

Calibrating the Eighth Amendment: *Graham, Miller*, and the Right to Mental Healthcare in Juvenile Prison



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ABSTRACT

Young people locked up in juvenile prisons have an enormous need for mental healthcare, one which juvenile prisons have consistently found themselves unable to meet. As a result, many incarcerated young people end up being denied the care they deserve. Yet for years, courts have implemented a confused, haphazard doctrine to evaluate youth right to mental healthcare claims—likely because the quasi-criminal nature of the system frustrates any more straightforward application. The constitutional tests that courts apply vary widely between jurisdictions, with some courts deriving tests from the Fourteenth Amendment, others from the Eighth, and many fashioning a standard somewhere in between. This has not only led to unpredictability between cases, but also led courts to express a troubling indifference to the unique needs and vulnerabilities of mentally ill youth.

Recent developments in the Eighth Amendment's youth sentencing doctrine have opened the door to reconsidering how courts evaluate these claims. The Supreme Court's decisions in *Graham v. Florida* and *Miller v. Alabama* emphasize the important differences between youth defendants and adults. Those differences do not disappear once the judge's gavel falls. This Comment argues that courts should, at the very least, apply a more protective Eighth Amendment test to the right to mental healthcare claims of incarcerated youth, a test informed by the Court's decisions in *Graham* and *Miller*. Doing so would not only increase doctrinal consistency; it would also take one small step toward addressing the urgent need for mental healthcare in modern juvenile prisons.

This Comment proposes a model for one such youth-informed test. The test acknowledges the real kinship between youth and adult prisons in its application of the Eighth Amendment to youth claims. Yet the test's modified, objective standard enables courts to more clearly focus on the unique problems that such claims raise. Hopefully, in doing so, youth prisoners will finally have the means to argue for a level of mental healthcare that may begin to match their need.

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INTRODUCTION

Young people in juvenile prisons¹ have an enormous need for mental healthcare. Approximately 70 percent of incarcerated youth have some sort of mental illness,² and 20 percent have an illness so severe that it significantly impairs their ability to function.³ If untreated, these disorders often translate into severe forms of illness in adulthood, and could impact these youths' chances of finding a job, maintaining relationships, and even keeping a home. Yet as it stands, juvenile prisons are woefully unequipped to deal with this high level of need. As a result, many incarcerated young people are denied the care they deserve.

Historically, youth were thought to have a broad right to treatment, one derived from the primarily rehabilitative purpose of the juvenile justice system. Originally intended to guide errant young people onto the right path, at its inception the juvenile justice system purported to prescribe treatment and civil detention rather than punishment or incarceration.⁴ Yet since the 1980s and

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1. I follow Nell Bernstein in referring to state-run juvenile facilities (often generally referred to as juvenile detention centers) as juvenile or youth prisons. NELL BERNSTEIN, *BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON* 6 (2014). While legally these centers occupy a space somewhere between adult prisons and adult civil commitment—an issue I discuss at more length throughout the article, and which greatly complicates attempts to determine the constitutional standard governing the right to treatment for young people incarcerated there—in practice prison is “the most accurate descriptor” for how the centers are run and experienced by youth and staff alike. *Id.* at 325 n.6; *see also infra* Part IV.C. While the legal classification of these centers may impose an obligation to improve incarcerated young people’s access to mental healthcare, the fact of the matter is that current conditions are more like prison than therapy. *See generally* BERNSTEIN, *supra* (documenting first person experiences of incarcerated youth that describe conditions remarkably like prison, from the physical construction of the facilities to the use of solitary confinement, strip searches, and other security tactics more strongly associated with adult prison than the psychotherapist’s couch). For a discussion of the importance of word choice in the field, and a short history of terms used for young people who “are neither in school nor working,” *see* Anya Kamenetz, *Delinquent. Dropout. At-Risk. When Words Become Labels*, NPR (Apr. 28, 2015, 8:03 AM), <http://www.npr.org/sections/ed/2015/04/28/399949478/delinquent-dropout-at-risk-whats-in-a-name> [<http://perma.cc/HE5V-JAWA>].
 2. *See infra* Part I.A and notes 14–17.
 3. *See infra* Part I.A and notes 19–21.
 4. *See, e.g.*, Thomas L. Hafemeister, *Parameters and Implementation of a Right to Mental Health Treatment for Juvenile Offenders*, 12 VA. J. SOC. POL’Y & L. 61, 73–74 (2004); Aaron Sussman, *The Paradox of Graham v. Florida and the Juvenile Justice System*, 37 VT. L. REV. 381, 387 (2012).

1990s, when the specter of the juvenile “superpredator” haunted the popular imagination, the juvenile justice system has moved toward a much more punitive model.⁵ Youth facilities and programs increasingly mimic those found in the adult prison context. As a result, the ideal of a broad right to treatment fell out of favor.

As it exists today, the juvenile justice system is a hybrid system, with justice-involved youth occupying an ambiguous position somewhere between civilly committed wards of the state and adult criminals. Delinquency proceedings themselves occupy an intermediate space between the traditional civil and criminal distinctions. Most states still treat juvenile proceedings as civil matters.⁶ Other states instead treat juvenile proceedings as quasi-criminal matters, making explicit the notion that the system may punish youth in addition to treating them.⁷ Some states, apparently confused or unable to decide, vacillate between the two dominant regimes.⁸ No state goes so far as to formally convict youth of crimes, unless they are charged and tried as adults.

Perhaps due to the unique legal position of juvenile adjudications, courts differ widely in how they evaluate young people’s claims asserting a right to mental healthcare while incarcerated. Some claim to apply a Fourteenth Amendment analysis, but do so in a way that gives little attention to the unique needs and vulnerabilities of youth.⁹ Others have abandoned the civil test altogether, instead evaluating the claims under the Eighth Amendment’s cruel and unusual punishment clause, traditionally reserved only for criminally convicted adults.¹⁰ This

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5. See, e.g., Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, N.Y. TIMES (Apr. 6, 2014), <http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html> [<http://perma.cc/NL2D-H6C5>]; Kamenetz, *supra* note 1 (discussing how “the image of the aggressive, incorrigible ‘superpredator’ led to increasingly punitive penalties for youth who became tangled up in the juvenile justice system). The term “superpredator” was coined by criminologist John J. Dilulio Jr. in a 1995 article for THE WEEKLY STANDARD. John J. Dilulio Jr., *The Coming of the Super-Predators*, THE WEEKLY STANDARD (Nov. 27, 1995), <http://www.weeklystandard.com/Content/Protected/Articles/000/000/007/011vsbrv.asp#> [<http://perma.cc/SA2C-5GMB>]. The wave of violence Dilulio predicted never came to pass, and he later denounced the claims. *The Superpredator Myth, 20 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), <http://www.eji.org/node/893> [<http://perma.cc/7M26-L2SS>].
 6. See, e.g., *People v. Sanchez*, 216 Cal. Rptr. 21, 23 (Cal. Ct. App. 1985); *Walker v. State*, 548 A.2d 492, 493 (Del. Super. Ct. 1987); *In re Shelton*, 654 P.2d 487, 491 (Kan. Ct. App. 1982); *J.M. v. Hensiek*, 847 S.W.2d 911, 913 (Mo. Ct. App. 1993).
 7. See, e.g., *In re Wilson*, 317 N.W.2d 309, 313–14 (Mich. Ct. App. 1982); *In re Cross*, 774 N.E.2d 258, 262 (Ohio 2002).
 8. Compare *In re L.T.*, 848 S.W.2d 769, 771–72 (Tex. App. 1993), with *In re K.P.S.*, 840 S.W.2d 706, 710 n.2 (Tex. App. 1992); compare *In re Wilfredo G.*, 586 N.Y.S.2d 725, 725–26 (N.Y. Fam. Ct. 1992), with *People v. Batista*, 602 N.Y.S.2d 774, 777 (N.Y. Sup. Ct. 1993).
 9. See *infra*, Part II.B.
 10. See *infra*, Part II.A.

lack of consistency in approaches means youth advocates and juvenile prisons alike face a great deal of uncertainty, both in bringing litigation and in preventing Constitutional violations.

This Comment argues that, because the consequences for failing to treat youth with mental disorders are so great, and because there are so many of these youth in juvenile prisons today, the U.S. Supreme Court should recognize a higher standard of care for incarcerated, mentally ill youth than it currently recognizes for adults. Much has been written on the *Graham/Miller* line of Supreme Court cases and what their effect will be on youth sentencing.¹¹ But if “kids are different,”¹² as these cases suggest, this difference should extend beyond sentencing, to the conditions of confinement in youth prisons. This Comment is the first to argue that *Graham* and *Miller* should apply to youths’ right to mental healthcare claims, arguing that young people have a stronger constitutional right to mental healthcare post-adjudication.

This Comment begins by outlining the critical need for mental healthcare in juvenile prisons. The huge number of young people incarcerated with mental illness, and the devastating impact those illnesses can have on those young lives if left untreated, underscores the urgency of reform. Part II attempts to synthesize the current state of right to mental healthcare claims in juvenile prisons. Courts vary widely when it comes to choosing which test should govern these claims. Once the test is chosen, courts further disagree as to how it should be applied. The resulting chaos produces very different standards of treatment, depending more on the state or region in which a claim is brought than on the facts of the case itself.

Part III discusses the recent string of Supreme Court decisions applying a different standard to youth sentencing determinations under the Eighth Amendment. Under the Court’s standard, a criminal sentence could be cruel and unusual as applied to a minor even when it would not be as applied to an adult.

Finally, Part IV argues for applying the logic of these cases to the post-adjudication context. If the unique characteristics of youth call for special solici-

11. See generally, e.g., Mary Berkheiser, *Death Is Not So Different After All: Graham v. Florida and the Court’s “Kids Are Different” Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1 (2011); Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285 (2012); Sussman, *supra* note 4; Michael Walton, *Like Taking Candy From A Baby: The Effects of Removing Juvenile Sentencing Authority from the Legislature*, 45 U. TOL. L. REV. 675, 679 (2014); Stephen St. Vincent, Commentary, *Kids Are Different*, 109 MICH. L. REV. FIRST IMPRESSIONS 9 (2010), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1021&context=mlr_fi.

12. “While the old approach was summed up by the adage ‘death is different,’ the new approach may be that ‘kids are different.’” St. Vincent, *supra* note 11, at 9.

tude during sentencing, logic dictates that same solicitude should apply once a young person begins serving his or her sentence. Part IV makes the case for evaluating young people's right to mental healthcare claims under a youth-specific Eighth Amendment test and, subsequently, proposes one such possible test. Implementing a youth-specific test will simplify and clarify the current doctrine. It will also prove more protective of mentally ill youths' right to obtain adequate mental healthcare while in lockup.

At the heart of this Comment, and of the post-adjudication claims of incarcerated youth generally, is the puzzle of youths' quasi-criminal status under the law. Nowhere in the United States does the juvenile justice system actually try and convict young people of any crimes. Yet many states recognize that punishment is one of the goals of juvenile incarceration, and in practice most juvenile prisons look much more like adult prisons than rehabilitative institutions responsive to the unique needs of youth. Developing a youth-specific test for evaluating right to mental healthcare claims provides one way to begin balancing these opposing impulses in the juvenile justice system. This Comment's proposed test acknowledges the kinship between youth prisons and the adult prison system by applying the Eighth Amendment to youths' right to mental healthcare claims. Yet the modified nature of the proposed test means that courts can more clearly focus on the unique problems that youth claims raise. The proposed test would thus be more responsive to the issues and challenges that mentally ill youth currently face in lockup.

I. THE CRITICAL NEED FOR MENTAL HEALTHCARE IN JUVENILE PRISONS

While youth currently have a basic right to access healthcare while locked up,¹³ the modern framework for adjudicating youth claims is insufficient to address the high level of need for services and individualized treatment in the incarcerated population. This Part describes that need in some detail, in order to illustrate that the scope of the problem is beyond the reach of the current doctrine. After taking a closer look at the mental health needs of incarcerated

13. Cf. *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982) (“Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (“*A fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.”); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (holding adult prisoners have a basic right to healthcare). The existence of this basic right in the juvenile prison context is taken as a given by those courts and scholars who have considered the issue—the difficult question is the extent of that right.

youth, this Part explores some of the reasons mentally ill youth continue to be underserved by the current system. Finally, this Part argues that the bulk of the research, best practices, and social norms suggest that the unique needs of mentally ill, incarcerated youth demand a higher standard of mental healthcare than the current doctrine requires.

A. Mental Health Needs in Juvenile Prisons

An astonishing number of incarcerated youth have mental disorders.¹⁴ In the general population, between 12 and 15 percent of youth are estimated to have mental disorders.¹⁵ By contrast, experts estimate that between 65 and 80 percent of youth in lockup have mental health disorders.¹⁶ Of those, more than three-

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14. It has been difficult to pin down exactly how many there might be. Experts have struggled to agree on objective standards to measure mental health disorders among youth. See JENNIE L. SHUFELT & JOSEPH J. COCOZZA, NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, YOUTH WITH MENTAL HEALTH DISORDERS IN THE JUVENILE JUSTICE SYSTEM: RESULTS FROM A MULTI-STATE PREVALENCE STUDY 1 (2006); see also BERKELEY CTR. FOR CRIMINAL JUSTICE, JUVENILE JUSTICE POLICY BRIEF SERIES: MENTAL HEALTH ISSUES IN CALIFORNIA'S JUVENILE JUSTICE SYSTEM 2 (2010). Prior to the early 2000s, estimates of mental health disorders among incarcerated youth diverged dramatically, likely depending on the point at which youth were sampled, the researchers doing the sampling, and the disorder being studied. See Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1134 (2002). Reported rates for mood/affective disorders varied between 2 percent and 88 percent, for example. Compare Jane Timmons-Mitchell et al., *Comparing the Mental Health Needs of Female and Male Incarcerated Juvenile Delinquents*, 15 BEHAV. SCI. & L. 195, 201 (1997) (88 percent), with JOSEPH J. COCOZZA & R.P. INGALLS, N.Y. STATE COUNCIL ON CHILDREN & FAMILIES, CHARACTERISTICS OF CHILDREN IN OUT OF HOME CARE (1984) (2 percent). Since then, however, improved tools have allowed experts to make more stable estimates of the prevalence of mental disorders among incarcerated youth. See SHUFELT & COCOZZA, *supra*.
15. Robert E. Roberts et al., *Prevalence of Psychopathology Among Children and Adolescents*, 155 AM. J. PSYCHIATRY 715, 715 (1998) (meta-study finding approximately 12 percent of preadolescents and 15 percent of adolescents meet criteria for mental disorders). A more recent study estimates prevalence of mental disorders among youth (defined as teens ages 13 to 18) may be closer to 20 percent. See e.g., Kathleen Ries Merikangas et al., *Lifetime Prevalence of Mental Disorders in U.S. Adolescents: Results From the National Comorbidity Survey Replication-Adolescent Supplement (NCS-A)*, 49 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 980, 980 (2010). See generally *National Survey Confirms That Youth Are Disproportionately Affected by Mental Disorders*, NAT'L INST. MENTAL HEALTH (Sept. 27, 2010), <http://www.nimh.nih.gov/news/science-news/2010/national-survey-confirms-that-youth-are-disproportionately-affected-by-mental-disorders.shtml> [<http://perma.cc/GUW7-7UQS>].
16. See, e.g., SHUFELT & COCOZZA, *supra* note 14, at 2 (finding 70.4 percent of youth in the juvenile justice system meet the criteria for at least one mental health disorder); Teplin et al., *supra* note 14, at 1135 (finding "nearly two thirds of the males and nearly three quarters of females met diagnostic criteria for 1 or more of the disorders" researchers studied); Gail A. Wasserman et al., *The Voice DISC-IV With Incarcerated Male Youths: Prevalence of Disorder*, 41 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 314, 317 tbl.2 (2002) (finding 68.5 percent of incarcerated youth met the criteria for at least one mental health disorder).

quarters have at least two co-occurring diagnoses, and nearly two-thirds were diagnosed with three or more disorders.¹⁷ The high prevalence of youth with co-occurring mental disorders is particularly troubling because these disorders are even more complex and difficult to treat than more simple presentations of a single disorder.¹⁸ Finally, researchers estimate that approximately 20 percent of incarcerated youth¹⁹ have a mental disorder so severe as “to significantly impair their ability to function”²⁰ and which “require[s] significant and immediate treatment.”²¹ Juvenile facilities, with their limited resources and institutional focus on safety rather than healthcare, are ill-equipped to serve these youth.²²

Young people of color are disproportionately harmed by these deficiencies. As with incarcerated adults,²³ it is well known that youth of color are severely

17. See SHUFELT & COCOZZA, *supra* note 14, at 3.

18. See *id.* at 3 (“Not only is the intensity of [youth with multiple, co-occurring disorders] needs likely to be greater, but proper response to their multiple needs requires increased collaboration, continuity of care, and the ability to recruit and retain providers with the ability to treat multiple needs.”); Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 33, 42 (Thomas Grisso & Robert G. Schwartz eds., 2000) (“[C]omorbidity conditions can have significant implications for the long-term functioning of the individual as well as responsiveness to interventions.”).

