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# Kidnapping Incorporated: The Unregulated Youth-Transportation Industry and the Potential for Abuse

Ira P Robbins

# ARTICLES

## KIDNAPPING INCORPORATED: THE UNREGULATED YOUTH-TRANSPORTATION INDUSTRY AND THE POTENTIAL FOR ABUSE

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### ABSTRACT

*Strangers come into a child's room in the middle of the night, drag her kicking and screaming into a van, apply handcuffs, and drive her to a behavior-modification facility at a distant location. What sounds like a clear-cut case of kidnapping is complicated by the fact that the child's parents not only authorized this intervention, but also paid for it. This scarcely publicized practice—known as the youth-transportation industry—operates on the fringes of existing law. The law generally pre-sumes that parents have almost unlimited authority over their children, but the youth-transportation industry has never been closely examined regarding exactly what the transportation process entails or whether it is in fact legal.*

*The companies provide a service to parents who want to send their children to behavior-modification facilities, including boot camps and other residential reform schools, but who are unable or unwilling to deliver the children themselves. A transportation company contracts with the parents to arrange for pickup and conveyance; the parents delegate rights over their children to the company, usually by signing a power of attorney. Due to the circumstances in which these transports typically take place, however, this delegation of rights has far greater implications than simply authorizing the transportation of a child from point A to point B. After suffering the emotional trauma of being taken from their parents, children may suffer physical abuse as well, as the companies often use force in the form of handcuffs and other restraints. This Article examines the details of the transport process and raises legal questions about the disciplinary authority that parents possess, including the extent to which they can grant this authority to a third party.*

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*Similar questions arose in the past with analogous private-transportation entities, but those questions were addressed when Congress issued strict regulations to monitor and limit their ability to transport vulnerable individuals. This Article provides the first in-depth examination of the legal issues relevant to the youth-transportation industry and recommends regulations that should be promulgated to keep the delegation of parental authority in check and thus protect the best interests of the child.*

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## INTRODUCTION

It was a quiet fall morning, just like any another.<sup>1</sup> Everyone was asleep, except Julie's parents, who were anxiously awaiting the call.<sup>2</sup> Julie had been experiencing difficulties at school and at home—the fighting over her recent behavior and

1. The following narrative is a fictional composite of several individual accounts of youths' experiences during transport by private transportation companies.

2. See Nadya Labi, *The Bogeyman*, LEGAL AFF., July–Aug. 2004, at 28, available at [http://legalaffairs.org/issues/July-August-2004/feature\\_labi\\_julaug04.msp](http://legalaffairs.org/issues/July-August-2004/feature_labi_julaug04.msp) (reporting on an example of the transport process).

disappointing academic performance had reached a boiling point.<sup>3</sup> Desperate and confused, Julie's parents had researched online residential reform schools that focused on adolescent behavior modification. Her parents had discovered a facility that seemed promising and enrolled Julie at once. Because Julie had been acting out, her parents feared that she would refuse to attend the new school and possibly run away.<sup>4</sup> After expressing these concerns to the facility, Julie's parents received contact information for a company that transports youths to the facility and similar programs.<sup>5</sup>

Julie's parents contacted the transportation company and received the necessary paperwork. They signed one form delegating parental rights over Julie to the transporters and another form that absolved the company from liability in case of an accident.<sup>6</sup> They also received information concerning how the process would be carried out; this information explained that the most efficient and peaceful way to transport Julie was for the transporters to wake her up early in the morning and to remove her from the house as quickly as possible.<sup>7</sup> The company recommended that Julie's parents not be involved in this process<sup>8</sup> and assured them that no physical restraints would be used unless absolutely necessary.<sup>9</sup> In addition, the company promised to treat Julie respectfully<sup>10</sup> and to keep her safe throughout the trip.

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3. See *id.* (describing the troubles a tenth-grade boy was facing that led to his transport to a private behavior-modification facility).

4. See Michelle Ray Ortiz, 'Escort Service' or Legalized Abduction?, L.A. TIMES, June 13, 1999, <http://articles.latimes.com/1999/jun/13/local/me-46067> (explaining that these transport services are often a "last-resort" for parents because they do not think their child will go to a program willingly).

5. See Tom Kellner, *Too-Tough Love?*, FORBES, Mar. 1999, at 112, available at <http://www.forbes.com/forbes/1999/0322/6306112a.html> (describing various teen reform facilities).

6. See, e.g., *Search and Rescue Application*, CHRISTIAN FAMILY NETWORK, [http://www.teentransport.org/files/sr\\_application\\_072209344pm.doc.pdf](http://www.teentransport.org/files/sr_application_072209344pm.doc.pdf) (last visited Mar. 14, 2014) (providing an indemnification contract and a special power of attorney for temporary child custody).

7. See Jack Swint, *Want Your Troubled Kid to Disappear in the Middle of the Night*, W. VA. NEWS (June 16, 2011), <http://westvirginianews.blogspot.com/2011/01/want-your-troubled-kid-to-disappear-in.html> (reporting that agents choose nighttime to minimize the potential for disruptive behavior).

8. See Decca Aitkenhead, *The Last Resort (Part One)*, THE GUARDIAN, June 28, 2003, <http://www.theguardian.com/education/2003/jun/29/schools.uk1>; Kellner, *supra* note 5. Although many accounts describe situations in which the child is awakened by the transport agents, other accounts specify that the parents wake their child and provide a brief explanation of what is happening before quickly leaving the room. See, e.g., Swint, *supra* note 7.

9. See *Youth Transport—Questions and Answers*, USA GUIDES INC., [http://www.youthtransport.us/?page=2\\_13](http://www.youthtransport.us/?page=2_13) (last visited Mar. 14, 2014) ("We will not utilize any restraints unless the Teen is in imminent danger of injuring themselves or others. If the circumstances arise where restraints are used we will make every effort to maintain the dignity of your child without sacrificing everyone's safety."). But see Swint, *supra* note 7 ("We found some companies have a security policy of using handcuffs in every case regardless of their behavior. Children have reported they were handcuffed and/or pepper sprayed just for crying.").

10. One company's policy provides:

Our Guides are trained to first use verbal skills & techniques to control a situation and are highly effective at de-escalating a potential confrontation. As our Guides are in very close proximity to the teen at all times they can 'read' the situation and if the Teen becomes combative we will employ restraint holds that may be uncomfortable yet, will assure that no harm comes to either the

At five o'clock in the morning, the transporters called to let Julie's parents know that they had arrived at the house.<sup>11</sup> Julie's parents let the men inside and directed them to Julie's room.<sup>12</sup> The parents handed over a small bag of Julie's belongings and remained out of sight.<sup>13</sup> The transporters<sup>14</sup> entered Julie's bedroom while she was fast asleep.<sup>15</sup> One man stood by the doorway while the other jolted Julie awake and quickly informed her that she was going to a new school and that she had to leave with them immediately.<sup>16</sup> Confused, Julie asked if she could use the restroom and change; the transporters refused and told her that everything she needed was already packed in the car.<sup>17</sup> At this point Julie became extremely frightened and demanded to see her parents, frantically searching to see if they were in the room or the hallway. Sensing that Julie was agitated, the transporters restrained her with handcuffs<sup>18</sup> and physically forced her down the stairs<sup>19</sup> and into the secure vehicle.<sup>20</sup>

Julie was upset and asked where these men were taking her. She had no idea where she was going.<sup>21</sup> After a few hours of driving, while at a gas station, Julie asked to use the restroom. To her surprise, she was escorted in handcuffs to the restroom,<sup>22</sup> which both she and the male transporter entered. Julie was released from the restraints, but remained supervised.<sup>23</sup> Immediately after, Julie was

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Teen or our Guides. The Teen will be handled with respect and they will be advised that the[y] will have to go and it is their choice on how comfortable they would like to be during the transport.

*Youth Transport—Questions and Answers, supra* note 9.

11. See Labi, *supra* note 2.

12. See, e.g., Reynolds Holding, *When Parents OK Abduction: Troubled Teenagers Snatched Away 'for Their Own Good,'* S.F. CHRON., June 22, 1994, at A1 (describing one girl's experience when she was taken by a male transporter).

13. See Swint, *supra* note 7 (describing a typical transport).

14. See Marianne Costantinou, *Disciplinary Camps, Schools Put Teens' Rights on the Line*, S.F. EXAMINER, Jan. 18, 1998, at A1 (noting that youth-transportation companies send "pretty good-sized guys" who travel in pairs and that the companies "try to send people who are intimidating").

15. See *id.* (explaining that the transporters arrive at night so that the child will likely be asleep and thus caught off-guard).

16. See, e.g., Holding, *supra* note 12.

17. See Labi, *supra* note 2 (recounting stories from a transporter who "has dragged teens to the car in their underwear" and finding that transporters do not allow children to grab their clothes before being taken from their homes).

18. See Costantinou, *supra* note 14 (interviewing a transporter who revealed that "[h]andcuffs are common in the industry"); Labi, *supra* note 2 (describing the experiences of two youths who were handcuffed during the transport process).

19. See, e.g., Holding, *supra* note 12 (quoting a youth describing his experience: "One guy knee-dropped in on the middle of my back, bent back my wrist, leaned over into my ear and said, 'If you don't stop f- - -ing screaming, I'm going to bust your f- - -ing wrist.' There was blood all over.").

20. See Costantinou, *supra* note 14 (stating that teens are often placed in a car with child locks to prevent escape).

21. See Kellner, *supra* note 5.

22. Cf. Swint, *supra* note 7 (asserting that children are also taken during the day from school and that in these cases the children are put in handcuffs in front of their peers).

23. See *id.*

restrained again and was escorted back to the vehicle in full sight of the patrons of the gas station. Embarrassed and alone, Julie remained silent and cried in the back of the car for the remaining hours of the drive.<sup>24</sup>

The public is largely unaware of how frequently youth transports, like the one depicted in Julie's story, occur.<sup>25</sup> This Article exposes the world of contracted, purportedly legal, child kidnapping and argues that if these practices are permitted to continue, appropriate regulations must be implemented to protect children's safety and well-being. In addition, this Article highlights the fundamental inconsistencies between the youth-transportation industry and the laws protecting children's rights. First, Part I of this Article describes the problems inherent in the transportation of youths by private transport companies and the laws that are potentially implicated. Part I also details analogous industries that have been forced to comply with regulations similar to those proposed in this Article. Next, Part II demonstrates the parallels between established industries, such as juvenile-offender transport and private-prison transport, and the youth-transport industry. Finally, Part III uses these parallels to formulate recommended regulations to protect the rights of children during transport.

## I. BACKGROUND

### A. *Youth-Transportation Companies*

The youth-transportation industry raises important questions about parental authority, children's rights, and the tensions that exist between the two. These companies are third-party entities that transport children to behavior-modification facilities.<sup>26</sup> Typically when "troubled" children and teens are taken to these facilities in the United States and abroad, parents are unwilling or unable to transport their children themselves.<sup>27</sup> These companies exist to remove and deliver the children efficiently and with minimal resistance.

Youth-transportation companies are in business throughout the United States as well as internationally.<sup>28</sup> Although often established by former law-enforcement

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24. See Constantinou, *supra* note 14 ("Most kids react with disbelief . . . . Some cry.").

25. See, e.g., Holding, *supra* note 12 (reporting that, among the hundreds of youth advocates, lawyers, police officers, and educators interviewed for the story, few had ever heard of the industry).

26. These facilities are privately owned and privately run, the children have not been convicted of a crime, and the facilities can maintain guardianship of the children until they turn eighteen. The children have restricted access to communication with their parents and endure various behavior-modification practices, including labor and workshops. See generally MAIA SZALAVITZ, *HELP AT ANY COST: HOW THE TROUBLED-TEEN INDUSTRY CONS PARENTS AND HURTS KIDS* (2006).

27. This Article focuses on transportation companies that exist and practice in the United States. See Lenore Behar et al., *Protecting Youth Placed in Unlicensed, Unregulated Residential "Treatment" Facilities*, 45 FAM. CT. REV. 399, 404 (2007) (reporting results of a survey that stated that nearly fifty percent of children taken to behavioral-modification facilities were transported by a youth-transportation company).

28. *National and International Youth Transport: Troubled Teen, At-Risk*, NEW START TRANSPORTS, <http://www.newstarttransports.com/international-transport.php> (last visited Mar. 14, 2014).

and military personnel, many companies do not require any specific background or training for their employees.<sup>29</sup> Despite this lack of training, parents delegate authority to these companies through a power of attorney. Typically, parents meet with the transport company's representative without the child's knowledge and sign a contract that gives the transporter temporary custody of the child in order to legally transport him or her to a facility, often across state lines.<sup>30</sup> These contracts and the rights conferred are executed independently of the state, with no legal or judicial oversight outside of traditional contract law.<sup>31</sup>

Most transportation companies employ similar procedures when escorting children. Contact with these companies begins with the parents' initial inquiries and can result very quickly in a child's transport to a residential facility.<sup>32</sup> The transport typically occurs in the middle of the night to ensure that the child is at home and asleep and therefore less likely to put up a fight.<sup>33</sup> Other examples of youth transport involve more brazen activity, such as taking the child from school—often without disclosing the true intentions to school administrators.<sup>34</sup> Parents complete and sign a power of attorney, legally delegating their parental rights to the transporters and authorizing them to exercise almost unlimited control over the child.<sup>35</sup> The consequences of signing this power of attorney are drastic.

The power of attorney in these circumstances is presumptively valid because parents have the ability to temporarily transfer their fundamental rights to any third party.<sup>36</sup> State statutes allow parents to do this by contract, without the need

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29. *Id.*

30. *See, e.g., Search and Rescue Application, supra* note 6.

31. *See infra* notes 59–61 and accompanying text.

32. *See Swint, supra* note 7 (explaining the transport process).

33. *See id.* (indicating that agents choose nighttime to minimize the potential for disruptive behavior).

