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ON PUNISHMENT: THE CONTINUING DEBATE OVER AVERSIVE  
THERAPY

ON PUNISHMENT:

NEW YORK STATE, THE JUDGE ROTENBERG CENTER  
AND THE CONTINUING DEBATE OVER AVERSIVE  
THERAPY

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I. INTRODUCTION

Aversive therapy, a form of reformatory treatment that includes electric shock, is a practice mired in controversy. It is administered liberally at the Judge Rotenberg Center (hereinafter “the JRC”), an educational facility in Canton, Massachusetts that provides educational services to students with disabilities.<sup>1</sup> Other techniques that have been used in order to achieve student compliance include physical restraint and meal deprivation. Collectively, these punishments are known as “aversive therapy,” or simply “aversives.”

For decades, New York State has routinely placed students with disabilities at the JRC due to a shortage of in-state facilities. New York officially tolerated the JRC’s use of aversives until a 2006 State investigation revealed how extensively aversives were being employed.<sup>2</sup> As a result of these negative findings, the New York State Education Department (hereinafter “NYSED”) took a stand and promulgated emergency regulations in 2007 that severely restricted the use of aversive therapy at the JRC.<sup>3</sup> A group of parents and guardians protested this decision and challenged the regulations in federal court.<sup>4</sup> A decision in this case, *Alleyne v. New York State Dept. of Education*, is pending.

The legal issue in *Alleyne v. New York State Dept. of Education* is whether New York complied with the mandate of several Federal statutes in promulgating its regulations. But perhaps more importantly, the case raises fundamental questions about law and society: when can parents permit the use of State-sanctioned punishment techniques on their children? Given the

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complexities surrounding the use of aversives, it is this author's opinion that the decision should ultimately rest in the hands of state authorities.

This article thus seeks to tell the story of aversive therapy; specifically, how aversives are applied at the JRC and how the center has interacted with New York State. Part II explains how New York students ended up at an educational facility in Massachusetts. Part III briefly outlines the history of aversive therapy and the JRC. Part IV explores both the negative aspects of extensive use of aversive therapy at the JRC and the arguments in favor of continued application of aversive therapy. Finally, in part V, I argue that NYSED's regulations constitute a sensible and workable compromise regarding the use of aversives. Part VI offers a brief conclusion.

### II. WHAT ARE NEW YORK STUDENTS DOING IN MASSACHUSETTS?

#### A. *The Individuals with Disabilities Education Act*

Students with disabilities from New York are attending the JRC in Massachusetts due to the broad mandate of the Individuals with Disabilities Act, a federal law that requires states to provide a free public education to students with disabilities.<sup>5</sup> Federal educational aid for students with disabilities, along with many modern civil rights laws, grew out of the Supreme Court's landmark ruling in *Brown v. Board of Education*.<sup>6</sup> While *Brown's* narrow holding prohibited states from maintaining separate public school programs for African-Americans, it has long stood for a broader proposition.<sup>7</sup> This proposition can be expressed as: "separate, discriminatory educational policies are not equal"; or, even more broadly, that "state-sponsored discrimination in education is unconstitutional."<sup>8</sup> *Brown* did not, however, put an immediate end to discrimination in education. Through the 1950s and 1960s, children with disabilities were routinely denied a public education.<sup>9</sup> Advocates of children with disabilities argued that *Brown* necessitated the right to a public education for all.<sup>10</sup> If

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grossly inadequate educational programs for African-Americans were unacceptable, how could the complete denial of a public education to students with disabilities be constitutional?<sup>11</sup>

This persuasive argument was accepted in two seminal 1972 cases: *Pennsylvania Association for Retarded Citizens v. Pennsylvania* and *Mills v. Board of Education*.<sup>12</sup> These successes inspired dozens of similar suits that were resolved in favor of students with disabilities.<sup>13</sup> Additionally, these decisions often coincided with legislation requiring public education for students with disabilities.<sup>14</sup> Most states had passed such laws by the 1970s.<sup>15</sup> The effectiveness of these reforms, however, was mitigated by practical and financial concerns. School districts claimed that their hands were tied as they did not have the funds to administer the inevitably costly programs for students with disabilities.<sup>16</sup>

Congress's answer was the Education for all Handicapped Children Act of 1975, later renamed the Individuals with Disabilities Education Act (hereinafter "IDEA") in 1990.<sup>17</sup> The IDEA establishes several substantive requirements which were well summarized in a recent article:

First, all children with disabilities should be given an education. Second, education must be in the least restrictive, appropriate placement. Third, education should be individualized and suited to the child's unique needs ... Fourth, education must be free.<sup>18</sup>

In short, children with disabilities are entitled to a free and public education. Like most federal initiatives, the IDEA is complex and replete with acronyms. Indeed, one must be vigilant to avoid being lost in the sea of acronyms, such as FAPE (the aforementioned Free and Appropriate Public Education requirement), LEA (Local Educational Agency) and IEP (Individualized Educational Plan).<sup>19</sup>

While the IDEA's paramount goal is substantive – the promotion of the rights of students with disabilities – it is also, more humbly speaking, a funding statute.<sup>20</sup> States may receive a significant amount of federal funding by complying with its provisions.<sup>21</sup> Specifically, states may receive a maximum of “40

percent of the average per-pupil expenditure in public elementary schools and secondary schools” for each student with disabilities.<sup>22</sup> This aids states in defraying the costs of education for students with disabilities which, by all accounts, are staggering.<sup>23</sup>

The IDEA has been re-authorized and amended several times since 1975.<sup>24</sup> The most significant changes resulted from the amendments of 1997, which expanded the goals of the IDEA.<sup>25</sup> Initially, the goal of the IDEA was to promote access to education for students with disabilities.<sup>26</sup> Congress supplemented this goal in 1997 with a new goal: the improvement of educational standards.<sup>27</sup> The movement towards improved standards continued with the 2004 amendments, written within the standards-based framework of the No Child Left Behind Act of 2002.<sup>28</sup>

Despite the noble and egalitarian goals of the IDEA, it has been met with several practical difficulties. As noted earlier, the most significant problem has been funding. Special education is extremely expensive. The National Education Association has reported that the average educational cost for a student with a disability per year is \$16,921.<sup>29</sup> This is well over twice the amount of the cost for students without disabilities,<sup>30</sup> and a modest amount considering that education for students with severe disabilities can run as high as \$100,000 - \$200,000.<sup>31</sup> Due to this high cost, the IDEA has gone under-funded since its inception. Federal funding was just below 20 percent in 2004, which was up from previous decades.<sup>32</sup> This number has further declined since the escalation of American military involvement in the Middle East.<sup>33</sup> The burden has thus fallen on state school districts to pick up the tab. Massachusetts, for example, spends more than \$1.6 billion each year on special education programs.<sup>34</sup>

#### *B. New York and the JRC*

Given the high cost of education for students with disabilities, school districts often struggle to find ways to satisfy the IDEA’s requirements. New York State has long been aided in its efforts to do so by the JRC. Students with disabilities have been

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placed with the JRC since the late 1970s.<sup>35</sup> New York students comprise a large percentage of the JRC's students because, as it was succinctly put in *Mother Jones* magazine, "New York has a shortage of beds for troubled kids."<sup>36</sup> While many school districts have this problem, New York City districts are especially taxed. As a major urban center, New York City is home to a large population – many of them minorities and recent immigrants, and many of them poor. Unable to shoulder the costs of a free public education, New York City and upstate school districts alike have long sent students to the JRC out of practical necessity.

New York has long harbored misgivings about the center<sup>37</sup> and officially took a stand against the JRC in 2006 following a report by an investigative team that evaluated the conditions at the JRC.<sup>38</sup> State officials were undoubtedly motivated to investigate by a lawsuit filed in 2006 by the mother of a JRC student against the JRC and the local New York school district.<sup>39</sup> The complaint alleged, among other causes of action, negligence, assault, battery and violation of the IDEA.<sup>40</sup> Following the extensive publicity that the suit generated, New York State sent a team of investigators in June 2006.<sup>41</sup> The report generated from this visit revealed a host of legal, professional, and moral violations.<sup>42</sup> Many of its findings have been echoed by past employees and other observers, such as the report's conclusions that the students at the JRC "are provided insufficient academic and special education service"<sup>43</sup> and that "the integrity of the behavioral programming is not sufficiently monitored by appropriate professionals."<sup>44</sup> Most disturbing, however, are the personal accounts – a student was shocked for sneezing; another for "failing to maintain a neat appearance."<sup>45</sup> The JRC strongly disputes these findings; however, given its documented history, it is unlikely that these incidents were simply fabricated.

