

ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 86/2

2386 SHESS HB 109

232

FISCAL NOTE CONTINUATION

HOUSE BILL NO. 109 No. 2

Page 4 of 5

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.

$$6 \times 1.75 = 10.5 \text{ beds}$$

6. Total beds required is 57 (rounded).

FISCAL NOTE CONTINUATION

HOUSE BILL NO. 109 No. 5

Page 5 of 5

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 date 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	<u>30,000</u>
TOTAL	\$1,591,000

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

POSITION PAPER

HOUSE BILL NO. 109

PAGE 1

"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 juvenile 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: *Roger C. Lange*  
*for* Roger Endell, Director  
Division of Adult  
Corrections

DATE: *February 14, 1983*

APPROVED BY: *Robert London Smith*  
*for* Robert London Smith, Ph.D.  
Commissioner

DATE: *2/18/83*

*ACK - send to Gabrielle*

March 17, 1983

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

Dear Senator *Bill* Ray:

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 -

<sup>1</sup>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

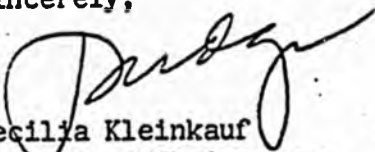
Sobie, Merrie, The Juvenile Offender Act: A Study of the Acts' Effectiveness & Impact on the New York Juvenile Justice System, New York Foundation for Child Development, 1981

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 preferable 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.

TO: Senator Bill Ray  
Page #2

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 ROJEY TAKEN  
SB 127



Superior Court  
State of Alaska  
THIRD JUDICIAL DISTRICT

Chambers of  
VICTOR D. CARLSON, Judge

303 K Street  
Anchorage, Alaska 99501

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,

The Honorable Bill Ray  
Juneau, Alaska 99811

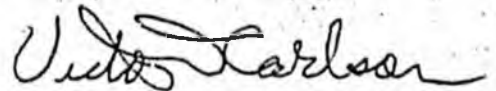
March 14, 1983  
-2-

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 Roíey  
Karla Forsythe  
William Hitchcock, Esq.

FILE WITH SB 127

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,

*Vic*

Victor D. Carlson

VDC:gp

cc: Senator Kodey  
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 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 if he probably cannot be rehabilitated by treatment under this chapter before he reaches 20 years of age. . . .

John C. Gabrielli, Esq.  
Juneau, Alaska 99811

April 11, 1983  
- 2 -

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

WELFARE AND INSTITUTIONS CODE

WELF

§ 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 4011.0 of the Penal Code.

(Amended by Stats.1970, c. 446, 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 86.

§ 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 it under the juvenile court tions set forth above, while in which a hearing has b poned the taking of a plea and no plea which may a hearing.

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

- (1) Murder;
- (2) Arson of an inhabitu
- (3) Robbery while attac
- (4) Rape with force or v
- (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 pu
- (11) Kidnapping with l
- (12) Assault with inter
- (13) Assault with a fir
- (14) Assault by any m
- (15) Discharge of a fir
- (16) Any offense descri

(c) With regard to a n son of the violation, wl fenses listed in subdivi tachment of jeopardy t submit a report on the considered for a deter tion of the report, and minor may wish to su and proper subject to the juvenile court con unting or mitigating c treatment, and traini court based upon an ev

- . . . (1) The c
- . . .
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- . . . (3) The ni
- . . . (4) Succes the minor.

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

N ACT

- 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, federal, 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  
 laho Code.

olators of beer, wine or other  
 lded by 1976, ch. 233, § 2, p.  
 a. 222, § 6, p. 412; am. 1982,

look place" for "found or living  
 county."  
 mendment by ch. 222 added  
 n (4).  
 cketed "a" in clause 2 was inserted  
 piler.  
 5 of S.I. 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

... a full and complete hearing to be conducted by the court officer designated by

... upon the motion to waive jurisdiction to the child, child, and the prosecuting attorney shall inform the child and the child of their right to court Service of the notice shall a summons under section

