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CIVIL RIGHTS—FROM NEGATIVE RESTRICTION TO AFFIRMATIVE OBLIGATION: A CALL FOR MASSACHUSETTS TO RECOGNIZE A RIGHT TO REHABILITATION BEGINNING WITH JUVENILE OFFENDERS

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CIVIL RIGHTS—FROM NEGATIVE RESTRICTION TO
AFFIRMATIVE OBLIGATION: A CALL FOR MASSACHUSETTS TO
RECOGNIZE A RIGHT TO REHABILITATION BEGINNING WITH
JUVENILE OFFENDERS

*Jennifer L. Weekley**

In Diatchenko v. District Attorney for Suffolk District, 1 N.E.3d 270 (Mass. 2013) the Massachusetts Supreme Judicial Court sparked significant juvenile sentencing reform in the state. Previously an outlier for its harsh treatment of juveniles, the Commonwealth now prohibits the imposition of life imprisonment without the possibility of parole for juvenile offenders. This crucial step forward in juvenile justice is dually rooted in neuroscience advancements and society's ever-evolving standards of decency. The premise is simply that children are different. Children are categorically impulsive, more susceptible to negative environmental influences, and their malleable character is less persuasive evidence of irretrievable depravity that would otherwise justify a sentence to die behind bars. Based on these accepted differences, the court holds that juvenile offenders, being the most apt for change, should thus be afforded a meaningful opportunity to demonstrate rehabilitation. Unfortunately, this significant step towards reform rings hollow given the current state of the Commonwealth's correctional system and its want for consistent rehabilitative services.

This Note examines: a history of case law and scientific developments leading up to the reform; competing theories of punishment and rehabilitation; social science regarding the outcomes of previously incarcerated juveniles; and the state of incarceration, rehabilitation, and paroling in Massachusetts. Ultimately, this Note argues that there are a multitude of legal sources from which the Commonwealth should find a

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freestanding, actionable right to rehabilitation for those arrested as juveniles and incarcerated into adulthood, thus making Diatchenko more than mere aspiration.

“No correctional approach is a panacea, but neither are all approaches equal.”¹

INTRODUCTION

Fourteen-year-old Philip Chism of Danvers, Massachusetts, has been charged, as an adult, and convicted of the robbery, sexual assault, and murder of his twenty-four-year-old high school math teacher, Colleen Ritzer.² Ms. Ritzer’s body was found in a recycling bin behind the school accompanied by a simple but cryptic note scratched on notebook paper that read, “I hate you all.”³ Philip’s mother later told police that the worst thing her son had ever gotten into trouble for was throwing paper on a school bus.⁴

It is an indisputably terrifying idea that someone as young as Philip and without a history of disciplinary issues or aggressive behavior could be capable of such atrocious acts. How tragically simple it would be to write off Philip as a biological anomaly—a superpredator⁵ in the making—and to throw away the key. Such unilateral severity has been the practice in Massachusetts, an unexpected outlier in its harsh treatment of juveniles.⁶ However,

1. Francis T. Cullen, *Make Rehabilitation Corrections’ Guiding Paradigm*, 6(4) CRIMINOLOGY AND PUBLIC POLICY 717, 722 (2007).

2. *Police: Student Admitted Killing Danvers Teacher*, CBS BOSTON (Jan. 27, 2014), <http://boston.cbslocal.com/2014/01/27/student-admitted-killing-danvers-teacher/> [<https://perma.cc/XR8C-87LT>].

3. *Id.*

4. O’Ryan Johnson, *DA: Teen didn’t raise any flags before slaying*, BOS. HERALD (Aug. 13, 2014) at 16, http://www.bostonherald.com/news_opinion/local_coverage/2014/08/da_teen_didn_t_raise_any_flags_before_slaying. Notably, after his arrest, Philip was housed at the Worcester Recovery Center and Hospital. *Id.*

5. The early 1990’s science that predicted an influx of “superpredators,” impulsive, brutal, remorseless children, has since been renounced by the scientific community including John DiIulio, the Princeton professor who coined the term. *The Superpredator Myth, 20 Years Later*, EQUAL JUSTICE INITIATIVE (Apr. 7, 2014), <http://www.eji.org/node/893> [<https://perma.cc/AL9S-GKFK>]. However, DiIulio’s prediction of hundreds of thousands of psychopathic children set off a public panic that resulted in nearly every state passing more stringent legislation regarding the treatment of juveniles as adults in criminal sentencing. *Id.* And while juvenile crime rates had in fact started to fall at the same time of this prediction, public fear of innately dangerous youths lingers on. *Id.*

6. LIA MONAHON & BARBARA KABAN, CHILDREN’S LAW CENTER OF MASSACHUSETTS, UNTIL THEY DIE A NATURAL DEATH: YOUTH SENTENCED

recent judicial⁷ and legislative⁸ developments, as well as public consensus,⁹ suggest a sea change could be on the horizon for the Bay State.

