Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children

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Introduction

Fifteen-year-old Jenny Flores, fleeing oppression and civil war, surreptitiously enters the United States to join her mother, who came before her to establish a safe haven. Unfortunately, Jenny is apprehended at the border by the INS and placed in a detention cell with adults of both sexes. She is strip searched. She is told she must make choices. A guard tells Jenny that she will be released if her mother comes to claim her, but the other detainees tell her that he is lying because if her mother comes, she too will be arrested and put in detention.

Jenny is afraid and alone.

Someone from the local legal services agency arrives to assist the detained children. Jenny meets with the nice person who, in Spanish, explains her options. She can voluntarily leave the United States or present a claim for asylum. She cannot be released to a nonrelative. Depending on her choice, she will remain in detention indefinitely, as the asylum process is long. Requesting asylum protects her from being returned to her war-torn country, but will not free her from confinement.

Is Jenny a good child—vulnerable and in need of protection—or a bad juvenile, mature and capable of effectuating due process rights? Can she simultaneously be characterized as both good and bad to accomplish indefinite detention? According to the United States Supreme Court, she is both good and bad, and as a result, both her procedural and substantive due process rights are limited in a fashion that allows indefinite detention. The significance of the distinction is an ever-present delineation used to determine when and how children's due process rights will be afforded.[1]

Children, as nonvoting actors in society, cannot advocate for their own rights.[2] Instead, their rights are determined by others. The way advocates and judges analyze appropriate standards for children usually fails to consider the child's concerns, actual abilities, or realities. One such method of obscuring due process analysis of children is to categorize them as either "good" or "bad."

1. *See* Flores v. Meese, 681 F. Supp. 665, 666-67 (C.D. Cal. 1988), *rev'd*, 934 F.2d 991 (9th Cir. 1989), *rev'd*, 942 F.2d 1352 (9th Cir. 1991) (en banc), *rev'd sub nom.* Reno v. Flores, 113 S. Ct. 1439 (1993).

2. *See* ALAN N. SUSSMAN, THE RIGHTS OF YOUNG PEOPLE 13 (1977).

Adjudicatory decisions reveal an unspoken and often unrecognized dichotomy between "good children" and "bad juveniles."[3] In response to this dichotomy, this Article advances a theory that requires an evaluation of the individual child's ability to claim or exercise due process rights. Children, as individuals in this society, are entitled to a fair determination of their liberty interests. By rejecting substitutes for those interests, often in the form of different characterizations, a determination of the individual capability is advanced. Application of this theory is necessary to ensure consideration of the complexity of a child's reality. In the absence of this requirement, the interests of children are often lost in the tug of war between the interests of parents and the state.[4]

Generally, the Supreme Court has distributed due process rights based on an implicit categorization of youth as either good or bad. When referring to good children, the Court has often acknowledged the legitimacy of children's requests for due process protection, but nevertheless denied or limited their rights.[5] This denial is shielded either by a parens patriae[6] approach invoked when the rights of the

3. In this Article, I focus on the due process cases decided by the United States Supreme Court. As a starting point, I have taken those cases identified in Susan G. Mezey, *Constitutional Adjudication of Children's Rights Claims in the United States Supreme Court, 1953-92*, 27 FAM. L.Q. 307, app. at 323 (1993).

Due process cases: DeShaney v. Winnebago County Dep't Social Servs., 489 U.S. 189 (1989) (state's duty to protect child); Schall v. Martin, 467 U.S. 253 (1984) (pretrial detention); Secretary of Pub. Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979) (procedure for voluntary commitment); Parham v. J.R., 442 U.S. 584 (1979) (procedure for voluntary commitment); Ingraham v. Wright, 430 U.S. 651 (1977) (corporal punishment in schools); Goss v. Lopez, 419 U.S. 565 (1975) (school suspension without hearing); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (jury trial for juveniles); *In re* Winship, 397 U.S. 358 (1970) (standard of proof in juvenile court); *In re* Gault, 387 U.S. 1 (1967) (right to counsel); Kent v. United States, 383 U.S. 541 (1966) (waiver of jurisdiction by juvenile court).

Cases implicating privacy interests, or that pit the interests of parents against the state, are beyond the scope of this Article. Despite their exclusion, much of the analysis relevant to the due process determinations may also apply to those cases.

4. *See* Jerry A. Behnke, Note, *Pawns or People?: Protecting the Best Interests of Children in Interstate Custody Disputes*, 28 LOY. L.A. L. REV. 699 (1995); *infra* notes 98-100 and accompanying text (demonstrating that children's rights are resolved in a bilateral nature, measuring the rights of the parents and the state but not those of the child).

5. *See, e.g.*, *infra* notes 66-70 (*Parham v. J.R.*), 96-100 (*DeShaney*) and accompanying text.

6. The parens patriae power has been defined by Professor Rendleman as a mechanism to protect the dependent and neglected:

> Under the English common law it was recognized that "the care of all infants is lodged in the king as parens patriae and by the kind [sic] this care is delegated to the Court of Chancery." In protecting neglected and dependent children chancery courts used what are called "equitable powers" the essential ideas of which

state supersede those of the child,[7] or a best-interest analysis invoked when the rights of parents are supreme.[8] In both of these situations, the Court has declared that the children are vulnerable and thus incapable of being entrusted with the power to independently or fully exercise due process rights.[9] At the same time, the Supreme Court has granted due process rights to bad juveniles. This was not done, however, to provide meaningful protection to individuals. Instead, the grant legitimized punishment against juveniles seen as perpetrators of harm.[10] Granting due process rights in this circumstance failed to evaluate the child's ability to effectuate those rights.

The extension of due process rights is complicated further when unaccompanied children are suspected of being undocumented immigrants.[11] *Reno v. Flores*[12] is an excellent example of when the Court's use of language created a dichotomous characterization that camouflages unfair treatment. In *Flores*, the Court applied two different characterizations to unaccompanied, undocumented immigrant children, both of which led to the approval of indefinite detention

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> are flexibility, guardianship, and a balancing of interests in the general welfare, with a view to getting a fairer result than could be obtained by applying the older more rigid rules.

Douglas R. Rendleman, Parens Patriae: *From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 256 (1971) (footnote omitted).

7. Limitations on the liberty interests of children are based on one of three principle rationales rooted in the parens patriae power: "the vulnerability of minors to harm, their lack of mature judgment, and maintenance of family authority." Lee E. Teitelbaum & James W. Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153, 160 (1978).

8. "The 'best interests' standard developed via the doctrine of parens patriae, and although beyond precise definition, basically holds the child's interest 'paramount' over other considerations." Suzanne D. Strater, *The Juvenile Death Penalty: In the Best Interests of the Child?*, 1995 A.B.A. SEC. INDIVIDUAL RTS. & RESP. HUM. RTS. J. 12.

9. *See infra* notes 41-43 and accompanying text.

10. *See infra* notes 17-20 and accompanying text.

11. The majority of the children in question were sent by their parents to the United States to escape the violence in their home country. Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159, 160 (1990); Peri H. Alkas, Note, *Due Process Rights for Unaccompanied Alien Minors in the United States*, 14 HOUS. J. INT'L L. 365, 371 (1992) (noting the children endured acts that make them prime candidates for the psychological condition Post Traumatic Stress Disorder).

Yet, compare their status with the admission of unaccompanied minor children as part of the overseas refugee program: unaccompanied children admitted to the United States as refugees, despite holding the same status, are afforded rights that do not exist for the plaintiff children in *Reno v. Flores*, 113 S. Ct. 1439 (1993). The refugee children are not held in detention facilities, but placed in homes subject to "home study evaluations." For a further analysis of these children's rights, see Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 YALE L. & POL'Y REV. 137, 154-69 (1989).

12. 113 S. Ct. 1439 (1993).

while eliminating or minimizing their substantive and procedural due process rights.[13] The Court determined that unaccompanied minors had neither a substantive due process right of release from INS detention,[14] nor a procedural due process right to an automatic review of their custody by the INS.[15] As a result, indefinite detention of minors by the INS was accomplished by reducing the due process liberty right of freedom from confinement to little more than a hollow slogan.

Part I of this Article defines the categories of "good children" and "bad juveniles," examines the definition of "good children" in historical context, and provides the same analysis for "bad juveniles." Part II further develops these categories by examining selected United States Supreme Court cases. This examination reveals that the Court grants due process rights to "bad children," and denies such rights to "good children."[16]

Part III focuses on *Reno v. Flores* and evaluates the different characterizations used by the Court in the decision. It finds that the difference in language used to characterize the children sheds some light on the "packaging" of children, which in turn shapes the Court's perception and, hence, the rights that will be extended to them. Part IV concludes that due process rights of children should be decided on

13. This Article will not address the overriding issue of plenary power that exists in the area of immigration law. Justice Scalia refers to this doctrine, citing Fiallo v. Bell, 430 U.S. 787, 792 (1977) and Mathews v. Diaz, 426 U.S. 67, 81 (1976) in support of the denial of rights, stating: "If we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles (concededly the overwhelming majority of all involved here) who are aliens." *Flores*, 113 S. Ct. at 1449. Although the plenary power is articulated, it is not the focus of the Court's analysis and will not be the focus of this Article. For a more in-depth analysis of the scope of the plenary power issue, and its potential influence on this issue as an issue involving immigration, see Arthur C. Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. REV. L. & SOC. CHANGE 353, 367 (1986); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 972-91.

14. *Flores*, 113 S. Ct. at 1447.

15. *Id.* at 1450-51.

16. Due process analysis traditionally states that until the deprivation is significant, there is not an entitlement of rights, and at the same time, the entitlement increases with increases in deprivation. *See* John Denvir, *Justice Rehnquist and Constitutional Interpretation*, 34 HASTINGS L.J. 1011, 1019 (1983) (noting the first step in due process analysis is identification of property or liberty interest at stake); *see also In re* Gault, 387 U.S. 1 (1967) (adopting due process protections in juvenile proceedings designed to effectuate punishment). Despite this analysis, however, the use of categorization may obscure whether due process rights are applied in a particular context since children's conduct may sometimes be innocent and culpable at the same time. *See, e.g.*, *Flores*, 113 S. Ct. 1439 (1993). For this reason, the revelation about the significance of the categories contributes significantly to the legal discourse.

a case-by-case basis in the context of the right advanced, without being obscured by a "good" or "bad" characterization of the class or individual child. This approach would focus on the ability of the child and thus facilitate protection of constitutional liberty interests covered by the Due Process Clause.

I. Defining the Classes

The use of two different categories to characterize children becomes apparent when the language of juvenile welfare dependency and neglect cases and civil commitment cases is compared with language used in juvenile adjudications involving criminal acts.[17] The former cases speak of the parties as vulnerable children in need of the protection of parents or the state.[18] In the latter cases, the children are labeled as juvenile delinquents or mature individuals capable of comprehending consequences and able to make choices about their actions. Accordingly, punishment may be imposed as a consequence of their bad acts.[19] The existence of punishment, or perceived punishment, is important in establishing when due process rights will be extended to juveniles.[20]

Categorizing children as good or bad minimizes their due process rights both as individuals and as "persons"[21] within the meaning of the Constitution, allowing for an amorphous shifting of their rights. Good children's rights are limited by invoking parens patriae power.[22] The

17. Generally speaking, delinquents are children charged with criminal law violations, whereas children in need of supervision are status offenders, that is, they are charged with committing acts that are illegal only for minors, such as truancy or running away from home. In contrast, in the neglect cases, it is the parents who are accused of mistreating their offspring.

Irene M. Rosenberg, Essay, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 165 n.6.

18. Justice Powell advanced this theory in Bellotti v. Baird, 443 U.S. 622, 634 (1979), justifying the limitations on children due to "the peculiar vulnerability of children." This was also the notion which formed the foundations of the creation of juvenile courts. *See* Mack, *infra* note 20, at 109-10.

19. The notion of delinquency has also evolved to the point where the term connotes criminal behavior. At least one juvenile court judge has advocated for the extension of commitment laws and reduction in the privacy rights that have surrounded the juvenile court process. *See* Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57, 83-93 (1992).

20. *See infra* note 54 and accompanying text. Compare the early development of the juvenile court process where reformers, in fashioning the juvenile court, worked to eliminate punishment to remove the stigma associated, with adjudication in adult criminal courts. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109-10 (1909).

21. *See In re* Gault, 387 U.S. 1, 13 (1967).

22. *See* Mack, *supra* note 20, at 109-10.

Court has justified upholding the power of parents by stating that the children are vulnerable and in need of protection not provided by the parents.[23]

Similarly, rights of bad juveniles are also limited because "juveniles, unlike adults, are always in some form of custody."[24] Thus, there is no need to evaluate their ability to exercise rights. When rights are granted, it is used to justify the retributive power of the state over the child.[25] Additionally, granting a right presumes maturity on the part of the juvenile without determining whether the individual choices are consistent with constitutional norms as applied to adults.[26]

The following sections more closely analyze attributes that the United States Supreme Court has assigned to good children and bad juveniles, and explores the dichotomous treatment in its historical context.

A. The "Good Children"

Early reformers placed an emphasis on the need to protect the "vulnerable youth" in society.[27] They spoke of children as innocent, wayward, and in need of guidance that was either lacking or insufficient in the home.[28] To ensure protection for these youth, the early

23. *See infra* notes 77-79 and accompanying text.

