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I. INTRODUCTION

In his dissenting opinion in *In re Gault*,[1] Justice Stewart articulated the traditionally accepted distinction between the juvenile justice system and the criminal justice system as follows: "[A] juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act."[2] Juvenile justice descends from the therapeutic tradition. Thus, the interventions of the juvenile system into youthful lives supposedly represent benign *parens patriae* attempts to cure undesirable or unhealthy states of being. Unlike the criminal law, juvenile justice responds to the status of children in need, treating them for what they are rather than punishing them for what they have done.[3]

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1. 387 U.S. 1, 78 (1967) (Stewart, J., dissenting).

2. *Id.* at 78-79; *see also* United Stetes *ex rel.* Stinnett v. Hegstrom, 178 F. Supp. 17, 18 (D. Conn. 1959); White v. Reid, 125 F. Supp. 647, 650 (D.D.C. 1954); State *ex rel.* Londerholm v. Owens, 197 Kan. 212, 223, 416 P.2d 259, 269 (1966) ("[t]he validity of the whole juvenile system is dependent upon its adherence to its protective, rather than its penal, aspects"); *In re* Rich, 125 Vt. 373, 377, 216 A.2d 266, 269 (1966).

3. For a discussion of some of the philosophical consequences of therapeutic versus punitive models of dealing with social deviancy, see generally Lowis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224 (1952-54); Morris, *Persons and Punishment*, in

Apart from its obvious importance in shaping decisions and actions of policymakers, Justice Stewart's punishment/therapy distinction[4] also carries important legal consequences. Punished persons are entitled to certain rights, both procedural[5] and substantive,[6] which are not necessarily available to persons receiving nonpunitive dispositions.[7]

The therapeutic model, however, probably never provided a totally accurate description of juvenile justice.[8] In any event, by

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PHILOSOPHY OF LAW 572 (J. Feinberg & H. Gross eds. 1975).

4. Whether to abandon systems of punishment in favor of therapeutic models was not only an issue of fundamental significance in the evolution of juvenile justice legislation, *see, e.g., Gault*, 387 U.S. at 14-30; Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 169-71, but also a lively subject of debate among scholars concerned with how best to control undesirable adult conduct. *Compare* M. MENNINGER, THE CRIME OF PUNISHMENT (1966) *and* B. WOOTON, CRIME AND THE CRIMINAL LAW (1963) *with* A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976) *and* J. WILSON, THINKING ABOUT CRIME (1975).

5. Criminal defendants are afforded special procedural protections under the United States Constitution such as the right to counsel and the right to jury trials. U.S. CONST. amends. V and VI. The United States Supreme Court traditionally has employed the concept of punishment as the relevant criterion for determining when procedures are "criminal." G. FLETCHER, RETHINHING CRIMINAL LAW 409 (1978); *see infra* notes 76-80 and accompanying text.

6. The presence of punishment is a necessary predicate for relief under the bill of attainder and ex post facto clause. U.S. CONST. art. I, § 9, cl. 3. *See* United States v. Brown, 381 U.S. 437, 445, 447, 456-57 (1965); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319 (1866); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810); Calder v. Bull, 3 U.S. (3 Dall.) 380, 390 (1798); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 477-82 (1978). For a more detailed discussion of *Brown*, see *infra* notes 104-12 and accompanying text. For a more detailed discussion of *Cummings*, see *infra* notes 41-56 and accompanying text.

Punishment is of course a necessary prerequisite for a finding of cruel and unusual punishment. U.S. CONST. amend. VIII. In applying the eighth amendment, the Supreme Court has struggled with the problem of determining whether a given sanction constitutes punishment. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 94-99 (plurality opinion), 124-25 (dissenting opinion) (1958). For a more detailed discussion of *Trop*, see *infra* notes 65-73 and accompanying text.

The Court recently has articulated a due process right to be free from punishment prior to conviction or plea. Bell v. Wolfish, 441 U.S. 520 (1979). For a more detailed discussion of *Wolfish*, see *infra* notes 114-43.

Courts distinguish foreign penal laws, imposing punishment, from nonpenal laws and refuse to enforce the former. *See* Huntington v. Attrill, 146 U.S. 657 (1892); Kutner, *Judicial Identification of "Penal Laws" in the Conflict of Laws*, 31 OKLA. L. REV. 590 (1978).

7. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 428 (1979) (civil commitment proceedings not "punitive" in purpose, hence, they are not "criminal prosecutions," and, therefore, reasonable doubt standard of proof need not be applied); Flemming v. Nestor, 363 U.S. 603, 612-620 (1960) (summary termination of social security benefits for deported aliens not punishment, therefore, no violation of the sixth amendment, the ex post facto clause, or the bill of attainder clause). For a comprehensive discussion of a variety of the legal consequences of the punitive/nonpunitive distinction, see generally Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

8. *See* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV.

the time that *Gault* was decided, a majority of the United States Supreme Court acknowledged that juvenile law could not be conceptualized entirely in terms of rehabilitative considerations.[9] Indeed, although Justice Stewart saw no constitutional need to criminalize the nonpunitive juvenile system by requiring the system to provide the same procedural protections to juveniles as the criminal law provides to criminal defendants,[10] the *Gault* majority held that the actual dispositions of juvenile delinquents often have little, if anything, to do with therapy.[11] The majority further held that these dispositions constitute such severe restrictions of liberty that many of the procedural protections required in criminal trials also are necessary in delinquency adjudications.[12] *Gault*, however, does not stand for the proposition that juvenile justice schemes are systematically nontherapeutic. Indeed, the Court in *McKeiver v. Pennsylvania*[13] later denied juveniles the right to jury trials in delinquency proceedings, in part on the theory that the presence of juries might interfere with the rehabilitative goal of the juvenile system.[14] Thus, *McKeiver* specifically recognizes the therapeutic potential of juvenile court dispositions.

The Supreme Court cases suggest that juvenile justice systems are often hybrids, sometimes punitive—or so like punitive models to require procedural protections unique to the criminal law—sometimes therapeutic, and often both punitive and therapeutic. As a consequence, courts that have addressed the constitutionality of the juvenile justice system since *Gault* have done so with the understanding that the system reflects a mixture of theoretical underpinnings. Not surprisingly, the courts have had difficulty defining the constitutional rights of juveniles[15] who are thrust into a system that is simultaneously punitive and therapeutic.[16]

1187, 1193-1230 (1970).

9. For a discussion of *Gault*, see *infra* notes 178-205 and accompanying text.

10. 387 U.S. at 78-79 (Stewart, J., dissenting).

11. The *Gault* Court did not discuss directly the concept of punishment in its analysis. The opinion, however, seems to imply that juvenile dispositions are tantamount to punishment for purposes of certain constitutional provisions. *See infra* notes 189-93 and accompanying text.

12. *See infra* notes 178-216 & 229-40 and accompanying text.

13. 403 U.S. 523 (1970); *see infra* notes 217-28 and accompanying text.

14. 403 U.S. at 541-51. For a discussion of the perceived virtues of informal proceedings in general in furthering the therapeutic aims of the juvenile courts, see Paulsen, *supra* note 4, at 170-72.

15. *See, e.g., infra* notes 241-63 and accompanying text.

16. Punishment and therapy often seem to be mutually exclusive goals because of the backward-looking nature of punishment as contrasted with forward-looking emphasis of

The difficult task facing the courts ultimately is assessing the extent to which the juvenile system is punitive in nature.[17] Because the concept of punishment includes a discrete set of constitutional protections,[18] Justice Stewart's punishment/therapy distinction, although not utilized explicitly by the *Gault* majority[19]—and perhaps even misapplied by Justice Stewart himself[20]—remains a useful analytical device for developing a coherent constitutional framework for juvenile law.[21] Judicial attention to the concept of

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therapy. Punishment imposes unpleasant restraints upon offenders because of their past offenses, but therapy seeks to alleviate undesirable conditions and thereby improve the patient's life. For a more detailed explication of punishment and therapy, see *infra* notes 144-50 and accompanying text.

17. Commentators describe the problematic state of juvenile justice as follows:

> While the *Gault* opinion purports to give no definition of punishment, it is evident that the justices were concerned about the confusion which arises over a use of related terms, such as punishment, treatment, sanction, and the like. Until clarification of terminology can catch up with practical techniques of handling those whose conduct is a threat to the community, we are likely to continue to have specific cases litigated in terms of constitutional guarantees. A serious discussion is needed, such as has taken place among philosophers, on the meaning of punishment in terms of current practice. There is an appreciable gap between what we traditionally have called punishment and what we currently use as methods for coercing conformity. The change in public sentiment, the progress in science, the advent of a full-fledged police force, all have contributed to an adaptation of methods of punishment. We can no longer speak of the simple process of punishing a man by putting him in prison. The least reflection will indicate that we punish by a wide variety of deprivations, including the trial process itself. Thus we must attempt to move toward an agreement of what punishment is by way of general definition before we can hope to put order into the welter of different applications of public coercion to the individual in the name of health, education, and general welfare.

Gerber & McAnany, *Punishment: Current Survey of Philosophy and Law*, 11 ST. LOUIS U.L.J. 491, 520 (1967). *See generally In re* Felder, 93 Misc. 2d 369, 402 N.Y.S.2d 528 (1978) (whether New York juvenile statutes impose punishment for purposes of sixth amendment jury trials); State *ex rel.* Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1977) (whether confinement of status offenders with delinquents in forestry camps constitutes disproportionate punishment in violation of the eighth amendment). For a detailed discussion of *Felder*, see *infra* notes 256-64 and accompanying text. *See generally* cases cited *infra* note 21.

One leading commentator welcomes the movement toward a punitive model of juvenile justice and suggests that juveniles soon may assert the "right to be punished for what they have done, not to be treated for what someone else thinks they are." Fox, *The Reform of Juvenile Justice: The Child's Right to Punishment*, JUV. JUST., Aug. 1974, at 2, 6; *see also* Fox, *Philosophy and the Principles of Punishment in the Juvenile Court*, 8 FAM. L.Q. 373 (1974). This Article's author extolls the virtues of a "right to be punished" in certain nonjuvenile situations. *See* Gardner, *The Right to be Punished—A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838 (1981).

18. *See supra* notes 5-7.

19. *But see supra* note 11.

20. The disposition of Gerald Gault's case may have constituted "punishment" under the definition employed by the Court at the time that *Gault* was decided. *See infra* notes 194-97 and accompanying text.

21. *See, e.g.*, Morgan v. Sproat, 432 F. Supp. 1130, 1136 (S.D. Miss. 1977) (confine-

punishment and its relationship to juvenile justice will be increasingly necessary in light of recent legislative trends toward punitive sanctions for certain youthful offenders.[22] Moreover, the Supreme Court, in dicta accompanying its recent holding that eighth amendment considerations are inapplicable to corporal punishment of public school children,[23] specifically left open the question whether the eighth amendment's protection against cruel and unusual punishment applies to juvenile justice dispositions.[24] The Court, thus, invited inquiry into whether, and to what extent, these dispositions constitute punishment.

For punishment to provide a useful framework, courts must have a clear understanding of the concept of punishment. This understanding is difficult, however, since punishment, in addition to being a legal term of art, is also a moral notion characterizing an area of responsible human activity not definable in terms of necessary and sufficient conditions.[25]

In light of the inability of the Supreme Court[26] and leading philosophical writers[27] to articulate a precise definition of punish-

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ment without full panoply of due process safeguards unconstitutional if done for "punitive" purposes, constitutionally permissible if serving "beneficent" purposes); Pena v. New York Div. for Youth, 419 F. Supp. 203, 207 (S.D.N.Y. 1976) ("[t]he court . . . finds itself in the very difficult position of evaluating the punitive and therapeutic components of defendants' practices"); *In re* Felder, 93 Misc. 2d 369, 377, 402 N.Y.S.2d 528, 533 (Fam. Ct. 1978) (citing Justice Stewart's punishment/therapy distinction as analytical tool for determining sixth amendment jury trial rights). For a further discussion of *Felder*, see *infra* notes 256-64 and accompanying text. *See also* R.R. v. Texas, 448 S.W.2d 187, 189 (Tex. Civ. App. 1969) (eighth amendment applicable to juvenile confinements only if the confinements are punitive rather than therapeutic), *appeal dismissed*, 400 U.S. 808 (1970).

22. *See, e.g.*, Stata v. J.K., 383 A.2d 283 (Del. 1977); *In re* Felder, 93 Misc. 2d 369, 402 N.Y.S.2d 528 (Fam. Ct. 1978).

23. Ingraham v. Wright, 430 U.S. 651 (1977).

24. *Id.* at 669 n.37 (dictum). The Court stated,

> Some punishments, though not labeled "criminal" by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment. . . . We have no occasion in this case, for example, to consider whether or under what circumstances persons involuntarily confined in . . . juvenile institutions can claim the protection of the Eighth Amendment.

25. *See* J. KLEINIG, PUNISHMENT AND DESERT 15 (1973).

26. Consider, for example, the Supreme Court's failure to distinguish clearly punishment from regulation. *See infra* note 33.

27. Perhaps the most widely accepted chacterization of legal punishment within the philosophical literature is that of H.L.A. Hart:

> (i) [Punishment] must involve pain or other consequences normally considered unpleasant.
> (ii) It must be for an offense against legal rules.
> (iii) It must be of an actual or supposed offender for his offence.
> (iv) It must be intentionally administered by human beings other than the offender.

ment, the difficulty encountered by lower courts that have attempted to delimit the constitutional protections available to juveniles is understandable. In general, these courts have tended to adopt one of two approaches: either courts assume, without attempting to provide definitions, that punishment is or is not manifested by the facts of the particular case,[28] or they seek a definition of punishment by relying solely on the Supreme Court's juvenile cases.[29] Both of these approaches are unsatisfactory—the first because it begs a crucially important question, and the second because it relies upon cases that do not utilize or define explicitly the

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(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

H. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 4-5 (1968). Hart borrows from Anthony Flew and S.I. Benn in formulating his definition. *Id.* at 4.

A variety of commentators would add to Hart's list of punishment characteristics. *See, e.g.*, J. FEINBERG, *The Excessive Function of Punishment*, in DOING AND DESERVING 95, 98 (1970) (punishment by definition expresses social disapprobation); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 310, 318 (2d ed. 1960) (punishment is logically related to harmful conduct and moral culpability).

Other critics focus on internal inconsistencies within Hart's definition. *See, e.g.*, Wasserstrom, *Some Problems with Theories of Punishment*, in JUSTICE AND PUNISHMENT 173, 176 (J. Cederblom & W. Blizek eds. 1977) (Hart's theory tends toward circularity. Clearly, not all "inflictions of unpleasant consequences for offenses against legal rules" constitute punishment, *e.g.*, tort liability for negligence per se, based on violation of a statutory norm. Only "criminal offenses" seem to generate punishment. Hart, however, provides no basis for distinguishing criminal and noncriminal offenses, apart from the circular path of appealing to the concept of punishment.

28. For example, many courts equate confinement of juveniles in jail-like facilities with punishment. *See, e.g.*, Cox v. Turley, 506 F.2d 1347, 1352-53 (6th Cir. 1974) (five days confinement of youth with general jail population prior to initial hearing on a charge of curfew violation constitutes cruel and unusual punishment); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1366 (D.R.I. 1972) ("[t]he reality of confinement in Annex B is that it is punishment"); *In re* Rich, 125 Vt. 373, 378, 216 A.2d 266, 269 (1960) ("[c]onfinement in a penal institution will convert the proceedings from juvenile to criminal and require the observance of constitutional criminal safeguards").

The Supreme Court has held, however, that all jail confinements are not punitive. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979) (pretrial detention of persons accused of crime is not punishment due to an absence of punitive intent); Shillitanti v. United States, 384 U.S. 364, 370 (1966) (jailing for civil contempt is remedial rather than punitive). For a more detailed discussion of *Wolfish*, see *infra* notes 113-43 and accompanying text.

Other courts, without attempting to define punishment or distinguish it from therapy, have found punishment in the administration of potentially dangerous or painful drugs to juveniles confined in state facilities. *See, e.g.*, Nelson v. Heyne, 491 F.2d 352, 357 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). For a more detailed discussion of *Nelson*, see *infra* notes 307-24 and accompanying text.