The Supreme Judicial Court (“SJC”), the highest court in the Commonwealth of Massachusetts, prides itself for frequently extending state constitutional protections above and beyond those afforded by the United States Constitution.¹⁰ Most recently, in the case of *Diatchenko v. District Attorney for Suffolk District*, the SJC further enhanced¹¹ the juvenile sentencing standard set forth by the Supreme Court of the United States in *Miller v. Alabama*.¹² In *Miller*, the imposition of *mandatory* life sentences without the possibility of parole unto juvenile offenders was found to be unconstitutional, in violation of the United States Constitution’s Eighth Amendment prohibition against cruel and unusual punishment.¹³ The Court rooted this decision in newly accepted scientific and sociological research on adolescent development that

TO LIFE WITHOUT PAROLE IN MASSACHUSETTS 6 (2009), <http://www.clem.org/untiltheydie.pdf> [<https://perma.cc/7LQC-PKL9>]; Sarah Thomas, *Chism Motion to Dismiss Denied, Will be Tried as an Adult*, WICKEDLOCAL (Aug. 13, 2014), <http://danvers.wickedlocal.com/article/20140813/News/140818825> [<https://perma.cc/ACB2-45VK>] (“[Massachusetts is] the only state that gives no discretion, even to prosecutors, over whether to try a juvenile as an adult in the case of first degree murder.”).

7. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013).

8. H.B. 1432, 2013–2014 Leg., 188th Sess. (Mass. 2013) (enacted).

9. *Ready for Reform? Public Opinion on Criminal Justice in Massachusetts*, MASSACHUSETTS INSTITUTE FOR A NEW COMMONWEALTH POLLING GROUP (Feb. 20, 2014), <http://www.massincpolling.com/?p=1334> [<https://perma.cc/27Q3-3NLE>] (a poll of 1,207 Massachusetts residents revealed that nearly two thirds of residents think the criminal justice system should prioritize rehabilitation or prevention over punishment or enforcement).

10. See *Commonwealth v. Mavredakis*, 725 N.E.2d 169, 178 (Mass. 2000) (holding that defendant’s right under art. XII of Massachusetts Declaration of Rights to be informed of attorney’s efforts to render assistance are broader than rights under Fifth and Sixth Amendments to United States Constitution); *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 109–10 (Mass. 1999) (affirming that privacy rights afforded drivers and occupants of motor vehicles during routine traffic stops are broader under art. XIV of Massachusetts Declaration of Rights than under Fourth Amendment to United States Constitution); *Commonwealth v. Amirault*, 677 N.E.2d 652, 658 (Mass. 1997) (affirming that confrontation rights under art. XII of Massachusetts Declaration of Rights are greater than those under Sixth Amendment to United States Constitution); *District Attorney for the Suffolk Dist. v. Watson*, 411 N.E.2d 1272, 1283 (Mass. 1980) (concluding that death penalty contravened prohibition against cruel or unusual punishment in art. XXVI, notwithstanding constitutionality under Eighth Amendment).

11. *Diatchenko*, 1 N.E.3d at 270.

12. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

13. *Id.* at 2475.

has slowly but surely weaved its way into legal precedent.¹⁴ The very salient thread that runs through the decision in *Miller* is that adolescents are different than adults and should be treated thusly by the courts.¹⁵

The court in *Diatchenko* went one step further to prohibit even *discretionary* life without the possibility of parole sentencing of juveniles.¹⁶ In doing so, the SJC whole-heartedly embraced the idea that juvenile, or youthful, offenders are different—in the midst of formation in all ways—and thus categorically cannot *ever* be deemed deserving of the state’s most severe punishment no matter how egregious the offense.¹⁷ This understanding affirms the youthful offender as a symbol of hope for the possibility of reform. The court thus implies that Philip, and others like him, should be afforded not only the possibility of parole, but a chance at rehabilitation.¹⁸ However, such a hope—as well as the court’s holding in *Diatchenko*—rings hollow given the current state of the Massachusetts correctional system and the lack of consistency when it comes to rehabilitation services offered to our incarcerated population.¹⁹ The qualities acknowledged by the court in their decision to prohibit life without the possibility of parole sentences for juveniles²⁰ give rise to a parallel set of reasons why reform is

14. Brief of the American Psychological Association, et al. as Amici Curiae in Support of Petitioners at 6–7, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647); Brief of the American Medical Association, et al. as Amici Curiae In Support of Respondent at 10, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633); See generally Nat’l Inst. of Mental Health, U.S. Dep’t of Health and Human Services, Publication No. 11-4929, *The Teen Brain: Still Under Construction* (2011), http://www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/teen-brain_141903.pdf [https://perma.cc/WS5R-L3PS].

