

# NO LONGER A CHILD: JUVENILE INCARCERATION IN AMERICA

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## I. INTRODUCTION

Across this country, thousands of children are dressed in orange jumpsuits, caged in isolation, separated from their families and communities, and horrifically victimized by those entrusted with their care—all in the name of juvenile justice. In the United States' juvenile justice system, judges are tasked with the responsibility of preventing future crime and effectively doling out justice to America's youngest offenders.<sup>1</sup> Case after case and child after child, these judges continuously choose incarceration in adult-like facilities as the means to rehabilitate children who have committed crimes.<sup>2</sup> Imprisonment is not the answer because there are other options.<sup>3</sup> There are facilities and programs that provide care and guidance; support and strength; potential for growth and a crime free future; and options that show children that even though they have done a bad deed, they are not bad people.<sup>4</sup>

The first section of this note provides a brief history of the juvenile justice system including its creation, changes since its inception, and the modern practices of the juvenile court. This section discusses the original and modern goals of juvenile justice, the differences between juveniles and adults, and the need to treat juveniles differently and separately from adults.

The second section of this note details how juvenile institutionalization in the United States is not accomplishing the mission set forth for juvenile justice. Specifically, this section focuses on the crises in juvenile correctional facilities, highlighted by the problems in California (California

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<sup>1</sup> Jeffrey A. Butts & Adele V. Harrell, *Delinquents or Criminals: Policy Options for Young Offenders*, 1998 URB. INST. 2.

<sup>2</sup> See *id.* at 6.

<sup>3</sup> See discussion *infra* Part IV.

<sup>4</sup> See discussion *infra* Part IV.

Youth Authority), Louisiana (Louisiana Department of Public Safety and Corrections, Youth Services, Office of Juvenile Justice), New York (New York Office of Children and Family Services), Ohio (Ohio Department of Youth Services), and Texas (Texas Youth Commission). Investigations in these states show countless illegal practices and procedures. These states provide good examples of the problems that plague juvenile correctional facilities across the country.

Finally, the last section of this note optimistically offers hope. Research and analysis of the various issues in juvenile correctional facilities show a real need for change, and not just with a few tweaks, but instead with a radical step away from the culture of institutionalization and a return to the rehabilitative roots of the juvenile justice system. Experts in restorative justice, commissioned by the United States Department of Justice, created a model to implement this type of change. Programs in Missouri, New York, and California speak to the success of restoration and the feasibility of implementation.

## II. BRIEF HISTORY OF THE JUVENILE JUSTICE SYSTEM

During the eighteenth century, there was little difference in the way children and adults were treated in the court system.<sup>5</sup> In fact, children as young as seven could be sentenced in adult courts.<sup>6</sup>

In 1825, the Society for the Prevention of Juvenile Delinquency started the idea that it was in the best interests of children to be separated from adults, especially when children were being placed in institutions.<sup>7</sup> These reformers created unique facilities for troubled juvenile offenders,<sup>8</sup> which often included educational and rehabilitative components to combat the lack of morality—the believed root of juvenile crime.<sup>9</sup> However, these juvenile facilities were often condemned for juvenile abuse.<sup>10</sup>

By the late nineteenth century, the notion that children are not just small adults became more common.<sup>11</sup> Ultimately, the realization that

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<sup>5</sup> *Child or Adult? A Century Long View*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/childadult.html> (last visited Sept. 15, 2010).

<sup>6</sup> *Id.*

<sup>7</sup> Thomas J. Bernard, *Introduction* to *SERIOUS DELINQUENCY: AN ANTHOLOGY* 3, 4 (Thomas J. Bernard ed., 2006).

<sup>8</sup> See *Dialogue on Youth and Justice*, 2007 A.B.A. DIV. PUB. EDUC. 5.

<sup>9</sup> *Child or Adult?*, *supra* note 5.

<sup>10</sup> Bernard, *supra* note 7, at 4.

<sup>11</sup> Barry Krisberg, *Reforming Juvenile Justice*, THE AMERICAN PROSPECT, Sept. 2005, at A2, available at <http://www.prospect.org/cs/articles?articleId=10120>.

putting children in adult prisons did not rehabilitate, but instead created the next generation of criminals, led to the creation of a separate juvenile court system.<sup>12</sup>

#### A. *Creation of the Juvenile Court*

The first juvenile court was established in Cook County (Chicago), Illinois in 1899.<sup>13</sup> By 1910, thirty-two states had juvenile courts, and by 1925, almost all states had juvenile courts.<sup>14</sup> These courts relied on the doctrine of *parens patriae* to allow state officials to act as guardians for children and to make decisions regarding the best interests of children when they came before the court.<sup>15</sup>

These early juvenile courts had a benevolent mission—to save and protect children.<sup>16</sup> The courts sought to help children “in trouble through treatment rather than punishment.”<sup>17</sup> Specifically, these courts wanted to be flexible, informal, focus on individual needs, rehabilitate, and maintain confidentiality.<sup>18</sup> Highlighting the rehabilitative drive of juvenile courts, Denver, Colorado Judge Ben Lindsey “preached the virtues of community treatment, probation, and a juvenile court fueled by optimistic compassion” for children in need.<sup>19</sup>

##### 1. *Due Process Safeguards*

From the 1950s through the 1960s, the juvenile justice system stayed true to its mission because juvenile courts focused on rehabilitation. However, there was a concern that children were being held indefinitely without due process safeguards.<sup>20</sup> Juvenile courts were never meant to punish, and as such, children were not initially afforded due process

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<sup>12</sup> *Id.*

<sup>13</sup> MARTHA DEITCH ET AL., FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 5 (2009); *Child or Adult?*, *supra* note 5; *Dialogue on Youth and Justice*, *supra* note 8, at 5.

<sup>14</sup> Bernard, *supra* note 7, at 5; *Dialogue on Youth and Justice*, *supra* note 8, at 5.

<sup>15</sup> FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 5–6 (2005). A child is dependent on supervision in order to survive. *Id.* When parents fail to protect their children, the state must step in and make decisions in accordance with the best interests of the child. *Id.*

<sup>16</sup> *Id.* at 7.

<sup>17</sup> DEITCH ET AL., *supra* note 13, at 6.

<sup>18</sup> *Child or Adult?*, *supra* note 5.

<sup>19</sup> ZIMRING, *supra* note 15, at 9.

<sup>20</sup> Bernard, *supra* note 7, at 6.

protections.<sup>21</sup> Ultimately, Supreme Court Justice Abe Fortes stated, “Under our Constitution, the condition of being a boy does not justify a Kangaroo court.”<sup>22</sup> In 1966, a landmark United States Supreme Court case, *In re Gault*,<sup>23</sup> rectified many due process issues but did not afford children all the protections that adults are given.<sup>24</sup> In that case, a fifteen-year-old boy was taken into custody after he made “lewd” phone calls to his neighbor.<sup>25</sup> Gault was found to be a delinquent child and was committed to the State Industrial School for six years, until his twenty-first birthday.<sup>26</sup>

The Supreme Court has held that juveniles have the right to timely notice of charges;<sup>27</sup> the right to be “represented by counsel retained by [parents], or if they are unable to afford counsel, that counsel will be appointed to represent the child”;<sup>28</sup> the right to protect themselves against self-incrimination; the right to cross-examine witnesses; and the right to a ‘beyond a reasonable doubt’ standard in delinquency cases.<sup>29</sup> With *Gault* and the cases that followed, children were finally afforded some adult-like due process protections within the juvenile court system.<sup>30</sup> However, children were still treated as adults in another realm—they were being institutionalized with adults in prisons across the country.<sup>31</sup>

## 2. Juvenile Protections from the Federal Government

During the 1970s, a class action lawsuit filed on behalf of children in prisons alleged that the conditions in the juvenile prisons constituted cruel and unusual punishment.<sup>32</sup> In response to allegations of abuse and detrimental conditions, Congress enacted the Juvenile Justice and

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<sup>21</sup> *Child or Adult?*, *supra* note 5.

<sup>22</sup> *In re Gault*, 387 U.S. 1, 28 (1967). A Kangaroo Court refers to a legal proceeding that is unauthorized or a sham. BLACK’S LAW DICTIONARY 409 (9th ed. 2009).

<sup>23</sup> 387 U.S. 1 (1967).

<sup>24</sup> *Id.* at 3–4.

<sup>25</sup> *Id.* at 4, 7.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.* at 33.

<sup>28</sup> *Id.* at 41.

<sup>29</sup> *In re Winship*, 397 U.S. 358, 368 (1970) (Harlan, J., concurring); *Child or Adult?*, *supra* note 5.

<sup>30</sup> See *Child or Adult?*, *supra* note 5.

<sup>31</sup> DEITCH ET AL., *supra* note 13, at 6–7.

<sup>32</sup> *Child or Adult?*, *supra* note 5.

Delinquency Prevention Act of 1974.<sup>33</sup> The Act created an Office of Juvenile Justice and Delinquency Prevention and conditioned the availability of federal funds to the states, requiring the states to separate juveniles from adults in jails and prisons, and deinstitutionalize status offenders.<sup>34</sup> In 1980, the Act was amended to completely prohibit children from being housed in adult jails, with a few minor exceptions.<sup>35</sup> The amendment seemed to be the first step in ensuring that children in the justice system would be protected from adult criminals.

*B. The Changing Mission of the Juvenile Court*

By the late twentieth century, the original rehabilitative and protective goals of the juvenile justice system were being replaced with conservative, “get tough on crime” rhetoric.<sup>36</sup> In the early 1990s, the myth of the juvenile super predator came to life.<sup>37</sup> It was predicted that 270,000 juveniles<sup>38</sup> would become “sociopathic youth with no moral conscience who believe committing crime is a rite of passage and who do not fear the stigma of arrest or the pain of imprisonment.”<sup>39</sup> Of course, this myth never came to fruition, but it successfully scared the public into believing that juveniles were dangerous and deserved punishment.<sup>40</sup> As a result of this fear, thirty-one states increased the number of sentencing options for juveniles with harsher punishments, and forty-seven states modified the strict confidentiality standards for children in juvenile proceedings.<sup>41</sup> Today, the goal of the juvenile court system is still rehabilitation, but now the court system’s mission also includes retribution, punitive sanctions,

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* Status offenders are children who commit crimes, such as drinking before the age of twenty-one, merely because they are minors. *Id.*

<sup>35</sup> *Id.* These minor exceptions allow juveniles to be housed in adult jails when there is an emergency situation or when a child will be in the prison for less than twenty-four hours, so long as children are kept separated from adults. Shay Bilchik, *Juvenile Justice: A Century of Change*, 1999 NAT’L REP. SERIES JUV. JUST. BULL. (Off. Juv. Just. & Delinq. Prevention, U.S. Dept. Just.), Dec. 1999, at 4.

