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The Right of Juvenile Offenders to be Punished: Some Implications of Treating Kids as Persons

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TABLE OF CONTENTS

I. INTRODUCTION

At first glance, one may wonder how being subjected to punishment could ever be viewed as a "right" rather than an onus of the severest sort. If "rights" are claims that must be honored upon assertion, why would *anyone* in possession of his or her senses, even a

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youngster whose "senses" may be incompletely developed to begin with, *ever* demand to be punished? In this Article, I hope to answer such questions and demonstrate why recognition of the right to be punished might significantly advance the interests of certain juvenile offenders.

This Article begins by sketching a theory of personhood and arguing that persons possess the right to be punished. Next, in contrast to traditional protectionist rights theory, the Article presents the claim that competent adolescents are autonomous "persons" who therefore possess the right to be punished. Finally, after presenting a theory for a constitutional right to be punished, the Article will examine some implications of such a right as it relates to the traditional juvenile justice system.

II. PERSONS AND PUNISHMENT

In his highly influential paper, *Persons and Punishment*, Professor Herbert Morris argued that guilty persons have a moral right to be punished for their criminal offenses.[1] Under Morris's theory, the right to be punished derives from a more fundamental natural right, inalienable and absolute, to be treated as a person.[2] "Persons" are those individuals possessed of the capacity for rational choice.[3] Persons are entitled to have their choices respected.[4] Therefore, when one chooses responsibly to engage in morally reprehensible conduct prohibited by a just system of criminal law,[5] one also chooses the con-

1. Morris, *Persons and Punishment*, in PUNISHMENT 74 (J. Feinberg & H. Gross eds. 1975). For an example of the influence of Professor Morris's work, see A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 48 (1976). Professor Morris's paper is reprinted in numerous collections of essays on punishment. *See, e.g.*, PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 116 (G. Ezorsky ed. 1972) [hereinafter PHILOSOPHICAL PERSPECTIVES]; SENTENCING 93 (H. Gross & A. von Hirsch eds. 1981). Much of the ensuing discussion of Morris's theory is derived from the author's earlier work, Gardner, *The Right to be Punished—A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838, 839-46 (1981).

2. Morris, *supra* note 1, at 84-86. The right to be treated as a person 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 morally requiring that a person be denied this right.

3. *Id.* at 82-86.

4. *Id.* at 79.

5. 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 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 or justifiable. 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,

sequences of his offense: punishment.[6]

Nonpunitive responses to deviant conduct, most notably sanctions imposing compulsory therapy or rehabilitation,[7] regard the deviant behavior as merely symptomatic of pathological conditions or emotional immaturity rather than as the actions of responsible human agents.[8] Coerced therapeutic responses fail to respect the rational choices, and thus the personhood, of the offender.[9] Whereas therapy and rehabilitation are directed toward altering undesirable status conditions presently possessed by the offender, with no necessary interest in proportioning the degree or kind of treatment to past undesirable conduct, punishment necessarily limits the amount of suffering the offender must endure to that deemed proper to pay the "debt" owed society through commission of the offense.[10] Moreover, therapy tends toward paternalism and coercion insofar as the therapist is assumed to know, and thus often permitted to use, those treatments that will be beneficial, no matter how objectionable the "patient" may find them.[11] On the other hand, the primary thrust of punishment, rather than seeking to benefit the offender, is to exact from the recipient his debt

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and protections against punishment that is disproportionate to the seriousness of the offense or the culpability of the offender. *Id.* at 75-78.

6. 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 because 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.*

7. For purposes of this Article, the author draws no distinction between the concepts of "therapy" and "rehabilitation." "Therapy" may be defined as the "altering of a person's undesirable physical or mental condition in the manner most beneficial to the person." Gardner, *supra* note 1, at 846. *See also* Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 815-16 (1982)[hereinafter *Punishment and Juvenile Justice*].

8. Morris, *supra* note 1, at 76-80.

9. *Id.*

10. *Id.* The author has defined "punishment":

> (1) Punishment is the purposeful imposition of unpleasant restraints by one person or authority upon another person.
> (2) Punishment is a sanction imposed upon a person for his offense or alleged offense against social or moral norms of conduct that also are usually, but not always, the subject of a preexisting legal rule that defines the offense and sets the amount of penalty for its commission.
> (3) Punishment is imposed to exact retribution and may also operate to deter undesirable conduct.
> (4) Punishment is often imposed upon offenders who, in addition to violating legal rules, are (or are believed to be) morally culpable.

Punishment and Juvenile Justice, *supra* note 7, at 817 (footnotes omitted).

11. Morris, *supra* note 1, at 79-80.

to society, payment of which nullifies his guilt.[12]

As a theory of justice, the right to be punished embraces the traditional retributive requirements that the form and degree of punishment be proportionate to the seriousness of the offense as determined by the characteristic harmfulness of the conduct and the individual culpability of the offender.[13] Moreover, forms of punishment that fail to respect the dignity of the person are, of course, impermissible.[14] Persons are subject only to just and humane punishment. Persons have rights to be free from unjust, cruel, or inhumane punishments.[15]

While punishment entails the purposeful infliction of suffering upon an offender for his offense, no special form of punishment is required under the right to be punished.[16] Some forms of punishment, such as imprisonment or death, connote social disapprobation,[17] while others, such as fines or periods of probation,[18] do not.[19] Under Morris's theory, the offender has a right to whatever disposition sufficiently addresses his guilt. He has no right to dispositions reflecting his shame. So long as the offender is made to suffer in proportion to the seriousness of his offense, the form of the suffering is irrelevant.[20]

Under Morris's theory, the right to be treated as a person, and its derivative right to be punished, do not require abandoning all therapeutic responses to criminal offenders. Young children and certain mentally ill individuals lack the capacity for rational choice and thus are unable to function as persons.[21] Although such individuals possess the right to be treated as persons, complete exercise of the right is postponed until such time as they acquire the capacity for rational choice.[22] When such individuals violate the law, it cannot plausibly be maintained that they have "chosen" to be punished; they therefore

12. *Id.* at 77-78.
13. A. VON HIRSCH, *supra* note 1, at 66, 79-80.
14. *See* Gardner, *supra* note 1, at 863.
15. For a discussion on the eighth amendment's proscription against cruel and unusual punishment, see *infra* notes 83-111 and accompanying text.
16. Gardner, *supra* note 1, at 862; Morris, *supra* note 1, at 80.
17. *See generally* J. FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING 95 (1970).
18. "Probation" is often defined as a manifestation of the rehabilitative ideal which allows the imposition of "conditions" geared to the "needs" of individual offenders as an alternative to imprisonment. Probation is thus often considered to be a nonpunitive sanction.

    However, probation may constitute a form of "punishment" if its conditions reflect the "purposeful imposition of unpleasant restraints" imposed upon "an offender for his offense." *See Punishment and Juvenile Justice*, *supra* note 7, at 817.
19. *See* J. FEINBERG, *supra* note 17.
20. *See supra* note 16.
21. Morris, *supra* note 1, at 82-83, 86.
22. *Id.* Drawing from property law concepts, Professor Morris suggests those lacking capacity for rational choice possess a "future interest" in personhood. *Id.* at 83.

possess no right to punitive sanctions and may be subject only to therapeutic ones.[23]

Moreover, the right to be punished does not require abandoning attempts to rehabilitate *within systems of punishment.* As long as rehabilitation programs are noncoercive, they are consistent with the offender's right to be treated as a person.[24] Indeed, extending offenders an opportunity to make themselves "better persons" through rehabilitation programs administered in conjunction with punishment may pay the highest homage to the values of personal dignity and individual integrity.

With these considerations in mind, the appeal of the right to be punished becomes apparent. Given the alternatives of an indefinite period of therapy or a given period of punishment, the right to be punished becomes an important right that offenders may wish to assert. Unlike therapeutic sanctions, punishment offers the offender opportunities to plan his future accurately and to pay the price for his action within a system that treats him as a responsible moral actor.

While much of Morris's theory contrasts the virtues of an ideal sys-

23. Professor Morris specifically permits the use of "force and deception" with respect to "children" and the "mentally ill." *Id.* at 82-83. He does not define "children" or "mental illness," but presumably he is thinking primarily of individuals lacking capacity to reason. Very young or mentally ill offenders are denied exercise of their rights of personhood and hence their rights to be punished, because they lack the "capacity to choose on the basis of reasons presented to them." *Id.* at 86. We all have an obligation "to respond to children in such a way as to maximize the chances of their becoming persons." *Id.* at 83. By the same token, society has an obligation to provide treatment for mentally incapacitated individuals so that they may be "[brought] back to the community of persons." *Id.* at 86. Therefore, no loss of the right to be punished obtains where the state coercively "treats" youthful offenders or those suffering from mental impairments so long as they lack the capacity for rationality. Similarly, because the right to be punished is not triggered until an offender is found legally guilty, *see supra* note 5, Morris's theory permits the exercise of prosecutorial discretion in seeking alternatives to criminal prosecution, including coercive therapeutic or preventive dispostions, for offenders who, for one reason or another, cannot be criminally convicted.

24. Herbert Morris likely would agree with the following observations of his namesake, Norval Morris, regarding the relationship between rehabilitation and imprisonment:

> 'Rehabilitation,' whatever it means and whatever the programs that allegedly give it meaning, must cease to be a purpose of the prison sanction. This does *not* mean that the various developed treatment programs within prisons need to be abandoned; quite the contrary, they need expansion. But it does mean that they must not be seen as *purposive* in the sense that criminals are to be sent to prison *for* treatment. There is a sharp distinction between the purposes of incarcertaion and the opportunities for the training and assistance of prisoners that may be pursued within those purposes. The system is corrupted when we fail to preserve this distinction and this failure pervades the world's prison programs.

N. MORRIS, THE FUTURE OF IMPRISONMENT 14-15 (1974).

tem of punishment against those of a totally therapeutic response to deviancy, where those two approaches are the only alternatives,[25] he also argues that, whatever the alternatives, persons have a moral right to be punished.[26] Furthermore, this right is meaningful in the context of our present, somewhat mixed, criminal justice system, which often embraces aspects of both punishment and therapy.[27]

Not surprisingly, Morris's views have not escaped criticism. In particular, commentators object to his position that guilty offenders are morally entitled to punishment, and only to punishment, when they violate the law.[28] Less controversial, however, is Morris's more moderate claim that, if presented with coercive therapy as the only alternative to punishment, guilty offenders have a right to be punished.