24. Schall v. Martin, 467 U.S. 253, 265 (1984) (citing Lehman v. Lycoming County Children's Servs., 458 U.S. 502, 510-11 (1982)).

25. *See, e.g.*, Nat Stern, *The Burger Court and the Diminishing Constitutional Rights of Minors: A Brief Overview*, 1985 ARIZ. ST. L.J. 865, 865 (noting under the Burger Court there was a clear move away from a recognition of independent constitutional rights for children in favor of a "excessive ascendancy of the state").

26. The range of constitutional autonomy that may be claimed by children is not coextensive with that of adults. Teitelbaum & Ellis, *supra* note 7, at 159. This position should be contrasted with the conclusions of Professor Melton, who states: "The capacity to perceive and evaluate the intentionality of behavior does not translate directly into the capacity to form criminal intent." Gary B. Melton, *Taking* Gault *Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 155 (1989); *see generally* Scharf & Hess, *infra* note 49 (noting the studies of Professor Grisso demonstrate that, in the constitutional context, minors do not exercise their rights).

27. *See generally* Barbara B. Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 B.Y.U. L. REV. 497, 500 & nn.8-9 (describing early state intervention into decisions traditionally made by the family).

28. That the originators of the juvenile court system viewed children as basically good is demonstrated by the object of the court "was invariably referred to as 'the child,' the 'boy or girl' or 'the lad.' Calling teenaged lawbreakers 'children' was not disingenuous rhetoric. Rather, it demonstrates that the social construction of adolescence as a species of childhood powerfully informed the ideology and practice of the parens patriae juvenile court." Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1101 (1991).

juvenile courts were designed in a manner broad enough to allow the state to both assist parents with difficult, unruly children and take children from parents incapable of caring for them.[29] To implement these objectives, status offenses, such as truancy and curfew violations, as well as dependency and neglect proceedings, evolved for the "protection" of the child.[30]

In the early 1900s, the parens patriae power emerged from commonlaw chancery to justify action by the state against parents,[31] and supplanted the custody rights of parents and the liberty interests of children. The liberty interests of children were also limited by a "best interest" analysis that emerged in civil custody determinations.[32] The common theme of both doctrines was that children are unable to protect themselves.[33] Two convergent theories about the nature of children supported their inability to make independent choices.[34] The first was a Calvinist doctrine, which focused on the badness of children, characterizing the young as "inherently sinful and doomed to spiritual death."[35] The second was an Enlightenment approach, in which children were viewed as "innately innocent beings,"[36] advancing the philosophy that good children, in their own interest, required nurturing and protection by the state and parents.[37] Additionally, the

29. *See* Mack, *supra* note 20, at 113. Alternatively, Professor Rendleman notes that the distinction between "those [children] who were threatened by their environment and those who were objective threats to the environment," arose from a duality in treatment deriving from poverty versus criminality. Rendleman, *supra* note 6, at 215 (providing an excellent treatment of the history of this duality and its effect on the current state of the parens patriae doctrine).

30. *See, e.g.*, Reno v. Flores, 113 S. Ct. 1439 (1993) (status offense); *supra* text accompanying note 8.

31. The parens patriae power came to represent the power of the state to control by "either analogy to the chancery power of parens patriae" or by the inherent sovereignty of the state to protect the interests of children. Rendleman, *supra* note 6, at 240.

32. JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 7 (1979). The United Nations Convention on the Rights of Children articulated this best interest approach and its deference to parents or others who are legally responsible parties in assessing whether the best interest is achieved. *See* Roger J.R. Levesque, *The Internationalization of Children's Human Rights: Too Radical for American Adolescents?*, 9 CONN. J. INT'L. L. 237, 277 n.195 (1994); *infra* note 297.

33. *See* Barbara B. Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1038-41 (1992) (discussing rise of children's rights as a contrast to other movements).

34. *See* Ainsworth, *supra* note 28, at 1093-94. In addition, there is great debate about the emergence of a reconstructed view of childhood. For an excellent treatment of the competing notions of children, see Levesque, *supra* note 32, at 243-52.

35. Ainsworth, *supra* note 28, at 1093.

36. *Id.* at 1094.

37. *Id.*

emergence of ideas or beliefs that indicated children were different than adults furthered a shift in the treatment of children.[38] Criminal culpability was linked to new discoveries about the different developmental stages and reasoning assigned to children.[39] It generally was agreed that these stages could more effectively be molded by guidance and treatment rather than through punishment.[40]

Coinciding with a notion of the parens patriae power as authorizing state responsibility for wayward children, who were viewed as members of a vulnerable class,[41] the early juvenile courts replaced adult courts.[42] Based on the notion that the children were in need, the jurisdiction of the juvenile court was designed to provide guidance and rehabilitation and protect society at large by isolating them.[43]

The next section briefly examines how the "bad juvenile" theory emerged from reform efforts which presumed badness or wrong-doing on the part of offenders.[44] Today's philosophy prevails to the extent that treatment and rehabilitation are nearly forgotten. Juveniles viewed as bad are systematically taken out of juvenile courts and

38. *Id.*

39. Patricia H. Miller, *Theories of Adolescent Development, in* THE ADOLESCENT AS DECISION-MAKER, 13-46 (Judith Worrell & Fred Danner eds., 1989) (summarizing the various theories of adolescent development); *see also* Lee E. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 B.Y.U. L. REV. 351, 386-89 (discussing the research of culpability for minors).

40. "Early child guidance clinics developed around the juvenile court system, in which due process concerns for the respondents' personal liberty were sacrificed in the name of 'treatment,' often for noncriminal behavior that was, though perhaps bothersome, arguably a product of 'normal' adolescent groups." Gary B. Melton & Nancy S. Ehrenreich, *Ethical and Legal Issues in Mental Health Services for Children, in* HANDBOOK OF CLINICAL CHILD PSYCHOLOGY 1035, 1036 (C. Eugene Walker & Michael C. Roberts eds., 2d ed. 1992).

41. As noted above, during the 1800s, a shift occurred that moved the state to intervene in cases where, by legislative definition, children who were suffering, abandoned, neglected, or improperly exposed to harm, became the target of child saving societies. Rendleman, *supra* note 6, at 226.

42. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 824 (1988) ("The juvenile court movement attempted to remove children from the adult criminal justice and corrections systems and provide them with individualized treatment in a separate system."); *see also* Levesque, *supra* note 32, at 249-50 n.50.

43. Claudia Worrell, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine*, 95 YALE L.J. 174, 176 (1985). At the same time, common-school movements emerged, which Levesque argues was an effort to subjugate working class and immigrant children. *See* Levesque, *supra* note 32, at 249 n.50.

44. *See* Martha G. Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725, 788-92 (1994) (noting two of the early movements designed to "save children," the Houses of Refuge and the Orphan Train Movement, were regimented and designed to pull the youths from their former "dirty" environments into areas of order and cleanliness, a notion consistent with retrieving the children from badness).

treated as adults to exact greater punishment.[45] The distinctions between children who are good and juveniles who are bad is demonstrated by the current treatment of bad juveniles.

B. The "Bad Juveniles"

"From a world in which the *child* by definition was morally incapable of committing a crime, we have now passed to a world in which *juveniles* are to be held strictly accountable for their crimes."[46] As the juvenile court was established as a mechanism to divert troubled youth from adult criminal courts, diversion to juvenile court provided an alternative to punitive sanctions in the form of treatment or rehabilitation.[47] At the outset, courts distinguished between bad juveniles, who needed rehabilitation through isolation from society, and good children, who needed protection from adverse social conditions.[48]

Once categorized as bad, juveniles were placed in either juvenile delinquency proceedings that resemble criminal trials or adult criminal trials.[49] Since *In re Gault*,[50] substantial procedural protections have developed in juvenile proceedings.[51] The addition of these safe-

45. As if the gunshots summoned them, legislators in Colorado, Utah, and Florida met in special sessions this fall and enacted measures making it easier to prosecute teen-agers as young as 14 as adults. A half-dozen other states took similar steps earlier this year, and many more are considering them.

Laura Mansnerus, *Treating Teen-Agers as Adults in Court: A Trend Born of Revulsion*, N.Y. TIMES, Dec. 3, 1993, at B7.

46. *See* Ainsworth, *supra* note 28, at 1105 (emphasis added).

47. *Id.* at 1100-01; *see, e.g.*, Martin, *supra* note 19, at 60 n.8, 65-68 (chronicling the history of the juvenile court movement); Sarah H. Clark, Note, *Substantive Due Process in a State of Flux: Should Courts Develop New Fundamental Rights for Alien Children?*, 72 B.U. L. REV. 579, 582 (1992).

48. *See* Mack, *supra* note 20, at 121-22 (The purpose of the juvenile system "'is to help all it can, and to hurt as little as it can; it seeks to build character—to make good citizens rather than useless criminals. The state is thus helping itself as well as the child, for the good of the child is the good of the state.'") (citation omitted).

49. This Article will not address the issue of children in adult courts. The due process rights afforded to children in this context, however, may not be meaningful if, as the data suggests, the children are incapable of exercising the rights competently. *See* Irene Scharf & Christine Hess, Comment, *What Process is Due? Unaccompanied Minors' Rights to Deportation Hearings*, 1988 DUKE L.J. 114, 115. Furthermore, where the transfers are being made to adult criminal court, there is an increasing tendency to do so without evaluating the nature of the offender as was traditional in the juvenile court. Today, the transfers are being made under automatic waiver statutes, which are defined by the offense and not by the offenders' amenability to be rehabilitated. Ainsworth, *supra* note 28, at 1112.

50. 387 U.S. 1 (1967).

51. *Gault* held that the Due Process Clause required in an adjudicatory stage of a juvenile court proceeding: written notice to the child and his parent or guardian, *id.* at 33; notice of right to have counsel or to have counsel appointed if the party is unable to afford counsel, *id.* at 41; notice of the right to remain silent since the privilege against self-incrimi-

guards created a shift in perception about the purpose of the juvenile court. Rather than rehabilitating or treating youth, juvenile courts, viewed as protecting society from the dangers posed by the youth, increased punishment against juvenile offenders.[52] Today, instead of focusing on particular individual needs, juvenile courts often focus on the punishment that should follow from the harm done by juveniles, even facilitating punishment rather than providing protection and rehabilitation.[53] With an increase in punitive action facilitated by the procedural protections, which themselves had been justified by the punitive nature of the penalty imposed, there has been a decrease in the application of the parens patriae doctrine. The juvenile court now substantially mirrors the adult system by emphasizing punishment, but unlike adults, children are limited in their ability to exercise rights.[54]

Today, society acts vigorously to punish bad juveniles under the belief that they possess maturity and well-developed cognitive skills. This approach supports a growing movement to hold juveniles accountable for criminal conduct in adult instead of juvenile courts.[55] Courts, legislatures, and the public justify this return of juvenile offenders to adult courts with data casting juvenile offenders as increas-

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nation applies, *id.* at 55; and that the right to confrontation applies, *id.* at 56-57. *But see* Feld, *supra* note 42, at 822 ("Affording juveniles procedural parity with adults as a prelude to punishment, however, raises the issue of whether there is any need for a separate juvenile system.").

52. *See* Feld, *supra* note 42, at 882-83 (noting a shift from focusing on the characteristics of the offender to a focus on the offense).

53. *Id.*; *see also* Alan Sussman, *Practitioner's Guide to Changes in Juvenile Law and Procedure*, 14 CRIM L. BULL. 311, 311 (1978) (noting trend toward increased punishment in juvenile court); Teitelbaum, *supra* note 39, at 351-52 (describing an increase in juvenile court orders related to the offense and harm done rather than the child's personal needs).

54. *See, e.g.*, Ainsworth, *supra* note 28, at 1105 ("As a consequence of the general disillusionment with rehabilitative penology, the focus of the criminal justice system turned from assessing the social needs of the offender to assessing the social harm that the offender caused—in short, from rehabilitation to retribution."); *see also* McKeiver v. Pennsylvania, 403 U.S. 528, 546 n.6 (1971) (reiterating that "'the guiding consideration for a court of law that deals with threatening conduct is nonetheless protection of the community'") (citation omitted).

55. *Compare* Mansnerus, *supra* note 45, at B7 *with* Martin, *supra* note 19, at 83-89 (juvenile court judge advocating, as a remedy to the perceived problem of dangerous juveniles, the elimination of the shield of confidentiality in juvenile proceedings and increasing periods of confinement).

ingly more violent,[56] thus possessing sufficient maturity to be granted rights[57] and receive severe, adult-style punishment.[58]

Even when rights are extended, however, children are not brought into parity with adults. Instead, the grant of rights legitimates punishment of youth for the harm they have inflicted, while simultaneously disadvantaging youth who are not capable of maturely exercising those rights.[59]

The next part of this Article evaluates due process cases decided by the United States Supreme Court to illustrate the different language patterns of good children and bad juveniles when discussing whether due process rights apply. The language is significant because it acts as a short cut in due process analysis. The rights of good children are limited because they are vulnerable, while the rights of bad juveniles are granted to justify exacting retributive punishment, without assessing the ability of the child.