19. Estimates vary between 15 and 25 percent. See BERKELEY CTR. FOR CRIMINAL JUSTICE, *supra* note 14, at 2. Although there are a number of possible explanations for this phenomenon, it is likely that youth of color are also less able to access mental health services than white youth. Lisa Rapp-Palichchi & Albert R. Roberts, *Mental Illness and Juvenile Offending*, in JUVENILE JUSTICE SOURCEBOOK: PAST, PRESENT, AND FUTURE 289, 292 (Albert R. Roberts ed., 2004) (reporting that “youths who eventually end up in the juvenile justice system are more likely to be from minority or economically disadvantaged backgrounds” than youth who are placed in mental health systems, and noting that “[m]anaged care organizations have severely limited the services in the mental health system for impoverished youths and their families”). For a more general discussion of the overrepresentation of youth of color in the juvenile justice system, see, for example, Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1521–27 (2012); Patricia Soung, *Social and Biological Constructions of Youth: Implications for Juvenile Justice and Racial Equality*, 6 NW. J.L. & SOC. POL’Y 428, 434–38 (2011).

20. BERKELEY CTR. FOR CRIMINAL JUSTICE, *supra* note 14, at 2.

21. SHUFELT & COCOZZA, *supra* note 14, at 4 (finding 27 percent meet this criteria).

22. Indeed, in 2005 the California Department of Corrections and Rehabilitation (CDCR) reported that “[w]ithout exception, every county described mental health service capacity related to either at risk youth, juvenile offenders or most frequently both, as a significant, if not their most significant, gap.” CAL. DEPT OF CORR. & REHAB., JUVENILE JUSTICE: STATUS REPORT ON JUVENILE JUSTICE REFORM 4 (2005).

23. See, e.g., Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 88S (2011) (citation omitted) (“If current trends continue, 1 of every 3 African American males born today can expect to go to prison in his lifetime, as can 1 of every 6 Latino males, compared to 1 in 17 White males. . . . [One] of every 18 African American females, 1 of every 45 Hispanic females, and 1 of every 111 White females can expect to spend time in prison.”); Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL’Y INITIATIVE (May 28, 2014), <http://www.prisonpolicy.org/reports/rates.html> [http://perma.cc/A3ET-3LWD] (“Nationally, according to the U.S. Census, Blacks are incarcerated five times

overrepresented in juvenile prisons.²⁴ The reality of these racial disparities means that it is of particular importance to consider the mental health needs of incarcerated youth of color. Indeed, incarcerated youth of color, and African American youth in particular, appear to have higher rates of mental illness when compared with incarcerated white youth.²⁵ For one thing, factors contributing to the development of mental health disorders—including exposure to violence, environmental toxins, and poverty—are more prevalent in communities of color, and thus put youth of color at greater risk for developing mental health disorders.²⁶ The systemic racism that shapes their lives may ultimately mean that youth of color enter the juvenile justice system with higher rates of mental health needs to begin with.²⁷

more than Whites are, and Hispanics are nearly twice as likely to be incarcerated as Whites”) (footnote omitted). Popular awareness of these disparities may be growing, as evidenced by an animated video interview featured on THE ATLANTIC magazine’s website. *Mass Incarceration, Visualized*, ATLANTIC (Sept. 11, 2015) <http://www.theatlantic.com/video/index/404890/prison-inherited-trait> [<http://perma.cc/NP4H-VP65>] (presenting a graph depicting the 2010 census numbers at 0:46).

24. See, e.g., BERNSTEIN, *supra* note 1, at 59–61 (emphasizing that youth of color “comprise 38 percent of the youth population, but 72 percent of incarcerated juveniles”); BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 3 (2006) (making the additional point that “[y]outh of color are disproportionately detained at higher rates than whites, even when they engage in delinquent behavior at similar rates as white youth”); MARK SOLER & LISA M. GARRY, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEPT OF JUSTICE, REDUCING DISPROPORTIONATE MINORITY CONTACT: PREPARATION AT THE LOCAL LEVEL 1 (2009) (providing historical context: Congress first requested action on this issue in 1988, when the former Coalition for Juvenile Justice “focused on the problem in its annual report to Congress”); NAT’L ALL. ON MENTAL ILLNESS, AN OVERVIEW OF MULTICULTURAL ISSUES IN CHILDREN’S MENTAL HEALTH 9 (2007), http://www2.nami.org/TextTemplate.cfm?Section=Multicultural_Support1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=55786 [https://web.archive.org/web/20101002073239/http://www.nami.org/TextTemplate.cfm?Section=Multicultural_Support1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=55786]; NAT’L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 2 (2007). Despite the extensive documentation of this disparity, it appears to have continued on unabated.
25. See, e.g., Purva Rawal et al., *Racial Differences in the Mental Health Needs and Service Utilization of Youth in the Juvenile Justice System*, 31 J. BEHAV. HEALTH SERVS. & RES. 242, 250 (2004) (“Overall, African American youth displayed the highest level of mental health needs compared to Caucasian and Hispanic youth.”).
26. See Kasey Corbit, *Inadequate and Inappropriate Mental Health Treatment and Minority Overrepresentation in the Juvenile Justice System*, 3 HASTINGS RACE & POVERTY L.J. 75, 82 (2005); see generally Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425, 431–40 (2001) (drawing out the complex relationship between race, poverty and disability).
27. For an excellent, in-depth exploration of the overlap between racism and incidences of mental illness in the U.S., see Pokempner & Roberts, *supra* note 26.

This disparity may also be attributed to differences in how and when youth of color are diagnosed.²⁸ Not only has mental illness has been found to manifest differently across cultures,²⁹ but people of color face greater systemic barriers when trying to access mental healthcare. Moreover, people of color may also be more reluctant to use, or may be more suspicious of, mental health care resources even when they are available.³⁰ As a result of these factors, and likely others that are as yet unclear to researchers, young people of color tend to be diagnosed later than white youth—often after they have already been locked up in juvenile prison.³¹

What's more, healthcare providers are themselves not immune to racial stereotyping. Researchers have documented how providers perceive symptoms of mental illness as simply aggressive, threatening behavior when working with youth of color.³² These providers thus view the young person's behavior as being indicative of an inherent character flaw, requiring correction and punishment, rather than as a symptom of mental illness, requiring treatment.³³ At the same time, once diagnosed, youth of color are more likely to receive more severe diagnoses than is warranted, and therefore are often overmedicated and overtreated for the disorder.³⁴ As a result of all of these processes, youth of color are—somewhat paradoxically—simultaneously underserved and overdiagnosed by the mental healthcare system as a whole.³⁵ These disparities carry over into the juve-

28. See, e.g., Corbit, *supra* note 26, at 83; (noting that “mental illness among minority youth often goes undiagnosed or misdiagnosed” and proposing one possible mechanism: observers perceive mentally disabled youth of color to be “simply . . . threatening instead of potentially subject to undiagnosed and untreated symptoms of mental illness”).

29. See Untress L. Quinn, *The Invisible Child: Disparities in the Mental Health Treatment of the African American Male in the Juvenile Justice System*, 28 CHILD. LEGAL RTS. J. 16, 19 (2008); Brent Pattison, Comment, *Minority Youth in Juvenile Correctional Facilities: Cultural Differences and the Right to Treatment*, 16 LAW & INEQ. 573, 578 (1998).

30. Andrés J. Pumariega et al., *Culturally Competent Systems of Care for Children's Mental Health: Advances and Challenges*, 41 COMMUNITY MENTAL HEALTH J. 539, 545 (2005) (“In addition to . . . barriers posed by our health system, many minority families are suspicious of the mental health system and are less likely to seek care in such a system.”).

31. See Corbit, *supra* note 26, at 85 (“African American youth, and other minorities, are less likely than whites to have received mental health services before entering the juvenile justice system.”); Quinn, *supra* note 29, at 19.

32. See Pattison, *supra* note 29, at 578 (“Due to the failure to understand these differences [in the manifestation of depression, attachment, and attention deficit disorders across cultures], a minority youth who suffers from one of these conditions is more likely to be processed in the juvenile justice system than in the mental health system.”).

33. See Quinn, *supra* note 29, at 19 (“African American juveniles with mental disorders are more likely to be sent to confinement rather than a mental health facility.”).

34. See Corbit, *supra* note 26, at 88–89 (noting that “African Americans are . . . most at risk of being misdiagnosed with a severe psychopathology”).

35. See Rawal et al., *supra* note 25, at 250.

nile justice system, where a disproportionate number of already overrepresented youth of color are first diagnosed and treated.³⁶

Mental health needs are also higher among incarcerated girls. As many as 80 percent of justice-involved girls nationwide meet the criteria for at least one mental disorder,³⁷ although the prevalence of specific disorders differs between girls and boys.³⁸ It has been proposed that these discrepancies may in part be due to differing routes into the juvenile justice system for girls and boys: girls are more likely than boys to have been involved with various social services (including the mental healthcare and foster care systems) long before entry into the juvenile justice system—and therefore, are more likely to have entered the system as a result of personal trauma.³⁹ It is only when these girls have become “too difficult to handle” in the eyes of facility staff that they are charged with minor crimes and sent to juvenile prison.⁴⁰

Taken together, the factors outlined above make it unsurprising that girls of color are particularly vulnerable to these dynamics. Race-based stereotypes about how to interpret these girls’ actions may influence decisionmakers to incarcerate girls of color, whereas for the same conduct white girls would be referred to community-based programming that includes mental healthcare.⁴¹ As the proportion of girls in the juvenile prison population continues to rise,⁴² and as racial disparities continue unabated, the need for appropriate, specialized mental healthcare among incarcerated youth can only become more pressing.

To drive the point home: as is the case with adult facilities,⁴³ juvenile prisons have seen an increase in mentally ill youth in recent years, due at least in part to a

36. *See id.*

37. SHUFELT & COCOZZA, *supra* note 14, at 4; *see also* Kazdin, *supra* note 18, at 40 (explaining that adolescent girls have higher rates of depression and eating disorders than boys).

38. For example, girls are more likely to have anxiety and mood disorders than boys. SHUFELT & COCOZZA, *supra* note 14, at 4; *see also* Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLA L. REV. 1584, 1601 (2012) (explaining that girls are more likely than boys to enter the juvenile justice system as a result of abuse and sexual trauma).

39. *See* Sherman, *supra* note 38, at 1601–02.

40. *See id.* at 1602.

41. *See* Nanda, *supra* note 19, at 1529–32 (discussing how girls who are not “feminine” enough—girls who are more aggressive or independent—are more likely to be incarcerated and how that plays into decisionmakers’ stereotypes about black girls in particular).

42. *See, e.g.*, Nanda, *supra* note 19, at 1508 n.15.

43. *See* Jacques Baillargeon et al., *Psychiatric Disorders and Repeat Incarcerations: The Revolving Prison Door*, 166 AM. J. PSYCHIATRY 103, 103 (2009) (tracing the history that led to the current “national public health crisis”); *see also* E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR., MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 4–6 (2010) (quoting, for example, officials in San Francisco as reporting in 2001 that “the number of prisoners requiring mental health treatment had increased 77 percent in the past 10 years”).

critical lack of services for youth who are mentally ill.⁴⁴ In some cases, parents have been known to intentionally relinquish custody of their children to the state in order to ensure the child receives appropriate treatment services.⁴⁵ Many of these youth will wind up incarcerated while the state scrambles to find services. In 2001 alone, the U.S. Government Accountability Office reported that more than 9000 young people in 30 counties were incarcerated solely in order to receive mental health services.⁴⁶ In other cases, as mentioned above, authority figures working with youth (and especially youth of color) will misinterpret symptoms of mental illness as delinquency.⁴⁷ Rather than receive appropriate treatment in a supportive setting, these youth are instead locked up in an institution ill-equipped to accommodate their needs.

