DARING TO CARE WHILE TENDING TO JUSTICE: AN ARGUMENT FOR THE REFORM OF PARENS PATRIAE AND VERMONT'S JUVENILE JUSTICE CODE

INTRODUCTION

This note is a discussion about sound parenting and its relevance when a state intervenes as parens patriae—parent of the country—to discipline juvenile delinquents whose natural parents cannot or will not do so. In this country, the doctrine of parens patriae has a checkered past of successes and failures. At present, this doctrine is a point of hot, sore contention.

In recent years, there has been a national movement toward getting rough with juvenile toughs.[1] The movement first swept onto the national scene when Ronald Reagan was inaugurated in 1981 and celebrated to the tune of "Happy Days Are Here Again." Among other things, the new Reagan agenda called for law-and-order,[2] and inherent in that plan was the notion that the juvenile justice system was mollycoddling violent juvenile offenders.[3] The chief target of criticism was parens patriae, and its attendant prescription of benevolent judicial discretion and preoccupation with "the best interests of the child."[4]

In the course of the debate about parens patriae, some experts have called for the complete abolition of all juvenile justice systems in the United States.[5] Proponents of the call for abolition have suggested that all alleged juvenile offenses instead

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1. IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD 59 (1989).

2. *Id.* at 118.

3. *See generally* Alfred S. Regnery, *Getting Away with Murder: Why the Juvenile Justice System Needs an Overhaul*, 34 POL'Y REV. 1 (1985). Regnery was an administrator of the Office of Juvenile Justice and Delinquency Prevention during the Reagan Administration. The theme of Regnery's article can be discerned in Peter Meyer's description of some Vermonter's sentiments and perceptions of violent juvenile offender treatment in Vermont at the time of the Jamie Savage case in Essex Junction. PETER MEYER, DEATH OF INNOCENCE 180-86 (1985).

4. Patricia Harris, *Is the Juvenile System Lenient?*, 18 CRIM. JUST. ABSTRACTS 104, 114 (1986).

5. *See generally* Barry Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991); Robert O. Dawson, *The Future of Juvenile Justice: Is It Time to Abolish the System?*, 81 J. CRIM. L. & CRIMINOLOGY 136 (1990).

should be adjudicated through the adult criminal justice system.[6] They contend that parens patriae is a worthless idea that is damaging to society and therefore should be completely repudiated.

These experts have not gone unheeded. Several state legislatures have since acted to ensure that violent juvenile offenders will no longer be pampered in the name of benevolence inspired by parens patriae.[7] Given the tenor of the parens patriae debate and the legislative actions it has inspired, what possible future lies in store for parens patriae? That is the question which this note explores. The note argues that Vermont should keep its juvenile justice system, but should amend its juvenile code to reflect a reformed version of parens patriae as the foundational doctrine. The discussion is placed in the context of the Vermont juvenile justice system because parens patriae historically has been well-received in Vermont.

Part I explains the origins of Gender Difference theories and some of the purposes and goals of conducting such an analysis. Part II.A offers a Gender Difference critique to explain how a "maternal" parenting ethic dominated the practice of parens patriae in this country's early juvenile justice movement, thereby causing an imbalance which eventually resulted in a backlash. Part II.B continues the Gender Difference critique by analyzing relevant United States Supreme Court cases to show how they reflect the "paternal" parenting ethic which came to dominate juvenile justice theories and practices in this country. Part II.C concludes the Gender Difference critique by analyzing parens patriae's role in Vermont's juvenile justice history and case law to show that the maternal and paternal parenting ethics appear to be headed toward a shared, balanced influence on Vermont's

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6. *Id.*

7. A dramatic, recent convert to tough justice for juvenile roughs is the Commonwealth of Massachusetts, which traditionally has numbered among the national leaders in devising rehabilitative strategies for treating juvenile delinquency. In late December of 1991, the Massachusetts Legislature voted to establish a 15-year mandatory minimum sentence for juveniles convicted of first-degree murder. The bill is also designed to facilitate trying many juveniles in adult court. Massachusetts State Senator William R. Keating called the bill's passage "a whole philosophical turnaround in our approach to the juvenile justice system." Robert Connolly, *State Slams Jail Door on Youth Killers*, BOSTON HERALD, Dec. 31, 1991, at 1. Bay State Governor William F. Weld greeted the changes as "a big step in the right direction." *Id.* at 15.

juvenile justice system. Part III explores the relevance of modern parenting theories as a starting point in reforming parens patriae. To illustrate a practical application of these parenting principles to parens patriae reform, the note turns to the Vermont juvenile code, where it explores three kinds of possible, relevant changes to the code.

I. THE ORIGINS AND GOALS OF A GENDER DIFFERENCE CRITIQUE

Gender Difference theorists argue that men and women differ from each other in their psychological, cultural, behavioral, and moral constitutions.[8] Some Gender Difference theorists believe that biology determines these differences,[9] but most contend that the differences between men and women are the product of the societal, psychological, and cultural forces which shape humans in their development.[10] Gender Difference theorists argue further that a woman's perspective—often termed "voice"—traditionally has been systematically[11] ignored or suppressed in virtually all[12] human inquiry. The object of

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8. Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 10 (1990).

9. *Id.*; *see, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987); SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (1970).

10. Bender, *supra* note 8, at 10. *See generally* MAKING A DIFFERENCE: PSYCHOLOGY AND THE CONSTRUCTION OF GENDER (Rachel T. Hare-Mustin & Jeanne Mrecek eds., 1990); THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1990); NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

11. To counter this system of omitting woman's experience from publicly recorded human reflection, feminist inquiry seeks to "take all women seriously by challenging the patterns of hierarchal power that have at times excluded or degraded all or some women." Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 116.

12. Feminists have contributed incisive critiques of the unstated assumptions behind political theory, law, bureaucracy, science, and social science that presuppose the universality of a particular reference point or standpoint. In field after field of human thought, feminist work exposes the dominance of conceptions of human nature that take men as the reference point and treat women as "other," "different," "deviant," or "exceptional." Male psychology, feminist theorists argue, is the source in a male dominated society of conceptions of rational thought that favor abstraction over particularity and mind over body.

Gender Difference theorists, then, is to identify and restore a woman's voice to the discourse on issues which humans confront in their quest for self-understanding.

In the last decade, Gender Difference inquiries have enjoyed renewed attention from feminist theorists due largely to the work of psychologist Carol Gilligan. Gilligan's groundbreaking scholarly work, *In a Different Voice,* exposed gender biases in knowledge about humans due to implicit male norms.[13] Gilligan's work is especially relevant to the present discussion because she attributes the genesis of *In a Different Voice* to her initial interest as a psychologist studying the relationship between judgment and action—the same relationship that lies at the heart

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> Similarly, the assumption of autonomous individualism behind American law, economic and political theory, and bureaucratic practices rests on a picture of public and independent man rather than private—and often dependent, or interconnected—woman. . . . Feminist work confronts the power of naming and challenges both the use of male measures and the assumption that women fail by them.

Martha Minow, *Feminist Reason: Getting It and Losing It,* 38 J. LEGAL EDUC. 47, 48-49 (1988). In support of her argument, Minow recommends the following sources to readers of her article: SIMONE DE BEAUVOIRE, THE SECOND SEX (1952); GILLIGAN, *supra* note 10; KATHY E. FERGUSON, THE FEMINIST CASE AGAINST BUREAUCRACY (1984); NANCY C.M. HARTSOCK, MONEY, SEX AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM (1983); ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983); EVELYN F. KELLER, REFLECTIONS ON GENDER AND SCIENCE (1985); Catherine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory,* 7 SIGNS 515 (1982); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory,* 8 SIGNS 635 (1983); JEAN BAKER MILLER, TOWARD A NEW PSYCHOLOGY OF WOMEN (1976); and SUSAN MOLLER OKIN, WOMEN IN WESTERN POLITICAL THOUGHT (1979). *Id.* at 48 n.4.

13. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort,* 38 J. LEGAL EDUC. 3, 18 (1988). *See generally* GILLIGAN, *supra* note 10. The catalogue of references to Gilligan's work touches on most disciplines and has made an impression on legal scholarship of a dimension which cannot be reasonably ignored. A rough idea of this dimension can be gleaned from reviewing a single lengthy footnote in Bender's article on Gender Difference. *See* Bender, *supra* note 8, at 1 n.2. To name a few applications of Gilligan's work to the field of law, legal scholars have drawn upon her concept of "a different voice" to sketch a rewritten U.S. Constitution, this time with "woman's voice" prominently integrated into the foundational principles; to suggest fundamental changes to a law school curriculum; and to shape law school classroom discussions. *See also* Kenneth L. Karst, *Woman's Constitution,* 1984 DUKE L.J. 447; Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web,* 38 J. LEGAL EDUC. 243 (1988); Patricia A. Cain, *Teaching Feminist Legal Theory at Texas: Listening to Difference and Exploring Connections,* 38 J. LEGAL EDUC. 165, 175 (1988).

of a juvenile code.[14] Just as Gilligan explored the intellectual underpinnings of decisions with moral consequences, this note explores the historical and philosophical underpinnings of the juvenile justice system—a system designed to confront juveniles with the moral and practical consequences of their decisions to engage in delinquent behavior.

Descriptions of Gilligan's work usually recount how, in the course of using the Heinz dilemma to assess the moral maturity of her study subjects, Gilligan came to hear, record, and name a different voice.[15] The Heinz dilemma postulates a man named Heinz who cannot afford to buy a drug that will save his wife's life. The question is: should Heinz steal the drug?[16] A male study participant—Jake—unequivocally answers "yes" because "human life is worth more than money."[17] Jake confidently arrives at his answer by abstracting the issues from the individuals and situations involved and deducing the answer logically from a hierarchical ladder of values.[18] Amy, on the other hand, first identifies two conflicting norms which arise from the dilemma—"he really shouldn't steal the drug—but his wife shouldn't die either"—and then articulates her discomfort with viewing the situation as static.[19] Amy wants more context and alternatives to the yes-or-no construct that Jake employs to arrive at his response.[20] In the end, Amy suggests that Heinz should describe his wife's dire condition in greater detail to the druggist to get him to give Heinz the drug, and to explore other payment

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14. I thought that a field that studied conflict—and, specifically, moral conflict—by looking at how people resolve hypothetical dilemmas was fooling itself and that we had to look at how people dealt with real situations of conflict and choice, where people had to live with the consequences of their decisions . . . . I was looking for a situation where people were faced with a decision which could have moral implications.

Ellen C. DuBois et al., *Feminist Discourse, Moral Values and the Law—A Conversation*, 34 BUFF. L. REV. 11, 37 (1985) (remarks of Carol Gilligan).

15. *See, e.g.*, Bender, *supra* note 13, at 28; Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61, 79 (1988); Spiegelman, *supra* note 13, at 247.

16. Dubois et al., *supra* note 14, at 40-41.

17. GILLIGAN, *supra* note 10, at 26.

18. Spiegelman, *supra* note 13, at 247.

19. GILLIGAN, *supra* note 10, at 28.

20. Spiegelman, *supra* note 13, at 247.

possibilities.[21] Amy addresses the moral dilemma in a different voice.

Gilligan wrote *In a Different Voice* to share her conclusion that Jake's "voice" reflected the use of an "ethic of justice" to resolve the Heinz dilemma, and Amy's "voice" articulated an "ethic of care."[22] Jake's world is one governed by rules, principles, hierarchy, and the logic of justification.[23] Amy's world is one governed by relationships, interdependence, and cooperation.[24]

Although side-by-side placement of Jake's and Amy's respective value systems invites examination of their differences, the purpose of this note is to contemplate how Jake's and Amy's values complement each other, and what a society can achieve through its juvenile justice code by merging the "justice" and "care" value systems. When a society seeks to teach juvenile delinquents how to behave compatibly with their communities, it does not have to choose between promulgating and enforcing laws premised on an ethic of justice and an ethic of care. Jake and Amy offer two approaches to regulating individual behavior in a collective context. Both approaches have a place in a single juvenile justice code.[25] Indeed, this note argues that the present

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21. GILLIGAN, *supra* note 10, at 29.

