2009

What's Wrong With Victims' Rights in Juvenile Court?: Retributive v. Rehabilitative Systems of Justice

Kristin N. Henning
Georgetown University Law Center, hennink@law.georgetown.edu

97 Cal. L. Rev. 1107-1170 (2009)

What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice

Kristin Henning†

INTRODUCTION

In 2007, a Washington State juvenile court judge sentenced a seventeen-year-old to 126 weeks of confinement after the teenager pled guilty to vehicular homicide.[1] This sentence was seventy weeks higher than the standard range for the charged offense and twenty-three weeks higher than the sentence requested by the government. In arriving at the sentence, the judge considered an oral victim impact statement from the decedent's father, read letters from the victims' families and friends, listened to an apology from the child, and heard mitigating evidence from the defendant's high school prevention specialist and probation officer. In finding "manifest injustice" to impose a sentence so far above the standard range, the judge noted that he was "disappointed" with the teenager because he "did not somehow force himself to continue to look at" the victims' families when he apologized.[2] The judge told the teenager:

> I think that was the least you owed them was to look at them in spite of how bad it may hurt you or how bad you may feel at this time. I'm disappointed that you chose not to or weren't able to put aside your suffering and anguish and respect the families enough to look at them while you were talking to them. . . . I'm just not impressed . . . with what you had to say.[3]

The judge concluded by noting that a lesser sentence would not "instill . . . confidence in the system" and that the "severe impact and tragedy to the

† Professor of Law, Georgetown University Law Center, J.D. Yale Law School; L.L.M., Georgetown Law Center; A.B., Duke University. I thank Greg Klass, Amanda Leiter, Wallace Mlyniec, Philomila Tsoukala, Sasha Volokh, and the Mid-Atlantic Criminal Law Collective for reading drafts of this Article. I also thank Toya Carmichael for her invaluable research assistance.

1. State v. A.V.R., No. 35032-7-II, 2007 WL 1335244 (Wash. Ct. App. May 8, 2007).
2. *Id.* at *2.
3. *Id.*

families mandates a sentence more strict" than what the government requested.[4]

The victims' rights movement has made significant inroads into the juvenile justice system during the last two decades. Legislators across the country have amended state statutes and state constitutions to give victims the right to attend juvenile hearings, be heard before critical decisions are made in a juvenile case, and present oral or written victim impact statements at the sentencing of an adjudicated youth.[5] Victims' rights like these have shifted the juvenile court's priorities and have altered the way judges and others think about young offenders. The case from Washington is an example of the considerable influence victim impact evidence may have on the fact-finder and reflects the high expectations some juvenile court judges may have for adolescent remorse and apology.

While the victims' rights movement has received considerable attention in scholarship written about capital punishment and the criminal justice system generally,[6] there has been very little discussion about the impact of victims' rights on the policy and practice of juvenile courts. While at one time, judges primarily concerned themselves with the best interests of the delinquent child, victims' rights statutes now require juvenile courts to balance the rehabilitative needs of the child with other competing interests such as accountability to the victim and restoration of communities impacted by crime. As victims actively participate in the juvenile justice system, accused youth lose the protective veil of confidentiality and face an expanding risk of retributive sentences from judges who hear and empathize with the victim's plight.

The rise of the victims' rights movement parallels a broader shift in juvenile court philosophy. Victims' rights were introduced in juvenile courts at a time when policymakers were already rethinking their reliance on rehabilitation as the primary goal of the juvenile justice system. In the 1980s and 1990s, juvenile courts became increasingly concerned about public safety and accountability and shifted their focus beyond rehabilitating the delinquent child. The retributive elements of the victims' rights movement fit well with these new law-and-order responses to juvenile crime and were readily incorporated into juvenile statutes and procedures.

This Article focuses on one of the most widely endorsed victims' rights: the right to introduce written and oral impact statements at the sentencing (or

4. *Id.*

5. *See infra* notes 47–53 and accompanying text.

6. *See, e.g.*, Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835 (2005); Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 STAN. L. & POL'Y REV. 447 (2004); Jean M. Callihan, *Victim Impact Statements in Capital Trials: A Selected Bibliography*, 88 CORNELL L. REV. 569 (2003); Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 N.E. J. ON CRIM. & CIV. CON. 21 (1999); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 362 (1996).

disposition) of an adjudicated youth. Victim impact statements provide the court with information about the nature and extent of the victim's harm and focus the court's attention on the victim's desire for catharsis, retribution, and recovery of economic and material loss. While some proponents believe that victim impact statements will also help rehabilitate young offenders, evidence suggests that presenting these statements before the child has the benefit of counseling and other rehabilitative services may actually hinder the court's efforts to cultivate empathy and remorse in the child. Victim impact statements delivered in the highly charged environment of the courtroom, without trained mediators to facilitate discourse between the victim and the offender, are also unlikely to foster the type of emotional healing and restoration that victims seek.

In Part I of this Article, I briefly outline the parallel evolution of the victims' rights movement and the law-and-order transformation of the juvenile court and evaluate whether the philosophy of rehabilitation can and should survive in the shifting juvenile court practice. Part I concludes with an examination of the legislative history behind the extension of victims' rights from criminal to juvenile courts. A review of that history suggests that many legislators did not carefully consider the differences between the retributive and rehabilitative goals of the criminal and juvenile justice systems in deciding to extend rights to victims of juvenile delinquency.

In Part II, I consider the practical and theoretical conflicts that surface at the intersection of victims' rights and juvenile justice. Specifically, I review the rationale offered in support of victim impact statements and consider the extent to which such statements inject a retributive element into the juvenile disposition and lead the court to rely on unreliable information, such as the victim's opinion about an appropriate disposition for the child. Part II also suggests that because many youth are not intellectually and emotionally equipped to experience and articulate sincere remorse in the days after an offense, victims are often disappointed in the child's response to the victim impact statement and judges are likely to penalize the child for an apparent lack of empathy. Finally, Part II will consider ways in which victim impact statements and other victims' rights compromise rehabilitation by eroding confidentiality for juvenile offenders and potentially violating their right to due process at disposition.

In Part III, I attempt to reconcile the many competing goals of juvenile court by identifying procedural safeguards that will best accommodate the needs and interests of victims and offenders. My recommendations include the exclusion of victim impact statements from disposition hearings, the use of trained mediators to facilitate face-to-face contact between victims and juvenile offenders in pretrial diversion programs or victim-offender mediation sessions after sentencing, and the development of victim impact curricula and counseling that educate offenders about the impact of their crimes and victims

about the root causes of delinquency. These recommendations are supported by empirical studies that suggest that victims often find greater satisfaction in victim-offender mediation and other restorative justice programs than they do in the limited interactions they have with offenders in court. This Article concludes by recommending strict due process safeguards when courts must consider victim impact statements at the juvenile disposition.

I
HISTORICAL EVOLUTION OF VICTIMS' RIGHTS IN JUVENILE COURT

A. The Victims' Rights Movement and the Criminal Justice System

In colonial America, victims were responsible for filing suit against criminal offenders.[7] Victims hired public officials to help them investigate crimes, file charges, and arrest and prosecute offenders.[8] By the middle of the nineteenth century, the criminal justice system was transformed from a private system into a public system in which the state was responsible for prosecution.[9] This shift was largely motivated by Enlightenment ideas that criminal prosecutions should serve societal interests of retribution and deterrence rather than the individual interests of victims in private redress.[10] Under the new public system, victims had no statutory or constitutional right to control the prosecutor's decisions in the case.[11] The prosecutor became an advocate for the state, not the victim, and the interests of the state and the victim did not always align.[12]

Since the middle to late twentieth century, the pendulum has begun to swing back in the direction of private redress with the creation and enforcement of victims' rights. The earliest victims' movements in 1972 were led by women's rights activists in response to domestic violence and rape cases.[13] These activists complained that victims had no voice in the prosecutorial process, were not being treated with sensitivity and respect by police and prosecutors, and were not being provided with adequate restitution or services to address the psychological, emotional, and material impacts of crime.[14]

---

7. Douglas E. Beloof & Paul G. Cassell, *Crime Victim Law: Theory and Practice: Symposium Article: The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 484–85 (2005); PEGGY M. TOBOLOWSKY, CRIME VICTIM RIGHTS AND REMEDIES 5 (2001).

8. TOBOLOWSKY, CRIME VICTIM RIGHTS, *supra* note 7, at 5.

9. *See* Baird & McGinn, *supra* note 6, at 449.

10. TOBOLOWSKY, CRIME VICTIM RIGHTS, *supra* note 7, at 5.

11. Baird & McGinn, *supra* note 6, at 449.

12. *See id.* at 448–49.

13. LEIGH GLENN, VICTIMS' RIGHTS, A REFERENCE HANDBOOK 16 (1997); TOBOLOWSKY, CRIME VICTIM RIGHTS, *supra* note 7, at 7.

14. TOBOLOWSKY, CRIME VICTIM RIGHTS, *supra* note 7, at 7; Rice Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 950 (2007).

These early grassroots efforts received support from the federal government through funding, research studies, and policy statements. In 1964, President Lyndon Johnson established the Commission on Law Enforcement and Administration of Justice which issued a report on victim-related issues, including the need for increased involvement of victims in the criminal justice process and the need for services to address victims' losses.[15] In 1972, the Law Enforcement Assistance Administration developed the first national survey on crime victimization, and in 1974, established the Crime Victim Initiative to serve as a resource for victim and witness assistance programs in local prosecutors' offices and law enforcement agencies.[16] In 1975, the first national victims' related organization, the National Organization for Victim Assistance, was established.[17] Although the victims' rights movement experienced some setbacks after the loss of funding in the late 1970s, President Ronald Reagan reinvigorated the movement when he created the President's Task Force on Victims of Crime in 1982.[18] That task force issued a final report later that year and recommended multiple reforms, including the presentation of victim impact evidence at sentencing and the inclusion of victims and their families who wish to attend the defendant's trial even if they have been identified as a witness in the case.[19]

State funding and legislation soon bolstered the federal victims' rights initiatives. It appears that the earliest state victims' rights statutes were adopted in the late 1970s and were followed by a peak in the adoption of similar statutes across the country between the mid-1980s and mid-1990s.[20] Every state now has some statute or series of statutes that confers an array of enforceable rights on victims. A typical victims' rights statute includes the victim's right to be notified of hearings, final adjudication, and the release or escape of the defendant; the victim's right to consult with the prosecutor before plea or dismissal; the victim's right to a speedy trial; the victim's right to present written or oral impact statements at sentencing; and the victim's right to receive restitution.[21] In addition, at least thirty-two states now have state constitutional provisions that grant victims rights similar to those afforded to the defendant.[22]

---

15. TOBOLOWSKY, CRIME VICTIM RIGHTS, *supra* note 7, at 7.

16. *Id.*

17. *Id.*

18. *See* Exec. Order No. 12,360, 47 Fed. Reg. 17,975 (Apr. 23, 1982) (establishing a Task Force on Victims of Crime); *see also* TOBOLOWSKY, CRIME VICTIM RIGHTS, *supra* note 7, at 9–10; Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendment in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 841.

19. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT 72–73 (1987).

20. *See infra* notes 39 and 41, tracking the enactment of victims' rights legislation.

21. *See, e.g.*, ALA. CODE §§ 15-23-60 to -83 (LexisNexis 1995); ARIZ. REV. STAT. ANN. §§ 13-4401 to -4437 (2001); COLO. REV. STAT. § 24-4.1-302.5 (2008); D.C. CODE § 23-1901 (Supp. 2008); FLA. STAT. § 960.001 (West 2005 & Supp. 2008); MICH. COMP. LAWS ANN. §§ 780.51-.911 (West 1998).

22. *See* ALA. CONST. art. I, § 6.01 (1995); ALASKA CONST. art. I, § 24 (1994); ARIZ.

While these constitutional provisions may not be used to overturn a criminal conviction and are generally unenforceable in a civil action against the state,[23] they signal a growing respect and concern for victims.

B. The Shifting Juvenile Court Philosophy

While victims' rights gained national attention in the 1980s and 1990s, significant changes also emerged in the stated policy and purpose of juvenile courts across the country. Fueled by some of the same themes evident in the victims' rights movement, legislators and judges became increasingly concerned about public safety and accountability for delinquent youth. Historically, juvenile courts were designed to facilitate nonadversarial proceedings in which the judge and other friendly stakeholders worked together to determine how best to treat or rehabilitate children involved in the juvenile justice system.[24] Juvenile courts were established and continue to operate on the principle that rehabilitation is a better response to delinquency than the punishment and stigma that generally accompany an adult conviction.[25]

CONST. art. II, § 2.1 (1990); CAL. CONST. art. I, § 28 (1982); COLO. CONST. art. II, § 16a (1992); CONN. CONST. art. I, § 8(B) (1996); FLA. CONST. art. I, § 16 (1988); IDAHO CONST. art. I, § 22 (1994); ILL. CONST. art. I, § 8.1 (1992); IND. CONST. art. I, § 13(b) (1996); KAN. CONST. art. XV, § 15 (1992); LA. CONST. art. 1, § 25 (1998); MD. CONST. art. 47 (1994); MICH. CONST. art. I, § 24 (1988); MISS. CONST. art. 3, § 26A (1998); MO. CONST. art. I, § 32 (1992); NEB. CONST. art. I, § 28 (1996); NEV. CONST. art. I, § 8(2) (1996); N.J. CONST. art. I, § 22 (1991); N.M. CONST. art. II, § 24 (1992); N.C. CONST. art. I, § 37 (1996); OHIO CONST. art. I, § 10 (1912); OKLA. CONST. art. II, § 34 (1996); OR. CONST. art. I, § 42 (2008); R.I. CONST. art. I, § 23 (1986); S.C. CONST. art. I, § 24 (1998); TENN. CONST. art. 1, § 35 (1998); TEX. CONST. art. I, § 30 (1989); UTAH CONST. art. I, § 28 (1995); VA. CONST. art. I, § 8-A (1997); WASH. CONST. art. I, § 35 (1989); WIS. CONST. art. I, § 9m (1993).

23. *See* Douglas Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, & Review*, 2005 BYU L. REV. 255, 258–59; *see also* IDAHO CONST. art. I, § 22 (1994) ("Nothing in this section shall be construed to authorize a court to dismiss a case, to set aside or void a finding of guilt or an acceptance of a plea of guilty, or to obtain appellate, habeas corpus, or other relief from any criminal judgment, for a violation of the provisions of this section; nor be construed as creating a cause of action for money damages, costs or attorney fees against the state, a county, a municipality, any agency, instrumentality or person; nor be construed as limiting any rights for victims previously conferred by statute. This section shall be self-enacting. The legislature shall have the power to enact laws to define, implement, preserve, and expand the rights guaranteed to victims in the provisions of this section."); KAN. CONST. art. XV, § 15 (1992) (including similar limitations); LA. CONST. art. I, § 25 (1998) (including similar limitations); S.C. CONST. art. I, § 24 (including similar limitations); *Ex parte* Littlefield, 540 S.E.2d 81, 85 (S.C. 2000) ("[E]ven if the solicitor fails to honor the Victims' Bill of Rights during a criminal proceeding, the Supreme Court cannot issue a writ of mandamus to re-open a criminal proceeding once it is resolved.").

24. *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 138 (1997); *see also In re* Gault, 387 U.S. 1, 14–16 (1967).

25. *See, e.g.*, ARK. CODE ANN. § 9-27-302 (2008) (juvenile code construed "[t]o protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution"); MASS. GEN. LAWS ANN. ch. 119, § 53 (West 2008) (juvenile court shall treat children, "not as criminals, but as children in need of aid, encouragement and guidance"); TENN. CODE ANN. § 37-1-101 (2005) (juvenile code construed "[c]onsistent with the protection of the public interest, [to] remove from children committing

However, in the late 1980s and early 1990s, several high-profile juvenile crimes spawned public anxiety and led to predictions of an emerging juvenile super predator.[26] National perceptions of high and rising crime generated pressure on state legislators to toughen laws that addressed juvenile delinquency.[27] Although data raises doubt as to the validity of these perceptions,[28] state legislatures responded by introducing accountability and punishment into juvenile court legislation.[29] As a result, contemporary law-and-order policies make it easier for prosecutors to transfer juveniles to adult court, create presumptions for detaining youth pending trial, impose mandatory minimum sentences for juveniles, lift the protective veil of confidentiality in juvenile proceedings, and require juveniles to register in sex-offender databases.[30]

The shifting juvenile court agenda is also evident in recent amendments to the purpose clauses that often accompany state juvenile court codes. While most purpose clauses still manifest a commitment to the rehabilitation of children, those clauses now also reflect a growing concern for the interests of victims, the accountability of the offending youth, the safety of the community,

---

delinquent acts the taint of criminality and the consequences of criminal behavior and substitute therefore a program of treatment, training and rehabilitation").

26. *See* David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 642 (2002); Scott & Grisso, *supra* note 24, at 137, 141 (identifying three waves of attack on juvenile justice policy and describing the most recent attack beginning in the late 1980s as a response to "public fear and anger" at youth violence).

27. *See* Tanenhaus & Drizin, *supra* note 26, at 642.

28. RICHARD A. MENDEL, AMERICAN YOUTH POLICY FORUM, LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS—AND WHAT DOESN'T 29–37 (2000); HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 127 (2006) (reporting that between 1994 and 2003, there were substantial declines in arrests for overall juvenile violent crime (-32%), murder (-68%), forcible rape (-25%), robbery (-43%), and aggravated assault (-26%). These declines were proportionately greater for juveniles than for adults).

29. *See* Tanenhaus & Drizin, *supra* note 26, at 642 (noting that between 1990 and 1996, "forty states passed laws to make it easier to prosecute juveniles as adults"); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 843–45 (1988); Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System"*, 22 PEPP. L. REV. 907, 918–22 (1995).

30. *See* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 536 (2004); Suzanne Meiners-Levy, *Challenging the Prosecution of Young "Sex Offenders": How Developmental Psychology and the Lessons of* Roper *Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 504–05 (2006); Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CALIF. L. REV. 163, 184–97 (2003) (discussing ways in which juvenile sex-offender registration departs from traditional juvenile justice policy); Arthur R. Blum, Comment, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L.J. 349, 393–96 (1996) (discussing state laws that erode confidentiality for certain serious offenses committed by juveniles).

and sometimes even the punishment of the child.[31] For example, Illinois legislators amended the juvenile justice code in 1999 to declare that juvenile justice policies shall "[h]old minors accountable for their unlawful behavior and not allow minors to think that their delinquent acts have no consequence for themselves and others."[32] In 1995, the New Hampshire legislature deleted statutory language explaining that its juvenile code was designed "to remove from a minor committing a delinquency offense the taint of criminality and the

31. *See, e.g.*, ALA. CODE § 12-15-1.1 (LexisNexis 2005) (added in 1990 "to facilitate the care, protection, and discipline of children who come within the jurisdiction of the juvenile court, while acknowledging the responsibility of the juvenile court to preserve the public peace and security"); ALASKA STAT. § 47.12.010 (2006) (repealed and reenacted in 1998 to, among other things, ensure a "balanced juvenile justice system," "protect the community," "impose accountability for violations of law," and "provide an early, individualized assessment and action plan for each juvenile offender . . . so that the juvenile is more capable of living productively and responsibly in the community"); CAL. WELFARE & INST. CODE § 202 (West 1998 & Supp. 2008) (amended in 1998 to hold the offender accountable in order to restore the victim or community through victim impact classes, victim-offender conferencing, and restitution, while continuing to recognize the importance of the minor's best interests); CONN. GEN. STAT. ANN. § 46b-121 (West 2004) (amended in 1995 to give courts authority to make and enforce orders necessary to punish the child, deter the child from further delinquent acts, assure safety of others, and provide restitution to the victim); FLA. STAT. ANN. § 985.01 (West 2006) (enacted in 1997 to "[t]o ensure the protection of society, by providing for a comprehensive standardized assessment of the child's needs so that the most appropriate control, discipline, punishment, and treatment can be administered consistent with the seriousness of the act committed, the community's long-term need for public safety, the prior record of the child, and the specific rehabilitation needs of the child, while also providing whenever possible restitution to the victim of the offense"); IDAHO CODE ANN. § 20-501 (2004) (amended in 1995 to ensure that "[w]here a juvenile has been found to be within the purview of the juvenile corrections act, the court shall impose a sentence that will protect the community, hold the juvenile accountable for his actions, and assist the juvenile in developing skills to become a contributing member of a diverse community"); IND. CODE ANN. § 31-10-2-1 (West 2008) (added in 1997 to "promote public safety and individual accountability by the imposition of appropriate sanctions," and to "ensure that children within the juvenile justice system are treated as persons in need of care, protection, treatment, and rehabilitation"); KAN. STAT. ANN. § 38-2301 (Supp. 2007) (enacted in 2006 to identify the primary goals of the juvenile justice code as "promot[ing] public safety, hold[ing] juvenile offenders accountable for their behavior and improv[ing] their ability to live more productively and responsibly in the community"); KY. REV. STAT. ANN. § 600.010 (LexisNexis 1999 & Supp. 2007) (amended in 2000 to promote the best interests of the child by "providing treatment and sanctions to reduce recidivism and assist in making the child a productive citizen by advancing the principles of personal responsibility, accountability, and reformation, while maintaining public safety, and seeking restitution and reparation"); LA. CHILD. CODE ANN. art. 801 (2004) (added in 1991 to ensure that each child receives "the care, guidance, and control that will be conducive to his welfare and the best interests of the state" and amended in 1993 to acknowledge more serious penalties required for certain enumerated felonies); ME. REV. STAT. ANN. tit. 15, § 3002 (2003) (amended in 1997 "[t]o provide consequences, which may include those of a punitive nature, for repeated serious criminal behavior or repeated violations of probation conditions"); OHIO REV. CODE ANN. § 2151.01 (LexisNexis 2007) (deleting the following purpose from the code in 2000: "to protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts," but retaining its commitment "to provide for the care, protection, and mental and physical development of children").

32. 705 ILL. COMP. STAT. ANN. 405/5-101 (West 2007) (added by 2008 Ill. Legis. Serv. P.A. 90-590, art. 2001, § 2001-10 (West), effective Jan. 1, 1999).

penal consequences of criminal behavior."[33] Legislators revised the language of the statute to

> promote the minor's acceptance of personal responsibility for delinquent acts committed by the minor, encourage the minor to understand and appreciate the personal consequences of such acts . . . and make parents aware of the extent if any to which they may have contributed to the delinquency and make them accountable for their role in its resolution.[34]

In Washington State, the purpose clause was amended in 2004 to provide opportunities for victims to participate in the juvenile justice system and to ensure that the state's victims' bill of rights would be fully observed.[35]

C. Victims' Rights in Juvenile Court

Today, most states grant victims of juvenile delinquency some or all of the rights guaranteed to victims of adult crime. It is not clear whether the expansion of victims' rights into juvenile court simply reflects the larger shift in juvenile justice philosophy or whether the victims' movement itself precipitated the court's philosophical change. However, because theories of retribution and accountability for the offender justify many of the rights afforded to victims,[36] it is no surprise that the victims' rights movement made its greatest inroads into juvenile court during the 1980s and 1990s. Some critics have even argued that crime-control advocates intentionally co-opted the victims' rights movement to push systemic reforms that increase the likelihood of conviction and incarceration for offenders.[37] Regardless of which came first, these developments have been closely intertwined and were both likely fueled by the media's attention to high-profile juvenile offenders, questionable perceptions of rising juvenile crime, public pressure for improved safety, and victims' desire to be heard and secure restitution for crimes.[38]

While most states now have some protections for victims of delinquency, not all states included victims of juvenile delinquency in their initial victims' rights legislation. A survey of state legislation reveals a couple of interesting trends. First, with a few exceptions, victims' rights statutes enacted in the 1980s tended to apply only to victims of adult crime.[39] During the following

33. N.H. REV. STAT. ANN. § 169-B:1 (LexisNexis 2001), *amended by* 1995 N.H. Laws ch. 308 (H.B. 2).

34. *Id.*

35. *See* WASH. REV. CODE ANN. § 13.40.010(2)(k) (West 2004), *amended by* 2004 Wash. Legis. Serv. ch. 120 (West).