Assuming that the right to be punished, at least in its less radical form, is philosophically credible, it appears promising as a legal principle to illuminate certain problem areas of current criminal and mental health law.[29] The implications of the right to be punished are no less significant in the context of juvenile justice. To appreciate this possible significance, it is first necessary to examine the general nature of young people's rights.

III. THE RIGHTS OF YOUNG PEOPLE

While the courts have long dealt with various private law matters involving children, the idea that kids might have legally enforceable "civil" rights against the state, and even their parents, is relatively new.[30] It is now widely recognized, however, that children do possess basic human, *"civil"* rights. Indeed, a veritable "children rights"

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25. Morris, *supra* note 1, at 74-79.
26. *Id.* at 80.
27. Morris stated:

> In the world as we now understand it, there are those who do wrong and who have a right to be responded to as persons who have done wrong. And there are those who have not done wrong but who are suffering from illnesses that in a variety of ways interfere with their capacity to live their lives as complete persons. These persons who are ill have a . . . right to be treated as persons. When an individual is ill he is entitled to that assistance which will make it possible for him to resume his functioning as a person.

Id. at 86.

28. *See, e.g.*, G. FLETCHER, RETHINKING CRIMINAL LAW 417-18 (1978); Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 617-18 & n.27 (1978); Wasserstrom, *Some Problems with Theories of Punishment*, in JUSTICE AND PUNISHMENT 173, 187-88, 191-94 (J. Cederblom & W. Blizek eds. 1977). *See* Hospers, *Retribution: The Ethics of Punishment*, in ASSESSING THE CRIMINAL, 181, 184, 196-209 (R. Barnett & J. Hagel III eds. 1977).
29. *See* Gardner, *supra* note 1, at 854-61.
30. *See* W. WADLINGTON, C. WHITEBREAD & S. DAVIS, CHILDREN IN THE LEGAL SYSTEM 47-48 (1983) [hereinafter W. WADLINGTON].

movement has emerged,[31] spawned by some, but by no means all, of the United States Supreme Court cases in the area.[32] Although it may now be conceded that young people have rights, the theoretical nature of those rights remains controversial.[33]

A. Protection Rights

Under the predominant view, children's rights are based on notions of protection. Minors, including adolescents, are considered to be a class distinct from autonomous persons and thus not entitled to the same civil rights enjoyed by adults. Rather, young people are entitled to grow to maturity in an environment manifesting love, affection, discipline, guidance and any other factor conducive to the development of those traits essential to responsible adulthood.[34] Deviant youngsters as "persons in the making" are considered appropriate subjects for treatment within the traditional, therapeutically oriented, juvenile system.

1. The Traditional Juvenile Justice Movement

From early times, the law has differentiated violations of criminal rules by children and those of their adult counterparts.[35] Until the

31. *Id.*

32. Two models of children's rights, the protectionist and personhood theories, exist. *See infra* notes 34-69 and accompanying text. The question of whether the Supreme Court has consistently embraced either theory is a matter largely beyond the scope of this Article but which, nevertheless, has beguiled the commentators. Some see the Court's recent expansion of constitutional rights as consistent with the protectionist position. *See, e.g.*, Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663 (1987)[hereinafter *Developing Student Expression*]; Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 60 [hereinafter *Children's Liberation*]. Other commentators read the Court's record as recognizing the personhood/autonomy theory, at least in certain circumstances. *See, e.g.*, Richards, *The Individual, the Family and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 56 (1980).

For discussion of the Court's "children's rights" cases, see Gardner, *Punitive Juvenile Justice: Some Observations on a Recent Trend*, 10 INT'L J.L. AND PSYCH. 129, 137-38 (1987) [hereinafter *Punitive Juvenile Justice*].

33. *Punitive Juvenile Justice*, *supra* note 32.

34. For development of the "protectionist" theory discussed in the text, see *Developing Student Expression*, *supra* note 32, and *Children's Liberation*, *supra* note 32.

35. Under Roman law, children enjoyed immunity from criminal liability until reaching seven years of age. Ludwig, *Rationale of Responsibility for Young Offenders*, 29 NEB. L. REV. 521, 525 (1950). While the Mosaic Code prescribed severe penalties, including death, against children committing certain offenses against their parents, the severity of these penalties was mitigated in practice and later by explicit provision of the Talmud delimiting criminal responsibility through a tripartite division of infancy (birth to six years), impubescence (seven years to puberty), and adolescence (puberty to the age of majority—twenty years). F.

nineteenth century, most legal systems dealt with youthful offenders through the same criminal justice machinery applied to adults, but recognized chronological age as the basis for a substantive defense[36] as well as a ground for mitigating punishment.[37]

While juvenile law reform quietly began with New York's House of Refuge in 1825, the creation of the first juvenile court system by the Illinois legislature in 1899 immediately triggered a worldwide movement. By 1945, every United States jurisdiction, state and federal, as well as most European nations, followed the Illinois lead by creating their own juvenile justice alternatives to the traditional criminal law.[38] These new systems handled the bulk of juvenile crime but, virtually from their inception, provided mechanisms to "waive" juvenile court jurisdiction in certain cases to the criminal courts.[39] The juve-

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LUDWIG, YOUTH AND THE LAW 12-36 (1955). Children were afforded similar leniency under Moslem law. *Id.*

In early English law, prior to its recognition as a substantive defense, infancy operated as a basis for pardoning the actions of the offending child. Kean, *The History of the Criminal Liability of Children*, 53 L.Q. REV. 364 (1937). By the sixteenth century, the common-law infancy defense, see *infra* note 36, had taken definite form. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1009 (1932). For an historical account of the infancy defense, see Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426-37 (1939). Many of the ideas in this section of the Article are derived from *Punitive Juvenile Justice*, *supra* note 32.

36. Historically, no separate juvenile court existed. Recognizing that children lack the adult measure of culpability, the common law embraced a special doctrine for children, the infancy defense, which embodied a series of presumptions reflecting children's incapacity to take responsibility for their actions. Children under the age of seven were conclusively presumed incapable of criminal responsibility while those over the age of fourteen were regarded as adults and presumed capable of committing crimes. Children between the ages of seven and fourteen presumptively lacked criminal capacity and could be punished only if the state showed that the child knew and understood the consequences of his act. Therefore, for youths in this age group the state was required to show not only that they committed the crime but also that they possessed the general capacity to be responsible.

Punitive Juvenile Justice, *supra* note 32, at 144 (footnotes omitted).

37. *See supra* note 35. Until the first American juvenile court system in 1899, "[c]hildren were dealt with on a relatively informal basis in the regular criminal courts and children who exhibited antisocial behavior were often treated as being dependent or neglected rather than as miniature criminals." Shepherd, *Challenging the Rehabilitative Justification for Indeterminate Sentencing in the Juvenile Justice System: The Right to Punishment*, 21 ST. LOUIS U.L.J. 12, 16 (1977). "[C]olonial and post-colonial period sentencing practices appear to have shielded most juveniles from especially harsh dispositions and included such 'creative sentencing alternatives' as lengthy apprenticeships in lieu of strict reliance upon more traditional penal sanctions." Thomas & Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 444 n.12 (1985).

38. *Punitive Juvenile Justice*, *supra* note 32, at 129-30.

39. In 1903, only four years after its establishment, the Chicago Juvenile Court transferred 14 children to the adult criminal system. Wizner, *Discretionary Waiver of*

nile court movement was founded on a promise to rehabilitate wayward youth by offering individualized and nonpunitive dispositions according to the minor's needs[40] without the encumbrances of the adversarial model familiar to the criminal system.[41] Under the guise of *parens patriae*,[42] juvenile court functionaries were to promote the welfare of the offender,[43] thus rendering unnecessary, indeed counter-

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Juvenile Court Jurisdiction: An Invitation to Procedural Arbitrariness, 3 CRIM. JUST. ETHICS 41, 42 (1984). That trend continued until by the 1970s every American jurisdiction had laws authorizing or requiring criminal prosecution of certain minors in adult courts. *Id. See also* Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 516 n.5 (1978). While waiver is generally reserved for those youths whose "highly visible, serious, or repetitive criminality raises legitimate concern for public safety or community outrage," Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 MINN. L. REV. 165, 171 (1980) [hereinafter *Juvenile Court*], many youths who commit minor offenses are dealt with in criminal court, perhaps because of the unavailability of fines as a juvenile court sanction. Wizner, *supra*, at 44-45.

40. The fundamental concern of juvenile courts towards child offenders was with "[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interests of the state to save him from a downward career." 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. McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REFORM 181, 207 (1977).

The rehabilitative objectives of the juvenile system were characterized by a system of indeterminate sentencing in which type and duration of sanction were dictated by the "best interests" of the offenders rather than the seriousness of the offense. Wizner & Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120, 1121 (1977).

41. > The child—essentially good, as [the early reformers] saw it—was to be made 'to feel that he is the object of [the state's] care and solicitude,' not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. . . . [T]he procedures were to be 'clinical' rather than punitive.

In re Gault, 387 U.S. 1, 15-16 (1967)(quoting Mack, *supra* note 40, at 120). The infatuation with procedural informality was explained by an early court:

> To save a child from becoming a criminal . . . the legislature surely may provide for the salvation of such a child . . . by bringing it into one of the courts of the state *without any process at all*. . . . When the child gets there and the court, with the power to save it, determines on its salvation, and not its punishment, *it is immaterial how it got there*.

Commonwealth v. Fisher, 213 Pa. 48, 53, 62 A. 198, 200 (1905)(emphasis added).

42. The English concept of *parens patriae*, applied historically by chancery courts, permitted the court 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. S. DAVIS, RIGHTS OF JUVENILES 1-2 (2d ed. 1980). *See generally* Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971).

43. *Parens patriae* was the theoretical justification for coercive court commitments

productive, the procedural protections of the criminal system.[44]

The juvenile court movement assumed that young people under an articulated statutory age (sometimes as high as 21 years of age) are incapable of rational decisionmaking and thus lack the capacity for moral accountability assumed by the punitive model. Under this view, youthful offenders are entitled to help, not punishment, and the state as a benign parent should intervene until its help is no longer necessary, even if that requires institutionalizing the youth in the state "reform school" for the entire period of his minority.

2. *The Right to Rehabilitation*

Assuming that punishment in and of itself carries no inherent therapeutic benefit,[45] the right to be punished cannot be found within the protectionist tradition that defines the nature of juvenile offenders' rights in terms of the rehabilitative ideal. Statutes routinely artic-

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for both neglected and criminal children. Early juvenile justice theory drew no distinction between offending and victimized children. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN L. REV. 1187, 1192-93 (1970).

