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Martin Gardner

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MARTIN GARDNER*

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* Martin R. Gardner, Steinhart Foundation Professor of Law, University of Nebraska College of Law. The author expresses his appreciation to Meredith Wailes for her outstanding research assistance, to Professor Barry Feld for his helpful comments, and to the Ross McCollum Faculty Research Fund for its financial support.

INTRODUCTION

Professor Herbert Morris has famously argued that criminal offenders possess a moral right to be punished for their offenses.[1] This right is derived from a more fundamental natural right–inalienable and absolute—to be treated as a person.[2] Because persons have a right to have their choices respected, when one responsibly chooses to engage in conduct prohibited by a just system of criminal law,[3] one chooses the consequences of the violation:

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1. Herbert Morris, *Persons and Punishment in* PUNISHMENT (Joel Feinberg & Hyman Gross eds., (1975). For an example of the influence of Morris's work, *see* ANDREW VON HIRSCH, DOING JUSTICE 48-49 (1976). Professor Morris's paper is reprinted in numerous collections of essays on punishment. *See, e.g.*, PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 116 (Gertrude Ezorsky ed., 1972); SENTENCING 93 (Hyman Gross & Andrew von Hirsch eds., 1981).

2. The right is "inalienable" in the sense that the right cannot be waived or transferred to another, and "absolute" in the sense
that it always exists, even if occasions arise requiring that a person be denied the right. Morris, *supra* note 1, at 84-86.

3. Professor Morris's right to be punished is applicable only within a legal system which conditions punishment on a careful finding that a person is guilty of violating a "primary rule," which is similar to a core rule of our criminal law. To

punishment.[4] Non-punitive responses—most notably compulsory rehabilitative therapy—regard deviant conduct as merely symptomatic of an unhealthy status condition plaguing the offender rather than the product of a responsible moral agent.[5] Paternalistically imposing compulsory rehabilitative regimens on morally accountable offenders[6] disregards the offender's right to be punished.[7]

I have suggested elsewhere that the right to be punished may be constitutionally protected under the Cruel and Unusual Punishments Clause of the Eighth Amendment.[8] I have also explored the extent to which juveniles might enjoy the protections of this right, while Professor Sanford Fox has raised his influential voice in arguing for this right without explicitly grounding it in the Constitution.[9] Thus, rather than experiencing the *parens patriae*

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avoid unjust applications of punishment, accused offenders must be afforded a variety of substantive defenses permitting them to show that their offenses were involuntary or otherwise excusable. Moreover, the system must provide safeguards against double jeopardy and self-incrimination, rights to trial by jury, requirements of proof beyond a reasonable doubt as a prerequisite to conviction, and protections against punishment that is disproportionate to the seriousness of the offense or the culpability of the offender. Morris, *supra* note 1, at 75-78.

4. Professor Morris justifies the institution of punishment both as a necessary means of promoting compliance with the law and as a requirement of justice. *Id.* at 75-80. Justice demands that an offender be punished in order to restore the equilibrium lost through the offender's renunciation of the burdens of law-abiding conduct. Without punishment, the offender would gain an unfair advantage over law-abiding citizens since he would receive the benefits of life within the legal order without assuming the burdens of restraining his conduct in accordance with the rules of the legal system. *Id.*

5. *Id.* at 76-80.

6. *Id.* at 79-80.

7. For a theory similar to Morris's, *see* C.S. Lewis, *Humanitarian Theory of Punishment*, 6 RES. JUD. 224 (1953).

8. Martin R. Gardner, *The Right to be Punished—A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838 (1981). I argue also that offenders may choose not to assert their right to be punished and choose instead to accept an executive pardon if offered or therapeutic treatment in lieu of punishment should the state offer such a choice. *Id.* at 852-53.

9. Martin R. Gardner, *The Right of Juvenile Offenders to be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182 (1989). While it may be difficult to imagine how a juvenile would ever see it desirable to assert a right to be punished, one need only consider the facts of the most famous Supreme Court juvenile justice case, *In re Gault*, to see the possible value of the right's constitutional recognition. *In re Gault*, 387 U.S. 1 (1987). In *Gault*, a juvenile court judge committed fifteen-year-old Gerald Gault to the State Industrial School for the remainder of his minority, "that is until [age] 21, unless sooner discharged." *Id.* at 7.

dispensations of traditional juvenile courts,[10] the argument is that to the extent that older juveniles function as adults, they may be entitled to the right to be punished for their offenses rather than being subjected to the sometimes more onerous "rehabilitative" dispositions imposed by juvenile courts.[11]

Although some social science data supports the claim that adolescents are functionally equivalent to adults in terms of cognitive ability[12] and a few Supreme Court cases specifically identify juveniles as "persons"[13] in light of a recent series of cases

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An adult committing the same offense as Gerald—making an obscene phone call—could have been punished by no more than a five to fifty dollar fine or a jail sentence up to two months. *Id.* at 8. Gerald may well have preferred to be punished for a maximum of two months in jail rather than be subjected to up to six years incarceration in a secure state facility.

In addition to substantive issues, recognition of a right to be punished would also afford juveniles procedural advantages not otherwise available within the juvenile justice system. For example, due process procedural protections in "reverse certification" proceedings from criminal court to juvenile court would be required, allowing the juvenile the opportunity to assert his right to be punished in criminal court rather than rehabilitated in the juvenile system. *See* Gardner *supra* note 9, at 212-13. *See infra* notes 278-82 and accompanying text for a discussion of reverse certification. For Fox's argument that "children have a right to be punished for what they have done, not to be treated for what someone else thinks they are," see Sanford J. Fox, *The Reform of Juvenile Justice: The Child's Right to Punishment*, JUV. JUST., Aug. 1974, at 2, 6.

10. *See infra* notes 54-79.

11. *See infra* notes 9, 13 and accompanying text.

12. Empirical studies indicate that nothing distinguishes adolescent decision-making competency from adults. A commentator summarized the existing social science literature as follows: "[The] findings, suggest that adolescents, aged 14 and older, possess the cognitive capability to reason, understand, appreciate, and articulate decisions comparable to young adults. . . . [T]here is a paucity of scientific or social science study that supports the present legal view of adolescent incapacity" suggesting "a promising legacy for the recognition of adolescent autonomous rights." Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1286 (2000).

Such findings lead some to conclude that the law should treat adolescents as autonomous persons: "[A]dolescents' personhood should be recognized by policymakers. Insofar as denial of autonomy has been based on assumptions of incompetence, current psychological research does not support such an age-graded distinction." Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOLOGIST 99, 102 (1983).

13. *See, e.g.*, Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 511 (1969) (holding that school students are "persons" under the Constitution and thus enjoy First Amendment rights at school, specifically the right to wear black armbands to protest the Vietnam War); Planned Parenthood v. Danforth, 428 U.S. 52, 72-74 (1976)

disallowing capital punishment and life sentences without parole, (LWOP), as cruel and unusual under the Eighth Amendment[14] when applied to juveniles, the Court has now recognized that rather than enjoying a right to be punished, young people, specifically adolescents, instead uniquely possess the quite different—indeed in many ways antithetical—constitutional "right to a meaningful opportunity to be rehabilitated."[15] This right is based on the Court's

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("[M]inors as well as adults . . . possess constitutional rights" to abort pregnancies and such "rights do not mature and come into being magically only when one attains the state-defined age of majority.").

14. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. *See infra* Part III for discussion of the Court's cases.

15. *See infra* notes 156-60 and accompanying text. A variety of lower courts have previously recognized a statutory right to rehabilitation or "treatment" of juvenile offenders confined in state institutions. *See, e.g.*, State v. S.H., 877 P.2d. 205, 216 (Wash. Ct. App. 1994) (juvenile statute creates a "statutory duty to provide treatment"); J.D.W. v. Harris, 319 S.E.2d 815, 822 n.10 (W. Va. 1984) (providing for a "statutory right to rehabilitation and treatment"); State v. Trent, 289 S.E.2d 166, 175 (W. Va. 1982) (state statutes authorizing institutionalization of juveniles are aimed at rehabilitation, therefore juveniles "must be given treatment").

Moreover, some lower courts have also recognized federal constitutional rights to rehabilitation for confined juvenile offenders. *See, e.g.*, Alexander v. Boyd, 876 F. Supp. 773, 797 n.43 (D.S.C. 1995) (juveniles "are entitled . . . to rehabilitative treatment" under Fourteenth Amendment Due Process); Gary W. v. Louisiana, 437 F. Supp. 1209, 1219 (E.D. La. 1976) ("[t]he constitutional right [of delinquents] to treatment is a right to a program of treatment that affords the individual a reasonable chance to acquire . . . skills" necessary to cope with the demands of life); Nelson v. Heyne, 355 F. Supp. 451, 459 (N.D. Ind. 1972), aff'd 491 F.2d 352 (7th Cir. 1974) ("juvenile offenders are [constitutionally] entitled to rehabilitative efforts"). On the other hand, some courts have held that reasons other than rehabilitation—protection of society and protection of the juvenile from a dangerous or unhealthy environment—suffice to justify institutional confinement. *See, e.g.*, Santana v. Collazo, 714 F.2d 1172, 1176 (1st Cir. 1983). In the eyes of these courts, juveniles do not enjoy a constitutional right to rehabilitation.

Prior to the cases discussed *infra* at Part III, the Supreme Court had not spoken to whether or not offenders enjoy a constitutional right to rehabilitation. A leading commentator summarized the situation as follows: "For the time being, it would be sheer speculation to predict what the Supreme Court's response might be to a right to treatment claim by juveniles." SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM 526 (2d ed. 2014) [hereinafter RIGHTS OF JUVENILES].

However, the Supreme Court has held that adults possess neither a right to rehabilitation nor parole release. *See* Swarthout v. Cooke, 131 S. Ct. 859, 862 (2011) (per curiam) ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners.") (citation omitted). Thus, determinate sentences

identification of adolescents as, among other things, singularly amenable to rehabilitation, thus designating them a categorically distinct class from adults. Specifically, as I will show, the Court's decisions logically extend beyond LWOP sentences and strongly suggest that it is now unconstitutional to punish adolescent offenders with *any* sentence of imprisonment without providing for their possible rehabilitation.[16]

The implications of this new constitutional right to rehabilitation for adolescents are far reaching, affecting both the juvenile and criminal justice systems. Indeed, one commentator has observed that the Court's Eighth Amendment cases raise "questions about the constitutionality of any sentencing scheme that fails to take account of the . . . differences between children and adults,"[17] especially the unique potential of youthful offenders to reform. This Article explores those questions. I will demonstrate that the emphasis on rehabilitation does not necessarily spell the demise of all punishment of youthful offenders, whether in the criminal or juvenile system. I thus reject the view of some that the Court's recognition of the fundamental differences between adolescents and adults logically leads to the conclusion that juveniles may never be tried in adult criminal court.[18]

To understand the potential scope of the Court's implicit conclusion that the punishment of adolescents is unconstitutional unless a meaningful opportunity for rehabilitation is afforded, it is necessary to carefully distinguish and clarify the distinction between the conflicting concepts of punishment and rehabilitation. I therefore begin Part I by analyzing this distinction. Since the logic of the Court's decisions impacts the punishment of adolescents in both the juvenile and criminal justice contexts, I contrast the two systems in Part II by tracing the development of the juvenile court movement

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with no opportunities for rehabilitation are perfectly legal for adults.

16. *See infra* notes 230-66 and accompanying text.

17. Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescent*, 15 U. PA. J.L. & SOC. CHANGE 283, 321 (2012). In discussing the *Roper* case, an early decision in the line of cases that will be considered later in this article, one commentator presciently observed: "*Roper* may open the door for [various] sentences imposed on juvenile offenders to be deemed unconstitutional. [T]he United States may begin to see a shift in the philosophy and focus of the juvenile justice system back to one of rehabilitation, rather than punishment." Julie Rowe, *Mourning the Untimely Death of the Juvenile Death Penalty: An Examination of Roper v. Simmons and the Future of the Juvenile Justice System*, 42 CAL. W. L. REV. 287, 289 (2006). For discussion of *Roper*, *see infra* notes 127-37 and accompanying text.

18. *See infra* note 226.

from its original rehabilitative origins towards an increasingly punitive model, dispensing dispositions traditionally found only in the criminal system. In Part III, I discuss the Court's Eighth Amendment cases from which the right to an opportunity for rehabilitation emerges, examining in Part IV this right's implications for juveniles within the criminal justice system, showing specifically that juvenile offenders are now entitled to: (1) systematically less punishment than that imposed on adults committing the same offenses; (2) a robust individualized pre-sentencing hearing, taking into account, among other things, the offender's amenability to rehabilitation; (3) a disposition in the juvenile system if, at the pre-sentencing hearing, the offender is deemed to be amenable to rehabilitation and the juvenile system affords the best opportunity for its realization; and (4) a sentence offering a realistic possibility for rehabilitation and parole if the offender is deemed not amenable to rehabilitation at the pre-sentencing hearing.

In Part V, I explore the ramifications of the right to a meaningful opportunity for rehabilitation for the juvenile system, concluding: (1) that rehabilitative juvenile justice systems are now constitutionally mandated; (2) that for all juveniles charged with criminal offenses, jurisdiction must now originate in juvenile court with transfer to criminal court permitted only if a juvenile court judge finds that an accused is not amenable to rehabilitation within the juvenile system; and (3) for punishment within the juvenile system, the same judicial hearing and parole release requirements applicable to criminal court punishment are now equally required. Finally, in Part VI, I show that these manifestations of the right to a meaningful opportunity for rehabilitation are not waiveable by juvenile offenders and that implementation of this right would require considerable reform of current practices in both the criminal and juvenile systems.

I. PUNITIVE VS. REHABILITATIVE DISPOSITIONS: THE CONCEPTUAL DISTINCTION

Before examining the Supreme Court's Eighth Amendment case law concerning adolescent offenders, it is helpful to understand the role played by the rehabilitative ideal in the traditional juvenile court movement. While the effort to rehabilitate through state intervention was the *raison d'etre* for the advent of juvenile courts, adolescent offenders were always subject to possible punishment through waivers of jurisdiction from juvenile to criminal courts.[19]

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19. *See infra* notes 68-69 and accompanying text.

Moreover, punishment is now an increasingly common occurrence within the juvenile system itself.[20]

A separate system of juvenile courts originated in large part to provide a "civil" rehabilitative, non-punitive alternative to deal with young people who violate criminal law.[21] The legislative choice of a system that rehabilitates rather than punishes was not simply an important policy decision, but also one of constitutional import. Impositions of "punishment" trigger legal consequences peculiar to that sanction.[22] Of particular importance for purposes of this Article, punitive sanctions alone are candidates for prohibition as cruel and unusual under the Eighth Amendment, while non-punitive dispositions, rehabilitative ones for example, are outside the Amendment's scope.[23] Thus, to understand the respective roles of rehabilitation and punishment within the juvenile justice system, as well as to comprehend the Court's recent recognition of the right to an opportunity for rehabilitation flowing from the Cruel and Unusual Punishments Clause—a right entailing both the concepts of rehabilitation and punishment—it is necessary to be clear about how coercive rehabilitation and punishment differ. As grounded in the Eighth Amendment, the rehabilitation right is triggered only if a punitive disposition is at stake.[24]

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20. *See infra* notes 80-93 and accompanying text; *see generally*, Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-*McKeiver *World*, 91 NEB. L. REV. 1 (2012) [hereinafter Gardner, *Punitive Juvenile Justice*].

21. *See infra* notes 54-79 and accompanying text.

22. For a discussion of various constitutional protections applicable only when punishment is employed, Gardner, *Punitive Juvenile Justice, supra* note 20, at 11-12, 21-22 (2012). *See also infra* notes 71-77 and accompanying text. For a discussion of the presence of punishment as a necessity for relief under the Cruel and Unusual Punishments Clause of the Eighth Amendment, *see infra* notes 23, 70-77 and accompanying text.

23. "[A]n imposition must be 'punishment' for the Cruel and Unusual Punishments Clause to apply." Ingraham v. Wright, 430 U.S. 651, 670 n.39 (1977). The Court did allow, however, that "some punishments though, not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments . . . to justify application of the Eighth Amendment," noting that "[w]e have no occasion in this case, for example, to consider . . . under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment." *Id.* at 669 n.37.

24. *See infra* notes 310-26 and accompanying text for a discussion of the necessity of distinguishing punishment and rehabilitation in understanding the constitutional impact of the rehabilitation right on presentencing practices in juvenile courts. I have elsewhere drawn the conceptual distinction developed in the text immediately *infra*. *See* Gardner, *Punitive Juvenile Justice, supra* note 20, at 13-

A. Punishment

Notwithstanding the unique legal significance of governmental imposition of punishment, the Supreme Court has never provided a precise definition of that sanction.[25] However, from the Court's cases, it is possible to make the following general observations: a sanction is punitive if a legislature so labels it,[26] and the Court will otherwise defer to the legislature if it labels a sanction non-punitive or "civil," unless a party challenging the sanction shows by the "clearest proof" that it is "so punitive either in purpose or effect as to negate [the State's] intention to deem it civil."[27] Moreover, in addressing the question of punitive purpose or effect, the Court routinely alludes to the "useful guideposts"[28] established in *Kennedy v. Mendoza-Martinez*,[29] which outlines "the tests traditionally applied to determine whether [a sanction] is penal . . . in character."[30] These tests include the following:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be

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22; Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 798-800 (1982) [hereinafter Gardner, *Punishment and Juvenile Justice*].

25. The Court first attempted to define punishment in mid-nineteenth century cases arising under the Bill of Attainder and Ex Post Facto Clauses. *See* Cummings v. Missouri, 71 U.S. 277, 286-322 (1866) (finding that a teacher-priest was unconstitutionally punished by imposition of a $500 fine for continuing to teach without taking a required oath of allegiance to the Union under a state constitutional provision enacted after the teacher had begun teaching).

26. Smith v. Doe, 538 U.S. 84, 92 (2003). The Court has characterized the framework described immediately hereafter in the text as the "well established" basis for determining the presence of punishment. For examples of cases following the framework, see Gardner, *Punitive Juvenile Justice*, *supra* note 20, at 13 n.48.

27. *Smith*, 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)) (internal quotation marks omitted).

28. *Id.* at 97 (quoting Hudson v. United States, 522 U.S. 95, 99 (1997)).

29. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (holding that forfeiture of citizenship rights for fleeing the United States to avoid the draft constituted "punishment," thus triggering the protections of the Fifth, Sixth, and Eighth Amendments).

30. *Mendoza-Martinez*, 372 U.S. at 168.

> connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[31]

These factors establish that punishment entails intentionally inflicting unpleasantness ("an affirmative disability or restraint") upon one engaging in undesirable "behavior" for purposes of exacting "retribution" and achieving "deterrence." So understood, punishment imposes unpleasantness upon a person as a response to his or her commission of a wrongful act.[32] Furthermore, the Court's attention to "scienter" in *Mendoza-Martinez* suggests that punishment is characteristically imposed on offenders believed blameworthy.[33] Thus, the state punishes when it purposely visits unpleasant consequences upon blameworthy offenders who have violated legal rules.

Although the Court has not emphasized the matter, philosophical literature defining punishment has articulated an additional central conceptual factor. Because punishment is a response to past action, it is "determinate" in the sense that its intensity and duration are set by the seriousness of the action to which it responds.[34] As one commentator notes, "we would be

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31. *Id.* at 168-69. For discussion of the problematic nature of the Court's reference to whether a sanction "appears excessive in relation to the alternative [non-punitive] purpose[s] assigned," see Gardner, *Punitive Juvenile Justice*, *supra* note 20, at 14 n.53.

32. This view of the Court's conception closely tracks H.L.A. Hart's famous characterization of the "standard case" of legal punishment:

> (i) [Punishment] must involve pain or other consequences normally considered unpleasant.
> (ii) It must be for an offence against legal rules.
> (iii) It must be of an actual or supposed offender for his offence.
> (iv) It must be intentionally administered by human beings other than the offender.
> (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 4-5 (1969).

33. Richard Wasserstrom also emphasizes blameworthiness as a fundamental precondition for punishment. Belief that the offender's action was "blameworthy" is a necessary factor in his definition of punishment. Richard Wasserstrom, *Some Problems with Theories of Punishment*, *in* JUSTICE AND PUNISHMENT 173, 179 (J.B. Cederblom & William L. Blizek eds., 1977). *See infra* note 36.