... jurisdiction shall be held in the original petition and shall

... to waive jurisdiction the court may be waived, the petition for youth rehabilitation act jurisdiction, as a result of the court should be waived and the court of the state of Idaho, the court of law upon which it bases its youth rehabilitation act jurisdiction for prosecution

... act jurisdiction shall be waived in the same case once the court has found that the child has come within the purview of the youth rehabilitation act

... juvenile court jurisdiction over the following factors: the protection of the public that afforded by juvenile

... in an aggressive, violent, or property, greater

... considerations of his home, living; contacts with the juvenile court use of facilities available

(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)

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§ 47.10.020 WELFARE, SOCIAL SERVICES AND INSTITUTIONS § 47.10.020

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 817; 146 ALR 1711.

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)

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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

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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 26, 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 (HCSB 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,

Supp. Ct. Op. P.2d 1004 (1977). Jurisdiction over offender a jurisdiction delinquency the age of delinquent. Op. No. 159 (1978).

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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 "aid" for "dependent minor" near the amendment substituted "child in need of" 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 1977 amendment, in subsection (b), deleted "by 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 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

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§ 47.10.130 WELFARE, SOCIAL SERVICES AND INSTITUTIONS § 47.10.140

(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. (5 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 incompetent 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

parents or court of the child is a child in need of care.

(d) The child shall be placed with the parent or guardian, if available, after being heard at a hearing at which the court shall determine if the child is a child in need of care. If the child is not to be placed with the parent or guardian, the court shall inform the parent or guardian of the reasons for the decision given as to the placement of the child.

(e) If the child is returned to the parent or guardian, the department shall make a reasonable effort to locate the probable parents of the child. (AS 47.10.150 § 24 ch 6)

Effect of amendment to child in need of care at the end of section.

- Section 150. General juvenile
- 160. Duties
- 170. Powers and operation
- 180. Operations

**Sec. 47.10.150. Institutional care**

- (1) placement, care, detention, and supervision of delinquent children
- (2) admission to facilities
- (3) admission to construction homes,
- (4) institutional care being n

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 09.85.130. — 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).

**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).

**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).

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

vided by subdetermining consent, the and maturity he has the minor from his own intent be appointed No. 2041 (1980).

The portion Sup. Ct. Op. P.2d 607 (1978) a waiver hearing advance consent Op. No. 2041 (1980).

While it is F.S., Sup. Ct. 586 P.2d 607 templates the additional period after the initiation does not matter to treatment be regarded Sup. Ct. Op. P.2d 12 (1980).

Court-ordered cannot be subsection (b) directly ordered by a decision juvenile has rehabilitation program states the end upon such L.C. v. State, Nos. 4401, 44

Protection Welfare Act, 25 U.S.C. 1978, provide protection to the initiation proceeding Native Alaska this section. E 2289 (File No. 1981).

Statutory judgments are:

In order to under this section clear and correct there is a child 47.10.010(a)(2) duct, and (2) it likely to continue Op. No. 2289 P.2d 1210 (1980).

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(e), 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

Martin R. Gardner\*

### I. INTRODUCTION

In his dissenting opinion in *In re Gault*,<sup>1</sup> 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."<sup>2</sup> 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.<sup>3</sup>

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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<sup>4</sup> also carries important legal consequences. Punished persons are entitled to certain rights, both procedural<sup>5</sup> and substantive,<sup>6</sup> which are not necessarily available to persons receiving nonpunitive dispositions.<sup>7</sup>

The therapeutic model, however, probably never provided a totally accurate description of juvenile justice.<sup>8</sup> In any event, by

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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, 466-67 (1965); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 319 (1866); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 132 (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.<sup>9</sup> 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,<sup>10</sup> the *Gault* majority held that the actual dispositions of juvenile delinquents often have little, if anything, to do with therapy.<sup>11</sup> 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.<sup>12</sup> *Gault*, however, does not stand for the proposition that juvenile justice schemes are systematically nontherapeutic. Indeed, the Court in *McKeiver v. Pennsylvania*<sup>13</sup> 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.<sup>14</sup> 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<sup>15</sup> who are thrust into a system that is simultaneously punitive and therapeutic.<sup>16</sup>