44. *See supra* note 41. In extolling the virtues of a procedurally flexible juvenile court, Chief Justice Burger argued that the "sensitive problems of youthful offenders" should be dealt with through "benevolent and less formal means than criminal courts" which "traumatize" youthful offenders. *In re* Winship, 397 U.S. 358, 376 (1970)(Burger, C.J., dissenting). Professor Barry Feld summarized the traditional rationale for, and the extent of, relaxed procedure in juvenile court:

> In distinguishing children from adult offenders, the juvenile court . . . rejected the procedures of criminal prosecution. It introduced a euphemistic vocabulary and a physically separate court building to avoid the stigma of adult prosecutions, and it modified courtroom procedures to eliminate any implication of a criminal proceeding. For example, proceedings were initiated by a petition in the welfare of the child, rather than by a criminal complaint. Because the important issues involved the child's background and welfare rather than the commission of a specific crime, courts dispensed with juries, lawyers, rules of evidence, and formal procedures. To avoid stigmatization, hearings were confidential and private, access to court records was limited, and youths were found to be "delinquent" rather than guilty of an offense. To make proceedings more personal and private, the judge was supposed to sit next to the child while court personnel presented a treatment plan to meet the child's needs as determined by a background investigation identifying the sources of the child's misconduct. Dispositions were indeterminate and nonproportional and could continue for the duration of minority. The events that brought the child before the court affected neither the degree nor the duration of intervention because each child's needs differed and no limits could be defined in advance. The dispositional process was designed to determine why the child was in court in the first instance and what could be done to change the character, attitude, and behavior of the youth to prevent a reappearance.

Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 150-51 (1984)(footnotes omitted).

45. Indeed, the traditional juvenile court wisdom is that punishment is antithetical to the aims of the rehabilitative ideal. *See supra* notes 41-44 and accompanying text.

ulate "rehabilitation" as the goal of juvenile justice, thus creating, in the eyes of some courts, "rights" to such dispositions.[46] Occasionally, theorists argue that youthful offenders possess rights to rehabilitation irrespective of any statutorily created interests.[47] Such views suggest that subjecting young people to punishment violates a basic *prima facie* human right to be "helped" rather than made to suffer the unpleasant effects of punishment.[48]

B. Personhood Rights

In contrast to the protectionist rights view, a quite different theory of children's rights recently has emerged. Recent social science literature suggests that adolescents[49] may be able to make rational decisions as effectively as adults.[50] Studies of adolescents' judgments about medical and psychiatric treatment, abortion, and consent to participate in research show little difference between adult and adolescent decisionmaking.[51] Moreover, various studies indicate that most ado-

46. *See, e.g.*, Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974).

47. Judge Skelly Wright, for example, appears to have accepted the notion that juveniles have a constitutional right to therapeutic, nonpunitive dispositions. Based on his view that procedural due process requires certain protections prior to waivers to criminal court, Judge Wright opposes "legislative waivers" which permit prosecutors to bring certain defined classes of offenses in criminal court without affording the juvenile an opportunity to show that juvenile court disposition is appropriate. *See* United States v. Bland, 472 F.2d 1329, 1338-50 (D.C. Cir. 1972)(Wright, J., dissenting). In order for procedural protections to be required, some constitutionally recognizable substantive interest must be offended by legislative waivers. Application of due process requires a "two-stage analysis: We must first ask whether the asserted individual interests are encompassed within the [due process clauses'] protection of 'life, liberty, or property'; if protected interests are implicated, we then must decide what procedures constitute 'due process of law.'" Ingraham v. Wright, 430 U.S. 651, 672 (1977). Presumably, therefore, Judge Wright must have in mind some substantive "liberty" or "property" interest of minors, not just statutorily created but grounded in the Constitution itself, in having their cases disposed of in juvenile court. The most plausible substantive interest is perhaps a juvenile "right to rehabilitation." Without such a substantive interest, his procedural due process considerations could never be triggered.

48. Defenders of the right to rehabilitation often recognize that if proper procedural protections are afforded, juveniles may be "waived" from juvenile to criminal court. *See supra* note 47. The right to rehabilitation is thus best understood as a *prima facie* right to non-punitive, rehabilitative disposition within the juvenile system.

49. While "adolescence" often is defined as the period between puberty and the age of majority, *see, e.g.*, BLACK'S LAW DICTIONARY 45 (5th ed. 1979), it is also sometimes understood both as a period and a transition, a term of years when those not yet adult are engaged in the process of becoming an adult. F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE x (1982).

50. The social science data are summarized in Melton, *Developmental Psychology and the Law, The State of the Art*, 22 J. FAM. L. 445, 462-66 (1984).

51. These studies also are summarized by Professor Gary Melton. *Id.*; Melton, *Mak-*

lescents, unlike most pre-adolescent children, possess the same moral reasoning skills as adults.[52] Such data has influenced some commentators to urge that "the law should accord the considered choices of competent adolescents the same treatment it accords similar choices of adults."[53] In any event, the social science data gives credibility to the notion that adolescent youngsters should indeed have a *right to be* held accountable for their acts of delinquency.[54]

1. The New Juvenile Justice

For a variety of reasons, the traditional rehabilitative model of juvenile justice recently has taken on markedly punitive aspects.[55] A revolution in substantive theory presently is occurring as various jurisdictions express disenchantment with the rehabilitative ideal and embrace punitive sanctions for youthful offenders.[56] Principles of

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ing Room for Psychology in Miranda Doctrine: Juveniles' Waiver of Rights, 7 L. & HUM. BEHAV. 67, 81-82 (1984) [hereinafter *Making Room*]. In the last cited work, Melton discusses Professor Thomas Grisso's "enigmatic" research which, apparently contrary to the conclusions of other studies, finds that juveniles are less able than adults to appreciate the meaning of certain legal principles, particularly *Miranda* rights. *Making Room*, *supra* at 81.

52. *See generally* Batey, *The Rights of Adolescents*, 23 WM. & MARY L. REV. 363 (1982).

53. *Id.* at 373.

54. "Psychological research concerning legal socialization, internalization of social and legal expectations, and ethical decision making . . . indicates that by about age fourteen a youth has acquired most of the legal and moral values that will guide his behavior through later life." Feld, *The Decision to Seek Criminal Charges: Just Deserts and the Waiver Decision*, 3 CRIM. JUST. ETHICS 27, 37 (1984). Therefore, some conclude: "There is no compelling or convincing evidence that persons [in late adolescence] differ significantly from persons [over the age of majority] in their capacity to understand the outcomes and consequences of their acts. . . . [S]erious crime should be treated seriously regardless of the offender's age." Confronting Youth Crime, Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders 25 (1978).

55. Four factors account for the shift toward punitive juvenile justice: (1) the Supreme Court's criminalization of juvenile courts; (2) a general rebirth of retributive theories of punishment throughout the legal system; (3) an expanded view of children's capacity for responsibility; and (4) perceived increases in the rate of serious crime committed by juveniles. *Punitive Juvenile Justice*, *supra* note 32, at 133-40.

56. Punitive theory is manifested by the movement towards holding juveniles accountable for their delinquent acts through proportioning sanctions to the seriousness of the offense. *See, e.g.*, WASH. REV. CODE § 13.40.010(2)(c) & (d) (West Supp. 1988) (which aims, *inter alia*, to "[m]ake the juvenile offender accountable for his or her criminal behavior" by "[p]rovid[ing] for punishment commensurate with the age, crime, and criminal history of the juvenile offender"). *See also* MINN. STAT. § 260.011(2) (West Supp. 1980)(which seeks, *inter alia*, to "develop individual responsibility for lawful behavior"); Dawson, *The Third Justice System: The New Juvenile-Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 ST. MARY'S L.J. 943 (1988)(new determinate sentencing scheme for juvenile courts in Texas which imposes determinate

personal responsibility and accountability, foreign to the earlier premises of juvenile justice,[57] now are routinely coming to the forefront as offending minors receive their "just deserts"[58] through "determinate sentencing"[59] systems that proportion punishment to the gravity of their offenses. In light of those developments, some leading commentators advocate the demise of juvenile court jurisdiction in delinquency cases and seek a return to a single criminal system for adults and minors alike.[60]

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sentencing for six serious, violent offenses). For a discussion of New York's move towards a system of punishment, see Note, *Rehabilitation vs. Punishment: A Comparative Analysis of the Juvenile Justice Systems in Massachusetts and New York*, 21 SUFFOLK U.L. REV. 1091, 1107-15 (1987). For a detailed list of jurisdictions adopting punitive, or partially punitive, models of juvenile justice, see Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 523 n.82 (1984). The standards promulgated by the Joint Commission on Juvenile Justice of the American Bar Association and the Institute of Judicial Administration systematically reject rehabilitation as the primary goal of the juvenile justice system and adopt instead, *inter alia*, as a general purpose "to reduce juvenile crime by maintaining the integrity of the substantive law proscribing certain behavior and by developing individual responsibility for lawful behavior." INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS, DISPOSITIONS 1.1, at 5 (1980)[hereinafter STANDARDS]. For commentary on the STANDARDS, see McCarthy, *Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale*, 52 N.Y.U. L. REV. 1093 (1977); Wizner & Keller, *supra* note 40.

57. *See supra* notes 35-48 and accompanying text.

58. The term "just deserts" describes the retributive justice model of punishment which proportions sanctions to the gravity of offense. *See generally* A. VON HIRSCH, *supra* note 1. While the sentencing aims of the juvenile penal codes seldom expressly define sentencing policy in terms of the "just deserts" rubric, the concept seems implicit in many of the requirements for proportionality. *E.g.*, STANDARDS, *supra* note 56, 2.1, at 6 (*"In choosing among statutorily permissible dispositions, the court should employ the least restrictive . . . disposition that is appropriate to the seriousness of the offense, as modified by the degree of culpability"*)(emphasis added); MINN. STAT. § 260.011(2) (West Supp. 1988). It must be emphasized, however, that none of the new juvenile justice models totally reject such utilitarian concerns as deterrence, incapacitation, and even rehabilitation *See, e.g.*, WASH. REV. CODE § 13.40.010(2)(a), (f), (g) & (j) (West Supp. 1988)(in addition to any retributive considerations, the system must "[p]rotect the citizenry from criminal behavior, provide community-based dispositions whenever 'consistent with public safety,' and respond to the needs of youthful offenders").