34. Punitive sentences are thus in a sense "fixed" and determined through attempts to proportion punishment to the seriousness of the relevant offense. *See, e.g.*, Anthony A. Cuomo, *Mens Rea and Status Criminality*, 40 S. CALIF. L. REV. 463,

punishing someone" if, in addition to imposing unpleasantness upon an offender by virtue of the fact that he or she culpably acted, "we determined—within at least some limits—at the time of our decision to punish what the nature and magnitude of the [inflicted] unpleasantness would be."[35]

To summarize, the Court's cases and the relevant philosophical literature reveal the following framework for determining whether a given sanction is punitive:

> (1) If the sanction is labeled punitive by the legislature, it is conclusively presumed to be so.
>
> (2) If the legislative label or intent indicates that the sanction is "civil," it will be presumed to be so unless it is shown "by the clearest proof" to be punitive under the following conception of punishment:
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> (a) The sanction involves an unpleasant restraint purposely imposed by the state;
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> (b) The sanction is imposed upon a person because of an offense;
>
> (c) The sanction is imposed to achieve the purposes of punishment—retribution and deterrence;
>
> (d) The extent of the unpleasant restraint is known, within possible limits, at the time of its imposition; and
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> (e) The sanction is generally imposed upon offenders deemed to be blameworthy.[36]

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507 (1967). Justice Scalia has identified judicial imposition of fixed periods of incarceration on uncooperative litigants as the basis for distinguishing "criminal" contempt from "civil" contempt, which is characterized by indeterminate confinement until a litigant complies with a specific order of the court. *See* Int'l Union, United Mine Workers of Am. v. Bagwell, 521 U.S. 821, 840 (1994) (Scalia, J., concurring).

35. Wasserstom, *supra* note 33, at 179; *see also* Morris, *supra* note 1, at 78 (noting that "with punishment there is an attempt at some equivalence between the advantage gained by the wrongdoer—partly based upon the seriousness of the interest invaded, partly on the state of mind with which the wrongful act was performed—and the punishment meted out").

36. Some argue that the power of punishment to express social disapprobation toward morally blameworthy offenders is the central characteristic that distinguishes punishment from non-punitive sanctions. *See, e.g.*, Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."); *see also* Joel Feinberg, *The Expressive Function of Punishment*, *in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 98 (1970) (arguing that judgments of disapproval and reprobation are part of the definition of

As noted above, the distinction between punitive and rehabilitative dispositions[37] is central to understanding the legal consequences of the Supreme Court's constitutional recognition of a rehabilitation right. After clarifying the concept of punishment, attention will be turned to distinguishing it from rehabilitation.

B. Rehabilitation

Because coercive rehabilitation often entails significant deprivations of liberty,[38] it is sometimes mistakenly considered to be punishment.[39] However, therapeutic or rehabilitative dispositions are premised on principles directly opposite those defining punishment. Where punishment entails the purposeful infliction of suffering upon its recipient, rehabilitation involves a beneficent response[40] aimed at overcoming unwelcome aspects of its recipient's life.

Moreover, while punishment is linked to proscribed actions, rehabilitation is directed at alleviating a present unwelcome

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legal punishment). For discussion of the view that punishment does not, by definition, entail blameworthiness, see Martin R. Gardner, *Rethinking* Robinson v. California *in the Wake of* Jones v. Los Angeles: *Avoiding the "Demise of the Criminal Law by Attending to Punishment,"* 98 J. CRIM. L. & CRIMINOLOGY 429, 464-65 (2008) [hereinafter Gardner, *Rethinking*].

37. Theorists have noted the significance—for both philosophical as well as legal purposes—of distinguishing rehabilitation, often characterized as "treatment" or "therapy," from punishment. *See, e.g.*, TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 1 (1969); Morris, *supra* note 1; HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 25-28 (1968); Wasserstrom, *supra* note 33, at 179,180.

38. In juvenile justice, custodial confinement in "training schools" or "industrial schools" for purposes of rehabilitation has been a dispositional alternative from the beginning of the juvenile court movement. *See* MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 303-04 (4th ed. 2014).

39. Some commentators have defined sanctions as punitive if the sanction is experienced as unpleasant by its recipients. Thus, if the "impact" of a sanction is to visit upon its recipient unpleasant restrictions similar to those experienced by persons who are punished—similar, for example, to deprivations existing in prisons—then the sanction is considered "punishment" regardless of the state's purpose in administering it. For a discussion of the impact theory and its inadequacies as a definition of punishment, see Gardner, *Punitive Juvenile Justice supra* note 20, at 17 n.61.

40. *See* PACKER, *supra* note 37, at 25 ("[T]he justification for [rehabilitation] rests on the view that the person subjected to it is or probably will be "better off" as a consequence."); Wasserstrom, *supra* note 33, at 179 ("[W]e would be treating someone if . . . [w]e acted in [a] way . . . [which] would alter [the recipient's] condition in a manner beneficial to him or her.").

status.[41] Wrongful conduct may be symptomatic of such status, but it is not a necessary predicate for rehabilitation.[42] As punishment responds to the commission of offenses, rehabilitation responds to the needs of the person, whether or not he or she has committed offenses. Finally, unlike punitive sentences which are determinate in nature,[43] rehabilitative dispositions are indeterminate upon imposition given the impossibility of knowing the time needed to rehabilitate a given offender.[44]

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41. *See* PACKER, *supra* note 37, at 25-26; Wasserstrom, *supra* note 33, at 179.

42. Offending conduct is the *sine qua non* of punishment but is not necessarily relevant to dispensations of treatment. PACKER, *supra* note 37, at 26. Packer explains:

> [I]n the case of Punishment we are dealing with a person because he has engaged in offending conduct; our concern is either to prevent the recurrence of such conduct, or to inflict what is thought to be deserved pain, or to do both. In the case of Treatment, there is no necessary relation between conduct and Treatment; we deal with the person as we do because we think he will be "better off" as a consequence.

Id.

43. *See supra* notes 34-35.

44. "[T]reatment [for rehabilitation is] always subject to revision upon a showing either: a. That an alternative response would be more beneficial to him or her, or b. That his or her condition has altered so as to no longer require that, or any other, further response." Wasserstrom, *supra* note 33, at 179. "The *idea* of treatment necessarily entails individual differentiation, indeterminacy, a rejection of proportionality, and a disregard of normative valuations of the seriousness of behavior." Barry Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 91 (1997) [hereinafter Feld, *Abolish the Juvenile Court*]. In distinguishing offense-oriented sentences (punitive) and offender-oriented ones (rehabilitative), Professor Feld observes:

> When based on the characteristics of the offense, the sentence usually is determinate and proportional, with a goal of retribution or deterrence. When based on the characteristics of the offender, however, the sentence is typically indeterminate, with a goal of rehabilitation or incapacitation. The theory that correctional administrators will release an offender only when he is determined to be "rehabilitated" underlies indeterminate sentencing. When sentences are individualized, the offense is relevant only for diagnosis. Thus, it is useful to contrast offender-oriented dispositions, which are indeterminate and non-proportional, with offense-based dispositions, which are determinate, proportional, and directly related to the past offense.

C. Punishment v. Rehabilitation: Mutually Exclusive Dispositions?

In light of the above discussion, it is not surprising that many consider punishment and coercive rehabilitation as mutually exclusive sanctions.[45] However, some disagree and consider

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Barry Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment and the Different it Makes*, 68 B.U. L. REV. 821, 847 (emphasis added) (footnotes omitted) [hereinafter Feld, *The Juvenile Court Meets . . . Punishment*].

45. Professor Feld sees an "innate contradiction" in attempting to combine a "penal social control" function with a rehabilitative "social welfare" function. Feld, *Abolish the Juvenile Court*, *supra* note 44, at 93.

> Conceptually, punishment and treatment are mutually exclusive penal goals. Both make markedly different assumptions about the sources of criminal or delinquent behavior. Punishment assumes that responsible, free-will moral actors make blameworthy choices and deserve to suffer the prescribed consequences for their acts. Punishment imposes unpleasant consequences because of an offender's *past offenses*. By contrast, most forms of rehabilitative treatment . . . assume some degree of determinism. . . . [T]reatment assumes that certain antecedent factors cause the individual's undesirable conditions or behavior. Treatment and therapy, therefore, seek to alleviate undesirable conditions in order to improve the offender's *future welfare*.

Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 44, at 833 (footnotes omitted).

Professor Federle observes that "the juvenile court fluctuates between punishment and rehabilitation without attempting to reconcile these opposing justifications" which are "two [irreconcilable] polar impulses." Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 38 (1990). H.L.A. Hart observes that "[t]he ideals of Reform . . . (corrective training) . . . plainly run counter to . . . [punitive] principles of Justice or proportion." Hart, *supra* note 32, at 25. Professor Herbert Morris, as noted above, argues for a basic human right to be punished for one's criminal offenses in stark contrast to being subjected to coercive rehabilitation which disrespects human dignity. *See generally* Morris, *supra* note 1. Herbert Packer adds that punishment and rehabilitation are "always distinguish[ed] . . . [by] the nature of the relationship between the offending conduct and what we do to the person who has engaged in it." PACKER, *supra* note 37, at 26. He explains:

> If we send [a troubled youth] to a school pursuant to a judgment that he has engaged in offending conduct, we are subjecting him to Punishment; if we think that he will be better off in jail than on the streets and proceed to lock him up without a determination that he has engaged in offending conduct, we are subjecting him to Treatment.

Id.

punishment and rehabilitation compatible.[46] Both camps are correct, depending on the context in which they make their claims.

Those seeing compatibility correctly point out that punishment sometimes makes its recipient "better off."[47] Adult inmates have long been sent to penal institutions as punishment for committing criminal offenses, but with hopes that they will also be rehabilitated.[48] While in practice these goals may well be fundamentally at odds,[49] there are situations where individuals emerge from prison "rehabilitated," at least in part as a consequence of events or rehabilitation programs occurring within the prison.[50]

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46. *See In re* Buehrer, 236 A.2d 592, 596-97 (N.J. 1967) (viewing probation as both punitive and rehabilitative).

47. *See* PACKER, *supra* note 37, at 26-27; *infra* note 51 and accompanying text.

48. *See infra* notes 78-79 and accompanying text. For example, the punishments defined by the Model Penal Code are administered within a "general framework of a preventative scheme" with "rehabilitation" as a "subsidiary" goal. MODEL PENAL CODE § 1.02 explanatory note (Official Draft 1985).

Some claim that the introduction of the rehabilitative ideal into adult criminal law theory meant that punishment, with its concerns for retribution and deterrence, had been totally abandoned in favor of a systematically rehabilitative and preventative model. *See* Jerome Hall, *Justice in the 20th Century*, 59 CALIF. L. REV. 752, 753 (1971) (describing the widespread disillusionment with punishment in the twentieth century with attendant disparagement of theories of deterrence and retribution and the emergence of rehabilitation as "the single rational goal" of legal policy).

However, the emergence of the rehabilitative ideal never meant the total demise of punishment. Vestiges of retributivism remained in legislation embodying the rehabilitative model. Sentences were based on legislative proscriptions of maximum penalties based on offenses and considerations of relative blameworthiness. *See* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 38 (1974). The commission of a criminal act as a necessary predicate for a sentence thus belied any systematic rehabilitative model in favor of a "backward-looking," desert-oriented system of justice.

49. In a famous statement expressing skepticism regarding the effectiveness of rehabilitation within penal confinement, Judge Marvin Frankel said "no one should ever be sent to prison *for rehabilitation*." United States v. Bergman, 416 F. Supp. 496, 499 (S.D.N.Y. 1976) (emphasis added). By the 1970s disillusionment with the rehabilitative ideal had become widespread. *See* Martin R. Gardner, *The Renaissance of Retribution: An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 782-83 [hereinafter Gardner, *The Renaissance of Retribution*].

50. *See* Christoper Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 132 (2005) (arguing that "properly conducted" programs of "risk management" may effectuate offenders' ability to change their antisocial behavior). *But see* Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, Spring 1974 PUB. INTEREST 22, 25 (arguing only in a "few and isolated" situations do rehabilitative efforts in correctional institutions actually reduce

In the juvenile justice context, one commentator made the following observation: "[P]unishment and rehabilitation are theoretically compatible. In recent years, researchers have begun to suggest that some degree of punishment, especially for serious offenders, is appropriate and compatible with the juvenile system's child-centered philosophy. . . . [s]ome types of 'punishment' can serve to rehabilitate a young offender."[51]

On the other hand, while rehabilitation may occur within a punitive regime,[52] the concepts of punishment and rehabilitation are mutually exclusive for purposes of assessing Eighth Amendment applicability.[53] If a given disposition is solely rehabilitative or otherwise non-punitive, it is not subject to scrutiny under the Cruel and Unusual Punishments Clause of the Eighth Amendment.

Having clarified the respective meanings of punishment and rehabilitation, consideration can now be directed to the role each plays in the context of criminal acts committed by juveniles. As the following discussion illustrates, both rehabilitation and punishment are often aspects of juvenile offender dispositions imposed in either juvenile or criminal courts.

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recidivism).

51. Julianne P. Sheffer, Note, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 506-08 (1995) (arguing that scaled-down punishment in the juvenile system followed by intensive follow up and counseling achieves effective rehabilitation).

52. Similarly, punishment may occur within rehabilitative dispositions. *See, e.g.*, Knecht v. Gillman, 488 F.2d 1136, 1139-40 (8th Cir. 1973) (holding that administering to hospitalized mental patient a drug, which induces vomiting as "aversive stimuli," for allegedly violating behavior rule of the institution, constitutes cruel and unusual punishment unless the inmate consents to the use of the drug). However, the Supreme Court has arguably ruled that Eighth Amendment remedies are unavailable to involuntarily committed mental patients even if hospital officials are deliberately indifferent to their medical and psychological needs. *See* Youngberg v. Romeo, 457 U.S. 307, 312, 325 (1982) (holding that the lower court erred in instructing the jury on the Eighth Amendment deliberate indifference standard in the case of a patient's allegations of unsafe conditions in the hospital where he was confined). The Court noted with approval the position of the Third Circuit Court of Appeals that the "Eighth Amendment, prohibiting cruel and unusual punishment of those convicted of crimes, was not an appropriate source for determining the rights of the involuntarily committed." *Id.* at 312.

53. *See supra* notes 22-23 and accompanying text.

II. THE JUVENILE JUSTICE MOVEMENT: FROM REHABILITATIVE TO PUNITIVE DISPOSITIONS

A. The Rehabilitative Ideal and Original Juvenile Justice

The first juvenile court system was implemented in 1899.[54] Prior to that time, young people committing criminal offenses were subjected to the same criminal court system and array of punishments as adult offenders.[55] Even so, children had long been recognized as different from adults, as exemplified by the common law infancy defense reflecting the view that children lack the mature ability to appreciate the wrongfulness of their actions and are thus less culpable and deterrable than their adult counterparts.[56] This defense specified that children under the age of seven conclusively lacked criminal responsibility thus exempting them from criminal court jurisdiction; children between ages seven and fourteen were subject to a rebuttable presumption of non-responsibility;[57] and adolescents, those over the age of fourteen, were treated as adults.[58]

With the arrival of the twentieth century, progressive reformers acted on these perceived differences between young people and adults and established separate court systems for juveniles aimed at rehabilitating those committing criminal offenses while attending to the needs of other troubled youths not charged with violating criminal statutes.[59] After its initial enactment in Illinois,[60] the movement quickly spread nationwide and throughout Europe.[61] Underlying the movement was the belief that because of their developing maturation, young people are by their nature uniquely

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54. SAMUEL M. DAVIS, CHILDREN'S RIGHTS UNDER THE LAW 253-54 (2011) [hereinafter DAVIS, CHILDREN'S RIGHTS].

55. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509 (1984).

56. *Id.* at 509-10.

57. The presumption could be overcome by the prosecutor showing that the young defendant in fact appreciated the wrongfulness of his or her actions. *Id.* at 510-11.

58. *Id.* Adolescence is often defined as the period beginning at age 14 and extending to adulthood. *See, e.g.*, Hartman, *supra* note 12.

59. Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 44, at 824; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141 (1997).

60. DAVIS, *supra* note 15, at 1.

61. *See* Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 451 (1985).

amenable to rehabilitation[62] while also being unfit subjects for punishment because their immaturity renders them neither culpable[63] nor deterrable.[64] As a manifestation of *parens patriae* power,[65] the juvenile court movement constituted an attempt to meet the needs of youthful violators of criminal statutes—generally referred to as "delinquents"—rather than to punish them for their offenses.[66] "Dispositions" were "indeterminate,"[67] possibly extending throughout the period of minority, and were aimed at promoting the

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62. Scott & Grisso, *supra* note 59, at 142. Young people were not the sole subjects of the "rehabilitative ideal." Reformers had come to believe that all criminal conduct was determined by underlying conditions affecting the offenders rather than as the product of their free choices. *Id.* at 141. Thus, treatment, rather than punishment, was the preferred disposition for adult offenders, although perhaps not as successfully employed as in the case of their more malleable juvenile counterparts. *See supra* note 36 and accompanying text.

63. *See* Sanford J. Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 661-64 (1970).

64. Scott & Grisso, *supra* note 59, at 143. The juvenile court movement thus extended the underlying predicates of the infancy defense not just to children under the age of fourteen, but to all young people under the age of majority.

65. The original English concept of *parens patriae*, applied historically by chancery courts, allowed courts to exercise the Crown's paternal prerogative to declare a child a ward of the Crown when the parents had failed to maintain the child's welfare. *See generally* Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205 (1971).

66. "Delinquents" are juveniles who commit offenses that would be crimes if committed by an adult. MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 175 (4th ed. 2014). The fundamental concern of juvenile courts towards child offenders was with "what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909). In adopting reformation as its goal, the juvenile court movement eschewed retributivist notions of guilt and blameworthiness. Francis Barry McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REFORM 181, 207 (1977).

67. A "disposition" is a euphemism for a criminal court "sentence." The juvenile court movement adopted a set of euphemisms to replace the stigmatic terminology of criminal law. GARDNER, *supra* note 38, at 167. "Indeterminate" dispositions are those with no set limit, which could continue until adulthood. Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?* 34 N. KY. L. REV. 189, 196 n.37 (2007) [hereinafter Feld, *A Century of Juvenile Justice*]. The rehabilitative objectives of the juvenile system were characterized by a system of indeterminate sentencing in which the type and duration of sanctions were dictated by the "best interests" of the offender rather than the seriousness of the offences. Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?* 52 N.Y.U. L. REV. 1120, 1121 (1977).

best interests of the offender, rather than "determinate" in proportion to the minor's offenses.

While enacted to function as rehabilitative alternatives to the criminal system, juvenile courts from early on provided mechanisms to transfer ("waive") juvenile court jurisdiction to criminal court in certain cases.[68] Once transferred to criminal court, juveniles enjoyed the full array of procedural protections of the criminal process while being subject to all the punishments imposed upon convicted adults.[69]

In opting for a "civil" rehabilitative alternative to the punitive system, reformers moved in a new policy direction[70] with constitutional implications. As mentioned above, impositions of punishment generate constitutional consequences, triggering rights—"some substantive[,][71] others procedural[—]under various Bill of Rights provisions applicable to 'criminal' cases[72] and 'prosecutions.'"[73] Such rights do not necessarily apply to proceedings

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68. "In 1903 . . . the Chicago juvenile court transferred fourteen children to the adult criminal system." Stephen Wizner, *Discretionary Waiver of Juvenile Court Jurisdiction: An Invitation to Procedural Arbitrariness*, 3 CRIM. JUST. ETHICS 41, 42 (1984). Such a trend continued into the 1970s, when every American jurisdiction had laws authorizing or requiring criminal prosecution of certain minors in adult courts. *Id.*; *see also* Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 516 n.5 (1978) (discussing the varied terminology used to describe the juvenile waiver procedure). Waiver is generally reserved for those youths whose "highly visible, serious, or repetitive criminality raises legitimate concern for public safety or community outrage." Barry C. Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 MINN. L. REV. 167, 171 (1980). However, many youths committing minor offenses are also dealt with in criminal court, perhaps because of the unavailability of fines as a juvenile court sanction. Stephen Wizner, *Discretionary Waiver of Juvenile Court Jurisdiction: An Invitation to Procedural Arbitrariness*, 3 CRIM. JUST. ETHICS 41, 44-45 (1984).

69. DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 214. As noted above, the Supreme Court has, however, recently found that certain punishments constitute cruel and unusual punishment under the Eighth Amendment when applied to offenders who commit their crimes while under eighteen years of age. *See infra* Part III.