29. *See, e.g.*, R.R. v. Texas, 448 S.W.2d 187, 189-90 (Tex. Civ. App. 1969) (punishment implicitly defined in terms of the "dismal picture" of the conditions within juvenile institutions painted in *Gault*), *appeal dismissed*, 400 U.S. 808 (1970).

concept of punishment.[30]

This Article attempts to provide an analytical framework for identifying the punitive aspects of the juvenile justice system. The Article proposes a framework that is extrapolated from Supreme Court cases which define punishment in contexts outside the juvenile area. Several commentators have criticized the Court's definitional efforts, some because of perceived inadequacies in the developed definitions,[31] others because of the belief that the very enterprise of defining constitutional rights in terms of the presence or absence of punishment is misguided.[32] Although many of these criticisms of the Court's record are understandable,[33] the alleged defects are less detrimental to an effective analysis of certain juvenile rights cases than they might be in other areas. Indeed, this Article argues that the Court's definitional framework is especially useful in the juvenile justice context.

II. THE CONCEPT OF PUNISHMENT: NONJUVENILE SUPREME COURT CASES

For more than a century, the United States Supreme Court has attempted to provide a workable definition of punishment.[34] The Court has addressed a number of cases. Each case has turned on whether a litigant has been, or is being, punished. Punishment is a necessary predicate for relief under the bill of attainder and ex post facto law clauses,[35] and under the eighth amendment ban on cruel and unusual punishment.[36] The fifth and sixth amendment protections granted to persons charged with criminal offenses during criminal prosecutions are contingent upon a showing that the

30. *See infra* notes 193-97 and accompanying text. For a leading commentator's view that *Gault* offers a definition of punishment, see G. FLETCHER, *supra* note 5, at 409-14.

31. *See generally* Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974); Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667 (1980).

32. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 563-64 (1979) (Marshall, J., dissenting); Comment, *The Availability of Criminal Jury Trials Under the Sixth Amendment*, 32 U. CHI. L. REV. 311, 327-30 (1965).

33. The Court's attempt to distinguish criminal punishment from civil regulation has been especially disappointing. *See* Charney, *supra* note 31, at 491-506; Clark, *supra* note 7, at 475-89.

34. The struggle began in earnest with Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) and its companion case, *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866). For a more detailed discussion of *Cummings*, see *infra* notes 41-56 and accompanying text.

35. *See supra* note 6.

36. *See id.*

sanction for the offense constitutes punishment.[37] Moreover, the Court has stated recently that governmentally imposed punishment prior to conviction or plea violates an accused's due process rights.[38] In addition, the Court has suggested that a person may be "treated" involuntarily, but never "punished," for undesirable status conditions.[39]

A. *A Preliminary Concept of Punishment*

The Court first attempted to define punishment in the mid-nineteenth century cases arising under the Constitution's proscriptions against bills of attainder and ex post facto laws.[40] In *Cummings v. Missouri*[41] the Court struck down as violative of the bill of attainder and ex post facto law clauses a provision of the Missouri Constitution that required teachers and priests to take an oath of noninvolvement and nonsympathy with "armed hostility to the United States."[42] The provision, a post-Civil War amendment, also required the affiant to pledge that he had never been in the service of the Confederate States of America nor "desir[ed] their triumph over the arms of the United States."[43] Cummings continued to perform his duties as a teacher and priest without taking the oath. He was convicted, fined $500, and sentenced to jail until the fine was paid. Noting that Cummings was punished "for a past act which was not punishable at the time it was committed,"[44] the Court stated that the oath requirement bore no rational relationship to the legitimate state interest in regulating Cummings' fitness as an educator[45] or to his qualifications as a religious minister.[46] The Court found the measure to be a punitive restraint[47]

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37. *See supra* note 5.

38. Bell v. Wolfish, 441 U.S. 520 (1979); *see infra* notes 113-41 and accompanying text.

39. Robinson v. California, 370 U.S. 660, 666-68 (1962) (state may require drug addict to undergo compulsory treatment, but may not punish him for the status of drug addiction).

40. U.S. CONST. art. I, § 9, cl. 3.

41. 71 U.S. (4 Wall.) 277 (1866).

42. *Id.* at 279.

43. *Id.*

44. *Id.* at 319.

45. *Id.*

46. *Id.*

47. The Court specifically rejected as too narrow the State's argument that the concept of punishment is limited to deprivations of legal rights, specifically restraints on "life, liberty, or property." *Id.* at 320, 322. In addition to denials of legal entitlements, punishment also may result through denials of a variety of moral and political rights not specifically embodied in positive law. Thus, interference with such interests as the "freedom from outrage on the feelings" or hindrance of one's "pursuit of happiness" may trigger a finding of punishment. *Id.* at 320-22. Under this view, any unpleasant restraint—such as interfer-

upon persons who had been sympathetic to the Confederacy.[48] Although this amendment did not refer specifically to crime or punishment,[49] the purpose clearly was punitive.[50] The enforcement of the amendment constituted punishment not only because the state subjected Cummings to unpleasant restraints for his failure to take the oath, but also because the sole purpose of the restraints was to mete out deserts for perceived wrongful acts committed in the past.[51] Because the wrongful acts—sympathizing with the Confederacy—were not crimes in Missouri at the time that Cummings might have committed them, the state conld not constitutionally punish him for their commission.[52]

Although some theorists have argued that punishment in its legal context "must [necessarily] be for an offence against legal rules,"[53] *Cummings* demonstrates that the relationship between punishment and legal rules is not a logical one. Although punishment may exist independent of legal rules, the principle of legality,[54] as reflected in such constitutional provisions as the ex post facto law and bill of attainder clauses, justifies the imposition of punishment only when legal rules articulate the conduct and the degree of punishment for its commission prior to the occurrence of the offense.[55] Thus, *Cummings* establishes that punishment is the intentional imposition by the state of unpleasant restraints[56] upon offenders solely because of past wrongful acts. The Court's conception of punishment turns heavily on an examination of legislative

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ence with happiness or well-being—can constitute punishment. Thus, the views of a recent commentator, who would link the notion of punishment to "deprivations of legal rights," should be rejected. Note, *supra* note 31, at 1680-81.

48. 71 U.S. (4 Wall.) at 320, 327. The Court found that the oath "reach[ed] the person, not the calling." *Id.* at 320.

49. *See id.* at 279-81.

50. The Court focused on the notion of punitive motivation as a necessary element of its finding of punishment. Punishment is determined hy the "causes of deprivation." *Id.* at 320.

51. *Id.* at 320, 327.

52. The Court found the Missouri constitutional clauses violative of both the bill of attainder clause, *id.* at 323-25, and ex post facto clause, *id.* at 327-28.

53. H. HART, *supra* note 27, at 5.

54. The principle of legality may be expressed in a variety of ways: no person may be punished except pursuant to a statute which prescribes a penalty; no conduct may be criminal unless it is precisely defined by a rule; no penal statute may be given retroactive effect. The principle is a limitation on the power of the state to punish. The definition of punishment, therefore, does not include the principle of legality. *See* J. HALL, *supra* note 27, at 27-28.

55. *Id.*

56. *See supra* note 47.

purpose, derived in *Cummings* from an independent judicial inquiry into the possible functions of the oath-taking provision, with virtually no deference to legislative history or characterizations.

B. Punishment v. Regulation

Dicta in *Cummings* suggest that the Supreme Court might have concluded that the Missouri amendment was a permissible state regulation, rather than punishment, if the oath requirement had been less retributive.[57] Thus, if the state had offered a forward-looking sanction that was rationally related to effectuating genuine state policy goals, then the Court may have sustained the Missouri amendment.[58] The Court intimated that punishment is conceptually distinct from sanctions whose sole purpose is to shape future states of affairs. Indeed, shortly after *Cummings* the Court, in *Dent v. West Virginia*[59] and *Hawker v. New York*,[60] sustained statutes that altered the requirements for practicing medicine in West Virginia and New York. These provisions denied continued practice to those physicians who failed to meet the new statutory requirements.[61] In both *Dent* and *Hawker* the Court rejected claims by the physicians that the statutes inflicted unconstitutional punishment under the bill of attainder and ex post facto law clauses. The Court found the statutes to be reasonable regulations of the medical profession under the state police power. Unlike the situation in *Cummings*, the statutes in *Dent* and *Hawker* reflected no attempt by the legislature to impose restraints upon the claimants because of their past wrongful actions.[62] Thus, regulation may be distinguished from punishment in that regulation controls future conduct for general purposes[63] without any attention necessa-

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57. 71 U.S. (4 Wall.) at 320 (dictum).

58. *Id.*

59. 129 U.S. 114 (1889).

60. 170 U.S. 189 (1898).

61. In *Dent* the Court unanimously upheld a West Virginia statute requiring doctors either to have graduated from medical school or to have passed a special examination as a valid exercise of state police power. In *Hawker* the Court upheld the retroactive application of a New York statute that prohibited convicted felons from practicing medicine.

62. Although the statute in *Hawker* affected persons who had been convicted of crimes, the Court statod that the state was "not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character." 170 U.S. at 196. While the Court granted that not all convicted criminals possess bad character, the state "has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist." *Id.* at 197.

63. Such a distinction in punishments and regulations is consistent with H. PACKER,

rily directed to one's past actions. Punishment, on the other hand, is always backward-looking in the sense that it is imposed because of some past action.

If, however, *Cummings* and *Dent/Hawker* represent cases of pure punishment and pure regulation, then the state's imposition of sanctions often will reflect attempts both to impose restraints upon offenders because of past actions and to shape future conduct for general purposes. Courts, therefore, encounter great difficulty when attempting to draw bright-line distinctions between punishments and regulations.[64]

The *Cummings* definition of punishment lay virtually unaltered for almost 100 years[65] until the Supreme Court's 1958 decision in *Trop v. Dulles*[66] that addressed the problem whether denationalization of persons convicted by court-martial for wartime desertion constituted punishment under the eighth amendment. The Government argued that the sanction was not punitive, but rather was a regulatory exercise under the congressional war power that was necessary to maintain military discipline.[67] The Court rejected the Government's argument and found that the sanction was not only punitive,[68] but also cruel and unusual punishment in

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THE LIMITS OF THE CRIMINAL SANCTION 23-26 (1968).

64. *See* H. PACKER, *supra* note 63, at 21-31; Charney, *supra* note 31, at 491-506; Clark, *supra* note 7, at 475-89; *infra* notes 101-03 and accompanying text.

65. This is not to say, however, that the Court did not have occasion to consider the problem of determining when sanctions are punitive. *See, e.g.*, Galvan v. Press, 347 U.S. 522, 531 (1954) (although deportation is "close to punishment," ex post facto clause inapplicable); United States v. Lovett, 328 U.S. 303, 313-18 (1946) (statutory denial of salary or other compensation to certain named governmental employees constitutes punishment without judicial trial in violation of the bill of attainder clause); Helvering v. Mitchell, 303 U.S. 391, 398-99 (1938) (tax assessment of 50% of total amount of fraudulently deficient taxes is not punishment barred by double jeopardy clause when defendant was acquitted previously of criminal fraud); Lipke v. Lederer, 259 U.S. 557, 561-62 (1922) (taxes upon trafficking in illegal liquor are in reality punishments which cannot be enforced by incarceration without hearing); Boyd v. United States, 116 U.S. 616, 633-35 (1886) (forfeiture proceedings under customs laws are criminal for purposes of fifth amendment privilege against self-incrimination).

66. 356 U.S. 86 (1958).

67. Although the *Trop* Court was sharply divided, four Justices in the plurality and four in dissent suggested that the definition of punishment should be analyzed separate from and prior to the issue of cruelty under the eighth amendment. Four Justices found punishment under the eighth amendment. *Id.* at 94-100, 124. The ninth Justice, Justice Brennan, did not utilize the eighth amendment in his analysis of the problem in *Trop*, but relied instead upon a theory of congressional abuse of the war power. Brennan agreed with the plurality that denationalization was punitive and found that it constituted an unnecessarily harsh exercise of Congress' war power. *Id.* at 105-14.

68. *Id.* at 94-95.

violation of the eighth amendment.[69] The Court relied primarily upon the presence of a punitive legislative motivation underlying the denationalization provision. A plurality of the Court found this motivation[70] by applying a more refined test than that articulated in *Cummings*: "If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose."[71] *Trop*, therefore, suggests that penal purpose is not defined solely in terms of retributive considerations. A legislature's attempts to achieve general deterrence also may reveal punitive motivation. Moreover, the plurality's "etc."[72] implies that punishment is determined by indicia other than the considerations provided by the *Trop* Court.

The *Trop* plurality offered additional insight into the nature of punishment by noting that penal laws characteristically define the consequences which will befall wrongdoers prior to any particular instance of wrongdoing. "[A] statute that prescribes the consequence that will befall one who fails to abide by [rules governing the proper performance of military obligations] is a penal law."[73]

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69. A four Justice plurality found an eighth amendment violation. A fifth Justice concurred with the result on other grounds. *See supra* note 67.

70. *See supra* note 69.

71. 356 U.S. at 96. The Court found that expatriation constituted punishment. The plurality rejected claims that the sanction reflected a mere regulation governing the proper performance of military obligations. "[A] statute that prescribes the consequence that will befall one who fails to abide by these [obligations] is a penal law." *Id.* at 97.

The Court, in a companion case to *Trop*, however, upheld a statutory provision imposing denationalization for the act of voting in a foreign election. Perez v. Brownell, 356 U.S. 44 (1958). Unlike *Trop*, the *Perez* Court found no retributive purpose. The sanction constituted a purely foward-looking exercise of Congress' power to regulate foreign affairs. *Id.* at 57-62. The expatriation sanction evidenced a reasonable method of avoiding embarrassing disputes with foreign nations. "The termination of citizenship terminates the problem." *Id.* at 60.

Although the Court did not apply the *Trop* definition of punishment to the expatriation sanction in *Perez*, this analysis yields interesting results. Unlike the situation in *Trop*, no attempt was made to "reprimand a wrongdoer" in *Perez*, because voting in a foreign election is neither reprehensible nor wrong. While voting in a foreign election may be interpreted as an act that indicates a lack of allegiance to the United States, American citizens may freely and without censure disassociate themselves from their country whenever they wish. The absence of perceived wrongful conduct in *Perez* eliminates the possibility of punitive motivation. Thus, while expatriation for the offense of desertion constitutes punishment in *Trop*, application of the very same sanction for the legally and morally neutral conduct of voting in a foreign election is nonpunitive in *Perez*.

72. *Trop*, 356 U.S. at 96.

73. *Id.* at 97.

Thus, unlike sanctions such as compensatory damages, the measure of punishment in any given case usually is legislatively predetermined[74] and is imposed following a showing by the state that certain proscribed conduct has occurred. Moreover, the state is not required to show that harm was actually suffered by any particular victim.[75]

The Court in *Kennedy v. Mendoza-Martinez*[76] again struggled with the punishment-regulation distinction in ruling that the procedural protections of the fifth and sixth amendments must be given to persons who have forfeited their United States citizenship by fleeing the country to evade the military draft. Unlike *Trop*, in which citizenship was forfeited after conviction by court-martial, the statute in *Mendoza-Martinez* automatically imposed forfeiture of citizenship, without prior court or administrative proceedings, upon any person fleeing the country to evade military service.[77] The issue in the case hinged on whether the forfeiture constituted punishment impermissibly imposed in the absence of criminal process protections,[78] or whether the forfeiture was a form of noncriminal regulation under Congress' war and foreign affairs powers.[79] Consistent with its decision in *Trop*, the Court in *Mendoza-Martinez* found that the forfeiture constituted punishment and, therefore, was constitutionally permissible only after a "criminal trial [with] all its incidents."[80] The Court determined that the sanction was punitive by relying on cases such as *Cummings* and *Trop* that set forth "the tests traditionally applied to determine whether an

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74. *But see supra* notes 53-55 and accompanying text.

75. The aim of the criminal law . . . is to protect the public against harm, by punishing harmful results of conduct or at least situations (not yet resulting in actual harm) which are likely to result in harm if allowed to proceed further. The function of tort law is to compensate someone who is injured for the harm he has suffered. With crimes, the state itself brings criminal proceedings to protect the public interest but not to compensate the victim; with torts, the injured party himself institutes proceedings to recover damages.

W. LAFAVE & A. SCOTT, CRIMINAL LAW 11 (1972); *see also* H. PACKER, *supra* note 63, at 23-24.

76. 372 U.S. 144 (1963).

77. *Id.* at 164-66. Although no hearing on the issue of flight to evade the draft was held, the government uncovered the flight in a variety of ways. *See, e.g., id.* at 147 (admission by defendant); *id.* at 151 (defendant remained outside the United States after being ordered to report for military induction).