36. *See infra* notes 116–119.

37. *See, e.g.*, TOBOLOWSKY, CRIME VICTIM RIGHTS, *supra* note 7, at 9 (listing denial of bail, abolition of exclusionary rule, mandatory sentencing, and elimination of parole as examples of reforms that are consistent with the crime-control approach).

38. *See supra* notes 26–30 and 13–14 and accompanying text.

39. *See, e.g.*, ALASKA STAT. § 12.61.010 (2006) (effective 1984, amended to include victims of juvenile crime in 1997); CONN. GEN. STAT. ANN. § 54-201 (West 2001) (enacted in

decade, however, most of those states amended that legislation to include victims of juvenile delinquency.[40] In a second apparent trend, states that did not pass their first victims' rights statutes until the 1990s or later tended to recognize the same rights for victims of juvenile and adult crime in the original legislation.[41] A few states have not yet explicitly extended victims' rights to the

---

1978, amended in 1995 to include any crime committed by a juvenile); CONN. GEN. STAT. ANN. § 46b-138b (West 2004) (enacted in 1989 to give victims the right to make statement at juvenile dispositions); D.C. CODE § 16-2340 (Supp. 2008) (enacted in 2005 to grant rights to victims of juvenile crime); D.C. CODE § 23-103a (enacted in 1989 to confer rights on victims of adult crime, repealed 2001); FLA. STAT. ANN. § 960.001 (West 2006 & Supp. 2008) (enacted in 1984 and amended in 1992 to include victims of juvenile delinquency); HAW. REV. STAT. § 801D-4 (LexisNexis 2007) (enacted in 1988 and amended in 1990, 1991, and 1998 to give minimal rights to victims of juvenile offense); IDAHO CODE ANN. § 19-5306 (2004) (enacted in 1985 and amended in 1995 to include victims of juvenile offenses); 725 ILL. COMP. STAT. ANN. 120/1-9 (West 2002) (enacted in 1984 and amended 1993); 705 ILL. COMP. STAT. ANN. 405/5-115 (West 2007) (enacted in 1998 to give victims in juvenile proceedings the same rights as victims in adult proceedings); KAN. STAT. ANN. § 74-7333 (2002) (enacted in 1989 and amended in 1993 to give rights to victims of juvenile delinquency); LA. REV. STAT. ANN. § 46:1841-45 (1999) (enacted in 1985 and amended in 1992 to change the definition of crime to encompass delinquency so that victims of juvenile crime would be included); LA. CHILD. CODE ANN. art. 811.1 (2004) (enacted in 1993 to give rights to victims of alleged delinquent acts); MASS. GEN. LAWS ANN. ch. 258B, §§ 1–3 (West 2008) (enacted in 1983 and amended in 1995 to include delinquency court in the definition of court); MO. ANN. STAT. § 595.200 (West 2003) (enacted in 1986 and amended in 1993); NEV. REV. STAT. § 217.070 (2005) (enacted in 1969 and amended in 1997 to include victims of juvenile crime in definition of victim); N.J. STAT. ANN. §§ 52:4B-34 to -38 (West 2006) (enacted in 1985, section 52:4B-37 amended in 2001 to include act of delinquency in definition of crime); OKLA. STAT. ANN. tit. 19, § 215.33 (West 2000) (enacted in 1981 and amended in 1994 to require notice of hearing to victims of juvenile crime); OR. REV. STAT. § 419C.411(4)(e) (2007) (amended in 1995 to require judges to consider statement of victims at juvenile disposition); WASH. REV. CODE ANN. §§ 7.69.010–.050 (West 2007) (enacted in 1985 and amended in 2004 to apply to victims of juvenile delinquency). Exceptions to this trend include CAL. WELFARE & INST. CODE §§ 679–679.08 (West 1998 & Supp. 2008) (victims of juvenile delinquency included at enactment in 1986); MICH. COMP. LAW ANN. §§ 780.751–.775 (West 2007) (enacted in 1985 and amended in 1988 to add sections 780.781–.801 to include victims of juvenile delinquency); N.C. GEN. STAT. §§ 15A-824 to -827 (2007) (victims of juvenile offenses that would be a felony or serious misdemeanor if committed by an adult included at enactment in 1985); N.D. CENT. CODE §§ 12.1-34-01 to -05 (1997) (victims of juvenile delinquency included at enactment in 1987); VT. STAT. ANN. tit. 13, §§ 5301–5307 (1998 & Supp. 2008) (victims of juvenile delinquency included at enactment in 1985).

40. *Id.*

41. *See, e.g.*, ALA. CODE §§ 15-23-60 to -84 (LexisNexis 2005) (victims of juvenile delinquency in "Crime Victim Rights" chapter included at enactment in 1995); ARK. CODE ANN. §§ 16-90-1101 to -1115 (2008) (victims of juvenile delinquency included at enactment in 1997); DEL. CODE ANN. tit. 11, §§ 9401–9408 (2007) (victims of juvenile delinquency included at enactment in 1992); IND. CODE ANN. §§ 35-40-5-1 to -9 (West 2008) (victims of juvenile delinquency included at enactment in 1999); IOWA CODE ANN. § 915.10–.29 (West 2004) (victims of juvenile delinquency included at enactment in 1998); MD. CODE ANN., CRIM. PROC. §§ 11-101 to -104 (LexisNexis 2008) (all sections enacted in 2001 include victims of delinquent acts); §§ 11-201 to -205 (pretrial services); §§ 11-301 to -304 (trial procedures); §§ 11-401 to -404 (sentencing procedures); §§ 11-501 to -508 (post-sentencing procedures); §§ 11-601 to -620 (restitution and other payments); MISS. CODE ANN. §§ 99-43-1 to -49 (2007) (enacted in 1999); S.C. CODE ANN. §§ 16-3-1505 to -1565 (2003) (victims of juvenile delinquency included at enactment in 1997). *But see* ME. REV. STAT. ANN. tit. 17-A, §§ 1175–1176 (2003) (enacted in 1995 to give rights to

juvenile justice system.[42]

Victims' rights in juvenile court essentially mirror those rights guaranteed to victims in the criminal justice system. While some states have separate juvenile code provisions that specifically protect victims of juvenile crime,[43] many states have one statute—typically located in the state's criminal code—that confers rights on all victims.[44] These latter states often extended rights to victims of delinquency by amending the definition of key words such as "victim," "crime," or "court."[45] When state legislators drafted separate juvenile code provisions for victims, they often tracked or referenced the language of the criminal code.[46] Like victims of adult crime, victims of juvenile delinquency typically have the right to notice of the child's release or escape from detention,[47] the rights to confer with the prosecutor and to be heard in

---

victims of crime); ME. REV. STAT. ANN. tit. 15, § 3007 (2003) (enacted in 1999 to give victims of juvenile crime the same rights as victims under title 17-A, section 1175, which addresses victim notification of a defendant's release); OHIO REV. CODE ANN. §§ 2930.01–.19 (LexisNexis 2006 & Supp. 2008) (enacted in 1994 and amended in 1999 to include victims of juvenile delinquency); 18 PA. CONS. STAT. ANN. § 11-101 to -216 (West 1998) (enacted in 1998 and amended in 2000 to include proceedings within the juvenile justice system); WYO. STAT. ANN. §§ 7-21-101 to -103 (2007) (enacted in 1990 to allow victim impact statements for felonies); WYO. STAT. ANN. §§ 14-6-501 to -509 (2007) (victim bill of rights for juvenile court enacted in 1998); UTAH CODE ANN. §§ 77-38-1 to -14 (2003) (enacted in 1994 and amended in 1995 to include victims of juvenile crime).

42. For example, although Tennessee and West Virginia statutes require juveniles to pay restitution, neither state appears to provide any other substantive rights to victims of juvenile crime. *See* W. VA. CODE ANN. § 49-5-13b (LexisNexis 2004 & Supp. 2007); TENN. CODE ANN. § 37-1-131 (2005 & Supp. 2008).

43. *See, e.g.*, LA. CHILD. CODE ANN. art. 811.1 (2004); MONT. CODE ANN. § 41-5-1416 (2007); OR. REV. STAT. § 419C.411 (2007); WYO. STAT. ANN. §§ 14-6-501 to -509 (2007).

44. *See, e.g.*, ALASKA STAT. § 12.61.010 (2006); FLA. STAT. ANN. § 960.001 (West 2006 & Supp. 2008); HAW. REV. STAT. ANN. § 801D-4 (LexisNexis 2007); 725 ILL. COMP. STAT. ANN. 120/4 (West 2002); MINN. STAT. ANN. §§ 611A.01–.06 (West 2003 & Supp. 2008); MO. ANN. STAT. §§ 595.200–.215 (West 2003); N.D. CENT. CODE §§ 12.1-34-01 to -05 (1997); OHIO REV. CODE ANN. §§ 2930.01–.19 (LexisNexis 2006 & Supp. 2008); 18 PA. CONS. STAT. ANN. § 11-101 to -216 (West 1998).

45. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 120/3 (West 2002) (redefining crime and victim); LA. REV. STAT. ANN. § 46:1842 (1) (1999 & Supp. 2008) (redefining crime); MASS. GEN. LAWS ANN. ch. 258B, § 1 (West 2008) (redefining victim and court); N.J. STAT. ANN. § 52:4B-37 (West 2001 & Supp. 2007) (redefining victim to include person harmed by an act of delinquency); NEV. REV. STAT. ANN. § 217.070 (LexisNexis 2005) (redefining victim to include any person harmed by an act committed by either adult or minor); 18 PA. CONS. STAT. ANN. § 11-103 (West 1998) (redefining crime to include an act committed by a juvenile).

46. *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/5-115 (West 2007) (stating that victims in juvenile cases "shall have the same rights of victims in criminal proceedings").

47. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 8-393, 8-395 (2007) (requiring notice of release or escape); CAL. WELFARE & INST. CODE § 679.02(5), (6), (14) (West 1998 & Supp. 2008) (allowing victims to express views at parole eligibility hearing, work furlough, and release on probation); MINN. STAT. ANN. § 611A.06 (West 2003 & Supp. 2008) (requiring notice of release); MO. ANN. STAT. § 595.209.1(5)–(7) (West 2003 & Supp. 2008) (requiring notice to victims and witnesses of release and escape); N.H. REV. STAT. ANN. § 169-B:35-a (2001) (requiring notice of "all review hearings, . . . change in placement, temporary release or furlough, interstate transfer, parole, runaway, escape or release"); N.C. GEN. STAT. §§ 7B-2513(j), 2514(d) (2007) (requiring notice to

court before critical decisions are made,[48] and the rights to a speedy trial[49] and restitution.[50] Juvenile statutes, unlike those concerning adult crime, often create an additional obligation on the child's parents to pay restitution to the victims of the child's conduct.[51] Victims of delinquency also have the right to attend all stages of a juvenile case, notwithstanding other statutes that typically bar public access to family court proceedings.[52] Finally, in most states, victims are allowed to submit victim impact evidence at the child's disposition.[53]

D. Survival of the Rehabilitative Promise in Juvenile Court

Notwithstanding the introduction of victims' rights and accountability into the juvenile court mission, the weight of contemporary evidence still recognizes rehabilitation as a viable objective for the juvenile justice system. Legislative action across the country, appellate court and Supreme Court jurisprudence, and recent psychological and neurological studies in adolescent development all demonstrate that juvenile courts can and should continue their

---

victims and victims' immediate family of child's release); N.D. CENT. CODE § 12.1-34-02(3), (16) (1997) (requiring notice of pretrial and custodial release); OHIO REV. CODE ANN. § 2930.16 (LexisNexis 2006 & Supp. 2008) (requiring notice of incarceration or release); 18 PA. CONS. STAT. ANN. § 11-201 (West 1998) (requiring notice of release or escape).

48. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-403 (2001) (right to confer with prosecutor and be heard in court regarding plea negotiation); DEL. CODE ANN. tit. 11, § 9405 (2007) (right to consult with prosecutor before prosecutor amends or dismisses charge, negotiates plea, or agrees to diversion); FLA. STAT. ANN. § 960.001 (West 2006 & Supp. 2008) (right to express views about release, plea, diversion, or sentencing); MINN. STAT. ANN. §§ 611A.03–.031 (West 2003 & Supp. 2008) (right to object to plea agreement, pretrial diversion, or disposition); MO. REV. STAT. § 595.209(1)(4) (2003 & Supp. 2008) (right to confer with prosecutors and be heard at plea hearings); MONT. CODE ANN. § 41-5-1416 (2007) (right to consult with state attorney before dismissal or reduction of charge from a felony or release of youth from detention or disposition); N.H. REV. STAT. ANN. §§ 169-B:34, 35-a (LexisNexis 2001 & Supp. 2007) (right to confer with prosecutor about disposition and plea bargaining and make statement in court prior to plea); N.J. STAT. ANN. § 52:4B-44(15) (West 2001 & Supp. 2007) (right to have prosecutor consider victim impact statement before deciding whether to formally prosecute); OHIO REV. CODE ANN. § 2930.08 (LexisNexis 2006) (right to object to delay in prosecution); 18 PA. CONS. STAT. ANN. § 11-201(4) (West 1998) (right to comment before reduction of charge, dismissal, plea, diversion, or consent decree).

49. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4435 (2001); DEL. CODE ANN. tit. 11, § 9405 (2007); FLA. STAT. ANN. § 960.001 (West 2006 & Supp. 2008); IDAHO CODE ANN. § 19-110 (2004); MICH. COMP. LAWS ANN. § 780.786a (West 1998); MINN. STAT. ANN. § 611A.033(a) (West 2003); MO. ANN. STAT. § 595.209.1(16) (West 2003 & Supp. 2008); N.D. CENT. CODE § 12.1-34-02(12) (1997).

50. *See, e.g.*, ALA. CODE § 12-15-1.1(7) (LexisNexis 2005); ALASKA STAT. § 47.12.120(b)(4) (2006); COLO. REV. STAT. § 19-2-918 (2008); MINN. STAT. ANN. § 611A.04 (West 2003); MONT. CODE ANN. § 41-5-1521 (2007); N.Y. FAM. CT. ACT § 353.6 (McKinney 2008). *See also* MONT. CODE ANN. § 41-5-1512(1)(n) (2007) (court may order youth "to pay a contribution covering all or part of the costs of a victim's counseling").

51. *See, e.g.*, ALA. CODE § 12-15-71 (LexisNexis 1995); ALASKA STAT. § 47.12.120(b)(4) (2006); COLO. REV. STAT. § 19-2-919 (2008); CONN. GEN. STAT. § 46b-140(b), (d) (West 2004); D.C. CODE § 16-2320.01 (Supp. 2008).

52. *See* further discussion and examples *infra* Part II.D.

53. *See* Payne v. Tennessee, 501 U.S. 808, 831 (1991).

efforts to rehabilitate young offenders. First, although many states have incorporated accountability and public safety into juvenile justice legislation, none have abandoned rehabilitation as an equally if not more important goal for the juvenile justice system.[54] State statutes manifest an ongoing commitment to the rehabilitation and treatment of children by requiring that judges act in the best interests of the minor, provide care and guidance conducive to the child's welfare, and identify a continuum of services that will make the child a productive citizen.[55] In addition, several state legislators have explicitly recognized that children should be held accountable only to the extent appropriate given the child's age, education, mental and physical condition, and background.[56] At least one jurisdiction has endorsed the goal of public safety while maintaining a premium on rehabilitation.[57]

Appellate courts have also continued to endorse rehabilitation as an appropriate and mandated response to juvenile delinquency.[58] Seven years after Illinois legislators revised the state's juvenile justice purpose clause,[59] Illinois appellate courts continue to recognize rehabilitation as a primary goal of the juvenile court. In 2006, the Supreme Court of Illinois made the following observation:

> Even as the legislature recognized that the juvenile court system should protect the public, it tempered that goal with the goal of

54. *See supra* note 31.

55. *See, e.g.*, ARK. CODE ANN. § 9-27-302 (1987 & Supp. 2007) (purpose is "to protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution"); COLO. REV. STAT. § 19-1-102 (2005) (purpose is "[t]o secure for each child . . . such care and guidance . . . as will best serve his welfare"); CONN. GEN. STAT. ANN. § 46b-121h (West 2004) (juvenile justice system is to "provide individualized supervision, care, accountability and treatment"); GA. CODE ANN. § 15-11-1 (2008) (purpose, enacted in 1971 with no substantive amendments thereafter, is to require that each child shall receive "the care, guidance, and control that will be conducive to the child's welfare"); HAW. REV. STAT. ANN. § 571-1 (LexisNexis 2005) (intended "to promote the reconciliation of distressed juveniles with their families, foster the rehabilitation of juveniles in difficulty, render appropriate punishment to offenders," and requiring that all children "receive dispositions that provide incentive for reform or deterrence"); IOWA CODE ANN. § 232.1 (West 2004) (purpose, enacted in 1979 with no substantive amendments thereafter, is to ensure that "each child . . . shall receive the care, guidance and control that will best serve the child's welfare"); MICH. COMP. LAWS ANN. § 712A.1(3) (West 2002) (noting purpose is to provide care, guidance, and control conducive to the child's welfare).

56. *See, e.g.*, ALA. CODE § 12-15-1.1 (LexisNexis 2005); D.C. CODE § 16-2301.02 (Supp. 2008); N.M. STAT. § 32A-2-2 (2004); WASH. REV. CODE ANN. § 13.40.010 (West 2004).

57. *See, e.g.*, D.C. CODE § 16-2301.02 (Supp. 2008) (enacted in 2005 to "provide for the safety of the public," while placing a "premium on the rehabilitation of children with the goal of creating productive citizens" and holding "the government accountable for the provision of reasonable rehabilitative services").

58. *See, e.g.*, Lopez-Sanchez v. State, 843 A.2d 915, 926 (Md. Ct. Spec. App. 2004) (recognizing General Assembly's desire to provide for the rehabilitation of delinquent youth in concluding that victim of delinquent act was not a party to any proceeding and did not have a right to vindicate private interests or to appeal from any final ruling of the juvenile court).

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

> developing delinquent minors into productive adults, and gave the trial court options designed to reach both goals. Article V may represent "a fundamental shift from the singular goal of rehabilitation to include the overriding concerns of protecting the public and holding juvenile offenders accountable for violations of the law," but proceedings under the Act still are not criminal in nature. "Delinquency proceedings are . . . protective in nature and the purpose of the Act is to correct and rehabilitate, not to punish."[60]

Eight years after Washington State legislators amended several sections of the state Juvenile Justice Act, the state appellate courts, like those in Illinois, concluded that recent amendments to the code did not negate the rehabilitative focus of juvenile court.[61] In 2005, a Washington appellate court noted that:

> Notwithstanding the adoption in 1997 of amendments to the juvenile justice code that tended to make it more punitive, we recognized the "unique rehabilitative nature of juvenile proceedings" as a continuing rationale for having judges, not juries, decide cases involving juvenile offenders. . . . "[T]he juvenile justice provisions as amended still retain significant differences from the adult criminal justice system and still afford juveniles special protections not offered to adults."[62]

California appellate courts were asked to interpret changes in the purpose clause of its state juvenile justice code much earlier than courts in other states. One California court made the following observation in 1987:

> At the core of the dispute before us is a fundamental disagreement over the purposes of the Juvenile Court Law. Prior to the amending of section 202, California courts have [sic] consistently held that "[j]uvenile commitment proceedings are designed for the purposes of rehabilitation and treatment, not punishment."
>
> In 1984, the Legislature replaced the provisions of section 202 with new language which emphasized different priorities for the juvenile justice system. The new provisions recognized punishment as a rehabilitative tool. Section 202 also shifted its emphasis from a primarily less restrictive alternative approach oriented towards the benefit of the minor to the express "protection and safety of the public."

---

60. *In re* Rodney H., 861 N.E.2d 623, 630 (Ill. 2006) (citations omitted) (holding that because the state's petition for adjudication of wardship was not intended to inflict punishment, neither the proportionate penalties clause nor the cruel and unusual punishment clause apply).

61. State v. J.H., 978 P.2d 1121, 1124–30 (Wash. Ct. App. 1999) (summarizing 1997 amendments to the state's Juvenile Justice Act and noting that section 13.40.010(2) and other provisions of the Act continued to emphasize the needs of the child over punishment).

62. State v. Tai N., 113 P.3d 19, 22 (Wash. Ct. App. 2005) (citations omitted). The court made another important observation in vacating Tai N.'s lengthy confinement. In rejecting the juvenile court's disposition, the appellate court noted that the juvenile disposition should reflect "not only the need to hold juveniles responsible for their offenses, but also the continuing rehabilitative goals of the juvenile justice system and the policy of responding to the individual needs of offenders." *Id.* at 25 (citations omitted).

> Thus, it is clear that the Legislature intended to place greater emphasis on punishment for rehabilitative purposes and on a restrictive commitment as a means of protecting the public safety. This interpretation by no means loses sight of the "rehabilitative objectives" of the Juvenile Court Law. Because commitment to CYA [California Youth Authority] cannot be based solely on retribution grounds, there must continue to be evidence demonstrating (1) probable benefit to the minor and (2) that less restrictive alternatives are ineffective or inappropriate.[63]

Even when the United States Supreme Court insisted upon basic due process protections for accused youth in *In re Gault*, in 1967, the Court took pains not to dismantle those features of juvenile court that were conducive to rehabilitation.[64] The Court recognized that the appearance and actuality of fairness, impartiality, and orderliness in the juvenile court may be just as, if not more, therapeutic for the child than rehabilitative programming.[65] Research suggests that when children believe the legal system has treated them with fairness, respect, and dignity, they are more inclined to accept the court's treatment plan and engage in the process of reform.[66] When children perceive legal rules, procedures, and actors as unfair, they have less respect for the law and legal authorities and may be less likely to accept judicial interventions.[67]

More recently, the Supreme Court reaffirmed the viability of rehabilitation for juveniles when it explicitly endorsed scientific conclusions about the differences between adults and adolescents.[68] In 2005, the Court accepted that "a greater possibility exists that a minor's character deficiencies will be reformed."[69] Because the character of a juvenile is less "fixed" than that of an adult, the Court concluded that it would be inappropriate to treat a juvenile as if he were of "irretrievably" depraved character.[70]

---

63. *In re* Michael D., 234 Cal. Rptr. 103, 104–05 (Ct. App. 1987) (analyzing impact of amendments to juvenile court).