34. *See, e.g., W. Shield Investigations & Sec. Consultants v. Superior Court*, 98 Cal. Rptr. 2d 612, 616 (Ct. App. 2000) (stating that the transporters came to the child's school while carrying handcuffs and firearms and misrepresented themselves as detectives working for the county child-protective-services agency); *Swint, supra* note 7 (recounting a case in which a child was removed from her school in handcuffs). The child described in *West Shield* appears to be the same child described in many newspaper stories using a pseudonym. *See Reynolds Holding, Abducted Daughter Tells Her Story*, S.F. CHRON., June 23, 1994, at A1 (reporting on the story of a girl named "Lucy" who was taken from school by persons presenting themselves as child-protective-service workers who carried handcuffs and firearms).

35. *See West Shield*, 98 Cal. Rptr. 2d at 615 (quoting the contract as stating that the parents "have authorized Agents of West Shield Investigations to exercise all control over Charleen [Eymil], that we, the parents can exercise in the event that Charleen should need to be transported to Pathfinders, as we believe Charleen to be a danger to herself or others"); *Labi, supra* note 2, at 29 (indicating that one contract authorized the transporters to take "any act or action" on the parents' behalf during the transport); *infra* notes 36–39 and accompanying text (detailing the process of delegating parental authority through a power of attorney). Few transport companies make the contract available on their web sites, but those that do provide a chilling hint of what the process entails. *See, e.g., Search and Rescue Application, supra* note 6, at 5 (authorizing transporters to "disciplin[e] according to the Word of God").

36. *See, e.g., ALA. CODE* § 26-2A-7 (LexisNexis 2009); *ALASKA STAT.* § 13.26.020 (2010); *ARIZ. REV. STAT. ANN.* § 14-5104 (2005); *COLO. REV. STAT.* § 15-14-105 (2008); *HAW. REV. STAT.* § 560:5-105 (2006); *IDAHO CODE ANN.* § 15-5-104 (2009); *IND. CODE* § 29-3-9-1 (West Supp. 2011); *ME. REV. STAT. ANN.* tit. 18-A, § 5-104 (Supp. 2011); *MASS. GEN. LAWS ANN.* ch. 190B, § 5-103 (West 2012); *MICH. COMP. LAWS ANN.* § 700.5103 (West Supp.

for a court's approval, and allow them to delegate all their parental powers except the right to consent to their child's adoption and marriage.<sup>37</sup> This delegation of parental powers provides the new guardian with substantial parental rights, including the right to consent to otherwise tortious acts on behalf of the minor.<sup>38</sup> Despite the wide-sweeping powers that this right allows, there is very little scholarly analysis of the subject.<sup>39</sup>

The exact rights that the parents confer can be ambiguous and difficult to apply in the youth-transport context.<sup>40</sup> Parents generally have the right to raise their children as they see fit, with the primary condition that their conduct be lawful and reasonable.<sup>41</sup> In the context of transferring parental rights to third parties, however, it can be difficult to determine where the lines of lawful and reasonable conduct should be drawn.<sup>42</sup> Courts have found that, when parents sign consent and power-of-attorney forms that delegate parental rights to third parties, those third parties are absolved of liability for tort claims to a comparable extent as the parents themselves would be.<sup>43</sup>

The transfer of parental authority, and its attendant tort immunity, is problematic when delegated to behavior-modification facilities. For example, in *Blair v. Wills*,<sup>44</sup> a sixteen-year-old student who attended one such facility brought several state-law claims, including false-imprisonment and battery charges, alleging that the school and its staff denied him reasonable bathroom privileges, forced him to remain on school premises, assaulted him, and subjected him to sleep depriva-

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2011); MINN. STAT. ANN. § 524.5-211 (West Supp. 2012); MO. ANN. STAT. § 475.024 (West 2009); MONT. CODE ANN. § 72-5-103 (2011); NEB. REV. STAT. § 30-2604 (2008); N.J. STAT. ANN. § 3B:12-39 (West 2007); N.M. STAT. ANN. § 45-5-104 (2011); N.D. CENT. CODE § 30.1-26-04 (2010); ORE. REV. STAT. § 109.056 (2011); S.C. CODE ANN. § 62-5-104 (2009); TENN. CODE ANN. § 34-6-302 (2007); UTAH CODE ANN. § 75-5-103 (LexisNexis 1993).

37. See, e.g., MONT. CODE ANN. § 72-5-103(1) (2011) ("A parent or a guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding 6 months, any powers regarding care, custody, or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward.").

38. See *Blair v. Wills*, 420 F.3d 823, 828–29 (8th Cir. 2005) (holding that the presence of a power of attorney properly executed pursuant to Missouri law precluded a student's claim of false imprisonment against a boarding school because the school administrators were able to consent to the action on behalf of the child).

39. For example, the three volume treatise, *LEGAL RIGHTS OF CHILDREN*, devotes only six sentences to the subject. 1 DONALD T. KRAMER, *LEGAL RIGHTS OF CHILDREN* § 6:18, at 567 (2d rev. ed. 2005).

40. See *Reynolds Holding, Parents' Rights vs. Children's Rights*, S.F. CHRON., June 24, 1994, at A1 (stating that a professor at Loyola Law School noted that parents' legal authority to delegate their rights originates in academic and temporary child-care circumstances, which differ from the youth-transportation and behavioral-modification-facility situations).

41. See *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000).

42. See *Holding*, *supra* note 40 ("There's not a judge in the country who wants to define the line between the constitutional rights of 14- or 17-year-old kids and the rights of parents to control them . . .") (internal quotation marks omitted).

43. See, e.g., *Blair*, 420 F.3d 823; *Woods v. Wills*, 400 F. Supp. 2d 1145 (E.D. Mo. 2005), *aff'd per curiam*, 225 F. App'x 420 (8th Cir. 2007).

44. 420 F.3d 823 (8th Cir. 2005).



tion.<sup>45</sup> Prior to his arrest, Blair's parents had signed a power of attorney delegating parental authority to school administrators.<sup>46</sup>

On his false-imprisonment claim, the court noted that Blair was required to show that he had been confined without his consent and without legal justification.<sup>47</sup> The court further stated that the parents' consent on behalf of the minor is relevant when determining whether the minor consented to confinement.<sup>48</sup> Blair seemingly conceded that his parents had the right to consent on his behalf, arguing only that his parents' consent was not informed.<sup>49</sup> The court granted summary judgment for the defendants, holding that, because his parents consented to his enrollment with full knowledge of the school's restrictions, the consent had been informed and thus Blair could not maintain an action for false imprisonment.<sup>50</sup>

Similarly, in *Woods v. Wills*,<sup>51</sup> five students brought claims of assault, battery, and false imprisonment, among others, against employees of the same school that Blair attended.<sup>52</sup> The parents of the five students had each executed a power of attorney to the school before enrolling their children.<sup>53</sup> Because the plaintiffs understood that the powers of attorney immunized the school administrators from liability for false imprisonment, they were forced to argue that their parents' consent to enrollment at the school had been obtained by fraud.<sup>54</sup>

Parental delegation of authority to third parties is equally problematic in the youth-transport context, as illustrated by the following news reports<sup>55</sup> about sixteen-year-old David van Blarigan from Oakland, California. David was taken by private transporters in the middle of the night and was eventually sent to an infamous therapeutic school in Jamaica.<sup>56</sup> He traveled unaccompanied on the

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45. *Id.* at 826.

46. *Id.*

47. *Id.* at 828.

48. *Id.* (citing MO. REV. STAT. § 475.025 (2000)).

49. *See id.*

50. *Id.* at 828–29.

51. 400 F. Supp. 2d 1145 (E.D. Mo. 2005), *aff'd per curiam*, 225 F. App'x 420 (8th Cir. 2007).

52. *Id.* at 1150.

53. *Id.* at 1153–57.

54. *See id.* at 1169–70 (observing that the false-imprisonment issue had already been decided in *Blair* and that plaintiffs attempted to respond by arguing fraud). The court ultimately rejected the fraud claims because the plaintiffs had not established all nine elements of Missouri's onerous test for fraud. *Id.* at 1185–86. On the alleged abuses at some juvenile behavior-modification facilities, see Timothy Williams, *Students Recall Special Schools Run Like Jails*, N.Y. TIMES, July 23, 2013, <http://www.nytimes.com/2013/07/24/us/students-recall-a-school-run-like-a-prison.html> (describing the highly structured life and severe disciplinary measures, including being “held on the floor for as long as an hour by staff members . . . pepper spraying, handcuffing, [and] being forced into dog cages”). One former student reported being hogtied with duct tape and rope—for “passing gas without permission.” *Id.*

55. Litigation was involved in both of these cases, but the records are sealed due to the parties' status as minors.

56. Jeff Stryker, *Sorry to Wake You, Honey. They're Coming to Take You Away*, N.Y. TIMES, Feb. 1, 1998, <http://www.nytimes.com/1998/02/01/weekinreview/word-for-word-teen-age-treatment-programs-sorry-wake-you-honey-they-re-coming.html>.

plane, and when the school's representatives were late to pick him up, he called his neighbor—an administrative law judge—to inform him of his situation.<sup>57</sup> The neighbor brought the allegations to the attention of authorities; eventually a county prosecutor filed a civil action against the parents seeking the child's return, accusing them of aiding and abetting in the kidnapping and false imprisonment of their son.<sup>58</sup> The parents had signed a contract stating, "When it becomes necessary, in the sole discretion of the Program, to restrain a Student, the Sponsors authorize the Program to use pepper spray (or electrical disabler, mace, mechanical restraints, handcuffs)."<sup>59</sup> The prosecutor argued that the parents illegally delegated their parental authority, but the judge ruled that the parents were acting within their parental rights.<sup>60</sup> The judge held that, without evidence of abuse, the parents' decision could not be disturbed.<sup>61</sup>

Despite the substantial authority that parents transfer to these companies, the youth-transportation industry is almost completely unregulated.<sup>62</sup> Most state laws make no mention of this industry at all. Thus, there are no legal requirements regarding personnel or procedures through which companies take, maintain, or transfer custody of a child. Not surprisingly, there are many documented—and who knows how many undocumented—examples of physical and emotional injury occurring during these transactions.<sup>63</sup>

While the industry lacks regulation, this is not for want of trying. Utah and California have both addressed the issue in their state legislatures, but with varying degrees of success. In 1991, the Utah legislature passed a law that would have regulated youth-transport services by revoking any facility's license if it accepted youths from transportation companies that were transporting children against their will; it would have done so by classifying the practice as unlawful detention.<sup>64</sup> The governor subsequently vetoed the bill because the only people who were prohibited from taking children against their will were those who had been hired professionally, thus excluding those who had not been paid.<sup>65</sup>

In 2000, California came closer than any other state to effectively addressing the

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57. Adam Cohen et al., *Is This a Camp or Jail?*, TIME, Jan. 26, 1998, at 56–57.

58. See Henry K. Lee, *Parents Had Right to Send Boy to Jamaica, Judge Rules / Reform School Was Their Last Resort*, S.F. CHRON., Jan. 21, 1998, <http://www.sfgate.com/news/article/Parents-Had-Right-to-Send-Boy-to-Jamaica-Judge-3016013.php>.

59. See Andrew Leonard, *Schools of Hard Knocks*, SALON (Feb. 23, 1998), <http://archive.is/8APDJ> (quoting from the contract); see also Lee, *supra* note 58 (relating the judge's concerns about these provisions).

60. Dan Reed, *Banishing Son OK, Judge Says Parental Rights: 'Drastic' Move Shipping Troubled Boy to Jamaica Legal*, SAN JOSE MERCURY NEWS, Jan. 21, 1998, at 1A (observing that legal experts described this ruling as "consistent with decades of law that gives parents broad latitude in rearing their children as they see fit").

61. *Judge Says Parents Had Right to Force Boy into Treatment*, SALT LAKE TRIB., Jan. 21, 1998, at A3.

62. See *National and International Youth Transport: Troubled Teen, At-Risk*, *supra* note 28.

63. See *infra* Part II.B.

64. Cherrill Crosby, *181 Legislative Measures Still Await Governor's Decision*, SALT LAKE TRIB., Mar. 17, 1991, at B1.

65. Cherrill Crosby, *Bangerter Vetoes 9 Bills, Nixes 3 Appropriations*, SALT LAKE TRIB., Mar. 20, 1991, at B1.

issues that are implicated in the operation of these youth-transportation companies. The legislature passed a law that actually defined "transport escort service,"<sup>66</sup> articulated its purpose of protecting children,<sup>67</sup> and required transport companies to register with the California child-care-provider registry, Trustline.<sup>68</sup> While the law made significant progress regarding the procedural aspects of youth transportation, it failed to adequately address the substance of the transportation—an omission that left it open to a great deal of criticism.<sup>69</sup>

### B. General Rights of Parents and Children

For more than a century, there has been a controversial dialogue in the United States over how best to protect children's interests and the amount of weight that should be given to children's fundamental rights, the rights of their parents, and the interests of the state. Children's rights reform gained momentum with the Supreme Court's 1966 decision in *Kent v. United States*,<sup>70</sup> in which the Court delineated the role of juvenile courts and required due process protections for juveniles.<sup>71</sup> Then, in *In re Gault*,<sup>72</sup> the Supreme Court in 1967 recognized children as people deserving of protection under the Fourteenth Amendment.<sup>73</sup> While children were still considered to have diminished constitutional rights due to their age, the Court granted equal-protection rights to them, albeit with some limitations.<sup>74</sup> This principle that children possess some constitutional rights was echoed in 1976, when the Court asserted that children do not one day arbitrarily acquire rights, but rather possess them all along.<sup>75</sup>

Despite numerous holdings that minors possess constitutional rights,<sup>76</sup> parents'

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66. See CAL. HEALTH & SAFETY CODE § 1596.653 (West 2008) (defining a "transport escort service" as "any person, partnership, association, or corporation that accepts financial compensation or other consideration to accompany or transport minors . . . to any residential facility or institution located outside the state").

