

## **The Rights of Delinquents in Juvenile Court: Why Not Equal Protection?**

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The United States Supreme Court has decided eight cases involving the constitutional rights of children charged with crime in juvenile court.<sup>1</sup> The result is a mixed bag-win some, lose some. Thus far the Court has applied minimal due process constraints to waiver hearings,<sup>2</sup> and has determined that at the adjudicatory stage of a delinquency proceeding in which guilt or innocence of the charges is determined,

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<sup>1</sup> Schall v. Martin, 467 U.S. 253 (1984) (upholding a state law permitting preventive detention of accused delinquents if there is a serious risk the juvenile would commit a crime before his or her adjudicatory hearing); Fare v. Michael C., 442 U.S. 707, 725 (1979) (holding that a juvenile's request to speak with his probation officer is not a per se invocation of the juvenile's *Miranda* right to counsel nor his right to be free from self incrimination; using the "totality of the circumstances" test that is used for adults, the Court found the juvenile had voluntarily waived his rights); Swisher v. Brady, 438 U.S. 204 (1978) (finding that Maryland's practice of allowing prosecutors to appeal not guilty recommendations made by referees to juvenile court judges, who, without hearing any evidence, could modify or reverse the referee's decision did not violate a juvenile's right to be free from double jeopardy); Breed v. Jones, 421 U.S. 519 (1975) (unanimously finding a violation of the double jeopardy clause when a juvenile was prosecuted as an adult in criminal court subsequent to a juvenile court hearing regarding the same charge); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (plurality opinion) (deciding that due process does not require a jury during the adjudicative stage of juvenile delinquency hearings); *In re Winship*, 397 U.S. 358, 368 (1970) (ruling that "the constitutional safeguard of proof beyond a reasonable doubt is . . . required during the adjudicatory stage of a delinquency proceeding . . ."); *In re Gault*, 387 U.S. 1, 30 (1967) (determining that juvenile court adjudications of delinquency "must measure up to the essentials of due process and fair treatment," and requiring the application of the following constitutional safeguards during the adjudicatory hearing: notice of charges, right to counsel, the rights of confrontation and cross examination, and the privilege against self incrimination); *Kent v. United States*, 383 U.S. 541 (1966) (mandating procedural safeguards for juveniles being considered for waiver to adult court: the right to a hearing, counsel who can examine probation files, and a statement of reasons for the waiver).

*Cf.* *New Jersey v. T.L.O.*, 469 U.S. 325, 333, (1985) (deciding that the Fourth Amendment's "prohibition on unreasonable search and seizures applies to searches conducted by public school officials"). The *T.L.O.* Court, however, also found that school officials were not required to obtain a search warrant before searching students under their authority, and that the standard to be used in determining the legality of a search was merely "reasonableness under all the circumstance." *Id.* at 341. Initially, certiorari was granted in *T.L.O.* to examine whether the exclusionary rule applied to searches by school officials. *Id.* at 327. However, before this issue was decided, the Court ordered re-argument on the substantive issue of the applicability of the Fourth Amendment to searches by school officials. *New Jersey v. T.L.O.*, 468 U.S. 1214 (1984). Thus, the case did not determine whether the exclusionary rule applied in delinquency cases. 469 U.S. at 333 n.3. See Irene M. Rosenberg, *A Door Left Open: Applicability of the Fourth Amendment Exclusionary Rule to Juvenile Court Delinquency Hearings*, 24 AM. J. CRIM. L. 29 (1996) (concluding that although most states would exclude evidence illegally seized from students by police officers, they would not do so for evidence illegally seized by school officials).

<sup>2</sup> *Kent*, 383 U.S. at 560-62.

juveniles are entitled to notice,<sup>3</sup> counsel,<sup>4</sup> cross-examination and confrontation,<sup>5</sup> the privilege against self-incrimination<sup>6</sup>, the double jeopardy prohibition,<sup>7</sup> and the reasonable doubt standard of proof.<sup>8</sup> On the downside, the justices have denied alleged delinquents the right to a jury trial,<sup>9</sup> permitted pre-trial detention based on a vague “serious risk” standard,<sup>10</sup> upheld a scheme allowing prosecutors to appeal a referee’s favorable decision regarding the juvenile’s guilt,<sup>11</sup> and concluded that a minor’s request to speak to a probation officer during custodial interrogation was not a per se invocation of either the right to silence or counsel under Miranda,<sup>12</sup> and that under the totalities of the circumstances, the same test used for adults, a 16 and a half year old “immature, emotional, and uneducated” adolescent subjected to a “skillful, two-on-one, repetitive style of interrogation,”<sup>13</sup> made a voluntary waiver of his Miranda rights.<sup>14</sup>

In resolving these cases the Court has never relied on the Equal Protection Clause of the Fourteenth Amendment, even when explicitly invited to do so, and, in fact, agrees to decide the question on that basis. In In re Winship<sup>15</sup> the question presented was whether the New York statute permitting an adjudication of delinquency based only on a preponderance of the evidence violated the “Fourteenth Amendment’s Due Process and Equal Protection Clauses.”<sup>16</sup> However, footnote 1 of the majority opinion states:

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<sup>3</sup> *Gault*, 387 U.S. at 33.

<sup>4</sup> *Id.* at 36-37.

<sup>5</sup> *Id.* at 57.

<sup>6</sup> *Id.* at 55.

<sup>7</sup> *Breed*, 421 U.S. at 531.

<sup>8</sup> *Winship*, 397 U.S. at 368.

<sup>9</sup> *McKeiver*, 403 U.S. at 547.

<sup>10</sup> *Schall*, 467 U.S. at 256.

<sup>11</sup> *Swisher*, 438 U.S. at 219. The Maryland Rule of Procedure in question required a master to hear the cases assigned to him and to file findings and recommendations to the juvenile court. If no exceptions were filed concerning these findings and recommendations they were to be “promptly... confirmed, modified or remanded by the judge.” *Id.* at 206. However, if the state elected to file exceptions to the master’s findings then the juvenile court judge was to “hear the entire matter or such specific matters as set forth in the exceptions *de novo*.” *Id.*

<sup>12</sup> *Michael C.*, 442 U.S. at 707.

<sup>13</sup> *Id.* at 732 (Powell, J., dissenting).

<sup>14</sup> *Id.* at 724. The *Michael C.* Court did not hold that *Miranda* applied to delinquency hearings. Instead, the Court only *assumed* that *Miranda* applied with full force to delinquents. *Id.* at 717 n.4. The *Gault* Court applied the 5<sup>th</sup> amendment privilege to delinquency hearings, but limited it to in-court statements. 387 U.S. at 55.