15. *Miller*, 132 S. Ct. at 2458.

16. *Diatchenko*, 1 N.E.3d at 284–85. Massachusetts is now one of fourteen states that ban life without the possibility of parole sentencing for juveniles. *States that Ban Life-Without-Parole Sentences for Children*, CAMPAIGN FOR THE FAIR SENTENCE OF YOUTH (Aug. 25, 2015), <http://fairsentencingofyouth.org/2015/08/25/states-that-ban-life-without-parole-lwp-sentences-for-children/>. Five additional states ban such sentencing in “most cases.” *Id.*

17. *Diatchenko*, 1 N.E.3d at 276–77.

18. AARON KUPCHIK, JUDGING JUVENILES: PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS 11 (2006). *Parens patriae* is a theory where the state assumes the role of a surrogate parent, becoming responsible for fostering the proper growth and development of the juveniles in its care. See *infra* Part I.C.

19. MASSACHUSETTS INSTITUTE FOR A NEW COMMONWEALTH, CRIME, COST, AND CONSEQUENCES: IS IT TIME TO GET SMART ON CRIME? 16 (2013), http://massinc.org/wp-content/uploads/2013/03/Crime_Cost_Consequences_MassINC_Final1.pdf [https://perma.cc/YGK4-QR3X] [hereinafter “MASSINC”].

20. *Diatchenko*, 1 N.E.3d at 277. Youthful qualities considered by the court include: lack of maturity, underdeveloped sense of responsibility, vulnerability to

overwhelmingly unlikely for youths facing adult charges and sentences, like Philip. In Massachusetts, juvenile offenders facing adult charges are caught between systems and between priorities. Without affirmative steps to guarantee meaningful access to rehabilitative services in adult facilities, the possibility of parole for juvenile offenders only represents the release of a likely uneducated, unskilled, inexperienced individual, who was deprived of the privilege of childhood and the development of dignity, being dumped back into the community where he is more than ever likely to recidivate.²¹

This Note will discuss the current practices of various Massachusetts correctional facilities, their successes and failures at reform, and will argue that without recognizing a free-standing right to rehabilitation, any permanent reform will ultimately fail because it is subject to budgetary whims and shifting state priorities. As it has done before, the Commonwealth of Massachusetts must enhance protections for those within its borders and recognize an actionable right to rehabilitation for those whom it incarcerates, beginning with those most apt for change—juvenile offenders.

This Note begins in Part I with an overview of the background necessary to consider this issue: case law, scientific research, theories of rehabilitation, and a history of the juvenile courts and rehabilitation in Massachusetts. Part II addresses Massachusetts's failures and successes in providing rehabilitative services to those whom it incarcerates in search of an amalgamation to function as an attainable model for rehabilitation services. Part III analyzes the outcomes of juveniles that have entered the criminal justice system in order to emphasize the particular struggles faced with reentry generally. Lastly, Part IV argues—based on an abundance of state law, international norms, and purposivist sources—that rehabilitation must be recognized as a free-standing right in the Commonwealth. This Note concludes with a call to action for Massachusetts's courts, legislators, and constituents to hold the Commonwealth legally responsible for providing dignity-centric

outside pressures, and lack of fixed sense of self or character. *Id.*

21. Elizabeth Gudrais, *The Prison Problem*, HARV. MAG. (Mar.–Apr. 2013), <http://harvardmagazine.com/2013/03/the-prison-problem>; Anna Aizer and Joseph Doyle, *What is the Long-Term Impact of Incarcerating Juveniles?*, VOX (July 16, 2013), <http://www.voxeu.org/article/what-long-term-impact-incarcerating-juveniles>; Maia Szalavitz & Joseph Doyle, *Why Juvenile Detention Makes Teens Worse*, TIME (Aug. 7, 2009), <http://content.time.com/time/health/article/0,8599,1914837,00.html>.

rehabilitative services.

