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SENTENCING JUVENILES FOR MURDER IN FRANCE AND THE UNITED STATES: ARE THEY JUVENILES WHO COMMIT ADULT CRIMES OR ADULT CRIMINALS WHO ARE JUVENILES?

At 11:20 a.m. on a Tuesday morning, two high school students clad in black trench coats, camouflage clothing, and masks walk into their Colorado high school, armed with two sawed off shot guns, one nine millimeter semi-automatic rifle, one semi-automatic handgun, and homemade pipe bombs.¹ Methodically, they hunt and shoot students at close range as the students huddle under tables.² They shoot one student in the back who tries to flee the chaos.³ While an injured student slides out a second-story window into the waiting arms of law enforcement officers, other students barricade themselves in bathrooms, classrooms, and choir rooms.⁴ Others plead for their lives as the gunmen execute students in the library.⁵ Another student lay sprawled on a walkway as his schoolmates leap over his injured body like cows fleeing from slaughter.⁶ By 4:45 p.m., fourteen people are dead, including the two gunmen, and twenty-three are injured.⁷ This was not just another day at school.⁸

I. INTRODUCTION

In recent years, the United States experienced a dramatic increase in the number of juveniles committing murder.⁹ On

1. See Burt Hubbard, *Moment by Moment at Columbine High School April 20, 1999*, DENV. ROCKY MTN. NEWS, Apr. 25, 1999, at 8AA.

2. See *id.*

3. See *id.*

4. See *id.*

5. See *id.*

6. See Michael Paterniti, *Snap Non Fiction; Columbine High School Massacre*, ESQUIRE, July 1, 1999, at 144.

7. See *Seven Shot Dead in Massacre at Church: Country Soaked in Blood*, MIRROR (London), Sept. 17, 1999, at 5, available in LEXIS, News Library, Curnws File. See also Hubbard, *supra* note 1, at 8AA.

8. See Paterniti, *supra* note 6, at 144.

9. See Barbara Lerner, *Founding Fathers Understood the Enemy Within*, ORLANDO SENTINEL, Apr. 5, 1998, at G1.

October 1, 1997, Luke Woodham, a sixteen-year-old boy from Mississippi, shot and killed his mother and then shot nine of his classmates, killing two of them.¹⁰ On May 21, 1998, Kipland Kinkel, a fifteen-year-old boy, shot and killed his parents and two schoolmates in Oregon.¹¹ On March 24, 1998, thirteen-year-old Mitchell Johnson and eleven-year-old Andrew Golden killed four Arkansas schoolgirls and one teacher.¹² One of the boys pulled the Westside Middle School fire alarm and then the two of them fired twenty-seven shots as the school's occupants evacuated the building.¹³ Most recently, seventeen-year-old Dylan Kleibold and eighteen-year-old Eric Harris slaughtered twelve classmates and a teacher and wounded twenty-three others at Columbine High School in Columbine, Colorado, before killing themselves in the school library.¹⁴

These horrendous and highly publicized murders serve as admonitions to the legal community about its obligation to ensure juvenile sentencing guidelines adequately address the crimes juveniles commit.¹⁵ Attempts to ensure punishment for minors who murder about recognition of the fact that the offenders are children. Sentiments of nurturing and caring for these youths rival the retributive interest in punishing them for their crimes. This struggle, which balances on the scales of justice, begs the question: should courts punish children murderers as they do adult murderers, mandating adult sentences, or should courts focus on the fact that the offenders are children, and not miniature adults, and therefore attempt to rehabilitate them?¹⁶

The United States is not the only nation experiencing an increase in the number of juveniles committing murder. France is also experiencing an epidemic increase in incidents of school

10. See John Ritter, 'Nobody Took Him Seriously' Oregon Student 'Joked' He Would 'Get People', USA TODAY, May 22, 1998, at 3A.

11. See Martin Kasindorf, *Parents Struggled to Control Their Son But Couple Gave in and Bought Teen Rifle*, USA TODAY, May 26, 1998, at 3A.

12. See Steve Marshall, *Attack Came with Insidious Twist Fire Alarm Drew Victims Out in the Open*, USA TODAY, Mar. 25, 1998, at 3A.

13. See *id.*

14. See Hubbard, *supra* note 1, at 8AA.

15. See John Cloud, *For They Know Not What They Do?; When and How Do Children Know Right from Wrong? And How Can We Devise a Punishment to Fit Their Crimes?*, TIME, Aug. 24, 1998, at 64.

16. See *id.* See also Richard Lacayo, *When Kids Go Bad*, TIME, Sept. 19, 1994, at 60.

violence.¹⁷ In January 1997, a fifteen-year-old student stabbed a twenty-year-old man who was picking up his brother at a Tournan-en-Brie High School near Paris.¹⁸ The fifteen-year-old, charged with murder, turned himself in to the police, and currently awaits trial.¹⁹ Accordingly, France, like the United States, reevaluated its juvenile sentencing standards, and amended its laws governing juvenile sentencing.²⁰

Part II of this Comment analyzes the historical development of the juvenile justice systems in the United States and France and discusses retributive punishment for juveniles, in its current forms, in both countries. Part III recommends that the United States adopt the French model of juvenile sentencing laws, which the Law of 1945²¹ established, which focuses on rehabilitation instead of retribution. Moreover, this Comment suggests that France retreat from the retribution-based punishment model it presently utilizes, and return to the Law of 1945's sentencing standards.

II. THE HISTORICAL DEVELOPMENT OF JUVENILE JUSTICE IN THE UNITED STATES AND FRANCE

A. *General Principles of Juvenile Criminal Sentencing*

"Sentencing" is legally defined as the "judgment of [the] court formally advising [the] accused of legal consequences of guilt which he has confessed or of which he has been convicted."²² Although the definition of "sentence" appears elementary, sentencing is a complicated concept that social mores, mandating proper punishment for individuals found guilty of illicit behavior, heavily influence. A "sentence" is not always the direct consequence of an individual's actions. Instead, a "sentence" is the consequence that the law deems appropriate for those actions. Criminal sentencing is a method of enforcing criminal law and punishing the behaviors the law prohibits.²³ Four primary

17. See Rana Dogar & Judith Warner, *Young, Tough and in Trouble*, NEWSWEEK, Apr. 6, 1998, at 17.

18. See *id.*

19. See *id.*

20. See *id.*

21. CODE PÉNAL [C. PÉN.] art. 45-174 (1945) (Fr.).

22. BLACK'S LAW DICTIONARY 1362 (6th ed. 1990).

23. See CONTEMPORARY PUNISHMENT, VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 4 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972) [hereinafter

punishment theories serve as the foundation for all sentencing guidelines: (1) retribution;²⁴ (2) social defense;²⁵ (3) deterrence;²⁶ and (4) rehabilitation;²⁷ in addition to providing the basis for sentencing guidelines, these theories also serve as justifications for the punishments rendered.²⁸

1. Retribution

Retribution theory focuses on the wrongdoer and the choice he or she made to break the law.²⁹ According to Immanuel Kant, a social theorist, punishment must always be imposed “because the individual on whom it is inflicted has committed a crime.”³⁰ Therefore, society punishes the wrongdoer for committing that crime. Retribution theory is best illustrated by the often-quoted biblical notion, “[a]n eye for an eye, and a tooth for a tooth,”³¹ which requires that punishment be proportional to the crime.³²

2. Social Defense

The social defense, or incapacitation, theory focuses on society’s right to protect itself against aggressors by restraining individuals who are dangerous to society. Punishment, therefore, is not justified because it presupposes an individual’s ability to freely choose crime and society’s ability to judge his or her guilt.³³ The social defense theory emphasizes benefiting the community rather than restraining dangerous individuals³⁴ and assumes that potential offenders will commit certain acts unless prevented.³⁵

CONTEMPORARY PUNISHMENT].

24. *See id.* at 39.

25. *See id.* at 129.

26. *See id.* at 96.

27. *See id.* at 175.

28. *See id.* at 3.

29. *See id.* at 4.

30. *Id.* at 40 (quoting Emmanuel Kant).

31. *Id.* at 39 (quoting *Matthew* 5:38 (King James)).

32. *See id.* at 4.

33. *See id.*

34. *See id.* at 129.

