Minority Youth in Juvenile Correctional Facilities: Cultural Differences and the Right to Treatment

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> Unwanted as workers, underfunded as students, and undermined as citizens, minority youth seem wanted only by the criminal justice system.[1]

Introduction

Although minority youths constitute only thirty percent of the juvenile population in the United States,[2] an overwhelming majority of the youths entering U.S. prisons, state reform schools and detention centers are minorities.[3] Congress amended the Ju-

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1. DICK HEBDIGE, HIDING IN THE LIGHT 17-18 (1988), *quoted in* HENRY A. GIROUX, FUGITIVE CULTURES: RACE, VIOLENCE, AND YOUTH 39 (1996).

2. *See* HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 93 (1995).

3. *See* SNYDER & SICKMUND, *supra* note 2, at 166 (noting that 69% of the youths confined in public, long-term correctional facilities are minorities); *Juvenile Detention Symposium: Systemic Critique and Transformation*, 3 D.C. L. REV. 403, 422 (1995) [hereinafter *Juvenile Detention Symposium*]. The overrepresentation of minority youths in juvenile corrections is particularly egregious in several states: Minnesota (minority youths constitute 9% of the juvenile population, but 45% of the youths incarcerated in long-term facilities), Georgia (36% and 80%), and Connecticut (23% and 83%). *See* SNYDER & SICKMUND, *supra* note 2, at 93. Black youths are especially at risk for incarceration: they constitute 15% of the general juvenile population, but account for over 50% of the incarcerated juvenile population. *See id.* at 91, 166; *see also* Barry Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 896 (1988).

There are numerous explanations for this overrepresentation. The most obvious is racial discrimination against minority youths. *See* SNYDER & SICKMUND, *supra* note 2, at 91. Because of discrimination on the part of juvenile justice decision makers, minority youths are more likely to be arrested, referred to juvenile court, detained, petitioned for formal processing, adjudicated delinquent,

venile Justice and Delinquency Prevention Act in 1988 to require states to attempt to reduce this disparity,[4] but the overrepresentation of minority youths in the system is still growing.[5] Furthermore, sixty-five percent of the youths in private facilities are

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and, ultimately, confined in juvenile correctional facilities. *See id.* Another possible explanation is that minority youths commit, proportionally, more crime than their non-minority counterparts. *See id.* This explanation, however, is not convincing when one considers "[t]he fact that minority juvenile offenders are at a greater risk of being apprehended than white youth who commit similar crimes . . . ." IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES 47 (1989). Research by Professor Feld suggests that the disparities can also be explained by his concept of "justice by geography." *See id.* Feld found that youths in urban jurisdictions are likely to receive more severe dispositions than youths in non-urban areas. *See id.* Because minority youths are concentrated in urban areas, this increases their overrepresentation in the criminal justice system. *See id.*

The overrepresentation of minority youths and its causes are replicated in the adult system. *See* MICHAEL TONRY, MALIGN NEGLECT (1995). This overrepresentation is not solely a problem in the United States: juvenile delinquents in France are disproportionately from poor, ethnic immigrant families. *See* Calvin Peeler, *Always a Victim and Never a Criminal: Juvenile Delinquency in France*, 22 N.C. J. INT'L. L. & COM. REG. 875 (1997).

In addition, there is substantial evidence that minority youths are treated differently than majority youths within the juvenile justice system. *See* Tomkins et al., *Subtle Discrimination in Juvenile Justice Decision Making*, 29 CREIGHTON L. REV. 1619 (1996); *see generally* MINORITIES IN JUVENILE JUSTICE (Kimberly Kempf Leonard et al. eds., 1995) (providing evidence of discrimination on multiple levels of the juvenile justice system). There are pronounced disparities between White and minority youths at the intake and detention decision points, and these disparities tend to accumulate as youths are processed through the system. *See* SNYDER & SICKMUND, *supra* note 2, at 92. Evidence of racism and racial disparities in the juvenile courts is a powerful critique of the popular myth that justice is "blind." Langston Hughes' poem "Justice" provides a related critique of this notion.

> That Justice is a blind goddess
> Is a thing to which we blacks are wise:
> Her bandage hides two festering sores
> That once perhaps were eyes.

Langston Hughes, *Justice, quoted in* MILTON MELTZER, LANGSTON HUGHES: A BIOGRAPHY 160 (1968). This poem was written for the "Scottsboro boys" a group of African-American teenagers falsely accused of raping two white women in Alabama in 1931. *See generally* D.T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969). I think Hughes would consider the group overrepresentation of minority youths in juvenile corrections as further evidence of justice's "festering sores."

4. *See* Coramae Richey Mann, *A Minority View of Juvenile "Justice,"* 51 WASH. & LEE L. REV. 465, 468 (1994). The Office of Juvenile Justice and Delinquency Prevention (OJJDP) has responded to this overrepresentation by recommending prevention programs aimed at minority youths and by requiring states to keep statistics on the overrepresentation. *See* SNYDER & SICKMUND, *supra* note 2, at 91.

5. *See* DALE G. PARENT, CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES (RESEARCH SUMMARY) 1 (1994) (noting that from 1987 to 1991 the proportion of minority youths in juvenile correctional facilities rose from 53% to 63%). The most recent data (1993) suggest that 69% of the youths confined in the United States are minority youths. *See* SNYDER & SICKMUND, *supra* note 2, at 166.

White, providing strong evidence that a racially-segregated system of youth corrections is emerging in the United States.[6]

At the same time that the overrepresentation of minority youths is growing, state and federal law has shifted to a more punitive response to juvenile crime. Differentiated juvenile courts have traditionally emphasized social rehabilitation for young offenders, but recent legal trends toward punitive justice have substantially diluted rehabilitation efforts.[7] The Violent Crime Control and Law Enforcement Act of 1994 was a signpost of the political trend toward "getting tough" on juvenile offenders.[8] It created new federal crimes for juveniles, increased sentences for gang-related crimes and decreased the minimum age at which a juvenile can be transferred to adult court.[9]

In addition, many states have amended their juvenile codes to make it easier to prosecute youths as adults and have otherwise increased penalties.[10] Sentencing decisions in contemporary juvenile courts increasingly focus on the offense committed, rather than on the characteristics and needs of the offender.[11] Mandatory detention and longer sentences for juveniles result in serious overcrowding in juvenile correctional facilities, endangering youths and impeding the delivery of basic services such as education and

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6. *See* SCHWARTZ, *supra* note 3, at 47. This is significant because both inmates and staff rate private facilities higher in terms of living conditions, security and rehabilitation programs. *See* Yitzhak Bakal & Harvey Lowell, *The Private Sector in Juvenile Corrections*, *in* JUVENILE JUSTICE AND PUBLIC POLICY 196 (Ira M. Schwartz ed., 1992).

7. *See generally* M.A. BORTNER & LUCINDA M. WILLIAMS, YOUTH IN PRISON xi (1997) (noting politicians' advocacy for increased punishment for juveniles); Jennifer M. O'Connor & Lucinda K. Treat, *Getting Smart About Getting Tough: Juvenile Justice and the Possibility of Progressive Reform*, 33 AM. CRIM. L. REV. 1299 (1996) (discussing recent trends toward retributive policies in juvenile justice and recommending continued rehabilitative services for juvenile offenders).

8. *See* Mark Soler, *Juvenile Justice in the Next Century: Programs or Politics?* 10 CRIM. JUST. 27 (1996). The political pressure to "get tough" on juvenile offenders is problematic when one considers that the nation's overall crime rates have actually fallen over the last 20 years and that 94% of young people arrested in the United States are arrested for non-violent, property crimes or less serious offenses. *See id. But see* Brian R. Suffredini, *Juvenile Gunslingers: A Place for Punitive Philosophy in Rehabilitative Juvenile Justice*, 35 B.C. L. REV. 885 (1994) (asserting that the number of juveniles arrested for murder in 1992 was more than double the number in 1984). Juveniles account for only 14% of the population, but they account for 25% of the individuals arrested for homicide, rape, robbery and felonious assault. *See id.* at 899.

9. *See* Soler, *supra* note 8, at 27.

10. *See id.*; *see also infra* notes 115-117 and accompanying text.