I. BACKGROUND

A. “*Children Are Constitutionally Different:*”²² Case Law Leading Up to *Diatchenko* and *Miller*

More than thirty years after the affirmation of his first degree murder conviction on direct appeal,²³ Gregory Diatchenko, who was seventeen-years-old at the time of his arrest and sentenced to life without the possibility of parole, suddenly became eligible for release²⁴ after the decision in *Miller*.²⁵ At the age of seventeen, Gregory violently stabbed a stranger over twenty times while committing a robbery.²⁶ No mitigating factors, including youth, were considered at the sentencing phase of the trial because the judge was required to impose the statutory punishment—life imprisonment without the possibility of parole.²⁷

Shortly after his conviction, Gregory brought a claim that asserted his sentence was in violation of both the federal²⁸ and state²⁹ prohibitions against cruel and unusual punishment for its severity, specifically its length in relation to his age at the time of sentencing.³⁰ The SJC rejected this claim, but the substantive law established in *Miller* enabled the court to accept Gregory’s nearly identical argument in 2013. The holdings in *Miller* and *Diatchenko* hinge on the principle of proportionality, a concept that seeks to find balance between the nature of the crime, any mitigating characteristics of the defendant—such as youth—and the severity of the sentence to be imposed.³¹ Given the robust precedent established since 1982 that contemplated such proportionality of harsh juvenile sentencing,³² the SJC held, in accordance with *Miller*,

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

23. *Commonwealth v. Diatchenko*, 443 N.E.2d 397, 399 (Mass. 1982).

24. *Diatchenko*, 1 N.E.3d at 286–87.

25. *Miller*, 132 S. Ct. at 2474.

26. *Diatchenko*, 443 N.E.2d at 399.

27. MASS. GEN. LAWS ch. 265, § 2 (2012).

28. U.S. CONST. amend. VIII.

29. MASS. CONST. art. XXVI.

30. *Diatchenko*, 443 N.E.2d at 400.

31. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 278 (Mass. 2013).

32. *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that the Eighth Amendment prohibits the imposition of life without parole on juvenile offenders who did not commit homicide); *Roper v. Simmons*, 543 U.S. 551, 553 (2005) (holding that the Eighth Amendment prohibits the imposition of the death sentence for juvenile offenders; a child’s action are less likely to be “evidence of

that Gregory's sentence was in fact cruel and unusual and that such severity in juvenile sentencing would no longer be the practice in Massachusetts.³³

Since the December 2013 decision, Gregory received a parole hearing and is soon to be paroled after serving over thirty-three years in prison.³⁴ The seven page parole board decision largely hinged on Gregory demonstrating that he had rehabilitated himself,³⁵ despite the fact that until that point Gregory did not have the possibility of ever being released. Gregory has spent pivotal developmental years of his life behind bars, in adult facilities, and because he was a juvenile facing adult charges, he was never afforded the benefit of rehabilitative services normally afforded to those adjudicated in juvenile courts. For this reason, the parole board imposed a special condition that Gregory be paroled after another twelve months in a lower security facility with weekly Alcohol Anonymous meetings and counseling sessions for adjustment and anxiety.³⁶ Because he was not provided resources for rehabilitation during his sentence, Gregory is being detained for an additional year to receive such support. Courts have acknowledged that, "[t]ime at [prison] costs a man more than part of his life; it robs him of his skills, his ability to cope with society in a civilized manner, and, most importantly, his essential human dignity."³⁷ Having been detained by the state since he was seventeen-years-old and given the degradation that accompanies

irretrievably depraved character"); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits the imposition of the death penalty for "mentally retarded" offenders); *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (holding that the Eighth Amendment prohibits the imposition of the death penalty absent consideration of mitigating evidence such as character and circumstances).

33. *Diatchenko*, 1 N.E.3d at 284–85.

34. *In re Gregory Diatchenko*, W38579, (Mass. Parole Bd. Oct. 31, 2014).

35. *Massachusetts Guidelines for Life Sentence Decisions*, MASS. PAROLE BOARD (Mar. 3, 2014), <http://www.mass.gov/eopss/agencies/parole-board/guidelines-for-life-sentence-decisions.html> [<https://perma.cc/MD4X-922R>]. These guidelines include eight direct references to the requisite of rehabilitation and reformation is the primary focus of two of the three main questions considered by the paroling board:

I. Has the inmate's period of incarceration been of sufficient length to adequately protect the public, punish him for his conduct, deter others, and allow for rehabilitation? II. Is the inmate rehabilitated? III. Are there reasons to conclude that the inmate will live outside prison as a sober, law-abiding, employed, productive person who is making positive contributions to his family and his community?

