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SPECTERS OF THE PRIVATIZED PUNISHMENT: EROSIONS OF CIVIL LIBERTIES IN JUVENILE PRISONS

❖ NOTE ❖

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I. INTRODUCTION

In February 2017, the Justice Department rescinded the directive under the Obama administration to phase out private prison contracts.¹ While the targeted prisons have been federal prisons for adults, there appears to be less public scrutiny on the privatization of state juvenile detention and correctional facilities. It is worthwhile to examine the legal state of juveniles in private prisons because their youth makes them particularly vulnerable to abuse and mistreatment and makes their incarcerated conditions uniquely problematic. This Note begins with examining the historical and

¹ Matt Zapotosky, *Justice Department will again use private prisons*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/world/national-security/justice-department-will-again-use-private-prisons/2017/02/23/da395d02-fa0e-11e6-be05-1a3817ac21a5_story.html?utm_term=.bfcac637b0f9.

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contemporary existence of juvenile private prisons. Then, this Note analyzes arguments that support and condemn the privatization of juvenile prisons, paying attention to policy and business implications. Furthermore, this Note examines constitutional issues that incarcerated youth face in private prisons, such as due process concerns and the propriety of governmental delegation of penal powers to the private sector, as reasons that support the closure of privatized juvenile prisons. Finally, this Note points out how the Missouri model of juvenile rehabilitation attempts to reform injustices characteristic of the private juvenile justice industry and why there should be enhanced support for progressive reform.

II. TROUBLED BEGINNINGS

Juvenile detention and correctional centers emerged as a response to the privatization of government welfare programs during the Reagan Era in the 1980s when the federal government began to contract with private prison companies.² In 1983, Corrections Corporation of America became the country's first private prison and today, nearly forty percent of all juvenile offenders are imprisoned inside private prisons.^{3,4} The rise of private juvenile prisons appears to be part of the larger trend from the 1970s of increased privatization of federal prisons to address bloated inmate populations and diminishing prison services.⁵ In Florida, all incarcerated youth reside in private prisons.⁶ State budgetary constraints incentivize governments to pursue privatized youth prisons, subsuming the welfare of imprisoned youth into the larger fiscal agenda.⁷ Nevertheless, private juvenile prisons have elicited negative criticism from the Departments of Justice in various states due to disconcerting treatment of imprisoned youth. Facilities from James Slattery's for-profit prison empire, Youth Services International, have encountered reports of youth fights arranged by prison staff in Maryland and, in Florida, authorities discovered failures to report prison riots, assaults, and

² Madison Pauly, *A Brief History of America's Private Prison Industry*, MOTHER JONES (July/August 2016), <http://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline/>.

³ *Id.*

⁴ Chris Kirkham, *Prisoner of Profit*, HUFFINGTON POST (Oct. 22, 2013), <http://projects.huffingtonpost.com/prisoners-of-profit>.

⁵ *Id.*

⁶ Chris Kirkham, *Prisoners of Profit": Despite Widespread Abuse, Private Juvenile Jail Firm Expands Empire*, DEMOCRACY NOW (Oct. 23, 2013), https://www.democracynow.org/2013/10/23/prisoners_of_profit_despite_widespread_abus.

⁷ *Id.*

even sexual abuse against imprisoned youth.⁸ However, private youth prisons remain a characteristic feature of the contemporary penal landscape.

III. JUSTICE UNDER A PROFIT MOTIVE

Support for the privatization of juvenile prisons largely center-around economic pragmatism. First, private prisons aim to save the government money through replacing government red tape with private employees who may be cheaper to employ.⁹ For instance, private contractors charge reduced daily rates compared with public employees for managing youth correctional facilities.¹⁰ Likewise, an Arizona Department of Corrections study noted that private prisons saved an average of 13.6% in operational costs than public prisons.¹¹ The business goal is provide greater efficient use of labor compared to public prisons, as private prisons strive to use fewer guards to monitor inmates and are not mandated to follow civil service rules regarding monitoring staff and consequently utilize around one-third the administrative personnel.¹² The assumption is that private operators can manage juvenile prisons at a lower cost while maintaining or improving the quality of the facilities.¹³ Additionally, private juvenile prisons allegedly reduce costs in the construction and design stage. The lack of governmental red tape found in private prisons means that private juvenile prison companies can design, construct, and operate private prisons in less time compared to public-operated prisons,¹⁴ and, unlike public prisons, private companies are not burdened with purchasing restrictions and contracting quotas.¹⁵ Here, the underlying policy incentives for the government are to save money while increasing juvenile incarceration capacity and the policy incentives for private youth prison companies are to make a profit.¹⁶