78. *Id.* at 164. A finding of punishment would require that defendant be afforded fifth amendment and sixth amendment rights to notice, confrontation, compulsory process for obtaining witnesses, trial by jury, and assistance of counsel.

79. *Id.* at 159-60, 164.

80. *Id.* at 167.

Act . . . is penal or regulatory."[81] The tests according to the *Mendoza-Martinez* Court include the following:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[82]

In the absence of "conclusive evidence of congressional intent as to the penal nature of a statute," courts must weigh these considerations in relation to the language of the statute.[83] The Court admitted that the listed elements "often point in different directions,"[84] but offered no method for weighing the various considerations when they conflict with one another. Moreover, the *Mendoza-Martinez* Court did not explain how these criteria would apply to the forfeiture statute "because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive."[85] Thus, the Court found that the clear legislative purpose of the statute was to provide an especially severe penalty, in addition to other penalties imposed for draft evasion, to a particularly reprehensible category of draft evaders.[86]

Two of the *Mendoza-Martinez* tests for punishment are especially useful in analyzing possible punishment cases.[87] The first

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81. *Id.* at 168.
82. *Id.* at 168-69.
83. *Id.* at 169.
84. *Id.*
85. *Id.*
86. *See id.* at 169-70, 180-84. The Court found no legislative intent to effectuate affirmative social goals through the sanction. Instead, the sanction was imposed only for retribution and for deterrence of draft evasion. For an insightful comment on the *Mendoza-Martinez* opinion, see Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at* Kennedy v. Mendoza-Martinez, 32 U. CHI. L. REV. 290 (1965).
87. Most of the *Mendoza-Martinez* tests add little to existing doctrine. The requirement of an "affirmative disability or restraint" seems merely to reflect the *Cummings-Trop* view that punishment entails the purposeful imposition of unpleasant restraints. Scrutiny of the historic characterization of the behavior and sanction in question is also of little utility. Whether the sanction historically has been regarded as punitive seems simply to rephrase the punitive motivation question rather than to provide a means for its answer. Similarly, the very question in many cases is whether the conduct to which a sanction applies *is* criminal for fifth and sixth amendment purposes. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). The answer to that question depends on whether the sanction is punishment. Defining punishment by reference to criminality does not answer the question. Finally, the Court's citation of retribution and deterrence as the traditional aims of punishment adds nothing to the criteria that were articulated in *Trop*.

test—whether the sanction is excessive in relation to assigned nonpunitive purposes—is a particularly promising analytical standard that will be discussed in detail later in this Article.[88] The second test, which focuses upon scienter as a characteristic precondition of punishment, deserves only brief attention. Under this approach, the Court seems to focus upon the nexus between punishment and blame. Indeed, some theorists have argued that the power of punishment to express social disapprobation toward morally blameworthy offenders is the central characteristic that distinguishes punishment from nonpunitive sanctions.[89] Since, however, the Court has sustained the validity of strict liability crimes,[90] moral blame does not seem to be a necessary characteristic for either the definition or the justification of the criminal sanction. Thus, the scienter test of *Mendoza-Martinez* is probably no more than a recognition that findings of personal responsibility often precede the imposition of punishment.[91]

1. Definition v. Justification

Trop and *Mendoza-Martinez* indicate a desire by the Court to incorporate traditional *justifications* of punishment—such as deterrence of undesirable conduct[92] and the dispensing of deserts to blameworthy offenders[93]—into the *definition* of punishment. On a

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88. *See infra* notes 123-40 and accompanying text.

89. *See, e.g.*, J. FEINBERG, *supra* note 27; Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("[w]hat distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition").

90. *See, e.g.*, United States v. Balint, 258 U.S. 250 (1922).

91. The relationship, however, between punishment and responsibility does not appear to be a logical one. Thus, the state could punish knowingly—although probably not justifiably—a person who is not responsible and known not to be responsible for the action for which he is being punished. *See* H. HART, *supra* note 27, at 4-6; J. KLEINIG, *supra* note 25, at 12-13.

92. For a classical statement of deterrence theory, see Bentham, *Utility and Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 56 (G. Ezorsky ed. 1972). For a more modern view of deterrence, see generally J. ANDENAES, PUNISHMENT AND DETERRENCE (1974).

93. Kant spoke in these terms:

> 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

philosophical level, the blurring of definitional and justificational issues is undesirable because definitions that emerge exclude from the range of possible justifications the considerations that are contained within the definition.[94] For example, if punishment is defined as "the purposeful infliction of suffering upon offenders because of their offense in order to deter others from committing similar offenses,"[95] then one encounters difficulty in utilizing the deterrence theory to justify punishment.[96] Although the justification for punishment is—or at least should be—of vital significance to theorists and policymakers,[97] it is perhaps of less concern to courts. Judicial inquiry generally focuses upon whether particular

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who creeps through the serpentwindings 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).

94. *See* J. FEINBERG, *supra* note 27, at 95; J. KLEINIG, *supra* note 25, at 10-13; E. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 56 (1966) ("[W]e want to avoid allowing any part of the justification (or dis-justification) of punishment to creep into its definition, so that a case for acceptance or rejection or reform can seem to turn on 'the very meaning' of punishment.").

95. Thomas Hobbes offered a similar definition:

A punishment, is an Evill inflicted hy publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience.

. . . .

. . . [A]ll evill which is inflicted without intention, or possibility of disposing the Delinquent, or (by his example) other men, to obey the Lawes, is not Punishment; but an act of hostility; because without such an end, no hurt done is contained under that name.

T. HOBBES, LEVIATHAN §§ 161-62.

96. *See* J. KLEINIG, *supra* note 25, at 11.

Another commentator has argued that the purpose of punishment must be distinguished from the justification of punishment.

The purpose of punishment must be distinguished from its justification. A justification is a morally acceptable purpose. Thus, it represents a second level of analysis, beyond mere purpose. As such, it does not define punishment, but rather defines morally defensible punishment. Mere purpose, on the other hand, is directly relevant to the broader definitional inquiry, to the extent that punishment may be described as conduct engaged in for a certain purpose. It should be noted, however, that in inquiries involving justification for punishment, punishment is assumed to be already defined. Where purpose is being examined, the concern is, strictly speaking, with the purpose of the conduct that has not yet been defined as punishment.

Note, *supra* note 31, at 1679 n.83.

97. Because punishment is the intentional infliction of suffering upon persons, it is morally and politically controversial. For some recent examples of the controversy, see generally AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS (1969); REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); Morris, *supra* note 3; Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973). *See also supra* note 4.

restraints constitute punishment as a matter of constitutional fact notwithstanding the general desirability of imposing the restraint.[98] If, however, punitive intent is to be a defining characteristic of punishment, the Court inevitably must appeal to justificatory theories of punishment in fashioning its definition.[99] This approach is not problematic if only those justifications that are unique to punishment are included in the definition. Thus, the Court would have been on firmer ground if it had included in the definition of punishment only retributive considerations such as "the judgment of community condemnation which accompanies [punishment] and justifies its imposition."[100] The Court, however, also includes considerations of deterrence in the definition. The deterrence of undesirable states of affairs is certainly not unique to the criminal sanction.[101] Indeed, deterrence is also a central feature of governmental regulation. Thus, if punitive purpose is defined as unpleasant restraints imposed to deter undesirable conduct or to achieve desirable consequences,[102] then the concepts of punishment and regulation may be indistinguishable.[103]

2. *United States v. Brown*: An Aberration

In *United States v. Brown*[104] the Court further blurred the definition and justification issues. The Court in *Brown* invoked the bill of attainder clause to strike down section 504 of the Labor-Management Reporting and Disclosure Act of 1959, which prohib-

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98. Courts are unlikely to encounter problems with defining punishment in terms of its traditional justifications, for these justifications—or at least the utilitarian ones—tend to relate to issues of the justification of punishment in general, which is an issue that seldom concerns the courts. *See* H. HART, *supra* note 27, at 8-12; Rawls, *Two Concepts of Rules*, in THE PHILOSPHY OF PUNISHMENT 105 (H. Acton ed. 1969). Even the retributive purposes of punishment may be viewed as nonjudicial issues of general justification. *See* Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 797-99.

Courts, however, do agonize over whether punishment in a given case is justified. *See, e.g.*, United States v. Bergman, 416 F. Supp. 496 (S.D.N.Y. 1976). Unlike the question of whether punishment in general is justified, however, judicial problems of justification focus narrowly on decisions concerning the punishment of particular persons. Often the judicial problem of justifying punishment is solved once the defendant is found to have violated a law imposing punishment.

99. *See* H. PACKER, *supra* note 63, at 21-23.

100. Hart, *supra* note 89, at 404.

101. *See id.* at 403-04.

102. The law often attempts to achieve desirable consequences by penalizing omissions to act. *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 75, 182-91.

103. *See supra* note 64 and accompanying text.

104. 381 U.S. 437 (1965).

ited past members of the Communist Party from serving in leadership positions of labor organizations.[105] Brown, who had been a member of the Party long before the enactment of the 1959 provision, was convicted of violating the statute despite the failure of the Government to show that he advocated or suggested any illegal or undesirable union activity. The Court rejected the Government's argument that section 504 was a nonpunitive regulatory attempt to prevent Communists from gaining positions of union influence from which they might encourage political strikes.[106] Although the Court found no retributive legislative motivation underlying section 504, the Court, nevertheless, satisfied itself that the provision constituted punishment. "It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."[107] Because section 504 inflicted punishment upon a specified group without a trial, the Court concluded that the provision clearly constituted a bill of attainder.[108] The *Brown* Court, however, did not explain why defining punishment solely in terms of retributive considerations would be "archaic." Indeed, defining punishment entirely in backward-looking terms hardly seems archaic.[109] By contrast, however, to attempt justifications for punishment, once defined, solely in retributive terms[110] clearly would be archaic to most modern minds.

The *Brown* Court's confusion of the definition and justification issues is more than a philosophical mistake. This confusion frustrates the legally necessary task of distinguishing punishment from other types of coercive sanctions.[111] If one defines punitive purpose as the imposition of restraints to achieve rehabilitation or incapacitation, then the definition provides no basis for differenti-

105. *Id.* at 449.

106. *Id.* at 439-40, 456-57.

107. *Id.* at 458.

108. *Id.* at 456-62.

109. *See* J. KLEINIG, *supra* note 25, at 17-22; E. PINCOFFS, *supra* note 94, at 56-57; *cf.* Wasserstrom, *supra* note 27, at 178-79 (considerations of deterrence are relevant but not necessary to the definition of punishment).

110. Even the most retributively oriented modern theories of punishment appeal in some manner to utilitarian considerations for justification. *See, e.g.*, A. VON HIRSCH, *supra* note 4, at 47.

111. *See infra* notes 114-50 and accompanying text.

ating punishment from therapy or preventive detention. The Court, however, requires the drawing of just such distinctions.[112]

C. Punishment v. Preventive Detention

Although some commentators would welcome the characterization of all coercive therapy and preventive detention as punishment for purposes of the fifth, sixth, and eighth amendments,[113] the Supreme Court has not adopted this view. The Court in *Bell v. Wolfish*[114] implicitly turned from the *Brown* approach and made a sharp distinction between punishment and preventive detention for purposes of due process analysis. The *Wolfish* Court rejected the argument that the confinement of pretrial detainees violated the due process clause because it constituted punishment in the absence of adjudication of guilt.[115] The Court found the detainees' confinement to be nonpunitive and, therefore, consistent with due process.[116] The Court noted, however, that the due process clause would have been violated if punishment were imposed without a prior adjudication of guilt.[117] After resorting to the "useful guideposts" of *Mendoza-Martinez* and its emphasis upon punitive motivation, the Court held that since the pretrial confinement reasonably promoted the nonpunitive aim of assuring presence at trial, no punitive intent existed.[118] Rather than punishment, the confinement reflected "a legitimate nonpunitive . . . objective."[119] The

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112. *See supra* note 39 and accompanying text; *see also infra* notes 114-50 and accompanying text.

113. *See, e.g.*, Coleman & Solomon, *Parens Patriae "Treatment": Legal Punishment in Disguise*, 3 HASTINGS CONST. L.Q. 345 (1976); Opton, *Psychiatric Violence Against Prisoners: When Therapy is Punishment*, 45 MISS. L.J. 605 (1974).

114. 441 U.S. 520 (1979).

115. *Id.* at 535-41. The inmates raised a variety of constitutional challenges to the conditions and practices at the Metropolitan Correctional Center. These complaints included confinement of two inmates in cells built for one, visual genital and anal searches by jail staff after all "contact" visits with outsiders, unobserved spot searches of cells, prohibition of the receipt of packages except at Christmas, and bans on hardcover books unless sent directly from the publisher or a book club.

116. *Id.* at 541.

117. "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535.

118. *Id.* at 538-41.

119. *Id.* at 539 n.20. The Court fashioned the following test for punishment: "[I]f a restriction or condition [of pretrial detention] is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id.* at 539. The Court then expanded its reasoning in a footnote:

> [I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may *on its face appear* to be punishment, is instead

Wolfish outcome, however, might have been different if the motivation for confinement had been to effectuate the objectives of retribution or deterrence—objectives that were viewed by the Court as "not legitimate nonpunitive governmental objectives."[120] Moreover, the Court suggested that punitive intent might have been inferred if the liberty restrictions had not been "reasonably related" to legitimate governmental aims.[121] *Wolfish*, therefore, seems to have abandoned the use of rehabilitative and preventive detention guidelines to assess punitive intent. Instead, the Court now apparently discerns punitive intent solely in terms of deterrence and retribution.[122]

Wolfish adds an important gloss to the problem of discovering punitive intent. In addition to actual and explicit expressions of intent, courts may infer punitive intent from pretrial restraints on liberty, or other restrictions which "on their face appear to be punishment,"[123] but are unreasonably harsh in relation to legitimate, nonpenal objectives.[124] Thus, pretrial preventive detention of an accused is permissible if the confinement is not unduly restrictive in relation to the nonpenal objective of assuring presence at trial.[125] If, however, the detainee can show that his confinement is unnecessarily harsh in relation to the state's nonpenal interests, then the detainee could argue that the conditions of confinement reflect an intent to punish. In this situation, preventive detention would become punishment.[126]

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but an incident of a legitimate nonpunitive governmental objective. . . . Retribution and deterrence are not legitimate nonpunitive governmental objectives.

Id. at 539 n.20 (emphasis added).

120. *Id.*

121. *Id.* at 539. For a criticism of *Wolfish*, see *The Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 99-108 (1979).

122. In a vigorous dissent, Justice Marshall criticized the majority's utilization of the concept of punishment as an "empty semantic exercise." 441 U.S. at 569 n.7. (Marshall, J., dissenting). Rather than invoke the concept of punishment, Justice Marshall advocated the application of a straight balancing test that weighed the detainees' liberty interests against the state's asserted interests. *Id.* at 569-70. Under this test, the government would be required to show that a restriction was "substantially necessary" to jail administration in order for it to outweigh the detainees' liberty interest. *Id.* at 570.

123. *See supra* note 119.

124. *Id.*

125. The Court also noted the interest in maintaining security within the jail as a nonpenal objective requiring restraints on liberty. *See* 441 U.S. at 539-40.

126. The Court offered the following illustration:

[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods,

Judicial scrutiny of the reasonableness of restraints that appear on their face to be punishment is both laudable and problematic. The use of a rationality standard for assessing punishment frees the inquiry from a rigid conceptual exegesis and creates possibilities for analysis enriched by considerations of underlying constitutional values. Unreasonable governmental restraints of liberty that appear to be punishment trigger the arsenal of constitutional protections traditionally attending that concept. At the same time this requirement—that the restraint "appear on its face to be punitive"—introduces a problem of circularity: What test determines punitive restraint? The Court's traditional test—whether the legislature enacted the law with a punitive motivation—is inapposite. Indeed, the Court seeks to infer punitive motivation once it discovers restraints that are punitive on their face and excessively harsh in relation to nonpunitive aims. In addition, the punitive-on-its-face rubric could result in an inference of punitive intent in situations in which the alleged punishers in fact intended no such thing. The courts may view the test as an abandonment of the inquiry into subjective punitive intent in favor of a more objective effect theory of punishment.[127] The effect theory defines punishment solely in terms of the impact of an alleged punisher's actions regardless of the punisher's purposes.[128] Thus, even if the state could

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would not support a conclusion that the purpose for which they were imposed was to punish. '

Id. at 539 n.20.

