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"Unchain the Children": *Gault*, Therapeutic Jurisprudence, and Shackling

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“UNCHAIN THE CHILDREN”: GAULT, THERAPEUTIC JURISPRUDENCE, AND SHACKLING

*Bernard P. Perlmutter**

It is certainly legitimate to write a history of punishment against the background of moral ideas or legal structures. But can one write such a history against the background of a history of bodies, when such systems of punishment claim to have only the secret souls of criminals as their objective?

—Michel Foucault¹

Cause every time they put you in the courthouse, they shackle you, you know they keep you waiting and you know, sit down and wait. But when you go into a program they shackle you too and you gotta sit there and wait but it ain't the same, you know, you get to at least see freedom. But when you're in the courthouse you feel like there ain't no freedom. They can lock your, you know, they can lock your body up but they can't lock your mind up. That's a good thing.

—Shackled Juvenile²

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1. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 25 (Alan Sheridan trans., Pantheon Books 1st ed. 1977) (1975).

2. Interview by Juvenile Shackling Voice Project with Miami-Dade County juvenile offender, in Miami, Fla. (Mar. 29, 2007) [hereinafter Voice Project] (interviewee first shackled at age fourteen) (interview on file with author).

The Juvenile Shackling Voice Project is a collaborative project with Bruce J. Winick, Professor of Law, Psychiatry and Behavioral Sciences at the University of Miami (and co-founder of Therapeutic Jurisprudence), the Miami-Dade Public Defender, and Miami artist and attorney Xavier Cortada. The Voice Project seeks to add the voices of youth to public discourse about courtroom shackling practices, to reform the practices through public education and advocacy, and to teach law students to apply principles of therapeutic jurisprudence.

Students in Professor Winick's Spring 2007 Law and Psychology seminar conducted interviews with approximately 12 juvenile offenders to elicit their views about being shackled. As part of the public education phase of the project, Xavier Cortada is producing a canvas about shackling using drawings and messages submitted by the juveniles. The canvas will be exhibited throughout Florida in connection with efforts to focus public attention on reform of this practice.

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I. INTRODUCTION

In a Tallahassee courtroom, an eleven year-old girl, 3-foot-7-inches tall, is “led to juvenile court wearing a belly chain connected to both handcuffs and leg irons—

For descriptions of previous Voice Project collaborations see Bernard P. Perlmutter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 563 n. 9 (2005); Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children's Law Clinic*, 17 ST. THOMAS L. REV. 623 (2005).

For other discussions of the importance of acknowledging youth voice in the attorney-client relationship, in lawyer ethics, and in discourse on child welfare and juvenile justice policy, see, e.g., Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692 (2006); Janet A. Chaplan, *Youth Perspectives on Lawyers' Ethics: A Report on Seven Interviews*, 64 FORDHAM L. REV. 1763 (1996); Kristin Henning, *Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89 (2002); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

usually reserved for adults who are flight risks or charged with first-degree murder.”³ Throughout Florida each day, the Department of Juvenile Justice (DJJ) shackles detained children when they are transported to court, and the chains often remain on as they stand before judges, regardless of the child’s age, height, weight, gender, offense, risk of flight, or threat to public safety. These children routinely appear before judges wearing metal handcuffs, metal leg shackles and sometimes belly chains. In several counties, children are escorted through open areas of the courthouse in plain view of the general public and then held in the courtroom in handcuffs and leg irons for hours at a time. Ironically, while all detained children at the pre-adjudicatory stage of the delinquency process are subject to a blanket policy of shackling in juvenile court, it is constitutionally impermissible for states to indiscriminately shackle convicted adult defendants even at the penalty phase of a capital case.⁴

The practice of requiring all detained children to appear in court in chains has recently been the subject of legal challenges, legislative advocacy, and a national campaign to influence public opinion in favor of ending this practice as inhumane, degrading, and illegal. The Miami-Dade County Public Defender’s Office led the charge, filing a series of groundbreaking motions for children to “appear free from degrading and unlawful restraints.”⁵ The motions spawned similar litigation in other parts of Florida and beyond Florida challenging, as contrary to principles of constitutional, state and international law, and the very purposes of juvenile delinquency statutes, the courts’ use of exceptional restraint procedures without an individualized showing of necessity.

The challenges summoned various legal theories including that shackling children violates the child’s right to due process, interferes with the right to counsel and to participate in his or her defense under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I sections 9 and 16 of the Florida Constitution, violates the detained child’s core right to be free from unnecessary bodily restraint under the Fourteenth Amendment to the United States Constitution and article I section 9 of the Florida Constitution, contravenes international human rights law, and violates the child’s right to be free from physical or emotional abuse under state law.

The litigation, public education, and other law reform efforts portrayed juvenile shackling as gratuitously punitive, counter-therapeutic, medically and psychologically harmful, an affront to the dignity of the children and the decorum of juvenile court proceedings, and antithetical to the juvenile court’s very objectives of individualized assessment and rehabilitation. Relying on psychological and medical expert opinion, the challenges to the legality and harmful effects of the practice

3. Jan Pudlow, *Bar Panel Urges: Unchain the Children: Committee Takes Issue with ‘Indiscriminate Shackling’ of Juveniles*, THE FLORIDA BAR NEWS, Oct. 1, 2006, 1, 4.

4. *Deck v. Missouri*, 544 U.S. 622 (2005).

5. The motions, addenda, memoranda, reports, photographs, and newspaper articles can be found on the Miami-Dade Public Defender web site. Miami Dade Public Defender, *Unchain the Children: Public Defender Challenges Shackling of Juveniles*, <http://www.pdmiami.com/unchainthechildren.htm> (last visited Sept. 28, 2007).

focused on the child's feelings and perception of the treatment accorded to him or her by being held in shackles.

The prevalence of shackling, not just in Florida, but in many jurisdictions across the U.S.,⁶ suggests that the original conception of the juvenile court as a rehabilitative social welfare institution has devolved into a punitive system that, as one leading critic of the contemporary juvenile court notes, "provides young offenders with neither therapy nor justice."⁷ Parading children through the courthouse in handcuffs and leg irons not only shocks the conscience in the post-*Gault*⁸ due process era, but is also certainly anathema to the pre-*Gault* vision of the juvenile court as a paternalistic institution dispensing careful, compassionate, individualized medical treatment for children afflicted with a variety of social ills or pathologies.⁹

This article examines the practice of shackling detained juveniles in light of the historical conception of juvenile court and of the *Gault* decision. Part II gives a short history of the practice from the point of view of those who defend it as a necessary courtroom security measure and those who oppose it as unlawful and degrading, including some of the children who have been subjected to it. Part III addresses *Gault*, focusing on its narrow holding and broader policy implications for the constitutional rights of children. The broader policy principles articulated by Justice Fortas in that case derived, in part, from social science research suggesting that the "appearance as well as the actuality of fairness, impartiality and orderliness—the essentials of due process"¹⁰—promote therapeutic values for children.

This article asks whether the practice of shackling would be countenanced by the *Gault* Court and gives two reasons why it would not. First, inasmuch as the practice constitutes a serious deprivation of the fundamental liberty interest to be free from external restraint, due process requires that the court have a procedure, based on constitutional principle, for making an individualized determination that a child needs to be shackled. Second, the blanket shackling policy is anathema to the historical rehabilitative aims of the juvenile justice system and is anti-therapeutic.

6. According to USA TODAY, "in 28 states, some juvenile courts routinely keep defendants in restraints during court appearances." Martha T. Moore, *Should Kids Go to Court in Chains?*, USA TODAY, Jun. 17, 2007, at 1A. Cf. Affidavit of Dr. Marty Beyer, ¶¶ 6-7, discussed *infra* Part II.D.2, available at <http://www.pdmiami.com/unchainthechildren.htm/AppendixDBeyer.pdf> (last visited Sept. 28, 2007) (observing that throughout the country children "are seldom handcuffed or shackled in juvenile or family courts," but only in those "rare situations" when the child "poses an imminent threat" to the safety of others in the courtroom). See also *infra* note 167 and Appendix (summarizing juvenile shackling practices in other jurisdictions).

7. Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 68 (1997); see also Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991).

8. *In re Gault*, 387 U.S. 1 (1967).

9. See, e.g., Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909) (attributing necessity for separate juvenile court to concern for social rehabilitation of wayward youths); see also Ainsworth, *supra* note 7, at 1096-1101 (discussing the ideological underpinnings of the reforms that gave rise to the separate juvenile court in the Progressive Era).

10. *Gault*, 387 U.S. at 26.

Part IV analyzes some of the key and relevant constitutional case law in the post-*Gault* era to present a due process argument against shackling and to incorporate social science research into the legal and policy argument. The article applies the research-based insights, combined with due process analysis derived from *Gault* and other case law, to argue that the use of exceptional restraints must be reserved for the rare case where the court makes an individualized determination that unusual facts warrant such an extreme measure, and that requiring such individualized determinations fosters positive behavioral and psychological outcomes for the child, both of which are key goals of the juvenile court process in the pre- and post-*Gault* eras.

Part V examines shackling through the perspective of “therapeutic jurisprudence,” a field of social inquiry that studies the ways in which legal rules, procedures, and the roles of legal actors produce therapeutic or anti-therapeutic consequences for those affected by the legal process. Therapeutic jurisprudence seeks to promote policies, systems, and relationships that are consistent with normative principles of justice and constitutional law, and will secure positive therapeutic outcomes and minimize negative psychological and behavioral effects of anti-therapeutic legal rules and practices.¹¹ Therapeutic jurisprudence provides a particularly useful methodology for the fashioning of policy in the juvenile justice system with its avowed goal of rehabilitation. As one scholar has observed: “Because the tools of therapeutic jurisprudence are borrowed largely from the psychological and other social science disciplines, it can inform and influence public policy within an established epistemological framework.”¹²

The article concludes by arguing that public policy should promote the due process rights and therapeutic interests of juveniles as they move through the juvenile justice system, while also being cognizant of legitimate public safety considerations. The indiscriminate shackling of juveniles without individualized determinations of public safety risk, subordinates to public safety concerns, the child’s right to be free from the government’s arbitrary use of external restraint. In doing so, it upsets a carefully modulated balance within the juvenile justice system, which is intended

[t]o provide judicial and other procedures to assure due process through which children and other parties are assured fair hearings by a respectful and respected court . . . the recognition, protection and enforcement of their constitutional and other legal rights, while ensuring that public safety interests and the authority and the dignity of the courts are adequately protected.¹³

The article urges Florida to adopt the National Juvenile Defender Center’s recommendation, the result of its recent assessment of access to counsel in Florida’s ju-

11. See *infra* Part V.

12. A.J. Stephani, *Symposium: Therapeutic Jurisprudence and Children*, 71 U. CIN. L. REV. 13, 14 (2002).

13. FLA. STAT. § 985.01(1)(a) (2007).

venile justice system, calling for a cessation of the practice of shackling children in the juvenile courtroom:

State legislators, local policymakers, and juvenile court judges should end the practice of shackling youth by hand, foot and belly chain for court appearances unless an extenuating individual situation warrants such restraint. Under any circumstances, the practice of shackling youth to each other in a group or to fixed objects in the courtroom should be strictly prohibited.¹⁴

II. A BRIEF HISTORY OF SHACKLING AND ITS DISCONTENTS

I think the back of my feets [sic] can describe it, they hurt real bad. They cut through your skin, they rip it and when you take them off, you have a permanent dent in there of the shackles. They hurt; you bleed a lot from them.

— Shackled Juvenile¹⁵

Throughout Florida, juveniles in secure detention routinely appear before judges wearing metal handcuffs, metal leg shackles, and sometimes belly chains regardless of age, size, gender, or alleged offense.¹⁶ In Miami-Dade County's Juvenile Justice Center, girls and boys dressed in orange and brown jumpsuits are held in a guarded holding area behind the courtrooms in ankle and wrist bracelets.¹⁷ When children in Miami-Dade and other parts of the state enter the courtroom, they are still held in restraints, frequently "chained to furniture, doors or other fixed structures in the courtroom to keep them in place."¹⁸ Photographs taken by the Miami-Dade Public Defender's Office (posted on its web site) show the children seated on benches in the waiting area and standing uncomfortably before the court while bound by metal ankle and wrist restraints. The chains stay on for hours at a

14. NATIONAL JUVENILE DEFENDER CENTER, FLORIDA—AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 5 (2006), available at <http://www.njdc.info/pdf/Florida%20Assessment.pdf> (last visited Sept. 28, 2007) [hereinafter FLORIDA—AN ASSESSMENT OF ACCESS TO COUNSEL]. See discussion *infra* Part II.D.2.

15. Voice Project, *supra* note 2 (Mar. 29, 2007) (on file with author).

16. FLORIDA—AN ASSESSMENT OF ACCESS TO COUNSEL, *supra* note 14, at 5, 57-58. See also Curt Anderson, *Effort Growing to End Florida Shackling of Juvenile Suspects*, ASSOCIATED PRESS, Nov. 18, 2006, available at http://www.pdmiami.com/Effort_growing_to_end_Florida_shackling.htm (last visited Sept. 28, 2007); Carlos Martinez, *Why are Children in Florida Treated as Enemy Combatants?*, 29 NATIONAL LEGAL AID AND DEFENDER ASSOCIATION (NLADA) CORNERSTONE, May/Aug. 2007, at 10 (2007), <http://www.nlada.org/DMS/Documents/1183059596.88/Cornerstone%20May-August%202007%20%232.pdf> (last visited Sept. 28, 2007) (summarizing history of juvenile shackling challenges in Florida).

17. See Motion for Child to Appear Free from Degrading and Unlawful Restraints, available at http://www.pdmiami.com/unchainthechildren.htm/Motion_for_Child_to_Appear_Free_from_Degrading_and_Unlawful_Restraints.pdf (last visited Sept. 28, 2007) [hereinafter Motion for Child to Appear Free] ("The Department of Juvenile Justice (DJJ) uses metal handcuffs to secure each child's wrists together. The child's legs are shackled with metal leg-irons connected by an approximately sixteen inch chain. This short length of chain makes normal walking impossible, and forces the child to shuffle." (citations omitted)).

18. FLORIDA—AN ASSESSMENT OF ACCESS TO COUNSEL, *supra* note 14, at 58.

time, sometimes as long as a full day, and are not removed even when the children need to use the bathroom.¹⁹ Many of the photographs show cuts, bruises and abrasions from the tight cuffs, which are fastened for hours on bare wrists and ankles.²⁰

Children interviewed about the practice complain that the restraints have caused bleeding and other serious physical harms and discomforts.²¹ Even children with special medical conditions, such as pregnancy, are not exempt from the practice.²² In several other counties, chained children are escorted through open areas of the courthouse in public view, and then held in the courtroom in handcuffs and leg irons for hours at a time.²³ Children as young as six are subject to these practices.²⁴

A. Shackling as Metaphor for Power, Surveillance and Control

I feel trapped, I felt violated, like that I wouldn't be able to go anywhere . . . I was being controlled.

—Shackled Juvenile²⁵

Just locked up man, powerless.

—Shackled Juvenile²⁶

Michel Foucault, in his seminal examination of the history of the modern prison, *Discipline and Punish*, observed that the architectural features of the prison were designed to create a “docile body” through “enclosure and the organization of individuals in space.”²⁷ In addition to rendering bodies docile, the spatial characteristics of prisons made it easier for the state to observe inmates and to quickly

19. According to one of the children interviewed: “Yeah man, shit, you can be sitting there for four hours, hours at a time, and then they call your name and then you have to wait for the next court, afternoon court, you might sit there for [the whole day, with shackles on] . . . Go to use the bathroom and you got shackles on, you gotta do it as best way you can.” Voice Project, *supra* note 2 (Mar. 30, 2007) (on file with author).

20. See Motion for Child to Appear Free, *supra* note 17 ¶¶ 5-8.

21. See *supra* note 15 and accompanying text.

22. Another juvenile interviewed reported that she had been shackled in court while pregnant. She also reported on this harrowing experience when she was transported to a hospital facility in shackles while pregnant: “Yeah, they shackled me when I was pregnant and then later when I was in the hospital when they told, you know, the people that I didn't have to wear cuffs, the man said oh well, she already fell down, the supervisor cause he told them to put shackles on me.” Voice Project, *supra* note 2 (on file with author).

23. See Motion for Child to Appear Free, *supra* note 17 ¶ 7 (“Thus chained, children await their court hearings in the locked, staff-supervised holding area behind the courtrooms. The waiting time varies with the type of proceeding, the length of the calendar, and the child's position on it. It is possible for a child to remain shackled for as long as four hours while waiting.”).

24. Bob Herbert, *6-Year-Olds Under Arrest*, N.Y. TIMES, Apr. 9, 2007, at A19 (“You can't handcuff them on their wrists because their wrists are too small, so you have to handcuff them up to their biceps,” quoting Avon Park, Florida, Police Chief Frank Mercurio).

25. Voice Project, *supra* note 2 (on file with author).

26. *Id.*

27. FOUCAULT, *supra* note 1, at 198. See also Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 420-44 (discussing Foucault's approach to power in different intellectual, institutional and historical contexts).

intervene to correct wayward behaviors. Foucault saw the “progressive objectification and the ever more subtle partitioning of individual behaviour”; the “innumerable petty mechanisms” of control and surveillance built into the penal spaces that he examined.²⁸ He also noted the nuanced spatial tactics that obscure their substantial influence on the behavior of those subjugated by these forces and spaces: “The disciplinary institutions secreted a machinery of control that functioned like a microscope of conduct; the fine, analytical divisions that they created formed around men an apparatus of observation, recording and training.”²⁹

Shackling children in the juvenile courtroom is a paradigmatic example or metaphor of the exercise of the machinery of power, surveillance, and control by the state *qua* judge over the docile body of the allegedly disobedient and powerless child.³⁰

B. Sources of the Power to Shackle Children

[T]he use of mechanical restraints is not an effort on the part of the Department or the Court to inflict physical or mental anguish, or to torture or humiliate detained youth. Rather, the practice, reserved as it is for those who have already been screened as posing a risk to public safety, serves to reduce the possibility that youths will pick up additional charges at this early stage of juvenile proceedings.

—Florida Department of Juvenile Justice³¹

The Florida Department of Juvenile Justice’s³² statutorily-delegated authority to use mechanical restraints is limited to the control of youth who present a threat to safety and security within secure detention facilities operated by the agency, and when it transports youth outside secure facilities and to court.³³ DJJ has the authority to place children in secure detention based on a risk assessment instrument administered and scored by a juvenile probation officer at the time of the child’s ar-

28. FOUCAULT, *supra* note 1, at 173.

29. *Id.*

30. It is also a case example of the broader power and dominion exercised by the apparatus of the state over children who have far fewer legal and constitutional rights than adults by virtue of their legal incapacity as children, and, therefore, see themselves as powerless to counter the overwhelming authority of the state and adults. See, e.g., Katherine Hunt Federle, *Children, Curfews and the Constitution*, 73 WASH. U. L. Q. 1315 (1995) (arguing for an empowerment rights perspective to enable incapacitated children to overcome paternalistic control and dominance); Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1695 (1996) (“Because children are powerless, they do not expect adults to treat them with respect or to listen to their opinions. They are treated as passive and subordinate beings who must follow the instructions of an older and wiser adult.”).

31. Department of Juvenile Justice’s Response to Child’s Motion to Appear Without Mechanical Restraints at 4-5, (Fla. Cir. Ct. 2006) [hereinafter Response to Child’s Motion] (on file with author).

32. [Hereinafter DJJ]

33. See *infra* Part IV.B and Part IV.C.

rest.³⁴ Youth who receive numerical scores above a certain level are presumed to warrant detention.³⁵ Although the use of screening instruments such as this are seen by some juvenile detention reform advocates as objective methods to promote alternatives to secure detention, the National Juvenile Defender Center criticizes Florida's reliance on this instrument as "flawed".³⁶ Risk assessment instruments, such as the DJJ detention instrument, reflect what Professor Jonathan Simon describes as the "complex relationship between citizens, government, and risk" in contemporary prison and correctional discourse, one "far more concerned with setting risk-appropriate custody levels and removing at-risk parolees from the community, than . . . with rehabilitating offenders."³⁷

After the DJJ risk assessment is completed, the court must hold a detention hearing within twenty-four hours of a child being taken into custody and detained by DJJ to decide whether a youth can be held in secure detention prior to adjudication.³⁸ At the detention hearing, the court determines whether there is probable cause that the child committed the delinquent act.³⁹ If the court does not find that probable cause exists, the court must release the child from detention.⁴⁰ If the court finds probable cause, it must base its decision to place a child in secure detention on a detailed set of statutory criteria, including the information in the DJJ risk as-

34. FLA. STAT. § 985.245 (2007). See also *S.W. v. Woolsey*, 673 So. 2d 152, 154-55 (Fla. Dist. Ct. App. 1996) (discussing purposes and functions of risk assessment instrument). The agency's authority to detain a child is "based in part on a prudent assessment of risk and . . . limited to situations where there is clear and convincing evidence that a child presents a risk of failing to appear or presents a substantial risk of inflicting bodily harm on others as evidenced by recent behavior." FLA. STAT. § 985.02(4)(a) (2007); see also FLA. STAT. §§ 985.01(1)(c), 985.24(1), 985.25(1)(b)-(c), 985.255 (2007) (outlining procedures and criteria used in the DJJ assessment of risk at detention intake).

DJJ also has the statutory authority to securely detain any child who "presents a history of committing a serious property offense prior to adjudication, disposition, or placement; has acted in direct or indirect contempt of court; or requests protection from imminent bodily harm." FLA. STAT. § 985.02(4)(a) (2007); see also FLA. STAT. § 985.24(1) (2007). The National Juvenile Defender Center report noted that children can be placed in secure detention for technical probation and parole violations (such as violating curfew). See FLORIDA—AN ASSESSMENT OF ACCESS TO COUNSEL, *supra* note 14, at 57.

These children and other children who are victims of abuse (*i.e.*, those seeking placement in secure detention as safe harbor from harm) are also chained in the courtroom even though their placement by the court in secure detention is not based on a determination by DJJ or a finding by the court by clear and convincing evidence that they present a substantial risk of inflicting bodily injury on others or of committing a property offense. FLA. STAT. § 985.02(4)(a) (2007).

35. FLA. STAT. § 985.25(1)(b)-(c) (2007).

36. FLORIDA—AN ASSESSMENT OF ACCESS TO COUNSEL, *supra* note 14, at 38. As evidence of these flaws, the Defender Center report points to the high percentage of children released by judges from secure detention based on material errors in the scoring of the instrument by DJJ workers and mitigating factors not captured by the risk assessment which are weighed by judges in departing from DJJ detention recommendations. *Id.* at 38-40. The report also notes that the instrument has been criticized by judges and lawyers as not "scientifically validated and . . . in serious need of revision." *Id.* at 38. See also *Martinez*, *supra* note 16, at 11 ("Florida uses a detention risk assessment instrument that has never been scientifically validated to measure dangerousness or anything else.").

37. Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U. MIAMI L. REV. 217, 238-39 (2001).