64. *See In re* Gault, 387 U.S. 1, 22–24 (1967) (allowing states to preserve confidential juvenile hearings and not disqualify youth from civil service); *see also* Schall v. Martin, 467 U.S. 253, 263 (1984) (recognizing that the Constitution does not mandate elimination of all differences in the treatment of juveniles and trying to strike a balance between the "informality" and "flexibility" that characterize juvenile proceedings and "fundamental fairness" demanded by the Due Process Clause).

65. *See In re* Gault, 387 U.S. at 26.

66. *See* Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 46–47 (1999) (discussing research on the psychology of procedural justice in legal proceedings); *In re* Amendment to Rules of Juvenile Procedure, 804 So.2d 1206, 1211 (Fla. 2001) (reviewing Professor Bruce Winick's view that the "child's perception as to whether he or she is being listened to and whether his or her opinion is respected and counted is integral to the child's behavioral and psychological progress" and applying that principle to civil commitment hearings for juveniles in need of treatment).

67. *Id.*

68. Roper v. Simmons, 543 U.S. 551, 570 (2005).

69. *Id.*

70. *See id.* (banning death penalty for youth who committed crime before the age of

Although research in developmental psychology cannot provide an exact age at which youth are no longer amenable to treatment, judgments about amenability can be made on an individual basis, by evaluating a child's socio-environmental circumstances, psychological state, and responses to prior interventions.[71] Several features of adolescence make youth particularly amenable to rehabilitation. First, evidence suggests that adolescents demonstrate considerable plasticity in response to environmental change.[72] Thus, positive changes in the family, peer group, school, and other settings may influence the child's course of development.[73] Adolescence is also a time when individuals experience significant and rapid change in their intellectual capacities.[74] Cognitive reasoning and intellectual functioning improve as the brain evolves and as youth gain more real-life opportunities to weigh and evaluate competing options. As a result, most youth will mature out of criminal behavior between the teenage years and young adulthood.[75]

As long as rehabilitation remains an important and viable objective in the juvenile justice system, legislators must carefully consider how victims' rights will advance or undermine this objective. Unfortunately, the legislative record in many states suggests that rehabilitation was not carefully considered by state policymakers in the drafting of victims' rights legislation for juvenile courts.[76]

E. Legislative History: The Failure of State Victims' Rights Statutes to Adequately Consider the Goal of Youth Offender Rehabilitation

A study of the legislative record from a few representative states reveals little meaningful discussion about the differences between juvenile and adult offenders when policymakers extended rights to victims of juvenile delinquency. Legislators, for example, did not explicitly contemplate how victim impact statements or other victims' rights would affect—either positively or negatively—the rehabilitative efforts on behalf of accused youth. Instead, legislators generally offered two reasons for extending victims' rights to juvenile court: a desire to provide equity for victims in each system and a belief that juvenile crime was rising.[77] The legislative record further suggests that policymakers faced considerable pressure to extend rights from victims'

---

eighteen).

71. *See* Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 411–14 (1999).

72. *Id. See also* Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles Be Treated as Adults?*, 63 FED. PROBATION 52, 53 (1999).

73. Steinberg & Cauffman, *supra* note 72, at 53.

74. *Id.* at 53.

75. *See* Scott & Grisso, *supra* note 24, at 154, 188 (noting that "only a small group of young offenders will persist in a life of crime" as adults).

76. *See infra* Part I.E.

77. *See infra* notes 97–98 and accompanying text.

advocates and community leaders concerned about public safety and juvenile crime.

A few case examples demonstrate these conclusions. In Idaho, the legislature significantly expanded the rights afforded to victims of adult crime between 1985 and 1994 by amending the criminal code to increase restitution for victims and provide an array of additional rights to victims of felonies.[78] There was no recorded discussion of juvenile delinquency in the hearings convened in connection with these early amendments. In 1994, however, the legislature proposed to amend the state constitution to extend rights to victims of all crimes committed by an adult and felonies committed by a juvenile.[79] The constitutional amendment was ratified in 1994[80] and followed by another statutory amendment to the criminal code that fully extended rights to victims of felonies committed by juveniles.[81] Several witnesses, including victims of juvenile crime, testified during the House and Senate Judiciary committee meetings that preceded the 1995 amendments. One citizen, who complained about delay in the prosecution of a juvenile offender who molested her two children, was frustrated that nothing happened in the case until she became involved.[82] She urged that laws be amended to require notice and case updates for victims of juvenile crime.[83] The constitutional amendment and related statutory amendments appeared to be the product of zealous lobbying by victims and victims' advocates. In response to media claims that he was pushing the bill to bolster his run for the governor's seat,[84] the Idaho Attorney General claimed the amendments stemmed from a series of statewide crime victim hearings and from a committee comprised of prosecutors, sheriffs, court clerks, police chiefs, members of the department of corrections, individual victims, and victim advocacy groups.[85] There is no discussion or debate in the recorded testimony about the possible implications of victims' rights for the rehabilitation of juveniles.

Similarly, in Connecticut, the first victims' rights statute was enacted in 1978 without any discussion of victims of juvenile crime.[86] In 1995, the

78. *See* An Act Relating to Victims' Rights in a Criminal Action, S.B. 1051, 48th Leg., 1st Reg. Sess. (Idaho 1985) (adding the right to be consulted during the preparation of the presentence report, to address the court at the defendant's sentencing, and to be informed of the disposition of the case); An Act Relating to Crime Victims' Rights, H. B. 235, 1st Reg. Sess. (Idaho 1989).

79. *See* H.R.J. Res. 16, 52d. Leg., 2d Reg. Sess. (Idaho 1994).

80. *See* IDAHO CONST. art. I, § 22 (1994).

81. *See* H.B. 175, 53d Leg., 1st Reg. Sess. (Idaho 1995) (introduced to bring Idaho Code section 19-5306 into accord with the 1994 constitutional amendment).

82. *Id.*

83. *Id.*

84. Foster Don Kunz, Sr., Letter to the Editor, *Pass Victims' Rights Plan*, IDAHO STATESMAN, Feb. 26, 1994, at A9.

85. Larry Echohawk, *Victims' Rights Now, Balance the Scales of Justice* (on file with author).

86. *See* CONN. GEN. STAT. ANN. § 54-201 (West 2001).

Connecticut General Assembly amended Connecticut General Statute section 54-201 to redefine "crime" to include acts committed by juveniles.[87] In support of that amendment, many victims' rights advocates testified about their need for information and advocacy in the justice system and the victims' need for safety and financial recovery after crime.[88] Victims' advocates complained that confidentiality laws in juvenile court prohibited the Office of Victims' Services from notifying victims about the incarceration status of juvenile offenders.[89] Although advocates acknowledged the need for continued confidentiality for juveniles who commit minor offenses, no discussion occurred about whether victims' rights might affect the rehabilitative prospects for juveniles who commit felonies. The Assembly ultimately concluded that the juvenile justice system, which was designed "50 years ago for shoplifters and kids who skip school," must change to reflect the presence of murderers and drug addicts in the system.[90]

In Michigan, rights were extended to victims of juvenile crime in 1989, four years after victims' rights legislation was included in the state criminal code.[91] Acknowledging significant differences between the criminal and juvenile justice systems in 1985, Michigan legislators declined to include victims of juvenile delinquency in initial victims' rights statutes but expressed a willingness to amend the juvenile code to accommodate those victims in the future.[92] Legislators first recognized that procedural barriers, such as confidentiality protections for accused youth, would need to be lifted to facilitate victims' rights in juvenile court.[93] The legislators also acknowledged the juvenile court's focus on rehabilitation and noted that juvenile justice terminology traditionally used to avoid criminalizing delinquent behavior would have to be revised to conform to victims' rights language in the adult system.[94] Legislators further recognized that because different agencies would be responsible for implementing and enforcing victims' rights in juvenile court, those agencies would need to be identified and incorporated into the

87. 1995 Conn. Acts 95-175 (Reg. Sess.).

88. *See Crime Victim Issues: Before the J. Comm. on the Judiciary*, 1995 Gen. Assem., Reg. Sess. (Conn. 1995), *available at* http://search.cga.state.ct.us/dtSearch.asp?cmd=getdoc&DocId=5465&Index=I%3a\zindex\1995 (statements of Carol Watkins, Director of the Office of Victims Services, Cathleen Edwards, Prosecutor for Juvenile Services, and Keith Sweeney, Investigator for the Prosecutor's Office).

89. *See id.*

90. Matthew Kauffman, *A Trouble System for Troubling Children; Lawmakers Aim to Fix Juvenile Justice System*, HARTFORD COURANT, Apr. 23 1995, at A1.

91. MICH. COMP. LAWS ANN. §§ 780.781–.801 (West 2007); H.R. 4240, 83d Leg., Reg. Sess. (Mich. 1987) (introduced March 5, 1987 and codified as MICH. COMP. LAWS ANN. §§ 780.781–.801 (West 1988)).

92. *See* William Van Regenmorter, *Crime Victims' Rights—A Legislative Perspective*, 17 PEPP. L. REV. 59, 70–72 (1989).

93. *Id.*

94. *Id.* at 71.

legislation.[95]

In 1989, Michigan legislators made all of the statutory changes necessary to accommodate victims' rights in the juvenile justice system with little additional discussion or analysis. Despite their more extended discussion in 1985, drafters of the later legislation did not contemplate how the final victims' rights provisions would affect rehabilitative efforts on behalf of juveniles. Although the statutory provisions for victims of juvenile crime reflected some procedural differences, the substantive rights provided to those victims were consistent with the rights afforded to victims of adult crime.[96] It appears that Michigan legislators simply waited until there was a proven track record in the criminal justice system before extending rights to victims of juvenile delinquency.[97] The legislative history further suggests a belief that a significant number of serious crimes were being committed by youth motivated the decision to codify victims' rights in juvenile court.[98]

The District of Columbia stands out among other jurisdictions in its examination of the impact of victims' rights on the special features of juvenile court. The District's city council first adopted extensive victims' rights legislation in 1989 to protect the rights and interests of victims of crime committed by adults.[99] There is no record of any discussion of juvenile delinquency in the history of the 1989 legislation and its subsequent amendments. Victims' rights were not introduced into juvenile court until 2004, almost fifteen years later. In 2003, the mayor introduced the Omnibus Juvenile Justice Victims' Rights Act to "redress an inequity in the current law, which failed to recognize the rights of victims and witnesses who have suffered at the hands of a juvenile offender."[100] The victims' rights provisions were introduced in a larger juvenile justice package that not only sought to secure rights for victims, but also sought to broadly erode juvenile confidentiality by making juvenile court records, social records, and law enforcement records available to

95. *Id.* at 70–71.

96. *See id.* at 71–72; *In re* McEvoy, 704 N.W.2d 78, 84 (Mich. Ct. App. 2005) ("[C]ourts' interpretation of provisions in the [Crime Victim's Rights Act] are properly applied to statutory interpretation of substantively identical corresponding provisions in the juvenile code.").

97. *See* Regenmorter, *supra* note 93, at 69.

98. *Id.* at 69–70.

99. *See* D.C. CODE § 23-103 (2001). D.C. CODE § 23-103 was initially introduced on January 28, 1987 as Bill B7-72, the "Victims Rights Act of 1987," by Councilmember John A. Wilson and referred to the Judiciary Committee "to provide victims of violent crime with the opportunity to file a victim impact statement and to require a sentencing court to consider a victim impact statement as part of the record prior to sentencing." There is no mention of juveniles in the sub or full committee report available in the legislative history documents. *See* Introduction of B7-72; Judiciary Committee of the Council of DC for B7-72 presented June 8, 1988.

100. Letter from Mayor Anthony Williams to Chairwoman Linda Cropp, Introduction of Bill 15-537, Omnibus Juvenile Justice, Victim's Rights and Parental Participation Act of 2003 (Oct. 31, 2003), http://www.dccouncil.washington.dc.us/images/00001/20031120154358.pdf (last visited July 4, 2007) [hereinafter Letter from Mayor].

identified District agencies.[101] Before the legislation was passed, several local and regional child advocates testified before the city council.[102] Because confidentiality was the central question in the debate, testimony about victims' rights was closely tied to other confidentiality provisions. The advocates expressed concerns about the dangers of disseminating personal and sensitive social information about the accused child to victims, a fear that the city council was responding to a false belief in rising juvenile crime, and a fear that eroding confidentiality by allowing victims to attend juvenile proceedings would stigmatize the child and compromise rehabilitation.[103] District city council members were forced to consider, and apparently rejected, arguments that victims' rights would have a negative impact on the rehabilitation of juveniles. Although the council was persuaded by public testimony against broad access to juvenile social, medical, mental health, and family history records, the council passed all of the victims' rights provisions, including those granting victims access to juvenile court information.[104] The council noted that victims of juvenile delinquency need to know if an offender has been detained or committed and was convinced that victims of juvenile delinquency should be granted the same rights as victims of adult crime.[105]

The absence of any meaningful discussion about rehabilitation and confidentiality in most of the legislative histories I surveyed marks a significant shortcoming in extending victims' rights to the juvenile justice system.[106] Part II of this Article attempts to fill this gap by considering whether victims' rights, namely victim impact statements, impede efforts to rehabilitate delinquent youth. For jurisdictions like the District of Columbia, which did contemplate the differences between juvenile and adult offenders, I contend in Part III that victims' rights statutes should be modified to better achieve the balance sought between the competing interests of victims and offenders.

---

101. *Id.*

102. *Hearing on Bill 15-537 Before the D.C. Council Comm. on the Judiciary*, 15th Council, Reg. Sess. (D.C. 2004).

103. *Id.* (testimony of Ronald S. Sullivan Jr. Director, Public Defender Service for the District of Columbia; Chief Judge Rufus G. King III, Superior Court of the District of Columbia; and Kristin Henning, Professor, Deputy Director Juvenile Justice Clinic, Georgetown University Law Center).

104. Letter from Mayor, *supra* note 100, at 5–6.

105. *Id.*

106. For other examples of the absence of serious consideration of the differences between juvenile and criminal court in the legislative history of victims' rights statutes, see the legislative history of Alaska's victims' rights provisions that first guaranteed rights to victims of adult crime in 1989 and later extended those rights to victims of juvenile crime in the state constitution in 1994, *see* ALASKA CONST. art. I, § 24, and into the state juvenile code, *see* ALASKA STAT. § 47.12.110(b) (2006), in 1996. *See* An Act Relating to A Victim's Rights in the Sentencing and Parole Hearings, H.B. 345, 1983 Leg., 1st Sess. (Alaska 1983); Proposing an Amendment to the Constitution of the State of Alaska Relating to Penal Administration, H.J. Res. 43, 1993 Leg., 1st Sess. (Alaska 1993); An Act Relating to Minors, H.B. 387, 1996 Leg., 2d Sess. (Alaska 1996).

II
PRACTICAL AND THEORETICAL CONFLICTS AT THE INTERSECTION OF VICTIMS' RIGHTS AND JUVENILE COURT

Juvenile courts have long struggled to reconcile the sometimes competing objectives of due process and rehabilitation for accused children.[107] With the advent of victims' rights legislation, the juvenile court's mission is now further complicated by the need to reconcile the rights and interests of the victim with accountability and due process for the child. This Part looks at the practical implications and theoretical conflicts that surface when victims' rights intersect with the child's rights in juvenile court. Specifically, this Part examines how victim impact statements introduce a retributive element at the disposition phase of a juvenile case and lead the court to over-rely on the adolescent's apparent remorse or lack of remorse in evaluating the child's amenability to treatment. This Part also considers how victim impact statements may erode confidentiality in juvenile court proceedings and compromise the child's right to fundamental fairness and due process at sentencing.

A. Victim Impact Statements and the Contemporary Victims' Rights Movement

The victims' right to be heard at the sentencing of a criminal or juvenile defendant has been one of the most widely adopted victims' rights across the country.[108] Most victims' rights statutes give victims of juvenile delinquency the right to speak or submit a written victim impact statement at the youth's disposition hearing.[109] Victim impact statements allow the victim to have direct contact with the judge, prosecutor, and adjudicated youth and are the most visible way in which victims' rights are advanced before the court. Generally, these statements help the judge understand the full extent of harm, stress, and trauma the offender's conduct has caused the victim. In some jurisdictions, the court may even hear victim impact statements arising out of a charge that has been dismissed if the child pleads guilty to a lesser-included offense or to an offense against one victim in exchange for the government's dismissal of an offense against a second victim.[110]

---

107. *See In re* Gault, 387 US 1 (1967) (attempting to preserve some of the special features of juvenile court while providing due process protections for accused juveniles).

108. TOBOLOWSKY, CRIME VICTIM RIGHTS, *supra* note 7, at 81.

109. *See, e.g.*, ALASKA STAT. § 47.12.110(b) (2006); ARIZ. REV. STAT. ANN. § 8-385 (2007); CAL. WELFARE & INST. CODE § 656.2(a) (West 1998 & Supp. 2008); CONN. GEN. STAT. ANN. § 466-138b (West 2004); N.H. REV. STAT. ANN. § 169-B:35-a (LexisNexis 2001); N.J. STAT. ANN. § 2A:4A-42 (1987 & Supp. 2007); N.D. CENT. CODE § 12.1-34-02 (1997); OHIO REV. CODE ANN. §§ 2930.13–.14 (LexisNexis 2006 & Supp. 2008); 18 PA. CONS. STAT. ANN. § 11-201(5) (West 1998); OR. REV. STAT. ANN. § 419C.411 (West 2003 & Supp. 2005); WYO. STAT. ANN. § 7-21-101 (2007). *See also* MONT. CODE ANN. § 41-5-1511 (2007) (requiring probation officer to include statement by victim or victim's family in predisposition report); N.Y. FAM. CT. ACT § 351.1 (McKinney 2008) (same).

110. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-383.01 (2007) (guaranteeing rights to victims of

Victim impact evidence has been presented in a variety of creative formats, including photographs, videotapes, and poetry prepared by or for the victim, detailing the victim's personal, professional, and family life.[111] Evidence may include medical records, statements of lost wages or employment, funeral programs, crayon drawings from children, and testimony or letters from compassionate physicians, friends, and neighborhood associations.[112] In some jurisdictions, a prosecutor may even engage the victim in a question-and-answer dialogue at the disposition.[113] Victim impact statements have been submitted by parents, siblings, and other relatives of the victim. Most jurisdictions do not place limits on the number and form of victim impact statements.[114] In several jurisdictions, impact statements not only include information about the physical, emotional, and financial impact of the crime on the victim and the victim's family, but may also include the victim's opinion about an appropriate disposition for the delinquent child or the victim's views about the child's character.[115]

---

dismissed counts); State v. Sailer, 587 N.W.2d 756, 761 (Iowa 1998) (holding that victim impact statements should not be limited to offenses for which guilt has been established, but should be more broadly construed to enable the victim to fully detail impact of all of the offenses).

111. *See, e.g.*, Hicks v. State, 940 S.W.2d 855, 855 (Ark. 1997) (noting that prosecution showed video while victim's brother narrated); State v. Koskovich, 776 A.2d 144, 500 (N.J. 2001) (noting that poetry by murder victim's mother was included in victim impact statement); State v. Hughey, 529 S.E.2d 721, 732–33 (S.C. 2000) (holding that photographs of victim's body in the sentencing phase are admissible to demonstrate circumstances of crime and character of defendant).

112. *See, e.g.*, Collins v. United States, 631 A.2d 48, 49 (D.C. 1993) (noting that presentence report made reference to fifteen letters from victim's family and friends, four crayon drawings from victim's daughter, and victim's funeral program); State v. Fleming, 644 A.2d 1034, 1036 (Me. 1994) (noting that letter was read to jury by rape victim's doctor at sentencing); *In re* Biechele, No. P.M. 06-2471, 2006 WL 1461192, at *1 n.4 (R.I. Super. Ct. May 26, 2006) (noting that presentence report included sixty-five impact statements including letters, statements, poems, and three booklets with a wide array of information, such as SAT scores, work certificates, and funeral guest logs).

113. *See, e.g.*, *Sailer*, 587 N.W.2d at 758.

114. *But see* ALASKA STAT. § 47.12.110(b) (2006) (court may limit the number of victims who may testify if there are numerous victims); LA. REV. STAT. ANN. § 46:1844K(1)(b) (1999 & Supp. 2008) (court may limit victim statements by relevance and if there are more than three statements, court may limit number read in court; "court may otherwise reasonably restrict the oral statement in order to maintain courtroom decorum"); OHIO REV. CODE ANN. § 2930.14 (LexisNexis 2006) (court may redact information in written statement that "is not relevant to and will not be relied upon in the sentencing or disposition decision" and court shall not rely on new material facts unless it allows juvenile opportunity to respond).

115. Tobolowsky, *supra* note 6, at 81; *see also* ARIZ. REV. STAT. ANN. § 8-385(2) (2007) (statement may include victims' opinions on restitution and disposition); CAL. WELFARE & INST. CODE § 656.2 (West 1998 & Supp. 2008) (victim has right to express views concerning the offense and disposition); COLO. REV. STAT. § 19-2-112 (2008) (victim has right to express "views concerning the act, the juvenile, the need for restitution, and the type of dispositional orders that should be issued"); MINN. STAT. ANN. §§ 611A.037–.038 (West 2003) (victim may state what disposition he deems appropriate and include reasons to support that opinion); N.Y. FAM. CT. ACT § 351.1 (McKinney 2008) (when a court finds such information relevant, victim may express views relating to disposition including amount of restitution); N.D. CENT. CODE § 12.1-34-02(14)

Arguments in support of victim impact statements reflect the wide range of goals served by the broader victims' rights movement. Some aspects of the victims' rights agenda advance the retributive goals of the criminal justice system, while others simply seek greater opportunities for victims to participate and heal within the system. Consistent with theories of retribution, some proponents of victim impact statements argue that such evidence is necessary to help the judge impose sentences that more accurately reflect the harm caused to the victim.[116] Because the criminal sentence is meant to be a "statement of social concern for the victim for what he has endured" and "a barometer of the seriousness with which the criminal conduct should be viewed," some advocates argue that victims must be allowed to describe the nature and extent of the harm they have suffered.[117] Others contend that fairness and justice cannot be served unless the court hears both the victim and the defendant and argue that victim impact evidence is necessary to counteract the vast array of mitigating evidence the defendant is entitled to introduce at sentencing.[118] Victim impact statements also provide a vehicle through which some victims may seek vengeance for the harm caused,[119] especially when victims are allowed to express their opinions about what the appropriate sentence should be.

Victim impact statements may serve nonretributive goals such as aiding in the victim's search for emotional healing and reducing the victim's fears of re-victimization.[120] Victim impact evidence, at least symbolically, recognizes the victim's status as the injured party in the prosecution and empowers the victim with an opportunity to participate in the criminal or juvenile justice system.[121] Victims' rights advocates argue that victims, no less than defendants, are entitled to have their day in court and to have their views considered.[122] Proponents of this view further contend that victims find greater satisfaction in the system and are more willing to assist the government in the prosecution when they believe their voice will be meaningfully considered in the process.[123] Finally, some advocates of the victims' right to be heard at sentencing also believe that victim impact statements may advance the rehabilitative goals of

---

(1997) (victim may recommend appropriate sentence); OHIO REV. CODE ANN. § 2930.13(C)(4) (LexisNexis 2006 & Supp. 2008) (victim may recommend appropriate disposition).