127. Justice Stevens has advocated this view:

> I believe the Court improperly attaches significance to the subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted. Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.

Estelle v. Gamble, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting).

Chief Judge Coffin has expressed a similar view: "It would be impossible, without playing fast and loose with the English language, for a court to examine the conditions of confinement under which detainees are incarcerated, . . . and conclude that their custody was not punitive in effect if not in intent." Feeley v. Sampson, 570 F.2d 364, 380 (1st Cir. 1978) (Coffin, C.J., dissenting); *see also* Lieggi v. INS, 389 F. Supp. 12, 21 (N.D. Ill. 1975) ("the overall effect, the reality of the situation, is that petitioner . . . and his family will suffer severe punishment in relation to the offense unless this Court grants him some form of relief"), *rev'd mem.*, 529 F.2d 530 (7th Cir. 1976). *See generally* Note, *A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition*, 90 YALE L.J. 632 (1981) (intent of a challenged practice is irrelevant in defining punishment).

128. Thus, if the state subjects an individual to unpleasant restrictions similar to those restraints experienced by persons who are punished, similar for example to depriva-

show that it actually intended nonpunitive detention, the confinement would nonetheless be punishment, albeit accidental, if the effects of detention were perceived by the inmates as punitive and if the confinement, for whatever reason, was excessive in light of its nonpenal purposes.[129]

Although confinement under these circumstances may be unconstitutional on other grounds,[130] the Supreme Court would probably decline to characterize the confinement as impermissible pretrial punishment. The philosophical literature and the Court's opinions clearly indicate that punishment is an activity concept that requires purposeful action and not just punitive effect.[131] "Punishments do not happen to or befall people. Rather, they are treatments to be understood within the context of responsible—or intentional—activity."[132] Accidental punishment, therefore, is logi-

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tions existing in prisons, then the sanction is considered to be "punishment" regardless of the state's purpose in administering it. *See Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1331 (1974) [hereinafter cited as *Developments*].

129. Suppose, for example, that the state implemented a drug treatment program for pretrial detainees awaiting trial on drug related charges. Suppose further that the therapy included a painful treatment regimen that was perceived by the detainees as a form of corporal punishment. Imagine that responsible state authorities genuinely believed that that form of therapy was the least drastic means of effectively treating drug addiction. Assuming the existence of a legitimate state interest in treating drug addiction in the context of pretrial detention, if the detainees could show that less drastic means were in fact available to achieve the state's therapeutic interest, the treatment program would, under the effect theory, appear to be punishment, notwithstanding the state's admittedly nonpunitive intent.

130. Doctrinal grounds for the constitutional invalidation of confinement exist under concepts of due process not necessarily linked to punishment and also under the equal protection clause. If the state deliberately inflicts "appreciable physical pain," then the confinement may violate the fourteenth amendment due process clause. Ingraham v. Wright, 430 U.S. 651, 672-74 (1977). Although *Ingraham* was a punishment case, the Court's due process language is not limited necessarily to a punitive context. Indeed, the Court specifically held the cruel and unusual punishment clause to be inapplicable to the case. *Id.* at 664; *see also* Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir.) (brutal treatment of pretrial detainees, although not punishment, is nevertheless unconstitutional under the due process clause), *cert. denied*, 414 U.S. 1033 (1973). The *Ingraham* Court further stated that "[t]he liberty preserved from deprivation without due process [includes] . . . a right to be free from, and to obtain judicial relief for, unjustified instrusions on personal security." 430 U.S. at 673.

A finding that the confinement is nonpunitive would not insulate the detention from attack under the equal protection clause. *See, e.g.*, Brenneman v. Madigan, 343 F. Supp. 128, 138, 142 (N.D. Cal. 1972) ("[w]hether onerous prison conditions are imposed on pretrial detainees under the shibboleth of 'punishment' or 'security,' the constitutionality of those conditions is always a proper subject of judicial inquiry" under the equal protection clause); *see also* Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 947-50 (1970) (to classify detainees with convicts for purposes of determining conditions is unreasonable).

131. *See* J. KLEINIG, *supra* note 25, at 17-22.

132. *Id.* at 17. The recognition of intentional activity as a necessary aspect of the concept of punishment does not require "an intentional activity engaged in for the purpose of

cally impossible.[133] Thus, the Court probably would reject any reading of *Wolfish* that found punishment in cases in which alleged punishers genuinely intended nonpunitive treatment. Indeed, an effect theory interpretation of *Wolfish* would commit the Court to a metaphorical conception of punishment[134] that would threaten to engulf virtually all legal sanctions within its definition.[135]

A more modest and plausible reading of *Wolfish* would save the Court from the effect theory and permit findings of punishment through the punitive-on-its-face criterion only when circumstances justify the conclusion that punitive intent actually exists. In cases of sanctions that suspiciously resemble punishment, a court would scrutinize the rationale underlying the sanctions. If the sanctions were unreasonably excessive in relation to articulated nonpunitive purposes, then a court would justifiably infer that the sanction reflected an actual intent to punish. The use of objective rationality standards to infer a subjective state of mind is not new to the law.[136] A problem arises, however, when determining which

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punishing." Indeed, the Court has recognized "deliberate or intentional indifference" to the medical needs of prisoners as a basis for invoking the cruel and unusual punishment clause. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). Such indifference leads directly to "unnecessary and wanton infliction of pain" proscribed by the eighth amendment. *Id.* at 104. Under such circumstances, a showing of direct intent to punish is not required since the alleged punisher knowingly and responsibly causes the prisoner to suffer by restricting his liberty and denying him the means to alleviate his pain.

133. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (second attempt to execute offender after first attempt failed due to mechanical malfunction of the electric chair did not violate cruel and unusual punishment's proscription against inflicting unnecessary pain because the first attempt was an unforeseeable accident). The Supreme Court has addressed this problem in the medical malpractice context:

> In the medical context, an inadvertent failure to provide adequate medical care cannot he said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Estelle v. Gamble, 429 U.S. 97, 105-06 (1976).

134. *See, e.g.*, J. KLEINIG, *supra* note 25, at 17.

135. If punishment is defined solely in terms of effect, without regard to questions of motivation, virtually no hasis exists for distinguishing punishment from treatment, compensation, or regulation. *See* H. PACKER, *supra* note 63, at 19-31. Moreover, the distinction between punishment and taxes also will be blurred, *see* Clark, *supra* note 7, at 463-79, as will the distinction between punishment and preventive detention. *See infra* notes 138-43 and accompanying text. For a discussion of reasons for rejecting the effect theory, see *infra* notes 158-77 and accompanying text.

136. Precise discovery of a person's state of mind is impossible. When subjective mat-

sanctions constitute punishment on its face or, as here conceptualized, cases which suspiciously resemble punishment,[137] and therefore activate the Court's rational basis scrutiny. *Wolfish* offers no solution apart from intimating that its context triggers this scrutiny. Indeed, the traditional pretrial detention setting reflects many of the earmarks of punishment. For example, a person is incarcerated before trial only after the state establishes probable cause to believe that he has committed a crime. As a consequence of that belief, the state purposely imposes highly unpleasant restraints upon the accused, who is often housed in the same jail and subjected to the same conditions of confinement as convicted offenders.[138] Thus, a court reasonably could infer that a pretrial detainee was intentionally punished when the state subjects the detainee to unnecessarily harsh treatment.[139] The inference of punishment is more difficult to draw in situations in which restraints are not triggered by criminal conduct, or for that matter by any conduct at all. In these cases the "earmarks of punishment" begin to dissipate.[140] Therefore, the *Wolfish* "punishment on its face" standard may be of little utility outside the suspiciously punitive context of pretrial detention. *Wolfish*, however, is useful in analyzing certain additional areas of juvenile justice, which will be examined below.[141]

The above discussion of *Wolfish* suggests that the pretrial confinement in that case reflected preventive detention and not punishment. Distinguishing preventive detention from punishment is useful not only to understand the abstract contours of the concept of punishment but also to further the analysis of juvenile cases.[142] Preventive detention is defined as the restriction of liberty of persons whose present status poses a perceived danger to society. The danger in *Wolfish* was the risk that the suspect would abscond

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ters are legally relevant, they are inferred through objective appraisals of external evidence. These inferences are generally made by appeal, either consciously or unconsciously, to a standard of rationality. The question asked is "what would a 'reasonable person' have been thinking in these circumstances?" *See* J. HALL, *supra* note 27, at 121, 163.

137. The author prefers the "suspiciously resembling punishment" characterizations to the *Wolfish* Court's "punishment on its face" language because the former does not explicitly beg the question of punishment.

138. *See, e.g.*, Johnson v. Lark, 365 F. Supp. 289, 301 (E.D. Mo. 1973); Collins v. Schoonfield, 344 F. Supp. 257, 267 (D. Md. 1972).

139. *See supra* notes 132 & 136.

140. Consider, for example, the whole range of involuntary mental health commitments as well as preventive detention settings such as quarantines and protective custody.

141. *See infra* notes 178-240 and accompanying text.

142. *See infra* notes 241-324 and accompanying text.

before trial.[143] While the state looks backward when punishing offenders for their past conduct, the government preventively detains a suspect based on his present and future dangerousness. Past conduct may provide useful evidence in assessing the suspect's dangerousness—and in the pretrial confinement context actually triggers the inquiry into present status—but preventive detention is inherently forward-looking in its efforts to avert the occurrence of undesirable future events.

D. Punishment v. Therapy

Therapeutic dispositions, like preventive detentions, sometimes display punitive characteristics. Involuntary therapy often entails not only a stigma to the patient and severe restriction of his liberty, but also painful and unpleasant treatment.[144] Despite its similarity to punishment, however, therapy is a concept analytically distinct from punishment.[145] Thus, the Supreme Court suggested in *Robinson v. California*[146] that while the Constitution may allow the state to subject drug addicts to involuntary therapy,[147] the state violates the eighth amendment when it punishes addicts for their addiction.[148] Although the Court frequently has discussed

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143. *See* 441 U.S. at 528, 534.

144. *See generally*, Gobert, *Psychosurgery, Conditioning, and the Prisoner's Right to Refuse "Rehabilitation,"* 61 VA. L. REV. 155 (1975); Symonds, *Mental Patients' Rights to Refuse Drugs: Involuntary Medication as Cruel and Unusual Punishment*, 7 HASTINGS CONST. L.Q. 701 (1980); Comment, *Right to Treatment for the Civilly Committed: A New Eighth Amendment Basis*, 45 U. CHI. L. REV. 731 (1978); *Developments*, *supra* note 128, at 1344-50.

145. A variety of theorists distinguish punishment from therapy. *See, e.g.*, T. HONDERICK, *supra* note 97, at 1; H. PACKER, *supra* note 63, at 25-28; Morris, *supra* note 3; Wasserstrom, *supra* note 27, at 179. For a view that involuntary therapy is logically impossible, see Coleman & Solomon, *supra* note 113, at 350-51.

146. 370 U.S. 660 (1962).

147. "[A] Stata might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement." *Id.* at 665 (dicta).

148. *Id.* at 667. The *Robinson* Court utilized the cruel and unusual punishment clause to strike down a California statute that punished persons adjudged to be drug addicts with a sentence of ninety days in the county jail. The eighth amendment violation occurred because the statute punished the status of drug addiction rather than a specific criminal act. *Id.* at 666-67.

The majority of the *Robinson* Court simply assumed that the jail term constituted punishment. The Court said, "To he sure, imprisonment for ninety days is not in the ahstract, 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." *Id.* at 667. Justice Clark argued in dissent that the confinement may have constituted therapy rather than punishment. *Id.* at 679-81 (Clark, J., dissenting).

Interesting conceptual problems arise when one speaks of punishing a status. If punish-

the concept of punishment, it has never directed much attention to defining therapy and to distinguishing it from punishment. Fortunately, commentators have provided valuable insights into this distinction by describing therapy as purposeful behavior toward another person that is intended to alter that person's condition in a manner beneficial to him. This purportedly beneficial behavior is always subject to revision upon a showing that a different mode of behavior would produce more beneficial results, or that a change in the person's condition has eliminated the need for further therapy.[149]

Examination of the role of offensive conduct illustrates the essential difference between coercive therapy and punishment. The distinction is similar to that between preventive detention and punishment. In cases of punishment, the state imposes restraints upon persons because they have committed offenses. Cases of therapy, however, do not involve necessarily a relation between the restraints imposed upon the person and his past conduct.[150] Therapy—like preventive detention and unlike punishment—is a forward-looking response to a person's present undesirable status. Unlike preventive detention, which merely incapacitates, therapy seeks to alleviate the undesirable status conditions.

E. Summary

The Supreme Court's approach to defining punishment includes the following three characteristics. First, *Wolfish* suggests that the Court will use its definitional approach to assess all claims of governmental punishment, regardless of whether the claims present a direct constitutional attack upon a specified statute—as in *Trop* and *Mendoza-Martinez*—or an allegation that the restraints constitute nonstatutorily imposed punishments. Second, from its earliest views in *Cummings* to its most recent opinion in *Wolfish*, the Court consistently has focused upon the intent of the alleged punisher as an essential element to determine the presence or ab-

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ment is necessarily linked to actions, *see* H. HART, *supra* note 27, then it appears logically impossible to punish a status. Perhaps for this reason some commentators see *Robinson* not as a problem of cruel punishment, but rather as one of irrational state action. *See, e.g.*, Robinson v. California, 370 U.S. 660, 689 (1962) (White, J., dissenting) (suggests a substantive due process rather than eighth amendment basis for the case); Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 147-48 n.144 (*Robinson* is substantive due process masquerading in eighth amendment garb).

149. *See* Wasserstrom, *supra* note 27, at 179.

150. *See* H. PACKER, *supra* note 63, at 25-26.

sence of punishment. Last, the Court does not seem to alter its definition of punishment to fit the particular constitutional problem at issue. Substantive and procedural constitutional rights are included in the same punishment analysis. Thus, the Court follows the same approach in defining punishment in the ex post facto law, bill of attainder, and cruel and unusual punishment cases as it does when determining the punishment concept that triggers the procedural protections required in criminal cases.[151]

In summary, the surveyed cases reveal the following punishment framework:

(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.[152]
(3) Punishment is imposed to exact retribution[153] and may also operate to deter undesirable conduct.[154]
(4) Punishment is often imposed upon offenders who, in addition to violating legal rules, are (or are believed to he) morally culpable.

Courts may discern punitive purpose from either the express words or actions of the alleged punisher or from independent inquiries

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151. Some commentators have criticized this aspect of the Court's performance.

> The bill of attainder clause, as it functions in *Cummings*, and the eighth amendment, as it was applied in *Trop*, each provide a medium for analysis and judgment on the issue of congressional authority to enact a particular sanction. This synonymity of purpose permits breeding the *Cummings* approacb to punishment with tlie doctrine of cruel and unusual punishments. But the gulf between the bill of attainder clause and the sixth amendment is not so easily bridged. The former focuses on the scope of legislative competence, the latter on tlie requirements of procedure. Each has its domain. Questions of procedural adequacy arise only on the assumption that Congress has the authority to enact a sanction. One clause is concerned with the question whether, the other, with the question bow. Transferring criteria for punishment from one clause to the other produces strange results. It produced the result in *Mendoza-Martinez* of a decision formally based on the sixth amendment, but whose rationale bespeaks a concern for tlie issue of congressional authority.

Comment, *supra* note 86, at 309.

152. *See* Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Locke *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 901 (1977) (eighth amendment punishment applies not only to statutorily imposed sanctions but also to ad hoc restraints meted out by state officials).

153. The Court nowhere defines precisely what "retribution" means. Supposedly it entails such things as meting out just deserts and expressing reprobative sentiments towards blameworthy offenders.

154. The Court does not define deterrence. Presumably, the Court uses the word in both its general—punishment meant to deter persons other than the one being punished—and special—punishment of an offender to deter that offender—senses.

into the possible functions of an allegedly punitive sanction. When the state imposes restraints that suspiciously resemble punishment, courts may infer a punitive purpose if the restraints are unreasonably harsh in relation to articulated nonpenal objectives. Punishment is a concept analytically distinct from regulation, preventive detention, and therapy. Regulation is the imposition of sanctions to control future conduct without necessarily attending to anyone's past wrongdoing. Preventive detention is the purposeful restriction of liberty of a person, who because of his present status, may pose a danger. Unlike punishment, which is generally determinate[155] —that is, knowable in kind and duration at the time the triggering offense is committed—preventive detention is indeterminate—that is, unknowable in duration at the time of imposition. Therapy is the alteration of a person's undesirable physical or mental condition in a manner beneficial to the person until the undesirable condition no longer exists. Therapy is characteristically indeterminate because its effectiveness is generally unknown in advance.[156]

In practice, the distinctions noted above may be difficult to make. This Article already has discussed some of the problems with the punishment-regulation distinction. Because the status-act distinction is sometimes unclear,[157] the distinctions between punishment and therapy, and punishment and preventive detention also may be difficult to draw.