New York State's investigation prompted a reconsideration of New York's policy toward the JRC. The Board of Regents of the State of New York<sup>46</sup> promulgated emergency regulations in 2006 banning the use of aversives – most notably, electric shock.<sup>47</sup> Following this, dozens of parents whose children were

receiving aversives quickly filed suit in the Northern District of New York, seeking injunctive relief allowing their children to continue to receive aversives.<sup>48</sup> The plaintiffs' complaint argues that New York's investigators were biased against the JRC and that NYSED's emergency regulations are invalid.<sup>49</sup> The crux of the complaint, however, is that restricting the availability of aversives violates the plaintiffs' right to a "free and public education," as defined by the IDEA.<sup>50</sup>

The plaintiffs obtained a preliminary injunction in district court.<sup>51</sup> NYSED then appealed to the Second Circuit Court of Appeals, arguing that the preliminary injunction was improperly granted because the district court did not make a requisite finding of irreparable harm.<sup>52</sup> The Second Circuit agreed and remanded the case to the district court to determine whether there would indeed be irreparable harm if the preliminary injunction were denied.<sup>53</sup> At the time of writing, this litigation is proceeding in district court.

Since the filing of *Alleyne v. NYSED*, the Board of Regents has adopted final regulations concerning the use of aversive therapy.<sup>54</sup> The regulations ban the use of aversives in New York and New York-approved schools;<sup>55</sup> however, parents may obtain a child-specific exception through an elaborate procedural process.<sup>56</sup> Many objectionable aversive techniques – including pinching, hitting, sleep and food deprivation – are completely banned, and no child-specific exception may be granted for their use.<sup>57</sup>

Of course, one may wonder why an educational facility has been engaging in such violent practices in the first place. The answer lies in the doctrine of behaviorism, a psychological theory developed in the twentieth century. More specifically, the answer lies in the radical behaviorism of Matthew Israel, founder of the JRC.

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### III. THE DEVELOPMENT OF AVERSIVE THERAPY AND THE JUDGE ROTENBERG CENTER

#### *A. Aversive Therapy's Psychological Roots*

While psychology is firmly established as a scientific discipline, it would have been located within University philosophy departments prior to the nineteenth century.<sup>58</sup> Modern psychology's theoretical underpinnings lie in philosophical attempts of the sixteenth and seventeenth centuries to define human consciousness.<sup>59</sup> Perhaps the most famous effort was John Locke's *Essay Concerning Human Understanding*, in which Locke drew a distinction between primary qualities of objects (e.g. the whiteness of a feather) and secondary qualities (e.g. the tickling sensation of a feather).<sup>60</sup> This distinction, which suggests that human understanding of objects cannot be explained by mere physical appearance, is fundamental to the study of the mysterious construct of consciousness.

With the advent of experimental science in the nineteenth century, psychologists increasingly used controlled experimentation to validate their theories, as opposed to philosophical speculation.<sup>61</sup> Accompanying this change was a shift in focus. Psychologists, accepting the Darwinian assumption that consciousness evolved for particular reasons, became increasingly focused on the function of human consciousness.<sup>62</sup> Thus, in their experiments, psychologists sought to determine how consciousness helps humans survive and thrive.<sup>63</sup> This view has been dubbed "functionalism" for its emphasis upon function.<sup>64</sup>

Psychology's theoretical foundations were rocked to the core in the early twentieth century by what has been called the Behaviorist Revolution.<sup>65</sup> John Watson, a gifted student of the newly established psychology program at the University of Chicago, grew frustrated with the amorphous nature of consciousness studies.<sup>66</sup> Watson believed that psychology, in order to become a respected discipline, must abandon its inquiry into the intangible concept of the mind and instead focus



on observable behaviors.<sup>67</sup> In 1913, Watson delivered a now famous lecture at Columbia University which was subsequently reprinted and dubbed “the behaviorist manifesto.”<sup>68</sup> In the lecture, Watson dismissed the theory underlying both functionalism and structuralism when he declared that: “the time seems to have come when psychology must disregard all reference to consciousness.”<sup>69</sup> Psychology, according to Watson, was to be a study of the behavior of organisms.<sup>70</sup> Behaviors could be objectively observed and catalogued without the interference of the amorphous, subjective notion of consciousness.<sup>71</sup>

Watson’s theories inspired America’s most famous behaviorist, B.F. Skinner.<sup>72</sup> Skinner spent much of his career attempting to validate Watson’s behaviorist theories and, in the process, established his own impressive body of studies regarding the prediction and control of behavior.<sup>73</sup> He also developed a method of conditioning known as operant conditioning.<sup>74</sup> To understand the difference between operant conditioning and the then prevalent stimulus-response conditioning, consider the following situation: a bright light is presented to a young child, and the child squints. The child is then scolded.<sup>75</sup> Classical stimulus-response (S-R) experimentation would consider the presentation of the light and its effect on the child – squinting. Operant conditioning, in contrast, is unconcerned with the initial stimulus – here, the presentation of the light. Operant conditioning is only concerned with the consequences that follow a particular event, which may take the form of reinforcers or punishers.

Therefore, according to this model, the child’s reaction and the punishment of scolding that followed it are the only relevant pieces of information. This has been referred to as reaction – stimulus conditioning (R-S), but the label is slightly misleading. There indeed is a stimulus which occurs before the initial reaction – it is simply irrelevant.<sup>76</sup> The role of punishers or reinforcers is to control behavior. Therefore, our hypothetical child will theoretically be deterred from squinting at bright lights because, with enough repetition of the drill, the child will expect a scolding and abstain from looking at the light.

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Skinner, it should be noted, was a proponent of positive reinforcement.<sup>77</sup> While his experiments using animals may have used punishers to compel certain behaviors, Skinner believed that positive reinforcement should be used in the treatment of human beings.<sup>78</sup> Behaviorist theory, however, clearly contemplated the use of punishers in order to achieve human behavioral compliance. Such experiments were being done long before Skinner offered theoretical justification for their use.<sup>79</sup> Frequently referred to today as “aversive therapy,” psychologists sought to curb what were deemed undesirable societal practices such as alcoholism, overeating, and homosexuality through the use of electric shocks, noxious odors, and loud noises.<sup>80</sup> These painful stimuli would be presented following the performance of the undesirable behavior.<sup>81</sup> Results were mixed: some psychologists reported successes, but many others found that their patients relapsed following their release from the clinic.<sup>82</sup> Many of these “successes” are dubious, however, because many psychologists deemed their patients cured after a short period of time (often six months to a year) and neglected to follow up on the patient’s progress.<sup>83</sup>

While Skinner is well known for his behaviorist experiments within the psychological discipline, he is perhaps best known to the general public for his utopian novel *Walden Two*. Published in 1948, *Walden Two* presented readers with an earthly paradise that had been achieved through the application of behaviorist principles.<sup>84</sup> The leaders of the community, so-called “behavioral engineers,” provided positive reinforcement in response to desired behaviors.<sup>85</sup> Writing in the wake of World War II, Skinner believed this would create a peaceful world devoid of the harmful human emotions that brought on the war, such as “aggression, jealousy [and] competition.”<sup>86</sup> While *Walden Two* did not receive much attention when it was first published, it achieved newfound popularity in the 1960s and 1970s, when its behaviorist principles were first applied to educational techniques.<sup>87</sup> At that time, it was subjected to intense criticism and denounced as a dehumanizing and totalitarian fantasy.<sup>88</sup> Historian of psychology Alexandra Rutherford has argued persuasively that Skinner’s ideas met with

particular resistance in the 1960s and 1970s due to the rebellious cultural and political climate in America which emphasized the value of individualism.<sup>89</sup>

Behaviorism was quite popular in the mid-twentieth century; however, it has declined as the driving force of psychology. Studies of consciousness enjoyed a renaissance in the 1980s and 1990s, and continue to occupy much of the field of psychology.<sup>90</sup> Few, if any, modern psychologists share the unbridled faith in behaviorism that Skinner possessed.