35. *See id.*

3. Deterrence

Deterrence theory also focuses on society.³⁶ It concentrates, however, on punishing wrongdoers when their actions elicit others to act in a similar manner.³⁷ The theory is defined as “the restraint which fear of criminal punishment imposes on those likely to commit crime.”³⁸ Therefore, the theory proffers that the threat of punishment should discourage potential criminals from pursuing criminal activity and protect society.³⁹

4. Rehabilitation

Finally, rehabilitation theory focuses on individuals rather than on society.⁴⁰ Punishment is a condition for self-reform.⁴¹ This theory promotes the “use of the coercive power of the state to impose a regime of social and psychological therapy.”⁴² Although this theory concentrates primarily on individuals, its implementation may also benefit society by reducing the number of criminals.⁴³

The notion of sentencing, and the four theories influencing sentencing guidelines, become more important when the offender is a juvenile. “Juvenile delinquency” is defined as “illegal behavior by a minor who falls under a statutory age limit.”⁴⁴ When applying the theories of punishment to children, questions arise: Is the punishment appropriate when the criminal is a minor? Is the punishment fair considering the law was designed to punish adults? The justification for using adult sentencing guidelines to sentence children when they commit “adult-like offenses,” such as murder, is that, because of the seriousness of the offense, the punishment should be the same for all individuals who commit murder, regardless of whether the individual is a child or an adult.⁴⁵

36. *See id.* at 4 (discussing the long-term social benefits of deterring future criminal action).

37. *See id.*

38. *Id.* at 93.

39. *See id.*

40. *See id.* at 4.

41. *See id.*

42. *Id.*

43. *See id.*

44. BLACK'S LAW DICTIONARY, *supra* note 22, at 867.

45. *See* CONTEMPORARY PUNISHMENT, *supra* note 23, at 5.

Over 100 years ago, efforts to reform children convicted of minor crimes led to the implementation of what is now the current juvenile justice system in the United States.⁴⁶ In the past six years, however, the number of juveniles committing serious crimes like murder, rape, and robbery has significantly increased.⁴⁷ Legislators and constituents call for an overhaul of the juvenile system but are reluctant to punish children in the same manner as adult criminals.⁴⁸ This debate strains the U.S. juvenile justice system. Some reformists support retributive measures, seeking to prescribe adult sentences for children who commit adult-like crimes.⁴⁹ Other reformists favor more rehabilitative measures, seeking to treat juvenile offenders as children and rehabilitate and prepare them for re-entry into society.⁵⁰

B. The Historical Development of the U.S. Juvenile Justice System

The U.S. juvenile justice system developed in three stages: (1) the traditional court,⁵¹ (2) the reformed court resulting from *In re Gault*,⁵² and (3) the modern reformed court resulting from post-*Gault* developments.⁵³

1. The Traditional Court

The U.S. juvenile justice system first evolved as an attempt to deal with dependent, neglected, and delinquent juveniles.⁵⁴ At the turn of the twentieth century, state legislatures created a juvenile justice system, separate from the adult system, to specifically

46. See Lacayo, *supra* note 16, at 60.

47. See *id.* at 61.

48. See *id.* See also Aric Press & Ginny Carroll, *Should Young Killers Face the Death Penalty*, NEWSWEEK, Jan. 13, 1986, at 74 (discussing the notion of imposing the death penalty on minors in the United States and noting that most countries refuse to do so).

49. See Lacayo, *supra* note 16, at 61.

50. See *id.* at 63.

51. See generally Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997) (discussing the development of the traditional juvenile court).

52. See generally *In re Gault*, 387 U.S. 1, 14-21 (1967) (discussing the development of the U.S. juvenile court system). See also discussion *infra* Part II.B.2 (discussing the reformed court resulting from *Gault*).

53. See Scott & Grisso, *supra* note 51, at 138.

54. See generally JERRY L. MERSHON, *JUVENILE JUSTICE: THE ADJUDICATORY AND DISPOSITIONAL PROCESS* 12 (1991) (exploring the philosophy animating the U.S. juvenile court system).

rehabilitate young offenders.⁵⁵ The traditional juvenile court reflected the notion that juveniles are not fully responsible for their actions because, as minors, they are “person[s] under the age of legal competence”⁵⁶ and therefore do not deserve the same treatment as their competent adult counterparts.⁵⁷ Although the traditional court viewed juveniles as lacking in experience and judgment and needing lessons in accountability,⁵⁸ it nevertheless considered juvenile offenders to be generally good kids who got into trouble with the law.⁵⁹

The notion that criminal conduct is a symptom of an underlying condition requiring treatment, rather than bad conduct warranting punishment, animated the juvenile justice system’s focus on rehabilitation.⁶⁰ The distinction between adult and juvenile offenders was made, in part, to underscore the lenient legal response to youth crime versus the more stringent standards applied to adult crime.⁶¹ Therefore, retributive punishment for adults was justifiable because an adult’s criminal offenses represent the adult’s free and rational choice to commit illegal acts;⁶² retributive punishment for children was rejected because juveniles were deemed developmentally unable to make this choice.⁶³ In these early years, the juvenile courts had jurisdiction over criminals ages seven to fourteen or sixteen, depending on the jurisdiction, which prevented these individuals from being tried as adults.⁶⁴ With retributive sentences not available for juvenile offenses,⁶⁵ the courts focused on rehabilitative approaches to “preserv[e] the future prospects of young offenders.”⁶⁶ The

55. See Scott & Grisso, *supra* note 51, at 143.

56. *Id.* See BLACK’S LAW DICTIONARY, *supra* note 22, at 997.

57. See BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 65 (1993).

58. See Scott & Grisso, *supra* note 51, at 138.

59. See *id.* at 147.

60. See *id.* at 141–142 (noting that the “underlying condition” requiring treatment was caused by poor parental guidance, care, and supervision as well as social harms associated with poverty) (quoting CHARLES LARSON, THE GOOD FIGHT: THE LIFE AND TIMES OF BEN B. LINDSEY 34 (1972)). See also MURRAY LEVINE & ADELIN LEVINE, A SOCIAL HISTORY OF HELPING SERVICES 155–229 (1970); BEN B. LINDSEY & HARVEY J. O’HIGGINS, THE BEAST 82–83 (1909).

61. See Scott & Grisso, *supra* note 51, at 142–143.

62. See *id.* at 144.

63. See *id.*

64. See *id.* at 143.

65. See *id.* at 141.

66. *Id.* at 144.

rehabilitative approaches were premised on the philosophy that rehabilitation could divert a juvenile off the criminal career path that he or she would proceed down without appropriate intervention.⁶⁷

2. The Reformed Court Resulting from *In re Gault*

*In re Gault*⁶⁸ spurred reforms in the juvenile justice system by ushering in changing views of juvenile sentencing.⁶⁹ Prior to the 1960s, courts attempted to implement strategies to rehabilitate juvenile offenders.⁷⁰ During this period, however, skepticism about rehabilitation's effectiveness for juvenile offenders grew.⁷¹ Prevalent beliefs that juvenile offenders, especially those convicted of serious crimes like murder, were more like adults than the traditional court model realized, further fostered doubts about rehabilitation's effectiveness.⁷² As a result, the juvenile justice system's focus shifted from addressing the juvenile offender's needs to emphasizing the seriousness of the offense.⁷³

Following the *Gault* decision,⁷⁴ legislators began constructing a more retributive juvenile sentencing system, which was based on the adult model, but still took into account juvenile offenders' youth and immaturity.⁷⁵ The new model held juveniles responsible for their criminal acts because it deemed them as having sufficient capacity for self-control.⁷⁶ The rationale for more severe punishment reflected adolescents' needs to take responsibility for their actions in preparation for adulthood, rather than blamed their illegal actions on youthful indiscretions.⁷⁷

67. *See id.*

68. 387 U.S. 1, 30 (1967) (holding that a 15-year-old boy, who was committed as a juvenile delinquent to the Arizona State Industrial School for the period of his minority was denied due process because a juvenile delinquency hearing, which may lead to commitment in a state institution, "must measure up to the essentials of due process and fair treatment.").

69. *See Scott & Grisso, supra* note 51, at 137-138.

70. *See id.* at 137 (discussing the philosophy of the traditional juvenile court).

71. *See id.* at 145.

72. *See id.*

73. *See id.*

74. *See In re Gault*, 387 U.S. 1, 31 (1967) (holding that hearings for juveniles before juvenile court judges must comport with the Due Process Clause requirements of the Fourteenth Amendment to the United States Constitution).

75. *See Scott & Grisso, supra* note 51, at 145.

76. *See id.*

77. *See id.* at 145-146.