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155. *See* Wasserstrom, *supra* note 27, at 179. The widespread use of indeterminate sentencing precludes knowledge of the exact term to be served by the offender at the time of sentencing. *See* Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 298-99 (1974). Even under indeterminate sentencing, however, the legislature generally sets maximum sentences for given offenses.

156. *See* Wasserstrom, *supra* note 27, at 179.

157. The *Robinson* Court did not discuss the problem of distinguishing status and act. In his dissenting opinion in *Robinson*, however, Justice White faulted the act/status distinction, and argued that the conviction rested upon the act of using drugs, an act that was subsumed necessarily in the subject's status as an addict. Robinson v. California, 370 U.S. 660, 686 (1962) (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." 392 U.S. at 550 n.2 (White, J., concurring); *see also* H. PACKER, *supra* note 63, at 28: "Treatment, like punishment, is triggered by conduct. A decision for treatment is determined almost invariably by observing conduct that is thought to indicate a need for treatment. However, the conduct need not constitute an offense, and often does not." Similarly, preventive detention is often triggered by conduct evincing a dangerous status. The conduct, however, need not constitute an offense. Consider, for example, the protective confinement of a person who threatens to kill himself.

F. *In Defense of Assessing Individual Rights in Terms of the Concept of Punishment*

In light of the inexact definition of punishment, questions may arise about a system that hinges vital constitutional rights upon such a vague concept. Punishment is a severe legal sanction that tends to stigmatize persons who receive it.[158] Understandably, these grave consequences require that punishment be contained by special safeguards. All punishment, however, is not especially severe.[159] Indeed, some nonpunitive sanctions are more severe than some punishments.[160] Moreover, stigma is not unique to punishment,[161] nor is it inherent in minor punishments such as fines or strict liability offenses in which offenders are not assumed necessarily to be blameworthy. At best, then, severity of treatment and imposition of stigma provide only a rough explanation for the use of punishment as a determinant of constitutional rights.

Because of the Court's failure to formulate a definition of punishment that encompasses all instances of severe and stigmatizing sanctions, critics have argued that the concept is too narrowly defined and should, therefore, either be abandoned as a means for assessing legal rights[162] or expanded to avoid the injustice of failure to protect all persons who are stigmatized by severe governmental sanctions.[163] Many theorists who advocate an expansion of the definition of punishment reject punitive motivation as a necessary condition for the concept and argue instead for an effect the-

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158. Some forms of punishment—the death penalty for example—have no comparable analogues in terms of their severity among nonpunitive sanctions. Moreover, other forms of punishment, specifically imprisonment, are often extremely severe and, when joined by the accompanying stigma, become sui generis. "[T]he combination of stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets that sanction apart from anything else the law imposes." H. PACKER, *supra* note 63, at 131. For views of the significance of the stigmatizing effect of punishment, see J. FEINBERG, *supra* note 27, at 95-118. *See also* Breed v. Jones, 421 U.S. 519, 529 (1975) (proceeding is essentially criminal if possible consequences include stigma and loss of liberty for several years).

159. Consider, for example, the common employment of money fines as a criminal sanction. Such sanctions are hardly severe to offenders of substantial economic means.

160. Compare, for example, the severity of a criminal fine of $100 to a damage award for thousands of dollars. Indeed, "with the possible exception of death, exactly the same kinds of unpleasant consequences, objectively considered, can be and are imposed upon unsuccessful defendants in civil proceedings." Hart, *supra* note 38, at 404.

161. For example, damage awards may entail stigmatization. *See* Clark, *supra* note 7, at 408. Mental health commitments may also entail stigmatizations. Addington v. Texas, 441 U.S. 418, 425-26 (1979).

162. *See supra* note 32 and accompanying text.

163. *See supra* note 31 and accompanying text.

ory of punishment as described earlier in this Article.[164]

The Supreme Court's concept of punishment, however, is not indefensible. First, the Court's theory of punishment, with its punitive motivation requirement, is far from arbitrary. Rather, the theory clearly agrees with much of the philosophical literature treating the concept of punishment.[165] Additionally, the effect theory fails to recognize that punishment is essentially an activity concept.[166] To the extent that the Court's definitional task is to articulate the meaning of a term of ordinary language it has done so remarkably well.[167] Of course, the Court's work extends beyond a mere formulation of an abstract definition. The Court's definitions must promote underlying constitutional values and avoid injustice. These interests need not be offended by the Court's definitional scheme, even in cases in which the Court concludes that a given restraint is nonpunitive and, thus, not governed automatically by the constitutional considerations applicable in cases of punishment. The Court has never held that the concept of punishment is the *sole* determinant of constitutional rights of persons subjected to highly coercive governmental sanctions. Nonpunitive treatment of a cruel, unreasonably harsh, or stigmatizing nature can and should be subjected to scrutiny under a variety of constitutional doctrines that are not logically tied to the concept of punishment.[168] Moreover, persons placed in jeopardy of receiving such treatment can and should receive procedural protections approach-

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164. *See supra* notes 127-29 and accompanying text.

165. *See, e.g.*, H. HART, *supra* note 27; J. KLEINIG, *supra* note 25, at 41-42; Wasserstrom, *supra* note 27, at 179.

166. *See supra* notes 131-32 and accompanying text.

167. Judicial attention te ordinary language contexts is certainly not inappropriate. Indeed, while

> [t]he central concern in any definitional inquiry should be the purpose for which the definition is sought. Ordinary usage . . . must serve as at least a starting point. A concept cannot be defined in a vacuum; before one asks how a concept should be construed so as to be consonant with certain policies or purposes, one must determine the general contours of the concept. Examination of ordinary usage elucidates these conteurs.

Note, *supra* note 31, at 1678 n.80.

168. The Court in Jackson v. Indiana, 406 U.S. 715, 719, 723-39 (1972) eschewed a cruel and unusual punishment analysis in favor of equal protection and due process doctrines and invalidated the involuntary pretrial hospitalization of a criminal defendant found incompetent to stand trial under statutes which resulted in a more restrictive confinement than that imposed upon persons involuntarily hospitalized through other statutes. *See, e.g.*, O'Counor v. Donaldson, 422 U.S. 563, 576 (1975) (state "cannot [consistent with every man's right to liberty] confine [in hospital] without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible [others]"); *see also supra* note 130 and accompanying text.

ing those provided to criminal defendants.[169]

Adoption of the effect theory of punishment would effectively eliminate the punishment/therapy and punishment/preventive detention distinctions that the Court has painstakingly drawn. Under the effect theory, any involuntary therapy of an unpleasant nature arguably could be punitive.[170] Once characterized as punitive, the treatment seemingly would become unconstitutional under *Robinson v. California* as punishment for a status.[171] This reasoning would render the whole institution of civil commitment constitutionally suspect. By the same analysis, varieties of preventive detention—even in such relatively benign forms as quarantines for control of infectious disease—would look suspiciously like punishment for a status if the detention should be labeled punishment under the effect theory. Similarly, a variety of procedural consequences would follow if the concept of punishment were substituted for present notions of therapy and preventive detention. If not rendered altogether unconstitutional under *Robinson*, detentions that are presently characterized as therapeutic or preventive seemingly could occur only after the provision of the full panoply of protections presently available to criminal defendants. The wisdom of such an innovation is debatable.[172]

While effect theorists chide the Court for generating too narrow a concept of punishment, others may object to the definition for being too broad. If some punishments entail little or no stigma-

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169. Due process concepts that are not logically tied to punishment or criminal proceedings may be utilized to achieve similar procedural effects as those resulting when punishment exists. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 431-33 (1979) (elevated standard of proof approaching that utilized in "criminal" cases required by due process in civil commitment proceedings); *In re* Gault, 387 U.S. 1 (1967) (rights to notice, counsel, confrontation, etc. required under due process clause); *see also* Rossman, *The Scope of the Sixth Amendment: Who Is a Criminal Defendant?*, 12 AM. CRIM. L. REV. 633, 650 (1975) (due process considerations require appointment of counsel in certain civil proceedings).

170. Coleman & Solomon, *supra* note 113, at 350-53 (defining all involuntary therapy as punishment).

171. *See Developments, supra* note 128, at 1331.

172. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 429-30 (1979) (discussion of the impossibility of applying the criminal standard of proof to the evaluations of status inherent in mental health commitments). The Court's present rejection of the effect theory of punishment in favor of a requirement of punitive intent, when considered in conjunction with the Court's flexible use of due process, permits the transplanting of appropriate aspects of criminal procedure into civil proceedings without inappropriately criminalizing such proceedings. *Compare In re* Gault, 387 U.S. 1 (1967) (holding fifth amendment privilege against self-incrimination applicable to delinquency adjudications) *with* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding sixth amendment right to jury trial not applicable to delinquency adjudications).

tization and are of minor severity, why impose all the expensive and time-consuming procedures of the criminal process? The Court has answered, at least partially, these objections in decisions limiting sixth amendment rights to counsel and jury trials to situations in which defendants risk substantial punishment and stigmatization.[173]

Critics frequently raise two other objections to the use of punishment as a standard for constitutional rights. First, they underscore the difficulty a court encounters when ascertaining whether a legislature had a punitive motivation. Although all assessments of subjective states of mind are difficult,[174] the punitive motivation requirement is especially problematic because it often entails an assessment of collective legislative intent. Commentators have examined this problem in depth,[175] reducing the necessity for a similar examination here. The collective intent problem is not unique to the Court's concept of punishment and has proven to be relatively manageable in other doctrinal areas.[176] Moreover, to the extent that *Wolfish* permits inferences of punitive intent, the collective intent problem is avoided altogether. Last, some critics advocate the abandonment of punishment as an analytical standard because of its vagueness. Although punishment admittedly is an inexact notion, the concept seems more precise than alternatives such as "fundamental fairness," which would likely replace the punishment concept as an analytical vehicle.[177]

The concept of punishment, however inexact its definition, and rough the explanation for its use, is firmly entrenched in the legal system as a mechanism for defining the reach of the Constitution. The concept's recent employment in *Wolfish* suggests that the Court is likely to continue to analyze a variety of rights in terms of the presence or absence of punishment.

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173. *See, e.g.*, Scott v. Illinois, 440 U.S. 367 (1979) (sixth amendment right to counsel limited to cases where imprisonment occurs). Of course this right also exists in capital cases. *See* Bute v. Illinois, 333 U.S. 640, 676 (1948). The Court has held that the right to trial by jury exists only in cases involving potential imprisonment of more than six months. Baldwin v. New York, 399 U.S. 66 (1970).

174. *See supra* note 136.

175. *See* Clark, *supra* note 7, at 435-91.

176. *See generally* Gardner, *Illicit Legislative Motivation as a Sufficient Condition for Unconstitutionality Under the Establishment Clause—A Case for Consideration: The Utah Firing Squad*, 1979 WASH. U.L.Q. 435.

177. For a discussion of the employment of the fundamental fairness test as an alternative analysis, see *infra* notes 180-88 and accompanying text.

III. Juvenile Justice and the Supreme Court

A. *In re Gault*

Although earlier doctrinal development existed,[178] *In re Gault*[179] marked the first major effort by the United States Supreme Court to relate constitutional principles to the juvenile justice system. The Court reviewed the constitutionality of the commitment of fifteen-year-old Gerald Gault to the Arizona State Industrial School for a period not to exceed Gault's twenty-first birthday. Gerald's commitment was the result of a delinquency adjudication, conducted without procedural formality,[180] at which it was determined that he had made an obscene phone call. The Court held that Gerald and others in similar situations who risk incarceration in state correction facilities if found to be delinquents 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.[181] 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 juvenile system, which was historically characterized by a procedural informality that was intended to protect youthful offenders from the harshness of criminal proceedings,[182] began with high motives and

178. *See* Kent v. United States, 383 U.S. 541 (1966) (enumeration of procedural rights under the District of Columbia Code in proceedings waiving juvenile court jurisdiction to the adult criminal process). *See generally* Paulsen, *supra* note 4.

179. 387 U.S. 1 (1967).

180. After a complaint by a neighbor that Gerald Gault had made an obscene phone call, Gault was taken into custody by 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. Gerald appeared without counsel at a hearing that was held on the petition. The complaining neighbor did not attend 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 apparently had admitted making the obscene call. Six days later, at a hearing at which Gault was again unrepresented by counsel, the judge sentenced Gault to the State Industrial School " 'for the period of his minority [until 21], unless sooner discharged by due process of law.' " *Id.* at 7-8.

181. *Id.* at 31-57. The Court chose not to rule on whether juvenile courts are required to provide transcripts of their proceedings to appealing litigants or whether juvenile proceedings are subject to appellate review. *Id.* at 57-58.

182. The supposed virtues of procedural informality in the juvenile system are explained by one commentator a follows:

enlightened goals. In reality, however, the system had failed to attain its rehabilitative goals and often was nothing more than a mechanism that stigmatized youths as delinquents[183] and restricted their liberty.[184] Thus, the *Gault* Court found that the essentials of due process and fair treatment under the fourteenth amendment entitled juveniles to increased procedural protections.[185]

By relying upon the concept of fundamental fairness under the due process clause for these procedural protections, the Court did not specifically find that juvenile sanctions such as those imposed upon Gerald Gault were punitive—even though such a finding would have provided an alternative basis for engrafting the *Gault* protections upon the juvenile system.[186] The Court averted

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> Not only was the aim of a court for children to differ from that of the criminal court; its way of going about things was to be changed as well. Procedure had to he "socialized." "The purpose of the juvenile court is to prevent the child's being tried and treated as a criminal; all means should be taken to prevent the child and his parents from forming the conception that the child is being tried for a crime." The respondent to a petition filed in bis own interest replaced the defendant to a criminal charge filed in the interest of the state. Trials by jury should be permitted "under no circumstances," because "they are inconsistent with both the law and the theory upon which children's codes are founded." Hearings were not to he "public trials" lest youngsters be damaged by publicity. Little or no need would be found for the respondent to have a lawyer; "the judge represents both parties and the law." . . .
>
> Not to be overlooked is another aspect of the insistence on informality in court. The community has never been much concerned with the impact of criminal procedure on the feelings of an accused. If be is terrified by the courtroom scene, so much the better. A malefactor might thus be convicted never to return. The reformers, on the other hand, sought to dispel the fear that can accompany a child's day in court. They perceived the appearance before the juvenile court judge as the beginning of the treatment process, a beginning that should not make the total job of serving a child's needs more difficult. If the state is to act like a father, its representative, the judge, should act like one at the hearing. The respondent child . . . should "be made to feel that he is the object of [the court's] care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a hench, looking down upon the bey standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work."

Paulsen, *supra* note 4, at 170-72 (footnotes omitted).

183. "[Supposedly,] one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a 'criminal.' The juvenile offender is now classed as a 'delinquent.' . . . [T]his term has to come to involve only slightly less stigma than the term 'criminal' applied to adults." 387 U.S. at 23-24 (footnote omitted).

184. *See infra* note 195 and accompanying text.

185. The Court found that the due process protections would not detract from the rehabilitative mission—to the extent that this actually exists—of the juvenile courts. In fact, the protections might even promote rehabilitation. 387 U.S. at 26-27.

186. *See supra* note 5.

the complete criminalization of delinquency adjudications by avoiding a specific finding that confinement of juvenile delinquents constitutes punishment.[187] The more flexible fundamental fairness standard permitted the Court to impose certain procedural requirements upon the juvenile system without stating that juveniles are entitled to the full panoply of fifth, sixth, and eighth amendment rights available to criminal defendants.[188] The *Gault* Court, however, deviated from the fundamental fairness approach by relying directly upon the fifth amendment and its specific application to criminal cases[189] in holding that the privilege against self-incrimination applied to state delinquency adjudications.[190] The Court based its analysis of the applicability of the privilege on the view that the juvenile system is the functional equivalent of the criminal system.[191] Thus, the Court's position seems to be not so much that due process fairness requires the application of the privilege, but that juvenile proceedings are essentially "criminal" proceedings for purposes of the privilege.[192] Because the Court consistently has viewed the dispensation of punishment as the defining characteristic of criminal law, the conclusion that the Court saw the sanction imposed in *Gault* as punitive is difficult to avoid.[193]

Although the *Gault* Court may have implicitly held that the juvenile system is in some aspects and for some purposes punitive, the Court failed expressly to provide a useful standard for identifying juvenile punishment in future cases. At several points in its opinion, however, the Court intimated that the unpleasantness ex-

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187. *See id.*

188. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (no right to jury trials for juveniles in delinquency adjudications). For a more detailed discussion of *McKeiver*, see *infra* notes 217-28 and accompanying text.