<sup>15</sup> 397 U.S. 358 (1970).

<sup>16</sup> 38 U.S.L.W. 3164 (Nov. 4, 1969).

“Finally, we have no occasion to consider appellant’s argument that section 744 (b)<sup>17</sup> is a violation of the Equal Protection Clause, as well as a denial of Due Process.”<sup>18</sup> Indeed, when grappling with these issues, the Court has almost always looked to notions of fairness encompassed by Due Process, and, occasionally, to explicit guarantees in the Bill of Rights. For example, in McKeiver v. Pennsylvania,<sup>19</sup> the Court found that denying juveniles the right to a jury trial did not violate Due Process (rather than the Sixth Amendment), whereas in Breed v. Jones,<sup>20</sup> a unanimous Court held that the double jeopardy clause of the Fifth Amendment applies to delinquency adjudicatory hearings, and consequently prohibited the state from trying a minor in both juvenile and adult criminal court for the same act.

Justice Black concurred in In re Gault,<sup>21</sup> the seminal case initiating the “constitutional domestication”<sup>22</sup> of the juvenile courts. True to his total incorporation theory,<sup>23</sup> Justice Black concluded that the Arizona law in question violated the Fifth and Sixth Amendments rather than Due Process. He went on to note that “[w]here a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be a plain denial of Equal Protection of the laws—an invidious discrimination—to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards.”<sup>24</sup> Perhaps Justice Black was merely intimating that Equal Protection would

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<sup>17</sup> This section of the New York Family Court Act permitted judges to find juveniles guilty of criminal offenses using a preponderance of the evidence standard of proof. *Winship*, 397 U.S. at 360.

<sup>18</sup> *Id.* at 359.

<sup>19</sup> 403 U.S. 528 (1971) (plurality opinion).

<sup>20</sup> 421 U.S. 519 (1975).

<sup>21</sup> 387 U.S. 1 (1967). It is unclear why Justice Black, an adherent to the total incorporation theory, *see infra* note 22, concurred rather than concur in the judgment. The majority opinion clearly based its holdings regarding notice, cross-examination and counsel on Due Process grounds rather than on Sixth Amendment grounds. *Id.* at 30-31.

<sup>22</sup> The term “constitutional domestication” was coined by Justice Fortas in his opinion for the Court in *In re Gault*. 387 U.S. at 22.

<sup>23</sup> *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting) (Justice Black argued that one of the main objectives in ratifying the Fourteenth Amendment was to make the entire Bill of Rights applicable to the states).

<sup>24</sup> 387 U.S. at 61.

be available only in cases where the juvenile's punishment was equal to or greater than that given to an adult convicted of the same offense. In Gault, an adult convicted of the offense with which Gerald Gault was charged would be subject to a fine and two months imprisonment, whereas Gerald received a six year sentence from the juvenile court.<sup>25</sup> However, in McKeiver, Justice Black joined Justice Douglas' dissenting opinion which alluded to the former's Equal Protection argument in Gault, and noted that the Fourteenth Amendment "speaks of denial of rights to any person, not to any adult person."<sup>26</sup>

The Winship Court's refusal to reach the Equal Protection issue after it had already invalidated the statute on Due Process grounds is seemingly in accord with Ashwanderian principles of judicial restraint,<sup>27</sup> and indeed, had the Court gone on to strike down the statute on Equal Protection grounds, that ruling could have been viewed as dictum and not binding in subsequent cases.<sup>28</sup> However, the Due Process holding in Winship was in one sense broader than an Equal Protection ruling would have been--the latter would only affect juveniles. Since the state (and every state) mandated the reasonable doubt standard of proof in criminal trials, all the Court had to rule was that it denied Equal Protection to grant such protection to adults and not children when in both cases the question was whether the person had violated a penal law. Such an approach would have obviated dealing with whether the Due Process clause dictated the reasonable doubt standard for both children and *adults*. In fact, the Due Process stance the Court took in Winship almost forced the Court to apply the reasonable doubt standard to adult criminal trials, even though that issue was not before the Court,<sup>29</sup> unless one took the

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<sup>25</sup> *Id.* at 9, 29.

<sup>26</sup> 403 U.S. at 560.

<sup>27</sup> *See, e.g.*, *Ashwander v. T.V.A.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.") (citing *Burton v. United States*, 196 U.S. 283, 295 (1905)). Further, "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885)).

<sup>28</sup> *See, e.g.*, *Kastigar v. United States*, 406 U.S. 441, 444-445 (1972) (stating that broad language of an opinion which is not necessary to decide the outcome cannot be considered binding); *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 103 (1937) ("It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.") (citing *Cohens v. Virginia*, 19 U.S. 264, 399 (1821)).

<sup>29</sup> *In re Winship*, 397 U.S. 358, 359 (1970). "This case presents a single, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the

position that delinquents are entitled only to those rights that adults enjoy—a possible but somewhat problematic view.<sup>30</sup> On the other hand, it is arguable that taking the Equal Protection route may ultimately have granted delinquents more rights than the Due Process approach because criminal defendants are entitled to many non-constitutional rights afforded by state law<sup>31</sup> which delinquents could argue should also apply to them. So although Equal Protection is generally viewed as a narrower basis for constitutional invalidation,<sup>32</sup> in this context it may have yielded more rights for juveniles (albeit under state law), than the more arduous and nebulous fundamental fairness methodology under federal law. Realistically, however, could an Equal Protection analysis succeed? The answer may well depend on the type of Equal Protection analysis that the Court would use.

In modern Equal Protection theory, if either a fundamental right or a suspect class is found, the Justices use strict scrutiny which requires the government to demonstrate a

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adjudicatory stage when a *juvenile* is charged with an act which would constitute a crime if committed by and adult.” *Id.* (emphasis added).

<sup>30</sup> See Irene Merker Rosenberg, *The Constitutional Rights of Children Charged With Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656 (1980). In this article I argue that the *Gault* majority applies a “dual-maximal standard” which “applies to children all the guarantees already applicable to adult criminal defendants, while also permitting enhanced protection of children because of their vulnerability and immaturity without making the additional protection automatically available to adults.” *Id.* at 671. The view that delinquents are only entitled to those rights which have previously been afforded adults is in tension with the “dual-maximal standard”. *Id.* at 675. I opined that “[t]he reasonable doubt standard can be viewed as a safeguard peculiarly essential to children because of their lesser capacity to assist in their own defense. If the dual-maximal theory does not require application of such a safeguard to delinquents, it is unlikely that this theory can assure application of any right to them.” *Id.* at 675.