67. See *id.* (providing that the California legislature's intent is "to protect the well-being of California children").

68. *Id.*

69. See Karen Abbott, *With Teens, Whose Rights Count Most?*, ROCKY MOUNTAIN NEWS, Aug. 29, 1999, at 2A (explaining that the law originally prohibited the use of handcuffs, straitjackets, and other restraints but was watered down to require only that the transporters' criminal records had been checked).

70. 383 U.S. 541 (1966).

71. *Id.* at 562.

72. 387 U.S. 1 (1967).

73. See *id.* at 30–31.

74. See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (articulating reasons why children's constitutional rights are more limited than adults, including their "peculiar vulnerability," their "inability to make critical decisions in an informed, mature manner," and the important "parental role" in raising children); *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (establishing that juveniles are not accorded all of the same rights as adult criminal defendants, such as the right to a jury trial).

75. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (declaring unconstitutional a state statute that required all unwed minors to obtain parental consent before receiving abortion services).

76. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (holding that children are entitled to due process notice and a hearing when suspended from school); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969) (free-speech rights); *Gault*, 387 U.S. at 31–57 (right to notice of criminal charges, right to counsel, right to not

rights over their children—including the right to delegate authority regarding their children’s freedom unilaterally and without review—have received great deference from the Supreme Court. For example, in 1923, in *Meyer v. Nebraska*,<sup>77</sup> the Court recognized that parents have the right to “establish a home and bring up children.”<sup>78</sup> Two years later, in *Pierce v. Society of Sisters*,<sup>79</sup> the Court reinforced the liberty of parents and guardians to direct a child’s upbringing and education.<sup>80</sup> These two cases protect parental autonomy by finding a liberty interest in raising a child as the parents see fit—a right that is protected by due process.<sup>81</sup>

Parental authority over children is not unlimited, however; the state can curb parental power to further the state’s interest in protecting children from harm.<sup>82</sup> *Parens patriae* is an archaic legal term that describes the state’s ability to act *in loco parentis*—in place of the parent—in order to protect children.<sup>83</sup> The Supreme Court has recognized a state’s broad *parens patriae* power and declared that a state “has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare.”<sup>84</sup> The state may limit or sever a parent’s right to his or her child if it deems that the health or safety of the child is at risk.<sup>85</sup>

In the context of parents voluntarily committing their children to state-run mental-health hospitals, for example, a neutral fact-finder must determine whether committal is appropriate.<sup>86</sup> The Court reached this conclusion in *Parham v. J.R.* by applying the balancing test from *Mathews v. Eldridge*, which is used to determine whether state procedures that deprive individuals of life, liberty, or property comport with procedural due process.<sup>87</sup> The Court weighed (1) the child’s interest in not being committed, (2) the parent’s interest in maintaining the health and welfare of the child, (3) the state’s interests in its procedures, and (4) the adequacy of the current procedures in protecting against arbitrary confinements.<sup>88</sup> After balancing these factors, the Court concluded that the risk of error is sufficiently great when parents decide to institutionalize their children for mental-health

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incriminate oneself, right to cross-examine witnesses); *Kent*, 383 U.S. at 562–63 (due process rights in juvenile court).

77. 262 U.S. 390 (1923).

78. *Id.* at 399.

79. 268 U.S. 510 (1925).

80. *Id.* at 534–35.

81. See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 801 (4th ed. 2010).

82. See *Prince v. Massachusetts*, 321 U.S. 158, 168–69 (1944) (asserting that the state’s police power allows for broader regulation over children than adults).

83. 2 KRAMER, *supra* note 39, § 16:1, at 8–9 & n.19.

84. See *Prince*, 321 U.S. at 166–67 (1944) (upholding state child-welfare law).

85. 2 KRAMER, *supra* note 39, § 16:2, at 11.

86. See *Parham v. J.R.*, 442 U.S. 584, 606–07 (1979) (declaring that the risk of error in letting the parent make the decision unilaterally was sufficiently great to justify this imposition on parents’ rights over their children).

87. See *id.* at 599–600 & n.11 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (emphasizing that this analysis applied because parents were committing their children to a state-run hospital).

88. See *id.*

reasons that a neutral fact-finder must determine whether the statutory requirements for admission to the hospital are met.<sup>89</sup>

Another issue affecting the balance of rights between children and parents is the parental-immunity doctrine. This doctrine, which was judicially created in Mississippi at the end of the nineteenth century in *Hewellette v. George*,<sup>90</sup> originally provided parents with blanket immunity from all negligent torts brought by their children.<sup>91</sup> The court cited no authority—neither from English common law nor from any other tradition—for the doctrine's creation.<sup>92</sup> Nevertheless, the doctrine spread rapidly and was eventually adopted in most other states.<sup>93</sup> The underlying rationales for the parental immunity doctrine include preservation of family harmony,<sup>94</sup> preservation of family assets,<sup>95</sup> and preservation of parental authority.<sup>96</sup> Support for this doctrine waned, however, with early exceptions being carved out for willful and malicious torts.<sup>97</sup> Other common exceptions include negligent child-rearing and parental abandonment, reckless and intentional acts, and negligent supervision.<sup>98</sup> In fact, four states and the District of Columbia never adopted the doctrine of parental immunity at all, and eleven states have abrogated it completely.<sup>99</sup>

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89. *Id.* at 606. The neutral fact-finder need not be a judicial officer, but he or she must make an in-depth analysis of all the circumstances surrounding the child's situation before making a decision. *Id.* at 606–10. Since the decision is largely medically based, medical professionals are in the best position to make the determination. *Id.* This investigation includes an interview with the child and is intended to provide for an accurate determination of whether hospitalization is necessary. *Id.* at 607. This decision is subject to periodic reviews. *Id.*

90. 9 So. 885 (Miss. 1891), *overruled by* *Glaskox ex rel. Denton v. Glaskox*, 614 So. 2d 906 (Miss. 1992).

91. See *Hewellette*, 9 So. at 887 (holding a parent immune from a false-imprisonment suit brought by her daughter in relation to her confinement in a mental institution).

92. See Irene Hansen Saba, *Parental Immunity from Liability in Tort: Evolution of a Doctrine in Tennessee*, 36 U. MEM. L. REV. 829, 833 (2006).

93. *Id.* at 834.

94. See *Wright v. Wright*, 191 S.E. 2d 223, 224 (Va. 1972) (stating that the purpose of the doctrine is “to protect parental discipline, domestic felicity, and family tranquility”). But see *Black v. Solmitz*, 409 A.2d 634, 636 (Me. 1979) (stating that the justification for immunity based on the preservation of family harmony “cannot withstand close scrutiny” because “[s]o many exceptions and qualifications have evolved in application of the rule . . . that the asserted rationale can no longer serve as a valid basis for a sweeping denial of liability”); *Briere v. Briere*, 224 A.2d 588, 591 (N.H. 1966) (arguing that prohibiting a child's personal-injury claim against a parent while permitting other causes of action “is indeed not only to perpetuate confusion and irreconcilable decisions, but to entrench a policy from which changing times have drained most of such vitality as it may have once possessed” (citation omitted)).

95. *Wallace v. Smyth*, 786 N.E.2d 980, 985 (Ill. 2002).

96. *Id.* See generally Joseph J. Basgier, III, *Children's Rights: A Renewed Call for the End of Parental Immunity in Alabama and Arguments for the Further Expansion of a Child's Right to Sue*, 26 LAW & PSYCHOL. REV. 123, 124–28 (2002) (discussing the origins of and early justifications for the parental-immunity doctrine).

97. See, e.g., *Emery v. Emery*, 289 P.2d 218, 224 (Cal. 1955) (holding that emancipated daughters could maintain a suit against their father for a willful tort).

98. See Sandra L. Haley, Comment, *The Parental Tort Immunity Doctrine: Is it a Defensible Defense?*, 30 U. RICH. L. REV. 575, 581–92 (1996).

99. *Verdier v. Verdier*, 219 S.W.3d 143, 145 (Ark. 2005) (detailing the current status of parental immunity in the U.S.).

In the states that still subscribe to the parental-immunity doctrine, many courts now take one of three approaches to determine whether immunity applies to parents' tortious acts. The first approach grants immunity when the parent's conduct is an exercise of parental discretion and authority.<sup>100</sup> Actions that fall within this category include conduct associated with the care, supervision, and discipline of a child.<sup>101</sup> The second approach employs the reasonably prudent parent standard, which looks at whether the discipline, punishment, or other action taken by the parent is what an ordinarily reasonable and prudent parent would have done in similar circumstances.<sup>102</sup> The third approach, taken from the Second Restatement of Torts, abolishes blanket immunity but leaves intact some privileges, such as the privilege of parental discipline.<sup>103</sup> Although courts are beginning to apply stricter standards to parental authority, children's rights still remain subordinate to their parents' wishes. The Supreme Court's 1995 decision in *Vernonia School District 47J v. Acton*<sup>104</sup> forcefully reemphasized that minors' liberty interests are limited, and stated that "[t]hey are subject, even as to their physical freedom, to the control of their parents or guardians."<sup>105</sup> While this case concerned drug testing in schools,<sup>106</sup> in many other settings the Supreme Court has

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100. See, e.g., *Hebel v. Hebel*, 435 P.2d 8, 15 (Alaska 1967); *Wagner v. Smith*, 340 N.W.2d 255, 256 (Iowa 1983) (adopting parental authority and discretion area of immunity); *Rigdon v. Rigdon*, 465 S.W.2d 921, 923 (Ky. 1971) (adopting zone of immunity as conduct within parental authority and discretion); *Wright v. Wright*, 351 N.W.2d 868, 871 (Mich. Ct. App. 1984) (adopting zone of immunity that extends to acts within parent's authority and discretion); *Foldi v. Jeffries*, 461 A.2d 1145, 1152 (N.J. 1983) (holding that immunity attaches for conduct within the parent's discretion or authority); *Silva v. Silva*, 446 A.2d 1013, 1016 (R.I. 1982) (utilizing parental-authority-and-discretion standard for protected conduct); *Broadwell ex rel. Broadwell v. Holmes*, 871 S.W.2d 471, 476-77 (Tenn. 1994) (operating vehicle that lead to child's death was not within parental-authority exception); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971) (adopting rationale that activities within parent's discretion or authority are protected); *Goller v. White*, 122 N.W.2d 193, 198 (Wis. 1963).

101. *Wallace*, 786 N.E.2d at 985.

102. See, e.g., *Broadbent ex rel. Broadbent v. Broadbent*, 907 P.2d 43, 50 (Ariz. 1995) (en banc); *Gibson v. Gibson*, 479 P.2d 648, 653 (Cal. 1971) (en banc). The court in *West Shield Investigations & Security Consultants v. Superior Court* acknowledged that there are some limits to the actions that the transporters can take. 98 Cal. Rptr. 2d 612 (Ct. App. 2000). In that case, Charleen Eymil brought numerous civil claims against her transporters and the wilderness program she attended. *Id.* at 616. Eymil was able to maintain claims of intentional fraud and concealment against the wilderness program. *Id.* at 625-26. The court emphasized that the program could act only within the scope of lawful parental authority assigned to them by Eymil's parents. *Id.* at 626. The issue came down to a determination of whether the program's actions were within the limits of what a reasonable and prudent parent would have done. *Id.* Notably, Eymil conceded that the program was acting *in loco parentis* and thus entitled the program to assert this defense of parental immunity. See *id.*

103. RESTATEMENT (SECOND) OF TORTS § 895G & cmt. k (1979) ("A parent or child is not immune from tort liability to the other solely by reason of that relationship. Repudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious."); see *Winn v. Gilroy*, 681 P.2d 776, 784 (Or. 1984) (abandoning blanket parental immunity and adopting the Restatement approach); see also *Haley*, *supra* note 98, at 596 (explaining that the intent of the Restatement approach was to allow parents flexibility in raising their children while still acknowledging the need for children to have remedies against their parents for tortious conduct).

104. 515 U.S. 646 (1995).

105. *Id.* at 654.

106. *Id.* at 648.

yet to delineate what constitutes the proper balance of competing interests among parents, children, and the state.<sup>107</sup>

### C. Child-Protection Laws

Although parents have significant authority to discipline their children as they see fit, they must do so reasonably or risk violating the law. States use criminal laws to protect children from acts that are unquestionably beyond the scope of proper parental conduct. Child-abuse laws, for example, set minimum standards for the care of children and limit the extent of corporal punishment that parents and those standing *in loco parentis*<sup>108</sup> are allowed to employ. Specifically, there has been a reexamination of the appropriate use of restraints on children, arising from a greater awareness of the long-term psychological and physical damage caused by their use. Juveniles suspected or convicted of a crime have benefited from increased restrictions on the nature and extent of restraints that may be utilized. Other criminal laws, such as kidnapping and false imprisonment, as well as false-imprisonment civil claims, afford general protections against taking people against their will; however, special rules regarding consent limit their effectiveness as applied to children.

#### 1. Child Abuse

The federal Child Abuse Prevention and Treatment Act ("CAPTA")<sup>109</sup> defines child abuse as an act "on the part of a parent or caretaker, which results in death [or] serious physical or emotional harm."<sup>110</sup> This legislation consists of several provisions that require states to implement standards that are substantively consistent with the federal regulations in order to receive federal funding.<sup>111</sup> The provisions of CAPTA, however, do not provide a mechanism under which to bring a private cause of action.<sup>112</sup>

Most child-abuse causes of action are prosecuted under state law,<sup>113</sup> and although state laws vary, parental conduct must always remain reasonable. In 1987, a Wisconsin court acknowledged that parents retain very broad discretion

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107. See *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972). See generally Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339 (2007).

108. See *supra* note 83 and accompanying text.

109. 42 U.S.C. §§ 5101–5119c (2006), amended by CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, 124 Stat. 3459.

110. 42 U.S.C. § 5101 (Supp. 2011).

111. 45 C.F.R. § 1340.14(b) (2012).