22. Given the significance of Gilligan's work to the analysis contained in this note, it is perhaps best to proffer her own summary of her study:

> Just as the language of responsibilities provides a weblike imagery of relationships to replace a hierarchical ordering that dissolves with the coming of equality, so the language of rights underlines the importance of including in the network of care not only the other but also the self.
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> As we have listened for centuries to the voices of men and theories of development that their experience informs, so we have come more recently to notice not only the silence of women but the difficulty in hearing what they say when they speak. Yet in the different voice of women lies the truth of an ethic of care, the tie between relationship and responsibility, and the origins of aggression in the failure of connection .... While an ethic of justice proceeds from the premise of equality—that everyone should be treated the same—an ethic of care rests on the premise of nonviolence—that no one should be hurt.

GILLIGAN, *supra* note 10, at 173-74.

23. Spiegelman, *supra* note 13, at 247-48.

24. *Id.* at 248.

25. In her later explanations of her work, Gilligan has pointed to the beneficial, transformative value of making room in one place for two different voices:

> This is what I mean by two voices, two ways of speaking. One voice speaks about equality, reciprocity, fairness, rights; one voice speaks about connection,

embattled state of the juvenile justice system derives precisely from our failure to base our juvenile justice codes on a philosophy that balances the justice and care ethics.

II. THE APPLICATION OF A GENDER DIFFERENCE PARADIGM

A. Identifying an Ethic of Care in the Child Saver's Parens Patriae Model for Treatment of Juvenile Delinquents

In a country with a history of aspiring toward a justice system free of cultural, economic, gender, and racial bias, the idea that the law may treat America's children differently from their adult parents may seem out of place. In fact, this apparent substantive and procedural double standard of justice has been

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not hurting, care, and response. My point is that these voices are in tension with each other. In my work I have attempted to ask, "What does it mean to include both voices in defining the domain of morality, of humanity, and so forth?" . . . I do not think [this inclusion] implies a simple addition, a kind of separate-but-equal thing or an androgynous solution. I think it implies a transformation in thinking.

The best way I can illustrate this is through an example provided by two four-year-olds who were playing together and wanted to play different games. The girl said: "Let's play next-door neighbors." The boy said: "I want to play pirates." "Okay," said the girl, "then you can be the pirate who lives next door." She has reached what I would call *an inclusive solution* rather than *a fair solution*—the fair solution would be to take turns and play each game for an equal period. "First we will play pirates for ten minutes and then we will play neighbors for ten minutes." Each child would enter the other's imaginative world. The girl would learn about the world of pirates and the boy would learn about the world of neighbors. It is a kind of tourism on a four-year-old's level. Really, it's simple. But the interesting thing is that neither game would change—the pirate game would stay the pirate game, and the neighbor game would stay the neighbor game. Both children would learn both games, hopefully for an equal period of time. It is what is called "androgyny."

Now look what happens in the other solution, what I would call the inclusive solution. By bringing a pirate into the neighborhood, both the pirate game and the neighbor game change. In addition, the pirate-neighbor game, the combined game, is a game that *neither* child had separately imagined. In other words, a new game arises through the relationship.

That is basically my point: The inclusion of two voices in moral discourse, in thinking about conflicts, and in making choices, transforms the discourse. It is no longer either simply about justice or simply about caring; rather, it is about bringing them together to transform the domain. We are into a new game whose parameters have not been spelled out, whose values are not very well known.

Dubois et al., *supra* note 14, at 44-45.

with us only since the early nineteenth century.[26] Before then, the criminal common law of most states did not differentiate between adults and legal minors when it came to conferring responsibility and punishment for criminal actions.[27] But in the second half of the nineteenth century, a social welfare movement known as the Child Savers swept the country with the goal of "saving" wayward children from their future careers as adult criminals.[28] In 1899, at the peak of the Child Savers' movement, Illinois became the first state to create a juvenile court of law.[29] Characterized by its procedural informality and rehabilitative goals, Illinois' court became a national model for addressing juvenile delinquency. By 1925, nearly every state in the union had adopted its own version of Illinois' juvenile justice system.[30] Although each state wrote its own code to accommodate local mores, the codes tended to share one common premise: children are not adults. In the name of parens patriae, the law may treat them separately and differently.[31]

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26. Friedman reports that as early as 1825, New York had established a "House of Refuge" for juveniles. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 598 (1985); *see* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187-1239 (1970) (providing information on the varied efforts to create special programs for juveniles prior to the late nineteenth century); *see also* BARRY KRISBER & JAMES AUSTIN, THE CHILDREN OF ISHMAEL: CRITICAL PERSPECTIVES ON JUVENILE JUSTICE (1977); Alexander Liazos, *Class Oppression: The Functions of Juvenile Justice*, 5 INSURGENT SOCIOLOGIST 1, 2-24 (1974); ROBERT M. MENNEL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1823-1940 (1973); ROBERT S. PICKETT, HOUSE OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE, 1815-1857 (1969).

27. SUSAN TIFFIN, IN WHOSE BEST INTEREST? 216 (1982).

28. The term "Child Savers" is used to characterize a group of "disinterested" reformers who regarded their cause as a matter of conscience and morality, serving no particular class or political interests. The Child Savers viewed themselves as altruists and humanitarians dedicated to rescuing those who were less fortunately placed in the social order. Their concern for "purity," "salvation," "innocence," "corruption," and "protection" reflected a resolute belief in the righteousness of their mission. ANTHONY M. PLATT, THE CHILD SAVERS 3 (1977).

29. Child welfare historians disagree about the precise chronological genesis of the American juvenile justice system. *Id.* 9-10. Nonetheless, Illinois is generally credited with giving birth to the American juvenile justice system because it was the first official enactment to be acknowledged as a model statute by other states and countries. *Id.* at 10.

30. MEYER, *supra* note 3, at 290; *see also* PLATT, *supra* note 28, at 10 (citing Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7-51).

31. Barry Feld, *The Punitive Juvenile Court and the Quality of Procedural Justice: Disjunctions Between Rhetoric and Reality*, 36 CRIME & DELINQ. 443, 447 (1990) [hereinafter *Punitive Court*]. *See generally* Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court*, 69 MINN. L. REV. 141 (1984) [hereinafter *Juvenile Court*]; Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L.

Today, in our litigious "I-know-my-rights" society, such differential treatment is easily mistaken for unequal or unfair treatment. But notions of mistreating children could not have been further from the minds of the nineteenth century Child Savers—the self-appointed child advocates who spearheaded the creation of the nation's first juvenile justice system.[32] Born of the Progressive Era in American history, the child-saving movement was dedicated to promoting the welfare of children in a society which barely recognized their humanity.[33] Many socially and economically oppressed adults of that era were attempting to assert themselves through incidents such as the Haymarket Riot of 1886, and militant movements such as the Socialist party and Industrial Workers of the World.[34] For unprivileged children, however, the only available avenue of protest was petty crime.[35] Recognizing that today's hungry young pickpocket is tomorrow's starved adult rioter, the "child-saving movement tried to do for the criminal justice system what industrialists and corporate leaders were trying to do for the economy—that is, achieve order, stability and control."[36]

The Child Savers viewed the criminal justice system as a means for "preventing disorder and harmonizing social conflicts."[37] The operative word here is "harmonizing." Amy, speaking in the voice of care, sought to harmonize Heinz's need for a life-saving drug he could not afford in a community that condemned even the most nobly motivated theft. Similarly, the Child Savers sought to harmonize the social conflicts that were propelling children into lives of crime. In the Heinz dilemma, Amy thought Heinz's theft could be prevented by enlisting the help of the neighborhood druggist. Similarly, the Child Savers thought that juvenile delinquency could be prevented by having the criminal justice system enlist the help of "the schools, the family and other institutions that affected the lives of people

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REV. 503 (1984).

32. *See generally* PLATT, *supra* note 28.

33. LETTY COTTIN POGREBIN, FAMILY POLITICS 46 (1983).

34. PLATT, *supra* note 28, at xix.

35. *Id.* at xviii; *see also* Herman Schwendinger & Julia Schwendinger, *Delinquency and the Collective Varieties of Youth*, 5 CRIME & SOC. JUST. 11 (1976).

36. PLATT, *supra* note 28, at xxii; TIFFIN, *supra* note 27, at 219.

37. PLATT, *supra* note 28, at xxvii.

considered likely to become criminal."[38] Thus, the Child Savers sought to reach out to delinquent children who were less fortunately placed in the social order, thinking that early, positive intervention from a caring, or at least interested, society might enable these children to mature into law-abiding citizens who could then become productive members of their communities.[39] The Child Savers acted to promote society's awareness of its interconnectedness with juvenile delinquents. They expected juvenile delinquents to learn to solve their conflicts legally, just as Amy expected Heinz to find a way to save his wife without stealing from the druggist. However, it was to be a shared onus: Amy expected the druggist to respond to Heinz's declaration of need. The Child Savers expected society to respond to their declarations that delinquent children were in need of food, shelter, behavioral role models, or just plain care. Thus, almost by definition, the Child Savers were proponents of an ethic of care.

The early influence of the Child Savers' values on the creation of this country's juvenile justice system cannot be overstated. Therefore, it is important to take a closer look at precisely who the Child Savers were to discover some of the values that shaped this movement of care. There were good intentions behind creating a legal system that acknowledged the experiential differences between children and adults. These good intentions were held by people who were considered the child rearing experts

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38. LYNN COOPER ET AL., THE IRON FIST AND THE VELVET GLOVE: AN ANALYSIS OF THE U.S. POLICE 23 (1975).

39. Platt convincingly argues in his work on the Child Savers that [the child-saving movement] "was not a humanistic enterprise on behalf of the working class against the established order. On the contrary, its impetus came primarily from the middle and upper classes who were instrumental in devising new forms of social control to protect their power and privilege." PLATT, *supra* note 28, at xx.

Still, Platt's argument does not warrant the conclusion that the Child Savers should not be credited with being proponents—or unconscious practitioners—of an ethic of care. However self-interested the Child Savers may have been, their efforts to address juvenile delinquency reflected a recognition that the fate of youthful offenders is intimately interconnected with that of adult communities. Practicing an ethic of care does not necessarily require acts of altruism and motives of selflessness. For instance, an applied ethic of care in tort law would impose a duty on a passerby to rescue a drowning person. Although it would be nice if the passerby intervened for love of human life, the passerby could intervene for the sake of escaping tort liability without betraying the ethic of care. Yes, the Child Savers probably were privileged classists bent on their own protection. But the point is that they recognized their connection to youthful offenders and acted on that recognition to promote their collective welfare as a community.

of their day: middle-class women of means.[40] These women were permitted to occupy themselves with jobs akin to "family-life with its many-sided development and varied interests and occupations."[41] Such jobs could be found in the child-saving movement, where members defended the home, family life, and parental supervision as important institutions with which to reform delinquent children, and as important institutions that had "traditionally given purpose to a woman's life."[42] A woman working outside her home for the Child Savers was simply a woman who was mothering outside her home. Her professional credential for treating juvenile delinquency was her experience as a mother.[43]

For fear of appearing to "usurp the rights and privileges of the sterner sex" by mixing into the making of public policy, many women preemptively announced that "public institutions needed housewifely skills, maternal guidance, and female tenderness . . . to supplement, not replace, paternal authority."[44] Interestingly, the distinction between "maternal guidance" and "paternal authority" was already recognized in the nineteenth century, long before any twentieth century student of Carol Gilligan might have thought to assign such labels of gender difference. In the Progressive Era, maternal guidance, according to some Child Savers, consisted of softening the social atmosphere of institutions "with motherly tenderness,"[45] and inspiring change as a "prophet

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40. PLATT, *supra* note 28, at 83. There were, of course, many men who made indispensable contributions of their legal, medical, clerical, political, and capital resources to the child-saving movement. For instance, without such contributions from men, the Illinois juvenile court bill would almost certainly never have passed. See *id.* at 132-34. However, when it came to informing the educational and administrative content of the movement, "the influence of a pure Christian woman in the permanent reformation of [delinquents could not] be overestimated." *Id.* at 82 (quoting Ira D. Otterson, *General Features of Reform School Work, in* PROC. NAT'L CONF. OF CHARITIES & CORRECTIONS 167 (1879)).

41. *Id.* at 81 (quoting W.P. Lynde, *Prevention in Some of Its Aspects, in* PROC. ANN. CONF. OF CHARITIES & CORRECTIONS 167 (1879)).

42. *Id.* at 83.

43. *Id.* at 81 (quoting W.P. Lynde, *Prevention in Some of Its Aspects, in* PROC. ANN. CONF. OF CHARITIES & CORRECTIONS 167 (1879)).

44. *Id.* at 82.