38. FLA. STAT. § 985.255(3)(a) (2007); Fla. R. Juv. P. 8.010(b) (2007). Additionally, youth charged with committing domestic violence may be put into secure detention, regardless of the risk assessment results, to protect the alleged victim from further injury. FLA. STAT. § 985.255(2) (2007).

39. FLA. STAT. § 985.255(3)(a) (2007).

40. Fla. R. Juv. P. 8.010(g) (2007).

assessment.⁴¹ The detention order must contain specific instructions regarding release of the child at the conclusion of the detention period.⁴² Moreover, the authority to securely detain a child cannot exceed twenty-one days, unless “an adjudicatory hearing for the case has been commenced in good faith by the court.”⁴³ Thus, the same child who appears in court in chains while in secure detention will appear in court without shackles at all subsequent hearings if released from secure detention prior to adjudication on day twenty-one.

DJJ argues that the authority vested in it to make “initial determinations of offender risk to the public” provides it with the authority to place mechanical restraints on securely detained juveniles within the courtroom.⁴⁴ In court filings, it contends that the harms to public safety presented by all securely detained juveniles justify the blanket use of shackles in the courtroom. DJJ concludes that its statutory authority to “ensure the protection of society by providing for a standardized assessment of the child’s needs so that the most appropriate control, discipline, punishment, and treatment can be administered consistent with the seriousness of the act committed,”⁴⁵ imbues the department with virtually unchecked authority to ensure that “all phases of restraint and/or forms of detention are taken into account within the assessment of risk process.”⁴⁶ Notwithstanding this broad claim of authority over “all phases of restraint,” DJJ concedes that it will unshackle an offender in the courtroom if ordered by the court.⁴⁷

Moreover, DJJ’s claim that it possesses plenary authority to manage and control all phases of restraint as part of its risk assessment process accountability duties fails to acknowledge the explicit limits imposed by the legislature, and by its own administrative regulations, on its authority to restrain children. Although detailed rules provide DJJ staff with carefully circumscribed authority to restrain youth while held in detention facilities and when transporting youth outside secure facilities,⁴⁸ the statutes or rules are completely silent with respect to the agency’s

41. FLA. STAT. § 985.255(1) (2007).

42. FLA. STAT. § 985.26(1) (2007).

43. FLA. STAT. § 985.26(2) (2007). The statute also provides that detention can be extended for “good cause” for an additional nine days if the charged offense is classified as a felony. *Id.*

44. See Response to Child’s Motion, *supra* note 31, at 3.

45. *Id.* at 2 (quoting FLA. STAT. § 985.01(1)(a) (undated), renumbered as FLA. STAT. § 985.01(1)(c) (2007)).

46. *Id.* at 3 (emphasis added).

47. *Id.* at 5 (noting that “[w]hile . . . a blanket policy of unshackling securely detained youth in the courtroom will jeopardize public safety, if the Court determines on a case-by-case basis that a particular youth should be unshackled in court, the Department will comply with that Order.”).

48. See FLA. STAT. § 985.03(44)(c)-(e) (2007) (authorizing use of mechanical restraints in moderate-risk, high-risk, and maximum-risk residential programs “when necessary”); FLA. ADMIN. CODE ANN. R. 63G-2.005(2)3 (noting use of mechanical restraints, *i.e.*, handcuffs, restraint belts, leg cuffs, soft restraints, as “security devices” in DJJ detention centers); R. 63G-2.005(6) (d) (noting permissible use “if necessary” of mechanical restraints in detention centers “[w]hen youth are noncompliant or present a danger to self or others”); R. 63G-2.012(3)(a)-(d) (noting limited use of mechanical restraints as a method of controlling youth who present a threat to safety and security within detention facility and when transporting youth outside secure area of facility, but forbidding use of mechanical restraints as a means of discipline and requiring report submitted for review when mechanical restraints are used); R. 63H-1.002 (detailing curricular requirements for staff training in detention facilities for use of mechanical restraints); R. 63H-1.003 (authorizing use of mechanical restraints as a “Level 3” response where a youth has initiated “active, combative, or aggravated resistance,” and in situations where a youth poses a physical threat to self or others); R. 63H-1.004 (describing techniques for use of mechanical restraints); R. 63H-1.005

authority to use mechanical restraints inside the courthouse and courtroom. Indeed, the agency's statutory authority to restrain children ends at the courthouse door. Unlike the detailed policies that govern use of restraints inside DJJ facilities and when transporting children outside of those facilities, there are no written policies pertaining to the use of restraints in the courtroom.⁴⁹

DJJ defends the use of chains and handcuffs as necessary for public safety, and rejects criticism that their use is indiscriminate.⁵⁰ A spokesperson argues: "Our agency is responsible for ensuring the safety and well-being of the public. Some youth in our care are accused of serious crimes, such as murder and armed robbery."⁵¹ In court filings, DJJ states that the use of shackles "is not an effort . . . to inflict physical or mental anguish, or to torture or humiliate detained youth," but intended to prevent youth from escaping or getting into further trouble.⁵² "All in the courtroom should share the common goal of seeing that youth do not become more deeply involved in the juvenile justice system."⁵³

On the question of whether to permit shackles to be removed, the agency says it defers to judges. However, judges typically do not question the presumption that all children are to be shackled, and instead defer to the judgment of law enforcement agencies and the asserted authority of DJJ regarding the need to use shackles in order to satisfy their concerns about courtroom safety.⁵⁴ Any countervailing concerns about the legality of the practice, or its effects on the children who are placed in shackles, are raised by judges (if at all) on a discretionary ad hoc basis—sometimes exercised in a principled and thoughtful manner, other times capriciously and arbitrarily.⁵⁵

The lack of a uniform statewide standard comporting with the requirements of constitutional due process results in dramatically different opinions, rulings, and policies about the use of shackles by courts throughout the state. By way of illustration, the first juvenile court judge in Miami-Dade County to grant a motion to unshackle a detained child stated that he would always permit the unshackling of

(describing authorized use of mechanical restraints (handcuffs, leg restraints, restraint belts, soft restraints, and waist chains) within DJJ facilities); R. 63H-1.006 (describing staff supervision of youth placed in mechanical restraints); R. 63H-1.009 (describing certification for training in use of restraints); R. 63H-1.012 (describing in-service training requirements on use of mechanical restraints); R. 63H-1.013 (describing restraint testing requirements); FLA. ADMIN. CODE ANN. R 10Q-5.015 (2007) (describing use of mechanical restraints in boot camps); Fla. Dept. of Juv. Justice Office of Probation & Community Corrections Probation & Community Corrections Handbook (2006) (*inter alia* prohibiting use of physical restraints by probation officers when transporting youths; prohibiting use of handcuffs and/or shackles in the airport; requiring use of approved mechanical restraints when transporting youth from detention facilities or assessment centers to court).

49. See *infra* Part IV.B and Part IV.C.

50. Anderson, *supra* note 16.

51. *Id.* (quoting DJJ spokesperson Cynthia Lorenzo in an e-mail to Associated Press reporter).

52. *Id.* (quoting Brian Berkowitz, Chief Assistant General Counsel of the Department of Juvenile Justice).

53. *Id.*

54. See *infra* Part II.C. See also *Tiffany A. v. Superior Court*, 59 Cal. Rptr. 3d 363, 373 (Cal. Ct. App. 2007) (holding that a juvenile delinquency court abused its discretion in justifying the shackling of juveniles solely on the inadequacy of courtroom facilities or the lack of available security personnel) (see discussion *infra* Part II.E.2).

55. *Tiffany A.*, 59 Cal. Rptr. 3d at 369-70 (describing the juvenile court's exercise of discretion in denying a petition to unshackle as an example of "arbitrary determination, capricious disposition or whimsical thinking").

children on motion of the public defender as long as a bailiff was present in the courtroom to ensure the safety of the proceedings:

This has always been my ruling in my courtroom. I have always said that they shall not be chained in this courtroom. I don't think it is an administrative position. I feel each judge has the right to call it as he sees it, but I have always disagreed with the policy of chaining the children. That has always been my position.⁵⁶

In contrast to the Miami-Dade judge's favorable ruling on the motion, a juvenile court judge in upstate Sumter County responded with indignation and outright contempt to a request by a public defender to unshackle his client before the start of an adjudicatory hearing in his courtroom. The judge denied the public defender's request with a lengthy speech about the threats to courthouse security that unshackling would unleash:

Is there any legal reason [to unshackle]? I mean, has it been that we would set aside twenty, thirty years of procedure in the courtroom on this particular case . . . [I]n light of the violence that is generally coming out of the people who tend to commit crimes and are involved in the court system . . .

. . . I would be [remiss] in my duties at this point, to start releasing people and let them walk freely around in the courthouse in light of everything that is going on. I mean, people can say, well, that's just the media and they don't—well, these people are dead. These people are dead from unshackling people who are in custody.

And I'm just in shock that we're in light of—and I know there are newspaper articles coming out now that are saying this is inhuman that we shackle people. It is the unshackled people that are killing people in the courtroom. It is the unshackled-in-custody people that are committing heinous crimes of unbelievable [proportions]. Yet out of South Florida we have people that say this is inhuman to treat people in this manner. So I am going to deny that request

56. Transcript of Hearing at 7, *State of Florida v. J.A.*, Case No. [redacted], (Fla. Cir. Ct. 2006) (on file with author). This *ore tenus* decision was rendered the same day that the shackling litigation commenced, and it prompted the other three delinquency court judges in the Eleventh Judicial Circuit to follow suit, which in effect led to the de facto, voluntary cessation of the blanket shackling policy in the circuit. (E-mail from Carlos J. Martinez, Chief Assistant Public Defender, Office of Public Defender (Miami-Dade), to Bernard P. Perlmutter, Assistant Professor of Clinical Legal Education, University of Miami School of Law (July 1, 2007, 02:52 p.m. (EST)) (on file with author).

because I think there is a safety factor to all people that are sitting in here.⁵⁷

These two rulings on motions to unshackle reflect the range of dramatically varying opinions among judges about the practice. They demonstrate why it is necessary to establish, through legislation, administrative or court rule, or judicial precedent, a uniform standard applicable in all courtrooms throughout the state. The standard should be one that comports with the requirements of substantive and procedural due process, ensures the state bears the burden of showing that the child is dangerous or at risk of running away, and mandates that the court make individualized findings based on the evidence presented before it can grant the state permission to impose such a severe restriction on the child's physical liberty.⁵⁸

C. Origins of the Practice of Shackling Children in Court

My God, it would be extremely dangerous [to remove restraints] . . . If just one kid is off, it could ignite the whole group. He could get a gun from a deputy. With the facilities we have and the lack of funding, it's a security issue.

—Maura Smith, Chief Administrative Circuit Court Judge in Orange and Osceola Counties⁵⁹

Shackling children in juvenile court proceedings appears to have been introduced at different times in different parts of the state, but for one reason—courtroom safety.⁶⁰ Published media reports of incidents of violence,⁶¹ courtroom shootings, and rising anxiety about public facility safety in the post-9/11 era, have undoubtedly prompted courts and law enforcement agencies to institute courthouse safety and security precautions.⁶² Like “zero-tolerance” and other emergency

57. Transcript of Hearing at 3-6, *State of Florida v. [Child]*, No. 2006-CJ-[redacted], (Fla. Cir. Ct. 2006) (unpaginated document) (on file with author).

58. See discussion *infra* Part IV. See also *Dep't. of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 967 (Fla. 1991) (“[W]hen an individual is charged with a crime, the government cannot deprive that person of life, liberty, or property unless [the government] carries the burden of proof beyond every reasonable doubt as to each essential element.”).

59. Maya Bell, *Public Defenders in Miami-Dade Call for Unshackling of Kids in Courtroom*, SUN-SENTINEL, Sept. 12, 2006, at 1B.

60. See Martinez, *supra* note 16, at 10-11. The Miami-Dade Public Defender's Office surveyed defender offices in Florida and found that in some counties children had been shackled for over two decades, while in others the practice is less than five years old.

61. See, e.g., Matthew Brown, *Judges Get Lesson in Protection; Gretna Police Sponsor Security Workshop*, TIMES-PICAYUNE (New Orleans), May 3, 2005, at 1 (Metro); Rhonda Cook, *Court Melee Renews Fear Over Security; Chief Judge's Report Says Warnings Were Ignored*, ATLANTA JOURNAL-CONSTITUTION, June 9, 2006, at 1E; Deborah Sontag, *In Courts, Threats Become Alarming Fact of Life*, N.Y. TIMES, Mar. 20, 2005, at A1.

62. See, e.g., News Release, National Center for State Courts, *Improving Security in State Courthouses: Ten Essential Elements for Court Safety* (Mar. 16, 2005), available at <http://www.ncsconline.org/> (last visited Sept. 28, 2007); NAT'L ASSN. FOR CT. MANAGEMENT, COURT SECURITY GUIDE (offering checklist of recommended courtroom security measures, including “a policy on the type of restraints that can be used, when and where restraints may be placed and removed, and emergency guidelines”).

measures enacted by school districts in response to student shootings,⁶³ shackling children in court is a reaction to threats (or perceived threats) of violence.⁶⁴ In several states, judges have even resorted to self-help measures such as arming themselves for protection in the courtroom.⁶⁵ While judges and law enforcement personnel repeatedly cite the need to maintain order and decorum in the courtroom as a central justification for shackling children,⁶⁶ data on the incidence of courtroom violence, and particularly violence perpetrated by juveniles, is sparse and not supportive of a blanket shackling policy.⁶⁷

D. Challenges to Shackling Children in Florida Courts

Shackling children is an affront to our principles of justice. It makes a mockery of the presumption of innocence doctrine, interferes with the right to freely think and express yourself in your own defense, demeans the dignity of an American courtroom, and runs counter to the rehabilitative nature inherent in juvenile court. Adult clients accused of the most serious crimes are not shackled absent evident danger.

—Marie Osborne, Chief, Juvenile Division, Miami-Dade Public Defender⁶⁸

1. Duval County Litigation

The earliest reported case to address the use of shackles on juveniles in Florida's court system was filed in 1990 in the Fourth Judicial Circuit (Duval County). Two judges had instituted a "general policy" requiring all children held in secure detention to be shackled during all court appearances.⁶⁹ Under their policy, indi-

63. See, e.g., Christina Curtis, Note, *Responding to Columbine: Kent School District and the Use of Handcuffs*, 28 WHITTIER L. REV. 793 (2006). Notably, however, there has not been a single report of a courthouse shooting by a juvenile, much less one of Columbine-like proportions. See *infra* note 67, and accompanying text.

64. See, e.g., Sabrina Tavernise, *Terror in Atlanta: Security; Budget Can Affect Safety Inside Many Courthouses*, N.Y. TIMES, Mar. 12, 2005, at A11 ("There's a general perception among judges that there are more threats," said Judge Lawrence L. Piersol of Federal District Court in Sioux Falls, S.D., president of the Federal Judges Association. "Many judges feel this way. Once this is analyzed, there may be some different security procedures initialized.").

65. See, e.g., Amanda Bronstad, *More Judges Packing Pistols in Courtrooms: Despite More Security, States Pass Laws Allowing Jurists to Arm Themselves*, NATIONAL L. J., Dec. 7, 2006 ("Judges in our courthouse have been carrying guns almost all the time," said Cynthia Stevens Kent, a Texas judge in the 114th District Court, where a man in a family law case killed his ex-wife and son last year on the steps of a Tyler courthouse.").

66. See, e.g., *S.Y. v. McMillan*, 563 So. 2d 807, 809 (Fla. Dist. Ct. App.1990) ("A court has the inherent power to control the conduct of its own proceedings in order to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and to generally further the administration of justice.").

67. See [Hon.] Fred A. Geiger, *Courthouse Violence: The View from the Bench*, 576 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 103 ("Because of the lack of hard data, security planners may be forced to base their decisions on anecdotal reports of risk. Unfortunately, these reports are often inaccurate and many times are totally wrong."). See also Moore, *supra* note 6 ("There are no national figures for violent incidents in juvenile courtrooms.").

68. Memorandum Re: Shackling Children in Court, from Marie Osborne, Chief, Juvenile Division, Public Defender's Office, to Honorable Lester Langer 2 (May 17, 2006) (on file with author).

69. *S.Y.*, 563 So. 2d at 807-808.

vidual hearings to determine if shackling was necessary to prevent escape or disruptive behavior were disallowed.⁷⁰ The public defender filed six motions on behalf of shackled juveniles. The two judges, sitting *en banc*, consolidated the motions and treated them as a class action. They entered a single order denying the motions. The juveniles filed a petition for writ of habeas corpus.

In reviewing the challenged order, the First District Court of Appeal treated the petition as a writ of certiorari and denied the relief requested. Overlooking procedural defects in the order,⁷¹ the court held that the juveniles had failed to show a departure from the essential requirements of law that could not be remedied on direct appeal. The decision ignored the fact that only an adjudicated juvenile could challenge the use of shackles on direct appeal, and that a juvenile subsequently acquitted or nolle prossed would have no remedy, direct or collateral, to challenge the use of shackles.

In denying the petition, the district court noted that all of the petitioners' supporting legal authority involved direct appeals or collateral attacks by adult defendants from convictions by juries.⁷² Because juvenile proceedings are conducted before the circuit court without a jury, the court reasoned that "the prejudicial effect of the shackling of a defendant in front of a jury" was absent.⁷³ The court's cramped view of the prejudicial effect on the juvenile of being shackled is particularly striking. It ignored the prejudice to the juvenile's ability to communicate effectively with counsel, to the presumption of innocence, to the intimate and informal tenor of juvenile court proceedings, and to the inherent dignity of the *child* when held in shackles in the courtroom.⁷⁴

The second reason given for denying the petition was the "positive effect [of shackling] on security and decorum in the courtroom."⁷⁵ Based on a trial court record that apparently consisted of uncontroverted and anecdotal testimony from a bailiff that the policy had decreased "fights among the juveniles and escape attempts,"⁷⁶ the appeals court deemed this evidence a sufficient factual reason to deny the petition, and thus, in effect, upheld the lower court's shackling policy.⁷⁷

Even though the decision was procedurally limited by the extremely deferential nature of certiorari review,⁷⁸ it reflects three disturbing assumptions: First, a lim-

70. *Id.* at 808.

71. *Id.* The Florida Rules of Juvenile Procedure and the Circuit Court's administrative rules disallowed the judges' treatment of the motions as a class action, conducting a single *en banc* hearing, and entry of a single order.

72. *Id.*

73. *Id.*

74. *Cf. McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 550 (1971) (plurality opinion) (noting that imposing a constitutional requirement for jury trials in juvenile court proceedings might put an end to "the idealistic prospect of an intimate, informal protective proceeding," and lead to a diminution of the "aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates"). See *discussion infra* Part III.A.

75. *S.Y.*, 563 So. 2d at 809.

76. *Id.*

77. *Id.* The decision contains no discussion of any testimony by the petitioners or expert witnesses concerning the prejudicial impact on the children affected by the court's blanket shackling policy.

78. *Id.* Because of the limited scope of certiorari review, the court did not reach or address any due process claims made by the petitioner. However, the merits of the petitioners' claims would today be significantly strengthened by the U.S. Supreme Court's recent holding that shackling adult criminal defendants at the penalty

ited understanding of the prejudicial impact of shackling on children; second, a prevailing social fear of uncontrolled juvenile violence; and third, a concern with courtroom security at all costs as an overreaction to publicized incidents of courtroom violence, even though the evidence of courtroom violence perpetrated by juveniles is exceedingly sparse.

2. Miami-Dade County Litigation

The most recent Florida efforts to challenge courtroom shackling, launched in Miami-Dade County,⁷⁹ were prompted by long-standing concerns about this practice and by the National Juvenile Defender Center's findings in its 2006 report, *An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings*. The Defender Center's report surveyed and observed court proceedings and identified numerous endemic problems, such as high rates of waiver of counsel, lack of zealous defense advocacy, hectic courtrooms, and inadequate defense resources.

One of the report's more disconcerting findings was the "frequent and liberal use of restraints on youth in Florida courtrooms."⁸⁰ Courtroom observers found the use of wrist and leg shackles with belly chains to be the "norm" in many juvenile courtrooms across the state, frequently used to restrain nonviolent offenders held in secure detention on parole or probation violations.⁸¹ Every courtroom visited by the observers had youth, including very young children, "fully shackled when they were brought from detention into the courthouse itself."⁸² In most cases, children were shackled together in groups. The observers saw "youth who were brought into courtrooms in wrist and leg shackles and then were further chained to furniture, doors or other fixed structures in the courtroom to keep them in place."⁸³ The report noted:

While there may be legitimate reasons for securing a specific youth in this extreme fashion, observers heard no justification for this practice of shackling every single detained youth for court. As explained above, many youth detained in Florida are being held based on technical violations of probation or parole, such as failing to meet curfew.⁸⁴

stage of a capital trial, without individualized findings of dangerousness or risk, violates the Due Process Clause of the Fourteenth Amendment. *Deck*, 544 U.S. at 622. See discussion *infra* Part IV.D.

79. See William R. Levesque & Curtis Krueger, *Is it a Chain Overreaction? Dangerous Adults Stand Unfettered Before Pinellas Judges, While Children are Routinely Shackled. Some are Asking Why*, ST. PETERSBURG TIMES, Apr. 22, 2004, at 1B (reporting on an unsuccessful effort by Pinellas-Pasco Public Defender Bob Dillinger in 2004 to persuade judges to remove chains from children appearing in Pinellas County Juvenile Court).

80. FLORIDA—AN ASSESSMENT OF ACCESS TO COUNSEL, *supra* note 14, at 57.

81. *Id.*

82. *Id.*

83. *Id.* at 58.

84. *Id.* at 57.

Perhaps the most disconcerting finding was that this widespread practice frequently went unchallenged by public defenders. In those circuits where children's attorneys were more zealous in challenging the practices, many judges refused to alter existing practices by making individual determinations of the need to shackle. As a result, public defenders were unable to challenge or change the status quo, and the judges were content to continue the unquestioned use of shackles to control children in their courtrooms:

[N]owhere in the state did observers see juvenile defenders openly challenging this dehumanizing practice [of shackling their clients]. It was reported that in counties where this practice has been challenged, the judges have refused to establish the more reasonable practice of shackling the individual child when there is a specific reason to do so.⁸⁵

The Miami-Dade challenge to the practice began in May 2006 with a memorandum sent by the Public Defender's Office to the Associate Administrative Judge for the Juvenile Division of the Eleventh Judicial Circuit. The memorandum was prepared in anticipation of the release of the Defender Center report, with its criticism of widespread public defender diffidence and judicial acquiescence toward shackling, and to redress long-standing objections to the practice.⁸⁶ The memorandum crystallized the practical and policy arguments against the practice in the Eleventh Judicial Circuit's courtrooms:

Now we have weapons detectors and security guards stationed at the only two entrances/exits to the Juvenile Justice Center. We have Miami Dade police officers permanently stationed within yards of the courtrooms. We have courtroom bailiffs, walkie talkies, judicial buzzer alarms and electronic gates capable of closing on a moment's notice

Despite all this increased hardware and security personnel, and with no increased danger or need, DJJ's policy of shackling children *while in transport* has been extended to shackling children period.