Ironically, rehabilitative theories, similar to those the traditional courts employed, were at the root of the implementation of retributive punishments.⁷⁸ By imposing adult punishments, the juvenile system sought to make today's children better adults tomorrow.⁷⁹

Once again, the question arose as to whether the new system would punish children more harshly than did the traditional court system. The new system used a child's age as a tool to determine his or her mental capacity for understanding criminal responsibility.⁸⁰ In presuming that adulthood signifies an ability to accept responsibility, the reformers recognized some of the developmental characteristics traditional courts' acknowledged contributed both to a juvenile's conduct and his diminished blameworthiness.⁸¹ This era of development limited retributive punishment's application, yet pursued more determinative sentencing provisions.⁸²

3. The Modern Reformed Court

The restraint on retribution in the post-*Gault* era wanes in recent years.⁸³ The modern era views juvenile offenders as "criminals who happen to be young, not children who happen to be criminal."⁸⁴ This view fostered the developing trend in social defense.⁸⁵ The perceived need to protect society from juvenile offenders has led to strict statutory minimum sentences for juveniles, especially for violent criminals,⁸⁶ that mirror adult sanctions.⁸⁷

The retributive approach to juvenile criminal conduct assumes that there is no difference, psychologically, between adolescent and adult offenders' competence levels.⁸⁸ Supporters of stringent standards for young offenders focus on the harm these

78. *See id.* at 145 n.34.

79. *See id.* at 146.

80. *See id.*

81. *See id.* at 147.

82. *See id.* at 147-148.

83. *See id.* at 148.

84. *Id.* at 147-148.

85. *See generally id.* at 149 (discussing the reasons why society should not be more lenient with a sixteen-year-old offender than with a thirty-year-old offender).

86. *See id.* at 150. *See also* discussion *infra* Part III.

87. *See* Scott & Grisso, *supra* note 53, at 148.

88. *See id.* at 151.

offenders cause.⁸⁹ In applying this stringent standard, courts mistakenly assume that juveniles meet any relevant standard for maturity.⁹⁰ Also, juvenile criminal courts reason that youth, in and of itself, is not an important factor in distinguishing juveniles from adults.⁹¹

Despite the retributive sentencing trend, which imposes full criminal responsibility on juvenile defendants, discomfort and controversy about the punishment fitting the crime arise.⁹² Reformers from the traditional court era still emphasize the juvenile offender's immaturity when discussing the retributive form of criminal responsibility.⁹³ Present day cases involving children incarcerated for minimal amounts of time for serious crimes, however, override these concerns.⁹⁴

In recent years, reformists favoring retributive punishment demanded that juveniles, on trial for murder, be tried in adult criminal court.⁹⁵ Once convicted in adult court, juvenile offenders are sentenced as adults for prolonged periods of incarceration—the purpose of such incarceration is to punish the offender, rather than to rehabilitate and prepare him or her for life after prison.⁹⁶

Recently, the most popular method among legislators to combat juvenile crime and severely punish young violent offenders is “transfer.”⁹⁷ A “transfer” occurs when a young offender is withdrawn from the juvenile justice system and placed in the adult criminal court system.⁹⁸ Transfers come in two forms—judicial transfers and legislative waivers.⁹⁹ Disputes regarding the minimum age necessary to transfer a juvenile criminal defendant

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.* at 151 (citing John McCormick, *Death of a Child Criminal*, NEWSWEEK, Sept. 12, 1994, at 45). *See also* Editorial, *Stopping Young Offenders*, ATLANTA J. & ATLANTA CONST., May 16, 1997, at A18, available in LEXIS, News Library, Curnws File.

93. *See* Scott & Grisso, *supra* note 53, at 152.

94. *See id.* at 153.

95. *See id.* at 150–151.

96. *See id.* at 150.

97. *See* Shari Del Carlo, Comment, *Oregon Voters Get Tough on Juvenile Crime: One Strike and You Are Out!*, 75 OR. L. REV. 1223, 1223 (1996) (defining the term “transfer” as “withdrawing young offenders from the juvenile justice system and placing them in adult criminal court.”).

98. *See id.*

99. *See id.* (distinguishing judges, who make judicial transfers, from legislators, who make legislative transfers in the form of statutes).

to the adult court system abound.¹⁰⁰ Some legislators suggest lowering the minimum “transfer age” for defendants accused of murder.¹⁰¹ In recent years, the average age for adolescent transfers was reduced from sixteen to fourteen.¹⁰² Once convicted as adults, even though they may be as young as fourteen years old, juvenile offenders receive the same sentences as do adult offenders.¹⁰³

By 1995, only one state, Hawaii, continued to try all juveniles under the age of sixteen in juvenile court, regardless of the severity the crimes involved.¹⁰⁴ The fact that all other U.S. states reduced the minimum transfer age illustrates the dramatic increase in the severity of juvenile sentencing and suggests that, in abandoning its focus on the juvenile offender’s age, the juvenile justice system is becoming more retributive. In the United States, imposing adult sentences on juvenile offenders has become commonplace.

State legislators are enacting stricter laws to combat juvenile crime by severely punishing young violent offenders.¹⁰⁵ For example, in Pennsylvania, juveniles fifteen years and older who commit violent crimes can automatically be transferred to, and tried in, the adult court system.¹⁰⁶ Georgia subsequently surpassed Pennsylvania when its legislature lowered the transfer age to thirteen.¹⁰⁷

In 1994, the California legislature changed its transfer law to allow for the transfer of violent criminals, fourteen years old or older, to the adult court system, after a fitness hearing.¹⁰⁸ By lowering the transfer age from sixteen to fourteen, the California

100. See generally *id.* at 1223–1224 (discussing Oregon’s implementation of legislative waivers and its automatic transfer of juveniles, ages fifteen and older, into the adult criminal system for specific enumerated felonies).

101. See *id.* at 1228.

102. See EDWARD HUMES, NO MATTER HOW LOUD I SHOUT 375 (1996) (noting that California and most other states are changing state law to allow for the transfer of juveniles ages fourteen and older who are charged with serious and violent crimes to adult court at the prosecution’s request).

103. For example, Luke Woodham, who was convicted of the schoolyard shooting in Pearl, Mississippi, was sentenced to two life terms in prison. See *Rampage Victim’s Dad Lauds Conviction*, CHI. TRIB., June 14, 1998, at 13C.

104. See HUMES, *supra* note 102, at 375.

105. See Del Carlo, *supra* note 99, at 1223–1224.

106. See HUMES, *supra* note 102, at 358.

107. See GA. CODE ANN. § 15-11-5(2)(A) (Harrison 1995). See also Linda F. Giardino, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 J.L. & POL’Y 223 (1996).

108. See HUMES, *supra* note 102, at 358.

legislature thereby made it possible for an adult court to sentence a fourteen-year-old offender to life in prison.¹⁰⁹

Several states followed California's example. Nevada reduced the transfer age from sixteen to fourteen;¹¹⁰ North Carolina reduced the transfer age from fourteen to thirteen;¹¹¹ Texas reduced the transfer age from fifteen to fourteen;¹¹² and West Virginia reduced the transfer age from sixteen to fourteen.¹¹³ In Massachusetts, a juvenile can be tried as an adult if he or she is at least fourteen years old and can be sentenced to a maximum confinement of twenty years for committing murder in the first degree.¹¹⁴

In 1995, Oregon voters passed Measure 11,¹¹⁵ which allows for the transfer of juveniles fifteen years old and older charged with any one of eighteen enumerated felonies, including murder, to adult criminal court.¹¹⁶ Measure 11 does not stipulate where a juvenile must serve his or her sentence, thus leaving open the possibility that the juvenile could serve the sentence in an adult prison.¹¹⁷

Although these new laws reflect public fears about juvenile crime, the lower transfer age threshold only affects a fraction of juvenile offenders.¹¹⁸ Nevertheless, every juvenile subject to these laws counts; the lower transfer ages mark a critical turning point in

109. *See id.* *See also* CAL. WELF. & INST. CODE § 602(b) (Deering, LEXIS through 1999 Sess.).

110. *See* NEV. REV. STAT. § 62.020 (1996).

111. *See* N.C. GEN. STAT. § 7A-608 (Michie 1995).

112. *See* TEX. FAM. CODE ANN. § 54.02 (West 1996). A juvenile can be sentenced to up to forty years in an adult prison for committing a capital felony, including first degree murder. *See id.* § 54.04(d)(3).

113. *See* W. VA. CODE § 49-5-10 (Supp. 1996).

114. *See* MASS. GEN. LAWS ANN. ch. 119, § 1 (West 1996).

115. *See* OR. REV. STAT. § 137.707(1) (1995).

116. *See* Del Carlo, *supra* note 99, at 1224 & n.10 (citing OR. REV. STAT. § 137.707(1) (1995) (codifying Ballot Measure 11)). The eighteen enumerated felonies in Measure 11 include: murder, attempt or conspiracy to commit aggravated murder, attempt or conspiracy to commit murder, first or second degree manslaughter, first or second degree assault, first or second degree kidnapping, first or second degree rape, first or second degree sodomy, first or second degree unlawful sexual penetration, first degree sexual abuse, and first or second degree robbery. *See* OR. REV. STAT. § 137.707(4)(a)(A)-(R).