II. The Distinctions Applied

A. The Good Children

Categorizing children as good has the unfortunate effect of denying or limiting their due process rights. Due process rights are not afforded to good children because they are believed to be vulnerable,

56. *See* Kristina H. Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999, 1002-03 (1991) (arguing violent behavior is on the rise because of gangs and drugs); Michael J. Dale, *The Supreme Court and the Minimization of Children's Constitutional Rights: Implications for the Juvenile Justice System*, 13 HAMLINE J. PUB. L. & POL'Y. 199, 201 (1992) [hereinafter Dale, *Minimization of Children's Constitutional Rights*] (noting perceptions held about juveniles include the notion that children and schools are more violent); Michael J. Dale, *Children Before the Supreme Court: In Whose Best Interests?*, 53 ALB. L. REV. 513, 521 (1989) [hereinafter Dale, *Children Before the Supreme Court*] (noting the appearance of violence was accompanied by a "need to 'get tough' with children [that] was embraced by the Burger and Rehnquist Courts"); Mansnerus, *supra* note 45, at B7 ("'Juveniles have become more violent and deadly, and kill at much younger ages.' said Chuck Quackenbush, a Republican in the California State Assembly . . . ."). *Contra* Teitelbaum, *supra* note 39, at 370 (asserting there is "little evidence to support the claim that violent behavior by or against children is greater now than in the past").

57. *See* Dale, *Minimization of Children's Constitutional Rights*, *supra* note 56, at 201; *see also* Strater, *supra* note 8, at 10-11 (noting "'with every brutal crime by a child, a troubled nation demands longer jail sentences, tougher treatment, even the death penalty—anything to stop the violence.'") (citation omitted).

58. Melton, *supra* note 26, at 153 ("In fact, if research contradicts the Piagetian hypothesis at all, it generally is in the direction of competence of even younger minors to make personal decisions."); *see also infra* notes 187-199 and accompanying text.

59. *See* Fare v. Michael C., 442 U.S. 707, 723 (1979); *infra* notes 197-199 and accompanying text.

a condition that makes them either incapable of effectively or knowingly executing rights, or otherwise in need of an overriding parens patriae protection vested in the state.[60] The effect of this approach is a de facto limitation of children's rights, which is often justified as being in the best interest of the child.[61] The following cases demonstrate the effect of the good child—bad juvenile dichotomy in mental health, child protection, corporal punishment, and criminal cases. In each of these areas, the rights of children are limited or denied altogether by a superior interest of the state or the parents acting on behalf of the child.

1. The Mental Health Confinement Case

Parham v. J.R.[62] demonstrates the use of the good child language, which effectively limits a recognized due process right to freedom.

a. The Majority Opinion

In finding that commitment to one of eight regional hospitals in Georgia constituted a "severe deprivation of a child's liberty,"[63] the district court held that the procedural due process required to protect this liberty interest "'include[d] at least the right after notice to be heard before an impartial tribunal.'"[64] It also found a substantive due process requirement to give "nonhospital treatment to those members of appellees' class who would benefit from it."[65]

In reversing, the Supreme Court summarily acknowledged the liberty interest under the Due Process Clause,[66] and noted that, notwithstanding a child's liberty interest, "in the voluntary commitment setting, . . . parents . . . retain a substantial, if not the dominant, role in the decision."[67] By justifying the need for parental decision-making, the majority focused on the vulnerability of the children and

60. *See* Dale, *Minimization of Children's Constitutional Rights*, *supra* note 56, at 222 (noting the reformulization of the parens patriae approach has minimized the rights of children); *see also* William S. Geimer, *Juvenileness: A Single-Edged Constitutional Sword*, 22 GA. L. REV. 949, 972 (1988) (arguing protectionist attitudes toward children are invoked to deny rights to juveniles).

61. The parens patriae power is often used to justify substantial infringements on the liberty interests of children. *See* Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1168 (1984).

62. 442 U.S. 584 (1979).

63. *Id.* at 597.

64. J.L. v. Parham, 412 F. Supp. 112, 137 (M.D. Ga. 1976), *rev'd sub nom.* J.R. v. Parham, 442 U.S. 584 (1979).

65. *See Parham*, 442 U.S. at 597.

66. *Id.* at 600.

67. *Id.* at 604.

applied the good-child prong of the dichotomy to limit the child's choice for freedom from detention.[68] Such reasoning minimizes a constitutional right solely because the person exercising the right is a minor construed as a vulnerable child.

The Supreme Court, in its reasoning, looked at procedures used in commitments instituted by parents and the state. The Court noted that the child had an interest in not being committed, but stated that "since this interest is inextricably linked with the parents' interest in and obligation for the welfare and health of the child, the private interest at stake is a combination of the child's and parents' concerns."[69] When the parents were the moving parties, there was a presumption on the part of the Court that the parents, "absent a finding of neglect or abuse," played a major role in the decisionmaking process and were guided by the "best interests" of the child.[70]

The language used by the Court in describing the class captures the good child image. The two named parties, J.L. and J.R., were referred to as "the child"[71] and "a neglected child"[72] respectively. Consistently throughout the opinion, references were made to these individuals as "children" not capable of independently exercising a constitutional right simply because they were children. The Court distinguished these children from the "bad juveniles" of *Gault* by noting that the effect of a ruling of commitment is not the equivalent of "being labeled by the state as delinquent, criminal, or mentally ill and possibly dangerous."[73] They were further distinguished as good children when the Court noted that the power of the parents to act in the child's best interest was found in the law's concept of the family, which "rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[74] The vulnerability of the children was reinforced when the Court noted: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment."[75] This sort of reasoning limits the liberty interest advanced by the children. The power of the parents, subject to agreement of an examining physi-

68. *See id.* at 613-15.
69. *Id.* at 600 (footnote omitted).
70. *Id.* at 604.
71. *Id.* at 589.
72. *Id.* at 590.
73. *Id.* at 600.
74. *Id.* at 602.
75. *Id.* at 603.

cian, preempted the district court's conclusion that the children's constitutional liberty interest had been violated and precluded an independent analysis of their individual abilities to exercise due process rights.[76]

The interests of the child are also subordinated to those of the state. The majority concluded that no additional procedural requirements were necessary when the state was the moving party.[77] Citing a state statute that created a presumption that the state will act in the best interests of the child,[78] the Court found that the agency was acting in loco parentis.[79] This power, linked to the parens patriae power, further subjected the constitutional rights of the child to state authority. The underlying notion was that the child's desire for freedom was too ill-informed to be weighed against the interests advanced by the parents or state.

b. The Dissent

The dissent referred to the class experiencing unwanted confinement as "Georgia's institutionalized juveniles,"[80] thereby rejecting the vulnerable good child portrayal of the majority opinion in favor of an image of mature juveniles. The dissent would have vested maturity, not vulnerability, in the class. The existence of maturity, in turn, justified granting constitutional rights that presumptively can be exercised by the class. These rights would obligate the state to provide postcommitment hearings in cases where the parents seek to voluntarily commit juveniles, and precommitment hearings where the state seeks commitment.[81] Contrasting this situation with privacy cases, in which full due process rights were extended to the parties,[82] the dissent justified limited intervention by the parents because of a break in familial structure deriving from the illness of the juvenile.[83] Using a balancing

76. *See id.* at 604.

77. *Id.* at 617-18.

78. *Id.* at 618; *see* GA. CODE ANN. § 24A-101 (1996).

79. *Parham*, 442 U.S. at 619.

80. *Id.* at 625, 634 (Brennan, J., concurring in part and dissenting in part).

81. *Id.* at 633, 635, 638-39 (noting both hearings would have appointed representatives for the interest of the minors).

82. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 72-75 (1976).

83. *Parham*, 442 U.S. at 635 (Brennan, J., concurring in part and dissenting in part); *see supra* note 3 (privacy cases are beyond the scope of this Article). As raised in *Danforth*, however, the distinction between the legitimate privacy interest of the "child" turned on the Court's perception of the family relationship and an individual assortment of the minor's decisionmaking ability. In *Parham*, "a break in the family autonomy has actually resulted in the parents' decision to surrender custody of their child to a state mental institution." *Parham*, 442 U.S. at 631. This distinction does not eliminate the possibility of

test, however, that weighs the individual assessment of the child against a medical determination of need,[84] the dissent only found procedural due process sufficiently protected where a postcommitment hearing was provided.[85] The dissent's approach would have required procedural due process, making the test consistent with procedural protection afforded in adult commitment cases.[86]

The dissent also rejected the paternalistic parens patriae notion advanced in support of the state's authority to commit the children, noting that the social worker-child relationship should not be given the deference accorded to parents.[87] Doing so, the dissent argued, would be the equivalent of stating that "criminal trials are unnecessary since prosecutors are not supposed to prosecute innocent persons."[88] Where a child is a ward of the state, the dissent would have required a precommitment hearing, equating the commitment process to a criminal proceeding[89] and characterizing the treatment as "confinement."[90] Accordingly, because good children are punished in the same way that bad juveniles are punished, they should also be given rights. Carefully avoiding language that portrayed the class as children, the dissent focused on the confinement of juveniles. Its choice of language powerfully argued for heightened protection when punishment is at issue.[91]

In *Parham*, both the majority and dissent used language to create images about the class. By serving as a short-hand method of determining whether due process rights should exist, the images minimized a true constitutional analysis based on the facts of the case. Under this framework, the children's desire—and constitutional right—to be

adopting standards consistent with the cases as a remedy to blanket categorizations of children.

84. *See Parham*, 442 U.S. at 635.

85. *Id.* at 633.

86. *Id.* at 627. For an excellent discussion of the right of competent adults to make treatment decisions and the methods employed by the court in balancing paternalism and autonomy, see Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science*, 37 VILL. L. REV. 1569, 1581-86 (1992).

87. *Parham*, 442 U.S. at 638.

88. *Id.* at 637.

89. *Id.*

90. *Id.* at 638.

91. Some would argue that this is the basis of all extensions of due process; however, I contend that the extension of due process is accorded and punishment exacted because the class is characterized as bad juveniles. This is apparent when contrasting the dissent's characterization with that of the majority. In each instance the same children exist, but the descriptions are different. *See supra* notes 69-76 and accompanying text.

free from unwanted confinement was not independently evaluated because the categories determine when rights are appropriate. Similarly, in the following case, a four-year-old child's due process rights were subordinated to the right of his father.

2. *The Child Protection Case*

In *DeShaney v. Winnebago County Department of Social Services*, the majority opinion declared that the state's failure to protect an individual against private violence did not constitute a substantive violation of the Due Process Clause.[92] The Court held that the Clause imposed no duty on the state "to provide members of the general public with adequate protective services."[93] The Due Process Clause, the Court reasoned, "is a limitation on the [s]tate's power to act, not . . . a guarantee of certain minimal levels of safety and security."[94] Accordingly, while the clause forbids the state itself from depriving individuals of life, liberty, and property without due process of law, it cannot be read "to impose an affirmative obligation . . . to ensure that those interests do not come to harm through other means."[95]

The approach of the *DeShaney* Court is one more example of the limitations placed on the due process rights of minors classified as vulnerable children. Joshua, the four-year-old victim of his father's abuse, was often paternalistically described as a "child."[96] In this case, the rights of Joshua were subordinated to the greater rights of both his father and the state. The Court acknowledged that Joshua was his father's victim, but found that the state, although aware of his plight, had no affirmative duty to act to protect him.[97] Articulating a belief that it was acting in Joshua's best interest, the Court deferred to Joshua's father. The Court reinforced its opinion by claiming that any state action taken without certainty of danger to Joshua would have

92. 489 U.S. 189, 200 (1989).

93. *Id.* at 197; *see* Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659, 684 (1990) ("In *DeShaney* the Court rejected the argument that certain 'special relationships' created or assumed by the state with respect to particular individuals impose an affirmative constitutional duty on the states to protect citizens.").

94. *DeShaney*, 489 U.S. at 195.

95. *Id.* at 194-97.

96. *Id.* at 194.

97. [T]he harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.

Id. at 201.

been premature and may have subjected the state to a due process action by his father.[98] Although the Court was sympathetic to Joshua's plight,[99] the parental authority of his father, accompanied by a presumption that he acted in the best interest of Joshua, precluded state responsibility. Joshua's independent claims of freedom from physical harm at the hands of his father were without constitutional recourse because he was categorized as a good child whose due process interests were best determined by others.[100]

Illustrating that the position of the majority was not the only position consistent with prior precedent, the dissent relied on *Estelle v. Gamble*[101] and *Youngberg v. Romeo*,[102] cases which also imposed due process responsibility on the state. Equating Joshua's plight with that of the "incarcerated individuals" in these other cases,[103] the dissent introduced the bad juvenile aspect of the dichotomy and recharacterized Joshua. The juvenile language was used not to conclude that Joshua was a bad child, but to argue for the application of higher due process protection by distancing Joshua from the vulnerable child language used by the majority to deny him rights as a victim subject to parental authority.[104]

In *DeShaney*, both the majority and dissenting opinions barely acknowledged the existence of the victim, focusing instead on the tug

98. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.

Id. at 203.

99. "Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them." *Id.* at 202-03.

100. For an excellent discussion of the family violence aspects of the case, and a rejection of the bright line custody test adopted by the Court, see Oren, *supra* note 93, at 700-17.

101. 429 U.S. 97 (1976).

102. 457 U.S. 307 (1982).

103. *DeShaney*, 489 U.S. at 205 (Brennan, J., dissenting) ("This initial action rendered these people helpless to help themselves or to seek help from persons unconnected to the government."); *see Estelle*, 429 U.S. at 104 ("It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.") (citation omitted); *Youngberg*, 457 U.S. at 317 ("When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioners that a duty to provide certain services and care does exist. . . .").