116. *See* Payne v. Tennessee, 501 U.S. 808, 819 (1991); Bandes, *supra* note 6, at 362; Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1124 (2002).

117. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 19, at 77–78.

118. *See Payne*, 501 U.S. at 825.

119. *See* Bandes, *supra* note 6, at 362; O'Hara & Yarn, *supra* note 116, at 1124.

120. *See* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 87 (2004); Robert Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules*, 88 CORNELL L. REV. 543, 548–49 (2003).

121. Tobolowsky, *supra* note 6, at 81.

122. *Id.* at 82.

123. *Id.*

the criminal and juvenile justice systems by inspiring compassion, empathy, and remorse in the offender.[124] Victim impact evidence may in turn help offenders reconcile with the community by motivating the offender to offer restitution, apology, and community service.

Although every state now has some statutory provision that allows victims to be heard before the sentencing of a convicted adult, there has been considerable opposition to the use of victim impact statements in the criminal justice system. Opponents of victim impact statements complain that such evidence injects excessive emotion into the sentencing process, reduces objectivity and reason, provides a forum for victim retaliation and vengeance, leads to harsher, inequitable sentences, and traumatizes victims by creating unmet expectations about how their input will affect the outcome.[125] These opponents further contend that any probative value victim impact statements have at sentencing is outweighed by their prejudicial effect.[126] Opponents also complain that victim impact statements are time consuming, administratively burdensome, and often unnecessary since victim impact information is already available to the court during trial or plea and can be reviewed in an unemotional, sanitized way by the prosecutor at sentencing.[127]

B. The Retributive Element

To the extent that victim impact statements satisfy retributive goals at the expense of other important objectives, such as rehabilitation, these statements may be misplaced in juvenile court proceedings. This Part examines traditional theories of retribution and contends that retributive justice does not take into account the diminished culpability of youth in the juvenile justice system. This Part further explores the ways in which the victim's emotional appeal may foster empathy and compassion for the victim while deflecting the court's attention from assessing the individual needs of the offending child.

1. Misplaced Retribution

While courts have had little opportunity to consider the role of victim impact statements in the primarily rehabilitative juvenile justice system, there is considerable jurisprudence from state and federal courts establishing the relevance of victim impact statements to the retributive goals of the criminal justice system. The Supreme Court first considered victim impact statements in *Booth v. Maryland* in 1987.[128] Recognizing that the victim's emotional appeal

124. *Id.*

125. *See id.*; Payne v. Tennessee, 501 U.S. 844, 846 (1991) (Marshall, J., dissenting); Booth v. Maryland, 482 U.S. 496, 508–09 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

126. *See Payne*, 501 U.S. at 846 (Marshall, J., dissenting).

127. Tobolowsky, *supra* note 6, at 81.

128. 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

may have a significant impact on the fact-finder, the Court concluded that victim impact statements may "inflame" the listener and obstruct reasoning in capital sentencing.[129] In excluding these statements from capital cases, the Court was worried that such evidence would create a risk of arbitrary outcomes that turn on the differing ability of victims to articulate pain and on the willingness of some victims to forgive or the desire of other victims to seek vengeance.[130] The Court was further concerned that victim impact statements create a risk that sentences will be affected by the perception of the victim as a "sterling member of the community rather than someone of questionable character."[131]

The Court's rejection of victim impact statements in *Booth* did not stand long. Relying in large part on theories of retribution and culpability, the Supreme Court reversed *Booth* just four years later in *Payne v. Tennessee*.[132] In *Payne*, the Court accepted victim impact evidence as an appropriate method of informing the sentencing authority about the specific harm caused by the crime.[133] The justices concluded that the extent of harm to the victim correlates with the "moral culpability" of the offender and held that victim impact statements serve a legitimate purpose of permitting the fact-finder to meaningfully assess the defendant's "blameworthiness," "personal responsibility," and "moral guilt."[134] The Court also noted that the law always punishes differently for different effects.[135] The defendant who pulls the trigger but misfires cannot be punished for murder, while a defendant who hits his target may receive the death penalty.[136] Both may be equally responsible for the reckless disregard for human life, but their punishments will vary according to the harm caused.[137] This reasoning is consistent with classic theories of retribution, in which the offender deserves to be punished in proportion to the severity of his offense and the harm caused.[138] The *Payne* Court ultimately overruled *Booth* by restoring the state's right to permit victim impact statements in capital cases.[139] State courts both before and after *Payne* have admitted victim impact statements in non-capital cases based on a similar

129. *See id.* at 508–09.

130. *See id.* at 505; *see also* Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 421–22 (2003).

131. *Booth*, 482 U.S. at 506; *see also* Bandes, *supra* note 6, at 406–07 (arguing that victim impact statements permit and encourage distinctions about the personal worth of victims based on race and class).

132. 501 U.S. 808 (1991).

133. *Payne*, 501 U.S. at 825.

134. *Id.* at 860–61; *see also* Nadler & Rose, *supra* note 130, at 438–39.

135. *See Payne*, 501 U.S. at 819; *see also* discussion in Yoshino, *supra* note 6, at 1875.

136. *See Payne*, 501 U.S. at 819.

137. *See id.*

138. Paul Butler, *Retribution, for Liberals*, 46 U.C.L.A. L. REV. 1873, 1879–80 (1999) (discussing Immanuel Kant's theory of retribution).

139. *Payne*, 501 U.S. at 827–30.

rationale.[140]

Accepting without critique the Court's analysis in *Payne*, it is clear that victim impact statements are legally relevant evidence in retributive and punitive systems of justice. The Court's retributive rationale, however, may not justify the admission of victim impact statements at a disposition hearing that is at least partly, if not primarily, rehabilitative. In a rehabilitative system, sentences do not turn on the severity of the child's offense, but are instead derived from an individualized assessment of the child's mental health and environment and an identification of services needed to reform the child.[141] Because the offender's needs are evaluated independently from the harm to the victim,[142] two youth causing the same or similar harms may have different dispositions or "treatment plans" that reflect their unique psychological, cognitive, familial, and environmental circumstances and characteristics.[143]

This analysis is not to suggest that victim impact statements cannot aid in the rehabilitation of delinquent youth. Quite to the contrary, victim impact statements might be useful in a rehabilitative system if they were appropriately incorporated into the child's long-term treatment plan after disposition. When combined with counseling, mediation, or other victim awareness programming, victim impact statements might educate the child on the far-reaching impact of his conduct, help the child empathize with victims, and encourage the child to conform to social norms.[144] In current practice, however, most victim impact statements are presented to the judge at the child's disposition hearing before the child's treatment plan has been developed and implemented. Given evidence that suggests that the courtroom may not be an environment conducive to fostering empathy and remorse in the child,[145] victim impact statements are not currently used in a way that will effectively rehabilitate juveniles.

While the mission of juvenile court is not primarily retributive, it is not purely rehabilitative either. The tension and ambiguity in the goals of the juvenile justice system make it particularly difficult to evaluate the role of

140. *See, e.g.*, State v. Wilson, 669 A.2d 766, 770 (Me. 1996) ("[W]idespread grief and outrage are evidence of harm caused by the defendant to . . . the community. . . ."); Haley v. State, 173 S.W.3d 510, 517 (Tex. Crim. App. 2005) ("Victim-impact evidence . . . may be admissible at [sentencing] when that evidence has some bearing on the defendant's personal responsibility and moral culpability." (quoting Salazar v. State, 90 S.W.3d 330, 335 (Tex. Crim. App. 2003))); Bitz v. State, 78 P.3d 257, 262 (Wyo. 2003) (holding that purpose of victim impact statement was to permit sentencing court to consider harm caused by defendant's crime).

141. *See* Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1224, 1271 (1998) (discussing evolution of rehabilitative courts in America and application of rehabilitative philosophy to drug and juvenile courts).

142. Although the victim's harm is not at the center of the rehabilitative system, the victim may still be vindicated by the child's admission of guilt in a plea or the court's finding of the defendant's guilt at trial.

143. *See* Steinberg & Cauffman, *supra* note 71, at 411–14.

144. *See* discussion *infra* Part II.C, notes 266–285 and accompanying text.

145. *See* discussion *infra* Part II.C, notes 262–263 and accompanying text.

victim impact statements in the juvenile justice system. As discussed in Part I, accountability, public safety, victim participation, and community restoration are all goals that compete with rehabilitation in contemporary juvenile courts.[146] Moreover, although few states include the word "punishment" in their juvenile justice statutes,[147] some appellate courts have held that punishment that fits the crime can be rehabilitative.[148] Unfortunately, juvenile justice statutes do not define terms like "accountability" and "punishment," and judges, practitioners, and policymakers have a difficult time ferreting out these concepts in the theory and practice of juvenile court.

Although the term "accountable" appears far more often in juvenile statutes than "punishment," it is not clear how accountability should be achieved and whether legislators mean for accountability to differ from our traditional understanding of punishment. Dictionary definitions of "account," "accountable," and "accountability" suggest three things: (1) the offender must accept responsibility for his conduct,[149] (2) the offender must give a statement of reasons, causes, or motives to explain his conduct,[150] and (3) the offender must be willing to suffer the consequences of failing to meet an obligation to another.[151] Thus, the concept of "accountability" includes an emphasis on accepting and explaining the conduct, while "punishment" focuses solely on the imposition of a penalty for an offense or violation.[152] It is not clear whether juvenile court practice draws this distinction in any meaningful way. The preference for the term "accountability" may be little more than an attempt to soft pedal the introduction of retributivist goals into juvenile court.

---

146. *See supra* notes 29–31 and accompanying text; *see also In re* S.K., 587 N.W.2d 740, 742 (S.D. 1999) (recognizing that public safety must be sought whether by rehabilitation or incarceration and noting that while rehabilitation is the preferred route in dealing with juveniles, it cannot be accomplished in all cases).

147. *But see* CONN. GEN. STAT. ANN. § 46b-121 (West 2004); FLA. STAT. ANN. § 985.01 (West 2006 & Supp. 2008); HAW. REV. STAT. ANN. § 571-1 (LexisNexis 2005); ME. REV. STAT. ANN. tit. 15, § 3002 (2003).

148. *See, e.g.*, *In re* Michael D., 234 Cal. Rptr. 103, 104–05 (Ct. App. 1987) (recognizing punishment as a rehabilitative tool under revised juvenile justice statutes); *In re* L.J., 546 A.2d 429, 439–40 (D.C. 1988) (noting that judges can "contribute to the rehabilitation of a delinquent by teaching him that conduct does have consequences"); *In re* Caldwell, 666 N.E.2d 1367, 1368 (Ohio 1996) ("Punishment is not the goal of the juvenile system, except as necessary to direct the child toward the goal of rehabilitation."); *In re* Anderson, 748 N.E.2d 67, 70 (Ohio Ct. App. 2001) (same).

149. Merriam-Webster Online, http://www.merriam-webster.com/dictionary/accountability (last visited Feb. 22, 2009).

150. Merriam-Webster Online, http://www.merriam-webster.com/dictionary/account (last visited Feb 14, 2008).

151. Merriam-Webster Online, http://www.merriam-webster.com/thesaurus/accountable (last visited Feb. 14, 2008).

152. Merriam-Webster Online, http://www.merriam-webster.com/dictionary/punishing (last visited Feb 15, 2008) (defining punishing to impose a penalty on a fault, offense or violation).

To complicate matters even further, judges and practitioners disagree about where to draw the line between rehabilitation and punishment or accountability.[153] The courts' perceptions of punishment and rehabilitation have varied according to the factual context and the collateral issues at stake. For example, in Washington, an appellate court concluded in 2004 that juvenile courts had become punitive enough to warrant due process safeguards such as the right against self-incrimination for youth at a disposition hearing,[154] but held in 2005 that juvenile courts had not become so punitive as to guarantee juveniles a Sixth Amendment right to jury trials.[155] All of these uncertainties create a vague duality in the mission of the juvenile court system, and juvenile judges have tried their best, with little uniformity, to accommodate both punishment and rehabilitation in the disposition of juvenile cases.[156] Accepting that accountability, punishment, and rehabilitation all now have some place in juvenile court, two questions remain: (1) Do judges need victim impact statements to hold the child accountable or to impose an appropriate punishment in the juvenile justice system? and (2) If so, do victim impact statements introduced at a juvenile disposition so undermine the companion goal of rehabilitation that the costs of these statements outweigh their value in juvenile court?

As discussed above, if their proponents are right, victim impact statements provide the court with the most reliable method for measuring harm caused by

153. *Compare In re* David T., No. H024334, 2003 WL 1914164, at *8 (Cal. Ct. App. Apr. 18, 2003) (rejecting minor's claim that judge "was so preoccupied with the gravity of the offenses and the impact on the victims that [he] . . . based [the disposition] primarily on retributive grounds," and finding that the trial court had properly focused on the need to rehabilitate the child and that punishment is appropriate so long as it is rehabilitative), *rev'd on other grounds*, 2004 WL 505254 (Cal. Ct. App. Mar. 16, 2004), *and* State v. B.C., No. 24800-4-II, 2007 WL 1822403, at *7 (Wash. Ct. App. June 26, 2007) (affirming goal of juvenile court to rehabilitate and not punish, but denying child's claim that disposition of eighty hours of community service, restitution, twenty-four hours of community supervision, thirty days of confinement and twelve to eighteen weeks of sex-offender treatment was punitive), *with* E.H. v. State, 764 N.E.2d 681, 685 (Ind. Ct. App. 2002) (noting that goal of juvenile system is to rehabilitate and not punish, and finding that the one-year commitment was punitive and did "not further the rehabilitative goals of the juvenile justice system"), *and* State v. Tai N., 113 P.3d 19, 24–25 (Wash. Ct. App. 2005) (finding that manifest injustice disposition of twenty to twenty-four weeks beyond the standard range of zero to thirty days was not justified as the judge did not articulate how disposition addressed any rehabilitative need).

154. *See* State v. Diaz-Cardona, 98 P.3d 136, 140 (Wash. Ct. App. 2004) (rejecting state's argument that the rehabilitative nature of juvenile proceedings would justify finding that a child's right against self-incrimination does not extend to dispositional proceedings, and holding that the right against self-incrimination should apply because it is now well recognized that juvenile courts function to punish as well to rehabilitate).

155. *See Tai N.*, 113 P.3d at 22 (Wash. 2005) (holding that "[n]otwithstanding the adoption in 1997 of amendments to the juvenile justice code that tended to make it more punitive, we recognized the 'unique rehabilitative nature of juvenile proceedings' as a continuing rationale for having judges, not juries, decide cases involving juvenile offenders").

156. *See supra* notes 58–63 and accompanying text in Part I.D., surveying post-1985 appellate cases.

the child's conduct and allow the court to impose a punishment that best fits the child's crime. Opponents of victim impact statements, however, argue that the impact of harm can be determined from other sources such as plea colloquies, trial testimony, and unemotional summaries provided by the prosecutor at the disposition or restitution hearing. While it may be true that victim impact statements provide a unique perspective on the nature and extent of the victim's harm, I contend in the next two Parts that the introduction of victim impact statements at a child's disposition hearing imposes two significant costs. First, these statements hinder the court's evaluation of the child's often diminished culpability in delinquent behavior.[157] Second, they distract the court's attention from the important goal of rehabilitation by placing a disproportionate emphasis on the emotional appeal of the victim and any apparent lack of remorse shown by the child.[158] Because these costs outweigh the statements' value in providing the court with important information, I argue that victim impact statements should be excluded from the disposition hearing and reserved for pretrial diversion and post-disposition victim-offender programs that significantly enhance the child's prospects for rehabilitation and are likely to provide greater satisfaction for the victim.[159]

2. Accountability and the Diminished Culpability of Youth

The shift to a retributive focus in juvenile court proceedings, brought about by victim impact statements, ignores the psychological and sociological evidence suggesting that juvenile offenders lack the mental culpability that undergirds the retributive rationale of punishment. While the exact meaning and contours of accountability remain unclear in the juvenile justice system, it seems relatively uncontroversial to assert that accountability, like retribution, cannot be measured entirely by the harm caused. Retributive justice dictates that offenders may only be punished in proportion to their culpability and blameworthiness.[160] Thus, the focus in the retributive analysis is first on the question of culpability and second on the question of harm. Two defendants who produce the same harm may and should be punished differently if they have different degrees of culpability. The defendant who accidentally kills or lacks the mental capacity to intentionally kill will be punished less severely than the defendant who, in a rational state of mind, intends to and does kill.[161]

157. *See infra* discussion in Part II.B.2.

158. *See infra* Part II.B.3.

159. *See infra* Part III.

160. *See* Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("With respect to retribution—the interest in seeing that the offender gets his 'just deserts'—the severity of the appropriate punishment necessarily depends on the culpability of the offender."); Tison v. Arizona, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.").

161. Accident, insanity, and intoxication are common defenses to crime. *See, e.g.*, CAL. PENAL CODE § 26 (West 1999 & Supp. 2008) (codifying the defenses of mental incapacity,

Theories of accountability should be no different. An offender should only be held accountable to suffer the consequences that are warranted by his level of culpability. As noted in Part I, legislators in some states have explicitly recognized that a child should be held accountable only to the extent appropriate given the child's age, education, mental and physical condition, background, and other relevant factors.[162] These statutes implicitly recognize that accountability may be mitigated by the child's diminished capacity to make appropriate decisions and act in accordance with social norms.

There is an emerging body of psychological and neurological evidence that supports a presumption of diminished capacity and reduced culpability for minors who engage in criminal conduct.[163] Research has identified four aspects of adolescent development—neurological, intellectual, emotional, and psychosocial—which affect the capacities of youth to process information and make well-reasoned decisions.[164] Neuroscience teaches us that "youth[] in early and mid-adolescence . . . are neurologically immature."[165] Brain-imaging studies conducted over the last ten years reveal that the brain continues to develop through adolescence.[166] The areas of the brain that are linked to cognitive reasoning and impulse control develop last.[167] These neurological delays mean that youth generally have diminished capacity to plan, organize information, and think about the possible consequences of their behavior.[168] Youth also have delayed emotional responses and diminished capacity for impulse control, both necessary for the rational identification and consideration of alternative courses of conduct.[169] Psychological research in adolescent emotional development

---

mistake, duress, accident, and unconsciousness); IDAHO CODE ANN. § 18-201 (2004) (codifying the defenses of accident, mistake, duress, and unconsciousness).

162. *See supra* note 56 and accompanying text.

163. *See* Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 811–16 (2005); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1011 (2003); Scott & Grisso, *supra* note 24, at 141–44.

164. *See* Scott & Grisso, *Developmental Incompetence*, *supra* note 163, at 811.

165. *Id.* at 812–13.

166. *Id.* at 812; *see also* Abigail A. Baird & Jonathan A. Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y B: BIOLOGICAL SCI. 1797 (2004); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77, 80–83 (2004). *But see* Jay D. Aaronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 PSYCHOL. PUB. POL'Y & L. 115, 133–34, 136–37 (2007) (noting newness and limitations of these studies).

167. *See* Scott & Grisso, *Developmental Incompetence*, *supra* note 163, at 812. *But see* Giedd, *supra* note 166 at 83 (acknowledging that a direct causal relationship between brain changes and teenage behavior has not been established).

168. Scott & Grisso, *Developmental Incompetence*, *supra* note 163, at 812; Baird & Fugelsang, *supra* note 166, at 1797. *But see* Aaronson, *supra* note 166, at 121 (arguing that brain-imaging research is still too new to be used in the legal system and does not yet draw a definitive link between developmental milestones of the brain and changes in decision-making capacity).

169. *See* Aaronson, *supra* note 166, at 122–23 (discussing Yurgelun-Todd interview on PBS Frontline Series, in which she says adolescents rely on the emotional region of the brain in

suggests that some youth struggle for impulse control well into middle and late adolescence.[170]

Well-documented research in intellectual and cognitive development demonstrates that individual capacity for abstract thinking and deductive reasoning improves through early and maybe mid-adolescence.[171] Yet, even when the teenager's capacity for reasoning and understanding begins to approximate that of an adult, there is reason to believe that adolescent decision making may be compromised in stressful and unstructured situations where youth have little life experience to draw upon.[172]

Immature psychosocial development further compounds adolescent cognitive limitations.[173] In social interactions, poor risk perception and preference, limited future orientation, and vulnerability to peer and adult influence all affect adolescent decision making.[174] Adolescents tend to weigh potential gains more heavily than losses in making decisions and are thus less risk averse than adults.[175] Adolescents also have limited life experience and less concern for the future, leading them "to pay less attention to [the] long-term consequences" of their behavior and "to focus [instead] on the short-term risks and benefits."[176] Because adolescents tend to take greater risks, they are more likely than adults to engage in reckless behavior.[177]

The Supreme Court has recently acknowledged that juveniles, as a class compared to adults, have diminished capacity and reduced culpability for their criminal behavior.[178] As the Court noted in *Roper v. Simmons*, the "susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'"[179] In

---

decision making); Scott & Grisso, *Developmental Incompetence*, *supra* note 163, at 812–14; M.C. Brower & B.H. Price, *Neuropsychiatry of Frontal Lobe Dysfunction in Violent and Criminal Behavior: Critical Review, Journal of Neurology*, 71 NEUROSURGERY & PSYCHIATRY 720–26 (2001) (strong evidence to show that the frontal lobe plays an important role in aggressiveness, impulse control, regulation of emotion, and executive decision-making functions).

170. *See* Scott & Grisso, *Developmental Incompetence*, *supra* note 163, at 814; Steinberg & Scott, *supra* note 163, at 1012–13.

171. *See* Steinberg & Scott, *supra* note 163, at 1011–12; Scott & Grisso, *Developmental Incompetence*, *supra* note 163, at 813–14.

172. *See* Aaronson, *supra* note 166, at 119; Scott & Grisso, *Developmental Incompetence*, *supra* note 163, at 813–14; Steinberg & Scott, *supra* note 163, at 1011, 1014.

173. *See* Scott & Grisso, *Developmental Incompetence*, *supra* note 163, at 815; Steinberg & Scott, *supra* note 163, at 1012–14.

174. *See* Scott & Grisso, *Developmental Incompetence*, *supra* note 163, at 815–16; Steinberg & Scott, *supra* note 163, at 1012–14.

175. *See* Scott & Grisso, *Developmental Incompetence*, *supra* note 163, at 815; Steinberg & Scott, *supra* note 163, at 1012.

176. *See* Scott & Grisso, *Developmental Incompetence*, *supra* note 163, at 815–16; Steinberg & Scott, *supra* note 163, at 1012.

177. *See* Scott & Grisso, *Developmental Incompetence*, *supra* note 163, at 815; Steinberg & Scott, *supra* note 163, at 1012–13.

178. *See* Roper v. Simmons, 543 U.S. 551, 571 (2005).