Shackling children is an affront to our principles of justice. It makes a mockery of the presumption of innocence doctrine, interferes with the right to freely think and express yourself in your own defense, demeans the dignity of an American courtroom and runs counter to the rehabilitative nature inherent in juvenile court.

85. *Id.*

86. Telephone interview with Marie Osborne, Chief of the Miami-Dade Office of Public Defender, Juvenile Division, in Miami, Fla. (June 21, 2007).

Adult clients accused of the most serious crimes are not shackled absent evident danger.⁸⁷

Weeks later, at the instigation of the public defender, the Associate Administrative Judge convened a series of meetings with the four juvenile court judges, the Miami-Dade Public Defender's Office, the State Attorney's Office, and representatives from DJJ. On June 21, 2006, in response to the public defender memorandum, the judges of the Juvenile Division agreed to remove handcuffs and shackles during adjudicatory hearings.⁸⁸ However, the discussions failed to effectuate any additional or more fundamental systemic alterations to the court's blanket shackling policy at detention hearings, dispositional hearings, or other proceedings in the court.⁸⁹

Because they were unable to convince the judges to agree to more sweeping changes to existing policy, on September 11, 2006, the public defenders initiated a strategy of challenging each instance of shackling through the filing of motions in all juvenile courtrooms. The Office prepared a Motion for Child to Appear Free from Degrading and Unlawful Restraints.⁹⁰ Over one hundred individual motions to unchain detained children were filed. The motion's core constitutional and legal arguments were summarized as follows:

The degrading practice of bringing children before the Court in chains is unlawful and must cease. The use of exceptional restraint measures without an individualized showing of necessity is contrary to chapter 985 [Florida Statutes] and the very purposes of the juvenile justice system. The practice violates children's right to due process and interferes with the right to counsel and to participate in the defense of the case, in violation of the Fifth, Sixth and Fourteenth Amendments and article I, sections 9 and 16 of the Florida Constitution. The Court's practice also stands in clear violation of international law. Just as importantly, the handcuffing and shackling of children can cause them serious mental and emotional harm, and undermine the Court's very objectives in preventing delinquency or rehabilitating a child.⁹¹

The motion argued that the statutory and constitutional rights derive from the ancient right under common law to "be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape."⁹² It emphasized the need to maintain "[t]he courtroom's formal dignity, which includes

87. Memorandum Re: Shackling Children, *supra* note 68 (emphasis in original). See also Martinez, *supra* note 16, at 10, 15 (describing history of advocacy efforts in Miami-Dade).

88. See Motion for Child to Appear Free, *supra* note 17, ¶ 9.

89. *Id.*

90. *Id.*

91. *Id.* ¶ 2.

92. *Id.* ¶ 40 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 317 (1769)); see Deck, 544 U.S. at 622 (shackling in penalty phase of capital trial violates due process).

the respectful treatment of defendants.”⁹³ Consequently, the motion argued that the use of shackles is only permissible where justified by “an essential state interest specific to each trial.”⁹⁴ The key argument was that, except in rare circumstances, the detriments to children of the practice, both legal and non-legal, outweigh the state’s interest in restraining children to maintain courtroom security.⁹⁵

The motion detailed the personal harms (emotional, psychological and medical) that children suffer when held in restraints. Relying on expert affidavits in therapeutic jurisprudence, adolescent development, and childhood trauma, the motion documented the practice as counter-therapeutic, psychologically and physically harmful, contrary to basic tenets of developmental pediatric practice, and tantamount to child abuse.⁹⁶ The psychological and medical affidavits elaborated on the harms that detained children suffer when placed in restraints.⁹⁷ Dr. Marty Beyer, a national consultant on juvenile justice issues,⁹⁸ opined that “[b]eing shackled in public is humiliating for young people, whose sense of identity is vulnerable. The young person who feels he/she is being treated like a dangerous animal will think less of him/herself. Children and adolescents are more vulnerable to lasting harm from feeling humiliation and shame than adults.”⁹⁹ Dr. Beyer, whose area of expertise is the interplay between adolescent development, trauma, and disability, described how the indiscriminate and routine shackling of children in court, before family and strangers, is damaging to the child’s fragile sense of identity; how being chained like a “dangerous animal” may cause the child to feel like one; and how

93. Motion for Child to Appear Free, *supra* note 17 ¶ 40 (quoting *Deck*, 544 U.S. at 630-31).

94. Motion for Child to Appear Free, *supra* note 17 ¶ 41 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986)).

95. Motion for Child to Appear Free, *supra* note 17 ¶ 60.

96. *Id.* ¶¶ 17-27, 60-64. The affidavits were submitted by University of Miami Law Professors Bruce J. Winick and Bernard P. Perlmutter (therapeutic jurisprudence); Dr. Marty Beyer (clinical psychology); and University of Miami Miller School of Medicine Dr. Gwen Wurm (pediatric medicine). The Winick/Perlmutter therapeutic jurisprudence affidavit, discussed *infra* Part V, complemented and elaborated on many of the points in the Beyer and Wurm affidavits. A fourth affidavit, beyond the scope of this article (prepared by University of Miami Law Professor Stephen J. Schnably), addressed the international human rights implications of the practice.

97. The Department of Juvenile Justice, in a memorandum prepared in response to the Motion for Child to Appear Free from Degrading and Unlawful Restraints, argued that use of mechanical restraints was a “public safety” precautionary measure not intended to inflict harm on juveniles or to torture them. It also contended that the Public Defender’s “plea for therapeutic jurisprudence” was a policy argument more appropriate for legislative consideration than for a judicial proceeding:

Notwithstanding the Public Defender’s plea for ‘therapeutic jurisprudence,’ which appeal should more appropriately be made to the legislature, the use of mechanical restraints is not an effort on the part of the Department or the Court to inflict physical or mental anguish, or to torture or humiliate detained youth. Rather, the practice, reserved as it is for those who have already been screened as posing a risk to public safety, serves to reduce the possibility that youths will pick up additional charges at this early stage of juvenile proceedings.

See Response to Child’s Motion, *supra* note 31 at 4-5. With respect to DJJ’s comment about “therapeutic jurisprudence,” see *infra* note 295, and accompanying text.

98. Affidavit of Dr. Marty Beyer ¶ 2, available at <http://www.pdmiami.com/unchainthechildren.htm>. (Appendix D) (last visited Sept. 28, 2007) [hereinafter Beyer Affidavit].

99. *Id.* ¶ 10.

the practice is especially severe to children of color, who may associate the practice with racism, even if the practice is universal.¹⁰⁰

In addition, Dr. Beyer posited that the practice could undermine a child's willingness to trust adults in positions of authority and the legal system, could damage the child's moral identity and development, and could undermine the rehabilitative goals of court intervention.¹⁰¹ Additionally, she expressed concern about the traumatic impact of shackling children who have been previously traumatized by physical and sexual abuse, loss, neglect, and abandonment. Dr. Beyer also noted that these children suffer from depression, attention and conduct disorders, and substance abuse.¹⁰² Furthermore, she observed that shackling exacerbates trauma, reviving feelings of powerlessness, betrayal and self-blame.¹⁰³ Finally, she added that shackling a victim of physical or sexual abuse, where restraint was part of the abuse, could trigger flashbacks and reinforce early feelings of powerlessness.¹⁰⁴

Dr. Gwen Wurm, a board-certified developmental-behavioral and general pediatrician, clinical faculty member at the University of Miami Miller School of Medicine, and medical director of the Jackson Memorial Hospital Medical Foster Care Program,¹⁰⁵ opined that the policy of subjecting all children and adolescents in the juvenile system to shackling without regard to their age, gender, mental health history, history of violence, or risk of runaway, "goes against the basic tenets of developmental pediatric practice."¹⁰⁶ She added that "[a]ll children are not the same based on their age, history, life experience, [or] mental health challenges. In working with children/adolescents, policies need to be individualized in order [to] achieve the best possible outcomes."¹⁰⁷ Utilizing "least restrictive settings" to fashion policy for juveniles is consistent with that tenet and, because of the "identity formation" issues, is critical to the children's well-being.¹⁰⁸ Being shackled conveys that others see the child as "a contained beast," an image that "becomes integrated in his own identity formation, possibly influencing his behavior and responses in the future."¹⁰⁹

100. *Id.* ¶¶ 9-13. See discussion *infra* Part IV.E. Several juveniles interviewed through the Voice Project compared their treatment to animals and one likened the experience of being shackled to a "choke hold" placed on an animal (on file with author).

101. *Id.* ¶¶ 14-17.

102. *Id.* ¶¶ 18-19. As with the other opinions set forth in the Beyer affidavit, this statement was supported by a substantial body of clinical research literature, a significant portion of it authored by Dr. Beyer. See, e.g., Marty Beyer, Ph.D., *Fifty Delinquents in Juvenile and Adult Court*, 76 AM. J. ORTHOPSYCHIATRY 206 (2006); Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26 (2000); Marty Beyer, *What's Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel*, 58 GUILD PRAC. 112 (2001); Linda Teplin, et al. *Psychiatric Disorders of Youth in Detention*, JUV. JUST. BULL., U.S. Dept. of Juvenile Justice, Office of Juvenile Justice and Delinquency Prevention (Apr. 2006) (noting that nearly two-thirds of detained males and three-quarters of females in one study met diagnostic criteria for one or more psychiatric disorders). See also discussion *infra* Part IV.E.

103. Beyer Affidavit, *supra* note 98, ¶¶ 18-19.

104. *Id.* See discussion *infra* note 287, and accompanying text.

105. Affidavit of Dr. Gwen Wurm, ¶¶ 1-3 available at <http://www.pdmiami.com/unchainthechildren.htm>. (Appendix F) (last visited Sept. 28, 2007) [hereinafter Wurm Affidavit].

106. *Id.* ¶ 7.

107. *Id.*

108. *Id.* ¶¶ 7, 11.

109. *Id.* ¶ 8.

Finally, like Dr. Beyer, Dr. Wurm warned that shackling can cause emotional, mental, and physical harm.¹¹⁰ She opined that shackling could exacerbate symptoms associated with post-traumatic stress disorder, depression, anxiety disorder, attention deficit disorder, conduct disorder, and interfere with the child's receptivity to rehabilitation.¹¹¹ She also observed that children "with previous nerve or vessel damage" to an extremity are vulnerable to re-injury.¹¹² She concluded that, given the damage to children from shackling them hand and foot, a parent or guardian who resorted to this method of restraint might be committing abuse under Florida's child abuse statutes.¹¹³

The motion requested an evidentiary hearing to allow the courts to hear testimony from the affiants and other witnesses.¹¹⁴ The use of medical and psychological as well as therapeutic jurisprudence experts' opinions to bolster legal arguments was a deliberate strategy, reflecting a conscious acknowledgment of the medical (*i.e.*, rehabilitative) purposes of the early juvenile court.¹¹⁵ Indeed, the motions relied on these expert opinions because contemporary juvenile justice policy and jurisprudence continue to be informed by this large body of research.¹¹⁶ The litigation thus sought to use this testimony as a way to remedy a practice seen as anathema to the rehabilitative and treatment objectives of the juvenile court.¹¹⁷

The judges declined to hear from any experts and offered several reasons for refusing to hear the testimony. After several days of hearings, one judge referred to the medical, psychological, and therapeutic jurisprudence expert opinions as "self-serving" and questioned their scientific validity: "[A]s far as I can tell, there [are]

110. *Id.* ¶¶ 9-12.

111. *Id.* ¶¶ 9-10.

112. *Id.* ¶ 12.

113. *Id.* ¶ 6.

114. Motion for Child to Appear Free, *supra* note 17, ¶ 80.

115. Early juvenile court discourse was dominated by analogies to delinquency as a medical illness and the juvenile court as a hospice for the treatment of the pathologies associated with delinquency. *See* Ainsworth, *supra* note 7, at 1096-1101. *See also* Charles J. Hoffman, *The Fundamental Principles of the Juvenile Court and Its Part in Future Community Programs for Child Welfare*, in PROCEEDINGS OF THE CONFERENCE ON JUVENILE-COURT STANDARDS 13, 23 (1922) (describing delinquency as "a disease showing and destroying the lives of more children than any other disease known to man."); Edward Schoen, *The Field of the Juvenile Court*, in PROCEEDINGS OF THE CONFERENCE ON JUVENILE-COURT STANDARDS 32, 35 (1922) (describing the juvenile court as "a social agency . . . for the adjustment of such social ills . . . as are disclosed by an act or by repeated acts of minors whose conduct gives us the objective symptoms of unwholesome social conditions"); Miriam Van Waters, *The Socialization of Juvenile Court Procedure*, in PROCEEDINGS OF THE CONFERENCE ON JUVENILE COURT STANDARDS 64, 66 (1922) (likening juvenile court judges to physicians).

Medical analogies were embedded in the functioning of the juvenile court decades after its inception. *See, e.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 3 (1967) ("[D]elinquency was thought of almost as a disease, to be diagnosed by specialists and the patient kindly but firmly dosed.").

116. *See, e.g.*, *Roper v. Simmons*, 542 U.S. 551, 575 (2005) (relying on psychological and neurological studies of adolescents to declare imposition of death penalty for juvenile offenders unconstitutional under Eighth Amendment cruel and unusual punishment clause); Laurence Steinberg and Robert Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL—A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 7* (Thomas Grisso and Robert Schwartz eds., 2000) (noting the importance of integrating adolescent development perspectives into moral, legal, political, and practical analyses of juvenile crime).

117. Motion for Child to Appear Free, *supra* note 17, ¶¶ 28-39.

no scientific underpinnings to their opinions.”¹¹⁸ The judge also speculated, without positing a scientific basis for his opinion, that the practice of shackling could actually have a *beneficial* effect on the child’s prospects for rehabilitation, and a *deterrent* effect on a child with a prior history of juvenile court involvement:

Perhaps this short period of loss of liberty, relative to this short period of shackling, which has been extended, will have a *positive impact*, and send the message that this Court takes seriously, and that this young man needs to take what the Court previously ordered seriously, and perhaps it will be a *benefit* to his rehabilitation as opposed to a detriment. I think that argument is equally as strong, counsel at this point in time.¹¹⁹

This statement is revealing for its deliberate refusal to consider the experts’ opinions or to take into account any research supporting those opinions. It illustrates the extent of the courts’ resistance to hear from experts (or the children themselves) about the harms inflicted on the children by the challenged practices.¹²⁰

Despite their reluctance to hear expert testimony concerning physical and psychological harms suffered by children placed in restraints, the juvenile court judges scheduled hearings on the daily “sounding” (arraignment) calendar on the motions to remove shackles. Three days after the filing of the first motion, the Associate Administrative Judge circulated a memorandum to the other judges advising them to use the DJJ risk assessment instrument as a “general guideline” for “determining risk and protecting the safety and security of the community, the Respondent [child] and other Personnel in the Courtroom.”¹²¹ The judges were asked to consider the charges against the children and to weigh any “evidence of mitigation or error” in scoring the risk assessment presented by the public defender.¹²²

Significantly, the Administrative Judge’s memorandum placed the burden on the *child* to petition for removal of the shackles and to present mitigating evidence showing why restraints were unnecessary. Rather than placing the burden on the

118. Transcript of Hearing at 9, Florida v. F.P. No. [redacted] (Fla. Cir. Ct. 2006) (on file with author) (emphasis added).

119. *Id.* at 14-15.

120. In Palm Beach County, the public defender filed a similar motion in October 2006, relying on the same affidavits. See discussion *infra* Part II.D.3. The West Palm Beach judges’ reactions to the expert affidavits were similar to the skepticism expressed by the Miami-Dade judge. Although the judges took judicial notice of the affidavits, they gave them no weight and refused to hear testimony from any of the affiants:

The motion is supported by a variety of affidavits alleging theories of harm to the juveniles subjected to the courtroom security measures in question. However, not one child who is or has been subjected to those security measures was ever evaluated or even interviewed by the affiants in order to confirm the application of their theories to case specific facts.

Order Denying Motion to Appear Free of All Mechanical Restraints at All Judicial Proceedings at 2, R.C. v. Juvenile Court Judges of the Fifteenth Judicial Circuit, Case No. 2006CJ4506 (Feb. 1, 2007) [hereinafter Order Denying Motion] (on file with author).

121. Memorandum from Judge Lester Langer Re: Shackling of Children in the Courtroom to Delinquency Judges, at 1 (Sept. 14, 2006) (on file with author).

122. *Id.*

state to demonstrate the necessity of restraining the child based on an individualized assessment of dangerousness to, or risk of absconding, the memorandum instructed the judges to require each child to show cause for removal of shackles: "The Court while balancing the rights of the Respondent together with the safety of the community and the security of the Courtroom, has the full discretion to determine whether the shackle should remain on or be removed on a case by case basis *after a showing by the defense.*"¹²³

Several weeks of individual hearings, involving hundreds of children, cemented the end to the routine shackling of children in court proceedings in Miami-Dade County. As of early July 2007, there have been no reported incidents of violence or absconding since cessation of the practice.¹²⁴ To date, however, no court in Miami-Dade County has issued a written court order stating a legal rationale or a factual basis for the removal of shackles.

Because the courts have not rendered any binding, written decisions regarding the legality of the practice, or given written, factual reasons for agreeing to unshackle individual children, it remains possible that one episode of violence or one runaway incident could spark a resumption of shackling as a blanket practice in the Eleventh Judicial Circuit. In fact, after the routine shackling ended, one judge began denying motions to unshackle if a child's parent was not present in court.¹²⁵ The public defenders quickly responded by dispatching appellate lawyers from their office to observe hearings in the judge's division, and having office staff "camera-ready" in the courtroom to record any incidents of indiscriminate shackling by the judge, and this policy was terminated.¹²⁶

Despite this seeming incongruity, the Miami-Dade Public Defender's landmark effort to "unchain the children" is an inspired case-study in lawyering for legal reform and social change. The effort combined proactive courtroom litigation with a variety of other traditional and out-of-the-box advocacy strategies, including county commission, legislative and executive branch advocacy,¹²⁷ court and admin-

123. *Id.* at 2 (emphasis added).

124. Carlos J. Martinez writes in an article:

In Miami Dade, since the first child was unshackled, more than 3,000 detained children have appeared in court, few have been determined to be a flight or safety risk to justify shackling. We have not had courtroom escapes or injuries caused by the detained but unshackled children. Despite seeing a high number of detained children in court each day, our judges dispense justice one-child-at-a-time, without additional courtroom personnel. We do not have armed officers in court.

Carlos J. Martinez, *Challenging the Shackling of Juveniles in Court*, 2 COD NETWORK NEWS—A NEWSLETTER FOR THE COMMUNITY ORIENTED DEFENDER NETWORK 5 (July 2007).

125. Requiring a parent to be present in the courtroom before the judge would consider unshackling a child would have been particularly callous and unfair to "crossover" children (*i.e.*, dependent children in foster care with delinquency charges), because many of these children do not have parents or guardians.

126. E-mail from Carlos J. Martinez, Chief Assistant Public Defender (Miami-Dade), to Bernard P. Perlmutter, Assistant Professor of Clinical Legal Education, University of Miami School of Law (July 1, 2007, 07:06 p.m. (EST)) (on file with author).

127. *See, e.g.*, MIAMI-DADE COUNTY BOARD OF COUNTY COMMISSIONERS, RESOLUTION URGING THE FLORIDA LEGISLATURE TO ENACT LEGISLATION BANNING THE USE OF INDISCRIMINATE CHAINS AND SHACKLES ON DETAINED CHILDREN IN JUVENILE COURTROOMS; AND ESTABLISHING A PRESUMPTION OF NO CHAINS OR SHACKLES ABSENT A SHOWING OF RISK TO SELF OR OTHERS, Agenda Item No. 14(A) (28) (Dec. 2006 (unani-

istrative rulemaking,¹²⁸ state and national bar advocacy,¹²⁹ media,¹³⁰ editorial and op-ed advocacy,¹³¹ grassroots organizing,¹³² community education,¹³³ and even artistic expression¹³⁴ as a means of educating the public about the practice and providing the children an outlet to vent their feelings about shackling. As Professor Lucie White has written:

All litigation has both direct and indirect effects. In many cases, the lawyer can seek simultaneously to persuade the judge and to mobilize the public. The two goals—of winning a legal remedy and influencing public consciousness—do not work at cross purposes. On some occasions, however, typically in high visibility political trials, lawyer and client may choose to spurn the legal ground rules and sacrifice a favorable outcome precisely in order

mously approved)); H. 19, 2007 Leg., Sess. (Fla. 2007), and S. 372, 2007 Leg., Sess. (Fla. 2007) (curtailing the use of “instruments of restraint, such as handcuffs, irons, or straightjackets,” in the courtroom) (died in House Comm. on Juv. Just. and S. Comm. on Crim. Just., May 4, 2007); Curt Anderson, *Crist: Routine Shackling of Juvenile Suspects is Wrong*, ASSOCIATED PRESS, Dec. 12, 2006 (“I think it’s only fair to judge these things on a case-by-case basis,” quoting then Florida Governor-elect Charlie Crist).

128. See, e.g., JUVENILE COURT RULES COMMITTEE’S RESPONSE CONCERNING PROPOSALS SUBMITTED BY THE FLORIDA BAR STANDING COMMITTEE ON THE LEGAL NEEDS OF CHILDREN AND THE PUBLIC INTEREST LAW SECTION OF THE FLORIDA BAR, Sept. 27, 2006 (on file with author) (voting by 9 (support), 8 (abstain), and 3 (oppose) to support proposed Florida Bar advocacy to “oppose the indiscriminate use of chains and shackles in juvenile court proceedings, and encourage the adoption of a ban on the indiscriminate use of chains and shackles in juvenile court proceedings through court rule, legislation and executive branch policy”).

129. See, e.g., *Shackled Juveniles Will Be Debated at General Meeting*, THE FLORIDA BAR NEWS, Sept. 1, 2006, at 10; Pudlow, *supra* note 3, at 1.

See also National Juvenile Defender Center News Release, *Legal System Shortchanges Florida’s Children: New Study Finds System Denies Justice for Many Young Offenders* (Oct. 23, 2006), available at http://www.njdc.info/pdf/florida_press_%20release.pdf (last visited Sept. 28, 2007):

Glaringly, the Assessment also revealed that wrist and ankle shackles, sometimes with belly chains, are routinely used on detained children every day in many juvenile courtrooms across the state. Children were observed chained to each other or to fixed objects in the courtrooms in several places. This demeaning practice has a chilling effect on the fair administration of justice. Steps taken to halt the unnecessary practice of shackling children in chain-gang like fashion in places like Miami and Broward are to be commended. *Id.* at 2.

130. See, e.g., Anderson, *supra* note 16; Maya Bell, *Shackling of Juveniles Challenged—Public Defenders Call Chaining Children Abusive*, ORLANDO SENTINEL, Sept. 12, 2006, at B1; Graham Brink, *Shackling in Juvenile Courts Faces Test*, ST. PETERSBURG TIMES, Sept. 27, 2006, at 6B; Carol Marbin Miller, *Public Defenders Want Chains Out of Juvenile Courts*, MIAMI HERALD, Sept. 11, 2006, at 3B; Abhi Raghunathan and Kevin Graham, *Lawyers Want Kids Unshackled in Court*, ST. PETERSBURG TIMES, Sept. 13, 2006, at 4B.