104. *See supra* notes 77-79 and accompanying text.

of war between the father and the state.[105] This treatment resulted in a decision that did not address the individual liberty interests of Joshua, demonstrating why Joshua's separate constitutional standing should not be determined by a classification as either a good or bad child. The dissent urged that the constitutional analysis must focus rather on a child's liberty interest to be free from physical abuse, but could not afford Joshua protection under the current approach since rights of minors are nonexistent in the face of the superior right of parents.[106]

The next section reveals a similar result in corporal punishment cases, where good children are denied procedural protection because the superior parens patriae power articulated by the school minimizes the individual liberty claims of the students.

3. *Good Children and the Eighth Amendment*

In *Ingraham v. Wright*, the Court described the class as one comprised of "recalcitrant student[s]"[107] who received punishment as part of a long "'accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children.'"[108] The Court framed the issue as one involving minor correction for the benefit of the student, and reinforced this notion by asserting that "limited corporal punishment may be necessary in the course of a child's education."[109] In this situation, "there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege."[110]

Thus, *Ingraham* is another illustration of the Court allowing an infringement on an otherwise recognized constitutional right.[111] In finding that a school child could be disciplined as a method of bringing responsibility to her "mischievous head," the Court emphasized that

105. *See generally* Oren, *supra* note 93.

106. 489 U.S. at 203-12 (Brennan, J., dissenting). Since there was not an adjudication against the father terminating his rights, the parens patriae power of the state to intervene was limited. *Id.* at 201.

107. 430 U.S. 651, 656 (1977).

108. *Ingraham*, 525 F.2d 909, 917 (5th Cir. 1976), *quoted in Ingraham*, 430 U.S. at 656.

109. *Ingraham*, 430 U.S. at 676.

110. *Id.* "At common law a single principle has governed the use of corporal punishment since before the American Revolution: Teachers may impose reasonable but not excessive force to discipline a child." *Id.* at 661.

111. The Court acknowledged that "corporal punishment in public schools implicates a constitutionally protected liberty interest, but [held] that the traditional common-law remedies are fully adequate to afford due process." *Id.* at 672.

"discipline" is distinct from punishment.[112] The Court did not refer to the children as bad, but concluded that limitations on their due process rights are justified because the discipline is for their own good.

The Court extended power to the state under the parens patriae power to justify compulsory education, then found a coextensive parens patriae power to justify disciplining the children.[113] Neither the acts of the children nor the children themselves were the focus of the Court.[114] Instead, the school's need for a quiet work environment free from disruption, and its need to respond quickly, superseded the rights of the children.[115] Not even procedural protection in the form of a prepunishment hearing was required.[116]

Describing the class as children, the majority emphasized their wayward nature.[117] In this way, the class was distinguished from juveniles, whose acts were the focus of punishment.[118] In contrast, the dissent focused on punishment and the act involved. The dissent characterized the issue as "whether spankings inflicted on public schoolchildren for breaking school rules is 'punishment.'"[119] In focusing on the acts, and determining that the consequence was punishment for "classroom misconduct," the dissent created an image consistent with the bad juvenile, and would have required a prepunishment hearing to ensure that procedural due process concerns were addressed.[120] The dissent noted that the punishment was:

> an institutionalized response to the violation of some official rule or regulation proscribing certain conduct and is imposed for the purpose of rehabilitating the *offender*, deterring the *offender* and others like him from committing the violation in the future,

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112. *Id.* at 656, 676-77.

113. *Id.* at 676-80.

114. *Id.* at 662. The Court noted that the authority to exert corporal punishment does not derive from the parents, but rested with compulsory education laws that allow the state to "impose such corporal punishment as is reasonably necessary 'for the proper education of the child and for the maintenance of group discipline.'" *Id.* (quoting 1 FOWLER V. HARPER & FLEMING JAMES JR., LAW OF TORTS § 3.20, at 292 (1956) (footnote omitted)).

115. *Id.* at 681-82.

116. *Id.* at 682. Professor Irene Rosenberg notes that this is simply a reinforcement of the traditional adult-child authoritarian relationship aimed at the incorporation of children into conduct traditionally accepted by society. To reach this goal, if there is a dispute about the power of the parent and the state (as there was in this case), the power will go to the party that upholds the more traditional values. Irene M. Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 697-98 (1980).

117. *Ingraham*, 430 U.S. at 659.

118. *See infra* note 178 and accompanying text.

119. *Ingraham*, 430 U.S. at 685 n.1 (White, J., dissenting).

120. *Id.* at 684.

> and inflicting some measure of social retribution for the harm that has been done.[121]

In this manner, the dissent framed the issue as one involving "offenders" entitled to due process protection, focusing on punishment for their conduct and retribution by society, instead of on their particular vulnerabilities as children in need of protection from harm.[122]

Ingraham highlights the linguistic images used by proponents and opponents of children's rights. The parens patriae position used by the state limited the rights of children by articulating a protective function that trumped the due process protection claimed by the class.[123] Unfortunately, as a result, these children exist as objects and not individuals. The next section illustrates that, even in juvenile court, good children have limitations placed on their due process rights.

4. Juvenile Court: Acknowledged but Limited Rights

The children in the juvenile court proceedings of *Schall v. Martin*[124] and *McKeiver v. Pennsylvania*[125] were denied rights to pretrial detention hearings and jury trials. Characterizing the parties as "children," and minimizing their culpability for the specific acts involved, the Court in both of these cases acknowledged a general need for due process protection, but refused to extend that right to children.

These cases further illustrate when children have allegedly engaged in criminal conduct, and are in juvenile proceedings that traditionally have required due process rights, they are characterized as good children, with the result that the Court limits their constitutional rights. These "children," unlike the "juveniles" discussed previously, have a vulnerability that is deemed to outweigh their maturity and justifies limiting their due process rights.

In *Schall v. Martin*, the Supreme Court acknowledged the applicability of the Due Process Clause to juvenile proceedings,[126] but stated that it did not apply to juveniles, as juveniles are "always in some form of custody."[127] In framing the issue as a method for the

121. *Id.* at 685-86 (emphasis added).

122. *Contra* Goss v. Lopez, 419 U.S. 565 (1975); *see infra* notes 178-186 and accompanying text.

123. *Ingraham*, 430 U.S. at 680-82.

124. 467 U.S. 253 (1984).

125. 403 U.S. 528 (1971).

126. *Schall*, 467 U.S. at 263.

127. *Id.* at 265 (citing Lehman v. Lycoming County Children's Servs., 458 U.S. 502, 510-11 (1982) and *In re* Gault, 387 U.S. 1, 17 (1967)).

state to protect the children from their own future conduct,[128] the Court supported this paternalistic view by citing cases that characterized the child as incapable of making competent choices without guidance.[129] The Court specifically distinguished detention from punishment[130] and found that the state had a legitimate, nonpunishment related purpose for the detention.[131] Because the "child"[132] was held in a nonsecure facility, the child was found to have a reduced claim to liberty.[133] Secure detention was also upheld as part of the regulatory scheme of the state pursuant to the parens patriae power and the state's objective in protecting the child.[134]

The procedural protection afforded under the state statutory scheme was justified by language that more fervently embraced a description of the parties as juveniles.[135] Further demonstrating the shift in language accompanying the grant or denial of due process rights was the Court's assertion that procedural due process rights exist, and that the current procedures were sufficient to protect the interests of "the juvenile."[136] Although subtle, this shift in language limited good children's rights and extended bad children's rights. By granting due process protection, in the form of release from pretrial custody, the lower court also characterized the class as juveniles.[137] Without assessing the individual ability to exercise due process rights, these rights were nevertheless granted, as the Court focused on the punitive nature of the detention and the juvenile's maturity.[138]

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128. The Court noted that the state has an interest in "*protecting* a juvenile from the consequences of his criminal activity . . . and from the downward spiral of criminal activity into which peer pressure may lead the *child*." *Id.* at 266 (emphasis added).

129. *Id.* (citing L.O.W. v. District Court, 623 P.2d 1253, 1258-59 (Colo. 1981), Morris v. D'Amario, 416 A.2d 137, 140 (R.I. 1980), and Iddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

130. *Id.* at 269.

131. *Id.* at 271.

132. "The assessment unit places the *child* in either nonsecure or secure detention. Nonsecure detention involves an open facility in the community, a sort of 'halfway house,' without locks, bars, or security officers where the *child* receives schooling and counseling and has access to recreational facilities." *Id.* at 271 (emphasis added) (citations omitted).

133. *Id.*

134. *Id.*

135. *See, e.g.*, *id.* at 275 ("[T]he accused juvenile is given full notice of the charges against him and a complete stenographic record is kept of the hearing.").

136. *Id.* at 275-77.

137. *See id.* at 262. "'[T]he vast majority of *juveniles* detained under [§ 320.5(3)(b)] either have their petitions dismissed before an adjudication of delinquency or are released after adjudication.'" *Id.* (quoting Martin v. Strasburg, 689 F.2d 365, 369 (2d Cir. 1982)).

138. *See id.* at 262.

The dissent never characterized members of the class as children, but instead focused on the punitive aspects of preventive detention.[139] The dissent used the term "child" only when referring to the decisions of the lower court or of the majority.[140] By drawing an analogy to adult punishment, the dissent argued that the liberty interest should not be abridged in the absence of a "weighty public interest [which] is substantially advanced by the statute."[141]

The goals advanced by the majority—protecting society at large and protecting the child from harm—were rejected by the dissent as insufficient to allow infringement of the liberty interests.[142] The dissent also would have found the procedural protection insufficient because of the punitive nature of the statute and its application, which compelled a higher level of constitutional protection than required by the majority.[143] This approach, however, failed to assess the ability of the party to exercise the right. In conformity with the bad juvenile language, this higher standard was supported by the characterization of the class as juveniles.

In *McKeiver v. Pennsylvania*, the Court rejected the plaintiffs' request for a jury trial in the adjudicative phase of a juvenile court hearing.[144] The plaintiff class characterized the proceedings as equivalent to the adult criminal procedure, which required a jury trial.[145] The *McKeiver* Court, however, distinguished the juvenile process from adult criminal trials by focusing on the "possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."[146] By emphasizing a view of juvenile court as "fed in part by humanitarian compassion for offenders who were children,"[147] the Court shifted its focus to the paternalistic purposes of the juvenile court.[148] Unfortunately, this shift ignored the

139. *Id.* at 290-92 (Marshall, J., dissenting).

140. *See, e.g., id.* at 284-85, 289.

141. *Id.* at 291 ("[P]retrial detention of a juvenile pursuant to § 320.5(3)(b) gives rise to injuries comparable to those associated with imprisonment of an adult.").

142. *Id.* at 293.

143. *Id.* at 304-06.

144. 403 U.S. 528, 550-51 (1971) (plurality opinion).

145. *Id.* at 541-42. The Court had held in Duncan v. Louisiana, 391 U.S. 145, 149 (1968) that the Sixth Amendment guarantee of a jury trial applied to the states through the Fourteenth Amendment because "trial by jury in criminal cases is fundamental to the American scheme of justice."

146. *McKeiver*, 403 U.S. at 545.

147. *Id.* at 545 n.6 (citation omitted).

148. *Id.* at 550.

issue of whether the individual can and should be allowed to have a procedural hearing. Thus, the Court adopted a paternalistic view to justify a denial in what would otherwise be recognized as a case involving deprivation of liberty.

While the Court noted that the system had failed,[149] the dissent did not refer to the appellants as children. Neither did it refer to the humanitarian goals of the juvenile system. Instead, the dissent focused on the similarities between juvenile proceedings and adult criminal trials, and concluded that the Due Process Clause demands a jury trial in juvenile cases.[150] Although this reasoning suggested a framework for an independent analysis of due process rights claimed by the class,[151] the dissent's approach was not fully framed by the individual rights accorded under the Constitution. Instead, it too was constrained by applying the label of bad juveniles to the class, who then receive social retribution for their acts. Based on this punitive function, rather than an immediate evaluation of present concerns, the dissent argued that constitutional due process protection must be extended.[152]

Both *Schall* and *McKeiver* demonstrated the Court's use of good children language to avoid the full-fledged constitutional analysis that is required when children are treated as persons rather than vulnerable parties subject to the protection of the state. The next section describes the abandonment of this vulnerability approach. The language and analysis advanced by the Court demonstrates an absence of vulnerability. Instead, the cases focused on the acts of the parties in a manner that characterized them as bad. In this context, due process rights were afforded. However, the grant of rights was linked to justifying punishment of the juvenile.

B. The Bad Juveniles

In *Kent v. United States*[153] and *In re Gault*,[154] the United States Supreme Court recognized the rights of juveniles who were subject to

149. *Id.* at 543-44 (stating that "fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized").

150. *Id.* at 560 (Douglas, J., dissenting).

151. *See id.* app. at 563 (Douglas, J., dissenting) (reprint of Rhode Island family court opinion discussing issues that would be the focus on adult liberty analysis, such as the trauma faced by juveniles, the effect on judicial backlog, the use of a public trial, and the jury of peers).

152. *Id.* at 558.

153. 383 U.S. 541 (1966).