117. *See id.* at 1232 n.74 (citing VOTERS' PAMPHLET: STATE OF OREGON GENERAL ELECTION NOVEMBER 8, 1994, at 57).

118. *See* HUMES, *supra* note 102, at 358 (noting that the lower transfer age only affects one percent of juvenile offenders).

the United States' juvenile justice system's philosophy:¹¹⁹ by punishing juveniles in the adult criminal system, "the American public is trying to lower the age of adulthood, rather than see what is happening as a failure of society."¹²⁰

C. The Historical Development of the French Juvenile Justice System

The French juvenile justice system also faces growing problems with juveniles committing serious crimes.¹²¹ The French take pride in their rehabilitative criminal justice system.¹²² The increase in serious crimes, however, led the French to remodel their system and implement measures similar to those executed in the United States following *In re Gault*,¹²³ including tracking the effectiveness of the United States' retributive system.¹²⁴ The French juvenile justice system developed in three stages: (1) The Law of 1912;¹²⁵ (2) The Law of 1945;¹²⁶ and (3) the 1996 Amendment to the Law of 1945.¹²⁷

1. The Law of 1912

Prior to 1912, French criminal law made no official legal distinction between adults and children when imposing punishment.¹²⁸ In practice, however, judges often made exceptions in prescribing punishment for children.¹²⁹ The legal definition of "child" was "anyone who had not attained the age of seven, the legal age of reason."¹³⁰ In the nineteenth century,

119. *See id.*

120. Giardino, *supra* note 107, at 258 n.118 (citing Fox Butterfield, *States Revamping Laws on Juveniles as Felonies Soar*, N.Y. TIMES, May 12, 1996, at A1 (quoting Barry Krisberg, President of the National Council on Crime and Delinquency in San Francisco, California)).

121. *See* Calvin Peeler, *Always a Victim and Never a Criminal: Juvenile Delinquency in France*, 22 N.C. J. INT'L L. & COM. REG. 875, 876 (1997).

122. *See id.* at 877.

123. *See generally id.* at 876-878. *See also* discussion *supra* Part II.B.

124. *See* Peeler, *supra* note 121, at 876.

125. *See id.*

126. C. PÉN. art. 45-174 (1945) (Fr).

127. *Id.* arts. 45-174, 8-1, 8-2, 8-3.

128. The first comprehensive French Penal Code, which was created in 1810, did not distinguish between children and adults—the legal age of reason was codified as seven years old for criminal purposes. *See* Peeler, *supra* note 121, at 878.

129. *See id.*

130. *Id.* (citing Daniel Amson, *Lynching Instigated by Three Children*, PARIS DAILY,

however, the French legal system began to display concerns for children's welfare and at times exercised discretion in punishing children between the ages of seven and sixteen.¹³¹ In 1912, the French legislature, for the first time, amended the 1810 Penal Code to distinguish between children and adults,¹³² as legislators assumed juveniles could not appreciate the wrongfulness of their illegal acts.¹³³ This amendment essentially established a rehabilitative method of punishment for children, similar to those the United States' juvenile justice system utilized in the nineteenth and early twentieth centuries.¹³⁴

2. The Law of 1945

The Law of 1945 continued to implement the rehabilitative form of juvenile justice that the Law of 1912 implemented.¹³⁵ The 1945 law focused on education rather than retribution.¹³⁶ The law's emphasis on education was based on the principle that a juvenile offender was not a young adult, but a child who committed a wrong and needed education to facilitate his or her re-entrance into society as a well-adjusted individual.¹³⁷ The Law of 1945 extended the presumption of criminal irresponsibility to all minors under the age of eighteen.¹³⁸

Under the Law of 1945, age was used as a mitigating factor in criminal sentences for juveniles ages thirteen to seventeen—minors under the age of thirteen were considered per se criminally irresponsible.¹³⁹ The purpose of the Law of 1945, which focused primarily on rehabilitation, was to make juveniles better citizens of the state.¹⁴⁰ Age was often a sentencing consideration that worked in the juvenile offender's favor.¹⁴¹ Use of this age-based

Nov. 29, 1993, at 7).

131. See Peeler, *supra* note 121, at 879. Prior to the amendment of the 1810 Penal Code, the age of majority in France was sixteen. See *id.*

132. See *id.*

133. See *id.*

134. See generally DROIT PENAL GENERAL 395-397 (2d ed. 1984) (discussing the Law of 1912 and the distinctions it made with regard to a juvenile offender's age).

135. See Peeler, *supra* note 121, at 880.

136. See *id.* at 881.

137. See *id.*

138. C. PÉN. art. 45-174 (1945) (Fr).

139. See Peeler, *supra* note 121, at 882.

140. See *id.* at 880-881.

141. See *id.* at 886-887.

sentencing leniency, however, was severely curtailed in later decades.¹⁴²

3. 1996 Amendment to the Law of 1945

The 1996 amendment to the Law of 1945 was proposed to combat the rise in juvenile crime that began in 1955.¹⁴³ Not only were juveniles committing more crimes, they were also committing more violent crimes than in previous decades.¹⁴⁴ In 1988, juveniles under the age of eighteen committed two percent of the nation's homicides.¹⁴⁵ This statistic shocked the French juvenile justice system, which was more humanitarian than was the United States' juvenile justice system.¹⁴⁶ The French public grappled with how to correct this rise in violent crime.¹⁴⁷ French lawmakers, however, did not want to completely abolish the Law of 1945 because it embodied the French juvenile justice system's educational and rehabilitative ideals.¹⁴⁸ The increase in juvenile crimes, however, had to be addressed.

French lawmakers hoped the Amendment of 1996¹⁴⁹ would be the answer.¹⁵⁰ Based on the crime a juvenile offender committed, the amendment allowed a judge to prescribe either a rehabilitative punishment or a retributive penalty.¹⁵¹ French lawmakers were concerned that the Law of 1945 did not sufficiently discourage juveniles from committing crime because the law's punishment was based on the offender's age and not the criminal offense committed.¹⁵² Some juvenile offenders thought they were virtually immune from serious punishment because their punishments would be minimal compared to the punishment

142. See discussion *infra* Part II.C.3.

143. See Peeler, *supra* note 121, at 885-886 (discussing the steady rise in all types of crimes).

144. See *id.* at 885.

145. See Laurence Follea, *Deux pour cent des homicides commis par des moins de 18 ans [Two percent of homicides committed by those under 18 years of age]*, LE MONDE (Paris), Mar. 3, 1993, at 1. See also Peeler, *supra* note 121, at 885.

146. See Peeler, *supra* note 121, at 886.

147. See *id.* at 886-887.

148. See *id.* at 894-895.

149. C. PÉN. art. 45-174, 8-1, 8-2, 8-3 (1945) (Fr.).

150. See Law No. 96-585 of July 1, 1996, J.O., July 2, 1996, p. 9920 (Fr.). See also Peeler, *supra* note 121, at 894 & n.111.

151. See Law No. 45-174 of Feb. 2, 1945, J.O., Feb. 4, 1945, art. 8, p. 530 (Fr.). See also Peeler, *supra* note 121, at 876 & n.7.

152. See Peeler, *supra* note 121, at 895.

adults committing similar crimes received.¹⁵³ The Amendment of 1996 was a compromise between preserving the Law of 1945's original intent¹⁵⁴ while addressing the rise of violent juvenile crime—it was an “inevitable . . . legal and political measure to keep in step with the current juvenile crisis.”¹⁵⁵

While France does not have the same system of transferring juveniles to adult criminal courts as does the United States, French judges can use the severity of the crime a juvenile committed in determining the juvenile offender's sentence.¹⁵⁶ Under the Law of 1945,¹⁵⁷ however, the juvenile judges had a great deal of discretion to consider the events surrounding the offense as well as the individual minor's personality and the appropriate means for his or her particular reeducation.¹⁵⁸ The 1996 Amendment created a new procedure that requires a hearing on the offense charged, where the judge is authorized to order either a rehabilitative measure or a penalty—in either case, the judge is authorized to order that the juvenile be confined to a public detention facility.¹⁵⁹ This change in French law, similar to the change in U.S. law, has reduced the French juvenile justice system to trying juveniles at younger ages without focusing on the individual circumstances that cause juveniles to commit murder.

153. *See id.* at 895–896.

154. The Law of 1945 was originally intended to rehabilitate juvenile offenders, not to punish them under retribution theories. *See id.* at 880–881.

155. *Id.* at 896 (quoting Marie-Amelie Lombard, *L'Assemblée Nationale Examine un Projet de Reforme a Partir D'aujourd'hui, Mineurs Delinquants: La Loi S'adapte [The National Assembly Examines a Reform Project Starting Today, Delinquent Minors: The Law Adapts]*, LE FIGARO (Paris), Mar. 27, 1996, at 8C).