B. Provision of Services in Juvenile Prisons

Despite the demonstrably high need for mental health services among incarcerated youth, juvenile prisons very often fail to provide even basic services to

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44. See HOLMAN & ZIEDENBERG, *supra* note 24, at 8 (reporting that community systems of support for mentally ill youth deteriorated from the 1980s to the 1990s, forcing juvenile prisons to become a “dumping ground” for youth with mental health disorders); Rapp-Palicchi & Roberts, *supra* note 19, at 291–92 (asserting that many youths with mental illness are “shunted to the juvenile justice system,” and further describing the “revolving door” between juvenile justice and mental health systems).
45. See Dennis E. Cichon, *Encouraging a Culture of Caring for Children With Disabilities: A Cooperative Approach*, 25 J. LEGAL MED. 39, 53 (2004) (reporting that in one survey, 23 percent of parents of mentally ill children were told by service providers that in order for their child to receive treatment, they would have to relinquish the child) (citing NAT'L ALL. FOR THE MENTALLY ILL, FAMILIES ON THE BRINK: THE IMPACT OF IGNORING CHILDREN WITH SERIOUS MENTAL ILLNESS, Exec. Summ. (1999)); Corbit, *supra* note 26, at 86; Kathleen A. Pajer et al., *Psychiatric and Medical Health Care Policies in Juvenile Detention Facilities*, 46 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 1660, 1661 (2007) (“[M]ore youths who have severe psychiatric disorders are admitted [to juvenile prison facilities]. Many of these youths are in detention not for antisocial behavior, but because families have ‘given them up’ to obtain psychiatric care.”) (citations omitted).
46. U.S. GOV'T ACCOUNTABILITY OFF., GAO-03-397, CHILD WELFARE AND JUVENILE JUSTICE: FEDERAL AGENCIES COULD PLAY A STRONGER ROLE IN HELPING STATES REDUCE THE NUMBER OF CHILDREN PLACED SOLELY TO OBTAIN MENTAL HEALTH SERVICES 14 (2003); see also RICHARD A. MENDEL, ANNIE E. CASEY FOUND., BERNALILLO COUNTY MENTAL HEALTH CLINIC CASE STUDY 3 (Tracey Feild ed., 2013) (discussing the GAO survey); H.R. COMM. ON GOV'T REFORM, INCARCERATION OF YOUTH WHO ARE WAITING FOR COMMUNITY MENTAL HEALTH SERVICES IN THE UNITED STATES i–ii (2004) (“Each night [in 2003], nearly 2,000 youth wait[ed] in detention for community mental health services, representing 7% of all youth held in juvenile detention.”); HOLMAN & ZIEDENBERG, *supra* note 24, at 8 (discussing the House report); Rapp-Palicchi & Roberts, *supra* note 19, at 291–92.
47. See Rapp-Palicchi & Roberts, *supra* note 19, at 292–93 (describing how symptoms of mental disorders like depression, bipolar disorder, and conduct disorders may manifest as delinquent behaviors).

youth with mental illness. These facilities may not provide therapy, medication, and other necessary services;⁴⁸ others reportedly overmedicate youth without reference to the appropriateness of the medication for the individual in question, or to potential side effects.⁴⁹ Many facilities simply place youth in solitary confinement for self-injuring or suicidal behavior or for behavior demonstrating an inability/unwillingness to follow the rules—often a direct result of their disability.⁵⁰ This is not to say that all facilities fail to appropriately care for youth; some do provide appropriate mental healthcare for their juvenile populations.⁵¹ But the very mechanism underlying the concept of the juvenile prison—that of separating a young person from his or her family and community—in and of itself enacts a trauma on young minds.⁵² Gladys Carrion, Commissioner of New York State’s Office of Children and Family Services (the department that runs New York’s juvenile facilities) has plainly stated, “I don’t think that you could do anything worse in the formative years of a child, of a young person, than to remove them from their community. We are interrupting their developmental process.”⁵³ She emphasizes, “that is the punishment: removing the kid from their family, from their school, and from their community.”⁵⁴ Thus, juvenile prisons that fail to provide adequate mental healthcare can only be expected to increase the complexity of the mental health disorders of the young people locked up inside.⁵⁵

48. See Rani A. Desai et al., *Mental Health Care in Juvenile Detention Facilities: A Review*, 34 J. AM. ACAD. PSYCHIATRY L. 204, 204, 208–09 (2006).

49. See *Human Rights at Home: Mental Illness in U.S. Prisons and Jails: Joint Hearing Before Subcomm. on Human Rights & the Law of the S. Comm. on the Judiciary*, 111th Cong. 5 (2009) (written Statement of the American Civil Liberties Union).

50. See *id.* at 4. In a sign that the national mood may be shifting away from a punitive model once more (see note 83, *infra*) this practice was recently ended in federal prisons. Juliet Eilperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, THE WASHINGTON POST, https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html.

51. See generally MENDEL, *supra* note 46 (providing in-depth examination of Bernalillo County’s community mental health clinic, which directly serves and is built adjacent to the juvenile prison facility).

52. See, e.g., JAMES AUSTIN ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEPT OF JUSTICE, ALTERNATIVES TO THE SECURE DETENTION AND CONFINEMENT OF JUVENILE OFFENDERS 2–3 (2005) (warning that “while the youth is in detention, long-term educational and mental health needs are often put on hold” and concluding that separating young people, mentally disabled or not, from family and community may reduce their chances of positively reintegrating with the community upon their return).

53. BERNSTEIN, *supra* note 1, at 36.

54. *Id.* (emphasis omitted).

55. See *infra* Part I.C.

In *C.B. v. Walnut Grove Correctional Authority*,⁵⁶ a case filed in 2010 and settled by consent decree in 2012, the Department of Justice (DOJ) investigated the facility and released a report of its findings.⁵⁷ According to the summary letter that Assistant Attorney General Tomas Perez attached to the report, Walnut Grove engaged in “systematic, egregious, and dangerous practices exacerbated by a lack of accountability and controls,”⁵⁸ including a “failure to ensure youth have direct access to . . . mental health care, failure to adequately assess and monitor suicidal risks and failure to diagnosis [sic] and provide treatment for youth with serious . . . mental health needs.”⁵⁹

Youth with a documented history of severe mental illness or psychosis were taken on and off medications and denied appropriate psychotherapy and other treatment.⁶⁰ One young man, who was admitted with a documented history of psychosis, went for as many as two months at a time without seeing an appropriate mental health professional, despite requesting help and regularly being placed on suicide watch.⁶¹ Other youth, with no documented history of mental illness before arriving at the facility, may have been forced to wait months for a diagnosis (and thus even the promise of treatment) because Walnut Grove did not perform its own mental health screening.⁶² In its report, the DOJ noted that the lack of treatment was especially troubling in this context because “most of these youth with their untreated or inadequately treated mental health problems are eventually going to be released in worse condition . . . than when they entered” the facility.⁶³

Although the facility was not equipped to house youth with serious mental health needs, Walnut Grove staff put almost a quarter of its population on suicide watch over a single six month period in 2010.⁶⁴ Yet less than ten percent of these

56. Complaint, *C.B. v. Walnut Grove Corr. Auth.*, No. 3:10CV663 DPJ-FKB (S.D. Miss. Nov. 16, 2010).

57. U.S. DEPT OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE WALNUT GROVE YOUTH CORRECTIONAL FACILITY: WALNUT GROVE, MISSISSIPPI 1, 2 n.2 (2012), <http://www.splcenter.org/sites/default/files/downloads/case/walnutgroveDOJ.pdf> [https://perma.cc/GWR6-YQ59].

58. Letter from Thomas E. Perez, Ass't Att'y Gen., to Phil Bryant, Governor of Miss. (Mar. 20, 2012), <http://www.splcenter.org/sites/default/files/downloads/case/walnutgroveDOJ.pdf> [https://perma.cc/L347-RA2S].

59. U.S. DEPT OF JUSTICE CIVIL RIGHTS DIV., *supra* note 57, at 20.

60. *See id.* at 23–24.

61. *See id.* at 24 (noting that the young man was “on suicide watch almost every month in 2010”).

62. *See id.* at 22 (noting that because “severe mental illness typically presents itself in youth ages 16 to 22 . . . new cases of depression, psychosis, and bipolar disorder may develop in the interim between screening by the State and when the youth are eventually seen by mental health staff”).

63. *Id.* at 21.

64. *Id.* at 22.

youth ever received a follow-up evaluation from a psychiatrist.⁶⁵ Most youth on suicide watch were not properly monitored, leading to death in at least one case.⁶⁶ Although court precedents and best practices require staff to monitor youth who are known to be suicidal, the DOJ detailed accounts of youth who openly discussed their plans to commit suicide but were ignored for hours or even days by staff.⁶⁷

At Walnut Grove, and places like it, youth with mental health needs are routinely treated with a disregard for their unique vulnerabilities, which stem directly from the young age at which their illnesses manifest. The next Subpart explores in greater detail the harmful effects that living conditions like those at Walnut Grove have on youth in both the short- and long-term.

C. Unique Vulnerabilities of Youth: A Higher Standard of Care Is Needed

Mentally ill youth are particularly vulnerable to certain kinds of abuse and neglect while incarcerated. Youth who are denied treatment or who are (re)traumatized while locked up are at high risk of negative consequences as adults, including greater mental health needs and higher rates of adult incarceration. Even conceding that punishment can be a legitimate purpose of the juvenile justice system, needless suffering surely cannot have a place in that punishment.⁶⁸ If we are going to continue locking up mentally ill youth,⁶⁹ it is imperative that

65. *See id.*

66. *See id.* (describing one incident in which a young man with a history of depression and suicidal ideation attempted suicide twice within ten days, and despite having told a nurse he had cut himself and would do so again, the nurse ignored him for 5–6 hours before finally returning to find him dead in his cell).

67. *See id.* at 22–23.

68. *See Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (“Conditions [even in prisons] must not involve the wanton and unnecessary infliction of pain . . .”).

69. There are strong arguments for abandoning the juvenile justice system altogether, on the grounds that it utterly fails to rehabilitate youth, and in fact may only serve to make young people more likely to reoffend as adults. *See e.g.*, BERNSTEIN, *supra* note 1 (arguing for complete abolition); Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interests of Children*, 33 NEW ENG. L. REV. 39 (1998) (expressing skepticism at the ability of the current system to rehabilitate youth); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 914 (1988) (“Abolishing the juvenile court would force a long overdue and critical reassessment of the entire social construct of ‘childhood.’ As long as young people are regarded as fundamentally different than adults, it becomes too easy to rationalize and justify a procedurally inferior justice system.”). Outside of talking to justice-involved youth themselves, Bernstein’s book makes the most recent, and to me the most compelling, case for abandoning juvenile prisons altogether. *See* BERNSTEIN, *supra* note 1. That being said, this Comment is agnostic as to the normative question of whether to abolish juvenile prisons. Instead, I proceed under the basic premise that prison for kids may not be

they have a clearer and stronger right to mental healthcare while inside. The consequences of continuing to ignore young people's mental health needs will be to severely circumscribe their potential life outcomes. Not only does failing to step in when youth face neglect and mistreatment in juvenile prison steal away possibilities—in many cases, it actively makes youth worse off than if they had never been locked up in the first place.⁷⁰

There are practical reasons to focus on increasing the quality of care for incarcerated, mentally ill youth. Failing to treat incarcerated youth with mental health disorders leads to a greater likelihood that antisocial behaviors will persist⁷¹ and that those same youth will continue to offend as adults.⁷² Especially in the case of youth who received no diagnosis or mental healthcare before entering the juvenile justice system, harsh and traumatic conditions of confinement harden delinquent behaviors in individuals who otherwise would have benefitted from appropriate mental health care.⁷³ This in turn may create dangerous conditions for others in the juvenile prison.

Practical consequences aside, the juvenile justice system has an obligation to prevent needless suffering among mentally ill youth. This includes preventing mentally ill youth from languishing as their disorders continue to worsen. Without adequate access to treatment, mentally ill youth are especially vulnerable to the long-term consequences of poor conditions of confinement. They are more vulnerable than adults with mental illness and more vulnerable than youth with-

abolished any time in the near future. If that is indeed the case, then at the very least the legal standards governing their operation must be clarified.

70. See, e.g., ERIC W. TRUPIN & RAYMOND PATTERSON, REPORT OF FINDINGS OF MENTAL HEALTH AND SUBSTANCE ABUSE TREATMENT SERVICES TO YOUTH IN CALIFORNIA YOUTH AUTHORITY FACILITIES 17 (2003), <http://www.prisonlaw.com/pdfs/CYA1.pdf> [<http://perma.cc/QQX9-C5PZ>] (reporting that “[t]he vast majority of youths who have mental health needs are made worse instead of improved by the correctional environment” in the California Youth Authority (CYA)); see also notes 78–80.
71. Cf. Julian D. Ford et al., *Complex Trauma and Aggression in Secure Juvenile Justice Settings*, 39 CRIM. JUST. & BEHAV. 694, 698 (2012) (“Several lines of evidence suggest an association between complex trauma and aggression among youth.”).
72. Cf. Keith R. Cruise et al., *Integrating Mental Health and Special Education Needs Into Comprehensive Service Planning for Juvenile Offenders in Long-Term Custody Settings*, 21 LEARNING & INDIVIDUAL DIFFERENCES 30, 30 (2011) (explaining that “a lack of adequate corrections-based educational programming, that is tailored to meet the needs of a large percentage of youth with learning disabilities, may increase recidivism risk for a significant proportion of justice-involved youth” and noting the significant overlap between youth in need of special education, and youth with mental illnesses).
73. See JULIAN D. FORD ET AL., NAT’L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, TRAUMA AMONG YOUTH IN THE JUVENILE JUSTICE SYSTEM: CRITICAL ISSUES AND NEW DIRECTIONS 3 (2007) (explaining that common reactions to trauma among youth include “risk taking, breaking rules, fighting back, and hurting others who are perceived to be powerful or vulnerable” and describing how inadequate treatment in juvenile prisons may retraumatize youth).

out. For one thing, youth-onset mental disorders tend to be more severe than adult-onset disorders.⁷⁴ What's more, mental illness that first arises in youth has been linked with mental illness as an adult, meaning it is common for these disorders to continue into adulthood.⁷⁵ Finally, adults whose symptoms first appeared in youth tend to have more severe forms of the disorder as adults than those whose disorders developed later.⁷⁶ Failing to provide adequate treatment thus likely leads youth to experience more severe forms of mental illness in adulthood than they otherwise would.

Indeed, some studies indicate that juvenile prisons themselves may be counterproductive for youth with mental health disorders.⁷⁷ Studies have found that youth who are not adequately treated for mental disorders “can decompensate over time, especially in a stressful environment like detention, incarceration, or

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74. See, e.g., Julia Kim-Cohen et al., *Prior Juvenile Diagnoses in Adults With Mental Disorder*, 60 ARCHIVES GEN. PSYCHIATRY 709, 710 (2003) (footnotes omitted) (“Juvenile-onset forms of disorders are known to be associated with more severe childhood risks . . .”); Myrna M. Weissman et al., *Children With Prepubertal-Onset Major Depressive Disorder and Anxiety Grown Up*, 56 ARCHIVES GEN. PSYCHIATRY 794, 794 (1999) (concluding there “is high morbidity” in children who developed Major Depressive Disorder and anxiety before puberty).
75. See, e.g., Daniel Geller et al., *Is Juvenile Obsessive-Compulsive Disorder a Developmental Subtype of the Disorder? A Review of the Pediatric Literature*, 37 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 420, 423–24 (reporting that all eight studies of the link between juvenile and adult OCD found that most cases of juvenile OCD persisted into adulthood); Kim-Cohen et al., *supra* note 74, at 713 (“[H]alf of the individuals who met criteria for a major *DSM-IV* diagnosis at 26 years of age first had a diagnosable disorder at 11 to 15 years of age, and three quarters had a first diagnosis before 18 years of age.”); Shirlene M. Sampson & David A. Mrazek, *Depression in Adolescence*, 13 CURRENT OPINION IN PEDIATRICS 586, 586 (2001) (“Individuals who experience major depression by age 19 are at significant risk for recurrence in adulthood.”) (footnote omitted).
76. See, e.g., Kazdin, *supra* note 18, at 41 (“Age of onset of a disorder may have significant implications regarding etiological and risk factors, prevalence, and long-term outcome. . . . For example, early onset of depression is associated with a more protracted and severe course of the disorder.”) (citation omitted); Kim-Cohen et al., *supra* note 74, at 710 (“Juvenile-onset forms of disorders are known to be associated with . . . worse prognosis in adulthood.”); Weissman et al., *supra* note 74, at 794 (“Compared with controls, both the children with [Major Depressive Disorder] and those with anxiety went on to have increased risk of substance abuse and conduct disorder . . . , increased use of long-term psychiatric and medical services, and overall impaired functioning.”).
77. See Kimberly Hoagwood & S. Serene Olin, *The NIMH Blueprint for Change Report: Research Priorities in Child and Adolescent Mental Health*, 41 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 760, 762 (2002) (“Some treatments have been found to be potentially ineffective or, worse yet, harmful. For example . . . [s]ome services provided to delinquent juveniles are . . . ineffective (e.g., boot camps and residential programs) . . .”); see also HOLMAN & ZIEDENBERG, *supra* note 24, at 2–3, 8 (reporting that “poor mental health, and the conditions of confinement together conspire to make it more likely that incarcerated teens will engage in suicide and self-harm” and that incarceration itself may make it more likely that youth will re-offend); cf. Yael Zakai Cannon, *There's No Place Like Home: Realizing the Vision of Community-Based Mental Health Treatment for Children*, 61 DEPAUL L. REV. 1049, 1054–61 (2012) (discussing reasons Residential Treatment Centers—institutions primarily devoted to mental health care but structured similarly to juvenile prisons—are ineffective in treating youth with mental illness).

boot camp.”⁷⁸ These youth are also at higher risk for self-harming behaviors and violent behaviors directed towards other incarcerated youth or staff.⁷⁹ Incarcerated youth with mental illness are also more likely to be targeted for sexual victimization (or revictimization) while in lockup.⁸⁰ Surely such experiences only increase these youths’ trauma and complicate any efforts to provide appropriate mental healthcare later on.