### B. *Radical Behaviorism, Matthew Israel and the JRC*

#### 1. Israel's Inspiration

Skinner's *Walden Two* was not dismissed as a fantasy by all. Matthew Israel, founder of the Judge Rotenberg Center, was inspired by Skinner's vision of psychology and society.<sup>91</sup> According to an interview with *Mother Jones* magazine, Israel first became interested in Skinner when he took a class called "Human Behavior" during his freshman year at Harvard.<sup>92</sup> The class was taught by none other than Skinner himself, and Israel soon became enamored with behaviorist theory.<sup>93</sup> After obtaining his PhD in Psychology, Israel desired to put Skinner's theories into practice and subsequently created his own utopian community.<sup>94</sup> He helped found two communal houses in Boston, one of which served as a de facto laboratory for behavioral experiments.<sup>95</sup> One of the inhabitants of the house was a three-year old girl whom Israel described as a loud, wild, and unruly child.<sup>96</sup> With her parents' permission, Israel applied a snap of his finger against her cheek, what Skinner would call a "punisher," whenever she misbehaved.<sup>97</sup> With repeated application of this punishment, Israel soon transformed the girl from a terror to, in his words, a "charming addition to the house."<sup>98</sup>

Although Israel did not say so, it was at this moment that he diverged from Skinner's teachings. As mentioned previously, Skinner did not advocate the use of punishers on human beings.

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Israel's true intellectual forebears, therefore, are those scientists who sought to eliminate alcoholism, obesity, and homosexuality – and who achieved mixed results at best.<sup>99</sup>

### 2. The JRC: Founding and Controversy

Israel's success with the three-year old girl inspired him to create a center where aversives would be applied to unruly children in the hope that behavioral compliance would eventually be achieved.<sup>100</sup> The first incarnation of this center, the Behavior Research Institute, was founded in Providence, Rhode Island in 1971.<sup>101</sup> The center later moved to Massachusetts and was renamed the Judge Rotenberg Center in honor of Massachusetts probate judge Ernest Rotenberg, who, in legal opinions, affirmed the center's right to use aversives.<sup>102</sup> Israel attempted to found a similar center in California in 1977. It soon became involved in controversy, however, when a child died from receiving aversives in 1981 and the State of California issued a highly critical report of facility conditions in 1982.<sup>103</sup> Pursuant to an agreement with the State of California, the center soon stopped using aversive therapy.<sup>104</sup>

Tragic death, unfortunately, was not restricted to Israel's California branch. In 1985, a 22-year old student with autism enrolled at the JRC died of a seizure shortly after receiving a particularly intense aversive treatment – sustained exposure to static-like “white noise.”<sup>105</sup> Another student, who suffered from mental retardation, experienced stomach pain early one day.<sup>106</sup> She clutched her stomach and refused to eat.<sup>107</sup> She also refused to speak, which was interpreted by the JRC staff as disobedience and punished accordingly with dozens of physical aversives and five “forced inhalings of ammonia.”<sup>108</sup> Her ailment was later discovered to be a perforated stomach, and she died in surgery.<sup>109</sup> The JRC was not prosecuted in either of these deaths, as it is not clear that the aversives were the sole – or a criminally sufficient – cause of either child's death.<sup>110</sup> Though causation may have been lacking, the treatment afforded the children was undeniably

harsh. The Massachusetts Department of Mental Retardation, investigating the death of the student with the perforated stomach, declared that the JRC's conduct "violated the most basic codes and standards of decency and humane treatment."<sup>111</sup>

### 3. The JRC Today

Focusing solely on the deaths that have occurred at the JRC paints a morbid picture of the Center; however, it is not necessarily an accurate portrait. These deaths have only occurred after excessive use of aversives and, today, only about 40% of the JRC's students receive aversive therapy.<sup>112</sup> Therefore, well over half of the JRC's students receive "positive procedures" and are not exposed to aversive treatment. There is also a three-step procedural process which must be undertaken before aversives may be used.<sup>113</sup> First, parents of the student in question must consent to the use of aversives.<sup>114</sup> Second, the JRC must obtain court approval, with an attorney representing the interests of the student with disabilities.<sup>115</sup> Finally, the procedure is reviewed by a panel of JRC-appointed "clinicians," a Human Rights Committee and a Peer Review Committee.<sup>116</sup>

The day-to-day operation of the JRC is fairly non-controversial, though it has been criticized as ineffective.<sup>117</sup> Due to the varying levels of students' functionality, each student is given a computer to use and proceeds at his or her own level through designed education plans.<sup>118</sup> Students are allowed breaks for lunch, exercise, and other activities.<sup>119</sup> Additionally, the JRC contains a room where students, in exchange for compliant behavior, can purchase desirable goods such as video game systems, DVDs or CDs.<sup>120</sup> This is an example of what psychologists have called a "token economy" and is discussed further in part IV.

Since Israel's founding of the JRC, two policies have been implemented that form the core of the present controversy. The first is the JRC's increased reliance on electric shock as a punishment method.<sup>121</sup> The use of electric shock as a treatment method has a long and unfortunate history. It was once used

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extensively in psychiatric treatment and, like many aversives, was used by psychologists to treat any behavior deemed socially undesirable.<sup>122</sup> Electric shock was even used to treat homosexuality throughout most of the twentieth century.<sup>123</sup> Israel has long advocated the use of electric shock as an aversive. In use at the JRC are two electric shock devices – the GED (Graduated Electric Decelerator<sup>124</sup>) and the GED-4, a model introduced after the initial GED that administers a shock almost three times as strong as its progenitor.<sup>125</sup>

The second significant development is that the JRC began to admit children with less severe disabilities. The JRC initially dealt only with “low-functioning” students, those with severe autism or mental retardation. However, recently the JRC has admitted students with so-called “high-functioning” disabilities such as ADD and bi-polar disease.<sup>126</sup> One may not realize this from reviewing the JRC’s literature, which continues to portray its students as highly dysfunctional and prone to violent self-abuse.<sup>127</sup> But the JRC indeed provides services to students with less than life-threatening disabilities – and they receive the same treatment as “low-functioning” students.<sup>128</sup>

### IV. THE CONTINUING DEBATE

The pictures painted by both sides of the aversive therapy debate are misleading. Opponents of the JRC invoke images of Stanley Kubrick’s *A Clockwork Orange*, suggesting that the JRC is a cruel institution that exploits some of society’s most troubled individuals. On the other hand, Matthew Israel presents himself as a savior who takes in children that cannot function in society and crafts them into functional and successful human beings. Both portraits are exaggerations, and they obscure the arguments on both sides of the issue.

#### A. *The Case Against Aversive Therapy*

There are five principal arguments against the use of

aversive therapy techniques. Critics allege that aversive techniques: (1) are morally unacceptable; (2) are painful; (3) create a culture of violence; (4) must be applied indefinitely to be effective; and (5) are based upon questionable logic.

Perhaps the most obvious argument against aversive therapy is that it, on its face, is morally unacceptable. Physical punishment is largely viewed as an archaic method of asserting authority and achieving compliance. This point was made in an editorial for the *New York Times*, which characterized the JRC's methods as "physically and mentally abusive."<sup>129</sup> It is a powerful argument. Simply hearing of the severity of aversive therapy is often enough to produce a visceral reaction. This is evidenced by the dozens upon dozens of online comments responding to Jennifer Gonnerman's investigation of the JRC, calling the JRC's conduct, among other things, "horrifying" and "barbaric."<sup>130</sup> One is reminded of former Chief Justice Earl Warren's explanation that "evolving standards of decency . . . mark the progress of a maturing society."<sup>131</sup> A prohibition on aversive techniques would appear to represent such an evolution.