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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 178-210 & 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.<sup>17</sup> Because the concept of punishment includes a discrete set of constitutional protections,<sup>18</sup> Justice Stewart's punishment/therapy distinction, although not utilized explicitly by the *Gault* majority<sup>19</sup>—and perhaps even misapplied by Justice Stewart himself<sup>20</sup>—remains a useful analytical device for developing a coherent constitutional framework for juvenile law.<sup>21</sup> 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.<sup>22</sup> Moreover, the Supreme Court, in dicta accompanying its recent holding that eighth amendment considerations are inapplicable to corporal punishment of public school children,<sup>23</sup> specifically left open the question whether the eighth amendment's protection against cruel and unusual punishment applies to juvenile justice dispositions.<sup>24</sup> 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.<sup>25</sup>

In light of the inability of the Supreme Court<sup>26</sup> and leading philosophical writers<sup>27</sup> to articulate a precise definition of punish-

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ment without full panoply of due process safeguards unconstitutional 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*, 400 U.S. 67 (1971).

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 characterization 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,<sup>28</sup> or they seek a definition of punishment by relying solely on the Supreme Court's juvenile cases.<sup>29</sup> 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. Blizick 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 (1975) (pretrial detention of persons accused of crime is not punishment due to an absence of punitive intent); *Shilitanti 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 13-43 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.<sup>30</sup>

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,<sup>31</sup> others because of the belief that the very enterprise of defining constitutional rights in terms of the presence or absence of punishment is misguided.<sup>32</sup> Although many of these criticisms of the Court's record are understandable,<sup>33</sup> 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.<sup>34</sup> 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,<sup>35</sup> and under the eighth amendment ban on cruel and unusual punishment.<sup>36</sup> The fifth and sixth amendment protections granted to persons charged with criminal offenses during criminal prosecutions are contingent upon a showing that the

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

#### 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.<sup>40</sup> In *Cummings v. Missouri*<sup>41</sup> 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."<sup>42</sup> 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."<sup>43</sup> 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,"<sup>44</sup> the Court stated that the oath requirement bore no rational relationship to the legitimate state interest in regulating Cummings' fitness as an educator<sup>45</sup> or to his qualifications as a religious minister.<sup>46</sup> The Court found the measure to be a punitive restraint<sup>47</sup>

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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.<sup>48</sup> Although this amendment did not refer specifically to crime or punishment,<sup>49</sup> the purpose clearly was punitive.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

Although some theorists have argued that punishment in its legal context "must [necessarily] be for an offence against legal rules,"<sup>53</sup> *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,<sup>54</sup> 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.<sup>55</sup> Thus, *Cummings* establishes that punishment is the intentional imposition by the state of unpleasant restraints<sup>56</sup> 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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once 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.<sup>57</sup> 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.<sup>58</sup> 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*<sup>59</sup> and *Hawker v. New York*,<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> Thus, regulation may be distinguished from punishment in that regulation controls future conduct for general purposes<sup>63</sup> 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,

only 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.<sup>64</sup>

The *Cummings* definition of punishment lay virtually unaltered for almost 100 years<sup>65</sup> until the Supreme Court's 1958 decision in *Trop v. Dulles*<sup>66</sup> 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.<sup>67</sup> The Court rejected the Government's argument and found that the sanction was not only punitive,<sup>68</sup> 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, 511 (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.<sup>69</sup> The Court relied primarily upon the presence of a punitive legislative motivation underlying the denationalization provision. A plurality of the Court found this motivation<sup>70</sup> 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.~~"<sup>71</sup> *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."<sup>72</sup> 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."<sup>73</sup>

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 forward-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<sup>74</sup> 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.<sup>75</sup>

The Court in *Kennedy v. Mendoza-Martinez*<sup>76</sup> 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.<sup>77</sup> The issue in the case hinged on whether the forfeiture constituted punishment impermissibly imposed in the absence of criminal process protections,<sup>78</sup> or whether the forfeiture was a form of noncriminal regulation under Congress' war and foreign affairs powers.<sup>79</sup> 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."<sup>80</sup> 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