45. *Id.* at 81 (quoting W.P. Lynde, *Prevention in Some of Its Aspects, in* PROC. ANN. CONF. OF CHARITIES & CORRECTIONS 165-66 (1879)).

of a higher and better humanity."[46] The voices may have been those of Child Savers from a hundred years ago, but the words were spoken in the same language of care which Amy might have used to address Heinz's dilemma. For instance, "motherly tenderness" speaks of compassion and a relational approach to the contact between institutional agents and their juvenile charges. Significantly, maternal guidance was to be exercised to promote a higher and better "humanity," not higher and better individuals. The women of the child-saving movement were numerous and influential. Their permission to participate in the movement was granted in the expectation that they would bring "maternal guidance," an ethic of care, to bear on the Child Savers' efforts to address the treatment of juvenile delinquency. These women kept their end of the bargain.

Had Amy been a middle class woman of means in the late nineteenth century, she probably would have joined the child-saving movement. Amy would have been at home in a movement where members felt that "the child . . . was to be made 'to feel that he is the object of [the state's] care and solicitude,' not that he was under arrest or trial."[47] In the name of softening institutions with motherly tenderness, the rigidities, technicalities, and harshness of both substantive and procedural criminal law were not to be visited on a child who had strayed into lawlessness.[48] The hand of maternal guidance was also visible in the reformers' notion that questions of "guilt" and "innocence" were to be supplanted by inquiries into "what is [the child], how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[49] Out of compassion and with an eye toward rehabilitation, children were to be spared the taint of criminality at all costs. Children were not to be accused of having committed crimes, they were to be offered guidance and assistance.[50] Juvenile delinquents were not be haunted by the stigma of a criminal record; no records were to be kept, and therefore, there

46. *Id.* at 82 (quoting C.D. Randall, *Child-Saving Work*, *in* PROC. NAT'L CONF. OF CHARITIES & CORRECTIONS 116 (1884)).

47. *In re* Gault, 387 U.S. 1, 15 (1967).

48. *Id.*

49. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).

50. PLATT, *supra* note 28, at 137.

would be no records to make available to the press or public.[51] The hearings were to be conducted in relative privacy, where proceedings would be informal[52] and due process safeguards would be suspended.[53] The juvenile courts would be vested with a jurisdiction that was protective and civil in nature.[54]

Noticeably absent from this juvenile court vision was the voice of justice—Jake's concern for rules and hierarchical values. It was maternal guidance, and not paternal authority, that carried the day. The Child Savers' goal was to create an atmosphere of cooperation, sympathy, and connectedness between juvenile delinquents and their communities.

But implementing such a "maternal" vision of juvenile justice was an innovative departure[55] from the traditional notion that a child's upbringing was a private matter that was well beyond the influence and scope of legitimate state interference.[56]

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51. *Id.* at 137-38.

52. *See infra* notes 96-101 and accompanying text.

53. PLATT, *supra* note 28, at 138; *see also* Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 547-67 (1957); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281-341 (1967).

54. The potential unconstitutionality of the juvenile justice system has always been evident to its proponents, but the constitutional question was never powerful enough to restrain the reformers from embarking on this socio-legal experiment. In Illinois, for example, the first juvenile court proposal was scuttled because of doubts regarding the constitutionality of creating a new tribunal with a jurisdiction already assigned to other courts. JOSEPH M. HAWES, CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN NINETEENTH CENTURY AMERICA 163-67 (1971). However, the Chicago Bar Association circumvented the constitutionality problem by drafting a bill that conferred jurisdiction for juvenile cases upon already existing civil courts which were then permitted rather than compelled to transfer cases to the juvenile court. TIFFIN, *supra* note 27, at 218.

55. TIFFIN, *supra* note 27, at 143.

56. The seventeenth century Puritans viewed the divine order of the universe as the appropriate paradigm for structuring familial relations. *Id.* at 40. Simply stated, God willed that children obey their parents. *Id.* "Since 'parents in regard to their children doe beare a singular image to God, as Hee is the Creator, Sustainer and Governour,' their authority was to be unchallenged." *Id.* (quoting EDMUND MORGAN, THE PURITAN FAMILY: ESSAYS ON RELIGION AND DOMESTIC RELATIONS IN SEVENTEENTH CENTURY NEW ENGLAND 106 (1944)). The "absolutism" of American parental authority continued well into the nineteenth century, until it was undermined by changes resulting from the industrial revolution, an escalation in the divorce rate, and the push to settle the West. *See generally id.* at 14-37, 141-65. Eventually, states such as Indiana began enacting statutes in 1889 that created a Board of Children's Guardians, an organization authorized to petition courts for custody and control of children under 15. FRIEDMAN, *supra* note 26, at 598-99. Such an organization could act upon showing probable cause that a child had been abandoned, neglected, or cruelly treated, or if the child generally had a bad reputation in the

Therefore, the reformers could not design a juvenile justice system that featured a mandate for state usurpation of the parental disciplinarian role, unless the reformers' agenda could be connected to a public policy or moral tradition of an appropriate precedential pedigree. Thus, the reformers reached for the doctrine of parens patriae to support their calls for state intervention.[57]

The reformers defined parens patriae as the state's right to intervene in the realm of parental authority where the public's paramount interest in the welfare of its members is at stake.[58] To justify this right of intervention, some reformers argued that:

> [P]arents . . . had a duty toward their children that the state should enforce because of the children's helplessness, their inability to distinguish right from wrong, and their extreme susceptibility to moral or bodily harm from influences they could neither avoid nor control. Second, the parents had a duty to the state to create and maintain a high standard of citizenship. Bringing human beings into existence was . . . one of the most responsible acts of human life. For its own protection, society should demand that children be nurtured properly. While "the relation of the parent to child is to be sacredly guarded, . . . general welfare should be more sacredly guarded." Both these arguments rejected the ancient notion of God-given, inviolable parental rights.[59]

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community. *Id.* at 35.

57. TIFFIN, *supra* note 27, at 143. Parens patriae was not an idea that Child Savers and other reformers created for the sake of shoring up an agenda for social engineering. The doctrine is rooted in English chancery practice, where the phrase was used to describe the King's power to act *in loco parentis* (in place of the parents) to protect the property interests and the personal rights of the child. *In re* Gault, 387 U.S. at 10; Morand G. Paulsen, Kent v. United States: *The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 179; HURLEY, *Origins of the Illinois Juvenile Court Law*, *in* THE CHILD, THE CLINIC, AND THE COURT 320-28 (1925); Sue Woolf Brenner, *Disobedience and Juvenile Justice: Constitutional Ramifications of Childhood as a "Moral" Concept*, 21 J. FAM. L. 457 (1982-83). The earliest appearance of this doctrine in an American juvenile disciplinary context dates to 1839, when the Pennsylvania Supreme Court issued a decision justifying state usurpation of a natural parent's custody of his delinquent child. *See Ex parte* Crouse, 4 Whart. 9 (Pa. 1839); Andrew J. Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, 5 FAM. L.Q. 64 (1971); *see also* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

58. TIFFIN, *supra* note 27, at 143.

59. *Id.* at 143-44. To frame this argument, Tiffin relies on the following sources: Byron C. Mathews, *The Duty of the State to Dependent Children*, 25 PROC. NAT'L CONF. OF CHARITIES & CORRECTIONS 368 (1899); Roger Baldwin, *How Shall We Frame a Consistent Public Policy?*, 40 PROC. NAT'L CONF. OF CHARITIES & CORRECTIONS 190 (1914); Ray M.

The voice of care is audible in this defense of the state's right of intervention. This argument reflects the conviction that "children should be nurtured properly," thereby evidencing a desire for children to be treated with "motherly tenderness" during their formative years. Also evident in this reasoning is a concern for the welfare of the community within which the child will live as an adult. "For its own protection," society must demand that children be taught about their connectedness, their responsibilities, and the need for a cooperative attitude toward their communities. Parents owe "a duty to the state to create and maintain a high standard of citizenship" for their children to emulate. According to the Child-Saver view, where parents fail or neglect their duty of care, the state must step in. States intervening as a consequence of the natural parents' failure would be described as assuming the role of "parens" patriae, but the role would have been better described as "mater patriae"—mother of the country—because inherent in this call for children to be nurtured and society to be protected was a plea for maternal guidance.

When the Child Savers embarked on their salvation mission in the late nineteenth century, they did so expecting that society would respond to their declarations that delinquent children were in need of society's care. Their persistence finally paid off in Illinois. By 1899, the Child Savers and their constituents succeeded in mobilizing the political and legislative support necessary for persuading the Illinois General Assembly to create a juvenile court.[60] One of the final public pushes for the juvenile court authorization bill came during the 1898 Illinois Conference of Charities. During the conference, the Warden of Joliet State Penitentiary gave a speech that reflected the prevailing sentiment of the increasingly influential juvenile justice reformers: "You cannot take a boy of tender years . . . and lock him up with thieves, drunkards and half-crazy men of all classes and nationali-

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Connel, *The Ethics of State Interference in the Domestic Relations*, 18 INT'L J. ETHICS 363-72 (1908).

60. *See* PLATT, *supra* note 28, at 132-34 (providing a detailed account of how the Illinois Legislature passed the juvenile court bill).

ties without teaching him lessons in crime."[61] Building on that sentiment, the superintendent of an Illinois reform school, at the same charities conference, articulated a vision of a juvenile court "presided over by a careful and most painstaking judge."[62]

Indeed, the superintendent's vision was realized when Illinois passed its juvenile court authorization bill in 1899. By 1907, Chicago's new juvenile court building was designed so that hearings could be held "in a room fitted up as a parlor rather than a court, around a table instead of a bench . . . in the nature of a family conference."[63] For juvenile courts that could not afford such elaborate arrangements, Judge Julian Mack advised judges to "evoke a sympathetic spirit" from children by sitting at a desk rather than at a courtroom bench.[64] In that same spirit, Judge Richard Tuthill candidly explained what he hoped to achieve through informality in his juvenile court: "I have always felt, and endeavored to act in each case, as I would were it my own son who was before me in the library at home, charged with some misconduct."[65] Clearly, the Child Savers had succeeded in softening the institution of criminal justice for juvenile delinquents. Thanks to the doctrine of parens patriae, youthful offenders now had a forum tailored to the scale of their problems and need for guidance. The American juvenile justice system was born, and it was founded on an ethic of care.

B. Identifying an Ethic of Justice in the U.S. Supreme Court's Critique of Parens Patriae

For the next seventy years, parens patriae remained virtually unchallenged as a foundational principle of the American juvenile justice system.[66] In exchange for foregoing due process and

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61. Major R.W. McClaughry, Warden of Joliet State Penitentiary in Illinois, spoke at the November 1898 meeting of the Illinois Conference of Charities and Corrections. *Id.* at 132 (quoting R.W. McClaughry, Address at the Proceedings of the Illinois Conference of Charities and Corrections 310-37 (1898)).

62. *Id.* The speaker, the Superintendent of the John Worthy School, was addressing the November 1898 meeting of the Illinois Conference of Charities and Corrections.

63. *Id.* at 144.

64. *Id.* (quoting Julian W. Mack, *The Law and the Child*, SURV. 23, 642 (Feb. 1910)).

65. *Id.* (quoting Richard S. Tuthill, *The Chicago Juvenile Court*, *in* PROC. ANN. CONG. OF THE NAT'L PRISON ASS'N 121 (1902)).

66. SCHWARTZ, *supra* note 1, at 151.

adversarial proceedings, juveniles received informal and confidential hearings and dispositions based on what was in "the best interests of the child."[67] Ultimately, however, parens patriae could not deliver on its promises. The new juvenile justice systems failed to eradicate delinquent behavior. Instead, juvenile crime rates rose dramatically.[68] The "unbridled discretion"[69] of the juvenile tribunals resulted in "treatment" plans for juveniles that more closely resembled prison sentences.[70] These "treatments," in turn, were meted out for crimes for which adults would not have been punished.[71] Furthermore, juveniles received indeterminate sentences that would have been deemed unconstitutional in adult courts.[72] The doctrine of parens patriae proved to be "a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme,"[73] and it apparently was doing little to help society manage the problem of juvenile delinquency.