131. See, e.g., Editorial, *Our Opinion: It’s Inhumane to Put Children in Irons for Court*, THE MIAMI HERALD, Sept. 13, 2006, at 20A; *Juvenile Justice—Issue: Florida’s Juveniles Endure a Practice Worthy of Chain Gangs*, SUN-SENTINEL, Sept. 18, 2006, at 18A; Editorial, *End the Shackling of Juveniles*, St. Petersburg Times, Oct. 3, 2006, at 10A; Editorial, *Justice in Chains—Stop Shackling Children in Court*, DAYTONA BEACH NEWS JOURNAL, Nov. 25, 2006, at 04A; Dick J. Batchelor and Gustavo Barreiro, *Other Views, Restrain Practice of Fear*, ORLANDO SENTINEL, Sept. 22, 2006, at A20; Brian Cabrey, Vice President, Florida’s Children First, Inc., *Guest Column: Ban Shackles on Juvenile Suspects*, FLORIDA TIMES-UNION, Dec. 20, 2006, at B-7; cf. Editorial, *Shackles and Safety—Our Position: Putting Restraints on Juveniles is Justified*, ORLANDO SENTINEL, Sept. 13, 2006, at A10.

132. See Martinez, *supra* note 16, at 15 (“Our efforts did not begin or end in the courtroom. We spoke to the media, reached out to the faith community, academics, social justice groups, other defenders and child advocates of all stripes.”).

133. *Id.*

134. Voice Project, *supra* note 2.

to make the litigation speak most effectively to public consciousness.¹³⁵

3. West Palm Beach County Litigation

The Miami-Dade unshackling litigation spawned similar efforts in other Florida circuits. Motions were filed in Broward, Hillsborough, Sumter, and other counties. While a handful of juvenile judges curtailed or abolished the practice,¹³⁶ it remains in widespread use throughout the state.¹³⁷ A similar motion was filed by the Palm Beach Public Defender's Office in October 2006 in the Fifteenth Judicial

135. Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 759. For recent discussion of lawyering for legal reform and broader social change in the children's rights context, see, e.g., Appell, *supra* note 2, at 721 ("Given the limitations of children's voice and the limited efficacy of children's litigation and policy advocacy on improving justice for children, maybe we should be representing, or supporting organizing efforts of, parents and communities—those who have stronger voices and can guide us more clearly.").

For a sampling of discussions of "collaborative," "rebellious," and allied forms of social justice lawyering, in other contexts, see, e.g., Anthony V. Alfieri, *Faith in Community: Representing "Colored Town,"* 95 CAL. L. REV. (forthcoming 2007); GERALD P. LÓPEZ, *REBELLIOUS LAWYERING* (1992); Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59 (2004); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994); Luke W. Cole, *Macho Law Brains, Public Citizens and Grassroots Activists: Three Models of Environmental Poverty Advocacy*, 14 VA. ENVTL. L.J. 687 (1995); Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996).

136. See Brink, *supra* note 130, at 6B (quoting Broward juvenile court judge Larry Seidlin as calling "routine shackling repugnant and a 'throwback to 18th century Europe'"); Jon Burstein, *Shackling of Youth Suspects Ends; Rulings Free Accused Juveniles From Wearing Ankle Restraints*, SUN-SENTINEL, Sept. 26, 2006, at 1B (quoting Judge Seidlin as commenting, "[s]ome of these children are 12 years old and picked up for misdemeanors like shoplifting . . . It's unconscionable to shackle these children."); Nikki Waller, *Shackling of Kids Curtailed in Broward Courtrooms*, THE MIAMI HERALD, Sept. 25, 2006, at 1B (Broward County juvenile court judges ended the indiscriminate practice of shackling juvenile offenders in their courtrooms, signing orders that found the practice detrimental for the youth.).

137. As indicated *supra* note 127, two bills were introduced in the 2007 Session of the Florida Legislature (HB 19 and SB 372). The bills would have amended Florida Statute § 985.35 (adjudicatory hearings) and created §985.602 by adding the following procedural safeguards designed to limit instruments of restraint in court proceedings:

985.602 Use of restraints during court proceedings prohibited; exceptions—

(1) Instruments of restraint, such as handcuffs, irons, or straightjackets may not be used on a child during court proceedings and must be removed prior to the child's appearance before the court unless the court finds that:

- (a) Instruments of restraint are necessary to prevent harm to the child or another person.
- (b) There are no less restrictive alternatives to prevent physical harm to the child or another person, including, but not limited to, the presence of department personnel, law enforcement officers, or bailiffs.
- (c) The child has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior.

(2) In using instruments of restraint, the department shall comply with its Protective Action Response policy adopted under s. 985.645 (2) (a).

The bills failed to make it out of the House Juvenile Justice and the Senate Criminal Committees, and thus the Florida Legislature was not given the opportunity to vote on the two amendments. Similar legislation has been reintroduced in the Florida Senate for the 2008 session by Senator Fredericka Wilson (SB 140).

Circuit. The Palm Beach litigation remained pending without resolution for over nine months, thwarted by delays and other factors that deprived the children of a ruling on their claim that shackling is unconstitutional, unlawful, and harmful. The protracted litigation in the Juvenile Court resulted in the issuance of a two-page order elevating courtroom security considerations over the children's constitutional, legal, or therapeutic interests. The trial court's ruling in *R.C. v. Judges of the Juvenile Court*, was upheld by the Florida Fourth District Court of Appeal after considerable delay on July 30, 2007, in a one-sentence unpublished order denying the petition for a writ of habeas corpus "on the merits, without prejudice for individual juveniles to move to remove shackles."¹³⁸

A brief recapitulation of the tortuous procedural history of this litigation is instructive in that it describes a proceeding that allowed conclusory arguments about courtroom security to dominate the discussion and excluded critical testimony necessary for proper appellate review of the trial court's ruling. It also provides a glimpse into how risk-averse courts are to changing the unwritten status quo when addressing controversial practices such as shackling.

After the motion to unshackle was filed by the Palm Beach Public Defender, the juvenile court issued an order requiring mediation between the various "interested parties" regarding the general policy of shackling juveniles. The Public Defender petitioned to the Fourth District Court of Appeal for habeas corpus relief.¹³⁹ The district court quashed the portion of the lower court's order requiring mediation, and remanded the matter to the trial court to rule on the pending motion.¹⁴⁰

A second petition for habeas relief was filed in the Fourth District in December 2006 after the trial court delayed ruling on the pending motion for over six weeks. The district court treated the petition as a motion to enforce its prior mandate that the juvenile court judges rule on the petitioners' motion. The court denied the habeas, "without prejudice to seek mandamus relief if the circuit court does not rule on the motion within forty-five days."¹⁴¹

Finally, after months of delay and facing sanctions by the appeals court, the court scheduled a "case management conference" in January 2007.¹⁴² Two judges presided. Representatives from DJJ, the State Attorney, the Public Defender, and the Sheriff's Office participated. The exchange between the judges and the participants is illuminating for the views expressed; many of the views were inconsistent with or uninformed by research on adolescent development, adolescent criminal

138. See *R.C. v. Juvenile Court Judges*, Case No. 4D07-454 (Fl. Dist. Ct. App. 2007); see also *Juveniles to Remain Shackled for County Court Appearances*, PALM BEACH POST, Aug. 3, 2007, available at http://www.iamforkids.org/newsdata/view_ind/3848 (last visited Sept. 28, 2007).

139. The Public Defender filed a petition for a writ of habeas corpus, which the district court treated as a petition for a writ of certiorari. *R.C. v. Juvenile Court Judges of the Fifteenth Judicial Circuit*, 942 So.2d 1007 (Fla. Dist. Ct. App. 2006).

140. *Id.* The court declined to reach the merits of the claim regarding the illegality of the shackling policy, holding that the issue was not yet ripe for review as the circuit court had not yet ruled on the unshackling motion. *Id.* See also Nancy L. Othon, *Juvenile Court to Reconsider Shackles*, SUN-SENTINEL, Dec. 6, 2006, at 9B (reporting on the appeals court's ruling on the mediation order).

141. Petition for a Writ of Habeas Corpus #3, *R.C. v. Juvenile Court Judges of the Fifteenth Judicial Circuit*, Case No. 4D06-4338 (subsequently re-docketed as Case No. 4D07-454), Feb. 2, 2007, at 1-2 (on file with author).

142. *Id.*

activity, or adolescent responses to punishment and rehabilitation. Most were consumed with courthouse security considerations to the exclusion of any interest in the impact of the practice on the children.

Both of the presiding judges interrogated the public defenders at length about courtroom security and who would bear liability for any damage committed by unshackled juveniles.¹⁴³ One of the judges suggested that damages liability should be imputed to the public defender.¹⁴⁴ The DJJ representative argued that the agency's risk assessment instrument for secure detention was a suitable proxy for any judicial process regarding the need to place a child in shackles.

The sergeant from the County Sheriff's Office supported continuation of the shackling policy based on his view that children and adults in large groups behave differently.¹⁴⁵ His conclusory statement was demonstrably at odds with research suggesting that the solution is not to herd offenders in large groups but to bring them into court individually.¹⁴⁶ The sergeant also argued that shackling was necessary to deter the offenders from future criminal activity, again revealing a lack of familiarity with current research. The most recent Supreme Court jurisprudence suggests that teenagers are less susceptible to deterrence for the same reasons that they have reduced culpability for criminal misconduct.¹⁴⁷

The judges declined to hear any testimony proffered by the public defenders from the expert witnesses in childhood trauma, child development, and therapeutic jurisprudence whose affidavits were filed in support of the motion.¹⁴⁸ The judges

143. Transcript of Hearing at 16, *R.C. v Juvenile Court Judges*, Case No. 2006CJ4506 (Fla. Cir. Ct. 2007) (on file with author):

[A]re you asking this Court to, I'm going to try to be as diplomatic as I can, you are asking this Court that this Court has to abdicate its responsibility to the public—no, that's not the right question. If it's DJJ policy, let's make sure the geographical boundaries are set up. Once they come through that door, you will concede that it is the Court's responsibility as to the security issues, correct?

144. *Id.* at 16-17:

Now, is the Public Defender's Office going to be willing to be responsible for any damages caused by the children [who] do cause problems, [who] do not have a violent background, do not have a history of escape, but do in fact cause violent acts in the Courtroom or on their way out on an attempted escape? That is a legitimate question, I believe.

145. *Id.* at 24:

If you go into larger numbers, juveniles are different than adults. There is no doubt about it. Their peer pressure is different. Their mindset is different. You can't reason as well. So to compare what we do there with adults and children, it's not apples to apples. So, you know, just our position is that we do what we do and we feel it is the safest and the best way to handle it.

146. See, e.g., Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY, 867, 867 (1981) (adolescent crime occurs in groups); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 757 (Adolescents, on average, are "less responsible, more myopic, and less temperate than the average adult.").

147. See *Roper*, 543 U.S. at 571 ("[T]he absence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable suggest as well that juveniles will be less susceptible to deterrence.").

148. The Order noted that the petitioners had not met their burden of proof (see *Order Denying Motion*, *supra* note 120), which paradoxically was the result of the court's refusal to conduct a proper evidentiary hearing at which they could present expert, factual and other testimony relevant to the motion.

each issued an identical two-page order denying the motion. The decision's core concern with security is encapsulated in this paragraph:

As a practical matter, the motion disregards the fact that the undersigned judge is not a security expert, but maintains the responsibility to preserve order and decorum in the courtroom to protect all those present. The record is completely devoid of any consideration of the many and various issues that impact court security. Such issues are more appropriately addressed through [an] Administrative Order issued by the Chief Judge after full consideration and input by all those affected.¹⁴⁹

As noted, the petition for a writ of habeas corpus was summarily denied by the Fourth District Court of Appeal, in an unpublished order issued on July 30, 2007.¹⁵⁰ Three weeks later, the Palm Beach Public Defender filed a virtually identical federal habeas petition, which remains pending before U.S. District Judge Donald Middlebrooks.¹⁵¹

E. Justifications for Shackling Children in Court

And so when you argue that we should simply tell D.J.J. or the Sheriff's Office, whoever it may be, this policy is no good, get rid of it and come up with something better, my concern is you are asking us to abdicate that responsibility to them, telling them what they have told us right now they need for security is no good, come up with something better, the bottom line is if something does happen in Court, that does become our liability.

—Juvenile Court Judge¹⁵²

As the Duval, Miami-Dade, and Palm Beach County litigation shows, the justifications for using shackles are both practical and philosophical. In practical terms, some judges are fearful that unshackling juveniles will cause disorder and mayhem in their courtrooms. These fears reflect a more fundamental, unspoken premise, *viz.*, that juvenile court proceedings are no longer able to effectively control the problems of juvenile crime and, therefore, that the historical rehabilitation and treatment purposes of the juvenile court should be supplanted by more punitive measures and procedures.

149. Order Denying Motion, *supra* note 120.

150. *See supra* note 138.

151. R.C. v. Flowers, Case No. 9:07-cv-80761-DMM (S.D. Fla.); *see also* Jane Musgrave, *Shackling of Juveniles in Court Criticized*, PALM BEACH POST (Aug. 25, 2007).

152. Transcript of Hearing at 20, R.C. v. Juvenile Court Judges of the Fifteenth Judicial Circuit, Case No. 2006CJ4506 (Jan. 17, 2007) (on file with author).

The hearings on public defender motions to unshackle children have given juvenile judges, law enforcement officials, and DJJ representatives opportunities to express support for the existing policy. The stated justifications rely on many outmoded and inaccurate myths about juvenile crime. They are based on sweepingly erroneous generalizations about children. Some judges argue that shackling is actually beneficial for children.¹⁵³ Others say that it deters children from participating in future or further delinquent activity.¹⁵⁴ Judges and law enforcement agencies fret about courtroom security threats posed by unshackled children.¹⁵⁵ Judges cross-examine public defenders about how the State could assume liability for hypothetical damages or injuries inflicted by their clients.¹⁵⁶ One judge even suggests making the public defender pay for damages or injuries perpetrated by unshackled children.¹⁵⁷ The judges who have upheld the existing practices assume virtually unfettered authority to condone shackling as part of their duty to maintain order in the courtroom.

Carlos Martinez, the Chief Assistant Public Defender in Miami-Dade, and the most publicly outspoken critic of these policies, has written that the judges, by abdicating to law enforcement and DJJ on this issue, fail to acknowledge the uniquely distinct roles played by judges and law enforcement officials inside the courtroom:

In Florida, judges have authority over what happens in the courtroom and the juvenile courtrooms are open to the general public. Deputy sheriffs and bailiffs are there to assist the judge in maintaining order. The irony here is that allowing anyone to have guns in the courtroom increases the likelihood that the judge, courtroom personnel, the children and the public will be killed or seriously injured. Yet, most juvenile court judges have abdicated their authority over courtroom decorum and safety. In Miami Dade, the general public is checked for weapons prior to entering the courthouse, and officers are not allowed to carry guns inside the courtrooms.¹⁵⁸

The second, more fundamental justification for shackling reflects long-standing frustration with the limitations of the contemporary juvenile court, which is seen as lacking in the resources and support to deal effectively with the public perception of escalating and more violent juvenile crime. The frustration has spawned a national discourse about whether the juvenile court should become punishment focused or remain rehabilitation focused. Recent years have seen a shift away from the juvenile court's historical emphasis on treatment towards a punishment model resembling criminal court proceedings without either the due process benefits of the criminal court or the rehabilitative resources necessary for a properly function-

153. See discussion *supra* Part II.D.2 and Part II.D.3.

154. *Id.*

155. *Id.*

156. See discussion *supra* Part II.D.3.

157. *Id.*

158. Martinez, *supra* note 16, at 11.

ing juvenile court. This frustration has also led to calls for the abolition of the juvenile court as an anachronistic institution with an outdated ideology that “provides young offenders with neither therapy nor justice.”¹⁵⁹

The impetus to shackle also appears related to the enactment of legislation in virtually every state permitting more juveniles to be tried in adult court.¹⁶⁰ It runs parallel to other stringent or punitive legislative measures, many reacting to media-driven perceptions of juvenile offenders as “superpredators.”¹⁶¹ Florida has been a “leader”¹⁶² in enacting more stringent transfer laws giving prosecutors significantly

159. Feld, *supra* note 7 at 68:

Within the past three decades, judicial decisions, legislative amendments, and administrative changes have transformed the juvenile court from a nominally rehabilitative social welfare agency into a scaled-down second-class criminal court for young people. These reforms have converted the historical ideal of the juvenile court as a social welfare institution into a penal system that provides young offenders with neither therapy nor justice.

See also Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime* [hereinafter Feld, *The Transformation of the Juvenile Court*], 84 MINN. L. REV. 327, 340 (1999) (“During the turbulent 1960’s, increases in youth crime and in urban racial disorders provoked politicians’ cries for ‘law and order’ and encouraged adoption of measures to ‘get tough’ and to repress, rather than rehabilitate, young offenders.”); Ainsworth, *supra* note 7, at 1118 (“Once the imagined nature of childhood changed and the child-adult dichotomy blurred, the ideological justification for a separate juvenile jurisprudence evaporated . . . Perpetuating an anachronistic juvenile court exacts its own costs, both ideological and practical. These costs compel me to conclude that the juvenile court ought to be abolished.”).

Cf. Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 184 (1993) (“Abandoning the juvenile court is an admission that its humane purposes were misguided or unattainable. I do not believe that. We should stay and fight—fight for a reordering of societal resources, one that will protect and nourish children . . . We can and should seek both procedural and dispositional reform in the juvenile courts.”).

160. *See* Patrick Griffin, National Center for Juvenile Justice and U.S. Department of Justice, *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws* 12 (Oct. 2003); FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 13-14 (1998).

161. Sociologists, criminologists and the media began using the term “superpredator” over ten years ago. *See, e.g.*, Lara A. Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent’s Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 177 (2000) (“The superpredator moniker marks a new era in the labeling of violent juveniles. The widespread use of the term by politicians, scholars, and the media implies a validation of its concept and confers upon it a quasi-scientific legitimacy.”); WILLIAM J. BENNETT, JOHN J. DILULIO, JR., & JOHN P. WALTERS, *BODY COUNT: MORAL POVERTY—AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* (1996).

But just as the superpredator label was entering popular and legislative discourse, juvenile crime began to subside. *See, e.g.*, Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 806-11 (2003) (referring to negative stereotypes of juvenile offenders as “super-predators” and contemporary juvenile justice policy as a response to a “moral panic” not justified by the real public safety threats posed by juveniles); David S. Tanenhaus & Steven A. Drizin, “Owing to the Extreme Youth of the Accused”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 642-43 (2002) (noting that lower rates of juvenile crime from 1994 to 2000, despite increases in the juvenile population, prompted many supporters of “super-predator” theory to back away from their predictions); Howard N. Snyder and Melissa Sickmund, NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL CRIME REPORT 133 (2006), available at <http://www.ojjdp.ncjrs.org/ojstatbb/nr2006/downloads/NR2006.pdf> (last visited Sept. 28, 2007) (national data showing that between 1994 and 2003, juvenile arrests for violent crime fell proportionately more than adult arrests); YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 5 (2001), available at <http://purl.access.gpo.gov/GPO/LPS9293> (last visited Sept. 28, 2007) (reporting that there was “no evidence that young people involved in crime during the peak years of the early 1990’s were more frequent or more vicious offenders than youth in earlier years”).

162. *See, e.g.*, FLORIDA DEP’T OF JUVENILE JUSTICE, BUREAU OF DATA AND RESEARCH, A DJJ SUCCESS STORY: TRENDS IN TRANSFER OF JUVENILES TO ADULT CRIMINAL COURT 5 (Jan. 8, 2002). In keeping with this trend, the Florida legislature has enacted a variety of statutory mechanisms for prosecution of juveniles in adult

greater authority to direct-file juveniles to adult court and to seek grand jury indictments of juveniles.¹⁶³ These changes have been driven by the same concerns about public safety that have prompted the use of courtroom shackling as a precautionary security measure in Florida and other states.

Ironically, expanded prosecutorial direct-file and enlarged grand jury indictment authority means that a less violence-prone segment of the population remains in the juvenile justice system and the supposedly more violent offenders are prosecuted as adults.¹⁶⁴ Paradoxically, criminal defendants in the adult system are rarely shackled in such a routine and indiscriminate manner, whereas children in the juvenile court are.¹⁶⁵

F. Advocacy in Other Jurisdictions to Abolish Shackling Children in Court

Although the use of shackles is reported in more than half of the states,¹⁶⁶ there is a similar lack of statutory or agency authority to use restraints inside the courtroom in other jurisdictions.¹⁶⁷ At least three states have recently addressed the le-

court, including discretionary waiver, prosecutorial waiver (or direct-file), and grand jury indictment of juveniles charged with capital or life felonies. *Id.* at 6.

Despite Florida's claims of reducing juvenile crime through its transfer policies, some studies have questioned whether prosecutors apply discretion to waive children over to adult court in a fair and even-handed manner, especially at a time when fewer juveniles were arrested for violent crimes. *See, e.g.*, Vincent Schiraldi & Jason Ziedenberg, CENTER ON JUVENILE AND CRIMINAL JUSTICE, THE FLORIDA EXPERIMENT: AN ANALYSIS OF THE IMPACT OF GRANTING PROSECUTORS DISCRETION TO TRY JUVENILES AS ADULTS 3-4 (1999), available at <http://www.cjcrj.org/pubs/florida/florida.html> (last visited Sept. 28, 2007) (finding that 28% of youth waived over to adult court were charged with violent crimes, and over 50% were charged with non-violent crimes against property).

163. *See, e.g.*, Henry George White, Charles E. Frazier & Lon Lanza-Kaduce, *A Socio-Legal History of Florida's Juvenile Transfer Reforms*, 10 U. FLA. J.L. & PUB. POL'Y 249 (1999) (describing "get tough" on juvenile crime and frustrations with "pampering" of juvenile offenders as two rationales to support juvenile justice reform in Florida); Lon Lanza-Kaduce, Charles E. Frazier & Donna M. Bishop, *Juvenile Transfers in Florida: The Worst of the Worst?*, 10 U. FLA. J.L. & PUB. POL'Y 227 (1999) (presenting data indicating that changes in Florida's transfer laws have had little impact on the number of offenders transferred to adult court).

164. *See, e.g.*, FLA. STAT. §§ 985.556, 985.557, 985.56 (2007) (detailing statutory criteria for discretionary judicial waiver, discretionary and mandatory prosecutorial waiver (direct-filing), and grand jury indictment of juveniles). *See also* Michael J. Dale, *Making Sense of the Lionel Tate Case*, 28 NOVA L. REV. 467 (2004) (discussing Florida's application of adult criminal charges and the adult criminal justice process to children who commit very serious offenses and the roles of judges, prosecutors and defense counsel in these cases); *cf.* Paolo Annino, *Children in Florida Adult Prisons: A Call for a Moratorium*, 28 FLA. ST. U. L. REV. 471, 477 (2001) (taking issue with the popular belief that many children imprisoned for adult crimes are more violent than those who are prosecuted in the juvenile justice system, and noting that empirical study of first offenders imprisoned in the adult system "establishes that for this group of children in adult prison, the juvenile justice system never had an opportunity to succeed because it was never given a chance").