As expected, many arguments exist against private juvenile prisons. In particular, private juvenile prisons suffer from dark histories of abuse, the neutral or negative net impact of private imprisonment on juvenile criminality, and long-term financial cost overlooked in short-term

⁸ Pauly, *supra* note 2.

⁹ Kevin Krajick, *Prisons for Profit: The Private Alternative*, State Legis., Apr. 1984, at 11.

¹⁰ *Id.*

¹¹ Alexander Volokh, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1876 (2002).

¹² *Id.* at 1879.

¹³ *Id.* at 1870.

¹⁴ *Id.* at 1878.

¹⁵ Volokh, *supra* note 11.

¹⁶ Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 459 (2005).

perspectives on private prisons' economic success. Some scholars believe that inadequate staffing characteristic of private juvenile prisons is directly linked to increased violence against juvenile inmates.¹⁷ In general, private prisons employ fifteen percent fewer guards per inmate compared to public prisons, increasing the risk of danger to staff and inmates.¹⁸ Furthermore, a whistleblower lawsuit from the Idaho Department of Corrections specifically noted that the Department failed to properly ensure there was enough staff on duty pursuant to standard juvenile-to-staff ratio of 8:1 during the day and 24:1 at night, which jeopardized staff and inmate safety.¹⁹ The complaint additionally alleged that regular lack of staff supervision for the juveniles, including those with violent histories, created precarious prison conditions.²⁰ As a result, there were four times more violent incidents between guards and inmates than compared to in Idaho public youth correctional facilities.²¹ Moreover, a letter from the Idaho Department of Corrections to the Idaho Correctional Center warden for a private juvenile prison argued that the prison's systematic issues included the failure of guards to adopt proper behavioral modifications to stop violence; prison guards routinely committed simple battery against juveniles when they violently misbehaved, fostering a "violent culture without commensurate consequences."²²

The troubled history of violence against imprisoned youth raises a critical legal and business issue of accountability in private juvenile prisons. Public prison officials hold qualified immunity from civil liability when they perform discretionary functions, such as disciplining juvenile inmates, if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."²³ However, the Supreme Court held in *Richardson v. McKnight* that private prison officials do not qualify for this immunity, which raised the accountability for private

¹⁷ Stephen Pevar, *Is CCA Guilty?*, ACLU (Mar. 5, 2014), <https://www.aclu.org/blog/cca-guilty>.