The methods employed by the JRC are also most certainly painful. The JRC claims that the electric shocks it employs feel like a bee sting; however, those who have experienced it report otherwise.<sup>132</sup> An advocate for children with autism who experienced the shock reported pain akin to a sunburn that lasted two hours after the initial shock.<sup>133</sup> Another first-hand observer reported that "it felt less like a bee sting than being stung by a horde of wasps."<sup>134</sup>

A related criticism is that allowing and encouraging aversives creates a culture of violence.<sup>135</sup> The acceptance of aversive therapy at every level of the JRC lends credence to its validity and allows employees of the JRC to rationalize their conduct. A former JRC teacher's assistant attested to this widespread acceptance of aversive therapy: "The psychologists said it was okay. The judges said it was okay. The state, of course, approved it as far as its laws and the parents approved of it, so who was I to question [their] methods?"<sup>136</sup> Especially for employees

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who may not be familiar with the nuances of behaviorist theory, this is a dangerous message.

Unsurprisingly, this culture of violence has manifested itself in numerous instances where aversives were overused. New York State's report on the facility, discussed above, found rampant instances of disproportionate use of aversives and aggressive staff behavior.<sup>137</sup> An incident that occurred twenty years ago provides perhaps the most egregious evidence: a nineteen-year old student received approximately 1,000 "pinchings, spankings and face-sprays" in one day – well over any acceptable limit, including the JRC's at the time.<sup>138</sup> These reports are an illustration of the danger of promoting aversive therapy. The JRC's unqualified insistence that such techniques are safe and necessary for students' well-being lends itself to abuse. Many of the students at the JRC are severely disabled and unresponsive to staff instruction. In desiring to curb undesirable and often dangerous behavior, the JRC staff has resorted to the tools available to them, including aversives.

Another argument against the use of aversives at the JRC is that, in order to be successful, aversives must be continuously employed.<sup>139</sup> Jennifer Gonnerman encountered this limitation in her investigation of the JRC. Shortly after her arrival at the JRC, Israel showed her a film created by Israel called "Before and After."<sup>140</sup> The film depicts six children, including two eleven year old girls who engage in dangerous, life-threatening behavior. When unrestrained, both flail, shriek, and bang their heads on the floor. Gonnerman asserts that the video is frightening and compelling: "The girls' self-abuse is so violent and so frightening that it almost ma[de] me want to grab a[n] [electric shock device] and push the button myself."<sup>141</sup>

As one may have predicted from the title of the film, the "after" footage portrays the two girls seemingly cured of their self-destructive behavior thanks to the JRC's efforts. One plays in a swimming pool; the other sits in a chair at a beauty salon. However, much to Gonnerman's surprise, she soon discovered that five out of the six children featured in the film – including both



girls – still reside at the JRC.<sup>142</sup> One is confined to a wheelchair and fails to respond to the staff as they walk by; the other is still hooked up to an electric shock device.<sup>143</sup> Gonnerman's observation reveals a truth underlying aversives: they must be continuously applied in order to be effective. Earlier studies of aversive therapy, attempting to suppress alcoholism or other undesirable social behaviors, confirmed this limitation.<sup>144</sup> Most subjects regressed to their initial problematic behaviors only a few weeks after treatment had ceased.<sup>145</sup>

The reasons for this appear to be two-fold. First, without the constant presence of the punisher, many students eventually ignore their previous conditioning.<sup>146</sup> This is because human beings rationally conclude that because the punishment no longer occurs, they may engage in the previously forbidden activity. Even animals are capable of this level of rational thinking. For instance, when dogs learn that an invisible fence is broken, they often freely bound over the previously forbidden line. The second reason, described below, is that punishment often does not address the root cause of a behavioral problem.

Professor John A. Mills has persuasively argued that the theoretical foundation underlying behavior modification – including aversive therapy – is replete with logical errors.<sup>147</sup> Mills offers four related reasons. First, the behaviorist's impulse to explain all behaviors in terms of operant conditioning obscures a complete understanding of human behavior.<sup>148</sup> For example, Mills discusses a study where behaviorists sought to eliminate two undesirable practices: (1) attacking the hospital staff; and (2) insisting upon only wearing white clothes.<sup>149</sup> Even if behavior modification could correct these behaviors, it is only capable of correcting the undesirable impulses, and not the patients' underlying beliefs or attitudes.<sup>150</sup> Attacking of the hospital staff was likely a mere manifestation of deeper feelings, and the patient who insisted upon wearing white clothes did so based on the belief that white represented virtue and black represented evil.<sup>151</sup> Discouraging a behavior which is a manifestation of a mental condition, attitude, or belief does not address the root of the identified problem.<sup>152</sup>

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Mills' second criticism is that behaviorists have fallen prey to the "inductive fallacy."<sup>153</sup> In a famous experiment, two behaviorists taught a patient with a severe mental disability to carry a broom around the hospital.<sup>154</sup> As something of a practical joke, the behaviorists invited two unaware psychiatrists to evaluate the patient's behavior.<sup>155</sup> The psychiatrists concluded that the carrying of the broom was a result of the patient's mental condition.<sup>156</sup> Joking aside, the behaviorists claimed to have created a "symptom" through the use of operant conditioning.<sup>157</sup> They then concluded that all symptoms are produced through operant conditioning.<sup>158</sup> This conclusion – because A produced B, A always produces B – is a logical failure too obvious to be discussed at length.

The third criticism is related to the second: behaviorists insist that there is – and can only be – one reason as to why reinforcers are effective. For instance, in so-called "token economy" programs employed by hospitals, it is largely indisputable that "money" given to patients, which may be exchanged for items or activities of interest, influences patient behavior. However, it is far from clear that patient behavior is *only* controlled by the delivery of the money.<sup>159</sup>

Finally, Mills offers a fourth logical flaw of behavior modification theory: what he calls the "denial of the antecedent."<sup>160</sup> This flaw is best illustrated through example: suppose a patient in a hospital exhibits signs of an eating disorder. The hospital staff is instructed to ignore the signs, and the signs of the disorder soon disappear. Proponents of behavior modification would conclude that the activity which allegedly prevented the disorder (attention) was also the cause of the disorder in the first place. Thus, according to Mills' hypothetical, attention was both the cause of the eating disorder and the solution to it. Such an "either or" approach to causation is appealing in its simplicity, but erroneous. Mills, quoting a fellow critic of behaviorism, put it best: "knowledge about how to change a phenomenon is not tantamount to knowing how it originated."<sup>161</sup>

Professor Mills is similarly critical of token economies such as JRC's reward store. While these programs appear to inject

a dose of reality into treatment, Mills argues that they instead provide patients with a “means of escape” to a “fantasy version of normal life.”<sup>162</sup> He does not disagree with the practical benefits of token economy programs – they generally make for more amiable relations between staff and patients and allow patients to acquire desirable goods.<sup>163</sup> However, these programs provide a distorted view of the real world. They take place within the context and culture of a highly regulated environment, where patients receive goods based upon the expectations and decisions of the staff. Experiments have proved that this harms the ability of patients to participate in the real world after their release from an institution. Patients who participate in token economies have a higher relapse rate than those who do not.<sup>164</sup>

#### B. *The Case for Aversive Therapy*

Despite the intense criticisms leveled at the JRC, aversive therapy does have its benefits. There are three principal arguments in favor of aversives: (1) aversives do work – in the most natural sense of the word – in achieving behavioral compliance; (2) a frequent alternative, the prescribing of drugs, can severely reduce a student’s functionality; and (3) eliminating aversives runs contrary to the wishes of many parents of students with disabilities.