154. 387 U.S. 1 (1967).

proceedings in juvenile court.[155] Noting that the proceedings were not themselves criminal in nature, but would have been had the parties been adults,[156] the *Gault* Court focused on the actions involved and not on the vulnerabilities of the parties as children.[157] In both cases, the Court extended rights to juveniles based on the social compact that exists with all citizens,[158] and rejected less informal proceedings as an inadequate protection of the parties' rights.[159]

The *Kent* Court found a reflection of criminal proceedings in the juvenile court,[160] but ignored an alternative approach that would have applied in those cases where juveniles' acts make them "bad" in the eyes of society, or where society sought retribution for the harm. This latter approach, established in *Gault* the following year, was the justification for extending rights without evaluating the child's ability to exercise them.[161]

By focusing on the curative purposes of the juvenile court, Justice Stewart's dissent illustrates language used to invoke paternalistic concern and care and eliminate the need to extend rights. Justice Stewart noted that:

> Whether treating with [sic] a delinquent child, a neglected child, a defective child, or a dependent child, a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of

155. *Kent* required waiver hearings to comport with due process. *See Kent*, 383 U.S. at 562. *Gault* provided the additional due process requirements of notice, representation by counsel, and protection against self-incrimination. *See Gault*, 387 U.S. at 33, 41, 55, 57-58.

156. *Gault*, 387 U.S. at 17; *see id.* at 68 (Harlan, J., concurring in part and dissenting in part) (noting the determination of whether juvenile courts are civil or criminal is too imprecise to decide the application of the Fourteenth Amendment).

157. *Id.* at 17. The early notion of the juvenile court system was that children needed to be protected from the formality of procedure and that "society's duty to the child could not be confined by the concept of justice alone." *Id.* at 15. The fact that *Gault* focused on bad children is demonstrated by its limited application to cases involving criminal offenses. It has not been held to apply to noncriminal status offenses. Rosenberg, *supra* note 116, at 662 n.33 (citations omitted).

158. *Gault*, 387 U.S. at 19-20. The Court indicated that "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." *Id.* (footnote omitted).

159. *Id.* at 21. The Court rejected the articulated purposes of the juvenile court and the notion of parens patriae as a justification for the nonapplication of rights. *Id.* at 17-21; *Kent*, 383 U.S. at 554-56.

160. *Kent*, 383 U.S. at 562. The Court made this clear in *Gault*, as well, by focusing on "whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." *Gault*, 387 U.S. at 13.

161. *See Ingraham*, 430 U.S. at 684-86 (White, J., dissenting); *see also infra* text accompanying notes 190-192.

> the one is correction of a condition. The object of the other is conviction and punishment for a criminal act.[162]

He would have limited the application of due process rights to facilitate the needs of society in dealing with the child whose parents "'knew of their right to counsel, to subpoena and cross examine witnesses, of the right to confront the witnesses against Gerald and the possible consequences of a finding of delinquency.'"[163] Justice Stewart rejected the criminal court parallel drawn by the majority, and emphasized the parental power to act in the child's best interest.

The good children language often leads to a limitation of rights, while the utilization of the bad juveniles language signals a shift which provides rights as well as punishment.[164] Contemporaneously, the analysis was focused on the acts of the offenders. The following sections highlight the characterization of "bad juveniles" as mature—a maturity invoked by the Court to justify an extension of constitutional rights, based in part on the execution of punishment, without reference to the social compact which initially framed the rights in *Gault*.[165]

1. Double Jeopardy

In *Breed v. Jones*, the juvenile court initially found that the defendant had violated a criminal statute.[166] In a unanimous decision, the Supreme Court granted due process rights to juveniles by holding that the prosecution of the defendant as an adult in a California superior court triggered the Double Jeopardy Clause of the Fifth Amendment.[167]

The defendant was defined by the Court as a juvenile. This use of the term juvenile allowed the Court to rely on the precedents of *Gault* and *Winship* in determining that the juvenile court proceeding was, in fact, a criminal proceeding, which justified the extension of due process rights. Drawing on the defendant's actions, rather than on vulnerabilities that might be corrected by an adjudication and treatment plan implemented in the juvenile court, the Court's discussion focused on the harm allegedly done by the defendant.[168] The transfer of the case to an adult court was also influenced by the lower court's conclu-

162. *Gault*, 387 U.S. at 78-79 (Stewart, J., dissenting).
163. *Id.* at 81 (quoting *In re* Gault, 407 P.2d 760, 763 (Ariz. 1965), *rev'd*, 387 U.S. at 21).
164. *See* Duncan, *supra* note 44, at 788-92.
165. *See supra* note 158 (discussing social compact).
166. 421 U.S. 519, 520 (1975).
167. *Id.* at 528-41.
168. *Id.* at 524 n.6.

sion that the defendant was "unfit for treatment as a juvenile."[169] The lower court opinion revealed little concern about the background or social needs of the child, and simply ordered him to be prosecuted as an adult.[170]

With the foregoing conclusion, the Supreme Court effectively declared that, since the rehabilitative aspects of the juvenile court would not assist the accused, no further individualized determination of his needs must occur.[171] At the same time, recasting the accused as a juvenile formalized the conclusion that he also lacked the vulnerable characteristics of a good child, and thus eliminated the need for the juvenile court to retain jurisdiction or exercise the goals of the parens patriae power. Seeing this as an application of adult punishment, the Court made "applicable in [the] juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions."[172] In effect, the Court was saying that, because punishment will be exacted,[173] an application of due process is required.

The contrast between this case and those in the previous section stands as a striking reminder of the disparity in treatment that results when the notion of vulnerability of children is eliminated and they are instead characterized as juveniles. The following cases yield further examples of the bad juvenile image resulting in exacting punishment.

2. *The Suspension Case: Due Process Goes to School*

In *Goss v. Lopez,* the majority granted procedural due process rights, in the form of pre- or post-suspension hearing procedures, to children suspended from school.[174] The term "child" was used only once in the majority opinion.[175] At all other times, members of the class were referred to either by name or as students who were en-

169. *See id.* at 524 (citation omitted).

170. *See id.*

171. This punishment is based on social retribution. *See supra* notes 46-48.

172. *Breed,* 421 U.S. at 528-29 (citing *In re* Gault, 387 U.S. 1 (1967) and *In re* Winship, 397 U.S. 358 (1970)).

173. "As we have observed, the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.'" *Id.* at 529. (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 548-49 (1943)).

174. 419 U.S. 565, 581 (1975).

175. "[T]he total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended *child.*" *Id.* at 576 (emphasis added).

gaged in "misconduct."[176] The Court focused not on the school's need to maintain discipline, as in *Ingraham*,[177] but on the punishment imposed—suspension from school—and acts of the student that invited it. Treating the suspension as a form of punishment, a conclusion supported by punitive language in the record,[178] the majority determined that constitutional due process was unquestionably applicable.[179]

The dissent demonstrated the other side of the dichotomy, by using the terms "child" and "children" much more frequently, and analyzed the issue as one involving the right of schools to exercise control and discipline[180] over them.[181] Pointing to precedent that distinguished and diminished the rights of children from those extended to adults,[182] the dissent applied the individual liberty interest of the children on the grounds that the rights of children are not "coextensive with those of adults."[183]

The dissent's attempt to justify the constitutional limitation, based on the immaturity of the children, is another example of opinions that characterize children as vulnerable.[184] Because the dissent perceived the teacher-pupil relationship as one in which the teacher takes on the role of parent-substitute,[185] the parental authority was used to limit due process rights. The class in this case can be analogized to the "children" in need of corporal punishment in *Ingraham v. Wright*.[186]

176. Because the seriousness of the misconduct charges, if sustained and recorded, could seriously damage the students' reputation, as well as interfere with later educational and employment opportunities, the Court required due process. *Id.* at 574-75.

177. *See supra* note 116 and accompanying text.

178. *Goss*, 419 U.S. at 574-75.

179. *Id.*

180. The dissent lamented what it perceived as a shift in power from the school to the courts, noting: "The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools." *Id.* at 585 (Powell, J., dissenting).

181. "I would conclude that a deprivation of not more than 10 days' suspension from school, imposed as a routine disciplinary measure, does not assume constitutional dimensions." *Id.* at 587.

182. "Moreover, the Court ignores the experience of mankind, as well as the long history of our law, recognizing that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults." *Id.* at 590-91.

183. *Id.* at 591 (citing Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring)).

184. "When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied . . . ." *Id.* at 593.

185. *Id.* at 594 (citation omitted).

186. *See supra* note 108 and accompanying text.

3. Self-Incrimination—the Fifth Amendment Case

In *Fare v. Michael C.*, the Court granted Fifth Amendment rights to the defendant, but found that he knowingly waived the right to remain silent.[187] The majority referred to this defendant as "the accused" or as "a juvenile,"[188] reinforcing the bad juvenile characterization. The majority cites to the lower court's description of a "'16 and a half year old minor who has been through the court system before, has been to [probation] camp, has a probation officer, [and is not] a young, naive minor with no experience with the courts,'"[189] a passage which evokes little concern about the welfare of a vulnerable child.

In *Fare*, the defendant failed to recognize the constitutional distinction between requesting to speak with his parole officer and requesting to speak with an attorney,[190] a nuance which, according to the majority, the accused was bound to recognize in the formal distinction in function between an attorney and a parole officer.[191] This reasoning precluded Michael's attempt to invoke his right to silence when he asked for his parole officer instead of an attorney.[192]

However, the constitutional analysis did not end with the grant of the right. The Court went on to apply a totality-of-the-circumstances test to determine the defendant's ability to knowingly waive the right.[193] The California Supreme Court had invoked a per se rule with regard to *Miranda*, and did not address the totality of the circum-

187. 442 U.S. 707, 725-26 (1979) (5-4) (holding request to speak to probation officer during police interrogation not a per se *Miranda* violation).

188. In the case, the term "juvenile" is used over 50 times, and "accused" is used over 25 times. *Id.* at *passim.*

189. *Id.* at 713.

190. The *Fare* opinion, however, is more troubling for another reason. Implicit in the majority opinion is an assumption that Michael C., the juvenile in this case, was mature enough to understand that he was waiving his *Miranda* rights by requesting to talk to his probation officer. This assumption suggests that juveniles are somehow similar to adults for purposes of Fifth Amendment protection; an assumption that illustrates the remarkable change in the Court's attitude toward children from that found in *Gallegos* and *Haley*, the early police interrogation cases in which the Court was solicitous of the special status of children.

Dale, *Children Before the Supreme Court*, *supra* note 56, at 536.

191. *Fare*, 442 U.S. at 723.

192. *Id.* ("The State cannot transmute the relationship between probation officer and juvenile offender into the type of relationship between attorney and client that was essential to the holding of *Miranda* simply by legislating an amorphous 'duty to advise and care for the juvenile defendant.'") (quoting Fare v. Michael C., 579 P.2d 7, 10 (Cal. 1978), *rev'd*, 442 U.S. at 725-26).

193. *Id.* at 725.

stances regarding waiver.[194] By characterizing Michael as a bad juvenile, the Court also presumed his competence to waive the right. The Court imposed standards of knowledge that comported with his presumed maturity, noting—as it would in the case of an adult defendant—that "[t]here is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be. He was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit."[195] This analysis contrasts with that of the lower court and of the dissent. The latter two instances focused on the rehabilitative function of the juvenile court system and on the function of the parole officer. The lower court found that the officer was "'a trusted guardian figure who exercises the authority of the state as parens patriae and whose duty it was to implement the protective and rehabilitative powers of the juvenile court,'"[196] which supported a categorization of the defendant as a vulnerable child—or at least as one in need of the rehabilitative functions of the juvenile court system. Further, according to Justice Marshall's dissent, the defendant was entitled to additional assistance by virtue of his immaturity.[197]

In the dissenting opinion of Justice Powell, the defendant was referred to as a "young person, 16 years old at the time of his arrest and the subsequent prolonged interrogation at the station house."[198] According to Justice Powell, "he was immature, emotional, and uneducated, and therefore was likely to be vulnerable to the skillful, two-on-one, repetitive style of interrogation to which he was subjected."[199] Reflecting the good-child prong of the dichotomy, his decision ad-

194. The totality-of-the-circumstances inquiry was rejected, with the court stating:

> Here, however, we face conduct which, regardless of considerations of capacity, coercion or voluntariness, per se invokes the privilege against self-incrimination. Thus our question turns not on whether the [respondent] had the ability, capacity or willingness to give a knowledgeable waiver, and hence whether he acted voluntarily, but whether, when he called for his probation officer, he exercised his Fifth Amendment privilege. We hold that in doing so he no less invoked the protection against self-incrimination than if he asked for the presence of an attorney.

Michael C., 579 P.2d at 10-11, *quoted in Michael C.*, 442 U.S. at 707.

195. *Michael C.*, 442 U.S. at 726-27.

196. *Id.* at 713-14 (quoting *Michael C.*, 579 P.2d at 10).

197. *Id.* at 730 (Marshall, J., dissenting) (citing with approval the determination of the lower court that "[t]he juvenile defendant, in the Court's view, required 'the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not.'") (quoting Gallegos v. Colorado, 370 U.S. 49, 54 (1982)).

198. *Id.* at 733 (Powell, J., dissenting).

199. Appellant's Brief at 54-82, *cited in Michael C.*, 442 U.S. at 733.

vanced the argument that this defendant did not have the ability to knowingly waive *Miranda* rights.