<sup>31</sup> For example, the bill of rights guarantee of a grand jury indictment in criminal cases has not been incorporated into the due process clause; nonetheless almost all states use grand juries to a greater or lesser degree. See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884) (ruling that the right to a grand jury is not incorporated into the due process clause of the Fourteenth Amendment). In such states an equal protection claim might result in a ruling that delinquency charges also require a grand jury indictment. A due process analysis, with its emphasis on fundamental fairness and accuracy in fact finding, would not dictate such a result. Furthermore, although a state need not grant certain rights, once it decides to do so, equal protection demands that they are not arbitrarily denied to others. See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion).

<sup>32</sup> See, e.g., *Railway Express Agency v. People of N.Y.*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable. Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation.”)

compelling interest and necessary means.<sup>33</sup> Such scrutiny usually results in invalidation of the law and helps to explain why the Court is eager to avoid using it whenever possible.<sup>34</sup> This was made clear in San Antonio Independent School District v. Rodriguez<sup>35</sup> in which the Court upheld Texas' school financing law, concluding that wealth was not a suspect class and that education was not a fundamental right as long as the state gave each child "the opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and a full participation in the political process."<sup>36</sup> Dropping to a low level rational relationship test, the court easily upheld the law.<sup>37</sup>

In certain instances, the Court will find a semi-suspect class, such as gender<sup>38</sup>, and use a heightened, but less than strict scrutiny, requiring the state to show an important or significant interest and substantially related means, a test that the state cannot always meet.<sup>39</sup> In Carey,<sup>40</sup> for example, a plurality held that since there was a fundamental right to privacy in preventing childbirth,<sup>41</sup> the state could not prohibit distribution of contraceptives, even to minors, and rejected the state's "significant" interest in

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<sup>33</sup> See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 2 (1973) (The strict scrutiny test is "reserved for cases involving laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution.").

<sup>34</sup> See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Changing Court*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny analysis as "'strict' in theory and fatal in fact").

<sup>35</sup> 411 U.S. 1 (1973).

<sup>36</sup> *Id.* at 18, 37. The opinion made clear that the Court was unwilling to find new fundamental rights or suspect classes except in limited situations. The majority stated that the level of scrutiny applied to state legislation does not rely on the majority's view "of the importance of the interest affected"; indeed, if this were the case the Court would become a "super-legislature". *Id.* at 31. The majority also made it clear that the only rights that will be considered fundamental are those "rights and liberties protected by the Constitution" or those necessary to use those rights. *Id.* at 29, 33.

<sup>37</sup> The Court applied a rational relationship test in this case asking only "whether the challenged state action rationally furthers a legitimate state purpose or interest." *Id.* at 55. The Court recognized that the Texas system of school financing does result in unequal expenditures for children in different districts, but could not "say that such disparities are the product of a system that is *so irrational* as to be invidiously discriminatory." *Id.* at 55 (emphasis added). In deciding that the system of financing is constitutional the Court also points out that Texas has "acknowledged its shortcomings" and that the legislation is not the "product of purposeful discrimination against any group or class." *Id.* at 55.

<sup>38</sup> See, e.g., United States v. Virginia, 518 U.S. 515, 532-33 (1996). The Court has also held that classifications based on illegitimacy should be reviewed using heightened but not strict scrutiny. See Clark v. Jeter, 486 U.S. 456, 465 (1988) (unanimous decision) (holding that Pennsylvania's six year statute of limitation on child support actions on behalf of children born outside of wedlock "does not withstand heightened scrutiny under the Equal Protection Clause.")

<sup>39</sup> United States v. Virginia, 515 U.S. at 533, 539-40.

<sup>40</sup> Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (plurality opinion).

<sup>41</sup> *Id.* at 685.

discouraging sexual activity by adolescents.<sup>42</sup> Occasionally, the Court will also use a form of heightened scrutiny when the class, although not suspect or quasi-suspect, constitutes a vulnerable underclass whose members are totally denied access to an important state service, as in Plyler v. Doe,<sup>43</sup> invalidating a Texas law excluding undocumented children from attending public school because the discrimination by the state could not “be considered rational unless it furthers a substantial goal of the state.”<sup>44</sup>

The Court has never found age classifications either suspect or quasi-suspect. In Massachusetts Board of Retirement v. Murgia<sup>45</sup> the Court, using rational relationship analysis, upheld a law requiring state police officers to retire when they reached fifty years of age.<sup>46</sup> The Court found that being old merely “marks a stage that each of us will reach if we live out our normal span.”<sup>47</sup> Using that logic, the Court would presumably view youth to be a stage out of which we all will grow.

Interestingly, however, In Oregon v. Mitchell<sup>48</sup> the Court, 5-4, in shifting plurality opinions, held that a provision of the Voting Rights Act Amendment granting 18 year olds the right to vote in state elections was beyond Congressional power under section 5 of the Fourteenth Amendment.<sup>49</sup> Justice Brennan argued that if a state prohibited 18 year olds from voting, and if the case came before the Court based directly on an Equal Protection claim rather than under a federal law, “there is serious question whether [such]

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<sup>42</sup> *Id.* at 694-96.

<sup>43</sup> 457 U.S. 202 (1982).

<sup>44</sup> *Id.* at 224. *But see* Martinez v. Bynum, 461 U.S. 321 (1983) (upholding a state law denying tuition free education for minors who did not live with their parents in the school district if the primary purpose of such residence is to obtain a free public school education); Kadramas v. Dickinson Pub. Sch., 487 U.S. 450 (1988) (distinguishing Plyler, 457 U.S. 202 (1982), and upholding fees for transporting students to and from public schools).

<sup>45</sup> 427 U.S. 307 (1976).

<sup>46</sup> *Id.* at 314-16. *See also* Vance v. Bradley, 440 U.S. 93 (1979) (holding that Congress did not violate the Equal Protection Clause by requiring federal employees covered by the Foreign Service Retirement and Disability System to retire at the age of sixty).

<sup>47</sup> Murgia, at 313-14.

<sup>48</sup> 400 U.S. 112 (1970) (plurality opinion).