189. 387 U.S. at 47-49.

190. "[J]uvenile proceedings to determine 'delinquency,' which may lead to commitment in a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination." *Id.* at 49.

191. Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 U.C.L.A. L. REV. 656, 665-71 (1980).

192. The *Gault* Court specifically noted that the privilege against self-incrimination protects values other than those values protected by due process fundamental fairness. While the latter generally speak to accurate factfinding in legal proceedings, *see* Rosenberg, *supra* note 191, at 677, "[t]he roots of the privilege are . . . far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state." 387 U.S. at 47 (footnote omitted); *see also supra* notes 190-91 and accompanying text.

193. *See supra* note 5.

perienced by involuntarily confined juveniles is itself sufficient to constitute a finding of punishment. Because adjudications favorable to the state often result in significant restrictions of liberty in both juvenile and adult criminal proceedings, the Court equated the two proceedings. "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[194] In the same vein, the Court stated,

> 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.[195]

To the extent that such langnage provides a definitional approach to punishment, it focuses entirely on the effect of the alleged punishment upon its subject. On its face, the Court's opinion suggests an effect theory of punishment and has been so read by some courts and commentators.[196] Nevertheless, when one reads *Gault* in conjunction with other Supreme Court cases, the conclusion that the Court intended to espouse the effect theory seems unlikely.[197]

The *Gault* Court could have avoided these confusions by analyzing the case explicitly in terms of the concept of punishment. Because of the expressed skepticism concerning the adequacy of the avowed nonpunitive purposes of delinquency dispositions, the Court easily could have found the dispositions punitive under its traditional punishment definition. Offenders receive unpleasant restraints because of their offenses against the criminal law. Juvenile dispositions suspiciously resemble punishment,[198] which triggers

194. 387 U.S. at 36.

195. *Id.* at 27 (footnotes omitted).

196. *See* authorities cited *supra* notes 29-30.

197. *See supra* notes 127-35 and accompanying text.

198. Compare the "suspiciously punitive" setting of pretrial detention, *supra* notes 137-40 and accompanying text, with that depicted by the *Gault* Court. While juveniles, unlike pretrial detainees, may not be housed routinely in the same facility with convicted offenders, the *Gault* Court's description of juvenile confinement, *see supra* note 195, suggests

inquiry into the reasonableness of the restraints in relation to their nonpunitive purposes. If this inquiry revealed that the restraints were excessive, then punitive intent would be inferred and the disposition would be labeled punishment. Although this approach is aided by the *Wolfish* test for inferring punitive intent—a test not yet fully developed at the time of *Gault*—the *Gault* Court could have employed the similar *Mendoza-Martinez* excessiveness standard to reach the same result obtained through *Wolfish*.[199] Other aspects of *Gault* deserve brief attention. The Court's attempts to narrow the scope of the opinion to the delinquency adjudication stage diminishes *Gault*'s usefulness as a basis for assessing the constitutional rights of juveniles. Thus, whether the *Gault* protections extend to pre-or post-adjudication problems or to such nondelinquency situations as PINS[200] or neglect proceedings is uncertain.[201] Moreover, *Gault*'s applicability to delinquency adjudications in which the petition, unlike that in Gerald Gault's case, is premised upon an act or upon a finding of a status[202] that would not be a crime if committed by an adult is not clear.[203] Finally, the *Gault* Court did not specify the types of deprivations of liberty that are sufficient to trigger the procedural protections. The risk of "incarceration against one's will" clearly suffices,[204] but the Court also

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a prison-like atmosphere similar to that experienced by pretrial detainees.

199. As one of its tests for punishment *Mendoza-Martinez* asks "whether the sanction . . . appears excessive in relation to . . . alternative [nonpunitive] purpose[s] assigned." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); *see supra* text accompanying note 82. Indeed, without specifically relying upon any of the Court's cases defining punishment, Justice Black in his concurring opinion in *Gault* found delinquency proceedings to be criminal for purposes of the fifth and sixth amendment:

> [I]n a juvenile system designed to lighten or avoid punishment for criminality, [Gault] was ordered by the State to six years' confinement in what is in all but name a penitentiary or jail.
>
> Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights . . . .

387 U.S. at 61 (Black, J., concurring).

200. The acronym stands for "persons in need of supervision."

201. 387 U.S. at 13 (pre-judicial and dispositional stages of juvenile proceedings not necessarily touched by *Gault*).

202. As defined under most statutes delinquency is a concept that is not limited to the commission of acts that would be crimes if committed by adults, but includes as well a variety of status conditions such as "being disobedient to parents" or "truanting from school." *See* S. Fox, Juvenile Courts 40 (2d ed. 1977).

203. The *Gault* Court appears to limit its holding to situations of misconduct, perhaps excluding delinquency adjudications based on status. *See* 387 U.S. at 13.

204. *Id.* at 50.

suggested that any "threatened . . . deprivation of . . . liberty" may also be enough to entitle the juvenile to the *Gault* protections.[205]

B. Gault*'s Progeny*

The Court continued to expand the protections applicable to delinquency adjudications in *In re Winship*.[206] In *Winship* the Court held that juveniles charged in delinquency proceedings with acts that would be crimes if committed by adults are entitled as a matter of due process right to the reasonable doubt standard of proof. The Court noted that the reasonable doubt standard is constitutionally required in adult criminal cases to minimize the risks of subjecting innocent persons to the stigma and loss of liberty inherent in criminal conviction and punishment.[207] Similar risks require that the same standard be applied in delinquency proceedings. "[Judicial] intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult."[208] As in *Gault*, the *Winship* Court avoided any explicit finding that the juvenile process was punitive and, therefore, governed by procedural protections unique to the criminal system. Instead, the Court focused on two aspects of juvenile dispositions—the potential for stigma and the potential for severely restricting liberty—as the reasons for requiring the reasonable doubt standard.

The juvenile justice system's potential for stigmatizing and denying liberty, however, was not the *Winship* Court's sole motivating force. Indeed, nine years later in *Addington v. Texas*[209] the Supreme Court rejected the argument, based upon *Winship*, that the loss of liberty and the stigma that occurred through involuntary hospitalization of the mentally ill constituted sufficient grounds for requiring the reasonable doubt standard in civil commitment proceedings. Acknowledging that significant stigma and loss of liberty are inherent in mental health commitments,[210] the *Addington* Court, nevertheless, distinguished the civil commitment process from the procedures in *Winship*. Unlike the juvenile system, which

205. *Id.*
206. 397 U.S. 358 (1970).
207. *Id.* at 363.
208. *Id.* at 367 (footnote omitted).
209. 441 U.S. 418 (1979).
210. *See id.* at 425-26.

imposes its stigma and restriction of liberty upon offenders because of their past offenses, the commitment process focuses on present status of the defendant and attempts to determine his present dangerousness and need for confinement and therapy.[211] Therefore, the central issue in *Winship* was "a straight forward factual question—did the accused commit the act alleged"[212]—but in *Addington* the Court grappled with an evaluation of the patient's mental health, a difficult subjective judgment of an inherently doubtful nature.[213] The Court concluded that the reasonable doubt standard would frustrate the purposes of commitment proceedings and, therefore, ought not be required.

The *Winship/Addington* distinction may be understood through the punishment/therapy distinction. The state imposes unpleasant sanctions upon juvenile offenders only after it has shown that offenses have been committed. Obviously, the sanction necessarily is related to a showing of past conduct of a wrongful nature. Thus, punishment accurately describes the sanction.[214] Hence, since offenders in *Winship* situations risk punishment at the hands of the state, the protections afforded criminal defendants must be provided. This conclusion, however, does not follow in *Addington*. In civil commitment proceedings the inquiry focuses upon the defendant's status. His past actions are either irrelevant or only incidentally relevant. Therefore, punishment does not result from decisions unfavorable to defendants in commitment proceedings.[215] The procedural protections unique to the criminal process are inapplicable to these therapeutic contexts.[216]

One year after *Winship*, the Court in *McKeiver v. Pennsylvania*[217] held that juveniles were not entitled to jury trials in adjudication hearings even though the underlying offenses would be criminal offenses if committed by adults[218] and the consequences

211. *Id.* at 428-29.

212. *Id.* at 429.

213. *Id.* at 429-30.

214. *See supra* notes 152-55 and accompanying text.

215. See *supra* notes 155-56 and accompanying text, for a definition of therapy.

216. The conclusion does not mean that litigants in civil commitment proceedings should go without procedural protections. Indeed, due process consideration should provide these protections. *See Developments, supra* note 128, at 1271-1316. When protections are provided, however, they arise from due process considerations and not because the proceedings are criminal under the fifth and sixth amendments. *See supra* note 5.

217. 403 U.S. 528 (1971).

218. *McKeiver* and the companion cases concerned a variety of criminal conduct ranging from robbery and assault to willfully impeding traffic and making riotous noise. *Id.* at 534-36.

of adjudications unfavorable to the juveniles entailed possible confinement in state institutions. Reasoning that neither *Gault* nor *Winship* compelled the conclusion that delinquency proceedings are criminal prosecutions for purposes of the sixth amendment right to jury trial,[219] a plurality of the Court concluded that due process concerns for fundamental fairness would not be offended if juries were excluded from the adjudication process.[220] Unlike the *Gault/Winship* rights of notice, counsel, confrontation, cross-examination and proof beyond a reasonable doubt, which all emphasize accurate factfinding, the plurality found that juries are not necessary to achieve that interest.[221] Moreover, juries in juvenile cases might actually be counterproductive. "If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it the traditional delay, the formality, and the clamor of the public trial."[222] If these consequences were to befall the juvenile courts "there [would be] little need for [their] separate existence."[223]

Noticeably absent from the *McKeiver* plurality's discussion was any attempt to explain *Gault*'s application of the privilege against self-incrimination to delinquency adjudications.[224] By failing to list the privilege among the other *Gault/Winship* rights, all of which were fundamental fairness requirements to achieve "accurate factfinding," the plurality apparently recognized that the theoretical underpinnings of the privilege rested neither in a concern

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219. "[T]he juvenile court proceeding has not yet been held to be a 'criminal prosecution' within the meaning of the Sixth Amendment." *Id.* at 541.

220. Justices Blackmun, Stewart, White, and Chief Justice Burger comprised the plurality. Justice Harlan concurred in the judgment and filed a separate opinion. Justice Brennan concurred in part and dissented in part. Justices Douglas, Black, and Marshall dissented.

221. 403 U.S. at 543.

222. *Id.* at 550.

223. *Id.* at 551. The dissent pointed out that juries in juvenile cases might actually promote the system's rehabilitative aims. "The child who feels that he has been dealt with fairly and not merely expediently or as speedily as possible will he a better prospect for rehabilitation." *Id.* at 566 (dissenting opinion).

224. The plurality apparently did not see *Gault*'s inclusion of the privilege against self-incrimination as grounded in due process. "Due process [in *Gault*] was held to embrace adequate written notice; advice as to the right to counsel, retained or appointed; confrontation; and cross-examination. The privilege against self-incrimination was also held available to the juvenile." *Id.* at 532. At another point in the opinion, the plurality excludes mention of the privilege entirely when discussing the due process dimensions of *Gault* and *Winship*. "As that standard [fundamental fairness] was applied in those two cases, we have an emphasis on factfinding procedures. The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis." *Id.* at 543.

for accurate factfinding nor in a notion of fundamental fairness.[225] The *McKeiver* plurality, like the *Gault* majority, appears to see juvenile adjudications as functionally equivalent to criminal cases within the meaning of the fifth amendment itself. Apart from suggestions that juries might be counterproductive in the juvenile system—an argument which one could make with similar force against *Gault*'s extension of the privilege against self-incrimination to juvenile defendants[226]—the plurality left unexplained why the system is characterized as criminal for purposes of the fifth amendment privilege but not for the sixth amendment right to jury trial. Indeed, if the issue in *McKeiver* had been framed in terms of whether the juvenile sanction constituted punishment,[227] the plurality might have recognized delinquency adjudications as criminal prosecutions within the meaning of the sixth amendment and thereby have entitled juveniles to the right to trial by jury.[228]

Although *McKeiver*, like *Gault* and *Winship* before it, avoided explicit reference to the concept of punishment as a measure of constitutional rights, the Court's unanimous opinion in *Breed v. Jones*[229] openly alluded to such an analytical framework. The Court held that the double jeopardy clause prohibits the trial of juveniles as adults if they have been subjected previously to a delinquency hearing on the same charge. Jeopardy describes "the risk that is traditionally associated with a criminal prosecution."[230] Indeed, "the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment.' "[231] In assessing delinquency adjudications in terms of such risks, the Court stated,

> [I]t is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.[232]

Thus, "in terms of potential consequences, there is little to distin-

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225. *See supra* notes 192 & 224.

226. Justice Harlan made these arguments in his concurring opinion in *In re Gault*, 387 U.S. 1, 74-77 (1967) (Harlan, J., concurring).

227. Each of the litigants in *McKeiver* agreed that fundamental fairness was the basis for *Gault* and *Winship*, 403 U.S. at 543.

228. *See supra* notes 5 & 196-97 and accompanying text.

229. 421 U.S. 519 (1975).

230. *Id.* at 528.

231. *Id.* at 529 (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 548-49 (1943)).

232. *Id.*

guish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution."[233] Both proceedings are designed "to vindicate [the] very vital interest in enforcement of criminal laws."[234] The Court concluded, therefore, that the juvenile respondent was put in jeopardy at the delinquency adjudication hearing.[235]

The Court's analysis in *Breed* does not refer to the fundamental fairness standard employed in *Gault, Winship,* and *McKeiver.* Instead, the case rests entirely on the conclusion that delinquency dispositions are the functional equivalents of criminal punishments. Although delinquency dispositions seem to be tantamount to punishment, the *Breed* Court made no attempt to show the presence of punitive motivation in juvenile dispositions and seemed content instead to rest its conclusion upon the stigma and incapacitating effects of these dispositions. This analysis, however, which was also suggested in *Gault,* is misleading. It implies the effect theory of punishment, a doctrine clearly antithetical to the Court's cases from *Cummings* to *Wolfish.* Again, as in *Gault,* punishment probably could have been found in *Breed* if the Court had applied its traditional punitive intent framework[236] instead of appearing to adopt the effect theory.

Breed poses a problem for the continued vitality of *McKeiver.* If juvenile dispositions are punishment for fifth amendment double jeopardy purposes, why not also for purposes of sixth amendment jury trial rights? *McKeiver* and *Breed,* however, are distinguishable on two grounds. First, the *McKeiver* Court opined that jury trials may frustrate whatever rehabilitative potential the juvenile system possesses. The *Breed* Court, however, found no similar effect when applying double jeopardy principles to the system.[237] Second, since *Breed* arose through a federal habeas corpus petition challenging a state criminal conviction, it may no longer be a true "delinquency case" because the juvenile court had abandoned its rehabilitative efforts and had relinquished the child to the adult criminal system.[238] *McKeiver,* on the other hand, takes place entirely within the "therapeutic" context of the juvenile setting. Al-

233. *Id.* at 530.

234. *Id.* at 531 (quoting United States v. Jorn, 400 U.S. 470, 479 (1971)).

235. *Id.*

236. *See supra* notes 198-99 and accompanying text.

237. 421 U.S. at 535-41 (double jeopardy protections will not diminish desired flexibility and informality and may even promote the objectives of the juvenile justice system).

238. Rosenberg, *supra* note 191, at 681.

though *parens patriae* assertions might have provided some basis for preventing application of the constitutional guarantee in *McKeiver*,[239] these assertions were inapposite in *Breed*.[240]

C. Summary

Gault, Winship, McKeiver, and *Breed* illustrate three manifestations of punishment's analytical role in juvenile cases. In some instances, as in *Gault* and *Winship*, the concept may operate merely as an alternative means to obtain the same results yielded by the fundamental fairness standard. In other cases, however, as exemplified by *McKeiver*, different outcomes may result depending upon whether fundamental fairness or the concept of punishment is applied. Finally, *Breed* suggests that certain issues are properly analyzed entirely in terms of the concept of punishment without reference to fundamental fairness.