In effect, failing to quickly identify young people with mental disorders and respond to their needs by delivering appropriate treatment ultimately sets them up to fail—at least, that is if “success” is defined to include having the ability to lead a reasonably normal life and staying out of further trouble upon release. These failures may also make it more difficult for formerly incarcerated youth to lead successful lives as adults. Further disability and the lessening of life chances is not part of the sentence when youth are sent to detention centers. Nor should it be. In juvenile prisons as in adult prisons, deprivation of access to adequate mental healthcare “is incompatible with the concept of human dignity and has no place in civilized society.”⁸¹

Yet despite the grave consequences for youth when juvenile prisons fail to provide adequate mental healthcare, the legal test for adjudicating their claims remains largely undefined. The next Part explores in more detail courts’ inconsistent approaches to adjudicating the right to treatment claims of incarcerated youth. No single test governs these sorts of claims. Rather, courts have cobbled together varying approaches drawing on both civil and criminal tests for evaluating adult conditions of confinement-type claims.

II. INCONSISTENCY IN THE MODERN APPROACH

Despite the great vulnerability of incarcerated, mentally ill youth,⁸² it is currently unclear what legal test should govern their claims of inadequate mental health care. Historically, courts have applied a variety of approaches, each differing in the extent to which they take account of the needs and special characteris-

78. Rapp-Palicchi & Roberts, *supra* note 19, at 296.

79. *Id.*

80. *Cf.* David Kaiser & Lovisa Stannow, *The Shame of Our Prisons: New Evidence*, N.Y. REV. BOOKS, Oct. 24, 2013, at 57 (2013) (describing the results of the 2012 NIS report, which found that people with mental illness and incarcerated in jails and prisons were much more likely to be victims of sexual assault, as perpetrated by both staff and other inmates; and reporting higher rates of victimization among youth than among adult inmates). Although by no means definitive, this evidence suggests that mentally ill youth, like adults, are at greater risk of sexual victimization than their nondisabled peers.

81. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

82. *See supra* Part I.

tics of youth. Some of this confusion may be attributed to states' ambivalence about the purpose and aims of their respective quasi-criminal juvenile justice systems.⁸³ Some courts analogize to the civil commitment context and, therefore, apply a version of the *Youngberg v. Romeo*⁸⁴ or *Bell v. Wolfish* Fourteenth Amendment test. Other courts understand juvenile prisons to function more like adult prisons. These courts apply the Eighth Amendment cruel and unusual punishment test.

Whether the Eighth Amendment applies at all to youth in the juvenile justice system remains an open question. This is primarily due to the hybrid nature of the system, in which youth are incarcerated without having been formally convicted of any crime. Accordingly, in *Ingraham v. Wright*,⁸⁵ the Supreme Court expressly reserved the question of whether the Eighth Amendment applies to incarcerated youth.⁸⁶ In other contexts the Supreme Court has warned against applying the Eighth Amendment to situations in which individuals have been involuntarily held by the state, but not convicted of any crime.⁸⁷ There are, however, enough similarities between juvenile prison and adult prison—especially since the rise of punitive justifications for confining youth—that many courts have presumptively applied the Eighth Amendment to youths' right to treatment claims.

Scholars and courts both tend to consider the Fourteenth Amendment test to be "more protective,"⁸⁸ and both tend to favor the Fourteenth Amendment as a route for establishing a right to treatment for incarcerated youth. While six circuits apply the Fourteenth Amendment due process test to incarcerated youth for purposes of the right to treatment, the Third, Fifth, and Seventh

83. Much has been written about the development of the modern juvenile justice system from its rehabilitative, Progressive Era roots. See, e.g., Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791 (1995); Sussman, *supra* note 4, at 386–89. For purposes of this Comment it is only necessary to recognize that the system has moved towards a significantly more punitive model since the 1980s, although there has been some easing of this trend in more recent years.

84. *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982).

85. 430 U.S. 651 (1977).

86. *Id.* at 669 n.37 ("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.") (citation omitted).

87. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *United States v. Lovett*, 328 U.S. 303, 317–18 (1946).

88. Or at least, they refer to it as such. E.g., *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987); *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1152 (D. Haw. 2006); see also *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983) ("[J]uveniles . . . have a due process interest in freedom from unnecessary bodily restraint which entitles them to closer scrutiny of their conditions of confinement than that accorded convicted criminals.").

Circuits have explicitly applied the Eighth Amendment.⁸⁹ In many cases, however, even those courts that purport to apply a Fourteenth Amendment due process approach in practice import Eighth Amendment language, tests, and considerations into their analysis.⁹⁰

This Part thus describes the confused proliferation of standards that plague the right to treatment claims of incarcerated youth. Ultimately, the lack of a clear test means that courts fail to fully take account of the important differences between youth and adult incarceration. Instead, these courts apply an unduly punitive approach to youth claims.

A. The Bare Eighth Amendment Approach

The Supreme Court has held that prison conditions “which ‘involve the unnecessary and wonton infliction of pain’” constitute cruel and unusual punishment under the Eighth Amendment.⁹¹ Therefore, the state has an obligation “to provide medical care for those whom it is punishing by incarceration” because failing to provide this care “may result in pain and suffering which no one sug-

89. The First, Eighth, Ninth, Tenth and Eleventh Circuits explicitly apply the Fourteenth Amendment test. See *Santana*, 714 F.2d at 1179 (First Circuit); *A.J. v. Kierst*, 56 F.3d 849, 854 (8th Cir. 1995); *Gary H.*, 831 F.2d at 1432 (Ninth Circuit); *R.G.*, 415 F. Supp. 2d at 1152 (affirming use of Fourteenth Amendment test in Ninth Circuit); *Milonas v. Williams*, 691 F.2d 931, 942 n.10 (10th Cir. 1982); *H.C. ex rel. Hewett v. Jarrard*, 786 F.2d 1080, 1084–85 (11th Cir. 1986); *K.M. v. Ala. Dep't of Youth Servs.*, 360 F. Supp. 2d 1253, 1258–59 (M.D. Ala. 2005) (affirming continued applicability of *H.C. ex rel. Hewett* and extending to adjudicated youth). But see *Collins v. Sheppard*, No. 1:13-CV-31 WLS, 2014 WL 5432118, at *3 (M.D. Ga. Oct. 24, 2014) (collapsing Eighth and Fourteenth Amendment tests). The Fourth Circuit has not clearly spoken on the issue, but district courts within the circuit apply the Fourteenth Amendment test. See *Alexander S. ex rel. Bowers v. Boyd*, 876 F. Supp. 773, 796 (D.S.C. 1995); *Reaves v. Honorable Peace*, No. CIV.A. 3:95CV640, 1996 WL 679396, at *8 (E.D. Va. Mar. 21, 1996), *aff'd sub nom. Reaves v. Peace*, 108 F.3d 1373 (4th Cir. 1997). While the Eighth Circuit only explicitly considered the application of the Fourteenth Amendment test to youth who were pre-trial detainees, the case's language was sufficiently broad to apply to both pre- and post-trial detainees. *A.J.*, 56 F.3d at 854 (“[W]e cannot ignore the reality that assessments of juvenile conditions of confinement are necessarily different from those relevant to assessments of adult conditions of confinement.”). However, a footnote in a more recent, unpublished opinion indicates that the Eighth Circuit may soon abandon this test for the Eighth Amendment alternative. *D.S. ex rel. Stinson v. County of Montgomery*, 286 F. App'x 629, 633 n.5 (11th Cir. 2008). For courts that explicitly apply the adult Eighth Amendment test, see *infra*, Part II.A.; *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 256–59 (3d Cir. 2010); *Morales v. Turman*, 562 F.2d 993, 998–99, 998 n.1 (5th Cir. 1977) (expressing doubt as to the existence of a right to treatment but arguing that any claim would properly be analyzed under the Eighth Amendment); *Nelson v. Heyne*, 491 F.2d 352, 354 (7th Cir. 1974).

90. See *infra* Part II.

91. *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

gests would serve any penological purpose.”⁹² The right to medical care includes the right to mental healthcare.⁹³ Adults who wish to challenge the mental healthcare they have received must prove that prison staff or administration was deliberately indifferent to their serious medical needs.⁹⁴ When challenging the provision of mental healthcare at a structural level, prisoners must prove staff or administrators acted with deliberate indifference to a substantial risk of serious harm.⁹⁵

As applied to adult prisoners, the deliberate indifference test has both a subjective and an objective component. First, adult plaintiffs must show that the medical need or risk of harm was sufficiently serious: either the condition was diagnosed as requiring medical treatment, or the need was sufficiently obvious that even a person without medical training could recognize it.⁹⁶ Second, adult plaintiffs must prove that prison staff or administration was deliberately indifferent to their needs.⁹⁷ The second prong of the test is subjective and best described as a form of criminal recklessness. It is met only when “the official knows of and disregards an excessive risk to inmate health or safety.”⁹⁸ That is, “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he [or she] must also draw the inference.”⁹⁹ In cases of systemic failures, the evidence of deficiencies in mental healthcare—stemming from lack of staffing, funding, facilities, and so on—may be so extreme that the administration’s failure to address these issues by itself amounts to deliberate indifference.¹⁰⁰

92. *Id.* at 103.

93. *See Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994) (“[T]he requirements for mental health care are the same as those for physical health care needs.”).

94. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

95. *Brown v. Plata*, 131 S. Ct. 1910, 1925 n.3 (2011) (holding that plaintiffs may “rely on systemwide deficiencies in the provision of medical and mental health care” in order to claim that “taken as a whole, [these conditions] subject sick and mentally ill prisoners . . . to ‘substantial risk of serious harm’” (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994))); *see also Farmer*, 511 U.S. at 834.

96. *See, e.g., Bingham v. Thomas*, 654 F.3d 1171, 1176 (11th Cir. 2011); *Clark-Murphy v. Foreback*, 439 F.3d 280, 292 (6th Cir. 2006) (mental illness can qualify as a serious medical need). The Fourth Circuit has created a test for determining whether a plaintiff’s mental illness is sufficiently serious to entitle him or her to treatment. *See Bowring v. Godwin*, 551 F.2d 44, 47–48 (4th Cir. 1977). A plaintiff is entitled to care when “a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that the prisoner’s symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial.” *Id.*

97. *Farmer*, 511 U.S. at 834; *see also Wilson*, 501 U.S. at 302–03.

98. *Farmer*, 511 U.S. at 837.

99. *Id.*

100. *Cf. id.* at 846 n.9; *Coleman v. Wilson*, 912 F. Supp. 1282, 1299 (E.D. Cal. 1995).

Starting in the early 1980s with *Rhodes v. Chapman*,¹⁰¹ Eighth Amendment conditions of confinement jurisprudence became much more restrictive.¹⁰² As a result, the deliberate indifference test poses a very high barrier to bringing a successful claim for mental healthcare in the adult context.¹⁰³ Under this test, “[s]ubstandard quality of care, negligence, or even malpractice does not suffice to establish a constitutional violation” in the provision of mental healthcare to incarcerated adults.¹⁰⁴ “The ‘deliberate indifference’ requirement has significantly limited court findings of constitutional violations with regard to mental health services and thus limits the courts’ ability to order improvements in those services.”¹⁰⁵

Courts that apply the Eighth Amendment deliberate indifference test in the youth context do so without fully unpacking the doctrinal justifications supporting that choice.¹⁰⁶ *Betts v. New Castle Youth Development Center*,¹⁰⁷ one of the few circuit court decisions published in this area, provides an example of the cursory attention the decision to apply an adult Eighth Amendment test to incarcerated young people has received. The plaintiff, a seventeen year-old incarcerated in the New Castle Youth Development Center in Pennsylvania, alleged various constitutional violations arising out of an injury he sustained in a game of pickup football.¹⁰⁸ He apparently argued for staff liability arising out of both the Eighth and the Fourteenth Amendments.¹⁰⁹ The court first analyzed the plaintiff’s claims under the Eighth Amendment deliberate indifference test.¹¹⁰ With no concern for the underlying doctrinal justifications, the court dove straight into an explana-

101. 452 U.S. 337 (1981).

102. See Holland & Mlyniec, *supra* note 83, at 1806–07.

103. See *id.* at 1807 (discussing the effect that this strict standard has had on youth claims); see also Hafemeister, *supra* note 4, at 89 (explaining how the deliberate indifference standard “significantly limit[s]” adult prisoners’ Eighth Amendment rights).

104. Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 405 (2006).

105. *Id.* at 406.

106. See *supra* Part II.B; see, e.g., *Nelson v. Heyne*, 491 F.2d 352, 356 (7th Cir. 1974); *Martarella v. Kelley*, 349 F. Supp. 575, 597 (S.D.N.Y. 1972) (jumping straight into an Eighth Amendment analysis without considering whether it is the most appropriate standard). Many of the cases that I cite in this Part and in the following Parts arise out of more general conditions of confinement, or right to medical care claims, rather than right to mental healthcare claims. This is because very few right to mental healthcare claims make it past the complaint stage—there simply are not that many published orders specific to the right to mental healthcare. The analysis, however, functions the same whatever the right detainees claim to have been deprived of. Therefore, the cases are still instructive, if not exactly on point.

107. 621 F.3d 249 (3rd Cir. 2010).

108. *Id.* at 252.

109. *Id.* at 256, 259.

110. *Id.* at 256.

tion of the test itself, making no effort to explain why the adult test should apply to youth who were never convicted nor tried of any crime.¹¹¹ The court simply assumed that this test would apply in the juvenile context.¹¹² Ultimately the court concluded that the defendants' failure to provide adequate equipment for the tackle football game did not rise to the level of deliberate indifference, as a matter of law.¹¹³

After rejecting the plaintiff's Eighth Amendment claim, the court went on to consider his Fourteenth Amendment claim.¹¹⁴ Plaintiff argued that the defendants' deliberate indifference to his safety deprived him of a liberty interest in his bodily integrity.¹¹⁵ This is a different type of argument than plaintiffs typically raise in claims asserting a right to mental healthcare under the Fourteenth Amendment, as I discuss below,¹¹⁶ and the court found it "fit squarely within" his Eighth Amendment cause of action. That is, the court read the plaintiff's Fourteenth Amendment argument to be essentially the same as the prior Eighth Amendment argument.¹¹⁷ For this reason, the court applied the more-specific-provision rule to dismiss the Fourteenth Amendment claim as well.¹¹⁸

Within a year, *Troy D. v. Mickens*,¹¹⁹ a district court case out of New Jersey, interpreted the Third Circuit's decision to require application of the Eighth Amendment deliberate indifference test when deciding *all* youth claims arising out of juvenile prisons.¹²⁰ In that case, plaintiffs had argued that the Fourteenth Amendment, rather than the Eighth, should govern their claims, because punishment is not the primary purpose of the juvenile justice system.¹²¹ The district court rejected this argument. First, it mentioned in a footnote that punishment *is* in fact one of the core purposes of the New Jersey juvenile justice system.¹²² Yet

111. *Id.*

112. *Id.*

113. *Id.* at 259.