<sup>36</sup> Bilchik, *supra* note 35, at 4.

<sup>37</sup> DEITCH ET AL., *supra* note 13, at 7.

<sup>38</sup> Krisberg, *supra* note 11, at A3.

<sup>39</sup> DEITCH ET AL., *supra* note 13, at 7.

<sup>40</sup> See Shay Bilchik, *Challenging the Myths*, 1999 NAT’L REP. SERIES JUV. JUST. BULL. (Off. Juv. Just. & Delinq. Prevention, U.S. Dept. Just.), Feb. 2000, at 1.

<sup>41</sup> *Child or Adult?*, *supra* note 5.

incapacitation, deterrence, and consistent and proportional sentencing.<sup>42</sup> As a result of the changing mission of the juvenile courts and an increased emphasis on retribution, it would seem that the rehabilitative and protective juvenile justice system is coming to an end.

### C. *Juvenile v. Adult Justice System*

Despite the foundational changes in the juvenile justice system since its inception, children are still children, and they are still different from adults. Science consistently shows that teenagers' brains are far less developed than previously thought, and they should not be held to the same stringent standards as adults.<sup>43</sup> Specifically, research demonstrates that "children's brains are still developing in ways that affect their impulse control and their ability to choose between antisocial and acceptable courses of action."<sup>44</sup> Pre-teenagers and teenagers who display psychopathic behaviors similar to criminal adults—such as being bored, lacking remorse and guilt, acting on impulse, failing to accept responsibility, and engaging in unstable relationships—are simply demonstrating normal traits for their ages.<sup>45</sup>

Science shows a marked difference when dealing with juveniles than when dealing with adults,<sup>46</sup> and the juvenile justice system took note of that difference when it enacted laws and formatted the system in which juveniles are served.<sup>47</sup> The rationale is that juveniles are "developmentally different" than adults and the primary goals of the juvenile justice system were initially rehabilitation, treatment, and community protection.<sup>48</sup> These goals promote the amenability of children, whereas the main goals of the adult criminal justice system are to invoke "criminal sanctions . . . proportional to the offense," deterrence,<sup>49</sup> retribution, and incapacitation.<sup>50</sup>

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<sup>42</sup> Daniel P. Mears, *Sentencing Guidelines and the Transformation of Juvenile Justice in the 21<sup>st</sup> Century*, in *SERIOUS DELINQUENCY: AN ANTHOLOGY* 91, 94 (Thomas J. Bernard ed., 2006).

<sup>43</sup> DEITCH ET AL., *supra* note 13, at 13–17.

<sup>44</sup> *Id.* at XIV.

<sup>45</sup> *Id.* at 17.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 18.

<sup>48</sup> *Juvenile vs Adult Justice*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/juvvsadult.html> (last visited Sept. 17, 2010); *see also* Mears, *supra* note 42, at 95.

<sup>49</sup> *Juvenile vs Adult Justice*, *supra* note 48.

<sup>50</sup> Mears, *supra* note 42, at 95.

The amenability of children also shapes the way in which juvenile records are kept.<sup>51</sup> When dealing with delinquency records, juvenile proceedings limit access to personal information to prevent unnecessary stigmatization, whereas adult records are open to public access.<sup>52</sup>

In the court system, juvenile proceedings are called hearings and the courts look at a multitude of factors including: psychological information, family characteristics, and youth history; whereas adults have trials focused solely on legal factors.<sup>53</sup> Furthermore, not all states allow juveniles to have jury trials, but jury trials are a constitutional right for adults.<sup>54</sup> Youth can be placed in preventative detention, otherwise known as detention halls or detention centers, for their own or for community protection; whereas adults are eligible for bail or bond and can be released from county or city jails.<sup>55</sup>

After a court hearing, youth can be adjudicated delinquent<sup>56</sup> for breaking any federal, state, or local laws,<sup>57</sup> and can be punished with various sentencing options. For instance, at the dispositional hearing, youth can be sent to juvenile correctional facilities for an unspecified period of time, typically for a period of six months, one year, or longer, and can remain committed until the age of majority.<sup>58</sup> The time period for commitment is based on how long it takes to correct the unlawful behavior of the juvenile.<sup>59</sup> Forty-five states and the District of Columbia allow for these “indeterminate periods of confinement.”<sup>60</sup> Adults, on the other hand, are found innocent or guilty of the crime with which they are charged, and if they are found guilty, the sentence they receive is for a specified period of time based on the severity of the crime.<sup>61</sup>

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<sup>51</sup> *Juvenile vs Adult Justice*, *supra* note 48.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Ruth Shonle Cauan, *The Concepts of Tolerance and Contraculture as Applied to Delinquency*, in *JUVENILE DELINQUENCY: CLASSIC AND CONTEMPORARY READINGS* 11, 11 (William E. Thompson & Jack E. Bynum eds., 1991).

<sup>58</sup> *Juvenile vs Adult Justice*, *supra* note 48.

<sup>59</sup> William E. Thompson & Jack E. Bynum, *What is Crime?*, in *JUVENILE DELINQUENCY: CLASSIC AND CONTEMPORARY READING*, *supra* note 57, at 25, 37.

<sup>60</sup> *Id.*

<sup>61</sup> *Juvenile vs Adult Justice*, *supra* note 48.

When youth complete their commitment to juvenile correctional facilities, they are placed on parole—a tool used to keep an eye on the child and also to reintegrate them back into the community.<sup>62</sup> When adults complete their sentences, they are placed on parole as well, but this type of parole serves as a check to make sure the adult is not reoffending.<sup>63</sup>

#### *D. Introduction to Juvenile Correctional Facilities*

In 1984, there were more than 83,000 juveniles in institutions across the United States.<sup>64</sup> The latest report from the Office of Juvenile Justice and Delinquency Prevention revealed that in 2004, there were 94,875 juveniles in 2,809 facilities.<sup>65</sup> There is a wide disparity among the states in the number of juvenile institutions and the number of juveniles housed in those institutions.<sup>66</sup> For instance, Vermont reported having only four juvenile institutions and housing only fifty-five juveniles, whereas California operated 275 institutions housing 15,406 juveniles.<sup>67</sup>

The institutions included in this report were described as detention centers, training schools, reception or diagnostic centers, shelters, ranches, forestry camps or farms, halfway homes, or group homes.<sup>68</sup> These facilities are classified as public or private facilities and can be operated by private organizations or by local or state governments.<sup>69</sup> The report found that there were more private facilities but that public facilities held far more youth.<sup>70</sup> Of these juvenile facilities, 750, or 37%, classified themselves as detention centers, holding 27% of all juvenile offenders.<sup>71</sup>

These facilities had varying degrees of security. Juveniles were locked in their rooms in 33% of the facilities.<sup>72</sup> Of the facilities that locked juveniles in their rooms, 86% did so at night; 77% did so when the juveniles were out of control; 56% did so whenever juveniles were in their

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<sup>62</sup> *Id.*

<sup>63</sup> *See id.*

<sup>64</sup> Thompson & Bynum, *supra* note 59, at 39.

<sup>65</sup> Sarah Livsey et al., *Juvenile Residential Facility Census, 2004: Selected Findings*, JUV. OFFENDERS & VICTIMS: NAT'L REP. SERIES (Off. Juv. Just. & Delinq. Prevention, U.S. Dept. Just.), Jan. 2009, at 2.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 4; Thompson & Bynum, *supra* note 59, at 39.

<sup>69</sup> Livsey et al., *supra* note 65, at 4.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 5.

rooms; 46% did so during staff shift changes; 28% did so for a certain period of time each day; 2% did so for a majority of the day; and 1% did so for the entire day.<sup>73</sup>

### III. PROBLEMS IN JUVENILE CORRECTIONAL FACILITIES

This section focuses on secure detention facilities, and how they are becoming more and more similar to adult prisons. Widespread problems in juvenile correctional facilities across the country have resulted in countless juvenile injuries and too many juvenile deaths.<sup>74</sup> There are serious troubles in California's Youth Authority, Louisiana's Office of Juvenile Justice, New York's Office of Children and Family Services, Ohio's Department of Youth Services, and Texas' Youth Commission.<sup>75</sup> In some instances, these problems have led to federal intervention and threats of federal takeover if serious institutional changes are not made.<sup>76</sup> A lack of treatment and suicide prevention, excessive force and violence, and increased periods of confinement lead to high recidivism rates and constitutional violations, which prevent these institutions from attaining the overarching goal of the juvenile justice system—rehabilitation.<sup>77</sup>

#### A. California Youth Authority

The promise that children in juvenile correctional facilities will be rehabilitated with treatment and programs is one that typically goes unfulfilled. Speaking about California's Youth Authority (CYA), author Randall G. Sheldon stated, "The promise that treatment will be provided has a hollow ring, since the same promises have been made from the day the CYA was opened more than [sixty] years ago."<sup>78</sup> California continues to have problems providing meaningful treatment to its child inmates.<sup>79</sup> However, California is not unique in this regard, as facilities across the country—specifically in Texas, Ohio, and New York—struggle to adequately provide treatment for children with mental health issues.<sup>80</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> See discussion *infra* Parts III.A–III.E.

<sup>75</sup> See discussion *infra* Parts III.A–III.F.

<sup>76</sup> See discussion *infra* Parts III.A–III.F.

<sup>77</sup> See discussion *infra* Parts III.F–III.G.

<sup>78</sup> RANDALL G. SHELDEN, *DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY* 374 (2009) [hereinafter SHELDEN, *DELINQUENCY*].

<sup>79</sup> *Id.* at 370–71.

<sup>80</sup> See discussion *infra* Parts III.C–III.E.

Many California institutions lack mental health beds, and children with mental health issues are not in a place where their individual issues can be addressed.<sup>81</sup> Instead, these vulnerable children are kept in isolation cells apart from others and fed “blender meals.”<sup>82</sup> Investigations into California’s system showed that most facilities lacked psychological treatment of any kind and effective medical care.<sup>83</sup>

Education in California institutions is often deficient because of the lack of teachers.<sup>84</sup> Children are kept from classes when they misbehave, and classes are often cancelled because there are not enough teachers.<sup>85</sup> The *Los Angeles Times* reported, “Youth in restricted programs spend 20 hours or more a day in their filthy, dimly lit cells, released only for one hour of school a day or to exercise in a cage.”<sup>86</sup>

As demonstrated above, confinement is not uncommon in California’s institutions. Many youth are confined for more than twenty-three hours per day.<sup>87</sup> One study found that in one institution twenty-seven juveniles were locked up in their rooms constantly, thirty-nine were locked up in their rooms for thirty or more days, and three juveniles were confined for more than two hundred days.<sup>88</sup> At the Herman G. Stark Youth Correctional Facility, the disciplinary unit is called “The Rock.”<sup>89</sup> This unit is extremely dangerous and tallied more than 300 attacks in a single year.<sup>90</sup> Videotape surveillance showed a police officer allowing his guard dog to bite a child’s leg without intervention.<sup>91</sup>

As awful as these conditions sound, it is nothing compared to the horror that these children live through on a daily basis. It is no wonder that these conditions neither rehabilitate nor prepare children to reenter society as productive citizens.<sup>92</sup> Recidivism rates prove this fact.<sup>93</sup> Startling

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<sup>81</sup> Michael Rothfeld, *Fixes Slow for Youth Prisons*, L.A. TIMES, Feb. 18, 2008 at B1, B10.