11. *See* Feld, *supra* note 3, at 821. Feld argues that juvenile courts have moved towards a "justice model" for dealing with juvenile offenders. *See id.* This model emphasizes sentences on the basis of "just deserts," and is a movement away from the rehabilitative model. *See id.*

health care.[12] Meanwhile, funding for prevention programs is being reduced, eliminated or dispersed in block-grants.[13]

This shift toward punishment and away from rehabilitation and treatment is a troubling development for all youths in the juvenile justice system. It is especially troubling because an overwhelming majority of such youths have mental health needs.[14] As a result of their overrepresentation in juvenile correctional facilities, minority youths are particularly disadvantaged by this trend toward punishment. Indeed, the racial makeup of offenders in the juvenile justice system may explain why a White-majority society has decided to "get tough" on juvenile crime.[15]

Despite the trends toward a more punitive juvenile court, all confined youths have a constitutional right to rehabilitative treatment in juvenile correctional facilities.[16] Furthermore, state laws require juvenile justice systems to provide rehabilitative pro-

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12. *See* Soler, *supra* note 8, at 29. U.S. youths are incarcerated at a rate higher than any other nation in the world, and the rate continues to rise. *See* BORTNER & WILLIAMS, *supra* note 7, at xi.

13. *See* Soler, *supra* note 8, at 29. One Washington D.C. official explains, "I have never seen things this bad in terms of the public attitudes regarding young offenders." *Juvenile Detention Symposium*, *supra* note 3, at 422. This official argues that these negative attitudes are driven by race. *See id.* He asserts that when constituents hear a politician shouting "crime, crime, crime," the constituents actually hear "race, race, race." *See id.* This is consistent with the changing nature of racism in the United States: instead of referring to minority groups as inherently inferior, minorities are now defined by characteristics that are theoretically race-neutral (for example, crime and poverty), but that are heavily racialized in public discourse. *See* john a. powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. J. 99, 110 (1997).

14. *See* Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System, *Let Justice Be Done: Equally, Fairly, and Impartially*, 12 GA. ST. U. L. REV. 687, 829 (1996) (finding that over 80% of the juveniles in the juvenile justice system met the qualifications of psychological disorders as defined by the American Psychiatric Association's Diagnostic and Statistical Manual, 3rd edition). Even more troubling is that the proportion of youths with such disorders placed in facilities where clinical intervention was available was quite low. *See id.* A consultant for youth corrections in Minnesota suggests that the percentage of youths with mental illnesses in Minnesota training schools is at least 80%. Interview with William Dikel, M.D., Child Psychiatrist and Consultant, in Minneapolis, Minn. (Nov. 6, 1997).

15. *See* Jonathon Simon, *Power Without Parents: Juvenile Justice in a Postmodern Society*, 16 CARDOZO L. REV. 1363, 1367 (1995). Racist representations of violence and crime "feed the increasing public outcry for tougher crime bills designed to build more prisons and legislate get-tough policies with minorities of color and class." GIROUX, *supra* note 1. The hypocrisy behind these racist representations is made clear by former Senator Bob Dole's simultaneous indictment of rap music (for contributing to violence in the United States) and support for repealing the ban on assault weapons. *See id.*

16. *See infra* notes 98-99 and accompanying text (discussing the constitutional rights of confined youths).

gramming for juvenile offenders.[17] In light of the increasing minority population in juvenile correctional facilities, some state laws even declare a goal of providing "culturally appropriate" treatment for minority youths.[18] In the context of an increasingly punitive juvenile court, culturally appropriate treatment is especially important for effective individualized treatment.

This Article argues that justice and common sense mandate that states recognize a legal right to culturally appropriate treatment for youths in juvenile correctional facilities.[19] Part I defines culturally appropriate treatment and demonstrates the importance of such services for rehabilitating minority youths. Part II discusses culturally appropriate treatment within the historical context of the right to treatment in juvenile facilities and examines present applications of the right to treatment. Part III addresses steps taken by some state legislatures to ensure that juvenile offenders receive culturally appropriate treatment, proposes a model code provision and discusses problems with implementing such legislative schemes.

I. "Culturally Appropriate" Treatment and Rehabilitation in Juvenile Correctional Facilities

A. Defining "Culturally Appropriate" Treatment

Culturally appropriate treatment is treatment adapted to the unique needs of minority adolescents.[20] Minority youths have cul-

17. *See infra* notes 100-101 and accompanying text (explaining the state law basis for a right to treatment).

18. *See* MINN. STAT. § 242.32 subd. 2 (1996); OR. REV. STAT. § 420A.010(9)(a) & (b) (1996); *infra* notes 135-140 and accompanying text (reviewing these statutes and discussing their importance for the provision of culturally appropriate services for confined minority youths). Until recently, Florida's juvenile code contained language emphasizing the importance of culturally appropriate treatment. *See* FLA. STAT. § 39.0205 sec. 13(1) (1996). When its juvenile code was reorganized in October of 1997, however, this language was left out of the new code. Telephone interview with Ken Winker, Legislative Research Director, House Committee on Juvenile Justice, Florida State Legislature (Apr. 9, 1998). Mr. Winker stated that this likely was inadvertent because the statutes were merely being reorganized into a new section of the code; no substantive changes were intended. *See id.*

Some states have encouraged the development of alternatives to incarceration that involve culturally appropriate programming. *See* COLO. REV. STAT. § 19-2-305(4)(c) (1997); WASH. REV. CODE § 13.40.310 (1997); N.J. ADMIN. CODE tit. 13, § 13.90-3.6(b)(4) (1997).

19. As a question of justice and humanity, the reader is respectfully urged to consider this issue more broadly than as an actuarial speculation on what measures may cost-effectively reduce recidivism.

20. *See* 1 TERRY L. CROSS ET AL., TOWARDS A CULTURALLY COMPETENT SYSTEM OF CARE 13 (1989).

turally unique needs not only because of easily recognized examples of cultural difference (e.g., language, religious beliefs or different family structures), but also because of their disproportionate exposure to racism and poverty.[21] Terms such as "culturally relevant" or "culturally specific" are also used to describe these services.[22]

In the mental health field, the provision of culturally appropriate services is a measure of the "cultural competence" of a system or agency.[23] Cultural competence has been defined as "a set of congruent behaviors, attitudes, and policies that come together in a system, agency, or among professionals and enable that system, agency, or those professionals to work effectively in cross-cultural situations."[24] While an "ethnocentric" organization configures its services without considering the culturally unique characteristics of the population it serves, a culturally competent or "ethnoconscious" organization integrates the needs and strengths of ethnic communities into the organization's mission, staffing and programs.[25]

Measures of the cultural appropriateness of programs and services include the quality and timeliness of a youth's initial needs assessment. At the earliest point of service delivery, assessment and evaluation should take into consideration cultural difference.[26] Research indicates that depression, attachment and attention deficit problems manifest themselves differently in different cultures.[27] Due to the failure to understand these differences, a minority youth who suffers from one of these conditions is more likely to be processed in the juvenile justice system than in the mental health system.[28] In contrast, a non-minority youth is

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21. *See* Judith Katz-Leavy et al., *Meeting the Needs of Severely Emotionally Disturbed Minority Children and Adolescents: A National Perspective*, CHILDREN TODAY, Sept.-Oct. 1987, at 11.

22. *See id.* at 10, 12.

23. *See* CROSS, *supra* note 20, at 19.

24. *Id.* at 13.

25. *See* Larry M. Grant & Lorraine M. Gutierrez, *Effects of Culturally Sophisticated Agencies on Latino Social Workers*, SOC. WORK, Nov. 1996, at 1.

26. *See* CROSS, *supra* note 20, at 46.

27. *See id*; B. Solomon, *Innovations in Service Delivery to Black Clients, in* THE BLACK EXPERIENCE: CONSIDERATIONS FOR HEALTH AND HUMAN SERVICES 75-94 (1983) (explaining that symptoms of mental illness may be culture bound because the way a person expresses intense feelings of despair, anger or joy is influenced by culture).