114. *Id.*

115. *Id.*

116. See generally *infra* Part II.B.

117. *Beets*, 621 F.3d at 261.

118. *Id.*

119. 806 F. Supp. 2d 758 (D.N.J. 2011). The plaintiffs in this case alleged, among other issues, that they were "deprived of necessities such as . . . mental health treatment" when they were denied access to regular sex offender treatment sessions and access to counseling when requested. *Id.* at 762–63.

120. *Id.* at 772. ("[Plaintiffs'] constitutional claims concerning their conditions of confinement, failure to protect from harm and lack of medical care should be analyzed under the Eighth Amendment.")

121. *Id.* at 771.

122. *Id.* at 771 n. 27 ("While New Jersey's early mission with respect to juveniles was predominately one of rehabilitation, 'punishment has now joined rehabilitation as a component of the State's core mission with respect to juvenile offenders.'" (quoting *State v. Presha*, 748 A.2d 1108, 1114 (2000))).

this offhand remark constituted the court's only discussion of the analytical similarities between the adult and juvenile prison systems. Instead, the court grounded the bulk of its analysis in precedent. It proceeded to interpret *Betts*' narrow rejection of one youth's redundant Fourteenth Amendment argument as a broad mandate that *all* youth claims arising out of juvenile prisons should be analyzed under the Eighth Amendment, rather than the Fourteenth.¹²³ Attempting to distinguish prior Third Circuit case law applying the Fourteenth Amendment to juvenile prisoners' claims, the district court further asserted that, as with adults, the Fourteenth Amendment due process standard only applied to youth detained pre-adjudication.¹²⁴ In the end, the court's broad reading of *Betts* resulted in its importing the adult test wholesale, with nothing more than passing mention of the analytical justifications for doing so.¹²⁵

Like the Third Circuit, the Fifth Circuit also applies the adult Eighth Amendment test to claims arising out of youth prisons, and has done so since it rejected the right to treatment doctrine in the 1970s. Yet although the case that established this rule, *Morales v. Turman*, gives a detailed explanation of its rejection of the right to treatment doctrine, it provides little justification as to why the adult Eighth Amendment test is more appropriate.¹²⁶ Since *Morales*, federal and

The court failed to take note of the fact that the *Troy D.* plaintiffs asserted different Fourteenth Amendment due process violations than did the plaintiff in *Betts*. *Id.* at 772.

123. *Id.* ("In this case, Plaintiffs were . . . adjudicated delinquent juveniles who had been committed to the custody of the [juvenile prison] when the actions giving rise to their constitutional claims occurred. Therefore, their constitutional claims concerning their conditions of confinement, failure to protect from harm and lack of medical care should be analyzed under the Eighth Amendment.")
124. *See id.* at 772 (distinguishing plaintiffs from youth pretrial detainees in the earlier Third Circuit case *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572 (3d Cir. 2004)).
125. *Id.* To be fair, the *Troy D.* court's reasoning was consistent with at least one other Third Circuit decision: although the court does not cite to it, *Beers-Capitol v. Whetzel*, 256 F.3d 120 (3rd Cir. 2001), similarly assumes that the adult Eighth Amendment deliberate indifference test applies without modification to claims arising out of juvenile prison. *Id.* at 130–35 ("In sum, to make out a claim of deliberate indifference based on direct liability . . . the [juvenile] plaintiffs must meet the test from *Farmer v. Brennan*: They must show that the defendants knew or were aware of and disregarded an excessive risk to the plaintiffs' health or safety, and they can show this by establishing that the risk was obvious."). On the other hand, the Third Circuit's decision may have been shaped by the plaintiffs' strategic choices: while the plaintiffs in *Beers-Capitol* originally raised Fourteenth Amendment claims in the district court, they were dismissed earlier in the litigation, and the plaintiffs apparently chose not to pursue those claims on appeal. *Id.* at 130 n. 5 ("The plaintiffs also originally brought claims under the . . . Fourteenth Amendment[.]. The District Court rejected these claims because it concluded that an Eighth Amendment analysis was the proper one to use for claims arising from incarceration in a facility for juvenile offenders. [] The plaintiffs do not press these other claims on appeal.") (citations omitted).
126. *Morales v. Turman*, 562 F.2d 993, 998–99 (5th Cir. 1977). The court merely explains that "any constitutional abuses that may be found in the Texas juvenile program can be corrected" under the Eighth Amendment test. *Id.* at 998.

state district courts in Texas have continued look to adult conditions of confinement claims for guidance in the youth context.¹²⁷ No subsequent decision has expanded on the Circuit's rationale.¹²⁸

Even in circuits that have not expressly adopted the adult Eighth Amendment test for the claims of incarcerated youth, district courts may still apply the Eighth Amendment deliberate indifference test, without exploring the analytical justifications for doing so. For example, in *J.P. v. Taff*¹²⁹, a federal district court in Ohio applied the Eighth Amendment deliberate indifference test to a youth plaintiff's medical treatment claim.¹³⁰ The court simply did not discuss whether the Fourteenth Amendment would be more appropriate.¹³¹ In *Hughes v. Judd*¹³², a Florida district court considered the claims of youth pretrial detainees, challenging the conditions of their confinement in the juvenile wing of the county jail.¹³³ The court rejected a proposed youth-specific test in favor of applying the adult deliberate indifference test, via the *Bell v. Wolfish* line of cases.¹³⁴

Although a relatively simple test for courts to apply, this approach is flawed. A major drawback of engaging in a pure Eighth Amendment analysis is that doing so essentially concedes that adult-style punishment is a legitimate purpose of the juvenile justice system. As it stands, advocates and scholars have gone to great lengths to argue for the continuing relevance of rehabilitation as the guiding purpose of the juvenile justice system.¹³⁵ Conceding that adult-style punishment is a

127. See *In re J.M.*, 287 S.W.3d 481, 492–95 (Tex. App. 2009); *Vega v. Parsley*, 700 F. Supp. 879, 883 (W.D. Tex. 1988) (stating that “[t]he Fifth Circuit has held that the Eighth Amendment applies to juvenile detention centers” and applying the Supreme Court’s adult Eighth Amendment jurisprudence in *Whitley v. Albers*, 475 U.S. 312 (1986) and *Rhodes v. Chapman*, 452 U.S. 337 (1981)).

128. Cf. *Austin v. Johnson*, 328 F.3d 204, 208–09 (5th Cir. 2003) (justifying use of the Eighth Amendment standard where plaintiff was convicted of a crime); *Smith v. Blue*, 35 F. App’x 390 (5th Cir. 2002) (applying Eighth Amendment without analysis).

129. 439 F. Supp. 2d 793 (S.D. Ohio 2006).

130. *Id.* at 808–12.

131. *Id.*

132. No. 8:12-CV-568-T-23MAP, 2015 WL 1737871 (M.D. Fla. Apr. 16, 2015).

133. *Id.* at *1.

134. *Id.* at *12, *50 (remarking that “*Bell* is an essential and compelling pillar of any informed discussion of the precedent that establishes the applicable constitutional standard” for the young people’s claims in this case).

135. See, e.g., Jessica Ann Garascia, Note, *The Price We Are Willing to Pay for Punitive Justice in the Juvenile Detention System: Mentally Ill Delinquents and Their Disproportionate Share of the Burden*, 80 IND. L.J. 489, 512–15 (2005) (arguing that the needs of mentally ill youth require a move away from the punitive system); Hafemeister, *supra* note 4, at 81 (“[R]ehabilitation remains a principal focus of the juvenile justice system”); Levick et al., *supra* note 11, at 311 (arguing that a Fourteenth Amendment analysis is more appropriate for youth conditions of confinement claims because such an analysis recognizes “the system’s uniquely rehabilitative and non-criminal nature”). But see, e.g., Conward, *supra* note 69, at 79–80 (arguing that society’s interest in punishing youth

legitimate goal of the juvenile justice system could well lead to further marginalization of its purported rehabilitative purpose and further reification of the impulses that, in the present moment, make “prison” a more apt descriptor for these facilities. Advocates may well worry that speaking of youths’ rights in Eighth Amendment terms will be yet another step away from the rehabilitative model that the founders of the juvenile justice system had in mind.

These fears appear to be borne out in practice. Applying a bare Eighth Amendment analysis, without consideration to the unique legal status and vulnerabilities of the young plaintiffs involved, invites callousness on the part of the court. For example, in *J.P. v. Taft*,¹³⁶ the Ohio court evaluated the plaintiff’s right to medical treatment claims under the *Estelle v. Gamble*¹³⁷ deliberate indifference test.¹³⁸ The young plaintiff (or “inmate” as the court called him) alleged that staff (“prison administrators”) failed to provide him with adequate medical care after he was choked to the point of unconsciousness by a juvenile corrections officer.¹³⁹ After being carried to an infirmary, the nurse on duty provided the youth with nothing but water and someone else’s inhaler.¹⁴⁰ Yet the court found that the plaintiff could not prove that the institution was deliberately indifferent to his medical needs because “he received *some* medical care,” rather than none at all.¹⁴¹ An arguably correct analysis in the adult context, the court never considered whether the lack of medical care in this situation was appropriate for someone of the plaintiff’s age. The court did not mention the possibility that the young man may have been entitled to a higher standard of care than an adult prisoner, by virtue of the fact that he was never criminally punished under the law. Indeed, he was ostensibly a ward of the state. Particularly in the mental healthcare context, where health needs may be less obvious, further assimilating to the adult test in youth proceedings only invites inattention to the unique needs of young people once they have been locked up.

can be reconciled with rehabilitative goals through alternative programs); Feld, *supra* note 69, at 909–15 (arguing that the rise of punitive purposes for juvenile imprisonment has erased any meaningful distinctions between juvenile courts and adult courts, and therefore that the separate juvenile system should be abolished altogether).

136. 439 F. Supp. 2d 793 (S.D. Ohio 2006).

137. 429 U.S. 97 (1976).

138. *J.P.*, 439 F. Supp. 2d at 808–09.

139. *See id.* at 800, 808–09.

140. *Id.* at 808 (plaintiff testifying that the nurse “[g]ave me some water, checked my heart rate. I believe that was it. She gave me an inhaler that, you know what I’m saying, wasn’t mine. I ain’t got asthma. She gave me an asthma inhaler that wasn’t even mine, so I don’t know where that came from . . .”).

141. *Id.* at 809.

B. The False Promise of the Fourteenth Amendment Approach

Historically, claims arising out of juvenile prison were commonly analyzed under the test laid out in *Youngberg v. Romeo*,¹⁴² which governs substantive due process claims in the civil commitment context.¹⁴³ In *Youngberg*, the Supreme Court held that the conditions of confinement for people who have been civilly committed must be evaluated under the Fourteenth Amendment's due process clause, which at the least guarantees civilly held individuals freedom from confinement in unsafe conditions.¹⁴⁴ In addition, the Court held that civilly committed individuals have a right to freedom from bodily restraint and to such "minimally adequate . . . training" as would ensure their safety and freedom from restraints.¹⁴⁵

Courts considering the conditions of confinement in juvenile facilities reasoned that incarcerated youth were more like civilly committed adults than criminally convicted adult prisoners. Like civilly committed individuals, incarcerated youth had not yet been convicted of a crime and had ostensibly been locked away by the government for primarily rehabilitative purposes. In this vein, the First Circuit reasoned that youth

who have not been convicted of crimes[] have a due process interest in freedom from unnecessary bodily restraint which entitles them to closer scrutiny of their conditions of confinement than that accorded convicted criminals. . . . While there are important distinctions between the involuntary confinement of a mentally retarded person [like in *Youngberg*] and that of a problem juvenile, the crucial similarity is that in neither context may the state assert punishment as a legitimate in-

142. 457 U.S. 307 (1982).

143. See K. Edward Greene, *Mental Health Care for Children: Before and During State Custody*, 13 CAMPBELL L. REV. 1, 34–35 (1990) ("The [Due Process] Clause entitles juveniles to the same expansive rights to rehabilitative care as the rights of patients committed to mental institutions."); Hafemeister, *supra* note 4, at 86; Holland & Mlyniec, *supra* note 83, at 1801–03; see also Gary H. v. Hegstrom, 831 F.2d 1430, 1432 (9th Cir. 1987) ("[T]he more protective fourteenth amendment standard applies to conditions of confinement when detainees, whether or not juveniles, have not been convicted."); Santana v. Collazo, 714 F.2d 1172, 1180 (1st Cir. 1983) ("[B]ecause the state has no legitimate interest in punishment, the conditions of juvenile confinement, like those of confinement of the mentally ill, are subject to more exacting scrutiny than conditions imposed on convicted criminals." (citing *Youngberg*, 457 U.S. at 321)); State *ex rel.* S.D., 832 So.2d 415, 434 (La. Ct. App. 2002) (analyzing mental health treatment under *Youngberg* standard).

144. *Youngberg*, 457 U.S. at 315–16.

145. See *id.* at 316, 318. Presumably "minimally adequate . . . training" refers to some sort of physical or behavioral therapy, although the Court never defines the phrase explicitly.

terest warranting incarceration. The state acquires the right to punish an individual only after it has tried and convicted him as a criminal.¹⁴⁶

This analogy to civil commitment allowed the *Santana* court to remand the case for reconsideration of the facility's use of solitary confinement for months at a time.¹⁴⁷

Yet more recently, many courts have apparently discarded the *Youngberg* analysis. In its place, courts increasingly apply the adult standard governing pretrial detainees, as laid out in *Bell v. Wolfish*.¹⁴⁸ In *Bell*, the Supreme Court acknowledged that detainees being held for trial cannot constitutionally be punished, because they have not yet been criminally convicted.¹⁴⁹ Instead, courts must apply the Fourteenth Amendment to their claims, asking "whether the challenged condition is reasonably related to a legitimate governmental objective."¹⁵⁰ While the language of *Bell* is seemingly more protective of pretrial detainees' rights, "[i]n many instances . . . the lower courts have assimilated pretrial detainees' claims to those by convicted prisoners, applying the Eighth Amendment standard to both."¹⁵¹ Many courts make a similar move when evaluating the claims of incarcerated youth. These courts recite that the due process rights of adjudicated youth are at least as great as those of convicted adults, and then proceed to analyze the claim under the adult deliberate indifference test.¹⁵²

The Eighth Circuit took this approach in *A.J. v. Kierst*,¹⁵³ a case that bridges the gap between the old right to treatment test and the new *Bell v. Wolfish*-inspired test. The case involved a class action challenging overcrowding and conditions of confinement in a Missouri juvenile justice facility.¹⁵⁴ Early in its analysis, the court emphasized that it applied "the more protective Fourteenth Amendment," rather than the Eighth Amendment to plaintiffs' claims.¹⁵⁵ The

146. *Santana*, 714 F.2d at 1179. One might note that the incredible number of incarcerated youth who are mentally ill, and especially the presence of youth who were purposely relinquished in order to secure otherwise inaccessible mental healthcare, further supports this analogy.

147. *Id.* at 1181–82.

148. 441 U.S. 520, 523 (1979). For problems inherent in this approach, see Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1026–30 (2013) (discussing trends in the circuit courts for analyzing right to medical care claims among pretrial detainees).