No expert, journalist or other person critical of aversives has been able to refute Israel’s argument that aversives do, in fact, reduce undesirable behaviors. While the long-term effects of aversives may do more harm than good,<sup>165</sup> it is indisputable that aversives provide tangible benefits in the short term.<sup>166</sup> This was asserted by counsel for the aggrieved plaintiffs in *Alleyne v. NYSED*, who pointed out that New York State’s investigation of the JRC never explicitly stated that the JRC’s methods were ineffective in treating students’ behaviors.<sup>167</sup> Studies conducted by Israel and others confirm the effectiveness of aversives in reducing behaviors, most notably self-injurious ones.<sup>168</sup>

Parents have also attested to the JRC’s success in treating their children’s behavior.<sup>169</sup> Parent Fran Bernstein, speaking to

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the Orlando Sentinel, praised the success of the JRC in treating her autistic son.<sup>170</sup> Prior to his admission to the JRC, Fran's son Bradley frequently banged his head and punched at his eyes. After treatment at the JRC, which included electric shocks, Bradley now no longer engages in these activities as long as Fran presents, and occasionally uses, an electrically charged cattle prod.<sup>171</sup>

The converse of this argument is also true: positive-only treatment rarely proves wholly effective for students with severe disabilities. Paul Kix, writing for *Boston Magazine*, cites two positive-only experiments which achieved success 68 percent and about 50 percent of the time respectively.<sup>172</sup>

Another strong argument in favor of aversives is actually an argument against an alternative: drugs. It is an almost unanimous refrain from parents: before coming to the JRC, their children were enrolled in a previous institution where they were heavily drugged into a coma-like state.<sup>173</sup> Serious mental illnesses require very strong drugs, such as Depakote, Paxil, Ritalin, and lithium.<sup>174</sup> These drugs have dangerous side effects: lithium, for instance, can induce "tremors, weight gain, acne and thyroid problems" and long-term harm to the kidneys.<sup>175</sup>

In addition to serious health effects, there is also the danger of the over-prescription of drugs due to payoffs from the pharmaceutical industry.<sup>176</sup> Pharmaceutical companies stand to profit handsomely from increased diagnoses of childhood disorders, including bipolar disease.<sup>177</sup> Recent discoveries illustrate the danger of these financial incentives. Dr. Frederick K. Goodwin, Professor at George Mason University and host of the award-winning radio show "The Infinite Mind," has argued that bipolar disease affects children and that certain drugs, if employed early enough, can prevent permanent harm.<sup>178</sup> A recent investigation by Senator Charles E. Grassley revealed that Goodwin failed to disclose that he received at least \$1.3 million from pharmaceutical giants including GlaxoSmithKline from 2000 – 2007.<sup>179</sup> Goodwin is not alone – Senator Grassley's investigation has implicated others, including Harvard psychologist Dr. Joseph Biederman, perhaps the greatest proponent of childhood diagnoses of bipolar

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disease.<sup>180</sup> These recent discoveries suggest that advocates for childhood diagnoses of serious conditions may not be free from bias.

The third argument in favor of aversives is that they are only applied with parental approval – and many parents approve of their use.<sup>181</sup> This is a significant argument. It is difficult for those who are not parents of a child with a disability to imagine what the experience is like. Accounts suggest that it is exhausting, frustrating, frightening, and expensive.<sup>182</sup> It is difficult to make the best choices for any child, but even harder when one is raising a child with a disability that may or may not be diagnosed. And even if the child's condition has been diagnosed, it is subject to change. Through trial by fire, one must become conversant in the language of disabilities and wade through the often conflicting advice of experts in the field.<sup>183</sup> Despite these difficulties, many parents familiarize themselves with the relevant information, formulate opinions, and decide to enroll their children at the JRC.

There is an additional argument specific to New York's involvement with the JRC. Anecdotal evidence suggests that students with severe disabilities who are unable to find placement at a school may end up on the streets or in jail.<sup>184</sup> Without institutional support, persons with disabilities are likely to slip through the cracks of public and private institutions.

### V. RECOMMENDATIONS

As recognized by all involved, aversive therapy is a drastic measure. Senator Brian Joyce of Massachusetts, stalwart critic of the JRC, has pointed out that these physically painful and invasive methods would be wholly decried if used in any other context.<sup>185</sup> Therefore, aversive therapy must be safe and effective if it is to be used liberally, as it is at the JRC. The evidence has proven, however, that it is not. Given the multiple theoretical and practical shortcomings of aversives, the JRC should be prevented from its current one-size-fits-all approach to using aversives.

However, the right to employ aversives should be reserved

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in cases of life-threatening situations. This is the balance struck by New York State's current regulations, and it is a sensible compromise. When a student with disabilities exhibits behavior that may cause serious – and in many cases, life-threatening – injury, the complex factors presented by the issue are reduced to the goal of preserving life. It is telling that the defenders of the JRC always present the case of severely disabled children in presenting their argument. This is because the argument in favor of applying behaviorist principles to children with milder disabilities and diagnoses which are new and disputed (such as bipolar disease) is much tougher to make and, in this author's opinion, unsatisfactory. Another important factor in favor of maintaining an exception for children with life-threatening disabilities is the practical harm that would result from abruptly ending New York's affiliation with the JRC. As previously mentioned, New York does not have enough facilities to adequately provide for its students with disabilities. If a location which houses dozens of students suddenly closed, the practical effect could be disastrous for present and potential students alike.

Two additional objective factors weigh in favor of a ban on aversives with a limited exception for life-threatening situations. The first is that the New York State Education Department is not a partisan commentator; it is a state agency, and it engaged in notice and comment rulemaking before adopting its current regulations. This provided members of the public to present NYSED with arguments on both sides of the debate. And the public did – Anthony Bottar, member of the Board of Regents, commented that this issue produced the most voluminous administrative record of any issue within the past ten years. The response was so voluminous that it succeeded in temporarily shutting down some of Regents' e-mail due to clogged inboxes.<sup>186</sup>

Despite NYSED's impartial position, the plaintiffs in *Alleyne* and the JRC repeatedly insist that New York is biased against the JRC and its use of aversives. However, they have offered no evidence to support this claim. The plaintiffs' complaint argues that the composition of New York's investigative team

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included psychologists who were hostile to the use of aversives. If true, this would answer the “how” of New York’s alleged bias – but not the “why.” This is the critical question: what would New York State stand to gain by attempting to hinder the JRC’s methods? Special education facilities are expensive and in demand, especially in populated areas such as New York City. If anything, New York State has every incentive to continue its relationship with the JRC since it has the facilities and equipment that New York students with disabilities need.

The second factor is that other jurisdictions are moving away from permitting aversives in educational facilities. Ten jurisdictions presently ban the use of aversive therapy, while others, like New York, are moving to limit access to facilities that utilize aversives.<sup>187</sup> The District of Columbia school system is one such jurisdiction eager to disassociate itself with the JRC: in 2008, the District proudly announced that it had relocated eight of its twelve students previously enrolled at the JRC.<sup>188</sup> While ten jurisdictions is hardly a majority, legislative or agency inaction may be due to irrelevancy rather than acquiescence as the JRC is unique in its unapologetic and extensive use of aversive techniques.<sup>189</sup>

### VI. CONCLUSION

In seeking to effectively summarize the issues presented by the use of aversives at the JRC, I found that this was already done in an online comment responding to Jennifer Gonnerman’s article by “Jenny H.”:

I have mixed feelings about this issue. I think that shock “therapy” is inappropriate, but on the other . . . hand, the alternatives are probably worse. These people have nowhere else to go except the street, jail, or a state institution. There is no way that the families can handle these individuals alone (physically or financially), and neither do they want to stand by and let their family member maim or kill themselves or others . . . For people who are outraged, then offer support to these families and individuals, learn more about the issue, and maybe volunteer or work at a school, state institution, homeless shelter, or prison. If we work together, maybe we can offer

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an effective alternative.<sup>190</sup>

While many of the posted comments offer knee-jerk responses to the issue, Jenny's is particularly thoughtful. Her insights are sound, and I hope that this article, in discussing the history of aversive therapy, describing the JRC, and weighing the arguments on both sides of the issue, has managed to help those who, in Jenny's words, would like to learn more about the issue.

However, while I too think it is advisable to encourage sympathetic readers to work with students with disabilities, something more is required with the JRC. It is telling that the JRC stands alone in its permissive use of aversive techniques. The New York State Education Department has done the right thing by limiting the availability of aversive therapy to situations where a student's life is at risk. But the debate will continue, and a decision in the *Alleyne* case will provide a step towards an ultimate disposition of the issue.