28. *See* CROSS, *supra* note 20, at 4. Roy Brooks argues that "[b]ecause of the inability or refusal of juvenile officials to perceive these conditions (depression and other neurological disorders) as features of a developmental process unique to blacks or other minorities, black youths are routinely sent to the criminal justice

more likely to be diagnosed with depression and treated by mental health professionals.[29]

A multicultural and bilingual staff is another measure of the cultural appropriateness of programming. Linguistic and other cultural barriers are overcome most successfully by a multicultural and bilingual staff.[30] Clients are more likely to respond to staff of the same or similar culture, and such staff are more likely to correctly identify and meet a minority youth's needs.[31] Assembling such a staff requires not only recruitment of minority staff, but cultural awareness training for all staff members.[32] This kind of training can assist staff in understanding how their own cultural preconceptions can interfere with the treatment process.[33] It can

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system rather than to mental health facilities." Roy L. Brooks, *Analyzing Black Self Esteem in the Post-Brown Era*, 4 TEMP. POL. & CIV. RTS. L. REV. 215, 221 (1995); *see also* J.P. Comer & H. Hill, *Social Policy and the Mental Health Needs of Black Children*, 24 J. AM. ACAD. CHILD PSYCHIATRY 175-81 (1985) (indicating that while Black youths are routinely referred to the criminal justice system, White youths with similar mental conditions are more likely to be routed to a medical facility than to a cell); J. David Hawkins & Bart R. Salisbury, *Delinquency Prevention Programs for Minorities of Color*, 19 SOC. WORK RES. & ABSTRACTS 5 (1983) (explaining that programs that attempt to prevent illegal behavior before the criminal justice system is involved are more likely to serve Whites than minorities of color).

29. *See* CROSS, *supra* note 20, at 4.

30. *See id.* at 41; M. Barrera, *Mexican American Mental Health Service Utilization: A Critical Evaluation of Some Proposed Variables*, 4 COMMUNITY MENTAL HEALTH J. 35 (1978).

31. *See* CROSS, *supra* note 20, at 41. *But see* Christopher Quin, *Youth Jail Conditions Attacked*, CLEVELAND PLAIN DEALER, Sept. 27, 1997, at A6 (arguing that when Blacks make up most of the staff at a juvenile facility and the conditions are terrible, it supports the conclusion many Black youths reach: "We don't matter and we're not important.").

32. *See* CROSS, *supra* note 20, at 41. Cross-cultural training for professionals who work with juvenile offenders has been deemed important by numerous commentators. *See* Tomkins et al., *supra* note 3, at 1647 (arguing that police, judges and intake personnel need to develop an appreciation for cultural differences in order to guard against stereotyping youths); *see, e.g.*, Georgia Supreme Court Commission, *supra* note 14, at 841 (asserting that the Department of Children and Youth Services in Georgia should receive adequate funding to provide cross-cultural diversity training for its personnel—especially those who are in direct contact with minority youths).

33. *See* CROSS, *supra* note 20, at 41. For example, when a minority youth meets with a non-minority juvenile justice professional, the minority youth is likely to exhibit "adjustment behavior." *See id.* at 47. The youth may be more reserved than usual, or may be apprehensive that the adult will be prejudiced against his or her racial group. *See id.* While the youth's behavior may appear resistant or passive, the behavior is probably a "normal" response to a cross-cultural encounter. *See id.* If the juvenile justice professional understands this, he or she can adapt his or her expectations when he or she attempts cross-cultural counseling. *See id.*

also teach skills that aid staff in cross-cultural communication with minority youths.[34]

Of course, culturally appropriate programs should also involve members of the minority community. For example, a grassroots constituency of minority community members and mental health professionals could serve as advisors in planning and monitoring programs in a juvenile facility.[35] In addition, members of the minority community can educate youths about their cultural backgrounds.[36] By focusing on the richness of youths' cultural backgrounds, such educational programs help youths build a positive self-identity.[37]

B. The Importance of Culturally Appropriate Treatment for Juvenile Offenders

Juvenile codes in several states have stressed the importance of culturally appropriate treatment for juvenile offenders.[38] This section addresses two important questions: Why is the creation of these kinds of programs so important? What does culturally appropriate programming offer to confined juveniles?

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34. *See id.*

35. *See* Katz-Leavy, *supra* note 21, at 13.

36. *See* CROSS, *supra* note 20, at 48.

37. *See id.* Programs that emphasize cultural history as a core component have been successful with minority juveniles. For example, the House of Umoja in Philadelphia, founded by Sister Falaka Fattah and David Fattah, provides education and social and skills training within a framework of African and African-American culture. *See* JANICE JOSEPH, BLACK YOUTHS, DELINQUENCY, AND JUVENILE JUSTICE 144 (1995). This program has been very successful in reducing gang violence and assisting gang members in avoiding violent behavior. *See id.* Some commentators argue that an Afrocentric curriculum in schools would improve Black children's self-esteem, and thereby improve their academic and social development. *See* Molefi K. Asante, *The Afrocentric Idea in Education*, 60 J. NEGRO EDUC. 170-80 (1991); *see also* Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1992) (discussing the merits of an Afrocentric curriculum).

38. *See supra* note 18 (listing state statutes that address the importance of culturally appropriate treatment for juvenile offenders); *infra* notes 132-137 and accompanying text (evaluating the three state statutes which address culturally appropriate correctional programming); *see also Minnesota Supreme Court Advisory Task Force on the Juvenile Justice System: Final Report (1994), reprinted in* 20 WM. MITCHELL L. REV. 595, 671 (1994) (explaining that, in the context of the overrepresentation of minority youths in the juvenile justice system, there is a need for more culturally specific and sensitive programming).

The Office of Juvenile Justice and Delinquency Prevention has called for the development of gender-specific programming within the juvenile justice system. *See* COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE JUSTICE ACTION PLAN 15 (1996). Minnesota has a statute requiring that programs for adult and juvenile female offenders be "based upon the special needs of female offenders." MINN. STAT. § 241.70 (1996).

1. Addressing the Unique Needs of Minority Youths

One reason culturally relevant programs are important is that minority juveniles are likely to have different treatment needs than their non-minority counterparts. Mental health professionals have noted the importance of the culturally unique treatment needs of minority youths.[39] For example, language differences may be a barrier to effective treatment for some minority youths.[40] In addition, when juvenile justice professionals do not understand the youth's cultural background, the youth's "cultural traits, behaviors or beliefs will likely be misinterpreted as dysfunctions to be overcome."[41] Finally, there is evidence that the characteristics of a particular mental illness may be different for minority youths. For example, many Black juvenile delinquents suffer from depression and mental illnesses that are more severe than those of their White counterparts.[42] Given these differences, culturally appropriate treatment is more likely to be successful.[43]

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39. *See generally* DERALD WING SUE, COUNSELING THE CULTURALLY DIFFERENT (1981) (discussing the importance of understanding cultural difference to successful interventions with clients from a different culture); Katz-Leavy et al., *supra* note 21, at 10-14 (advocating the development of more culturally specific programs for minority children with mental health needs).

40. There are only 12 licensed psychiatrists and psychologists in the state of Minnesota who are fluent in Spanish. Interview with Sonia Carbonell, St. Anthony Park Family Development Center, in Minneapolis, Minn. (Nov. 6, 1997).

41. CROSS, *supra* note 20, at 4. Behavior such as eye contact, language use or emotional expressiveness are culturally dependent. *See id.* at 47. If service providers only evaluate such behavior in the context of the majority culture, it may appear dysfunctional. *See id.* "For example, some Native American children are taught to express remorse about negative behavior by not looking directly at the adult who is correcting them." *Id.* Such behavior could be misjudged as resistance to the adult intervention. *See id.*

In addition, students who are from language minorities are likely to be inappropriately referred for special education services. *See* A.A. Ortiz & E. Maldonado-Colon, *Reducing Inappropriate Referrals of Language Minority Students in Special Education*, *in* BILINGUALISM AND LEARNING DISABILITIES (Ann C. Willig & Hinda Feige Greenberg eds., 1986). Such referrals are an example of a cultural trait (speaking another language) being viewed as a "disability." Finally, "in an integrated setting, White administrators too often view differential patterns of behavior between Whites and Blacks, particularly Black males, as indicators of learning disabilities in Blacks." *See* Brooks, *supra* note 28, at 222. *But see* 20 U.S.C. § 1412 (Supp. 1997) (explaining that the Individuals with Disabilities Education Act requires that assessments for special education services be culturally sensitive.).