<sup>82</sup> See, e.g., SHELDEN, DELINQUENCY, *supra* note 78, at 372 (describing blender meals as a whipped mix of leftover food).

<sup>83</sup> *Id.* at 370.

<sup>84</sup> Rothfeld, *supra* note 81, at B10.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at B1.

<sup>87</sup> SHELDEN, DELINQUENCY, *supra* note 78, at 370.

<sup>88</sup> Tim Reiterman, *Auditors Rebuke Youth Authority*, L.A. TIMES, Jan. 4, 2005, at B1.

<sup>89</sup> Angie Cannon, *Juvenile Injustice*, U.S. NEWS & WORLD REP., Aug. 9, 2004, at 29.

<sup>90</sup> SHELDEN, DELINQUENCY, *supra* note 78, at 371.

<sup>91</sup> *Id.*

<sup>92</sup> See SHELDEN, DELINQUENCY, *supra* note 78, at 374–75.

recidivism rates show that nine out of ten juveniles are in trouble again within three years of their release from a California juvenile institution.<sup>94</sup> In fact, past incarceration is the single greatest predictor of future criminal conduct, even more so than family troubles or gang membership.<sup>95</sup> However, incarceration coupled with a lack of education, placement, skills, and community support; and an increase in gang membership, drug addiction, and mental health issues all but mandates that these children will continue on criminal paths.<sup>96</sup>

Immense problems and poor conditions caused one county court judge to stop committing juveniles to California institutions altogether.<sup>97</sup> To combat the staggering problems in California's institutions, juvenile justice advocates from the Prison Law Office urged a California Superior Court Judge to appoint a new superintendent of the California Youth Authority.<sup>98</sup> Advocates contend that they tried to work with California officials, but the Youth Authority missed court deadlines for documenting changes.<sup>99</sup> Even though officials added twenty-two programs to train staff and made minor improvements to safety and education, officials made a "mockery of compliance in six areas: education, safety, medical care, mental health, disabilities and sex offender treatment."<sup>100</sup> Advocates state that California's "failures are pervasive, severe and chronic."<sup>101</sup>

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<sup>93</sup> See *id.* Recidivism is "when someone who has been convicted of a crime is subsequently re-arrested for another crime." *Id.* More specifically, juvenile recidivism can be an "arrest, a referral to juvenile court, a petition filed, or a re-commitment to an institution." *Id.* at 376.

<sup>94</sup> Randall G. Shelden, *From Houses of Refuge to 'Youth Corrections': Same Story, Different Day* 18 (2005) (unpublished paper, Ctr. on Juv. & Crim. Just.), [http://www.cjcj.org/files/from\\_houses.PDF](http://www.cjcj.org/files/from_houses.PDF) [hereinafter Shelden, *From Houses of Refuge*].

<sup>95</sup> *Id.* The length of time a child spends in a juvenile institution increases the rate and likelihood of recidivism. *Id.* at 25.

<sup>96</sup> SHELDEN, *DELINQUENCY*, *supra* note 78, at 377–78.

<sup>97</sup> Shelden, *From Houses of Refuge*, *supra* note 94, at 18–19.

<sup>98</sup> Rothfeld, *supra* note 81, at B1.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

*B. Louisiana Office of Juvenile Justice*

The Louisiana Office of Juvenile Justice is no stranger to severe and chronic problems. The Office of Juvenile Justice has been involved with the United States Department of Justice since 1996.<sup>102</sup>

The Department of Justice began investigating the various facilities in Louisiana because of horrid reports of violence among the staff and residents.<sup>103</sup> The first investigations of the Bridge City and Jetson Juvenile Correctional Facilities revealed life-threatening and dangerous conditions.<sup>104</sup> Department of Justice investigators found that nearly every child interviewed gave repetitious accounts of violence from juvenile correctional officers for minor infractions.<sup>105</sup> Some of the youth reported being severely beaten but did not report their injuries to staff members for fear of retaliation by the guards.<sup>106</sup> A guard choked a girl who was seven-months pregnant.<sup>107</sup> Another youth required facial reconstruction surgery because a guard punched his face with such force that his bones were crushed.<sup>108</sup> And, guards branded another young girl “untouchable” because she was HIV positive. She tried to commit suicide and “repeatedly expressed her wish to die.”<sup>109</sup> What kind of activity would warrant such a response from adult guards? A riot situation? An escape? The problem is that these children were talking after hours, or fighting, or not standing in line<sup>110</sup>—as if there could possibly be an activity that would warrant a guard crushing the facial bones of a child. In five months alone, 40 out of 178 injuries required emergency room visits.<sup>111</sup>

The investigations garnered shocking results, but there were even worse reports coming from the Monroe and Tallulah Juvenile Correctional

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<sup>102</sup> See Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Div., to Mike Foster, Governor of La. 1 (July 15, 1996), <http://www.clearinghouse.net/chDocs/public/JI-LA-0001-0005.pdf> (regarding the findings of the investigation of secure correctional facilities for children in Louisiana) [hereinafter Letter from Deval L. Patrick to Mike Foster July 15, 1996].

<sup>103</sup> See *id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (stating that they were hit or kicked by guards for talking back or stepping out of line).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 2.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

Facilities.<sup>112</sup> As with the Bridge City and Jetson investigations, almost every child out of the 100 children interviewed attested to some violence at the hands of guards.<sup>113</sup> Children reported that guards would crush boys' testicles during searches.<sup>114</sup> Other children reported that guards often relied on mechanical restraints (handcuffs), chemical restraints (mace), and isolation as punishment for minor offenses and even for suicide attempts.<sup>115</sup> While investigators were at Monroe, they witnessed one child placed in handcuffs and then sprayed continuously with two cans of mace.<sup>116</sup>

It seems that the culture of violence at these facilities prolong the problems and exacerbate youth injuries. Juveniles became so ingrained with violence and fearful of abuse at the hands of guards, they were willing to perform assaults for cookies.<sup>117</sup> Guards regularly practiced violent initiation tactics on new youth and encouraged youth-on-youth violence.<sup>118</sup>

These children are faced with the daily worry of violence and abuse, and they have little to no support. During the investigation, many youth commented that they were only given limited contact with their families and communities through mail, phone calls, and visits.<sup>119</sup> The increase in violence, fear, and retribution and decrease in community and family support does not sustain the notion of rehabilitation. In fact, the "limitations on mail, telephone access, and visitation estrange juveniles

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<sup>112</sup> Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Div., to Mike Foster, Governor of La. 1–2 (Oct. 3, 1996), <http://www.clearinghouse.net/chDocs/public/JI-LA-0001-0010.pdf> (regarding the findings of the investigation of secure correctional facilities for Louisiana children in Louisiana).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (reporting that guards were willing to give juveniles a "sixty," a package of sixty cookies, if they hurt other youth to the point of hospitalization).

<sup>118</sup> *Id.*

<sup>119</sup> Letter from Isabelle Katz Pinzler, Acting Assistant Attorney General, Civil Rights Div., to Mike Foster, Governor of La. 9 (June 18, 1997), <http://www.clearinghouse.net/chDocs/public/JI-LA-0001-0011.pdf> (regarding the findings of the investigation of secure correctional facilities for juveniles in Louisiana). At Bridge City, children could only write letters on Sunday, make two phone calls per week, and receive visitors on one Sunday per month. *Id.* However, most youths were taken to facilities so far from their homes and communities that their families were not able to visit them. *Id.*

from their families instead of strengthening family ties that increase the likelihood that the juvenile will succeed after release.”<sup>120</sup>

Since the first investigation in 1996, the Department of Justice detailed immediate remedial measures for Louisiana’s Office of Juvenile Justice to implement.<sup>121</sup> Specifically, the Department of Justice requested that the State implement, among other requirements, the following measures in order to avoid formal litigation: (1) institute a zero tolerance policy for violence; (2) hire juvenile justice professionals to implement violence prevention mechanisms; (3) train current and new staff on appropriate levels of force; (4) group children in units based on their age and cognitive ability; and (5) establish an independent task force to remedy and address the persistent abuse apparent at juvenile facilities.<sup>122</sup> However, these measures were not implemented, and on November 5, 1998, the Department of Justice filed a complaint against Louisiana’s Office of Juvenile Justice in federal court.<sup>123</sup> The complaint alleged that the Office of Juvenile Justice failed in many respects, but namely they failed to provide medical care and adequate education; decrease isolation tactics; protect the children; and most importantly, they failed to rehabilitate.<sup>124</sup>

Between 1998 and 2002, litigation ensued, but little changed.<sup>125</sup> In 2003, a youth at Bridge City died after a fight with a guard due to blunt force trauma to the head.<sup>126</sup> This unnecessary death caused renewed interest in overhauling Louisiana’s juvenile justice system, despite the State’s assurances that changes were made.<sup>127</sup> In 2004, some progress was made.<sup>128</sup> The Tallulah Juvenile Correctional Facility was shut down.<sup>129</sup> At

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<sup>120</sup> *Id.*

<sup>121</sup> Letter from Deval L. Patrick to Mike Foster July 15, 1996, *supra* note 102, at 4–6.

<sup>122</sup> *Id.*

<sup>123</sup> Complaint at 1, 6–7, *United States v. Louisiana*, No. 98–947 (M.D. La. dismissed May 2, 2006), *available at* <http://www.clearinghouse.net/chDocs/public/JI-LA-0001-0011.pdf>.

<sup>124</sup> *Id.* at 6–7.

<sup>125</sup> *See* JUSTICE POLICY INST., *THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE* 7 (May 2009), [http://www.justicepolicy.org/images/upload/09\\_05\\_REP\\_CostsOfConfinement\\_JJ\\_PS.pdf](http://www.justicepolicy.org/images/upload/09_05_REP_CostsOfConfinement_JJ_PS.pdf); *Louisiana Is Closing Toughest Juvenile Prison*, ST. LOUIS POST-DISPATCH, May 30, 2004, at A7.

<sup>126</sup> *Coroner: Inmate’s Death a Homicide*, WSDU.COM (May 1, 2003, 2:20 PM), <http://www.wdsu.com/r/2173096/detail.html>.