59. As used in this Article, the term "determinate sentencing" refers to legislatively determining punishment in either a fixed or narrowly variable term in reference to the offense. Thus, the discretion of judges, other sentencing authorities, and correctional authorities is vastly curtailed, if not eliminated altogether. *See generally* Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, 1980 DUKE L.J. 1103.

60. N. KITTRIE, THE RIGHT TO BE DIFFERENT 107 (1971); *Juvenile Court*, *supra* note 39, at 242; Fox, *Abolishing the Juvenile Court*, HARV. L. SCH. BULL. 22 (Spring 1977); McCarthy, *supra* note 56, at 1116-17; Wizner & Keller, *supra* note 40, at 1132-35.

The new juvenile justice reflects a general disillusionment with the ability of the juvenile justice system to live up to its traditional rehabilitative promise. Because punishment is justifiable only if its recipient is a "person" capable of moral agency, the movement toward a punitive model seriously questions the existing view that juveniles lack capacity for rational decisionmaking.

2. *The Right to be Punished*

Recognizing that adolescents possess capacity for rational decisionmaking means that they meet the qualifications for "personhood" and thus are entitled to punishment for their culpable offenses.[61] While the right to be punished requires holding adolescents accountable for their offenses, the extent of their accountability generally should not be synonymous with that of similarly situated adult offenders.[62] Developmental differences generally render adolescent persons less culpable or criminally responsible than their adult counterparts.[63] Adolescent persons lack life experience and thus might best be viewed as "semi-autonomous,"[64] "incomplete adults."[65] It is therefore unreal-

61. Professor Morris likely would agree with the conclusion in the text. Even for children not yet "persons," Morris has advocated the right to be punished:

> There is an obligation imposed upon on us all, unlike that we have with respect to animals, to respond to children in such a way as to maximize the chances of their becoming persons. This may well impose upon us the obligation to treat them as persons from a very early age, that is, to respect their choices and to place upon them the responsibility for the choices to be made. There is no need to say that there is a close connection between how we respond to them and what they become. It also imposes upon us all the duty to display constantly the qualities of a person, for what they become they will largely become because of what they learn from us is acceptable behavior.

Morris, *supra* note 1, at 83.

62. In situations justifying "waiver" to the criminal system, *see supra* note 39, youthful offenders may be punished similarly to adults. *But see* Thompson v. Oklahoma, 108 S. Ct. 2687 (1988)(holding that an offender could not be executed for a crime he committed at age fifteen).

63. After reviewing the social science literature on the subject, one commentator concluded: "[A]dolescent children may be generally regarded as possessing the capacity to be culpable, although quite often not at the level one would expect of a mature adult." Walkover, *supra* note 56, at 543. Thus, the social science research, *see supra* text accompanying notes 49-54, establishes that children, at least by adolescence, may justifiably be held accountable for their delinquent acts but, because they lack important life experience, not to the extent of responsibility extended to adult criminals. *See also* Lasswell & Donnelly, *The Continuing Debate Over Responsibility: An Introduction to Isolating the Condemnation Sanction*, 68 YALE L.J. 869, 884-85 (1959); Zimring, *Pursuing Juvenile Justice: Comments on Some Recent Reform Proposals*, 55 J. OF URB. L. 631, 643-45 (1978).

64. F. ZIMRING, *supra* note 49, at 99-116.

65. "Juveniles may be viewed as incomplete adults, lacking in full moral and experiential development." STANDARDS, *supra* note 56, at 19 n.5 (quoting Cohen, Posi-

istic and unfair to hold them to adult responsibility standards. As Franklin Zimring stated:

> To impose full responsibility because adolescents have begun to make life choices is much like expecting every new bride to be an instant Betty Crocker. . . . [Juvenile offenders must be protected from the full burden of adult responsibility while being] pushed along by degrees toward the moral and legal accountability that we consider appropriate to adulthood.[66]

Persons possess the right to punishment proportionate to the seriousness of their offenses, taking into account individual culpability factors. Given their semi-autonomous status, adolescent persons, therefore, possess the right to punishment but to punishment scaled down from that imposed upon adults. In the capital punishment context, the Supreme Court recently precluded use of the death penalty upon an offender who committed his crime while only fifteen years old. A plurality of the Court said: "[T]he experience of mankind, as well as the long history of our law, [reveals] that the normal 15-year-old is not prepared to assume the full responsibilities of an adult."[67]

These considerations support the view that adolescent persons possess a right to be punished but, except in cases appropriately "waived" to criminal court,[68] less severely than similarly situated adults. To avoid undue stigma associated with the adult "criminal" system, punishment for juvenile delinquency should occur within a separate system. As the author has noted elsewhere:

> Assuming that youthful offenders are less culpable than their adult counterparts, they should no more be saddled with the same stigma imposed upon adult offenders than with the same punishment. While being branded 'delinquent' by a punitive juvenile system is surely stigmatic, it may well carry fewer negative connotations, both in the minds of offenders and to the community at large, than flow from being convicted a 'criminal' by the adult court.[69]

Moreover, if incarceration is to be the form of punishment,[70] respect for adolescent personhood may require confinement separate from adult offenders given the risks of exploitation, sexual and otherwise, of youthful offenders at the hands of physically stronger, adult fellow-inmates.

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tion Paper (Juvenile Justice Standards Project, No. 18, 1974)). *See* F. ZIMRING, *supra* note 49, at 21, 89-98.

66. F. ZIMRING, *supra* note 49, at 95-96.

67. Thompson v. Oklahoma, 108 S. Ct. 2687, 2693 (1988).

68. *See supra* note 39.

69. *Punitive Juvenile Justice*, *supra* note 32, at 148-49.

70. Because incarceration is costly, both in humanitarian and economic terms, it should be imposed only where less onerous forms of punishment (probation, house arrest, fines, restitution, etc.) are inadequate to achieve the purposes underlying the punitive sanction. *See* N. MORRIS, *supra*, note 24, at 58-84.

C. Accommodating Protection and Personhood Rights

The discussion thus far has suggested that juvenile offenders may possess two kinds of seemingly conflicting rights: protection rights to rehabilitation and personhood rights to be punished. In fact, however, the two kinds of rights may be accommodated.

Pre-adolescent offenders often lack capacity to take responsibility for their actions.[71] In the absence of such capacity, they cannot justly be punished[72] and must be dealt with by the state therapeutically, if at all.[73] Likewise, adolescent offenders who lack normal competency for rational choice are not entitled to personhood rights and instead possess whatever rights protectionist theory entails. Adolescent "persons," on the other hand, possess the right to be punished in lieu of being rehabilitated.

Consistent with the theory of personhood, youths possessing the right to be punished may choose not to assert their right. They may, for example, choose to accept a rehabilitative or therapeutic disposition in lieu of a punitive one if the state offers such nonpunitive alternatives. "Waivers" of, or failures to assert, the right to be punished are not inconsistent with Professor Morris's description of the "inalienable" right to be treated as a person.[74] What cannot be "alienated" is the right to be treated as a rational being whose choices are respected.[75] So long as an offender competently and rationally chooses to accept a nonpunitive disposition, no violation of his right to be treated as a person exists. If the offender competently chooses to withdraw a waiver once made and to assert his right to be punished, he should be permitted to do so. Because the offender's initial waiver of the right to be punished would have rendered his nonpunitive detention essentially consensual, his desire to withdraw his waiver and to assert his punishment right would invalidate his consent. If the period of nonpunitive detention has exceeded that which could have been im-

71. "Review of [the social science data] confirms our intuitive and experiential judgments concerning children. . . . [I]t can safely be said that unlike an adult, a preadolescent's capacity to be culpable cannot be assumed." Walkover, *supra* note 56, at 543.

72. *See Punitive Juvenile Justice*, *supra* note 32, at 143-46.

73. This Article takes no position on the question of whether or not protection rights entail a right to rehabilitative disposition for juvenile offenders who do not qualify for the right to be punished.

74. Although presumably one could not waive the right to be free from cruel and unusual punishments and thereby consent to inhuman or barbaric punishments, see Note, *In Defense of Behavior Modification for Prisoners: Eighth Amendment Considerations*, 18 ARIZ. L. REV. 110, 141 (1976), waiver of an eighth amendment right to be punished would appear to be constitutionally permissible as long as it was made competently, especially if the offender is offered an opportunity to receive meaningful therapy. *See infra* notes 91-110 and accompanying text; Note, *supra*, at 140-45.

75. *See* Morris, *supra* note 1, at 83-85.

posed as punishment, he should be freed immediately. If the period of nonpunitive detention has not exceeded the term set for punishment, the offender should be punished no more than the set period remaining.[76]

IV. A CONSTITUTIONAL RIGHT TO BE PUNISHED?[77]

A leading constitutional scholar has suggested that a fundamental purpose of our constitutional scheme is the "preservation of 'those attributes of an individual which are irreducible in his selfhood.' "[78] Inherent in such purpose is the protection of an unarticulated "right of personhood," manifested by "the obviously incomplete listing in the Bill of Rights" and woven throughout the "spirit and structure" of the Constitution's "spare text."[79]

Given such an understanding of the Constitution and assuming that Morris's moral theory is sound, it is logical to suggest that the right to be punished, because it is an aspect of the right to be treated as a persoh, might itself be an interest worthy of constitutional protection.[80] Although such protection apparently has never been recog-

76. Unless credit is given for the period the offender has been nonpunitively detained, he might be penalized for his waiver of this right to be punished. For example, an offender who could be punished for a maximum of one year for his offense might actually be restricted for three years if he is given a full one-year sentence when he asserts his right to be punished after having accepted two years of compulsory therapy in lieu of punishment. To the extent that it is desirable for offenders in certain circumstances to accept therapy in lieu of punishment, waivers of the right to be punished should be encouraged and not penalized.

77. Much of the ensuing discussion of constitutional rights is derived from the author's earlier work. *See* Gardner, *supra* note 1, at 846-54.

78. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 889 (1978)(quoting Freund, 52 ALI ANN. MTG. 42-43 (1975)).

79. *Id.* at 893.