179. *Id.* at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality

finding the death penalty unconstitutional for youth who committed crimes while under the age of eighteen, three primary differences between juveniles and adults moved the Court: (1) juveniles' immaturity and "underdeveloped sense of responsibility" that lead to poorly reasoned decisions and reckless behavior; (2) juveniles' vulnerability or susceptibility to "negative influences and outside pressures," including environmental circumstances beyond their control; and (3) juveniles' less well-formed identity and character.[180] The Court concluded that due to these differences juveniles are entitled to greater forgiveness for falling prey to the negative influences of a home or community environment they cannot escape.[181] The Court further recognized that a child's diminished culpability calls into question the retributive justification for at least some types of criminal punishment.[182]

As the Court found in the juvenile death penalty context, a strong "likelihood exists that the brutality or cold-blooded nature of any particular crime [will] overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[183] The Court's assessment of the emotional impact of these tragedies on the fact-finder is no less true in non-capital juvenile cases. By their very nature, victim impact statements—offered to counteract mitigating evidence introduced by the defendant[184]—distract the listener's attention from evidence of the child's immaturity and individual needs in the juvenile courts. Victim impact statements are valuable in retributive systems of justice precisely because they focus the listener's attention on the severity of the harm to the victim and the brutality of the offender's conduct.

3. Persuasive Power and Voice: Empathizing with the Victims' Emotional Appeal

The real effect of victim impact evidence in juvenile court is hard to measure in concrete or empirical terms. Given the subjective nature of any sentencing determination and the number and complexity of factors the judge considers at the juvenile disposition, it is often impossible to determine how much any one factor has swayed the judge's decision. In addition, there are no statistics on the number of victims who actually submit written or oral impact statements in juvenile cases, and there are no empirical studies documenting the ways in which juvenile sentences differ in the presence or absence of victim

---

opinion)).

180. *Id.* at 569–70 (citing Johnson v. Texas, 509 U.S. 350, 367 (1993), Eddings v. Oklahoma, 455 U.S. 104, 115 (1982), and Steinberg & Scott, *supra* note 163, at 1014).

181. *See id.* at 570.

182. *See id.* at 571 (finding that retributive justification for death penalty not appropriate in light of diminished culpability of youth).

183. *Id.* at 573.

184. *See* Payne v. Tennessee, 501 U.S. 808, 825 (1991).

impact evidence. Notwithstanding these gaps, state statutes, anecdotal evidence, case law, and psychological studies on the role of empathy in sentencing all suggest that victim impact evidence does affect critical decisions at every phase of the juvenile case.

State legislators have intentionally drafted statutes to provide an opportunity for victim input at every stage of a proceeding. State statutes often require the court to consider the victim's input at hearings on the offender's release from confinement,[185] the child's competence to stand trial,[186] pretrial requests for continuance,[187] waiver to adult court,[188] and motions to sever from co-respondents.[189] State statutes also give victims the right to consult with the prosecutor at various stages of the juvenile case, including plea and disposition.[190] While none of these statutes require prosecutors to follow the victim's preferred course of action, the victim's involvement naturally impacts the zeal with which prosecutors pursue individual cases. In the author's own practice, a prosecutor recently refused to dismiss a juvenile case without the victim's consent although the offense occurred eighteen months earlier, the child had already received treatment at an in-patient residential facility for over one year since the alleged offense took place, and counselors at the treatment facility reported that the child had been rehabilitated and no longer needed care and supervision from the court. Notwithstanding her own stated doubt about the child's need for further services, the prosecutor felt compelled to follow the wishes of the victim, who wanted the child not only prosecuted but incarcerated in a local detention facility.

Victim impact evidence also appears to have a psychological impact on judges who must determine the appropriate disposition for the juvenile

185. *See, e.g., In re* L.C.H., No. 03-03-00687-CV, 2005 WL 2313506, at *4 (Tex. App. Sept. 23, 2005) (victim allowed notice and opportunity to be heard in the release of a child or transfer of a child from juvenile to adult correctional facility pursuant to sections 54.11(a) and (k) of the Texas Code). *See also supra* note 47.

186. *See e.g., In re* A.B., 715 N.W.2d 767, 2006 WL 469945, at *2, *4 (Iowa Ct. App. Mar. 1, 2006) (discussing state's argument concerning the juvenile court's finding of incompetency based on Iowa Code chapter 812 that "findings of incompetency in juvenile delinquency proceedings . . . adversely impact the rights of victims" and that "society . . . has significant interests in preventing juveniles from escaping the consequences of [their] acts by reason of incompetency").

187. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-414(B) (2007); OHIO REV. CODE ANN. § 2930.08 (LexisNexis 2006 & Supp. 2008).

188. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 6355(a)(4)(iii)(A) (West 2000); *In re* Welfare of B.A.D., No. A06-1776, 2007 WL 584371, at *3 (Minn. Ct. App. Feb. 27, 2007) (discussing factors for certification to adult court under section 260B.125, subd. 4 of the Minnesota Code); Commonwealth v. Saez, 925 A.2d 776, 778 (Pa. Super. Ct. 2007) (noting that impact on victim must be considered in decision to waive juvenile to adult court).

189. *In re* Welfare of I.M., Nos. C4-94-1517 & C6-94-1518, 1995 WL 91583, at *2 (Minn. Ct. App. Mar. 7, 1995) (applying adult criminal rules on joinder and severance to juvenile case and noting that under section 631.035 of the Minnesota Code severance may be granted "as long as the court considers the impact of severance upon the victim").

190. *See supra* note 48.

offender.[191] Very few state appellate courts have had an opportunity to rule on the admissibility of victim impact statements in juvenile court. Those that have ruled on such statements acknowledged the potential for their misuse, but concluded that "[juvenile court] judges can be trusted to recognize the limited relevance of the[se] statements" in the rehabilitation of the child.[192] For example, in Arkansas, the state supreme court found no prejudice in the erroneous admission of victim impact evidence during a juvenile disposition hearing after the child had been adjudicated for three counts of negligent homicide arising from an auto collision.[193] In finding no prejudice, the court noted that the victim impact evidence had been "unnecessary to impress upon the [trial] court the seriousness of the offense" as "the judge already knew [the child] was responsible for the deaths of three adults and a viable fetus."[194] The petitioner also failed to preserve his claim that the judge imposed a punitive and retributive disposition instead of one consistent with his best interests.[195] In Alaska, an appellate court held that a juvenile judge had authority to consider unsolicited letters from the victims' relatives absent any showing the letters would unduly delay or interfere with the purpose or character of the disposition hearing.[196]

As is evident from these cases, we expect a lot from juvenile judges. In non-jury trials, we repeatedly ask judges to perform the "mental gymnastics" required to ignore or compartmentalize inadmissible or prejudicial evidence that has been introduced in error.[197] Some commentators even hope that judges will overcome their own individual prejudices and biases through intellectual awareness and critical self-reflection.[198] Although we remain hopeful about the capacity of judges to weigh evidence appropriately and avoid consideration of extraneous factors, we may ask too much in requiring judges to compartmentalize the emotionally weighty victim impact statement and remain

191. *See* Nadler & Rose, *supra* note 130, at 423.

192. *See, e.g.*, *In re* M.N.T., 776 A.2d 1201, 1205 (D.C. 2001).

193. *See* Hunter v. State, 19 S.W.3d 607, 608, 611 (Ark. 2000). In 2003, the state legislature amended the Arkansas Juvenile Code section 9-27-329 to permit the court to hear victim impact evidence in juvenile disposition. *See* H.B. 2457, 84th Gen. Assem., Reg. Sess. (Ark. 2003) (amending the Juvenile Code).

194. *Hunter*, 19 S.W.3d at 610–11.

195. *Id.* at 611–12.

196. *See* J.C.W. v. State, 880 P.2d 1067, 1701 (Alaska Ct. App. 1994).

197. *See, e.g.*, People v. Williams, 617 N.E.2d 87, 93 (Ill. App. Ct. 1993) (stating that a trial judge is able to consider a codefendant's statement against the codefendant, but not against the defendant); People v. Moore, 470 N.E.2d 1284, 1290–91 (Ill. App. Ct. 1984) (finding that Bruton v. United States, 391 U.S. 123 (1968), has no application in a judge-tried case because judges and lawyers commonly engage in such "mental gymnastics" with sufficient accuracy to protect the defendant's constitutional rights); Commonwealth v. Montanez, 788 N.E.2d 954, 962 (Mass. 2003) (noting that a trial judge sitting without a jury ordinarily is presumed able to weigh the evidence appropriately and to avoid consideration of extraneous factors); Commonwealth v. Collado, 690 N.E.2d 424, 427 (Mass. 1998) (noting that the law assumes a judge able to decide on the admissibility of evidence and then ignore the inadmissible evidence).

198. Bandes, *supra* note 6, at 371.

focused on the individual needs of an offending child. As Judge Learned Hand stated in 1932, asking fact-finders to ignore prejudicial evidence often requires them to perform "a mental gymnastic which is beyond, not only their powers, but anybody's else."[199]

This Article opens with a summary of *State v. A.V.R.*,[200] in which a juvenile court judge imposed a sentence of 126 weeks of confinement in a state facility after reading letters from the victims' families and friends, hearing one victim's father allocute about his wife's attempted suicide after their son's death, and considering the respondent's apology. Police reports and witness statements prepared immediately after the offense "indicated that A.V.R. knew 'right away' that he had done 'something terribly wrong.'"[201] The probation officer assigned to A.V.R.'s case also opined that A.V.R. "feels very badly about what has happened," and the high school prevention specialist who testified on A.V.R.'s behalf was certain that A.V.R. felt remorse as demonstrated by his emotional speech at a school assembly.[202] Notwithstanding substantial evidence of the child's contrition, the judge remained unconvinced, and was clearly moved by the enormity of the harm and emotional toil the offense had on the victims' family. In his final ruling, the judge concluded that the sentence requested by the government was not high enough to instill public confidence in the juvenile justice system and did not adequately reflect the severe impact and tragedy to the victims' families.[203] We can only speculate about whether the outcome would have been different if the surviving victim had not attended the hearing or if the judge had not been so unsatisfied with the child's apology to the victims' families. The state court of appeals ultimately reversed the trial court's ruling, finding the length of detention excessive and the court's conclusion that the child lacked remorse unsupported by the evidence.[204]

---

199. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (finding that an instruction to ignore an inadmissible prejudicial statement from one codefendant against another constituted such a "mental gymnastic," but holding that the error was harmless) *see also* United States v. Delli Paoli, 229 F.2d 319, 321 (2d Cir. 1956) ("Possibly it would be extreme to say that nobody can ever so far control his reasoning that he will not in some measure base his conclusion upon a part of the relevant evidence before him, which he has been told to disregard; but at least it is true that relatively few persons have any such power, involving as it does a violence to all our habitual ways of thinking."); Lois R. v. Super. Ct., 97 Cal. Rptr. 158, 163 (Ct. App. 1971) (recognizing "a variation in the degree to which referees and judges can handle the mental gymnastics necessary to presenting and judging a case"); People v. Ventura, No. 5693, 2007 WL 4170847, at *1 (N.Y. J. Ct. Nov. 15, 2007) ("Even if the Court could intellectually separate its earlier determination from the suppression issues on trial itself, that Chinese Wall would come tumbling down by virtue of the appearance of impropriety that such mental gymnastics would create. This Court and all others are fallible.").

200. No. 35032-7-II, 2007 WL 1335244 (Wash. Ct. App. May 8, 2007).

201. *Id.* at *1.

202. *Id.* at *1–2.

203. *Id.* at *3.

204. *Id.* at *4.

In *Commonwealth v. Saez*, a juvenile court judge in Pennsylvania certified a fourteen-year-old child to stand trial as an adult on charges of attempted murder, notwithstanding the probation officer's belief that the child was "amenable to treatment in the juvenile justice system."[205] The state's attorney seriously undermined the probation officer's recommendation by demonstrating that the probation officer had not considered the impact of the crime on the victims.[206] Although there was no victim impact statement, the court of appeals concluded that the trial court's decision to transfer the child to adult court was supported by evidence of the details and impact of the offense, the juvenile's use of a gun, and the child's apparent lack of empathy for the victim.[207] Even without a formal victim impact statement, other victim impact evidence heavily influenced the court's decision to disregard the probation officer's recommendation.

In *In re Welfare of D.S.M.*, a juvenile court judge in Minnesota found the impact of the youth's conduct on the victim to weigh heavily in favor of extending the court's jurisdiction beyond the age of minority.[208] The appellate court noted that the youth was "charged with the serious offense of First Degree sexual contact and penetration with a much younger boy."[209] The court "inferred that the appellant was in a position of trust and authority with the victim" and referred to the victim as the appellant's "stepbrother," even though the parents of the victim and appellant were not married.[210] The court also noted that the victim had scarring around his anus and opined that he "may suffer psychological effects for years to come."[211] Again, even without a formal victim impact statement at the hearing, the victim impact evidence was found to weigh "indisputably" in favor of extending jurisdiction, notwithstanding the child's consistent compliance with prior psychiatric recommendations and lack of any prior delinquency record.[212]

These latter two cases suggest that victim impact evidence presented by the government already weighs heavily in the court's sentencing determination and often overshadows other relevant factors such as the child's psychological state, the child's response to prior intervention, and opportunities for change in the child's social, educational, or familial environment. Emotional impact statements delivered by the victims themselves can only further distort the balance between retribution and rehabilitation. Empirical studies provide additional support for the anecdotal evidence that retributive responses to the

205. 925 A.2d 776, 779–80 (Pa. Super. Ct. 2007).
206. *See id.* at 780–81.
207. *See id.*
208. *See In re* Welfare of D.S.M., No. A03-949, 2004 WL 771680, at *2 (Minn. Ct. App. Apr. 13, 2004).
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*

victim's harm significantly affect individual sentencing preferences.[213] Literature in psychology suggests that judges, probation officers, police officers, and prosecutors are likely to empathize more with those most like them and best understand that which conforms to their own experiences.[214] As a result, judges who can imagine themselves in the place of the victim are likely to experience vicariously the emotions and distress that are associated with the victim's position.[215]

Victims' rights advocates value victim impact statements because they give the fact-finder an opportunity to exercise empathy and compassion for the victim.[216] Victim impact evidence not only evokes empathy for the victim, but also evokes emotion against the defendant.[217] Victims' emotions are likely to range from compassion and forgiveness to anger, outrage, fear, vengeance, and even racial animus. Victims' reactions may evoke similar emotions from the fact-finder, and may elicit sympathy that motivates judges to impose harsher sentences or sentences desired by the victims.[218] Victim impact statements that communicate greater emotional harm lead to more severe punishments for offenders, and anger induced by victim impact evidence may lead the fact-finder to search for rational support for blame or punishment.[219]

Although it is not necessarily inappropriate for judges to empathize with victims in a criminal case,[220] emotions that interfere with reason, compromise the court's commitment to the child's rehabilitation, or cause the court to dehumanize the accused child in order to show support for the victim are cause for concern. At least one commentator has argued that victim impact statements should be categorically excluded because they appeal to vengeance and bigotry and block the "sentencer's ability to perceive the essential humanity of the defendant."[221] Other commentators have expressed similar concerns that the court's evaluation of the offender may be improperly influenced by racial, cultural, class, or gender bias, either in favor of victims most like them or against defendants whom they do not understand.[222]

---

213. *See* Nadler & Rose, *supra* note 130, at 423.

214. Bandes, *supra* note 6, at 375. Bandes accepts a definition of empathy that includes three alternatives: feeling the emotion of another, imagining oneself to be in the position of the other, or action brought about by experiencing the distress of another. *Id.* at 373 (citing Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987)).

215. *Id.* at 400 (discussing psychological literature that identifies fear of being in the same position of suffering as a component of empathy).

216. *See* Bandes, *supra* note 6, at 392 (citing LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 135, 142–43 (Paul Gewirtz ed., 1996) (arguing that victim impact statements "invite empathetic concern in a way that abstractions and general rules do not")).

217. *See id.* at 395; Nadler & Rose, *supra* note 130, at 445 (discussing research that suggests that wrongdoing activates three moral emotions of contempt, anger, and disgust).

218. *See* Nadler & Rose, *supra* note 130, at 446–47.

219. *See id.* at 445.

220. *See* Bandes, *supra* note 6, at 365.

221. *Id.* at 365–66.

222. *See, e.g.*, Edward L. Glaeser & Bruce Sacerdote, *Sentencing in Homicide Cases and*

The juxtaposition of victim impact statements against inadequate apologies by young offenders exacerbates the risk that judges will impose purely or primarily retributive sentences at disposition. Power differences between immature youth on the one hand and articulate or well-coached victims on the other often produce imbalanced advocacy in juvenile court. As in any legal narrative, the dominant story will often drown out the other stories.[223] In the victims' rights movement, the victim has been portrayed as a marginal figure worthy of our compassion; however, as one commentator has argued, the victim can be "immensely powerful and destructive."[224] Politically, victims as a class carry considerable power in today's law-and-order climate.[225] Courts and politicians have certainly been influenced by vocal victims' rights lobbyists as evident in the rapid spread of victims' rights legislation.[226] In individual cases, judges who are forced to choose between competing interests may well be swayed by powerful allocutions by or on behalf of the victim.

Because adults are generally more articulate, educated, and expressive than juvenile offenders, there is a risk that victim impact statements from adults will drown out the voice of the accused child. Even when victims of juvenile crime are juveniles themselves,[227] the victim's parents or other adult family

---

the Role of Vengeance, 32 J. LEGAL STUD. 363, 372–73 (2003) (showing that sentences in vehicular homicide cases were harsher when women and whites were victims); Nadler & Rose, *supra* note 130, at 451 (discussing Angela Harris's views about the inability of "jurors to reflect on their own emotional reactions to the defendant in a self-critical manner"); Bibas & Bierschbach, *supra* note 120, at 105 (discussing sentencer's perception of remorse); *see also* Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1555 (1997) (assessment of remorse allows police and prosecutors to discriminate, consciously or unconsciously, by race and other characteristics); Bandes, *supra* note 6, at 371, 375 ("Our" ability to feel and understand another's pain is "constrained by each individual's particular capacities and limitations.").

223. *See* Bandes, *supra* note 6, at 386 (recognizing that "not every story can prevail, and the consequences for the loser can be enormous" and arguing that sometimes the dominant story—the victim's story—should not be told so that the alternate story may be heard).

224. Yoshino, *supra* note 6, at 1878.

225. *See* Nadler & Rose, *supra* note 130, at 453 (suggesting that the victims' rights movement is politically powerful and gaining momentum).

226. See *supra* Part I.E for a survey of legislative history. In Alaska, state representatives explicitly reference the victims' rights movement and the President's Task Force on Victims of Crime in their decision to pass victims' rights legislation. *See An Act Relating to A Victim's Rights in the Sentencing and Parole Hearings: Hearings on H.B. 345 Before the House Judiciary Committee*, 1983 Leg., 2d Sess. (Alaska 1983) (statement of Representative Brian Porter); *see also* Nadler & Rose, *supra* note 130, at 427 (arguing that the Supreme Court's decision in *Payne v. Tennessee* was consistent with the "tenor and goals" of the victims' rights movement when it overturned the four-year-old decision in *Booth* that recognized a per se objection to victim impact statements in capital cases).

227. Statistics from 2004 show that as many as two-thirds of victims of juvenile violent crime are children. *See* CARL MCCURLEY & HOWARD SNYDER, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN, VICTIMS OF VIOLENT JUVENILE CRIME (2004), *available at* http://www.ncjrs.org/pdffiles1/ojjdp/201628.pdf.

members may exercise rights on the victim's behalf.[228] Parents of child and adolescent victims routinely report on the emotional pain and physical injuries the child has experienced, the child's withdrawal, transfer, or refusal to attend school, and the parents' own loss of work as a result of the crime.[229] When victims are less articulate or less engaged in the system, many jurisdictions hire victim assistance counselors or advocates to locate victims, attend hearings with the victim for moral support, and help victims draft or rehearse oral and written impact statements.[230] With this level of support and guidance, victim impact statements are often more powerful and effective than the offending child's oral or written apology, statement of remorse, or explanation for his conduct, which are often prepared without the meaningful assistance of counsel or a parent.[231]

Maybe the most powerful voice against an alleged juvenile offender can be found in statutes that grant local community leaders and neighborhood activists the opportunity to exercise rights on behalf of the entire community. In a few states, local neighborhood associations have rights that mirror those of individual victims, including the right to notice of proceedings, the right to be present at all hearings where the defendant is entitled to be present, and the right to address the court at the juvenile disposition.[232] In Rhode Island, for example, any "association or other group of persons" in the community where the crime took place may file a "community impact statement" providing information about the financial, emotional, and physical effects of a crime on the community.[233] Even in states where victims' rights are not explicitly granted to a neighborhood association by statute, courts have exercised their

228. *See, e.g.*, ARK. CODE ANN. § 12-55-185(18)(B) (2003); FLA. STAT. ANN. § 960.001(7) (West 2006 & Supp. 2008); KY. REV. STAT. ANN. § 421.500 (LexisNexis 1992 & Supp. 2005).

229. For sample instructions to parents completing a victim impact statement for a child, see, Victim Impact Statement for Children and Their Parents, http://ag.ky.gov/NR/rdonlyres/D2AA1B9A-50A3-4486-A091-0054B11A9DEA/0/impact_statement_instructions.pdf (last visited Apr. 16, 2009) (Kentucky Office of the Attorney General); Victim Impact Statements for Parents of Child Victims, http://www.pwcgov.org/docLibrary/PDF/007911.pdf (last visited Apr. 16, 2009) (Commonwealth of Virginia).

230. For examples of victim assistance personnel in different states, see National Ctr. for State Courts, Victim Services Job Descriptions, http://www.ncsconline.org/D_KIS/jobdeda/Jobs_Victim%20Services.htm (last visited February 16, 2008) (describing duties and responsibilities for victim advocates, victim-witness coordinators, victim services legal assistant, victim assistance counselors, victim-advocate volunteer and other victim support staff).

231. For a discussion of limited involvement of lawyers and parents in the preparation of the delinquent child's apology letter, see *infra* notes 235 through 242 and accompanying text.

232. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-385.01 (West 2001); DEL. CODE ANN. tit. 11, § 9401(7) (2007) (defining victim to include neighborhood association); MINN. STAT. ANN. § 611A.038(b) (West 2003) (allowing representative of the community affected by the crime to submit impact statement describing adverse social and economic affects); R.I. GEN. LAWS § 12-28-4 (2002) (permitting a community that has been impacted by a crime to file a community impact statement).

233. R.I. GEN. LAWS § 12-28-4 (2002).

discretion to admit any "material and relevant" evidence at the disposition.[234] Comments from neighborhood boards generally involve the collective harm of crime in the neighborhood and provide a powerful voice of condemnation against the child.

Strong empirical and anecdotal evidence suggests that lawyers appointed to represent accused and adjudicated youth do not restore the imbalance between the youth and the victim. First, many children in juvenile court waive their right to counsel.[235] Second, even when the child has a lawyer, lawyers are especially lax in preparing for the disposition where it is easy to defer to the probation officer's findings and reports.[236] Many lawyers who advocate zealously for youth at trial believe they should act in the child's "best interests" at disposition.[237] These lawyers may join the victim in the chorus of voices lobbying for the child's accountability and punishment. Finally, by no fault of their own, lawyers for juvenile offenders often receive the written impact letter minutes before it is submitted to the court and generally first hear the victim's oral impact statement as it is being read to the judge. With high caseloads and limited resources, lawyers take little time to explain proceedings to the child and even less time to prepare clients to apologize or otherwise respond to victim impact statements.[238] Under these circumstances, the child is left with

234. In the author's own experience, representatives from the local Advisory Neighborhood Commissions have been allowed to submit victim impact letters in isolated cases in the District of Columbia Family Court, Juvenile Branch.