Id.

36. *In re Gregory Diatchenko*, W38579, (Mass. Parole Bd. Oct. 31, 2014).

37. *Laaman v. Helgemoe*, 437 F. Supp. 269, 325 (D.N.H. 1977).

long-term incarceration, what Gregory has to prove in one year with some counseling raises the bar on an already improbably high standard.

B. *The “Science, Social Science and Common Sense”³⁸ behind Adolescent Decision Making*

The area of the brain involved in impulse control, the prefrontal cortex, is incompletely developed in adolescents.³⁹ In fact, the most recent science suggests that this part of the brain is not fully formed until the mid-twenties.⁴⁰ The prefrontal cortex is responsible for a process known as executive functioning, which occurs subconsciously in most adults and is responsible for decision-making, long-term planning, and the ability to assess risks and consequences.⁴¹ Impulsive behavior nearly exclusively attributed to adolescents, or the often pejorative “teenagers,” is rooted in this cognitive science; the oldest, most primitive part of the brain takes the lead before the prefrontal cortex is fully functional.⁴² The adolescent, or twenty-something, brain has come to be understood as primarily instinctual, operating on automatic “flight or fight” responses.⁴³

Drawing from this neuroscience, and a long list of Supreme Court precedent that gradually integrated it into case law,⁴⁴ the SJC wrote that “science, social science, and common sense” tell us that children, even children who committed egregious crimes, are not as culpable as their adult counterparts.⁴⁵ More specifically, children are different in three primary ways. First, “[c]hildren demonstrate ‘a lack of maturity and underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.”⁴⁶

38. *Diatchenko*, 1 N.E.3d at 277.

39. Brief for the American Psychological Association, et al. as Amici Curiae in Support of Petitioners at 6–7, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647); Brief of the American Medical Association, et al. as Amici Curiae In Support of Respondent at 10, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633); see generally NAT’L INST. OF MENTAL HEALTH, U.S. DEP’T OF HEALTH AND HUMAN SERVS., Publication No. 11-4929, *The Teen Brain: Still Under Construction* (2011), http://www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/teen-brain_141903.pdf [<https://perma.cc/WS5R-L3PS>].

40. *MONAHON & KABAN*, *supra* note 6, at 12.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 284–85 (Mass. 2013).

45. *Id.* at 277.

46. *Id.* at 277 (citing *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) and

Second, children “are more vulnerable . . . to negative influences and outside pressures.”⁴⁷ Lastly, and perhaps most importantly, “a child’s character is not as ‘well-formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely be ‘evidence of irretrievabl[e] deprav[ity].”⁴⁸ The court further opines that given the unique characteristics universal to juvenile offenders as a class, these offenders show the greatest possibility of reform and should subsequently “be afforded a ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’”⁴⁹ This inclusion, and in fact the court’s entire rationale, can be read as requiring rehabilitative services for juveniles. The recognition of these differences is not entirely ground-breaking when considering that the juvenile courts in this Commonwealth were created expressly for the purpose of treating youthful offenders differently—to treat them “not as criminals, but as children in need of aid, encouragement and guidance.”⁵⁰

C. *Juvenile Courts and the Department of Youth Services in Massachusetts*

Massachusetts has historically been a pioneer and leader in juvenile justice. In addition to creating the nation’s first juvenile correctional system in 1846,⁵¹ much of the research on adolescent development has come out of programs at the University of Massachusetts.⁵² Massachusetts “has statewide juvenile courts, well-trained judges, excellent juvenile court clinics, a juvenile defense bar, and one of the best Department of Youth Services (“DYS”) in the country.”⁵³

quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

47. *Id.* at 276–77 (citing *Miller*, 132 S. Ct. at 2464 and quoting *Roper*, 543 U.S. at 570).

48. *Id.* at 277 (citing *Miller*, 132 S. Ct. at 2464 and quoting *Roper*, 543 U.S. at 570).

49. *Id.* at 286–87 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)).

50. MONAHON & KABAN, *supra* note 6, at 13 (quoting MASS. GEN. LAWS ch. 119, § 53 (2016)).

51. *First in the Nation*, DEP’T OF YOUTH SERVICES, <http://www.mass.gov/eohhs/gov/departments/dys/programs-and-services/history/first-in-the-nation.html> [<https://perma.cc/R9D5-BJHW>] (last visited Feb. 29, 2016).