42. *See* Brooks, *supra* note 28, at 221. Brooks argues that while both Black and White children face difficult developmental challenges, racial prejudice and discrimination inhibit attempts to address these challenges by Black children. *See id.* at 225 n.51; *see generally* Jewell T. Gibbs, *Black American Adolescents*, *in* CHILDREN OF COLOR 179-223 (Jewell T. Gibbs and L. Huang eds., 1989) (discussing developmental challenges unique to Black children). Jody David Armour asserts that racism forces Black people to pay a "Black tax" when they live in the United

Ethnic minorities are also exposed disproportionately to certain aggravating factors that contribute to delinquent behavior, such as racial discrimination, neighborhood crime and poverty.[44] Current treatment programs may provide discipline and structure for a youth in the short term, but may not deal with environmental influences on the youth's delinquent behavior.[45] Any effort to provide treatment for minority offenders should take into account the effect of the socioeconomic position of minority youths.[46]

2. The Traditional Bias of Treatment Services for Juvenile Delinquents

The need for culturally appropriate services is also a result of the traditional delivery of culturally inappropriate services. Institutional racism is not only a significant cause of the overrepresentation of minority youths in juvenile correctional facilities,[47] it is also a reality of juvenile confinement.[48] Once minority youths enter juvenile correctional facilities, they are faced with a harmful, often racist, environment.[49] The rural locations of most facilities,

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States: "The Black Tax is the price Black people pay in their encounters with Whites because of Black stereotypes." JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM 13 (1997).

43. While there is insufficient research on the efficacy of culturally specific programs for juvenile offenders, there have been positive results from such programs. *See* John Woolredge et al., *Effectiveness of Culturally Specific Community Treatment for African American Juvenile Felons*, 40 CRIME & DELINQ. 589 (1994). A Minneapolis program called Side by Side has successfully used culturally specific programs to reach Black youths who would otherwise be in a correctional facility. Interview with Roger Clarke, Director of Side by Side, in Minneapolis, Minn. (Nov. 6, 1997).

44. *See* JOSEPH, *supra* note 37, at 39-54. Some sociologists argue that deviance among Black youths can be connected to lack of employment opportunities and attendant poverty. *See id.* at 47. Other commentators suggest that racism creates a "subculture of exasperation" in which the frustration of minority youths is turned into delinquent behavior. *See id.* at 49.

45. One juvenile court probation officer noted,

> I can send a minority juvenile to Thistledew (a forestry and conservation rehabilitation program) and he'll do just fine there. But when he comes back, he's got no more skills to deal with what is going on in the streets than he did when he left. He's just going to get dragged into trouble again.

Minnesota Supreme Court Task Force on Racial Bias in the Judicial System: Juvenile and Family Law, reprinted in 16 HAMLINE L. REV. 624, 658-59 (1993) [hereinafter *Minnesota Supreme Court Task Force*].

46. *See id.*

47. *See supra* note 3 (giving various explanations for the overrepresentation of minority youths in juvenile correctional facilities).

48. *See* Mann, *supra* note 4, at 474-75 (discussing institutional racism in confinement facilities).

49. *See* Bakal & Lowell, *supra* note 6; Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Reform*, 79 MINN. L. REV. 965, 1073-76

for example, demonstrate a pointless cultural mismatch harmful to inner-city youths. The rural locations separate the youths from family, preclude access for families without economic means or transportation, and expose them only to each other and to the racial prejudice of predominantly White, rural corrections officers.[50]

Worse, traditional mental health standards are based on ethnocentric and harsh notions of normalcy.[51] Rather than treat the behavioral problems of emotionally-disturbed minority youths as symptoms of insufficient identity formation or another form of mental illness, for example, the juvenile justice system often deals with these problems under criminological theories of deviance.[52] Mental health professionals who work with minority youths are ordinarily middle class Whites.[53] Despite evidence that Black therapists are more effective in dealing with Black youths,[54] there are very few minority mental health professionals working with juveniles in correctional facilities.[55]

(1995); *infra* notes 66-72 (discussing the deplorable conditions of confinement in many juvenile correctional facilities).

50. *See* Mann, *supra* note 4, at 474-75.

51. *See* Ellen Chun, *Falling Between the Cracks*, 17 B.C. THIRD WORLD L.J. 395, 402 (1997) (reviewing DENNIS WOYCHUK, ATTORNEY FOR THE DAMNED: A LAWYER'S LIFE WITH THE CRIMINALLY INSANE (1996)).

52. *See* Brooks, *supra* note 28, at 221. Black youths are often referred to the juvenile justice system, rather than the mental health system. *See* Teresa Glenon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1337 n.111 (1995). Indeed, it has been argued that a two track system has developed for juvenile offenders:

> "Two tracks exist for [youths involved in the juvenile justice system:] one for those of families, largely middle- and upper-class [Whites], with means to afford private behavioral health treatment services, and a second for children of low income families, largely African American, Hispanic, and Native American children living in single-parent homes, perhaps surviving through public assistance, children whose parents know of no treatment options to suggest to juvenile justice decision makers."

BORTNER & WILLIAMS, *supra* note 7, at 51 (quoting ARIZONA STATE JUVENILE JUSTICE ADVISORY COUNCIL (MINORITY YOUTH ISSUES COMMITTEE), EQUITABLE TREATMENT OF MINORITY YOUTH: A REPORT ON THE OVER REPRESENTATION OF MINORITY YOUTH IN ARIZONA'S JUVENILE JUSTICE SYSTEM 73-74 (1993)). This is consistent with the unwritten and unspoken rule that White children with behavioral problems can be treated, but minority children with similar behavioral problems need to be punished. *See id.*

53. *See* Chun, *supra* note 51, at 409. Ethnic minority professionals constitute only three percent of the psychologists in the United States. *See* 2 MAREASA R. ISAACS & MARVA P. BENJAMIN, TOWARDS A CULTURALLY COMPETENT SYSTEM OF CARE 24 (1991).

54. *See* Chun, *supra* note 51, at 409 (asserting that when the client is Black, Black therapists can be more effective than White therapists because Black therapists have the ability to understand both White and Black perspectives on mental health).

55. *See id.* Several states have noted, with concern, the paucity of minority professionals working with youths in the juvenile justice system. *See, e.g., Minne-*

3. Culturally Appropriate Services in Social Work and Child Welfare

The importance of culturally appropriate services has been more readily accepted in the fields of social work and child welfare than in the criminal justice system. Social work research in the 1960s challenged social services agencies to serve Black families with a better appreciation for the unique position of minorities in the United States.[56] Since then, the field of social work has slowly begun to recognize that successful interventions with minority children require strategies to help the children cope with the discriminatory realities they face.[57]

At the federal level, the Indian Child Welfare Act[58] (ICWA) calls for culturally appropriate placements for Indian children who are adopted or otherwise removed from their homes. The ICWA provides protection against unnecessary removal of Indian children from their families and tribes by involving the tribes in child welfare proceedings and by raising the State's burden of proof for removing an Indian child from an Indian home.[59] Congress explicitly recognized that prior removal procedures and out-of-home placements were not culturally appropriate.[60]

Many states have imported notions of cultural appropriateness into their child welfare laws.[61] Only Minnesota, however, re-

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sota Supreme Court Task Force, supra note 45, at 663; *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System* (1994), *reprinted in* 73 OR. L. REV. 823, 882 (1994).

56. *See* Ruth-Arlene W. Howe, *Transracial Adoption: Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT. L.J. 409, 459 (1997).

57. *See id.* "In the 1990s, child welfare educators now instruct students to be aware of the social context in which they will interact with their clients, and acknowledge that a client's progress may be hindered by discrimination." *Id.*

58. 29 U.S.C. §§ 1901-63 (1994).

59. *See* Christine Metteer, *Pigs in Heaven: A Parable of Native American Adoption under the Indian Child Welfare Act*, 28 ARIZ. ST. L.J. 589, 591 (1996). The Act was passed because too many Indian children were being removed from Indian families and placed with non-Indian families, without considering the cultural and social implications for the child and the tribe. *See id.* at 597-98. The negative effects of this kind of policy are clear. As one tribal chief explained during a congressional hearing on ICWA, "[c]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to their people." *Id.* at 597.

60. *See id.* at 598.