¹⁸ Curtis R. Blakely & Vic W. Bumphus, *Private & Public Sector Prisons--A Comparison of Select Characteristics*, 68 FED PROB. 27, 29 (2004).^[1]^[2]^[3]^[4]^[5]^[6]^[7]^[8]^[9]^[10]^[11]^[12]^[13]^[14]^[15]^[16]^[17]^[18]^[19]^[20]^[21]^[22]^[23]^[24]^[25]^[26]^[27]^[28]^[29]^[30]^[31]^[32]^[33]^[34]^[35]^[36]^[37]^[38]^[39]^[40]^[41]^[42]^[43]^[44]^[45]^[46]^[47]^[48]^[49]^[50]^[51]^[52]^[53]^[54]^[55]^[56]^[57]^[58]^[59]^[60]^[61]^[62]^[63]^[64]^[65]^[66]^[67]^[68]^[69]^[70]^[71]^[72]^[73]^[74]^[75]^[76]^[77]^[78]^[79]^[80]^[81]^[82]^[83]^[84]^[85]^[86]^[87]^[88]^[89]^[90]^[91]^[92]^[93]^[94]^[95]^[96]^[97]^[98]^[99]^[100]^[101]^[102]^[103]^[104]^[105]^[106]^[107]^[108]^[109]^[110]^[111]^[112]^[113]^[114]^[115]^[116]^[117]^[118]^[119]^[120]^[121]^[122]^[123]^[124]^[125]^[126]^[127]^[128]^[129]^[130]^[131]^[132]^[133]^[134]^[135]^[136]^[137]^[138]^[139]^[140]^[141]^[142]^[143]^[144]^[145]^[146]^[147]^[148]^[149]^[150]^[151]^[152]^[153]^[154]^[155]^[156]^[157]^[158]^[159]^[160]^[161]^[162]^[163]^[164]^[165]^[166]^[167]^[168]^[169]^[170]^[171]^[172]^[173]^[174]^[175]^[176]^[177]^[178]^[179]^[180]^[181]^[182]^[183]^[184]^[185]^[186]^[187]^[188]^[189]^[190]^[191]^[192]^[193]^[194]^[195]^[196]^[197]^[198]^[199]^[200]^[201]^[202]^[203]^[204]^[205]^[206]^[207]^[208]^[209]^[210]^[211]^[212]^[213]^[214]^[215]^[216]^[217]^[218]^[219]^[220]^[221]^[222]^[223]^[224]^[225]^[226]^[227]^[228]^[229]^[230]^[231]^[232]^[233]^[234]^[235]^[236]^[237]^[238]^[239]^[240]^[241]^[242]^[243]^[244]^[245]^[246]^[247]^[248]^[249]^[250]^[251]^[252]^[253]^[254]^[255]^[256]^[257]^[258]^[259]^[260]^[261]^[262]^[263]^[264]^[265]^[266]^[267]^[268]^[269]^[270]^[271]^[272]^[273]^[274]^[275]^[276]^[277]^[278]^[279]^[280]^[281]^[282]^[283]^[284]^[285]^[286]^[287]^[288]^[289]^[290]^[291]^[292]^[293]^[294]^[295]^[296]^[297]^[298]^[299]^[300]^[301]^[302]^[303]^[304]^[305]^[306]^[307]^[308]^[309]^[310]^[311]^[312]^[313]^[314]^[315]^[316]^[317]^[318]^[319]^[320]^[321]^[322]^[323]^[324]^[325]^[326]^[327]^[328]^[329]^[330]^[331]^[332]^[333]^[334]^[335]^[336]^[337]^[338]^[339]^[340]^[341]^[342]^[343]^[344]^[345]^[346]^[347]^[348]^[349]^[350]^[351]^[352]^[353]^[354]^[355]^[356]^[357]^[358]^[359]^[360]^[361]^[362]^[363]^[364]^[365]^[366]^[367]^[368]^[369]^[370]^[371]^[372]^[373]^[374]^[375]^[376]^[377]^[378]^[379]^[380]^[381]^[382]^[383]^[384]^[385]^[386]^[387]^[388]^[389]^[390]^[391]^[392]^[393]^[394]^[395]^[396]^[397]^[398]^[399]^[400]^[401]^[402]^[403]^[404]^[405]^[406]^[407]^[408]^[409]^[410]^[411]^[412]^[413]^[414]^[415]^[416]^[417]^[418]^[419]^[420]^[421]^[422]^[423]^[424]^[425]^[426]^[427]^[428]^[429]^[430]^[431]^[432]^[433]^[434]^[435]^[436]^[437]^[438]^[439]^[440]^[441]^[442]^[443]^[444]^[445]^[446]^[447]^[448]^[449]^[450]^[451]^[452]^[453]^[454]^[455]^[456]^[457]^[458]^[459]^[460]^[461]^[462]^[463]^[464]^[465]^[466]^[467]^[468]^[469]^[470]^[471]^[472]^[473]^[474]^[475]^[476]^[477]^[478]^[479]^[480]^[481]^[482]^[483]^[484]^[485]^[486]^[487]^[488]^[489]^[490]^[491]^[492]^[493]^[494]^[495]^[496]^[497]^[498]^[499]^[500]^[501]^[502]^[503]^[504]^[505]^[506]^[507]^[508]^[509]^[510]^[511]^[512]^[513]^[514]