<sup>49</sup> Justice Black announced the judgment of the Court in an opinion expressing his own views, and decided that it is within Congress’s power to set the age of voters in national elections, but that it is beyond the power of Congress to set the voting age in state and local elections. *Id.* at 117-18. He was joined by Chief Justice Burger, and Justices Harlan, Stewart, and Blackmun in concluding that Congress does not have the power to set the voting age for state and local elections. *Id.* at 118. However, these four Justices dissented from Justice Black’s opinion that Congress has the power to set the voting age in federal elections. *Id.* Justices Douglas, Brennan, White, and Marshall agreed with Justice Black that Congress is within its power in setting the national voting age, but dissented from the view that Congress does not have the authority to set the voting age for state and local elections. *Id.*

a statute . . . could, in any event, withstand present scrutiny under the Equal Protection Clause.”<sup>50</sup> Justice Stewart responded that such a state statute would certainly be found rational and thus not violative of Equal Protection.<sup>51</sup> It is clear that the two justices had different views regarding the proper standard of scrutiny to use with such Equal Protection claims, which involved the right to equal access to the ballot, a right the Court had already found fundamental.<sup>52</sup> Thus, the justices’ views of the underlying constitutional claim influenced their vote on the reach of congressional power; that is, if a justice believed the congressional legislation came to the same result that the Court would on the underlying constitutional right, that justice could uphold the law without concern that Congress was exercising substantive power; conversely, however, if a justice believes the Court would come to a different result than the federal law, he or she would be concerned that Congress went beyond its remedial power under § 5 of the 14<sup>th</sup> Amendment.

The cases calling for explicit heightened scrutiny do not exhaust the possibilities and do not mean that there is no scrutiny at all absent such classes or rights. The rational relationship tests used to be of little value in protecting non-fundamental but important rights or non-suspect but vulnerable classes,<sup>53</sup> but that is no longer true.<sup>54</sup> The rational relationship test is not applied uniformly. In cases dealing with economic matters the

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<sup>50</sup> *Id.* at 240 (Brennan, J., dissenting as to Congress’ authority to establish state voting age).

<sup>51</sup> *Id.* at 294-95 & n.14. “Yet it is inconceivable to me that this Court would ever hold that the denial of the vote to those between the ages of 18 and 21 constitutes such an invidious discrimination as to be a denial of the equal protection of the laws. The establishment of an age qualification is not state action aimed at any discrete and insular minority.” *Id.* at 295 n. 14.

<sup>52</sup> *See, e.g.,* Harper v. Virginia State Board of Elections, 383 U.S. 663, 667 (1966) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” (quoting Reynolds v. Sims, 377 U.S. 533, 561-62 (1964))).

<sup>53</sup> In the past the Court gave the government extreme deference when applying the rational relationship test. Indeed, the Court has gone so far as to uphold legislation on the grounds that “there are plausible reasons for Congress’ action”, and has stated that it “is irrelevant whether this reasoning in fact underlay the legislative decision”. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)). This deferential treatment had led many to view the rational relationship test as applying “minimal scrutiny in theory and virtually none in fact.” Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

<sup>54</sup> *See, e.g.,* Romer v. Evans, 517 U.S. 620 (1996) (striking down on equal protection grounds an amendment to the Colorado Constitution because it lacked a rational relationship to a legitimate state interest); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (applying the rational relationship test to strike down a zoning ordinance as violating the equal protection clause).

Court will usually use an extremely deferential standard, whether there is any conceivable basis for the legislation, which almost always ensures the act is upheld.<sup>55</sup> Sometimes, however, when similar cases come before the court, it applies a slightly more rigorous rationality test that does not automatically assure that the law will be upheld.<sup>56</sup> As Justice Rhenquist noted in Fritz,<sup>57</sup> the rational relationship jurisprudence is not very clear. For example, in some cases the Court will purport to use rational relationship scrutiny but in fact do a more intensive analysis as in City of Cleburne v. Cleburne Living Center<sup>58</sup> in which the Court found that mentally retarded persons were not a suspect or quasi-suspect class,<sup>59</sup> but then went on to invalidate the local zoning board's refusal to permit construction of a group home for them because it was based on "an irrational prejudice,"<sup>60</sup> even though the state has no constitutional obligation to provide housing,<sup>61</sup> and zoning decisions usually are given great deference.<sup>62</sup>

Similarly, in Lawrence v. Texas,<sup>63</sup> the Court, in an opinion written by Justice Kennedy, overruled an earlier case,<sup>64</sup> found merely a liberty interest in sexual intimacy,<sup>65</sup> and concluded that a state law criminalizing sexual relations between adult persons of the same sex in private was irrational, and thus violated Due Process.<sup>66</sup> Morality was no

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<sup>55</sup> See, e.g., Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) ("When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.")

<sup>56</sup> See, e.g., F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.")

<sup>57</sup> U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 177 n.10 (1980) (Rehnquist, J., explaining that it is not possible to extract "a uniform or consistent test" from the rational relationship equal protection jurisprudence).

<sup>58</sup> 473 U.S. 432 (1985).

<sup>59</sup> *Id.* at 442.

<sup>60</sup> *Id.* at 450.

<sup>61</sup> See Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("We are unable to perceive in [the Constitution] any constitutional guarantee of access to dwellings of a particular quality . . . . Absent constitutional mandate, the assurance of adequate housing . . . [is a] legislative, not judicial, function[.]")

<sup>62</sup> See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (before zoning provisions can be found unconstitutional it must be said that "such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.")

<sup>63</sup> 539 U.S. 558 (2003).

<sup>64</sup> Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (deciding that a Georgia sodomy statute did not violate a fundamental right of homosexuals and that there was a rational basis for the law because the majority of Georgia's electorate held the belief that "homosexual sodomy is immoral and unacceptable").

<sup>65</sup> 539 U.S. at 578.

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

longer a sufficient basis for such a law.<sup>67</sup> Interestingly, Justice O'Connor concurred in the judgment on Equal Protection grounds, not Due Process. She saw Equal Protection, in this context at least, as a narrower ground for overturning the law,<sup>68</sup> and concluded that “[m]oral disapproval of. . . [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to withstand rational basis review under the Equal Protection clause.”<sup>69</sup> Professor Tribe also takes the view that notwithstanding its Due Process analysis, the majority opinion in Lawrence is based on equality concerns.<sup>70</sup> Either way the case signals that there is a new mode of rational relationship analysis for at least certain kinds of liberty interests and certain kinds of classes.

Although Lawrence was decided on Due Process grounds, an Equal Protection analysis would have yielded the same result even if neither a fundamental or quasi-fundamental right nor suspect or semi-suspect class were found. Justice O'Connor's opinion makes that clear. In other words, rational relationship analysis a la Lawrence would not displace the fundamental right or suspect class prongs of Equal Protection, it would simply afford the Court an additional flexible tool for dealing with a wide variety of impingements affecting individual liberty, a tool that does not automatically dictate the outcome.