112. See, e.g., *Doe ex rel. Fein v. District of Columbia*, 93 F.3d 861, 865 (D.C. Cir. 1996); *A.S. ex rel. Blalock v. Tellus*, 22 F. Supp. 2d 1217, 1224 (D. Kan. 1998).

113. See *Breaking the Silence on Child Abuse: Protection, Prevention, Intervention, and Deterrence: Hearing Before the Subcomm. on Children & Families of the S. Comm. on Health, Educ., Labor, and Pensions*, 112th Cong. (2011) (testimony of Teresa Huizar, Exec. Dir., National Children's Alliance), available at <http://www.help.senate.gov/imo/media/doc/Huizar.pdf> ("98% of child abuse investigations and prosecutions occur at the state/local level . . .").

over child-rearing, but they must exercise this discretion reasonably.<sup>114</sup> Three years later an Iowa court recognized that parents' punishment and disciplinary measures must be reasonable.<sup>115</sup> Similarly, a California court recognized that not all parental acts of discipline are legal, and that a court should consider the intent of the action and whether the action was reasonable.<sup>116</sup> In addition, the California Penal Code, like most child-abuse statutes, looks to both physical and mental injury to determine liability.<sup>117</sup>

The Government Accountability Office ("GAO") has recently addressed the subject of restraints on children and whether their use constitutes child abuse.<sup>118</sup> Restraints pose several health threats; studies indicate that hundreds of children have died or suffered serious physical injury due to being restrained improperly or for unreasonable periods of time<sup>119</sup> and that being restrained can cause psychological damage.<sup>120</sup> In general, there are three types of restraints—physical,<sup>121</sup> mechanical,<sup>122</sup> and chemical<sup>123</sup>—but schools and transportation services primarily use physical and mechanical restraints.

In schools, the use of restraints arises in two overlapping settings: corporal punishment and special education. Federal laws do not restrict the use of restraints in public and private schools, and laws are widely divergent at the state level.<sup>124</sup>

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114. *State v. Teynor*, 414 N.W.2d 76, 80 (Wis. Ct. App. 1987).

115. *State v. Siemer*, 454 N.W.2d 857, 862 (Iowa 1990).

116. *People v. Checketts*, 84 Cal. Rptr. 2d 491, 495 (Ct. App. 1999).

117. CAL. PENAL CODE § 273a(b) (West 2008).

Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

*Id.*

118. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS 1 (2009), available at <http://www.gao.gov/assets/130/1225/26.pdf>.

119. *Id.* at 5.

120. EMILY BANKS ET AL., UNIV. OF FLA. LEVIN COLL. OF LAW, SHACKLING OF JUVENILE OFFENDERS: THE DEBATE IN JUVENILE JUSTICE POLICY (2008), available at [http://www.law.ufl.edu/\\_pdf/academics/centers-clinics/centers/shackling.pdf](http://www.law.ufl.edu/_pdf/academics/centers-clinics/centers/shackling.pdf).

121. Arthur R. Block, *Restraints, Seclusion and Aversives*, in PRACTICING LAW INSTITUTE, 11TH ANNUAL SCHOOL LAW INSTITUTE 117, 120 (2011) (defining a physical restraint as the use of bodily force to cause a "restriction that immobilizes or reduces the ability of an individual to move the individual's arms, legs, body, or head freely").

122. *Id.* (defining a mechanical restraint as "the use of devices as a means of restricting a [child]'s freedom of movement").

123. *Id.* at 121 (describing a chemical restraint as the use of an unprescribed "drug or medication . . . to control behavior or restrict freedom of movement").

124. See U.S. DEP'T OF EDUC., SUMMARY OF SECLUSION AND RESTRAINT STATUTES, REGULATIONS, POLICIES AND GUIDANCE, BY STATE AND TERRITORY (2010), available at <http://www.ed.gov/policy/seclusion/summary-by-state.pdf>.



Even today, the use of corporal punishment in private schools may be justified by the doctrine of *in loco parentis*.<sup>125</sup> Because “[c]ourts consistently affirm that parents are privileged ‘to administer such reasonable and timely punishment as may be necessary to correct faults in [their] growing children,’”<sup>126</sup> this privilege has been extended to teachers who are often held to stand *in loco parentis* to their students.<sup>127</sup>

In some cases, constitutional claims against the use of restraints have been limited because courts are reluctant to find constitutional violations for actions that could be remedied under state tort law. In *Ingraham v. Wright*,<sup>128</sup> for example, the Supreme Court ruled that corporal punishment in public schools does not violate the Eighth Amendment’s Cruel and Unusual Punishments Clause.<sup>129</sup> The Court nevertheless held that “the traditional common-law remedies are fully adequate to afford due process.”<sup>130</sup> But the use of restraints may violate the Due Process Clause if their use is found to be unreasonable.<sup>131</sup>

Additionally, courts give parents wide discretion in the upbringing and education of their children. The U.S. Court of Appeals for the Seventh Circuit has held that “parents’ liberty interest in directing the upbringing and education of their children includes the right to discipline them by using reasonable, nonexcessive corporal punishment, and to delegate that parental authority to private school officials.”<sup>132</sup> Thus, in states allowing corporal punishment generally, physical restraints may be employed in a reasonable manner for this purpose.<sup>133</sup> Since *Ingraham*, however, thirty-one states have completely banned corporal punishment in public schools,<sup>134</sup> including the use of restraints as punishment. Even

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125. 78A C.J.S. *Schools and School Districts* § 1110 (2013); see also Timothy Garrison, *From Parent to Protector: The History of Corporal Punishment in American Public Schools*, 16 J. CONTEMP. LEGAL ISSUES 115, 118–19 (2007) (explaining that, although corporal punishment is justified in some public schools as well, *parens patriae* is the rationale more often used in this context).

126. Garrison, *supra* note 125, at 116 (quoting *Carpenter v. Commonwealth*, 44 S.E.2d 419, 423 (Va. 1947)).

127. See, e.g., *Webb v. McCullough*, 828 F.2d 1151, 1158–59 (6th Cir. 1987) (holding that, although the school principal stood *in loco parentis*, his acts of breaking through a locked bathroom door and throwing a student against the wall may have exceeded the reasonably-necessary-for-discipline standard).

128. 430 U.S. 651 (1977).

129. *Id.* at 671.

130. *Id.* at 672.

131. See, e.g., *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987). Courts are likely to find that the use of seclusion or restraint is unreasonable if such use “shocks the conscience.” See, e.g., *Orange v. Cnty. of Grundy*, 950 F. Supp. 1365, 1373 (E.D. Tenn. 1996).

132. *Doe v. Heck*, 327 F.3d 492, 523 (7th Cir. 2003).

133. See, e.g., *T.W. ex rel. Wilson v. Sch. Bd.*, 610 F.3d 588, 602 (11th Cir. 2010) (finding that a teacher’s repeated use of physical restraint against an autistic student was not excessive corporal punishment because it was related directly to disciplining and correcting the student’s behavior); *Peterson v. Baker*, 504 F.3d 1331, 1337 (11th Cir. 2007) (holding that a teacher did not use excessive corporal punishment when she physically restrained a student by grabbing his neck and squeezing in order to prevent him from leaving the room without permission).

134. Alison Bath, *Despite Opposition, Paddling Students Allowed in 19 States*, USA TODAY (Apr. 23, 2012 6:02 PM), <http://www.usatoday.com/news/nation/story/2012-04-22/school-corporal-punishment/54475676/1>; see also Jerry R. Parkinson, *Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence that*

though there is controversy regarding whether corporal punishment should be permitted in schools, certain school district regulations still allow it,<sup>135</sup> and courts usually uphold such conduct as reasonable.<sup>136</sup>

Physical and mechanical restraints are used frequently in the special-education setting. In 2009, the GAO released a report discussing the use of restraints in public and private schools and treatment centers as well as the consequences of the unregulated use of such restraints.<sup>137</sup> The GAO found “hundreds of cases of alleged abuse and death related to the use of these methods on school children during the past two decades.”<sup>138</sup> These restraint techniques are dangerous “because they may involve physical struggling, pressure on the chest, or other interruptions in breathing.”<sup>139</sup> In addition, the GAO found that children can suffer severe emotional trauma from being restrained, bringing the use of restraints within the purview of child-abuse statutes.<sup>140</sup>

In public school special-education settings, the majority of court decisions and agencies, such as the Office for Civil Rights of the U.S. Department of Education, have deemed employing any type of mechanical restraint to be unacceptable and “in clear violation of a student’s individual rights.”<sup>141</sup> And in March 2010, the House of Representatives passed H.R. 4247, which directed the Secretary of Education to establish minimum standards restricting the use of seclusion and restraint in both public and private schools.<sup>142</sup> H.R. 4247, as passed by the House, would require the Secretary of Education to promulgate regulations “in order to protect each student from physical or mental abuse, aversive behavioral interventions that compromise student health and safety, or any physical restraint or seclusion imposed solely for purposes of discipline or convenience . . . .”<sup>143</sup> Further, the Children’s Health Act of 2000<sup>144</sup> established national standards for the

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*Is Literally Shocking to the Conscience*, 39 S.D. L. REV. 276, 279 & n.30 (1994) (listing states which had banned corporal punishment as of 1994).

135. See, e.g., CLAY CNTY. BD. OF EDUC., STUDENT RESTRAINT/SECLUSION/ISOLATION POLICY (2006), available at [http://web.archive.org/web/20080725030724/http://www.hayesvillems.org/handbook/restraint\\_policy.htm](http://web.archive.org/web/20080725030724/http://www.hayesvillems.org/handbook/restraint_policy.htm); HENDERSON CNTY. BD. OF EDUC., SCHOOL BOARD OPERATIONS § 6.314 (2010), available at <http://boardpolicy.net/documents/files/henderson/6314.pdf>; PORT ARTHUR ISD, BOARD POLICY MANUAL: STUDENT DISCIPLINE (2011), available at [http://pol.tasb.org/Policy/Download/723?filename=FO\(LOCAL\).pdf](http://pol.tasb.org/Policy/Download/723?filename=FO(LOCAL).pdf); see also Bath, *supra* note 134.

136. See, e.g., *Daniels v. Lutz*, 407 F. Supp. 2d 1038, 1046–47 (E.D. Ark. 2005); *Sims v. Bd. of Educ.*, 329 F. Supp. 678, 690 (D.N.M. 1971); *Willoughby v. Lehrbass*, 388 N.W.2d 688, 697–98 (Mich. Ct. App. 1986).

137. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 118.

138. *Id.* at Introduction.

139. *Id.* at 1.

140. *Id.*

141. Joseph B. Ryan & Reece L. Peterson, *Physical Restraint in School*, 29 BEHAVIORAL DISORDERS 154, 160 (2004); see, e.g., *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987) (“A young student who is not being properly punished or disciplined has a constitutional right not to be lashed to a chair through the school day and denied, among other things, the basic liberty of access to the bathroom when needed.”).

142. Keeping All Students Safe Act, H.R. 4247, 111th Cong. (2010).

143. *Id.* § 5.

144. Pub. L. No. 106-310, 114 Stat. 1101 (codified in scattered sections of 42 U.S.C.).

use of physical restraints on children in psychiatric facilities and prohibited the use of certain restraints.<sup>145</sup> Moreover, regarding the care of mentally ill patients, the federal district court in the seminal case, *Wyatt ex rel. Rawlins v. King*,<sup>146</sup> held that staff working with these patients required specific training regarding interventions germane to their unique care.<sup>147</sup>

The use of restraints is concerning not only in the school context, but also in the juvenile-offender setting, in which the use of handcuffs and shackles is similarly problematic. The concern is that the “handcuffing and shackling of children can cause them serious mental and emotional harm, and undermine the court’s very objectives in preventing delinquency or rehabilitating a child.”<sup>148</sup> In 2007, the Third Judicial District Court of New Mexico entered an order that prohibited children appearing in court from being restrained with any device, including handcuffs, unless a prior determination indicates a specific individual need.<sup>149</sup> Even though law enforcement has an interest in restraining juveniles in the criminal-justice system, courts are recognizing that the harm from shackling may outweigh the benefit.<sup>150</sup> Thus, the trend seems to be moving toward eliminating the use of restraints on children in all contexts because of the physical and psychological harm that they inflict—i.e., the very definition of child abuse.<sup>151</sup>

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145. 42 U.S.C. § 290ii (2006).

146. 793 F. Supp. 1058 (M.D. Ala. 1992).

147. *Id.* at 1067–68.

148. BANKS ET AL., *supra* note 120, at 3.

149. *In re Use of Physical Restraints on Respondent Children*, No. CS-2007-01 (N.M. Third Jud. Dist. Ct. Sept. 17, 2007) (temporary emergency order establishing procedures for the use of physical restraints), *reported in Court Order for Youth Shackles*, LAS CRUCES SUN-NEWS (Sept. 21, 2007), [http://www.lcsun-news.com/news/ci\\_6959696](http://www.lcsun-news.com/news/ci_6959696); *see also* BANKS ET AL., *supra* note 120, at 10.

150. *See, e.g.*, AMENDMENT TO THE TRIAL COURT OF THE COMMONWEALTH COURT OFFICER POLICY AND PROCEDURES MANUAL 3, *available at* <http://www.youthadvocacydepartment.org/about/shacklingpolicy.pdf> (summarizing the law of several jurisdictions); *Tiffany A. v. Superior Court*, 59 Cal. Rptr. 3d 363, 375 (Ct. App. 2007) (“The use of shackles in a courtroom absent a case-by-case, individual showing of need creates the very tone of criminality juvenile proceedings were intended to avoid.”). *See generally* *People v. Fierro*, 821 P.2d 1302, 1321–22 (Cal. 1991) (discussing California case law).

151. *See* BANKS ET AL., *supra* note 120, at 11. For example:

The Vermont law mandates that when the state transports a child who is in the custody of the state, all reasonable and appropriate measures consistent with safety must be made to transport or escort the person in a manner which prevents physical and psychological trauma, respects the privacy of the individual, and represents the least restrictive means necessary for the safety of the person being transported. The recent legislation adds a provision stipulating that mechanical restraints are not to be routinely used during transport, but may be used if circumstances warrant and the reasons are documented in writing.