80. The following seems particularly relevant in the context of the right to be punished as that right conflicts with state impositions of coercive therapy:

> The very idea of a fundamental right of personhood rests on the conviction that, even though one's identity is constantly and profoundly shaped by the rewards and penalties, the exhortations and scarcities and constraints of one's social environment, the "personhood" resulting from this process is sufficiently "one's own" to be deemed fundamental in confrontation with the one entity that retains a monopoly over legitimate violence—the government. Thus active coercion by government . . . to alter a person's being, or deliberate neglect by government which permits a being to suffer, are conceived as qualitatively different from the passive, incremental coercion that shapes all of life and for which no one bears precise responsibility.
>
> Although relevant factors can be identified, neither the artistry nor the archaeology of constitutional doctrine can determine finally the extent to which such a right of personhood . . . can be asserted against governmental control or deliberate governmental indifference.

nized, it could sensibly be generated under a variety of theories.[81] Yet the cruel and unusual punishments clause of the eighth amendment, because it is the only Bill of Rights text specifically dealing with substantive rights regarding punishment and because it has been a particularly rich source of creative constitutional law,[82] seems the most plausible place to find constitutional underpinnings for the right to be punished.

The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[83] Although the amendment traditionally has been read as creating a right in criminal offenders[84] to be free from certain kinds, and perhaps excessive degrees, of punishment,[85] its text certainly does not foreclose a corresponding right in such offenders to receive "noncruel and usual punishments."

It is probably impossible to prove that the drafters of the eighth amendment intended it to establish a basis for the right to be punished, although, as discussed below, neither can it be proven that the amendment's authors rejected, or necessarily would have rejected, such a reading. Moreover, the underlying values protected by the amendment, as well as at least one Supreme Court case to be analyzed later, give positive support for the right. At the outset, however, it should be noted that the eighth amendment discussion which follows is not intended to be a thorough exploration of the possible eighth amendment roots of the right to be punished. Rather, the attempt here is merely to suggest a tentative constitutional basis for the right.

Id. at 890.

Another commentator suggested a legal right somewhat similar to Professor Morris's right to be punished, stating:

> The structure of the criminal justice system leaves intact the individual's ability to disobey the law and take the consequences. Participation in this system on the same terms as one's fellow citizens is a legal right. I would say not that the society necessarily recognizes a moral right to disobey the law and take the consequences, but rather that the structure of the criminal justice system recognizes the *possibility* of such a right in every set of circumstances.

Burns, *Behavior Modification as a Punishment*, 22 AM. J. JURIS. 19, 34 (1977).

81. Substantive due process would be a leading candidate. *See* L. TRIBE, *supra* note 78, at 893-96. Another basis might be the "penumbra of rights" theory expressed in Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

82. "[The eighth amendment] has become one of the new frontiers of creative constitutional law." L. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT xiii (1975).

83. U.S. CONST. amend. VIII.

84. Whether the framers wished to restrict the eighth amendment to criminal contexts is subject to controversy. *See* Rosenberg, Ingraham v. Wright: *The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75, 76-80 (1978).

85. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

A. Eighth Amendment Legislative History

The legislative history of the eighth amendment is scant, and what little exists generally is vague and equivocal.[86] The history shows that the amendment primarily was meant to limit punishment.[87] It appears, therefore, that the framers did not explicitly incorporate a right to be punished into the eighth amendment.

To suggest that something like Morris's theory simply might have been taken for granted by the framers may not be entirely fanciful. Ideas similar to Morris's were being expressed by Immanuel Kant at roughly the time the eighth amendment was debated and enacted,[88] and thus possibly could have been a part of the consciousness of the constitutional drafters.[89] Moreover, the therapeutic and rehabilitative

86. Rosenberg, *supra* note 84, at 79-80.

87. *See generally* Granucci, *supra* note 85; *see also* Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 992-95 (1978).

88. Although Kant apparently did not specifically espouse a right to be punished, he did emphasize the right to be treated as a person. "[R]ational beings . . . are called *persons*, because their very nature points them out as ends in themselves, that is, as something which must not be used merely as means, and so far therefore restricts freedom of action (and is an object of respect)." I. Kant, *Fundamental Principles of the Metaphysics of Morals*, in THE ESSSENTIAL KANT 295, 330 (A. Zweig ed. 1970). Kant related the right to be treated as a person to the context of punishment:

> [Judicial] punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of Real Right. Against such treatment his Inborn Personality has a Right to protect him, even although he may be condemned to lose his Civil Personality. He must first be found guilty and *punishable*, before there can be any thought of drawing from his Punishment any benefit for himself or his fellow-citizens. The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it.

I. KANT, THE PHILOSOPHY OF LAW 195 (W. Hastie trans. 1887)(1st ed. 1796).

89. Professor David Richards suggests that in drafting the Bill of Rights the framers intended to express a "radical vision of . . . rights" in order to give life to the "moral implications of human personality." Richards, *supra* note 32, at 6-7. The Constitution was conceived as a means of protecting personal autonomy, "the central value of moral personality." *Id.* at 8. Such a view of man, traced directly to Kant and others, repudiates the paternalism of Plato's "therapeutic state," which permitted the "benevolent physician" to "completely control the life of the disabled patient." *Id.* at 6-14. Guilty offenders' assertions of a right to be punished for their offenses, at least as opposed to being "treated" for them, thus would seem perfectly consistent with, indeed required by, the theory of human autonomy and personal responsibility embraced by the founding fathers.

Some of Kant's more particular views on punishment also might have shaped American punishment theory at the time the eighth amendment was drafted. *See*

approach toward crime was essentially a nineteenth-century phenomenon.[90] Therefore, punishment of criminal offenders probably was the only available alternative at the time the eighth amendment was adopted.[91] If so, the constitutional drafters would have found no need to specify constitutional protection of the right to be punished, however central such a concept might have been. Perhaps this explains why it was not until the nineteenth-century advent of "the rehabilitative ideal" that the right to be punished was first explicitly articulated by Hegel.[92]

If these historical considerations are plausible for adults, they are equally so for juvenile offenders who were dealt with exclusively within the criminal system at the time the Bill of Rights was drafted. Subject to the defense of infancy, which would render most adolescents liable for punishment,[93] youthful offenders were subjected to the same system of sanctions imposed upon adult offenders.

B. Eighth Amendment Values

Although an eighth amendment right to be punished may find no

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Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 845-47, 853-55 (1972)(the principle of proportioning punishment to offense, a central concept of Kantian, as well as of utilitarian philosophy of punishment, "stands as the underlying principle most surely relied upon by the [eighth] amendment's framers"). Kant's *lex talionis* theory also seems to have found American expression in the ideas of Thomas Jefferson. *See* Kaufman, *Retribution and the Ethics of Punishment*, in ASSESSING THE CRIMINAL 211, 223 (R. Barnett & J. Hagel eds. 1977).

90. *See* Dershowitz, *Background Paper*, in Fair and Certain Punishment, Report of the Twentieth Century Fund Task Force on Criminal Sentencing 83, 84 (1976). *See also* D. ROTHMAN, THE DISCOVERY OF THE ASYLUM 3-56 (1971). In the Jacksonian period, a widespread move toward the therapeutic and rehabilitative treatment of criminal offenders began. The Jacksonian notion of the perceived causes of crime and deviant behavior contrasted sharply with the Calvinist view of the depraved nature of man held by earlier colonists. *See id.* at 57-108; Dershowitz, *supra*, at 85-91. *See also* H. BARNES, THE STORY OF PUNISHMENT 113-49 (rev. 2d ed. 1972).

91. As David J. Rothman notes, "[t]he two most widely used penalties in the eighteenth century were the fine and the whip." D. ROTHMAN, *supra* note 90, at 48. He also points out that only

> [r]arely . . . did the statutes rely upon institutionalization. A sentence of imprisonment was uncommon, never used alone. Local jails held men caught up in the *process of judgment*, not those who had completed it; persons awaiting trial, those convicted but not yet punished, debtors who had still to meet their obligations. The idea of serving time in a prison as a method of correction was the invention of a later generation.

Id. See also Dershowitz, *supra* note 90, at 83.

92. *See* Hegel, *Punishment as a Right*, in PHILOSOPHICAL PERSPECTIVES, *supra* note 1, at 107. Hegel's theory concerning the right to be punished appeared in his *The Philosophy of Right*, first published in 1821. *See* 3 ENCYCLOPEDIA PHIL. 435 (1972).

93. *See supra* note 36 and accompanying text.

direct support from legislative history, it fares better when considered in light of the values and policies underlying the cruel and unusual punishments clause. Indeed, the Supreme Court seems to have given explicit recognition to the principle that punishment must be consistent with one's right to be treated as a person. In *Trop v. Dulles*,[94] the Court considered the eighth amendment constitutionality of punishing the crime of wartime desertion with the penalty of denationalization. A four-justice plurality of the Court articulated the fundamental value protected by the amendment: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[95] Commentators have identified the eighth amendment's protection of human dignity as "bottomed on a moral obligation of each person [as well as the state] to treat others as persons, with the kind of equal concern and respect that we call 'human' or 'humane.' "[96] Moreover, the *Trop* plurality recognized a dynamic character to the eighth amendment text, stating that "the words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[97] Whatever its historical meaning, the amendment assures that punishments will be administered in a manner consistent with the current understanding of what it means to be a person. Although the amendment always has been viewed as a limitation on punishment, there seems to be no necessary reason to deny its application to support an entitlement to be punished if the state is disregarding the personhood of offenders through nonpunitive responses. The eighth amendment claim suggested here provides the guilty offender with a constitutional right to be punished that may well override whatever interest the state has in administering therapy.[98] The offender is entitled to be humanely punished; rejecting his assertion of this entitlement would constitute a denial of his personhood.[99]

C. *Robinson v. California*: A Case for Consideration

A single United States Supreme Court case will be offered in support of an eighth amendment right to be punished. In *Robinson v.*

94. 356 U.S. 86 (1958).
95. *Id.* at 100 (plurality opinion).
96. Radin, *supra* note 87, at 1044.
97. Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion).
98. The right to be punished could be overridden by the need to impose coercive therapeutic sanctions if, but only if, the government could show compelling reason. *See infra* notes 112-15 and accompanying text.
99. The right to be punished is satisfied by the receipt of legally prescribed punishment, whatever its form or duration. *See supra* notes 16-19 and accompanying text. Certainly incarceration need not be the only form of punishment imposed. Fines and even probation, where its conditions manifest a punitive sanction, *see supra* note 10, could satisfy the offender's right to be punished.