Freedom from bodily restraint also implicates a strong liberty interest protected by the Fourteenth Amendment.<sup>71</sup> This is true presumably even for children,<sup>72</sup> even though that assumption must be evaluated in the context of the Schall Court's statement that children “are always in some form of custody,”<sup>73</sup> and that a child's liberty interest is

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<sup>67</sup> *Id.* at 582. *But cf.* *Poe v. Ullman*, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting) (arguing that society “has traditionally concerned itself with the moral soundness of its people” and therefore morality is a sufficient basis for law); *Gonzales v. Carhart*, 127 S. Ct. 1610, 1624 (2007) (upholding a federal law prohibiting partial birth abortions based on congressional findings that “[a] moral, medical, and ethical consensus exists that the practice of performing a partial birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.”)

<sup>68</sup> *Id.* at 584 (O'Connor, J., concurring in the judgment).

<sup>69</sup> *Id.* at 582.

<sup>70</sup> Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1908-09 (2004) (explaining that the Court could have found the Texas sodomy statute unconstitutional on equal protection rather than due process grounds, but that result would have been too narrow because states would simply enact gender neutral anti-sodomy statutes to subvert the decision).

<sup>71</sup> *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (holding that it violated Due Process for the state to involuntarily commit a person who was not a danger to themselves or others to a state mental hospital without providing treatment).

<sup>72</sup> *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

<sup>73</sup> *Schall v. Martin*, 467 U.S. 253, 265 (1984).

less than an adult's, even vis-a-vis the state<sup>74</sup>. Clearly, however, parental and state custody are fundamentally different and the attempt to equate them is premised on “a false analogy.”<sup>75</sup> In general, parents are moved by love.<sup>76</sup> While it may be necessary for parents to discipline their children, home is not a prison and they are not guards. The parents' allegiance is only to the child. The state has two interests in this context: *parens patriae* and public safety.<sup>77</sup> These two interests are fundamentally in conflict, and public safety will almost always trump the best interests of the child.<sup>78</sup>

Interestingly, in other contexts, the lower federal courts have used equal protection analysis when determining the constitutionality of laws impinging on the rights of juveniles to move about freely. In Nunez v. City of San Diego<sup>79</sup> the Ninth Circuit, using Equal Protection analysis, found that juveniles have a fundamental right to free movement and accordingly applied strict scrutiny in reviewing the constitutionality

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<sup>74</sup> See *Id.* The Court suggested that juveniles have a weaker liberty interest than adults because “juveniles are not assumed to have the capacity to take care of themselves” and “are assumed to be subject to the control of their parents.” *Id.* The Court goes on to state that “the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's ‘parens patriae interest in preserving and promoting the welfare of the child.’” *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

<sup>75</sup> Claudia Worrell, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine*, 95 YALE L.J. 174, 179 (1985) (explaining the fundamental differences between parental and state custody).

<sup>76</sup> In some families that is not true; children may be physically and sexually abused. In such cases the states step in to protect the abused child. See, e.g., Tex. Fam. Code Ann. § 262 (Vernon 2007).

<sup>77</sup> See *Schall*, 467 U.S. at 264. “When making any detention decision, the Family Court judge is specifically directed to consider the needs and best interests of the juvenile as well as the need for the protection of the community.” *Id.* The Court further stated that “crime prevention is ‘a weighty social objective’ and this interest persists undiluted in the juvenile context.” *Id.* (quoting *Brown v. Texas*, 443 U.S. 47, 52 (1979)).

<sup>78</sup> See *Schall*, 467 U.S. at 264-65. The Court, while discussing “the combined interest in protecting both the community and the juvenile himself”, states that the interest in protecting the community “may even be greater in this context given the high rate of recidivism among juveniles.” *Id.* This interest in protecting the community from juveniles and the fact that juveniles are apparently “always in some form of custody” was integral to the Court's decision that preventive detention serves a legitimate state interest. *Id.* at 257, 264-66. Cf. *Terry v. Ohio*, 392 U.S. 1, 9, 26 (1968) (Recognizing that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others,” but stating that this right is trumped by searches “necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a ‘full’ search, even though it remains a serious intrusion.” (quoting *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891))). If a right as important as the right to control one's own person can be trumped by a state's interest in public safety, it should come as no surprise that a child's interests would also be trumped in the name of public safety, especially if one takes the view that children are “always in some form of custody”. *Schall*, 467 at 265.

<sup>79</sup> 114 F.3d 935 (9<sup>th</sup> Cir. 1997).

of a San Diego juvenile curfew ordinance.<sup>80</sup> The Ninth Circuit went on to find that the City had a compelling interest in both “reducing juvenile crime and juvenile victimization” and stated specifically that “[t]he City has a compelling interest in protecting the entire community from crime, including juvenile crime.”<sup>81</sup> However, in spite of the City’s compelling interest, San Diego’s juvenile curfew ordinance was struck down. The Nunez court was careful not to invalidate the ordinance on the grounds that the curfew was an ineffective way of dealing with juvenile crime and victimization, even though the City failed to make a strong showing that the curfew was a “particularly effective means of achieving” a reduction in those areas.<sup>82</sup> Instead, the court found that the ordinance was not narrowly tailored to meet the City’s compelling interest because it “[did] not provide exceptions for many legitimate activities” and therefore “excessively burden[ed] minors’ right to free movement.”<sup>83</sup>

The Second Circuit has also recently weighed in on the issue of minor’s rights versus public safety. In Ramos v. Town of Vernon,<sup>84</sup> the court decided that juveniles have the right to move around freely, but, for many reasons, including “the vulnerabilities particular to minors,”<sup>85</sup> decided to apply an intermediate level of review. The Second Circuit also recognized that “the government has an important interest in protecting all its citizens from crime,” and further “acknowledge[d] this interest may take on added strength in light of attributes particular to children.”<sup>86</sup> Notwithstanding the important state interest, and in spite of the lowered level of scrutiny used by the Court, the curfew ordinance was struck down because the town failed to show the ordinance was “substantially related to an important governmental interest.”<sup>87</sup> Specifically, the town “failed to present any persuasive reason for the curfew hours chosen by the town” and the

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<sup>80</sup> *Id.* at 945-46.

<sup>81</sup> *Id.* at 946-47.

<sup>82</sup> *Id.* at 947-48. Indeed, a San Diego Police Department report revealed “that the percentage of juvenile victimization that occurred during the curfew hours slightly increased in the year following the curfew ordinance.” *Id.*

<sup>83</sup> *Id.* at 949. The courts decision to strike the curfew ordinance down based on a lack of exceptions has the effect of making it easier on the city to create a curfew that will pass constitutional muster. After all, it seems unlikely that the statistical evidence supporting the effectiveness of the curfew would be any stronger in the following years. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41 (1999) (invalidating a loitering statute directed at gang members).

<sup>84</sup> 353 F.3d 171 (2<sup>nd</sup> Cir. 2003).