*Id.*; *see also* H.B. 156, 130th Gen. Assemb., Reg. Sess. (Ohio 2013) (“A BILL . . . to require restraints to be removed from an alleged or adjudicated delinquent child prior to the commencement of a juvenile court hearing or proceeding unless the court determines that the use of restraints is necessary to prevent physical harm to the child or another person or to prevent the child from escaping.”).

## 2. *Kidnapping and False Imprisonment*

To prove a violation of the federal kidnapping statute, the government must show that a person (1) willfully and knowingly (2) transported in interstate commerce (3) an unconsenting person (4) who is held for “ransom or reward or otherwise.”<sup>152</sup> Courts have interpreted “otherwise” very broadly, holding that the kidnapping need not be for an illegal purpose.<sup>153</sup>

An important aspect of kidnapping is that the transportation must be against the will of the victim. Children up to a certain age are held to lack recognizable will, so their parents’ will controls.<sup>154</sup> Courts have declined to set a definitive age at which the child’s will controls,<sup>155</sup> but the Supreme Court has recognized the age of fourteen as a rebuttable baseline.<sup>156</sup> The federal kidnapping statute excludes parents of minor children from prosecution under the law, but that exemption is not ironclad.<sup>157</sup>

Like kidnapping, false imprisonment involves intentionally restraining or confining a person without consent or legal authority and may include independent criminal and civil claims.<sup>158</sup> However, kidnapping requires the additional element

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152. 18 U.S.C. § 1201(a) (2012); *United States v. McBryar*, 553 F.2d 433, 433 (5th Cir. 1977) (per curiam) (summarizing and applying the federal kidnapping statute to a driver who, in an attempt to receive sexual gratification, refused to let a female passenger exit his vehicle). In addition to transporting a person across state lines, federal jurisdiction can be established in four other ways, *see* 18 U.S.C. § 1201(a)(2)–(5), but they are not applicable in the youth-transportation context. State kidnapping statutes similarly involve elements of restraint and consent, using language such as “without lawful authority,” GA. CODE ANN. § 16-5-40(a) (2011), or “has neither the authority nor the consent of the other to do so,” IOWA CODE § 710.1 (2001).

153. *See United States v. Healy*, 376 U.S. 75, 81–82 (1964) (reasoning that the language of the statute suggests no distinction based on the ultimate purpose of a kidnapping); *Gooch v. United States*, 297 U.S. 124, 128 (1936) (stating that Congress’s addition of the word “otherwise” indicated its intent that the statute be given a broad application); *United States v. Jones*, 808 F.2d 561, 565–66 (7th Cir. 1986) (“[A]ny purpose, moral or immoral, satisfies the kidnapping statute . . .”).

154. *See, e.g., IOWA CODE § 710.1* (2001) (stating that kidnapping occurs when a person “confines a person or removes a person from one place to another, knowing that the person who confines or removes the other person has neither the authority nor the consent of the other to do so,” and requiring that one other element is present, including ransom, hostage, sexual abuse, secrecy, or interference with government function); *Chatwin v. United States*, 326 U.S. 455, 460 (1946) (“If the victim is of such an age or mental state as to be incapable of having a recognizable will, the confinement then must be against the will of the parents or legal guardian of the victim.”); *United States v. McCabe*, 812 F.2d 1060, 1062 (8th Cir. 1987) (holding that a twenty-three-month-old child did not have “recognizable will”).

155. *See Chatwin*, 326 U.S. at 461–62 (finding that there is no per se age of incapacity and holding that a fifteen-year-old did have recognizable will). Some states set statutory age limits. *See* N.Y. PENAL LAW § 135.00(1) (McKinney 2012) (sixteen years old); N.C. GEN. STAT. § 14-39(a) (2011) (sixteen years old); OHIO REV. CODE ANN. § 2905.1(A) (LexisNexis Supp. 2013) (thirteen years old); VT. STAT. ANN. tit. 13, § 2404(4)(A) (2009) (sixteen years old).

156. *Chatwin*, 326 U.S. at 461 & n.4.

157. 18 U.S.C. § 1201(g)–(h) (2012) (providing that parents whose rights have been terminated may be convicted of kidnapping); *see also State v. McLaughlin*, 611 P.2d 92 (Ariz. 1980) (en banc) (upholding conviction of a mother, who had lost custody of her children, for kidnapping them with the assistance of an agent).

158. *See, e.g., MO. REV. STAT. § 565.130(1)* (2000) (“A person commits the crime of false imprisonment if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty.”).

that the confinement be carried out for the purpose of obtaining an objective or benefit.<sup>159</sup> Therefore, false imprisonment is generally treated as a lesser-included offense within kidnapping.<sup>160</sup> Civil false imprisonment is closely related. It requires that a person act with the intent of confining another, that this act results in a confinement, and that the victim is conscious of the confinement or is harmed by it.<sup>161</sup>

While parents are granted wide authority and are afforded great deference when it comes to transporting and confining their children, their power is not without limits. Both federal and state courts have held that parental authority ends when it is exercised for an unlawful purpose.<sup>162</sup> A typical restriction is that any confinement or other disciplinary measure must be reasonable.<sup>163</sup> As with kidnapping, issues of consent are also often implicated in false imprisonment, both in terms of the child's consent and a parent's consent for a third party to confine or transport the child.<sup>164</sup>

#### *D. Parallels: Juvenile-Offender and Private-Prisoner Transport Industries*

In addition to the particular legal issues involved in the youth-transportation process, broader issues arise, such as safety conditions and the inherent risk of

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159. See *State v. Ortega*, 817 P.2d 1196, 1212 (N.M. 1991) (detailing the differences between the two crimes), *abrogated on other grounds by Kersey v. Hatch*, 237 P.3d 683 (N.M. 2010).

160. See, e.g., *State v. Sanborn*, 533 So. 2d 1169, 1170 (Fla. 1988); *Ortega*, 817 P.2d at 1212. Compare FLA. STAT. ANN. § 787.02(1)(a) (West 2007) ("The term 'false imprisonment' means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will."), with *id.* § 787.01(1)(a) ("The term 'kidnapping' means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to: 1. Hold for ransom or reward or as a shield or hostage. 2. Commit or facilitate commission of any felony. 3. Inflict bodily harm upon or to terrorize the victim or another person. 4. Interfere with the performance of any governmental or political function.").

161. See RESTATEMENT (SECOND) OF TORTS § 35 (1965).

162. See *People v. Checketts*, 84 Cal. Rptr. 2d 491, 492–93 (Ct. App. 1999) (holding that a parent who confines a child with the intent to endanger the health or safety of the child or for an unlawful purpose can be prosecuted for false imprisonment); *People v. Senior*, 5 Cal. Rptr. 2d 14, 24 (Ct. App. 1992) (holding that the defendant's right to physical custody of his child ended when he exercised it for an unlawful purpose).

163. See *State v. Kinchen*, 963 P.2d 928, 929 (Wash. Ct. App. 1998) (finding that, upon objective review, a parent can be found guilty of unlawful imprisonment if the restrictions on the child's movement were "excessive, immoderate, or unreasonable"); *State v. Teynor*, 414 N.W.2d 76, 80 (Wis. 1987) (noting that, while parents can confine their children in order to control their whereabouts and daily activities, parents must exercise this authority reasonably).

164. See MO. REV. STAT. § 565.140 (2000) ("A person does not commit false imprisonment under section 565.130 if the person restrained is a child under the age of seventeen and . . . [a] parent, guardian or other person responsible for the general supervision of the child's welfare has consented to the restraint . . ."); *Kellar v. Wills*, 186 F. App'x 714, 715 (8th Cir. 2006) (per curiam) (holding that a student could not maintain a false-imprisonment claim against her therapeutic school because her parents consented to her enrollment with full knowledge of the school's programs and restrictions); *Blair v. Wills*, 420 F.3d 823, 828 (8th Cir. 2005) (noting that, in examining whether a sixteen-year-old boy's confinement at a boarding school was without consent or legal justification, the court should look to whether the parents consented to his treatment and confinement at the school).

abuse in unregulated environments. The federal and state governments have previously recognized these issues—and comprehensively addressed them—in both the juvenile-offender and private-prisoner transport industries. These industries provide appropriate analogies to the youth-transport industry because of the comparable safety risks to both the transporters and the transportees. Certainly differences exist between the youth-transport industry and these two industries. In the youth-transport context, for example, the state has an even greater interest in regulating the industry because the rights and welfare of minors not even charged with a crime are implicated. Moreover, transporting these types of minors raises fewer public-safety concerns up front than transporting convicted felons and even non-convicted juvenile offenders. Finally, state action is involved in the juvenile-offender context. Despite these differences, the general premise is the same: societal needs were perceived, services and industries were created, accidents and explicit violations occurred as a result of no regulation or lax enforcement, and ultimately state legislatures stepped in to attempt to ensure the well-being of all parties involved. This Section begins with a brief history of the juvenile-justice system, including modern-day regulation of juvenile-offender transportation, and concludes with a discussion of the private-prisoner transport industry.

The treatment of juvenile offenders has changed drastically over the last two centuries, creating a juvenile-justice system that incorporates strong regulations for the transportation of juvenile offenders. In the United States, originally juveniles were tried in the same manner as adult offenders.<sup>165</sup> Yet, while juvenile offenders were tried in adult courts, juries would rarely convict for a minor offense on account of the defendant's age.<sup>166</sup> Instead of focusing on punishment, the prevailing ideal during the 1820s centered on reform for juveniles and on preventing "pauperism."<sup>167</sup> The reality of juvenile custodial institutions, however, has rarely lived up to the rehabilitation goals touted by juvenile courts.<sup>168</sup>

The first reformatory juvenile institution, the House of Refuge, was established in New York City in 1825.<sup>169</sup> The House of Refuge provided a place to send juvenile paupers, including many who had not committed a single criminal offense but were considered potential criminals on the sole basis of their poverty.<sup>170</sup> Commitment to the institution could be initiated by a parent or through a city order, usually without any investigation into the family situation.<sup>171</sup> Once admitted, the

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165. THOMAS J. BERNARD & MEGAN C. KURLYCHEK, *THE CYCLE OF JUVENILE JUSTICE* 33 (2d ed. 2010).

166. *Id.* at 51.

167. *Id.* The theory of pauperism was that crime was a result of the "undeserving" poor, who were in poverty because of their wicked ways. *See generally id.* at 48–52.

168. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 716 (1991) (noting that both historical and "[c]ontemporary evaluations of juvenile institutions reveal a continuing gap between rehabilitative rhetoric and punitive reality").

169. BERNARD & KURLYCHEK, *supra* note 165, at 52–53.

170. *Id.*

171. *Id.* at 53.

youths were required to remain committed until the age of twenty-one, regardless of whether they had been convicted of a crime.<sup>172</sup> As the institutions reached capacity, most juveniles were sent to the West as indentured servants, and many children were never heard from again.<sup>173</sup> These types of institutions, and the problems associated with them, spread throughout the country during the 1800s.<sup>174</sup>

Following a public outcry over the conditions of reform institutions in Chicago, the Illinois legislature established the first juvenile-court system in 1899.<sup>175</sup> This system expanded the state's authority over children by granting the new juvenile courts coercive power to implement the "help" necessary to reform troubled youths.<sup>176</sup> Within twenty-five years, all but two states had followed the Illinois example and developed a separate court system for young offenders.<sup>177</sup>

As the notion of a separate juvenile-court system expanded throughout the nation, the need to transport juvenile offenders within the system increased. To protect juveniles during transport, the federal and state governments, as well as the American Bar Association ("ABA") and the United Nations ("UN"), have promulgated safety regulations. The ABA, for example, has published model standards for the transport of juvenile offenders, including that "[a]ll police departments should establish a unit or officer specifically trained for work with juveniles."<sup>178</sup> In addition, the UN has developed specific rules for the protection of juvenile offenders during transport.<sup>179</sup> Its comprehensive model states that "[t]he transport of juveniles should be carried out . . . with adequate ventilation and light, in conditions that should in no way subject them to hardship or indignity," and that juveniles "should not be transferred from one facility to another arbitrarily."<sup>180</sup>

Juveniles facing federal detention are protected by mandatory safety standards that specifically address the issue of transportation. Those involved in the transportation of federally detained juveniles must "[i]nspect security vehicles used to transport juvenile detainees to ensure they are equipped with the following: first aid kits, fire extinguishers, seat belts that anchor securely, instructions for actions

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172. *Id.*

173. *Id.* at 55–56.

174. *See id.* at 59; *see also id.* at 57–59 (describing the case of Mary Ann Crouse, a young girl who was committed to the Philadelphia House of Refuge over the objections of her father and despite the fact that she had never committed a crime).

175. *Id.* at 33, 75–76. For the historical context preceding juvenile courts, including indentured servitude and reformation, *see generally id.* at 48–70.

176. *Id.* at 71; *see also* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 971 (1995) (describing the vast discretion of the judge and the elimination of procedural safeguards).

177. Alexander S. *ex rel.* Bowers v. Boyd, 876 F. Supp. 773, 781 (D.S.C. 1995) (citing JAMES O. FINCKENAUER, JUVENILE DELINQUENCY AND CORRECTIONS—THE GAP BETWEEN THEORY AND PRACTICE 116 (1984)).

178. INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, STANDARDS RELATING TO POLICE HANDLING OF JUVENILE PROBLEMS § 4.1 (1979).

