242.6(c)).
(See GAO note 5.)
With respect to the USMS, the GAO statement in the fifth paragraph on page 43 relating to the USMS transportation policy on juveniles is incomplete. USMS policy directs that the transportation of juveniles be accomplished separately from adult offenders. Only as an exception to policy are juveniles transported in the same vehicle as adult prisoners. In such rare instances, the trip must be of short duration and the adult offender present must not exhibit a negative influence on the juvenile. For example, mothers and children are transported together to a half-way house facility where they will reside together as a family unit.

The policies of the USMS regarding the complete removal of juveniles from adult facilities is discussed in the last paragraph on page 45 of the report. GAO's statement of USMS policy is incomplete and should include the following additional policy. USMS policy directs that upon remand, juveniles be detained only in a juvenile facility. When no such facility is available, the Marshal must notify the U.S. Attorney and the court of that problem. Only with the court's specific knowledge and/or approval can juveniles be placed in an adult facility. This type of situation occurs primarily when a violent or dangerous juvenile will not be accepted into a youth facility or has been rejected by a facility.
(See GAO note 6.)
To meet GAO's recommendation to both adequately account for and monitor USMS juvenile detention practices, each U.S. Marshal has been directed to develop a standard operating procedure for the custody and detention of juveniles based on that particular judicial district's resources, availability of juvenile housing, and applicable State laws. A listing of all available juvenile facilities will also be maintained to ensure that whenever possible, juveniles will be housed in a juvenile facility rather than an adult facility which has a juvenile housing unit.

* * * * * * * * * *

APPENDIX III

We appreciate the opportunity to review and comment on your draft report prior to its publication. Overall, we believe that our support and fulfillment of the recommendations of the report will result in improved juvenile detention practices at the local, State and Federal levels.

Should you desire any additional information, I trust you will let me know.

Sincerely,

Kevin D. Rooney
Assistant Attorney General
for Administration

*Page references have been changed to correspond to the final report.

APPENDIX IV

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

DEC 13 1982

Mr. J. Dexter Peach
Director, Resources, Community
and Economic Development Division
U.S. General Accounting Office
Washington, D. C. 20548

Dear Mr. Peach:

Thank you for the opportunity to review the GAO Draft Report "Improved Federal Efforts Needed To Change Juvenile Detention Practices."

Attached are the comments from the two Interior agencies involved, the National Park Service and the Bureau of Indian Affairs.

Sincerely,

J. Robinson West
Assistant Secretary -
Policy, Budget and
Administration

Enclosure

APPENDIX IV

United States Department of the Interior

NATIONAL PARK SERVICE
WASHINGTON, D.C. 20240

IN REPLY REFER TO:
F4217(230)

DEC 2 1982

Memorandum

To: Director of Budget

From: Assistant Director, National Park Service

Subject: GAO Draft Report, "Improved Federal Efforts Needed to Change Juvenile Detention Practices"

We have reviewed the subject draft audit report from the General Accounting Office and have the following comments concerning the specific recommendations on page 44 of the report.

The National Park Service (NPS) will work with the Office of Juvenile Justice and Delinquency Prevention, Department of Justice (OJJDP), and the Coordinating Council at the national level to better coordinate the policies and practices of the OJJDP and the NPS.

The NPS will instruct its Parks and Regions to establish a record-keeping and monitoring program to assist in determining whether the objectives of the act are being achieved.

APPENDIX IV

BIA Central Office Response
to
U. S. General Accounting Office

Draft Report

IMPROVED FEDERAL EFFORT NEEDED TO CHANGE
JUVENILE DETENTION PRACTICES

Bureau of Indian Affairs - Pages 40 and 41

The statements concerning criminal justice data are misleading and require clarification. It is true that we do not collect data on detention and length of stay in custody of juveniles at the Central Office level. This information is not utilized at this level. Detention and length of stay data is available at the operating level (reservation) of our programs and is available if requested.

It is true that a number of operating programs do not report as required. Generally speaking, however, Bureau programs do meet the annual as well as the monthly reporting requirements. Primarily because the use of the ADP system is a new process, as is the operation of their own law enforcement programs, tribal programs do not always report as required. It must be understood that the contracting process and the operation of their own law enforcement programs is a new process that takes time and guidance from knowledgeable sources. Training for Bureau and Tribal programs in the use of the newly re-designed ADP system is scheduled for the first two weeks in December, 1982, and it is our hope this training will aid greatly in the programs' abilities to fulfill the reporting requirements.

With regard to the comments concerning reliability of data collected, we objected to statements of this nature in the OIG Memorandum Audit Report "Survey of Law Enforcement, Investigative, and Audit and Program Activities" earlier this year and we object to the statement in this report. Although the data is often under-reported due to some tribes' failure to submit incident reports for long periods of time, what is actually in the computer is absolutely correct. We, therefore, recommend that comments regarding the reliability of the data in the system be deleted. (See GAO note 7.)

Inspection of the Facilities used by the Federal Agencies to Detain Juveniles was Inadequate to ensure standards are met - Pages 42 and 43

We concur with the report that one method of ensuring compliance with existing regulations and policies is through a regular Inspection routine.

The Bureau has made an effort to increase the Inspection staff. However due to program and fiscal constraints, the staff has been maintained at two inspectors. They have the responsibility for program review mandated by 68 BIAM for Bureau operated programs and 25 CFR 11.304 for Tribally operated progams.

Furthermore, field program oversight is shared by the following program supervisors:

1. Area Special Officers are required to conduct periodic inspections of detention facilities.

2. Superintendents are responsible for detention facilities at their Agency (if present).

3. Agency Special Officers (BIA) are responsible for the day-to-day operations of detention facilities.

4. Tribes are responsible for detention operation and maintenance under P.L. 93-638 contract guidelines in 25 CFR 11.305.

5. Indian Public Health Service conducts Environmental Health Survey of Detention Facilities, BIA or Contract.

We concur with the comments by the Inspectors to the extent that they do not have the authority to direct change. All revisions to Bureau programs must come through the Bureau's line officers and for Tribally operated P.L. 93-638 contract programs, the changes must be made either in compliance to the existing contract or as a modification to the contract.

We have no knowledge of the Bureau reporting to a Senate Committee that all detention facilities are inspected twice a year. We assume you have reference to a June 30 letter to the Chairman, Senate Select Committee on Indian Affairs, in response to correspondence it received from the National Criminal Justice Association. In our response to that correspondence, no mention is made on the frequency of Inspections or that even Inspections of facilities are made by the Bureau. Therefore, we recommend that this statement be deleted.