165. *See* Martinez, *supra* note 16:

Jailed adult defendants are not routinely shackled in court in many Florida counties. In Miami-Dade wholesale shackling of children began in 2004. We had a situation where a child was shackled in juvenile court, but if that child were transferred (direct filed) to adult court, he would not be shackled in adult court if he did not pose a physical danger to himself or others, or was not an escape risk. *Id.* at 11.

166. *See supra* note 6.

167. A compilation of juvenile justice shackling policies for all fifty states and the District of Columbia, prepared by University of Miami School of Law reference librarian Whitney A. Curtis, appended to this article, reveals that at least forty-three states have statutes, regulations, juvenile justice agency policies or other written

gality of the practice through published decisions or statutory amendment and the issue has been catapulted to national prominence through the media and discussions in the “blogosphere.”¹⁶⁸ Within the space of four months, the North Dakota Supreme Court, a California intermediate appeals court, and the North Carolina General Assembly have each restricted the use of shackles and mandated standards for courts to apply in imposing this measure on detained juvenile offenders in the courtroom.

1. North Dakota

The North Dakota Supreme Court issued a constitutionally-grounded decision applying the U.S. Supreme Court’s ruling in *Deck v. Missouri*,¹⁶⁹ which barred the use of shackles before juries at the penalty phase of capital trials, to adjudicatory hearings in juvenile delinquency court. In *In the Interest of R.W.S.*,¹⁷⁰ the court held that a juvenile court referee violated the offender’s constitutional rights by refusing to remove his handcuffs at an evidentiary hearing, deferring to the sheriff’s office’s policies on courtroom security,¹⁷¹ without first independently deciding the necessity of restraints.

The child, charged and convicted by the juvenile court of burglary, robbery, and disorderly conduct, argued that keeping him in handcuffs during his adjudicatory hearing “impaired his physical movement and mental faculties, caused psychological harm, interfered with his ability to testify, and was an affront to the dignity of the hearing.”¹⁷² Applying the due process analysis of *Deck*, the court held that the juvenile’s due process rights were violated by the juvenile court’s refusal to assess whether the child posed an immediate and serious risk of dangerous or

guidelines (including case law, Department of Justice civil rights investigations, settlement agreements, and other policies created by agencies voluntarily or as a result of litigation or investigation) regarding the use of instruments of restraint in juvenile justice programs. Of those states with written policies or laws, shackling is used on a regulated basis primarily in detention facilities and when transporting youth. No states have written policies expressly permitting the use of restraints in the courtroom. See 50 state and District of Columbia shackling survey *infra* at Appendix.

Although not every state has promulgated statutes, regulations or written policies on the use of physical and mechanical restraints in juvenile justice programs, the national Council of Juvenile Correctional Administrators recommends that all states do so. See Council of Juvenile Correctional Administrators, *Position Paper on: Physical and Mechanical Interventions With Juveniles* (2003), available at <http://cjca.net/photos/content/documents/Interventions.pdf> (last visited Sept 28, 2007). The position paper recommends that all jurisdictions have written policies regarding the use of physical interventions or restraints in juvenile detention facilities as a last resort; which would include use of restraints: only following prudent preventative screening, classification and programmatic interventions; only when de-escalation of a crisis has failed and the need to protect staff, other youth or property is necessary; only by trained individuals and only used defensively and in a manner that provides maximum safety for staff and youths; for as long as the youth presents a danger to self, others or property; and with medical, mental health and/or administrative case review of interventions as part of quality assurance.

168. See, e.g., USA TODAY ON DEADLINE, *Should Florida Shackle Kids in Court?*, http://blogs.usatoday.com/ondeadline/2006/09/should_florida_.html (last visited July 6, 2007) (over 73 comments posted as of July 6, 2007).

169. *Deck*, 544 U.S. at 622; see discussion *infra* Part IV.D.

170. *In the Interests of R.W.S.*, 728 N.W.2d 326 (N.D. 2007).

171. *Id.* at 328.

172. *Id.* at 329.

disruptive behavior or of escape or flight prior to denying his request to remove the handcuffs during the adjudicatory hearing.¹⁷³ The court also held that the referee erred by leaving the decision of whether to physically restrain the juvenile to the judgment of law enforcement officials rather than deciding this matter himself.¹⁷⁴

The court rejected arguments that jury trials are different than juvenile court proceedings tried before a judge for three reasons. First, the prejudice to the child means more than being seen by a jury in visible physical restraints, and includes the prejudice from the “inhibition of free consultation with counsel.”¹⁷⁵ Second, “extending the right to remain unshackled during juvenile proceedings is consonant with the rehabilitative purposes’ of the juvenile justice system.”¹⁷⁶ And lastly, a “therapeutic jurisprudence” reason, “[a]llowing a young person who poses no security hazard to appear before the court unshackled, with the dignity of a free and innocent person, may foster respect for the judicial process.”¹⁷⁷

For R.W.S., however, this was a pyrrhic victory. Despite holding that his due process rights were violated by the juvenile referee’s refusal to remove his handcuffs at trial, the court found harmless error based on the “overwhelming” evidence of guilt presented, and affirmed the judgment of the trial court.¹⁷⁸ Nevertheless, the decision’s analysis should be instructive to courts in other jurisdictions considering the constitutional implications of this practice.

2. California

Considering a similar challenge to the propriety of a juvenile court’s shackling policy in Southern California, an appeals court declared the policy unlawful under state law, rejecting the lower court’s justification of the policy as necessary to prevent escape attempts and maintain order in the courthouse.¹⁷⁹ In striking down the practice, the court held that the trial court was obligated to conduct an individual assessment of the need to shackle, and that courthouse security concerns could not trump individualized assessments of dangerousness and risk posed by juvenile offenders:

[W]e conclude that any decision to shackle a minor . . . must be based on the non-conforming conduct and behavior of that individual minor. Moreover, the decision to shackle a minor must be made on a case-by-case basis . . . [T]he Juvenile Delinquency Court may not, as it did here, justify the use of shackles *solely* on

173. *Id.* at 331.

174. *Id.* (citing *In re Millican*, 906 P.2d 857, 860 (Or. Ct. App. 1995)) (holding that a conclusory statement by a law enforcement officer or prosecutor of a juvenile’s serious risk of dangerous behavior was a legally and factually inadequate reason to allow shackling in the courtroom, and that this was a decision requiring the independent exercise of discretion by the court).

175. *R.W.S.*, 728 N.W.2d at 330 (quoting *In re Millican*, 906 P.2d at 860).

176. *Id.* (citation omitted).

177. *Id.* (citation omitted).

178. *Id.* at 331-32.

179. *Tiffany A.*, 59 Cal. Rptr.3d at 363.

the inadequacy of the courtroom facilities or the lack of available security personnel to monitor them.¹⁸⁰

The court relied on California case law to declare that juvenile court proceedings, no less than adult criminal court proceedings, are obligated to comport with the values and protections of fundamental fairness, dignity, and respect. In sweeping language, the court held that denying a child an individualized judicial determination of the need to shackle would defeat the essential and defining purposes of juvenile proceedings. These defining purposes are to assure individualized attention from the court in order to further the goal of rehabilitation for the child:

In our view, the constitutional presumption of innocence, the right to present and participate in the defense, the interest in maintaining human dignity and the respect for the entire judicial system, are among these essentials whether the accused is 41 or 14. Moreover, the rationale of the California cases—that the Constitution does not require juveniles to have the full complement of rights afforded adult defendants because to do so would introduce a tone of criminality into juvenile proceedings—would not be served by requiring all juveniles, irrespective of the charges against them, or their conduct in custody, to wear shackles during all court proceedings. The use of shackles in a courtroom absent a case-by-case, individual showing of need creates the very tone of criminality juvenile proceedings were intended to avoid . . . Given the rehabilitative objectives of the juvenile justice system, we conclude, a juvenile has the same right to an individual determination of need for the use of shackles as enjoyed by an adult criminal defendant.¹⁸¹

The court issued a writ of prohibition setting aside the juvenile court's policy of using physical restraints on all children in delinquency proceedings, and mandated individual hearings regarding their use in the courtroom.¹⁸² This decision should be helpful to courts in other jurisdictions regarding the legality of these policies under state law.

3. North Carolina

On June 14, 2007, both chambers of the North Carolina General Assembly voted unanimously to ratify a bill that provides a standard procedure for deciding when to use restraints on detained juveniles in the courtroom.¹⁸³ Governor Michael F. Easley signed the bill into law on June 20th.¹⁸⁴ Under the new law, a judge can

180. *Id.* at 373.

181. *Id.* at 375.

182. *Id.* at 376.

183. H.R.,1243, 2007 Session (N.C. 2007) (amending N.C. GEN. STAT. § 24-7B (2007)).

184. 2007 N.C. Sess. Laws 100.

only allow a juvenile to be restrained in the courtroom to maintain order in the court, prevent the juvenile's escape, or provide for the safety of the courtroom. The judge, when practical, must allow the juvenile and the juvenile's attorney a hearing to contest the decision prior to the use of restraints:

At any hearing authorized or required by this Subchapter, the judge may subject a juvenile to physical restraint in the courtroom only when the judge finds the restraint to be reasonably necessary to maintain order, prevent the juvenile's escape, or provide for the safety of the courtroom. Whenever practical, the judge shall provide the juvenile and the juvenile's attorney an opportunity to be heard to contest the use of restraints before the judge orders the use of restraints. If restraints are ordered, the judge shall make findings of fact in support of the order.¹⁸⁵

III. GAULT AND THE SHACKLING OF CHILDREN

In re Gault is celebrated for holding that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"¹⁸⁶ and that the Fourteenth Amendment is violated when a child charged with a delinquent act is denied notice of the charges, the right to counsel, the privilege against self-incrimination, and the right to confrontation and cross-examination in the adjudicatory stage of the juvenile court process. Justice Fortas's decision carefully limited its holding to the constitutional protections that apply to the procedural requirements at this stage with the caveat that it had "no necessary applicability to other steps of the juvenile process,"¹⁸⁷ or to the "totality of the relationship of the juvenile and the state."¹⁸⁸ Despite the self-imposed limitations on breadth and scope, the decision's sweeping language, wide-ranging historical perspective, and the multi-disciplinary methodology underpin-

185. *Id.* As in Florida, the legislative effort was preceded by juvenile court litigation filed on behalf of shackled children by their public defenders. See Jonathan D. Jones, *Group: Limit Use of Cuffs on Kids*, GREENSBORO NEWS-RECORD, Feb. 5, 2007, at A1. According to the bill's sponsor, Rep. Angela Bryant:

There was a statutory procedure for restraining adults in court but not for juveniles. The gap had resulted in some instances of the indiscriminate shackling of juveniles in court around the state without a standard procedure to consider each individual child. This bill, while still protecting the judge's authority to preserve order and safety in the courtroom, also protects the child's right to fairness, dignity, humane treatment and due process.

Bryant Bill to Protect Juveniles Heads to Governor, CAROLINA NEWSWIRE, June 20, 2007. Unlike similar but unsuccessful legislative efforts in Florida, the North Carolina legislation was supported by that state's Department of Juvenile Justice, which banded together with a broad coalition, including the law firm of Kilpatrick Stockton LLP of Raleigh (pro bono counsel), the Juvenile Defender's Office, legal services organizations, and children's advocacy groups around the state. *Id.*

186. *Gault*, 387 U.S. at 13.

187. *Id.* at 31 n. 48; see also *id.* at 12 ("For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process.")

188. *Id.* at 13.

ning its analysis suggest a much broader judicial agenda for expansion of constitutional protections into other contexts and phases of the juvenile court process.¹⁸⁹

Although the *Gault* Court's analysis focused on the lack of procedural safeguards in the adjudicatory phase of the delinquency process it represents a far broader critique of the *parens patriae*¹⁹⁰ ideology of the juvenile court in which "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."¹⁹¹ Because the critique was directed to the ideology and culture of juvenile court proceedings as much as to the specific procedural deficiencies at issue in the Arizona juvenile court proceedings, there is little doubt that the *Gault* Court would find routine indiscriminate shackling a thoroughly reprehensible practice. The Court would recoil at the unbridled discretion exercised by those judges who tolerate and even encourage this practice to be carried out in their courtrooms in 2007, for the same reason that it found juvenile court practices in 1967 to be unconstitutional and unfair to Gerald Gault:

The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.¹⁹²

A. The Effects of Shackling on the Child's Right to Counsel

Gault is most celebrated for holding that the Fourteenth Amendment requires that, in any proceeding which may result in the loss of a child's freedom, "the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel be appointed to represent the child."¹⁹³ Shackling a child interferes with the child's fundamental due process right to the "guiding hand of counsel"¹⁹⁴ deemed so essential to help the juvenile "cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a de-

189. See BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 532-33 (1988) ("Even more important than [*Gault*'s] new set of guarantees was Fortas's flowing language in the opinion and his vast body of citations of supporting psychological, historical, and sociological data. It was clear that given time he would be willing to write into law a still greater set of protections for juvenile defendants."). See also Abe Fortas, *Equal Rights—For Whom?*, 42 N.Y.U. L.REV. 401, 405-407 (1967) (elaborating rationales for ending the juvenile court's historical treatment of children "as constitutional nonpersons and outside of the much criticized shelter of constitutional protections . . .").

190. *Gault*, 387 U.S. at 16 ("The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.")

191. *Id.* at 18.

192. *Id.* at 18-19.

193. *Id.* at 41.

194. *Id.* at 36 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

fense.”¹⁹⁵ Just as shackles “impos[e] physical burdens, pains, and restraints” on an adult criminal defendant, “tend to confuse and embarrass” his “mental faculties,” and, therefore, “materially . . . abridge and prejudicially affect his constitutional rights,”¹⁹⁶ in the case of a child facing allegations of delinquency, the prejudicial effects of shackles in the courtroom, in practical, clinical, and constitutional terms, are markedly more severe and debilitating.

First, handcuffing a child handicaps the child’s ability to communicate with counsel. Putting cuffs on the child’s wrists impairs the child’s motor coordination, making it difficult to write messages to counsel while the hearing is in progress, if talking to the defense lawyer is impractical. Second, research on the problems manifested by children in the juvenile justice system reveals that most “are affected by trauma, at least half are struggling with learning disabilities, and all are limited by their childish thinking.”¹⁹⁷ Because these conditions are already known to impair their ability to assist counsel, chaining a child in the courtroom may even further hamper the child’s ability to communicate and interact with counsel due not only to physical handicaps or discomforts associated with cuffs or shackles, but to psychological effects. Like adults, but even more so, shackled children are likely to be confused or embarrassed by their restraints.¹⁹⁸ Third, beyond impairing the child’s physical ability to communicate and causing the child to have a lowered self-image, shackling may exact a coercive effect on the child’s ability to freely and voluntarily decide whether to engage in plea-bargaining or to proceed to trial. The restraints may in fact coerce the child to believe that he must waive rights to counsel, to trial, or to plea bargain in order to have the shackles removed.¹⁹⁹

Thus, the impairment of a child’s physical movement and mental faculties, psychological harm, and interference with the child’s ability to assist counsel caused by shackling, constitute significant burdens to the child’s constitutionally guaranteed right to be guided by counsel during a hearing.

B. *Gault* and the Psychology of Procedural Justice

A key insight of the *Gault* decision was its view, bolstered by policy research and empirical evidence, that “the appearance as well as the actuality of fairness,

195. *Gault*, 387 U.S. at 36.

196. *Deck*, 544 U.S. at 631 (quoting *People v. Harrington*, 42 Cal. 165, 168 (1871)). See generally ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY 15-3.2, at 188-91 (1996) (describing various constitutional and practical dimensions of a criminal defendant’s right to be free of physical restraints at trial).

197. Marty Beyer, *Developmentally Sound Practice in Family and Juvenile Court*, 6 NEV. L.J. 1215, 1215 (2006).

198. See Beyer Affidavit, *supra* Part II.D.2, ¶¶ 9-10 (courtroom shackling of children causes them shame and humiliation, causing them to think less of themselves).

199. Although beyond the scope of this article, *Gault*’s view of coercion in the police interrogation context and the considerable literature on adolescent waiver of Miranda rights may have some relevance to waivers of rights resulting from courtroom shackling. See generally *Gault*, 387 U.S. at 55 (“[T]he greatest care must be taken to assure that [a minor’s] admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.”); Barry C. Feld, *Juveniles’ Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26 (2006); THOMAS GRISSO, JUVENILES’ WAIVER OF RIGHTS IN PERSPECTIVES IN LAW AND PSYCHOLOGY Vol. 3 (1981) (exploring coercion and disparity of power in the juvenile context).

impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.²⁰⁰ The Court relied on three studies for this proposition. The first, prepared by sociologists Stanton Wheeler and Leonard S. Cottrell, Jr., referred to a research study then being conducted by the National Council of Juvenile Court Judges, regarding the benefits of providing children with legal counsel not just on the quality of decisions rendered by judges but “on the juveniles themselves, and juveniles’ perception of the processes of justice as manifested by the court.”²⁰¹ Justice Fortas gleaned this observation from the Wheeler/Cottrell study to support his conclusion that denying children due process protections would have a negative impact on the child’s rehabilitation prospects: “[W]hen the procedural laxness of the ‘*parens patriae*’ attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed.”²⁰² The Court quoted a conclusion of the Wheeler/Cottrell study in support of the proposition that increasing due process safeguards would have a salutary effect on the child’s amenability to rehabilitation: “Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel.”²⁰³

The other two studies cited by the Court similarly endorsed the view that the lax attitude of the juvenile court and the informality of the court process, “contrary to the original expectation, may themselves constitute a further obstacle to effective treatment of the delinquent to the extent that they engender in the child a sense of injustice provoked by the seemingly all-powerful and challengeless exercise of authority by judges and probation officers.”²⁰⁴

The importance of these insights, gained from research in criminology, sociology, and public policy, cannot be underestimated. They represent the “procedural justice”²⁰⁵ policy underpinning of the due process analysis in the opinion and are

200. *Gault*, 387 U.S. at 26.

201. STANTON WHEELER & LEONARD S. COTTRELL, JR., *JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL* (1966) 33. The Wheeler/Cottrell study was prepared at the request of the Secretary of the U.S. Department of Health, Education and Welfare. *Id.*

202. *Gault*, 387 U.S. at 26.

203. WHEELER & COTTRELL, *supra* note 201, at 33.

204. PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 85 (1967) (quoted in *Gault*, 387 U.S. at 26, n.37). See also FRANCES A. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE—ESSAYS IN LAW AND CRIMINOLOGY* (1964) (cited in *Gault*, 387 U.S. at 26, n.37).

A child brought before a tribunal, more or less specifically charged with commission of particular acts, will feel, and I believe will properly feel that he has the right to receive from the court a sober and cautious weighing of the evidence relating to that issue. He has, in short, a right to receive not only the benevolent concern of the tribunal but justice. One may question with reason the value of therapy purchased at the expense of justice.

ALLEN, at 19.

205. See *Gault*, 387 U.S. at 38. Psychologist Gary B. Melton, in *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 167-77 (1989), analyzes this insight as part of his study of the construct of the new juvenile court. In calling for increased procedural protection for children in delinquency proceedings, he notes that “the most fundamental point that must be recognized is that liberty and privacy are important to children

notable for recognizing the importance of the *child's* perception of the fundamental unfairness of an arbitrary court proceeding, seeing the proceeding through the *child's* viewpoint, and empathizing with the *child's* feelings of unfairness and powerlessness vis-à-vis the entire court process. In addition to demonstrating an awareness of the psychology of procedural justice, the opinion's focus on the child's feelings and perceptions of fairness in the process as key elements of the child's amenability to rehabilitation augurs the approach of therapeutic jurisprudence scholarship, which considers the therapeutic or anti-therapeutic consequences on litigants of court proceedings and processes.²⁰⁶

Research in the psychology of procedural justice examines how individuals feel the legal system has treated them. If they believe that they have been treated with fairness, respect, and dignity, the experience has positive therapeutic consequences for them. In addition, the experience promotes changes in their conduct that reduce the likelihood of recidivism and improve their prospects for rehabilitation. The research demonstrates that judicial procedures are the primary criteria by which litigants judge the fairness of the process.²⁰⁷

Thus, the question of whether the practice of holding juvenile offenders in shackles would be countenanced by the *Gault* Court can be answered by examining the Court's views of the child's perceptions of the fairness of juvenile court process. The *Gault* Court saw the absence of procedural rules, the arbitrary hearing process in the Arizona court, and the court's paternalistic treatment of Gerald Gault, as having anti-therapeutic and anti-rehabilitative consequences. Analogously, the practice of shackling juveniles in Florida courtrooms without making individualized judicial assessments of the need to shackle sets in motion psychological forces that undermine rehabilitation. A blanket policy, uninformed by any statutory standards, procedural rules, or administrative guidelines, will likely be seen by the child as arbitrary and unfair and will therefore undermine the child's amenability to treatment.

and youth, just as they are to adults." *Id.* at 167. He elaborates on this important point by analyzing the relevance of the social psychology of procedural justice to the new juvenile court, and proposes using empirical study to help understand how children respond to their treatment in the juvenile court and by other agencies within the juvenile justice system. *Id.* at 168-69. He calls for empirical research to help policymakers fashion the "procedures needed to ensure both that respondents *are* treated fairly and that they *feel* they are being treated fairly." *Id.* at 174 (emphasis in original). This plea is very much in line with the scholarly and research agendas of therapeutic jurisprudence. See *infra* note 292, and Part V.

206. See, e.g., Bruce J. Winick, *Therapeutic Jurisprudence: Enhancing the Relationship Between Law and Psychology*, in LAW AND PSYCHOLOGY—CURRENT LEGAL ISSUES (Belinda Brooks-Gordon and Michael Freeman, eds., 2006) ("Therapeutic jurisprudence suggests that law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law, should attempt to bring about healing and wellness." *Id.* at 33.). See also discussion *infra* Part V.

207. See, e.g., E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); E. Allan Lind et al., *Voice, Control and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 83-84, 94-95, 115 (1975); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

C. How *Gault* Views Shackling

Gault's repudiation of the arbitrary process in the Arizona juvenile court thus carries a powerful message for the unbridled discretion exercised four decades later by state court judges reluctant to require or establish procedural guidelines, based on constitutional principle, for individualized determinations of necessity before children can be shackled in their courtrooms. If anything, they demonstrate cavalier disregard for the severe deprivation of liberty suffered by shackled children, reminiscent of the complacency shown by the Arizona juvenile court judge toward Gerald *Gault's* six years of lost freedom at the euphemistic "industrial school."²⁰⁸ They show a return to the laxness of the pre-*Gault* juvenile court, coupled with a view that the court is less an instrument for rehabilitation than for punishment. And they reflect acquiescence by the judiciary to unconstitutional and punitive practices by DJJ, which is able to carry out indiscriminate shackling with impunity free from any checks or oversight by the court.²⁰⁹

Indeed, some of the shackling hearings in Florida's juvenile courts bring to mind *Gault's* acerbic descriptions of the early juvenile court as a "star chamber proceeding with the judge imposing his own particular brand of culture and morals on indigent people"²¹⁰ in which children were treated as chattel.²¹¹ The hearing transcript in Sumter County reveals a disconcertingly informal culture of paternalism toward children, in which the judge treats the child who appears before him in shackles with very little regard for the child's loss of liberty and virtually none of the "care and solicitude" that defined the juvenile court in the pre-*Gault* era.²¹² The

208. *Gault*, 387 U.S. at 27.