<sup>85</sup> *Id.* at 180-81.

<sup>86</sup> *Id.* at 181.

<sup>87</sup> *Id.* at 186.

town's own witness admitted that the "adoption of the curfew itself could be considered a knee jerk reaction" to recent events in the community.<sup>88</sup>

Although not exactly on point, these cases are relevant because they suggest that, notwithstanding the view that children are always in some form of custody, the rights of minors in free movement, which surely must include the right not to be incarcerated, requires a showing that the curtailment of movement is necessary and at least substantially related to the stated objective.

Strict scrutiny review is, however, not always fatal to curfew ordinances. In Qutb v. Strauss,<sup>89</sup> the Fifth Circuit Court of Appeals, reviewing a Dallas curfew ordinance, simply "assume[d] that the curfew impinge[d] upon a fundamental right" and thus applied strict scrutiny to the ordinance.<sup>90</sup> The Fifth Circuit, like the courts discussed above, also found that the State has a compelling interest in increasing juvenile safety and decreasing juvenile crime.<sup>91</sup> However, unlike the courts discussed above, the Fifth Circuit went on to find that the city had "provided sufficient data to demonstrate that the classification created by the ordinance 'fits' the state's compelling interest" in spite of the fact that the "city was unable to provide precise data concerning the number of juveniles who commit crimes during the curfew hours."<sup>92</sup> Also, unlike the ordinance in Nunez which was found to violate the Constitution, Dallas's ordinance provided many exceptions allowing the court to find that the ordinance "employs the least restrictive means of accomplishing its goals."<sup>93</sup>

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<sup>88</sup> *Id.* at 186-87. The town's expert even admitted: "I would feel uncomfortable saying that the curfew directly decreases crime simply because I didn't conduct an analysis, because data wasn't available to me, and I don't want to overstep the data that I had." *Id.* at 185. The knee jerk reaction was a reaction to "groups of young people gathering in certain parts of town" and a recent murder of a 16-year-old Vernon resident. *Id.* at 172-73. Interestingly, the murder of the 16-year-old resident took place in the victim's home and was apparently related to a robbery rather than gang activity, making it doubtful that a juvenile curfew would have prevented the crime. *Id.* at 185-86.

<sup>89</sup> 11 F.3d 488 (5<sup>th</sup> Cir. 1993).

<sup>90</sup> *Id.* at 492.

<sup>91</sup> *Id.* at 493.

<sup>92</sup> *Id.* The Fifth Circuit overruled the district court which found that the city "totally failed to establish that the Ordinance's classification between minors and non-minors is narrowly tailored to achieve the stated goals of the curfew." *Id.* The statistical information presented by the city does not contain *any* information concerning the times that *juveniles* are most likely to commit crimes or the times that *juveniles* are likely to be victims of crime. *Id.*

<sup>93</sup> *Id.* The court describes the exceptions to the ordinance as follows: "As the city points out, a juvenile may move about freely in Dallas if accompanied by a parent or a guardian, or a person at least eighteen years of age who is authorized by a parent or guardian to have custody of the minor. If the juvenile is traveling interstate, returning from a school-sponsored function, a civic organization-sponsored function, or

If strict or heightened scrutiny is required to protect minors' freedom of movement, why would such scrutiny not be used when a child is subject to incarceration, the ultimate lack of freedom to move about freely? If such an analysis were applied, it is unclear whether the state would be able to demonstrate that denying juveniles adjudicatory safeguards substantially furthers the state's goals in public safety and protection of the child. While delinquents do have some advantages in juvenile court such as anonymity and the prospect of shorter sentences, these advantages are unrelated to the issue of fact finding. It is unclear how depriving children the rights that adults enjoy in the adjudicative process, which determines if the accused committed a crime, is in any way an advantage of the juvenile system. The true advantages of the juvenile court system occur in the dispositional phases of the delinquency proceeding, not in the determination of guilt or innocence.

Furthermore, in my view, the state's interest in denying delinquents the same constitutional and statutory rights criminal defendants enjoy is dubious. The states claim that they are treating and rehabilitating children, and therefore constitutional protection is neither necessary nor helpful in the process and indeed may be counter productive. But actions speak louder than words. In recent years, states have been amending the purposes sections of their juvenile codes to include punishment as a relevant objective<sup>94</sup>. They have increased the sentences in juvenile courts, lowered the age at which children can be

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a religious function, or going home after work, the ordinance does not apply. If the juvenile is on an errand for his or her parent or guardian, the ordinance does not apply. If the juvenile is involved in an emergency, the ordinance does not apply. If the juvenile is on a sidewalk in front of his or her home or the home of a neighbor, the ordinance does not apply. Most notably, if the juvenile is exercising his or her First Amendment rights, the curfew ordinance does not apply." *Id.* at 493.

<sup>94</sup> See, e.g., Patrick Griffin, Linda Szmanski, and Melanie King, "National Overviews." *State Juvenile Justice Profiles*, <http://www.ncjj.org/stateprofiles/overviews/faq9.asp>, (2006) ("Purpose clauses in at least 6 states can be loosely characterized as "tough," in that they stress community protection, offender accountability, crime reduction through deterrence, or outright punishment, either predominantly or exclusively." Texas and Wyoming have gone as far as to explicitly insert "'protection of the public and public safety' and the promotion of 'the concept of punishment for criminal acts'--at the head of [their purposes] list.).

waived to adult criminal court<sup>95</sup>, and passed extended and blended sentencing laws that permit children to be incarcerated for long periods of time, often in adult facilities.<sup>96</sup>

Likewise, the states' purported benevolent and therapeutic views of the juvenile court system are belied by the way that some of them use juvenile adjudications. For example, in most jurisdictions juveniles are not entitled to jury trials during the adjudicative or dispositional phases of delinquency hearings.<sup>97</sup> In some states juveniles committing the same crime as adults receive harsher sentences. The courts are split as to whether such sentences deny Equal Protection.<sup>98</sup> Other jurisdictions allow adjudications of delinquency to be used as a predicate conviction to enhance sentences or to establish recidivism in criminal court. Again the courts are divided as to the validity of such tactics.<sup>99</sup>

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<sup>95</sup> At the end of the 2004 legislative session 23 states had at least one provision allowing the transferring juveniles to criminal court without specifying a minimum age. The remainder of the states had provisions arranging for movement of juveniles to adult criminal court with a minimum age ranging from ten to fifteen years of age. Patrick Griffin, National Center for Juvenile Justice, "*National Overviews.*" *State Juvenile Justice Profiles. What is Each States Minimum Age for Transfers to Criminal Court?*, <http://www.ncjj.org/stateprofiles/overviews/transfer5.asp>