61. *See, e.g.*, CAL. WELF. & INST. CODE § 18961(a)(3) (1996) (requiring child abuse prevention, intervention and treatment organizations to provide culturally appropriate services); COLO. REV. STAT. ANN. § 26-5.5-104 (West 1996) (providing that family preservation services must consider cultural background of family when assessing the needs of the family); MINN. STAT. § 260.012(a) (1996) (requiring culturally appropriate family preservation services to families prior to

quires services tailored to the cultural background of juvenile offenders.[62] The distinction is problematic: If juvenile courts' only purpose were to promote public safety by locking up juvenile offenders, then culturally appropriate treatment would be irrelevant. But if juvenile courts purport to rehabilitate, the fact that a youth has committed a crime shouldn't negate the concern about whether an out-of-home placement (i.e. confinement) is culturally appropriate.

C. Critiquing the Value of Culturally Appropriate Services

One problem with evaluating the need for culturally appropriate services is the lack of research demonstrating the effectiveness of such programming for juvenile delinquents.[63] Culturally appropriate programs for minority populations have been developed without any empirical evidence that they are more effective than other kinds of services.[64] Furthermore, while members of the minority community demand culturally appropriate services, the professionals who work with minority youths are not sure what culturally appropriate means.[65]

The provision of culturally appropriate services may be especially problematic given the present state of juvenile corrections. Evaluations of juvenile correctional facilities "reveal a continuing

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placement outside the home); MINN STAT. § 257.025 (1996) (providing that the cultural background of the youth is a relevant consideration in a custody dispute); MINN. STAT. § 257.071 subd. 1(a) (1996) (stating that when a child is placed in a foster home, the state should try to find a culturally appropriate home); N.M. STAT. ANN. § 32A-3B-19(G)(8) (Michie 1996) (requiring disposition to "provide for a culturally appropriate treatment plan, access to cultural practices and traditional treatment for an Indian Child"); S.C. CODE ANN. § 20-7-480(A)(7) (Law Co-op 1996) (stating that the state's child welfare system "must be designed to be child-centered, family-focused, community based, and culturally competent in its prevention and protection efforts").

62. *See* MINN. STAT. § 242.32 subd. 2 (1996); *infra* note 137 and accompanying text (discussing Minnesota's treatment requirements for youths in secure facilities).

63. *See* CROSS, *supra* note 20, at 11. While some research suggests that culturally appropriate programs are more effective than other kinds of programs, most of the research has been about community-based corrections rather than secure facilities. *See* Woolredge, *supra* note 43, at 589, 597. Even this evidence does not clearly show that culturally appropriate programs are more effective. *See id.* Recidivism among offenders in the culturally specific program was similar to those who simply received traditional probation services. *See id.* The juveniles in the culturally specific program, however, would have been institutionalized if not for the program; the youths on probation were probably a lower risk for reoffending at the outset. *See id.* at 597.

64. *See* Grant & Gutierrez, *supra* note 25, at 1.

65. *See* CROSS, *supra* note 20, at 12.

gap between rehabilitative rhetoric and punitive reality."[66] The Department of Justice's 1994 study of conditions in juvenile confinement facilities provides evidence of the punitive reality of juvenile confinement nationwide.[67] Three-quarters of the nation's public and private juvenile detention and correction facilities lack adequate bed space, health care, security or suicide control.[68] Overcrowding is a pervasive problem in juvenile facilities, with sixty-two percent of juveniles detained in long-term institutional facilities that are operating above their design capacity.[69] The combination of crowding, inadequate program resources and intense interaction between the most dangerous youths in the system results in "correctional warehouses," which are disproportionately populated by minority youth.[70] These conditions promote violence among youths and a chaotic, abusive environment.[71] In spite of the rhetoric of rehabilitation, "staff and inmate violence, predatory behavior, and punitive incarceration constitute the daily reality for juvenile offenders confined in many treatment centers."[72] Where maltreatment pervades, culturally appropriate measures are unlikely to result in meaningful change.

Finally, the entire juvenile court treatment model itself has come under attack.[73] The treatment model assumes that rehabilitation can be provided in the correctional setting.[74] Evaluations of juvenile correctional programs, however, provide little support for the proposition that juvenile correctional facilities effectively treat

66. Feld, *supra* note 49, at 1073-74.

67. *See* PARENT, *supra* note 5, at 6.

68. *See id.*

69. *See* SNYDER & SICKMUND, *supra* note 2, at 92.

70. *See generally* PARENT, *supra* note 5 (describing institutional crowding as a serious problem and correlating crowding with higher rates of institutional violence). In a Rockville, Maryland juvenile confinement facility, rooms built for one juvenile often hold three. Because there is not enough space or staff, each resident gets only one hour of schooling each day. *See* Nancy Lewis, *Youths Strain Maryland Capacity for Detention; Packed Facilities Called 'A Recipe for Disaster,'* WASH. POST, Aug. 7, 1997, at A1.

71. *See* Barry C. Feld, *Criminalizing the Juvenile Court: A Research Agenda for the 90s*, *in* JUVENILE JUSTICE AND PUBLIC POLICY 75 (Ira M. Schwartz ed., 1992).

72. Feld, *supra* note 49, at 1074. A June 1997, Department of Justice investigation of conditions at Louisiana's four training schools found "systemic life-threatening abuse" by guards at all four facilities. *See* Fox Butterfield, *Few Options or Safeguards in a City's Juvenile Court*, N.Y. TIMES, July 22, 1997, at A1. The abuse ranged from guards assaulting the youths, to guards rewarding those juveniles who assault other juveniles. *See id.*

73. *See* Feld, *supra* note 49, at 1075-77.

74. *See id.* at 1075.

youthful offenders or reduce recidivism.[75] While many commentators "resist the general conclusion that 'nothing works' in juvenile or adult corrections, the conclusion has not been persuasively refuted."[76] Juvenile offenders may be better served by more radical, systemic changes in juvenile justice administration than by developing new treatment alternatives within the present context of juvenile corrections.[77]

These critiques, however, do not render the development of culturally appropriate services irrelevant. First, whether culturally appropriate services are more effective than general correctional programming is not measurable unless we attempt to provide services adapted to the unique needs of minority youths. Second, there is ample evidence that "culturally inappropriate" services are ineffective methods of treating minority youths.[78] Culturally appropriate services are not merely new kinds of programs that should be evaluated by their ability to reduce recidivism. Instead, they are a response to the traditional ethnocentric services for minority youths. Third, while the prevention and diversion programs recommended by the Office of Juvenile Justice and Delinquency Prevention are important means for addressing disproportionate minority confinement in the long term, they do not address the needs of currently confined youths. Finally, while radical changes in disposition alternatives for juvenile offenders would be welcome, the juvenile correctional facilities are probably not going to disappear in the near future. Therefore, in spite of the "nothing works" mentality, it is important to attempt to improve the kinds of services minority youths receive in correctional facilities. Attempting to provide services adapted to the unique

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75. *See id.* at 1075-76. In fact, there is some evidence that youths actually end up more dangerous after a stint in a juvenile correctional facility. *See* Alexander S. v. Boyd, 876 F. Supp. 773, 780 n.13 (D.S.C. 1995) (noting a study of juveniles in South Carolina facilities who were administered the Minnesota Multiphasic Personality Inventory, which found that juveniles have more hostility and more aggressive tendencies after their confinement).

76. Feld, *supra* note 49, at 1077.

77. *See id.* at 1079. Feld argues that "[e]ven if some programs might work for some offenders under some conditions, in the face of unproven efficacy, the possibility of an effective rehabilitation program cannot justify confining young offenders 'for their own good,' while providing fewer procedural safeguards than are afforded adults." *Id.* According to Feld's view, due process procedures (i.e., right to a jury trial, right to an attorney) would be more meaningful than hollow promises to rehabilitate.

78. Under current correctional programming in juvenile facilities, the recidivism rates are extremely high. *See* SCHWARTZ, *supra* note 3, at 51. As mentioned above, present programs produce juveniles who may be more dangerous than when they entered. *See supra* note 75.

needs of minority youths is a critical part of this effort, especially in the context of growing minority overrepresentation in the juvenile justice system.

II. Juvenile Correctional Facilities and the Right to Treatment

All confined youths have legal rights that regulate their conditions of confinement.[79] The juvenile's right to treatment while under the care of the juvenile court is one such right.[80] While the right to treatment is grounded in the historical development of the juvenile court, it only developed recently into a legal right for challenging the conditions of juvenile facilities.[81] By examining the development of the right to treatment and its present application, this section will investigate whether the right to treatment includes the right to "culturally appropriate" treatment.