70. At the same time the rehabilitative ideal was being embodied in the new juvenile movement, similar policies were enacted in the criminal law as indeterminate sentencing emerged in the attempt to rehabilitate adult offenders within prisons, if possible, and restrain them therein if deemed dangerous and unrehabilitated. ANDREW VON HIRSCH, *supra* note 1, at 9-10.

71. *See* Gardner, *Punitive Juvenile Justice*, *supra* note 20, at 11 n.37 for a discussion of constitutional rights depending on the presence of punishment.

72. *Id.*

73. *Id.*

dispensing such non-punitive sanctions as coerced rehabilitation.[74] Moreover, distinguishing punishment from rehabilitation is constitutionally necessary in light of the Supreme Court's proclamation in *Robinson v. California*[75] that a person may never be "punished" under the Eighth Amendment for undesirable status conditions, but may be subjected to compulsory rehabilitation or medical "treatment."[76] Thus, if a juvenile justice system were in fact "punitive," even though nominally "rehabilitative," it would become a "criminal" legal system subject to those requirements unique to state impositions of punishment.[77]

At the same time the rehabilitative ideal was finding its place in the juvenile court movement, a similar policy was emerging in the criminal law as indeterminate sentencing and parole release were embraced as aspects of the attempt to rehabilitate adult offenders within prisons, and to restrain therein dangerous, unrehabilitated offenders.[78] Today, many jurisdictions continue indeterminate sentencing with inmates being released from confinement when parole boards find them rehabilitated.[79]

B. The Modern Juvenile Court and the Emergence of the Punitive Sanction

While for most of the twentieth century the rehabilitative ideal influenced criminal law sentencing, in the 1970s various theorists and legislatures de-emphasized rehabilitation as a penal goal and

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74. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 428 (1979) (holding civil commitment proceedings are not "punitive" in purpose, and hence are not "criminal cases" uniquely requiring "proof beyond a reasonable doubt"—proof by "clear and convincing evidence" is sufficient in civil commitment matters). For a comprehensive discussion of the variety of legal consequences of the punitive/nonpunitive distinction, see *generally* J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

75. Robinson v. California, 370 U.S. 660, 666-68 (1962).

76. *Id.* (holding that a state may require drug addict to undergo compulsory treatment, but may not punish him for the status of drug addiction). *See In re* De La O, 378 P.2d 793 (Cal. 1963) (holding that a confinement of petitioner for six months to five years for a drug addiction constituted permissible "treatment and rehabilitation" rather than impermissible "punishment" under *Robinson*).

77. "Criminal" law is distinguished from "civil" law by the former's imposition of punishment. Professor George Fletcher explains: "The best candidate for a conceptual proposition about the criminal law is that the infliction of 'punishment' is sufficient to render a legal process criminal in nature." GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 408-09 (1978) (footnotes omitted).

78. *See supra* note 70.

79. *See supra* 48-49 and accompanying text.

embraced retributive theory, supporting punishment as the vehicle to afford offenders their "just deserts" and to deter crime.[80] By the mid-1980s roughly half the states had enacted determinate sentencing laws, with several eliminating parole and some enacting sentencing guidelines setting prison terms.[81]

This new retributive philosophy also infiltrated juvenile justice as policy makers adopted "get tough" penalties on youthful offenders in response to the perception of rapidly increasing juvenile crime.[82] In the mid-1990s, virtually all states enacted measures facilitating the transfer of more and younger youths to criminal court for prosecution.[83] Moreover, the traditional offender-oriented emphasis of juvenile courts began to be joined, if not replaced, by retributive and deterrence considerations reflected in the enactment of statutes embodying determinate and mandatory minimum offense-based sentencing.[84]

Some states, Washington in particular, enacted systems explicitly aimed at providing "punishment commensurate with the age, crime, and criminal history of the juvenile offender"[85] in order

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80. *See generally* Gardner, *The Renaissance of Retribution*, *supra* note 49. Professor Feld notes that in the 1970s determinate sentencing based on present offense and prior record increasingly replaced indeterminate sentencing as "just deserts" and retribution displaced rehabilitation as the underlying rationale for criminal sentencing. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 26 n.83 (2007) [hereinafter Feld, *Unmitigated Punishment*].

81. Feld, *Unmitigated Punishment*, *supra* note 80, at 26 n.83.

82. *Id.* at 25, 31; Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 331 (1991).

83. Feld, *Unmitigated Punishment*, *supra* note 80, at 31, 34, 40. Among the states, the enhanced waiver policy took three forms: liberalizing the power of judges to make waiver decisions; legislative exclusion of certain offenses from juvenile court jurisdiction; and granting prosecutors discretion to "directly-file" certain cases in criminal court. *Id.* at 38-39. *See generally* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987); *see also* Forst & Blomquist, *supra* note 82, at 337-42 (discussing the various waiver procedures used to transfer juveniles into adult criminal court).

84. As of 1988, about one-third of the states had employed offense-based determinate sentencing in one form or another. Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 44, at 851.

85. WASH. REV. CODE ANN. § 13.40.010(2)(d) (West 2013). "In passing the Juvenile Justice Act of 1977, Washington became the first state to enact a [systematic] determinate sentencing statute for juvenile offenders." Forst & Blomquist, *supra* note 82, at 343. *See id.* at 343-45, 346-49 for discussion of California's enactment of a punitive approach. Kansas has adopted a system similar

to, among other things, "[m]ake the juvenile offender accountable for his or her criminal behavior."[86] The Washington juvenile code embodies a presumptive sentencing system in which dispositions are determined by the youth's age, the offense committed, and the history and seriousness of previous offenses.[87] The direct purpose of such provisions is not to promote the rehabilitative needs of the offender, but rather to create an extensive sentencing system aimed at holding juveniles accountable in proportion to their culpability, thus imposing less severe dispositions than adult offenders committing the same offense would receive in criminal court.[88]

The statutes of other states also now include offense-based criteria with substantial sentences imposed on juvenile offenders committing the most serious crimes and proportionally shorter sentences for those committing less serious offenses.[89] Some dictate mandatory minimum terms of confinement based on the seriousness of the offense,[90] while others retain indeterminate sentencing for convicted delinquents generally, but mandate determinate dispositions for repeat offenders or those committing certain serious offenses.[91] These latter jurisdictions thus manifest pockets of punitive juvenile justice within otherwise indeterminate, and arguably rehabilitative, systems. The offense-oriented, determinate sentencing movement constitutes a clear invocation of the punitive sanction,[92] and stands in stark contrast to the offender-oriented, indeterminate dispositional scheme reflected in traditional rehabilitative juvenile justice.[93]

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to Washington's. *See In re* L.M., 186 P.3d 164 (Kan. 2008) for a discussion of the Kansas model.

86. WASH. REV. CODE ANN. § 13.040.010(2)(c) (West 2013).

87. The Washington system is described in detail elsewhere. *See* Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 44, at 843, 852-55; Walkover, *supra* note 55, at 528-31. The ramifications of the right to rehabilitation, discussed *infra* notes156-84 and accompanying text, would impact the Washington system in significant ways. See *infra* notes 307-12 and accompanying text.

88. Walkover, *supra* note 55, at 531.

89. *See, e.g.*, Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 44, at 859-60.

90. *Id.* at 862-63.

91. *Id.* at 863-71. For the impact the new rehabilitation right had on these statutes, *see infra* notes 313-25 and accompanying text.

92. *See supra* notes 26-36 and accompanying text for a definition of "punishment" for constitutional purposes.

93. *See supra* notes 54-77 and accompanying text.

C. Punishment of Juveniles in Criminal Court

1. Judicial Waiver

Today most states continue to vest juvenile courts with exclusive original jurisdiction over young people charged with acts of delinquency.[94] In these states, where waiver of jurisdiction to criminal court is permitted,[95] the juvenile court judge conducts a hearing[96] and—using statutorily defined criteria—decides whether

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94. DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 53; BARRY C. FELD, JUVENILE JUSTICE ADMINISTRATION 221 (2014).

95. Most states require that the accused juvenile be over a certain age and charged with a particularly serious offense before juvenile court jurisdiction may be waived. DAVIS, RIGHTS OF JUVENILES *supra* note 15, at 224. However, some states place no limitations on waiver, permitting waiver without regard to age or nature of offense. *Id.* at 228.

96. The Supreme Court has required due process protections for juvenile candidates for waiver to criminal court. Kent v. United States, 383 U.S. 541 (1966). Finding the loss of the rehabilitative protections of the juvenile court to be "critically important" to the juvenile, the *Kent* Court required: a judicial hearing; assistance of counsel; access to social investigations; and a record of the findings of the judge thus enabling review by an appellate court. *Id.* at 553-54. The *Kent* Court also offered a list of adequate substantive criteria for courts to employ when making waiver decisions:

> The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction . . . will be waived are the following:
> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver. 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner. 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted. 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney). 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in [adult criminal court]. 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living. 7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions. 8. The prospects for adequate protection of the public and the likelihood of reasonable

the case should be waived to criminal court.[97] Waiver is generally reserved for cases of serious criminality where repetitive misconduct raises concerns for public safety or where the likelihood of rehabilitation within the juvenile system is deemed unlikely.[98]

Waiver procedures often employ presumptions in favor of waiver for certain designated serious offenses with the burden of proof placed on the juvenile to establish why the juvenile court should retain jurisdiction.[99] Waiver hearings are conducted informally,[100] and allow both the state and the juvenile to present evidence and cross-examine the testimony and submissions of the other side.[101] Proceedings are initiated by the state filing a motion to "waive" jurisdiction and—except in cases involving a presumption in favor of waiving the case to criminal court—the state must carry the burden of proof by either a preponderance of the evidence or clear and convincing evidence, depending on the jurisdiction.[102] Generally, state statutes dictate that the decision to waive is irrevocable.[103]

Because the focus of waiver hearings is at least in part directed to the juvenile's amenability to rehabilitation, expert psychiatric evidence and clinical evaluations are often considered by the court.[104] In making amenability decisions, courts consider the clinical evidence in light of the juvenile's age and the time remaining within juvenile court jurisdiction.[105] Thus older juveniles, particularly those committing serious offenses, are prone to be

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> rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Id. at 566-67.

97. State statutes often incorporate the *Kent* criteria listed above, *see supra* note 95; FELD, *supra* note 94, at 225.

98. Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 147 (2010). For a list of the waiver statutes from all the states, see Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 493-94 (2012).

99. FELD, *supra* note 94, at 227.

100. For example, strict evidentiary rules are not followed, with "informal-but-reliable evidence" sometimes sufficing. FELD, *supra* note 94, at 229-31.

101. *Id.* at 229.

102. *Id.* at 229-30.

103. *Id.* at 230. However, some states require a juvenile to be returned to juvenile court for disposition if he or she is convicted in criminal court of a lesser included offense than that originally considered by the juvenile court. DAVIS, RIGHTS OF JUVENILES *supra* note 15, at 240.

104. *Id.* at 232.

105. *Id.* at 234.

transferred to criminal court due to inadequate time for rehabilitation within the juvenile system.[106] Moreover, courts routinely transfer juveniles to criminal court who have been unsuccessful in prior rehabilitation interventions made available by the state.[107]

2. Legislative Exclusion

Statutes in the majority of states grant criminal courts exclusive jurisdiction over youths of a certain age charged with certain offenses—generally serious crimes committed by older juveniles.[108] Apart from considering age, the statutes focus on the crime charged rather than the circumstances of the offender and thus foreclose consideration of the juvenile's amenability to treatment through the juvenile court.[109] Rejecting claims that a right to such treatment exists,[110] courts have historically upheld legislative exclusion statutes against constitutional attack.[111] Underlying such statutes is the belief that youthful offenders committing serious crimes are not amenable to rehabilitation, or even if they were, the costs of their rehabilitation would be too expensive, thus diverting resources from other more amenable juveniles within the juvenile system.[112] Furthermore, the statutes reflect the perception that older juveniles committing serious crimes deserve to be punished for their offenses.[113]

3. Prosecutorial Discretion: Direct File

A dozen or so jurisdictions grant prosecutors the authority to decide whether to bring cases involving youthful offenders in either juvenile or criminal court.[114] In most concurrent jurisdiction states,

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106. *Id.*

107. *Id.*

108. DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 30; FELD, *supra* note 94, at 239.

109. FELD, *supra* note 94, at 243.

110. *Id.* at 239.

111. *See, e.g.*, United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973). *Bland* is considered in detail *infra* notes 269-72, 268 and accompanying text.

112. FELD, *supra* note 94, at 244.

113. *Id.*

114. DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 38. *See infra* notes 284-85 and accompanying text.

the statutes afford no guidelines, standards, or criteria,[115] but simply allow the prosecutor discretion to choose either juvenile or criminal court. As with legislative exclusion, direct file statutes routinely have been upheld, often with courts explicitly rejecting claims that juveniles have constitutional rights to the rehabilitative auspices of the juvenile court.[116]

III. THE SUPREME COURT'S JUVENILE PUNISHMENT CASES AND THE EIGHTH AMENDMENT RIGHT TO REHABILITATION

As mentioned above, the Supreme Court has sometimes flirted with the idea that young people enjoy the constitutional protections afforded autonomous persons.[117]At the same time, the Court has often recognized that for some legal purposes children, even adolescents, are sufficiently different from adults so as to justify denials of autonomy and personhood rights.[118] Because of a perceived lack of mature competence, the Court has upheld numerous state measures denying juveniles personhood rights in the name of affording them protection, care, discipline, and guidance.[119] At no time, however, has the Court *required* that children be treated differently from adults.[120]

That all changed in the Court's Eighth Amendment cases with the Court's recognition of a categorical distinction between young people and adults entitling juveniles to constitutional rights of protection and care unavailable to adults. These cases—beginning with capital punishment situations and moving to the context of life imprisonment—are certain to impact juvenile law in significant ways.

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115. FELD, *supra* note 94, at 247.

116. *Id.* at 247-48; *see infra* notes 286-92 and accompanying text.

117. *See supra* note 13 and accompanying text.

118. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (parents have the liberty to "direct the upbringing and education of children" and to "direct [their] destiny"); Prince v. Massachusetts, 321 U.S. 159, 169-70 (1944) (children, unlike adults, have no First Amendment right to proselytize on public streets); Parham v. J.R., 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments."). *See generally* Bruce C. Hafen, *Children's Liberation and the New Egalitarianism, Some Reservations About Abandoning Youth to Their "Rights."* 1976 B.Y.U. L. REV. 605.

119. *Supra* note 118.

120. Guggenheim, *supra* note 98, at 486.

A. The Death Penalty Cases

In *Thompson v. Oklahoma*,[121] the Supreme Court planted the seeds for its eventual conclusion that minors, specifically adolescents, are a categorically distinct class from adults for purposes of the Cruel and Unusual Punishments Clause of the Eighth Amendment. The *Thompson* Court held that inflicting the death penalty on offenders committing murder when fifteen-years-old or younger constitutes cruel and unusual punishment. In finding that individuals that young are unable to act with sufficient culpability to justify capital punishment, the Court referred to "the experience of mankind" as evidence of the differences between young people and adults, differences which must be recognized in determining the rights and duties of juveniles and adults respectively.[122] The Court noted "broad agreement" that adolescents are "less mature and responsible than adults" while also being "more vulnerable, more impulsive, and less self-disciplined than adults."[123] Thus, juvenile offenders are less culpable than adults committing the same crime. Even though this conclusion was "too obvious to require extended explanation,"[124] the Court nevertheless explained: "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[125] Interestingly, the Court footnoted a host of social science data supporting its conclusions about adolescents, but did not directly relate the studies to its analysis.[126]

However, the social science data referenced in *Thompson* burst to the forefront in *Roper v. Simmons*,[127] which held that the Eighth

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121. 487 U.S. 815 (1988). A four Justice plurality issued the opinion of the Court.

122. *Id.* at 824-25. Supporting its conclusion that adolescents are less culpable than adults, the Court appealed to "evolving standards of decency" manifested by the reluctance of state legislatures and juries to impose the death penalty on offenders under age sixteen who committed capital crimes. *Id.* at 821-31.

123. *Id.* at 834 (quoting 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders as quoted in Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982)).

124. *Id.* at 835.

125. *Id.*

126. "The . . . decision in *Thompson* does not speak explicitly in the language of adolescent development or support its arguments with scientific research on adolescents' capacities." Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1013 (2003).

127. 543 U.S. 551 (2005). "*Roper* was the first time the Supreme Court applied

Amendment prohibits execution of offenders who were under age eighteen at the time they committed capital crimes.[128] The infrequency of state imposition of the death penalty on juveniles,[129] along with empirical evidence suggesting differences between adolescents and adults, convinced the Court that juveniles are "categorically less culpable" than average adult offenders,[130] thus immunizing them from the death penalty.

Appealing directly to empirical studies, the Court identified three general characteristics of adolescents that differentiate them from adults: (1) immaturity and underdeveloped awareness of responsibility, manifesting itself in propensities to engage in reckless behavior and impetuous and ill-considered actions and decisions; (2) a vulnerability and susceptibility to negative influences and outside pressures, including peer pressure; and (3) less character development than adults with more transitory, and fewer fixed, personality traits which enhance a minor's amenability to rehabilitation.[131] Rejecting traditional arguments in favor of case-by-

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psychological studies to the area of juvenile law." Samantha Schad, *Adolescent Decision-Making: Reduced Culpability in the Criminal Justice System and Recognition of Complexity in Other Legal Contexts*, 14 J. HEALTH CARE L. & POL'Y. 375, 388 n.124 (2011).

128. Between *Thompson* and *Roper*, the Court decided Stanford v. Kentucky, 492 U.S. 361 (1989), which upheld imposition of the death penalty for murderers who were sixteen or seventeen-years-old at the time of their crimes. While the Court recognized that juveniles are generally less culpable than adults, it rejected a categorical ban on capital punishment favoring instead a case-by-case jury assessment of whether particular offenders are sufficiently culpable to deserve execution.

129. *Roper*, 543 U.S. at 564-67. In reaching its conclusion, the *Roper* Court applied a two-step test developed in earlier death penalty cases. The first inquiry focuses on whether the punishment at issue is consistent with "evolving standards of decency," indicated by "objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question." *Id.* at 563-64. Applying this standard, the Court concluded that objective indicia of consensus in the case—"the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today society views juveniles," as "categorically less culpable than the average criminal." *Id.* at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

The second inquiry of the two-part test allows the Court to exercise its "own independent judgment." *Id.* at 564. In doing so, the Court appealed the "categorical" differences between juveniles and adults, discussed *infra* notes 130-37 and accompanying text, in concluding that juveniles lack sufficient culpability to merit the death penalty.

130. *Id.* at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

131. *Roper*, 543 U.S. at 569-70.

case assessments in assessing culpability in administering the death penalty,[132] the Court concluded: "The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[133] In addition to culpability issues, the Court emphasized that the transitory nature of adolescents' character development rendered them uniquely amenable to rehabilitation. Noting that "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed[,]"[134] the Court gave voice to the notion that juvenile offenders might be entitled to an opportunity to be rehabilitated.

In fashioning its categorical rule, the Court argued that fixing the line for eligibility for the death penalty at age 18 was not an arbitrary choice,[135] observing that in light of the transitory personality development of adolescents, psychiatrists are forbidden by rule from diagnosing any patient under age eighteen as having a personality disorder.[136] Moreover, the "age of 18 is the point where society draws the line for many purposes between childhood and adulthood."[137]

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132. *Id.* at 572.

133. *Id.* at 572-73.

134. *Id.* at 570.

135. Justice O'Connor argued in her dissent that the relevant differences between "adults" and "juveniles" are matters of degree rather than of kind:

> Chronological age is not an unfailing measure of psychological development, and common experience suggests that many 17-year-olds are more mature than the average young "adult." In short, the class of offenders exempted from capital punishment by today's decision is too broad and too diverse to warrant a categorical prohibition.

Roper, 543 U.S. at 600-02 (O'Connor, J., dissenting).

136. *Id.* at 573.