149. *Bell*, 441 U.S. at 535–37.

150. *Id.* at 538–39.

151. Struve, *supra* note 148, at 1012.

152. *E.g.*, *A.M. ex rel. J.M.K. v. Luzerne Cty. Juvenile Det. Ctr.*, 372 F.3d 572, 579, 584 (3d Cir. 2004) (holding that "it is clear that detainees are entitled to no less protection than a convicted prisoner is entitled to under the Eighth Amendment" and concluding defendants were deliberately indifferent to the plaintiff's mental health needs).

153. 56 F.3d 849 (8th Cir. 1995).

154. *Id.* at 852–53.

155. *Id.* at 854.

court explained that it “cannot ignore the reality that assessments of juvenile conditions of confinement are necessarily different from those relevant to assessments of adult conditions of confinement.” Juvenile adjudications lack the procedural protections of adult criminal trials and place youth “in a system whose purpose is rehabilitative, not penal, in nature.”¹⁵⁶ Yet as the analysis progressed, the court relies solely on *Bell* as precedent, directly importing the adult standard into the juvenile context.¹⁵⁷

By contrast, in *R.G. v. Koller*,¹⁵⁸ a District of Hawaii court split its Fourteenth Amendment analysis into two strains, depending on whether the alleged injury was the result of official policy or the actions of independent third parties.¹⁵⁹ If the injury was the result of official policy, the court evaluated the policy to determine whether the facility’s actions amounted to punishment; it reasoned that without a formal trial with adequate procedural protections, the state could not legitimately impose punishment on incarcerated youth.¹⁶⁰ If the injury was the result of third party actions, the court evaluated facility officials’ actions for deliberate indifference, importing the Eighth Amendment standard.¹⁶¹ Both *A.J.* and *R.G.* further demonstrate courts’ increasing willingness to analogize youth claims to the adult prison context.

This trend is most pronounced when courts consider only claims brought by youth being held prior to adjudication—that is, young people who are the direct analogue of the adult pretrial detainees with whom *Bell* was concerned.¹⁶² Courts may find that youth being held prior to an adjudication of guilt are subject to the *Bell* standard because, as the *Hughes* court put it, “the administration of ‘punishment’ has no application to a pretrial detainee, whether juvenile or adult, who is by definition not yet found guilty of a crime and who is perforce not subject to ‘punishment,’ as the word ‘punishment’ is used in the Eighth Amendment.”¹⁶³ Thus courts use the fact that neither youth nor adult pretrial detainees have been convicted of a crime to gloss over the different purposes of the two systems, as well as the differing levels of vulnerability present between both populations. Ultimately, because *Bell* typically calls for applying the deliberate indifference test,

156. *Id.*

157. *Id.* at 855 &n.5.

158. 415 F. Supp. 2d 1129 (D. Haw. 2006).

159. *Id.* at 1152–53.

160. *Id.* at 1152.

161. *Id.* at 1153 (citing to *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc), which imports the adult Eighth Amendment deliberate indifference test into the Fourteenth Amendment analysis of adult pretrial detainees’ conditions of confinement claims).

162. *See, e.g.*, *Hughes v. Judd*, No. 8:12-CV-568-T-23MAP, 2015 WL 1737871, at *10 (M.D. Fla. Apr. 16, 2015); *see also Kierst*, 56 F.3d at 854.

163. *Hughes*, 2015 WL 1737871, at *10.

this trend means ever more youth claims are effectively being decided according to the adult Eighth Amendment standard.

It is understandable that courts would rely so heavily on cases drawn from the adult context, even when they recognize that youth are differently situated by virtue of the fact that they have not been tried or convicted. The Supreme Court has never even gestured at a youth-specific test, and the adult prison system is in many ways the closest analogue that courts have. Yet importing the adult standards without considering the ways in which youth are physiologically different invites callousness. Courts fail to take account of the unique traumas that institutionalization can and does inflict on young people, and particularly on mentally disabled young people.¹⁶⁴ Despite the promise that the Fourteenth Amendment *Youngberg* approach would allow youth to assert a positive right to rehabilitation, courts rarely consider this possibility in their analyses. Courts will still quote the rule from *Youngberg* when holding that the Fourteenth Amendment applies. But from there, courts fail to substantively engage with that case's requirements for civilly committed or detained individuals. Instead, courts now almost universally focus their opinions on only those rights youth would be guaranteed under a pure Eighth Amendment analysis: to safe conditions of confinement and access to the most basic mental healthcare.

Finally, applying the *Youngberg* analysis to the juvenile context appears to have evolved so as to encompass a high level of deference to administrators. In *Youngberg*, the Court's language outlined a broad balancing approach to guide courts' analyses: "[w]hether [an individual's] constitutional rights have been violated must be determined by balancing his [or her] liberty interests against the relevant state interests."¹⁶⁵ The test explicitly contemplates that the state agent will be a trained medical professional. A court must take into account whether the medical professional in question applied his or her professional judgment to the situation—unless "the decision by the professional is . . . a substantial departure from accepted professional judgment . . . as to demonstrate that the person responsible actually did not base the decision on such a judgment," the decision will be found presumptively valid.¹⁶⁶

The Court goes into some detail as to what makes someone a professional decisionmaker in the civil commitment context. Under *Youngberg*, a professional is a person with the relevant training and experience to make the decision in question.¹⁶⁷ Accordingly, "[l]ong-term treatment decisions normally should be made

164. See generally *supra* Part I.

165. *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982).

166. *Id.* at 323.

167. See *id.* at 323 n.30.

by persons with degrees in medicine or nursing” or other similar fields, whereas “day-to-day decisions regarding care—including decisions that must be made without delay—necessarily will be made in many instances by employees without formal training but who are subject to the supervision of qualified persons.”¹⁶⁸ Yet many juvenile prisons simply do not have the staffing or resources to provide youth with regular access to individuals supervised by someone with a degree in mental healthcare, let alone qualified mental health professionals.¹⁶⁹ Instead, decisions may be made by minimum-wage employees with minimal experience or prior training.¹⁷⁰

In practice, courts analogize *Youngberg* professional deference to the deference courts must give prison staff in the Eighth Amendment context. The Florida court in *Hughes* emphasized that “the corrections and detention professionals” who run juvenile prisons “receive[] under the governing constitutional law a strong presumption of correctness.”¹⁷¹ These professionals’ “supervision is subject to judicial intervention under the Fourteenth Amendment only in the extraordinary circumstance.”¹⁷² Similarly, the court in *Gary H. v. Hegstrom*¹⁷³—which overturned a detailed injunction that included instructions for improved mental healthcare—admonished the district court, stating that “[i]t is not the duty of the district judge to fashion operating manuals for state institutions.”¹⁷⁴ The *Gary H.* court determined that the state must be offered an opportunity to submit a proposal for meeting youths’ constitutional rights.¹⁷⁵ This language anticipates Justice Scalia’s scolding in *Lewis v. Casey*,¹⁷⁶ a case arising out of the adult prison

168. *Id.*

169. See ANDREA J. SEDLAK & KARLA S. MCPHERSON, OFFICE OF JUSTICE PROGRAMS, YOUTH’S NEEDS AND SERVICES 2–3, 9 (2010) (“SYRP documents considerable unevenness in the qualifications of mental health providers. Nearly 9 in 10 youth (88 percent) are in facilities where staff who counsel youth about their mental health problems are not mental health professionals.”); Rani A. Desai et al., *Mental Healthcare in Juvenile Detention Facilities: A Review*, 34 J. AM. ACAD. PSYCHIATRY L. 204, 208, 212 (2006) (“Juvenile detention staff, even when well trained, are not hired as milieu or therapeutic staff, again illustrating the limitations of detention as a substitute for a mental health setting.”).

170. See, e.g., Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001, 1015 (2005) (“The resumes of staff members recently hired by private juvenile justice contractors [in Florida] showed ‘training’ that included jobs at a donut shop, a turnpike toll booth, and a grocery store.”).

171. *Hughes v. Judd*, No. 8:12-CV-568-T-23MAP, 2015 WL 1737871, at *4 (M.D. Fla. Apr. 16, 2015).

172. *Id.*

173. 831 F.2d 1430 (9th Cir. 1987).

174. *Id.* at 1433.

175. See *id.* (“On remand, the trial court should invite the state to submit a report of the remedial actions it has taken to date, with or without the compulsion of the challenged order, and to designate which remedial actions it will take in the future.”).

176. 518 U.S. 343 (1996).

context, that the lower court's expansive order was "the *ne plus ultra* of what our opinions have lamented as a court's 'in the name of the Constitution, becom[ing] . . . enmeshed in the minutiae of prison operations.'"¹⁷⁷ Justice Scalia went on to require that the lower court "give adequate consideration to the views of state prison authorities" in its final order, a move echoing the order in *Gary H.*¹⁷⁸

Yet there is a strong argument to be made that youths' claims should be entitled to a higher level of scrutiny and correctional authorities afforded a lower level of deference, than adult prisoners' claims, or even claims by adult pretrial detainees. In *Bell v. Wolfish*,¹⁷⁹ the Supreme Court premised its requirement of deference on "the realities of running a corrections institution," which require "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."¹⁸⁰ Unlike in adult prisons, most youth confined in juvenile prisons are there for nonviolent offenses.¹⁸¹ Only one in four incarcerated youth has committed a violent crime, while "nearly 40 percent of juvenile commitments and detentions are due to technical violations of probation, drug possession, low-level property offenses, public order offenses and status offenses."¹⁸² Because maintaining internal security is less of a concern and those young people the state has detained were never convicted of any crime, courts should have higher expectations for the conditions of youth confinement.

Nevertheless, broadly worded claims for mental healthcare in juvenile prisons generally go unanswered. In *Stevens v. Harper*,¹⁸³ a court refused to certify a class claiming inadequate provision of mental health services in the California Youth Authority.¹⁸⁴ The court held that while, "[u]ndoubtedly, [the provision of mental healthcare in juvenile prisons] is an important topic" it is better left to "the state legislature and . . . state administrators. . . . [B]ecause the court is not a policy making body, it can only adjudicate specific controversies."¹⁸⁵ Although certainly tied to a general reluctance on the part of the courts to issue broad remedial orders since the end of the civil rights era, the deference that has developed around the Fourteenth Amendment appears to conflate the appropri-

177. *Id.* at 362 (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)).

178. *Id.*

179. 441 U.S. 520 (1979).

180. *Id.* at 547 & n.29.

181. See THE ANNIE E. CASEY FOUND., REDUCING YOUTH INCARCERATION IN THE U.S. 2 (2013).

182. *Id.*

183. 213 F.R.D. 358 (E.D. Cal. 2002).

184. See *id.* at 382.

185. *Id.*

ate levels of deference to prison administrators with that due to staff in juvenile prisons—without considering the consequences this deference may have on incarcerated youth or whether it is appropriate in that context.

III. “KIDS ARE DIFFERENT”¹⁸⁶: CHANGES IN THE SUPREME COURT’S EIGHTH AMENDMENT YOUTH SENTENCING DOCTRINE

The Supreme Court’s recent decisions in *Graham v. Florida*¹⁸⁷ and *Miller v. Alabama*¹⁸⁸ indicate that youth prisoners may have expanded protections under the Eighth Amendment, beyond those offered to adult prisoners. Extending the logic of those decisions to the post-adjudication context could be the first step in shaping a right to mental healthcare doctrine specifically targeted to the needs of incarcerated youth. The *Graham* and *Miller* decisions recognized that youth are physically and developmentally distinct from adults, and that therefore, the Eighth Amendment should apply differently to youth sentencing decisions. These physical and developmental differences extend to the post-adjudication context, as sentencing and incarceration are simply two points on the same timeline for any individual young person. Taking the Court’s decisions in these cases seriously requires extending their logic to the post-adjudication context.

A. The Logic of *Graham* and *Miller*

Starting in 2005, the Supreme Court began to radically reshape its sentencing doctrine for youth offenders. In *Roper v. Simmons*,¹⁸⁹ the Court held that the Eighth Amendment forbids putting youth offenders to death, even when they have been tried and convicted as adults.¹⁹⁰ The Court based its opinion on social science demonstrating that youth have a diminished capacity for decisionmaking as compared with adults, but also a greater capacity for rehabilitation and change.¹⁹¹ This basic insight into the physical and mental differences between youth and adults has translated into several Supreme Court decisions since *Roper*.

Graham v. Florida heralded the next major change in the Court’s application of the Eighth Amendment to youth offenders. There, the Supreme Court held that the Eighth Amendment categorically prohibits sentencing juvenile youth

186. St. Vincent, *supra* note 11.

187. 560 U.S. 48 (2010).

188. 132 S. Ct. 2455 (2012).

189. 543 U.S. 551 (2005).

190. *See id.* at 573–74.

191. *See id.* at 569–70.

nonhomicide offenders to life without parole.¹⁹² The case also marked the first time the Court found that youth could be treated as a separate class for purposes of an Eighth Amendment challenge to a term of years sentence.¹⁹³ Importantly, the Court found in its analysis that the culpability of juvenile offenders is categorically lessened by virtue of their youth.¹⁹⁴ Thus, while “[a] juvenile is not absolved of responsibility” for his or her actions, any transgression “is not as morally reprehensible as that of an adult.”¹⁹⁵ Furthermore, youth offenders are (by definition, really) immature, and “more capable of change” than adult offenders.¹⁹⁶ It is therefore less likely that youth offenders are incorrigible: “a greater possibility exists that a minor’s character deficiencies will be reformed.”¹⁹⁷ Taken together, these factors militated against allowing judges to sentence juvenile nonhomicide offenders to life without parole.

In *Miller v. Alabama*, the Court extended its reasoning in *Graham* to prohibit mandatory sentences of life without parole for all youth defendants.¹⁹⁸ The Court explicitly leaned on the findings in *Graham* regarding the lesser culpability and increased capacity for reform among young people to hold that even when youth have committed murder, they are entitled to an individualized sentencing scheme before being sentenced to life without parole.¹⁹⁹ The Court emphasized that youth offenders lack the maturity of adults, have an underdeveloped sense of responsibility, are more vulnerable to negative influences, have less control over their environment, and have a more plastic character (and thus are more likely to be reformed) than adult offenders.²⁰⁰ In explaining its decision, the Court reminded readers of the language in *Graham*, that “[a]n offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”²⁰¹

This decision, in addition to solidifying the Court’s reasoning in *Graham*, provides a model for future extensions of that case’s rationale. It might be argued that a literal reading of the Court’s decision in *Graham* would require that it remain confined to the narrow circumstances of nonhomicide youth offenders.²⁰²

192. *Graham*, 560 U.S. at 74. It bears noting that these youth were being sentenced as adults in the adult criminal system, and therefore were due the protections of the Eighth Amendment.

193. *See id.* at 61–62.

194. *See id.* at 67–69.

195. *Id.* at 68 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)).

196. *See id.*

197. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

198. 132 S. Ct. 2455, 2460 (2012). Again, the *Miller* defendants had been tried and sentenced as adults.

199. *See id.* at 2464.

200. *Id.*

201. *Id.* at 2462 (quoting *Graham*, 560 U.S. at 76).

202. *See id.* at 2458.