(See GAO note 8.)

We concur with the observations that relate to problems encountered in some of the facilities inspected either by the Bureau's Inspectors or through the Inspections conducted by the Indian Health Service. Area/Agency plant managers make an effort to rectify these problem areas through the Bureau's Facilities Improvement and Repair program. They place priority on those areas that endanger the health and safety of persons in custody.

Policies do not require sight and sound separation - Page 43

We do not agree with the statement that our Manual "suggests" that juveniles be detained in a separate facility. 68 BIAM, Supplement 1, 4.8, specifically states the following, "Juveniles should not be detained in a facility where adults are detained. It is the policy of the Bureau to avoid placement of a juvenile in any adult detention facility except where there are no separate detention facilities available for juveniles and a real emergency exist. However, a juvenile may not be detained in an adult facility unless the juvenile is in a separate room or cell from adult detainees and adequate supervision is provided 24 hours per day."

As it relates to the detention of juveniles in Tribal facilities, the Tribes make a concerted effort to comply with the OJJDP requirement of sight and sound even though, an opinion from the Acting General Counsel, OJARS September 1, 1981, to the Acting Administrator of OJJDP clearly pointed out the fact that the provisions of Section 223(a)(12) and (13) of the Juvenile Justice Act are not applicable to Indian Tribal courts exercising jurisdiction over juvenile offenders.

We recommend removal of Paragraph "1 of this section, as it is incorrect and misleading. The Bureau's regulation is a prohibition and not a "suggestion" as per the report. (See GAO note 9.)
There is no doubt that there may be instances where juveniles may be kept in a section of a reservation detention facility where there is the possibility of sight and sound contact with adults. The Bureau and the Tribes who operate their own P.L. 93-638 contract programs are constrained from incarcerating adult and juveniles in the same cell.

It should be also noted that the majority of detention facilities that are owned by the Tribes were constructed by LEAA. They were constructed without the OJJDP requirement of sight and sound. These facilities are in use throughout Indian country today.

*Page references have been changed to correspond to the final report.

GAO NOTES

1. Our report has been clarified to show that OJJDP's policy is to encourage the adoption of national standards advocating "...the reduction in the use of detention and incarceration for all but the most serious or violent juvenile offenders...". (See p. 6.)

2. The juveniles referred to by the Department were charged with status offenses. These offenses were not considered to be serious or nonserious delinquent acts. (See p. 10.)

3. Our discussion of OJJDP's efforts to improve detention practices is presented in chapter 3 of this report. Additional discussions with agency officials conducted after receipt of the Department's comments surfaced two cooperative agreements which began in October 1982 to provide training and assistance in the adoption of standards. The only other efforts identified were in the planning stages and we were told they resulted from our draft report. (No changes were made in the report.)

4. Information concerning the juvenile detention statistics available at INS have been clarified in the final report. (See pp. 38 and 39.)

5. The policy stated in the Department's comments is the same policy we considered during our review. This policy permits the detention of juveniles in adult facilities because (1) the upper age limit for juveniles in some States is lower than the Federal age limit of 18 and (2) adult jails and lockups are recognized and licensed to detain juveniles in many States. (No changes were made in the report.)

6. The new Marshals Service policies concerning transportation of juveniles and adults and complete removal of juveniles from adult facilities have been added to the final report. A Marshals Service official told us that these policies have not yet been distributed to the field. (See pp. 43 to 45.)

DEPARTMENT OF THE INTERIOR

7. The statements in our report concerning data on detention and length of stay have been clarified where appropriate. BIA's comment that Bureau programs meet reporting requirements fails to mention that there are only a few "Bureau programs." The comments concur that tribal programs do not always report data but attributes this to the new process of tribes contracting for and operating their own law enforcement programs. The process of the tribes contracting with BIA to operate their own programs started January 4, 1975. (See pp. 40 and 41.)

   BIA objected to comments in our report taken from an Interior Office of Inspector General's audit report concerning reliability of data in BIA's law enforcement reporting system. We reviewed BIA's response to the report and find no basis for changing the statement.

8. The letter to the Senate Select Committee on Indian Affairs cited by BIA was the support for our statement. In it, the Bureau says "...and inspectors from the Bureau's Division of Law Enforcement Services inspect all facilities twice a year." (No changes were made in the report.)

9. BIA's policy requiring the use of separate juvenile facilities where possible and separate cells from adult detainees in other cases has been clarified in our final report. (See p. 43.) Regarding the OJARS legal memorandum concerning sight and sound separation, our report never implied that Indian tribes must meet the same separation requirement that States are required to follow when receiving formula grant funds. The issue we are raising is that BIA's juvenile detention policies should reflect the national policy objectives established by the Juvenile Justice and Delinquency Prevention Act, including separation of juveniles from adult prisoners and complete removal of juveniles from adult facilities.

Section 1. AS 12.05 is amended by adding a new section to read:

Sec. 12.05.020. JURISDICTION OVER CERTAIN MINORS CHARGED WITH SERIOUS FELONIES. (a) A person 16 or 17 who is charged with an offense designated as an unclassified [or Class A] felony must be arrested and presecuted as an adult.

(b) A person 16 or 17 years of age who is charged with a Class A felony is subject to AS 47.10.

(c) If the court has waived juvenile jurisdiction over a person under the age of 18 under AS 47.10.060, that person must be prosecuted as an adult.

(d) References in this section to the age of a person refers to the person's age at the time of the offense.

Sec 2. page 1, line 29:

delete "class A"

page 2, line 2:

delete "Class A"

tals of the two surveys indicate that on a given day in 1982 approximately 1,122,000 American adults were locked up. Probation and parole figures for 1981, the last year available, add another 1,445,800 to those under correctional supervision, for a total of more than two million.

The states with the greatest increases last year were California, up 5,257 inmates, or 18 percent; Texas, up 4,780, or 15.2 percent, and Florida, up 4,241, or 18 percent. Those states' populations are growing so rapidly that each could build a new 500-bed institution every month and barely keep pace.

Some smaller states showed even greater percentage increases: North Dakota, 28.2 percent; Alaska, 27.7 percent; Nevada, 25.4 percent; New Mexico, 23 percent, and Oklahoma, 21 percent. By region, the largest percentage increase was in the West, 17.7 percent. But the South continued to lead the nation in imprisonment; the 16 Southern states (by BJS's definition) and the District of Columbia account for 47 percent of the nation's prison population.