52. *See generally Systems and Psychosocial Advances Research Center*, DEP’T OF PSYCHIATRY UNIV. OF MASS. MED. SCH., <http://www.umassmed.edu/sparc/> [<https://perma.cc/6CBW-EA8Q>] (last visited Feb. 29, 2016).

53. Jean Trounstine, *Why Sentencing Children as Adults is a Bad Idea*, BOS. MAG.: BOS. DAILY (Nov. 1, 2013, 11:28 AM), <http://www.bostonmagazine.com/news/blog/2013/11/01/philip-chism-juvenile-adult-court/> [<https://perma.cc/3EUW-MHWX>].

However, there remains a multifarious gap for juveniles facing adult charges. The 1996 enactment of the Commonwealth's Youthful Offender statute provides that all juveniles aged fourteen and older charged with murder be automatically treated as adults.⁵⁴ There exists no mechanism for anyone, not even prosecutors, to have such a case removed to juvenile court. A juvenile delinquent, defined as a youth between the ages of seven and seventeen who has committed a felony or misdemeanor, "may be given an 'indeterminate' sentence which commits them to DYS custody until age 18."⁵⁵ A youthful offender, defined as a youth between the ages of fourteen and seventeen, who has committed a felony and either has previous DYS commitment, a firearms offense, or an offense involving the infliction or threat of serious bodily harm, "can receive a commitment to DYS until age 21, a combination DYS commitment and adult sentence, or an adult sentence at a judge's discretion."⁵⁶ Those juveniles tried for murder are left in a no-man's-land of pre-trial detainment without the guarantee of DYS services and similarly without hope for consistent rehabilitative services after sentencing.

Why this gap exists can be traced back to a time of pivotal change for the Massachusetts DYS and other correctional facilities all over the country. During the 1990s, DYS experienced a simultaneous "growth in the numbers of juveniles committed to its custody" and a decrease in its budget.⁵⁷ As a result of decreased funding, previously lauded juvenile training programs were lost.⁵⁸

A change in administration in the mid-1990s led to the creation of the Hogan Commission ("Commission") to evaluate the state of DYS.⁵⁹ The Commission concluded that DYS priorities must shift away from training and rehabilitation to public safety and crime prevention given the "more violent juvenile

54. MASS. GEN. LAWS ch. 119, § 72(B) (2016).

55. *Juvenile Justice and Rehabilitation in Massachusetts*, MASS.GOV, <http://170.63.70.137/portal/articles/juvenile-justice-and-rehabilitation-in-massachusetts.html> [<https://perma.cc/A9LK-MXH9>] (last updated Feb. 5, 2016).

56. *Id.*

57. *The Growth of Community Partnerships and a Continuum Care*, DEP'T OF YOUTH SERVICES, <http://www.mass.gov/eohhs/gov/departments/dys/programs-and-services/history/growth-of-community-partnership-and-a-continuum-care.html> [<https://perma.cc/AC2P-BBWU>] (last visited Feb. 29, 2016).

58. *Id.*

59. *Hogan Commission*, DEP'T OF YOUTH SERVICES, <http://www.mass.gov/eohhs/gov/departments/dys/programs-and-services/history/hogan-commission.html> [<https://perma.cc/87ZN-ZDBM>] (last visited Feb. 29, 2016).

population.”⁶⁰ The Commission issued a report of recommendations including, inter alia, the need to physically separate juveniles facing adult sentences from other juveniles in its facilities.⁶¹ Shortly thereafter, DYS opened its first wing in an adult correctional facility to house juveniles facing adult sentences for crimes such as murder.⁶²

Again based on the increase in violent offenses, DYS applied for and received a U.S. Department of Justice grant to establish the Serious and Violent Offender Re-entry program.⁶³ DYS was awarded funds to design a model reentry program for a “targeted group of serious and violent juvenile offenders.”⁶⁴ Today, over a decade after its inception, this reentry program takes only fifteen to twenty applicants per month, age eighteen to thirty-two, who are expected to be released into one of three specific Boston neighborhoods, and have been determined high-risk for recidivism,⁶⁵ as opposed to those determined to have a high probability of reform.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Community Re-entry*, DEP’T OF YOUTH SERVICES, <http://www.mass.gov/eohhs/gov/departments/dys/programs-and-services/history/community-re-entry.html> [<https://perma.cc/F639-ZTPM>] (last visited Feb. 29, 2016).