137. *Id.* at 574. In his dissenting opinion, Justice Scalia questioned the Court's reliance on the social science evidence. In addition to raising questions about possible methodological problems with the studies, Scalia cited the studies described above in this Article, *see supra* note 13—for him contradicting the Court's conclusion that adolescents lack the ability to take moral responsibility for their decisions—showing that "by middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, and reasoning about interpersonal relationships and interpersonal problems." *Id.* at 617-18 (Scalia, J. dissenting) (citing Brief for APA as Amicus Curiae, Hodgson v. Minnesota, 497 U. S. 417 (1990) (No. 88-805) at pp. 19-20) (citations omitted)). Scalia also chided the Court for its categorical rule, claiming that the studies cited by the

B. Mandatory Life Imprisonment Without Parole (LWOP)

1. Graham

Five years after *Roper* acknowledged the categorical distinction between adolescents and adults, the Court reaffirmed that view in *Graham v. Florida*,[138] which invalidated as cruel unusual mandatory LWOP sentences for offenders committing non-homicide crimes[139] when the offender was younger than 18.[140] Citing *Roper*, the *Graham* Court again declared that compared to adults juveniles embody a "lack of maturity and an underdeveloped sense of responsibility; . . . are more . . . susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed."[141] The Court pointed out that these conclusions had become even more firmly established since *Roper*, noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[142] The Court again emphasized that juvenile offenders

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Court offered "scant support" for a categorical prohibition, showing at most that "*on average* . . . persons under 18 are unable to take moral responsibility for their actions," and not that "all individuals under 18 are unable to appreciate the nature of their crimes." *Id.* at 618. Scalia observed that "at least some minors will be mature enough to make difficult decisions that involve moral considerations." *Id.* at 620. For an argument that the social science sources relied on by the *Roper* Court were "too scanty, vague, and dated," see Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379, 380 (2006).

138. 560 U.S. 48 (2011).

139. Graham, the juvenile involved in the case, was charged with attempted robbery after a prosecutor elected to bring his case in criminal, rather than juvenile, court. *See supra* note 114.

140. Graham v. Florida, 560 U.S. 48, 68, 74 (2011). As with *Roper*'s finding of a national consensus against capital punishment of juvenile offenders, *supra* note 122, the *Graham* Court found a similar consensus against sentencing juveniles to mandatory life sentences. *Graham*, 560 U.S. at 62-67.

141. *Id.* at 68 (quoting *Roper*, internal citations omitted).

142. *Id.* at 68. Leading commentators agree with the soundness of the science supporting the Court's conclusions. *See, e.g.*, Barry C. Feld, *The Youth Discount: Old Enough To Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 108-121 (2013) (extensive review of the social science research) [hereinafter Feld, *Youth Discount*]; Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 85-87 (2013) (noting that the differences between juveniles and adults are "verified through a solid and growing body of research"); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 801 (2003) (noting that the judgment of teens is "immature"); Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 230 (1995) (noting that adolescents are uniquely susceptible to

manifest a unique "capacity for change" which makes them "most . . . receptive to rehabilitation," an impossibility in the context of life imprisonment without the possibility of parole.[143] This amenability to rehabilitation, and to a lesser extent the limited culpability of juveniles, convinced the Court that LWOP sentences for juveniles committing non-homicide crimes are unconstitutionally severe.[144]

At issue in *Graham* was a challenge to a "particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."[145] The Court thus saw the need to apply a "categorical approach" previously utilized only in capital punishment cases,[146] and in so doing, rejected the longstanding view that the death penalty is different in kind from other punishment thus necessitating a rigorous Eighth Amendment approach exempting certain categorical classes[147] such as juveniles[148] or the mentally retarded from the death penalty.[149] Prior to *Graham*, the

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peer pressure); Christopher Slobogin et al., *A Prevention Model of Juvenile Justice: The Promise of* Kansas v. Hendricks *for Children*, 1999 WIS. L. REV. 185, 196 (research shows that "the average adolescent . . . differs from the average adult in ways that diminish willingness to pay attention to the criminal law"); Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1773, 1773-75 (1995) (documenting propensity of adolescents to be influenced by peer pressure).

143. *Graham*, 560 U.S. at 74.

144. *Id.* "The idea that juveniles are capable of rehabilitation was central to the Court's analysis in Graham." Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 378 (2014).

145. *Graham*, 560 U.S. at 61.

146. *Id.* at 61-62. *See supra* note 129. In a concurring opinion, Chief Justice Roberts agreed with the majority that "*Roper*'s conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases," but opposed a categorical rule outside the death penalty context. *Id.* at 88-91 (Roberts, C.J. concurring). Treating life sentences as analogous to capital punishment was, for Roberts, "at odds with [the] longstanding view that 'the death penalty is different from other punishments in kind rather than degree.'" *Id.*

147. In cases adopting categorical rules, the Court has taken the two-step approach utilized in *Roper*. *See supra* note 129. The first consideration involves determining whether a national consensus exists against the sentencing practice at issue. *Graham*, 560 U.S. at 61. The second step requires the Court to exercise its own understanding in light of controlling precedent and its interpretation of the Eighth Amendment's text, history, meaning and purpose. *Id.* The judicial exercise of independent judgment also requires assessing the culpability of the offenders at issue in light of their crimes and personal characteristics, along with the severity of the punishment in question. *Id.* at 67.

148. *See supra* notes 127-37 and accompanying text.

149. *See* Atkins v. Virginia, 536 U.S. 304 (2002).

Court had always engaged in a more narrow proportionality analysis in non-capital cases, one heavily differential to legislative prerogative and finding excessive punishment only in "rare cases" of "gross disproportionality" of a sentence for a particular crime, taking into account circumstances of the particular offender.[150]

In finding that mandatory LWOP constituted disproportionately severe punishment for the class of non-homicide crimes involved,[151] the Court directed its focus to the characteristics of juvenile offenders that—in light of traditional justifications for punishment—immunize them from such from sentences. Retributive interests in giving adult offenders their just desserts are less applicable to juveniles, who by definition lack adult culpability.[152] Due to their impetuous nature, juveniles are also less susceptible to deterrence than their adult counterparts.[153] Moreover, confining juveniles for life to incapacitate them from committing further crime is less justifiable than similar dispositions for adults given that it "is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption," suggesting to the Court that "incorrigibility is inconsistent with youth."[154] Finally, the Court noted that mandatory life sentences obviously preclude release upon rehabilitation, a particularly cruel plight for juveniles given that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult [in light of the] greater possibility that [the] minor's character deficiencies will be reformed."[155]

The *Graham* Court's repeated references to a juvenile's unique amenability to reform grants constitutional status to an interest in rehabilitation.[156] Recognizing rehabilitation as the basis of parole

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150. *Graham*, 560 U.S. at 59-60, 88.

151. The Court compared the severity of mandatory life sentences to the death penalty, noting that such sentences "alter the offender's life by a forfeiture that is irrevocable," denying them "basic liberties without hope of restoration." *Id.* at 69-70. Life without parole is also especially harsh for juveniles who on average end up serving more years and a greater percentage of their lives in prison than adult offenders. *Id.* at 70.

152. *Id.* at 71.

153. *Id.* at 72.

154. *Id.* at 73 (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005); Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968)).

155. *Graham*, 560 U.S. at 68-69.

156. *Id.* at 73. Various commentators have viewed *Graham* as establishing, in some sense, a constitutional "right to rehabilitation." *See e.g.*, Arya, *supra* note 98, at

systems, the Court declared in the language of constitutional requirement: "*What the State must do* . . . is to give [juveniles] some meaningful, ['realistic'] opportunity to obtain release based on demonstrated maturity and rehabilitation."[157] Juvenile offenders thus now have a right to demonstrate "maturity and reform," and "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential" outside prison walls.[158]

Such a conclusion does not mean that juveniles have a right to be rehabilitated in the sense that they may never be confined for life.[159] Rather the view is that—at least in *Graham*'s context of non-homicide crimes—juveniles cannot be confined for life unless they have a "meaningful opportunity" to be rehabilitated, successful occurrence of which mandates parole.[160] Thus, at a minimum,

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102 (*Graham* provides the "fodder" for "firmly establishing a constitutional right to rehabilitation"); Meghan J. Ryan, *Finality and Rehabilitation*, 4 WAKE FOREST J.L. & POL'Y. 121, 143-44 (2014) ("ignoring juveniles' potential for rehabilitation rendered the punishments unconstitutional"). Aaron Sussman, *The Paradox of* Graham v. Florida *and Juvenile Justice System*, 37 VT. L. REV. 381, 389 (2012) (*Graham* establishes "the right to rehabilitative treatment" for juveniles). *But see* Feld, *Youth Discount*, *supra* note 142, at 145 (*Graham* and *Miller* "rest firmly on retributive grounds"); Guggeheim, *supra* note 98, at 490, 491 ("I do not . . . suggest that *Graham* stands for the notion that juveniles have a constitutional right to rehabilitation"—*Graham*'s "preeminent conclusion" is that "juveniles have lessened culpability than most adults") (internal quote omitted). The author gives content to the right to rehabilitation entailed in *Graham*. *See infra* notes 312-14 and accompanying text.

157. *Id.* at 75, 82 (italics added).

158. *Id.* at 79.

159. The Court specified that its holding did not "require the State to release [all offenders during their natural lives] as some juveniles who commit "truly horrifying crimes may turn out to be irredeemable." *Id.* at 75. "The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.*

160. The Court noted that the concept of rehabilitation is imprecise, making no attempt to define what legally adequate rehabilitation programs would look like, but instead left it for legislatures to determine appropriate and effective rehabilitative techniques. *Id.* at 73, 74. However, termination of imprisonment must occur upon rehabilitation. *See infra* note 209.

The opportunity for release through parole is the "logical inference" of *Graham*. Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How State Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 30 (2011); Michelle Marquis, Graham v. Florida: *A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 LOY. L.A. L. REV. 255, 284 (2011) (*Graham* requires sentencing statutes to include the possibility of parole for juveniles

juveniles have an Eighth Amendment right to be free from a sentencing scheme that mandates life in prison without possibility of parole.

2. Miller

Shortly after *Graham*, the Court in *Miller* v. *Alabama*[161] again extended Eighth Amendment protection to juveniles by striking down mandatory life sentences without parole imposed upon offenders committing murder when under the age of 18 at the time of their crimes.[162] Reemphasizing the *Roper/Graham* position that "children are constitutionally different from adults for purpose of sentencing,"[163] the Court found that the social science supporting those differences had become "even stronger."[164] The Court observed that the logic of *Graham* was not limited to non-homicide cases, noting that "none of what [*Graham*] said about children—about their distinctive . . . mental traits and environmental vulnerabilities—is crime specific"[165] and concluded that sentencing juveniles to mandatory life without parole impermissibly precludes considerations of the characteristics that make adolescents unique.[166]

In language inviting application to any and all juvenile punishment, the Court quoted *Graham*: "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[167] Noting that the mandatory penalty schemes at issue in *Miller* prevented the sentencer from considering the offender's age, thus running afoul of the fundamental principle of *Roper/Graham*, the Court observed: "the imposition of a State's most severe

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serving life sentences); Leslie Patrice Wallace, *"And I Don't Know Why It Is that You Threw Your Life Away": Abolishing Life Without Parole, The Supreme Court in* Graham v. Florida *Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 64-76 (2010) (discussing requirement that states have parole boards). Indeed, the Court has recognized that "parole is a regular part of the rehabilitative process." Solem v. Helms, 463 U.S. 277, 300-01 (1991).

161. Miller v. Alabama, 132 S. Ct. 2455 (2012).

162. *Id.* at 2475. Statutes from Alabama and Arkansas were struck down in *Miller*. *Id.*

163. *Id.* at 2464.

164. *Id.* at 2465 n.5. *See infra* note 170 and accompanying text.

165. *Id.* at 2465.

166. *Id.* at 2468.

167. *Id.* at 2466 (quoting Graham v. Florida, 560 U.S. 48, 76 (2010)).

penalties on juvenile offenders cannot proceed as though they were not children."[168]

The *Miller* Court analogized life sentences to capital punishment, imposition of which requires "individualized sentencing" which takes into account mitigating factors, including the offender's age, background, and mental and emotional development.[169] Mandatory life sentences for a juvenile homicide offender thus impermissibly preclude consideration

> of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. . . . [Finally] this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[170]

Failure to consider such factors before imposing the harshest prison sentence creates "too great a risk of disproportionate punishment."[171] The Court concluded, therefore, that the Eighth Amendment forbids a sentencing scheme that mandates LWOP for juvenile offenders,[172] but declined to explicitly forbid all juvenile LWOP sentences.[173] The Court did predict, however, that "appropriate occasions" for such sentences will be "uncommon" in light of juveniles' diminished culpability and heightened capacity for

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168. *Id.* at 2466. The Court viewed life imprisonment for juveniles as "akin to the death penalty" by altering an offender's life by through a "forfeiture that is irrevocable." *Id.* (citing Solem v. Helm, 463 U.S. 277, 300-01 (1983)).

169. *Id.* at 2467.

170. *Id.* at 2468. The Court rejected the argument that because many states permitted mandatory LWOP sentences for some juveniles convicted of murder, no finding of a national consensus against the practice could be made, suggesting that such permission may instead be the inadvertent product of multiple independent statutory provisions. *Id.* at 2470-72.

171. *Id.* at 2469.

172. *Id.* at 2469, 2471.

173. In dicta, the Court declared that its holding forbidding mandatory LWOP was sufficient to decide *Miller*, therefore "we do not consider . . . the argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles." *Id.* at 2469.

change.[174] It thus appears, for the time being at least, that so long as robust individualized pre-sentencing procedures are followed, LWOP sentences are still allowed.

The *Miller* Court rejected the argument by the involved states that the requirement for an "individualized sentencing" had been satisfied by the juvenile court proceedings that waived the cases to criminal court.[175] Noting that at the early pretrial stage juvenile courts have only partial information about the child and the circumstances of the suspected offense,[176] the Court found the waiver process further deficient because it did not always include expert opinion by mental health professionals on behalf of the juvenile.[177] Perhaps more significantly, the Court focused on the differences between the issues at stake in pretrial waiver hearings and those at post-conviction sentencing in criminal court. Because juvenile courts lose jurisdiction when offenders reach a particular age, waiver decisions often present the choice of a disposition for a brief period of time in the juvenile system or waiver to criminal court where, prior to *Miller*, the juvenile could receive a mandatory sentence of life without parole.[178] The Court easily imagined a juvenile court judge deciding that a minor deserves a much higher sentence than would be available in juvenile court while thinking life-without-parole inappropriate.[179] Therefore, the Court found that judicial waiver hearings in juvenile court are inadequate vehicles to assess relevant sentencing issues.

Adequate considerations are afforded, however, if juveniles receive post-conviction discretionary sentencing in criminal court where a judge or jury could choose, rather than a life-without-parole prison sentence, "a lifetime prison term *with* the possibility of parole or a lengthy term of years."[180] Such a situation honors *Graham*'s requirement of a "meaningful opportunity" for the juvenile to show that he or she has been rehabilitated.[181] "By making youth (and all that accompanies it) irrelevant to imposition of the harshest prison sentence, [mandatory] scheme[s] pose[] too great a risk of disproportionate punishment."[182]

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174. *Id.*

175. *Id.* at 2474; *see supra* notes 95-107 and accompanying text.

176. *Id.* at 2474.

177. *Id. But see supra* notes 104-05 and accompanying text.

178. *Id.* at 2474.

179. *Id.* at 2475.

180. *Id.* at 2474-75.

181. *See* Graham v. Florida, 560 U.S. 48 (2010). The *Miller* Court quoted language from *Graham*. *Miller*, 132 S. Ct. at 2469.

182. *Miller*, 132 S. Ct. at 2469.

Four Justices dissented in *Miller*.[183] Criticizing the majority opinion as implicitly providing "a way station on the path to further judicial displacement of the legislative role in prescribing appropriate punishment for crime," the dissenters saw "no discernable end point" to the implications of *Miller*.[184] Having cast aside the possibility of limiting the Court's recognition of juveniles' right to rehabilitation to the death penalty as in *Roper*, or to non-homicide crimes in *Graham*, the dissent noted that the *Miller* majority made no attempt to restrict the scope of its opinion.[185] Indeed, the dissent noted that with its observation that "none of what [*Graham*] said about children is 'crime specific,'" the majority had extended the juvenile rehabilitation right principle to any and all crimes, whatever their punishment.[186] Viewing the sole principle underlying *Miller* to be "that because juveniles are different from adults they must be sentenced differently," the dissenters declared:

> There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive. Unless confined, the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults.[187]

IV. DECIPHERING THE RIGHT TO REHABILITATION IN THE CRIMINAL JUSTICE SYSTEM

A. Reconciling Graham *and* Miller

Tension exists between *Graham* and *Miller*.[188] Unless the cases can be distinguished, *Miller*'s failure to prohibit all juvenile LWOP sentences is at odds with *Graham*'s recognition of a right to parole release upon rehabilitation.[189] A distinction could seemingly rest

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183. Chief Justice Roberts and Justices Scalia, Thomas and Alito dissented. *Id.* at 2477.

184. *Id.* at 2481 (Roberts, C.J., dissenting).

185. *Id.* at 2482.

186. *Id.*

187. *Id.*

188. Beth A. Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. & C.L. 79, 94 (2013) (*Graham* and *Miller* provide "vastly different remedies, . . . fully categorical protection against a [LWOP] sentence for non-homicide offenses [in *Graham*] and mere protection against mandatory imposition of such sentences [in *Miller*]").

189. *See Miller*, 132 S. Ct. at 2469. The *Miller* Court, with a "cf." signal, cited *Graham*'s language requiring the State to provide "some meaningful opportunity to

only on the basis of the different underlying offenses in the two cases—non-homicide in *Graham*, homicide in *Miller*. Such a distinction appears insignificant, however, in light of *Miller*'s observation that none of what *Graham* said about the distinct status of juveniles is "crime specific."[190]

Moreover, while *Graham* focused heavily on capability for rehabilitation, *Miller*'s requirement of an individualized pre-sentence hearing emphasized front end culpability issues in setting an appropriate sentence, paying virtually no attention to back end issues requiring parole release should the juvenile's amenability to rehabilitation be realized.[191] These considerations might suggest that juveniles are entitled to either an individualized pre-sentence hearing or an opportunity for eventual parole release, but not to both. As a prelude to examining this question, it should be noted that numerous commentators have concluded that LWOP sentences are now unconstitutional and will eventually be declared so by the Court if they are not repealed by legislative action.[192] Such conclusions obviously imply that denial of the right to a meaningful opportunity for rehabilitation through absence of parole release is unconstitutional, whether or not a robust *Miller* pre-sentence hearing is provided.

1. Parole Release in Lieu of an Individualized Pre-sentence Hearing

Carol and Jordan Steiker, argue that if the individualized hearing required by *Miller* envisions the same "unbridled consideration of mitigating evidence" mandated in capital cases, such hearings will likely seldom occur.[193] Rather than exploring

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obtain [parole] release based on demonstrated maturity and rehabilitation." *Miller*, 132 S. Ct. at 2469.

190. *Id.* at 2465. *Graham*, *supra* note 165 and accompanying text.

191. *Id.*; Scott, *supra* note 142, at 77. *Miller* focused on the reduced culpability of juveniles, with its proportionality analysis supporting "a general mitigation principle." *See also infra* notes 199-202 and accompanying text (Prof. Felds views). On the other hand, *Graham*'s emphasis was on juveniles' unique capacity for rehabilitation. *Supra* note 143 and accompanying text.

192. *See e.g.*, Colgan, *supra* note 188, at 96 (suggesting that the Court's remand of a case imposing a discretionary LWOP indicates that the Court disfavors such sentences); Richard S. Frase, *What's "Different" (Enough) in Eighth Amendment Law?* 11 OHIO ST. J. CRIM. L. 9, 10 (2013) (courts will most likely invalidate *non-mandatory* LWOP sentences imposed on juveniles); Carol S. Steiker & Jordan M. Steiker, Miller v. Alabama: *Is Death (Still) Different?* 11 OHIO ST. J. CRIM. L. 37, 46 (2013) (the requirement of individualized sentences in the juvenile LWOP context will likely end juvenile LWOP).

193. Steiker & Steiker, *supra* note 192, at 42-45. The authors observe that the

"every aspect of a defendant's character and background" through the expertise of mitigation specialists, mental health professionals, and other "pertinent professionals,"[194] the Steikers suggest that to avoid such expense and complexity, "[s]tates will [likely] choose to forego LWOP in the juvenile context and opt out of 'individualized sentencing' by simply tacking on parole eligibility to juvenile life sentences."[195] For the Steikers, simply adding parole eligibility would be a constitutionally permissible "simpler fix . . . rather than attempting to inaugurate a new system of individualized sentencing."[196] Therefore, of the unique attributes of juveniles, amenability to rehabilitation trumps lesser culpability as a matter of constitutional significance.