Only three states showed a decrease in the BJS figures, and for two of them the figures are misleading. Kentucky, which reported a 2.8 percent decline, ceased counting inmates backed up in county jails waiting for room to be available in state prisons. Had they been counted, a Kentucky official says, the state would have shown a ten percent increase. In West Virginia, the assistant to the commissioner of corrections sounded surprised at BJS figures showing a 4.3 percent decline; he said the state prison population grew 4.4 percent. A BJS official said the discrepancy could have come about because of differing definitions of a state prisoner, and that the figure will be double-checked.

The only state showing a true decline was Michigan, where the prison population decreased 2.8 percent. That was attributed to a Michigan law that reduces prison sentences whenever the population exceeds capacity. This act has been emulated by several other states, and prison officials, judges and parole boards have let out hundreds of other inmates early in order to keep things from getting out of hand.

Students of imprisonment trends cite a number of factors behind the increase: the post-war "baby boom," longer sentences, decreased paroles, mandatory sentences, increased police and court efficiency, unemployment, and above all, a seemingly insatiable public thirst for punishment of criminals.

"On the basis of the incarceration rate and the increasing length of stay, I'd have to say that as a society we have never been more punitive than now," says Allen Breed, director of the National Institute of Corrections. "I'm not necessarily condemning that, but it has a price tag that is astronomical."

The size of that price tag was calculated by M. Kay Harris, professor of criminal justice at Temple University. "There are 100,000 new prison beds on the drawing boards across the country," she says. "I was doing some figuring, and we're talking about spending $70 billion for them over the next 30 years, not counting inflation." California is planning to build 21,000 new prison beds by 1987 — more than all the inmates in 17 states put together — at a cost of $1.5 billion. The Texas Department of Corrections asked the legislature for $1.5 billion for the next two fiscal years, to enable it to meet the requirements of the federal court in the *Ruiz v. Estelle* lawsuit.

"We are a very foolishly punitive society," says Alvin Bronstein, director of the National Prison Project of the ACLU, which has won court orders against prison conditions in many states. "We don't have the resources to confine these people, and the cost is going up. There's got to be an explosion."

Minor explosions traced to overcrowding and idleness occurred last year at several prisons, such as New York's Ossining Correctional Facility and Illinois' Pontiac Correctional Center. Other states are being pressed to the limit. South Carolina has 1,500 prisoners living in spaces of less than 30 square feet per person, half the space called for by the standards of the American Correctional Association. Maryland is 44 percent over capacity; Massachusetts, 39 percent over capacity.

The skyrocketing cost and the potential for problems in the nation's prisons have led even those who favor a punitive approach to question whether we have gone too far. In a major address in March, U.S. Attorney General William French Smith said: "The meteoric rise in the nation's prison population has led to a serious overcrowding problem." Smith called for alternative sanctions for lesser offenders, saying: "We must recognize that we cannot continue to rely exclusively on incarceration and dismiss other forms of punishment."

Last year, Delaware's incarceration rate was five times what it was a decade ago; its prison population has increased by 40 percent in the last two years. "If we continue to grow at the rate we have for the last 20 months, in 20 years the entire population of the state will be incarcerated," says Correction Commissioner John Sullivan. "What's happening now is an aberration from everything that's ever happened to this state. I'm at a loss for an explanation. We've tried every mathematical model [to explain it] we could use. If anyone can figure it out, I'd like to know."

Trying to predict prison populations is a notoriously risky business. In 1981, consultants to the Maryland prison system forecast a "worst case scenario" of 9,900 inmates in 1987. By the end of 1982, Maryland had 11,012 inmates and a net gain beyond that of 150 per month. A North Dakota study several years ago predicted a need for 355 cells at the state prison by the end of the century; the state will need that many by the end of this year.

The magnitude and strength of the population boom has defied most attempts to explain it. "One thing you usually count on in making projections is that the pendulum will eventually swing — but it hasn't," says Zimring. "As a rule, you can't just take your rate of increase and mindlessly project it forever. But guess what?"

Carnegie-Mellon's Blumstein has for

Additional reporting for this article was done by Charles M. Young, a free-lance writer based in New York City.

Bureau of Justice Statistics Prison Census as of 12/31/82

Region and State	12/31/82	12/31/81	Percent change	Number of sentenced prisoners per 100,000 population 12/31/82[a]
Northeast	59,751	54,013	10.6	115
Maine	1,007	992	1.5	69
New Hampshire	445	398	11.8	47
Vermont[c]	599	534	12.2	84
Massachusetts	4,431	3,889	13.9	77[c]
Rhode Island[c]	1,037	962	7.8	82
Connecticut[c]	5,674	5,263	7.8	114
New York	27,910	25,599	9.0	158
New Jersey[d]	8,126	7,011	15.9	107
Pennsylvania	10,522	9,365	12.4	88
North Central	77,553	72,348	7.2	130
Ohio	17,317	14,968	15.7	160
Indiana	8,827	8,022	10.0	152
Illinois	13,875	13,206	5.1	119
Michigan	14,737	15,157	−2.8	162
Wisconsin[c]	4,662	4,416	5.6	96
Minnesota	2,081	2,024	2.8	50
Iowa	2,829	2,670	6.0	93
Missouri	7,283	6,489	12.2	147
North Dakota	359	280	28.2	47
South Dakota	791	693	14.1	109
Nebraska	1,680	1,653	1.6	99
Kansas	3,112	2,770	12.3	129
South	180,388	159,712	12.9	224
Delaware[c]	2,064	1,712	20.6	250
Maryland	11,012	9,335	18.0	244
District of Columbia[c]	4,152	3,479	19.3	531
Virginia	10,079	9,388	7.4	177
West Virginia	1,498	1,565	−4.3	77
North Carolina[c]	16,578	15,791	5.0	255
South Carolina	9,161	8,538	7.3	270
Georgia[c]	14,320	12,444	15.1	247
Florida	27,830	23,589	18.0	261
Kentucky	4,051[c]	4,167	−2.8	110
Tennessee	8,046	7,897	1.9	173
Alabama	8,687	7,657	13.5	215
Mississippi	5,484	4,624	18.6	210
Arkansas	3,819	3,328	14.8	166
Louisiana	10,935	9,415	16.1	251
Oklahoma	6,390	5,281	21.0	201
Texas	36,282	31,502	15.2	237
West	64,938	55,182	17.7	139
Montana	917	831	10.3	114
Idaho	1,036	957	8.3	107
Wyoming	677	587	15.3	135
Colorado	3,286	2,772	18.5	108
New Mexico[c]	1,842	1,497	23.0	126
Arizona	5,994	5,223	14.8	209
Utah	1,216	1,140	6.7	77
Nevada	2,653	2,116	25.4	301
Washington	6,264	5,336	17.4	148
Oregon	3,867	3,295	17.4	146
California	34,459	29,202	18.0	135
Alaska[c]	1,301	1,019	27.7	194
Hawaii[c]	1,426	1,207	18.1	88
Total State Institutions	382,630	341,255	12.1	160
Total Federal Institutions[b]	29,673	28,133	5.5	10
Total United States	412,303	369,388	11.6	170