64. *Id.*

65. *Boston (Massachusetts) Reentry Initiative*, NAT’L INST. OF JUSTICE, <http://www.crimesolutions.gov/ProgramDetails.aspx?ID=42> (last visited Feb. 29, 2016).

D. *Competing Theories of Rehabilitation: Why the Right Lens Matters*

“I cannot withdraw at least the respect that belongs to him in his quality as a man, even though by his deeds he makes himself unworthy of it.”⁶⁶

At its base, the concept of rehabilitation rests on the assumption that criminal behavior is caused by some factor that has the potential to be remedied or at least substantially mitigated.⁶⁷ While individuals are capable of making free-willed or conscious criminal choices, rehabilitation is premised on the notion that even these choices are heavily influenced by a person’s social surroundings, psychological development, and/or biological makeup.⁶⁸ Youth is the perfect storm⁶⁹ of social, psychological, and biological predisposition for criminality alongside which there runs a parallel potentiality for rehabilitation.⁷⁰ Criminogenic risk factors, such as age at the time of first offense, poor school performance, association with an anti-social peer group, substance abuse, and subpar parenting practices, have been recognized as rehabilitatable factors.⁷¹

In the way that parents, caretakers, and teachers aim to guide youthful minds and behavior, so must the Commonwealth in the case of a childhood interrupted by incarceration. This notion is referred to as *parens patriae*, a legal theory where the state assumes the role of surrogate parent, becoming responsible for fostering proper growth and development of those juveniles under its care.⁷² Without affirmative efforts to neutralize the negative effects of incarceration, the Commonwealth’s punitive intervention, and the anti-social trappings that come along with it, can easily become an added criminogenic risk factor—an

66. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 255 (Mary Gregor trans., Cambridge Univ. Press 1991).

67. *ENCYCLOPEDIA OF CRIME AND JUSTICE* (2d ed. 2002).

68. *Id.*

69. “Perfect storm,” is defined as “a critical or disastrous situation created by a powerful concurrence of factors.” *Perfect storm*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/perfect%20storm> [https://perma.cc/86LK-F4WV] (last visited Feb. 29, 2016).

70. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 277 (Mass. 2013).

71. Cailin O’Connor, *What Research Tells Us about Effective Interventions for Juvenile Offenders*, UNIV. OF WIS.-MADISON/EXTENSION (Jan. 2008), http://fyi.uwex.edu/whatworkswisconsin/files/2014/04/factsheet_1juvenile.pdf [https://perma.cc/VQ6C-UUTA].

72. KUPCHIK, *supra* note 18.

experience in a young person's life that increases the chances of future behavior problems. Why, and thus, how, the Commonwealth should intervene leads to the consideration of different models of rehabilitation.

For the purposes of this Note, two different, and inherently opposing, theories of rehabilitation will be addressed, either of which could be successfully used to analyze inmate rehabilitation in the Commonwealth of Massachusetts. The first theory or model has been described as utilitarian or authoritarian.⁷³ This model emphasizes the need for reform so that society may benefit from a reduction in crime and an increase in productive citizenry.⁷⁴ The second model is humanistic or rights-based and is rooted in the recognition of an individual's inherent dignity as a human being,⁷⁵ a proposition that may very well also lead to the utilitarian goal of civic responsibility.⁷⁶

Utilitarianism may be best understood by an axiom created by its founder, "it is the greatest happiness of the greatest number that is the measure of right and wrong."⁷⁷ To maximize the total benefit and reduce the total suffering is to place the desires of the majority ahead of the needs of the individual.⁷⁸ Pure utilitarianism would readily sacrifice the individual to preserve or restore happiness to the majority.⁷⁹ While the intent of utility sounds moral—a system that seeks to ensure the majority of its members are happy—its application today registers as predominately economic.⁸⁰ Thus, the

73. Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation*, 77 J. CRIM. L. & CRIMINOLOGY 1023, 1026 (1987).

74. *Id.* "In this view correctional treatment is essentially a technical device to mold the personality of offenders and obtain their compliance with a predesigned pattern of thought and behavior. Such 'rehabilitation' is easily downgraded to a mere instrument of institutional discipline . . ." *Id.*

75. *Id.*

76. "[H]umanistic rehabilitation offers inmates a sound and trustworthy opportunity to remake their lives. Thus, this model seeks to awaken in inmates a deep awareness of their relationships with the rest of society, resulting in a genuine sense of social responsibility." *Id.*

77. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT xiv (Ross Harrison ed. 1988).