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. LAFAYE & 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."<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> The Court admitted that the listed elements "often point in different directions,"<sup>84</sup> 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."<sup>85</sup> 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.<sup>86</sup>

Two of the *Mendoza-Martinez* tests for punishment are especially useful in analyzing possible punishment cases.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> Since, however, the Court has sustained the validity of strict liability crimes,<sup>90</sup> 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.<sup>91</sup>

### 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<sup>92</sup> and the dispensing of deserts to blameworthy offenders<sup>93</sup>—into the *definition* of punishment. On a

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. Ezoraky 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.<sup>94</sup> 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,"<sup>95</sup> then one encounters difficulty in utilizing the deterrence theory to justify punishment.<sup>96</sup> Although the justification for punishment is—or at least should be—of vital significance to theorists and policymakers,<sup>97</sup> 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 *de*: justification) 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.

. . . [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. HOBBS, *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.<sup>98</sup> 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.<sup>99</sup> 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."<sup>100</sup> 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.<sup>101</sup> 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,<sup>102</sup> then the concepts of punishment and regulation may be indistinguishable.<sup>103</sup>

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

In *United States v. Brown*<sup>104</sup> 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. LAFAYE & 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.<sup>105</sup> 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.<sup>106</sup> 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."<sup>107</sup> Because section 504 inflicted punishment upon a specified group without a trial, the Court concluded that the provision clearly constituted a bill of attainder.<sup>108</sup> 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.<sup>109</sup> By contrast, however, to attempt justifications for punishment, once defined, solely in retributive terms<sup>110</sup> 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.<sup>111</sup> 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. KLZINIG, *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.<sup>112</sup>

### 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,<sup>113</sup> the Supreme Court has not adopted this view. The Court in *Bell v. Wolfish*<sup>114</sup> 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.<sup>115</sup> The Court found the detainees' confinement to be nonpunitive and, therefore, consistent with due process.<sup>116</sup> The Court noted, however, that the due process clause would have been violated if punishment were imposed without a prior adjudication of guilt.<sup>117</sup> 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.<sup>118</sup> Rather than punishment, the confinement reflected "a legitimate nonpunitive . . . objective."<sup>119</sup> The

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

113. See, e.g., Coleman & Solomon, *Paras 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.”<sup>120</sup> Moreover, the Court suggested that punitive intent might have been inferred if the liberty restrictions had not been “reasonably related” to legitimate governmental aims.<sup>121</sup> *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.<sup>122</sup>

*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,”<sup>123</sup> but are unreasonably harsh in relation to legitimate, nonpenal objectives.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup>

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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 569 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.<sup>127</sup> The effect theory defines punishment solely in terms of the impact of an alleged punisher’s actions regardless of the punisher’s purposes.<sup>128</sup> 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 Collin 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) (Collin, 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 these 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.<sup>129</sup>

Although confinement under these circumstances may be unconstitutional on other grounds,<sup>130</sup> 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.<sup>131</sup> "Punishments do not happen to or befall people. Rather, they are treatments to be understood within the context of responsible—or intentional—activity."<sup>132</sup> Accidental punishment, therefore, is logi-

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.<sup>133</sup> 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<sup>134</sup> that would threaten to engulf virtually all legal sanctions within its definition.<sup>135</sup>

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.<sup>136</sup> 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,<sup>137</sup> 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.<sup>138</sup> Thus, a court reasonably could infer that a pretrial detainee was intentionally punished when the state subjects the detainee to unnecessarily harsh treatment.<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup>

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.<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup> Despite its similarity to punishment, however, therapy is a concept analytically distinct from punishment.<sup>145</sup> Thus, the Supreme Court suggested in *Robinson v. California*<sup>146</sup> that while the Constitution may allow the state to subject drug addicts to involuntary therapy,<sup>147</sup> the state violates the eighth amendment when it punishes addicts for their addiction.<sup>148</sup> Although the Court frequently has discussed

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. HONDERICK, 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.<sup>149</sup>

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.<sup>150</sup> 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.<sup>151</sup>

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.<sup>152</sup>
- (3) Punishment is imposed to exact retribution<sup>153</sup> and may also operate to deter undesirable conduct.<sup>154</sup>
- (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

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 synonymy 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<sup>155</sup>—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.<sup>156</sup>

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,<sup>157</sup> the distinctions between punishment and therapy, and punishment and preventive detention also may be difficult to draw.