<sup>127</sup> *Id.*

<sup>128</sup> *See Louisiana Is Closing Toughest Juvenile Prison*, *supra* note 125, at A7.

<sup>129</sup> *Id.*

the facility's closing, child advocates stated that "the adult-style prison—with individual cells inside cellblocks behind fences and razor wire—created an atmosphere unlikely to rehabilitate the teens."<sup>130</sup>

*C. New York Office of Children and Family Services*

The *New York Times* reported, "Anything from sneaking an extra cookie to initiating a fistfight may result in a full prone restraint with handcuffs . . . . This one-size-fits-all approach has, not surprisingly, led to an alarming number of serious injuries to youth, including concussions, broken or knocked-out teeth, and spiral fractures."<sup>131</sup> The article also reported that "[i]n November 2006, an emotionally disturbed teenager, Darryl Thompson, 15, died after two employees at the Tryon Center pinned him down on the ground. The death was ruled as a homicide, but a grand jury declined to indict the workers."<sup>132</sup>

Scathing reports, such as those published in the *New York Times*, prompted the United States Department of Justice to investigate New York's Office of Children and Family Services.<sup>133</sup> Specifically, the Department of Justice reviewed documents, interviewed facility officials, and observed youth to determine if youth were protected from harm, focusing on "unreasonable use of restraints."<sup>134</sup>

New York's Office of Children and Family Services' policy "limits 'the use of physical restraint to exceptional circumstances when all other pro-active, non-physical behavior management techniques have been tried and failed.'"<sup>135</sup> Physical force should only be used when necessary, and even then, only the minimalist amount of force should be used.<sup>136</sup> However, the Department of Justice found that from training to implementation this policy was neither followed nor enforced at the four

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<sup>130</sup> *Id.*

<sup>131</sup> Nicholas Confessore, *4 Youth Prisons in New York Used Excessive Force*, N.Y. TIMES, Aug. 25, 2009, at A1.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*; Letter from Loretta King, Acting Assistant Attorney General, to David A. Paterson, Governor of N.Y. 1 (Aug. 14, 2009), [http://www.justice.gov/crt/split/documents/NY\\_juvenile\\_facilities\\_findlet\\_08-14-2009.pdf](http://www.justice.gov/crt/split/documents/NY_juvenile_facilities_findlet_08-14-2009.pdf) (regarding the findings of the investigation of Lansing Residential Center, Louis Gossett, Jr. Residential Center, Tryon Residential Center, and Tyron Girls Center).

<sup>134</sup> Letter from Loretta King to David A. Paterson, *supra* note 133, at 1.

<sup>135</sup> *Id.* at 5.

<sup>136</sup> *Id.* (internal citation omitted).

facilities they investigated.<sup>137</sup> Staff members at these facilities were trained to use a similar amount of force in all situations, regardless of whether force was necessary.<sup>138</sup> Investigators found that “staff . . . tended to escalate, rather than de-escalate, minor behavior problems into serious incidents.”<sup>139</sup> For example, at the Tryon Boys Residential Center, the response mechanisms were classified as either a code red (a security emergency) or a code white (needing an emergency escort).<sup>140</sup> These two codes were not adequately tailored for the variety of possible situations, which would require vastly different responses.<sup>141</sup>

The lack of training for juvenile correctional officers and other facility staff members leads to serious injuries to juveniles.<sup>142</sup> The Department of Justice reported that in 2007, at the Lansing facility alone there were 698 restraints resulting in 123 injuries.<sup>143</sup> When interviewed by Department of Justice investigators, youth at the facilities told of an unauthorized restraint that staff were using called the “hook and trip.”<sup>144</sup> This method involved staff members pinning children’s arms behind their backs and tripping them so that they would fall forward, not surprisingly leading to many injuries among the youth at the facilities.<sup>145</sup> Another restraint used at New York’s Juvenile Correctional Facilities is the “prone restraint.”<sup>146</sup> This restraint caused the death of a fifteen-year-old boy.<sup>147</sup>

These injuries are bad enough alone, but the even bigger issue lingering at these facilities is that injuries caused by staff using unauthorized restraints are rarely investigated.<sup>148</sup> The Department of Justice’s investigation found that New York’s facilities often failed to investigate youth injuries.<sup>149</sup> When there was an investigation, it was

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<sup>137</sup> *Id.* at 5–6.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 7.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 6.

<sup>143</sup> *Id.* at 9.

<sup>144</sup> *See id.* at 10.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* This restraint is very dangerous because it can cause a child’s airway to become blocked, and the child would not be able to breathe or express distress. *Id.*

<sup>147</sup> *Id.*; *see also* Confessore, *supra* note 131, at A3.

<sup>148</sup> Letter from Loretta King to David A. Paterson, *supra* note 133, at 11.

<sup>149</sup> *Id.*

“superficial” and “not conducted by detached investigators.”<sup>150</sup> These pseudo-investigations had zero consequences for accused staff and caused zero changes in system-wide policies and procedures.<sup>151</sup>

Finally, the Department of Justice found that the New York facilities paid little to no attention to mental health issues or to providing adequate treatment for youth with mental health problems. The specific problems noted by the Department of Justice include the following: heavy reliance on using restraints on youth with mental health issues; poor diagnosis and evaluation of mental health problems; poor administration of appropriate medication for youth; poor treatment plans; and poor chemical dependency intervention units for treating youth with serious substance abuse issues.<sup>152</sup> Investigators found that youth with mental health problems were restrained far more often than youth without mental health issues.<sup>153</sup> Specifically, at the Tryon Boys Residential Center, youth with mental health issues made up 50% of the population but accounted for 82% of the reported restraints.<sup>154</sup> At the Tryon Girls Residential Center, youth with mental health issues made up 48% of the population but accounted for 60% of the reported restraints.<sup>155</sup> As for evaluations and diagnoses, investigators found that mental health staff was not using approved standards.<sup>156</sup> Specifically, staff failed to take into account the current status of mental health issues, history, past medications, past treatment, and other relevant facts.<sup>157</sup>

The Department of Justice sent their findings to New York’s Juvenile Correctional Facilities’ Director, and New York is currently working to rectify the issues found during the Department of Justice’s investigation.<sup>158</sup> New York has a specified period of time to implement system-wide changes.<sup>159</sup> If New York fails to implement changes, then New York’s Juvenile Correctional Facilities run the risk of being sued by the Federal Department of Justice.<sup>160</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 13.

<sup>152</sup> *Id.* at 15.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 17.

<sup>158</sup> *See id.* at 31–32.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

*D. Ohio Department of Youth Services*

Since 2007, Ohio's Department of Youth Services has been the subject of investigations and a settlement agreement, stipulating that the conditions within Ohio's juvenile correctional facilities embrace a culture of violence.<sup>161</sup> In 2007, Department of Justice investigators found that Ohio's Department of Youth Services failed to: (1) protect children from harm; (2) give adequate mental health treatment; (3) investigate youth grievances; and (4) accommodate special education needs at Scioto Juvenile Correctional Facility in Delaware, Ohio.<sup>162</sup> Similar failures were found at Marion Juvenile Correctional Facility in Marion, Ohio.<sup>163</sup> After months of litigation, the United States Department of Justice and Ohio's Department of Youth Services reached a settlement.<sup>164</sup> In the stipulation for injunctive relief, the Department of Youth Services detailed their plan to better protect children from harm; provide more mental health services and medical care; significantly improve the grievance process; and increase rehabilitative programming for youth.<sup>165</sup> The stipulation also provided for a monitoring system to ensure that actual changes were being made.<sup>166</sup>

However, less than one year after the settlement problems still existed. Records show that there continued to be reports of excessive force and

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<sup>161</sup> *Ohio Youth Prisons Battle Staff, Youth Problems*, HUNTINGTON HERALD-DISPATCH, (May 20, 2009, 5:09 PM), <http://www.herald-dispatch.com/news/x726241763/Ohio-youth-prisons-battle-staff-youth-problems>; Letter from Wan J. Kim, Assistant Attorney General, to Ted Strickland, Governor of Ohio 1 (May 9, 2007), [http://www.justice.gov/crt/split/documents/scioto\\_findlet\\_5-9-07.pdf](http://www.justice.gov/crt/split/documents/scioto_findlet_5-9-07.pdf) (regarding the findings of the investigation of the Scioto Juvenile Correctional Facility, Delaware, Ohio) [hereinafter Letter from Wan J. Kim to Ted Strickland, Delaware].

<sup>162</sup> Letter from Wan J. Kim to Ted Strickland, Delaware, *supra* note 161, at 1–3.

<sup>163</sup> Letter from Wan J. Kim, Assistant Attorney General, to Ted Strickland, Governor of Ohio 3–15 (May 9, 2007), [http://www.justice.gov/crt/split/documents/marion\\_findlet\\_5-9-07.pdf](http://www.justice.gov/crt/split/documents/marion_findlet_5-9-07.pdf) (regarding the findings of the investigation of the Marion Juvenile Correctional Facility, Marion, Ohio).

<sup>164</sup> Stipulation for Injunctive Relief at 1, *United States v. Ohio*, No. 2:08-cv-475 (S.D. Ohio dismissed June 4, 2008), *available at* [http://www.justice.gov/crt/split/documents/us\\_v\\_ohio\\_scioto\\_marion\\_6-24-08.pdf](http://www.justice.gov/crt/split/documents/us_v_ohio_scioto_marion_6-24-08.pdf). The State represented that it would also implement additional remedial measures, according to then-pending litigation in *S.H. v. Stickrath*. *Id.* at 2.

<sup>165</sup> *Id.* at 5–17.

<sup>166</sup> *Id.* at 18–20.

violence.<sup>167</sup> From the 2008 settlement through May of 2009, there were hundreds of incidents of violence, and in sixty-three cases youth were hospitalized because of their injuries.<sup>168</sup> In September of 2009, the settlement monitor issued a report stating that the Department of Youth Services failed to plan for closing the Marion Juvenile Correctional Facility.<sup>169</sup> The federal monitor stated that violence continued in Ohio's youth facilities.<sup>170</sup> Despite federal intervention and an agreement on behalf of the State of Ohio that there are serious, ingrained problems in Ohio's juvenile correctional facilities, the culture of violence persists.

*E. Texas Youth Commission*

In March of 2007, the Department of Justice completed an investigation of a Texas Juvenile Correctional Facility—the Evins Regional Juvenile Center in Edinburg, Texas.<sup>171</sup> Pursuant to 42 U.S.C. § 1997 (Civil Rights Institutionalized Persons Act) and 42 U.S.C. § 14141 (Violent Crime Control & Law Enforcement Act), the Department of Justice has the “[a]uthority to seek a remedy for a pattern or practice of conduct that violates the constitutional or federal statutory rights of children in juvenile justice institutions.”<sup>172</sup> The inspection took place in September of 2006<sup>173</sup> because of allegations of serious youth injuries and terrible conditions.<sup>174</sup>

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<sup>167</sup> *Ohio Youth Prisons Battle Staff, Youth Problems*, *supra* note 161.