179. United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

180. *Id.* ¶ 26.

to take in case of an emergency/breakdown, documentation of completion of repairs, and documentation of regular maintenance.”<sup>181</sup>

At the state level, the standards for the transportation of juvenile offenders vary. Virginia, for example, has specific guidelines for transporting juveniles in detention, including the requirement that transporters not be “suspected of or charged with criminal acts.”<sup>182</sup> Juveniles in Massachusetts are afforded the same protections as all other prisoners, and are transported by police cruiser whenever possible.<sup>183</sup> Vermont has a more progressive set of guidelines, requiring, *inter alia*, that (1) the least-restrictive method of transport reasonable to the situation be used, (2) the transport be private and have at least one person known to the child, and (3) the transporters be subject to criminal checks and safety inspections.<sup>184</sup> The regulations in Cincinnati, Ohio contain the uncommon requirement that all juveniles “remain handcuffed during all phases of transportation and processing.”<sup>185</sup>

The private-prisoner transport industry provides the second analogy to the youth-transportation industry. In the late 1980s, private prisons emerged in response to the drastic increase in the U.S. prison population.<sup>186</sup> Private prisons were created as a purported solution to state-prison overcrowding and were claimed to be more cost effective in delivering correctional services.<sup>187</sup> Many concerns arose, however, regarding the potential mistreatment of prisoners in private prisons because such environments are concealed from public view and

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181. See DEP’T OF JUSTICE, JUVENILE FEDERAL PERFORMANCE-BASED DETENTION STANDARDS HANDBOOK § C.1 (2011), available at <http://www.justice.gov/archive/oftd/juvenile.pdf> (containing numerous checklists for ensuring the safety and control of juvenile offenders in federal care).

182. See VA. DEP’T OF JUVENILE JUSTICE, GUIDELINES FOR TRANSPORTING JUVENILES IN DETENTION 2 (2004), available at [http://townhall.virginia.gov/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\777\GDoc\\_DJJ\\_3652\\_v1.pdf](http://townhall.virginia.gov/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\777\GDoc_DJJ_3652_v1.pdf) (implementing guidelines, the purpose of which is “to ensure the safety of detained juveniles and the staff who transport them; protect the public safety through appropriate security and supervision practices; and reduce the liability exposure of those who are responsible for transporting detained juveniles,” pursuant to 6 VA. ADMIN CODE § 35-150-260 (2011)).

183. *E.g.*, TRURO POLICE DEP’T, TRANSPORTATION OF PRISONERS 7 (2005), available at <http://www.truropolice.org/On%20Line%20Manuals/Transportation%20Of%20Prisoners.pdf>.

184. VT. DEP’T FOR CHILDREN & FAMILIES, TRANSPORTATION OF YOUTH IN DCF CUSTODY 1–3 (2006), available at [http://dcf.vermont.gov/sites/dcf/files/pdf/fsd/policies/150\\_\\_Transportation\\_of\\_Youth\\_.pdf](http://dcf.vermont.gov/sites/dcf/files/pdf/fsd/policies/150__Transportation_of_Youth_.pdf); see also TENN. DEP’T OF CHILDREN’S SERVS., GUIDELINES FOR TRANSPORTATION OF CHILD/YOUTH BY REGIONAL EMPLOYEES 1 (2014), available at <http://www.tn.gov/youth/dcsguide/policies/chap31/31.15.pdf> (“Any employee trained in search techniques and the use of mechanical restraints may be required to transport [a] delinquent child/youth.”).

185. CINCINNATI POLICE DEP’T, PROCESSING JUVENILE OFFENDERS 7 (2013), available at <http://www.cincinnati.oh.gov/police/assets/File/Procedures/12900.pdf>.

186. See Rachel Christine Bailie Antonuccio, Note, *Prisons for Profit: Do the Social and Political Problems Have a Legal Solution?*, 33 J. CORP. L. 577, 578, 583 (2008). See generally IRA P. ROBBINS, *THE LEGAL DIMENSIONS OF PRIVATE INCARCERATION* (1988).

187. Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 813–17 (1987); Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 149–50 (2010).



house a population of politically powerless and unpopular people.<sup>188</sup>

In conjunction with the perceived need for and creation of private prisons, private-prisoner transport companies emerged.<sup>189</sup> These private-transport services subjected prisoners to the same risk of abuse that exists in private prisons.<sup>190</sup> The co-founders of Fugitive One Transport Company, for example, were charged with raping a female prisoner they were transporting.<sup>191</sup> In a similar occurrence, a guard reportedly sexually assaulted a female prisoner whom his company was transporting from Nevada to a Colorado jail.<sup>192</sup> Prior to being hired by the private-transport company Extradition International, the transportation guard had been fired from the Texas prison system for assaulting another prisoner.<sup>193</sup> Extradition International knew of the guard's violent history, but hired him anyway.<sup>194</sup> The company ultimately settled a lawsuit brought by the American Civil Liberties Union ("ACLU"), which had alleged that the transportation company "failed to train or supervise [its] staff appropriately, allowing the assault to occur."<sup>195</sup> In addition, the company was "operat[ing] illegally by transporting prisoners without proper licensing or insurance."<sup>196</sup> David C. Fathi, co-counsel in the lawsuit and staff attorney at the ACLU's National Prison Project stated: "This case provides an

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188. David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1453 (2010); see *supra* Part I.B (discussing children's rights and explaining that children share the characteristics of a politically powerless group).

189. Examples of private prisoner-transport companies include TRANSCOR AMERICA, LLC, <http://www.transcor.com> (last visited Mar. 14, 2014), and U.S. PRISONER TRANSPORT, INC., <http://usprisonertransport.com/> (last visited Mar. 14, 2014).

190. On abuse in private prisons, see, for example, Ira P. Robbins, *Privatisation of Corrections: A Violation of U.S. Domestic Law, International Human Rights, and Good Sense*, in PRIVATISATION AND HUMAN RIGHTS IN THE AGE OF GLOBALISATION 57, 74–75 (Koen De Feyter & Felipe Gómez Isa eds., 2005) (describing some abuses in the United States and abroad); Alyssa Figueroa, *5 Shocking Revelations About Hellish Private Juvenile Prisons and the Man Who Profits From Them*, ALTERNET (Oct. 23, 2013), <http://www.alternet.org/civil-liberties/5-shocking-revelations-about-hellish-private-juvenile-prisons-and-man-who-profits> (stating that "[s]exual assault is . . . rampant" at a particular private juvenile facility in Georgia); Brendan Fischer, *Violence, Abuse, and Death at For-Profit Prisons: A GEO Group Rap Sheet*, PRWATCH (Sept. 26, 2013), <http://www.prwatch.org/news/2013/09/12255/violence-abuse-and-death-profit-prisons-geo-group-rap-sheet> (discussing allegations of prisoner abuse and sexual assault at private adult and juvenile facilities); Chris Kirkham, *Private Prison Empire Rises Despite Startling Record of Juvenile Abuse*, HUFFINGTON POST (Oct. 22, 2013), <http://projects.huffingtonpost.com/prisoners-of-profit> (describing abuses at a private juvenile-detention facility); Ian Urbina, *Hawaii to Remove Inmates Over Abuse Charges*, N.Y. TIMES (Aug. 25, 2009), <http://www.nytimes.com/2009/08/26/us/26kentucky.html> ("[I]nvestigators found that at least five corrections officials at the [Kentucky] prison, including a chaplain, had been charged with having sex with inmates in the last three years, and four were convicted.").

191. Alex Friedmann, *US: Private Transportation Firms Take Prisoners for a Ride*, CORP WATCH (Nov. 1, 1997), <http://www.corpwatch.org/article.php?id=863>.

192. See Press Release, ACLU, *Private Prisoner Transport Company Pays Damages in Lawsuit Over Sexual Assault and Death Threats Against Woman* (Mar. 14, 2003), available at <http://www.aclu.org/prisoners-rights/private-prisoner-transport-company-pays-damages-lawsuit-over-sexual-assault-and-death> (discussing *Darbyshire v. Extraditions Int'l, Inc.*, which was filed by the ACLU in the U.S. District Court for the District of Colorado).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

excellent example of why contracting with private for-profit companies to conduct correctional functions can be dangerous to prisoners and the public.”<sup>197</sup>

Further, lack of regulations concerning the maintenance of private-transport vehicles and other transport conditions subjected prisoners to various other abuses. For example, private-transport guards reportedly ignored strange noises coming from the transport van, which had logged over 260,000 miles.<sup>198</sup> Trapped in the van’s wire-mesh cage, six prisoners burned alive when the van caught fire due to disrepair.<sup>199</sup> When this tragedy occurred in 1997, “there [were] more regulatory guidelines for shipping cattle or other commodities across state lines than for extraditing prisoners,” and the “lack of safety standards and government oversight of the prisoner transport industry . . . had deadly consequences.”<sup>200</sup>

In response to such incidents of prisoner mistreatment by private-transportation companies, Congress passed legislation in 2000 requiring that the Attorney General promulgate strict rules for the private-prisoner transportation industry. The Interstate Transportation of Dangerous Criminals Act of 2000,<sup>201</sup> otherwise known as Jeanna’s Act, mandates, among other things, that private-prisoner transport companies: adopt pre-employment screening measures for all potential employees; require employee training in six areas; follow a guard-to-prisoner ratio; and comply with standards set forth to ensure the safety of prisoners during transport.<sup>202</sup> Pursuant to this statute, the Attorney General promulgated more detailed rules and stricter standards for the private-prisoner transport industry.<sup>203</sup>

The underlying problems and abuses addressed by the juvenile-offender and private-prisoner transport statutes are now occurring in the youth-transportation industry as well. That these youths have not been convicted of any crimes makes these abuses even more disturbing. The circumstances surrounding the private transportation of youths heighten the likelihood of abuse and unsafe conditions, while at the same time protecting the transportation companies from liability via their contracts. Therefore, the industry greatly needs regulations similar to those implemented in the analogous industries.

## II. POOR REGULATION IN THE YOUTH-TRANSPORTATION INDUSTRY OPENS THE DOOR TO POTENTIALLY CATASTROPHIC CONSEQUENCES

Youth-transportation companies have existed for decades, but the industry remains relatively unknown and almost completely unregulated despite the violations of children’s rights that occur within the system. From the moment that

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197. *Id.*

198. Friedmann, *supra* note 191.

199. *Id.*

200. *Id.*

201. Pub. L. No. 106-560, 114 Stat. 2784 (codified at 42 U.S.C. § 13726b (2006)).

202. *Id.*

203. 28 C.F.R. § 97.20 (2013).

parents delegate their parental rights to the transport companies to the time that the children are delivered to the behavior-modification facilities, many children experience severe physical and emotional trauma. Some experience a sense of abandonment, wondering why their parents have sent them away; others fear that they are actually being kidnapped. Even if these psychological harms do not occur, the likelihood of physical abuse in the form of aggressive restraints or unsafe traveling conditions remains.

The industry lacks adequate regulation, likely due in part to the difficulty in applying current law to private youth transportation because many of the relevant laws were contemplated in different, more traditional contexts. Power-of-attorney contracts, for example, originally used to delegate parental authority temporarily when a parent was unavailable or incapacitated, are now used to shift parental authority and immunity to transportation companies. Through this modern application, transporters—acting with parental authority and cloaked in parental immunity, yet strangers with no historical or emotional connections to their charges—can take children against their will using physical force, bounded only by the legal limitations placed on parents, who presumably know and love their children.

*A. Parental Delegation of Authority to Youth Transporters Through Power of Attorney Is Inconsistent with the Purpose of Power-of-Attorney Statutes*

The risk of abuse in the youth-transportation industry is rampant as a result of parents' unfettered ability to delegate their authority to these companies. The companies usually obtain nearly unrestricted authority over children via power-of-attorney or temporary-guardianship clauses in their contracts.<sup>204</sup> These clauses give transportation companies the same immunity that parents enjoy, thus preventing children who are abused during transport from seeking recourse. To curb the transport industry's authority and to protect the best interests of the child, regulations should require a neutral fact-finder's consent before a child can be sent to a behavior-modification facility, and states should limit the amount of authority that parents can delegate to these companies in the first place.

The delegation of parental authority to transport companies has several negative ramifications for children. One such implication is that children are unable to bring their plight to anyone's attention because their ability to contact the outside world is effectively eliminated once they arrive at a therapeutic school.<sup>205</sup> Without proof of child abuse, which is often difficult to obtain, there is essentially no recourse for

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204. See *supra* notes 36–39 and accompanying text (describing the process by which parental authority is delegated).

205. See Lou Kilzer, *Parents Hire Firms to Lock Up Teens*, TIMES UNION (Albany, NY), Nov. 27, 1998, at D3 (quoting a lawyer who said that “[b]asically, parents who have legal custody of their children can determine where to send their children, and that decision is not reviewable unless some party brings it to a court’s attention”).

the children affected.<sup>206</sup> In effect, children are at the whim of their parents, and third parties have little success when attempting to enforce rights on children's behalf.

Further complicating the problem, the act of delegating parental authority to a corporate third party for the sole purpose of transporting the child to a behavior-modification school runs contrary to the intent of many power-of-attorney statutes. Those statutes were originally designed to enable a parent who was temporarily unavailable to empower a close relative to take any emergency action regarding the child during the parent's absence.<sup>207</sup> The use of powers of attorney in non-emergency situations to delegate parental authority to transporters—strangers with no relation to the children—clearly exceeds the original scope of these statutes.

This usage of powers of attorney not only surpasses the intended purpose of the statutes, but also may be unenforceable under the principles set forth in the Restatement (Second) of Contracts. Under the Restatement, contracts affecting the right to custody of a minor are unenforceable if they are not in the best interests of the child.<sup>208</sup> This reasoning should also apply to contracts affecting the temporary guardianship of a minor. There is currently no guarantee that transport to a behavior-modification school is in the child's best interest. With parents able to make this decision unilaterally, the only way to ensure that the best interests of the child are met is through a neutral examination of the facts.

In order to protect children from arbitrary confinement, a neutral fact-finder should be required to approve a parent's decision to transfer a child to a private behavior-modification facility. In contrast to parents' unfettered ability to send their children to behavior-modification facilities,<sup>209</sup> parents must obtain approval from a neutral fact-finder before committing their children to state-run mental hospitals, as required by *Parham v. J.R.*<sup>210</sup> The incongruity of this situation is highlighted by the fact that state-operated hospitals are regulated and subject to minimum standards, whereas behavior-modification schools and the transportation of juveniles to them are largely unregulated. Without a neutral fact-finder, there is effectively no way to guarantee that children are protected from arbitrary and inappropriate actions by their parents.