Legal scholars and even child advocates began questioning the carte blanche that parens patriae seemed to confer on the states in addressing the delinquencies of their juveniles. Some critics attributed the "abuses" to the lack of financial support that the juvenile courts received.[74] Most critics, however, agreed that a juvenile justice system founded on notions of parens patriae was a failed experiment in social engineering that was in urgent need of reassessment.[75] Beginning in 1966 with *Kent v. United States*,[76] the Supreme Court undertook such an assessment of parens patriae and its shortcomings. Over the next twenty years, parens patriae fell from grace as the Court's holdings in juvenile cases completely changed the face of American juvenile justice. Jake's voice, the ethic of justice, would finally come to be heard in the Court's trio of decisions—*Kent*, *In re Gault*,[77] and *In re*

67. *Id.* at 150.
68. MEYER, *supra* note 3, at 290.
69. *In re* Gault, 387 U.S. 1, 18 (1967).
70. MEYER, *supra* note 3, at 290.
71. *Id.*
72. *Id.* at 291.
73. *In re* Gault, 387 U.S. at 16.
74. Kent v. United States, 383 U.S. 541, 555-56 (1966) (footnotes omitted).
75. SCHWARTZ, *supra* note 1, at 151.
76. *Kent*, 383 U.S. at 541.
77. *In re* Gault, 387 U.S. 1 (1967).

Winship[78]—in which the justices extended several standard procedural protections to juvenile defendants.

In *Kent*, the Supreme Court considered the validity of a juvenile court's waiver of jurisdiction over a sixteen-year-old defendant in connection with charges of housebreaking, robbery, and rape.[79] The Court viewed the waiver decision as "critically important"[80] to the outcome of the juvenile's case. Accordingly, it voiced some discomfort with a system which, in the name of informality and confidentiality, was required neither to articulate a policy for making waiver decisions nor to document the application of such a policy to any given case, thereby seriously undermining any later potential appellate review:[81]

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity . . . . There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children. [82]

The Court ruled that henceforth, in the interest of permitting meaningful review, the juvenile court would be obliged to provide written justification for its decision to waive jurisdiction over a juvenile.[83] Furthermore, the Court concluded that a juvenile is

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

79. *Kent*, 383 U.S. at 546. "Waiver" is the term of art that describes the transfer of a juvenile from juvenile court jurisdiction to a criminal court where the accused juvenile is tried as an adult. SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM § 4.1, at 4-1 (2d ed. 1981).

80. *Kent*, 383 U.S. at 560. At the time Morris Kent's case was decided, the applicable criminal code fixed the punishment for rape at 30 years or death if the jury so provided in its verdict. *Id.* at 554 n.17.

81. SCHWARTZ, *supra* note 1, at 152.

82. *Kent*, 383 U.S. at 555-56 (footnotes omitted).

83. *Id.* at 561.

entitled to a hearing prior to entry of a waiver order, that a juvenile is entitled to counsel in connection with such a hearing, and that counsel, in turn, must have access to the juvenile's social records.[84] Although the Court did not go as far as to declare parens patriae unconstitutional, it did hold that juvenile hearings "must measure up to the essentials of due process and fair treatment."[85]

This holding was a dramatic departure from the Child Savers' vision of "fatherly judges" who were to dispose of juvenile cases as they saw fit, their sole guideline being whatever the child's best interests required.[86] Speaking in a language of rights and rules, the Court placed a premium on observing procedural due process and affording juveniles "fair treatment." The concept of "fair treatment" connotes proportionality: getting the same treatment that others in like circumstances would receive. This notion of "fair treatment" lies at the heart of an ethic of justice.

To illustrate this point, let us return to Jake and the Heinz dilemma. Had Heinz been caught stealing the drug for his wife, Jake would have expected Heinz to receive "fair treatment" from the justice system. Therefore, it did not bother Jake to recommend theft as a means of solving Heinz's dilemma. Jake trusted the legal system to be "fair" to Heinz; the judge would agree that the wife's life was more important than the druggist's right to payment. That is not to say that Jake would have expected Heinz to go unpunished. Rather, Jake simply trusted that Heinz's motives would have a mitigating effect on the court's judgment: legal systems feature statutory provisions for considering mitigating circumstances in recognition of the fact that life is full of unpredictable Heinzian dilemmas. Jake could have full confidence in a justice system governed by consistently applied procedures and rules for weighing aggravating against mitigating circumstances. To obtain justice, Jake knew that an accused person would have to have the benefit of procedures by which courts dispense justice. Thus, Jake would have wanted to see Heinz, upon his arrest, receive exactly the same procedural

84. *Id.*

85. *Id.* at 562.

86. Patricia D. Junger, *The Serious Young Offender Under Vermont's Juvenile Law: Beyond the Reach of Parens Patriae*, 8 VT. L. REV. 172, 177 (1983).

protections that past drug thieves in like circumstances had received.

When the Supreme Court insisted in *Kent* on "fair treatment" or "the essentials of due process" for juvenile defendants, the Court was voicing an ethic of justice, an ethic that places great stock in the fairness of abiding by rules and balancing competing rights to promote maximum individual liberty. To a proponent of the justice ethic, it was disconcerting to picture juvenile courtrooms with no procedural protocol in place. If this was parens patriae in practice, then, in the eyes of a justice ethic proponent, parens patriae would have to go.

In 1967, one year after *Kent*, the Supreme Court continued its critical investigation of the merits of parens patriae. In *In re Gault*, the Court pointedly observed that "[u]nder our Constitution, the condition of being a [child] does not justify a kangaroo court."[87] The Court further noted the "surprising unanimity" of studies which sharply criticized the "fatherly judge" model of juvenile justice administration, and which suggested that "the appearance as well as the actual fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."[88] In the spirit of these misgivings, the Court held that, absent a voluntary confession from the accused juvenile, neither a determination by a juvenile court of delinquency nor an order of commitment to a state institution could be sustained without sworn testimony that had been given with an opportunity for cross-examination in accordance with standard constitutional requirements.[89]

Some of the Court's language in *Gault* appears to signal a measure of antipathy toward the juvenile justice system as it had evolved under the philosophical influence of parens patriae. The language conveys a sense of good intentions that have been taken too far. The "fatherly" judge is greeted with skepticism—juvenile delinquents would profit more from a demonstration of "fairness, impartiality and orderliness." These words evoke the image of a

87. *In re* Gault, 387 U.S. at 28.
88. *Id.* at 26.
89. *Id.* at 57.

stern father who shows love for his child by not sparing the rod when a beating is warranted. The Child Savers once enlisted women in their cause for the sake of introducing "female tenderness" and "maternal guidance" into institutions that handled juvenile delinquents. These maternal attributes were meant to "supplement . . . paternal authority," but the *Gault* court seemed to indicate that the maternal influence had all but driven out any semblance of paternal authority: fairness, impartiality, and orderliness. In the Court's view, the informal institution of juvenile justice—softened by "motherly tenderness"—had turned into a "kangaroo court." If this was parens patriae in practice, then parens patriae had to go.

In 1969, the Court once more extended a constitutional right to juvenile defendants. In *In re Winship*,[90] the Court announced that "the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*—notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination."[91] The Court explained that the higher standard of proof was appropriate even in juvenile delinquency proceedings because the twelve-year-old who had been charged with larceny possibly faced a lengthy loss of liberty.[92] Once again, the Court applied an ethic of justice in its approach to the fate of juvenile delinquents at the hands of the law.

Kent, *In re Gault*, and *In re Winship* provided the impetus for legislatures across the nation to enact modern juvenile justice statutes.[93] These new statutes reflected a different philosophy from the parens patriae philosophy that colored the original juvenile justice statutes. The ethic of justice overtook the ethic of care as a guiding principle in shaping juvenile delinquency treatment. The emphasis shifted from entrusting the actors of the juvenile justice system—judges and social workers—with maximum discretion to safeguard the best interests of the child to

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

91. *Id.* at 368.

92. *Id.* at 366-68.

93. Dawson, *supra* note 5, at 138.

limiting and controlling that discretion.[94] The juvenile justice system "changed even more in the direction of a law-driven system and away from a treatment-driven system. To that extent, the juvenile system came increasingly to resemble the criminal system."[95] With paternal authority in mind, the states would revamp their juvenile courts to administer juvenile justice with "the essentials of due process."[96] No one had yet suggested that the juvenile courts be abolished; rather, states simply changed the philosophical underpinnings. Thus, with the Supreme Court's call for "fairness, impartiality and orderliness," parens patriae was transformed into a doctrine of "pater" patriae—father of the country.

In light of the Court's articulated skepticism regarding parens patriae, one wonders why the Court did not finish the job by declaring the juvenile justice system unconstitutional. Apparently, the idea that delinquents should not (yet) be treated as adult criminals held some small appeal for the Court. *Schall v. Martin*[97] presented Justice Rehnnquist with an opportunity to repeat, as author for the majority, the same endorsement of parens patriae which, only two years earlier, he had offered as a dissent in *Santosky v. Kramer*:[98]

> The State has "a parens patriae interest in preserving and promoting the welfare of the child," which makes a juvenile proceeding fundamentally different from an adult criminal trial. We have tried, therefore, to strike a balance—to respect the "informality" and "flexibility" that characterize juvenile proceedings, and yet to ensure that such proceedings comport with the "fundamental fairness" demanded by the Due Process Clause.[99]

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94. *Id.*

95. *Id.*

96. *In re* Gault, 387 U.S. at 30.

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

98. Santosky v. Kramer, 455 U.S. 745, 766 (1982). Between the *Winship* decision in 1969 and the *Schall v. Martin* decision in 1984, Justices William Rehnquist, Louis Powell, John Paul Stevens, and Sandra Day O'Connor had joined the Court; Justices Hugo Black, John Harlan, Potter Stewart, and William Douglas had left the bench.

99. *Schall*, 467 U.S. at 263 (citations omitted).

Convinced that the Constitution did not mandate the elimination of all differences in the adjudicatory treatment of juveniles, the *Schall* court held that a section of New York's Family Court Act did not violate the Due Process Clause by authorizing the pre-trial detention of an accused juvenile delinquent, based on a finding that there was a serious risk of further pre-trial delinquent activity.[100] The Court reasoned that it was not unconstitutional for the Act to call for preventive detention because such detention served a legitimate state objective, and because the juvenile detainee was afforded adequate procedural protection.[101] Justice Rehnquist explained the Court's decision in language that recalls the early rhetoric of the Child Savers' movement: "Children, 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*."[102] According to Justice Rehnquist, children in need of pre-trial detention were children beyond the control of their custodial parents. For Justice Rehnquist, then, a reasonable exercise of the state's parens patriae power included temporarily detaining an accused juvenile before adjudication because:

> Society has a legitimate interest in protecting a juvenile from the consequences of his criminal activity—both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child.[103]

Although the *Kent*, *In re Gault,* and *In re Winship* line of cases may have vested juveniles with constitutionally based procedural rights, Justice Rehnquist's opinion in *Schall* seemed to signal that the present Court did not view that line of cases as supporting

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100. *Id.* at 281.

101. *Id.*

102. *Id.* at 265.

103. *Id.* at 266; *see also* Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage"); Bellotti v. Baird, 443 U.S. 622, 635 (1979) (juveniles "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"); L.O.W. v. District Court of Arapahoe, 623 P.2d 1253, 1258-59 (Colo. 1981); Morris v. D'Amario, 416 A.2d 137, 140 (R.I. 1980); .

arguments favoring the total abandonment of the juvenile justice ideal.[104]

Roughly a century has passed since social workers, advocates, police, and judges first began to name juvenile delinquency as a type of behavior distinct from adult criminality. In that time, systems have been devised to treat juvenile delinquent behavior; those systems, in turn, have been subject to reforms as their inadequacies were recognized. What remained constant throughout those one-hundred years were the rationalizations of delinquent juvenile behavior: primarily poor parenting practices and economic hardship.

The *Schall* Court, however, departed from this traditional analysis by suggesting that delinquent behavior inheres in the immaturity of juveniles, and that the gamesmanship, the peer approval, and the excitement of "getting away with something" might actually be the true cause of juvenile delinquency.[105]

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104. In *McKeiver v. Pennsylvania*, the Court explicitly stated that it was not yet willing to give up on parens patriae: "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971).

105. Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted. . . . For the same reasons that our society does not hold juveniles to an adult standard of responsibility for their conduct, our society may also conclude that there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult charged with crime will do so. To the extent that self-restraint may be expected to constrain adults, it may not be expected to operate with equal force as to juveniles. Because of the possibility of juvenile delinquency treatment and the absence of second-offender sentencing, there will not be the deterrent for the juvenile which confronts the adult. Perhaps more significant is the fact that in consequence of lack of experience and comprehension the juvenile does not view the commission of what are criminal acts in the same perspective as an adult. . . . There is the element of gamesmanship and the excitement of "getting away" with something and the powerful inducement of peer pressures. All of these commonly acknowledged factors make the commission of criminal conduct on the part of juveniles in general more likely than in the case of adults.