[a] Calculations include only those serving sentences longer than one year.
[b] Figures include the following number of persons held under jurisdiction of the Immigration and Naturalization Service rather than the Bureau of Prisons: 1,921 on 12/31/81 and 1,203 on 12/31/82.
[c] Figures include both jail and prison inmates; jails and prisons are combined into one system.
[d] Official prison population counts exclude state prisoners held in local jails.
[e] Population counts for New Mexico, North Carolina and Wisconsin are estimated for 12/31/82.

several years championed the role of demographics. He uses the metaphor of "a pig in a python" to show how the postwar baby boom is moving through society: creating crises in the schools in the 1960s, raising the crime rates in the 1970s, and now (since the prime age for imprisonment is ten years older than the prime age for committing crimes) jamming the prisons. But, he concedes, the prison population boom is much stronger and has persisted much longer than the age factor can account for. He believes the formula for explaining the phenomenon is "demographics plus toughness."

Most experts agree with Blumstein that the key reason behind population increases is the hardening of public attitudes. That is something they were loathe to concede a few years ago, when demographics or sentencing-law changes took the blame. Carlson speaks of the popularity of "the Ronald Reagan level of solutions — rewarding and punishing individuals." Kay Harris says that the incarceration rates "reflect a growing punitiveness and repressiveness. There's a sense of futility and despair in American society. We have lost our characteristic optimism. It's kind of giving up."

Norval Morris speaks with wonder of the public's "astonishing belief that leniency [previously] characterized our sentencing practices." A contributing factor, Morris says, was the improvement in catching and prosecuting criminals that occurred in the 1970s, spurred partially by innovations funded by the Law Enforcement Assistance Administration. "The earlier protections of inefficiency have been removed," he says.

One anomaly is that prison commitment rates have shot through the ceiling just as rates of serious crime have been declining. "The Uniform Crime Index went down in 1982, and yet throughout the country you see a trend toward harsher sentences," says Bronstein. In many cities, serious crimes declined significantly last year. In New York City, murders went down by 8.6 percent, robberies 10.7 percent and burglaries 16.1 percent. In Miami, those crimes declined by ten percent, 17 percent

and 12 percent, respectively. "What scares me is that somebody will take these two graphs and argue that crime has gone down because of the deterrence factor," says Harris. Most experts agree with her that the crime rate has little impact on the imprisonment rate, and the imprisonment rate has virtually no impact on the crime rate.

The increasing "punitiveness" of American society is indicated most clearly by the incarceration rate. The highest recorded figure of previous decades was 137 per 100,000 in 1939. That figure was surpassed in 1980 to reach its current level of 170. There is wide variation among the states, from North Dakota's 47 to Nevada's 301. The rate for the District of Columbia, 531, is the highest known rate for any jurisdiction in the world. But Carol Kalish of the Bureau of Justice Statistics says the figure is deceptive, because it covers only an urban area. She says that statistics for other metropolitan areas, such as Baltimore and Chicago, are similarly high.

Nevada's high incarceration rate seems to stem from the fact that it sends 47 percent of its convicted felons to prison, the highest such rate in the nation. "Anyone who breaks the law here just has to be prepared to do time," says Vernon Housewright, commissioner of corrections.

Lonnie Fouty of the Florida Department of Corrections says that the South's high incarceration rate (224 for the region) may reflect efficient police and court systems as much as a harsh public attitude. "In Florida, we put 18 percent of our convicted felons in prison; it's 27 percent nationally," he says. "We just have an efficient conviction rate." He traces this fact partially to Reconstruction, during which most Southern court systems were streamlined. He contrasts Florida with Ohio, a state with a slightly larger population. It sends approximately the same percentage of convicted felons to prison, but only produced half as many convictions last year. Ohio has an incarceration rate of 160; Florida had a rate of 261.

John Keenan, a researcher with the Georgia Department of Offender Rehabilitation, has done a study of the variance in incarceration rates among states. He came up with three factors that explain most of the variation: the rate of admissions to prison, the rate at which violent crimes are cleared by arrest and indictment, and the percentage of blacks in the population. "The South clears violent crimes much more efficiently than any other region," he says. The South, of course, also has the greatest percentage of blacks in its population.

Prison populations depend on two factors: the number of people coming in and number of people going out. While 1981 increases were brought about largely by increased admissions, last year's were often the product of tougher parole policies and longer sentences. "Perhaps what we have here is the two-punch of a one-two combination," says Zimring.

In Florida, Massachusetts and New Jersey, last year's large increases were fueled by efforts to reduce backlogs in the courts, through speedy trial rules and transferring judges from rural districts to urban ones. In Florida, for example, felony convictions jumped from 56,537 to 70,950. Increased admissions also seem to be behind the increases in California (where prison admissions are up 138 percent in the past five years) and Illinois.

Several states reported increases in admissions of minor offenders serving short terms — often due to tough new laws against drunk drivers. In Alaska, the prison system (which includes both prisons and jails) was flooded with people serving mandatory three-day terms for drunken driving. In North Carolina, misdemeanor commitments were up 19 percent, while felony commitments rose only two percent. Officials there also attributed the increase to a crackdown on drunk drivers, even though there is no new drunk-driving law.

The number of state prisoners backed up in local jails waiting for space in state prisons increased from 6,900 in 1981 to 8,217 in the BJS survey. That number would be larger, but Kentucky last year ceased to count these inmates. Georgia and New Jersey have not provided these figures to BJS for the last two years.

The number of people leaving a prison system is affected by a number of factors: parole policies, sentence lengths, and good-time rules.

Paroles have been declining in several states: In Nevada, the rate of paroles has been cut in half, and it has also gone down in Massachusetts and Ohio. Some states have tried to use parole boards to reduce overcrowding. The Washington legislature passed a law last year directing the parole board to take prison capacity into account in determining parole dates.