209. By contrast, three decades ago, U.S. District Judge Constance Motley, in hearing a challenge to the constitutionality of shackling, seclusion and other disciplinary practices routinely deployed at a juvenile correctional facility in New York State, held that they violated the children's constitutional right to substantive due process and to rehabilitation. *Pena v. N.Y. State Div. for Youth*, 419 F. Supp. 203 (S.D.N.Y. 1976). In so doing, she forcefully asserted her judicial responsibility to oversee executive branch treatment of the children and to enforce their rights to substantive due process and rehabilitative care:

This is a task for which the judiciary perhaps is not ideally suited, yet it is a task which must be assumed in cases such as this, where there is a clear showing that plaintiffs' rights under the Constitution . . . have been violated. In undertaking this task, the court views its role not to be that of ultimate purveyor of standards of treatment. Rather, it sees itself as a guiding force in an evolutionary process. By specifically declaring certain practices to be unconstitutional, the court is attempting to furnish parameters for those administering the juvenile justice system, but those parameters are not inflexible. As the science of treatment in such cases matures, one can expect new insights as to effective therapy and, in turn, new parameters. While the task of evaluating such changes falls first on the executive branch of the system, the judiciary may be compelled to intervene periodically to objectively evaluate new developments. The interplay between administrator and judge which results is meant to be mutually supportive and constructive rather than competitive. *Id.* at 207.

210. *Gault*, 387 U.S. at 19 n.25.

211. *Id.*

212. See, e.g., Mack, *supra* note 9, at 120. Judge Mack, in his widely cited article, famously observed:

The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude . . . The judge on a bench, looking down upon the boy standing at the bar . . . where he can on occasion put his arm

Florida shackling hearings thus exemplify how “the focus of delinquency hearings from a child’s ‘real needs’ [shifted] to proof of legal guilt and formalized the connection between criminal conduct and coercive intervention.”²¹³

The acquiescence toward shackling in juvenile courts thus compels us to ask whether we have returned full-circle to the pre-*Gault* era oblivious to the reforms ushered in by that decision.²¹⁴ Do we see children as needing *fewer* due process rights because of their vulnerability, immaturity (or impulsivity), and inability to make sound decisions?²¹⁵ Have we reduced our understanding of their rights to the supposed truism that children have a right “not to liberty but to custody?”²¹⁶ Is a child’s right to the panoply of due process safeguards recognized in *Gault* and other decisions necessarily diminished when the state holds the child in its custody?²¹⁷ Have we, as the title of this Symposium suggests, revived the view of childhood in which the condition of being a child justifies a kangaroo court?

IV. POST-GAULT VIEWS OF SHACKLING

A. Post-*Gault* Case Law

Although *Gault* holds that the Fourteenth Amendment guarantees fundamental protections for children in juvenile proceedings, “[t]he problem is to ascertain the

around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work. *Id.*

213. Feld, *supra* note 159, at 350. Professor Feld faults *Gault* for providing children with the worst of both the juvenile court and criminal court worlds: “Delinquents, then and now, continue to receive the ‘worst of both worlds,’ neither the care and treatment juvenile courts promise for children nor the criminal procedural rights provided adults.” *Id.* See also Elizabeth Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141-53 (1997) (discussing reforms in juvenile court policy in the wake of *Gault*).

214. As Professor Lois Weithorn writes in concluding her study of systemic reform in the juvenile justice and other child-treatment systems:

Returning to the proverb with which I began this Article—‘plus ça change, plus c’est la même chose’—much has changed over this century in our nation’s responses to troubled and troublesome youth, and yet, much has stayed the same. Despite many cycles of reform aimed at the mental health, juvenile justice, and child welfare systems, we have not yet achieved most of the underlying goals articulated by these reform movements.

Lois A. Weithorn, *Envisioning Second-Order Change in America’s Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1505 (2005).

215. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (rejecting constitutional challenge to Georgia civil commitment scheme that authorized parents to involuntarily commit minors under the age of eighteen, stressing that “[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions”); *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (identifying three factors that distinguish children’s constitutional rights from those enjoyed by adults: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing”).

216. See *Gault*, 387 U.S. at 17.

217. As DJJ argues, the statutory authority conferred on it to securely detain children deemed a risk to public safety for up to twenty-one days pending trial, provides it with the legal authority to hold these children in restraints at all appearances before the court during this statutory time period. Once the child is released prior to adjudication, and therefore no longer in the custody of DJJ, its authority to shackle at all court appearances vanishes. This creates an irrational double standard in which children in state custody are shackled while those released from custody prior to trial appear in court without shackles. See *supra* Part II.B.

precise impact of the due process requirement upon such proceedings.”²¹⁸ In addition to those basic constitutional protections for adults accused of crimes that the Supreme Court has held applicable to juveniles in the *Gault* decision (*viz.*, the rights to notice, to counsel, to cross-examine witnesses, and to invoke the privilege against self-incrimination), the Court has held that in juvenile proceedings the state must prove allegations beyond a reasonable doubt²¹⁹ and the protection against double jeopardy applies to children in delinquency proceedings.²²⁰ But the Court has also made clear that the Constitution does not mandate the elimination of all differences in the treatment of children. For example, the right to jury trial is absent from juvenile court proceedings,²²¹ and the Due Process Clause does not prohibit pretrial detention of children deemed to be “serious risks” to public safety.²²² Moreover, juvenile curfews and other forms of liberty restriction have been upheld as constitutional in many federal circuits.²²³ Similarly, under the guise of *parens patriae*, the Court has upheld the constitutionality of regulations promulgated by the federal government that deny unaccompanied alien children in its custody the right to an individual hearing to decide whether to release the child to the custody of a person other than the child’s parent or a close relative, even though the policy restricts the child’s physical liberty and consigns the child to institutional confinement.²²⁴

The state has “a *parens patriae* interest in preserving and promoting the welfare of the child,”²²⁵ which makes a juvenile proceeding fundamentally different from an adult criminal trial. The Supreme Court has attempted, therefore, to reconcile these different approaches by balancing the “informality” and “flexibility” that characterize juvenile proceedings²²⁶ while seeking to ensure that these proceedings comport with the fundamental fairness required by the Due Process Clause.²²⁷

Indiscriminate shackling of juveniles based only on courtroom security considerations to the exclusion of the important liberty interest at stake thus raises the question of whether it is compatible with the “fundamental fairness” required by due process. Two corollary inquiries are thus necessary to answer this question.²²⁸

218. *Gault*, 387 U.S. at 13-14.

219. *In re Winship*, 397 U.S. 358 (1970).

220. *Breed v. Jones*, 421 U.S. 519 (1975).

221. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

222. *Schall v. Martin*, 467 U.S. 253 (1984).

223. See, e.g., Note, *Juvenile Curfews and the Major Confusion Over Minor Rights*, 118 HARV. L. REV. 2400 (2005); Calvin Massey, *Juvenile Curfews and Fundamental Rights Methodology*, 27 HASTINGS CONST. L.Q. 775 (2000); Brian Prevot, *Dusk 'Til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U.L. REV. 415 (1999).

224. *Reno v. Flores*, 507 U.S. 292 (1993). Notably, however, Justice Scalia (and concurring Justice O'Connor), acknowledged that shackling or handcuffing a child implicates a more grave liberty interest that at least implicitly mandates heightened judicial scrutiny: “The ‘freedom from physical restraint’ invoked by respondents is not at issue in this case. Surely not in the sense of shackles, chains, or barred cells” *Id.* at 302; see also O'Connor concurrence: “A child’s placement in this kind of governmental institution is hardly the same as handcuffing her, confining her to a cell, yet it must still satisfy heightened constitutional scrutiny.” *Id.* at 317-18.

225. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). See also *Bellotti*, 443 U.S. 622 (restricting adolescent medical decision-making in abortion context).

226. *Winship*, 397 U.S. at 366.

227. *Breed*, 421 U.S. at 531; *McKeiver*, 403 U.S. at 543 (plurality opinion).

228. *Schall*, 467 U.S. at 263-64.

First, does shackling serve a legitimate state objective?²²⁹ Second, are the procedural safeguards employed by the state and the court adequate to authorize the blanket policy of shackling securely detained children charged with delinquent offenses?²³⁰

The state and the judiciary assuredly have an interest in maintaining the dignity and decorum of the courtroom and in ensuring the safety of all present in the courtroom.²³¹ Children's countervailing interests to be free from unwarranted restraint, and to be treated with dignity and respect by the court in a manner that promotes their amenability to rehabilitation, are substantial as well.²³² But how qualified are children's constitutional interests in light of the recognition that children, "unlike adults, are always in some form of custody?"²³³ Children, we are told, by definition are "not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*."²³⁴ As observed by Justice Rehnquist: "In this respect, 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.'"²³⁵

However, the state's *parens patriae* interest cannot completely override the child's due process interests. A crucial distinction exists between present-day blanket shackling policies and the individualized pretrial detention practices that the Supreme Court approved in *Schall v. Martin*. *Schall* reviewed the facial constitutionality of an elaborate New York statutory scheme that contained a standard for the pretrial detention of juvenile offenders in which judges (not DJJ officials) were given a risk assessment calculus focusing on the child's propensity for serious dangerousness as a basis to order pretrial detention. By contrast, the de facto unwritten shackling policies used in Florida's courtrooms contain no such dangerousness standard for judges to apply and are based almost entirely on judicial deference to DJJ's unreliable risk assessment instrument.²³⁶

229. See, e.g., *Estelle v. Williams*, 425 U.S. 501 (1976) (requiring defendant in a criminal case to appear before jury in prison garb furthers no essential state interest).

230. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *Schall*, 467 U.S. at 264; *Reno*, 507 U.S. 292.

231. As the Supreme Court observed in *Deck*:

There will be cases, of course, where these perils of shackling are unavoidable. We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations. We are mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms.

Deck, 544 U.S. at 632.

232. Melton, *supra* note 205, at 167-72.

233. *Schall*, 467 U.S. at 265.

234. *Id.* at 265.

235. *Id.* (quoting *Santosky*, 455 U.S. at 766).

236. *Schall*, 467 U.S. at 255, 263-64. See also John A. Washington, Note, *Preventive Detention: Dangerous Until Proven Innocent*, 38 CATH. U. L. REV. 271 (1988) (commenting on inherent inconsistencies between varying methods used to determine dangerousness).

Because the Florida shackling policy is devoid of a written statutory standard, and lacks any duly promulgated administrative guidelines for the court to use in ascertaining whether a child is dangerous or presents a concrete, identifiable risk sufficient to warrant being shackled, the judge exercises virtually unbridled discretion. Having no need to make individualized determinations of dangerousness or risk of absconding, the court is unrestrained by any constitutional limits.²³⁷

Notably, however, the primary reason the Supreme Court has given children fewer procedural rights than those enjoyed by adult criminal defendants is to allow for flexibility in the proceedings, and to protect and rehabilitate the child.²³⁸ A blanket shackling policy accomplishes neither. It inflexibly denies children the same rights of adult criminal defendants to appear in court without shackles and denies them the informality and protection so essential to the integrity and mission of the juvenile court process.

B. Due Process Considerations

It is axiomatic that a government agency may not exercise authority not delegated to it by the legislature and, when the agency purports to have authority that infringes on a constitutionally protected fundamental right, the Supreme Court has insisted upon an explicit legislative expression of that authority.²³⁹ In *Kent v. Dulles*,²⁴⁰ the Court invoked the delegation doctrine to overturn an agency's authority under regulations promulgated pursuant to broad congressional delegation in a federal statute to deny a passport to a member of the Communist Party. In doing so, it declined to "find in this broad generalized power an authority to trench so heavily on the rights of a citizen."²⁴¹ Thus, when an agency asserts an "unbridled discretion" to act in a constitutionally questionable manner pursuant to broad legislative authority containing inadequate standards, a court should construe narrowly all delegated powers that curtail or dilute constitutionally-protected rights and find that the agency's action infringing on those rights is *ultra vires* and null and void.

When the state and the court place children in mechanical restraints, the child's fundamental right to be free from external physical restraint and other forms of institutional confinement is more at stake than in any other liberty-deprivation con-

237. Contrary to the DJJ arguments that the risk assessment instrument filled out and scored by a juvenile probation officer is a valid and conclusive predictor of dangerousness, and that a judicial process is therefore superfluous, the restrictions on the child's liberty in the shackling context are far more severe than the deprivations of liberty in the secure detention context and thus the procedural and substantive due process protections accorded the child must be paramount. *See, e.g., Reno*, 507 U.S. at 302, 317-18.

Moreover, DJJ's willing compliance with court orders to remove shackles is an example of cognitive dissonance: on the one hand it arrogates to itself unassailable expertise about the dangers posed by children placed in secure detention (by virtue of the detention risk assessment instrument); on the other hand it concedes the validity of the court's individualized findings of no danger to public safety when the court orders DJJ to remove the restraints.

238. *See, e.g., McKeiver*, 403 U.S. at 545 ("There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversarial process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.")

239. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105-14 (1976).

240. *Kent v. Dulles*, 357 U.S. 116 (1958)

241. *Id.* at 129.

text.²⁴² As described above, there is a void in the legislative scheme regarding the use of shackles in the courtroom. The Florida legislature has not explicitly authorized DJJ to enact a blanket policy of shackling all juveniles in the courtroom, but DJJ nonetheless has asserted that it has the right to do so subject to any constraints imposed by a judge.²⁴³

In fact, the Florida legislature authorizes DJJ to utilize mechanical restraints and other similarly restrictive forms of discipline in two circumscribed contexts: first, in carrying out disciplinary treatment of children as part of its responsibility to administer a system of detention services for children under the legislatively-created “juvenile justice continuum;”²⁴⁴ second, as part of the agency’s responsibility to have a “protective action response policy” governing “the use of verbal and physical intervention techniques, mechanical restraints, aerosol and chemical agents, and Tasers by employees” in detention facilities, delinquency programs, or commitment programs operated by DJJ or its contract providers.²⁴⁵

Pursuant to these limited grants of legislative authority, DJJ has promulgated rules that govern the discipline of youth in DJJ detention facilities and programs. The rules provide for the use of a “behavior management system” that meets the needs of the youth and the facility, explicitly prohibit the use of corporal punishment and drugs to control behavior of youth in the facility and expressly limit the use of restrictive behavior controls such as mechanical restraints and confinement. For example, the agency’s regulations provide that mechanical restraints “shall be used as a method of controlling *youth who present a threat to safety and security within the facility.*”²⁴⁶ The regulations require the use of mechanical restraints when transporting youth “outside the secure area of the facility.”²⁴⁷ In the clearest statement of the agency’s own limitations on the use of restraints, they expressly prohibit the blanket use of mechanical restraints in its facilities as “a form of discipline.”²⁴⁸ DJJ authority to use mechanical restraints is thus confined to the control of youth who present a threat to safety and security within secure detention facili-

242. *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992); *see also Reno*, 507 U.S. at 318 (O’Connor, J. concurring) (“Just as it is true that ‘in our society liberty [for adults] is the norm, and detention prior to trial or without trial is the carefully limited exception,’ . . . so too, in our society, children grow up in families, not in governmental institutions . . .”) (citations omitted).

243. *See supra* Part II.B.

244. FLA. STAT. § 985.601(9) (2007).

245. FLA. STAT. § 985.645 (2007).

246. FLA. ADMIN. CODE ANN. R. 63G-2.012(3)(a) (2007) (emphasis added).

247. FLA. ADMIN. CODE ANN. R. 63G-2.012(3)(b) (2007). As a further accountability check on the use of restraints in facilities, R. 63G-2.012(3)(d), requires that “[w]henver mechanical restraints are used, a report shall be completed and submitted for review,” except when restraints are used to transport youth outside the secure area of the facility.

248. FLA. ADMIN. CODE ANN. R. 63G-2.012(3)(c) (2007). In addition to its published rules, DJJ has published extensive and detailed agency policies and procedures governing the use of restraints in facilities and during transportation. *See, e.g.*, FLA. DEP’T OF JUVENILE JUSTICE POLICIES AND PROCEDURES, PROTECTIVE ACTION RESPONSE (PAR) POLICY, § FDJJ-1508-03(II)(C)(3) (revised 08/15/03); FLA. DEP’T OF JUVENILE JUSTICE POLICIES AND PROCEDURES, STATEWIDE TRANSPORTATION OFFENDER POLICY (STOP), § FDJJ-5000(II)(C)(4) (revised 05/25/04); DEPARTMENT OF JUVENILE JUSTICE 2006 DETENTION SERVICES MANUAL, CHAPTER 8.

ties, and to situations when it transports youth outside secure facilities, but the agency's authority to use mechanical restraints ends at the courthouse door.²⁴⁹

In addition to exceeding its delegated statutory authority, DJJ has failed to comply with statutory rulemaking requirements under the Administrative Procedure Act prior to adopting its blanket policies governing the shackling of juveniles in the courtroom. The legislature has made it plain that "[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule under section 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."²⁵⁰ Section 120.52 (15) provides in part:

"Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.²⁵¹

The blanket shackling policy in force throughout Florida is of general applicability and therefore a "rule" as defined by this provision.

By applying this policy without first following the statutorily required rulemaking procedures,²⁵² DJJ has exceeded its delegated authority.²⁵³ Because DJJ has not followed the rulemaking procedure in fashioning its unwritten blanket shackling policy, that policy is an invalid exercise of delegated legislative authority.²⁵⁴

While DJJ has written agency protocols regarding the use of mechanical restraints in DJJ detention facilities and for transportation of juvenile offenders between secure facilities, there is no such policy on conditions inside a courtroom.²⁵⁵ The only written reference to the court's role in overseeing the use of mechanical restraints on juveniles in a courtroom appears in Chapter 8 of the Department of Juvenile Justice 2006 Detention Services Manual, which states that "[t]he Judge

249. DJJ does not consider juvenile court as one of its "facilities." The department distinguishes between what it defines as facilities and agencies involved in the juvenile justice continuum. In the DJJ DETENTION SERV. MANUAL, CHAPTER 2, SECTION XI INTERAGENCY AND COMMUNITY RELATIONS, the distinction is made clear:

A. The facility shall maintain open lines of communication and shall meet and/or make contact quarterly with representatives of agencies involved in the juvenile justice continuum, including: 1. The juvenile court(s); 2. The State Attorney's Office; 3. The Public Defender's Office; 4. Local law enforcement agencies; 5. School system; 6. Contracted programs / agencies.

250. FLA. STAT. § 120.54(1)(a) (2007). See *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 580-81 (Fla. Dist. Ct. App. 1977) (policy statements of general applicability require rulemaking).

251. FLA. STAT. § 120.52(15) (2007).

252. See FLA. STAT. § 120.54 (2007).

253. See FLA. STAT. § 120.52(8)(a) (2007).

254. See *Matthews v. Weinberg*, 645 So. 2d 487 (Fla. Dist. Ct. App. 1994) (holding that Department of Health and Rehabilitative Services exceeded delegated authority by not following rulemaking procedures in fashioning foster parent licensing policies excluding homosexuals and unmarried couples).

255. See *supra* Part II.B.

may request restraints be removed while the youth is in the courtroom. The youth will be restrained upon leaving the courtroom and entering the courtroom.”²⁵⁶

However, this operational guideline is not a rule, and because it provides no specific guidance as to how the court should exercise discretion in deciding whether or not to remove restraints, it does not come close to the individualized assessment of safety and security risk that DJJ’s own regulations require it to make before it uses mechanical restraints to control a youth or others in a secure detention facility.²⁵⁷ Tellingly, it also lacks a constitutional standard to guide the judge in exercising discretion with respect to the shackling or unshackling of offenders.

C. The *Youngberg v. Romeo* Professional Judgment Standard

Shackling involves intrusions on the historic, fundamental right to “[l]iberty from bodily restraint,” long recognized as “the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”²⁵⁸ As a result, courts should apply a heightened level of scrutiny of a state’s justifications for shackling all juveniles in court regardless of their age, size, gender, pending charges, history of violence, or risk of escape. In *Youngberg v. Romeo*,²⁵⁹ the Supreme Court held that the Due Process Clause of the Fourteenth Amendment prohibited a decision to physically restrain a patient in a mental health facility for prolonged periods of the day if the professionals’ decision to use restraints amounted to “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment.”²⁶⁰

The court’s practice entails the use of instruments of restraint, such as handcuffs, chains, irons, or straightjackets, for hours or even entire days at a time²⁶¹ on many youths charged with nonviolent offenses, with no histories of disruptive courtroom behavior, no court findings that restraints are necessary to prevent harm to the child or another person, and with no consideration of less restrictive alternatives to ensure security of the courtroom and its occupants. This practice arguably constitutes a “substantial departure from accepted professional judgment, practice or standards.”

DJJ’s blanket policy of courtroom shackling, and the judges’ acquiescence in that policy, violate the *Youngberg* professional judgment standard. DJJ uses, and the court countenances, a blanket, across-the-board standard for using restraints in the courtroom, irrespective of the child’s age, size, gender, pending charges, history of violence, or risk of escape, in clear contrast to the “protective action response policy” adopted pursuant to its delegated statutory authority,²⁶² for use in

256. See *supra* note 248.

257. See FLA. ADMIN. CODE ANN. R. 63G-2.012(3)(a) (2007).

258. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part, dissenting in part).

259. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

260. *Id.* at 323.

261. See discussion *supra* Part II.

262. See FLA. STAT. § 985.645 (2007).

secure detention facilities. The response policy carefully details how the agency is to exercise its professional judgment when using mechanical restraints in DJJ facilities and programs. It circumscribes the use of mechanical restraints in secure detention facilities, limiting their use to “situations where a youth has initiated active, combative, or aggravated resistance; and in situations where a youth poses a physical threat to self, staff, or others.”²⁶³ In contrast, in the courtroom, DJJ asserts free rein, immune from any standards and very little oversight by the judge, to use restraints at will, even where the youth has initiated no aggravated resistance and poses no physical threat to self or others.