This is not to minimize the significance of a pre-sentence hearing as a forum affording individual offenders the opportunity to present mitigating factors in their lives, which justify leniency in determining of their sentences.[197] Pre-sentence consideration of such mitigating factors is crucial because once a sentence is imposed, culpability issues are settled and theoretically should not be revisited.[198]

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circumstances the Court deemed relevant in *Miller*'s case included:

> [t]hat he was 'high on drugs' at the time of the offense, that his 'stepfather physically abused him,' that his 'alcoholic and drug-addicted mother neglected him,' that he had been 'in and out of foster care,' and that he had attempted suicide four times, 'the first when he should have been in kindergarten.' [The Court] concludes that the sentence in *Miller*'s case "needed to examine all these circumstances before concluding that life without possibility of parole was the appropriate penalty."

Id. at 44.

194. *Id.* at 43.

195. *Id.* at 45.

196. *Id.* at 48.

197. *Supra* note 191 and accompanying text.

198. "*Miller*'s ban on mandatory LWOP . . . assumes that judges and juries can be trusted to individualize at the time of sentencing and to forecast whether a juvenile killer must remain in prison for life." Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 417 (2013). While culpability issues are theoretically finalized at sentencing, some parole boards do ill-advisedly consider an inmate's culpability in making parole decisions. As Professor Russell states: "The severity of the crime is taken into account in determining the original sentence—including the date for parole eligibility. Under *Graham* and *Miller*, crime severity should not influence an assessment of release suitability." Russell, *supra* note 144, at 413. However, historically parole boards have factored in crime severity, often as a bases for parole denial in cases of violent

2. Individualized Pre-sentence Hearing in Lieu of Parole

Unlike the Steikers, Barry Feld takes the position that the culpability factor predominates, claiming that *Graham/Miller* are satisfied so long as the minimal culpability of juveniles is accommodated. "Rather than require judges to provide some 'meaningful opportunity to obtain release' or to grapple with 'the mitigating qualities of youth,' state legislatures should use age as a proxy for reduced culpability and provide substantial reductions in sentence lengths."[199] Arguing that the "reduced culpability that precludes the death penalty for juvenile offenders is just as diminished for other sentences,"[200] Professor Feld proposes a "youth discount" to apply to any and all punishment imposed on youthful offenders.[201]

Feld pays virtually no attention to the rehabilitative amenability factor articulated in *Roper/Graham/Miller*,[202] and instead sees the cases as "rest[ing] firmly" on retributive—reduced culpability—grounds.[203] For him, the demands of these cases are satisfied so long

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offenses. *Id.* at 397.

199. Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson, *and the Youth Discount*, 31 LAW & INEQ. 263, 264-65 (2013) [hereinafter Feld, *Adolescent Criminal Responsibility*].

200. Feld, *The Youth Discount*, *supra* note 142, at 122.

201. Feld justifies his position by noting that *Miller* provided no practical guidance as to how to incorporate mitigating qualities of youth into sentencing decisions. *Id.* at 136. He observes that states are already "scrambling" to revise sentencing laws to convert mandatory LWOP statutes to life *with* the possibility of parole or to impose minimum terms of years. Seeing such measures as inadequately accounting for the lesser culpability of youth, he argues:

> Rather than try to weigh the role of youthfulness on a discretionary basis, states should formally incorporate an offender's age as a mitigating factor in sentencing statutes. The Court's jurisprudence of youth recognizes that juveniles who produce the same harms as adults are not their moral equals and do not deserve the same consequences for their immature decisions. *Roper*, *Graham*, and *Miller* . . . endorse youthfulness as a mitigating factor that applies to capital and non-capital sentences.

Id. at 137.

202. Without explanation, Feld does say that "states should provide [juveniles] with resources [enabling] them to demonstrate maturity and rehabilitation." Feld, *Adolescent Criminal Responsibility*, *supra* note 199, at 329.

203. Feld, *The Youth Discount*, *supra* note 142, at 145.

as juveniles receive substantially less severe penalties than those imposed on adults committing the same crime.[204]

3. Both Parole Release and an Individualized Pre-Sentence Hearing

Rather than either parole release or individualized presentencing hearings, the best reading of *Roper/Graham/Miller* requires both. If the cases indeed establish a right to an opportunity for rehabilitation, then parole upon rehabilitation is clearly mandatory. Given the Court's acknowledgment of the pre-sentence impossibility of precisely distinguishing those juveniles whose crimes are one-time products[205] of "transient immaturity" and those "rare [offenders] whose crime[s] reflect irreparable corruption,"[206] rehabilitation programs within prison[207] with parole release are necessary to effectuate a youthful offender's right to a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[208] Moreover, because rehabilitation can occur at any time and requires immediate release from prison upon its occurrence,[209] it follows that mandatory minimum sentences can no

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204. Professor Feld's system would give the largest sentence reductions to the youngest, least mature offenders based on a sliding scale of diminished responsibility, with fourteen-year-olds receiving no more than twenty or twenty-five percent the length of an adult sentence. *Id.* at 141. Mid-adolescents could receive no more than half the adult length. *Id.* at 142. Because the length of an LWOP is indeterminate, states should apply a youth discount to a presumptive life sentence length of about forty years. *Id.* at 142 n.163.

205. Some see criminal conduct as a "normal aspect of teen life," especially for males, which is usually not repeated upon reaching adulthood. Scott & Grisso, *supra* note 59, at 154 (quoting Terrie Moffitt, *Adolescent-Limited and Life Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993)). Professor Scott elaborates:

> [M]any studies find a . . . pattern of adolescent offending, with the aggregate level of criminal involvement beginning at about age thirteen and increasing until age seventeen, followed by a sharp decline. This age-crime trajectory confirms the transitory nature of most adolescent offending and supports the Court's judgment that juveniles are more likely to reform than their adult counterparts.

Scott, *supra* note 142, at 87.

206. *Graham*, *supra* note 154 and accompanying text.

207. For what such programs might look like, see *infra* note 227.

208. *Graham*, *supra* note 157 and accompanying text.

209. *See supra* note 44. In discussing the inconsistency of mandatory minimum sentences within a rehabilitative model, one court noted that if "at any time" during

longer be imposed on juvenile offenders if *Graham* is followed to its logical conclusions.

Supposing scaled-down sentences are legislatively enacted as an accommodation to the diminished culpability of juveniles, *Miller* hearings would still be required even if the juvenile has arrived in criminal court as a consequence of a judicial waiver hearing in juvenile court.[210] The *Miller* Court found that waiver hearings lack the rigor of a thorough and effective individualized inquiry into the culpability and rehabilitative amenability of the juvenile offender.[211] While *Miller*'s main focus was directed to considerations of retributive justice in accommodating the diminished culpability of juveniles, the Court did note that another purpose of such hearings is to address "the possibility of rehabilitation."[212] This suggests—again, in light of the acknowledged difficulty in accurately assessing rehabilitative amenability at the pre-sentencing stage—that no juvenile, not even ones deemed not amenable to rehabilitation, can be given a punitive sentence where no meaningful and realistic prospect of rehabilitation exists. This is true even if a juvenile court judge has also previously found the juvenile not amenable to rehabilitation. Where, however, a prison sentence with a parole release mechanism does present a realistic opportunity for rehabilitation,[213] such sentence could permissibly be imposed.

The situation is arguably different, however, in cases where the criminal court judge concludes in a *Miller* hearing that a juvenile is amenable to rehabilitation. Here, the juvenile may well be a fit candidate for rehabilitation in the juvenile system, even if a juvenile court judge, in transferring the case to criminal court, has previously found the juvenile not amenable to rehabilitation.[214] This is

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a rehabilitative placement, a juvenile offender is "successfully rehabilitated, he [is] entitled to release." *In re* Felder, 402 N.Y.S.2d 528, 533 (N.Y. Fam. Ct. 1978) (finding mandatory dispositions based on crime seriousness to constitute "punishment" for purposes of determining jury trial rights).

210. *See supra* notes 94-98, 104-107 and accompanying text.

211. *See supra* notes 177-181 and accompanying text.

212. *See* note 170 and accompanying text (the discussion of *Miller*).

213. For questions about how likely this opportunity is in present prison settings, see *supra* note 49; *infra* note 243 and accompanying text.

214. There are several reasons why the criminal court in a post-conviction *Miller* hearing might be better able to make an accurate assessment of amenability to rehabilitation than was the juvenile court judge at the pretrial waiver hearing. The judge in a post-conviction *Miller* hearing has access to more information than did the juvenile court judge who acted on "only partial information at [the] early, pretrial stage about either the child or the circumstances of [the suspected] offense." *See supra* note 178 and accompanying text. The trial evidence, while justifying a guilty verdict may also reveal aspects of the offender's circumstances which support a

particularly true in cases of younger offenders who will not soon reach termination age for juvenile court jurisdiction. In such situations, a rehabilitative disposition in juvenile court would be appropriate, and arguably required, and could be effectuated through a "blended sentencing" mechanism which would allow the criminal court judge to impose a juvenile court disposition either in lieu of a criminal sentence, or to stay a criminal sentence pending successful completion of a commitment to the juvenile system.[215] If such disposition presents the best opportunity for rehabilitation, justifying its denial would be difficult in light of the Court's recognition of the rehabilitative amenability of juvenile offenders.

B. The Right to Rehabilitation-Beyond LWOP

Clearly the "Court has broken new ground" in its attempt in *Roper/Graham/Miller* to "decipher [through social science] the young minds of those who disobey the law."[216] As the *Miller* dissenters correctly note, there is no principled reason to limit the Court's conclusions regarding the inherent nature of young people to the context of LWOP sentences.[217] As Professor Feld accurately observes, "the reduced culpability that precludes the death penalty

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conclusion that the offender is amenable to rehabilitation, contrary to the earlier conclusion of the juvenile court judge's juvenile court judge at the waiver proceeding. Moreover, the judge in the *Miller* hearing may have richer access to the expertise of mental health and other professionals than did to the juvenile court, thus enhancing the possibilities of a more informed assessment of the offender's prospects for successful rehabilitation. *Supra* note 179.

Transferring judicially-waived cases back to juvenile court from criminal court would require changes in current law. Presently, transfer from criminal to juvenile court is possible only in cases originating in criminal court in legislative exclusion and direct file situations, and not ones involving judicial waivers. *See* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 824 (Barry C. Feld & Donna M. Bishop eds.) (2012).

215. For a discussion of blended sentencing, see DAVIS, CHILDREN'S RIGHTS, *supra* note 54, at 391-93. The American Law Institute's revised Model Penal Code (MPC) sentencing provisions require that juvenile offenders' age is to be presumed a mitigating factor and that criminal court judges should have authority to impose any disposition that would have been available had the offender been adjudicated for the same conduct in juvenile court. MODEL PENAL CODE § 6.11A(d). Alternatively, the court may impose a juvenile-court disposition while reserving the possibility of imposing an adult criminal sentence if the offender fails to comply with the conditions of the juvenile-court disposition. *Id.*

216. Denno, *supra* note 137, at 384.

217. *See supra* notes 184-87 and accompanying text.

for juvenile offenders is just as diminished for other sentences"[218] whether they be sentences of life or for any shorter term. Therefore, the *Miller* dissenters again appear correct in concluding that any and all juvenile sentences must now be less severe than those imposed on similarly-situated adults,[219] thus requiring something like Feld's "youth discount." By the same token, if juvenile offenders are indeed uniquely amenable to rehabilitation, they are so regardless of the offense committed or the possible punishment. The Court's cases thus clearly imply that all juvenile offenders have a right to a disposition presenting a realistic, meaningful opportunity for rehabilitation.

While punishment can take many forms—fines and house arrest for example—punishment in the form of incarceration was the subject of the *Graham* and *Miller* Courts. Therefore, the rehabilitation right entailed in those cases may be limited to contexts where imprisonment is the form of punishment at stake. In any event, my discussion of the right throughout the remainder of this Article assumes situations where juveniles face the possibility of punitive imprisonment. As will be demonstrated in Part V, the above description of the rehabilitation right is equally applicable to juvenile, as well as criminal, court dispensations of punishment.

It is, of course, impossible to predict whether the Court will impose the full array of reforms entailed in *Graham/Miller*[220] as spelled out above. Nevertheless, it seems clear that the requirements of an individualized pre-sentence hearing and parole upon successful rehabilitation described in the context of LWOP sentences[221] also

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218. *Supra* note 200 and accompanying text.

219. *See supra* note 187 and accompanying text. While the *Graham* Court implied that juvenile LWOP sentences are unique as the "second most severe penalty," Graham v. Florida, 560 U.S. 48, 72 (2010). Justice Thomas correctly notes that "no reliable limiting principle remains to prevent the Court from immunizing juvenile offenders from the law's third, fourth, fifth or fiftieth most severe penalties as well." *Id.* at 103, (Thomas, J., dissenting). One commentator made the point this way: "The complexities of childhood exist no matter the crime of conviction." Colgan, *supra* note 190, at 95.

220. "The Court has broken new ground and announced a constitutional principle with potentially far reaching implications: 'children are different.' At this point it is not clear whether the Court will apply the principle to further enhance juveniles' special constitutional status." Scott, *supra* note 142, at 105. I have previously argued for extension of the "children are different" concept beyond the context of juvenile punishment. *See* Martin R. Gardner, *The Categorical Distinction Between Adolescents and Adults: The Supreme Court's Juvenile Punishment Case—Constitutional Implications for Regulating Teenage Sexual Activity*, 28 BYU J. PUB. L. 1 (2013).

221. *See supra* notes 204-09 and accompanying text.

logically extend to all juvenile sentencing contexts.[222] Thus, all juveniles now appear entitled to indeterminate sentences as noted by the *Miller* dissenters.[223] However, the dissenters mistakenly

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222. As one commentator put it: "[The *Roper*, *Graham*, and *Miller* cases] carve out a clear message. Young people, even those who have committed serious crimes, are capable of change. This capacity demands individualized consideration at sentencing and throughout the course of incarceration." Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 CARDOZO L. REV. 1031, 1055 (2014). For an illustration of how these principles apply to juvenile court sentencing, *see infra* text Part V.

Some courts agree. *See, e.g.*, State v. Null, 836 N.W.2d 41, 74-76 (Iowa 2013) (state constitution requires trial courts to apply the "core teaching" of *Roper*, *Graham* and *Miller* in making sentencing decision for long prison terms—here 52.5 years in prison before parole eligibility—involving juveniles); State v. Pearson, 836 N.W.2d 88 (Iowa 2013) (individualized *Miller* hearing required when juvenile received a 35 year mandatory minimum sentence); State v. Lyle, 854 N.W.2d 378, 402 (Iowa 2014) (reasoning of *Miller* applies even to "short" mandatory sentences—here 7 years—thus requiring sentencing court to "craft[] punishment that serves the best interests of the child and of society").

Other courts have, however, limited *Graham* and *Miller* to situations of mandatory LWOP, *see, e.g.*, Bunch v. Smith, 685 F.3d 546, 550-51 (6th Cir. 2012), *cert.* denied 569 U.S. ___ (2013) (*Graham* limited to LWOP and arguably does not extend to lengthy sentences amounting to the "practical equivalent" of LWOP). Still other courts have extended *Graham* and *Miller* to sentences technically not LWOP but with parole eligibility dates that fall outside the juvenile offender's natural life expectancy. *See, e.g.*, People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (sentence of 110 years to life constituted cruel and unusual punishment). See also People v. Pacheco, 991 N.E.2d 896, 907 (Ill. App. Ct. 2013) (20-year minimum sentence "does not compare" to LWOP); State v. Vang, 847 N.W.2d 248, 262-65 (Minn. 2014) (life sentence with possibility of release after 30 years is "not tantamount" to LWOP).

223. *See supra* note 189 and accompanying text. By declaring that juveniles can no longer be given "mandatory sentences," I assume the Justices meant that indeterminate sentencing must now be employed. While apparently no court has yet explicitly so held, the Iowa Supreme Court has entertained the possibility. In holding that even "short" mandatory minimum sentences are impermissible under *Miller*, the court observed:

> Because our holding focuses exclusively on a statutory schema that requires a district court to impose a sentence containing a minimum period of time a juvenile must serve before becoming eligible for parole and that denies a district court the discretion to impose a lesser sentence, we do not consider the situation in which a district court imposes a sentence that denies the juvenile the opportunity for parole in the absence of a statute requiring such a result. Accordingly, we do not determine whether such a sentence would be constitutional.

Lyle, 824 N.W.2d at 401 n.7.

conclude that the "only stopping point" for the *Miller* analysis is that juveniles can never be tried as adults, if, by that, they mean that juveniles can never be tried in criminal court.[224] There is nothing in the Court's cases that precludes juveniles being tried in adult criminal court so long as they receive rigorous pre-sentence hearings and indeterminate sentences[225]—less severe than those imposed on adults committing the same crime—with parole upon rehabilitation.[226]

How the mechanics of the hearing procedures and the juvenile parole requirements could be effectuated is a complicated matter[227]

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224. *Id.* This view is embraced by some commentators. *See, e.g., infra* note 226.

225. "Indeterminate sentences" are those with no mandatory minimum prison terms. *See supra* note 209 and accompanying text. I argue in Part V that a judicial waiver hearing in juvenile court is a constitutional precondition to assertion of criminal court jurisdiction over any juvenile accused of committing criminal offenses. *See infra* notes 231-66 and accompanying text.

226. Thus, Neelum Arya erroneously views decisions to transfer juveniles to criminal court as themselves cruel and unusual punishment because of the "lifelong impact of a criminal court conviction" and because "available evidence indicates that [transfer laws] . . . are counterproductive." Arya, *supra* note 98, at 138, 142 (internal quotes omitted). In arguing that transfer decisions are "punishment and not merely . . . jurisdictional [matters]," *Id.* at 138. Arya pays insufficient attention to the concept of punishment, *see supra* notes 35-36 and accompanying text, the presence of which is necessary for Eighth Amendment applicability. *See supra* notes 22-23 and accompanying text. Transfer decisions serve the non-punitive, administrative purpose of making a criminal trial possible with punishment a possible future consequence. These decisions thus function the same way as such things as police arrests, pretrial detention, and preliminary hearings function within the criminal justice system. While such restraints on liberty may be unpleasant to their recipients, they constitute non-punitive precursors to possible future punishment. For an analysis demonstrating the non-punitive nature of police arrests and pretrial detention, see Gardner, *Rethinking*, *supra* note 36, at 452-58 (2008).

227. Professor Feld notes some of the complexities:

> *Graham* . . . required states to provide them with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." but did not define states' responsibility to provide youths with resources with which to change or identify when they would become eligible for parole. Does a "meaningful opportunity" to change require states to provide rehabilitative programs? Would a first parole release hearing in forty years provide "some meaningful opportunity to obtain release"?

Feld, *Youth Discount supra* note 142 at 135 (footnotes omitted).

For some of the problems involved in implementing the hearing requirement, see Steiker & Steiker, *supra* note 192, at 42-47. As possible ways to usefully implement the hearing and parole release requirements, consider the

following recommendations:

A. Sentencing and Institutional Reform
- Eliminate all true and de facto juvenile LWOP sentences.
- Amend sentencing statutes to create differential sentencing schemes for youth tried in the adult system, including shorter . . . terms than those faced by adults, and compel courts to consider and weigh defendants' ages and developmental status both at the time they committed their offenses and at sentencing.
- For youth serving indeterminate sentences, create presumptions in favor of release upon completion of minimum terms, if current dangerousness is not established.
- Increase available prison programming—including mental health, substance abuse, educational, vocational, release-preparation, and re-entry programs—for adolescent and young adult inmates.
- Create post-conviction victim-offender mediation or education programs for inmates sentenced as adolescents.

B. Parole Process
- Require parole board members who hear cases involving inmates convicted as minors to have expertise in adolescent development and the nexus between developmental science and juvenile offending.
- Require parole board members to receive training in the causes and frequency of juvenile wrongful convictions, and to take these considerations into account, when appropriate, in evaluating inmates who were convicted as adolescents for parole.
- Require annual parole reviews once youth have served . . . [defined] terms of incarceration.
- Require parole boards to consider and afford weight to prospective parolees' age and developmental status at the time of offense and conviction.
- Ensure that actuarial risk assessment instruments are validated for adolescents in adult systems, and require pre-parole clinical interviews as well as actuarial assessments for this population.
- Provide access to counsel at parole hearings and on appeal from denials of parole for inmates convicted as adolescents.