156. *See* Stephanie J. Millet, Note, *The Age of Criminal Responsibility in an Era of Violence: Has Great Britain Set a New International Standard?*, 28 VAND. J. TRANSNAT'L L. 295, 343 (1995).

157. C. PÉN. art. 45-174 (1945) (Fr.).

158. *See* Peeler, *supra* note 121, at 895.

159. *See id.*

III. THE UNITED STATES AND FRANCE SHOULD ADOPT THE MODEL ESTABLISHED IN FRANCE'S LAW OF 1945, WHICH FOCUSES ON REHABILITATION INSTEAD OF RETRIBUTION

The U.S. and French juvenile justice systems face an internal struggle between two seemingly mutually exclusive competing interests: enforcing the rehabilitative ideals upon which the juvenile justice systems were created and maintaining the retributive interests in punishing juvenile criminal offenders thereby protecting society.¹⁶⁰ The two countries' legislatures are torn between punishing murderers who happen to be children and punishing children who happen to commit adult crimes.¹⁶¹ Today, because of the recent increase in highly publicized juvenile murderers, these two polar opposite interests are now colliding.

The United States should retreat from utilizing retributive punishment for juveniles convicted of murder, and adopt the French "rehabilitation model of justice" embodied in the Law of 1945.¹⁶² France should also return to the rehabilitation model and abandon its 1996 Amendment to the Law of 1945.¹⁶³

A. The Basis for Comparison

France and the United States share many similarities making comparison of their respective juvenile justice systems possible. For example, both are industrialized nations with large urban populations,¹⁶⁴ and both have active juvenile justice systems attempting to adjust to an increase in violent juvenile offenders.¹⁶⁵ In recent years, both countries witnessed increases in juvenile crime and both responded by imposing more retributive punishments, in lieu of the rehabilitative punishments implemented previously.¹⁶⁶

Although both countries share important similarities, their differences should be acknowledged. Their different political histories greatly affect their respective political and legal systems.

160. See Giardino, *supra* note 107, at 224.

161. See Cloud, *supra* note 15, at 64. See also Lacayo, *supra* note 16, at 60.

162. C. PÉN. art. 45-174 (1945) (Fr.).

163. See *id.*

164. See generally Peeler, *supra* note 121, at 875.

165. See generally *id.* See also Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

166. See Peeler, *supra* note 121, at 893.

Additionally, France and the United States do not share the same culture, even though both experienced recent increases in their immigrant populations, which changes their respective ethnic compositions.¹⁶⁷

B. Adopting the Rehabilitative Model and Rejecting the Retributive Model

The United States and France should both abandon retributive punishment for juveniles convicted of murder, and adopt the French Law of 1945's rehabilitative model.¹⁶⁸ Because of the demand for tougher punishment for children who commit murder, this is an unpopular stance.¹⁶⁹ Some reformists contend that allowing juveniles who commit murder to avoid incarceration while punishing adults who commit the same offense is unfair.¹⁷⁰ Although children eventually develop a sense of responsibility and must be punished for their actions, they are juveniles and should not receive the same punishment as do adults.¹⁷¹ The current retributive models in effect in France and the United States require that juveniles, who commit serious offenses, be tried as adults.¹⁷² These models do not recognize that these juvenile offenders are nevertheless minors who have committed horrible crimes and need treatment to help them re-enter society and become law-abiding citizens.¹⁷³ Retributive laws emphasize punishment by sentencing juveniles to serve extended

167. See generally *id.* at 892–893 (discussing rising immigrant and urban populations and their affect on the increase of juvenile crime in France). See generally Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 PEPP. L. REV. 907 (1995) (discussing rising immigrant and urban populations and their affect on the increase of juvenile crime in the United States).

168. C. PÉN. art. 45-174 (1945) (Fr.).

169. See, e.g., OR. REV. STAT. § 137.707(1) (1995) (codifying Measure 11, which automatically places juveniles ages fifteen and older who are charged with murder in the adult criminal justice system). See also generally Del Carlo, *supra* note 97, at 1223 (discussing the massive media attention focusing on the increasing level of juvenile crime).

170. In an April 1998 Wall Street Journal/NBC News Poll, when asked whether juveniles who commit murder should be tried as adults, fifty-six percent of the individuals surveyed answered yes. See Ronald G. Shafer, *Tougher Stances Against Violent Youths Gain Growing Support*, WALL ST. J., Apr. 24, 1998, at A1.

171. See generally Mack, *supra* note 165, at 119–120 (arguing that the state should discipline juveniles offenders in the same manner as parents discipline their children). See also *id.* at 111 (proffering that children should be treated as children and not as criminals).

172. See discussion *supra* Parts II.B.3 & C.3.

173. See Mack, *supra* note 165, at 106–107.

incarceration periods rather than reforming them to become productive members of society.¹⁷⁴

Both the United States and France should return to a rehabilitative model for three reasons: (1) rehabilitation instills positive values that a child can use for the rest of his or her life; (2) rehabilitation focuses on the offender's psychological needs rather than on his or her criminal conduct; and (3) rehabilitation better prepares a juvenile for release after incarceration.¹⁷⁵

1. Rehabilitation Instills Positive Values that Children Can Use for the Rest of Their Lives

One of the positive aspects of rehabilitation that would benefit the United States and France is encapsulated in France's Law of 1945—instilling positive values in juveniles who are convicted of murder.¹⁷⁶ Implementing this seemingly obvious solution is a difficult undertaking. It is undeniable that taking an individual's life is wrong and society must punish those who violate such a social norm.

In a 1998 Wall Street Journal/NBC News Poll, fifty-three percent of the people surveyed linked the incidence of juvenile murderers to diminished social values.¹⁷⁷ Many argue that society does not need to instill juvenile murderers with positive values because, by committing murder, they violated one of society's most valued norms and punishing them is the only way to teach them a lesson. The fact that a murderer is a juvenile, however, should not automatically trigger an adult standard of sentencing, which could, in turn, trigger longer confinement without intensive treatment. Providing intensive treatment for juvenile offenders can afford them opportunities to make effective long-term changes in their values. Juveniles who commit murder before reaching the age of majority¹⁷⁸ lack experience and judgment and need lessons

174. See discussion *supra* Parts II.B.3. & C.3. See, e.g., OR. REV. STAT. § 137.707(1)(1995) (imposing mandatory minimum sentences for murder with no possibilities of parole or sentence reductions for juveniles).

175. See discussion *infra* Parts III.B.1-3.

176. See Peeler, *supra* note 121, at 895.

177. See Shafer, *supra* note 170, at A1.

178. C. PÉN. art. 45-174 (1945) (Fr.). In many U.S. states, the age of majority is eighteen years of age. See, e.g., ALASKA STAT. § 25.20.010 (Michie 1962); ARK. CODE ANN. § 9-25-101 (Michie 1987); CONN. GEN. STAT. § 1-1d (1988); GA. CODE ANN. § 39-1-1 (Harrison 1998); 755 ILL. COMP. STAT. 5/11-1 (West 1992); NEV. REV. STAT. ANN. § 129.010 (Michie 1998); N.Y. DOM. REL. § 2 (McKinney 1988); OR. REV. STAT. ANN. §

in accountability to help them make proper judgments in the future.¹⁷⁹ Because juveniles are less mature and less responsible than adults, their values are still developing and need molding by adults. Through a rehabilitative incarceration model, juvenile offenders can develop the values they need to operate in a socially acceptable manner. Courts should have discretion to determine the causes of a juvenile's trouble, and create a punishment plan that addresses those causes accordingly.¹⁸⁰

The French model, which was established in the Law of 1945¹⁸¹, consistently focuses on educating juvenile offenders, regardless of the nature of their offenses, about the societal values involved in functioning as law-abiding citizens.¹⁸² The education juveniles receive in France is based on the concept that, to be better citizens, individuals must abide by society's laws,¹⁸³ which are rooted in social values. Although the social values in the United States and France may be different, the basic premise for education remains the same. Regardless of the country's values, juveniles must be taught right from wrong so they can understand and follow laws.

In France, a juvenile court judge can send a child offender to an institution for "therapeutic education."¹⁸⁴ The education juveniles receive varies; however, in France, children are not "locked up" like they are in the United States, where juveniles are incarcerated together with adult criminals.¹⁸⁵ The French do not subscribe to this retributive approach because the French system emphasizes maintaining the juvenile offender's close contact with

109.510 (1989); TEX. CIV. PRAC. & REM. CODE ANN § 129.001 (West 1997); W. VA. CODE § 2-3-1 (1999).

179. See *Thomas v. Oklahoma*, 487 U.S. 815, 834 (1988) (recognizing that adolescents are less mature and responsible than are adults).