Graham was a conservatively worded decision that took care to delineate exactly when and why it should apply. Yet in *Miller*, the Court found that “none of what [the *Graham* court] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.”²⁰³ Instead, the specific vulnerabilities and limited culpability of youth offenders required adjusting the Eighth Amendment analysis when deciding on an appropriate sentence. The court emphasized that a life without parole sentence imposed on a young person is “the same . . . in name only” to the same sentence imposed on an adult.²⁰⁴

Indeed, while not explicitly referencing this line of cases, the Court had already extended this type of rationale outside of the Eighth Amendment sentencing context a year before *Miller* was decided. In *J.D.B. v. North Carolina*,²⁰⁵ the Court held that certain inherent characteristics of youth—including that youth are “less mature and responsible,” “often lack . . . experience, perspective, and judgment,” and “are more vulnerable or susceptible to outside pressures” than adults—require that the age of a suspect be taken into account when determining whether the suspect was in custody for *Miranda* purposes.²⁰⁶ Like the first prong of the Eighth Amendment deliberate indifference test, the question of whether a suspect was in custody is an objective test.²⁰⁷ Yet the Court found that the objective analysis would not be “damage[d]” by taking into account youthful characteristics that “any parent knows—indeed . . . any person knows—about children generally.”²⁰⁸ Further, the Court emphasized that consideration of the unique characteristics of youth has a long and well-established history in the common law.²⁰⁹ To this day, an understanding that youth lack the maturity and judgment of an adult influences their ability to buy and sell property, enter into contracts, or be held liable for negligent acts.²¹⁰ Although not an Eighth Amendment case, the *J.D.B.* decision provides further support for extending the Court’s modified youth jurisprudence beyond the four corners of its *Graham* and *Miller* sentencing decisions, and into the post-adjudication context.

203. *Id.* at 2465.

204. *Id.* at 2466 (quoting *Graham*, 560 U.S. at 70).

205. 131 S. Ct. 2394 (2011).

206. *Id.* at 2403 (first quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982); then quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979); and then quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

207. *See, e.g.*, *Stansbury v. California*, 511 U.S. 318, 325 (1994) (per curiam).

208. *J.D.B.*, 131 S. Ct. at 2403 (quoting *Roper*, 543 U.S. at 569).

209. *See id.* at 2403–04.

210. *See id.*

IV. RAISING THE FLOOR: A MODIFIED EIGHTH AMENDMENT FOR YOUTH

At the very least, youth are entitled to the same level of constitutional protection as adult prisoners.²¹¹ Yet under the logic of *Graham* and *Miller* it would seem that the post-sentencing claims of youth also ought to be evaluated under a modified test that takes their unique needs and vulnerabilities into account. But this raises the question: what would a youth-sensitive Eighth Amendment analysis look like in the juvenile prison? This Part first argues that the logic of *Graham* and *Miller* strongly counsels adjusting post-adjudication standards to account for the ways in which “kids are different.” The Part then proposes a modified Eighth Amendment framework for evaluating youth claims and addresses some concerns this approach might raise.

A. Extending *Graham* and *Miller* to the Post-Adjudication Context

The same characteristics of youth that affected the juvenile sentencing analysis in *Graham* and *Miller* should also be taken into account when youth are placed in juvenile prison following an adjudication of delinquency. It would make little sense to extend protections to youth during sentencing on the basis of those characteristics, only to pull back when evaluating the conditions of confinement of those same youth, post-adjudication.

Much of the language in *Graham* was dedicated to examining whether penological justifications could support sentencing youth convicted of nonhomicide crimes to life without parole, within the adult criminal system. The Court determined that neither retribution, deterrence, incapacitation, nor rehabilitative goals could justify imposing such a sentence on youth in light of their diminished culpability when compared to adults.²¹² Although retribution “is a legitimate reason to punish . . . it [could not] support the sentence at issue” in *Graham* because of the diminished culpability of juvenile offenders and the less severe nature of a nonhomicide crime.²¹³ Post-adjudication, youth continue to have “diminished culpability” and “greater prospects for reform” than adults.²¹⁴ If youth are understood to be less culpable for their offenses at sentencing, even within the adult criminal system, one might expect to find higher standards for those conditions

211. See *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (“*A fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.”).

212. See *Graham v. Florida*, 560 U.S. 48, 71–74 (2010).

213. *Id.* at 71.

214. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

once those same youth have been incarcerated. That is, there should be less of a focus on punishment for youth offenders because, knowing what we do about youth psychology and applying the lessons of the Supreme Court's Eighth Amendment youth sentencing doctrine, there is simply less to punish.²¹⁵

The *Graham* Court found that deterrence, too, was insufficient to support the sentence. "Because juveniles' 'lack of maturity and an underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,' they are less likely to take a possible punishment into consideration when making decisions."²¹⁶ These "significant gaps"²¹⁷ in development and behavior between young people and adults impact the capacities and vulnerabilities of youth just as much once they have been locked up in juvenile prison. Logically, it must be expected that young people will continue to exhibit these same traits both before and after adjudication, because these traits arise out of psychology, not environment. One does not simply become an adult, equipped with a fully functioning adult brain, the minute one steps foot inside a juvenile prison. Ultimately this means that, for example, youth may need more guidance and understanding from staff and administrators, as they may have more difficulty consistently conforming their behavior to the strict rules and expectations of a juvenile facility.

This is especially true for those with mental illness or who have a history of complex trauma. Having been betrayed in the past by adults they trusted, these young individuals are more likely to "test" facility staff by intentionally breaking rules in ways calculated to be stressful and difficult for staff.²¹⁸ Although well-supported by research in the field of psychology, this intuition should also be common sense for any individual who has spent some time with children or adolescents. Youth recklessness, as the Supreme Court depicts it, is inherent to our social understandings of what it means to be a teenager. An Eighth Amendment analysis of juvenile prison facilities' handling of rule-breaking and related issues,

215. This rationale is a fitting compliment to—or possibly a reinvigoration of—the traditional Progressive Era justifications for the inappropriateness of punishment in the juvenile post-adjudication context.

216. *Graham*, 560 U.S. at 72 (citation omitted) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

217. *Miller*, 132 S. Ct. at 2464.

218. Ford et al., *supra* note 71, at 701–02; *see also, e.g.*, Kevin M. Fitzpatrick & Janet P. Boldizar, *The Prevalence and Consequences of Exposure to Violence Among African-American Youth*, 32 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 424, 425 (1993) (“[C]hildren exposed to violence are more likely than those not exposed to suffer from a variety of social and emotional problems (e.g., low self-esteem, learned helplessness, anger, and aggression), as well as to experience problems in school and getting along with peers and family members. Many of these studies find that children were reporting PTSD symptomatology as a consequence of this exposure.”) (citation omitted).

then, should be expected to take into account the lower maturity and increased recklessness of incarcerated young people.

Moreover, young people who have been locked up continue to be “more vulnerable . . . to negative influences and outside pressures”²¹⁹ than incarcerated adults. Again, this may make it more difficult for incarcerated youth (like free youth) to consistently follow rules or directions or to comply with behavior plans. This may be especially true when conditions within the facility reinforce those negative behaviors that likely contributed to the young person’s incarceration in the first place. For example, when youth feel unsafe due to staff’s lack of responsiveness²²⁰ or outright abuse,²²¹ they react by putting on a hard or violent demeanor in order to protect themselves from further abuse.²²² When youth shut down like this as a result of conditions in juvenile prison, a critical window of possibility closes. Rather than learning positive behaviors from the adults around them, they double down on the destructive, antisocial behaviors that may have contributed to landing them in juvenile prison in the first place.

As Chief Justice Roberts described in *Graham*, an incarcerated youth’s character continues to be “less fixed” and “more transitory”²²³ than that of an incarcerated adult. Although this means that facility administrators may have greater hope in the results of well-executed rehabilitative efforts, it also means that failures to rehabilitate may seriously inhibit a young person’s long-term prospects. Indeed, incarcerated youth with mental illness are particularly vulnerable in this regard, as untreated mental illness in a young person often leads to worse mental health outcomes as an adult.²²⁴ Because environment and social modeling have a greater effect on incarcerated youth than on incarcerated adults, administrators and staff of juvenile prisons should be expected to be aware of and sensitive to these vulnerabilities in youth. Further, they should be held accountable when facilities fail to meet certain minimum standards.

219. *Graham*, 560 U.S. at 68 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

220. See, e.g., *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1145–46 (D. Haw. 2006) (staff ignored verbal and physical abuse directed at plaintiffs due to their LGBT status).

221. See, e.g., *J.P. v. Taft*, 439 F. Supp. 2d 793, 800 (S.D. Ohio 2006) (juvenile corrections officer strangled plaintiff to the point of unconsciousness).

222. See notes 71 and 73; c.f. Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 971 (2012) (describing the “hypermasculinity imperative” of the L.A. County Jail, which “puts pressure on residents to seem ‘hard and tough, and [not] show weakness’” (quoting Derrick Corley, *Prison Friendships*, in *PRISON MASCULINITIES* 106 (Don Sabo et al. eds., 2001))).

223. *Graham*, 560 U.S. at 89 (Roberts, C.J., concurring) (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

224. See *supra* Part I.C.

Finally, the *Graham* Court held that, although it is true that incarcerating juvenile nonhomicide offenders for life without any possibility of parole would incapacitate them, “[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment’s rule against disproportionate sentences be a nullity.”²²⁵ In the case of youth, determining that any individual juvenile must be incapacitated for life requires making the determination that the youth is incorrigible—and doing so before that youth has ever had a chance to grow or mature.²²⁶ The Court concluded that this analysis was flawed, as “incorrigibility is inconsistent with youth.”²²⁷

The flip side of this determination is an understanding that youth are inherently more likely to benefit from rehabilitation programs than adult offenders. Because young people are understood to be more susceptible to environmental influences, we should expect that youth detention facilities accommodate this inherent capacity for reform and be held to a higher standard for their rehabilitative efforts than adult prison administrators. Just as sentencing judges must take into account young defendants’ decreased culpability and increased capacity for reform, so too should juvenile prison administrators and staff charged with carrying out those sentences be expected to understand and accommodate the unique needs and capacities of incarcerated youth.²²⁸ If the Eighth Amendment requires

225. *Graham*, 560 U.S. at 73.

226. *See id.*

227. *Id.* (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968)).

228. At least one district court has declined to find that the Supreme Court’s rulings in *Graham* and *Miller* should be extended to youth conditions of confinement claims. In *Hughes v. Judd*, No. 8:12-CV-568-T-23MAP, 2015 WL 1737871 (M.D. Fla. Apr. 16, 2015), plaintiffs challenged the conditions of confinement in the juvenile unit of the Central County Jail of Bartow, Polk County, Florida, where they were being held prior to adjudication. *Id.* at *1. Among other things, plaintiffs claimed that *Graham* and *Miller* together stood for the proposition that “kids are different” and are entitled to a higher standard of care than adults while incarcerated. *Id.* at *11. A skeptical court rejected this reading, asserting unequivocally that:

[t]he declaration that ‘children are constitutionally different for the purpose of sentencing’ is neither a pervasive rule of law nor a pre-emptive finding of fact with indiscriminate application to, or with supervening effect in, every circumstance in which a juvenile appears; the statement neither pretends nor aspires to general application.

Id. at *12. Yet the court never explained why it would be inappropriate to extend the reasoning of *Graham* and *Miller* to conditions of confinement claims arising out of juvenile prisons. The court simply asserted that:

[e]ven if Justice Kagan had said ‘children are constitutionally different,’ as the plaintiffs suggest, that catchy but insubstantial phrase would resolve as little or less than the similarly catchy but equally insubstantial phrase that it echoes: ‘death is different,’ In point of fact, as both common sense and metaphysics confirm, everything is different from everything else.

Id. In determining that *Graham* and *Miller* should not bear on its analysis, the court relies on a formalist distinction between sentencing and incarceration. It is content to note that, along with

judges to apply a different legal standard when sentencing young people charged and convicted as adults, surely it is even more important to apply an adjusted standard to the right to mental healthcare claims of youth defendants who prosecutors have chosen not to try as adults, and who therefore cannot constitutionally be punished.

B. Calibrating the Eighth Amendment: A Youth-Sensitive Test for Mental Healthcare Claims in Juvenile Prison

As described above in Part II.A, adults' claims alleging the unconstitutional deficiencies of mental healthcare in prison are evaluated under a two-pronged approach. This test includes both an objective and a subjective component. Extending the decisions in *Graham* and *Miller* to post-sentencing juvenile incarceration should influence both the objective and subjective prongs of the Eighth Amendment analysis. As applied, the test should explicitly incorporate some consideration of the ways youth are categorically different, as articulated in *Graham* and *Miller*.

A recent article by Levick and colleagues²²⁹ provides a useful analysis of how the *Graham* and *Miller* decisions could affect the objective prong of the Eighth Amendment deliberate indifference test. Currently, the objective prong of the test looks to whether plaintiffs have demonstrated a sufficiently serious medical need.²³⁰ In the case of structural claims, the question is whether plaintiffs have demonstrated that they faced a substantial risk of serious harm as a result of the allegedly unconstitutional conditions.²³¹ The Levick article argues that when assessing the conditions of confinement claims of incarcerated youth, the objective analysis "must account for the unique juvenile vulnerability to harm in confinement."²³² In particular, the test should recognize that less harm is necessary to trigger constitutional protection in the juvenile prison context than when evaluating adult prisons. As previously discussed, the consequences of neglect and harsh punishment are much higher for young people than for adults, including more serious long-term effects on personality, mental health, and behavior.²³³ As the Court noted in *J.D.B.*, "the effect of the . . . setting cannot be disentangled from

everything else, the two are different. The court fails to consider whether the factors raised by the Supreme Court in *Graham* and *Miller* are sufficiently applicable to incarcerated youth to justify their application outside of the narrow context of criminal sentencing.

229. Levick et al., *supra* note 11.

230. See *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

231. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1925 n.3 (2011).

232. Levick et al., *supra* note 11, at 313.

233. See *id.*; see also *supra* Part I.

the identity of the person” in question.²³⁴ When courts apply the objective prong of the test to juvenile prisons, they must also take the distinctive characteristics of youth into account.

Expanding the objective analysis is especially important when evaluating the right to mental healthcare claims of incarcerated youth. As discussed above,²³⁵ a failure to treat young people with mental illness greatly increases the chances that those individuals will develop serious mental disorders as they become adults. Because youth disorders tend to present with more serious symptoms than adult disorders, courts should expect that young people who develop disorders while incarcerated will develop more disabling versions of those disorders than would adults.

Finally, conditions that one would expect an adult to tolerate, albeit with some discomfort, may be more generally damaging to the mental health of incarcerated youth. As the Supreme Court stated in *Hudson v. McMillian*,²³⁶ “[t]he objective component of an Eighth Amendment claim is . . . contextual and responsive to ‘contemporary standards of decency.’”²³⁷ While society may not have promised adult prisoners a rose garden,²³⁸ it must expect somewhat more when it comes to the housing and mental healthcare of youth. Incarcerated young people are simply at a critical period in their lives, where more minor harms would be expected to have a much greater impact on their development than would those same harms when visited upon adults.

The subjective prong of the *Farmer* deliberate indifference test proves more troublesome when attempting to extend the *Graham/Miller* rationale. Levick and colleagues argue that an objective, criminal negligence test “that imposes liability when the prison official disregards an obvious risk of harm better responds to adolescent developmental immaturity” and would be more appropriate for evaluating staff liability in a conditions of confinement cause of action.²³⁹ The authors further suggest that maintaining a subjective test for youth claims would

234. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2405 (2011).

235. *See supra* Part I.C.

236. 503 U.S. 1 (1992).