C. Judicial Review
- Create new mechanisms for post-conviction review of adolescent sentences (including, for example, judicial early release procedures similar to those that exist in some juvenile courts).
- Enact less deferential standards of judicial review of parole board determinations.

Cohen, *supra* note 222, at 1087-88.

See also Bierschbach & Bibas, *supra* note 198, at 450-51 arguing for "parole juries"; *Green*, *supra* note 160, at 30-38 (describing "a separately created prison

which the Court has left up to state policymakers to work out.[228] I have made no attempt here to examine how such matters could or should be implemented. Instead, I have attempted to flesh out the meaning of the individual constitutional rights entailed in the Court's Eighth Amendment juvenile cases, leaving it to others to translate those principles to practical, structural reforms.[229]

V. JUVENILE JUSTICE SYSTEM IMPLICATIONS

In this Part, I consider the impact on juvenile justice systems should the rehabilitation right be extended to its logical conclusions. That impact would be significant in four ways: 1) a rehabilitative juvenile justice system is now constitutionally mandated;[230] 2) the waiver standards in most, if not all, jurisdictions are now constitutionally inadequate; 3) judicial hearings in juvenile court are now constitutionally required as prerequisites to any possible trial in criminal court, thus making legislative exclusion and direct file statutes unconstitutional; and 4) punishment of juveniles within the juvenile system must now be governed by the same pre-sentence hearing and parole release requirements discussed above in the context of criminal court punishment.

A. Juvenile Courts as Constitutionally Mandated

With the recent movement towards punishment within the juvenile justice system,[231] Barry Feld and others have argued that juvenile courts should be abolished.[232] As they become increasingly

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release model for juvenile life sentence offenders"); *Marquis*, *supra* note 160, at 282-86 (describing state parole requirements for complying with *Graham*); Russell, *supra* note 143 (detailing: 1) a chance for release at a meaningful point in time; 2) provisions promoting a realistic likelihood of release for the rehabilitated; and 3) measures assuring a meaningful opportunity to be heard).

228. *Supra* note 160 and accompanying text.

229. *See* Bierschbach & Bibas, *supra* note 198, at 436.

230. Some leading commentators have long urged abolishing the juvenile justice system. *See infra* note 232 and accompanying text.

231. *See supra* notes 80-93 and accompanying text.

232. Feld, *Abolish the Juvenile Court*, *supra* note 44; NICHOLAS N. KITTRIE, THE RIGHT TO BE DIFFERENT 106-07 (1971); Janet E. Ainsworth, *Re-Imaging Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991) [hereinafter *Abolishing the Juvenile Court*]; Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927 (1995) [hereinafter *Youth Justice*]; Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Sanford J. Fox, *Abolishing the*

punitive, in some places juvenile courts have become indistinguishable from their adult criminal counterparts, thus calling into serious question the rationale for continuing a separate juvenile system.[233] Hence, juvenile court abolitionists argue for doing away with the juvenile system so long as criminal courts impose scaled-down punishments to accommodate the diminished culpability of juveniles.[234]

While some have responded to the abolitionists with a variety of policy considerations supporting retention of the juvenile court system,[235] the implications of the newly-recognized rehabilitation

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Juvenile Court, 28 HARV. L. SCH. BULL. 22 (1977); Francis Barry McCarthy, *Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale*, 52 N.Y.U. L. REV. 1093 (1977); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977).

233. In language no longer defensible in light of the Supreme Court's recent recognition of the unique status of children, Janet Ainsworth argued that the movement towards punitive juvenile justice manifests a recognition that the sharp child-adult dichotomy assumed by the originators of the juvenile court movement has broken down. Adolescents are viewed more as a subclass of adults than as a subclass of child. Ainsworth, *Youth Justice, supra* note 232, at 931-41. If adolescents are not "essentially" different from adults, "[t]he continued existence of a separate juvenile court system [is] difficult . . . to sustain." *Id.* at 936. "With its philosophical underpinnings no longer consonant with the current social construction of childhood, the juvenile court now lacks a rationale for its continued existence other than sheer institutional inertia." Ainsworth, *Abolishing the Juvenile Court, supra* note 232, at 1118. Barry Feld agrees: "[O]nce a state separates social welfare from criminal social control, no role remains for a separate juvenile court for delinquency matters." Feld, *Abolish the Juvenile Court, supra* note 232, at 69.

234. Feld, *Abolish the Juvenile Court, supra* note 232.

235. For example, Professor Irene Rosenberg argues against "[a]bandoning the juvenile court [as] an admission that its humane purposes were misguided or unattainable. . . . We should stay and fight . . . for a reordering of societal resources . . . that will protect and nourish children." Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 184. She further argues:

> Despite all their failings . . . the juvenile courts do afford benefits that are unlikely to be replicated in the criminal courts, such as the institutionalized intake diversionary system, anonymity, diminished stigma, shorter sentences, and recognition of rehabilitation as a viable goal. We should build on these strengths rather than abandon ship.

Id. at 184-85 (footnotes omitted). For a similar argument favoring separate juvenile and criminal systems, see Martin L. Forst & Matha-Elin Bloomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L.

right now provide a powerful constitutional argument against juvenile court abolition.[236] In short, juvenile offenders now appear to have a constitutional right to a meaningful opportunity for rehabilitation which translates to a *prima facie* right to have their cases originate in a forum dispensing rehabilitation rather than punishment. Under present circumstances, that forum is the juvenile court, which would now be required to exercise jurisdiction over all juvenile offenders except those whose danger to the public or nonamendability to rehabilitation disposition is sufficiently strong to override the presumption of juvenile court disposition.[237]

As one commentator has argued, after *Graham* "[l]awyers may . . . create successful arguments that juveniles have a substantive right to juvenile treatment if they are able to pair arguments based on the right to rehabilitation with empirical data showing that treatment available within the juvenile system is the only realistic way for the youth to achieve that rehabilitation."[238] Such data exists.[239]

1. Juvenile Courts as Best Rehabilitative Alternative for Youthful Offenders

Although juvenile systems have become increasingly punitive, none has abandoned rehabilitation as an important goal.[240] State statutes continue to manifest an ongoing commitment to the rehabilitation and treatment of children by mandating dispositions

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ETHICS & PUB. POL'Y 323, 335-36, 359-69 (1991).

236. For Professor Scott, the mitigation of culpability recognized by the *Roper*, *Graham*, and *Miller* also provides a rationale for "retaining most juveniles in a separate justice system that systematically deals with offenders within its jurisdiction more leniently than does the criminal justice system." Scott, *supra* note 142, at 98.

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> While all youth, even those charged with the most heinous of offenses, are amenable to rehabilitation, the fact remains that there may always be a very small, discrete number of youth who remain a danger to the public. . . . [W]e will need a safety net for the public that operates *after* the juvenile justice system has failed, rather than *before* youth are given an opportunity to change.

Arya, *supra* note 98, at 155.

238. *Id.* at 152.

239. See *infra* text and notes 242-254.

240. Kristin Henning, *What's Wrong with Victim's Rights in Juvenile Court?* 97 CALIF. L. REV. 1107, 1119 (2009).

that promote the best interest of juveniles through state services aimed at making them productive citizens. While the juvenile system has not been widely successful in dispensing effective rehabilitation,[241] some commentators are optimistic that meaningful treatment can occur within the system.[242] Moreover, it is clear that the criminal justice system is no better and probably worse. In fact, the Supreme Court recently cited congressional findings that the federal prison system's "attempt to 'achieve rehabilitation of offenders [has] failed.'"[243] On balance, it is likely that rehabilitative benefits are more forthcoming from the present juvenile system

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241. *Id.* Clearly, not all juvenile offenders emerge from rehabilitative programs as "productive citizens." As Professor Feld notes, while numerous studies of the efficacy of juvenile correctional have been conducted, "[f]ew have encouraged proponents of rehabilitation." Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver: *Sentence Enhancements Based on Delinquency in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1118 n.18 (2003). The Supreme Court itself expressed doubt about whether young people subjected to juvenile court jurisdiction in fact received the "solicitous care and regenerative treatment postulated for children." *Kent*, 383 U.S. at 556; *In re* Gault, 387 U.S. 1, 17, 18, (1967) ("the results of the juvenile system have not been entirely satisfactory").

242. *See, e.g.*, Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 143, 194-98 (2014) (praising the rehabilitative efforts of the "Missouri Model"); Feld, *supra* note 241 (citing Lipsey & Wilson as a source describing characteristics of successful treatment programs for serious juvenile offenders); *see also* Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 315-16 (1999) (identifying the three attributes of juvenile treatment programs most likely to "work" in reducing recidivism). Some even make the modest claim that widespread rehabilitative success is not necessary to satisfy the juveniles' right to an initial rehabilitative disposition:

> To comply with *Graham*, involvement in the juvenile justice system must not *impede* a child's rehabilitation . . . [P]olicies that make it more difficult for a child to demonstrate maturity and rehabilitation than it would be without system involvement do not constitute a meaningful opportunity, and thus do not comply with *Graham*.

Sussman, *supra* note 156, at 386-87.

Although the Supreme Court has been pessimistic about the effectiveness of the juvenile courts in delivering effective rehabilitation, *see supra* note 241, the Court never completely gave up on the ability of the system to achieve its purposes. A plurality of the Court stated that they were "reluctant to say that, despite disappointments of grave dimensions, [the juvenile system] still does not hold promise." McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

243. Tapia v. United States, 131 S. Ct. 2082, 2087 (2011) (quoting Mistretta v. United States, 488 U.S. 361, 366 (1989)).

administered by court personnel experienced in working with young people.[244]

Furthermore, it is well established that stigmatizing offenders often hinders their prospects for rehabilitation.[245] Because the consequences of conviction in juvenile courts are likely less stigmatic than those attending convictions in criminal courts,[246] retaining a

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244. Leading commentators argue:

> The most effective means to implement the lessons from developmental psychology is to maintain a system of adjudication and disposition that is separate from the adult criminal justice system. First, a juvenile court can better recognize and accommodate the reduced culpability and more limited trial competence of younger offenders. Moreover, a separate juvenile correctional system is more likely to utilize dispositional strategies, goals, and approaches that are grounded in developmental knowledge. . . . The ability or inclination of the criminal justice system to tailor its response to juvenile crime so as to utilize the lessons of developmental psychology is questionable. The evidence suggests that political pressure functions as a one-way ratchet, in the direction of ever-stiffer penalties. Programs designed for adolescents and sentencing distinctions between adults and juveniles will be much harder to maintain in a unified system in which juveniles are otherwise treated as adults; it seems predictable that the lines between age groups will become blurred.

Scott & Grisso, *supra* note 59, at 188-89.

Finally, evidence suggests that "approximately 34%" of juveniles transferred to criminal court are more likely to recidivate than similarly situated juveniles retained in juvenile court. Arya, *supra* note 98, at 141 (citing studies).

245. *See, e.g.*, Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 1 (2003) (a criminal record presents a major barrier to employment); Richard D. Schwartz & Jerome Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133 (1962); Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519 (1996) (discussing ways in which convicted criminals suffer stigma manifested through the reluctance of others to interact with them economically and socially).

246. In discussing why separate juvenile courts should be retained, even ones dispensing punishment, one commentator observed:

> If shorter sentences were all that were involved, there would be no need for a separate juvenile court; criminal court judges could simply take a juvenile's age into account in setting the sentence. But more *is* involved. Juveniles' capacity for change means that less stigma should be attached to conviction and punishment of a juvenile than of an adult; a teenager's criminality should not hang over him like a cloud for the rest of his life. . . . [T]he stigma [of juvenile courts] is milder and less enduring that that provided by the criminal courts.

separate system of juvenile courts is more consistent with the rehabilitative interests of youthful offenders than would be the case if all juvenile cases were tried in criminal court, even if scaled-down punishments were implemented.[247] While not beyond dispute, being labeled a "delinquent" by a juvenile court appears less stigmatic—both in the minds of offenders[248] and to the community at large—than that attached to "criminals" convicted in adult court.[249] Given that the vast majority of young people who commit criminal acts while minors eventually outgrow their deviance,[250] the "delinquent" label connotes understandable, for some even *normal*, behavior.[251] Furthermore, given the tendency to transfer serious juvenile offenders to criminal court,[252] the delinquency label connotes not simply that the individual offender is similar to many other young people, but also that he or she likely committed a relatively minor offense.[253] None of this follows when one is stigmatized "criminal," a label connoting neither immature foolishness nor minor offense.

CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 356 (1978).

"[T]he end result of a declaration of delinquency '*is* significantly different from and less onerous than a finding of criminal guilt.'" McKeiver v. Pennsylvania, 403 U.S. 528, 540 (1971) (quoting *In re* Terry, 265 A.2d 350, 355 (Pa. 1970)). Another commentator concluded that the stigma of being classified a delinquent has been overestimated. *Supra* note 227, at 1157. *But see* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1231 (1970) (stating a "juvenile delinquent is viewed as a junior criminal hardly less threatening . . . than his more mature counterpart"); Francis Barry McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REFORM 181, 213 (1977) ("[A] stigma attaches to a delinquent in a manner similar to an adult criminal.").

247. *Supra* note 246. I have made this argument elsewhere. *See* Gardner, *Punitive Juvenile Justice*, *supra* note 20, at 68-70; Martin R. Gardner, *Punitive Juvenile Justice: Some Observations on a Recent Trend*, 10 INT'L. J.L. & PSYCHIATRY 129, 148-49 (1987).

248. *See* Jack Donald Foster et al., *Perceptions of Stigma Following Public Intervention for Delinquent Behavior*, 20 SOC. PROBS. 202 (1972) (finding that only a few boys adjudicated delinquent felt seriously handicapped by their encounter with the juvenile court relative to their interpersonal relationships with family, friends, or teachers).

249. *See supra* note 246.

250. *Supra* note 205.

251. *Id.*

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

253. Theorists point out that the term "criminal" tends to "over label" through its failure to describe precise types of deviant behavior(s) triggering the label, the seriousness of those behaviors, or their social context. Ronald A. Feldman, *Legal Lexicon, Social Labeling, and Juvenile Rehabilitation*, 2 OFFENDER REHAB. 19, 24-25 (1977). The term "delinquent," on the other hand, connotes an offense committed by a

All of these considerations argue that the rehabilitative interests of young people are better protected in juvenile rather than in criminal courts. As a "constitutionally exceptional class,"[254] juvenile offenders are entitled to a meaningful opportunity for rehabilitation to demonstrate maturity and reform[255]—an opportunity that implicitly must begin in juvenile court.

2. Waiver Criteria

If the juvenile system is not likely to allow a juvenile a "meaningful opportunity" to be rehabilitated, then transfer to criminal court may be appropriate. The only relevant transfer consideration is, therefore, whether a particular offender is amenable to rehabilitation in juvenile court.[256]

However, as noted above,[257] state waiver statutes routinely include considerations in addition to amenability to rehabilitation, such as the seriousness of the crime charged and the perceived dangerousness of the juvenile,[258] considerations, which speak to

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minor which, while perhaps serious, is at least not necessarily serious enough to merit disposition in criminal court. As one commentator observed: "When a juvenile is transferred and tried in adult court, the consequences of criminal conviction are readily apparent and warrant a vigorous defense, but for a child facing a delinquency adjudication, the criminal consequences of his or her adjudication may not be clear." Courtney P. Fain, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions,"* 49 B.C. L. REV. 495, 523 (2008).

254. Colgan, *supra* note 190, at 85. Professor Scott sees a "special status" for juveniles under the Eighth Amendment. Scott, *supra* note 142, at 75.

255. *See supra* notes 157-58 and accompanying text.

256. *See supra* note 237. If the right to rehabilitation is to be given meaning, waiver standards should focus only on amenability to rehabilitation. As Christopher Slobogin puts it "only if no treatment is available in the juvenile system should transfer to adult court be considered." Slobogin, *supra* note 242, at 299. If juveniles are amenable to treatment, they by definition pose no future danger to society if their rehabilitation is successful. On this view, the seriousness of the crime charged is irrelevant to the transfer decision. Seriousness of the offense is a retributive consideration and along with the blameworthiness of the offender, goes to giving offenders their just deserts. ANDREW VON HIRSCH, DOING JUSTICE, *supra* note 1, at 6 (people should be punished because they deserve it, severity of punishment depends on the seriousness of the crime); FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 49 (2005) (seriousness of an offense is a factor in determining the amount of punishment the offense deserves). As Slobogin puts it: "Intuitively and empirically, the nature of the offense in the abstract bears no relationship to treatability" and may in fact bear "a negative relationship to treatability." Slobogin, *supra* note 242, at 317.

257. *Supra* notes 96-98 and accompanying text.

258. The seriousness of the crime charged and concerns with incapacitating

interests different from[259]—and which often override—the rehabilitation factor in judicial waiver decisions.[260] While such multi-factored criteria were acceptable prior to the Supreme Court's identification of juveniles as a categorically distinct constitutional class,[261] those criteria would constitute unconstitutional infringements of a juvenile offender's rehabilitation right.

In addition to the requirements just noted, juveniles in waiver hearings are, of course, still entitled to the procedural protections guaranteed by the Supreme Court in the *Kent* case.[262] These protections include the right to counsel, access to social reports assessing the circumstances of the juvenile, and a record of the waiver court's findings for possible appellate review purposes.[263]

If, after a consideration of an accused offender's amenability to rehabilitation, the juvenile court judge concludes that a particular juvenile is not likely to be rehabilitated in the juvenile system,[264] the

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perceived dangerous offenders routinely join, and often override, the amenability to treatment criterion. Summarizing the empirical research on the matter, Slobogin concludes that "the amenability to treatment inquiry often ends up being an inquiry about something else. Rather than focusing on treatability, the courts appear to be driven by a mix of incapacitative, retributive and rehabilitative concerns, with the latter focus routinely taking a back seat to the first two objectives." Slobogin, *supra* note 242, at 300. He thus concludes that "[r]ather than representing a genuine attempt to assess a child's treatability, courts' evaluation of amenability focuses more on culpability and dangerousness." *Id.* at 330.

While such a situation was constitutionally permissible prior to the *Roper*, *Graham*, and *Miller* cases, when "juveniles [had] no 'right' to juvenile court disposition in the first place," *id.* at 323 (citing cases), waiver standards allowing a focus on anything other than amenability to rehabilitation would run afoul of a juvenile offenders *prima facie* right to rehabilitation within the juvenile justice system. Thus, the waiver standard statutes of virtually all states are now unconstitutional.

259. The seriousness of the crime speaks to retributive demands for doing justice while the dangerousness factor speaks to protecting the public through incapacitating those posing a threat with no suggestion of rehabilitation. *See supra* notes 256, 258.

260. *See supra* note 258.

261. Indeed, the criteria are either identical, or very similar, to those recommended by the Supreme Court itself in the *Kent* case, *supra* notes 96-97 and accompanying text.

262. *See supra* note 96.

263. *Id.*

264. A host of complicated issues are involved in determining amenability to treatment. In the first place, a viable treatment program must be available within the state's juvenile system. If such is not the case, the state will be under an obligation to create effective services for juvenile offenders similar to the requirements imposed by the Court in implementing *Graham*'s parole release

judge may transfer the case to criminal court where, as discussed above,[265] upon conviction the juvenile would enjoy a right to a *Miller* pre-sentence hearing and a sentence providing a realistic opportunity for rehabilitation with possible parole release, and—if deemed amenable to rehabilitation at the pre-sentence hearing—a disposition in the juvenile system if that affords the best rehabilitative opportunity.[266]

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requirement. *See supra* note 160. Even before the emergence of the right to rehabilitation, some commentators had argued the Supreme Court case law might mandate treatment that "obviates the need for pure incapacitation." Slobogin, *supra* note 242, at 324.

Assuming adequate state programs are in place, determining a particular juvenile's amenability to success therefrom is a difficult matter within the short time frame of a waiver hearing. Moreover, a particular problem arises: Juveniles approaching the age of termination of juvenile court jurisdiction who are amenable to treatment within a reasonable period of time are routinely deemed "nonamenable" simply because they will reach the cutoff age for juvenile court jurisdiction before successful rehabilitation could likely occur. Slobogin, *supra* note 242, at 326. A solution to this problem could be achieved if, as in many states, the dispositional age of jurisdiction is extended to 21 or beyond. *Id.* at 326.