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. PACER, *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.~~<sup>158</sup> Understandably, these grave consequences require that punishment be contained by special safeguards. All punishment, however, is not especially severe.<sup>159</sup> Indeed, some nonpunitive sanctions are more severe than some punishments.<sup>160</sup> Moreover, stigma is not unique to punishment,<sup>161</sup> 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<sup>162</sup> or expanded to avoid the injustice of failure to protect all persons who are stigmatized by severe governmental sanctions.<sup>163</sup> ~~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.<sup>164</sup>

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.<sup>165</sup> Additionally, the effect theory fails to recognize that punishment is essentially an activity concept.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup> Moreover, persons placed in jeopardy of receiving such treatment can and should receive procedural protections approach-

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; Wassstrom, *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.<sup>169</sup>

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.<sup>170</sup> Once characterized as punitive, the treatment seemingly would become unconstitutional under *Robinson v. California* as punishment for a status.<sup>171</sup> 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.<sup>172</sup>

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.<sup>173</sup>

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,<sup>174</sup> the punitive motivation requirement is especially problematic because it often entails an assessment of collective legislative intent. Commentators have examined this problem in depth,<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup>

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.

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## III. JUVENILE JUSTICE AND THE SUPREME COURT

A. *In re Gault*

Although earlier doctrinal development existed,<sup>178</sup> *In re Gault*<sup>179</sup> 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,~~<sup>180</sup> 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.~~<sup>181</sup> ~~The Gault Court rejected the view that the juvenile justice system is an entirely benign dispenser of *parcns 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,<sup>182</sup> 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 as 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<sup>183</sup> and restricted their liberty.<sup>184</sup> Thus, the *Gault* Court found that the essentials of due process and fair treatment under the fourteenth amendment entitled juveniles to increased procedural protections.<sup>185</sup>

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.<sup>186</sup> 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.<sup>187</sup> 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.<sup>188</sup> The *Gault* Court, however, deviated from the fundamental fairness approach by relying directly upon the fifth amendment and its specific application to criminal cases<sup>189</sup> in holding that the privilege against self-incrimination applied to state delinquency adjudications.<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup> 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.<sup>193</sup>

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-

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 attachment 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."<sup>194</sup> 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.<sup>195</sup>

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.<sup>196</sup> 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.<sup>197</sup>

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,<sup>198</sup> 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*.<sup>199</sup> 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<sup>200</sup> or neglect proceedings is uncertain.<sup>201</sup> 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<sup>202</sup> that would not be a crime if committed by an adult is not clear.<sup>203</sup> 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,<sup>204</sup> 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.<sup>205</sup>

### B. *Gault's Progeny*

The Court continued to expand the protections applicable to delinquency adjudications in *In re Winship*.<sup>206</sup> 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.<sup>207</sup> 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."<sup>208</sup> 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*<sup>209</sup> 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,<sup>210</sup> 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 dangerousness and need for confinement and therapy.<sup>211</sup> Therefore, the central issue in *Winship* was "a straight forward factual question—did the accused commit the act alleged"<sup>212</sup>—but in *Addington* the Court grappled with an evaluation of the patient's mental health, a difficult subjective judgment of an inherently doubtful nature.<sup>213</sup> 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.<sup>214</sup> 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.<sup>215</sup> The procedural protections unique to the criminal process are inapplicable to these therapeutic contexts.<sup>216</sup>

One year after *Winship*, the Court in *McKeiver v. Pennsylvania*<sup>217</sup> 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<sup>218</sup> and the consequences

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,<sup>219</sup> 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.<sup>220</sup> 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.<sup>221</sup> 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."<sup>222</sup> If these consequences were to befall the juvenile courts "there [would be] little need for [their] separate existence."<sup>223</sup>

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.<sup>224</sup> 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

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 549.