<sup>168</sup> *Id.*

<sup>169</sup> Jennifer Cuffman, *Report: DYS Failed to Plan Marion Closing*, MARIONSTAR.COM (Sept. 17, 2009), <http://pqasb.pqarchiver.com/marionstar/access/1863118711.html?FMT=ABS&FMTS=ABS:FT&date=Sep+17%2C+2009&author=JESSICA+CUFFMAN&pub=Marion+Star&edition=&startpage=A.1&desc=Report%3A+DYS+failed+to+plan+Marion+closing>.

<sup>170</sup> *Id.*

<sup>171</sup> Letter from Wan J. Kim, Assistant Attorney General, to Rick Perry, Governor of Tex. 1 (Mar. 15, 2007), [http://www.justice.gov/crt/split/documents/evins\\_findlet\\_3-15-07.pdf](http://www.justice.gov/crt/split/documents/evins_findlet_3-15-07.pdf) (regarding the findings of the investigation of Evins Regional Juvenile center, Edinburg, Texas).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See id.*; *TYC Statement on the Evins Regional Juvenile Center*, TEXAS YOUTH COMMISSION ARCHIVE (Jan. 27, 2005), [http://www.tyc.state.tx.us/archive/Press/012705\\_evins\\_statement.html](http://www.tyc.state.tx.us/archive/Press/012705_evins_statement.html); *Justice Department to Review Evins Facility*, TEXAS YOUTH COMMISSION ARCHIVE (June 23, 2006), [http://www.tyc.state.tx.us/archive/Press/062306\\_evins\\_justicedept.html](http://www.tyc.state.tx.us/archive/Press/062306_evins_justicedept.html).

The Evins Regional Juvenile Center is owned and operated by Texas through the Texas Youth Commission.<sup>175</sup> The Center houses up to 240 male juveniles between the ages of fifteen and twenty.<sup>176</sup> The Center has several separate buildings to accommodate different populations.<sup>177</sup> For instance, one building houses youth with substance abuse issues, while another building houses youth on psychotropic medications and other youth who are too young to be in the general population unit.<sup>178</sup> During the course of the investigation, Department of Justice investigators met with experts; interviewed youth, staff, and administration; and inspected documents.<sup>179</sup>

The number of youth-on-youth assaults at the Evins Center increased from 2005 through 2006 when investigations were conducted.<sup>180</sup> In 2005, there were 1,025 reported youth-on-youth assaults at the Evins Center. This number was expected to grow in 2006 because the number of reported youth-on-youth assaults for the first six months of 2006 was 568.<sup>181</sup> However, these numbers tended to not reflect the true amount of violence at the Evins Center because more assaults occurred than were reported to officials.<sup>182</sup> Youth who were interviewed by investigators stated that fights were a daily part of life at the Evins Center.<sup>183</sup>

The investigators found that violence at the Evins Center resulted from inadequate staffing due to the poor layout of the building; small numbers of juvenile corrections officers<sup>184</sup> and overpopulation;<sup>185</sup> inadequate programming;<sup>186</sup> inadequate classifications for youth;<sup>187</sup> and a dysfunctional reporting system that did not allow youth to adequately report problems to the Evins Center administration.<sup>188</sup>

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<sup>175</sup> Letter from Wan J. Kim to Rick Perry, *supra* note 171, at 2.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1.

<sup>180</sup> *See id.* at 4.

<sup>181</sup> *Id.*

<sup>182</sup> *See id.*

<sup>183</sup> *Id.* at 6.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 7.

<sup>186</sup> *Id.* at 8.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 9.

Regarding inadequate programming, the investigators noted that there was no incentive for youth to conform their behavior or to be compliant with institutional rules, and that boredom tended to increase fighting and youth-on-youth assaults.<sup>189</sup>

Regarding inadequate classifications, the investigators noted that the Evins Center was not following acceptable professional standards for housing youth.<sup>190</sup> Specifically, the investigators stated that the Evins Center was not taking certain factors—including age, offense, history of violence, gang affiliation, health, mental health, and institutional history—into consideration when deciding how to classify and place youth.<sup>191</sup> Instead, youth were being placed into whichever unit had an available bed.<sup>192</sup> It can be reasoned that youth who are older, have gang affiliations, or who are most dangerous should not be placed with youth who are younger and commit relatively minor crimes. These situations can cause more influential or defenseless youth to be the targets of youth-on-youth crime.

The investigators focused their efforts on determining the level of staff-on-youth violence and the adequacy of the procedural protections in place so that youth could report incidents to the Evins Center administration.<sup>193</sup> Investigators discovered numerous stories of youth being injured by staff.<sup>194</sup> In one scenario, investigators were told that staff slammed one youth into the ground, subsequently causing the youth to have a seizure and to need stitches.<sup>195</sup> These injuries are caused by an insufficient number of staff who are not properly trained or do not have experience dealing with delinquent youth.<sup>196</sup> Improper training and experience caused the staff members to rely on force and inappropriate restraints to deal with stressful or out-of-control situations.<sup>197</sup>

Additionally, youth who were assaulted by staff did not have an appropriate avenue for recourse. Investigators found that the review process at the Evins Center was beyond inadequate.<sup>198</sup> There were no

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<sup>189</sup> *Id.* at 8.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *See id.* at 9.

<sup>194</sup> *See id.* at 9–10.

<sup>195</sup> *Id.* at 10.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 12.

security cameras or videos to document what happened in the facility, and the administration did not evaluate restraining techniques used by staff.<sup>199</sup>

In order to correct these problems, investigators required remediation of the facility to ensure that (1) youth are protected from harm, (2) staff are trained before they are allowed to monitor youth, (3) a working and usable behavior modification system is in place, (4) there is more housing, (5) a better classification system is in place, (6) a working reporting system is in place and youth know how to access it, (7) guidelines are set and known to staff regarding the appropriate and acceptable level of force, and (8) staff are trained in how to use force.<sup>200</sup>

The Department of Justice filed a complaint against the state of Texas, under the guise of the Texas Youth Commission, in the United States District Court for the Southern District of Texas.<sup>201</sup> The complaint sought to enjoin the Texas Youth Commission from “depriving youth confined in the Evins Regional Juvenile Center (“Evins”) in Edinburg, Texas of rights, privileges or immunities secured or protected by the Constitution and laws of the United States.”<sup>202</sup> The complaint alleged, based on the Department of Justice’s investigation, that the Texas Youth Commission “engaged, and continue to engage, in a pattern or practice of [(1)] failing to ensure that youth at Evins [Center] are adequately protected from harm and from undue risk of harm from staff assault and youth-on-youth assault,” (2) “failing to provide youth at Evins [Center] adequate due process,” and (3) failing to make sure that youth “receive adequate rehabilitative treatment.”<sup>203</sup>

After receiving this complaint, the Texas Youth Commission and the Department of Justice finalized an agreed order that was filed in the District Court.<sup>204</sup> In this order, the State of Texas conceded that the conditions at the Evins Center necessitated action and that changes needed to be made.<sup>205</sup> The State of Texas, through the Texas Youth Commission, agreed to make changes to increase the quality of conditions at the Evins Center in order to comply with the Department of Justice and to make

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 13.

<sup>201</sup> Complaint at 1, *United States v. Texas*, No. 7:08 cv 00038 (S.D. Tex. agreed May 5, 2008), available at [http://www.justice.gov/crt/split/documents/evins\\_comp\\_2-1-08.pdf](http://www.justice.gov/crt/split/documents/evins_comp_2-1-08.pdf).

<sup>202</sup> *Id.* at 2.

<sup>203</sup> *Id.* at 4.

<sup>204</sup> Agreed Order at 1, *United States v. Texas*, No. 7:08 cv 00038 (S.D. Tex. agreed May 5, 2008), available at [http://www.tyc.state.tx.us/reform/agreed\\_order\\_DOJ\\_evins.pdf](http://www.tyc.state.tx.us/reform/agreed_order_DOJ_evins.pdf).

<sup>205</sup> *Id.* at 3–4.

certain that incarcerated juveniles' constitutional rights were being protected.<sup>206</sup> These remedial measures included protecting youth from harm;<sup>207</sup> protecting youth from undue restraints<sup>208</sup> and never using restraint as a mechanism for punishment;<sup>209</sup> implementing a system to report staff misconduct;<sup>210</sup> providing adequate health care;<sup>211</sup> documenting and tracking investigations, including "all incidents of use of force, staff-on-youth assault, youth-on-youth assault, inappropriate staff relationships with youth, [and] sexual misconduct between youth";<sup>212</sup> implementing a behavior management system;<sup>213</sup> increasing the number of staff in the facilities to "provide youth with adequate time spent in out-of-cell activities";<sup>214</sup> providing youth with due process rights so that they get a due process hearing if they are ever held for more than twenty-four hours in a secure unit;<sup>215</sup> and providing training for staff members on when and how to use restraints.<sup>216</sup>

In the order, the Department of Justice reserved the right to seek judicial action, including a federal takeover of the management of juvenile correctional facilities in Texas, if the Texas Youth Commission did not comply with the remedial measures set forth in the agreed order.<sup>217</sup>

The first compliance report was issued in November of 2008, just six months after the agreed order.<sup>218</sup> In this report, the Department of Justice determined whether or not the Texas Youth Commission was in compliance with the remedial measures set forth in the agreed order.<sup>219</sup>

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<sup>206</sup> *Id.* at 6.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 7.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 8.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 9.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 10.

<sup>217</sup> *Id.* at 14–15.

<sup>218</sup> Compare Compliance Report at 35, *United States v. Texas*, No. 7:08 cv 00038 (S.D. Tex. agreed May 5, 2008), available at [http://www.justice.gov/crt/split/documents/evins\\_compreport.pdf](http://www.justice.gov/crt/split/documents/evins_compreport.pdf), with Agreed Order at 19, *United States v. Texas*, No. 7:08 cv 00038 (S.D. Tex. agreed May 5, 2008), available at [http://www.tyc.state.tx.us/reform/agreed\\_order\\_DOJ\\_evins.pdf](http://www.tyc.state.tx.us/reform/agreed_order_DOJ_evins.pdf).

<sup>219</sup> Compliance Report at 3, *United States v. Texas*, No. 7:08 cv 00038.