180. See Mack, *supra* note 165, at 119-120. According to Judge Mack, a juvenile court judge in Chicago in the early twentieth century, it is a mistake to treat children as adult criminals; this is a belief rooted in the original purpose of the U.S. juvenile court system, which is to treat juveniles as juveniles who happen to commit crimes, instead of as criminals who happen to be minors. See *id.*

181. C. PÉN. art. 45-174 (1945) (Fr.).

182. See generally Peeler, *supra* note 121, at 880-881.

183. See *id.*

184. Millet, *supra* note 156, at 343 (quoting RICHARD J. TERRILL, *WORLD CRIMINAL JUSTICE SYSTEMS: A SURVEY* 150 (1992) (comparing different countries' justice systems)).

185. See *id.*

the community.¹⁸⁶ France's therapeutic education institutions operate under the basic and logical assumption that juvenile offenders, especially very young ones, need the entire community's care and supervision.¹⁸⁷ This assumption is consistent with France's juvenile welfare reform model.¹⁸⁸ Conversely, the United States' juvenile justice system, although rooted in reformation, nevertheless treats juveniles as adults by removing them from the system that was designed specifically for them, and placing them in the adult criminal system.¹⁸⁹ The United States' emerging retributive punishment model is inconsistent with its rehabilitative model roots.

Some argue, however, that the present retributive system is appropriate because society's desire to punish and banish children who commit frightening and violent acts is a natural one.¹⁹⁰ This argument proffers an overly simplistic answer that does not resolve the problem.¹⁹¹ In fact, all it does is guarantee additional increases in crime because the individual juveniles' values have not changed.¹⁹² Supporters of retributive punishment argue that if society neglects to punish juveniles who commit serious crimes, the juveniles will never understand the differences between right and wrong.¹⁹³ If society fails, however, to educate juveniles about right and wrong through rehabilitation programs, incarceration will not provide them any future benefit. Society must accept responsibility, not only for juveniles' actions (because children learn values from those around them), but also for their future social improvement.¹⁹⁴ Calling for tougher and longer punishments may send a counterproductive message to juvenile offenders¹⁹⁵ because the punishment they receive may advance

186. *See id.* at 343–344.

187. *See id.* at 344.

188. *See id.*

189. *See Peeler, supra* note 121, at 893–894, 895.

190. *See Abbe Smith, They Dream of Growing Older: On Kids and Crime*, 36 B.C. L. REV. 953, 1004–1005 (1995).

191. *See id.*

192. *See id.* For example, in Los Angeles, California, Richard Perez, a sixteen-year-old, was convicted of first-degree murder and sentenced, as an adult, to thirty years to life in prison. *See HUMES, supra* note 102, at 25–26, 373. His murder trial constituted his thirty-first appearance in Los Angeles' juvenile court and his sixth criminal arrest. *See id.*

193. *See Millet, supra* note 156, at 344.

194. *See Smith, supra* note 190, at 1012.

195. *See id.* at 1010.

their misguided values.¹⁹⁶ Therefore, rehabilitation is a more logical approach to changing juvenile offenders' values, so that in the future, they do not revert back to the values, or lack thereof, they had at the time they committed murder.

Arguably, juveniles commit murder because they lack the values society holds in high esteem and consequently lose their freedom because of their actions; however, this does not necessarily mean they should lose the right to be treated as children.¹⁹⁷ They need assistance in developing values to guide them through the rest of their lives—assistance that only rehabilitation and instilling positive values can provide. Retribution-based punishment focusing on incarcerating offenders for specific lengths of time, without regard to remolding juvenile values, will not result in benefits to either the offenders or society.

2. Rehabilitation Focuses on Offenders' Psychological Needs Rather than on Their Criminal Conduct

Focusing on offenders' psychological needs could benefit both the U.S. and French juvenile justice systems. Concentrating on an offender's psychological needs, rather than on the consequences of their illegal actions, better rehabilitates the juvenile.¹⁹⁸ The state "has a duty to discern the physical, mental, and moral state of the child to determine whether he or she is in danger of future criminality."¹⁹⁹ The most important consideration "is not, [h]as this boy or girl committed a specific wrong, but [w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."²⁰⁰ The underlying circumstances, like the child's psychological maturity, emotional stability, and perceptions of life and death must be considered when examining "how he has

196. *See id.*

197. *See HUMES, supra* note 102, at 165 (detailing an interview with supervisors of juvenile prosecutions in Los Angeles Juvenile Court, where one prosecutor stated that "Kids who commit murder should automatically lose their right to be kids.").

198. *See generally* Rossum, *supra* note 167, at 909–910. Arguably, the system should focus on the consequences of a juvenile's illegal action, because it is the fact that he or she committed murder that led to his or her incarceration. *See id.* at 909. Punishment for that act, however, should entail discovering why, from the child's mental perspective, he or she committed murder. *See id.* at 910.

199. *Id.* at 909–910 (quoting Mack, *supra* note 165, at 107).

200. *Id.* (alteration in original).

become what he is”—namely, a child convicted of murder.²⁰¹ Examining all the factors causing juveniles to commit murder, including their psychological histories, provides a complete picture and allows the system to prescribe comprehensive treatment for juveniles.²⁰² In terms of juveniles' mental health, the examination must also focus on their inability to develop reasons and accept culpability for their actions. Although a juvenile's actions, such as committing murder, are not always well thought out,²⁰³ examining the reasons why these children choose to commit these crimes is key to understanding the nature of their mental health problems.²⁰⁴ Figuring out why juvenile offenders make these decisions is central to one of the juvenile justice system's purposes—to prevent stigmas from attaching to juvenile offenders' and thereby preserve their future prospects for future development.²⁰⁵

In the French juvenile justice system, a juvenile's age is a factor that may work in his or her favor in punishment determinations.²⁰⁶ In France, courts use age as a mitigating factor in sentencing determinations for juveniles between the ages of thirteen and seventeen.²⁰⁷ In the mid-twentieth century, juveniles under age thirteen were considered criminally irresponsible because of their inability to comprehend the severity of their

201. *See id.*

202. *See, e.g.,* Brian Jackson & John H. White, *Only a Child, But Robert Endured a Cruel Existence*, CHI. SUN TIMES, Sept. 2, 1994, at 5 (describing the horrible and terrifying upbringing of child killer, Robert Sandifer, who was “born into meanness and died in horror and, in between, lived a short and miserable life of cruelty, neglect and despair.”). At twenty-two months old, Sandifer was treated at a hospital for scratches on his neck and bruises on his arms and torso. *See id.* His mother said his father beat him. *See id.* Within that same year, the police found him alone with his two older brothers, ages three and five; Sandifer had scars, bruises, and burns on his face, neck, shoulders, and abdomen. *See id.* It was not unusual for Robert and his siblings to be left alone. *See id.* The children were left, at such young ages, to defend themselves. *See id.* At eleven years old, Sandifer was found dead with two gunshot wounds in his head. *See id.* Perhaps, had Sandifer received treatment or family counseling, his life would not have ended so tragically.

203. *See* Scott & Grisso, *supra* note 51, at 164.

204. *See id.*

205. *See* State v. Benoit, 490 A.2d 295, 299 (N.H. 1985) (stating the juvenile justice system's purpose is to shield children and prevent attachment of the criminal stigma by reason of conduct resulting from immature judgement (quoting United States v. Fotto, 103 F. Supp. 430, 431) (S.D.N.Y. 1952)).

206. *See* Millet, *supra* note 156, at 342–343.

207. *See* Peeler, *supra* note 121, at 879.

criminal wrongdoing.²⁰⁸ In 1945, when this French policy developed, the crime rate in France was lower than at present and the types of crimes juveniles committed were generally less serious than they are today.²⁰⁹ France now unfortunately gravitates toward a retributive system, similar to the system the United States employs, in which age is not used to mitigate culpability for immature juveniles who commit crimes like murder.²¹⁰ Instead, in the U.S. juvenile justice system, age works to the juvenile offender's detriment because it serves as an across-the-board standard used to transfer juveniles to the adult system.²¹¹ This standard is problematic because it ignores one of the most important elements of maturity age indicates—the ability to reason.²¹²

Juveniles today are more sophisticated than were juveniles in the 1940s and 1950s.²¹³ Regardless of sophistication, however, age should still be a consideration in determining a child's ability to comprehend his or her actions. The French juvenile justice system determines the age of criminal responsibility by taking into account the offender's age, the type of offense committed,²¹⁴ and the individual circumstances surrounding the crime.²¹⁵ Consequently, if a juvenile between the ages of thirteen and seventeen commits a violent crime, he or she might be tried in juvenile court and charged with a lesser offense than murder because, using age as a mitigating factor, the court could determine that the juvenile did not comprehend the severe consequences of the criminal act.²¹⁶

208. *See id.*

209. *See id.* at 887–888. *See also* Scott & Grisso, *supra* note 51, at 148–149.