235. *See* Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 470 (2007) (noting that about half of youth in delinquency courts appear unrepresented and plead guilty to crimes without first consulting an attorney); Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 581 (2002); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 320 (2003).

236. *See, e.g.*, A.B.A. JUVENILE JUSTICE CTR. & S. CTR. FOR HUMAN RIGHTS, GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 31 (2001), *available at* http://www.njdc.info/pdf/georgia.pdf (quoting Georgia defense attorney as saying, "Disposition hearings are really conducted between probation and the judge. My input as the defense attorney is not required.").

237. *See* Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 260–61 (2005).

238. *See, e.g.*, A.B.A. JUVENILE JUSTICE CTR. & MID-ATLANTIC JUVENILE DEFENDER CTR., MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003) (discussing limited contact and poor communication between juveniles and lawyers in delinquency cases in Maryland); A.B.A. JUVENILE JUSTICE CTR., ET. AL., MONTANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 28–29 (2003) (discussing "brief and distracted encounter(s)" lawyers have with juvenile clients in delinquency cases in Montana); A.B.A. JUVENILE JUSTICE CTR. & S. JUVENILE DEFENDER CTR., NORTH CAROLINA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 29 (2003) (discussing barriers to meaningful contact between juveniles and lawyers in delinquency cases); A.B.A. JUVENILE JUSTICE CTR. & JUVENILE LAW CTR., PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 41–43 (2003) (discussing "excessive caseloads" in Pennsylvania that "prevent lawyers from having

minimal support and guidance. Even if we improve the quality of legal representation for children, the lawyer is not likely to compensate for the cognitive, emotional, and environmental impediments that make apologies and remorse so difficult for youth in the days after an offense.[239]

Parents are often in no better position than lawyers to help the child respond to victim impact statements. Parents rarely understand the importance of the victim impact statement in the disposition hearing, and without guidance from the child's lawyer, may neglect to help the child write or prepare an apology for the court.[240] Even when parents do discuss empathy and remorse with the child, they may not be able to adequately convey the child's feelings to the judge, as parents themselves experience a wide range of emotions connected to the child's delinquent conduct.[241] Some parents may be angry or embarrassed by the child's arrest and attempt to deflect blame from themselves by joining in condemnation of the child.[242] Other parents may be angry, defensive, or resentful of the victims' characterizations and presumptions about their child. These parents may lash out at the victims and exacerbate the court's negative view of the child and the child's family.

In any case, as greater resources are allocated to the support of victims, there is a growing risk that the victim's voice will overshadow that of the delinquent child. If the child's voice is lost in the exchange, the judge will make critical decisions at the disposition hearing heavily swayed by the victim's perspective. Ultimately victim impact statements distort the balance between rehabilitation and accountability in the juvenile justice system when they pit the victim's harm and potential desire for retribution against the child's need for services at arguably the most important stage of the juvenile court process—the disposition. Because there is a great risk that victim impact statements will lead to the outright rejection of rehabilitation in favor of retribution at the time of sentencing, this evidence should be excluded from the disposition hearing. However, assuming that victim impact statements can and do advance nonretributive goals such as youth rehabilitation, victim participation, catharsis, and community restoration, I contend in Part III that victim impact statements are more appropriately introduced in the child's long-term treatment plan after disposition or in a pretrial diversion program that avoids adjudication altogether. Accountability and punishment can still be

---

meaningful contact" with juvenile clients).

239. *See infra* notes 254–263 and accompanying text for a discussion of the cognitive and emotional barriers to effective apologies by youth in the juvenile justice system.

240. In the author's experience representing juveniles in the District of Columbia, parents rarely understand the importance of statements from the victim and apologies from the respondent in the juvenile disposition hearing. As a result, parents rarely help children prepare a formal statement for the court.

241. Kristin Henning, *It Takes A Lawyer to Raise A Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 848–51 (2006).

242. *Id.* at 849.

achieved in the juvenile disposition when judges consider other, less emotional evidence of the impact of the child's conduct on the victim.

C. The Unreliability of Adolescent Empathy and Remorse as a Measure of a Child's Amenability to Treatment

One of the more interesting and maybe unintentional consequences of the extension of victims' rights to juvenile court is the court's increasing reliance on the child's apparent lack of empathy and remorse in its evaluation of the child's amenability to treatment or need for punishment. At the disposition hearing, victims are encouraged to provide the court—in the child's presence—with information about the nature and extent of physical injuries, emotional toll, and material losses caused by the child's conduct. The child's response, during and after the victim's presentation, weighs heavily on the court's determination of the child's final disposition.

Legislators, judges, prosecutors, juries, probation officers, parole boards, and the media all weigh remorse heavily in the evaluation of an offender's character and the resolution of criminal cases.[243] Offenders who demonstrate remorse will often receive reduced sentences, avoid transfer from juvenile to adult criminal court, earn better pleas from prosecutors, and sometimes have their cases dismissed.[244] The child's remorse and apology suggest that he has accepted social norms and recognizes that his conduct fell outside of societal expectations.[245] Juvenile and criminal court judges also view remorse and apology as early evidence of deterrence and rehabilitation and are more willingly to excuse a remorseful offender from incarceration or retribution.[246] Judges seem to believe that youth who demonstrate remorse have a greater capacity to transform and self-regulate in the future.[247]

By contrast, youth who appear callous and unemotional are considered likely to reoffend and become candidates for more severe penalties in juvenile court or waiver to adult criminal court.[248] Youth who fail to make eye contact

243. *See* Bibas & Bierschbach, *supra* note 120, at 92–94; Martha Grace Duncan, *"So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1493, 1500 (2002); *see, e.g.*, People v. Steele, 434 N.W.2d 175, 177 (Mich. Ct. App. 1989) (holding that defendant's lack of remorse could be considered at sentencing in determining potential for rehabilitation and to support deviation from sentencing guidelines).

244. *See* Bibas & Bierschbach, *supra* note 120, at 93–94; Duncan, *supra* note 243, at 1471; Kimberly A. Thomas, *Beyond Mitigation: Towards A Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2644, 2664 (2007) (describing defendant's acceptance of responsibility as a well-recognized mitigating factor); Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 310–11 (1999) (citing cases in which child's perceived remorse affects decisions to transfer child to adult court).

245. *See* Bibas & Bierschbach, *supra* note 120, at 113.

246. *Id.* at 88, 94–95 (arguing that remorse and apology serve as indicators that defendants are "less bad and so need less deterrence, incapacitation or retribution").

247. *Id.* at 94–95.

248. *See* Duncan, *supra* note 243, at 1493–94.

with the victim, appear to laugh or smirk during the victim's impact statement, give inarticulate apologies, exhibit flat facial expressions, or otherwise appear uninterested are deemed less amenable to treatment.[249] Offenders who fail to demonstrate remorse are likely to receive longer and more severe sentences.[250] As one Minnesota judge stated to a juvenile at the time of sentencing:

> I just need to tell you if you were here today showing some remorse and ready to pay restitution up front, that would be a compelling indication to me that you are taking this seriously and willing to make amends. Unfortunately, that is not what I am seeing. That is not what is reflected in the [predisposition study report]. Instead, what I'm being presented with is a situation where you showed very little remorse for what has happened here.[251]

The Court of Appeals of Minnesota affirmed the juvenile court's refusal to stay the adjudication and noted that remorse or lack of remorse is an appropriate factor for the court to consider when imposing disposition.[252]

A number of scholars have begun to challenge the appropriateness of using remorse and apology as a valid measure of amenability to treatment or a fair metric for punishment.[253] Not every offender will have the mental capacity to experience remorse or the intellectual capacity and language skills to convey remorse.[254] A child who has limited life experiences or lacks the full capacity to reason may not have the same range of emotions as a more developed adult.[255] Likewise, a child who believes he had no alternative at the time he committed the delinquent act may not experience the same guilt as one who understands

---

249. *See id.* at 1498 (discussing example of case in which judge relied on child's facial expression); *see also In re* Welfare of A.J.S., No. A05-2185, 2006 WL 2675759, at *2–3 (Minn. Ct. App. Sept. 19, 2006) (noting that A.J.S. contributed minimally and appeared uncooperative in the pre-disposition interview, which suggested that he did not have remorse or empathy for victims); State v. A.V.R., No. 35032-7-II, 2007 WL 1335244, at *4 (Wash. Ct. App. May 8, 2007) (overruling trial court's finding that child lacked remorse because he did not raise his eyes and look at the victims' family).

250. *See* Bibas & Bierschbach, *supra* note 120, at 92 (discussing case in which judge cites lack of remorse as reason for harsh sentences); Duncan, *supra* note 243, at 1471, 1494–1501 (surveying cases in which lack of remorse resulted in harsher sentences).

251. *In re* Welfare of A.J.S., No. A05-2185, 2006 WL 2675759 (Minn. Ct. App. Sept. 19, 2006) (quoting comments of judge in refusing to grant stay of adjudication and noting serious impact of the child's burglary on the victims' business and personal lives).

252. *Id.* at *3.

253. *See* Duncan, *supra* note 243, at 1473.

254. *See* Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 142–44 (2006); Joseph A. Nese, Jr., Comment, *The Fate of Mentally Retarded Criminals: An Examination of the Propriety of Their Execution Under the Eighth Amendment*, 40 DUQ. L. REV. 373, 393 (2002); *see also* People v. Superior Court *ex rel.* Soon Ja Du, 7 Cal. Rptr. 2d 177, 181 (Ct. App. 1992) (discussing trial court's grant of a probationary sentence after defendant was convicted of voluntary manslaughter because the defendant's failure to show remorse likely resulted from cultural and language barriers).

255. *See* Bandes, *supra* note 6, at 368 ("Emotion and cognition . . . act in concert together to shape our perception and reactions.").

the choice he made.[256]

Reliance on the child's emotions and reactions in the hours or days after an offense is particularly troubling in the juvenile justice context.[257] Because remorse is a type of painful suffering, youth will sometimes "resort to defense mechanisms" of humor, denial, or apparent indifference to avoid it.[258] Other developmental features of adolescence, including the rejection of child-like behaviors such as crying, may also block traditional expressions of grief and remorse.[259] Similarly, youth culture, which often requires youth to hide their weaknesses and project a violent image, stifles guilt and other remorseful emotions.[260] Given these variables, the child's true emotions likely cannot be reliably inferred from his appearance or even laughter in the delinquency context.[261]

Physical and procedural barriers in the courtroom further impede meaningful expression and experiences of remorse and apology.[262] The courtroom, for example, is rarely set up to facilitate true eye-to-eye contact between the offender and the victim and does not provide the child with a safe space in which to explore or experience remorse. The parties, who generally speak to the judge instead of each other, are constrained by the limits of the court's time and have little or no meaningful opportunity to understand the other's plight and emotions. The offending child may also feel embarrassed, humiliated, or ostracized in court under the intimidating gaze and judgment of the prosecutor, judge, victim, and even his own family.[263]

As discussed above, judges expect the child to speak for himself and are either unwilling to hear from the lawyer or place limited value on the lawyer's protestations of his client's remorse. On the other hand, apologies staged by lawyers or insisted upon by judges often appear insincere, rarely foster forgiveness from the victim, and may lead to further resentment by both parties.[264] An apology by a child who reads a script written or conceived by his lawyer is likely to sound rigid and forced.[265] At the same time, a seemingly unacknowledged victim impact statement may exacerbate preexisting

256. *See* Duncan, *supra* note 243, at 1490 (discussing case example).

257. *See id.* at 1491 (arguing that practice of looking for sorrow in first few hours after the crime inaccurately assumes that remorse is an automatic reaction instead of something that will be achieved over time).

258. *Id.* at 1472; *see id.* at 1478–79, 1485, 1500.

259. *See id.* at 1483, 1492.

260. *See id.* at 1504–07.

261. *See id.* at 1499–1500, 1506.

262. *See* Bibas & Bierschbach, *supra* note 120, at 98.

263. *Id.* at 98 (discussing likely emotions of adult defendant at sentencing); O'Hara & Yarn, *supra* note 116, at 1176 (noting subjective cost associated with apology).

264. *See* O'Hara & Yarn, *supra* note 116, at 1127, 1139, 1141.

265. *See* Bibas & Bierschbach, *supra* note 120, at 98; *see also* O'Hara & Yarn, *supra* note 116, at 1159 (noting that a strategic person understands that he can get away with wrong "by apologizing after the fact").

frustration, fear, and alienation for the victim and hinder the victim's healing process.

Maybe the most troubling aspect of the court's focus on the child's apparent lack of remorse at disposition is the court's failure to capitalize on the opportunity to teach empathy. Evidence suggests that an individual develops the capacity to empathize with others over time through education and experience.[266] The increase of peer influence during adolescence provides a significant opportunity to guide youth in developing strong interpersonal relationships and a positive orientation towards others.[267] Community service and other programs that are attentive to this developmental opportunity may foster pro-social attitudes such as "an enduring tendency to think about the welfare and rights of other people, to feel concern and empathy for them, and to act in a way that benefits them."[268]

Some of the more innovative and effective court-ordered responses to juvenile delinquency have also begun to incorporate empathy training into their curricula.[269] Following the lead of the California Youth Authority, a number of states now teach empathy through victim impact classes that are incorporated into the child's long-term treatment plan. In 1984, the California Youth Authority established an "Impact of Crime Curriculum" to help juvenile offenders recognize the harm they caused to victims, families, and communities.[270] Adjudicated youth complete thirty-five to sixty hours of

266. *See* Bandes, *supra* note 6, at 393, 368–71 (noting that "[m]ost scholars who study emotion agree that emotions are partially cognitive, and, therefore, educable," and that "[t]he cognitive aspect [of emotion] allows emotions to evolve with exposure to new information and experiences"); Duncan, *supra* note 243, at 1485, 1501 (suggesting that "remorse is an acquired behavior" and that character is not fixed "until the close of adolescence").

267. *See* Rebecca Lakin & Annette Mahoney, *Empowering Youth to Change Their World: Identifying Key Components of a Community Service Program to Promote Positive Development*, 44 J. SCH. PSYCHOL. 513, 516 (2006) (discussing results of pilot study and recognizing limits of small sample size and reliance on self-reported attitudes instead of changes in behavior).

268. *Id.* at 517 (findings particularly true for those youth in early adolescence). *See also id.* at 522–23, 526–27 (discussing results from another study in which lower-income youth who participated in a school-based community service program in their urban neighborhood were more committed to the well being of others, expressed a strong intent to be involved in future community action, and expressed greater understanding and empathy for others); Sara Salmon, *Teaching Empathy: The PEACE Curriculum*, 12 RECLAIMING CHILD. & YOUTH 167, 172 (2003) (discussing PEACE program at the Center for Safe Schools and Communities, which drew upon research suggesting that teaching empathy is an important strategy for preventing and replacing aggression); Yael Kidron & Steve Fleischman, *Promoting Adolescents' Prosocial Behavior*, 63 EDUC. LEADERSHIP 90 (2006) (discussing other programs that may develop "empathy, moral values, and a sense of personal responsibility" by incorporating these values into the classroom and fostering a sense of community through teamwork).

269. One innovative program in New Mexico pairs adolescent offenders with shelter dogs to "foster empathy, community responsibility, kindness, and an awareness of healthy social interactions." Tami Harbolt & Tamara H. Ward, *Teaming Incarcerated Youth with Shelter Dogs for a Second Chance*, 9 SOC'Y & ANIMALS 177 (2001). At the end of the program, the adolescents return the dogs to the shelter with a letter to prospective adopters. *See id.*

270. Patrick Griffin, Office of Juvenile Justice and Delinquency Prevention, *Developing*

training with victims of crime integrally involved in the curriculum as guest speakers.[271] The course is designed for offenders who have committed all types of crimes, ranging from property offenses to violent crimes.[272] At least one study evaluating the Impact of Crime Curriculum found that offenders who have completed the course are less likely to recidivate.[273]

Florida began using the Impact of Crime Curriculum in 2001.[274] By 2004, the program's success inspired the Florida Department of Justice to require all state and privately owned residential commitment programs to teach empathy and remorse.[275] Program facilitators in Florida use a series of student exercises and quizzes designed to help youth understand the impact of crime and accept responsibility for the harm they have caused.[276] The program also fosters a "safe and healthy forum for crime victims to share their experiences" and facilitates a dialogue about ways in which offenders may begin to restore victims and communities.[277]

While both California and Florida have implemented victim impact curricula in secure detention facilities, other states offer similar programs to youth on probation. In Colorado, for example, the Probation Department offers victim empathy classes through a program called Recognizing Opportunities for Change.[278] The classes rely heavily on visits from crime victims in lieu of more common methods such as worksheets and role playing.[279] Many other juvenile probation departments across the country have experimented with their own innovative empathy training and victim awareness programs.[280]

---

and Administering Accountability-Based Sanctions for Juveniles, JAIBG Bulletin 7 (Sept. 1999), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/177612.pdf. The California Youth Authority is now the Division of Juvenile Justice.

271. *Id.*

272. *Id.*

273. *Id.*

274. FLA. DEPT. OF JUVENILE JUSTICE, IMPACT OF CRIME CURRICULUM (updated Dec. 5, 2006), http://www.djj.state.fl.us/Residential/documents/Impact_of_Crime_Curriculum_1206.doc.

275. *Id.*

276. *Id.*

277. *Id.*

278. *See, e.g.*, Victim Empathy Courses in Morgan County, http://www.courts.state.co.us/Probation/County/Programs.cfm/County_ID/40.

279. Telephone interview with Renee Stewart, Victim Advocate, Recognizing Opportunities for Change Program (July 18, 2007).

280. For other examples of victim awareness programs for juveniles, see Juv. Domestic Rel. Ct., Arlington, Virginia, Victim Awareness Program, http://www.arlingtonva.us/Departments/JuvenileDomesticRelations/JuvenileDomesticRelationsProgramsServices.aspx (last visited Jan. 23, 2008); Texas Department of Criminal Justice Victim Services Division, Victim Impact Panel Program (serving both juvenile and adult offenders), *available at* http://www.tdcj.state.tx.us/publications/victim.svcs/VIPP%20Brochure_updated_dec07.pdf (last visited Jan. 23, 2008); Youth Services of Southern Wisconsin, Victim Offender Conferencing, VOC Accountability Group and Victim Impact Panels, *available at* http://www.youthsos.org/pdfs/VOC2006.PDF (last visited Jan. 23, 2008). *See also* Best Practice Guidelines for Victim Impact Panels within Pennsylvania's Juvenile Justice System, http://www.jcjc.state.pa.us/jcjc/lib/jcjc/barj/victim_impact_panels.pdf (last visited Feb. 16, 2008).

In Pennsylvania, the Bethesda Day Treatment Center, which received recognition from the U.S. Department of Justice as a model agency, designed its own victim-offender curriculum for youth in the community.[281] The Center facilitates a group counseling intervention called Victim Offender Awareness Restitution (VOAR).[282] This intervention recognizes that facilitators must first process and validate the young offender's feelings about his own abuse and victimization before the child will understand and have remorse for the crimes he committed and the harm he caused others.[283] VOAR courses take place at treatment centers located throughout the state and are followed up by individual and family therapy.[284] The Bethesda Center has found the curriculum to be effective in both residential and community-based settings.[285]

The recognition that children and adolescents are malleable in response to treatment has been a hallmark of the juvenile justice system.[286] However, by relying on the child's inadequate responses to the victim impact statement before counseling, empathy training, or other relevant services have been provided, the juvenile court makes critical sentencing decisions based on incomplete data and unreliable assumptions.

D. Due Process, Victim Impact Statements, and the Juvenile Disposition

Concerns about victims' rights in juvenile court involve more than a clash of theories; they also raise questions of justice, fairness, and due process. Although rehabilitation was a hallmark of the juvenile justice system at its inception, the Supreme Court soon concluded that rehabilitation could not be implemented at the expense of due process.[287] Thus, beginning in 1967, the Court issued a series of rulings that ensured due process for youth in delinquency proceedings, including the right to counsel, the right to confront witnesses, and the right to have charges proven beyond a reasonable doubt.[288] Today juvenile courts seek to implement rehabilitation within the confines of these due process protections.[289]

---

281. Email from Jennifer Napp, Regional Manager, Bethesda Day Treatment Center, Inc., to Latoya Carmichael, research assistant, Georgetown University Law Center (July 17, 2007) (on file with author).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *See supra* Part I.D; *see also* Duncan, *supra* note 243, at 1475.

287. *See In re* Gault, 387 U.S. 1, 18 n.23 (1967) (citing Kent v. United States, 383 U.S. 541, 556 (1966)) (expressing fear that children were getting the "the worst of both worlds" because they received neither the promised rehabilitation from juvenile court nor the procedural rights of adult defendants).

288. *See id.* at 31–57; Breed v. Jones, 421 U.S. 519, 540–41 (1975); *In re* Winship, 397 U.S. 358, 368 (1970).

289. *In re* Gault, 387 U.S. at 22 (noting that notwithstanding shortfalls in due process, many aspects of juvenile court process are valuable, including efforts to shield juvenile offenders from public view).

Conflicts between victims' rights and the defendants' right to due process have been considered at length in legal scholarship.[290] As victims have secured greater voice in the juvenile and criminal justice systems, the victims' state constitutional and statutory rights have conflicted with the long-standing constitutional rights of the accused. The victim's right to a speedy trial, for example, may compromise the defendant's right to competent representation.[291] The victim's right to privacy may also conflict with the defendant's right to competent investigation as well as the defendant's right to a public trial.[292] The victim's right to be present during the testimony of other witnesses may compromise the defendant's Sixth Amendment right to confront the victim in a fair adversarial hearing.[293] Some commentators have further speculated that prosecutorial independence may be jeopardized by the victim's right to confer with the prosecutor before critical decisions are made in the prosecution, dismissal, or plea bargaining of a case.[294]

The absence of procedures for testing the veracity of victim impact statements raises an additional concern about fairness as it leaves the juvenile respondent vulnerable to inaccurate and unreliable evidence at disposition. With the exception of a few states like Arkansas, where victims' rights statutes give defense counsel an opportunity to respond to any new factual information introduced in a victim impact statement,[295] most states do not provide any

290. *See, e.g.*, Tobolowsky, *supra* note 6; Beloof & Cassell, *supra* note 7.

291. *See, e.g.*, State v. Lamar, 72 P.3d 831, 836 (Ariz. 2003) ("[I]n determining whether to grant a continuance made in conjunction with a motion to proceed pro se," "[t]he court must consider the defendant's right in conjunction with a victim's constitutional right to a speedy trial . . . ."). For statutory examples of the victim's right to a speedy trial, see *supra* note 49.

292. *See* Zaal v. State, 602 A.2d 1247 (Md. 1992) (attempting to strike a balance between victim's privacy interests and defendant's right to fair trial by denying defendant unrestricted access to victim's records but requiring in camera inspection of records by court). *But see* State *ex rel.* Dean v. City Court, 844 P.2d 1165, 1166 (Ariz. Ct. App. 1992) (Neither the Victim's Bill of Rights nor Victim's Rights Implementation Act prevents defendant from subpoenaing victim to testify at pretrial hearing; "[w]hile the Act provides certain safeguards to protect the alleged victim's privacy and to minimize victim's contacts with defendant, the Act impliedly recognizes that a victim may appear and testify at a proceeding other than trial."). For examples of provisions securing victim privacy, see ARIZ. REV. STAT. ANN. § 8-413 (2007); IDAHO CONST. art. I, § 22 (1994).