Although the majority used the bad juvenile image and granted rights, there was a void in the independent analysis about the circumstances of the individual. The case in the next section reveals that the use of both characterizations has significant consequences for the class in which minors are too vulnerable to be released and yet sufficiently mature to affirmatively request procedural due process. The effect of these disparate characterizations is the loss of constitutional protections.

III. *Reno v. Flores*

A. Facts and Procedural Background

In *Reno v. Flores*,[200] the plaintiffs were unaccompanied, undocumented minor children, detained by INS officials in one of three Western Region sites: Los Angeles, San Diego, or El Centro.[201] Once detained, deportation proceedings were initiated,[202] and without any articulated suspicion, they were routinely strip searched for weapons and contraband.[203] The plaintiffs challenged this action as a Fourth Amendment violation,[204] and the district court enjoined the searches as unconstitutional.[205] Despite this victory, the children remained in the indefinite custody of the INS. Under a Western Region policy adopted in 1984, unaccompanied minors in deportation proceedings were detained without bail unless they were claimed by a parent or legal guardian.[206] This treatment in deportation cases contrasted sharply with exclusion proceedings[207] and deportation proceedings

200. 113 S. Ct. 1439 (1993).

201. *See* Alkas, *supra* note 11, at 367; Kathleen M. Keith, Comment, *Deportation Proceedings—Protecting the Constitutional Rights of Alien Minors In Deportation Proceedings*, Flores v. Meese, 906 F.2d 396, 15 SUFFOLK TRANSNAT'L L.J. 316, 316 n.4 (1991).

202. Exclusion proceedings, which are not at issue in the present case, involve aliens apprehended before "entering" the United States. 8 U.S.C. § 1226(a) (1994). Deportation proceedings apply once entry has been accomplished. 8 U.S.C. § 1251 (Supp. 1995).

203. *See* Linda R. Coffey, Note, *Detention of Juvenile Aliens*, 16 SUFFOLK TRANSNAT'L L.J. 292, 293 (1992).

204. Flores v. Meese, 681 F. Supp. 665, 669 (C.D. Cal. 1988), *rev'd,* 934 F.2d 991 (9th Cir. 1989), *rev'd*, 942 F.2d 1352 (9th Cir. 1991) (en banc), *rev'd sub nom.* Reno v. Flores, 113 S. Ct. 1439 (1993).

205. *Flores*, 681 F. Supp. at 669.

206. 8 C.F.R. § 242.24 (1996); Alkas, *supra* note 11, at 375 (noting adoption of new regulations regarding release of deportable minors); Richard A. Karoly, Note, Flores v. Meese: *INS' Blanket Detention of Minors Invalidated*, 22 GOLDEN GATE U. L. REV. 183, 184 (1992).

207. 8 C.F.R. § 212.5(a)(2)(ii) (1995).

conducted outside the Western Region, where minors were not only released to parents and guardians but to other responsible parties as well.[208] The minors in *Reno v. Flores* filed an action against the INS challenging the policy on equal protection grounds.[209] According to the court, the INS failed to rationally justify broader release in exclusion proceedings than in deportation proceedings.[210] The court upheld the challenge and enjoined enforcement of the indeterminate detention in deportation proceedings.[211] In addition, the court required a procedural hearing to determine whether the plaintiffs should be released to a nonparent.[212] The INS responded in 1988 by applying the restrictive rule nationwide to both deportation and exclusion proceedings.[213] The plaintiffs went back to court and once again the district court enjoined the policy, this time on grounds that it deprived the respondent class of its liberty without procedural due process.[214]

This holding affirmed substantive due process rights and found a fundamental right to liberty from physical restraint that cannot be infringed if a responsible party is able to take custody and assure the

208. This was consistent with the language found in the Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, § 504, 88 Stat. 1109, 1135 (1974). The Western Region, like other INS regions in the United States, adopted the procedure, which authorizes the release of a juvenile charged with an offense:

> to his parents, guardian, custodian, or *other responsible party (including, but not limited to, the director of a shelter-care facility)* upon their promise to bring such juvenile before the appropriate court when requested by such court unless the magistrate determines, after hearing, at which the juvenile is represented by counsel, that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others.

18 U.S.C. § 5034 (1994) (emphasis added).

209. *Flores*, 934 F.2d at 995.

210. *Flores*, 942 F.2d at 1357; Thomas A. Bockhorst, Note, *The Constitutionality of INS Pre-Hearing Detention of Alien Children:* Flores v. Meese, 942 F.2d 1352 (9th Cir. 1991), 62 U. CIN. L. REV. 217, 219 (1993).

211. The detention was indeterminate because those who sought full administrative review of asylum applications could remain in detention for years. If relief such as asylum is granted, then the person who initially entered or attempted entry illegally may become a citizen. *See* Michael A. Olivas, Plyler v. Doe, Toll v. Moreno, *and Postsecondary Admissions: Undocumented Adults and "Enduring Disability,"* 15 J.L. & EDUC. 19, 20 (1986).

212. *Flores*, 942 F.2d at 1357-58.

213. 8 C.F.R. § 242.24 (1989).

214. *See Flores*, 934 F.2d at 996. The district court issued an order requiring INS to: (1) release minors otherwise eligible to their parents, guardian, custodian, conservator, or responsible party; (2) advise those released promptly in writing of the conditions of their release; and (3) hold a prompt hearing to determine probable cause for their arrest and the need for any restrictions to be placed upon their release. *See id.* at 1014 (Fletcher, C.J., dissenting).

children's appearance at future hearings.[215] The court also guaranteed procedural due process by requiring an automatic individualized hearing for each unaccompanied minor to determine probable cause for detention and to evaluate the reasonableness of release.[216]

The Ninth Circuit reversed in a two-to-one decision.[217] In their petition for rehearing en banc, the plaintiffs argued that the panel majority erred in failing to recognize a fundamental liberty interest.[218] In rejecting a narrow definition of the rights in question,[219] the Ninth Circuit vacated the panel opinion and affirmed the district court.[220] The en banc majority determined that the detained children had the fundamental right to be free from physical restraint.[221] Since the right abridged was classified as a fundamental liberty interest, the governmental detention could not stand "unless there is a determination that such detention furthers a significant governmental interest."[222] The en banc decision rejected the INS claim of a legitimate interest based on the welfare of the children.[223] According to the majority, the mere mention of a concern for child welfare could not justify indefinite detention where other less restrictive measures existed.[224]

Citing *Mathews v. Diaz*,[225] the court further noted that even illegal aliens enjoy Fifth Amendment due process protection,[226] indicating that the liberty right was not affected by the children's status as aliens or minors.[227] The court found that "[b]ecause the children are persons present in the United States they must be afforded procedural protections in conjunction with any deprivation of liberty."[228]

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215. *See id* at 1014.

216. *See id.* In 1987, only 5% of the arrested children asked for a hearing while nearly 85.5% asked for and received voluntary departure. Scharf & Hess, *supra* note 49, at 115.

217. *Flores*, 934 F.2d at 1013; *see* Karoly, *supra* note 206, at 187-88.

218. *Flores*, 942 F.2d at 1358.

219. The majority in the panel decision and the dissent in the en banc decision characterized the right at issue as the nonfundamental right to be released to an unrelated third party adult. *Flores*, 942 F.2d at 1377 (Wallace, C.J., dissenting); *see* Bockhorst, *supra* note 210, at 235.

220. *Flores*, 942 F.2d at 1365; *see also* Keith, *supra* note 11, at 322-27 (summarizing the action of the lower courts).

221. *Flores*, 942 F.2d at 1361-62.

222. *Id.* at 1360.

223. *Id.* at 1362-63.

224. *Id.* at 1361-62; *see also* Bockhorst, *supra* note 210, at 233 (arguing for less restrictive measures).

225. 426 U.S. 67, 77 (1976) (holding that due process rights apply to aliens).

226. *Flores*, 942 F.2d at 1354.

227. *Id.* at 1362.

228. *Id.* at 1354 (quoting *Mathews*, 426 U.S. at 77).

Procedural due process aspects of the district court order, such as providing for a hearing to determine the terms and conditions of release, were also upheld as reasonable.[229] This measure served to maintain the substantive and procedural due process rights of the class. The en banc decision was appealed to the United States Supreme Court, which granted certiorari.[230]

B. Appeal to the United States Supreme Court

In a seven-to-two decision, the Supreme Court reversed the Ninth Circuit.[231] The various opinions of the Court reflect different extensions of rights, as well as different characterizations of the class. The following sections demonstrate how the Court's use of language to create different images of children correlates to a grant or denial of rights.

1. The Majority Decision

Justice Scalia's dual characterization of the class amounted to a shift in the language that gave these children "the worst of both worlds."[232] With regard to substantive due process issues, Justice Scalia characterized the class as "children,"[233] vulnerable and subject to the parens patriae power of the INS.[234] But in the procedural due process context, Justice Scalia used the terms "aliens" or "alien juveniles,"[235] signaling a shift in his view of their ability to act on their own behalf. According to the majority opinion, the plaintiffs were simultaneously children who required the government's protection and mature juveniles who were not denied procedural due process by the affirmative requirement of having to ask for a hearing.[236] As juveniles, the members of the class were judged as being "not . . . too young or too ignorant to exercise that right when the form asking

229. *Id.* at 1364.

230. Barr v. Flores, 503 U.S. 905 (1992) (No. 91-905).

231. *Flores*, 113 S. Ct. at 1454.

232. Kent v. United States, 383 U.S. 541, 556 (1966) (Fortas, J.) (noting that pursuant to the limitations of the juvenile court, "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").

233. *See, e.g., Flores*, 113 S. Ct. at 1448 ("the government does not intend to punish the child"), 1448 ("whether private placement would be in the child's 'best interest'").

234. This finding is notwithstanding the initial INS position that argued that the policy was not adopted to protect the welfare of the children, but to prohibit liability claims against the INS. *See infra* note 278 and accompanying text.

235. *See, e.g., Flores*, 113 S. Ct at 1450.

236. *See* 8 C.F.R. § 242.2(d) (1996).

them to assert or waive it is presented."[237] The following sections more clearly demonstrate the shift in language and its due process significance.

a. The Substantive Due Process Issues

The substantive due process claims arose from the challenge to section 242.24 of title 8 of the Code of Federal Regulations, which involved a regulation that eliminated the possibility of release from detention to anyone other than a parent, legal guardian, or adult relative such as a brother, sister, aunt, uncle, or grandparent.[238] According to the majority, the substantive right did not involve detention as a form of punishment.[239] As Justice Scalia stated, "'Legal custody' rather than 'detention' more accurately describes the reality of the arrangement, however, since these are not correctional institutions but facilities that meet 'state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children.'"[240] Thus, to the extent that they protect dependent children, these facilities were categorically different from an institution which limits freedom.[241] To support his conclusion that the facilities were not houses of punishment, Scalia described them as being:

> "in an open type of setting without a need for extraordinary security measures,"[242] . . . [and they] must provide, in accordance with "applicable child welfare statutes and generally accepted child welfare standards, practices, principles and procedures," an extensive list of services, including physical care and maintenance, individual and group counseling, education, recreation

237. *Flores*, 113 S. Ct. at 1451. In addition, since the majority described the claim as a facial challenge, it would be denied as long as even one member of the class could exercise the right. *Id.* at 1446.

238. *Id.* at 1446; 8 C.F.R. § 242.2(d) (1995). This right existed in other parts of the country and in nondeportation proceedings prior to 1988. *See supra* note 208.

239. *Flores*, 113 S. Ct. at 1448.

240. *Id.* at 1445 (quoting Memorandum of Understanding Re: Compromise of Class Action: Conditions of Detention, Flores v. Meese, 681 F. Supp. 665 (C.D. Cal. Nov. 30, 1987) (No. 85-4544-RJK), *reprinted in* App. to Brief for Petitioners at 148a-205a [hereinafter Juvenile Care Agreement]).

241. Compare this with the position of Justices O'Connor and Stevens, *see infra* text accompanying notes 270, 283, who note that "recipients are required to design programs and strategies to discourage runaways and prevent the unauthorized absence of minors in care." *Flores*, 113 S. Ct. at 1458 n.4 (Stevens, J., dissenting) (citing Juvenile Care Agreement, *supra* note 240, at 173a); *see also* Alkas, *supra* note 11, at 367-71 (describing the conditions of detention as deplorable).

242. *Flores*, 113 S. Ct. at 1445 (citing Juvenile Care Agreement *supra* note 240, at 173a).

and leisure-time activities, family reunification services, and access to religious services, visitors, and legal assistance.[243]

Narrowly characterizing the right in question as an "alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution,"[244] the Court rejected respondents' claim to due process freedom from physical restraint.[245] In support of this conclusion, the Court used language that described the class as being comprised of vulnerable or dependent children, who were simply being protected by the INS because they had "no available parent, close relative, or legal guardian, [and] where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution."[246]

The least restrictive alternative, advanced by the en banc decision,[247] was also rejected by the majority because "institutional custody (despite the availability of responsible private custodians) is not unconstitutional in itself, [and therefore] it does not become so simply because it is shown to be less desirable than some other arrangement for the particular child."[248] The Court's claim that there is a major difference between "the best interests of the child"[249] and the "welfare of the child,"[250] is simply another example of the distinction between "good children" whose "best interests" must be determined, and "bad juveniles" whose welfare must be balanced against the safety of the community. The "best interest" criterion is not "the sole *constitutional* criterion . . . where their interests conflict in varying degrees with the interests of others";[251] rather, the parental and state authority counter balances the claims.