Hence, the DJJ professional judgment standard regarding use of mechanical restraints, set forth in detail in DJJ’s juvenile detention protocols, is violated by the indiscriminate shackling practices deployed in the juvenile courtroom.²⁶⁴

D. The *Deck v. Missouri* Standard

As analyzed above, considerations of due process require DJJ to bear the burden of justifying to the trial court its use of restraints in the courtroom on an individual, case-by-case basis. Thus, *Youngberg* requires DJJ to demonstrate that it has used restraints in conformity with its own professional judgment standard. Additionally, placing the burden on DJJ is mandated under *Deck v. Missouri*, which held that a capital defendant must be unshackled at the penalty phase of the trial, unless the *state* can show the court that the use of restraints is “justified by an essential state interest”—such as courtroom security—specific to any danger posed by the individual defendant.²⁶⁵

In *Deck*, the Supreme Court cited three reasons to require the state to justify the need to shackle a convicted defendant at the penalty phase of a capital proceeding, all of which are *a fortiori* relevant to shackled juveniles who are subjected to shackling even at pre-adjudicatory court appearances. First, “the appearance of the offender in the penalty phase in shackles . . . almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to

263. FLA DEP’T OF JUVENILE JUSTICE POLICIES AND PROCEDURES, PROTECTIVE ACTION RESPONSE (PAR) POLICY, § FDJJ-1508-03(III)(C)(3), *supra* note 248, at 3. Indeed, the thirty-one page Protective Action Response Policy contains a detailed (over seventeen page) description of the protocols for use of handcuffs, restraint belts, leg cuffs, restraint chairs, soft restraints, and waist chains in “Level 3 Response” situations, and training for staff to use in subduing a youth who initiates active, combative, or aggravated resistance, or who poses a physical threat to self or others. This detailed protocol, designed to ensure stringent accountability measures for the use of mechanical restraints to “establish and maintain safe environments for staff and youth,” “ensure public safety,” “provide for order and discipline,” and ensure that Level 3 [mechanical restraints] responses are “used as a last resort,” *id.* at 1, illustrates the glaring absence of guidance for the exercise of professional judgment in the use of restraints by DJJ in the courtroom.

264. Cf. Susan Stefan, *Leaving Civil Rights to the “Experts”*: From Deference to Abdication Under the Professional Judgment Standard, 102 YALE L.J. 639, 703-704 (1992) (criticizing reliance on the *Youngberg* professional judgment standard in a number of different institutional contexts (psychiatric hospitals, higher education, juvenile justice, prisons and jails, foster care, effective assistance of counsel, etc.), and in particular to defend the use of isolation and restraint and other “intrusive practices designed to control children in the juvenile justice system.”).

265. *Deck*, 544 U.S. at 624 (quoting *Holbrook*, 475 U.S. at 560).

the community.”²⁶⁶ Second, “[s]hackles can interfere with the accused’s ‘ability to communicate’ with his lawyer.”²⁶⁷ And third, “the use of shackles at trial ‘affront[s]’ the ‘dignity and decorum of judicial proceedings that the judge is seeking to uphold.’”²⁶⁸ In holding that the defendant’s due process rights were violated when he appeared at sentencing in leg irons, handcuffs, and a belly chain, the Court set forth precisely the individualized judicial fact-finding and risk assessment balancing process that also should apply to juveniles who have not yet been adjudicated delinquent but routinely appear in shackles and other restraints before the court:

[W]e must conclude that courts cannot routinely place defendants in shackles or other restraints visible to the jury during the penalty phase of a capital proceeding. The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial.²⁶⁹

If an adult defendant, convicted by a jury of double murder and robbery, is entitled to a rebuttable presumption that he will not appear shackled before the court, should a child charged with a nonviolent offense and no history of disruptive courtroom behavior be entitled to any less protection? Although Florida statutory law disallows an unwritten, across-the-board policy of shackling every juvenile offender who appears in the courtroom in these hearings, DJJ and court shackling policies also violate the child’s right to be free from external restraint, and due process requires an individualized determination of dangerousness and a finding that there are no less restrictive alternatives before requiring the juvenile to be restrained in court.²⁷⁰

E. Incorporating Social Science Research Into Due Process Analysis

In applying *Deck* to the routine practice of shackling alleged juvenile offenders, it is also important to incorporate social science research about adolescents, and their unique developmental needs and responses to incarceration and rehabilitation, into the due process analysis. An example, pre-dating *Deck* and *Youngberg*,

266. *Deck*, 544 U.S. at 633.

267. *Id.* at 631.

268. *Id.*

269. *Id.* at 633.

270. See generally Weithorn *supra* note 214, at 1417-25. Professor Weithorn specifically notes that “[t]he view that there is, or should be, a constitutional right to the least restrictive alternative when restrictions of physical liberty are implicated is grounded in application of that mode of constitutional analysis that requires strict scrutiny of policies that impair fundamental rights.” *Id.* at 1417.

is illustrated by *Pena v. New York State Division for Youth*.²⁷¹ In *Pena*, Judge Motley scrutinized the constitutional and statutory claims of juveniles subjected to indiscriminate shackling, among other forms of restrictive and intrusive disciplinary measures, while housed in New York youth correctional facilities. In holding that the use of isolation, as well as physical and chemical restraints to control their behavior had violated the children's due process rights to rehabilitative treatment, Judge Motley found that their use "should be tolerated only in cases where a child is a serious and evident danger to himself or others and incapable of being controlled by any less restrictive means."²⁷²

The court identified rare instances when shackling might be necessary, such as short-term transportation from one institution to another, and limited the use of physical restraints to no more than thirty minutes, except in the instance of "vehicular transportation" where their utilization is "necessary for public safety."²⁷³ The court found that the constitutional violations were also contrary to the rehabilitative purposes of commitment of the juveniles to the facilities, and thus held that the shackling practices were "punitive and anti-therapeutic and therefore unconstitutional."²⁷⁴

The court analyzed the children's substantive due process right to rehabilitative treatment²⁷⁵ informed by clinical insights into the anti-therapeutic consequences of the practices in the facility's institutional milieu.²⁷⁶ In effect, the court scrutinized the constitutional interests of the children through a social science lens, assessing their constitutional rights within a normative framework that incorporated current scientific knowledge about the rehabilitative and anti-rehabilitative consequences of the practices into the legal rights analysis.

Contemporary policy concerning youth transitioning to adulthood continues to demand social science and other research data from a variety of disciplines to inform the juvenile justice system's responses to the problems of youth crime. The MacArthur Research Network on Transitions to Adulthood and Public Policy²⁷⁷ and current research about adolescent crime, in particular research on correctional

271. *Pena v. N.Y. State Div. for Youth*, 419 F. Supp. 203 (S.D.N.Y. 1976).

272. *Id.* at 211.

273. *Id.* at 210. In contrast to the New York restraint and seclusion practices declared unconstitutional in *Pena*, the Florida shackling policy permits the chaining of children to furniture, doors or other fixed structures in the courtroom to keep them in place for up to four hours. These practices are carried out without any individualized findings of dangerousness, and none of the broad public safety considerations attendant to vehicular transportation or risk of flight.

274. *Id.* at 207.

275. *Id.* at 206 (analyzing the due process rights of juveniles under Supreme Court case law to deduce a constitutionally-grounded right to rehabilitative treatment, a *parens patriae* prohibition against punishment and retribution, and treatment modalities consistent with the juvenile justice system's goal to provide "guidance and rehabilitation for the child . . . not to fix criminal responsibility, guilt and punishment." (quoting *Kent v. United States*, 383 U.S. 541, 554 (1966))).

276. *Id.* at 207 ("As the science of treatment in such cases matures, one can expect new insights as to effective therapy and, in turn, new parameters.").

277. See Frank F. Furstenberg, *Keynote Address: Vulnerable Youth and the Transition to Adulthood, Symposium: Law and Adolescence: The Legal Status, Rights, and Responsibilities of Adolescents in the Child Welfare, Juvenile, and Criminal Justice Systems*, 79 TEMP. L. REV. 325, 325 (2006). For more information about the MacArthur Research Network, see <http://www.transad.pop.upenn.edu>.

practices such as the use of restraints in disciplining incarcerated youth,²⁷⁸ demonstrate “why a legal regime that is grounded in scientific knowledge about adolescence and the role of criminal activity during this developmental period is better for young offenders and for society than the contemporary policy, which often pays little attention to differences between adolescents and adults.”²⁷⁹

Research on the effects of shackling children in the delinquency system, including children with disabilities,²⁸⁰ girls,²⁸¹ and minority youth²⁸² is especially

278. See COMM. ON LAW AND JUSTICE ET AL., JUVENILE CRIME JUVENILE JUSTICE (Joan McCord *et al.*, eds., 2001) (recommending study by the federal government and the states in “evaluating the effects of correctional policies and practices such as the use of behavior modification programs, *physical restraints* and isolation on incarcerated juveniles” (emphasis added)).

279. Elizabeth S. Scott, *Keynote Address: Adolescence and the Regulation of Youth Crime, Symposium: Law and Adolescence: The Legal Status, Rights, and Responsibilities of Adolescents in the Child Welfare, Juvenile, and Criminal Justice Systems*, 79 TEMP. L. REV. 337, 337 (2006).

280. As Dr. Beyer detailed in her affidavit, *supra* Part II.D.2, detained children suffer from depression, attention and conduct disorders, and substance abuse. She opined that shackling exacerbates trauma, reviving feelings of powerlessness, betrayal and self-blame. She added that shackling a victim of physical or sexual abuse, where restraint was part of the abuse, could trigger flashbacks and reinforce early feelings of powerlessness. Beyer Affidavit, *supra* note 98 at 7.

See also Beyer, *supra* note 197 at 1215 (“Court procedures and attorney-client relationships in dependency and delinquency hearings would be designed differently if we stood in the child’s shoes: because of the effects of trauma, disabilities, and childish thinking, children and teenagers are significantly compromised in the relationships that are crucial for them to develop normally.”); Teplin, *supra* note 102 at 1 (observing that few epidemiological studies regarding psychiatric disorders of juvenile detainees exist, and cautioning that without sound data on the prevalence of psychiatric disorders, “defining the best strategies to use and allocating the juvenile justice system’s scarce mental health resources are difficult”).

281. A 2005 study by the Florida Office of Program Policy Analysis and Governmental Accountability (OPPAGA) reported in 2005 that 94% of the ninety girls in residential facilities studied had a diagnosed mental health problem and 68% of the girls reported that they had suffered past neglect, physical or sexual abuse. See OPPAGA, GENDER-SPECIFIC SERVICES FOR DELINQUENT GIRLS VARY ACROSS PROGRAMS, BUT HELP REDUCE RECIDIVISM (Report No. 05-13) (2005).

Shackling girls with histories of sexual abuse and serious mental health diagnoses is known to exacerbate serious underlying illnesses and disorders. See Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling and Law*, 88 NW. U. L. REV. 1271, 1274 (1994).

An enormous proportion of women in mental institutions have suffered from sexual abuse and violence. And when women who have been raped and sexually abused are institutionalized, the ‘treatment’ they receive fails to address the connection between past abuse and present behavior such as anorexia, self-mutilation, severe depression, and attempts at suicide. Instead, institutional conditions and treatment replicate and exacerbate the pain of the original assaults and abuse, often leaving women patients in a condition that fulfills the prophecy of their pathology. *Id.*

282. With respect to racial impact of juvenile justice detention policy nationally and in Florida, the National Juvenile Defender Center report observed:

The disproportionate confinement of youth who are members of racial and ethnic minorities is a disturbing nationwide phenomenon. Disproportionality exists at striking levels despite the fact that the offense profiles of youth in the juvenile justice system do not vary substantially by race and ethnicity. Nationwide, African American youth are more likely than white youth to be formally charged in juvenile court, even when referred to court for the same type of delinquent act. Detention rates for African American youth exceed the rates for white youth within every offense category. Florida is no exception to this stark picture. African American youth are 45% of the detainees in Florida’s secure facilities, although they are only 22% of the youth population. FLORIDA—AN ASSESSMENT OF ACCESS TO COUNSEL, *supra* note 14, at 59 (citations omitted).

As Dr. Beyer opined in her affidavit, the practice of shackling detained youth is especially severe to children of color, who may associate the practice with racism, even if the practice is universal. Beyer Affidavit, *supra* Part II.D.2, ¶ 12. This observation is particularly compelling from both clinical and historical standpoints, given the legacy of African American servitude on brutal chain gangs throughout Florida and the South, and the obvious

important, because of its potential to damage these already vulnerable populations through practices whose effects are as yet unknown and that may be ultimately found to be seriously anti-therapeutic. Ethical canons governing research subject experimentation, particularly in the child and prisoner experiment contexts, are necessarily implicated.²⁸³ At a very minimum, the views of those children who have been subjected to the shackling practices should be elicited²⁸⁴ and analyzed so that the detrimental effects of shackling on children are better understood by judges and policymakers.

Additionally, given the dearth of local or national research data on the incidence of juvenile-perpetrated courtroom violence, court policy regarding shackling should be informed by systematic research analyzing and gauging the actual (not just anecdotal or perceived) threats of juveniles to courthouse safety. Organizations such as the American Bar Association and the National Council of Juvenile and Family Court Judges should spearhead this study and develop standards for use by juvenile courts and other stakeholders to assist in their efforts to improve practice in this area.²⁸⁵ Juvenile courts have a historical and moral obligation to lead in crafting knowledge-based solutions rather than abdicating to narrow institutional interests of stakeholders uninformed by data and research that result in policies contrary to the profession's "best practices" and to the children's best interests.²⁸⁶

analogies between the dehumanizing treatment of convicts on chain gangs and shackled juveniles. See Lisa Kelley, *Chain Gangs, Boogeymen and Other Real Prisons of the Imagination*, 5 RACE & ETHNIC ANC. L.J. 1 (1999) (presenting a "fictionalized account of real legal, historical, and interpersonal issues rooted in the social construction of race," through chain gang narratives).

283. See, e.g., THE NAT'L COMM'N FOR THE PROT. OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, REPORT AND RECOMMENDATIONS: RESEARCH INVOLVING CHILDREN 1-26, 91-121 (1977) (describing research methodology recommendations and discussing appropriate ethical standards for scientific study involving children as research subjects); DENNIS M. MALONEY, PROTECTION OF HUMAN RESEARCH SUBJECTS: A PRACTICAL GUIDE TO FEDERAL LAWS AND REGULATIONS (1984) 343-49 (discussing research protocols for prisoner research in HHS and FDA-funded studies).

284. See Winick & Cortada, *supra* note 2 (describing Voice Project).

285. Although the National Council's *Juvenile Delinquency Guidelines* contain recommendations for court security measures designed to provide guidance to delinquency court and law enforcement staff, the Council has not yet developed a shackling policy. The security measures that it has developed recommend, among other procedures, security screenings upon entering the court building, alarm buzzers in the courtroom to access security assistance outside the courtroom, adequate security staff inside the courtroom, and emergency response plans. See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES, 32, available at <http://www.ncjfcj.org/> (last visited Sept. 28, 2007).

The current National Council President, Judge Dale Koch, supports restrictions on the indiscriminate use of shackles in the courtroom as a security measure. As quoted in a recent *USA Today* story on this topic, Judge Koch favors a presumption against shackling, making its use the exception rather than the rule in juvenile court practice: "My experience has been that [shackling] can be done safely, as long as you have an exception built in where you can decide that under circumstances of that youth, they need to be shackled . . . It is just more respectful to not have the kids shackled while they're . . . in front of the judge." Moore, *supra* note 6.

286. See Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 S. CAL. L. REV. 1993 (1993):

Not only does the juvenile court have a history of being at the center of the child and family service system, but the role of moral leadership, especially on behalf of disadvantaged groups, is at the heart of some visions of the judiciary in general. At its best, the judicial system educates the citizenry in the core social values and their significance for everyday life. Most fundamentally, the courts have the responsibility and the authority to ensure that public agencies act in children's best interest. *Id.* at 2040-41 (citations omitted).

Juvenile court policies governing this practice should also be informed by what is already known about the adverse and co-morbidity effects of using physical restraints in other settings, such as psychiatric institutions,²⁸⁷ before they implement policies that may have potentially devastating medical and psychological (and even fatal²⁸⁸) consequences for these children.

Incorporating social science and other research into juvenile justice practice in formulating policy on the use of restraints in the courtroom is supported by federal Department of Health and Human Services (HHS) regulations governing physical and chemical restraints on children, adolescents, and adults in state and local mental health facilities. These regulations were developed in response to “the danger posed to residents in psychiatric residential treatment facilities as a result of improper restraint” practices upon children and adolescents.²⁸⁹ They demonstrate the importance of carefully regulating the use of shackles in the courtroom, and why these practices need to be developed with the goal of fostering, rather than hindering, the child’s amenability to rehabilitation.²⁹⁰ The HHS standards exemplify “best

287. The research literature on adverse effects of restraints in psychiatric settings is considerable, and it overwhelmingly shows a need to circumscribe the use of physical and other forms of restraint as an accepted intervention in the therapeutic milieu. See, e.g., David M. Day, *Examining the Therapeutic Utility of Restraints and Seclusion With Children and Youth: The Role of Theory and Research in Practice*, 72 AM. J. ORTHOPSYCHIATRY 266 (2002); Kathleen R. Delaney & Louis Fogg, *Patient Characteristics and Setting Variables Related to the Use of Restraints on Four Inpatient Psychiatric Units for Youths*, 56 PSYCHIATRIC SERVICES 186 (2005); William A. Fischer, *Restraint and Seclusion: A Review of the Literature*, 151(11) AM. J. PSYCHIATRY 1584 (1994); Sheila S. Kennedy & Wanda K. Mohr, *A Prolegomenon on Restraint of Children*, 71 AM. J. ORTHOPSYCHIATRY 26 (2001); Brian D. Leity et al., *Review of Restraint Data in a Residential Treatment Center for Adolescent Females*, 35 CHILD YOUTH CARE FORUM 339 (2006); Derek Miller et al., *Use of a Holding Technique to Control the Violent Behavior of Seriously Disturbed Adolescents*, 40 HOSPITAL AND COMMUNITY PSYCHIATRY 520 (1989); Wanda K. Mohr et al., *A Restraint on Restraints: The Need to Reconsider the Use of Restrictive Interventions*, 12 ARCHIVES OF PSYCHIATRIC NURSING 95 (1998); Wanda K. Mohr et al., *Adverse Effects Associated With Physical Restraint*, 48 CANADIAN J. PSYCHIATRY 330 (2003); Louise Nelstrop et al., *A Systematic Review of the Safety and Effectiveness of Restraint and Seclusion as Interventions for the Short-Term Management of Violence in Adult Psychiatric Inpatient Settings and Emergency Departments*, in 3 WORLDVIEWS ON EVIDENCE-BASED NURSING 8 (2006); Michael A. Nunno et al., *Learning From Tragedy: A Survey of Child and Adolescent Restraint Fatalities*, 30 CHILD ABUSE & NEGLECT 1333 (2006); A. Sourander et al., *Use of Holding, Restraints, Seclusion, and Time-Out in Child and Adolescent Psychiatric In-Patient Treatment*, 11(4) EUROPEAN CHILD AND ADOLESCENT PSYCHIATRY 162 (2002); George M. Schreiner et al., *Decreasing the Use of Mechanical Restraints and Locked Seclusion*, 31 ADMIN. AND POL’Y IN MENTAL HEALTH AND MENTAL HEALTH RESEARCH 449 (2004); Lorna K.P. Suen et al., *Use of Physical Restraints in Rehabilitation Settings: Staff Knowledge, Attitudes and Predictors*, 55 JOURNAL OF ADVANCED NURSING 20 (2006); J. Carole Taxis, *Ethics and Praxis: Alternative Strategies to Physical Restraint and Seclusion in a Psychiatric Setting*, 23 ISSUES IN MENTAL HEALTH NURSING 157 (2002).

288. See, e.g., Cassi Feldman, *State Facilities’ Use of Force is Scrutinized After Death*, N.Y. TIMES, Mar. 4, 2007, at A22 (reporting that death of a juvenile in state-run rehabilitation center in New York state “refocused attention on the use of physical restraint in state youth facilities”).

289. Medicaid Program: Use of Restraint and Seclusion in Psychiatric Residential Treatment Facilities Providing Psychiatric Services to Individuals Under Age 21, 66 Fed. Reg. 7148 (Background) (Jan. 22, 2001) (to be codified at 42 C.F.R. pts. 441 and 483).

290. See, e.g., 42 C.F.R. § 482.13(e)(2007) (“All patients have the right to be free from restraint or seclusion, of any form imposed as a means of coercion, discipline, convenience, or retaliation by staff.”); 42 C.F.R. § 482.13(e)(2) (stating that restraints on patients should “only be used when less restrictive interventions have been determined ineffective to protect the patient, a staff member or others from harm”); 42 C.F.R. § 482.13(e)(3)(8)(i)-(iii) (requiring that use of restraints be done pursuant to order of physician, but prohibiting standing or “as needed” orders, recommending consultation with the treating physician if ordered by a non-treating doctor, in accordance with a written modification to patient’s treatment plan, implemented in the least restrictive manner possible, in accordance with safe and appropriate restraining techniques, and ended at the earliest possible time); 42 C.F.R. §

practices” in the use of restraints to control patients (particularly children and adolescents) in psychiatric facilities. By contrast, the unbridled and indiscriminate use of mechanical restraints upon children and adolescents in the courtroom, without any consideration of less restrictive alternatives, any checks on the use of restraints to situations involving an immediate risk of safety to the juvenile or others, and any durational limits, is, at best, arbitrary and capricious, and at worst, egregiously anti-therapeutic and potentially seriously harmful to children.

The need for procedural due process standards to establish factually and legally grounded bases for the decision to shackle a child is critical both to the integrity of the process as well as to the therapeutic goals that are so essential to the functioning and mission of the juvenile justice system itself.²⁹¹ Indeed, the central purposes of the Florida juvenile justice system are:

To ensure the protection of society, by providing for a comprehensive standardized assessment of the child’s needs so that the most appropriate control, discipline, punishment, and treatment can be administered consistent with the seriousness of the act committed, the community’s long-term need for public safety, the prior record of the child, and the specific rehabilitative needs of the child . . .²⁹²

A blanket courtroom shackling policy that fails to take any of these factors into account, on an individual basis, is antithetical to these key purposes of the Florida juvenile justice system.

V. THERAPEUTIC JURISPRUDENCE CONSIDERATIONS

Consistent with this analysis, considerations of therapeutic jurisprudence strongly argue against a blanket policy of shackling juveniles in court. Therapeutic jurisprudence is a field of social inquiry with a law reform agenda that studies the ways in which legal rules, procedures, and the roles of legal actors produce therapeutic or anti-therapeutic consequences for those affected by the legal process.²⁹³

482.13(f)(2) (cautioning that restraints “can only be used in emergency situations if needed to ensure the patient’s physical safety and less restrictive interventions have been determined to be ineffective”); 42 C.F.R. § 482.13(f)(3)(a) (prohibiting the use of standing orders for restraint); 42 C.F.R. § 482.13(e)(8)(i)(B)-(C) (limiting the duration of restraint to *two hours* for children and adolescents *ages nine through seventeen*, or *one hour* for patients *under age nine*).

291. See *Eckerhart v. Hensley*, 475 F. Supp. 908, 927 (W.D. Mo. 1979) (use of seclusion or restraint in a psychiatric facility constitutionally may be used as a form of institutional discipline for infraction of ward rules, at least for dangerous patients housed in a forensic unit, but in such cases there must be a formal hearing, including written notice of the alleged violation, a written statement by the fact-finder of the evidence relied upon and the reasons for the disciplinary action, and the opportunity to call witnesses and present other evidence in defense).