The Court's cases from *Gault* to *Breed* demonstrate clearly that the juvenile justice system reflects a mixture of therapeutic and punitive concerns. To the extent that the system is punitive, important constitutional consequences follow. Yet, apart from misleading reliance upon the effect theory, the Court's juvenile cases provide no definition of punishment— much less a standard for distinguishing punishment from therapy. Therefore, those attempting to draw such a distinction must look beyond the juvenile cases to discover the proper analytical framework necessary for conducting the inquiry.

IV. The Concept of Punishment Applied: Some Cases for Illustration

The preceding sections have defined the concept of punishment and suggested that it provides a useful and sometimes even necessary means for analyzing juvenile problems. Nevertheless, an examination of the cases reveals that the analytical potential of the concept remains largely untapped. Indeed, several cases reach questionable results simply because the courts have failed to utilize the concept of punishment as a basis for decision.

A. Fixed Confinement: Rights to Jury Trials Reconsidered

The 1977 Delaware Supreme Court opinion in *State v. J.K.*[241]

239. *See supra* note 182.
240. Rosenberg, *supra* note 191, at 681.
241. 383 A.2d 283 (Del. 1977), *cert. denied*, 435 U.S. 1009 (1978).

upheld the constitutionality of the recently enacted Juvenile Mandatory Commitment Act.[242] The statute, among other things, required institutional confinement for one year, subject to judicial discretion to suspend confinement in excess of six months, of any juvenile adjudged to be a delinquent based on the commission of two or more burglaries within a one-year period.[243] The juveniles who were sentenced to mandatory confinement under the statute alleged that they were denied both equal protection of the laws and sixth amendment rights to trial by jury. The youths premised the equal protection issue upon the disparate treatment afforded youthful burglars under the juvenile and adult systems. While juvenile burglars found "not amenable to the rehabilitative processes of the [Juvenile] Court" were tried as adults and were eligible for probation upon conviction, those found "amenable" to rehabilitation were retained within the juvenile system and subjected to at least six months mandatory confinement under the statute.[244] The jury trial claim was based on the theory that potential incarceration in excess of sixth months triggered the sixth amendment

242. DEL. CODE ANN. tit. 10, § 937 (1980 Cum. Supp.) (enacted July 30, 1976).

243. The entire text of the statute stated as follows:

(c) Subject to the provisions governing amenability pursuant to Section 938 of this Chapter, the court shall commit a delinquent child to the custody of the Department of Correction under such circumstances and for such periods of time as hereinafter provided:

(1) Where he has been once or more than once adjudicated delinquent for committing separate and distinct acts or courses of conduct, not arising from the same transaction or occurrence, committed within any one-year period, which said acts, when aggregated, would constitute two offenses designated as felonies under Subchapter 11, Chapter 5, Title 11; or attempts to commit any such felonies, or which would constitute burglaries in any degree involving a dwelling house pursuant to Subpart B, Subchapter III, Chapter 5, Title 11, or attempts thereof, or any combination thereof, then custody shall be awarded for one year;

. . . .

(6) Where a child is adjudicated a delinquent based upon the conditions outlined in (c)(1), (2), (3), (4) or (5) of this Section, the Court may, at the time of sentencing or upon subsequent hearing initiated by the filing of a potition by the Department of its duly authorized representative, due notice of which has been given to the Atterney General, suspend all of the commitment in excess of six months, when it determines by a preponderance of the evidence before it that such lesser period of commitment; (1) would best serve the needs of the child; and (2) would pose no probable threat to property or person upon his earlier release. In the event that the Court should determine that all or a portion of the commitment in excess of six months should be suspended as hereinbefore provided, then it shall set forth with particularity the reasons relied upon in so doing in its order or disposition.

60 Del. Laws 2125 (1975). The statute has since been amended removing judicial discretion to suspend mandatory commitments, which presently are fixed at six months. DEL. CODE ANN. tit. 10, § 937(c) (1980 Cum. Supp.).

244. 383 A.2d at 287-89.

right.[245]

Notwithstanding the possibility of different treatment for "amenable" and "nonamenable" juveniles, the court found these differences to be permissible under the equal protection clause. The court held that the classification drawn by the amenability analysis constituted reasonable statutory attempts to promote the compelling state interest in rehabilitating "amenable" youthful burglars while excluding those not susceptible to the juvenile court's rehabilitative potential.[246] The Delaware court, however, never addressed the possibility that the mandatory confinement might be punitive in nature, and simply assumed that it was rehabilitative.

The court declined to rule on the right of juveniles to jury trials under the mandatory commitment statute because the issue had not been adequately briefed by counsel. The court, however, strongly suggested that no such right exists, "invit[ing] the attention of the Trial Courts"[247] to a series of cases—including *McKeiver v. Pennsylvania*—that denied the right to a jury in juvenile cases.[248]

If the *J.K.* court had utilized the concept of punishment in analyzing its facts, the outcome might have been different. The mandatory confinement of the "amenable" burglars seems clearly to constitute punishment.[249] The state is imposing unpleasant restraints to answer a specific kind of criminal conduct. The determinate nature of the restraint—a mandatory term fixed for at least six months—strongly suggests a legislative intent to punish while belying a rehabilitative purpose.[250] The statute did not provide an indeterminate disposition, which is characteristic of therapeutic attempts to alter undesirable status conditions,[251] but rather fixed a term of confinement based solely upon the offenses committed by youthful burglars. The punitive purposes of retribution and deter-

245. *Id.* at 285; *see supra* note 173.

246. 383 A.2d at 289.

247. *Id.* at 292.

248. In addition to *McKeiver* the court cited Raines v. Alabama, 552 F.2d 660 (5th Cir. 1977), United States v. Hill, 538 F.2d 1072 (4th Cir. 1976), and United States v. Torres, 500 F.2d 944 (2d Cir. 1974). The court also cited 100 A.L.R.2d 1241 (1965) which provides, "[I]t is now almost universally held that . . . individual[s] charged with being . . . delinquent[s] [have] no right, under the . . . federal constitution, to demand that the [dolinquence] issue . . . be determined by a jury." *Id.* at 1242-43.

249. *See supra* notes 152-55 and accompanying text.

250. *See supra* notes 155-56 and accompanying text.

251. *See id.*

rence are evident. Indeed, the Delaware Legislature would later describe the purpose of the statute before the *J.K.* court as follows: "[T]he general intention behind the enactment of a mandatory commitment law for juveniles adjudicated delinquet [sic] for certain delineated offenses was to serve as a warning to a first offender of the consequences of a second conviction."[252] Even without an express statement of punitive intent, the *J.K.* court easily could have inferred punitive intent by applying the excessiveness test of *Mendoza-Martinez*. Six months confinement clearly would be excessive for "amenable" juveniles who became rehabilitated prior to the expiration of the six-month period. Thus, the confinement in these cases would constitute punishment because it is clearly "excessive in relation to the [therapeutic] purpose assigned."[253]

Once the confinement of the "amenable" juveniles becomes punitive rather than therapeutic, the distinction between "amenable" and "nonamenable" juveniles becomes untenable. The state subjects both classes to punishment and the denial of the possibility of probation to the "amenable" class would constitute an arbitrary and irrational exercise of state power.[254] Moreover, the court's suggestion that the right to a jury trial does not attach under the mandatory commitment statute also appears unsound. Because punishment is inflicted for violation of the statute, the proceedings become criminal prosecutions under the sixth amendment and, thus, entitle juveniles to jury trials.[255]

A New York family court reached this conclusion in *In re Felder*.[256] The *Felder* court found a sixth amendment right to jury trials under the "designated felony" provisions of the Juvenile Justice Reform Act of 1976.[257] While labeling proceedings under the

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252. 62 Del. Laws 749 (1979) (act amending the statutory provision before the *J.K.* court).

253. *See supra* note 82 and accompanying text. Similar conclusions may be derived from the *Wolfish* test. The confinement in *J.K.* would appear to be punitive on its face since it imposes unpleasant restraints because of criminal conduct. *See supra* notes 123-26, 137-39 & 197-99 and accompanying text. Thus, an inquiry into the reasonableness of the confinement in relation to its nonpunitive purposes is appropriate. Under this inquiry, the confinement would clearly be excessive in cases in which the burglars were rehabilitated prior to the expiration of the six month period of confinement.

254. An equal protection violation also may be present. For a discussion of the applicability of the equal protection clause to similar situations, see Rosenberg, *supra* note 191, at 712-13.

255. *See infra* notes 256-63 and accompanying text.

256. 93 Misc. 2d 369, 402 N.Y.S.2d 528 (Fam. Ct. 1978).

257. Juvenile Justice Reform Act of 1976, ch. 878 (codified at N.Y. FAM. CT. ACT. §§

statute "juvenile proceedings," the New York State Legislature imposed fixed periods of confinement, either for six month or twelve month intervals, for juveniles who commit certain enumerated offenses and who were found to be in need of restrictive placement.[258] The *Felder* court analyzed the confinement issue by utilizing the punishment/therapy distinction. The court cited *McKeiver* and concluded that there is no requirement of jury trials in juvenile proceedings in which the disposition is "rehabilitative and nonpenal."[259] "When, however, . . . what is actually a punishment is characterized as a treatment, an abuse of constitutional dimension has occurred, and, a jury trial is required before punishment, although appropriate, may be inflicted."[260] Without relying directly upon the Supreme Court's cases defining punishment, the *Felder* court found that the New York provisions were punitive because they premised the length of confinement upon "the act committed rather than [upon] the needs of the child."[261] Moreover, the court found the mandatory nature of the confinement to be inconsistent with the "philosophy of treatment," which requires that juveniles be released when rehabilitation occurs.[262] "Indeterminate sentencing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution or punishment."[263] This analysis by the *Felder* court closely reflects the concept of punishment developed earlier in this Article.[264]

The concept of punishment may be helpful in analyzing the sixth amendment consequences of fixed confinement statutes such as those discussed in *J.K.* and *Felder*, but a punishment theory is also useful in less blantantly punitive contexts. Indeed, whenever the state imposes "suspiciously punitive"[265] restraints preceded by criminal conduct, the court should scrutinize the sanction under the *Wolfish* excessiveness test.[266] The result of this scrutiny may

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711-67 (Consol. 1977)).

258. 93 Misc. 2d at 376, 402 N.Y.S.2d at 532. The statute in *Felder* differed somewhat from that in *J.K.* The confinement in *Felder* was not mandatory, but was discretionary with the court. *Id.* The period of confinement, however, was fixed by the statute, once the court determined that confinement was appropriate. *J.K.*, on the other hand, dealt with a statute that imposed both mandatory and fixed confinement. *See supra* note 243.

259. 93 Misc. 2d at 374-75, 402 N.Y.S.2d at 531.

260. *Id.* at 375, 402 N.Y.S.2d at 531.

261. *Id.* at 376, 402 N.Y.S.2d at 533.

262. *Id.* at 377, 402 N.Y.S.2d at 533.

263. *Id.*

264. *See supra* notes 34-177 and accompanying text.

265. *See supra* notes 123-26, 137-40 & 197-99 and accompanying text.

266. *See id.*

reveal wholesale inflictions of punishment within the juvenile justice system.

B. *"Status Offenders" and the Applicability of* Gault

In addition to fixed confinement delinquency cases, the concept of punishment may play a significant role in assessing the rights of status offenders. Status offenses include noncriminal juvenile misbehavior that is handled through the juvenile justice system.[267] Sometimes the attention to status relates to conditions and states of being. For example, juvenile courts often have jurisdiction over "incorrigible" children[268] or those children "who, by reason of being wayward or habitually disobedient, [are] uncontrolled by . . . parent[s], guardian[s], or custodian[s]."[269] In other instances, however, status offenses describe conduct that is proscribed for children but not for adults such as disobeying curfew or school attendance rules.[270] Status offenses in either the pure status or conduct form often are included with criminal offenses in the definition of delinquency.[271] In these situations, often no attempt is made to differentiate the dispositions of status delinquents from those of criminal delinquents.[272] Some states, however, segregate status offenders from nonstatus delinquents and place them in less restrictive confinements.[273] Many recent statutory provisions further distinguish status offenders from delinquent offenders who commit offenses that would be criminal if committed by adults.[274] Under these schemes, status offenders often are called "persons in need of supervision" (PINS).[275] The restraints on PINS children are characteristically less severe than those on "delinquents."[276]

Because the scope of *Gault* is uncertain outside the context of delinquency adjudications based on conduct of a criminal nature,[277] the courts have encountered difficulty in assessing the rights of status offenders. The concept of punishment is helpful in resolving these difficulties. The *Gault* protections have been con-

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267. *See* S. Fox, *supra* note 202, at 39-40.
268. *See* S. Davis, Rights of Juveniles (2d ed. 1980).
269. Neb. Rev. Stat. § 43-247(3) (Supp. 1980).
270. *See* S. Fox, Modern Juvenile Justice 512-17 (2d ed. 1981).
271. *See* S. Davis, *supra* note 268, at 6-13.
272. *See id.*
273. *See In re* Ellery C., 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973).
274. *See, e.g.*, 29A N.Y. Jud. Law § 712 (McKinney Supp. 1976-80).
275. *See* S. Fox, *supra* note 202, at 40.
276. *See* S. Davis, *supra* note 268, at 6-7.
277. *See supra* notes 200-02 and accompanying text.

stricted unnecessarily by judicial insensitivity to the relationship between punishment and status offenses. For example, the Maryland Court of Appeals in *In re Spalding*[278] limited *Gault* to situations in which the juvenile is "charged with an act which . . . would constitute a crime if committed by an adult."[279] Noncriminal adjudications such as those conducted in Maryland against juveniles "who [have] committed . . . offense[s] applicable only to children" were untouched by the *Gault* line of cases, even though confinement in a state institution is a possible consequence of being found guilty of these offenses.[280] Indeed, the *Spalding* court saw no need to address the constitutional implications of restricting juvenile liberty in cases where criminal conduct is absent.

> [W]e need not decide whether the second prong of the *Gault* test, i.e., potential confinement of the child to a state institution, mandated an application of the privilege against self-incrimination in this case. We reach this conclusion because, in any event, we think that appellant was not *charged* in this proceeding with an act which would constitute a crime if committed by an adult.[281]

This interpretation assumes that the *Gault* protections are premised on the concept of criminality. If, however, the earlier analysis in this Article is correct, *punishment*, with its attendant stigma and restriction of liberty, is the proper analytical standard.[282] The concept of punishment defines criminality and not vice versa.[283] Punishment is a concept more extensive than criminality and may exist in a variety of noncriminal settings.[284] Therefore, a proper reading of *Gault* should not limit the case to delinquency actions triggered by "criminal" conduct.

Hence, the *Gault* protections should not be excluded from status offense adjudications, especially those which entail *conduct* as opposed to pure status determinations.[285] Dispositions in these cases could entail punishment because the state often imposes unpleasant restraints upon youthful offenders who are guilty of mis-

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278. 273 Md. 690, 332 A.2d 246 (1975).

279. *Id.* at 709, 332 A.2d at 257. *Spalding* concerned a delinquency action that was initiated against a minor but later dropped in favor of a PINS (also called CINS—children in need of supervision) proceeding when it was discovered that the minor was the victim of a series of sexual perversions rather than a culpable actor in the affairs.

280. *Id.* at 698-99, 713, 332 A.2d at 251, 259 (dissenting opinion).

281. 273 Md. at 708, 332 A.2d at 256.

282. *See supra* notes 183-85, 189-93, 207-16 & 229-35 and accompanying text.

283. *See supra* note 5. *But see supra* note 27 (problems with generating the concept of "criminality" from the concept of "punishment").

284. *See, e.g., supra* notes 52-55 and accompanying text.

285. *See infra* text accompanying notes 295-96 & 301-02.

conduct. Because punishment is the traditional response to criminal conduct, a court may have more difficulty in discovering punitive intent in the status cases than in cases such as *J.K.* and *Felder* that, because they were based upon criminal conduct, are likely to reflect "punishment on their face" under *Wolfish*.[286] Punitive intent, however, may be readily apparent in some status cases. But even if a court has difficulty discerning punitive intent, severe restrictions of liberty in status cases may still look "suspiciously like punishment" and thereby trigger the *Wolfish* excessiveness test.[287] Precluding these inquiries altogether by *Spalding*'s wooden reading of *Gault* seems clearly unsound.