243. *Id.* (citing Juvenile Care Agreement, *supra* note 240, at 159a, 178a-185a). *Contra* Olivas, *supra* note 11, at 160; Alkas, *supra* note 11, at 371.

244. *Flores*, 113 S. Ct. at 1447.

245. *Id.*

246. *Id.* at 1448. *Contra* Timothy L. Raschke Shattuck, Note, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743, 2746-53 (1992) (establishing a framework for analyzing Justice Scalia's due process cases). Based upon the articulated approach, the Court's decision in *Flores* is contrary to traditional notions of liberty. The right to be free from physical restraint is a well-established right that should not be abandoned, unless Justice Scalia is influenced by some other unspoken policy.

247. *See supra* note 212 and accompanying text.

248. *Flores*, 113 S. Ct. at 1448.

249. *Id.*

250. *Id.*

251. *Id.*

The substantive due process analysis was shaped by the characterization of the class as children, which allowed the INS to raise the parens patriae power as a justification for refusing to release a child to an unrelated adult[252] and adversely affect the children's constitutional rights by revitalizing their interest in freedom. This approach also failed to account for the parents' rationale in not coming forward and its impact on the children.[253] Deferring to the INS also eliminated the need to evaluate the unique and complex reality of the children—the very reality which might have explained conflicts of interest between the children and INS.[254] A better solution would have been to analyze the ability of the children to participate in determining the outcome.

Finally, the Court did not indicate why release to an unrelated adult violated standards of care for minors since the Department of Justice Juvenile Justice Standards allowed for such a release in nonimmigration settings.[255] The Court's deference to the protective function of the INS in this context was apparently misplaced.

252. Ironically, a review of the early parens patriae cases would have allowed release to the adults seeking the children in the *Flores* case. As noted by Professor Rendleman, "The members of 'any duly organized or incorporated humane society having for one of its objects the protection of children from cruelty' were allowed to become guardians of the child." Rendleman, *supra* note 6, at 227. The failure to acknowledge the right is the equivalent of punishing the children to coerce the parents into the action of coming forward. *See* Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 37 (1988); Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026, 1031 (1994).

253. The plaintiffs asserted that the change in policy was a ruse to apprehend the adult. *Accord* Olivas, *supra* note 11, at 160 (noting one of the purposes of the detention is to use the children as "bait" to catch the other members of the family). Jenny Flores's mother failed to seek custody because she feared deportation proceedings would be initiated against her. Beth S. Rose, Comment, *INS Detention of Alien Minors: The* Flores *Challenge*, 1 GEO. IMMIGR. L.J. 329, 331 (1986); *see also* Gail Q. Goeke, Note, *Substantive and Procedural Due Process for Unaccompanied Alien Juveniles*, 60 MO. L. REV. 221, 223 (1995).

254. *See* Bockhorst, *supra* note 210, at 242 ("The parens patriae doctrine is laden with fundamental contradictions. It assumes that the state will act in the best interests of the child, when in fact the interests of the child may conflict with the interests of the state.") (citing Claudia Worrell, Note, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine*, 95 YALE L.J. 174, 175, 181-82 (1985)); Olivas, *supra* note 11, at 160 (arguing pressure brought to bear on the children is in an attempt to have them waive their rights to immigration hearings); Alkas, *supra* note 11, at 379 (noting coercive practices adopted by the INS to entice unaccompanied minors into conceding deportability and waiving rights).

255. *See supra* note 208 and accompanying text.

b. The Procedural Due Process Issues

When the issue was one of procedural due process, the respondent class was no longer referred to as children. Fifth Amendment rights were acknowledged,[256] but whether procedural due process existed was determined by "review[ing] in some detail the procedures the INS has employed" with regard to "alien juveniles."[257] In this context, the class was now recast as juveniles who were granted procedural due process rights. In their particular circumstances, however, the result was a furtherance of detention.[258]

The Court, focusing on an arrest by an INS officer followed by an opportunity to voluntarily depart the country,[259] noted that before voluntary departure, detained juveniles "must in fact communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list."[260] These juveniles were subsequently taken before an INS officer, who determined whether there was sufficient evidence to initiate deportation proceedings.[261] Based on this determination, an order to show cause, containing a form entitled "Notice of Custody Determination," was issued,[262] thereby notifying the individual that he or she must affirmatively request a custody determination hearing.[263]

Justice Scalia, writing for the majority, stated that "due process is satisfied by giving the detained alien juveniles the right to [request] a hearing before an immigration judge. It has not been shown that all of them are too young or too ignorant to exercise that right when the form asking them to assert or waive it is presented."[264] In the absence of such evidence, the Court presumed that "juvenile aliens" are mature enough to competently exercise that right. The image of the class

256. *See, e.g., Flores*, 113 S. Ct. at 1449.

257. *Id.*

258. *See* Fare v. Michael C., 442 U.S. 707, 724-27 (1979) (analyzing the application within the dichotomy); Scharf & Hess, *supra* note 49, at 115 (noting 85.3% of the unaccompanied minors apprehended by the INS in July-September 1987 voluntarily returned to their home country, while only 5% asked for a hearing) (footnote omitted), 123-26 (noting that children are unable to knowingly waive *Miranda* warnings, and therefore unaccompanied minors are incapable of exercising the request for a hearing); *see supra* note 190 and accompanying text.

259. *See* 8 U.S.C. § 1252(b) (1994); *Flores*, 113 S. Ct. at 1449-50; 8 C.F.R. § 242.5 (1996).

260. *Flores*, 113 S. Ct. at 1450; *see* 8 C.F.R. § 242.24(g) (1996).

261. 8 C.F.R. § 287.3 (1996).

262. *Flores*, 113 S. Ct. at 1450 (citing Form I-221S, *reprinted in* App. to Brief for Petitioner at 7a-8a).

263. *Id.* ("The alien must check either a box stating 'I do' or a box stating '[I] do not request a redetermination by an Immigration Judge of the custody decision' . . . .").

264. *Id.* at 1450-51.

as juveniles was further supported by equating this proceeding with criminal cases, in which the Court "held that juveniles are capable of 'knowingly and intelligently' waiving their right against self-incrimination."[265] Unlike vulnerable good children in need of protection, these alien juveniles were deemed to possess the ability to determine what would be in their own best interest.[266]

The bad juvenile image in the analysis resulted in a denial of a right to an automatic hearing, based on the characterization of the class as competent and able to choose action that is in their best interest. This is very different from the characterization of their vulnerability in the substantive due process context.[267] As an approach, it failed to evaluate the complex concerns of the individual members of the class.[268] Granting them rights without determining their ability to exercise them undercuts those rights and allows the INS to continue their detention.[269] The following section illustrates how the concurrence used a different characterization to limit both substantive and procedural due process rights.

2. *The Concurring Opinion*

Unconsciously reinforcing the themes of the good child—bad juvenile dichotomy, Justice O'Connor wrote separately to clarify that "these children have a constitutionally protected interest in freedom from institutional confinement. That interest lies within the core of

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265. *Id.* (citing Fare v. Michael C., 442 U.S. 770, 724-27 (1979)); *see also* United States v. Saucedo-Velasquez, 843 F.2d 832, 835 (5th Cir. 1988) (applying *Fare* to alien juvenile).

266. This is contrary to the weight of evidence, which demonstrates that children who are victims of Post Traumatic Stress Disorder are incapable of exercising their rights knowingly. *See supra* note 11. Further, these children are even more disadvantaged, and incapable of making the choice, since they are unfamiliar with the rights and processes which they are asked to evaluate.

> Because a majority of American juveniles cannot make a knowing, intelligent, and voluntary waiver of their *Miranda* rights, it is inconceivable that foreign children, not only suffering the difficulties of youth, but also unfamiliar with both the American judicial process and the English language, can make a knowing and intelligent waiver of similar legal rights.

Scharf & Hess, *supra* note 49, at 126-27 (footnote omitted).

267. *See supra* note 246 and accompanying text.

268. Many of these children are victims of severe systemic abuse. They have fled their countries in search of safety and freedom, escaping from trauma which may adversely affect their ability to act in their own best interest. Alkas, *supra* note 11, at 371; *see also* Scharf & Hess, *supra* note 49, at 123 (citing psychological data supporting the inability of detained children to voluntarily and knowingly waive legal rights).

269. *See* Scharf & Hess, *supra* note 49, at 122 (noting a waiver of rights may not be made "voluntarily, intelligently, and knowingly, [and] are [therefore] ineffective [and effect] a de facto deprivation . . . of constitutional rights") (quoting Perez-Funez v. INS, 611 F. Supp. 990, 1002-03 (C.D. Cal. 1984)).

the Due Process Clause."[270] Nevertheless, finding a core liberty interest does not end the analysis since, where children are concerned, the liberty interest was "subject to the control of their parents, and if parental control falters, the [s]tate must play its part as parens patriae."[271] Despite a heightened scrutiny analysis, the parental protection interest asserted by the INS was sufficient to meet the standard.[272]

In cases involving adults, the articulated interest was "usually a punitive interest in imprisoning the convicted criminal or a regulatory interest in forestalling danger to the community."[273] In this case, however, the determination of custody was made by the Service:

> Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane [and therefore], such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in "preserving and promoting the welfare of the child."[274]

Furthermore, it is important to the analysis that the custody was for the "welfare of the minors" and not for a punitive purpose.[275] This approach clearly articulated the good child language, which acknowledged due process rights, but then limited them by relying on a superior parens patriae purpose.

The dissent would also have found that a fundamental liberty interest existed, challenged the rationale advanced by the INS, and argued that the rights were triggered because the minors were subject to punishment. The next section examines the outcome when the children are categorized differently.

3. The Dissent

a. The Substantive Due Process Issues

Countering the majority's description of the detention as custody,[276] Justice Stevens stated that "[t]he right at stake in this case is not the right of detained juveniles to be *released* to one particular cus-

270. *Flores*, 113 S. Ct. at 1454 (O'Connor, J., concurring).

271. *Id.* at 1455 (quoting Schall v. Martin, 467 U.S. 253, 265 (1984)).

272. *Id.* at 1456.

273. *Id.* at 1454 (citing United States v. Salerno, 481 U.S. 739, 748 (1987) and Foucha v. Louisiana, 504 U.S. 71, 81-82 (1992)).

274. *Id.* at 1456 (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

275. *Id.*

276. *See supra* note 240 and accompanying text. Alternatively, Justice Stevens found:

todian rather than another, but the right not to be *detained* in the first place."[277] He described the class as being composed of "*juveniles* who pose no risk of flight, and no threat of harm to themselves or to others."[278] Justice Stevens declared the existence of a core liberty interest—"the right to be free from government confinement[, which] is the very essence of the liberty protected by the Due Process Clause."[279] Upon finding a fundamental liberty interest, the dissent searched for a compelling state interest.[280] The dissent found the rationale of the INS not to be compelling:

> This case is not about the *permanent* settlement of alien children, or the establishment of *permanent* legal custody over alien children. It is about the *temporary detention* of children that come into federal custody, which is precisely the focus of section 504 of the Juvenile Justice and Delinquency Prevention Act of 1974.[281]

The thrust of the Act and Justice Stevens's position was that the confinement in question is punishment of juveniles who are entitled to substantive due process protection.

b. The Procedural Due Process Issues

Justice Stevens also found that section 242(a) required greater procedural due process protection than the majority required. He argued for an individualized determination for each child to determine whether detention was necessary when a child does not have an authorized custodian.[282] Justice Stevens would have held that detention "on the basis of a general presumption as to the [suitability] of [particular] custodians without an individualized [determination] as to whether that presumption" ought to apply in a particular case is an

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> It makes little difference that juveniles, unlike adults, are always in some form of custody, for detention in an institution pursuant to the regulation is vastly different from release to a responsible person . . . . In many ways the difference is comparable to the difference between imprisonment and probation or parole. Both conditions can be described as "legal custody," but the constitutional dimensions of individual "liberty" identify the great divide that separates the two.

Flores, 113 S. Ct. at 1458 (Stevens, J., dissenting) (citing Morrissey v. Brewer, 408 U.S. 471, 482 (1972)).

277. *Id.* at 1468.

278. *Id.* at 1457-58 (emphasis added).

279. *Id.* at 1470.

280. *Id.* at 1468.

281. *Id.* at 1465 n.24.

282. *Id.* at 1467. He also noted that the children in question "are children who have responsible third parties available to receive and care for them; many, perhaps most, of them will never be deported." *Id.* at 1458 (footnote omitted).

infringement on a child's freedom from bodily restraint.[283] Without such an individual hearing, children without INS-approved custodians could remain detained indefinitely.[284] But "[i]f the government is going to detain juveniles in order to protect their welfare, due process requires that it demonstrate, *on an individual basis*, that detention in fact serves that interest."[285]

This conclusion was supported by the inconsistency of the INS policy with congressional preference for release of juveniles, as established in section 5034 of the Juvenile Justice and Delinquency Prevention Act.[286] Under the Act, juveniles were not to be detained when there was a "responsible party"[287] willing and able to assume care for them. The INS, however, justified its policy by advancing the notion that it served "the best interest of the child."[288] Justice Stevens argued that, by dismissing the intent behind section 504, the INS must contend that Congress was granting the Attorney General the discretion to treat alien minors better than American juveniles.[289]

The dissent's discussion of the limitation demonstrated an acknow-ledgement of the vulnerable nature of children that requires an automatic hearing to ensure access to the legal system.[290] This approach echoed the good children language, portraying the class as children who were dependent on others for full implementation of their constitutional rights.