<sup>96</sup> "A total of 26 states have blended sentencing laws as of the end of the 2004 legislative sessions." Patrick Griffin, National Center for Juvenile Justice, "*National Overviews.*" *State Juvenile Justice Profiles.*, <http://www.ncjj.org/stateprofiles/overviews/transfer5.asp>. "Blended sentencing laws . . . focus not on the trial forum but on the correctional system in which the serious juvenile offender will be sanctioned. Patrick Griffen, National Center for Juvenile Justice, *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws 2* (2003), <http://ncjj.servehttp.com/ncjjwebsite/pdf/transferbulletin.pdf>. "15 States have *juvenile blended sentencing* schemes that empower courts to impose adult criminal sanctions on certain categories" of juvenile offenders. *Id.* "Most of these laws authorize the court to combine a juvenile disposition with a suspended criminal sentence . . . .If the juvenile cooperates, he or she will remain in the juvenile sanctioning system; if not, he or she may be sent to the adult [system]." *Id.* "17 states have *criminal blended sentencing laws* . . . under which criminal courts, in sentencing transferred juveniles, may impose sanctions that would ordinarily be available only to juvenile courts." *Id.*

<sup>97</sup> *See, e.g.,* *McKeiver v. Pennsylvania*, 403 U.S. 528, 548 (1971) (plurality opinion) ("It therefore is of more than passing interest that at least 28 States and the District of Columbia by statute deny the juvenile a right to a jury trial in cases such as these.").

<sup>98</sup> *See, e.g.,* *U.S. v. Ballesteros*, 691 F.2d 869 (9<sup>th</sup> Cir. 1982) (per curiam) (holding that juvenile sentences exceeding those of adults for the same crime do not violate the Equal Protection Clause as long as the serve a rehabilitative purpose); *People v. Olivas*, 551 P.2d 375 (Cal. 1976) (holding that a statute authorizing the detention of juvenile misdemeanants for terms longer than those authorized for adults violated the equal protection clause of both the California and United States Constitutions); *Matter of S.L.M.*, 951 P.2d 1365, 1373 (Mont. 1997) (using strict scrutiny review the Supreme Court of Montana struck down the Extended Jurisdiction Prosecution Act which put juveniles at risk of "serving an adult sentence in addition to their juvenile disposition" and determined the state "has no compelling state interest in treating [juveniles] as adults and restricting their physical liberty beyond the restrictions which are imposed upon an adult for the same offense.").

<sup>99</sup> The split is due to differing interpretations of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held in pertinent part that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

Moreover, the juvenile facilities to which delinquents are committed are not therapeutic communities. They are often barbaric environments in which children's physical and mental well being are ignored, if not destroyed. In the 1970's there was a spate of class actions filed against such correctional facilities charging Due Process, Equal Protection, Eighth Amendment and First Amendment violations.<sup>100</sup> The allegations were horrific. Judgments were entered prohibiting various practices such as prolonged isolation, lifting rocks in a straight knee position for hours at a time, beatings, standardized injections of anti-psychotic drugs, lack of medical care, cold and damp cells,

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reasonable doubt." *Id.* at 490. See *United States v. Mathews*, 498 F.3d 25 (1<sup>st</sup> Cir. 2007), *petition for cert. filed*, (Dec 31, 2007) (No. 07-9073) (allowing the use of a defendant's prior adjudication of delinquency as a predicate conviction under the Armed Career Criminal Act and hinting that the outcome would have been the same even if the appellant had not had the right to a jury in the underlying juvenile adjudication); *United States v. Crowell*, 493 F.3d 744, 750 (6<sup>th</sup> Cir. 2007), *cert. denied*, 128 S.Ct. 880 (Jan. 2008) ("[W]e join the Third, Eighth, and Eleventh circuits in finding that the imposition of a sentence enhancement under the ACCA based on a defendant's juvenile adjudication without a jury trial does not violate the defendant's due process rights or run afoul of *Apprendi*."); *United States v. Burge*, 407 F.3d 1183, 1191 (11<sup>th</sup> Cir. 2005) (relying on *United States v. Jones*, below, the eleventh circuit decided that using prior non-jury juvenile adjudications to enhance adult sentences beyond the statutory maximum does not violate due process of the law because juveniles are guaranteed adequate safeguards); *United States v. Jones*, 332 F.3d 688, 696 (3<sup>rd</sup> Cir. 2003) ("A prior nonjury juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes" because these safeguards are "sufficient for purposes the *Apprendi* exception."); *United States v. Smalley*, 294 F.3d 1030 (8<sup>th</sup> Cir. 2002) (holding that *Apprendi* does not stand for the proposition that prior adjudications must have been decided by a jury in order to meet the *Apprendi* exception, and allowing the use of juvenile convictions to enhance sentences because of the court's belief that juvenile convictions are so reliable that using them to enhance sentences beyond the statutory maximum does not violate due process of law). *But see* *United States v. Tighe*, 266 F.3d 1187, 1194 (9<sup>th</sup> Cir. 2001) ("Thus, as we read *Jones* and *Apprendi*, the "prior conviction" exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall within *Apprendi*'s "prior conviction" exception." (referring to *Jones v. U.S.*, 526 U.S. 227 (1999)).

<sup>100</sup> See, e.g., *Inmates of the Boy's Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972) (finding Eighth Amendment, equal protection, and due process of law violations at the Boy's Training School). The *Affleck* court explains that boys confined in Annex B of the Training School were never allowed to go outside for exercise. *Id.* at 1359. This wing of the old women's reformatory was built in 1863 and was used to keep boys in solitary confinement and included rooms known as "bug-out" rooms which contain nothing but a toilet and a mattress on the floor. *Id.* At times these rooms were rendered completely dark. *Id.* Boys were kept in annex B for up to two and a half months and during this time no visitors, including parents, were allowed. *Id.* One of the inmates testified that he was kept in one of these "bug-out" rooms for a week with nothing to wear except his underwear. *Id.* The rooms were dark and cold yet the child was given nothing to comfort him in his week long stay; not soap, toilet paper, sheets, blankets, or a change of clothes. *Id.* See also *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973) (finding first, eighth, due process, and equal protection violations in Texas juvenile institutions). The *Morales* court found evidence of a "widespread practice of beatings, slapping, kicking, and otherwise physically abusing juvenile inmates" which violated the Eighth Amendment. *Id.* at 173. The court also found evidence of tear gas being used as a form of punishment, in situations that did not pose an imminent threat, in violation of the cruel and unusual punishment clause. *Id.* at 174-74.

isolation and lack of food for prolonged periods of the day.<sup>101</sup> After that round of cases it was thought that there was going to be at least some change in the treatment of delinquents and that at least the worst “treatments” were a thing of the past. But as the French say so pithily, the more things change, the more they remain the same. It is not just trash that gets recycled, cruelty does too. Cases are now pending against juvenile correctional facilities around the country raising the same issues – sexual abuse, beatings, and lack of treatment.<sup>102</sup> Even the so-called alternatives to incarceration such as boot camps are dangerous. Children die of dehydration and are pushed beyond their limits<sup>103</sup>. This is all in the name of treatment.