Given this view of juvenile behavior and psychological development, the present Supreme Court seems to have discovered a renewed relevance in parens patriae and the separate system of juvenile justice which it has spawned. Oddly enough, the Court has chosen to reinvigorate the parens patriae doctrine at the very moment when preeminent critics are advocating the abolition of the juvenile justice philosophy and its systemic applications.[106]

Whose voice will carry the day still remains to be seen. The Supreme Court can rule that it is constitutional to keep juveniles out of adult criminal courts, but the Court cannot require the states to do so. The states are free to turn away from parens patriae, as is apparent in the recent enactment of tough-minded juvenile justice reforms by the Massachusetts Legislature—formerly a bastion of child-saving, care-oriented proponents of juvenile rehabilitation.[107] Is parens patriae then a doomed doctrine? Possibly, but not necessarily. As the next part shows, Vermont is not prepared to abandon parens patriae completely.

C. Identifying an Ethic of Justice and an Ethic of Care in Vermont's Parens Patriae System for Addressing Juvenile Delinquency

Much of Vermont's juvenile justice history parallels the nation's experience. Well over one-hundred years ago, Vermonters realized that delinquent children did not belong in jail along with adult criminals. Speaking in the voice of care, Vermonters tasked their legislators with promulgating "a law of kindness" by which to reform wayward, errant children.[108]

Schall, 467 U.S. at 265-66 n.15 (quoting People *ex rel.* Wayburn v. Schupf, 350 N.E.2d 906, 908-09 (N.Y. 1976)).

106. *See generally* Feld, *supra* note 5, at 691; Dawson, *supra* note 5, at 136.

107. *See supra* note 7 and accompanying text.

108. Report of the Commissioner Relating to Juvenile Offenders and the Establishment of a Reform School 6 (1858), *reprinted in* 1 VT. REFORM SCHOOL (1865-1880). That original parens patriae mandate is still visible today in the purpose statement of Vermont's juvenile code:

> The purposes of this chapter are:
> (1) to provide for the care, protection and wholesome moral, mental and physical development of children coming within the provisions of this chapter;
> (2) to remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and to provide

For the next century, Vermont's philosophy for treating juvenile delinquency was dominated by the "maternal," child-saving concept of parens patriae and the attendant commitment to protect the best interest of the child. Then, beginning in the 1960s, the abrupt arrival of violent juvenile crime in Vermont led to a crisis in confidence regarding the wisdom of reserving a "law of kindness" for juvenile offenders.[109] The crisis of doubt reached a peak in 1981, when sixteen-year-old Louie Hamlin and fifteen-year-old Jamie Savage brutally abducted, raped, and tortured two twelve-year-old girls in Essex Junction.[110] The Essex Junction tragedy prompted changes designed to "toughen" Vermont's juvenile code.

Louie Hamlin stood trial as an adult for murder, but Jamie Savage was too young to be charged and adjudicated as an adult. The relatively benevolent disposition of his case[111] provoked a public demand for juvenile justice reform in Vermont. In all,

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> a program of treatment, training, and rehabilitation consistent with the protection of the public interest . . . .

VT. STAT. ANN. tit. 33, § 5501 (1991).

109. Vermont Attorney General John Easton reported in 1981 that arrests of juveniles under 15 for rape, murder, and aggravated assault had risen 254% since 1960. MEYER, *supra* note 3, at 182. Furthermore, one juvenile police officer in Burlington reported in the early 1980s that of 121 juveniles ages 10 through 16 who had been delinquent for felonious acts, 78 already had two or more felonies on their record; almost 25% of them had been charged five or more times for various felonies. *Id.* at 296.

Beginning in 1976, Democratic State Representative Lorraine Graham repeatedly but unsuccessfully lobbied her colleagues to pass new, tighter juvenile laws. *Id.* at 170. For instance, in 1979, she introduced a bill to lower from 16 to 14 the age at which juveniles could be prosecuted in adult court for major crimes. *Id.* at 296. The bill fell short by one vote in a House-Senate conference committee. *Id.*

110. *See* MEYER, *supra* note 3, at 22-35. One of the victims died at the scene, but the other survived to tell about the gruesome attack. Under Vermont's juvenile code at the time, Louie Hamlin was old enough to be tried as an adult for his acts. *See* VT. STAT. ANN. tit. 33, § 635 (1968) (current version at VT. STAT. ANN. tit. 33, § 5505 (1991)). Eventually, Louie was convicted of murdering the one girl. MEYER, *supra* note 3, at 250. Jamie Savage, however, was too young to be tried as an adult. *See* VT. STAT. ANN. tit. 33, § 635(b). To the dismay and outrage of Vermonters, Savage walked away from his maniacal deeds with nothing more than an official title of delinquency, a court order for psychiatric evaluation, and the prospect of release from juvenile detention in three years time. MEYER, *supra* note 3, at 204-05; BURLINGTON FREE PRESS, Oct. 4, 1981, (Vermonter), at 18. As it had for nearly a century, the existing Vermont juvenile code required that Jamie be protected from any taint of criminality. VT. STAT. ANN. tit. 33, § 631 (current version at VT. STAT. ANN. tit. 33, § 5501 (1991).

111. *See supra* note 106.

27,350 Vermonters signed a petition demanding a 1981 special legislative session for reforming Vermont's juvenile laws.[112]

The juvenile laws were amended to reduce the age at which children could face allegations of delinquency[113] from twelve to ten years of age.[114] Furthermore, children could now be prosecuted as adults for serious offenses.[115] If this statute had controlled Jamie Savage's case, he would have stood trial for murder along with Louie Hamlin. Another change created the option of extending the jurisdictional reach of the juvenile justice system over a child from the age of eighteen to the age of twenty-one.[116] Thus, if Jamie Savage had been taken into custody today, the juvenile justice system could have retained him in its custody for three years longer[117] than was possible in the actual case.

These changes, and others that emerged from the special session in July of 1981, seemed to signal a change in the philosophy that Vermonters wanted to apply in disciplining juvenile delinquents. Gone was traditional parens patriae and its

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112. MEYER, *supra* note 3, at 180.

113. Delinquent act means an act designated a crime under the laws of this state, or of another state if the act occurred in another state, or under federal law, provided, however, that traffic offenses committed by an individual after becoming 16 years of age shall not be deemed delinquent acts . . . .

VT. STAT. ANN. tit. 33, § 5502(a)(3) (1991).

114. *See id.* § 5502(a)(1)(c).

115. Such offenses, sometimes referred to as "target offenses" are set forth in § 5506. These are:

(1) arson causing death . . .;
(2) assault and robbery with a dangerous weapon . . .;
(3) assault and robbery causing bodily injury . . .;
(4) aggravated assault . . .;
(5) murder . . .;
(6) manslaughter . . .;
(7) kidnapping . . .;
(8) maiming . . .;
(9) sexual assault . . .;
(10) aggravated sexual assault . . .;
(11) burglary of sleeping apartments in nighttime . . . .

Id. § 5506(a).

116. *Id.* § 5504(b).

117. Savage was age fifteen and a half when he was taken into custody; at the time, the statutory age limit for juvenile custody was the child's majority, i.e., the age of eighteen. *See id.* § 5502(a)(11).

overriding concern for the best interest of the child. In its place stood an amended statute that appeared to focus solely on punishment and public safety.

The collective effect of the 1981 amendments has been described as a "digression from the Parens Patriae ideal, which Vermont seemingly has held immutable for over a century."[118] However, even after the horror of Essex Junction, Vermont was not yet ready to repudiate parens patriae entirely. Significantly, in 1981, the juvenile code's benevolent introductory language was not repealed.[119] Thus, the purpose statement was left intact and continued to signal Vermont's overarching commitment to the lenient parens patriae philosophy as a suitable foundational principle for the state's juvenile justice system.

Furthermore, the 1981 amendment session did not produce changes in the statutory guidelines for the final disposition of cases after the initial juvenile delinquency determination.[120] In deciding on a course for treatment, the court must still consider the child's connection to the community and the quality of the community resources available to rehabilitate the child. The court must make an assessment of the child's medical, psychological, educational, and vocational needs; a description of the resources in home, school, and community; a statement of goals and objectives for treatment; and a recommendation as to disposition of the case, including a case plan and estimate of the plans' duration.[121]

In all, these guidelines reflect one central concern—the welfare of the child who has come into the state's parens patriae custody. An ethic of care is visible in these statutory requirements. The focus is on treatment, not punishment or retribution. The Child Savers would have approved of these dispositional guidelines.

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118. Junger, *supra* note 86, at 182.

119. *See supra* note 108. *Compare id. with* VT. STAT. ANN. tit. 33, § 631 (1991).

120. When Jamie Savage was adjudged a delinquent in 1981, the statutory guidelines at the time for the final disposition of his case were identical to the guidelines in force today. *See* VT. STAT. ANN. tit. 33, § 5527(b) (1991). *Compare id. with* VT. STAT. ANN. tit. 33, § 655 (1991).

121. VT. STAT. ANN. tit. 33, § 5527(b) (1991).

In light of the changes that were and were not made to the Vermont juvenile code in 1981, a balance seemed to evolve between pursuing the benevolent goals of parens patriae and dealing more firmly with juvenile delinquency. This balance is visible in the few published juvenile appellate cases decided by the Vermont Supreme Court. These opinions indicate that Vermont's highest court does not share the skepticism of parens patriae that the U.S. Supreme Court evinced in *Kent*, *In re Gault*, and *In re Winship*. Rather, the Vermont Supreme Court has repeatedly declared its full confidence in juvenile court judges to protect the best interests of juvenile delinquents by exercising their sound parens patriae discretion.[122] But, as the following two cases illustrate, the Vermont Supreme Court's vote of confidence for judicial discretion has not meant business as usual for parens patriae.

In *State v. Jacobs*, the Vermont Supreme Court declined to follow the U.S. Supreme Court in adopting the *Kent* standards for deciding motions to transfer cases to juvenile court.[123] David Jacobs stood accused of intended burglary and receipt of stolen property.[124] Since Jacobs had not yet attained his majority, the juvenile court could have legitimately adjudicated his case. However, after an informal hearing in which the district court judge allowed unsworn testimony, and after examining Jacobs' prior record of delinquency, the judge denied Jacobs' transfer motion.[125]

On appeal, the Vermont Supreme Court conceded that the lower court's procedure in deciding the transfer motion had been "dangerously informal, and [was] not to be encouraged as a prototype."[126] Nonetheless, out of deference to an inferred legislative intent, the court rejected defendant's argument for adopting the *Kent* procedural due process safeguards.[127] The

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122. *See In re* R.D., 154 Vt. 173, 176, 574 A.2d 160, 161 (1990); State v. Barrette, 153 Vt. 476, 477, 571 A.2d 1137, 1138 (1990); State v. Lafayette, 152 Vt. 108, 110, 564 A.2d 1068, 1069 (1989); State v. Smail, 151 Vt. 340, 343, 560 A.2d 955, 957 (1989); State v. Jacobs, 144 Vt. 70, 74, 76, 472 A.2d 1247, 1249, 1250 (1984).

123. *Jacobs*, 144 Vt. at 74, 472 A.2d at 1249.

124. *Id.* at 71, 472 A.2d at 1248.

125. *Id.*

126. *Id.* at 72, 472 A.2d at 1248.