### Notes:

- 1 Alleyne v. New York State Educ. Dept., 516 F.3d 96, 98 (2d Cir. 2008).
- 2 Jennifer Gonnerman, *School of Shock sidebar: "Nagging? Zap. Swearing? Zap."*, MOTHER JONES, Aug. 30, 2007 at 41, available at <http://www.motherjones.com/politics/2007/08/why-cant-massachusetts-shut-matthew-israel-down> (last visited September 29, 2009).
- 3 *Alleyne*, *supra* note 1, at 98.
- 4 Alleyne v. New York State Educ. Dept., 248 F.R.D. 383 (N.D.N.Y. 2008).
- 5 20 U.S.C.A. §§ 1400 – 1455 (2004).
- 6 THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 2 (2d ed. 2001). See also the third edition: THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 5 (3d ed. 2008). I have relied upon the second edition because it includes more information on the legal developments preceding the IDEA.
- 7 GUERNSEY & KLARE, SPECIAL EDUCATION LAW 2-3 (2d ed. 2001).
- 8 *Id.*
- 9 *Id.* at 3.
- 10 *Id.*



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- 11 *Id.*  
12 *Id.* at 3.  
13 *Id.*  
14 MITCHELL L. YELL, THE LAW AND SPECIAL EDUCATION 68-9 (2d ed.  
2006).  
15 *Id.* at 69.  
16 GUERNSEY & KANE, *supra* note 6, at 3.  
17 YELL, *supra* note 14, at 73. To avoid confusion and to accord with  
modern terminology, I refer to the Education for all Handicapped  
Children Act as the IDEA as the evolution of the Act is beyond the  
scope of this article.  
18 Jordan L. Wilson, Comment, *Missing the Big Idea: The Supreme  
Court Loses Sight of the Policy Behind the Individuals with  
Disabilities Act in Schaffer v. Weast*, 44 Hous. L. Rev. 161, 167  
(2007). [internal citations omitted]  
19 GUERNSEY & KANE, *supra* note 6, (2d ed.) at 6.  
20 *Id.* The precise scope of the IDEA depends on whether it is  
viewed primarily as a funding or as a civil rights statute. Given the  
origins of the IDEA, this author contends that it is most accurately  
characterized as a civil-rights statute.  
21 *Id.* at 6-7. While this may sound like states may choose to opt in  
or out of the program, compliance with the IDEA is most likely  
not optional given the dozens of court opinions declaring that  
the denial of a public education to children with disabilities is  
unconstitutional.  
22 20 U.S.C.A. §1411 (a)(2)(B).  
23 For example, a study by M. L. Minow found that, by 2001, the  
states, as a whole, were responsible for 38 billion dollars of special  
education costs. On average, state governments paid 58% of this  
sum, leaving local districts to pay for the remaining amount. *See*  
M. L. Minow, Funding Mechanisms in Special Education, National  
Center on Accessing the General Curriculum, [http://www.cast.  
org/publications/ncac/ncac\\_funding.html](http://www.cast.org/publications/ncac/ncac_funding.html) (last visited September 29,  
2009).  
24 Cynthia L. Kelly, *Individuals With Disabilities Education Act – the  
Right ‘Idea’ for Childrens’ Education*, 75-MAR J. KAN. B.A. 24, 25-  
6 (2006).  
25 *Id.* at 26.  
26 *Id.*  
27 *Id.* *See also* Philip T. K. Daniel, “Some Benefit” or “Maximum  
Benefit”: Does the No Child Left Behind Act Render Greater  
Educational Entitlement to Students With Disabilities, 37 J.L. &  
EDUC. 347, 352-3 (2008).

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- 28 Daniel, *supra* note 27, at 353.
- 29 National Education Association, Background of Special Education and the Individuals with Disabilities Education Act (IDEA), <http://www.nea.org/home/19029.htm> (last visited September 29, 2009). The yearly cost of admission at JRC is approximately \$214,000 – well over 10 times the average amount. See Jarrett Murphy, “School of Shock,” THE VILLAGE VOICE, Oct. 11, 2006, available at 2006 WLNR 18875099.
- 30 National Education Association, *supra* note 29.
- 31 Murphy, *supra* note 29.
- 32 National Education Association, *supra* note 32.
- 33 Kelly, *supra* note 24, at 24.
- 34 Erica Noonan, *Push on for Insurers to Share Autism Costs*, BOSTON GLOBE, Sept. 16, 2008, available at [http://www.boston.com/news/health/articles/2008/09/16/push\\_on\\_for\\_insurers\\_to\\_share\\_autism\\_costs/?page=1](http://www.boston.com/news/health/articles/2008/09/16/push_on_for_insurers_to_share_autism_costs/?page=1) (last visited September 29, 2009).
- 35 Alleyne, *supra* note 1, at 98.
- 36 See Gonnerman, *School of Shock sidebar: “Why Can’t Massachusetts Shut Israel Down?”*, *supra* note 2, at 41.
- 37 For example, in 1979 New York issued two reports critical of the JRC. See Paul Kix, *The Shocking Truth*, BOSTON MAGAZINE, at 2, July 2008, available at [http://www.bostonmagazine.com/articles/the\\_shocking\\_truth](http://www.bostonmagazine.com/articles/the_shocking_truth) (last visited September 29, 2009).
- 38 See New York State Department of Education, Observations and Findings of Out-of-State Program Visitation Judge Rotenberg Center, June 9, 2006, available at <http://nospank.net/jrc.pdf> (last visited September 29, 2009).
- 39 See Gonnerman, *supra* note 2, at 38.
- 40 See *Id.*
- 41 Gonnerman, *School of Shock sidebar: “Nagging? Zap. Swearing? Zap.”*, *supra* note 2, at 41.
- 42 See New York State Department of Education, Observations and Findings, *supra* note 38, at 2-3, finding, among other things, that the JRC was not conducting Functional Behavioral Assessments (FBAs) in accordance with the requirements of the IDEA, was “compromising” students’ “privacy and dignity” and was using aversives in a manner that raised “health and safety concerns.”
- 43 For example, former JRC teacher Jessica Croteau, has commented on the lack of dedication to education at JRC. See Kix, *supra* note 37.
- 44 In 2006, the Massachusetts Division of Licensure fined the JRC for falsely claiming that 14 of its 17 psychologists were “licensed.” This may have cost the state of Massachusetts about \$800,000

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- because Massachusetts pays for psychologists' services at the JRC and licensed psychologists command a higher price than other employees. *See* Kix, *supra* note 37, at 4; *See also* Erin Conroy, *Remedy or Abuse?: Controversy resurfaces over use of shock treatment at Canton school*, BOSTON GLOBE, Sept. 13, 2007, at 1, available at 2007 WLNR 18011045.
- 45 New York State Department of Education, Observations and Findings of Out of State Program Visitation: Judge Rotenberg Center, *supra* note 38, at 14.
- 46 The Board of Regents is the governing body of the State Education Department, headed by a Commissioner of Education. *See* New York State Education Department, About the University of the State of New York (USNY), <http://usny.nysed.gov/about/aboutusny.html> (last visited September 29, 2009).
- 47 Rick Karlin, *Regents Set to Reject Use of Electric Shock; Other Forms of Corporal Punishment for Disturbed Children also up to a Vote*, TIMES UNION (Albany, N.Y.), Jan. 9, 2007, at A1, available at 2007 WLNR 534254
- 48 *See* Plaintiffs' Fifth Amended Complaint Plaintiffs' Fifth Amended Complaint in *Alleyne v. New York State Educ. Dept.*, 248 F.R.D. 383 (N.D.N.Y. 2008), Sept. 9, 2007, at VII.(1).
- 49 *Id.* Several of the argued reasons are general grievances common to all legislation or rules: they are too vague (para. 116), not all districts know about them (para. 121) and the change is too sudden and not gradual enough (para. 120).
- 50 Plaintiffs' complaint in *Alleyne v. NYSED*, *supra* note 48, at I. (3).
- 51 *Alleyne*, *supra* note 4 (district court opinion).
- 52 *Alleyne*, *supra* note 1 (appellate opinion).
- 53 *Id.* at 102.
- 54 *See generally* 8 NYCRR 200.
- 55 8 NYCRR 200.7(b)(8).
- 56 *See* 8 NYCRR 200.22(e)(3) – (9). During the “2006-2007, 2007-2008 and 2008-2009 school years,” a child-specific application may be made to the Commissioner of Education. 8 NYCRR 200.22(e)(3). This application will then be referred to an independent panel of experts, who will review the student's individual record. 8 NYCRR 200.22(e)(4) and (5). If the panel determines that the student's behavior, among other things, “threaten[s] the physical well being of the student or that of others,” then the panel may recommend to the Committee on Special Education (CSE), a multidisciplinary team required under New York State law, that specific aversive procedures be employed. *See* 8 NYCRR 200.22(e)(6)(i) and (8); *see also* 8 NYCRR 200.1(j)