The transporters' activities are legal only because they operate with parental authority and are cloaked in parental immunity. To prevent third parties from acting with impunity, states should limit the authority and legal protections that

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206. See *id.*; see also *supra* notes 55–61 and accompanying text (discussing the experience of David van Blarigan).

207. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 1-107 cmt. (1982) (explaining that powers of attorney were “designed to reduce problems relating to consents for emergency treatment”).

208. RESTATEMENT (SECOND) OF CONTRACTS § 191 (1981).

209. See *supra* notes 55–61 and accompanying text.

210. 442 U.S. 584, 606–07 (1979)

transporter contracts confer. Unless states narrowly construe power-of-attorney statutes to comport with their intended scope and require a neutral fact-finder to ensure that transfer is in the child's best interest, these contracts should be found unenforceable. Without the protections conferred by these contracts, transporters would be guilty of kidnapping and false imprisonment and liable for numerous torts.

*B. The Circumstances Surrounding Youth Transport Often Constitute Child Abuse*

Even with the current parental immunity enjoyed by youth-transportation companies, transporters may still be guilty of child abuse. Throughout the transportation process, many youths experience unjustifiable physical pain and mental suffering willfully caused by the transporters.<sup>211</sup> Children taken from their beds in the middle of the night by strangers, without knowing where they are being taken or why, can suffer "everlasting trauma that includes emotional distress and trust issues with the parent(s)."<sup>212</sup> Although simply restraining a child may not always constitute child abuse, using violent force to subdue a child while inflicting unjustifiable physical and emotional pain would fall within the purview of child abuse.<sup>213</sup>

The use of restraints in the youth-transportation industry is particularly disconcerting. When children are transported, they are usually handcuffed or otherwise restrained,<sup>214</sup> even though transport companies claim to handcuff children only if they become violent or resistant.<sup>215</sup> Restraints have already been a controversial subject within the public- and private-school context because of the injuries and deaths that have resulted from their use.<sup>216</sup> These same risks of unjustifiable physical pain are also present when restraints are used on children in the youth-transportation context. For example, children who resist the transporters are often physically restrained through the use of violent force.<sup>217</sup> When one teenager, Aaron Reed, broke away from his transporters and headed toward a window to escape, the transporters knee-dropped him in the middle of his back, bent his wrist back, leaned over and said, "If you don't stop f - - -ing screaming, I'm going to bust your f - - -ing wrist."<sup>218</sup> Transporters have even admitted to using

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211. Labi, *supra* note 2, at 28, 30.

212. Swint, *supra* note 7.

213. See 42 U.S.C. §§ 5101-5119c (2006 & Supp. 2011).

214. See Swint, *supra* note 7.

215. E.g., *Youth Transport—Questions and Answers*, *supra* note 9 ("We will not utilize any restraints unless the Teen is in imminent danger of injuring themselves or others.").

216. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 118, at 10-13 tbl.1 (summarizing cases where children were killed or seriously injured while being restrained at school).

217. Holding, *supra* note 12.

218. *Id.*

chokeholds to render children unconscious.<sup>219</sup> Thus, employing restraints on children being transported clearly can inflict unjustifiable physical pain on the child.

In addition to the physical risks involved, the use of restraints can also cause children serious psychological and emotional harm.<sup>220</sup> In the youth-transportation context, most of the children being transported have not been charged with or convicted of any crime. Handcuffing these children, especially in public, is inhumane and degrading.<sup>221</sup> Vermont has addressed these harms in the juvenile-offender context by requiring the least restrictive means of transport.<sup>222</sup> Furthermore, the use of restraints arguably is also anti-therapeutic, despite the purported intent of the parents and the transportation companies to reform the child.

In the private-transportation context, the use of mechanical and physical restraints is prevalent. Given the trauma that accompanies many of these interventions, youths who are transported against their will by strangers not surprisingly may become violent and aggressive. In addition, because private-transport companies service behavioral institutions, youths being transported are more likely to be troubled and, as a result, potentially violent. Although many of the transportation company web sites claim to use restraints only as a last resort, reports indicate otherwise.<sup>223</sup> Because of the increased likelihood of violence, transporters frequently will be required to conduct certain interventions with the use of restraints. Applying the reasoning in *Wyatt ex rel. Rawlins v. King*<sup>224</sup> in the context of treatment of the mentally ill, staff working with such youths should be required to have specific training regarding interventions that are germane to their unique care during transport.<sup>225</sup> Some state laws draw an important distinction by allowing restraints of children in emergency situations and prohibiting restraints for convenience or coercion. While the companies initially claim to use restraints only if the child becomes resistant or combative, many children are cuffed preventatively,<sup>226</sup> suggesting a combination of coercion and convenience.

Handcuffing is inherently coercive by making the child feel less in control, thus more easily permitting the transporter to dominate him or her. Moreover, handcuffs become tools of convenience when used simply to assure the transporter that the child is less capable of resisting or escaping, even when the child has not yet demonstrated an inclination to resist or escape. In sum, there is an extremely high

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219. Labi, *supra* note 2, at 29.

220. BANKS ET AL., *supra* note 120, at 3.

221. *Id.*

222. See *supra* note 184 and accompanying text.

223. See Swint, *supra* note 7 (discussing the frequent use of restraints).

224. 793 F. Supp. 1058 (M.D. Ala. 1992) (concerning the treatment of patients involuntarily committed to the custody and care of the Alabama Department of Mental Health and Mental Retardation).

225. See *id.* at 1063, 1067, 1069 (recognizing the need for better training appropriate to the context to protect patients' rights).

226. See Labi, *supra* note 2, at 30.

potential of significant abuse in these contexts: the private-transportation companies are not subject to public scrutiny and have obtained indemnification from parents for most, if not all, of the consequences of their conduct. Thus, there is a dire need for regulation regarding the use of mechanical and physical restraints, transporter training, and transporter background checks.<sup>227</sup>

*C. The Circumstances Surrounding Youth Transport Often Constitute Kidnapping and False Imprisonment*

In addition to child abuse, kidnapping and false imprisonment are also of critical concern in the youth-transportation industry. The transport process in the youth-transportation industry is strikingly similar to kidnapping: a stranger enters the youth's bedroom in the middle of the night and makes it clear that the child has no choice but to leave with the transporter. Eventually the child receives confirmation that his parents sanctioned the abduction, sometimes through a letter read once the child is securely confined to the strangers' vehicle, or sometimes just by the sight of his parents waving goodbye on the front porch as the child is driven away.

Any bystander witnessing such an abduction would not hesitate to phone the police and report a child kidnapping, unless they realize that the parents consented to—and paid for—the transport. Because the parents are involved, however, it seems more like a “consensual kidnapping.” As discussed above,<sup>228</sup> kidnapping laws vary from state to state and include caveats for consent and parents' authority over minor children. Courts have also circumscribed parents' ability to confine their children by introducing considerations of reasonableness and other unlawful behavior.<sup>229</sup> But the degree to which parents can reasonably delegate their authority and their potential liability for incidental abuses that may occur simultaneously is unclear.

Under the federal kidnapping statute, such a removal should be considered kidnapping because all of the statute's elements<sup>230</sup> appear to be satisfied. The interstate commerce element of the statute is met whenever the child is transported across state lines.<sup>231</sup> The transport process also satisfies the federal kidnapping statute's element of carrying away or abducting, as well as the purpose element, “for ransom or reward or otherwise.”<sup>232</sup>

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227. *But see* Reynolds Holding, *Child-Escort Services Must Be Restrained*, S.F. CHRON., June 13, 1999, at 3 (reporting that an organization with ties to West Shield Investigations, lobbying against the California regulation of child-escort services, argued that reasonable means of forcing children to accompany the escorts, including the use of handcuffs, should be allowed).

228. *See supra* Part I.C.2.

229. *See supra* notes 109–17 and accompanying text.

230. *See supra* note 152 and accompanying text.

231. *See* 18 U.S.C. § 1201(a)(1) (2012); *United States v. Welch*, 10 F.3d 573, 574 (8th Cir. 1993) (*per curiam*) (holding that transportation across state lines is not an essential element of the kidnapping offense, but merely serves to provide federal jurisdiction and therefore need not be performed willfully and knowingly).

232. 18 U.S.C. § 1201(a) (emphasis added).

Although the federal statute provides an exemption for parents,<sup>233</sup> this exemption may not apply when a parent hires a third party to remove the child. The transport process raises questions about the type of conduct to which parents can consent on behalf of their children and thus the kind of legal authority third-party transport services possess.<sup>234</sup> Even assuming that transport companies qualify as parents under the doctrine of *in loco parentis*, these companies could still be liable for kidnapping if their conduct and actions exceed those of a reasonable parent.<sup>235</sup> The reasonableness standard alone, however, does not provide an easily applicable way to determine whether particular transporter conduct is acceptable.

Regardless of parental consent, a transport likely constitutes kidnapping if the minor has a recognizable will.<sup>236</sup> Because behavior-modification facilities typically accept juveniles up to approximately eighteen years of age,<sup>237</sup> many of those who are transported are older than the age at which many courts have found children to have a recognizable will in other contexts.<sup>238</sup> But this reasoning has not been extended to the youth-transportation context, in which youths are often denied the legal right to object to their own kidnapping.<sup>239</sup> Accordingly, parents' consent to the abduction of their children should not alone be sufficient to absolve transport companies of federal kidnapping liability. State kidnapping laws, on the other hand, are typically written more narrowly, thereby giving transport companies greater opportunity to avoid liability. While the federal statute requires only that the kidnapping be "for ransom or reward or otherwise,"<sup>240</sup> state laws often require that the kidnapping be carried out for a specific enumerated purpose, such

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233. *Id.* § 1201(g)–(h).

234. See *supra* Part II.A (discussing the different kinds of authority parents may delegate to youth transporters).

235. See *United States v. Brown*, 330 F.3d 1073, 1079 (8th Cir. 2003) (holding that the defendant did not qualify as a surrogate parent because his sexually abusive behavior was not that of a surrogate parent). *But see United States v. Floyd*, 81 F.3d 1517, 1523–24 (10th Cir. 1996) (establishing that a non-biological parent qualifies for the parental exception to the kidnapping statute if that person "fulfill[s] the responsibilities of a parent at the time of the kidnapping," which include "love, affection, support, maintenance, instruction, discipline, and guidance").

236. See *Chatwin v. United States*, 326 U.S. 455, 460 (1946).

237. See, e.g., *The Boston Center*, ARBOUR HEALTH SYSTEM, <http://www.arbourhealth.com/organizations/the-boston-center/> (last visited Mar. 21, 2014) ("Services include highly structured, intensive behavior modification group programs for children, ages 6–12, and adolescents, ages 13–18, with acute emotional and behavioral difficulties."); C. Kapela, *Mitt Romney: A Voice of Freedom and Hope? Not for America's So-Called "Troubled" Youth*, WWASP DIARIES (Apr. 14, 2012), <http://wwaspdiaries.com/2012/04/14/mitt-romney-a-voice-of-freedom-and-hope-not-for-americas-so-called-troubled-youth/> (describing a facility in Oregon at which children "rang[ed] in age from 13 to 17.5"); STRATEGIC BEHAVIORAL CENTER, <http://www.sbcwilmington.com/> (last visited Mar. 21, 2014) (providing services to "male and female adolescents ages 12–17").

238. See *United States v. McCabe*, 812 F.2d 1060, 1061–62 (8th Cir. 1987) (holding that a twenty-three-month-old child did not have a recognizable will, because a child has a recognizable will when he understands the concept of kidnapping and its potential relevance to his situation); *supra* note 154 and accompanying text (stating that lack of recognizable will is the federal standard for when the child's consent does not control).

239. Cf. *W. Shield Investigations & Sec. Consultants v. Superior Court*, 98 Cal. Rptr. 2d 612, 627 (Ct. App. 2000) (involving a girl who was sixteen years old at the time of her abduction).

240. 18 U.S.C. § 1201(a) (2012) (emphasis added).



as to commit a felony.<sup>241</sup> It is difficult to pinpoint whether a felonious act actually occurs during the course of a transport, however. For example, although transporters represent that they do not handcuff or otherwise restrain transportees unnecessarily—which could constitute felonious child abuse—some transporters admit that they do handcuff children every time.<sup>242</sup>

The personal stories found online and in interviews demonstrate that a transport can quickly escalate to the point where transporters use excessive force.<sup>243</sup> Because state kidnapping statutes often include a felonious-purpose element, and child abuse is a felonious act, transporters who employ unreasonable excessive force during the transport could be liable not only for child abuse, but also for kidnapping.<sup>244</sup> But just as under federal law, the reasonableness standard does not provide an easily applicable means of determining what transporter behavior will be deemed lawful.<sup>245</sup>

Even if kidnapping is not implicated, transporters may still be guilty of false imprisonment. This might be the result if, for example, all of the elements except the purpose element of kidnapping are met.<sup>246</sup> Like kidnapping, however, false-imprisonment claims are also difficult to establish in the transport context because they depend on whether parents can consent to the transport on their children's behalf. Whether parents can provide consent depends on how much authority parents can delegate to third-party transport companies and if the youth has a recognizable will.

If parents can in fact delegate full authority over their child to a transporter, the inquiry becomes whether the transport was conducted reasonably, because even parents can be liable for false imprisonment when they confine their children unreasonably.<sup>247</sup> As under the kidnapping analysis, however, reasonableness is

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241. See, e.g., ARIZ. REV. STAT. ANN. § 13-1304 (2010); OHIO REV. CODE ANN. § 2905.01 (LexisNexis Supp. 2013); 18 PA. CONS. STAT. § 2901 (Supp. 2012); MODEL PENAL CODE § 212.1 (1985).