127. *Id.* at 74, 472 A.2d at 1249.

court reasoned that, had the Vermont Legislature intended to require anything other than a sound discretionary judgment by the trial court, it would have provided specific procedures and standards for transfer decisions.[128] After reiterating that "attainment of the salutary purposes of the juvenile statutes calls for the exercise of sound judicial discretion," the Vermont Supreme Court declined to find an abuse of discretion in the trial court's holding that "[j]uvenile probation is not feasible for dealing with [defendant] on the latest case."[129]

In terms of assessing the current status of parens patriae in Vermont, the *Jacobs* decision is interesting for two reasons. First, the decision suggests a basis for concluding that Vermont's lawmakers remain supportive of parens patriae as the foundational doctrine of the juvenile code. As the *Jacobs* court pointed out, the transfer provision in question[130] had last been acted on during the 1981 Special Session, at the peak of the pressure from the Savage case to do away with benevolence, informality, and unaccountability in Vermont's juvenile laws.[131]

Accordingly, had the legislature wished to pare back the benevolent parens patriae doctrine completely, it could have eliminated, or at least limited, the parens patriae hallmark of heavy reliance on judicial discretion.[132] Since the legislature had not seized the moment to curtail the discretion of "fatherly judges," the Vermont Supreme Court concluded that the judicial discretion prescribed by parens patriae was still favored.[133]

The second point of interest in *Jacobs* is its balance between the ethic of justice and the ethic of care. Or, put another way, the Vermont Supreme Court succeeded in promoting "care" by supporting parens patriae and promoting "justice" by allowing a trial court to visit adult consequences upon a repeat delinquent who had committed adult crimes. On one hand, the *Jacobs* court

128. *Id.* at 75, 472 A.2d at 1250.
129. *Id.* at 72, 76, 472 A.2d at 1248, 1250.
130. VT. STAT ANN. tit. 33, § 635(b) (1991).
131. *Jacobs*, 144 Vt. at 75, 472 A.2d at 1250.
132. *Id.*
133. *Id.*

implied that achieving the "salutary purposes"[134] of Vermont's juvenile laws, to rehabilitate delinquents and avoid the taint of criminality, remains a continuing aspiration, the attainment of which depends on the exercise of judicial discretion.[135] On the other hand, the court upheld an exercise of parens patriae discretion in this case which produces a result that would have been anathema to the Child Savers: the juvenile is retained for adjudication in adult criminal court, where he risks incurring an adult penalty instead of "maternal guidance" and treatment.

The *Jacobs* decision illustrated that the mere existence of a lenient option does not have to lead to its exercise. The case showed that there were some judges in Vermont who, in their discretion, were willing to hold that it is sometimes in the best interests of some delinquent children to answer for their actions in a court of criminal law. These judges understood the fine art of balancing an ethic of justice against an ethic of care.

In 1989, five years after *Jacobs*, the Vermont Supreme Court again reviewed a case that reflected the judiciary's increased willingness, in its parens patriae discretion, to expand the concept of promoting "the child's best interests" in the adjudication of juvenile cases. Prior records of delinquency and the prospects for juvenile probation to actually be meaningful had begun to matter as well. In *State v. Lafayette*,[136] the high court of Vermont held that a sixteen-year-old boy should remain in adult criminal court for adjudication on charges of unlawful mischief and simple assault on a police officer.[137]

The defendant, Thomas Lafayette, had injured a policeman by throwing a rock at his patrol car. Since he was not yet eighteen, Lafayette moved to transfer his case to juvenile court.[138] The trial court, in its discretion, denied the motion, citing, among other things, the nature of the boy's crimes and his lack of remorse, his past juvenile record, and the inability of the juvenile

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134. *See* VT. STAT. ANN. tit. 33, § 5501(1)(b) (1991).

135. *Jacobs*, 144 Vt. at 72, 472 A.2d at 1248 (quoting State v. Powers, 136 Vt. 167, 169, 385 A.2d 1067, 1068 (1978)).

136. State v. Lafayette, 152 Vt. 108, 564 A.2d 1068 (1989).

137. *Id.* at 109, 564 A.2d at 1069.

138. *Id.*

courts to arrange a suitable treatment plan.[139] The supreme court affirmed the lower court's discretionary judgment after noting that these facts constituted "ample reason . . . to find that adult probation could be more effectively enforced than juvenile probation."[140]

At first glance, the *Lafayette* decision reads like yet another nightmare come true for a child-saving, ethic-of-care proponent in which another misguided youth is trapped in adult criminal court because of judicial shortsightedness. But a closer look reveals that the Vermont Supreme Court once again maintained an admirable balance between an ethic of justice and an ethic of care. The care ethic was evident in the court's advocacy of discretion in *Lafayette*. The court reiterated that it would defer to the discretionary judgments of the trial courts as long as there was "a reasonable basis for the court's action."[141] Thus, the court continued to advocate for the flexibility of judicial discretion in juvenile proceedings.

The court's advocacy of judicial discretion reflects an applied ethic of care because systemic flexibility provides the window of opportunity for juvenile court judges to offer delinquents "maternal guidance" or, if the case warrants, "paternal authority." Discretion allows for the individualized treatment of juveniles. Discretion allows the juvenile court to issue disposition orders that account for a delinquent child's particular needs and circumstances. Discretion is an agent of care.

Balanced against the ethic of care in *Lafayette* was the ethic of justice. In upholding the trial court's decision to retain Lafayette in adult criminal court, the Vermont Supreme Court spoke in the unmistakable voice of justice. Lafayette's crime of simple assault was a physical crime against a person, not "merely" property.[142] Crimes against people are "more serious" than crimes against property.[143] After considering that there

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139. *Id.*

140. *Id.* at 111, 564 A.2d at 1069.

141. *Id.* at 110, 564 A.2d at 1069 (quoting State v. Willis, 145 Vt. 459, 470, 494 A.2d 108, 114 (1985)).

142. *Lafayette*, 152 Vt. at 113, 564 A.2d at 1070.

143. *Id.*

was no mitigating evidence of peer pressure in the case, the Vermont Supreme Court presented Lafayette with the legal sum of his circumstances: "These considerations alone are adequate to support the [trial] court's decision to refuse transfer. Affirmed."[144] Thomas Lafayette would answer the charges against him in adult criminal court because that was what the voice of justice demanded.

All in all, by relying heavily on judicial discretion, Vermont seems to have found a workable way of pursuing the "salutary purposes" of its juvenile laws. This arrangement has kept parens patriae alive, but the Vermont judiciary bears the burden of compensating for the state's poor parenting practices. Juveniles, such as David Jacobs and Thomas Lafayette, enter Vermont's adult criminal courts with records of repeated delinquency.[145] These records suggest that the state, as parens patriae, is not clearly and consistently communicating society's behavioral expectations to these young offenders. Although Vermont's judges arguably have been making good use of their discretion, the discretionary disposition of juvenile charges makes it difficult for pre-delinquent children to understand what is likely to happen to them if they decide to engage in delinquent behavior.

Vermont could be a better parent when it acts in the name of parens patriae. The state could adopt parenting practices that would complement the judiciary's efforts to balance the paternal ethic of justice with the maternal ethic of care in the treatment of juvenile delinquents. The next section explores how Vermont, as parens patriae, could become a better parent by weaving both the maternal care ethic and the paternal justice ethic into the textual fabric of its juvenile code.

III. TOWARD A REFORM OF PARENS PATRIAE

Arguably, the history of parens patriae and the juvenile justice system need not be read as proof that states are doomed to failure when, as parents, they seek to recognize and address the difference between immature juvenile delinquency and mature adult criminality. Rather, this history may be read as the story

144. *Id.* at 113, 564 A.2d at 1070.

145. *Id.*; *Jacobs*, 144 Vt. at 73, 472 A.2d at 1249.

of well-intentioned states, such as Vermont, setting themselves up to become parenting failures by embarking on their missions with little or no comprehension of what sound parenting entails.

It is odd, but it is true: some human endeavors requiring enormous skill and vision are thought simply to come to us "naturally."[146] Up until approximately one hundred years ago, humans received little preparation for parenthood. Formal parenting training consisted largely of religious maxims[147] and relatives who assured the expectant mother and father that their parenting reflexes and instincts would kick in upon the infant's arrival. Society has only recently begun to conceive of parenting as a vocation that requires forethought, goals, and direction to succeed. If, in the past, we have poorly understood the need to teach parenting formally, then surely we have not considered that governments might require guidance or training in how to be an effective parens patriae for juvenile delinquents. It is small wonder, then, that many states' parenting mandates, such as Vermont's juvenile code, reflect conflicting instructions and expectations that amount to a recipe for disastrous parenting.[148]

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146. For instance, consider procreation: whether for fear of embarrassment or fear of mundacity, humans receive little, if any, instruction on the practical mechanics of sexual intercourse. Muses a mother as her daughter, the bride, walks down the aisle: "Why, she'll figure it out, it comes naturally." Thinks a father as his son, the groom, waits at the altar: "If he hasn't figured it out by now." It, it, it. The unspeakable "it" of sexual intercourse supposedly requires no encouragement and no instruction because, well, "it" is instinctual. We all "just know" how to do "it." So it has been with parenting, "it" just comes to us "naturally."

147. Some people no doubt will argue that parents through the ages have had the benefit of counsel from religious teachings about parenting. The Old Testament of the Christian Bible, for instance, offers parents the following wisdom: "He that spareth his rod hateth his son, but he that loveth him chasteneth him betimes." *Proverbs* 13:24 (quoted in JOHN BARTLETT, FAMILIAR QUOTATIONS 23 (Emily Morison Beck ed., 1980)). Surely, many parents have found this maxim useful in their time, but reliance upon such advice generally presupposes a parent who adheres to Judeo-Christian teachings. By comparison, in remarking upon an "absence" of parental guidance in centuries past, I mean to address the absence of secular studies and treatises on human developmental theory to which past parents could have turned for secular advice on how to nurture and discipline their children.

148. *See supra* note 31 and accompanying text (discussing the contents of juvenile code preambles throughout the United States).

Generally speaking, most modern parenting theories stress that sound parenting rests on three principles: clarity,[149] consequences,[150] and consistency.[151] If the State of Vermont means to parent the juveniles who enter its parens patriae custody competently, then the Vermont juvenile code ought to reflect the sound parenting principles of clarity, consistency, and consequences. The remainder of this section explores possible amendments to the Vermont juvenile code which could help the State of Vermont be a better parent.

A. First Rule of Good Parenting: Clarity

In the context of parenting, an applied ethic of justice requires parents to formulate and communicate behavioral norms, rights, and responsibilities to their children. This ethic yields the greatest benefit when parents firmly formulate and clearly communicate the behavior they expect from their children.

Allowing for variations on the theme, parenting experts often state the clarity principle in the following terms: contentious and manipulative interactions between parent and child can be significantly reduced if parents are clear and firm about what they want their children to do.[152] Such firmness, in turn, pertains to the parents' ability to clarify their position, not with their ability to persuade their children to do their bidding.[153] Firm, assertive parents, then, must state what they want in a direct manner,[154] so that their children have a clear concept of what is expected of them.[155]

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149. PHILIP OSBORNE, PARENTING FOR THE 90S 167 (1989); DON FONTENELLE, HOW TO LIVE WITH YOUR CHILDREN: A GUIDE FOR PARENTS USING A POSITIVE APPROACH TO CHILD BEHAVIOR 27-34 (1981); WILLIAM SEARS, CREATIVE PARENTING 243, 319 (1982).

150. LAWRENCE KUTNER, PARENT & CHILD: GETTING THROUGH TO EACH OTHER 111-13 (1991); FONTENELLE, *supra* note 149, at 27-34; OSBORNE, *supra* note 149, at 175; SEARS, *supra* note 149, at 246.

151. FONTENELLE, *supra* note 149, at 17-23.

152. OSBORNE, *supra* note 149, at 166-67.

153. *Id.* at 167.

154. *Id.*

155. SEARS, *supra* note 149, at 243. Interestingly, Sears further suggests that the parents' choice of language materially affects a child's ultimate choice of behavior:

> For example, "We are going to Grandma's and I expect you to be careful around her furniture." Notice the phrase "I expect you." This conveys to your child that you really expect good behavior. If you say "Don't touch Grandma's

The Vermont judiciary already appears to be excelling in dealing firmly with repeat juvenile offenders who are brought up on charges in adult criminal court.[156] However, in light of the frequency with which such juvenile offenders appear in adult court with lengthy prior records of delinquency,[157] one has to wonder how successfully the state, as parens patriae, conveys a clear sense of just what does and what does not constitute expected, acceptable, legal behavior. Similarly, one has to wonder if these children knew or had reason to know that there could or would be adult consequences if they were apprehended for their offenses.

One thing is certain, neither these children nor their attorneys could have turned to the Vermont juvenile code for clarification. The code fails miserably when it comes to defining clearly the behavior that the state, as parens patriae, expects from juveniles.[158] Nor does the code clearly define the consequences

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things" he will feel that you expect him to misbehave and he probably will. *Id.*

156. All of the following cases involved defendants who qualified for treatment under Vermont's juvenile code, but who instead were adjudicated in adult criminal court: State v. Barrette, 153 Vt. 476, 571 A.2d 1137 (1990); *In re* R.D., 154 Vt. 173, 574 A.2d 160 (1990); *In re* K.F., 151 Vt. 211, 559 A.2d 663 (1989); State v. Lafayette, 152 Vt. 108, 564 A.2d 1068 (1989); State v. Smail, 151 Vt. 340, 560 A.2d 955 (1989); State v. Jacobs, 144 Vt. 70, 472 A.2d 1247 (1984); and State v. Piper, 143 Vt. 468, 468 A.2d 554 (1983).