The Department of Justice determined that Texas had fully complied with a few remedial measures—including making sure that children with injuries received immediate medical attention<sup>220</sup>—but Texas was only in partial compliance with the rest of the remedial measures.<sup>221</sup>

#### *F. Lack of Suicide Prevention*

From 1995 through 1999, there were 110 suicides in juvenile correctional facilities.<sup>222</sup> Non-violent offenders made up 70% of those who committed suicide, with 34% being status offenders, probation violators, and public order offenders.<sup>223</sup> Analyses of those children who committed suicide in juvenile correctional facilities show that an alarming number had been confined in isolation prior to their deaths.<sup>224</sup> Approximately 62% of those who committed suicide had a history of being confined in their institution, and 50% were in confinement at the time of their death.<sup>225</sup> Further, some of the precipitating factors of juvenile suicides in correctional facilities included being bound over to adult court; being moved to a more secure facility; experiencing the death of a family member; failing at treatment; experiencing another suicide in the institution; not being able to see family members or parents; and experiencing a birthday, ridicule, or the loss of an important relationship.<sup>226</sup>

Of course, juvenile suicides occur outside of juvenile correctional facilities.<sup>227</sup> However, many of the precipitating factors are unique to the institution atmosphere and present another problem with using institutionalization as a means of treating juvenile offenders.<sup>228</sup>

#### *G. Recidivism*

As if the violence and abuse at juvenile correction facilities are not horrific enough, the likelihood that children will return to these facilities is very high. Juvenile recidivism rates across this country clearly prove that

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<sup>220</sup> *Id.* at 10.

<sup>221</sup> *Id.* at 3.

<sup>222</sup> Lindsay M. Hayes, *Characteristics of Juvenile Suicide in Confinement*, JUV. JUST. BULL. (Off. Juv. Just. & Delinq. Prevention, U.S. Dept. Just.), Feb. 2009 at 1.

<sup>223</sup> *Id.* at 3–4.

<sup>224</sup> *Id.* at 6 (defining room confinement as a “behavioral sanction imposed on youth that restricted movement for varying amounts of time”).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 11.

<sup>227</sup> *Id.* at 1.

<sup>228</sup> *See id.*

institutionalization is not reducing juvenile crime or making communities safer. For instance, in 1994 South Carolina had a 71% recidivism rate.<sup>229</sup> Minnesota reported that 50%–75% of males re-appeared before the juvenile court or were arrested as adult offenders within two years of being released from Minnesota institutions.<sup>230</sup> In Hawaii, 82% of juvenile offenders were re-arrested within two years between the years of 1995 and 1999.<sup>231</sup> Current and prior research states that “the longer a youth spend[s] time in a juvenile institution, the higher the recidivism rate.”<sup>232</sup> The recidivism rate is likely to increase, and the chance of future criminal conduct is greatly impacted by past incarceration, even more so than by family problems and gang affiliations.<sup>233</sup>

#### *H. Law and Litigation*

In 1982, in *Youngberg v. Romeo*,<sup>234</sup> the United States Supreme Court found that incarcerated individuals have the right to be free from physical abuse and assaults from staff and other youth; free from excessive force and unreasonable restraints; and have the right to adequate medical care, including mental health treatment and suicide watches.<sup>235</sup> Consequently, in 1994, Congress passed 42 U.S.C. § 14141, allowing the United States Attorney General to bring suit against state institutions who take constitutional protections away from juveniles housed in juvenile correctional facilities.<sup>236</sup>

Further, the Eighth Amendment requires that the state must provide its detainees with basic human necessities, including protecting them from harm—from both staff and other inmates.<sup>237</sup> The corrections officers at the juvenile detention centers have a duty to uphold the Eight Amendment.<sup>238</sup> The Department of Justice found that officials at the Evins Center in Texas violated the Constitution “when they act[ed] ‘with conscious or callous indifference to their duty to protect a prisoner from others.’”<sup>239</sup> The

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<sup>229</sup> SHELDEN, DELINQUENCY, *supra* note 78, at 376.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 376–77.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 372.

<sup>234</sup> 457 U.S. 305 (1982), *remanded to* 687 F.2d 33 (3d Cir. 1982).

<sup>235</sup> *See id.*; Letter from Loretta King to David A. Paterson, *supra* note 133, at 4–5.

<sup>236</sup> *Id.*

<sup>237</sup> Letter from Wan J. Kim to Rick Perry, *supra* note 171, at 3.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

Department of Justice concluded that it constitutes cruel and unusual punishment when the level of violence in a juvenile correctional facility becomes so high that youth are not adequately protected from other youth.<sup>240</sup> Similarly, the Eighth Amendment protects incarcerated youth from “unwarranted or excessive use of restraints.”<sup>241</sup>

Children are not learning.<sup>242</sup> Children are not getting help.<sup>243</sup> Children are being hurt, beaten, and abused.<sup>244</sup> They are being subjected to levels of violence at the hands of the State.<sup>245</sup> These children’s rights to be free from harm are being violated.<sup>246</sup> They are surely not being rehabilitated.<sup>247</sup> But the saddest news of all—based on current recidivism rates—is that they will commit additional criminal acts and be back in the system that failed them once more.<sup>248</sup> However, there are models that are providing a framework for change so that the juvenile justice system can get back to its rehabilitative roots.<sup>249</sup>

#### IV. THE RESTORATIVE JUSTICE ALTERNATIVE

“With juvenile justice in particular, the debate . . . has see-sawed between the justice model and the welfare model. See-sawing between retribution and rehabilitation has got us nowhere.”<sup>250</sup> The problems highlighted above in juvenile justice facilities across the country prove that the retributive approach is not working and is not furthering the goals of juvenile justice.<sup>251</sup> Instead, we are left with children who are jaded and fearful, and recidivism rates are too high. Any alternative system has to address the current problems of juvenile correctional facilities: a culture of violence, excessive force, and punishment; an overuse of isolation; inadequate programming and education; and inadequate mental health

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> See *supra* text accompanying notes 84–86.

<sup>243</sup> See *supra* Part III.A–III.E.

<sup>244</sup> See *supra* Part III.A–III.E.

<sup>245</sup> See *supra* Part III.A–III.E.

<sup>246</sup> See Letter from Loretta King to David A. Paterson, *supra* note 133, at 4.

<sup>247</sup> See *supra* Part III.G.

<sup>248</sup> See discussion *supra* Part III.G.

<sup>249</sup> See discussion *infra* Part IV.

<sup>250</sup> John Braithwaite, *Restorative Justice and a Better Future*, in *A RESTORATIVE JUSTICE READER* 83, 85–86 (Gerry Johnstone ed., 2003).

<sup>251</sup> See discussion *supra* Part III.

services for those who are most in need.<sup>252</sup> However, there is an alternative that solves these problems, and it involves a restorative and holistic approach to rehabilitating children.

Restorative justice provides a centralized approach to healing and restoring the three participants who are always touched by a crime—the victim, the offender, and the community.<sup>253</sup> Restorative justice gives youth the opportunity “to take responsibility for their actions, give back to the community, and continue the rehabilitation process.”<sup>254</sup> The restorative justice model includes a component to reintegrate the youth back into the community as a law-abiding citizen and productive community member.<sup>255</sup> There are several different approaches within the restorative model, including victim-offender mediations,<sup>256</sup> family group conferences, and restorative justice conferences.<sup>257</sup> There are several model programs that have been set-up around the country that exemplify the restorative justice principles within the juvenile justice system.<sup>258</sup> At the core, however, is the belief that children should not be locked up in adult-like prisons.<sup>259</sup>

There is also a need and concern for safety—of the youth and the community.<sup>260</sup> Therefore, high-security incarceration should only be used for those juveniles who have committed violent offenses or who are at a high risk to cause harm to themselves or to others. A program in Santa Cruz, California follows this approach.<sup>261</sup> Only high-risk offenders are placed in juvenile detention centers<sup>262</sup> because “[c]hildren should be confined only when they present a clear threat to public safety.”<sup>263</sup> The

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<sup>252</sup> SHELDEN, *DELINQUENCY*, *supra* note 78, at 371.

<sup>253</sup> Braithwaite, *supra* note 250, at 86.

<sup>254</sup> DEITCH ET AL., *supra* note 13, at 64.

<sup>255</sup> Mears, *supra* note 42, at 94–95.

<sup>256</sup> *See* Butts, *supra* note 1, at 11–13 (allowing young offenders to meet their victims in the company of family members).

<sup>257</sup> *Id.* (teaching juveniles about how their behavior affects others while looking for a way to repair the harm done).

<sup>258</sup> *See infra* Part IV.A.

<sup>259</sup> Marian Wright Edelman, *Promising Models for Reforming Juvenile Justice Systems*, HUFFINGTON POST (Sept. 8, 2009, 9:40 AM), [http://www.huffingtonpost.com/marian-wright-edelman/promising-models-for-refo\\_b\\_279204.html](http://www.huffingtonpost.com/marian-wright-edelman/promising-models-for-refo_b_279204.html) [hereinafter Edelman, *Promising Models*].

<sup>260</sup> *See* DEITCH ET AL., *supra* note 13, at 60.

<sup>261</sup> Edelman, *Promising Models*, *supra* note 259.

<sup>262</sup> *Id.*

<sup>263</sup> Editorial, *Juvenile Injustice*, N.Y. TIMES, Jan. 6, 2010, at A22.

rest of the children are placed in community-based detention where they are still connected with their families—their support groups.<sup>264</sup>

Another example of restorative principles in action is the Models for Change Initiative, which includes Illinois, Louisiana, Pennsylvania, Washington, and twelve other partner states.<sup>265</sup> The Initiative highlights the differences between adults and children, and promotes fairness in all aspects of the program.<sup>266</sup> The Initiative emphasizes individual strengths and responsibility while collaborating with mental health and substance abuse professionals and ensuring aftercare for juveniles when they are released from state supervision.<sup>267</sup>

New York City programs are trying to decrease their reliance on detention.<sup>268</sup> These programs—such as the Collaborative Family Initiative, Risk Assessment, and Re-entry Supports Program—focus on using the family as a support mechanism; providing services for a successful reintegration back into the community; assessing the likelihood of recidivism; and giving in-depth information about the court process.<sup>269</sup> Gladys Carrion, head of New York’s Office of Children and Family Services, has faith in these alternative approaches.<sup>270</sup> She asked the state legislature to close many of the juvenile prisons so that more therapeutic facilities located within communities can be utilized instead.<sup>271</sup>

Although these programs are on the right track, they each present a small piece of the restorative justice mission. The remainder of this section discusses two exemplary approaches—one in action and one in theory—to show that reliance on violence, force, and punishment does not create change or rehabilitate. As Dr. Martin Luther King Jr. stated, “Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars . . . [h]ate cannot drive out hate: only love can do that.”