293. Beloof & Cassell, *supra* note 7, at 521–24 (acknowledging due process objections to the victim's right to attend criminal trials, but arguing that victims should have a complete right to attend even if they will serve as witnesses); Tobolowsky, *supra* note 6, at 48–51. For examples of statutes permitting victims to attend juvenile proceedings, see, *e.g.*, ALASKA STAT. § 47.12.110(b) (2006); ARIZ. R. CRIM. P. 3; ARK. R. EVID. 616; MONT. CODE ANN. § 46-24-106 (2003 & Supp. 2008); OR. REV. STAT. § 40.385 (2007); UTAH R. EVID. 615.

294. *See* Tobolowsky, *supra* note 6, at 60–63 (discussing failure of jurisdictions to expand formal right of victim to be heard regarding charging decision). For statutory examples, *see supra* note 48.

295. ARK. CODE ANN. § 16-90-1112 (2008) ("[I]f the victim impact statement includes new material factual information upon which the court intends to rely, the court shall adjourn the sentencing proceeding or take other appropriate action to allow the defendant adequate opportunity to respond."). *See also* FED. R. CRIM. P. 32 (requiring verification of evidence introduced at sentencing); GA. CODE ANN. § 15-11-65(b) (2008) ("In dispositional hearings . . .

explicit method for challenging information introduced by the government or the victim at the disposition hearing. States also rarely—if ever—require that victim impact statements be sworn under oath or otherwise verified before they are read to the judge and often fail to specify whether and how much advance notice should be given to the respondent before impact statements are introduced.[296]

The dearth of procedures for the adversarial testing of victim impact statements leaves this evidence vulnerable to exaggeration and occasional embellishment, yet difficult to challenge.[297] In other cases, the absence of statutory procedures for the verification of victim impact evidence requires defense counsel to make a difficult strategic decision about whether and to what extent to "attack" the victim's character or impact evidence before the court. The lawyer who elects to challenge the victim's impact evidence risks making the defendant appear recalcitrant and not empathetic.[298] The lawyer who opts not to challenge the victim's evidence relinquishes the opportunity to have potentially unreliable evidence excluded.

---

[t]he parties or their counsel shall be afforded an opportunity upon request to examine and controvert written reports so received and to cross-examine individuals making the reports."); MICH. CT. R. 3.943 (In dispositional hearings, "[t]he juvenile, or the juvenile's attorney, and the petitioner shall be afforded an opportunity to examine and controvert written reports" and "may be allowed to cross-examine individuals making reports."); LA. CHILD. CODE ANN. art. 709 (2004) (The court "may limit the admissibility or weight of any evidence which it deems unreliable, cumulative, or unduly dilatory.").

296. *See, e.g.*, Collins v. United States, 631 A.2d 48, 50 (D.C. 1993) (holding that correspondence submitted to judge before sentencing was not required to be verified); People v. Abrams, 562 N.E.2d 613, 618 (Ill. App. Ct. 1990) (holding that defendant was not entitled to cross-examine victim on written impact statement since statement was not sworn); *In re* K, 800 N.Y.S.2d 287, 288 (N.Y. Fam. Ct. 2005) (holding that evidence in juvenile disposition and restitution hearing need not be competent, thus hearsay is admissible and respondent is not entitled to notice and opportunity to inspect damaged property); *In re* Zachary S., No. L-01-1310, 2002 WL 471732 (Ohio Ct. App. Mar. 29, 2002) (finding that victim impact statement did not have to be under oath or subject to cross-examination to be admissible). While most states do not explicitly require the government to provide defense counsel with advance copies of the victim impact statements, a few states require advance disclosure of the predisposition report which may include or summarize the victim impact statement. *See, e.g.*, MONT. CODE ANN. § 41-5-1511 (2007) (requiring probation officer to provide defense counsel with advance copy of predisposition report which must include statement by victim or victim's family with no time frame specified); N.Y. FAM. CT. ACT § 351.1 (McKinney 1999 & Supp. 2007) (requiring that all probation investigation reports be provided to the respondent at least five court days prior to dispositional hearing).

297. *See, e.g.*, South Carolina v. Gathers, 490 U.S. 805, 821 (1989) (O'Connor, J., dissenting) (discussing lawyer's challenge to the veracity of the victim impact statement as a "manipulation", if not "outright fabrication", of the evidence by the government, when it knew little about the unemployed victim and spun an elaborate narrative about personal characteristics out of limited facts).

298. The Supreme Court in *Payne v. Tennessee* acknowledged arguments that it might not be tactically prudent for defendant to rebut victim impact statement, though it was not ultimately persuaded by them. *See* 501 U.S. 808, 823 (1991).

The broad discretion judges have in deciding what evidence to consider at the sentencing further compromises due process.[299] State statutes and appellate rulings across the country permit courts to consider any evidence that is "material and relevant" at the juvenile disposition.[300] Materiality and relevance have been read broadly in the courts,[301] and few states limit the number of victims who may speak or witnesses who may give victim impact statements on the victim's behalf.[302] Appellate courts have interpreted victims' rights statutes to provide only a minimum threshold of admissibility and do not preclude the trial judge from expanding victims' opportunities to address the court or from considering other evidence deemed relevant to the disposition.[303] Even when

299. For a survey of long-standing and broad discretion of judges at sentencing, see United States v. Tucker, 404 U.S. 443, 446 (1972) (noting that judge has broad discretion regarding the kind and scope of information to consider in federal sentencing); Williams v. New York, 337 U.S. 241, 246 (1949) (stating that "sentencing judge [may] exercise a wide discretion [in] the sources and types of [evidence] used to assist him in determining the [kind and extent of punishment] to be imposed"); United States v. Morgan, 595 F.2d 1134, 1136 (9th Cir. 1979) (noting that "judges have discretion to consider a wide variety of information from a variety of sources in order to tailor the punishment to the criminal rather than to the crime"); State v. Huey, 476 A.2d 613, 618 (Conn. App. Ct. 1984) (noting that "court exercises wide discretion in sources and types of evidence which it may consider"); Collins v. United States, 631 A.2d 48, 50 (D.C. 1993) (noting well-established principle of law that trial court may consider wide range of reliable information concerning the defendant's character and crime in fashioning an appropriate sentence); State v. Fleming, 644 A.2d 1034, 1037 (Me. 1994) (finding broad discretion at sentencing as long as information is factually reliable according to due process and admitting newspaper article of defendant's criminal history).

300. *See* D.C. CODE § 16-2316(b) (2001) ("Evidence which is competent, material, and relevant shall be admissible at fact-finding hearings."); 705 ILL. COMP. STAT. ANN. 405/2-22 (West 2007) (allowing all evidence helpful in determining dispositional questions, including oral and written reports, even though not competent for the purposes of the adjudicatory hearing); MICH. CT. R. 3.943 ("[Rules,] other than those with respect to privileges, do not apply at dispositional hearings. All relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value, even though such evidence may not be admissible at trial."); *In re* M.N.T., 776 A.2d 1201 (D.C. 2001); *Ex rel* Lang, 392 N.E.2d 752, 745 (Ill. App. Ct. 1979) (holding that juvenile court's consideration of past arrests of juvenile found guilty of armed robbery was not in error because the applicable state statute provided that the judge may rely on "all evidence helpful" in determining disposition).

301. *See, e.g.*, People v. Albert, 523 N.W.2d 825, 826 (Mich. Ct. App. 1994) (holding that "[a]lthough [victim's civil attorney] did not constitute a 'victim' as defined in the Crime Victim's Rights Act, . . . a sentencing court is afforded broad discretion in the sources and types of information to be considered when imposing a sentence" and allowing the attorney to suggest that defendant was a "pedophiliac") (citing MICH. COMP. LAWS ANN. §§ 750.520b(1)(a), 750.520c(1)(a), 780.752(1)(i) (West 1998)).

302. *See* State v. Wilson, 669 A.2d 766, 768 (Me. 1996) (holding that sentencing court acted within discretion in considering statements from twenty-one members of community that were unsolicited by the court, including decedent's teachers, neighbors, and a community minister).

303. *See, e.g.*, J.C.W. v. State, 880 P.2d 1067, 1071–72 (Alaska Ct. App. 1994) (recognizing that although the public is generally excluded from juvenile proceedings, a court has discretion to admit individuals who do not meet the definition of victim and to read unsolicited letters from the victim's family if those actions would be "compatible with the best interests of the minor," but remanding the case so requisite findings could be made on the record).

statutes clearly prohibit or exclude victim impact evidence, appellate courts have been unwilling to find prejudice in the admission of that evidence when its content was already apparent in the proceedings.[304] Defendants have repeatedly challenged the inclusion of evidence concerning other crimes in victim impact statements but have found little support in the appellate courts.[305]

A final concern is the inclusion in the impact statement of the victim's opinion about the defendant's character and the victim's recommendations for a specific sentence.[306] The victim's opinions on these issues provide a particularly unstable and unreliable basis for decision making in the juvenile justice system. Victims generally have limited knowledge about the rehabilitative purpose of juvenile court and even less understanding of theories of adolescent development that undergird that purpose. The victim's comments about the character of the child are speculative, at best, when based solely on a single encounter with the child at the time of the offense. Thus, unless the victim is related to or otherwise intimately involved with the child, the victim's opinion offers little reliable insight into the appropriate disposition. Moreover, while anger and vengeance are often fresh at the time of the victim impact statement, that anger may dissipate after the victim learns more about the child or better understands the treatment options available to youth in juvenile court.[307] It often takes time, and maybe even face-to-face interaction mediated by a third-party, for victims to overcome resentment and "see offenders as redeemable human beings."[308]

---

304. *See* State v. Tesch, 704 N.W.2d 440, 452–53 (Iowa 2005) (finding that a juvenile sentenced for vehicular homicide was not prejudiced by the victim impact statement of the victim's wife although she did not meet the statutory definition of victim); *see also* State v. Sumpter, 438 N.W.2d 6 (Iowa 1989) (finding that although aunts and uncles were not among the group of persons allowed to give victim impact statements, defendant suffered no prejudice because he did not prove the court impermissibly relied on the statements).

305. Iowa v. Sailer, 587 N.W.2d 756, 761 (Iowa 1998) (holding that "the word 'offense' . . . should not be limited to the offense or offense for which guilt has been established . . . , [but] should be more broadly construed to enable the victim to fully detail the impact of the offense," including uncharged and unproven acts which were part of same course of conduct); State v. Phillips, 561 N.W.2d 355, 359 (Iowa 1997) (allowing victim impact statement to include other possible offenses in addition to third-degree sexual assault to which defendant pled); State v. Dumont, 507 A.2d 164, 166–67 (Me. 1986) (finding no abuse of discretion by court in considering affidavits from victims of other, uncharged crimes). *But see* State v. Whitten, 667 A.2d 849, 852 (Me. 1995) (vacating trial court's sentence after judge appropriately exercised his discretion to consider a non-victim's claim that she had been forcibly raped by defendant but failed to implement any process to ensure the factual reliability of the evidence); Bitz v. State, 78 P.3d 257, 262 (Wyo. 2003) (reversing trial court sentence because the trial court read and considered victim impact statement from the defendant's biological daughter, who had been previously molested by the defendant but was not a victim in this case).

306. *See infra* note 115.

307. *See* Bibas & Bierschbach, *supra* note 120, at 138 (discussing victim's comfort in realizing the offender was "just a kid who made a mistake"); *see also* Nadler & Rose, *supra* note 130, at 442 (arguing that emotional harm is less reliable as a measure of culpability because emotional responses vary widely among individuals).

308. Bibas & Bierschbach, *supra* note 120, at 115, 138.

E. The Erosion of Confidentiality and Mounting Stigma

Finally, the victims' rights movement creates a difficult tension between the child's statutory right to confidentiality in juvenile cases and the victim's right to attend hearings, access information, and offer input at various stages of the juvenile justice process. At the inception of the contemporary juvenile court, records and hearings were kept confidential to avoid permanently stigmatizing juveniles who were likely to age out of delinquent behavior.[309] Confidentiality was linked to the rehabilitative philosophy of the juvenile justice system since it was understood that confidential proceedings would allow youth to benefit from treatment and services while being protected from the stigma of a criminal record that might impede their progress in school, work, and the community.[310] Because the victims' rights movement grants victims and witnesses greater access to juvenile proceedings, the movement may threaten both confidentiality and rehabilitation.

In many states, victims have the right to attend any phase of a juvenile case that the defendant has a right to attend.[311] Victims also have the right to notice of the child's release from detention, the right to access of juvenile court records, and the right to be informed about final outcomes in the juvenile's case.[312] Granting victims these rights would not necessarily erode

309. *See* Henning, *supra* note 30, at 525–27; Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155, 155 (1999).

310. *See* Bazelon, *supra* note 309, at 155; Henning, *supra* note 30, at 525–27; *see also In re* M.C., 527 N.W.2d 290, 293 (S.D. 1995) (noting that confidentiality promotes juvenile rehabilitation); *In re* J.S., 438 A.2d 1125, 1129 (Vt. 1981) (stating that confidential proceedings protect juveniles from self-perpetuating stigma that makes "change and growth impossible").

311. *See, e.g.*, ALASKA STAT. §§ 47.12.110(b), 12.61.010 (2006); CAL. WELFARE & INST. CODE § 676.5 (West 1998 & Supp. 2008); IDAHO CODE ANN. § 19-5306 (2004); KY. REV. STAT. ANN. § 610.060 (LexisNexis 1999 & Supp. 2007); KAN. STAT. ANN. § 74-7335 (2002 & Supp. 2007); MD. CODE ANN., CRIM. PROC. § 11-302 (LexisNexis 2008); MO. CONST. art. I, § 32; MO. ANN. STAT. § 595.209.1(1) (West 2003 & Supp. 2008); N.H. REV. STAT. ANN. § 169-B:34 (LexisNexis 2001 & Supp. 2007); N.C. GEN. STAT. § 7B-2402 (2007); N.D. CENT. CODE § 12.1-34-02 (1997); OHIO REV. CODE ANN. § 2930.09 (LexisNexis 2006); OR. CONST. art. 1, § 42 (2008).

312. *See, e.g.*, CAL. WELFARE & INST. CODE § 679.02(2), (13) (West 1998 & Supp. 2008) (right to be informed of final disposition and conviction for certain enumerated offenses); CAL. WELFARE & INST. CODE § 656.2(c) (West 1998 & Supp. 2008) (right to access charging petition, minutes of transfer proceeding, orders of adjudication, and disposition when child subject to transfer hearing); MO. ANN. STAT. § 595.209.1(3) (West 2003 & Supp. 2008) (right to notice of final disposition in the case); MONT. CODE ANN. § 41-5-215(3) (2007) (right to notice of juvenile felony of filing of petition, entry of consent decree, disposition made, and release of youth from correctional facility); N.H. REV. STAT. ANN. §§169-B:34, 35-a (2001 & Supp. 2007) (right of victims and victims' immediate family to access information about child, including name, age, address, gender, offense charged, custody status, case progress, adjudicatory status, and disposition); N.J. STAT. ANN. § 52:4B-37 (West 2001 & Supp. 2007) (right to access information about case progress and final disposition); N.D. CENT. CODE § 12.1-34-02(2) (1997) (right of victims and witnesses to be informed of status of investigation and criminal charges filed); OHIO REV. CODE ANN. § 2930.12 (LexisNexis 2006) (right to notice of acquittal, conviction, and dismissal of complaint); 18 PA. CONS. STAT. ANN. § 11-201(12) (West 1998).

confidentiality if legislators narrowly drafted statutes to achieve the limited goals of transparency and catharsis for the victim and to clearly prevent further disclosure of the child's confidential information. Unfortunately, it appears that current victim access statutes are neither narrowly drawn, nor vigorously enforced to ensure the confidentiality of juvenile proceedings. Few statutes strictly limit juvenile court access to the victim or to the victim's immediate family when the victim is deceased, but instead permit eyewitnesses, relatives of the victim, victim support persons, and neighborhood associations to attend and speak at juvenile court hearings in the name of victims' rights.[313] State legislators and juvenile courts also have not been vigilant in crafting statutes and rules to prohibit victims from disclosing the identity of juvenile offenders outside of the courtroom.[314] Even where these additional protections do exist, they are rarely enforced by imposing criminal or financial penalties on the victim or other persons who improperly disclose juvenile information.[315]

Today, child advocates and scholars writing about the important features of juvenile court do not uniformly endorse confidentiality. Some advocates argue that public hearings are mandated by the First Amendment and necessary to protect against arbitrary decision making by the government and the court.[316]

---

313. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-384E (2007) (allowing minor victim to have adult representative present at all times); CAL. WELFARE & INST. CODE § 676.5 (West 1998 & Supp. 2008) (allowing up to two support persons); D.C. CODE § 16-2316(e)(4) (Supp. 2008) (permitting victims and eyewitnesses to attend specified juvenile hearings); N.H. REV. STAT. ANN. § 169-B:34 (LexisNexis 2001 & Supp. 2007) (allowing victim, victim advocate, or other person chosen by victim to attend juvenile hearing); N.C. GEN. STAT. § 7B-2402 (2007) (allowing victim, member of victim's family, or witness to attend juvenile hearing); N.D. CENT. CODE § 12.1-34-02(18) (1997) (allowing every victim or witness who is a minor to have a spouse, parent, guardian, and no more than two other designated adults present with him during any delinquency proceeding); OHIO REV. CODE ANN. § 2930.09 (LexisNexis 2006 & Supp. 2008) (allowing victim to be accompanied by an individual for support); 18 PA. CONS. STAT. ANN. § 11-201 (West 1998) (allowing victim to be accompanied at all juvenile proceedings by family member, victim advocate, or other person providing assistance or support). See also *supra* note 232–234 and accompanying text for discussion of neighborhood associations.

314. *But see* D.C. CODE § 16-2336 (2001) (person unlawfully disclosing information shall be punished by misdemeanor charge and fine of 250 dollars); CAL. WELFARE & INST. CODE § 656.2(c) (West 1998 & Supp. 2008) (person unlawfully disclosing information shall be punished by misdemeanor and fine of five hundred dollars); N.H. REV. STAT. ANN. § 169-B:34 (LexisNexis 2001 & Supp. 2007) (making it a misdemeanor for victim or any member of victim's family to disclose confidential information to any person not authorized to access such information).

315. In the author's own jurisdiction, judges, defense attorneys, and prosecutors could not think of a single case in recent memory in which this protection had been enforced pursuant to D.C. CODE § 16-2336 (2005). Quite to the contrary, practitioners noted several examples in which the child's name had been leaked at a local Advisory Neighborhood Commission (ANC) meeting, to a school principal, or to a news reporter. The author has heard similar comments from practitioners in other jurisdictions.

316. *See* Jennifer L. Rosato, *The Future of Access to the Family Court: Beyond Naming and Blaming*, 9 J.L. & POL'Y 149, 165 (2000); Joshua M. Dalton, *At the Crossroads of* Richmond *and* Gault*: Addressing Media Access to Juvenile Delinquency Proceedings Through a Functional Analysis*, 28 SETON HALL L. REV. 1155 (1998) (arguing that juvenile proceedings should be presumptively open to the media and public in order to facilitate systemic reform).

Others believe that public access could lead to positive systemic reform in the juvenile justice system.[317] Yet, notwithstanding valid arguments in favor of public access, it is clear that legislators did not draft victims' rights statutes to protect the First Amendment rights of the media, nor to protect the child's interests through public oversight. Victims' rights provisions grant access to a particular class of people—namely the victim, the victim's family, and eyewitnesses of the offense—who are likely to be hostile to the interests of the child. In Part III, I propose that legislators rewrite existing victim access provisions to better accommodate the competing goals of the victim and the child and urge prosecutors to strictly enforce statutory provisions that impose sanctions on those who share information obtained from juvenile court.

III
BALANCING THE RIGHTS AND INTERESTS OF ADJUDICATED YOUTH AND VICTIMS

Not every goal in the victims' rights movement is incompatible with the rehabilitative goals of juvenile court. Some aspects of the movement attempt to satisfy nonretributive goals that may be accommodated in the juvenile justice system. For example, many victims' rights statutes simply require prosecutors and law enforcement officials to treat victims with dignity and respect and require prosecutors to be considerate of the victims' time, schedule, and privacy.[318] Other statutes ensure that victims will be safe in court, avoid penalties for missing work to testify, and have access to compensation, counseling, and other services.[319] These statutes do little to advance the

317. *Id.*

318. For examples of states that require the courts and law enforcement officials to show dignity and respect to victims, see FLA. STAT. § 960.001(n) (West 2005 & Supp. 2008) (dignity and passion); MD. CODE ANN., CRIM. PROC. § 11-1003 (LexisNexis 2008) (respect, dignity, courtesy, and sensitivity); N.J. STAT. ANN. § 52:4B-36 (West 2001 & Supp. 2007). For statutes that ensure victims have adequate advance notice of trial dates, cancellation of scheduled court hearings, and early termination of the case through pleas, see CAL. WELFARE & INST. CODE § 679.02 (West 1998 & Supp. 2008); MD. CODE ANN., CRIM. PROC. § 11-1003 (LexisNexis 2001 & Supp. 2007); MINN. STAT. ANN. § 611A.033(b) (West 2003); MO. ANN. STAT. § 595.209.1(3) (West 2003 & Supp. 2008); N.D. CENT. CODE § 12.1-34-02 (4) (1997); OHIO REV. CODE ANN. § 2930.08 (LexisNexis 2006 & Supp. 2008). For examples of statutes that shield victims' identifying information from the public, see KAN. STAT. ANN. § 38-2309(b) (Supp. 2007) and LA. REV. STAT. ANN. § 46:1844(W)(1)(a) (1999 & Supp. 2008). For examples of statutes that require a separate waiting area for juveniles, see D.C. CODE § 16-2340(a)(3) (Supp. 2008); MINN. STAT. ANN. § 611A.034 (West 2003); MO. ANN. STAT. § 595.209.1(17) (West 2003 & Supp. 2008); N.J. STAT. ANN. § 52:4B-37 (2001); N.C. GEN. STAT. § 15A-825 (2007); N.D. CENT. CODE § 12.1-34-02(9) (1997); OHIO REV. CODE ANN. § 2930.10 (LexisNexis 2006).

319. For statutes that offer victims protection against credible threats, see MO. ANN. STAT. § 595.209.1(9) (West 2003 & Supp. 2008) and N.J. STAT. ANN. § 52:4B-37 (2001 & Supp. 2007). For statutes that ensure victim compensation and services and require prosecutors to intercede with the victim's employer, see CAL. PENAL CODE § 679.02(7)(West 1999) (ensuring that victims receive witness fees and mileage); MINN. STAT. ANN. § 611A.02 (West 2003 & Supp. 2008) (requiring relevant agency to provide victims with information about victim crisis centers, elderly

retributive goals of the victims' rights movement and are unlikely to impede the rehabilitative agenda of the juvenile justice system.