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- (defining Committee on Special Education).  
57 8 NYCRR 200.22(e)(2).  
58 See LUDY T. BENJAMIN, A HISTORY OF PSYCHOLOGY: ORIGINAL SOURCES  
AND CONTEMPORARY RESEARCH at Chapter 2 (3d ed. 2009).  
59 *Id.*  
60 *Id.* at 22-3.  
61 See *Id.* at chapter 3.  
62 *Id.* at 124-5.  
63 *Id.*  
64 *Id.*  
65 *Id.* at 254. However, as many historians have noted, Watson was  
not the first to advocate for a subjective-free psychology. See, e.g.,  
ERNEST KEEN, A HISTORY OF IDEAS IN AMERICAN PSYCHOLOGY, 85-6  
(2001). However, as is common to most figures credited with a  
particular innovation, Watson was an effective advocate whose  
message reached the right people at the right time.  
66 BENJAMIN, *supra* note 58, at 253-4.  
67 *Id.* at 254.  
68 *Id.*  
69 *Id.*  
70 *Id.* at 259.  
71 *Id.* at 261, 263.  
72 *Id.* at 257.  
73 *Id.*  
74 *Id.* at 282.  
75 This example is the author's own.  
76 BENJAMIN, *supra* note 62, at 283. This example is the author's own;  
however, it was drawn from an explanation of behaviorism by  
Skinner himself. See *Id.* at 281-5.  
77 See Murphy, *supra* note 29, at 7.  
78 *Id.*  
79 See STEPHEN J. SANSWEET, THE PUNISHMENT CURE: HOW AVERSION  
THERAPY IS BEING USED TO ELIMINATE SMOKING, DRINKING, OBESITY  
HOMOSEXUALITY ... AND PRACTICALLY EVERYTHING ELSE at 6-8 (1985)  
at 6-8.  
80 *Id.* at 8.  
81 *Id.* at 2.  
82 *Id.* at 11, 37.  
83 *Id.* at 11.  
84 HILKE KUHLMANN, LIVING WALDEN TWO: B.F. SKINNER'S BEHAVIORIST  
UTOPIA AND EXPERIMENTAL COMMUNITIES iv (2005).  
85 *Id.*  
86 *Id.*

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- 87 BENJAMIN, *supra* note 58, at 295.  
88 *Id.* at 299.  
89 *Id.* at 294-5.  
90 *See generally* BENJAMIN, *supra* note 58, at chapter 10. For an example of a modern – and very readable – discussion of consciousness studies, *see* JAY INGRAM, *THEATRE OF THE MIND: RAISING THE CURTAIN ON CONSCIOUSNESS* (Toronto, 2005).  
91 Gonnerman, *supra* note 2, at 40.  
92 *Id.*  
93 *Id.*  
94 *Id.* Israel was not the only person to establish a commune based upon Skinner’s ideas. Skinner’s utopian fantasies inspired numerous communities. *See generally* KUHLMANN, *supra* note 84; BENJAMIN, *supra* note 62, at 299.  
95 Gonnerman, *supra* note 2, at 40.  
96 *Id.*  
97 *Id.*  
98 *Id.* at 40.  
99 *See generally* SANSWEET, *supra* note 79.  
100 Gonnerman, *supra* note 2, at 40.  
101 Kix, *supra* note 37, at 2.  
102 Murphy, *supra* note 29, at 7.  
103 Gonnerman, *supra* note 2, at 41.  
104 *Id.*  
105 Fox Butterfield, *School’s Use of Physical Punishment as Therapy is Challenged*, N.Y. TIMES, Nov. 19, 1985, at A20, *available at* 1985 WLNR 596158.  
106 Gonnerman, *supra* note 2, at 41.  
107 *Id.*  
108 *Id.*  
109 *Id.*  
110 The JRC wholly denies that aversive therapy played any role in the death of the two students. *See* Judge Rotenberg Center, Response to Mother Jones Article, “School of Shock,” *available at* <http://www.judgerc.org/SummResponsetoGonnermanArticle.pdf>, (last visited September 29, 2009) [“a few students have died from natural causes having nothing to do with the treatment they received at JRC.”]. Given the facts of the students’ deaths (which JRC does not dispute), it appears extremely unlikely that aversives played no role in the tragic results.  
111 Gonnerman, *supra* note 2, at 41.  
112 *See* Judge Rotenberg, Introduction to JRC, <http://www.judgerc.org/introtojrc.html> (last visited September 29, 2009). It should be noted,

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however, that the JRC likes to have it both ways: in representations to the media, it frequently emphasizes the severe condition of its students, presenting the misleading conclusion that most of its students are low-functioning recipients of aversive therapy. For example, officials told the Albany Times Union in 2006 that the “typical” JRC student “engages in self-mutilation and extreme behaviors including eye-gouging, head-hitting, smearing feces, throwing furniture and indiscriminate screaming.” Michele Morgan Bolton, *Therapy Ban’s Repeal Sought: Controversial Treatment is Best Hope for Some Severely Disturbed Children*, TIMES UNION (Albany, N.Y.), Aug. 22, 2006, at A3, available at 2006 WLNR 14545081.

- 113 Judge Rotenberg Center, Frequently Asked Questions: 14. What aversive does JRC use and with what policies? available at <http://www.judgerc.org/> (last visited September 29, 2009).
- 114 *Id.*
- 115 *Id.*
- 116 *Id.*
- 117 See Gonnerman, *supra* note 2, at 44-5.
- 118 Gonnerman, *supra* note 2, at 44.
- 119 *Id.*
- 120 *Id.*
- 121 *Id.* at 41-2. The electric shocks are, by far, the most controversial practice at the JRC. As this article was going to press, the U.S. Department of Justice announced that it is opening an investigation into whether the JRC’s use of electric shocks violates federal disability laws. See Patricia Wen, *US Opens Canton School Inquiry; Shock Discipline at Rotenberg Center Prompts Concern*, BOSTON GLOBE, Feb. 25, 2010, at B1.
- 122 See generally SANSWEET, *supra* note 79.
- 123 *Id.*
- 124 According to Jennifer Gonnerman’s article, the GED obtained its name due to Israel’s original goal for the machine – the ability to adjust the severity of the shock. According to Gonnerman, this innovation was not included – but the name remained. See Gonnerman, *supra* note 2, at 41-2.
- 125 *Id.* at 42.
- 126 *Id.* at 39, 43.
- 127 See discussion at note 112 *supra*.
- 128 See Gonnerman, *supra* note 2, at 43.
- 129 Maia Szalavitz, *Shocks From the System*, N.Y. TIMES, Jan. 7 2007, at 14WC, available at 2007 WLNR 290827.
- 130 Gonnerman, *supra* note 2.

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- 131 Trop v. Dulles, 356 U.S. 86, 100-101 (1958). Specifically, this comment was used to describe how the Constitution's prohibition on cruel and unusual punishment should be interpreted.
- 132 Matthew Israel, *Mild shock can be tremendous healing force*, TIMES UNION (Albany, N.Y.) Aug. 13, 2006, at B1, available at 2006 WLNR 14068425.
- 133 Claude Solnik, *Shock to the System*, LONG ISLAND BUSINESS NEWS, Sept. 28, 2007, available at 2007 WLNR 19240375.
- 134 *NPR News & Notes: School of Shock* (National Public Radio broadcast Sept 4, 2007), transcript available at 2007 WLNR 17260613.
- 135 Szalavitz, *supra* note 129.
- 136 *NPR News & Notes: School of Shock*, *supra* note 134.
- 137 See New York State Department of Education, Observations and Findings, *supra* note 38.
- 138 Butterfield, *supra* note 105. The JRC's limit at the time was 40 aversives for every eight-hour period.
- 139 JOHN A. MILLS, CONTROL: A HISTORY OF BEHAVIORAL PSYCHOLOGY 170 (1998).
- 140 A shorter version of the film that Ms. Gonnerman viewed is available on the JRC's website. See Judge Rotenberg Center, Important Documents and Films: 2. "Parent's Journey," <http://www.judgerc.org/> (last visited September 29, 2009).
- 141 Gonnerman, *supra* note 2, at 43.
- 142 *Id.*
- 143 *Id.*
- 144 See SANSWEET, *supra* note 79.
- 145 *Id.*
- 146 See SANSWEET, *supra* note 79.
- 147 MILLS, *supra* note 139, at 170-2.
- 148 *Id.*
- 149 *Id.*
- 150 *Id.*
- 151 *Id.*
- 152 *Id.*
- 153 *Id.* at 170.
- 154 *Id.* at 166.
- 155 *Id.* at 166-7.
- 156 *Id.* at 167.
- 157 *Id.* at 166, 171.
- 158 *Id.* at 171.
- 159 *Id.* at 167, 171.
- 160 *Id.* at 171.