Long sentences are becoming the rule, rather than the exception, in many states. The average sentence of new inmates in South Carolina is now 12 years. Alabama gives a mandatory life-without-parole sentence to anyone convicted of a violent felony with two previous felony convictions; there are about 130 inmates doing such terms. Florida has some 950 prisoners doing 25-year sentences; they cannot earn good time. "By the time the first one gets out, in 1997, there will be 3,600 in the system," says Fouty. These sentences, says John Conrad, a senior fellow at the National Institute of Justice, "mean we have a different type of prison community. We never had anything like it before."

Average time served has gone up in many states. In Maryland, Illinois, and Oklahoma, where it has risen from 20 months to 30 months in the past five years. Several states, such as Texas, have eliminated good time for many offenses, which will raise the amount of time served there by a third or more.

State officials have come up with a number of ways of trying to manipulate these factors to bring down prison populations. In California, a new law provides for "incentive good time" under which inmates who work or go to school full-time can cut their determinate sentences in half; the most good time that they could earn previously could reduce sentences by a third. Illinois officials discovered a little-known law authorizing prison officials to grant releases for "meritorious good time" or "administrative reasons." The fact that there is no room in the prisons is considered a significant "administrative reason,"

and as many as 100 nonviolent offenders have been let out each week under the state's "forced release" program. "We've been catching a lot of flak for it," concedes a spokesman for the Department of Corrections. "We're not nuts about forced release, it's just a means to keep it together."

Other states have made these early releases part of a more formal policy, which begins with the legislature establishing a population "cap." Many observers think such a cap is the starting point for keeping prison populations in check. "The only effective remedy for overcrowding is a defined capacity," declares William Bennett Turner, the attorney who guided the massive *Ruiz* case against the state of Texas. Perry Johnson, director of the Michigan Department of Corrections, says: "When you get on a plane, you accept the fact that there is a limit on the number of people it can hold. Why don't people accept that with respect to prisons?"

Under Michigan's Prison Overcrowding Emergency Powers Act of 1981, whenever the prison population exceeds the system's defined capacity for more than 30 consecutive days, the governor must declare an emergency. Then every inmate in the system with a minimum sentence — 80 percent of all inmates — gets 90 days off that minimum. It remains up to the parole board to release them or not, but if it does not reduce the prison system to under 95 percent of capacity, then another 90 days is lopped off sentences.

The emergency act was triggered once in 1981, three times in 1982, and again in March 1983. Inmates who have been in the system since 1981 have thus had one year and three months knocked off their minimum sentences.

"We had one guy come in with six months left on his sentence," says William Kime, deputy director of the Department of Corrections. "He had some jail-time credit, plus good time, and then the Emergency Powers Act was triggered. It turned out he was eligible for parole three days before he committed the crime."

Because the parole board will not release dangerous offenders no matter how much time has been taken off their minimum sentences, each time the act is triggered there are fewer and fewer minor offenders to parole. "It's become increasingly less effective," says Johnson. "If we can just wait a year between emergencies, then it works fine," says Kime.

In Iowa, which passed a capping law similar to Michigan's (but with 45 days as the period during which capacity must be exceeded), a cynical game has developed in which officials try to dip below the capacity just often enough to avoid triggering the act, which they fear would bring public outcry. "One time every 45 days we drop under 2,780, our capacity," says Paul Grossheim, deputy director of the Iowa Bureau of Correctional Institutions.

In late January, newspaper headlines counted down the days before the 45-day limit was reached. With five days left, the parole board had approved the release of a record number of inmates, and a newspaper described officials working

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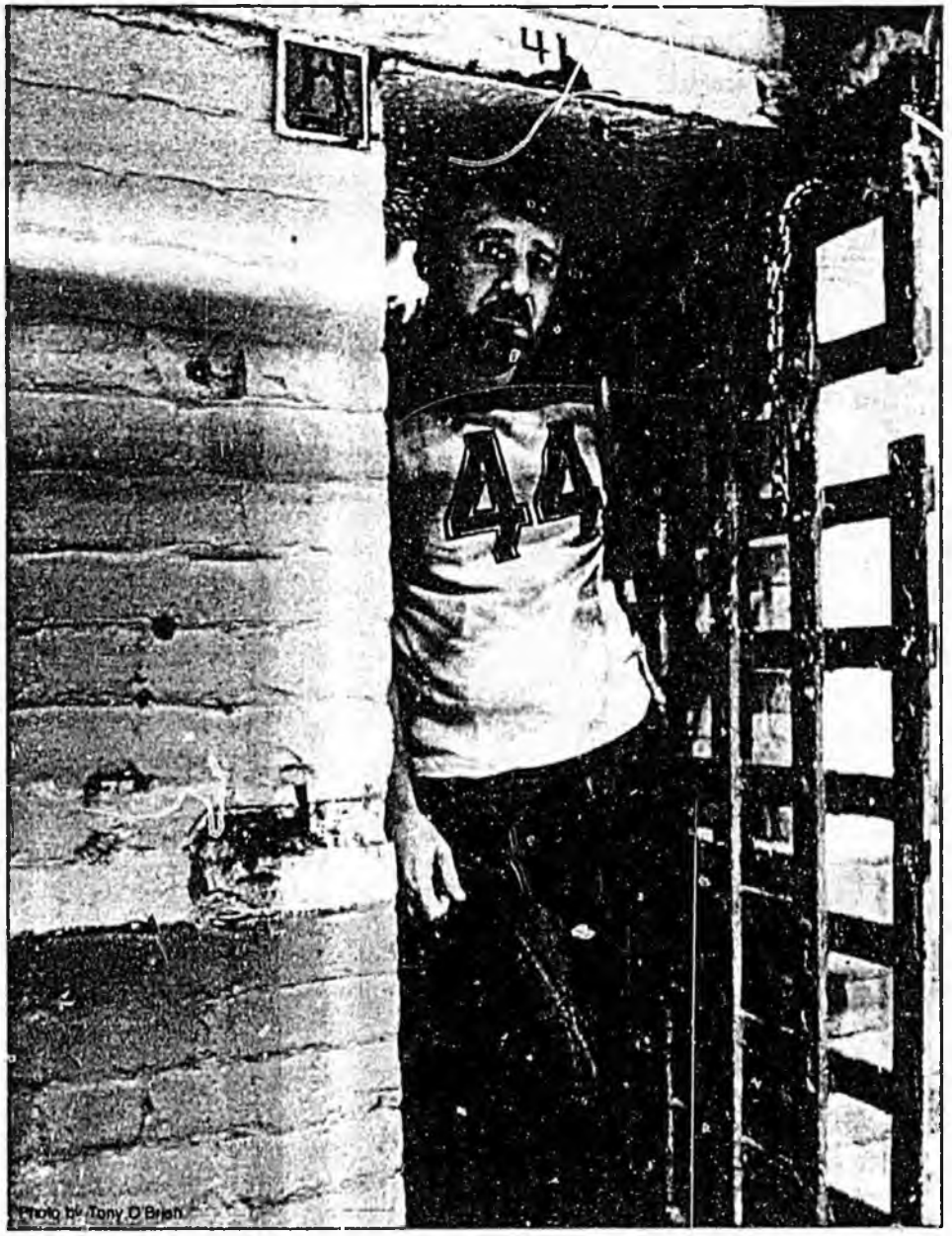