^[515]^[516]^[517]^[518]^[519]^[520]^[521]^[522]^[523]^[524]^[525]^[526]^[527]^[528]^[529]^[530]^[531]^[532]^[533]^[534]^[535]^[536]^[537]^[538]^[539]^[540]^[541]^[542]^[543]^[544]^[545]^[546]^[547]^[548]^[549]^[550]^[551]^[552]^[553]^[554]^[555]^[556]^[557]^[558]^[559]^[560]^[561]^[562]^[563]^[564]^[565]^[566]^[567]^[568]^[569]^[570]^[571]^[572]^[573]^[574]^[575]^[576]^[577]^[578]^[579]^[580]^[581]^[582]^[583]^[584]^[585]^[586]^[587]^[588]^[589]^[590]^[591]^[592]^[593]^[594]^[595]^[596]^[597]^[598]^[599]^[600]^[601]^[602]^[603]^[604]^[605]^[606]^[607]^[608]^[609]^[610]^[611]^[612]^[613]^[614]^[615]^[616]^[617]^[618]^[619]^[620]^[621]^[622]^[623]^[624]^[625]^[626]^[627]^[628]^[629]^[630]^[631]^[632]^[633]^[634]^[635]^[636]^[637]^[638]^[639]^[640]^[641]^[642]^[643]^[644]^[645]^[646]^[647]^[648]^[649]^[650]^[651]^[652]^[653]^[654]^[655]^[656]^[657]^[658]^[659]^[660]^[661]^[662]^[663]^[664]^[665]^[666]^[667]^[668]^[669]^[670]^[671]^[672]^[673]^[674]^[675]^[676]^[677]^[678]^[679]^[680]^[681]^[682]^[683]^[684]^[685]^[686]^[687]^[688]^[689]^[690]^[691]^[692]^[693]^[694]^[695]^[696]^[697]^[698]^[699]^[700]^[701]^[702]^[703]^[704]^[705]^[706]^[707]^[708]^[709]^[710]^[711]^[712]^[713]^[714]^[715]^[716]^[717]^[718]^[719]^[720]^[721]^[722]^[723]^[724]^[725]^[726]^[727]^[728]^[729]^[730]^[731]^[732]^[733]^[734]^[735]^[736]^[737]^[738]^[739]^[740]^[741]^[742]^[743]^[744]^[745]^[746]^[747]^[748]^[749]^[750]^[751]^[752]^[753]^[754]^[755]^[756]^[757]^[758]^[759]^[760]^[761]^[762]^[763]^[764]^[765]^[766]^[767]^[768]^[769]^[770]^[771]^[772]^[773]^[774]^[775]^[776]^[777]^[778]^[779]^[780]^[781]^[782]^[783]^[784]^[785]^[786]^[787]^[788]^[789]^[790]^[791]^[792]^[793]^[794]^[795]^[796]^[797]^[798]^[799]^[800]^[801]^[802]^[803]^[804]^[805]^[806]^[807]^[808]^[809]^[810]^[811]^[812]^[813]^[814]^[815]^[816]^[817]^[818]^[819]^[820]^[821]^[822]^[823]^[824]^[825]^[826]^[827]^[828]^[829]^[830]^[831]^[832]^[833]^[834]^[835]^[836]^[837]^[838]^[839]^[840]^[841]^[842]^[843]^[844]^[845]^[846]^[847]^[848]^[849]^[850]^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prisons.²⁴ Nevertheless, the lack of public oversight for private juvenile prisons translates to more difficulty in ensuring a higher degree of accountability. Additionally, critics against for-profit juvenile prisons observe that private juvenile prisons are more likely to lead to heightened juvenile criminality. Since the main source of revenue for private juvenile prisons is the government, they depend on consistent incarceration of juvenile offenders in order to maintain their government contracts. This means tapping into a “continual supply of new clients (first time convicts) and a base of frequent dependable clients (recidivist convicts).”²⁵ This motivates private prison lobbyists to support mandatory sentencing policies and other high recidivism measures to sustain their cash flows.²⁶ For example, in 1998, private prison lobbyists donated over \$540,000 to 361 candidates in twenty-five states who supported higher criminal sentencing regimes and guidelines and eighty-seven percent of these recipients won their elections.²⁷