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.<sup>225</sup> 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<sup>226</sup>—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,<sup>227</sup> 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.<sup>228</sup>

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*<sup>229</sup> 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."<sup>230</sup> Indeed, "the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment.'"<sup>231</sup> 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.<sup>232</sup>

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

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."<sup>233</sup> Both proceedings are designed "to vindicate [the] very vital interest in enforcement of criminal laws."<sup>234</sup> The Court concluded, therefore, that the juvenile respondent was put in jeopardy at the delinquency adjudication hearing.<sup>235</sup>

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<sup>236</sup> 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.<sup>237</sup> 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.<sup>238</sup> *McKeiver*, on the other hand, takes place entirely within the "therapeutic" context of the juvenile setting. Al-

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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*,<sup>239</sup> these assertions were inapposite in *Breed*.<sup>240</sup>

### 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.*<sup>241</sup>

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.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup> 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.<sup>245</sup>

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.<sup>246</sup> 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"<sup>247</sup> to a series of cases—including *McKeiver v. Pennsylvania*—that denied the right to a jury in juvenile cases.<sup>248</sup>

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.<sup>249</sup> 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.<sup>250</sup> The statute did not provide an indeterminate disposition, which is characteristic of therapeutic attempts to alter undesirable status conditions,<sup>251</sup> but rather fixed a term of confinement based solely upon the offenses committed by youthful burglars. The punitive purposes of retribution and deter-

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 [delinquency] 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 delinquent [sic] for certain delineated offenses was to serve as a warning to a first offender of the consequences of a second conviction."<sup>252</sup> 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."<sup>253</sup>

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.<sup>254</sup> 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.<sup>255</sup>

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

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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 burglar 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.<sup>258</sup> 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."<sup>259</sup> "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."<sup>260</sup> 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."<sup>261</sup> 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.<sup>262</sup> "Indeterminate sentencing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution or punishment."<sup>263</sup> This analysis by the *Felder* court closely reflects the concept of punishment developed earlier in this Article.<sup>264</sup>

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 blantly punitive contexts. Indeed, whenever the state imposes "suspiciously punitive"<sup>265</sup> restraints preceded by criminal conduct, the court should scrutinize the sanction under the *Wolfish* excessiveness test.<sup>266</sup> The result of this scrutiny may

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.*

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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.<sup>267</sup> Sometimes the attention to status relates to conditions and states of being. For example, juvenile courts often have jurisdiction over "incurable" children<sup>268</sup> or those children "who, by reason of being wayward or habitually disobedient, [are] uncontrolled by . . . parent[s], guardian[s], or custodian[s]."<sup>269</sup> 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.<sup>270</sup> Status offenses in either the pure status or conduct form often are included with criminal offenses in the definition of delinquency.<sup>271</sup> In these situations, often no attempt is made to differentiate the dispositions of status delinquents from those of criminal delinquents.<sup>272</sup> Some states, however, segregate status offenders from nonstatus delinquents and place them in less restrictive confinements.<sup>273</sup> Many recent statutory provisions further distinguish status offenders from delinquent offenders who commit offenses that would be criminal if committed by adults.<sup>274</sup> Under these schemes, status offenders often are called "persons in need of supervision" (PINS).<sup>275</sup> The restraints on PINS children are characteristically less severe than those on "delinquents."<sup>276</sup>

Because the scope of *Gault* is uncertain outside the context of delinquency adjudications based on conduct of a criminal nature,<sup>277</sup> 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. N.H. 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 688, 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*<sup>278</sup> limited *Gault* to situations in which the juvenile is "charged with an act which . . . would constitute a crime if committed by an adult."<sup>279</sup> 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.<sup>280</sup> 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.<sup>281</sup>

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.<sup>282</sup> The concept of punishment defines criminality and not vice versa.<sup>283</sup> Punishment is a concept more extensive than criminality and may exist in a variety of noncriminal settings.<sup>284</sup> 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.<sup>285</sup> Dispositions in these cases could entail punishment because the state often imposes unpleasant restraints upon youthful offenders who are guilty of mis-

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.