Also relevant in predicting amenability to treatment is whether the juvenile has committed past offenses. Slobogin points out that "[i]f past offenses did not trigger meaningful treatment, or ended in diversion out of the system, then they should ordinarily not weigh heavily in the amenability determination." *Id.* at 318. Thus, past treatment attempts become a crucial consideration. "Ideally, courts would examine the precise type of treatment provided in the past to ascertain whether the proper treatment course was utilized and, if so, whether it was effectively implemented." *Id.* at 319.

Without going into all the problems entailed in clarifying the meaning treatment amenability, it is helpful to consider Professor Slobogin's proposed definition:

> A juvenile's amenability to treatment depends upon the extent to which: (1) those aspects of the juvenile's personality and environment (2) that contribute significantly to an increased risk of criminal behavior (3) can be ameliorated by age [21] through individual, family or community-oriented intervention (4) that is available under the juvenile court system and applicable law.

Id. at 331.

265. *Supra* notes 204-28 and accompanying text.

266. *Supra* notes 204-14 and accompanying text. Again, a juvenile court judicial waiver proceeding does not satisfy the *Miller* hearing requirement.

B. Legislative Exclusion and Direct File Now Unconstitutional

If judicial waiver hearings are constitutionally mandated for all offenders, it follows that legislative exclusion and direct file provisions are unconstitutional. The discussion immediately below so demonstrates.

1. Legislative Exclusion

As noted above, statutes in most states grant criminal courts exclusive jurisdiction over youths of certain ages charged with certain offenses, thus precluding any consideration of amenability to treatment through the juvenile court.[267] Historically, the courts have upheld the constitutionality of such statutes.[268]

A leading 1972 case, *United States v. Bland*,[269] from the Court of Appeals for the District of Columbia Circuit provides a vivid illustration of how the rehabilitation right changes the legislative exclusion landscape. The *Bland* Court upheld amendments to the District of Columbia juvenile code which repealed earlier provisions granting juvenile courts exclusive original jurisdiction over all juvenile cases while instead granting criminal court jurisdiction over minors between sixteen and eighteen charged with certain serious offenses.[270] The statute required trial of these offenses in criminal

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267. See *supra* notes108-09 and accompanying text.

268. *See, e.g.*, Bishop v. State, 462 S.E.2d 716 (Ga. 1995) (upholding against due process and separation of powers attack regarding a Georgia statute granting exclusive original jurisdiction to criminal courts over juveniles age 13 and over charged with enumerated serious crimes but allowing prosecutorial discretion in cases of "extraordinary cause" to decline to prosecute in criminal court and bring the case in juvenile court); People v. J.S., 469 N.E.2d 1090 (Ill. 1984) (upholding against due process and equal protection attack on an Illinois statute exempting from juvenile court jurisdiction 15 and 16-year-olds charged with enumerated serious offenses); State v. Leach, 425 So. 2d 1232 (La. 1983) (upholding against equal protection attack a Louisiana statute exempting from juvenile court jurisdiction cases of juveniles 15 years of age and over charged with committing enumerated serious offenses); *In re* Boot, 925 P.2d 964 (Wash. 1996) (upholding against equal protection and due process attack on a Washington statute granting exclusive original jurisdiction in criminal courts over cases of juveniles age 16 and over charged with committing enumerated serious offenses).

269. United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied* 412 U.S. 909 (1973). Professor Feld describes *Bland* as "the leading case on legislative offense exclusion statues." FELD, *supra* note 94, at 240.

270. Prior to their amendment, the District of Columbia statutes granted juvenile courts exclusive jurisdiction over all "children," defined as "a person under 18 years of age." U.S. v. Bland, 472 F.2d 1329, 1330-31 (1972) (Wright, J.,

court, thus foreclosing a juvenile court waiver hearing with the attendant due process protections required by *Kent*.[271] The *Bland* court distinguished *Kent*, finding it applicable only to statutory models fixing original jurisdiction in juvenile courts with possible judicial waiver to criminal court,[272] concluding that access to juvenile court was essentially a matter of legislative grace and not constitutional entitlement.

With this understanding, the *Bland* court disagreed with the spirited dissent of Judge Skelly Wright who argued that "a child may [not] be summarily deprived of his right to juvenile treatment without being heard,"[273] claiming that the "crucially important [decision] between the treatment afforded children in an adult court and that granted them in [juvenile court]" could not be made without the protections of a judicial waiver hearing with *Kent* protections.[274]

The essence of Judge Wright's argument was that juveniles charged with criminal offenses have *prima facie* rights to treatment—rehabilitation—within the juvenile system that cannot be denied without a showing that the particular accused offender could not benefit from that system. The weakness of Wright's position was, of course, simply that there existed no legal support for his claim. Prior to the Supreme Court's recent identification of juveniles as a constitutionally-distinct class, the courts had consistently held with the *Bland* majority that juvenile court

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dissenting). The amendment (16 D.C. CODE ANN. § 2301(3)(A) (1972)) excluded from the definition of "child" individuals who are sixteen years of age or older and charged with murder, forcible rape, first degree burglary, armed robbery, and certain other offenses. *Bland*, 472 F.2d at 1330-31 (Wright, J., dissenting).

While charges brought under the § 2301(3)(A) amendment granted exclusive jurisdiction to the criminal courts, federal prosecutors could choose not to charge under the amendment and instead bring a case in juvenile court, even though the crime charged was one included under the amendment. *See* Pendergast v. United States, 332 A.2d 919, 922-23 (D.C. 1975) (juvenile charged in juvenile court with assault with intent to kill, an offense which could have been brought under § 2301(3)(A)). In this sense, the statute in *Bland* could be understood as a concurrent jurisdiction, direct file measure. Indeed, in his treatise Dean Davis categorizes *Bland* under his § 2:9 "prosecutorial discretion" section rather than under his § 2:8 "exclusion of certain conduct from jurisdiction" section. DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 40, 30-38.

271. For discussion of *Kent*, *see supra* note 96.

272. The court appealed to separation of powers principles in finding that it was "without power to interfere with or override [or review] the exercise of [federal prosecutors'] discretion" to charge juveniles with crimes within the exclusive jurisdiction of the criminal court. *Bland*, 472 F.2d at 1337.

273. *Id.* at 1348 (Wright, J., dissenting).

274. *Id.* at 1344.

treatment was statutorily based and not a matter of constitutional right.[275] After the *Roper/Graham/Miller* cases, however, with their support for a right to an opportunity for rehabilitation, Judge Wright's position becomes compelling.

Indeed, as shown above, under the implications of *Roper/Graham/Miller* juveniles are now entitled to judicial hearings in juvenile court before their cases could be transferred to criminal court. Because legislative exclusion statutes provide no such hearing,[276] these statutes are unconstitutional.[277]

Thus, a right to a judicial waiver in juvenile courts would not be satisfied by "reverse certification" provisions in some states that grant original jurisdiction over certain offenses to criminal courts with authority—often discretionary—to transfer cases to juvenile court,[278] sometimes with a rebuttable presumption in favor of keeping cases in criminal court.[279] While historically courts have

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275. *See, e.g.*, State v. Martin, 530 N.W.2d 420 (Wis. Ct. App. 1995) (juveniles do not have a "due process right to individualized treatment" in waiver procedures or at sentencing because such "is neither explicitly nor inherently found in the Constitution"); State v. A.L., 638 A.2d 814, 818 (N.J. Super. Ct. App. Div. 1994) ("statutes governing transfer from juvenile court do not involve a fundamental right"); Lane v. Jones, 257 S.E.2d 525, 527 (Ga. 1979) ("[t]reatment as a juvenile is not an inherent right but one granted by the [legislature which] . . . may restrict or qualify that right as it sees fit").

276. There are numerous legislative exclusion statutes in many states. For some examples, see N.C. GEN. STAT. § 7B-2200 (West 2014) (mandating criminal court jurisdiction for juveniles over age 13 charged with class A felonies); ALA. CODE § 12-15-102(6) (West 2014) (exempting enumerated offenses from juvenile court jurisdiction); N.M. STAT. ANN. § 32A-2-3(H) (West 2014) (exempting from juvenile court jurisdiction individuals 15 or older charged with committing first-degree murder). For an extensive list of examples of legislative exclusion statutes, see DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 31-34 n. 3.

277. While legislative exclusion statutes often apply only to older juveniles committing serious crimes, *see supra* note 108 and accompanying text, there is nothing about the age of an offender or the seriousness of the crime charged which necessarily precludes amenability for treatment in the juvenile system. *See supra* note 264. Therefore, individual judicial waiver hearings are necessary to determine a particular juvenile's amenability to rehabilitation.

278. The process is called "reverse certification" because it is the reverse of the usual process by which cases arrive in criminal court after a waiver hearing in juvenile court. DAVIS, CHILDREN'S RIGHTS, *supra* note 54, at 262 n. 56.

279. *See, e.g.*, S.D. CODIFIED LAWS § 26-11-3.1 (Supp. 2015), which provides:

> Any delinquent child sixteen years of age or older against whom [designated felony] charges have been filed shall be tried in circuit court as an adult. However, the child may request a transfer hearing which shall be conducted . . . to determine if it is in the best interest of the public that the child be

upheld these provisions,[280] they obviously circumvent the right to original juvenile court jurisdiction. None of the reverse certification measures presently in place require the decision to be solely in terms of the accused offenders' amenability to rehabilitation, as I have argued, is now constitutionally required.[281] But even if that criterion were applied in reverse certification hearings, the process would still inadequately protect the juvenile's right to a judicial waiver as a prerequisite to punishment. Juvenile court judges—with their access to the resources of the juvenile system and their considerable experience in dealing with youthful offenders—are arguably better able to assess amenability to rehabilitation than are their criminal court counterparts. Moreover, the process of reverse certification unnecessarily casts the "criminal" label on the juvenile, even if he or she is ultimately transferred to juvenile court. The stigma of being initially charged as a criminal in criminal court would still attach.[282] These considerations strongly suggest that reverse certification procedures do not comply with a juvenile's right to a meaningful opportunity for rehabilitation entailed in *Roper/Graham/Miller.*

2. Direct File, Concurrent Jurisdiction

As already mentioned, a dozen or so states grant concurrent jurisdiction to either juvenile or criminal courts to adjudicate certain juvenile cases.[283] Under such measures, prosecutors are granted discretion as to which court to bring these cases. While one state, Arkansas, allows juveniles a right to a waiver hearing in juvenile court upon request as a prerequisite to assumption of jurisdiction by

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> tried in circuit court as an adult. In such a transfer hearing, there is a rebuttable presumption that it is in the best interest of the public that any child, sixteen years of age or older, who is charged with a [designated felony], shall be tried as an adult.

Id. See infra note 285 for other examples of reverse certification provisions.

280. *See, e.g.*, Commonwealth v. Cotto, 753 A.2d 217 (Pa. 2000) (due process not violated by statute placing burden of proof on juvenile seeking transfer from adult criminal court to juvenile court); State *ex rel.* Coats v. Rakestraw, 610 P.2d 256 (Okla. Crim. App. 1980) (reverse certification does not violate equal protection or due process); State v. Martin, 530 N.W.2d 420 (Wis. Ct. App. 1995) (reverse certification presuming juvenile will be kept in the adult system unless it is found that he or she cannot receive adequate treatment does not violate due process or equal protection).

281. For examples of reverse certification provisions in the context of direct file statutes, see *infra* note 285.

282. *See supra* notes 245-53.

283. *See supra* text and notes 114-16.

the criminal court,[284] all other direct file jurisdictions deny juvenile court waiver hearings, although most allow for reverse certification hearings in criminal court.[285]

When attacked, the courts historically have upheld the constitutionality of concurrent jurisdiction direct file measures.[286] A

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284. *See* ARK. CODE ANN. § 9-27-318(2) (2015) (direct file option for 14 or 15-year-olds charged with enumerated serious offenses with, upon motion of "any party," a hearing in juvenile court as prerequisite to transfer to criminal court).

285. *See, e.g.*, ARIZ. REV. STATS § 13-501(B), (C), (E) (West 2014) (direct file option for enumerated serious felonies with a criminal court order required, after a hearing, to transfer non "chronic felony offenders" to juvenile court); COLO. REV. STAT. Ann. § 19-2-517(1), (3)(a) (2015) (direct file option for juveniles 16 and older charged with enumerated serious felonies with a right to a "reverse transfer hearing" upon request by the juvenile); GA. CODE ANN. § 15-11-2(15), 15-11-560(a)(e) (2014) (juvenile and criminal courts have concurrent jurisdiction over juveniles charged with offenses which are punishable by loss of life, LWOP, or life imprisonment, with possible reverse certification for "extraordinary cause" of juveniles 13 to 17 years of age charged with enumerated offenses); MONT. CODE ANN. § 41-5-206(1), (3) (2015) (direct file option for juveniles over age 12 charged with enumerated serious offenses with a required hearing in criminal court to determine "whether the matter must be transferred back to juvenile courts"); OKLA. STAT. ANN. tit. 10A, § 2-5-206(A) to (C), (F) (Supp. 2015) (direct file option for "youthful offenders" over age 15 charged with enumerated offenses with optional reverse certification hearing); VT. STAT. ANN., tit. 33, §§ 5102(a)(2)(C); 5203(b) (2014) (direct file option for juvenile over age 16 charged with enumerated serious offenses with criminal court discretion to transfer the proceedings to juvenile court); WYO. STAT. ANN. §§ 14-6-203(f), 14-6-237 (West 2014) (direct file option—with specified determinative factors for prosecutorial consideration—for juveniles age 17 charged with felonies with criminal court discretion to order a reverse certification hearing).

Several states allow for direct file in criminal court while apparently denying the possibility of reverse certification. *See, e.g.*, CAL. WELF. & INST. CODE § 707(d) (West 2014) (direct file option for juveniles 16 and older charged with enumerated offenses and for juveniles 14 and older for enumerated offenses under certain circumstances); FLA. STAT. ANN. § 985.557(1)(a)(1), (b) (West 2014) (direct file option for juveniles 14 or older charged with enumerated offenses and for juveniles 16 or older charged with any felony offense); LA. CHILD. CODE ANN. art. 305(B)(3) (2016) (direct file option for juveniles charged with enumerated offenses); MASS. GEN. LAWS Ann. ch. 119, § 54 (West 2014) (direct file option for juveniles 14 and older charged with enumerated offenses who have previously been committed to Department of Youth Services or who have committed an offense involving illegal infliction, or threat, of serious bodily harm); MICH. COMP. LAWS ANN. § 764.1f(1)(2) (West 2014) (direct file option for juveniles over 14 charged with committing enumerated offenses); VA. CODE ANN. § 16.1-269.1(D) (West 2014) (direct file for juveniles 14 and older committing enumerated offenses if juvenile court fails to find probable cause or dismisses warrant or petition).

286. *See, e.g.*, Walker v. State, 827 S.W.2d 637 (Ark. 1992) (upholding direct file measure and allowing criminal court to retain jurisdiction even though charge

California case, *Manduley v. Superior Court*,[287] is representative. Pursuant to the California statute,[288] a prosecutor filed enumerated felony charges against juveniles directly in criminal court. Upholding the statute against, *inter alia*, separation of powers, due process and equal protection attacks, the California Supreme Court rejected claims of a statutory right to be subject to juvenile court jurisdiction, holding that

> [W]hen governing statutes provide that the juvenile court and the criminal court have concurrent jurisdiction, minors who come within the scope of [such statutes] do not possess any right to be placed under the jurisdiction of the juvenile court before the prosecutor initiates a proceeding accusing them of a crime. Thus, the asserted interest that petitioners seek to protect through a judicial hearing does not exist.[289]

The court found similarly unpersuasive a claim that juvenile offenders possess a constitutionally-protected liberty interest in their cases originating in the juvenile system, which would preclude the prosecutor from directly filing their cases in criminal court.[290] Distinguishing *Kent*, the court found "no . . . protected interest in remaining in the juvenile system."[291] Therefore "[a] statute that authorizes discretionary direct filing in criminal court . . . does not require [the *Kent*] procedural protections."[292]

As with the legislative exclusion statutes discussed above,[293] direct file provisions are unconstitutional if the implications of *Graham* are fully realized.[294] Again, the "meaningful opportunity for

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reduced to a lesser-included offense not otherwise within the scope of the direct file statute); Chapman v. State, 385 S.E.2d 661, 662 (Ga. 1989) (direct file upheld, no constitutional right to juvenile court adjudication); Myers v. District Court 518 P.2d 836 (Colo. 1974) (direct file statute upheld).

287. Manduley v. Superior Court, 41 P.3d 3 (Cal. 2002).

288. *See supra* note 285 for reference to the statute.

289. *Manduley*, 41 P.3d at 20.

290. *Id.* at 21.

291. *Id.*

292. *Id.* at 22.

293. *See supra* notes 267-77.

294. Again, none of statutory elements permitting direct file necessarily preclude the accused's amenability to rehabilitation. *See supra* note 277. Thus, for example, the mere fact of past adjudication for a felony does not necessarily mean an accused has exhausted his or her right to rehabilitation, as illustrated by *State v. Cain*, 381 So.2d 1361 (Fla. 1980). In *Cain*, the Florida Supreme Court upheld a direct file provision allowing prosecutors to file charges in criminal court against juveniles 16 and older who have in the past committed two delinquent acts, one of which involved

rehabilitation" would require judicial waiver hearings in juvenile court as a prerequisite to any trial in criminal court.

C. Punishment within the Juvenile Justice System

While current juvenile systems have become increasingly punitive,[295] they accommodate the reduced culpability of juveniles by scaling down the severity of sentences from those imposed on adults in the criminal system committing the same crime.[296] Two conflicting policy considerations are reflected in the emergence of punishment within the traditional non-punitive model.[297] For some theorists, punishment in the juvenile system is, in a sense, actually good for juvenile offenders[298] and is thus at home with rehabilitative goals, especially when followed by extensive follow-up counseling.[299]

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a felony. *Id.* at 1362. Again, the statutory requirements of past adjudication and disposition in juvenile court do not necessarily mean that juveniles whose cases are directly filed in criminal court under these conditions have had a meaningful opportunity for rehabilitation. Treatment may not even have been offered, and if it was, it might not have been meaningful. *See supra* note 264.

295. *See supra* notes 82-93 and accompanying text.

296. *Supra* note 88 and accompanying text.

297. *See supra* notes 54-69 and accompanying text.

298. Even though many theorists recognize that most juveniles outgrow their acts of delinquency, some argue that does not mean that they should not receive some punishment for their offences. Developmental psychologists recognize the importance of lessons in accountability amounting to more than mere slaps on the wrist. Scott & Grisso, *supra* note 59, at 187. "The fact that many youthful offenders will desist in their criminal activity as they mature does not justify a license to offend during adolescence." *Id.* Franklin Zimring expresses similar views:

> [N]o learning role is complete without, in some measure, learning responsibility for conduct. . . . Just as the learning theory of adolescence implies a transition toward adulthood, so too it also implies a progression toward adult levels of responsibility. The adolescent must be protected from the full burden of adult responsibilities, but pushed along by degrees toward the moral and legal accountability that we consider appropriate to adulthood.

FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 95-96 (1982). In the words of one commentator: "[T]he very concept of rehabilitation may include a serious message that consequences follow conduct. . . . When children commit heinous crimes, swift and definite punishment is an essential part of both 'justice' and 'rehabilitation.' Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1059 (1995).

299. *See* Sheffer, *supra* note 51.

For others, the move to punitive dispositions constitutes a decision to deemphasize rehabilitation in favor of just deserts and deterrence theory.[300] In any event, with punishment comes possible scrutiny under the Cruel and Unusual Punishments Clause of the Eighth Amendment.[301] Thus, the principles of the *Roper/Graham/Miller* cases speak to both the criminal and juvenile justice systems.

Punishment is manifested in juvenile systems in two contexts: 1) through systematic and explicit determinate statutory provisions linking punitive dispositions to specific offenses; and 2) through pockets of punitive dispositions within otherwise indeterminate, rehabilitative models. The manner in which the right to rehabilitation affects these two contexts will be discussed in turn.

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300. Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 44, at 852-53 (describing the Washington system as embracing "just deserts" sentencing principles aimed at assuring individual accountability, rather than rehabilitation).