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- 161 *Id.* at 172.  
162 *Id.* at 169-70.  
163 *Id.* at 172.  
164 *Id.* at 176.  
165 *See* part IV.A *supra*.  
166 *See* Murphy, *supra* note 29, at 8. New York educators have insisted that they have not seen any “peer-reviewed” research “showing the shocks [employed at the JRC] [a]re effective.” Kevin Rothstein, *N.Y. Shock Therapy Ban Could Drain Mass. School*, BOSTON HERALD, May 20, 2006, at 11, available at 2006 WLNR 8705641. The wording of this statement does not refute the argument that, in general, aversives are effective in preventing undesirable behavior in the short-term. Indeed, psychologist Dr. Ilana Slaff, writing in the Albany Times Union, argues that “recent research literature” supports the use of aversives for those who are autistic. Ilana Slaff, *Aversives Have Helped an Autistic Brother*, TIMES UNION (Albany, N.Y.), Aug. 14, 2006, at A6, available at 2006 WLNR 14132781. It should be noted that it would be impossible to find articles specifically supporting JRC’s shock devices because the JRC refuses to “sell or lend” its’ devices to others. *See* Plaintiffs’ Fifth Amended Complaint, *supra* note 48. Also, given the decreasing credibility of aversive therapy in psychology, it is not hard to imagine why scholarly journals would be hesitant to publish articles finding electric shocks effective.  
167 Plaintiffs’ Fifth Amended Complaint, *supra* note 48.  
168 *See, e.g.*, Van Oorsouw, W.M.W.J., Israel, M.L., von Heyn, R.E., and Duker, P.C., “Side Effects of Contingent Shock Treatment.” (2007); Blenkush, N.A., von Heyn, R.E., and Israel, M.L., “An Example of the Effectiveness of Contingent Skin Shock with Problem Behaviors that Proved Refractory to Standard Positive-Only Techniques” (2007). These articles and similar ones are available on the JRC’s website. *See* Judge Rotenberg Center, Papers and Documents: 5. “Professional papers by JRC staff members or consultants,” <http://www.judgerc.org/> (last visited September 29, 2009).  
169 *See, e.g.*, Lindsey Tanner, *Are Shocks Treatment or Abuse? An Illinois Couple Say a Cattle Prod Helps Keep Their Son From Self-injury*, ORLANDO SENTINEL, Mar. 18 2007, at A8, available at 2007 WLNR 5117038.  
170 *Id.*  
171 *Id.*  
172 Kix, *supra* note 37, at 6.  
173 *See, e.g.*, Conroy, *supra* note 44; Leslie Kaufman, *Parents Defend*



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- School's Use of Aversive Therapy*, N.Y. TIMES, Dec. 25, 2007, at A1, available at 2007 WLNR 25441060; Gonnerman, *supra* note 2 at 39.
- 174 Gonnerman, *supra* note 2, at 39; Jennifer Egan, *The BiPolar Puzzle*, N.Y. TIMES MAGAZINE, Sept. 12, 2008, at 71; Israel, *supra* note 99.
- 175 Egan, *supra* note 174, at 71.
- 176 *Id.* at 71-2; Gardiner Harris, *Radio Host Has Drug Company Ties*, N.Y. TIMES, Nov. 22, 2008, at A14, available at [http://www.nytimes.com/2008/11/22/health/22radio.html?\\_r=1&ref=health&oref=slogin](http://www.nytimes.com/2008/11/22/health/22radio.html?_r=1&ref=health&oref=slogin) (last visited September 29, 2009).
- 177 See Egan, *supra* note 174, at 71-2.
- 178 Harris, *supra* note 176.
- 179 *Id.*
- 180 See Harris, *supra* note 176 and Editorial, *Hidden Drug Payments at Harvard*, N.Y. TIMES, June 10, 2008, at A22, available at <http://www.nytimes.com/2008/06/10/opinion/10tue2.html> (last visited September 29, 2009).
- 181 See, e.g., Jennifer Gonnerman, *School of Shock sidebar: "Why Can't Massachusetts Shut Israel Down?"*, *supra* note 2, at 41 and Tom Benner, *Parents: Don't Ban Electric Shocks; Their Son, a Former Silver Lake Student, was Rotenberg Prank Victim*, PATRIOT LEDGER, Jan. 22, 2008, at 2, available at 2008 WLNR 1625555 (describing a parent's support of aversive therapy at the JRC, despite their son being a victim of a prank where he was subjected to unnecessary electric shocks).
- 182 The difficulties of raising children with disabilities recently reared its head in the controversy over amending Nebraska's "safe-haven" law. The law in question allowed parents to surrender a "child" to a safe place (most frequently a hospital) without fear of prosecution. Due to the ambiguity of the word "child," teenagers as old as seventeen were surrendered, many of them with disabilities. Mother Lavennia Coover testified before the Nebraska Legislature about how she abandoned her eleven-year old child with disabilities, insisting that she did what she thought was best for the child. Her story reveals the overwhelming difficulty faced by parents of children with disabilities. See Fred Knapp, *Neb. Lawmakers Put Age Limit On Safe Haven Law*, NATIONAL PUBLIC RADIO, Nov. 21, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=97317532> (last visited September 29, 2009).
- 183 See Stephanie Lindsey, *Autism and Education: Who Should we Focus on – my Disabled Son or my Gifted Girl?*, NEWSWEEK, Mar. 9, 2009 at 18 (discussing numerous challenges of being the parent of

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- an autistic child).
- 184 A former student of the JRC has stated that if not for her enrollment at JRC, she would have wound up in “jail, [a] state institut[ion] or dead.” See Judge Rotenberg Center, “Parent’s Journey,” *supra* note 140.
- 185 Brian A. Joyce, *A Shocking Form of Therapy*, BOSTON GLOBE, June 19, 2006, at A11, available at 2006 WLNR 10593775. It is worth noting that in April of 2008, Sen. Joyce was named the legislator of the year by The Association of Developmental Disabilities Providers for his work against aversives and the JRC. See *Group Names Joyce Legislator of the Year*, THE PATRIOT LEDGER (Quincy, MA), April 11, 2008, at 12, available at 2008 WLNR 7140224.
- 186 Karlin, *supra* note 47.
- 187 Kyle Cheney, *Barbaric or Life Saving? Impassioned, Split Testimony on Aversive Treatment*, State House News Service (Boston, MA), Jan 16, 2007, available at [http://www.statehousenews.com/cgi/as\\_web.exe?rev2008.ask+D+11931999](http://www.statehousenews.com/cgi/as_web.exe?rev2008.ask+D+11931999) (last visited September 29, 2009).
- 188 Christina A. Samuels, *D.C. Schools Trying New Approach to Spec. Ed. Cases*, EDUCATION WEEK, May 21, 2008, at 6, available at 2008 WLNR 10481039.
- 189 Cheney, *supra* note 187.
- 190 Gonnerman, *supra* note 2, available at [http://www.motherjones.com/news/feature/2007/09/school\\_of\\_shock.html](http://www.motherjones.com/news/feature/2007/09/school_of_shock.html) (comment of Jenny H., Aug. 31, 2007 6:32:30 PM).

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