157. In the following cases, the juvenile's prior record of delinquency was a factor in the court's ultimate decision: State v. Barrette, 153 Vt. 476, 571 A.2d 1137 (1990); *In re* R.D., 154 Vt. 173, 574 A.2d 160 (1990); State v. Lafayette, 152 Vt. 108, 564 A.2d 1068 (1989); and State v. Jacobs, 144 Vt. 70, 472 A.2d 1247 (1984).

158. The code starts out clearly enough on the issue of jurisdiction: "The juvenile court shall have exclusive jurisdiction over all proceedings concerning any child . . . except as otherwise provided in this chapter." VT. STAT. ANN. tit. 33, § 5503(a) (1991). The clarity is quickly lost, however, upon reviewing the various "exceptions." Juvenile jurisdiction which was supposed to end at 16 suddenly *may* be extended until age 21 at the court's discretion. *Id.* § 5504(b). Delinquents who are over 16 but under 18 *may* wind up in juvenile court, and murder suspects who are over 14 but under 16 *may* wind up in juvenile court. *Id.* § 5505(b). Finally, murder suspects over 10 but under 14 *may* wind up in adult criminal court. *Id.* § 5506(a)(5). The cognoscenti of Vermont's juvenile code may comprehend how all of these interwoven provisions amount to clear guidance for predicting when a juvenile delinquent will and will not be adjudicated as an adult. The same perceptivity, however, cannot be expected of a thirteen-year-old potential thug. Such children are far more likely to get a more simplistic, comprehensible message: "Do everything before you are sixteen and you won't get in that much trouble." The message they apparently do not get is that they are expected to refrain from engaging in delinquent behavior, and that there will be severe consequences to pay if they do.

that the state, as parens patriae, intends to visit upon young offenders.[159]

For instance, in *State v. Barrette*,[160] the sixteen-year-old defendant was unable to anticipate that his crimes of burglary and arson would result in trial as an adult. The Vermont Supreme Court affirmed the trial court's denial of the defendant's motion to transfer the case to juvenile court.[161] It is understandable that a sixteen-year-old might be confused by the state's statutory signals regarding its rules and expectations for juvenile delinquents. Such confusion, in turn, might have induced Stephen Barrette to discount the risks inherent in his conduct in favor of betting that he could "get away with it." Apparently the court felt the crimes were serious enough for a prosecutor to charge Stephen Barrette in adult criminal court.[162]

But how could sixteen-year-old Stephen Barrette anticipate that he would be charged as an adult if he were caught? After all, at age sixteen, he was legally still a minor. As such, he could have qualified for juvenile court jurisdiction[163] with its presumably "more lenient" penalties for juvenile acts that resemble the crimes of burglary and arson. Stephen Barrette might have relied, imprudently, but not unreasonably, on his age[164] to protect him from the adult consequences of his admittedly reprehensible behavior.

Some might argue that the purpose of writing ambiguous jurisdictional rules of the juvenile code was to deter delinquent

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159. The closest the present Vermont juvenile code comes to spelling out consequences for delinquent behavior is to announce that the court *may* place the delinquent juvenile under protective supervision, impose probation of an entirely discretionary nature, or transfer custody of the delinquent child to the commissioner of social and rehabilitation services. *Id.* § 5529(a) (1991). The commissioner, in turn, enjoys full discretion to dispose of the child's case. *Id.* § 5529(a)(3). The sole guideline is that the commissioner *may* act after determining what lies in "the best interests of the child." *Id.* Nowhere does this statutory section mention concrete consequences that juvenile delinquents can expect to be confronted with, such as mandatory restitution, community service, or mediated conferences with victims.

160. *Barrette*, 153 Vt. 476, 571 A.2d 1132 (1990).

161. *Id.* at 477, 571 A.2d at 1139.

162. *Id.*

163. VT. STAT. ANN. tit. 33, § 5505 (b), (c) (1991).

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

behavior, like Barrette's: if he cannot be sure of what is going to happen to him when he is caught, then he may think twice about doing it. But such a strategy is ill-advised when dealing with children. Chief Justice William Rehnquist himself acknowledged that juveniles do not view the commission of criminal acts from the same perspective as adults, and that it is the *possibility* of juvenile delinquent treatment that leads minors such as Stephen Barrette to take risks under circumstances that would deter adults.[165]

Ambiguity regarding rules and expectations leaves children feeling angry, not reflective and chastened.[166] Ambiguity encourages children to test, not to obey, authority. Ambiguity does not teach children to develop a sense of responsibility for what happens to them and for what happens to their communities as a result of their harmful actions.[167]

The ambiguity of the jurisdictional rules in Vermont's juvenile justice code directly contradicts the parenting principle of clarity. The ambiguity also undermines Vermont's credibility and fairness in applying the justice ethic to the treatment of juvenile delinquency. It may be fair and effective for parents to state rules and to expect their children to obey those rules; but it is not fair, and therefore not effective, for parents to allow their children to trip over ambiguities and to stumble into delinquency. As long as the Vermont juvenile code remains replete with ambiguity, the state, as parens patriae, must be prepared to share the blame for allowing Stephen Barrette to stumble repeatedly into unacceptable conduct. Additionally, the state must face the fact that its continued parental incompetence will simply result in yet more misbehaving juveniles compiling more records of anger, irresponsibility, and delinquencies.

B. Second Rule of Good Parenting: Consequences

In the parenting context, an application of the justice ethic results in the articulation of behavioral rights and responsibilities. But a code of rights and responsibilities is useless as a parenting

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165. *See supra* note 103.

166. FONTENELLE, *supra* note 149, at 24-25.

167. *Id.* at 27.

tool unless it is accompanied by an articulation of the consequences that the parents are prepared to administer when their children misbehave.[168] Children feel angry and do not develop a sense of responsibility for what happens to them when they do not know in advance the consequences of their behavior.[169] Therefore, effective parents must institute penalties for bad behavior, and they must clearly announce these penalties *before* their children have opportunities to break parental rules.

This need for articulated consequences presents an opportunity for parents to apply the ethic of care in their child-rearing practices, thereby balancing out the justice ethic application that leads parents to promulgate behavioral rules for their children. The need for articulated consequences is an invitation for parents to employ disciplinary consequences that emphasize their children's connectedness to their family. In the context of addressing juvenile delinquency, an applied ethic of care would produce a juvenile code that provides for punishments that teach and reinforce the connectedness of juveniles to the communities that they harm when they engage in delinquent behavior.

Vermont's present juvenile code is practically silent on the issue of punitive consequences. The purpose statement calls for the "treatment, training, and rehabilitation" of juvenile delinquents, but it does not mention imposing consequences on juveniles for their delinquencies.[170] In fact, the word "consequences," or, for that matter, "punishment" never appears in the code. At best, the statute refers to the "disposition" of juveniles who have been adjudged delinquent.[171] These careful word choices[172] are entirely in keeping with the rehabilitative ideal of parens patriae to which Vermonters historically[173] have subscribed, but Vermont's statutory silence on the issue of punitive consequences directly undermines the state's effectiveness as a

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168. *Id.* at 26-33.

169. *Id.* at 27.

170. VT. STAT. ANN. tit. 33, § 5501(a)(2) (1991).

171. *Id.* §§ 5529, 5530 (1991). Feld attributes the use of the word "disposition" in most juvenile sentencing provisions to the "progressive origins" of the juvenile justice movement. *Punitive Court*, *supra* note 31, at 449.

172. *See* Dawson, *supra* note 5, at 140 (providing an interesting discussion of the word choices which characterize juvenile justice systems).

173. *See* Junger, *supra* note 86.

parent to juvenile delinquents because sound parenting requires that children have advance notice of the consequences of their behavior.[174] Silence on this crucial subject invites delinquent juveniles to think that the harm they cause to their victims is of little interest or consequence to their communities.

One way for the State of Vermont to remedy this parental shortcoming would be to create and announce predetermined consequences[175] which juveniles can expect to experience in the event of their apprehension for delinquent conduct. To return to Stephen Barrette's case, it can be argued that he was ultimately well-served by the firm justices who decided that it was best for him to remain in adult criminal court for adjudication, given that he had graduated at that point to burglary and arson. But it is also possible that Stephen could have learned to resist his criminal impulses had his first brush with the law included an overview of the predetermined, not discretionary, punishments awaiting him should Vermont, as parens patriae, ever again have cause to take him into custody.

In the past, it has generally been argued that a "forward-looking" or "educational" approach to juvenile punishment required that there not be predetermined sentencing in juvenile court because judges needed vast discretion in gearing their rehabilitative, punitive messages to the individual receptivity of delinquent

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174. FONTENELLE, *supra* note 149, at 25, 27.

175. At this juncture, I want to warn the reader that the terms "predetermined consequences" and "predetermined sentencing" are not intended to equate with "determinate sentencing," which is a term of art in criminal sentencing law and practice. "[A] 'determinate sentence' is one that is selected by a judge or jury, within statutory limits, but does not allow for release on parole before it has been served, while an 'indeterminate sentence' is one that is selected by a judge or jury but permits parole." Robert O. Dawson, *Sentencing Reform: The Current Round*, 88 YALE L.J. 440, 440 n.2 (1978); *see* Robert O. Dawson, *The Third Justice System: The New Juvenile-Criminal System of Determinate Sentencing for The Youthful Violent Offender in Texas*, 19 ST. MARY'S L.J. 943, 945 n.3 (1988). When I speak of "predetermined" consequences or sentences, what I am describing are punishments that have been designated as the consequences to be administered for certain acts before such acts have actually been committed. By way of illustration, one "predetermined consequence" that I might suggest for inclusion in the Vermont juvenile code would be to require juvenile delinquents to perform restitution for their victims.

juveniles.[176] Judicial discretion was presumed to be in the best interest of the child.[177] But this rationale conflicts with the modern parenting principle of stating consequences before infractions occur so that children may develop a sense of responsibility for what happens to them.

Admittedly, maximum judicial discretion in "disposing" of juveniles certainly *allows* judges to impose obligations or tasks upon delinquents. This drives home the point that juvenile delinquents belong to communities and must learn to exercise acceptable behavior within their communities. However, the state, as parens patriae, might obtain better results in disciplining juvenile delinquents by stating unequivocally that specific acts of delinquency *shall* be met with specific forms of punishment. A clear delineation of punishments would help Vermont's juvenile delinquents acquire an understanding that their communities require limits on their conduct and would convey to them the "depth of [Vermont's parens patriae] attachment to the values underlying [those] limit[s]."[178]

One concrete way to change the Vermont juvenile code to reflect the sound parenting principle of consequences and the ethic of care would be to introduce mandatory restitution sentences for juveniles who are adjudged delinquent in Vermont. Restitution is a form of punishment that holds offenders accountable to their communities for their actions, and provides them with the opportunity to take personal responsibility within their communities for their unlawful behavior. "[A]ccountability and responsibility are, in turn, expected to meet the traditional

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176. Francis Schrag, *Discretion, Punishment, and Juvenile Justice*, 10 CRIM. JUST. ETHICS 3, 4 (1991). Schrag offers the following illustration of the classic argument made in defense of discretionary sentencing:

> Since the primary aim of punishment is communication, the "message" must be geared to the receptivity of the receiver. The message needed to convey to a five-year-old the seriousness of taking money from her father's wallet is quite different from the message suitable for a fifteen-year-old.

Id. at 4.

177. *Punitive Court*, *supra* note 31, at 449.

178. Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263, 266 (1981); *see also* Schrag, *supra* note 176.

sentencing goals of punishment, deterrence, and rehabilitation."[179]

In the *Lafayette* case, for instance, a restitution order would have compelled Thomas Lafayette to pay for the medical care that the police officer required after being wounded by the rock Thomas threw at the police car window. Because of Vermont's commitment to affording judges maximum discretion in handling juvenile cases,[180] the present Vermont juvenile code neither prohibits nor requires judges to impose restitution orders on adjudicated juvenile offenders.[181]

But by mandating restitution orders, the state, as parens patriae, would be sending a clear signal to juvenile defendants that they must reckon with predetermined consequences for their criminal acts. Furthermore, those consequences are not likely to vary depending on the discretion of the judge adjudicating the defendant's case. Such a clear warning in advance of a juvenile's decision to engage in delinquent behavior would put the juvenile in a position to make an informed choice about whether or not to commit the crime.