Moreover, private prison companies have faced ethical issues of corruption, as one private prison company in New York was found to have provided free chauffeur transportation for favored politicians for four unnoticed years and a private detention center in Pennsylvania was found to have paid two judges \$2.6 million over five years to reject pleas for lenient sentences and alternative sentencing arrangements.²⁸ This makes apparent that private interests conflate with public interests of the penal systems to support a for-profit empire where greater incarceration rates for juveniles endanger their safety in prison and endanger the safety of the public that absorbs the collateral impact of a greater reoccurrence of juvenile crime. The “tough on crime” positions that private prison companies advocate do not benefit society because they encourage longer, more frequent imprisonment of youth.²⁹ This means greater contact with dangerous, unhealthy conditions that damage prospects for post-release employment, great familial alienation, and higher likelihood of being incentivized to commit more crime after getting out.³⁰ Furthermore, the more juveniles in private prisons, the more the government has to spend on renewing existing contracts or forming more contracts with private prison operators. Thus, even though private juvenile

²⁴ *Richardson v. McKnight*, 521 U.S. 399, 412 (1997).

²⁵ Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113, 127 (fall 2009).

²⁶ *Id.*

²⁷ *Id.* at 128.

²⁸ *Id.*

²⁹ *Id.* at 129.

³⁰ *Id.*

prisons may help stymie costs up front, they may actually incur greater long-term expenses for the government, making private incarceration of youth less economically practicable.

IV. PRIVATIZED INFRINGEMENT ON CIVIL LIBERTIES

Private juvenile detention centers should be phased out because they raise serious constitutional concerns that jeopardize the welfare of incarcerated American youth. On one hand, privatization of juvenile youth prisons strips the public power away from the government. For instance, the nondelegation constitutional doctrine prohibits the government from assigning certain powers away to private actors.³¹ Outsourcing the bulk of operational duties to private prisons raises the question of whether it implicates juvenile offenders' liberty interests, as incarceration is considered "among the most severe and intrusive manifestations of power the state exercises against its own citizens. When the state incarcerates, it strips offenders of their liberty and dignity and consigns."³²

The systematic rise of private juvenile prisons underscores how economic gain subverts traditional values of public accountability in the juvenile justice system. Due process clauses in the Fifth and Fourteenth Amendments indicate that the government cannot delegate discretionary government functions to industries where there is a direct financial stake when discretion is applied.³³ In the context of incarcerated youth, private prison officials exercise nearly the same broad discretion in the management of the lives of the incarcerated youth as do public prisons.³⁴ Private prison officials are able to discipline imprisoned juveniles with inherent discretion, carrying out the penal objectives of inherently governmental functions. However, unlike public prison officials, private officers may have direct financial stake in the substantial incarceration, such as company stock, which may unduly influence how they discipline juveniles and what penal outcomes they can produce from their interactions with imprisoned youth.³⁵ Thus, the welfare and due process rights of incarcerated youth are unfairly subjected to the discretionary whims of profit-minded operators.

³¹ *Id.* at 122–23.

³² Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 441–42 (2005).

³³ *Id.* at 122.

³⁴ *Id.*

³⁵ *Id.*

Essentially, the privatization of juvenile prisons points to a greater movement towards the privatization of State action, as “detention is a power reserved to the government, and is an exclusive prerogative of the state.”³⁶ Because of rampant lack of oversight, not only has private actors entered into the governmental sphere of penal operations, but they also have avoided many of the public oversight and regulations to which their public predecessors were subject.