292. FLA. STAT. § 985.01(1)(c) (2007).

293. See generally BRUCE WINICK, *CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL* (2005); JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick and David B. Wexler, eds., 2003); *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler and Bruce J. Winick, eds., 1996).

As described *supra* note 96, the author of this article and Bruce Winick submitted a therapeutic jurisprudence affidavit in the Miami-Dade, Palm Beach and other Florida cases. The affidavit was also used in similar litigation filed in California, North Carolina, and New Mexico. See, e.g., *Tiffany A.*, 59 Cal.Rptr.3d at 368 n. 7

Therapeutic jurisprudence seeks to promote policies, systems, and relationships consistent with normative principles of justice and constitutional law, which will secure positive therapeutic outcomes and minimize negative psychological and behavioral effects of anti-therapeutic legal rules and practices.²⁹⁴ The principles of therapeutic jurisprudence are especially germane to the juvenile court setting that was designed to meet a rehabilitative agenda by which judges dispense an assortment of therapeutic services to children who are victims of abuse or charged with delinquent offenses.²⁹⁵

(“[P]etitioner has also submitted new evidence supportive of her position—a declaration from two law professors who stated the physical restraint policy is ‘anti-therapeutic for juveniles, prejudicial to their obtaining a fair trial, and antithetical to the rehabilitative aims of the juvenile justice system.’”).

The author and Professor Winick also filed an *amicus curiae* brief on behalf of the University of Miami School of Law’s Children & Youth Law Clinic and Florida’s Children First, Inc., in support of the petitioners in *R.C. v. Juvenile Court Judges*, the habeas petition recently denied by Florida’s Fourth District Court of Appeal. See discussion *supra* Part II.D.3. The *amicus* brief is the latest in a series of such briefs applying principles of therapeutic jurisprudence to Florida juvenile court proceedings. See David B. Wexler, *Lowering the Volume Through Legal Doctrine: A Promising Path for Therapeutic Jurisprudence Scholarship*, 3 FLA. COASTAL L.J. 123, 133 (2002) (encouraging law schools to submit *amicus curiae* briefs utilizing therapeutic jurisprudence principles to inform evolving legal doctrine) and cases and articles cited *infra* note 292.

294. Some therapeutic jurisprudence proponents question whether its approach is impoverished by its failure to endorse a specific social science methodology for understanding the therapeutic (as opposed to anti-therapeutic) consequences of legal rules and practices. See, e.g., Susan L. Brooks, *Using Therapeutic Jurisprudence to Build Effective Relationships With Students, Clients and Communities*, 13 CLINICAL L. REV. 213, 216 n. 11 (“Until now, therapeutic jurisprudence has neither embraced nor rejected any particular theoretical approach. Despite my general enthusiasm for therapeutic jurisprudence, I find this aspect to be problematic. Because therapeutic jurisprudence does not prescribe a particular normative framework, there is a genuine danger that many misguided ideas and programs will be passed off as ‘therapeutic.’”).

Of course, therapeutic jurisprudence does not shun a normative viewpoint and it very much seeks empirical study to test its assumptions. See, e.g., David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 269 (1999) (“[T]herapeutic jurisprudence scholarship recognizes the crucial importance of empirical inquiry to test the accuracy of its speculations.”). Moreover, as discussed in Part III.B *supra*, its aims very much coincide with research in the psychology of procedural justice, which demonstrates that it relies heavily on empirical study to promote court procedures and practices that foster normative therapeutic values and rehabilitative outcomes.

295. Therapeutic jurisprudence has been widely embraced by the Florida courts, especially in juvenile court proceedings. See, e.g., *In re Amendments to the Rules of Juvenile Procedure*, Fla. R. Juv. P. 8.355, 952 So.2d 517 (Fla. 2007) (acknowledging therapeutic benefits to child of being heard in dependency court hearings on administration of psychotropic medication); Amendments to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 842 So.2d 763 (Fla. 2003) (adopting rule of juvenile procedure requiring appointment of counsel and hearings for children objecting to placement in residential treatment); Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 804 So.2d 1206, 1210-11 (Fla. 2001) (expressly applying the principles of therapeutic jurisprudence in the Florida Supreme Court’s consideration of a rule of juvenile procedure requiring the court to consider the child’s views before ordering him or her into residential treatment); Amendment to the Rule of Juvenile Procedure, Fla. R. Juv. P. 8.100(a), 796 So.2d 470 (Fla. 2001) (acknowledging anti-therapeutic consequences to the child of video detention hearings); *M.W. v. Davis*, 756 So.2d 90, 107 (Fla. 2001) (noting the psychological benefits to juveniles from being afforded procedural protections prior to being placed in psychiatric treatment facilities); *S.C. v. Guardian ad Litem*, 845 So.2d 953 (Fla. Dist. Ct. App. 2003) (utilizing therapeutic jurisprudence to uphold child’s right to invoke the psychotherapist-patient privilege to prevent court-appointed guardian *ad litem* from gaining access to records covered by privilege).

See also Janet Gilbert *et al.*, *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153 (2001); Barbara J. Pariente, *Introduction, Symposium Issue: Therapeutic Jurisprudence in Clinical Legal Education and Legal Skills Training*, 17 ST. THOMAS L. REV. 403 (2005); Perlmutter, *supra* note 2; Patricia Puritz and Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 476 (2007); Salisbury, *supra* note 2; Bruce J. Winick & Ginger Lerner Wren, *Do Juveniles Facing Civil Commitment Have a Right to Counsel?: A Therapeutic Jurisprudence Brief*, 71 U. CIN. L. REV. 115 (2002).

Indiscriminate shackling brands and stigmatizes juvenile defendants in ways that adversely affect how others regard them, and the manner in which they regard themselves. This “self-fulfilling prophecy” effect is documented in the social psychology and sociological literature.²⁹⁶ Labeling persons or otherwise treating them in ways that convey to them a negative or discrediting message sets in motion forces that lead them to behave in ways that conform to their ascribed roles. It does so in two ways: first, it produces behavior in individuals observing the labeled person that causes them to act toward the person in a manner that confirms the label’s negative attributes; second, it causes the labeled individual to regard himself differently, accepting the discrediting impact of the label and transforming his identity in ways that subsequently cause him to act in accordance with the stigmatizing label.

Shackling is a particularly pernicious form of labeling. It conveys the unmistakable message that the shackled individual is dangerous and violent, and must have committed a serious crime. It conveys this message to the judge, the prosecutor, and other court personnel. Shackling assigns labeled juveniles a spoiled identity: they are “bad” and “dangerous” people who must be restrained in the most primitive way. They must thereby lack self-control. This is exactly the opposite message the juvenile court would want to convey to adolescents struggling with their identity who get into trouble with the law.

Lastly, as the Supreme Court observed in *Deck*, a routine policy of shackling offends basic judicial notions of “formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual’s liberty through criminal punishment.”²⁹⁷ This symbolic yet concrete objective is no less important in a juvenile court proceeding than it is in a criminal proceeding, both of which should aim to secure positive therapeutic outcomes and minimize negative psychological and behavioral effects of anti-therapeutic legal rules and practices.

VI. CONCLUSION

But the body is also directly involved in a political field; power relations have an immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs.

— Michel Foucault²⁹⁸

296. See generally THOMAS J. SCHEFF, *BEING MENTALLY ILL: A SOCIOLOGICAL THEORY* (1966) (deviancy labeling serves to marginalize those labeled, causing them to internalize a deviant self-image, and sometimes as a result, to engage in acts of secondary deviance); Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 *PSYCHOL. PUB. POL’Y & L.* 6 (1995).

297. *Deck*, 544 U.S. at 631.

298. FOUCAULT, *supra* note 1, at 25.

What you need the shackles for, you got bailiffs, two-hundred and fifty pound bailiffs, six foot-two and what you need shackles for you got all these dudes, we're only a buck oh-five, need no shackles for us man.

— Shackled Juvenile²⁹⁹

The spectacle of groups of children in 2007 herded into our juvenile courts in belly chains connected to handcuffs and leg irons, forty years after the landmark *In re Gault* decision, is a stark symbol of the legal and moral culture of the contemporary juvenile court, with its assertion of power and control, and its technology of dominion, over the bodies of the children who appear before it. The prevalence of this practice reveals the persistent fear of juvenile violence in society and within the juvenile justice system, which is the motivating force for this policy of containing and controlling children. The countervailing force to unshackle children is one that seeks a measured and informed response to the problems of juvenile crime, cognizant of the grave liberty deprivations implicated by the practice, informed by research, and aware of the unique developmental needs of children.

As described by one international observer, the two approaches have significant differences in outlook:

These practices will be received with mixed reactions. For some people they will be considered a justifiable and necessary response to the actions of children who violate accepted codes of behavior. The punitive motivation may even be accompanied by a genuine belief that such treatment will assist in the rehabilitation of these children and that no other method of control exists. For others however, they will bring about an immediate revulsion and anger at the barbaric nature of such practices being meted out on the most vulnerable members of society.³⁰⁰

Although *Gault* is celebrated as the harbinger of sweeping reforms in the protection of children's due process rights, this practice, carried out on a routine basis in more than half of the states in the U.S., refutes that proposition. Holding children in chains before juvenile court judges, without conducting individualized assessments of their danger to public safety and other risks, is a serious repudiation of their liberty and due process interests to be free from external restraint when they appear before the court. Moreover, requiring all juvenile offenders be held in restraints, shackles, and chains for their appearances in the juvenile court, without consideration by the court of less restrictive or drastic safety precautions, is

299. Voice Project, *supra* note 2 (Mar. 30, 2007) (on file with author).

300. John William Tobin, *Time To Remove the Shackles: The Legality of Restraints on Children Deprived of their Liberty Under International Law*, 9 INTL. J. OF CHILDREN'S RTS. 213, 213 (2001).

counter-therapeutic in that it brands and stigmatizes them as dangerous and deprives them of fair and dignified hearings by a respectful and respected court.

For rehabilitative and therapeutic jurisprudence reasons, as well as for the due process reasons articulated forty years ago by Justice Fortas in *In re Gault*, Florida and other states that shackle children in the courtroom should heed the recommendations of the National Juvenile Defender Center and abolish the blanket practice of shackling detained children in court.³⁰¹

VII. APPENDIX

State	Statute	Regulation	Juvenile Justice Agency	Other
Alabama		ALA. ADMIN. CODE r. 950-1-13.12 (2007).		
Alaska		ALASKA ADMIN. CODE tit. 7, § 52.365 (2007); ALASKA ADMIN. CODE tit. 7, § 52.370 (2007).		
Arizona				Operational Guidelines & Best Practices for Juvenile Detention Care in Arizona Sections A11.1—11.8; ARIZONA DEP'T OF JUVENILE CORRS., OPERATING PROCEDURES MANUAL NO. 4630.05.
Arkansas	ARK. CODE ANN. § 9-27-303 (2002 & Supp. 2007).			ARK. DEP'T OF HUMAN SERVS., DIV. OF CHILDREN & FAMILY SERVS., MINIMUM LICENSING STANDARDS FOR CHILD WELFARE AGENCIES §§ 100.15, 400.3, 500.4.
California		CAL. CODE REGS. tit. 15, § 1358 (2007).		Tiffany A. v. Superior Court of L.A. County, 59 Cal. Rptr. 3d 363, 150 Cal. App. 4th 1344 (Ct. App. 2007).
Colorado	COLO. REV. STAT. § 19-2-404 (2007); COLO. REV. STAT. § 26-20-102 (2007).			

301. FLORIDA—AN ASSESSMENT OF ACCESS TO COUNSEL, *supra* note 14, at 5.

Connecticut				CONN. AGENCIES REGS. § 19a-495-570(11) (2007).
Delaware	No specific mention of restraints.			
D.C.	No specific mention of restraints. D.C. CODE § 16-2310 (2001 & Supp. 2007); D.C. CODE § 16-2313 (2001 & Supp. 2007).			
Florida	FLA. STAT. ANN. § 985.03 (West 2006 & Supp. 2007); FLA. STAT. ANN. § 985.404(10) (West Supp. 2007); FLA. STAT. ANN. § 985.645 (West Supp. 2007).	FLA. ADMIN. CODE ANN. r. 63G-2.005 (2007); FLA. ADMIN. CODE ANN. r. 63G-2.012 (2007); FLA. ADMIN. CODE ANN. r. 63H-1.002 (2007); FLA. ADMIN. CODE ANN. r. 63H-1.003 (2007); FLA. ADMIN. CODE ANN. r. 63H-1.004 (2007); FLA. ADMIN. CODE ANN. r. 63H-1.005 (2007); FLA. ADMIN. CODE ANN. r. 63H-1.006 (2007); FLA. ADMIN. CODE ANN. r. 63H-1.009 (2006); FLA. ADMIN. CODE ANN. r. 63H-1.012 (2006); FLA. ADMIN. CODE ANN. r. 63H-1.013 (2006); FLA. ADMIN. CODE ANN. r. 10Q-5.015 (1994), <i>superseded by</i> FLA. ADMIN. CODE ANN. r. 63E-2.015 (1997) (repealed 2001).		FLA. DEP'T OF JUVENILE JUSTICE OFFICE OF PROB. & CMTY. CORRIS., PROBATION & CMTY. CORRECTIONS HANDBOOK; FLA. DEP'T OF JUVENILE JUSTICE, PROTECTIVE ACTION RESPONSE POLICY, § FDJJ-1508-03(III)(C)(3); FLA. DEP'T OF JUVENILE JUSTICE, STATEWIDE TRANSPORTATION OFFENDER POLICY, § FDJJ-5000(II)(C)(4); FLA. DEP'T OF JUVENILE JUSTICE, 2006 DETENTION SERVICES MANUAL CHAPTERS 2 & 8.
Georgia				STATE OF GEORGIA, DEPARTMENT OF JUVENILE JUSTICE POLICY # 8.13.
Hawaii				STATE OF HAWAI'I, DEP'T OF HUMAN RES. DEV., YOUTH CORRECTIONS OFFICER JOB DESCRIPTION (no specific policy, but this job description provides that one of the duties is maintaining security equipment such as shackles, etc.).

Idaho	IDAHO CODE ANN. § 16-2425 (2001).	IDAHO ADMIN. CODE r. 05.01.01.269 (2007); IDAHO ADMIN CODE r. 05.01.02.225 (2007); IDAHO ADMIN. CODE r. 05.01.02.255 (2007).		Idaho Department of Juvenile Corrections— Idaho Juvenile Corrections Act & Rules Sec. 269; 225.02; 255(g); IDAHO PEACE OFFICER STANDARDS & TRAINING ACAD., JUVENILE DET. ACAD., JUVENILE DETENTION OFFICER TRAINING MANUAL.
Illinois		ILL. ADMIN. CODE tit. 20, § 702.160 (2007); ILL. ADMIN. CODE tit. 89, § 411.465 (2007).		<i>In re Staley</i> , 7 Ill. Dec. 85, 67 Ill. 2d 33, 364 N.E.2d 72 (1977).
Indiana				Internal Policies and Procedures unavailable.
Iowa	IOWA CODE ANN. § 232.19 (West 2006).	IOWA ADMIN. CODE r. 201-50.13 (356, 356A) (2007); IOWA ADMIN. CODE r. 201-51.11(356, 356A) (2007); IOWA ADMIN. CODE r. 441-105.1(232) (2007); IOWA ADMIN. CODE r. 441-105.16(232) (2007); IOWA ADMIN. CODE r. 441-105.21(232) (2007); IOWA ADMIN. CODE r. 441-109.12(237A) (2007).		Op. Att’y Gen. (Lind) April 22, 1991, referenced in IOWA CODE ANN. § 232.21 notes of dec., 2 (West 2006).
Kansas		KAN. ADMIN. REGS. § 28-4-353a (2007); KAN. ADMIN. REGS. § 28-4-355b (2007); KAN. ADMIN. REGS. § 123-5-106 (2007); KAN. ADMIN. REGS. § 123-12-327 (2007).	JUVENILE JUSTICE AUTH., STATE OF KANSAS, COMMUNITY SUPERVISION STANDARDS No. CSS-01-126.	OFFICE OF THE COMM’R, KAN. JUVENILE JUSTICE AUTH., OFFENDER RULE BOOK.
Kentucky			KY. DEP’T OF JUVENILE JUSTICE, POLICY & PROCEDURES MANUAL.	

Louisiana		No specific mention of the use of restraints. LA. ADMIN. CODE tit. 22, pt. I, § 377 (2007); LA. ADMIN. CODE tit. 22, pt. I, § 381 (2007); LA. ADMIN. CODE tit. 22, pt. I, § 383 (2007); LA. ADMIN. CODE tit. 22, pt. I, § 385 (2007).		
Maine	No specific mention of restraints. ME. REV. STAT. ANN. tit. 15, § 3203-A (2003 & Supp. 2006).			
Maryland	MD. ANN. CODE art. 83C, § 2-118 (2003 & Supp. 2006).	MD. CODE REGS. 16.18.02.04 (2007).		Settlement Agreement between Maryland & DOJ Provision III. B. xi; U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., AMENDED SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE STATE OF MARYLAND.
Massachusetts		109 MASS. CODE REGS. 6.00-.05 (2007).		
Michigan		MICH. ADMIN. CODE r. 400.10177 (2007).		
Minnesota		MINN. R. 2960.0710 (2006).		
Mississippi				Policies regarding the use of restraints developed in response to numerous DOJ investigations.
Missouri				STATE OF MISSOURI, RULES OF PRACTICE & PROCEDURE IN JUVENILE COURTS: RULE 111-CUSTODY & DETENTION.
Montana		MONT. ADMIN. R. 20.9.630 (2007).		
Nebraska		83 NEB. ADMIN. CODE § 8-007 (2007); 390 NEB. ADMIN. CODE § 11-002 (2007).		

Nevada	Juveniles to be housed in a home-like environment. NEV. REV. STAT. ANN. § 62B.210 (LexisNexis 2006); NEV. REV. STAT. ANN. § 62C.050 (Lexis Nexis 2006).			
New Hampshire	No specific mention of restraints. N.H. REV. STAT. ANN. § 169-B:1 (2002).			
New Jersey		N.J. ADMIN. CODE § 13:92-7.5 (2007).		
New Mexico		N.M. CODE R. § 8.14.1.12 (2007) 8.14.21.		
New York		N.Y. COMP. CODES R. & REGS. tit. 18, § 441.17 (2007); 18 NY ADC 181.8.		
North Carolina	2007 N.C. Sess. Laws 100, <i>amending</i> N.C. GEN. STAT. § 7B-24 (2007).		N.C. DEP'T OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, POLICY No. JCPC 1.4; N.C. DEP'T OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, POLICY No. DJJDP 1.	
North Dakota		Nothing specific on juveniles and restraints, but the use of restraints on children in group homes, etc. is regulated. N.D. ADMIN. CODE 75-03-16-26 (2007); N.D. ADMIN. CODE 75-03-16-26.1 (2007); N.D. ADMIN. CODE 75-03-16-26.2 (2007).		<i>In re</i> R.W.S., 728 N.W.2d 326 (N.D. 2007).

Ohio		OHIO ADMIN. CODE 5139:35-19 (2007).		
Oklahoma				
Oregon		OR. ADMIN. R. 416-490-0010 (2007).		<i>In re</i> Millican, 138 Or. App. 142, 906 P.2d 857, 860 (Ct. App. 1995).
Pennsylvania		55 PA. CODE § 3800.209 - 211(2007); 55 PA. CODE § 3800.274 (2007).		JUVENILE DET. CENTERS ASS'N OF PA., USE OF RESTRICTIVE PROCEDURES IN SECURE JUVENILE DETENTION FACILITIES; JUVENILE DET. CENTERS ASS'N OF PA., JUVENILE DETENTION PROGRAM STANDARDS.
Rhode Island	R.I. GEN. LAWS § 42-72-15 (2006); R.I. GEN. LAWS § 42-72.9-4 (2006).			
South Carolina	S.C. CODE ANN. § 44-24-280 (2002).	S.C. CODE ANN. REGS. 114-590 (2007).		S.C. DEP'T OF JUVENILE JUSTICE, COMMUNITY SERVICES MANUAL.
South Dakota	S.D. CODIFIED LAWS § 26-11A-23 (2004).			
Tennessee		TENN. COMP. R. & REGS. 1400-2-.13 (2007).		
Texas		37 TEX. ADMIN. CODE § 343.68 (2007).	TEX. JUVENILE PROBATION COMM'N, STANDARDS FOR SECURE JUVENILE PRE-ADJUDICATION DETENTION AND POST-ADJUDICATION CORRECT-IONAL FACILITIES.	TEX. YOUTH COMM'N, 2007 JUVENILE JUSTICE HANDBOOK.

Utah		UTAH ADMIN. CODE r. 547-1 (2007).	UTAH DEP'T OF HUMAN SERVS., DIV. OF JUVENILE JUSTICE SERVS., POLICY & PROCEDURES POLICY NO. 05-04: TRANSPORTATION POLICY; UTAH DEP'T OF HUMAN SERVS., DIV. OF JUVENILE JUSTICE SERVS., POLICY & PROCEDURES POLICY NO. 05-06: USE OF PHYSICAL INTERVENTION & RESTRAINTS.	
Vermont	VT. STAT. ANN. tit. 18, § 7511 (Supp. 2006); VT. STAT. ANN. tit. 33, § 5534 (2001 & Supp. 2006).			<i>In re</i> B.F., 157 Vt. 67, 595 A2d 280 (1991); H. 0306.
Virginia		6 VA. ADMIN. CODE § 20-50-20 (2007); 6 VA. ADMIN. CODE § 20-50-110 (2007); 6 VA. ADMIN. CODE § 20-230-160 (2007); 6 VA. ADMIN. CODE § 23; 6 VA. ADMIN. CODE § 35-60-575 (2007); 6 VA. ADMIN. CODE § 35-140-280 (2007); 6 VA. ADMIN. CODE § 35-140-670 (2007); 6 VA. ADMIN. CODE § 35-140-680 (2007); 6 VA. ADMIN. CODE § 35-140-685 (2007); 6 VA. ADMIN. CODE § 35-140-690 (2007); 6 VA. ADMIN. CODE § 35-150-10 (2007); 6 VA. ADMIN. CODE § 35-150-680 (2007).		

Washington		WASH. ADMIN. CODE 388-730-0030 (2007); WASH. ADMIN. CODE 388-730-0040 (2007).		
West Virginia	Not specifically addressed; W. VA. CODE ANN. § 49-5-16a (LexisNexis 2004).			
Wisconsin		WIS. ADMIN. CODE DEP'T OF CORR. § 346.04 (2007); WIS. ADMIN. CODE DEP'T OF CORR. § 346.31 (2007); WIS. ADMIN. CODE DEP'T OF CORR. § 373.03 (2007); WIS. ADMIN. CODE DEP'T OF CORR. § 376.03 (2007); WIS. ADMIN. CODE DEP'T OF CORR. § 376.09 (2007); WIS. ADMIN. CODE DEP'T OF CORR. § 393.03 (2007).		
Wyoming				WYO. DEP'T OF FAMILY SERVS., RULES & REGULATIONS: CH. 5, § 6; WYO. DEP'T OF FAMILY SERVS., RULES & REGULATIONS: CH. 7, § 8.