Photo by Tony O'Brien

Cell Block 1 at the Central Correctional Institution (CCI) Columbia, S.C. The inmate population in South Carolina has tripled in the last decade; at the Civil War-era CCI, long slated for demolition, more than 1,200 prisoners are housed.

 (continued from page 11)

"feverishly" to get them out of prison more quickly than the normal five-to-ten day period for releasing parolees. Officials were also counting on inmates on furlough or in hospitals to not return, and hoping that snowy roads would keep newly sentenced inmates in county jails and out of the population count. Three days before the deadline, parole board members consulted with each other by telephone to release another 22 prisoners, dropping the count to five below the maximum; officials kept checking until midnight of the last day to see if new admissions would keep them under that figure. They squeaked by, but Grossheim says that next time "it may be insurmountable. The parole board says they might not be able to do it again. They may have paroled all the best people."

Reformers are more enamored of systems that try to prevent so many people from coming into the prison system in the first place. Their favorite is the sentencing guideline commission set up in Minnesota. But in its third year, the Minnesota system did not prevent the state prison population from increasing 2.8 percent, and it is now very close to the maximum capacity. Kay Knapp, executive director of the guidelines board, says the increase was due to a new mandatory minimum sentencing law and the fact that prosecutors are figuring out ways to build up points on the sentencing grid to place marginal offenders in prison rather than in county jails or community programs. To deal with the problem, she says, the commission might decrease the weight given to past convictions.

Oregon uses parole guidelines on a grid system similar to Minnesota's; they are supposed to take prison capacity into account, but they did not prevent that state from a 17 percent increase last year. Washington adopted guidelines this year, but no one can agree on what their effect will be. A spokesman for the commission that drew them up estimated that they would reduce the prison population by 1,000 within a year, and eventually cut the incarceration rate 40 percent. But Commissioner Amos Reed found these estimates excessively optimistic, and in January Gov. John Spellman said he was "very skeptical of such predictions."

The West's 17.7 percent increase last year led the nation, compared with 12.9 percent for the South, 10.6 percent for the Northeast, and 7.2 percent for the North Central states. Observers attribute the West's surge to several factors: population increases, particularly of transient young men; increased ethnic conflict, and a sharp turn from a liberal to a conservative political outlook in states like California, Washington and Oregon.

California provided the bulk of the numbers. Officials in the California Department of Corrections (CDC) once considered it the crown jewel of America's corrections systems. In 1974, when it had 22,000 inmates, then-director Raymond Procunier

boasted: "If you came in here tomorrow and gave me another $20 million, I'm not sure I'd know what to do with it."

Now, with 35,000 inmates, a system at 134 percent of capacity, and tent cities about to be erected at San Quentin and Chino, the system is reeling. Even if that state's 1977 determinate sentencing law is not responsible for the increase (page 34), it has surely provided a mechanism for sending more people to prison and keeping them there longer. The state projects a total of 57,000 inmates by 1987, although increased good-time may reduce that somewhat. In addition to the sentencing law, CDC researcher Norman Holt points to the passage of Proposition 13, which cut property taxes and hence revenues for local government. Many cities and counties took an ax to community programs and probation. "The demise of local alternatives makes it advantageous for counties to send people to state facilities," Holt says.

Two years of extraordinary prison population growth in Nevada have left that state with the highest incarceration rate in the nation and a host of prison problems. Parole rates have dived from 60 percent of eligible inmates to 30 percent. For all this, Nevada prisons are not yet severely overcrowded, because a new prison opened near Las Vegas last year. It is almost full, however, and Commissioner Housewright says it will soon be over capacity. "Where it all ends, I don't know," he says.

The northwestern states of Washington and Oregon had identical rates of increase, 17.7 percent, and both have serious problems finding room for their prisoners. Inmates are sleeping two to a cell and in the hallways at the prison in Shelton, Wash.; the former federal penitentiary at McNeil Island, acquired in 1981 as a temporary facility, is now at 136 percent of capacity, and state officials are negotiating to purchase it for permanent use. The governor has proposed spending $116 million to add 2,400 beds to the system, which he thinks will be needed despite the sentencing guidelines.

The one western state that is bucking the trend is Utah, which had an increase of only 6.7 percent and has one of the lowest incarceration rates in the country. Utah is using every method at its disposal to keep the prison population within bounds: There is an emergency release program, time served has been reduced from a median of 31 to 24.5 months, offenders are being diverted from prison to do community service and highway work, and private residential programs are receiving inmates. Nevertheless, director of corrections William Millikan says: "We may be in good shape compared to others, but our incarceration rate is still too high."

Two states experiencing rapid development in energy-related fields, North Dakota and Alaska, have suffered from high rates of prison expansion. Both attribute it largely to the influx of young men in search of work.

North Dakota had almost no transients in 1970, and young people were leaving the state to find work, according to Bill Broer, deputy warden of the penitentiary. Now 13 percent of the state's population is classified as transient; 29 percent of the prison population comes from out of state. The prison population has risen from 186 in 1979 to 359 last year. Still, Broer says, "we are one of the lucky 11 states not under court order." The prison is nearing capacity, however.

In Alaska, "we're putting them in every nook and cranny," says commissioner Roger Endell. In addition to the influx of rootless young people, he says Alaska suffers from high unemployment in the winter, the highest per-capita income in the U.S. ("There is a tremendous disparity between those with jobs, who are making lots of money, and the unemployed"), and one of the highest rates of alcohol consumption. This is "everything you need for a high crime rate," says Endell.

The South accounted for almost half of the additional prisoners in the U.S. in 1982.