By contrast, statutes that help victims participate in and find healing through the juvenile justice system may pose a real challenge to the goals of rehabilitation. In this Part, I contend that victim impact statements, as currently used in juvenile courts, not only threaten to undermine the child's rehabilitation, but also fail to achieve the cathartic goals of the victim. Because victim impact statements are introduced in court at the child's disposition hearing before counseling and other services have been provided, these statements fail to generate the kind of empathy and forgiveness that is desired between the victim and offender. These shortcomings should prompt policymakers to critically examine the timing and format of the victim-offender interaction in juvenile cases.

This Part proposes that courts and policymakers remove victim impact statements from the disposition hearing and incorporate them instead into the post-disposition treatment plan for an adjudicated youth or in the pretrial diversion programs that avoid adjudication. Recognizing the risks and challenges associated with this proposal, this Part also suggests that safeguards be implemented to prevent further erosion of confidentiality in juvenile courts and to avoid the "shaming" and coercion of juveniles in mediation. The Part concludes with recommendations that will protect the due process rights of youth at disposition.

---

victims project, victim assistance hotlines, domestic violence shelters, and programs); MINN. STAT. ANN. § 611A.036 (West 2003) (stating that employer may not discharge or discipline any witness or victim for honoring a subpoena); MO. ANN. STAT. § 595.209.1(14) (West 2003 & Supp. 2008) (same); N.J. STAT. ANN. § 52:4B-42 to 44 (West 2001 & Supp. 2007) (establishing victim-witness information program to provide twenty-four hour hotline for questions about services; requiring prosecutor to assist victim with court information, parking, notification to work, counseling, etc.); N.C. GEN. STAT. § 15A-825 (2007) (requiring authorities to intercede with employers, provide witness fees, or victim compensation); N.D. CENT. CODE § 12.1-34-02(5)-(7) (1997) (requiring prosecutor to inform victim about procedures for obtaining witness fees and counseling and to intercede with employers on victim's behalf). For examples of states that require law enforcement officials to provide medical assistance or information about counseling, treatment, or other services for victims, see ARIZ. REV. STAT. ANN. § 8-386 (2007); N.J. STAT. ANN. § 52:4B-37 (West 2001 & Supp. 2007). For examples of states that require the expeditious return of property to victims, see CAL. WELFARE & INST. CODE § 679.02(9) (West 1998 & Supp. 2008); IDAHO CODE ANN. § 19-5306 (2004); MO. ANN. STAT. § 595.209.1(13) (West 2003); N.J. STAT. ANN. § 52:4B-37 (West 2001 & Supp. 2007); N.C. GEN. STAT. § 15A-825 (2007); N.D. CENT. CODE § 12.1-34-02(8) (1997); OHIO REV. CODE ANN. § 2930.11 (LexisNexis 2006 & Supp. 2008) (noting, however, that government must retain property if juvenile offender asserts that it is needed for defense in the case); 18 PA. CONS. STAT. ANN. § 11-201(6) (West 1998).

A. Reframing the Victim-Offender Interaction and Rethinking Victim Impact Statements

1. Pretrial Diversion and Post-Disposition Strategies for Victim-Offender Reconciliation

Recognizing the limits of the courtroom to secure meaningful participation and satisfaction for victims, victims' advocates have identified other strategies to involve victims in the juvenile and criminal justice processes. Proponents of restorative justice, for example, have endorsed programs such as victim-offender mediation, victim impact classes, and victim awareness training, as vehicles to facilitate both victim participation and offender rehabilitation.[320] Unlike victim impact statements that are merely read in court, these programs take advantage of the social and relational aspects of remorse and apology and encourage victims and offenders to talk and understand each other's experiences.[321] The mediated face-to-face dialogue allows the victim and offender to ask questions of one another and gives the child time to understand and explain why he committed the crime.[322]

Victim impact panels and victim-offender mediation facilitate meaningful contact between victims and offenders, partly by providing trained counselors to talk with the individual participants before the parties meet. Before victim impact panels, for example, facilitators explain the purpose and format of the program to the young offenders and talk about the importance of "posture, attentiveness, attitudes, and nonverbal facial expressions."[323] Facilitators also help youth understand how the panel will fit into their larger plan of treatment or probation.[324] Following the panels, facilitators help youth explore and discuss how they felt during the victims' presentation.[325] These discussions are generally incorporated into a much longer curriculum of empathy training and victim awareness activities.[326]

Buttressing claims regarding the efficacy of these conferences and panels, recent empirical studies show that more offenders apologize in restorative

320. *See, e.g.*, William R. Nugent, Mona Williams & Mark S. Umbreit, *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137 (2003) (discussing "victim-offender mediation [as] one of the oldest and most widely practiced models of restorative justice"). For other program examples, see *supra* notes 269–285 and accompanying text.

321. *See* Bibas & Bierschbach, *supra* note 120, at 88–89.

322. *See, e.g.*, Lisa Sink, *Juveniles to Meet With Victims—Waukesha Panels Designed to Foster Offender Empathy*, MILWAUKEE J. SENTINEL, July 22, 2002, at B1.

323. Best Practice Guidelines for Victim Impact Panels within Pennsylvania's Juvenile Justice System 7, http://www.jcjc.state.pa.us/jcjc/lib/jcjc/barj/victim_impact_panels.pdf (last visited Feb. 16, 2008).

324. *Id.*

325. *Id.*

326. *See supra* notes 269–285 and accompanying text.

justice conferences than in court.[327] By delaying apologies until after the child receives counseling, education, or mediation, the child has more time to appreciate the victims' experiences and internalize moral lessons; thus, there is a greater chance that apologies will be meaningful and sincere.[328] A delayed apology can be even more meaningful than an immediate one when it demonstrates to the injured party that the offender has had time to thoroughly contemplate and reflect on his actions.[329] Moreover, a trained mediator who meets with the offending child before the victim-offender conference may help the child better articulate his feelings and avoid off-putting behaviors such as lowered eyes and mumbling. Because the victim's perception of the offender will determine how the apology is received, the offender's nonverbal "cues" such as eye contact, facial expressions, and body posture are important.[330] Victims who meet with a counselor before mediation may also learn important information about the offender and better interpret nonverbal signals.

Of course, some youth will immediately recognize their behavior was wrong and be ready to apologize shortly after the offense. The recommendations in this Article would not preclude these apologies.[331] Youth who apologize early may still attend victim impact classes as leaders who can educate others. These youth may also participate in one-on-one victim-offender mediation to reinforce the sense of personal responsibility and help victims understand why the crime occurred. Although the risk of staged apologies may not be avoided, offenders who attend victim impact classes or victim-offender mediation before or after disposition may internalize their victims' pain and eventually experience genuine sorrow and remorse.

Victim impact panels and victim-offender mediation programs not only capitalize on the child's capacity for growth and development, but are also more likely to help the victim find closure and healing. Evidence suggests that victims and communities are more likely to forgive when they perceive the offender's remorse to be genuine.[332] Expressions of forgiveness and compassion by the victim towards the child may in turn evoke additional empathy from the child. Through this interactive exchange, apology and forgiveness may ultimately restore communities, reconcile broken

327. *See* Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 189; Bibas & Bierschbach, *supra* note 120, at 132 (discussing studies that confirm offenders are more likely to apologize after meaningful face-to-face interaction with victim).

328. *See* Bibas & Bierschbach, *supra* note 120, at 87–90.

329. *See* O'Hara & Yarn, *supra* note 116, at 1139.

330. *Id.* at 1140.

331. Some scholars have argued that defendants have a due process right to allocute at sentencing—both in an effort to humanize themselves and in an attempt to mitigate their conduct in the case. *See, e.g.*, Thomas, *supra* note 244, at 2649–50.

332. *See* Bibas & Bierschbach, *supra* note 120, at 132 (noting that studies confirm victims are more likely to forgive after meaningful face-to-face encounters with defendants).

relationships, and heal emotional injuries.[333]

Even when the victim does not wish to participate in a face-to-face exchange with the offender, the victim may submit written letters or video tapes for the offender to view in the company of a counselor or a victim impact specialist. In the alternative, the court may order the child to attend victim impact panels or participate in other victim awareness curricula that are staffed by community volunteers who previously have been victimized by crime. In response to victimless crimes, the court may order youth to participate in programs offered by community reparation or neighborhood accountability boards to learn about the impact of their conduct on the community.[334] These programs can be used either to divert youth from the juvenile court process altogether or as a condition of probation.[335] Moreover, neighborhood accountability boards are designed to achieve many of the same goals as the victims' rights movement. Specifically, these boards strive to increase feelings of safety in the community, insist on accountability for offenders, provide an opportunity for victims to participate in the criminal justice process, secure restitution for victims, and increase offenders' awareness of the impact of their conduct on society.[336]

Although the data is new and quite limited, early evidence suggests that excluding victim impact statements from the sentencing determination will not compromise the victim's desire to be heard, to hold the defendant accountable, or to find catharsis in the juvenile or criminal justice system. Empirical studies have attempted to compare victim satisfaction in restorative justice programs with victim satisfaction in court.[337] Professor Barton Poulson collectively analyzed a number of these studies, and he found that participants in victim-offender mediation were more satisfied with the way their cases were handled than were victims who only participated in court.[338] Victims in mediation and restorative justice programs were more likely to believe that offenders had been held accountable than victims in court.[339] Victims in restorative justice programs were also more likely to believe that the mediator had been fair in mediation than victims were to believe that judges had been fair in court.[340] Victims in court and restorative justice programs were equally likely to believe

333. *Id.* at 87–89.

334. *See, e.g.*, Child & Family Services, Restorative Justice Programs, http://www.childfamilybny.org/Programs/RJ/default.aspx (last visited Aug. 8, 2007) (discussing neighborhood accountability boards); Neighborhood Accountability Boards: A Guide to Learn More About NABs 7, http://www.djj.state.fl.us/Prevention/nab/NAB_GuideBook.pdf (last visited Aug. 8, 2007) [hereinafter FLORIDA GUIDE] (discussing Neighborhood Accountability Boards in Florida Department of Juvenile Justice).

335. FLORIDA GUIDE, *supra* note 334, at 7.

336. *Id.* at 19–24.

337. *See* Poulson, *supra* note 327 (collecting studies).

338. *Id.* at 180.

339. *Id.* at 187.

340. *Id.* at 185.

their opinions had been adequately considered in the criminal justice process.[341] Finally, victims generally left restorative justice meetings with a better perception of the offenders and were less likely to feel afraid or upset about the crime than those victims who only met the offenders in court.[342] Although more studies are needed, these early findings suggest that exclusion of victim impact statements from sentencing proceedings and inclusion of victim-offender programming in the child's diversion or disposition plan would not only advance the goals of the victims' rights movement, but would also avoid the pitfalls of the courtroom interaction.

Maybe most importantly, delaying victim impact statements until after sentencing in a juvenile case would allow judges to focus their attention on the needs of the adjudicated child. Current victims' rights provisions ask the judge and the probation officer to determine not only what treatment and services are needed to rehabilitate the child, but also what financial, emotional, and material reparations are needed to make the victim whole. In contemporary juvenile courts where caseloads are high, probation officers who must now spend more time with victims, assessing the impact of the child's harm and obtaining or preparing victim impact statements, often sacrifice time they would otherwise spend learning about the offending child and preparing the child's disposition report.[343] Likewise, judges who must allocate more time to victims in the courtroom may compromise the court's already limited interaction with the accused child. To reduce this tension and preserve the court's time for a thorough examination of the socioeconomic, environmental, familial, and mental health factors that have contributed to the child's delinquent behavior, the judge can assign the youth to victim-offender programs that begin after the child's disposition. If the court chooses to monitor the child's compliance and progress in victim awareness programs, probation officers or program coordinators may submit periodic reports to the court or provide transcripts of the mediation. Youth who refuse to comply or fail to show progress may lose privileges of probation or receive additional counseling and interventions to address underlying barriers to empathy and remorse.

Finally, recognizing that many of the restorative justice and victim awareness programs identified in this Article are time intensive and may

341. *Id.* at 184.

342. *Id.* at 193, 195–96.

343. *See* MINN. STAT. ANN. § 611A.037 (West 2003) (requiring probation officer to summarize damages and impact of crime on victim and obtain the victim's written objections to the probation officer's proposed disposition); MONT. CODE ANN. § 41-5-1511 (2007) (requiring probation officer to include statement by victim or victim's family in youth assessment or predisposition report); N.J. STAT. ANN. § 2A-4A-42 (1987 & Supp. 2007) (requiring probation officer to include victim impact statement in predisposition evaluation); N.Y. FAM. CT. ACT § 351.1 (McKinney 1999 & Supp. 2007) (requiring probation officer to prepare victim impact statement by consulting victim when it appears such information would be relevant); OHIO REV. CODE ANN. § 2930.13 (LexisNexis 2006 & Supp. 2008) (requiring probation officer to use the victim impact statement in preparing the disposition investigation report).

impose additional costs on an already stretched juvenile justice system, this Article does not ask policymakers to divert existing juvenile court resources to these programs. Instead it encourages policymakers to apply for and use funds that have already been made available for the implementation of victims' rights. The victims' rights movement has been largely funded by federal and state grants that compensate state and local law enforcement offices, courts, and victim assistance agencies for implementing new, innovative programs for victims.[344] Grants have been and are still available from organizations like the Office for Victims of Crime and the National Association of VOCA Assistance Administrators.[345] Victims' rights advocates and court officials have secured funding to develop notification systems to alert victims of court dates and outcomes, to provide counseling and other support services for victims, and to compensate victims for medical expenses, material damages, and lost wages. Pretrial or post-disposition victim-offender programming may well fall within the purview of these funding sources.

2. Caveats to Restorative Justice Programs

While victim-offender mediation and other restorative justice programs have significant benefits, they do carry some risks. Concerns about these programs include confidentiality, the risk of coercion, the lack of cultural sensitivity, and the considerable time commitment. These programs do not resolve concerns about eroding confidentiality in juvenile court.[346] In fact, the intimate face-to-face interaction and advance preparation necessary for effective mediation may even increase the amount of information victims learn about adjudicated youth. Thus, it will be essential for programs to implement and enforce strict confidentiality protections. Both victims and offenders should be instructed and agree not to disclose identifying information about the other, since trust and confidentiality must be core objectives for any mediation

344. TOBOLOWSKY, CRIME VICTIM RIGHTS, *supra* note 7, at 7.

345. For grants available from the U.S. Department of Justice, Office for Victims of Crime, see Discretionary Grant Application Kits, http://www.ojp.usdoj.gov/ovc/fund/dakit_archive.htm (last visited Feb. 5, 2008); The Crime Victims' Rights Enforcement Project, *available at* http://apply.grants.gov/opportunities/instructions/oppOVC-2007-1661-cfda16.747-instructions.pdf (last visited Feb. 5, 2008); Nat'l Crime Victims' Rights Week Cmty. Awareness Project, http://www.navaa.org/extlnk/lnkframe.htm?http%3A//cap.navaa.org/ (last visited Feb. 5, 2008). For state grant recipients of federal grants, see Press Release, Kansas Office of the Governor, Crime Victims Programs to Receive Funding (Oct. 10, 2007), *available at* http://www.governor.ks.gov/news/NewsRelease/2007/nr-07-1010a.htm (last visited Feb. 5, 2008) (describing allocation of 3.8 million dollars in Kansas for crime victims programs). For state crime victims assistance grants, see Oregon Department of Justice, Crime Victims' Services, http://www.doj.state.or.us/crimev/vagrants.shtml (discussing state grants available to public and private non-profit agencies from Criminal Injuries Compensation Account).

346. Professor Mary Ellen Reimund has summarized several statutory schemes available for protecting confidentiality in victim offender mediation programs. Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 J. DISP. RESOL. 401 (2004).

program that seeks to bridge barriers and establish rapport between victims and offenders.[347]

Confidentiality protections will be particularly important in larger victim impact panels, neighborhood accountability boards, and community reparation boards where youth, victims, and volunteers will interact in a group setting. These programs should ensure each participant's anonymity to the greatest extent possible by withholding the child's name or identifying the child by initials, a pseudonym, or the first name only. Recognizing that complete anonymity will not always be possible in local neighborhood programs, community volunteers should be selected on the condition that they agree not to disclose names or other identifying information about the participants. Program developers should also secure the cooperation and consent of local prosecutors to seek sanctions for those who violate confidentiality protections.

Critics of programs like victim-offender mediation and neighborhood accountability boards have also raised concerns about the facilitator's apparent insensitivity to cultural and economic differences between the offender and the larger community and about the possible coercion of juveniles in these programs.[348] In theory, restorative justice programs attempt to restore the parties to their respective positions before the crime.[349] Tension occurs when restorative justice means returning the offender to an inferior status determined by age, race, or class, with substandard living conditions and inadequate opportunities for educational advancement and employment.[350] Coercion occurs when adults appear to "gang up" on the child or attempt to "shame" the child into remorse and apology.[351] In Florida, a guidebook for the Neighborhood Accountability Board reminds stakeholders to employ community reparation alternatives with caution so that an offender is not overpowered and ostracized by a community of adults who are judging him.[352] Program facilitators must go further and impose minimal standards of cultural competence in victim-offender mediation, operate restorative justice programs in a language and structure that is appropriate for the developmental stage of the child, and provide a safe forum in which the child may fully participate without shame or humiliation.

Other critics have complained that contemporary victim-offender programs are too brief and too perfunctory to make any real difference in the

347. *Id.* at 409–16 (discussing variety of statutory schemes for protecting confidentiality in victim-offender mediation).

348. *See, e.g.*, Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community and Justice*, 52 STAN. L. REV. 751 (2000); Bruce A. Arrigo & Robert C. Schehr, *Restoring Justice for Juveniles: A Critical Analysis of Victim-Offender Mediation*, 15 JUST. Q. 629 (1998).

349. Delgado, *supra* note 348, at 763–64.

350. *Id.*

351. *Id.* at 764.

352. FLORIDA GUIDE, *supra* note 334, at 17.

child's behavior.[353] If the child is required to meet with the victim without any opportunity for self-esteem building, counseling, or other services to address the underlying causes of the child's delinquency, then victim-offender programs may be of only limited value. This critique underscores the primary argument in this Article: victim-offender dialogues should occur in a much larger continuum of treatment and services for the child and the victim. Some of the programs described in this Article, including the Bethesda Day Treatment Center, recognize this need and work extensively with youth before they participate in victim impact curricula.[354]

While a thorough critique of the restorative justice movement is beyond the scope of this Article, the concerns identified here suggest that the wholesale adoption of existing restorative justice and victim-offender mediation programs would be a mistake. It is critical that any victim-offender interaction be facilitated by well-trained, unbiased mediators who understand the particular vulnerabilities of youth and remain committed to confidentiality standards.

B. Recommendations to Preserve Due Process

This Article calls for the incorporation of victim impact statements into the long-term treatment plan for an adjudicated youth and for the exclusion of these statements from the youth's disposition hearing. Recognizing that not every state will take this approach, this Article also proposes, in the alternative, that states enact strict statutory limitations on the introduction and content of victim impact statements. The procedural protections I propose here flow naturally from the concerns identified in Part II.D and do not require extensive discussion.

Currently, the child's only protections against overbroad and unreliable victim impact statements lie in vague notions of due process that preclude the introduction of evidence that is "so unduly prejudicial" that it would render the trial or sentence unfair.[355] Following Arkansas's lead, states should adopt formal procedures to provide the respondent with an opportunity to confront and challenge evidence at sentencing.[356] Victims' rights statutes should also require prosecutors and probation officers to provide the child's counsel with copies of any documents that will be admitted into evidence well in advance of the disposition. Such documents might include medical and mental health records, insurance claims, invoices for property repair, and victim impact statements. States should further require that victim impact statements be sworn under oath and enforced with the penalty of perjury for false statements. Judges should exclude cumulative and highly inflammatory statements and consider limiting the number of victims who speak when large numbers of victims are

353. Delgado, *supra* note 348, at 765.
354. *See supra* notes 281–285 and accompanying text.
355. *See* Payne v. Tennessee, 501 U.S. 808, 825 (1991).
356. *See supra* note 295 and accompanying text.

affected.

In juvenile courts, states should narrowly limit the content of victim impact statements to the impact of the crime on the victim and generally exclude, with few exceptions, any reference to the victim's opinion about the child's character and the disposition the child should receive. In jurisdictions that still conduct confidential juvenile proceedings, statutes should limit the victim's right to bring relatives and other support persons in the courtroom. When victims need moral support or help in drafting victim impact statements, that support can be provided in advance of the court hearing by victim assistance advocates and relatives who wait outside of the courtroom when the victim presents his statement. While reasonable accommodations should be made for young children who are victims of juvenile crime, these accommodations should limit the victim's support to one adult who may accompany the child in the proceedings. Prosecutors, judges, and law enforcement officers should also impose and strictly enforce rules against further disclosure of confidential juvenile information.

Finally, victim impact statements should be victim specific and thereby preclude representatives from neighborhood associations from speaking or submitting written impact statements unless the association was the direct target or victim of an offense committed by the child. Even in *Payne v. Tennessee*, the Supreme Court presumed that victim impact statements would discuss specific harms caused by the defendant being sentenced.[357] Broad statements about the general effects of crime on the community would not meet this limitation.

CONCLUSION

Although rehabilitation is no longer the only goal of the juvenile justice system, it certainly is and should remain an important component of our response to juvenile delinquency. A growing body of literature on the science of adolescent development recognizes that youth as a class are more amenable to treatment than adults and suggests that youth may have diminished culpability when they engage in delinquent conduct. As long as the underlying science is valid, this literature should compel us to adopt juvenile justice policies and procedures that will capitalize on the child's prospects for reform and account for the limitations in the child's cognitive and emotional capacities. This Article contends that victim impact statements, as currently used in juvenile court, undermine both of these objectives.

Victim impact statements delivered in the strained and highly charged environment of the courtroom are unlikely to cultivate the healing and satisfaction victims seek after crime. Evidence suggests that many youth are not

357. 501 U.S. at 825 (noting that extent of harm to the victim correlates with the culpability of the offender).

intellectually and emotionally equipped to meet the high expectations of judges and victims who expect offenders to demonstrate sincere remorse and contrition at the juvenile disposition hearing. Not only are victims disappointed by the child's inadequate responses to the victim impact statement, but judges are also more likely to penalize the child for his apparent disrespect and lack of empathy for the victim.

Fortunately, current impediments to victim satisfaction and offender rehabilitation do not require us to wholly abandon victim impact statements. These statements are valuable in the juvenile justice system because they allow victims to express pain and fear to the offender and may help victims find healing and closure after crime if they are meaningfully considered by the child. Victim impact statements may also aid in the child's rehabilitation if they are made at a time and in a forum that is safe and supportive for the child. Thus, to make better use of victim impact statements, this Article proposes that these statements be excluded from the juvenile disposition hearing and instead be incorporated into pretrial diversion programs or post-disposition treatment plans that include counseling and other services for the child. Incorporation of victim impact evidence at victim-offender mediation and victim impact panels would foster greater empathy and remorse from the child and encourage forgiveness by the victim. Furthermore, it would preserve the child's due process rights at sentencing and allow the court to focus on the child's individual needs, meeting the compromised, but not forgotten, goal of rehabilitation in the juvenile justice system.