California,[100] the Court struck down as cruel and unusual punishment a California statute that punished drug addiction with a sentence of ninety days to one year in the county jail. The statute violated the eighth amendment because it punished the status of being a drug addict instead of requiring a specific criminal act.[101] The Court recognized addiction to narcotics as an "illness"[102] which, while nonpunishable, could be dealt with permissibly through compulsory therapy.

The Court offered little explanation of why punishing Robinson under the California statute offended the eighth amendment. Clearly, it was not because the form of punishment, incarceration, was unconstitutionally cruel.[103] Nor did the Court seriously argue that the unconstitutionality consisted in the excessiveness of the punishment. "To be sure," said the Court, "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[104] The problem was not so much that ninety days was too much punishment for the "crime," but rather that punishment, in *any* form or degree, was simply inappropriate and irrational in the *Robinson* context.[105]

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100. 370 U.S. 660 (1962).

101. *Id.* at 666-67. The majority did not discuss the problem of distinguishing "status" and "act." In his dissenting opinion, however, Justice White faulted the act-status distinction, arguing that the conviction of Robinson, an addict, rested upon the "acts" of using drugs that were necessarily subsumed in his status as an "addict." *Id.* at 686 (White, J., dissenting). Similarly, in Powell v. Texas, 392 U.S. 514 (1968), which addressed the issue of whether the eighth amendment prevents the conviction of a chronic alcoholic for being drunk in public, Justice White said: "Analysis of this difficult case is not advanced by preoccupation with the label 'condition' .... 'Being' drunk in public is not far removed in time from the acts of 'getting' drunk and 'going' into public." *Id.* at 550 n.2 (White, J., concurring).

102. Robinson v. California, 370 U.S. 660, 667 (1962). The Court noted the "illness" of drug addiction may be contracted involuntarily, presumably recognizing that it is also often contracted through the addict's voluntary use of drugs. Apparently, the *Robinson* Court considered it unimportant whether the addiction was acquired innocently or voluntarily. *See* Powell v. Texas, 392 U.S. 514, 542 n.3 (1968) (Black, J., concurring).

103. The defense argued that imprisonment of the drug addict would be cruel and unusual because it would impose "intense mental and physical torment and suffering; via the 'cold turkey' withdrawal method." Brief for Appellant at 30, Robinson v. California, 370 U.S. 660 (1962).

104. Robinson v. California, 370 U.S. 660, 667 (1962).

105. Yet Justice Douglas suggested that *Robinson* is really an excessive punishment case. *Id.* at 676 (Douglas, J., concurring). "[T]he principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick." *Id.* Others see *Robinson* as a substantive due process case masquerading in eighth amendment garb. For example, Justice White said:

The emphasis in *Robinson* thus is not so much toward the *cruelty* of the punishment, as determined by traditional eighth amendment attention to its modes and degrees,[106] as it is toward its *rationality*. Because punishment is necessarily tied to a criminal act,[107] and not to a status, it made no sense to punish Robinson. But more than conceptual anomaly was at stake. Punishment of Robinson merely because of his status can be viewed as a violation of his right to be treated as a person and to be punished only upon a showing that he had committed an unlawful act. Whereas compulsory therapy or preventive detention would not necessarily have entailed an infringement of Robinson's personhood,[108] punishment clearly would have.

Such an understanding of *Robinson* provides a basis for an eighth amendment right to be punished in cases where the offender *has* been convicted of a criminal act. If one's right to personhood is violated upon punishment even when no criminal act was committed, the same eighth amendment interest might be violated if nonpunitive dispositions, in lieu of punishment, are administered when a person has been convicted of a criminal act.[109]

Case exegesis aside, a right to punishment for youthful offenders

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> I deem this application of 'cruel and unusual punishment' so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress.

Id. at 689 (White, J., dissenting). *See also* Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 147-48 & n.144.

For a discussion of the reasons why punishment of individuals who have committed no criminal act is irrational and "absurd," see Powell v. Texas, 392 U.S. 514, 543-44 (1968) (Black, J., concurring).

106. For an account of traditional eighth amendment analysis and of *Robinson's* "novel" break with this tradition, see Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636-50 (1966).

107. *See supra* note 10.

108. *See supra* notes 20-21 and accompanying text.

109. A kernel of this idea can be found in Justice Marshall's plurality opinion in Powell v. Texas, 392 U.S. 514 (1968)(plurality opinion). In discussing the benefits of being "punished" as opposed to being "treated" with respect to the offender who commits the offense of public drunkenness, Justice Marshall said:

> One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit; this is universally true in the case of petty offenses, such as public drunkenness, where jail terms are quite short on the whole. 'Therapeutic civil commitment' lacks this feature; one is typically committed until one is 'cured.' Thus, to do otherwise than affirm might subject indigent alcoholics to the risk that they may be locked up for an indefinite period of time under the same conditions as before, with no more hope than before of receiving effective treatment and no prospect of periodic 'freedom.'

Id. at 529.

eventually may be established by the legislative trend toward punitive juvenile justice.[110] The Supreme Court has identified legislative enactments as perhaps the best "indicators of contemporary standards of decency" in determining eighth amendment rights.[111] As more and more jurisdictions embrace systems that punish youthful offenders, the constitutional claim for a right to such a system becomes stronger in jurisdictions that cling to the rehabilitative ideal.

D. Judicial Scrutiny of Infringements of the Right to be Punished

Recognition of a constitutional right to be punished does not mean that all legitimate claims of the right must necessarily be honored.[112] Because the right is tied to basic rights of personhood, however, it should be viewed as a "fundamental" constitutional right for purposes of judicial review.[113] Thus, governmental infringement of the right, through involuntary therapeutic or preventive detentions of convicted offenders, for example, should be subjected to strict scrutiny.[114] The state may deny the right only if it can show that compelling state interests are promoted through the denial and that the denial is necessary for protecting those interests.[115]

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110. *See supra* text accompanying notes 55-60.

111. Thompson v. Oklahoma, 108 S. Ct. 2687, 2697 (1988).

112. That the exercise of the right to be punished may sometimes be overridden by other interests does not deny that the right is an aspect of one's "absolute" right to be treated as a person. As Professor Morris states:

> When I claim . . . that the right to be treated as a person is absolute what I claim is that given that one is a person, one always has the right to be so treated, and while there may possibly be occasions morally requiring not according a person this right, this fact makes it no less true that the right exists and would be infringed if the person were not accorded it.

Morris, *supra* note 1, at 86.

113. "Fundamental constitutional rights" are rights which the United States Supreme Court recognizes as essential to individual liberty. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 416 (1978)[hereinafter J. NOWAK]. Fundamental rights analysis recognizes the validity of concepts of "natural rights" theory. *Id.* Thus, if the right to be punished is derived from the "natural right" to be treated as a person, *see* Morris, *supra* note 1, at 74, then the right to be punished logically is a fundamental constitutional right.

114. *See* J. NOWAK, *supra* note 113, at 418.

115. This conception of strict scrutiny comports with the Supreme Court's analysis in equal protection cases in which the state discriminated against members of a "suspect class." *See* Developments, *The Family*, 93 HARV. L. REV. 1156, 1189 (1980). Such scrutiny, however, has not been limited exclusively to equal protection cases. It also appears in cases reviewing governmental infringements of other important constitutional rights. For the Court's treatment of free exercise of religion cases, see L. TRIBE, *supra* note 78, at 846-59.

Professor Gunther's description of the Court's equal protection scrutiny of suspect classifications as " 'strict' in theory and fatal in fact," Gunther, *The Supreme Court 1971 Term*, 86 HARV. L. REV. 1, 8 (1972), may also characterize the result if involuntary therapy were strictly scrutinized, given the dismal success of past programs of coerced therapy. *See, e.g.*, S. FOX, JUVENILE COURTS 19 (3d ed.

E. Implementing the Right to be Punished

Implementation of the right of adolescent persons to be punished could be achieved without defining the right in terms of a minimum chronological age. Thus, case-by-case evaluations of the personhood of any offender under the age set for juvenile court jurisdiction could be made. The offender, whatever his age, could assert a right to be punished as an "affirmative defense" when the state seeks to subject him to coercive therapy or rehabilitation.[116] Once establishing their "personhood," such offenders would be entitled to appropriate punitive dispositions except in rare cases where the state shows compelling necessity to impose therapeutic sanctions.[117]

Case-by-case assessments of personhood may prove to be administratively cumbersome, however.[118] A system linking the right to be punished to chronological age may therefore be desirable. For example, "persons" could be defined as youngsters between age fourteen and the age of majority. Arguably, such a definition provides a reasonable, non-arbitrary method for dispensing the right to be punished. The social science literature often refers to fourteen-year-olds as generally possessing the characteristics of persons.[119] Moreover, offenders over the age of fourteen were presumed to be criminally responsible for their conduct at common law.[120] Certainly some youngsters under the age of fourteen could in fact qualify as "persons." The interests of those under age fourteen could be accommodated by employing the common law's rebuttable presumption of non-

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1984)(rehabilitation, treatment, etc., an "empty promise" in juvenile courts). The state would face stiff challenges in justifying such programs under a strict scrutiny analysis.

116. The "affirmative defense" to be punished is the opposite of most traditional criminal defenses which defendants employ to avoid conviction and punishment. Nevertheless, certain procedural rules applicable to those defenses seem equally applicable in the right to be punished context. Thus, as in traditional defense contexts, the "defendant" may be required to carry both the burdens of production and persuasion in right to be punished defenses. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 51-56 (2d ed. 1986). Perhaps the better policy, however, would be to require the state to carry the burden of persuasion once the defendant has met the burden of "producing evidence" of his personhood.

117. *See supra* notes 112-15 and accompanying text.

118. Resolving issues of subjective competency are time consuming and expensive, especially if both sides employ expert witnesses. However, determining the capacity for rational choice for given young people seemingly entails no greater administrative difficulty than other kinds of competency determinations routinely made throughout the law. For a general discussion of a variety of legal competency issues and procedures, see G. MELTON, J. PETRILA, N. POYTHRESS & C. SLOBOGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 65-109 (1987).

119. *See supra* note 54.

120. *See Punitive Juvenile Justice*, *supra* note 32, at 144. Social science data "bears out the internal coherence of the infancy defense." Walkover, *supra* note 56, at 543.

responsibility,[121] thus permitting assertions of the right to be punished as affirmative defenses on a case-by-case basis.[122]

Chronological age also could operate as a basis for denying application of the right to punishment. Similar to the common law's irrebuttable presumption of incapacity for youths under seven years of age,[123] the right to be punished could be denied all children under a stated, pre-adolescent age so long as a general concensus exists that children

121. *See Punitive Juvenile Justice, supra* note 32, at 144.