On a procedural due process level, this means that there is a dearth of safeguards to ensure the fair treatment of the incarcerated.³⁷ For juvenile inmates, procedural due process implicates their fundamental interests in “life, liberty, or property.”³⁸ Since imprisonment affects their liberty interest, procedural due process requires procedural safeguards to exist to ensure their fair treatment; the amount of process due is evaluated through the comparative weight of the inmates’ and the government’s interests.³⁹ For example, in New Mexico, mandatory inspectors only come to private prisons twice a year, raising questions about whether there are enough safeguards.⁴⁰ Additionally, the tendency of private prison staff to impose harsh discipline against juvenile inmates may reflect the private prison’s financial interests in preserving a high occupancy rate, which would be inconsistent with the prisoners’ interests in legitimate treatment.⁴¹ Since juvenile inmates are provided limited to no counsel in disciplinary hearings in prison, it is often just their word against the guard, leaving problematic opportunity for unchecked bias or unfair treatment.⁴² Private prisons’ institutional stake in maximizing profits creates the risk of illegitimate influence on prisoners’ civil rights, as it invisibly animates the decisions and actions of private prison staff and the sentencing outcomes of juvenile inmates.

Furthermore, the troubling conditions in private juvenile prisons raise substantive due process concerns. On a substantive due process level, administrative decisions are evaluated for fundamental fairness and may not be arbitrary or capricious.⁴³ However, substantive due process concerns are mostly only recognized in the prison context when abuse is “readily

³⁶ *Medina v. O'Neill*, 589 F. Supp. 1028, 1038 (S.D. Tex. 1984).

³⁷ Douglas W. Dunham, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1482 (1986).

³⁸ *Id.*

³⁹ *Id.* at 1480.

⁴⁰ Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 642 (1987).

⁴¹ Dolovich, *supra* Note 32 at 520.

⁴² *Id.*

⁴³ Dunham, *supra* note 33 at 1482.

apparent,” with courts preferring to give deference to prison officials.⁴⁴ Moreover, substantive due process has historically experienced highly limited application in courts, as courts have rarely expanded the concept of substantive due process because “the guideposts for responsible decision-making in this uncharted area are scarce and open-ended.”⁴⁵ However, a South Carolina federal district court found that abusive conditions in juvenile prison violated the juvenile inmates’ substantive due process when prison staff regularly used harmful tear gas against the juveniles, failed to identify inmates in need for special education or create individualized education plans for identified inmates, and the prison food was often riddled with cockroaches.⁴⁶ Likewise, the increased occurrences of violence that juveniles in private prisons face at the hands of prison staff similarly violate juvenile inmates’ substantive due process right to safe confinement conditions. Without comprehensive data collection and thorough empirical investigation, alongside strategic litigation for courts to provide flesh to the skeletal definition of “substantive” due process, it remains difficult to know and ensure that the due process rights of incarcerated youth are properly preserved.

V. CONCLUSION

Nevertheless, an improved model for juvenile justice that may be adopted by private juvenile prisons is the Missouri juvenile justice corrections model that aims to provide the “least restrictive environment possible without compromising public safety.”⁴⁷ Under this innovative model, highly trained professionals provide consistent therapy in small community-based treatment centers near the juveniles’ homes, striving to value rehabilitation and individual accountability over punishment.⁴⁸ The shift from the goal of individual punishment towards improving the juvenile offender’s relationship to the community through local community service and therapy allow juvenile offenders a healthy positive space to be exposed to positive role models, caretaking practices and productive engagement with the broader society.⁴⁹ Most significantly, the holistic Missouri model reflects lower

⁴⁴ *Id.*

⁴⁵ *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992).

⁴⁶ Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability and Public Safety*, 84 OR. L. REV. 1001, 1009 (2005).

⁴⁷ Ira M. Schwartz & Russel K. Van Vleet, *Center for the Study of Youth Policy, Incarcerating Youth: The Minnesota and Missouri Experiences* 10 (1996).

⁴⁸ *Id.* at 1004.

⁴⁹ *Id.* at 1069.

recidivism rates than traditional public or private detention centers and costs one-third less than the youth prisons in the surrounding eight states.⁵⁰ Cost-effective youth rehabilitation, such as the alternative Missouri model, serves as an important lesson that quality of penal services do not have to come at the cost of government money. The Missouri model meaningfully signifies how the pursuit for rehabilitative justice in the juvenile justice system can accommodate capitalist principles of economic feasibility and frugality.

⁵⁰ *Id.*