The final aspect involving procedural due process was whether the right existed in a meaningful way if the class members must have affirmatively requested a hearing. The majority held that, insofar as a facial challenge is concerned, due process was satisfied by giving the detained alien juvenile the right to a hearing before a judge.[291] In

283. *Id.* at 1467.

284. *See Flores*, 942 F.2d at 1361-62.

285. *Flores*, 113 S. Ct. at 1469 (Stevens, J., dissenting) (citations omitted).

286. *See* S. Rep. No. 93-1011, 93d Cong., 2d Sess. § 204, at 56 (1974).

287. 18 U.S.C. § 5034 (1994).

288. *Flores*, 113 S. Ct. at 1448.

289. *Id.* at 1465 (Stevens, J., dissenting).

290. It also affirms the research that indicates that the vulnerable nature of the children affects their ability to effectuate procedural due process. *See* Scharf & Hess, *supra* note 49, at 123-27 (summarizing research that demonstrates limitation on the ability to exercise waivers).

291. *Contra supra* note 20. As Judge Rymer pointed out in her separate opinion in the Court of Appeals:

> Unlike the statutes at issue in Schall v. Martin, 467 U.S. 253 (1984), and [United States v.] Salerno, [481 U.S. 739 (1987),] which survived due process challenges, the INS regulations provide no opportunity for the reasoned consideration of an alien juvenile's release to the custody of a nonrelative by a neutral hearing officer. Nor is there any provision for a prompt hearing on a § 242.24(b)(4) release. No

addition, the majority noted that there was no evidence showing that the children were incapable of exercising that right.[292] The majority justified this assertion by indicating that most of the children were sixteen or seventeen years of age and were in contact with responsible third parties to assist them.[293] The result of this conclusion is that the detention without a hearing will continue unless the child affirmatively requests a hearing, an unlikely situation since the children in question have a "troubled background and lack of familiarity with society and our culture, [which] give them particularized needs not commonly shared by domestic juveniles."[294] Members of the class may suffer from post traumatic stress[295] and be unfamiliar with the United States legal system. They often speak a different language and are pressured into waiving rights.[296] Under such circumstances, the mere extension of an opportunity to request a hearing is entirely inadequate to ensure constitutional protection.

Neither approach used in *Flores* fully takes into account the personal liberty interests of the class members.[297] To remedy this omission, the final section of this Article advances an argument for a case-

findings or reasons are required. Nothing in the regulations provides the unaccompanied detainee any help, whether from counsel, a parent or guardian, or anyone else. Similarly, the regulation makes no provision for appointing a guardian if no family member or legal guardian comes forward. There is no analogue to a pretrial services report, however cursory. While the INS argues that it lacks resources to conduct home studies, there is no substantial indication that some investigation or opportunity for independent, albeit informal consideration of the juvenile's circumstances in relation to the adult's agreement to care for her is impractical or financially or administratively infeasible. Although not entirely clear where the burden of proof resides, it has not clearly been imposed on the government. And there is no limit on when the deportation hearing must be held, or put another way, how long the minor may be detained. In short, there is no ordered structure for resolving custodial status when no relative steps up to the plate but an unrelated adult is able and willing to do so.

Flores, 942 F.2d at 1374-75 (Rymer, C.J., concurring in part and dissenting in part) (footnotes omitted).

292. *Flores*, 113 S. Ct. at 1450-51.

293. *Id.*

294. *Id.* at 1457 (Stevens, J., dissenting) (quoting Reply Brief for Petitioners at 4-6).

295. *See supra* note 11.

296. Olivas, *supra* note 11, at 160; Alkas, *supra* note 11, at 379 (citing Perez-Funez v. District Director, 619 F. Supp. 656 (C.D. Cal. 1985), where the INS admitted to using threats to coerce unaccompanied minors to concede to deportation); Dirk Johnson, *Choice for Young Illegal Aliens: Long Detentions or Deportation,* N.Y. TIMES, Nov. 30, 1992, at A1.

297. The United Nations Treaty on the Rights of Children requires rights that the United States Supreme Court fails to accord:

State parties shall ensure that:

. . . .

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the

by-case liberty interest evaluation, which includes considering the ability and desire of the parties as part of the determination of when due process should apply.

IV. Individually Assessed Liberty Interests

> When a society recognizes the personhood of its smallest and most vulnerable members and not only protects them but does so in a manner that promotes their dignity, it sets a tone conducive to promote democratic ideals. When such conditions are not present, the message is clear that raw power is more important than either reason or caring.[298]

To ensure the constitutional protection of a child's personhood, the Court should recognize and then move away from the use of categories such as good children and bad juveniles. The constitutional interests at stake demand nothing less. Too often, however, the Court evaluates the rights of vulnerable youth by deferring to the interests of the parents or the state.[299] Language that substitutes a paternalistic approach for a punitive goal—by denying rights to good children and granting rights to bad juveniles without evaluating the individual ability of the children—adversely affects due process rights.

As seen in the *Flores* case, the result is a denial of substantive and procedural due process. The characterization of the INS action, as within the parens patriae concerns, effectively eliminated the need for a heightened constitutional scrutiny of the challenged regulation. The scrutiny that would otherwise apply is eliminated by the characterization of the class as vulnerable children whose best interest is served by

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law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) . . . In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD art. 37, at 13 (Sharon Detrick ed., 1992).

298. Gary B. Melton, *Is There a Place for Children in the New World Order?*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 491, 531 (1993).

299. *See* Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 436-40 (1993); Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 977-78 (1988); Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 490 (1973).

INS maintaining custody. Instead of reviewing the regulation under a heightened form of scrutiny, a rational relationship is considered sufficient.[300]

The foregoing approach denies liberty and dignity to the class, normally the benchmark of constitutional due process. A straightforward approach could be obtained by reliance on the existence of the plenary power, but this would signal a diminution in the status of the children to less than persons.[301] Accomplishing this same goal by cloaking the class with the good children description shifts the focus—from the right to the class—by allowing the Court to narrowly draw the right and apply a lower standard of constitutional review. The INS then prevails with the simple claim that it is acting in the best interest of the children.[302] This claim receives little scrutiny.[303]

In the procedural due process context, the majority describes the class as juveniles to minimize concerns for vulnerability and effectuate punishment—in the form of indefinite detention—that occurs by the Court's refusal to consider deficiencies in the ability of members of the class to request a hearing.[304] The rights are diminished by describing the challenge as a facial one that will fail even if one juvenile is assumed capable of exercising the request for a hearing.[305] This is de facto punishment for alien juveniles, which also undermines the unaccompanied minor's constitutional protections.

A preferable method would apply constitutional rights on a case-by-case basis, taking the facts of the case into account from the child's perspective and ability level.[306] By recasting the issues in a manner that does not automatically defer to the parents or the state[307] or ex-

300. *See* Keith, *supra* note 11, at 190.

301. *See supra* note 13.

302. This claim is illusive, as demonstrated by the terms and conditions for confinement agreed to by the INS in 1992, several years after deplorable conditions were revealed. *See generally* CHILD WELFARE ADVISORY GROUP, WORKING GROUP ON MINORS IN DETENTION, RECOMMENDATIONS TO THE IMMIGRATION AND NATURALIZATION SERVICE FOR CARE OF MINORS (1992) (raising many of the same concerns as the *Flores* plaintiffs) (on file with author).

303. In fact, the INS claims the administrative and economic inability to conduct in-home studies, even though the cost of the study would be far less than the cost of detention. Reno v. Flores, 113 S. Ct. 1439, 1452 (1993).

304. Scharf & Hess, *supra* note 49, at 123-27 (summarizing the inability of minors to request a hearing).

305. *Flores*, 113 S. Ct. at 1451.

306. A similar approach is taken in abortion cases with minors. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (requiring a proceeding to determine whether a female juvenile is mature enough to make the abortion decision in consultation with a physician).

307. *Accord* John Coons et al., *Puzzling Over Children's Rights*, 1991 B.Y.U. L. REV. 307, 341.

tend rights when punishment is the goal, a more just due process analysis emerges. This approach would consider the strengths and weaknesses of the child's reasoning ability in the particular circumstances to determine whether rights should be extended. Of course, such an approach challenges the courts and the parties, but it also creates a more just system of due process. As applied to *Flores*, the children would be able to say whether they want to be released to someone other than their parents, a question omitted from the current analysis.

Substantive due process has meaning when the application of a strict scrutiny analysis is applied to the regulation. The due process rights of the children are furthered under this analysis because the vulnerability of the class does not automatically require a narrowing of the alleged right. Rather than classifying the right as release to an unrelated adult, which would not be in the best interest of a vulnerable child, the courts would have to look at the result of nonrelease—indefinite detention. When the focus is on that result, it is clear there is a right to "[f]reedom from bodily restraint[; which] has always been at the core of the liberty protected by the Due Process Clause."[308]

The procedural due process analysis also requires an examination of the minors' ability to exercise their choice, remembering their unique status as persons who are not adults.[309] Because children are limited by their age and maturity, the procedural due process extended to them must be tailored to the ability of the particular individual in the specific case to make self-determinations.[310] This method allows the Court to acknowledge the unique concerns and differences of children's ability,[311] and assures that children who lack the necessary skills are not forced to exercise rights.[312] Due process is a right that can be measured by the circumstances of the case. A due process

308. *See Flores*, 113 S. Ct. at 1454 (O'Connor, J., concurring).

309. *Id.*; *see also* Jerry Suls, *Self-Awareness and Self-Identity in Adolescence*, *in* THE ADOLESCENT AS DECISION MAKER 143, 173 (Judith Worrell et al. eds., 1989) ("The phenomena that are thought to be part of adolescence—self-consciousness, introspection, confusion—are not necessarily simultaneous. Instead, they are manifested and worked out at different times during the period from 12 to 18 or 21 years of age.").

310. Elizabeth S. Scott, *Judgement and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1665-67 (1992) (supporting the ability of adolescents to act with self-determination). *Contra* John E. Coons et al., *Deciding What's Best For Children*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 465, 489 (1993) (arguing limitations in children's ability to choose require that the power to decide remain with parents or the state).

311. *Accord* Melton, *supra* note 26, at 157 ("The age threshholds for recognition of autonomy and privacy, cessation of special age-based entitlement, and establishment of criminal responsibility need not be, indeed should not be, the same.").

312. Teitelbaum & Ellis, *supra* note 7, at 154.

analysis that focuses on the abilities of the parties, therefore, will further a just application of due process.

Conclusion

Children are persons within the meaning of the Constitution. Under the current approach to due process, however, the liberty interest ensured by the application of the "person" within the Constitution is overshadowed by the interests of the parents or state to protect children and society. When labeled as "good children," they are automatically considered vulnerable, and thus are precluded from utilizing their voice and constitutional rights because their interests are subordinated to the will of parents or the state. This subordination accords them no independent determination of the applicable constitutional concerns and inappropriately restricts constitutional protection. Reliance on the parens patriae power or the best interest analysis justifies a limitation on the child's right but fails to consider the individual concerns of a detained child.

Children, such as those in the *Flores* case, are held in indefinite detention by the approval of custody based on parens patriae concerns articulated by the INS. This detention is not the same as liberty, and custody which is "good enough" still infringes on liberty interests in a manner that requires the application of substantive due process protection. If the children in *Flores* were given full constitutional recognition as persons, the outcome could not have summarily disregarded the liberty interest.[313] This approach is preferable and advances constitutional principles.

Today, the protection of society is the underlying social goal when rights are granted to legitimize punishment.[314] By understanding that the bad juvenile language is used as a method to extend rights to legitimize punishment against youths who are viewed as violent, we can move from that approach and instead focus on the actual substantive or procedural due process rights required to effectuate equal protection under the law. Thus, in the context of the *Flores* case, the majority could not simply ascribe the bad juvenile characteristics to the class as a method of justifying an extension of procedural due process to

313. *Accord* text accompanying *supra* note 308.

314. One commentator has noted that the loss of constitutional rights is attributable to the Court employing "'juvenileness' to reach the conclusion that the young person loses." Geimer, *supra* note 60, at 950.

persons who are in fact incapable of exercising the right.[315] Although children are limited by their age and maturity, it is insufficient to recognize those limitations as an end to independent analysis.[316] A more appropriate solution would be to evaluate children's ability to exercise rights as a prerequisite to the extension of rights. Then, if the children are able to make self-determinations, they can exercise the rights granted.[317] This method allows the courts to acknowledge the unique concerns and differences of each children's abilities. As applied in the *Flores* case, the indefinite detention, which is seen by the child as punishment, could not continue if the child was truly able to invoke due process protection.

Because children are persons in a constitutional and real sense, we must accord them justice by applying a fact-based analysis of their ability to effectively exercise due process rights. The actual injury and ability of each child should be evaluated to promote dignity and democratic ideals.

315. For an argument that the rights cannot be effectively exercised, see *supra* notes 266, 269, 290 and accompanying text.

316. Note, *Assessing the Scope of Minors' Fundamental Rights*, *supra* note 61, at 1168.

317. *See supra* notes 307, 310 and accompanying text.