122. Treating youngsters over 14 years of age as "persons" but presuming non-personhood for those under 14 appears constitutionally permissible. Defining children's rights in terms of chronological age is, of course, common.

Perhaps the closest analogy is the traditional employment of chronological age as a basis for regulating marriage. While marriage has been recognized as a "fundamental" constitutional right, Zablocki v. Redhail, 434 U.S. 374 (1978), the courts have denied the right to marry to young people under a legislatively determined age. Moreover, the courts have not strictly scrutinized denials of marriage under chronological age provisions. Thus, in Moe v. Dinkens, 533 F. Supp. 623 (S.D.N.Y. 1981), *aff'd per curiam*, 669 F.2d 67 (2d Cir. 1982), *cert. denied*, 459 U.S. 827 (1982), the court found that New York's use of age as the basis for determining probable maturity in the absence of parental consent, instead of requiring proof of maturity on a case-by-case basis, was "reasonable" even if the rule produces "seemingly arbitrary results in individual cases." *Id.* at 630. The *Moe* court specifically rejected strict scrutiny review of the New York statute which required parental consent for marriage licenses for all males between ages 16 and 18 and for all females between 14 and 18. While the rights of some "mature" minors under the statutory ages may be denied, the court found such denials to be merely "temporary" and "reasonable" in light of the state's "legitimate" interests in "mature decision-making with respect to marriage by minors, preventing unstable marriages, and protecting the privacy rights of parents to act in the best interests of their children." *Id.* at 630-31. A fourth state interest, discouraging marriage in order to encourage minors to stay in school, *see, e.g.*, Davis v. Meek, 344 F. Supp. 298, 300 (N.D. Ohio 1972), also could be added to support the age restriction in *Moe*.

Because the system described in the text does not absolutely foreclose exercise of the constitutional rights at issue, the system appears constitutionally permissible *a fortiori* under *Moe*, given the reasonableness of drawing lines at age 14. *See supra* text accompanying notes 119-20. While *Moe* permits drawing the line at age 18 for purposes of the right to marry, nothing in the case justifies a conclusion that 18 years of age is a permissible place to trigger the exercise of any and all constitutional rights. The state interests in protecting parental privacy and discouraging youthful marriages may support setting the age for marriage at 18. Such interests are obviously not pertinent to deciding the age for exercise of the right to be punished. No alternative state interests appear sufficient to outweigh the rights of 14-year-old persons to be punished.

Finally, the system described in the text is offered merely as an example of an age-based model which would pass constitutional muster. Punitive juvenile justice systems which draw lines at ages other than 14 also may be consitutional. Constitutional problems appear to increase, however, as the line is drawn higher and higher above age 14, thus denying the right to be punished to more and more adolescent persons.

123. *See Punitive Juvenile Justice, supra* note 32, at 144.

under that age lack the capacity to be culpable.[124]

V. JUVENILE JUSTICE IMPLICATIONS OF THE RIGHT TO BE PUNISHED

The legal implications of the right to be punished as it relates to the traditional model of juvenile justice appear enormous. This section considers a few of the substantive and procedural effects of the right.

A. Substantive Effects

The most famous juvenile case, *In re Gault*,[125] provides a useful vehicle for exploring the substantive ramifications of the right to be punished. The doctrinal power of the rights to personhood and punishment is illustrated by a rethinking of Gerald Gault's case.

Fifteen-year-old Gerald, while still on six months' probation for having been in the company of another boy who stole a wallet from a woman's purse, was accused of making an obscene phone call, an offense punishable in the criminal system by a maximum fine of five to fifty dollars, or a jail sentence of up to two months. Because Gerald was a juvenile, his case was not brought in criminal court, but instead under the jurisdiction of the juvenile court. In proceedings making kangaroo courts appear models of due process by comparison, the juvenile court judge adjudicated Gerald a delinquent[126] and ordered him

124. A system having an age provision embodying such a general concensus likely would be subjected to minimal scrutiny by courts entertaining claims of denial of the right to be punished by children below the chosen age. For a discussion of the analogous situation in the marital age context, see *supra* note 122.

125. 387 U.S. 1 (1967).

126. *Id.* at 29. After a complaint by a neighbor that Gerald Gault had made an obscene phone call, Gault was taken into custody by the police. The arresting officer initiated the adjudication proceeding by filing a petition in juvenile court alleging only that Gerald Gault was "under the age of eighteen years, and is in need of the protection of this Honorable Court; [and that] said minor is a delinquent minor." *Id.* at 5. The petition alleged no factual basis for the judicial action proposed and was never served on Gerald or his parents. After spending the night in the detention center, Gerald, along with his parents, appeared without counsel at a hearing that was held on the petition. The complaining neighbor did not attend, no witnesses were sworn, and no record of the proceedings was prepared. The juvenile judge questioned Gerald about the neighbor's complaint as related to the judge by the arresting officer to whom Gault allegedly had admitted making the obscene call. The judge decided to "think about" the matter. Gerald was taken back to the detention center where he spent three or four more days and then was released to the custody of his parents.

Several days later a second "hearing" was held, again without counsel or the complaining witness. Probation officers filed a "referral report" with the court, but did not disclose its contents to Gerald or his parents. At the conclusion of the hearing, the judge committed Gerald as a juvenile delinquent to the State Industrial School. *Id.* at 6-7.

indefinitely committed to the State Industrial School for the remainder of his minority, "that is, until 21, unless sooner discharged."[127] Thus, Gerald was confined in the name of rehabilitation possibly for an excess of five years because he committed an act punishable by no more than two months in jail.

The case reached the United States Supreme Court which held that Gerald's procedural due process rights had been violated.[128] The Court observed:

> Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours. . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide.[129]

Interestingly, however, *Gault* dealt only with procedural matters and never addressed the substantive issue of whether committing Gerald for an excess of five years in the State Industrial School would be permissible *if he were* afforded full procedural protections at his adjudication hearing. Had Gerald been given proper notice, assistance of counsel, etc., he still would have risked the possibility of "doing five-plus years" for a measly two-month offense. Such a situation raises questions of additional violations of Gerald's rights distinct from those assessed by the *Gault* Court.

Traditional juvenile justice wisdom sees no necessary violation of young people's rights in confining them for longer periods as "delin-

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127. *Id.* at 7.

128. The Court held Gerald and others in similar situations who risk incarceration in state detention facilities if found to be delinquent are constitutionally entitled to the following rights in their adjudication proceedings: notice of the charges; assistance of counsel; rights of confrontation and cross-examination; and the privilege against self-incrimination. *Id.* at 31-57.

The *Gault* Court rejected the view that the juvenile justice system is an entirely benign dispenser of *parens patriae* therapy and rehabilitation to youths who deviate from socially accepted norms of conduct. The Court noted that the system's tradition of procedural informality was intended to achieve the enlightened goal of protecting youthful offenders from the harshness of criminal proceedings. In reality, however, the system failed to attain its rehabilitative goals and often was nothing more than a mechanism that stigmatized youths as delinquents and restricted their liberty. Thus, the *Gault* Court found the essentials of due process and fair treatment under the fourteenth amendment entitled juveniles to increased procedural protections. *Id.* at 22-28.

129. *Id.* at 27.

quents" than they could be confined as "criminals."[130] Chief Justice Rehnquist recently summarized the established protectionist view:

> [J]uveniles, unlike adults, are always in some form of custody. Children by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of parents, and if parental control falters, the State must play its part as *parens patriae*.[131]

Protectionist rights theory as reflected in the rehabilitative ideal permits the state to confine Gerald Gault for years for doing something for which an adult may incur only a small fine. In the protectionist's eyes, he is always "in custody," whether at home or in the State Industrial School. Of course, Gerald could argue that his confinement was inconsistent with the therapeutic premises of juvenile justice.[132] However, as long as he receives "therapy," "treatment," or "rehabilitation," his rights have not been infringed. Indeed, he receives everything to which he is entitled under protectionist theory.

Dispositions like the one imposed on Gerald are problematic in part because they do *not* rehabilitate—if anything, they make a troubled youngster more troubled.[133] But suppose reliable evidence existed to justify the belief that Gerald's indeterminate commitment to the State Industrial School really would improve his life. Assuming he possesses normal competency for people of his age, his incarceration nevertheless would seriously threaten his basic human rights.

If Gerald's rights are violated by a potential five-year stint in the Industrial School—even assuming that such is indeed a meaningfully

130. "[A] number of state courts have concluded that committing juveniles to institutions for longer periods than would be permissible in the case of adults charged with the same offense violates neither due process nor equal protection of the law." S. DAVIS, *supra* note 42, at 6-19.

131. Schall v. Martin, 467 U.S. 253, 265 (1983).

132. A few such actions have been successful. *See, e.g.*, Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974).

133. In Kent v. United States, 383 U.S. 541, 556 (1966), the Supreme Court noted "[t]here is evidence . . . that there may be grounds for concern that the [delinquent] child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." A year later, the *Gault* Court cited statistics from the President's Commission on Crime in the District of Columbia which found recidivism rates over 50% for juvenile offenders who had had prior contact with the juvenile court. *In re* Gault, 387 U.S. 1, 21-22 (1967). In McKeiver v. Pennsylvania, 403 U.S. 528, 544-45 n.5 (1971), the Court quoted the President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9 (1967) which concluded: "In theory [the juvenile court] was to exercise its protective powers to bring an errant child back into the fold. In fact, there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses."