Despite the stringent *Ruiz* court order that brought prison problems to the forefront of political concern, Texas showed an increase of 4,780 inmates. The lieutenant governor called the prison system "an absolutely bottomless pit" and the legislature's budget body cut the Texas Department of Corrections' $1.5 billion request almost in half, even though TDC director W.J. Estelle warned legislators that they were embarking on a collision course with U.S. District Judge William Wayne Justice.

The TDC's building program should soon begin to ease crowding a bit; by early next year 3,600 additional beds should be available in new prisons and additions to existing facilities. This is, however, barely enough space for the prisoners currently housed in tents at 15 of 25 prisons.

Few states have suffered as much from the influx of prisoners in the past decade as South Carolina. Its inmate count has almost tripled in that time, and it is operating at 136 percent of capacity. Some 58 percent of the population is housed in less than 40 square feet per person; 1,250 of them are at the ancient Central Correctional Institution in Columbia. Meanwhile, two new facilities — a 144-bed pre-release center and a 62-bed work-release center — are standing idle because the state has not appropriated enough money to staff them. Corrections officials have scoured the South for quonset huts for temporary housing, but none seem to be available; presumably they are being used to house prisoners in other states. "We don't know what the hell we're gonna do," says deputy corrections director Sam McCuen.

Maryland's population increase, 42 percent in two years, paralleled the fall from power of Gordon Kamka, who championed alternatives to imprisonment as commissioner until he became a political liability and was replaced in 1982. Officials say that admissions are up 8.3 percent and paroles are down 35.6 percent. While the legislature has agreed to build a new prison, locating it has become a major political issue. A new prison at Hagerstown, with 720 cells, is scheduled to open in early 1986; officials concede already that they will have to double-cell it.

The Midwest showed the smallest increase, probably because devices such as Michigan's emergency release program and Minnesota's sentencing guidelines have been picked up by a number of

states. Illinois' capacity limit was set by the Department of Corrections, not the legislature, and officials hope their "forced release" program will not backfire. "We got away from triple-celling six years ago and won't go back," says spokesman Nik Howell. "We're not going to shoehorn them in. Overcrowding and idleness were a contributing factor to the riot at Pontiac. We learned our lesson. We're not going to . . . tents or quonset huts either; those half-measures cost more in the long run."

In Ohio, "bed-making is one of our biggest industries," says a spokesman for the corrections department. The state, which had 15,000 inmates in early 1982, expects to have 21,500 by the end of next year. One reason is a law that took effect last July doubling minimum sentences for second offenders. Paroles have dropped. The state has embarked on a $638 million construction program.

Several large northeastern states had significant population increases. New Jersey's population rose by 16 percent in 1982, after rising 30 percent the year before. County jail backup declined from 1,500 to 1,330. To find room for the prisoners, officials are putting beds in chapels, recreation rooms and gymnasiums.

Pennsylvania had no capital budget for its corrections system for eight years in the 1970s; now more than $400 million has been set aside for construction and expansion. Almost 3,000 cells have been doubled up.

"I could recite these figures in my sleep," says Joseph Landolfi, public information officer for the Massachusetts Department of Corrections, as he ticks off a dirge of overcrowding: Court commitments doubled from 1978 to 1982; paroles fell from 59 percent to 50 percent between 1980 and 1982; Concord Correctional Facility, with a capacity of 272 inmates, houses 640; the state system is 39 percent over capacity. Landolfi attributes last year's 14 percent increase to several factors: reduction of a court backlog; an increase in the youthful population, and longer sentences.

The U.S. Bureau of Prisons saw its population growth slow a bit — 5.5 percent compared with 15.5 percent last year. Bureau figures, however, include those people held in federal prisons as immigration cases, and the release of 500 Cuban and 500 Haitian detainees helped keep the increase down. Admissions, however, increased from 19,595 to 22,278 in one year, and the Bureau is no longer talking about abandoning the outmoded penitentiary at Atlanta; instead, it will be refurbished. A 400-bed medium-security institution is under construction near Phoenix; money has been appropriated for 780 beds in expansion facilities, and the President's budget for 1984 included $97 million for new facilities, of which Congress approved $60 million in a bill passed this year.

Canada seems a stark contrast to the picture in the U.S. Over the last four years, the population in the Canadian federal system — which includes all those sentenced to more than two years — has gone from only 9,500 to 11,000. But there is some double-bunking taking place. "In the past, we had been proud of the fact that we only had one inmate in a cell," says Dennis Finlay, director of public information.

To figure out what to do in the coming years, many states — 30 by one count — have set up commissions to study the problem. North Carolina's privately funded Citizens Commission on Alternatives to Incarceration, a 20-member group of judges, legislators, attorneys, business leaders and ex-prisoners, issued a report last year with 26 suggestions for keeping the prison population in check. But "one wonders whether prison commissions are just a way of buying time," says Norval Morris. To try to overcome this problem, the Prison Overcrowding Project, sponsored by the Edna McConnell Clark Foundation, has set up commissions in four states (Michigan, Colorado, South Carolina and Oregon) that include key legislators, who will have responsibility for implementing recommendations.

In his year-end "Report on the Judiciary," Chief Justice Warren Burger proposed that Congress create a National Commission on Corrections Practices. It would presumably formulate a national corrections policy, something that many reformers say is sorely needed amid the welter of claims about deterrence, incapacitation, retribution and rehabilitation.

Meanwhile, some reformers are losing their enthusiasm for one of the prime strategies of the past decade, promoting alternatives to incarceration. "One of the lessons of the 1970s is that alternatives do not reduce imprisonment," says Barry Krisberg. In practice, he says, many programs intended to divert people from prison have ended up being used to crack down on probationers instead, thus "widening the net of social control." Kay Harris says it is time to rethink our most fundamental approaches toward reducing crime. "Trying to tinker with the punishment apparatus is not very effective," she says. "A greater proportion of citizens have been brought under social control."

One thing most experts agree on is that unless some dramatic and unexpected event occurs, there will be no improvement in the next few years. "Increased prison terms are like a time bomb set to go off a few years later," says Krisberg. "We won't see the full effect for some three or four years, and we'll see increases well into the end of the decade." John Conrad agrees: "We can expect increases for a long time to come."

Lonnie Fouty, who has a good track record for predicting Florida's prison population, says that growth will slow by the end of the decade because of demographics, but will pick up again early in the next century as the children of the Baby Boom come of age. "We have to plan for the next wave now," he says. "We're trying to tell the legislature to build single cells now so we can double-cell later. There's nothing we can do about it short of nuclear holocaust."