Conversely, the absence of clearly stated consequences in the code undermines the purpose of the juvenile justice system, which is to teach juveniles to behave lawfully, and therefore responsibly. Juveniles such as Thomas Lafayette are not likely to develop a sense of responsibility for the harm they cause, unless they have the opportunity to choose between risking the known consequences of their actions or refraining from taking a delinquent course of action. But most importantly, requiring juvenile delinquents to make restitution is a means of emphasizing their membership in a community, with its attendant duty of care owed by all members to one another. Mandatory restitution makes the point that for each harm juveniles cause to their communities, the juveniles incur an obligation to make their communities whole by

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179. Sudipta Roy, *Offender-Oriented Restitution Bills: Bringing Total Justice for Victims?*, 54 FED. PROB. 30, 34 (Sept. 1990). According to Roy, restitution has been shown to reduce recidivism among juveniles. *Id*; *see id.* at 35 (providing an expansive list of sources regarding the topic of restitution).

180. *See, e.g., In re* R.D., 153 Vt. at 176, 574 A.2d at 161.

181. *See* VT. STAT. ANN. tit. 33, §§ 5529, 5530 (1991).

accounting for the damage they do to their victims. For the communities, "restitution offers a juvenile justice response which makes sense. It is [an] understandable, observable, tangible, logical consequence to unlawful behavior."[182]

Beyond requiring juvenile delinquents to make restitution to their victims, Vermont might add a victim-offender mediation component to its restitution requirement. A victim-offender mediation program would call for juvenile offenders to meet their victims face-to-face to negotiate compensation to the victims.[183] For instance, a victim and offender could work out an agreement by which the offender performs a service for the victim or for the community.[184] Where appropriate, the service could be related to the nature of the offense, such as repairing property damage.[185] An agreement to serve the community could involve allowing the victim to pick the charity for which the offender will perform the negotiated service.[186]

Such a mediation program would help young offenders associate faces with the pain they cause. This would teach them that the amorphous "society" at which they aimed their delinquencies consists of a web of individual people who experience emotional repercussions because of the juveniles' victimizing behavior.[187] Such personal contact with the victims undermines the juveniles' ability to rationalize their delinquent behavior and to deny responsibility for their actions.[188]

Victim-mediation programs are rapidly winning supporters throughout the United States,[189] but these programs are not without their points of contention. One criticism is that not all

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182. Roy, *supra* note 179, at 33 (quoting D. Maloney et al., *Juvenile Restitution: Combining Common Sense and Solid Research to Build an Effective Program*, NEW DESIGNS FOR YOUTH DEV. 3-8 (July/Aug. 1982)).

183. Melinda Smith, *Mediation and the Juvenile Offender*, 15 UPDATE ON LAW-RELATED EDUC. 7, 9 (1991) (providing a helpful list of sources on victim-offender mediation programs).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

victims will want to sit down to negotiate with their juvenile victimizers. This criticism is indisputably valid. However, the criticism could be addressed by making participation in the victim-offender mediation component optional. If a victim refuses to participate in restitutional mediation with the juvenile defendant, then the responsibility for determining the form of societal restitution could revert to the court or another agent within the juvenile justice system, such as Vermont's Department of Social and Rehabilitation Services.

A second criticism is that participation in a victim-offender mediation program would result in the disclosure of a juvenile offender's identity to the victim. This would violate the present juvenile code provision that protects juveniles from such disclosures.[190] However, this problem could be addressed by requiring all victim-offender meetings to be conducted on a first-name basis or by giving each participant an alias.

A final criticism of both mandatory restitution orders and victim-offender mediation is the impracticability of assigning a monetary value to the damage or "emotional repercussions" that the victims of juvenile delinquency experience. This criticism, however, seems to presume that victim-offender mediation and the restitution requirement for juvenile delinquents are nothing more than a torts-inspired mechanism for assessing and awarding damages. But that is not the case.

Both victim-offender mediation and the restitution requirement are process-oriented concepts that assume that juveniles will be rehabilitated through the experience of meeting their victims, and performing acts that either actually or symbolically repair the harm the delinquents have caused. The point is less to compensate the victim for the damage done, but more to teach the offending juveniles about the human costs of their delinquent behavior. Consequently, the reliability of assigning a monetary value to the harm done is not the central concern of mandatory restitution or victim-offender mediation. Rather, the point is to facilitate "discussion of the facts of the offense; discussion of the feelings of the victim and the offender about it and its impact on

190. VT. STAT. ANN. tit. 33, §§ 5536-5538 (1991).

their lives; and negotiation of a restitution agreement that is acceptable to all parties."[191]

C. Third Rule of Good Parenting: Consistency

Parental inconsistency is another frequently cited reason for why children learn to be confused, to ignore directions, and to engage in harmful behavior.[192] Problematic are statements, threats, and promises that parents make without intending to follow through.[193] Worse still are overstatements that call for the parent to deliver actions or consequences beyond the parents' capabilities and resources. Empty threats, empty promises, and overstatements are the functional equivalents of telling children: "Don't believe or listen to what I say because I don't mean anything I'm saying."[194] Effective parenting requires that parents be consistent; children must not catch their parents making threats or promises that they cannot or do not want to keep.[195] Conversely, good parents do everything they say they are going to do.[196]

For Vermont, as parens patriae, the consistency principle dictates that the juvenile code's purpose statement be amended to reflect the attitudinal, philosophical, and historical changes that have occurred since the statement's first composition. The juvenile code's purpose statement currently reflects only the traditional rehabilitative intent of parens patriae:

> (a) The purposes of this chapter are:
> (1) to provide for the care, protection and wholesome moral, mental and physical development of children coming within the provisions of this chapter;
> (2) to remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and to provide a program of treatment,

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191. Smith, *supra* note 183, at 9.
192. FONTENELLE, *supra* note 149, at 18.
193. *Id.* at 17.
194. *Id.* at 20.
195. *Id.* at 19.
196. *Id.*

> training, and rehabilitation consistent with the protection of the public interest.[197]

The state is tasked with providing for the wholesome moral development of juveniles, who, when they run afoul of the law, are also to be shielded from the taint of criminality and the consequences of criminal behavior.[198] Thus, the primary concern of the statute is to promote the welfare of the child through protective procedures.[199] Nowhere is there any mention of teaching juveniles to take responsibility for their actions. Nowhere is there an explicit acknowledgment that justice might require restitution from those who violate the law with impunity and hurt others in the process.

At best, the present statutory mission statement sets the state up to be an inconsistent, and therefore ineffective, parent when it exercises its parens patriae function. No juvenile is going to be impressed by warnings that punishment flows from unlawful deeds when the juvenile code itself explicitly states that children are to be protected from the consequences of criminal behavior.[200] As one fifteen-year-old burglar stated: "'A lot of kids say, "Do everything before you are sixteen and you won't get into that much trouble." . . . They go out and steal a car because they know they're not goin' to jail.'"[201]

Many juvenile statutes across the nation feature preambles that closely resemble the language of Vermont's purpose statement.[202] Since 1978, however, at least ten state legislatures have reworded the purpose statements of their juvenile codes[203] to reduce or eliminate the emphasis on "the exclusive role of rehabilitation in the child's best interest."[204] These words conveyed a commitment to an ethic of care in dealing with juvenile

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197. VT. STAT. ANN. tit. 33, § 5501(a)(1)-(2) (1991).

198. *Id.*

199. *In re* N.H., 135 Vt. 230, 234, 373 A.2d 851, 855 (1977).

200. VT. STAT. ANN. tit. 33, § 5501(a)(2) (1991).

201. MEYER, *supra* note 3, at 183.

202. *Punitive Court*, *supra* note 31, at 447. *See generally Juvenile Court*, *supra* note 31; Walkover, *supra* note 31.

203. Barry C. Feld, *Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 842 n.84 (1988).

204. *Punitive Court*, *supra* note 31, at 447.

delinquents. The newly amended purpose statements tend to reflect a nearly exclusive commitment to an ethic of justice by "elevat[ing] the importance of public safety, punishment, and individual and juvenile justice system accountability."[205] In fact, the State of Washington's amended purpose statement has been described as an adoption of "a *justice* model juvenile code that emphasize[s] just deserts rather than individualized treatment."[206]

Although consistent parenting demands that the purpose statement of Vermont's juvenile code be changed to accommodate the reality that not all juvenile delinquents need or deserve to be protected from "the taint of criminality," the idea is not to adopt language that elevates the ethic of justice over the ethic of care or vice versa. Rather, the idea is to seek a balanced expression of these two ethics that will mirror and sustain the balance between a juvenile law of justice and a juvenile law of kindness.

Vermonters inclined toward juvenile justice reform may find a helpful model in neighboring Canada, which clarified and reorganized its approach to juvenile justice in 1984. Canada's Young Offenders Act of 1984 features eight fundamental principles, some of which would be directly relevant to reforming the Vermont juvenile code purpose statement. Section 3 of the Canadian act declares that:

> [W]hile young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behavior as adults, young persons who commit offenses should nonetheless bear responsibility for their contraventions . . . . [Y]oung persons who commit offenses require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance.[207]

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205. *Id.*

206. *Id.* at 448. Feld argues further that like Washington State, the following states are evincing changes in philosophical attitudes toward juvenile delinquency treatment: Arkansas, California, Florida, Hawaii, Indiana, Minnesota, Texas, Virginia, and West Virginia. *Id.*

207. Paul Calarco, *Juvenile Justice in Canada*, 15 UPDATE ON LAW-RELATED EDUC. 5 (1991).

This statutory language reflects precisely the balance that Vermont needs in its own juvenile code between an ethic of justice and an ethic of care. The ethic of justice is articulated in the Canadian statutory language which speaks of society's right to visit responsibility on even its young members for their actions.

This concern for justice is complimented, however, by an articulation of the needs that connect young people to their communities. Children need discipline and control so that they know not to trespass upon the rights and well-being of others. Where the statutory language foresees that children need discipline and control to learn to behave in a caring manner, the language also contemplates that an adult society must care for its young by supervising them, guiding them, and assisting them as they take their place in the web of their communities.

Indeed, both adults and children have rights and responsibilities vis-à-vis each other, and it is appropriate to stress these rights and responsibilities in a statutory expression of a state's parenting philosophy. These rights and responsibilities derive from the biological, emotional, cultural, and economic ties between children and adults, to which past statutory expressions of parens patriae have attempted to pay tribute. In the interest of expressing a clear parental purpose and practicing parental consistency, this web of connection continues to warrant explicit articulation along with a new expression of the rights that adults and juveniles enjoy against each other. A parens patriae that statutorily describes a vision of care and justice can then, with good conscience, realize its vision by maintaining a rehabilitative juvenile justice system that emphasizes due process, discipline, and community membership while showing children the compassion and mercy they need to learn from their mistakes.

CONCLUSION

The history of juvenile justice in America has been the struggle of a noble ideal to survive a record of failed good intentions. It has been a contest between voices of justice and voices of care, each perspective vying to be heard.

Through a Gender Difference analysis, some of the philosophical reasons that account for parens patriae's poor track record

have been exposed. At its inception, parens patriae was a doctrine dominated by the voice of "maternal guidance." Seventy years later, after parens patriae had failed to eradicate juvenile delinquency, the United States Supreme Court stopped short of declaring parens patriae unconstitutional. However, the Court introduced the voice of "paternal authority" into juvenile delinquency treatment by insisting that juvenile delinquents were more likely to reform if judges showed them "fairness, impartiality and orderliness" in place of "motherly tenderness" and "maternal guidance." The future of parens patriae is not yet settled, but the early returns suggest that America's juvenile delinquents will increasingly find themselves being adjudicated in adult criminal courts.

Vermont is an excellent showcase for reforming parens patriae because, even after the Essex Junction tragedy, some of Vermont's published case law concerning juvenile delinquents suggests that the state continues to believe in trying to reach errant, wayward youths through rehabilitation before writing them off as nothing more than miniature adult criminals who belong in adult court and in adult jails with adult cellmates who will reinforce their criminal tendencies. This note encourages Vermonters to stick with parens patriae at a time when their neighbors are abandoning the concept. Armed with a reformed foundational parens patriae philosophy based on modern parenting principles, Vermont would have a sound basis for retaining its enlightened disposition toward the treatment of juvenile offenders, not as adults, but as children in need of help.

J. Elizabeth Tierney