A. The Development of a Right to Treatment: Rehabilitative Rhetoric and Punitive Reality

Young offenders have always presented special problems for the criminal justice system because of the tension between punishment and rehabilitation.[82] While the criminal law seeks to de-

79. The Eighth Amendment (providing for no cruel and unusual punishments), U.S. CONST. amend. VIII, and Fourteenth Amendment (providing for due process), U.S. CONST. amend. XIV, § 1, provide constitutional bases for challenging conditions of confinement in juvenile facilities. *See* Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791, 1793 (1995) (explaining that in the early 1970s, judges began to rule that juveniles have a right to treatment based on equal protection and due process). State law may also regulate conditions of confinement in juvenile facilities. *See id.* Other laws may also create rights for incarcerated juveniles; for example, the Individuals with Disabilities Education Act requires that states provide special education services to all children with disabilities, which includes incarcerated juveniles. *See* 20 U.S.C. § 1400 (1995). For more discussion of the legal bases for the right to treatment, see *infra* notes 98-133 and accompanying text.

80. *See generally* David L. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969); Nicholas N. Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848 (1969). These articles discuss the basis for, and inception of, the right to treatment. For further discussion of the origins and present application of the right to treatment, see *infra* notes 98-133 and accompanying text.

81. *See infra* note 98 and accompanying text (discussing the development of the right to treatment as a means of challenging conditions of confinement in juvenile correctional facilities).

82. *See* Alexander S. v. Boyd, 876 F. Supp. 773, 781 (1995). In colonial America, children convicted of crimes were treated much like adults, but by the early 1800s, reformers argued that juveniles should be rehabilitated rather than punished for their misbehavior. *See* JOSEPH, *supra* note 37, at 1-2.

ter crime by punishing adult criminals, advocates for juvenile offenders have argued that wayward youths could and should be rehabilitated through education and treatment.[83] The first separate institutions for delinquent youths, developed in 1825, were known as the Houses of Refuge.[84] The House of Refuge was envisioned as a place where delinquent youths would be educated and rehabilitated so that they could return to society as productive citizens.[85] Unfortunately, the reality was "more like an ordinary prison rather than a place for treatment."[86]

In 1899, the city of Chicago, adopting the notion of *parens patriae*,[87] created the first juvenile court.[88] Like the creators of the Houses of Refuge, the reformers who developed the juvenile court envisioned rehabilitative placements for juvenile offenders where the youths would learn the skills and values they needed to avoid further contact with the court system.[89] These reformers, however, sought solutions for deterring delinquency that would be more effective and that would reach more children than the Houses of Refuge.[90] Theoretically, the court was to provide individual dispositions based on the "best interests" of the child.[91] In practice, however, juveniles were processed without the procedural

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83. *See* BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 8-32 (1993) (describing the historical attitudes of reformers toward rehabilitation of youths).

84. *See* SIMON I. SINGER, RECRIMINALIZING DELINQUENCY 29-30 (1996) (describing institutions for delinquents).

85. *See id.* at 30. The first House of Refuge was in the city of New York. *See id.* at 29-30. Cadwallader D. Colden, the Mayor of New York City at that time, argued that placing juveniles in adult facilities opened the "road to ruin" because it created a situation where juveniles would learn to be better criminals. *See id.*

86. *Id.* at 31. The juvenile offenders lived in overcrowded facilities where the "benevolent hand of officials quickly turned into a slap or a whip." *Id.*

87. *Parens patriae* "refers traditionally to [the] role of state as sovereign and guardian of persons under legal disability, such as juveniles . . . ." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

88. *See* KRISBERG & AUSTIN, *supra* note 83, at 30.

89. *See* Feld, *supra* note 3, at 824. One of the founders of Chicago's juvenile court, Judge Jullian Mack, explained:

> Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is physically, mentally, morally, and then if he learns that he is treading the path that leads to criminality, to take him in charge, not so much as to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.

SINGER, *supra* note 84, at 35-36.

90. *See* Suffredini, *supra* note 8, at 889.

91. *See id.* at 890.

protections of the adult courts and placed in institutions "[r]ecognized as brutal, violent, costly, ineffective, and often racist."[92] Despite the rhetoric of rehabilitation, the reality of confinement for juveniles continued to be primarily punitive.[93]

In 1967, the U.S. Supreme Court finally commented on the distinction between the rhetoric of rehabilitation and the punitive reality of juvenile corrections. In *In re Gault*,[94] the Supreme Court recognized the difference between the theory and practice of confinement.[95] Previously, juveniles had been denied basic procedural safeguards because the procedures were deemed unnecessary in the juvenile court where a child's best interests were supposed to be served.[96] In *Gault*, the Supreme Court stated that the reality of confinement was not significantly different for children and adults; therefore, there was no principled basis for denying juveniles basic due process rights, such as the right to an attorney.[97]

B. Enforcing the Juvenile Court's Promise of Rehabilitation

Following *Gault*, several cases challenged conditions of confinement in juvenile facilities and attempted to enforce the juvenile court's promise to provide rehabilitative care by asserting a "right to treatment."[98] Some courts found the right to treatment in

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92. Bakal & Lowell, *supra* note 6, at 196.

93. *See* Feld, *supra* note 49, at 1073-74; *see also* DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE 280 (1980) (arguing that the original juvenile training schools were basically indistinguishable from adult prisons).

94. 387 U.S. 1 (1967). In *Gault*, a 15-year-old boy was committed to a state industrial school for six years for allegedly making an obscene phone call. *See id.* The young man was processed by the court without: an attorney; the right to cross-examine witnesses against him; appropriate notice of charges; or the privilege against self-incrimination. *See id.*

95. *See id.* The Supreme Court explained:

> The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours . . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

Id. at 27 (quoting in part *In re* Holmes, 109 A.2d 523, 530 (Pa. 1954) (Musmanno, J., dissenting)).

96. *See id.* at 14-30.

97. *See id.* "There is evidence . . . that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Id.* at 18 n.23 (citing Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7).

98. *See* Feld, *supra* note 49, at 1074. *See, e.g.*, Nelson v. Heyne, 355 F. Supp.

the Eighth or Fourteenth Amendments of the U.S. Constitution.[99] Other courts based the right to treatment on state juvenile court statutes.[100] In these latter cases, the court examined the promise of rehabilitation in the statutes authorizing juvenile court jurisdiction over youthful offenders.[101] Because the stated purpose of the statutes was to rehabilitate young offenders, the courts held states accountable for providing services to youths in confinement.

C. Restricting the Right to Treatment

Despite strides toward improving conditions of confinement through a right to treatment in early cases, the Supreme Court later defined this right to treatment more restrictively.[102] In *Youngberg v. Romeo*,[103] the Supreme Court dealt with the substantive rights of involuntarily committed mentally retarded adults in mental institutions.[104] While the plaintiffs claimed a right to training and skill development, the Court limited its holding to require only "minimally adequate training."[105] Furthermore, the Supreme Court warned lower courts to defer to the judgment of

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451 (N.D. Ind. 1972) (holding, *inter alia*, that the lack of minimal effort of treatment and rehabilitation at the Indiana Boys' School violated constitutional rights of inmates); Inmates of Boys' Training Sch. v. Affleck, 346 F. Supp. 1354 (D.R.I 1972) (holding, *inter alia*, that where the use of confinement of juveniles was antirehabilitative, equal protection and due process were violated); Morales v. Truman, 383 F. Supp. 53 (E.D. Tex. 1974) (holding, *inter alia*, that the state of Texas would need to follow many criteria in order to give proper treatment to juvenile inmates).

99. Courts asserted that the Eighth Amendment's prohibition against cruel and unusual punishment requires states to provide treatment to juveniles in confinement. *See* Holland & Mlyniec, *supra* note 79, at 1798. Others found that the challenged conditions themselves were cruel and unusual punishment. *See id.* The Fourteenth Amendment Due Process Clause provided two more bases for the right to treatment. *See id.* The "quid pro quo" theory stated that juveniles traded the procedural protections of adult court for the rehabilitative treatment of their juvenile court placement. *See id.* at 1799. The other Fourteenth Amendment theory supporting a right to treatment was the right to substantive due process. *See id.* In *Jackson v. Indiana*, the Supreme Court stated that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* (quoting *Jackson*, 406 U.S. at 715). Because the stated purpose of confinement was rehabilitation or treatment, due process required that treatment be provided to confined juveniles. *See* Holland & Mlyniec, *supra* note 79, at 1799.