301. While the Supreme Court has held that the Eighth Amendment applies only to "criminal punishment," it is surely arguable that punishment by juvenile courts for acts of delinquency, which entail commission of "criminal" statutes, would qualify for Eighth Amendment coverage. Ingraham v. Wright, 430 U.S. 651 (1977). The Supreme Court has required that virtually all the procedural protections of criminal trials be afforded juveniles in delinquency proceedings. *See In re* Gault, 387 U.S. 1 (1967) (rights to notice of charges, assistance of counsel, rights of confrontation and cross-examination, and protections of the privilege against self-incrimination); *In re* Winship, 397 U.S. 358, 367 (1970) (beyond a reasonable doubt standard of proof required in criminal trials also required in delinquency adjudications); Breed v. Jones, 421 U.S. 519, 545 (1975) (delinquency adjudications constitute being placed in jeopardy for purposes of the Double Jeopardy Clause). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (jury not constitutionally required in delinquency proceedings). These decisions among other things, have led Professor Feld to see juvenile courts as "scaled-down, second class criminal court[s] for young offenders." FELD, JUVENILE JUSTICE ADMINISTRATION, *supra* note 94, at 22.

For a case applying the Eighth Amendment to a juvenile court disposition, see *In re* C.P., 967 N.E.2d 729 (Ohio 2012) (holding sex offender registration and notification requirements on juvenile sex offenders to be cruel and unusual punishment, relying on *Graham*). One dissenter in *C.P.* argued that the disposition was not punitive and was thus outside Eighth Amendment protection. *Id.* at 752-55 (O'Donnell, J., dissenting).

For a case applying the Eighth Amendment to a juvenile disposition, but finding it not disproportionately severe, see *In re* Sturm, 2006 WL 3861074 (Ohio Ct. App. 2006) (upheld serious youthful offender dispositional sentencing scheme). For cases denying Eighth Amendment coverage because juvenile dispositions were deemed rehabilitative and not "punishment" under the Eighth Amendment, see *In re* B.Q.L.E., 676 S.E.2d 742 (Ga. App. 2009); *In re* Rodney H., 861 N.E. 2d 623 (Ill. 2006); *In re* Kelly, No. 98AP-588, 1999 WL 132862 (Ohio App. 1999).

1. Systematic Punishment

As mentioned above, Washington was the first state to enact a systematically punitive juvenile system. The Washington example is thus useful in examining the impact of the right to rehabilitation on punitive juvenile justice systems. As with other such models, Washington imposes punishments scaled-down from those imposed on similarly situated adult offenders. Sentences are determined by presumptive sentencing guidelines that fix dispositions to the seriousness of the offense[302] and increase their severity with the advancing age of the offender, thus reflecting the increased culpability of older juveniles.[303] Thus, legislative purpose statements declare that the system is intended to be punitive.[304] Therefore, sentences administered through the system clearly constitute punishment.[305]

Therefore, the demands of *Graham* and *Miller* apply. This means that mandatory punitive sentences[306] deny the right to pre-sentencing *Miller* hearings required in order to assess the offender's amenability to rehabilitation.[307] No present systematically punitive system meets these demands.

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302. *See* Feld, *Juvenile Court Meets . . . Punishment*, *supra* note 44, at 853.

303. Walkover, *supra* note 55, at 531.

304. *Supra* note 86 and accompanying text; Henning, *supra* note 240, at 1113-14, 1133 (purpose clauses reflecting growing concern for "accountability of offending youth," an attempt to "soft pedal the introduction of retributivist goals into juvenile court").

305. *See supra* note 36 and accompanying text for a definition of "punishment."

306. The Washington system allows judges to suspend a statutorily-defined disposition and order the offender to participate in a treatment program. WASH. REV. CODE ANN. §13.40.0357 (2014) (Option B). Similarly, the Kansas system, which is also systematically punitive, grants the court discretion to impose non-punitive sentencing alternatives, some rehabilitative in nature, e.g. probation, counseling and drug evaluation. KAN. STAT. ANN. § 38-2361 (2014). For a case describing the punitive nature of the Kansas system, see *In re* L.M., 186 P.3d 164 (Kan. 2008) (holding that a sentence constituted punishment, thus recognizing the juvenile offender's right to a jury trial under the Sixth Amendment). While not as systematically punitive as Washington or Kansas, New Jersey provides a table of sentences authorizing substantial sentences for the most serious offenses and proportionally shorter sentences for less serious offenses. N.J. STAT. ANN. 2A:4A-44(d) (West 2014). However, juvenile court judges retain discretion over whether to impose a punitive sentence, which if imposed must be based on legislatively described offense-based criteria. *Id.* at §§ 2A:4A-43(a), 44(d) (West 2014).

307. *See supra* notes 190-221 and accompanying text for discussion of the presentencing requirement. Neither Washington nor Kansas requires a showing of non-amenability to rehabilitation as a precondition of a punitive disposition.

Moreover, whenever a rigorous pre-sentence hearing establishes that a given offender is not amenable to rehabilitation, the offender may be sentenced to a term of punishment so long as a parole release mechanism is in place should the offender be rehabilitated during the punishment term.[308] Thus, mandatory minimum sentences are no longer constitutional.[309] If the pre-sentence hearing reveals that the offender is amenable to treatment, he or she is entitled to a rehabilitative disposition in lieu of a term of punishment.

These considerations require that courts carefully distinguish punitive and rehabilitative dispositions. If dispositions are rehabilitative and not punitive, the requirement of an Eighth Amendment pre-adjudication *Miller* hearing would be unobtainable. This means that for rehabilitative dispositions, bifurcated adjudication and disposition hearings would not be required, rendering constitutionally permissible the practice in some states of allowing juvenile court judges to order dispositions immediately upon adjudication.[310] If, on the other hand, a disposition is punitive, a *Miller* hearing separate from the adjudication hearing is required. Thus, in this context, the conceptual distinction between punishment and rehabilitation described above[311] becomes central as a constitutionally necessary vehicle for defining the scope of the Eighth Amendment rehabilitation right.[312]

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308. *See supra* 190-221 and accompanying text for a discussion of the parole release requirement.

309. Both the Washington and Kansas systems appear unconstitutional for failing to provide parole release mechanisms.

310. *See* DAVIS, RIGHTS OF JUVENILES *supra* note 15 (discussing cases upholding the constitutionality of dispositions imposed immediately upon adjudication).

311. *See supra* text notes 36-44 and accompanying text.

312. Even in systems as obviously punitive as Washington's, courts sometimes fail to honor the constitutional consequences of this distinction by mischaracterizing punishment as "rehabilitation." *See, e.g.*, State v. Chavez, 180 P.3d 1250 (Wash. 2008) (denying jury trial rights because the court deemed the juvenile system only partially punitive and primarily rehabilitative).

Sometimes courts make the opposite mistake of characterizing as "punitive" dispositions that are in fact rehabilitative, often applying the misguided "impact theory" described *supra* at note 39. *See, e.g.*, *In re* Hezzie R. 580 N.W.2d 660 (Wis. 1998) (merely housing juveniles in adult facilities constituted "punishment" even though the terms of confinement were indeterminate and individualized plans were in place aimed at reuniting juveniles with their families—as a result, juveniles could not be transferred to such adult facilities without a jury determination).

2. Punishment Within Rehabilitative Systems

Unlike states like Washington and Kansas, the juvenile systems in most states continue to embrace the rehabilitative ideal, imposing indeterminate dispositions aimed at reforming the offender.[313] Nevertheless, within these systems pockets of punishment sometimes exist, triggering the same Eighth Amendment implications as those visited upon systematically punitive models. Proper application of the Eighth Amendment depends, of course, on recognizing a sanction as punitive. Unfortunately, courts have often failed in this recognition, mistakenly characterizing punitive dispositions as rehabilitative.[314]

A Delaware case, *State* v. *J.K.*,[315] provides a vivid example. A state statute required that juveniles adjudicated delinquent be confined for at least six months[316] if they had committed two or more statutorily enumerated felonies within a one-year period. Despite the fact that such sentences clearly evidenced punishment—imposing on their recipients determinate terms of unpleasantness through institutional confinement because of the commission of prohibited offenses[317]—the Delaware court nevertheless found them rehabilitative, thus defeating claims that the sentences could not be imposed without jury determinations of guilt.[318]

Instead of carefully considering whether the sentences might be punitive, the *J.K.* court simply begged the constitutional question by appeal to the statute's purpose clause, which characterized delinquency matters as "civil" in nature with the aim of achieving "control, care, and treatment" of juveniles.[319] The court added that the rehabilitative interests were actually reflected in the mandatory sentencing law, which it characterized as "an attempt to salvage something in a juvenile who has committed . . . two separate felonies

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313. *See supra* note 84 (as of 1988 two-thirds of the states had failed to embrace offense-based determinate sentencing. Despite the emergence of punitive aspects, "the ameliorative purposes, and the rehabilitative philosophy for the most part has endured" in the juvenile court movement. DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 5.

314. *See, e.g.*, *supra* note 312 (the *Chavez* case).

315. State v. J.K., 383 A.2d 283 (Del. 1977).

316. The statute actually required institutional confinement for one year, but allowed judges' discretion to suspend confinement in excess of six months. *Id.* at 285.

317. See the definition of punishment, *supra* note 36 and accompanying text.

318. Technically, the court did not rule on the jury trial issue because it was not adequately briefed, but with its finding that the sentences involved in the case were non-punitive, it essentially eliminated any claim for a right to trial by jury.

319. *J.K.*, 383 A.2d at 286-87.

in one year [which] begin[s] with a mandatory commitment for a six-month minimum."[320]

Such careless analysis would deny juveniles realization of their rehabilitation right. How that right would be implicated when provisions like the statute in *D.K.* are correctly characterized as punitive can be illustrated by a consideration of the current version of the Delaware statute.

Similar to the statute in *D.K.*, current Delaware law requires juvenile court judges to impose minimum sentences of six months upon "child[ren] in need of mandated institutional treatment."[321] Such children are those who have been adjudicated delinquents for committing felonies and who commit subsequent felonies within a twelve-month period. Juveniles committed under these provisions must serve at least six months unless the court determines that it is in the "best interest of the child's treatment" to participate in programs outside the institution, or a judge determines that "the child has so progressed in a course of mandated institutional treatment [so] that release would best serve both the welfare of the public and the interest of the child."[322]

Despite its characterization as "mandated institutional treatment," the offense-based, determinate nature of the Delaware disposition belies a rehabilitative characterization and instead renders the disposition punitive.[323] Thus the *Graham* and *Miller* requirements of a rigorous pre-sentence hearing and a parole release mechanism are applicable. The mandatory commitment under the Delaware statute is triggered by past adjudications, which do not necessarily entail exhaustion of the offender's right to a meaningful opportunity for rehabilitation.[324] Thus, unless it could be shown that a particular juvenile had been exposed to effective treatment in the past,[325] a pre-sentencing *Miller* amenability hearing is required prior to imposing the mandated institutional punishment, a disposition that would be permissible only if the juvenile is shown not to be amenable to rehabilitation. As for *Graham*'s parole release requirement, the Delaware statute satisfies that demand.[326]

Punishment provisions in numerous states would be affected should the implications of *Graham*'s meaningful opportunity for

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320. *Id.* at 289.

321. DEL. CODE ANN. tit. 10, § 1009 (West 2014).

322. *Id.* at (e)(1), (2), (3).

323. See the distinction between punishment and rehabilitation, *supra* notes 36-44 and accompanying text.

324. *Supra* note 264.

325. *Id.*

326. *See supra* note 322 and accompanying text.

rehabilitation requirement and *Miller*'s pre-sentencing hearing mandate be given full effect.[327] A cursory sample of the statutes suggests that many statutes provide neither a *Miller* hearing nor a *Graham* opportunity for rehabilitation and parole.[328]

D. Summary

Recognition of the principles entailed in the Supreme Court's *Graham* and *Miller* cases would require that juvenile courts exercise original jurisdiction over all alleged juvenile offenders, transferring them to criminal court only upon a judicial finding that a given juvenile is not amenable to rehabilitation in the juvenile system. This requirement would mean that many, if not all, of the waiver criteria standards presently employed in juvenile systems are unconstitutional, as are the legislative exclusion and direct file statutes widely in place throughout the nation. Moreover, mandatory punitive sentencing within juvenile systems would also be unconstitutional.

These manifestations of the right to rehabilitation conceived in the Court's Eighth Amendment cases would be significant, impacting virtually all juvenile justice systems in one way or another. Whether courts and policy makers actually follow the *Graham* and *Miller* cases to their logical conclusions is, of course, not clear. But if they do, the effect will be to bring juvenile courts back to their original rehabilitative roots, a welcome development for those championing the "humane purposes" of a juvenile system aimed at "protect[ing] and nourish[ing] children."[329]

VI. WAIVING THE RIGHT TO REHABILITATION?

However Far It Will Eventually Extend, The Right To A Meaningful Opportunity For Rehabilitation Granted To Juveniles By *Graham* and *Miller* is an individual constitutional right protected by

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327. *See* Feld, *Juvenile Court Meets . . . Punishment*, *supra* note 45, at 862-79 for references to various statutes.

328. *See, e.g.*, ALA. CODE § 12-15-219 (West 2014) (children committing enumerated felonies "shall be committed to the custody of the Department of Youth Services where he or she shall remain for a minimum of one year"); CONN. GEN. STAT. ANN. § 46b-140(i) (West 2014) (court given discretion to set a minimum twelve month sentence to a residential facility for juveniles committing "serious" offenses); N.Y. FAM. CT. ACT § 353.5(3),(4)(a)(ii), (4)(a)(iv) (2008) (mandatory sentences of twelve to eighteen months for offenders committing "designated felon[ies]" with no release during the set term of the sentence).

329. *Supra* note 235.

the Eighth Amendment, similar to the due process procedural protections granted to juveniles in cases like *Kent*, *Gault*, and *Winship*.[330] As with those rights, individual juveniles are now arguably entitled to governmental recognition of a rehabilitation right, to the extent it has been defined in this Article.

As with their other rights, juveniles would almost always gladly accept, and demand if not granted, the manifestations of their new Eighth Amendment right. But what if an accused or convicted juvenile disavows the rehabilitation right and instead asserts Professor Fox's right to be punished—not rehabilitated—[331] along the lines proposed for mature persons by Herbert Morris?[332] Indeed, Florida law presently affords juveniles a statutory right to be punished, permitting them to opt out of dispositions in juvenile court and demand criminal court trial.[333] Upon such demand, the juvenile court must transfer the case to criminal court.[334] Assuming recognition of an Eighth Amendment right to a judicial waiver hearing in juvenile court,[335] would it be constitutionally permissible for juveniles to waive this right? Would the other manifestations of the rehabilitation right described in this Article be waiveable?

The Supreme Court has recognized that in some contexts juveniles are permitted to waive constitutionally-mandated rights. Thus, for example, the Court held in *In re Gault* that, while juveniles are entitled to the assistance of counsel at delinquency adjudications, accused juveniles may waive their counsel rights if they do so intelligently and knowingly.[336]

Whatever the waiver status of other constitutional rights, the right to be free from cruel and unusual punishment under the Eighth Amendment is almost certainly not waivable.[337] One cannot

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330. *Supra* notes 96, 301 and accompanying text.

331. I have shown concepts of rehabilitation and punishment are theoretically antithetical. *Supra* notes 36-53 and accompanying text. *See supra* text note 9 and accompanying text.

332. *Supra* notes 1-8 and accompanying text.

333. FLA. R. JUV. P. Form 8.937 (West 2014) permits a "child" and his or her parent to "demand . . . voluntary waiver of [juvenile court] jurisdiction" and have the case brought to trial "in adult court as if the child were an adult to face adult punishments . . . ."

334. "On demand . . . the court shall . . . certify[ ] the case for trial as if the child were an adult." FLA. R. JUV. P. RULE 8.105 (West 2014).

335. For discussion of the right to a judicial waiver hearing, see *supra* notes 236-66 and accompanying text.

336. *In re* Gault, 387 U.S. 1 (1967) (juvenile can waive counsel right if done so intelligently and knowingly).

337. There are apparently no Supreme Court opinions directly on point, but lower courts have found the right to be free from cruel and unusual punishment not

demand to be subjected to cruel punishment. As Justice White put it, "the consent of a convicted defendant in a criminal case does not privilege a state to impose a punishment otherwise forbidden by the Eighth Amendment"[338] Justice Marshall has noted that, while Eighth Amendment rights are possessed by individuals, society shares an interest in living in a culture where cruel punishments are not imposed: "Society's independent stake in enforcement of the Eighth Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver."[339] This means that juveniles would not be allowed to waive any of the manifestations of the rehabilitation right identified in this Article.[340] It also means that the Florida law noted above allowing a waiver of a judicial transfer hearing in juvenile court[341] is unconstitutional.

Unlike the right to be punished arguably possessed by autonomous moral agents, the right to a meaningful opportunity for rehabilitation flowing from the *Roper*, *Graham*, and *Miller* cases is premised on the view that adolescents are a class distinct from fully-accountable moral agents. Therefore, paternalistic responses to juvenile offenders are not only appropriate, but also necessary, lest these offenders be "abandoned" to the same practices and punishments applicable to adults[342]—practices and policies that disregard both the minimal culpability and the unique rehabilitative amenability of young people.

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waivable. *See, e.g.*, Commonwealth v. McKenna, 383 A.2d 174, 181 (Pa. 1978) ("the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence," thus waivers can never require courts to impose "an illegal execution of a citizen"); State v. Brown, 326 S.E.2d 410, 411 (S.C. 1985) (defendants demanded castration, a form of cruel and unusual punishment under state analogue to Eighth Amendment).

338. Gilmore v. Utah, 429 U.S. 1012, 1018 (White, J., dissenting) (court held convicted defendant validly waived his right to appeal his death sentence).

339. Lenhard v. Wolff, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting) (court denied stay of convicted offender's execution). A leading commentator agrees. Professor Richard Bonnie has stated that "it is clear that [one] may not waive [a] constitutional ban and thus empower the state to impose a punishment that it is otherwise forbidden to inflict." Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1371 (1988). *See also* Lystra Batchoo, *Waiving the Eighth Amendment Protection from Cruel and Unusual Punishment*, 72 BROOK. L. REV. 689, 712-13 (2007).

340. *See supra* notes 205-215; 254-56, 306-309 and accompanying text.

341. *See supra* notes 332-33 and accompanying text.

342. Bruce Hafen has counseled against "abandoning youth" to adult rights and responsibilities. *See generally* Hafen, *supra* note 118.

CONCLUSION

The Supreme Court's recent Eighth Amendment cases have made clear, seemingly once and for all, what all mothers know as a matter of common sense: kids are different. However, the Court's knowledge comes not just from common sense but, more significantly, from a vast body of social science research documenting the differences between adolescents and adults. In recognizing these differences, the Court has blessed young people with a unique constitutional status.

In this Article, I have explored the ramifications of this newly-recognized status in terms of a non-waiveable rehabilitation right spawned by in the *Roper*, *Graham*, and *Miller* cases—a right representing the antithesis of the right to punishment arguably possessed by adults. This right, if followed to its logical conclusions, would grant juveniles in both the criminal and juvenile systems a meaningful opportunity for rehabilitation.

Specifically, I have argued that this right means that, for accused offenders, jurisdiction would necessarily originate exclusively in juvenile court, with transfer to criminal court permitted only if a juvenile court judge finds that a given juvenile is not amenable to rehabilitation within the juvenile system. Punishment within that system could not be imposed unless it were shown at a pre-dispositional hearing that an adjudicated delinquent is not amenable to rehabilitation. Moreover, any punishment within the juvenile system would be required to afford a meaningful opportunity for rehabilitation and parole.

When juveniles are transferred to the criminal system, they would be entitled to less severe punishment than that imposed on adults committing the same crime. Upon conviction, they would be entitled to a rigorous pre-sentencing hearing, taking into account amenability for rehabilitation. If a given offender is deemed unamenable to rehabilitation by the criminal court, he or she could be given punitive sentences, so long as they carry a realistic possibility of rehabilitation and parole if rehabilitation is achieved during the sentence. If an offender is adjudged amenable to rehabilitation at the pre-sentencing hearing, he or she should receive a juvenile court disposition if that affords the best rehabilitative opportunity.

I have shown that these requirements are entailed in the *Roper*, *Graham*, and *Miller* cases, and, if put into effect by courts and legislatures, would significantly impact both the criminal and juvenile justice systems. Time will tell the extent of that impact. As for the wisdom of recognizing the broad implications of the rehabilitation right, if the science is correct and juveniles are indeed uniquely amenable to reformation, implementing the reforms

discussed in this Article would constitute a compassionate recognition of that amenability and would likely pose little increased risk to, and perhaps even greater protection of, society's interest in being safeguarded from crime.