At a colloquium on the prison overcrowding crisis held in March at the New York University School of Law, Norval Morris summed up the proceedings with a more optimistic view of the future. "It is highly likely that this, too, will pass," he said. "I don't know what level of incarceration we will achieve, and at the present it is terrifying, but it will indeed pass." □

Senator Vic Fischer's presence was noted.

CONSIDERATION OF THE CALENDAR

SENATE BILLS IN SECOND READING

Rubini

SB 154

SENATE BILL NO. 154 (repealing the municipal exemption option to the Public Employees Relations Act) which had been held from June 7 was before the Senate in second reading.

Senator Faiks moved and asked unanimous consent for the adoption of the Rules Committee Substitute offered on page 1180. Senator Eliason objected, then withdrew his objection. There being no further objection, CS FOR SENATE BILL NO. 154 (RLS) (relating to the municipal exemption option to the Public Employees Relations Act) was adopted.

CS FOR SENATE BILL NO. 154 (RLS) was read the second time.

Senator Mulcahy offered the following Amendment No. 1:

Page 1, line 18: after "option" insert "(1)"

Page 1, line 23: after "resolution" insert "; or (2) conduct a local election to determine whether to adopt such local ordinances. If the election indicates that local ordinances shall be adopted the borough or political subdivision shall adopt local ordinances within 180 days after the results of the local election are certified"

Senator Mulcahy moved that Amendment No. 1 be adopted. Senator Fahrenkamp objected.

The question being: "Shall Amendment No. 1 be adopted?" The roll was taken with the following result:

SB 154 cont'd

CS SB 154 (RLS) AM 1

Yeas:	10	Eliason, Faiks, Fischer Paul, Gilman, Halford, Kerttula, Mulcahy, Pettyjohn, Ray, Ziegler
Nays:	8	Bennett, Fahrenkamp, Fischer Vic, Josephson, Kelly, Moss, Rodey, Sturgulewski
Absent:	2	Ferguson, Sackett

and so, Amendment No. 1 was adopted.

Senator Ray moved and asked unanimous consent that CS FOR SENATE BILL NO. 154 (RLS) am be considered engrossed, advanced to third reading and placed on final passage. Without objection, it was so ordered.

CS FOR SENATE BILL NO. 154 (RLS) am was read the third time.

Senator Sackett's presence was noted.

Senator Ray moved and asked unanimous consent that the calendar be held until tomorrow. Senator Kelly objected, then withdrew his objection. There being no further objection, it was so ordered.

SB 154

CS FOR SENATE BILL NO. 154 (RLS) am (municipal exemption option to the Public Employment Relations Act) will appear on the June 10 calendar in third reading.

Stark / Horecki

SB 224

CS FOR SENATE BILL NO. 224 (FIN) (establishment of prison facilities) will appear on the June 10 calendar in third reading.

colvin

HB 202

SENATE CS FOR HOUSE BILL NO. 202 (JUD) (increasing the liquor tax) will appear on the June 10 calendar in second reading.

Citations will appear on the June 10 calendar.

SENATE ANNOUNCEMENTS 6/9/83

Meetings are in Capitol Building & times listed unless noted

FINANCE - SENATE FINANCE ROOM - 8:30 a.m.
June 9 **CANCELLED**
June 10 SB 85 Certificate of need SB 87 Harbor Facilities SB 106, SB 167 Prisons HB 319 Municipal Bond Bank

HEALTH, EDUCATION & SOCIAL SERVICES - ROOM 504 - 3:00 p.m.
June 9 *1:30 p.m.* SB 303 Social work
June 10 HB 352 Definition death HB 357 Religious schools HB 403 Insurance trade practices

JUDICIARY - BUTROVICH ROOM - 1:30 p.m.
June 10 SB 228 Indian tribes HB 270 Child pornography HJR 2 Session length

LABOR & COMMERCE - BELTZ ROOM - 1:30 p.m.
June 9 **CANCELLED**

STATE AFFAIRS - BUTROVICH ROOM - 3:00 p.m.
June 9 HB 209 Personnel classification HB 323 Residency HB 413 Historic Properties Commission
June 14 HB 258 Special Investment Tax Credit

RESOURCES - BELTZ ROOM - 3:00 p.m.
June 10 SB 43, SB 102, HB 130 Homesteads HCR 27 Trapping HCR 31 Kenai River HCR 37 Economic development

Sec. 7. AS 12.80 is amended by adding a new section to read:

Sec. 12.80.060. CONFINEMENT OF CERTAIN MINORS. If a person under the age of 18 who is subject to the jurisdiction of the court under AS 12.05.020 is confined to custody while awaiting trial or sentencing or is sentenced to a period of incarceration upon conviction, the court shall

(1) order that the defendant be confined to an institution designated by the Department of Health and Social Services for offenders under 18 years of age; and

(2) order that the defendant be transferred to an adult correctional facility when the defendant reaches 18 years of age if more than one year remains of the defendant's term of imprisonment and there is no substantial likelihood that the defendant is amenable to treatment.

Page 6, line 12 amend to read:

decision. [A finding that there is no substantial likelihood of successful rehabilitation of the person under children's court proceedings may be based on any one or a combination of the factors.] If the...

Sec. 12.80.060. CONFINEMENT OF CERTAIN MINORS. (a) A person 16 or 17 years of age who is charged with an unclassified felony, and who is held in custody, shall be confined in a facility for juvenile offenders until indicted for, held to answer following a preliminary hearing on, or charged by complaint or information following a waiver of indictment or preliminary hearing for an unclassified felony offense. Following indictment, preliminary hearing, or waiver the person, if held in custody, shall be confined in a facility for adult offenders.

(b) Except as provided in (a) of this section, a person under the age of 18 who has been arrested and is being held in custody for an offense which would be a criminal offense if committed by an adult shall be confined to a facility for juvenile offenders unless children's court jurisdiction over the person has been waived under AS 47.10.060, and the person has been indicted for, held to answer following a preliminary hearing on, or charged by complaint or information following a waiver of indictment or preliminary hearing for a felony offense.

(c) If a person under the age of 18 who is subject to the jurisdiction of the court under AS 12.05.020 is confined to custody while awaiting sentencing, or is sentenced to a period of incarceration upon conviction, the person must be committed to the custody of the Department of Health and Social Services for confinement in a correctional facility for juvenile offenders, unless the person is 17 or 18 years of age and has committed an unclassified felony, in which case the person may be confined in a correctional facility for adult offenders.