237. *Id.* at 8 (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).

238. *Atiyeh v. Capps*, 449 U.S. 1312, 1315–16 (1981) (containing Chief Justice Rehnquist’s famously callow pronouncement that “nobody promised [convicted prisoners] a rose garden”; he further explained that “I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression, and the like. They have been convicted of crime, and there is nothing in the Constitution which forbids their being penalized as a result of that conviction.”).

239. Levick et al., *supra* note 11, at 313.

“undermine[] the requirement implicit in a rehabilitative system that staff proactively engage youth.”²⁴⁰

Yet this proposal disregards current Eighth Amendment jurisprudence. In *Farmer*, the Court justified its imposition of a criminal recklessness standard on prison officials by pointing to the language of the Eighth Amendment itself, which “does not outlaw cruel and unusual ‘conditions’; [but only] outlaws cruel and unusual ‘punishments.’”²⁴¹ And for a prison official’s action to be a punishment, according to the Court’s previous decision in *Wilson*, “some mental element must be attributed to the inflicting officer before [the action] can qualify.”²⁴² At first blush, it appears that there is simply no room for an objective standard to take the place of the *Farmer* test’s intent prong. For a court to consider prison conditions “punishment”—and thus invoke the protections of the Eighth Amendment—the defendants in the case must at the very least have been aware of a significant risk of serious harm.²⁴³

Nevertheless, “[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”²⁴⁴ By virtue of the fact that incarcerated youth have not been convicted of any crime, they have a “right to be free from punishment.”²⁴⁵ The quasi-criminal status of young people, then, continues to frustrate a clean application of the Eighth Amendment to the juvenile context. A youth-informed Eighth Amendment test should recognize this and accommodate the hybrid nature of the system. Therefore, for purposes of adjudicating the right to mental healthcare claims of youth prisoners, courts should not feel bound to the *Farmer* criminal recklessness test when determining whether juvenile prison staff or administration were deliberately indifferent. Staff who work with sentenced and incarcerated youth should be expected to understand the unique needs and vulnerabilities of youth—especially because the Su-

240. *Id.* at 314.

241. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

242. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991).

243. For a critical take on this requirement, see Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009). In her article, Dolovich argues that “what makes an experience ‘punishment’ is not the mental state of the inflicting officer, but whether prisoners’ suffering is traceable to state-created conditions of confinement.” *Id.* at 897. Ultimately, Dolovich makes the case for replacing the criminal recklessness test with an objective test, either a well-tailored negligence standard, or a modified strict liability standard. *Id.* at 936.

244. *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982) (comparing this statement to the decision in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

245. *Bell v. Wolfish*, 441 U.S. 520, 534 (1979).

preme Court has already done so. Courts can and should apply an objective test to youth claims.²⁴⁶

An objective test would require courts to look to whether staff or administration knew or should have known of the plaintiff's risk. This approach would also allow courts to consider what minimum standards of care should be required in the juvenile context. Considering that juvenile corrections staff are specifically employed to work with delinquent youth, society should be able to expect that young people's increased needs and risks while in juvenile prison will be obvious to staff.²⁴⁷ The First Circuit contemplated this possibility over thirty years ago, when it noted that "[i]t would not be unreasonable to assume that society's conscience might be shocked by the conditions of confinement imposed on a juvenile . . . when it would be unwilling to label the same treatment, given to an adult, cruel and unusual."²⁴⁸ When common sense—"what 'any parent knows'"²⁴⁹—dictates that incarcerated youth who have serious mental health needs require treatment, society must expect that the staff entrusted to care for those youth be able to identify and reasonably respond to those needs.²⁵⁰

Applying the test to one claim from the *C.B. v. Walnut Grove*²⁵¹ case demonstrates how the test would play out in practice, including how it would balance punitive and rehabilitative concerns.²⁵² As discussed in Part I, the DOJ

246. Catherine Struve has advocated for a similar standard in the context of adult pretrial detainees, who are also detained without a determination of guilt. See Struve, *supra* note 148, at 1068 (“[W]here the Eighth Amendment . . . requires that the defendant *actually knew* of the risk, my proposed test would permit liability if the defendant *knew or reasonably should have known* of the risk.”) (footnote omitted).

247. See Levick et al., *supra* note 11, at 313 (“[I]t is not unreasonable to expect that juvenile corrections staff understand—or are at least aware of—juveniles’ unique vulnerability to harm and that they act accordingly.”).

248. *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983).

249. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

250. Like Struve, I would also allow staff and administration to mount a defense on the basis that they reasonably responded to the risk, “even if the harm ultimately was not averted.” Struve, *supra* note 148, at 1069 (quoting *Farmer v. Brennan*, 511 U.S. 825, 844 (1994)). However, this defense should be scrutinized—as I discuss below, courts should not exercise the same level of deference to juvenile prison administrators as they do in the prison context.

251. Order Approving Settlement, *Depriest ex rel C.B. v. Walnut Grove Corr. Auth.*, No. 3:10-cv-663 (S.D. Miss. Mar. 25, 2012), ECF No. 75.

252. I use *Walnut Grove* as an example even though it was settled before it could be evaluated by a court because there are few cases in which a court has clearly considered the availability and quality of mental healthcare for incarcerated youth under the adult Eighth Amendment standard in recent years. This is in part due to the proliferation of standards governing youth right to treatment claims, as I discuss in Part II, *supra*. In addition, as was the case with *Walnut Grove* itself, these cases often settle before the court can issue a decision. See, e.g., Consent Decree, *Farrell v. Allen*, No. RG-03079344 (Cal. Sup. Court., Nov. 8, 2004), <http://www.clearinghouse.net/chDocs/public/JI-CA-0013-0002.pdf>.

found that Walnut Grove staff members were unresponsive to suicidal youth. Very few young people who expressed suicidal tendencies received follow-up evaluations from a psychiatrist or were properly monitored. Some were ignored for hours or days by inattentive staff. Faced with this claim, a court using the youth-specific Eighth Amendment test would first look at the staff's alleged action in context, as applied to youth. The question for the court would be: is the fact that suicidal youth were ignored for long periods of time sufficiently serious to trigger constitutional protection? Given youths' impulsiveness and their greater vulnerability to isolation, the risk for harm seems especially great in this case. Impulsiveness means youth may be more likely to follow through on threats of suicide; a failure to treat youth in this case may have longer-term effects than a failure to treat adults would. The objective prong of the test tips in favor of finding a constitutional violation.

Second, the court should ask whether staff knew or should have known about the risk of harm facing youth. The DOJ report notes that youth openly discussed plans to commit suicide, meaning there is some evidence that staff actually knew of the risk of harm facing their charges. Yet even if this had not been the case, it is not unreasonable to expect staff to understand the risk facing suicidal youth who are left unsupervised for extended periods of time. Best practices aside, it is simply common sense that suicidal youth need access to mental healthcare and monitoring. A flexible, context-dependent Eighth Amendment approach should hold staff accountable for recognizing the high likelihood of harm in this case, whether or not staff actually did so. Therefore, a court should find that the youth in Walnut Grove were unconstitutionally deprived of access to mental healthcare while incarcerated.

During confinement, youth continues to be "a moment and 'condition of life when a person may be most susceptible to influence and to psychological damage."²⁵³ As discussed above, this insight is especially salient when considering the vulnerabilities of those young people who are psychologically disabled. The same actions on the part of juvenile prison staff, on the one hand, or correctional officers in an adult prison on the other, would almost certainly cause more serious harm in the incarcerated young person than the incarcerated adult. Those same actions would subject a mentally ill young person to still higher risks. And considering the staggering number of young people living with a serious mental illness in juvenile prison, one can expect that a very high proportion of incarcerated youth will face this substantially increased likelihood of great harm. The rates of youth mental health morbidity clearly demonstrate the key vulnerabilities

253. *Miller*, 132 S. Ct. at 2467 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

of youth, and consequently the need for a higher Eighth Amendment baseline when evaluating their right to treatment claims.

C. The Problem of Punishment

A youth-informed Eighth Amendment test still faces the problem of conceding that one purpose of the juvenile justice system is to punish youth.²⁵⁴ Yet this battle has in some ways already been lost. Starting in the late 1980s, juvenile courts and codes were revised to increasingly emphasize punishment as a primary goal of juvenile intervention and began to treat justice-involved youth more like adult prisoners. Some states even began to outright charge and try some youth offenders as adults.²⁵⁵ Across the nation, current state statutes governing the operation of juvenile courts and detention centers identify the purposes of the juvenile justice system to include both rehabilitation and punishment.²⁵⁶ Despite the vast number of mentally ill youth in juvenile prison, the system as currently conceived clearly has a punitive as well as a rehabilitative purpose.

Yet the fact remains that, under current law, incarcerated youth have not been tried or convicted of a crime. The quasi-criminal system may incorporate a punitive impulse but has not afforded youth adequate due process protections to justify criminal punishment.²⁵⁷ The youth-specific Eighth Amendment analysis proposed above attempts to strike a balance that responds to the hybrid nature of the juvenile justice system. The objective prong of the youth-specific test acknowledges the similarities between youth prison and adult prison, both in purpose and in form. The new objective prong would ask courts to evaluate serious medical needs not in the abstract, but rather in the context of the heightened vulnerability of incarcerated youth. Similarly, translating the subjective prong to a reasonableness test (whether staff knew or should have known of the need for mental healthcare) effectively requires a higher level of training and expertise among staff. In the case of young people, ignorance is not an excuse. This re-

254. See *supra* Part II.A (discussing the adult Eighth Amendment test, which is only applicable to cruel and unusual *punishment*).

255. See, e.g., Conward, *supra* note 69, at 45 (describing “pioneering” provisions allowing courts and prosecutors to file cases against juvenile offenders in adult criminal courts).

256. The California Welfare and Institutions Code, for example, states that justice-involved youth “shall . . . receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances.” CAL. WELF. & INST. CODE § 202(b) (West 2008). “This guidance may include punishment” but only if it “is consistent with the rehabilitative objectives” of the code. *Id.*

257. “[T]he less protective Eighth Amendment standard applies ‘only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.’” *Graham v. Connor*, 490 U.S. 386, 398 (1989) (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)).

quirement therefore includes an implicit acknowledgement that young people are locked up for other purposes in addition to punishment. As a whole, the youth-specific test explicitly reminds courts that “kids are different,”²⁵⁸ in a way that applying the typical, adult Eighth Amendment test to the youth context does not.

By its own terms, this test requires courts to adjust the Eighth Amendment test to be more responsive to the fact that these claims are raised by young people—and therefore, should not simply apply the adult test and precedents without inquiring into whether that is appropriate for the youth context. Although this test recognizes the fact that youth are subject to punishment while incarcerated, the proposed modifications remind courts that even while being punished, the needs of young people differ from those of adults.

D. The Issue of Cost

Finally, underlying this analysis is the lurking question of whether courts will actually apply the test as proposed—or whether it would be rejected because, if applied rigorously, the test would require substantial and expensive changes to the majority juvenile prisons, as currently administered.²⁵⁹ Aaron Sussman acknowledges this concern when he predicts that *Graham* and *Miller* will have little effect on juvenile justice reform efforts in practice.²⁶⁰ Sussman argues that “[h]olding the Court to its theory as properly applied to the conditions within juvenile justice systems . . . would entail economic and political costs so substantial that they virtually ensure such an application to be a non-starter.”²⁶¹ This argument speaks directly to this Comment’s position that the reasoning of *Graham* and *Miller* should be extended to youth Eighth Amendment claims.

It may be that the economic and political costs of reform are so high that courts will hesitate to apply the context-dependent version of the Eighth Amendment test that this Comment proposes. Perhaps the only response to such hesitation is simply to point out the extent of the need in juvenile prisons and the great damage that we regularly inflict on our kids when we leave them to suffer from untreated mental illnesses. Ultimately, the human costs of failing to

258. *E.g.*, *St. Vincent*, *supra* note 11.

259. *See Hughes v. Judd*, No. 8:12-CV-568-T-23MAP, 2015 WL 1737871 at *4 (M.D. Fla. Apr. 16, 2015) (fearing that a broader interpretation of the standard of care in juvenile prisons would require “wholesale intervention into detention and incarceration at most of the facilities in the United States”).

260. *See Sussman*, *supra* note 4, at 383 (arguing that *Graham* “creates a significant categorical rule but is premised on reasoning bearing little relationship to the reality of the juvenile justice system—a disjuncture that impedes the application of such reasoning to other areas in critical need of reform”).

261. *Id.*

more vigorously protect the rights of mentally ill youth outweigh the economic costs of reform.²⁶² Having recognized that young people are uniquely vulnerable, it is both irresponsible and dangerous to then fail to elaborate a more protective test for evaluating violations of their rights. Formulating that test to explicitly acknowledge the physical and mental differences of youth may go some way toward reminding courts to apply it with care for the heightened risk of harm facing youth. Further, this test would be simpler, clearer, and less strained than the tests that many courts currently use to evaluate youth claims. As Justice Kennedy cautioned in *Graham*, “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”²⁶³ The same is true of the substantive standards governing youth prisoners’ right to treatment claims. This Comment’s proposed youth-specific Eighth Amendment test suggests one means of doing so.

CONCLUSION

The huge number of youth incarcerated with mental illness underscores the critical importance of setting a standard for constitutionally adequate mental healthcare in youth prisons. Even granting that punishment is an increasingly acceptable reason for incarcerating youth under the modern regime, the evolving standards of decency embodied in the Eighth Amendment should require holding facilities to the minimum standard of at least not further damaging their vulnerable charges. As the Supreme Court noted in *Graham* and *Miller*, youth are less culpable for the crimes they have committed. Thus, their time in juvenile prison should be marked by at least the possibility of having basic medical needs like mental illness treated.

For years, courts have implemented a confused, haphazard doctrine to evaluate young people’s right to mental healthcare claims. Tests vary widely between jurisdictions, creating both unpredictability and a troubling indifference to the unique needs and vulnerabilities of mentally ill youth. Yet recent developments in the Eighth Amendment youth sentencing doctrine have opened the door to reconsidering how courts evaluate these claims. The Supreme Court’s decisions

262. See *supra* Part I. Common sense and experience with the current adult prison system suggests that the economic costs of continuing to house young people who are more likely to recidivate or need further mental healthcare may also ultimately outweigh the up-front costs of reform. See CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS, EXECUTIVE SUMMARY (Jan. 2012), http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf.

263. *Graham v. Florida*, 560 U.S. 48, 76 (2010).

in *Graham* and *Miller* emphasize the important differences between criminally convicted youth defendants and adults. Those differences do not disappear once the judge's gavel falls. This Comment argues that courts should—at the very least—apply a more protective Eighth Amendment test, informed by the decisions in *Graham* and *Miller*, to the right to treatment claims of incarcerated youth. Doing so would be one small step towards addressing the yawning need for mental healthcare in modern juvenile prisons.

This youth-specific Eighth Amendment approach should only be regarded as the constitutional minimum to which youth are entitled. Their quasi-criminal status means they are at least entitled to the same protections that adult prisoners receive. Yet they are likely entitled to more, including positive rights to minimal rehabilitation arising out of their Fourteenth Amendment due process rights. Further scholarship should explore this possibility. This Comment merely argues for modestly raising the constitutional floor when evaluating incarcerated youths' right to mental healthcare claims. Hopefully, a more protective test will move us slightly closer to providing young people with the positive, rehabilitative facilities that they have been promised since the juvenile justice system was founded over a hundred years ago.