210. *See* Peeler, *supra* note 121, at 887–888.

211. *See, e.g.,* NEV. REV. STAT. § 62.020 (1996), TEX. FAM. CODE ANN. § 54.02 (West 1996), W. VA. CODE § 49-5-10 (Supp. 1996), MASS. GEN. LAWS ANN. ch. 19, § 1 (West 1994) (reducing the juvenile transfer age to fourteen years old). *See also* N.C. GEN. STAT. § 7A-608 (Michie 1995) (reducing the juvenile transfer age to thirteen years old).

212. *See* Scott & Grisso, *supra* note 51, at 160. *See also* Del Carlo, *supra* note 97, at 1235.

213. *See* HUMES, *supra* note 102, at 166.

214. *See* C. PÉN. art. 69 (1960) (Fr.).

215. *See id.* art. 67.

216. *See* Millet, *supra* note 156, at 341 (discussing two juveniles who, in 1993, killed a thirty-seven-year-old homeless man from Vitry-sur-Seine, attempted to hide his body in a shallow well, and were not charged with murder but with deliberate wounding leading to unintended death (a charge equivalent to manslaughter)).

In France, the use of an offender's age as a mitigating factor in sentencing determinations is employed on a case by case basis—it is not a standard applied in a wholesale manner to all juveniles of the same age.²¹⁷ In contrast, the standard many U.S. states adopt for transferring children to adult courts fails to consider that children who are the same age might not be at the same psychological or developmental stage. For example, while a mature fourteen-year-old may comprehend the severity of killing another person and may be mature enough to appreciate the consequences of such an action, a mentally immature fourteen-year-old may not be sufficiently able to understand and comprehend the consequences of such an action. Therefore, the U.S. juvenile justice system's standards should incorporate age as a factor in determining whether a child can comprehend the nature and severity of his or her actions. Furthermore, age should (1) be a factor that works in the juvenile's favor by allowing his or her case to be heard in juvenile court, and (2) be applied on a case by case basis and not be used as an across-the-board standard allowing for the wholesale transfer of all juveniles over a certain age to adult criminal court. The United States can establish such standards by utilizing France's stratified age classification system to determine juvenile offenders' expected comprehension levels.²¹⁸ This system allows courts to consider the varying maturity levels of children who are the same age, and ensures that justice is served by rehabilitating juveniles and treating them as individuals.²¹⁹

The shift from rehabilitation-based to retribution-based punishment for juvenile murder renders the system less concerned with juveniles' needs.²²⁰ Rehabilitation-based facilities have programs fostering personal growth and positive socialization opportunities and providing medical and psychological treatment to address dysfunctional family and personal relationships.²²¹ In comparison, under retributive punishment, for serious crimes like murder, courts do not even review a juvenile's individual

217. See *id.* at 341–342.

218. See discussion *supra* Parts II.C.2–3.

219. See *id.*

220. See generally Scott & Grisso, *supra* note 51, at 148 (discussing the increasing emphasis on social control and the imposition of penalties on adolescents).

221. See Mary E. Spring, Comment, *Extended Jurisdiction Juvenile Prosecution: A New Approach to the Problem of Juvenile Delinquency in Illinois*, 31 J. MARSHALL L. REV. 1351, 1372–1373 (1998).

circumstances in determining whether to transfer the juvenile to adult criminal court.²²² Instead, in determining whether to transfer a juvenile to adult court, the retributive system focuses on the crime's severity and the gravity of the consequences.²²³ This focus appeases reformists who want to subject juvenile offenders, who cause adult-like harms, to adult-like punishment.²²⁴

The recent call for increasingly severe punishment for juvenile murderers stems, in part, from the media attention a few particularly outrageous cases received.²²⁵ Neither today's U.S. juvenile justice system nor its adult counterpart, in which juveniles are tried and convicted, emphasize rehabilitation.²²⁶ Nevertheless, rehabilitation should be considered because although sentencing juveniles for the crimes they commit is fair, they also need treatment to address the psychological conditions causing them to commit murder at ages when other children are playing with friends rather than serving incarceration sentences.²²⁷

222. See Scott & Grisso, *supra* note 51, at 151.

223. See *Hicks v. Superior Ct.*, 43 Cal. Rptr. 2d 269, 269–276 (Cal. App. 4th 1995). In *Hicks*, a fourteen-year-old who killed a pizza deliveryman was transferred to adult court. The attorneys for the juvenile defendant convicted of murder tried to rebut the court's presumption that the victim's death renders the offender unfit to be tried in juvenile court and triggers the offender's transfer to adult court. See *id.* at 271. Even though the juvenile may have committed the same act against two victims with the same intent, meaning one victim dies and one victim lives, the victim's death is the factor controlling the offender's transfer to adult court. See *id.* at 273. The defendant's attorney used two hypothetical examples to attempt to rebut the unfitness presumption: in the first hypothetical, a juvenile under age sixteen tortures, rapes, and shoots an elderly woman, but she does not die. See *id.* at 276 n.15. The juvenile is charged with attempted murder, torture, and rape, and is not, hypothetically, unfit to be tried in juvenile court because the victim lived. See *id.* In the second hypothetical, after a fourteen-year-old minor witnesses her alcoholic father beating her mother, she shoots and kills her father. See *id.* The minor is charged with murder, is therefore presumed unfit to be tried in juvenile court, and is transferred to adult court. See *id.* Responding to these hypotheticals, the *Hicks* court noted "the presumption is founded on the notion that the more serious the crime (the taking of a life is at the top of the list), the more severe consequences." *Id.* Under this presumption, a juvenile offender's individual circumstances are not a factor in determining fitness—the only factor considered is the consequences of his or her actions. See *id.*

224. See Smith, *supra* note 190, at 1019–1021.

225. See HUMES, *supra* note 102, at 389 (noting that because an eleven-year-old and a twelve-year-old in Chicago dangled a five-year-old from a fourteenth floor window, then dropped him to his death for refusing to steal candy for them, hundreds of juveniles will be tried as adults in Illinois).

226. See Scott & Grisso, *supra* note 51, at 150.

227. See Spring, *supra* note 221, at 1372.

3. Rehabilitation Better Prepares Juveniles for Release After Incarceration

Rehabilitative punishment prepares juveniles for release after incarceration. Rehabilitation's primary goal is to treat juveniles and return them to society. Conversely, retributive punishment does not focus on treatment, and thereby cultivates juvenile offenders into adult criminals.²²⁸ If juveniles are so impressionable as to learn behavior from adult role models, it makes no sense to imprison these impressionable youths together with convicted adult criminals.²²⁹ By learning from example, juveniles in prison will learn to be better criminals. In contrast, implementing rehabilitative punishment methods and focusing on juveniles' values and psychological states prevents this negative influence. Confinement alone, without treatment, will not render juveniles useful and productive members of society upon release from incarceration.²³⁰

The French juvenile justice system provides a good example of how therapeutic education better rehabilitates juveniles for release into society than does the United States' retributive system of placing juvenile offenders who commit murder in adult prisons. Maintaining a juvenile's close contact with the community exposes him or her to positive social values, which better prepares him or her for release into the community.²³¹ Although France's system is criticized for being too lenient, it is a humane way to teach juveniles the difference between right and wrong, regardless of whether or not they should have already known that murder is wrong.²³² While it is indisputable that committing murder is

228. See Jeffrey K. Day, Comment, *Juvenile Justice In Washington: A Punitive System in Need of Rehabilitation*, 16 U. PUGET SOUND L. REV. 399, 443 & n.311 (1992) (citing Martin L. Forest & Martha-Elin Blomquist, *Cracking Down On Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 443 (1991)).

229. See generally KRISBERG & AUSTIN, *supra* note 57, at 176-177 (noting that juveniles who are held in adult facilities are often sexually abused by adult inmates and staff).

230. See *Rust v. State*, 582 P.2d 134, 140 n.21 (Alaska 1978). The *Rust* court stated that to keep with a rehabilitative stance, "[m]ere confinement without treatment does not contribute to the goal of rehabilitation." *Id.* The court also concluded that the right to treatment comes from "the notion of rehabilitation and the sire to render inmates useful and productive citizens upon their release." *Id.* at 142.