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<sup>101</sup> See *supra* note 96.

<sup>102</sup> A recent newspaper article references abuses taking place in Texas’s juvenile facilities. The abuses include “two supervisors routinely awaken[ing] boys for late-night encounters behind closed doors in deserted offices.” Ralph Blumenthal, *Texas Calls for Takeover of State’s Juvenile Schools*, N.Y. Times, Feb. 28, 2007. There are also reports of supervisors having sex with under age inmates. *Id.* “After the Texas Youth Commission sex and physical abuse scandal broke . . . 82 complaints were lodged claiming that TYC youth[s] were victims of excessive force or sexual impropriety by staff and other youths in the system.” R.G. Ratcliffe, *Abuse Poured in Amid Debate*, Houston Chronicle, April 29, 2007.

Texas is not alone in this problem. A recent suit brought against the California Youth Authority alleges “such practices as the use of cages as classrooms and the forcible injection of mind-altering drugs to control the behavior of inmates. It contends mental health care is virtually nonexistent and says prisoners with disabilities are sometimes isolated in dungeon-like holes splattered with feces and blood and that the inmates live in fear of physical and sexual abuse.” Evelyn Nieves, *Youth Prisons in California Stay Abusive, Suit Contends*, N.Y. Times, January 26, 2002.

New York has also received criticism for the treatment of its’ juvenile inmates. A recent report issued in 2006 alleges that inmates at all female centers were “violently restrained for minor infractions, subjected to sexual harassment and assault, cut off from families, and provided little rehabilitation.” Lisa W. Foderaro, *In New York, A Report Details Abuse and Neglect at 2 State-Run Centers for Girls*, N.Y. Times, Sep. 25, 2006, at A25.

<sup>103</sup> See, e.g., *Buckeye Boot Camp Director on Trial for Death of Boy* (2004), <http://teenadvocatesusa.homestead.com/tonyhaynes.html>. Anthony Haynes, on July 1, 2001, along with others boys was part of a “drop on request” line taking place in the 112 degree desert heat of Arizona. *Id.* After several hours Haynes began “acting erratically, eating dirt, refusing to drink water and eventually collapsing in convulsions.” *Id.* Rather than being taken to a hospital, Haynes was taken to a hotel room where he was unclothed and placed unsupervised in a shower where he was later found facedown in his own vomit. *Id.* “Haynes was airlifted to a Phoenix hospital, where he was pronounced dead. An autopsy ruled that the cause of death was “complications of near drowning and dehydration due to heat exposure.”” *Id.*

Further, a recent report issued by the Governmental Accountability Office provided evidence of abuses in privately owned boot camps including evidence that “teenagers were starved, forced to eat their own vomit, and to wallow for hours in their own excrement.” Diana Jean Schemo, *Report Recounts Horrors of Youth Boot Camps*, N.Y. Times, October 11, 2007, at A19. The report includes information on the death of Aaron Bacon, who died while attending a correctional boot camp in Utah. Aaron, who was 16 years old when he died, dropped from 130 pounds to 108 pounds during his three week stay at the camp. *Id.* For fourteen of the twenty days that Aaron was able to survive at the camp he received no food whatsoever, and at the same time was forced to hike eight to ten miles a day. *Id.* On the days Aaron was allowed to eat his meals consisted of “uncooked lentils, lizards, scorpions, trial mix and a celebrated

If the state claims that its' *parens patriae* interest in children is a reasonable basis for denying Equal Protection in juvenile court adjudicatory proceedings, how will it explain away the inadequacies of its facilities? Given such conditions in their "rehabilitative" facilities it is fair to question if the states' "benevolent" motives and *parens patriae* concerns are merely peripheral. If the stated purpose for denying juveniles equal protection is a desire to improve the unique benefits of the juvenile court system, a test the Court uses in Due Process analysis of delinquent rights,<sup>104</sup> one may rightfully inquire what exactly these unique benefits are and whether they relate substantially to the states' interest in public safety and *parens patriae*.

If the only real objective of the state is simply to protect public safety, and *parens patriae* concerns are merely incidental, by what right does it deprive children charged with crime the same safeguards given to adults charged with crime? When the Court discerns a punitive purpose or animus, it will often do a heightened rational relationship analysis as in Cleburne,<sup>105</sup> or Moreno,<sup>106</sup> and Village of Willowbrook<sup>107</sup> and invalidate the law. Indeed, as we have seen, even if a court uses an ordinary low level rational

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canned peach on the 13<sup>th</sup> day." *Id.* Aaron's parents had sent him to the camp in an attempt to distance him from the negative influences of drugs which he had recently began to dabble with. *Id.*

<sup>104</sup> See Breed v. Jones, 421 U.S. 519, 533 (1975) (after deciding that the respondent was subjected to two trials for the same offense, a violation of the double jeopardy clause and due process, the court inquired into "whether either traditional principles or 'the juveniles court's assumed ability to function in a unique manner' supports an exception to the 'constitutional policy of finality' to which respondent would otherwise be entitled." (citation omitted)); In re Winship, 397 U.S. 358, 367 (1970) (requiring the beyond a reasonable doubt standard in juvenile adjudications only after deciding that "beyond a reasonable doubt 'will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.'" (citation omitted)).

<sup>105</sup> Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (using a rational relationship analysis to strike down a statute requiring a special use permit for group homes for the mentally retarded because it appeared to be based on "an irrational prejudice against the mentally retarded");

<sup>106</sup> U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534-35 (1973) (applying a rational relationship review the Court struck down a provision of the federal food stamp program limiting assistance to households consisting of related people. The majority states: "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, '[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment.'"). *But see* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (upholding a total employment exclusion for methadone users).

<sup>107</sup> See Village of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (per curiam) (Upholding a court of appeals' ruling that the requirement a larger easement for one particular house for no rational basis is "sufficient to state a claim for relief under traditional equal protection analysis."). Justice Breyer concurred in the result because he believed the presence of "illegitimate animus" was necessary to bring the zoning claim under an equal protection analysis. *Id.* at 565.

relationship test, what rational reason could the state have to treat juveniles in this manner? I can find none.