100. *See* Holland & Mlyniec, *supra* note 79, at 1798.

101. *See, e.g.*, *Jackson*, 406 U.S. at 715 (holding that the state juvenile court statute entitles delinquent "feeble-minded" youths to treatment).

102. *See* Holland & Mlyniec, *supra* note 79, at 1801-02 (describing the Supreme Court's decision in Youngberg v. Romeo, 457 U.S. 307 (1982)).

103. 457 U.S. 307 (1982).

104. *See id.*

105. *See id.* at 322.

professionals regarding training requirements.[106] After *Youngberg*, due process arguments asserting a right to treatment have been less powerful.[107] In addition, the Supreme Court has ruled that the demands of due process differ in the adult and juvenile context, and that this distinction is constitutionally acceptable.[108] The effect of the *Youngberg* decision has been to slow the filing of right to treatment suits.[109]

The Eighth Amendment basis for the right to treatment has also been limited in lower court decisions. In *Morales v. Truman*,[110] a Texas district court explained that while the Eighth Amendment protects juveniles from abusive conditions, it does not necessarily include a right to a certain kind of treatment because treatment options are open to discretionary interpretation.[111] Furthermore, in cases relating to cruel and unusual punishment in the adult system, the Supreme Court has examined the conduct of prison administrators rather than the conditions of penal facilities.[112] While the *Morales* court recognized that the Eighth Amendment requires adequate food, shelter, clothing and medical care, it decided that the failure to provide these services only reached a constitutional violation when it was sufficiently dangerous and a result of a prison official's disregard of the prisoner's health and safety.[113] These cases suggest that the constitutional right to treatment probably does not entail a right to culturally appropriate treatment. "At most, this once prominent doctrine [against cruel and unusual punishment] forbids only the most horrible abuse or neglect."[114]

D. Limiting State Statutory Bases for the Right to Treatment

While constitutional bases for the right to treatment were being limited, legislatures in many states were amending their juvenile codes to alter the expressed purposes of the juvenile

106. *See id.*

107. *See* Holland & Mlyniec, *supra* note 79, at 1801-03.

108. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (holding that delinquency cases do not require a jury trial); Holland & Mlyniec, *supra* note 79, at 1802-03.

109. *See* Holland & Mlyniec, *supra* note 79, at 1803.

110. 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 993 (5th Cir.), *rev'd*, 430 U.S. 322 (1976).

111. *See id.*

112. Wilson v. Seiter, 501 U.S. 294 (1991).

113. *See* Farmer v. Brennan, 114 S. Ct. 1970 (1994).

114. Holland & Mlyniec, *supra* note 79, at 1835.

courts.[115] Newer "purpose clauses" introduced punishment and protection of the community as valid purposes of the juvenile court.[116] Therefore, even if due process demands a reasonable relationship between the confinement of the juvenile and the reason he was confined, incarceration for the protection of the community would meet this demand.[117]

Even though juvenile code purpose clauses may still support a right to treatment,[118] it is unlikely that this treatment must be culturally appropriate. One can argue that any right to treatment includes a right to individualized treatment that considers the youth's cultural background, but purpose clauses are, by definition, general statements of juvenile court goals, not requirements for particular styles of treatment.

E. Judicial Limitations on the Right to Treatment

Even when violations of the right to treatment occur, judges are reluctant to order particular kinds of treatment programs. The Supreme Court has shown great deference to prison and mental health institute administrators.[119] One form of this deference is the judicial presumption of correctness regarding decisions made by medical professionals.[120] Because the justices are not experts in rehabilitating delinquent youths, they will probably not order juvenile justice professionals to implement particular kinds of programs for correctional facilities.[121] This judicial "hands-off" doctrine[122] is further reason to believe that the right to treatment does not entail a right to culturally appropriate treatment.

F. Alexander S. v. Boyd*: New Strength for the Right to Treatment?*

A more recent federal district court case, however, suggests that there may be some basis for a constitutional right to cultur-

115. *See id.* at 1803.

116. *See, e.g.*, HAW. REV. STAT. § 571-1 (1996) (stating that punishment is a valid goal of the juvenile justice system); WASH. REV. CODE ANN. § 13.40.010 (West 1995) (providing that punishment, accountability and treatment are equally important purposes).

117. *See* Holland & Mlyniec, *supra* note 79, at 1803.

118. *See id.*

119. *See* Holland & Mlyniec, *supra* note 79, at 1807-08.

120. *See id.* at 1808.

121. *See id.* In the adult prison context, the Supreme Court warned trial judges against becoming "enmeshed in the minutiae of prison operations." Bell v. Wolfish, 441 U.S. 520, 562 (1979).

122. *See* Holland & Mlyniec, *supra* note 79, at 1808.

ally appropriate treatment. In *Alexander S. v. Boyd*[123] the court ruled that under the Fourteenth amendment, "a minimally adequate level of programming is required in order to provide juveniles with a reasonable opportunity to accomplish the purpose of their confinement, to protect the safety of the juveniles and the staff, and ensure the safety of the community once the juveniles are released."[124] Furthermore, the court defined "minimally adequate training" to be services:

> [D]esigned to teach juveniles the basic principles that are essential to correcting their conduct. These generally recognized principles include: (1) taking responsibility for the consequences of their actions; (2) learning appropriate ways to respond to others (coping skills); (3) learning to manage their anger; and (4) developing a positive sense of accomplishment.[125]

The court held that by offering a very limited number of programs for youths in the South Carolina facilities, the state Department of Juvenile Justice had violated the standard for minimally adequate treatment.[126]

This ruling has important implications for asserting a right to culturally appropriate services in juvenile training schools. The *Alexander S.* court articulated the purpose of treatment and defined this purpose in relation to life outside of the institution.[127] The court deemed rehabilitative treatment important because it would "enhance the juvenile's opportunity to succeed upon release."[128] Given the importance of culturally appropriate services when providing treatment in the mental health context[129] and the large proportion of delinquent youths who have mental health

123. 876 F. Supp. 773 (D.S.C. 1995).

124. *Id.* at 790.

125. *Id.*

126. *Id.* at 790-91. The court noted that the unsuccessful attempts to rehabilitate youths in South Carolina facilities are explained by the lack of resources applied to create and deliver programs that allow juveniles to correct their behavior. *See id.* at 781. The court further noted that, among the 50 states, South Carolina ranks forty-third in spending on juvenile corrections, and had the fifth highest rate of adult violent crime. *See id.* at 780. The court determined that there is likely a correlation between those two statistics: 82% of the juveniles leaving South Carolina facilities commit crimes that send them to adult prisons. *See id.*

127. *See* Holland & Mlyniec, *supra* note 79, at 1804.

128. 876 F. Supp. at 790. The court returned to the original justification for the juvenile court: to help youths become productive citizens when they reentered their communities. For discussion of this rehabilitative ideal, see *supra* notes 87-97.

129. *See supra* notes 39-46 and accompanying text.

needs,[130] treatment programs that do not address culturally relevant issues may not pass constitutional muster.

The *Alexander S.* opinion articulated some limitations, however, casting doubt on whether culturally appropriate services are constitutionally required. For example, the court explicitly refused to "construct a paragon or 'model' training school program for DJJ."[131] Many of the recommendations for programming made by the plaintiff's expert witnesses were found to exceed the constitutional mandate.[132] The court did not order any particular kinds of treatment programs, nor did it mention cultural issues; it instead mandated that the defendants develop a reasonable timetable for providing minimally acceptable programs at the facility.[133]

III. Implementing a Right to Culturally Appropriate Treatment in Juvenile Correctional Facilities

The *Alexander S.* court pointed out that while many of the programs and services proposed by the plaintiffs were not required by the Constitution, they were "model programs which the state of South Carolina, through its duly elected representatives, might voluntarily choose to establish."[134] States have the power to provide funding, re-design programs and strengthen treatment rights for juvenile delinquents—including the provision of culturally appropriate services. If states do not exercise this power to remedy the problems, the power is useless.

A. Current State Law Related to the Provision of Culturally Appropriate Services for Minority Juveniles in Correctional Facilities

There are a few states which have already recognized the importance of culturally appropriate services for incarcerated juveniles.[135] In Oregon, for example, state law regulates the operation

130. *See supra* note 14 and accompanying text (explaining that the overwhelming majority of delinquent youths in correctional facilities have mental health disorders).