231. See Millet, *supra* note 156, at 343-344.

232. See *id.* at 344.

wrong, France's system recognizes the possibility that some juveniles can not comprehend the seriousness of the offense and punishes them accordingly.²³³ France's, unlike the United States' system, rehabilitates juveniles by educating them about the difference between right and wrong.²³⁴ It does not treat a juvenile offender like a criminal who happens to be a juvenile, but instead, treats him or her like a juvenile who happened to commit a very serious crime and needs both punishment and rehabilitation. Thus, by allowing for both punishment and rehabilitation, France's system is more complete and effective than is the U.S. system.²³⁵ Juveniles released from incarceration return to society in better condition than they were prior to incarceration²³⁶—this is crucial in preventing them from committing future crime.

Unfortunately, both the American and French publics perceive rehabilitative-style juvenile court as contributing to, rather than preventing, serious juvenile crime.²³⁷ Recent highly publicized and incredibly violent juvenile schoolyard shootings²³⁸ reinforce this perception. This societal shift towards more punitive forms of punishment leads legal commentators to speculate whether some states have abandoned the rehabilitative theory altogether.²³⁹ Recent cases, wherein juveniles tried in adult court received long incarceration sentences in adult facilities and little or no rehabilitation, fuel this speculation. The "get tough" approach's popularity gains continued support as publicity of juvenile crime increases.²⁴⁰ The increase in publicity, however,

233. *See id.*

234. *See* Peeler, *supra* note 121, at 880–881 (discussing educating juvenile offenders to prepare them for reentry into society).

235. C. PÉN. art. 45-174 (1945) (Fr.).

236. *See* Peeler, *supra* note 121, at 881.

237. *See* Rossum, *supra* note 167, at 909. *See also generally* Peeler, *supra* note 121, at 876–877 (arguing that France's "get tough" campaign, which is similar to the United States' campaign, is a quick political move to mollify the increasing public anger directed at the ethnic minority youth of immigrant families).

238. *See* Paterniti, *supra* note 6, at 144 (detailing the news' coverage of three schoolyard shootings).

239. *See* Korine L. Larson, *With Liberty and Juvenile Justice for All: Extending the Right to Jury Trial to the Juvenile Courts*, 20 WM. MITCHELL L. REV. 835, 837–839 (1994).

240. *See* William T. Stetzer, Note, *The Worst of Both Worlds: How the Kansas Sentencing Guidelines Have Abandoned Juveniles in the Name of Justice*, 35 WASHBURN L.J. 308, 313 & n.31 (1996) (referring to a statement Texas Governor George Bush made when he signed a new "tough love" juvenile justice reform bill—that "punishment will be certain for young criminals in Texas."). *See also* *Bush Signs Juvenile Justice Bill*, UPI, May 31, 1995, available in LEXIS, News Library, UPI State and Regional Wires File; Smith,

should not be proportional to the amount of retribution popular opinion demands. Publicity provokes the demand for more punishment and increasingly severe sentences; the more retributive the punishments, however, the more likely juvenile offenders will commit more crime.²⁴¹ More crime spurs more publicity—and the vicious cycle continues. Juveniles incarcerated in adult facilities are often physically and sexually abused therein²⁴² and emerge more hardened and corrupt than when they entered.²⁴³ Therefore, although it is necessary to punish juveniles who commit murder, incorporating rehabilitation may facilitate their return to the community as productive adults.²⁴⁴

In the wake of highly sensationalized media coverage and public anger and frustration over the increase in juvenile crime, winning renewed support for rehabilitative punishment poses a difficult challenge.²⁴⁵ Ensuring that juveniles become productive members of society, instead of hardened adult criminals, requires dedication in teaching juvenile murderers to become responsible adults. Fortunately for both society and juvenile offenders alike, the existing French and U.S. retributive systems can be reformed so as to mirror their prior rehabilitative systems.

supra note 190, at 989 (quoting an anonymous letter to a Dade County, Florida judge that read: “What are we going to do about these kids (monsters) who kill with guns??? Line them up against the wall and get a firing squad and pull, pull, pull [the trigger]. I am volunteering to pull, pull, pull.”).

241. See Scott & Grisso, *supra* note 51, at 156 (noting that many adolescents are inclined to mimic their peers’ anti-social behaviors).

242. See generally KRISBERG & AUSTIN, *supra* note 57, at 176–177.

243. See Scott & Grisso, *supra* note 51, at 151–152.

244. See *id.*

245. See Giardino, *supra* note 107, at 276. See also HUMES, *supra* note 102, at 164–165.

The following exchange took place in an interview Los Angeles District Attorney Gil Garcetti conducted with a fourteen-year-old incarcerated in juvenile hall:

[Juvenile:] ‘If I kill someone, can I go to the gas chamber?’ . . .

[Garcetti:] ‘no.’ . . .

[Juvenile:] ‘Even if I kill more than one person? They still have to let me go when I am twenty-five?’

[Garcetti:] ‘That’s right. That’s what the law requires. For now. That’s probably going to change, though.’

[Juvenile:] ‘But right now, even if I kill ten people, they can’t send me to the gas chamber, they have to let me go?’

Id. at 164. In response to the juvenile interviewee’s last inquiry, Mr. Garcetti changed the subject. See *id.* at 164–165. Reports of this type of heinous calculation by a juvenile spur the demand for tougher punishment for juvenile offenders. See *id.* at 165.

IV. CONCLUSION

In light of the recent publicity of violent juvenile crimes, the time has come to reexamine the effectiveness of the French and U.S. juvenile justice systems.²⁴⁶ Society cannot succumb to the hysteria that the country is under siege by children wielding guns and shooting their schoolmates and teachers in the schoolyard. Although juvenile crime is on the rise, the number of juvenile murderers is not increasing in proportion to the number of murders committed.²⁴⁷ Therefore, rehabilitation seems to be working to rehabilitate juveniles who murder.²⁴⁸ The proliferation of media publicity of juvenile murderers, however, makes the problem seem worse than it actually is.²⁴⁹ Society must try to examine, objectively, the manner in which the juvenile justice system handles the few juveniles who commit murder, which is the gravest crime society punishes. The United States moves towards proscribing adult punishments for children under the assumption that rehabilitation has thus far been ineffective.²⁵⁰ Plainly stated, this assumption is wrong because punishment alone will not address the emotional, psychological, and intellectual issues that lead juvenile offenders to commit murder.²⁵¹ It is a quick fix solution that seems to resolve the problem by making the victims' families feel better because the juveniles "pay" for what they did. In reality, purely retributive punishments resign juveniles to a system that does not rehabilitate. Consequently, the juveniles do not become better adults, but better criminals with unresolved

246. *See generally* Del Carlo, *supra* note 97, at 1223-1224 (discussing the media's influence on public perception of juvenile violent crime offenders). *See also id.* at 1259-1261 (suggesting that the mass media takes advantage of public hysteria by reporting extensively on juvenile crime issues, which allows for the passage of more retribution-based legislation). Del Carlo argues the media's extensive coverage of Oregon youths committing murder played a large role in Measure 11, which was voted into law in Oregon in November 1994. *See id.* at 1224. Measure 11, for which sixty-five percent of voters voted, employs a legislative waiver statute that automatically places children ages fifteen years and under in the adult criminal court system if they are charged with any of Measure 11's enumerated felonies, including murder. *See id.*

247. *See id.* at 1223.

248. *See generally id.* at 1224.

249. *See id.* at 1223.

250. *See id.* at 1244.

251. The problem of juvenile crime is destined to worsen. The number of juveniles in the highest crime prone age groups will increase by more than thirteen percent by the end of the decade. *See Rossum, supra* note 167, at 908.

emotional issues that probably worsen and are primed to be expressed and released upon their return to society.

Society can neither continue ignoring juvenile murderers²⁵² nor can it submit to the mass media's manipulation of public hysteria or extensive reporting of juvenile crime. Society cannot merely incarcerate and forget about juvenile offenders; someday they will grow up and, at some point, they will be released from incarceration.²⁵³ Criminal conduct and its influence on society depends on the treatment juveniles receive today.²⁵⁴ Preventing today's juvenile offenders from engaging in future criminal activity is a more realistic and humane goal than forfeiting the future of an entire segment of the population.²⁵⁵ To prevent juvenile offenders from becoming future criminals, the juvenile justice system must focus on the individuals.²⁵⁶ On a case by case basis, courts must explore the underlying causes of the crime involved and formulate a plan to address them.²⁵⁷ Society, as a whole, must take responsibility for rehabilitating juvenile offenders,²⁵⁸ because doing so is the only way to secure a safer future.²⁵⁹

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252. See Del Carlo, *supra* note 97, at 1251.

253. See *id.*

254. See *id.*

255. See Giardino, *supra* note 107, at 275 n.162. See also Day, *supra* note 228, at 457-459 (explaining that a state must make a financial commitment if it is to achieve an efficient rehabilitative ideal).

256. See Rossum, *supra* note 167, at 910.

257. See *id.*

258. See Smith, *supra* note 190, at 1010.

259. See *id.*

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