Apart from conceptual niceties, policy reasons dictate an extension of *Gault* to status offense adjudications in which conduct of a noncriminal nature is at issue. Significant liberty interests turn on the finding of specific facts. To the extent that *Gault* and its progeny express an interest in protecting the fairness and integrity of judicial factfinding, that same interest exists in status offense cases. In both status and criminal offenses, the state has accused a juvenile of misconduct and has assumed an adversarial position in relation to the juvenile. Hence, the *Gault* protections are equally applicable to both contexts. Moreover, little likelihood exists that the juvenile justice system's goal of rehabilitation—to the extent that it actually is attainable— would be sacrificed by extending the *Gault* protections[288] to noncriminal misconduct.[289]

The relationship between the concept of punishment and status adjudications that are not premised on particular actions or conduct presents a more difficult problem. Some courts have applied the concept of punishment to these pure status cases. For

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286. *See supra* notes 123-26 & 137-40 and accompanying text.

287. *See id.*

288. Whether the *Gault* protections should be extended to pre or postadjudication stages is a problem not addressed in this Article.

289. The rehabilitative value of due process protections at delinquency adjucications was noted by the *Gault* Court:

> [R]ecent studies . . . suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned. For example, in a recent study . . . sociologist[s] . . . observe that when procedural laxness of the "*parens patriae*" attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed. They conclude as follows: "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."

In re Gault, 387 U.S. 1, 26 (1967); *see also* Paulsen, *supra* note 4, at 186.

example, the district court in *Gesicki v. Oswald*[290] held that incarceration in adult penal institutions of "wayward minors" found to be "morally depraved or in danger of becoming morally depraved" constituted punishment for a status contrary to *Robinson v. California*.[291] The soundness of the *Gesicki* result, however, is questionable because of the court's failure to establish that the disposition was in fact punitive. The court made no attempt to establish punitive intent and failed to scrutinize the actual conditions within the penal institution. In fact, the court intimated that even if the juveniles were receiving meaningful rehabilitation, their confinement would still be punitive.

> [I]t is not an acceptable answer to say that some minors . . . are in fact treated appropriately for medical, psychological, or social disorders. Such instances of effective treatment, if they exist, would fail to distinguish the Wayward Minor statute from criminal legislation generally. It is safe to say that few if any prison administraters today would describe the function of the institutions they direct as entirely punitive, and most would undoubtedly cite "rehabilitation" or the equivalent as their most important goal.[292]

Thus, the *Gesicki* court seemed content to equate imprisonment with punishment regardless of whether rehabilitation actually occurred within the prison. The *Gesicki* court's analysis is suspect in light of *Wolfish*, which implied that a single jailhouse may be simultaneously a place of punishment for convicted offenders and a center of nonpunitive detention for pretrial detainees.[293] Assessments of punitive intent are necessary to distinguish the jail's punishment from its preventive detention.[294]

More problems arise upon examination of the meaning of "punishing a status." The definition of punishment is linked to the occurance of an offense,[295] but this factor is not present when the state imposes restraints in response to status conditions. Thus, punishment of a status appears logically impossible.[296] Nevertheless, *Robinson* clearly holds that punishing status is possible and

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290. 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 913 (1972).

291. N.Y. CRIM. PROC. § 913-a(5), -a(6) (McKinney 1976). The court also found the language quoted in the text to be an "unconstitutionally vague penal law" in violation of due process. 336 F. Supp. at 377, 379.

292. 336 F. Supp. at 378.

293. Pretrial detainees are often housed in the same jails that house convicted offenders. *See supra* text accompanying note 138. There is nothing in *Wolfish* to call this practice into constitutional question so long as the restraints of the pretrial detainees are not unreasonable in light of the interests in assuring their presence at trial.

294. *See supra* notes 34-154 and accompanying text.

295. *See supra* notes 62-64, 148-50 & 152-56 and accompanying text.

290. *See supra* note 148.

unconstitutional whenever it occurs.[297] Therefore, the *Gesicki* result may be sound if punishment actually was administered. *Wolfish* itself provides an avenue for finding punishment in cases like *Gesicki* in which juveniles are housed in adult prisons. Because such facilities are the most vivid symbols of punishment in modern society,[298] confinement within them may well evidence punishment on its face under *Wolfish*—even though the incarceration is a response to a status condition rather than to specific acts of misconduct.[299] *Wolfish* would then require judicial scrutiny of the actual conditions of confinement in terms of their relationship to nonpunitive purposes. If the court found the confinement to be excessive in light of the nonpunitive purpose, the confinement would properly be labeled punitive[300] and, hence unconstitutional under *Robinson.*

Because of the conceptual anomalies inherent to an analysis of status confinements in terms of the concept of punishment,[301] soundly reasoned opinions on the punishment of status offenders will probably rarely appear. Nevertheless, courts may rely upon a variety of due process and equal protection doctrines to utilize as alternatives to punishment when assessing the constitutionality of juvenile confinements of the pure status variety.[302]

C. *Cruel and Unusual Punishment of Nonstatus Offenders*

Although some status offense cases are not easily analyzed through the concept of punishment, eighth amendment analysis of nonstatus offense cases is less difficult. Indeed, because of current

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297. *See id.*

298. *See* J. FEINBERG, *supra* note 27, at 111. "[I]mprisonment in modern times has taken on the symbolism of public reprobation. 'It is . . . imprisonment in a penitentiary, which now renders a crime infamous.'" *Id.* (quoting United States v. Moreland, 258 U.S. 433, 447-48 (1922) (Brandeis, J., dissenting)).

299. *Wolfish* intimates that excessive restraints may be "punitive" when imposed upon pretrial detainees, who are preventively detained because of their "status" as likely absconders from trial. *See* Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979); *supra* text accompanying note 141.

300. Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979).

301. *See supra* notes 295-96 and accompanying text.

302. A substantive due process "right to treatment" may provide an additional basis, *see generally supra* notes 130-35 & 309 and accompanying text, for scrutinizing conditions of confinement imposed upon juvenile status offenders. *See Developments, supra* note 128, at 1324-44. The right to treatment has become well established within the juvenile justice system. *See, e.g.*, S. FOX, *supra* note 202, at 228-34. Procedural protections for pure status offenders may be required by fundamental fairness under due process. *See supra* notes 180-88 and accompanying text. This Article does not consider the constitutional necessity for, or the desirability of, extending the *Gault* protections to pure status proceedings.

suspicions of nontreatment and mistreatment of youthful offenders within the juvenile justice system,[303] the ban on cruel and unusual punishment is an especially appropriate vehicle to protect constitutional interests. Unfortunately, however, as discussed earlier,[304] judicial failure to employ carefully a proper concept of punishment in eighth amendment juvenile jurisprudence often has frustrated sound analysis. Some courts simply have assumed, without question, that the eighth amendment is inapplicable to juvenile dispositions, which the courts perceive to be nonpunitive by definition.[305] Fortunately, these cases are in the minority. More often, courts recognize the applicability of the eighth amendment, but usually determine whether a given juvenile disposition is cruel and unusual without first showing whether the disposition constitutes punishment. Because the juvenile system is a hybrid that is comprised of both punitive and therapeutic aspects, a court is remiss when it fails to analyze the question whether punishment exists. Other courts have made attempts to establish the punitive nature of a given disposition, but employ inappropriate definitions of punishment in their analysis. Utilizing the effect theory of punishment, these courts have generated a body of cases inconsistent with the Supreme Court conception of punishment.[306] *Nelson v. Heyne*[307] is

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303. *See supra* text accompanying note 195. *But see infra* note 305.

304. *See supra* text accompanying notes 236-40.

305. *See, e.g.*, R.R. v. State, 448 S.W.2d 187 (Tex. Civ. App. 1969), *appeal dismissed sub nom.* Rios v. Texas, 400 U.S. 808 (1970).

> Appellant . . . takes the position that the confinement of a delinquent child must be viewed as 'punishment' for the purpose of determining the child's rights under the Eighth Amendment, even though the language of our juvenile statutes speaks in terms of treatment rather than punishment.
>
> The record before us contains no evidence concerning the conditions at the state training schools. . . . In the absence of evidence that the dismal picture painted in Gault reflects the conditions in the institutions of this State, and giving due consideration to the legislative declaration of policy and purpose, 'we are not prepared to condemn out of hand . . . the people working in this field.'

Id. at 189-90.

306. The question arises whether the eighth amendment applies at all to juvenile dispositions. The Supreme Court in Ingraham v. Wright, 430 U.S. 651 (1977), held that the cruel and unusual punishment clause was inapplicable in the context of public school punishments. The Court found that an eighth amendment remedy for school children was unnecessary because schools are traditionally "open" institutions, visible to public scrutiny, and, therefore, are able to avoid improper punishments either through self-policing or through public pressure. *Id.* at 670. The Court noted that unduly severe punishment within the contexts of penal incarceration would trigger eighth amendment protection. *Id.* at 669. Moreover, the Court specifically left open the possible applicability of the eighth amendment to involuntarily confined juveniles. *Id.* at 669 n.37.

This Article assumes that juvenile dispositions, at least within state institutions, more closely resemble incarceration settings than they do open schools. *Gault* also operates under

a vivid example. In *Nelson*, the Seventh Circuit considered the constitutionality of two practices prevalent within the Indiana Boy's School: corporal punishment inflicted with a "fraternity paddle"[308] and the intramuscular injections of tranquilizing drugs. The court condemned both practices under the eighth amendment. Furthermore, the court held that the due process clause of the fourteenth amendment guarantees a "right to treatment" for juveniles committed to state institutions.[309]

The analysis of the tranquilizer issue in *Nelson* is of particular interest. The court found that drugs were occasionally administered to control the excited behavior of juvenile inmates. Apart from their effects as sedatives, the drugs possessed no siguificant psychotherapeutic benefits.[310] Moreover, the drugs were capable of causing severe and dangerous side effects unless carefully monitored by trained medical personnel.[311] The court found that medical personnel did not monitor the administration of these drugs. At no time prior to or following the injections did medical professionals examine the youths to determine their individual tolerances for the drugs. Instead, the school administered standardized dosages pursuant to orders given by the school's only physician.[312] The *Nelson* court summarily rejected the school's claim that the use of the drugs did not constitute punishment.[313] Without mentioning punitive intent or attempting to establish the absence of therapeutic motivation,[314] tbe court found the injections to be cruel and unusual punishment simply because of the dangers inherent in misuse of the drugs. The court, however, suggested that the injections

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this assumption. *See supra* text accompanying note 195.

For a discussion of *Ingraham*, see Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75 (1978).

307. 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

308. As punishment for various offenses against institutional rules, juveniles were beaten with a paddle between one-half and two inches thick and twelve inches long, with a narrow handle. The beatings were apparently ungoverned by extensive formal procedures and sometimes caused painful injuries. *Id.* at 354.

309. *Id.* at 358-60.

310. *Id.* at 356.

311. *Id.* at 357. The court found that the drugs could cause "the collapse of the cardiovascular system, the closing of a patient's throat with consequent asphyxiation, a depressant effect on the production of bone marrow, jaundice from an affected liver, and drowsiness, hemotological disorders, sore throat and ocular changes." *Id.* (footnote omitted).

312. *Id.* at 354, 356.

313. "We are not persuaded by defendants' argument that the use of tranquilizing drugs is not 'punishment.'" *Id.* at 357.

314. The court recognized that the drugs were not administered "as part of an ongoing psychotherapeutic program but for the purpose of controlling excited behavior." *Id.* at 356.

may have been permissible if they had been administered more carefully.[315]

The *Nelson* court's definition of punishment appears to hinge on the objective quality of the medical care that is provided. If the care is reasonably safe, no punishment, or at least no cruel punishment, exists. If, on the other hand, the care creates unreasonable risks, it is punitive and violative of the eighth amendment. The *Nelson* approach is surely at odds with the Supreme Court's concept of punishment. Indeed, a few years after *Nelson*, the Court specifically rejected a medical malpractice conception of punishment similar to that espoused in *Nelson*. The Court said that only "*deliberate* indifference to the serious medical needs of inmates" could constitute punishment proscribed by the eighth amendment.[316] Punishment cannot be defined simply in terms of unpleasant effects upon the allegedly punished persons, no matter how threatening or unpleasant those effects might be. The effects must be caused purposely.

If the *Nelson* court had properly applied the concept of punishment, it could have prohibited the injections under the eighth amendment. If the court had found that the injections were administered to penalize misconduct by juvenile inmates,[317] the injections may have been punitive, especially in light of the physical pain inflicted by the needle. Like the fraternity paddle, which the court justifiably held to violate the eighth amendment,[318] the needle could also be viewed as an instrument of punishment, purposely imposed to achieve retributive or deterrent aims. Once found to be punishment, the injections could then be proscribed under the eighth amendment if found to be cruel and unusual. On the other hand, if the court's inquiry into the purpose for the injections had revealed an intent to relieve undesirable status condi-

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315. In detailing the minimum medical safeguards that should be followed in using the drugs, the court limited its holding to the *Nelson* facts. "We do not intend that . . . reform institutional physicians cannot prescribe necessary tranquilizing drugs in appropriate cases. Our concern is with . . . potential abuses under policies where . . . drugs are administered to juveniles intramuscularly by staff, without trying medication short of drugs and without adequate medical guidance and prescription." *Id.* at 357.

316. Estelle v. Gamble, 429 U.S. 97, 104 (1976); *see supra* note 132.

317. The court said only that the injections were administered "for the purpose of controlling excited behavior." 491 F.2d at 352. The court, however, did not state whether the behavior entailed acts of misconduct by the juveniles. The court cited two examples of the use of the injections to control behavioral conditions of a morally neutral nature. *Id.* at 356 n.8 (drug used to control a "hollering juvenile" and to prevent another from escaping from the school).

318. *See supra* note 308 and accompanying text.

tions,[319] the injections could be characterized as therapy rather than as punishment.[320] The prescription of sedatives to control excited behavior, even when involuntarily administered, is sometimes unquestionably a therapeutic action.[321] But even if the *Nelson* court had found the injections to constitute therapy and not punishment, the court should not have allowed the drugs, with their attendant dangers, to be administered. Indeed, *Nelson*'s own right to treatment theory would have prohibited the injections as unreasonably risky[322] as would more general due process doctrines that protect a person from unreasonable or dangerous applications of state force.[323] If the *Nelson* court could not find the injections to be punitive under the proper definition of punishment, then the court should not have forced the case into an eighth amendment framework,[324] and thus distort the concept of punishment and restrict its analytical effectiveness.

V. CONCLUSION

This Article has suggested that Justice Stewart's focus upon the concept of punishment—as distinct from the notion of therapy—is a useful and sometimes necessary analytical approach to assess juvenile rights, which exist in a system that commingles punitive and therapeutic considerations. The punishment approach has to date been sporadically and ineffectively employed, in part because courts have had difficulty in formulating workable definitions of punishment and therapy. The conceptual framework suggested in this Article is proposed to lessen these difficulties. In light of the illustrative cases discussed, the concepts of punishment

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319. See *supra* note 317 for evidence that the drugs were used to relieve status conditions rather than to punish acts of misconduct.

320. *See supra* notes 144-50 and accompanying text. For a case similar to *Nelson* that struggles with the punishment/therapy distinction, see Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) (administration of drug that induces vomiting as "adversive stimuli" treatment of mental institution inmate for allegedly violating behavior rule of institution constitutes cruel and unusual punishment unless inmate consents to use of the drug).

321. *See supra* note 315.

322. "[T]he 'right to treatment' includes the right to minimum acceptable standards of care and treatment." 491 F.2d at 360; *see supra* note 315.

323. *See supra* note 168; *see also* Rochin v. California, 342 U.S. 165 (1952) (involuntarily pumping a suspect's stomach violates due process); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) (although not punishment, application of undue force by the state against a criminal suspect deprives him of liberty without due process of law).

324. One commentator has criticized the *Nelson* court's eighth amendment analysis: "It is clear that . . . the panel of the Seventh Circuit were more sure of their desire to stop the particular practice at issue than they were of the analytical basis for such a prohibition." 60 Va. L. Rev. 864, 871 (1974).

and therapy here derived appear useful in promoting analysis of juvenile problems without abandoning established Supreme Court doctrine. If the Court's future analysis remains true to this doctrine, then a host of other juvenile rights issues may await illumination through the concept of punishment.