131. 876 F. Supp. at 779. D.J.J. is the South Carolina Department of Juvenile Justice. *See id.* at 777.

132. *See id.* at 779.

133. *See id.* at 791.

134. *Id.* at 779.

135. *See supra* note 18 (listing state statutes that declare the goal of providing culturally appropriate services to juvenile offenders). The Florida statute states:

> It is the intent of the legislature that, to the maximum extent possible, commitment programs . . . be racially balanced and culturally specific and that minority youth be represented in various types of programs with different costs, service philosophies, and treatment modalities in approxi-

of the Oregon Youth Authority, the agency that supervises the state juvenile correctional facilities. The state law requires the Youth Authority to:

> a) Be cognizant of and sensitive to the issue of overrepresentation of minority youth in youth correctional facilities;
>
> b) Endeavor to develop and operate, and require its subcontractors to develop and operate, culturally appropriate programs for youth offenders.[136]

While this statutory language does not create an entitlement to culturally appropriate services (the statute only requires the state to "endeavor" to provide such services), the Oregon state legislature clearly recognized the need for such services, and viewed this need as connected to the problem of overrepresentation.

Minnesota's statute regarding programming in secure facilities has stronger language requiring culturally appropriate services for youthful offenders. The statute requires programming to be "tailored to the types of juveniles being served, including their . . . cultural and ethnic heritage."[137] Like the Oregon statute, however, the Minnesota statute does not define "culturally appropriate" or services "tailored" to the youths "cultural and ethnic heritage." Nor do the statutes provide any examples of such services. Most importantly, there are no guidelines for evaluating the cultural appropriateness of programming. If, for example, a juvenile challenged the cultural appropriateness of programs in his correctional facility, the judge would have no criteria with which to determine whether the programs met the statutory requirements.

Minnesota law also requires culturally specific counseling programs for Native American youths, providing a greater degree of specificity for evaluating whether culturally appropriate services are being provided.[138] It requires the Commissioner of Corrections to develop a model for counseling services provided to American Indian inmates of adult and juvenile facilities. The statute

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> mately the proportion that minority youth bear to the total committed population.

FLA. STAT. ANN. § 39.0205 § 13(1) (1996) (repealed 1997).

136. OR. REV. STAT. § 420A.010(9)(a-b) (1996).

137. MINN. STAT. § 242.32 subd. 2 (1996). Prior to placement in a secure facility, Minnesota law states that the court *may* "conduct a culturally appropriate psychological evaluation which includes a functional assessment of anger and abuse issues." MINN. STAT. § 260.185 subd. 1c(3) (1996). Furthermore, pretrial diversion programs must be designed and operated with the goal of developing the "use of demonstrated culturally specific programming, where appropriate." MINN STAT. § 388.24 Subd. 2(6) (1996).

138. *See* MINN. STAT. § 241.80 subd. 2 (1996). The statute does not, however, provide an unqualified right to the services because the services need only be provided "within the limits of available money." *Id.*

specifically addresses the kinds of counseling programs that must be provided, including counseling to "improve American Indian self-image," to develop "an understanding of and an adjustment to the cultural differences between American Indians and other ethnic groups," and to assist American Indians with reentry into their communities.[139] While it is still not perfectly clear how these ends should be fulfilled, the statement of the goals is more specific than the requirement of "tailoring" services to "cultural and ethnic heritage."[140] This provides the agency with better guidance as it attempts to comply with the law.

B. Model Code Provision Establishing Right to Culturally Appropriate Services

To address the identified deficiencies in present state law references to culturally appropriate treatment for confined juveniles (discretionary language, failure to provide adequate guidance regarding the definition and application of culturally appropriate services), this Article proposes a model code provision relating to provision of such services:

> Subd. X Secure Juvenile Facilities shall:
>
> (A) develop and operate, and require subcontractors to develop and operate, culturally appropriate programs for juvenile offenders.
>
> (1) "Culturally appropriate programs" means services adapted or directed to the unique needs of minority youth.
>
> (a) Evidence of culturally appropriate services includes, but shall not be limited to:
>
> (i) a diverse staff which has been trained to work in the cross-cultural context;
>
> (ii) a committee of minority parents, community members and service professionals to review the appropriateness of treatment programs for minority youth;[141]
>
> (iii) educational and mental health pro-

139. *Id.*

140. *Compare* MINN. STAT. § 241.80 subd. 2 (1996), *with* MINN. STAT. § 242.32 subd. 2 (1996).

141. Committees such as this already are used in pilot projects in Minnesota for establishing culturally appropriate mental health services for juvenile offenders and children in need of protection or services who are *not* in residential programs. *See* MINN. STAT. § 260.152 (1996). The Council on Affairs of Spanish Speaking People, the Council on Black Minnesotans, and the Council on Asian-Pacific Minnesotans would be valuable resources for the Department of Corrections. Other states can use similar groups as resources.

> grams which address issues relevant to minority communities; and
>
> (iv) assessments and interventions that utilize culturally appropriate methodologies.

The proposed code provision improves upon the code provisions in Florida, Oregon and Minnesota in two basic ways. First, it makes provision of culturally appropriate services mandatory, rather than discretionary. Second, it provides a definition of culturally appropriate services and criteria for evaluating the provision of such services.

C. Implementation Problems for the Proposed Model Code

Even if state legislatures are able to pass clearer, more detailed legislation that requires culturally appropriate services for confined minority youths, there are still several problems with enforcing and implementing such a right. For example, despite existing requirements for rehabilitative programming, many correctional facilities provide almost no mental health, education or vocational programming.[142] Attempting to enforce a right to culturally appropriate services might be unrealistic without a mechanism for enforcement, such as a private right of action under the statute. In addition, recognizing a right to culturally appropriate services in correctional facilities may be premature because of the lack of evidence regarding the effectiveness of such programs in the corrections context.[143]

The most significant problem facing advocates for culturally appropriate services for confined youths may be the growing evidence that almost any rehabilitative programming in the correctional setting is ineffective.[144] While improving the cultural relevance of current programs is likely to provide some benefit to confined youths, large corrections facilities may never be able to achieve cultural competence.[145]

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142. *See supra* notes 68-72 and accompanying text (discussing failure of juvenile correctional institution to provide adequate services).

143. *See supra* notes 63-65 and accompanying text (noting the lack of evidence of the effectiveness of culturally appropriate services).

144. *See supra* notes 73-77 and accompanying text (questioning the efficacy of the treatment model in juvenile corrections).

145. While large juvenile correctional facilities still exist in many states, they are under attack from commentators because they are similar to adult facilities in overcrowding, inadequate services, and inmate violence. *See* Feld, *supra* note 49, at 1074. Massachusetts deinstitutionalized delinquent youths by closing the last "reform school" over 20 years ago. *See Juvenile Detention Symposium*, *supra* note 3, at 418. Since then, Massachusetts has moved to smaller, community-based facilities with success. *See id.* at 418-19. The current Massachusetts system is less

IV. Conclusion

Given the continued unsatisfactory conditions of confinement in juvenile correctional facilities, and the growing number of minority youths disproportionately exposed to these conditions, states have an obligation to address racism at all levels of the juvenile justice system. While prevention and diversion programs are important ways to address minority overrepresentation, it is also critical to confront the racism in juvenile justice by improving the cultural competence of juvenile institutions. Despite the rather narrow interpretations of the "right to treatment" by courts, some state legislatures have passed legislation recognizing the importance of culturally appropriate services for confined minority youths. By addressing the unique needs of minority offenders, culturally appropriate programming is likely to reduce recidivism and improve conditions in juvenile facilities. In addition, improving the cultural relevance of correctional programming would refocus public policy on strategies for rehabilitating youthful offenders. At a time when the media portrays youthful offenders as "teenage predators," and juvenile courts have become increasingly punitive, it is especially important to demand that states honor each juvenile's right to treatment.

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expensive, more humane and less likely to produce juvenile offenders who require transfer to adult court. *See id.* In 1994, fewer than 20 youths were tried in adult court in Massachusetts, while 5,000 were tried as adults in Florida. *See id.* at 419. The best chance for the successful rehabilitation of serious youthful offenders is probably in smaller, community-based secure facilities that offer comprehensive treatment programming. *See Minnesota Supreme Court Task Force, supra* note 45, at 670.