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<sup>264</sup> Edelman, *Promising Models*, *supra* note 259.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> Neil Hernandez, *For Juveniles, Alternatives to Incarceration*, *GOTHAM GAZETTE* (June 2, 2008), <http://live.gothamgazette.com/article/iotw/20080602/200/2547>.

<sup>269</sup> *Id.*

<sup>270</sup> Editorial, *supra* note 263.

<sup>271</sup> *Id.*

A. *Missouri Department of Youth Services*

The exemplar, hailed as the national model, is Missouri's state juvenile justice system—Missouri's Department of Youth Services.<sup>272</sup> This model works off of the philosophy that youth have potential and are not just “lost causes.”<sup>273</sup> A youth at Waverly Youth Center, a juvenile center for boys in Missouri, stated, “In my town, I was labeled the troublemaker . . . here, everybody cares for you.”<sup>274</sup> This system not only shows that implementation is feasible, but also successful with recidivism rates for juvenile offenders at only 8%,<sup>275</sup> down from 11% in 2001 through 2002.<sup>276</sup> If the recidivism rate alone was not enough of a reason to applaud this model approach, the savings warrant a standing ovation. Comparable states spend \$140 per youth per day in juvenile correctional facilities, whereas Missouri spends just \$94 per youth per day.<sup>277</sup> In a year, successfully rehabilitating a youth costs about \$50,000 or half of what other states spend.<sup>278</sup> Missouri Department of Youth Services Director Tim Decker stated, “Other programs put their money into fences and isolation, cells and security hardware . . . . We put our money into surrounding these young people with caring adults who help them learn the kinds of skills that they're going to need to be successful.”<sup>279</sup>

Walking into a center in Missouri, one would not think they were walking into a juvenile correctional facility—the walls are painted with bright colors, and kids are housed with their peers in open, college-like dorms.<sup>280</sup> There are no restraints and no handcuffs.<sup>281</sup> Within these walls, there is no stigmatization—“the kind of shaming that creates outcasts . . . is disrespectful, [and] humiliating.”<sup>282</sup> One of the biggest changes that

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<sup>272</sup> Edelman, *Promising Models*, *supra* note 259.

<sup>273</sup> *Id.*

<sup>274</sup> Chris Cuomo et al., *Missouri's New Take on Juvenile Justice*, ABC NEWS (Sept. 8, 2009), <http://abcnews.go.com/GMA/missouris-juvenile-justice-system/story?id=8511600>.

<sup>275</sup> Edelman, *Promising Models*, *supra* note 259.

<sup>276</sup> DEITCH ET AL., *supra* note 13, at 67–68.

<sup>277</sup> *Id.*

<sup>278</sup> Cuomo et al., *supra* note 274.

<sup>279</sup> *Id.*

<sup>280</sup> Press Release, Primetime: Crime, Is Missouri's Radically Different Approach to the Juvenile Justice System Working? (Sept. 9, 2009), <http://blogs.abcnews.com/pressroom/2009/09/is-missouris-radically-different-approach-to-the-juvenile-jail-system-working-on-primetime-crime-wed.html>.

<sup>281</sup> DEITCH ET AL., *supra* note 13, at 67–68.

<sup>282</sup> Braithwaite, *supra* note 250, at 85.

Missouri made to its juvenile system was the look and feel of its facilities.<sup>283</sup> The state traded in its giant prison-like facility, capable of housing 2,500 juveniles, for dozens of small dorm-like facilities with no more than twelve juveniles at each facility.<sup>284</sup> In these facilities, there are no orange jumpsuits, there are no barbed wire fences or isolation rooms, and there are no corrections officers or armed guards.<sup>285</sup> Instead, kids wear their own clothes—jeans and t-shirts;<sup>286</sup> they live in dorm rooms with carpeting, couches, and pillows,<sup>287</sup> and the kids are surrounded by caring adults, who often give them hugs for their successes.<sup>288</sup>

The focus in these facilities is on small teams that help each other and give support to get to the root of the juvenile's problems.<sup>289</sup> These small family-like teams are crucial to a better treatment experience for juveniles. In fact, "[m]ost researchers believe—and several states have proved—that small groups more effectively foster the human connections troubled youths need to turn around their lives."<sup>290</sup> Aside from individualized treatment; education,<sup>291</sup> job training, and life skills make up the Missouri Department of Youth Services' curriculum.<sup>292</sup> Success, and ultimately release, is determined through progress, hard work, and good behavior.<sup>293</sup> Director Decker stated, "This approach is much tougher than young people spending their time sitting in a cell . . . . This is far more rigorous, and for a young person to . . . complete this program takes a great deal of effort on

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<sup>283</sup> See Cuomo et al., *supra* note 274.

<sup>284</sup> Marian Wright Edelman, *Missouri's Humane and Sensible Approach to Juvenile Justice*, HUFFINGTON POST, [http://www.huffingtonpost.com/marian-wright-edelman/missouris-humane-and-sens\\_b\\_91853.html](http://www.huffingtonpost.com/marian-wright-edelman/missouris-humane-and-sens_b_91853.html) (last visited Sept. 20, 2010) [hereinafter Edelman, *Missouri's Humane*]; Stephanie Chen, *Teen Offenders Find a Future in Missouri*, CNN.COM (Aug. 27, 2009, 10:18 AM), <http://www.cnn.com/2009/CRIME/08/25/missouri.juvenile.offenders/index.html>.

<sup>285</sup> Edelman, *Missouri's Humane*, *supra* note 284.

<sup>286</sup> Chen, *supra* note 284.

<sup>287</sup> Edelman, *Missouri's Humane*, *supra* note 284.

<sup>288</sup> See Cuomo et al., *supra* note 274.

<sup>289</sup> Press Release, *supra* note 280.

<sup>290</sup> SHELDEN, *DELINQUENCY*, *supra* note 78, at 373 (quoting Jenifer Warren, *State Youth Prisons on Road to Rehab*, L.A. TIMES, Nov. 17, 2004, at A36).

<sup>291</sup> See Chen, *supra* note 284. Education is considered extremely important. See *id.* In fact, more than 370 juveniles graduated from high school while in the custody of Missouri's Department of Youth Services in 2009. *Id.* Many graduates continue to go on to college. *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

their part.”<sup>294</sup> Often times, a more “holistic” approach tends to appear more “soft on crime,”<sup>295</sup> but Missouri’s system has received praise from many people, even “tough on crime” conservatives such as John Ashcroft.<sup>296</sup> It is hard to appear “soft on crime” when recidivism rates prove success.

Another integral part of Missouri’s system is the location of its facilities. Often, when juveniles are committed to institutions, they are sent to facilities hundreds of miles from their communities, homes, and families.<sup>297</sup> However, Missouri’s system houses youth “as close to home as possible in order to involve parents and community groups in the therapeutic process.”<sup>298</sup> In fact, no child is more than two hours from their family or community.<sup>299</sup> Kids are able to remain in contact with their families and communities so that reintegration is more successful.<sup>300</sup> Missouri’s Department of Youth Services also buffers the re-entry transition by providing more educational opportunities, job training, and drug treatment opportunities when the child is released.<sup>301</sup> Missouri’s system shows that providing options and intensive services is key to reducing recidivism rates.<sup>302</sup>

Many of the juvenile offenders in Missouri’s system are non-violent offenders;<sup>303</sup> however, those who are violent offenders are not excluded.<sup>304</sup> These juveniles are placed in “gated facilities” but are given the same small-group atmosphere, rehabilitation, counseling, and schooling that

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<sup>294</sup> Cuomo et al., *supra* note 274.

<sup>295</sup> *See id.*

<sup>296</sup> Chen, *supra* note 284.

<sup>297</sup> *See, e.g.*, Letter from Isabelle Katz Pinzler to Mike Foster, *supra* 119, at 9.

<sup>298</sup> Editorial, *supra* note 263.

<sup>299</sup> Edelman, *Missouri’s Humane*, *supra* note 284.

<sup>300</sup> *See* Letter from Isabelle Katz Pinzler to Mike Foster, *supra* 119, at 9 (“[L]imitations on mail, telephone access, and visitation estrange juveniles from their families instead of strengthening family ties that increase the likelihood that the juvenile will succeed after release.”).

<sup>301</sup> Edelman, *Missouri’s Humane*, *supra* note 284.

<sup>302</sup> SHELDEN, DELINQUENCY, *supra* note 78, at 371 (citing Jenifer Warren, *Shut Down Youth Prisons, Expert Says*, L.A. TIMES, Sept. 22, 2004, at B8).

<sup>303</sup> *See* Chen, *supra* note 284.

<sup>304</sup> *Id.*

their non-violent counterparts receive.<sup>305</sup> These juveniles also complete community service projects as part of their commitments.<sup>306</sup>

Missouri's model lays the foundation for the implementation of a well-balanced approach to rehabilitating children who have committed crimes. This system demonstrates that small cohorts of children learning to rely on and trust each other; living in small facilities close to their community and familial support groups; and focusing on educational opportunities, programming for life skills, learning to avoid negative influences, and how to handle difficult situations will decrease recidivism rates and help children become better adults.<sup>307</sup> However, Missouri's model lacks community and victim support.<sup>308</sup> Adding a restorative component to Missouri's model, such as the one detailed below, allows children to take responsibility for their actions and learn from their mistakes while giving the community and the victim an opportunity to heal and forgive.

#### *B. Balanced and Restorative Justice*

In 1992, the Annie E. Casey Foundation launched a reform movement to decrease the number of juvenile detention facilities and divert money to more effective services.<sup>309</sup> Specifically, the Foundation sought programs that provided a comprehensive continuum of services, involved youth and their families, and provided humane and fair treatment.<sup>310</sup> Through a grant from the Foundation, the Office of Juvenile Justice and Delinquency Prevention presented a request for proposals for alternative programs that would more effectively rehabilitate youth.<sup>311</sup> Specifically, the Office of Juvenile Justice and Delinquency Prevention sought "to develop a strategic approach for using restitution, reparative sanctions and related approaches as 'catalysts for change' in juvenile justice systems."<sup>312</sup>

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<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> See discussion *supra* Part IV.A.

<sup>308</sup> See discussion *supra* Part IV.

<sup>309</sup> Krisberg, *supra* note 11, at A4.

<sup>310</sup> *Id.*

<sup>311</sup> GORDON BAZEMORE ET AL., BALANCED AND RESTORATIVE JUSTICE FOR JUVENILES: A FRAMEWORK FOR JUVENILE JUSTICE IN THE 21<sup>ST</sup> CENTURY 3 (1997), available at <http://www.ncjrs.gov/pdffiles/framwork.pdf>.