242. Swint, *supra* note 7.

243. See Holding, *supra* note 12 (setting forth cases of violence).

244. Many state child abuse statutes are applicable only to parties responsible for the child's welfare. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., WHAT IS CHILD ABUSE AND NEGLECT? RECOGNIZING SIGNS AND SYMPTOMS 2 (2013), available at <http://www.childwelfare.gov/pubs/factsheets/whatiscan.pdf>; see CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT 7–92 (2011), available at [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/define.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/define.pdf) (summarizing each state's child abuse statute). Because transporters are acting *in loco parentis*, they satisfy this requirement.

245. See Holding, *supra* note 40 (arguing that what is reasonable behavior in the child-care context is not analogous to the youth-transportation industry).

246. See *supra* notes 158–61 and accompanying text (establishing that false imprisonment is a lesser included offense of kidnapping and is differentiated by its lack of a purpose requirement).

247. See *State v. Kinchen*, 963 P.2d 928, 929 (Wash. Ct. App. 1998) (acknowledging that parents may be guilty of false imprisonment of their own children in circumstances in which the restrictions on the children's movements, viewed objectively, are excessive, immoderate, or unreasonable); *State v. Teynor*, 414 N.W.2d 76, 80 (Wis. Ct. App. 1987) (noting that it is possible for parents to commit false imprisonment against their own children and that exercising their authority unreasonably is one such way to do so).

difficult to determine. This flimsy test thus provides children with insufficient protection, especially because courts have refused to clearly delineate the line between reasonable and unreasonable behavior<sup>248</sup> and tend to construe parental authority broadly.<sup>249</sup> To better protect children, regulations should be implemented, including the requirement that parents obtain the consent of a neutral fact-finder before hiring a transport company to convey their children to a treatment facility.

Alternatively, if regulations requiring a neutral fact-finder are not promulgated, courts should at least engage in an individualized determination of whether the youth being transported has a recognizable will. Youths who have a recognizable will should be able to object to their parents' decision to send them to a behavior-modification facility. Without conducting this recognizable-will inquiry, parental consent to a minor's confinement and transport unjustly relieves transport companies of false-imprisonment liability.<sup>250</sup> Courts' reluctance to recognize a minor's will in the youth-transport context, combined with the heightened potential for abuse in these circumstances, produce the need for regulations similar to those implemented in analogous situations to protect transported children.

*D. Comparable Abuses in the Transport of Juvenile Offenders and Private Prisoners Demonstrate the Need for Regulation*

Two comparable industries illustrate an effective approach for regulating the youth-transportation industry: the juvenile-offender and the private-prisoner transportation industries. Regulation of the juvenile-offender transportation industry arose largely in response to rampant child abuse. Before the establishment of a separate juvenile-court system, many children were sent away to reform institutions without ever having committed a crime<sup>251</sup>—mirroring the current situation in the youth-transportation industry. These reformatory “houses of refuge” were unregulated, resulting in numerous abuses to the children living there.<sup>252</sup>

With the establishment of a separate, regulated juvenile-justice system after *Kent*, juveniles were able to rely on the state to ensure their safety and welfare.<sup>253</sup> The Court in *Kent*, *Gault*, and *Parham* recognized the due process rights of juveniles,<sup>254</sup> and the state now regulates every aspect of the juvenile justice system, including the transportation of offenders.<sup>255</sup> The liberty interests described

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248. See *supra* notes 40–43 and accompanying text.

249. See *supra* notes 76–81 and accompanying text.

250. Cf. *Kellar v. Wills*, 186 F. App'x 714, 715–16 (8th Cir. 2006) (per curiam) (holding that a student could not maintain a false-imprisonment claim against her therapeutic school because her parents consented to her enrollment with full knowledge of the school's programs and restrictions).

251. See *supra* notes 169–74 and accompanying text.

252. See *supra* notes 169–74 and accompanying text.

253. See *supra* notes 70–71 and accompanying text.

254. See *supra* Part I.B.

255. See *supra* Part I.B.

in the cases above also apply to the children presently being transported to reformatory institutions by private-transport companies. Therefore, the same path to regulation must be taken to ensure their safety and welfare.

State policies for transporting juvenile offenders can provide a model for the currently unregulated private youth-transportation industry. If the state has an interest in juvenile offenders' health and safety,<sup>256</sup> it surely also has an interest in the health and safety of innocent children who are transported privately. The state should therefore extend the regulations applicable to the transport of juvenile offenders to the private transport of children to reformatory institutions. Vermont's policy for transporting children in state custody serves as a progressive model.<sup>257</sup> Private transporters should not use restraints unless absolutely necessary to protect the child or others from harm, and each time restraints are used transporters should log a written report outlining why the restraints were justified. Vermont also requires that the youths be accompanied by an adult with whom they are familiar.<sup>258</sup> This person does not need to be a parent, but can be someone whom the child knows and trusts, to ease the trauma of travelling with strangers and ensure the welfare of the child.<sup>259</sup> This regulation for transporting juvenile offenders serves as an example of rules that ensure the health, safety, and welfare of children in any sort of transport.

In addition, the genesis and evolution of private youth-transportation companies mirror those of private-prisoner transport companies. Just as the need for private-prisoner companies arose from the growing private-prison industry, youth-transportation services also emerged as private behavior-modification programs gained popularity. These private youth-transport companies, however, are unregulated and are thus susceptible to the same mistreatment and abuse that permeated the private-prisoner transport industry prior to its regulation.<sup>260</sup>

The circumstances that facilitate such abuses are similar in both contexts. For example, just as two men were permitted to transport one female prisoner prior to regulation of the private-prison industry, men are currently permitted to transport female youths in the youth-transportation industry, thus creating circumstances conducive to sexual abuse.<sup>261</sup> Further, the lack of regulations regarding employee background checks and hiring in the private-prisoner transport industry led to assault and sexual abuse. Similarly, the lack of regulation in the private youth-

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256. See *supra* Part I.B.

257. See *supra* note 184 and accompanying text.

258. VT. AGENCY OF HUMAN SERVS., DEP'T FOR CHILDREN & FAMILIES, TRANSPORTATION OF CHILDREN IN STATE CUSTODY 3 (2011), available at [http://dcf.vermont.gov/sites/dcf/files/pdf/reports/Transporting\\_Youth.pdf](http://dcf.vermont.gov/sites/dcf/files/pdf/reports/Transporting_Youth.pdf).

259. *Id.*

260. See Friedmann, *supra* note 191 (recounting the story of an abused female prisoner); see also Holding, *supra* note 12 (describing Autumn Joyce—taken from her bed at five a.m. by a towering man and thrown to the floor).

261. See Friedmann, *supra* note 191 (describing how a female prisoner was transported by two men); see also Holding, *supra* note 12 (reporting that female children are at times transported solely by male transporters).

transport industry has allowed transport companies to hire “agents who not only have criminal histories[] (including sexual abuse)[,] but have also been arrested while transporting teens and charged with unlawful imprisonment and assault.”<sup>262</sup> Just as these abuses were the catalyst for the development of juvenile-offender and private-prisoner transport regulations, the misconduct in the youth-transportation context demonstrates the critical need for industry regulation.

### III. PROPOSED REGULATION

Based on the regulations implemented for the transportation of juvenile offenders and private prisoners, the following is a proposed federal regulation to protect children who are transported by private companies.

**A. Purpose.** The purpose of this regulation is to protect the well-being of minors who are transported by private youth-transportation companies to private residential facilities by providing minimum security and safety standards for such transport.

**B. Definitions.** For purposes of this section:

1. A “youth transportation service” means an entity, other than the United States, a State, or any inferior political subdivision of a State, that engages in the business of transporting minors for compensation, based on the authority delegated from the minor’s parent(s) or legal guardian(s), for the purpose of transporting to a behavioral-modification facility, private mental hospitals, and like private institutions, or an attempt thereof.
2. A “behavioral modification facility” is a residential treatment facility that enrolls minors who are perceived as displaying problematic behavior in an attempt to alter their conduct.
3. A “restraint” is a tool used to limit the mobility of an individual through the use of force, which can be physical, mechanical, or chemical. Such restraints may include, but are not exclusively, handcuffs, shackles, stun guns, zip ties, and pepper sprays.
4. A “minor” means any person under the age of eighteen years.<sup>263</sup>

**C. Neutral Fact-finder.**

1. A child may be transported by a youth-transportation service to a behavioral-modification facility only after a proceeding conducted by a neutral and detached fact-finder.
2. The fact-finder who conducts the inquiry may not profit, financially or otherwise, from the physical placement of the child in that setting.

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262. Swint, *supra* note 7.

263. The definition of minor varies by state.

3. Upon determination by the fact-finder that the following circumstances clearly exist, the fact-finder may approve a parent's or legal guardian's decision to send the child to a behavioral-modification facility:

- a. the child demonstrates a risk of harm to himself/herself or others;
- b. the child is experiencing significant impairment in his/her ability to perform socially;
- c. the child will benefit from care and treatment by the behavioral-modification facility; and
- d. there is no appropriate less-restrictive alternative.

4. The commitment proceeding before the neutral and detached fact-finder shall be conducted in as informal a manner as possible, and in a physical setting that is not likely to have a harmful effect on the child.

#### **D. Standards and Requirements.**

1. *Pre-employment screening.* Pre-employment screening measures must include determination of a valid driver's license, a background check, and a test for the use of controlled substances. The background check must include a fingerprint-based criminal background check. A person will be disqualified from employment if he/she has either (1) a prior felony conviction, or (2) a misdemeanor conviction for a domestic-violence crime, sex crime, or a crime involving child abuse. The failure of an employee to pass any screening measure shall act as a bar to employment.

2. *Employee training.* Youth-transportation services must require the completion of 100 hours of employee training before an employee may transport a minor. Training must include instruction in each of the following areas:

- a. use of restraints;
- b. use of force;
- c. first aid;
- d. cardiopulmonary resuscitation (CPR);
- e. non-violent crisis intervention;
- f. anger management; and
- g. suicide awareness and prevention.

3. *Maximum driving time.* Youth-transportation services must adhere to the maximum driving time provisions applicable to commercial motor vehicle operators, as set forth in Department of Transportation regulations at 49 C.F.R. 395.3, which will apply regardless of whether the youth-transportation service is covered by Department of Transportation regulations.

4. *Transporter-to-transportee ratio.* Youth-transportation services must ensure that at least two transporters be present for every minor being transported. This requirement does not preclude a contracting entity from establishing more stringent transporter-to-transportee ratios. Youth-transportation services must also ensure that, when transporting female individuals, at least one female transporter or female accompanying adult must be present.

5. *Use of restraints.* Youth-transportation-service employees shall not possess or employ the use of chemical restraints. Physical and mechanical restraints may be employed to the extent reasonable and necessary under the circumstances to prevent immediate harm to the transportee, the transporter, or third parties. Under no circumstance should the duration of the restraint exceed the period of imminent harm. Before commencing the transport, transporters should obtain the explicit permission or lack thereof from a parent or guardian to employ the use of restraints on the transportee. In the event that a transporter employs the use of a physical or mechanical restraint, such transporter must promptly write and file a detailed report describing the reason for such use, the restraints applied, the duration of the restraint, along with all other relevant information.

6. *Standards to ensure the safety of minors during transport.* Youth transport services must ensure that:

- a. protective measures are in place to make sure that all vehicles are safe and well-maintained, including documentation of completed repairs and regular maintenance;
- b. vehicles are equipped with efficient communication systems;
- c. policies, practices, and procedures are in effect to ensure the health and physical safety of the minors during transport, including a fire extinguisher, functioning seat belts, a first-aid kit, and employees who are qualified to dispense medications and administer CPR and emergency first aid;
- d. policies, practices, and procedures are in effect to prohibit possession or use of firearms, mistreatment of minors, use of excessive force, and sexual misconduct; and
- e. the well-being of minors in their custody is maintained. This includes, but is not limited to, necessary stops for restroom use and meals, proper heating and ventilation of the transport vehicle, climate-appropriate clothing, and prohibitions on the use of tobacco or alcohol in any form in the transport vehicle.

#### **E. Insurance.**

All individual transporters must have personal vehicle insurance. In addition, each youth-transportation service must have liability insurance related to the transport of youths.

#### **F. Enforcement.**

Any person found in violation of the regulations in this Part will:

1. be liable to the United States for a civil penalty in an amount not to exceed \$\_\_\_\_\_ for each violation; and
2. be liable to the United States for the costs of collection.

If, as a result of a violation, any minor is seriously injured, those liable for the violation shall be required to compensate the victim.

### CONCLUSION

The youth-transportation industry implicates legal concerns ranging from the delegation of parental authority to child abuse, kidnapping, and false imprisonment. The industry is permitted to exist, essentially without regulation, and is purportedly legal. The circumstances surrounding industry practices, however, facilitate unreasonable and unlawful conduct. In the course of developing American law, states and courts have maintained a laissez-faire approach to the rights of parents in disciplining their children. But these rights should not be accorded as much deference as they have been in the youth-transport context because of the great potential for serious harm to children during transport. Instead, when this type of liberty interest is at stake, the government should require a neutral fact-finder to determine whether the desired parental action actually serves the child's best interest.

While we might like to assume that parents always act with the best interests of their children in mind,<sup>264</sup> and that a neutral fact-finder would in fact be bound to do so, neither assumption is sufficient to protect children's rights. Without any regulation of the transportation services themselves, no parent or court-appointed fact-finder should, in good conscience, permit a child to be taken to a behavior-modification facility by these companies. If we are actually committed to protecting the rights and ensuring the physical and emotional well-being of minors, transport companies should be federally regulated.

Many people are shocked to learn about the youth-transportation industry and the unrestricted way in which it operates. It undeniably parallels other private and state-run programs that once were responsible for committing serious physical and emotional abuse. It is imperative, therefore, that society become more aware of these services and that the government adequately regulate them to protect our children.

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264. See *supra* note 41 and accompanying text.