A leading commentator has concluded that "the evidence continues to mount that reliance on the juvenile process as rehabilitative rather than punitive in nature has paid more heed to rhetoric than to reality." S. DAVIS, *supra* note 42, at 6-19.

rehabilitative sanction—protectionism obviously fails to provide an adequate theoretical ground for his rights. Coercive therapy for "adult persons" making obscene phone calls would violate *their* rights to be punished.[134] Surely Gerald Gault might have wished to assert the same claim. Assuming that he possessed the attributes of adolescent personhood (capacity for rational choice), he would have been entitled to be *punished* for what he did rather than be *treated* for who he is. Moreover, his punishment should, if anything, be *less* severe than that imposed upon similarly situated adults.[135]

While the right of juveniles to be punished doubtless appears controversial, several jurisdictions already afford versions of the right to youthful offenders who seek punishment in lieu of therapeutic disposition. Under Florida statutory law,[136] for example, cases of youngsters fourteen years of age or older at the time the alleged violation occurred may be waived to criminal court for trial. The child thereafter shall be subject to prosecution, trial, and sentencing as if the child were an adult. The statute expressly provides:

> [T]he court *shall transfer* and certify the case for trial as if the child were an adult if the child is alleged to have committed a violation of law, and, the child, joined by a parent or, in the absence of a parent, by his guardian or guardian ad litem, demands in writing to be tried as an adult.[137]

The statute recognizes waiver on demand, mandatory and not discretionary with juvenile court judge,[138] as an aspect of a state constitutional right of children to be tried as adults "upon demand made as provided by law before a trial in a juvenile proceeding."[139]

The State of Florida thus provides adolescents and their parents a right to the same system of punishment available to adults. But, as the above discussion suggests, the Florida scheme does not fully reflect the right of youthful offenders to be punished. Autonomous persons should be able to exercise their rights free from parental power to veto those rights.[140] Moreover, adolescent persons are entitled to a

134. *See supra* notes 1-23 and accompanying text. The conclusion in the text assumes that the offense of making obscene phone calls constitutes a "primary rule" within the criminal system. *See supra* note 5 and accompanying text. A variety of similar offenses such as obscene libel, indecent exposure, and obscene language were indictable offenses at common law. *See* R. PERKINS & R. BOYCE, CRIMINAL LAW 471-74 (3d ed. 1982).

135. *See supra* notes 61-69 and accompanying text.

136. FLA. STAT. ANN. § 39.02(5)(a) (West Supp. 1988).

137. *Id.* § 39.02(5)(b) (emphasis added).

138. Sumner v. Williams, 304 So. 2d 472 (Fla. Dist. Ct. App. 1974).

139. FLA. CONST. art. I, § 15(b). The Florida courts have suggested that part of the rationale for the right to proceed in criminal court is to afford the opportunity for jury trials, unavailable in juvenile proceedings. Summer v. Williams, 304 So. 2d 472, 473 (Fla. Dist. Ct. App. 1974). The right may also be understood as embracing the right to be punished as discussed in this Article.

140. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976)(competent pregnant minors possess right to make abortion decision free of parental consent). The

system of punishment, but generally to one embodying *less* punishment than that established for their adult counterparts committing the same offense.[141]

Full-blown recognition of adolescents as persons possessing the right to be punished would require systematic reform of the juvenile justice system with determinate punitive sanctions replacing the traditional indeterminate rehabilitative dispositions.[142] Moreover, the sanctions for juvenile offenders must be scaled down, in perhaps both form and degree, from those imposed for the same offense within the criminal system. "Waivers" of juvenile court jurisdiction to the criminal courts in appropriate cases may be retained so long as criminal dispositions are consistent with principles of justice and the demands of social protection.[143]

Finally, because the right to be punished entails the right to be *fairly* punished,[144] adolescent persons subjected to a system of punitive juvenile justice must be afforded the full panoply of traditional defenses available in the criminal system.[145]

B. Procedural Effects

In addition to substantive effects, several procedural consequences flow from recognition of the right to be punished. In most states, juveniles have no right to procedural due process protections when jurisdiction over their cases is waived from criminal court *to* juvenile

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Illinois version of the right to be punished permits minors 13 years of age or over to elect criminal prosecutions with "consent of counsel." ILL. ANN. STAT. ch. 37, § 804-4(5)(Smith-Hurd Cum. Supp. 1988). *See* People v. Thomas, 34 Ill. App. 3d 1002, 341 N.E.2d 178 (1976)(no judicial discretion to reject demand for criminal proceedings under § 804-4(5)). See 18 U.S.C. § 5032 (Supp. V 1987) for a federal version of criminal proceedings on demand.

141. *See supra* notes 61-69 and accompanying text.

142. Apart from the requirement of a general theory of less severe punishments for juveniles than adult criminals, this Article offers no specific system of sanctions. Several existing models are worthy of consideration. *See, e.g.*, STANDARDS, *supra* note 56; Walkover, *supra* note 56, at 528-31 (discussing the Washington model). The Article's proposal for scaled-down punishments, of course, assumes dispositions respecting the dignity and personhood of juvenile offenders.

143. *See supra* note 39. *See also* Feld, *supra* note 54.

144. *See supra* text accompanying notes 13-15.

145. The only defense which might not be applicable in a system of punitive juvenile justice is the defense of infancy, and then only in systems reasonably employing chronological age as a proxy for personhood. *See supra* text accompanying notes 118-24. Such systems might incorporate the infancy defense in defining substantive rights, and thus render the traditional affirmative defense redundant. On the other hand, the infancy defense would be critically important should the government seek to impose punishment on youngsters not yet "persons." *See Punitive Juvenile Justice*, *supra* note 32, at 143-46.

court;[146] procedural protections are required only where waiver is from juvenile to criminal court.[147] This rule appears to be based on a perception that the juvenile loses no significant interest when his case is transferred from a punitive system to a therapeutic one. Supposedly, the transfer will benefit the juvenile who is about to partake of *parens patriae* blessings. However, as illustrated by the discussion of *In re Gault*,[148] juveniles whose cases are transferred from the criminal courts may in fact *lose* a great deal—the right to be punished. Like other fundamental rights, this interest should not be denied without procedural protections, including the right to a judicial hearing with the assistance of counsel and the requirement that the state show the necessity of denying the person's right to be punished.[149] As the Supreme Court has said in another context, "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony."[150]

Implementation of the right to be punished within the juvenile system also would often carry a right to trial by jury. Supreme Court case law recognizes the right to trial by jury for offenses punishable by incarceration in excess of six months.[151] Even though nearly all the procedural protections of the criminal process are also constitutionally required in the juvenile justice system,[152] the Court found the sixth amendment right to trial by jury is not mandated in current delinquency adjudications, in part, because juvenile justice is presumed to be nonpunitive and rehabilitative in nature.[153] The right of juveniles to be punished, therefore, would carry with it the same jury trial rights as are enjoyed by adult offenders.[154]

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146. S. Fox, *supra* note 115, at 66; Vega v. Bell, 74 N.Y.2d 543, 393 N.E.2d 450, 419 N.Y.S.2d 454 (1979).

147. S. Fox, *supra* note 115, at 66.

148. 387 U.S. 1 (1967). *See supra* text accompanying notes 125-35.

149. *See* Kent v. United States, 383 U.S. 541 (1966)(enumerating procedural rights to judicial hearing, counsel, access to social report, and statement of reasons in proceedings to waive juvenile court jurisdiction to the adult criminal process). For discussion of the requirement of an infringement of substantive interests as a prerequisite to procedural due process rights, see *supra* note 47.

150. Kent v. United States, 383 U.S. 541, 554 (1966).

151. Baldwin v. New York, 399 U.S. 66 (1970).

152. In addition to the protections afforded by *In re* Gault, 387 U.S. 1 (1967), the Court has imposed further procedural protections in the juvenile justice system. *See* Breed v. Jones, 421 U.S. 519 (1975)(double jeopardy clause prohibits trial as adults if juveniles have been subjected previously to a delinquency hearing on the same charge); *In re* Winship, 397 U.S. 358 (1970)("reasonable doubt" standard required in delinquency adjudications).

153. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). *See* Feld, *supra* note 44, at 247; *Punishment and Juvenile Justice*, *supra* note 7, at 829-33.

154. *See In re* Felder, 93 Misc. 2d 369, 402 N.Y.S.2d 528 (Fam. Ct., Onondaga County 1978). In *Felder*, a sixth amendment right to jury trials exists under New York's "designated felony" provisions of the juvenile statutes which fixed periods of con-

VI. CONCLUSION

This Article has outlined a theory of the right to be punished, discussed its possible status as a legally enforceable interest available to a class of juvenile offenders, and noted several of the more significant implications of the right. Although recognition of the right to be punished would transform the face of juvenile justice, the transformation already may have begun. Several jurisdictions have become sufficiently disenchanted with the rehabilitative ideal to have recently embraced explicitly punitive sanctions as appropriate for juvenile offenders.[155] Some jurisdictions already permit jury trials in juvenile cases[156] and many commentators argue that the openness and public scrutiny of the legal system entailed therein is long overdue in the juvenile system.[157]

These reform movements toward punitive juvenile justice require rethinking the nature of the rights of youthful offenders. The time for such rethinking may well be at hand for all interested observers of juvenile justice. Treating competent kids as persons with rights to fair, proportionate, humane punishment could well be an important step forward in the quest for a legal order respectful of individual rights. Some might worry that recognition of the right to be punished would, in the words of one commentator, constitute "abandoning children to their . . . rights."[158] But being "abandoned" with the rights discussed in this Article when the state intervenes in the lives of adolescent law breakers may well be preferable to being "rescued" by paternalistic governmental meddling. Mindful of Gerald Gault's predicament, C.S. Lewis's observations ring as true for juvenile persons as they do for adult offenders:

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finement, either for six- or twelve-month intervals, for juveniles committing certain enumerated offenses and were found to be in need of restrictive placement. While the state argued that the sanction was rehabilitative and thus removed the case from sixth amendment scope, the court concluded that "[w]hen . . . what is actually a punishment is characterized as treatment, an abuse of constitutional dimension has occurred, and, a jury trial is required before punishment although appropriate, may be inflicted." *Id.* at 375, 402 N.Y.S.2d at 531.

155. *See supra* note 56.

156. W. WADLINGTON, *supra* note 30, at 485.

157. *See, e.g.*, Foley, *Juveniles and Their Right to a Jury Trial*, 15 VILL. L. REV. 972 (1970); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 19-21; Parker, *Instant Maturation for the Post Gault "Hood"*, 4 FAM. L.Q. 113 (1970); Note, *Minnesota Juvenile Court Rules: Brightening One World for Juveniles*, 54 MINN. L. REV. 303, 324-25 (1969); Note, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. PA. L. REV. 1171, 1185-86 (1966).

158. *Children's Liberation*, *supra* note 32, at 643. In this work, Dean Hafen argues for protectionist rights in contexts generally outside the juvenile justice system, often with the value of protecting family privacy firmly in mind. Therefore, he may be less concerned with granting personhood rights to children in the context of this Article where family privacy issues are less relevant.

> Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth. Their very kindness stings with intolerable insult. To be 'cured' against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we 'ought to have known better,' is to be treated as a human person made in God's image.[159]

159. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATA 224, 228 (1953, reprinted 1982).