<sup>312</sup> *Id.*

One of the proffered proposals focused on restorative justice from leading scholars on the topic.<sup>313</sup> The restorative justice approach provides “a strong point of view and a value-driven vision for a more effective, fair and humane juvenile justice system.”<sup>314</sup> The Balanced and Restorative Justice Approach centers on rehabilitation where youth come to terms with the harm done and are given a meaningful chance to make reparations through non-monetary means.<sup>315</sup>

In the current system, youth adjudicated delinquent are determined to be offenders and not viewed as kids with serious needs.<sup>316</sup> However, within the restorative framework, youth are much more than their crime and are given the opportunity to define themselves.<sup>317</sup> This balanced approach encompasses three goals: accountability, competency development, and community protection.<sup>318</sup>

### *1. Accountability*

In order to hold youth accountable for their actions and develop competency, youth are encouraged to make amends for the harm they have caused by repaying the loss to the victim and by restoring the community.<sup>319</sup> “Restorative justice offers a coherent alternative to the increasingly retributive philosophical focus of the juvenile court sanctioning process and moves beyond the limits of individual treatment based on the ‘medical model.’”<sup>320</sup> In restorative justice, youth assume responsibility and repair harm, as contrasted with punishment as the only accountability measure; youth are defined by their future opportunities and potential, as contrasted with being defined as an offender with problems; and reconciliation is encouraged, as contrasted with pain and violence.<sup>321</sup>

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<sup>313</sup> See RESTORATIVE JUSTICE ONLINE, <http://www.restorativejustice.org/> (last visited Sept. 27, 2010) (providing numerous articles written by Gordon Bazemore and Mark Umbreit regarding restorative justice).

<sup>314</sup> BAZEMORE ET AL., *supra* note 311, at 3.

<sup>315</sup> Krisberg, *supra* note 11, at A4.

<sup>316</sup> BAZEMORE ET AL., *supra* note 311, at 5.

<sup>317</sup> See *id.* at 27.

<sup>318</sup> *Id.* at 11.

<sup>319</sup> *Id.* at 13. It is the responsibility of the community to make certain that youth can manageably handle the restoration. *Id.* Often, youth are allowed to repay the victim through community service rather than through monetary means. *Id.*

<sup>320</sup> *Id.* at 16.

<sup>321</sup> *Id.* at 15.

These restorative measures support rehabilitation with an emphasis on social justice.<sup>322</sup>

### 2. *Competency Development*

In the current system, children's weaknesses are identified and remedial measures are taken to correct those weaknesses.<sup>323</sup> However, in the restorative justice model, children's strengths are identified and are used to develop competency.<sup>324</sup> Traditionally, children would not be considered competent until their weaknesses were corrected; however, the restorative approach "assumes that most [children] with the right supervision and support can begin immediate involvement in some valued activity."<sup>325</sup> Counseling is still important to a juvenile's successful rehabilitation, but counseling alone does not allow the child to practice their competency skills.<sup>326</sup> When children are allowed to practice skills in a controlled environment, such as in a juvenile facility, they will be better prepared and better able to use their skills upon release.<sup>327</sup> Active participation in valued activities begins to change the community's view of a child.<sup>328</sup> When a young offender successfully participates in a productive activity, such as community service, schooling, or a community group, they are changing decision-making skills and are viewed as a productive citizen and not as a juvenile offender.<sup>329</sup> Competency not only enhances juveniles' reputations but also changes their own self-image, which is important for a successful reintegration into the community and end to criminal behavior.<sup>330</sup>

### 3. *Community Protection*

Even though statistics, reports, and analysis reveal the success of restorative justice as a successful alternative to incarceration in adult-like prisons, it is often hard for the public at-large to understand restorative

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<sup>322</sup> *Id.* at 17.

<sup>323</sup> *Id.* at 27.

<sup>324</sup> *Id.* (defining competency as "the capacity to do something well that others value").

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 28.

<sup>327</sup> *See id.* at 28–29 (practicing competency through aiding teachers, giving presentations, serving as conflict mediators, doing community service, and doing peer counseling).

<sup>328</sup> *Id.*

<sup>329</sup> *See id.*

<sup>330</sup> *Id.*

justice as something other than a seemingly “soft on crime” approach.<sup>331</sup> It is the states’ obligation to demonstrate to the public that restorative justice places accountability on kids; provides consequences for poor behavior; and rehabilitates and reintegrates offenders back into the community as law-abiding and productive citizens, all while reducing recidivism rates and decreasing costs.<sup>332</sup> The restorative justice framework does not advocate for freeing serious or extremely violent offenders to the streets. However, the restorative framework is appropriate for these offenders’ rehabilitation as well because “restorative justice policies and practices would be employed as part of a systemic response to even the most serious offenders as well as in response to first[-time] offen[ders].”<sup>333</sup> Community protection measures are central to the restorative justice mission and “addresses the need to build . . . communities in which most conflicts which lead to crime can be peacefully resolved and the cycle of violence broken.”<sup>334</sup> The public has a right to be safe, but the public also has a responsibility to promote healing and restoration.<sup>335</sup> Community members are encouraged to participate in restorative conferences with the youth and to make preparations for the youth to successfully transfer back into the community.<sup>336</sup> Community member volunteers can act as guardians to youth upon reintegration to make sure they are engaging in structured, productive activity while developing a bond with their community.<sup>337</sup> In this way, children are held accountable for their actions and are expected to develop competency skills for making better decisions, but the community is also held accountable for its own safety, prevention of violence, and helping children and the community heal.

### C. *How Would This Work?*

In a typical juvenile court/incarceration setting, a child who shot bullets through a neighbor’s home or vandalized a community building

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<sup>331</sup> See Bruce P. Archibald, *Let My People Go: Human Capital Investment and Community Capacity Building Via Meta/Regulation in a Deliberative Democracy—a Modest Contribution for Criminal Law and Restorative Justice*, 16 CARDOZO J. INT’L & COMP. L. 1, 15 (2008).

<sup>332</sup> BAZEMORE ET AL., *supra* note 311, at 11.

<sup>333</sup> *Id.* at 19. Missouri advocates for similar treatment of violent and non-violent offenders. See Chen, *supra* note 284.

<sup>334</sup> BAZEMORE ET AL., *supra* note 311, at 19.

<sup>335</sup> *Id.* at 32.

<sup>336</sup> See *id.*

<sup>337</sup> *Id.*

would be sent to a secure institution, far from his family, friends, and community, for an indeterminate period of time.<sup>338</sup> This youth would more than likely face many of the dangers described in Part III of this article.<sup>339</sup> If the child is abused or hurt while incarcerated, he will be more likely to withdraw from his surroundings and become untrusting of authority figures.<sup>340</sup> When he is released from the juvenile facility, he will expect nothing from the community, and the community will expect nothing from him.<sup>341</sup> His victim will fear his return.<sup>342</sup> Based on recidivism rates, as demonstrated in Part III(A) and III(G),<sup>343</sup> this child will more than likely commit another offense and will again find himself back in the juvenile system or in the adult system.<sup>344</sup>

However, the restorative justice system can provide a very different outcome for this same child. In this setting, the child who shot bullets through a neighbor's home or vandalized a community building would be sent to a community facility with peers of his own age.<sup>345</sup> This facility would be located in his community, near his family.<sup>346</sup> This child would participate in specialized treatment conducted by highly trained, caring professionals with emphasis placed on education and competency development.<sup>347</sup>

In order to practice his competency skills, the child would be encouraged to get in contact with his community, and possibly the victim.<sup>348</sup> A meeting with the victim would give the child an opportunity to learn how his crimes have affected the victim and the community at

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<sup>338</sup> Compare *supra* Part III (describing the current approach to juvenile justice), with *supra* Part IV (describing an alternative child-centered approach to juvenile justice).

<sup>339</sup> See *supra* Part III.

<sup>340</sup> Letter to the Editor, *Right Way to Treat Youthful Offenders*, 242 N.Y. L.J. 6, 6 (2009) ("Trauma, distrust, and recidivism are predictable end results of a system that mistreats children and models abusive behavior.").

<sup>341</sup> See BAZEMORE ET AL., *supra* note 311, at 22.

<sup>342</sup> See *id.* at 36 (allowing victims to provide input on continuing safety concerns and fear).

<sup>343</sup> See *supra* Part III.A, III.G.

<sup>344</sup> See *supra* Part III.G.

<sup>345</sup> See DEITCH ET AL., *supra* note 13, at 65. Compare *supra* Part III (describing the current approach to juvenile justice), with *supra* Part IV (describing an alternative child-centered approach to juvenile justice).

<sup>346</sup> See Editorial, *supra* note 263.

<sup>347</sup> See *supra* Part IV.B.2.

<sup>348</sup> BAZEMORE ET AL., *supra* note 311, at 36.

large.<sup>349</sup> A plan is developed for the youth to make amends.<sup>350</sup> Oftentimes, this includes the youth fixing broken windows and painting vandalized signs. Victims are not required to attend restorative justice meetings, but the youth is encouraged to reach out to the community and restore the balance that his crime disrupted.<sup>351</sup>

Importantly, violence and fear would not be a part of this youth's daily life. He would learn to trust authority figures and depend on them for support.<sup>352</sup> When this youth is released from the community facility, he will expect the community's support, and the community will expect him to be a productive citizen.<sup>353</sup>

## V. CONCLUSION

"We can and must do more for our families and our young people by investing in programs that reduce the use of detention while still ensuring public safety, and that offer the promise of more positive and meaningful outcomes for juveniles."<sup>354</sup> Although many children have suffered at the hands of justice in juvenile correctional facilities and detention centers across the country,<sup>355</sup> there is hope that others will not fall victim to the same fate.<sup>356</sup> As a society, we have failed our youth by conveying the message that their offense is more important and determinative than their potential as a human being.

The Balanced and Restorative Justice mission can be implemented within a value framework, which prioritizes restoration and returns the juvenile justice system to its original goal of rehabilitation.<sup>357</sup> Combining the Missouri model with the restorative justice approach provides the opportunity for youth to take control of what has happened in their lives and make amends without fear of retribution, violence, or abuse.

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<sup>349</sup> *Id.* at 47.

<sup>350</sup> *Id.*

<sup>351</sup> See *supra* Part IV.B.2. If a restorative meeting is possible, it is likely that the child's victim would not fear the child's return to the community.

<sup>352</sup> Peter C. Yeager, *Law Versus Justice: From Adversarialism to Communitarianism*, 29 *LAW & SOC. INQUIRY* 891, 904 ("[R]estorative justice conferences . . . can increase trust in authorities.").

<sup>353</sup> See *id.*; *supra* Part IV.B.3.

<sup>354</sup> Hernandez, *supra* note 268.

<sup>355</sup> See *supra* Part III.

<sup>356</sup> See *supra* Part IV.

<sup>357</sup> BAZEMORE ET AL., *supra* note 311, at 13.