78. *Id.*

79. H.J. McCloskey, *An Examination of Restricted Utilitarianism*, 66 PHIL. REV. 466, 468–69 (1957). McCloskey offered the classic criticism of utilitarian theory via a hypothetical in which a sheriff is faced with the choice of either framing a black man for a rape to prevent race-based rioting or conducting an investigation for the actual assailant and effectively allowing the rioting to occur. Pure utilitarianism would require the sheriff to frame the man regardless of guilt. *Id.*

80. *Infra*, Part II.C. See also Samuel Lewis, *Rehabilitation: Headline or*

consequence or outcome of any action is analyzed for not only the majority's happiness, but also for the majority's economic benefit. The individual is lost.

Rights-based theory is founded on the notion that an individual has moral rights that one is said to enjoy or have naturally and that legal rights should flow from those natural rights.⁸¹ In other words, a rights-based approach can be framed in this way:

First, it means clearly understanding the difference between a right and a need. A right is something to which I am entitled solely by virtue of being a person. It is that which enables me to live with dignity. Moreover, a right can be enforced before the government and entails an obligation on the part of the government to honor it. A need, on the other hand, is an aspiration which can be quite legitimate, but is not necessarily associated with an obligation on the part of the government to cater to it; satisfaction of a need cannot be enforced. Rights are associated with "being," whereas needs are associated with "having."⁸²

A right for one to do X necessarily implies a reciprocal duty unto others, including the state, to not interfere with one's performance of X.

When an incarcerated person is seen as the holder of rights, meaningful individual rehabilitation, as opposed to the benefit of rehabilitation derived by the society at large, becomes not only a possibility, but a priority.⁸³ When an incarcerated person is viewed as a passive recipient of available rehabilitative services offered after a cost-benefit analysis, then that person becomes a means to an end,⁸⁴ and their inherent human dignity is disregarded. A rights-based approach "requires a penal policy that maintains scrupulous respect for the dignity of prisoners and provides for the genuine fulfillment of their basic human needs, which go beyond mere physical survival."⁸⁵ The longevity and reliability of a recognized right to rehabilitative services, versus mere participation in a program, is indisputable; "[w]here rehabilitation is conceived as a

Footnote in the New Penal Policy?, 52(2) PROBATION JOURNAL 123 (2007).

81. Ligia Bolívar, *The Fundamentalism of Dignity*, in A HUMAN RIGHTS MESSAGE 27, 28 (Swedish Institute ed. 1998).

82. *Id.* at 29–30.

83. Rotman, *supra* note 73, at 1026–27.

84. KANT, *supra* note 66, at 57. "Punishment . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society." *Id.* at 140.

85. Rotman, *supra* note 73, at 1027.

right, effectiveness becomes a secondary consideration and no longer encroaches upon other priorities related to the needs of individual offenders and to the requirements of their actual sociopsychological improvement.”⁸⁶ Under this model, governments or wardens could not simply withdraw services because of statistically insignificant outcomes or a desire to reallocate funding; available services are not determined by utilitarian value, but by explicit legal conditions.⁸⁷

While either model may be used as a rationale to provide rehabilitative programs or services for incarcerated citizens of Massachusetts, this Note argues that the latter model is the preferable framework through which long-lasting improvements to the criminal justice system can be made because a dignity-centered approach requires recognizing a free-standing, actionable right to rehabilitation.

Further, this Note advocates for a system of state-obligated rehabilitation under which the Commonwealth has a duty to offer meaningful rehabilitative services.⁸⁸ State-obligated rehabilitation is a form of social contract theory, “the moral legitimacy of the State’s demand that people refrain from offending is maintained if the State fulfills its duty to ensure that people’s basic needs are met.”⁸⁹ Under this theory, there are three relevant guiding principles. First, the state has a duty to provide, and the incarcerated individual the right to receive, rehabilitation.⁹⁰ Second, the amount of intervention by the criminal justice system in an incarcerated individual’s life should be entirely separate from rehabilitative goals; those sentenced to determinate or indeterminate sentences are equally entitled to rehabilitation.⁹¹ Third, while the state is obligated to provide rehabilitation, engagement on the part of an incarcerated individual must be voluntary so that those participants derive authentic benefit from their choice to participate as opposed to developing resentment and decreased self-worth associated with mandatory, state-imposed programming.⁹² While mandatory participation might sometimes

86. Rotman, *supra* note 73, at 1036.

87. Lewis, *supra* note 80, at 119.

88. *Id.*

89. Peter Raynor, et al., *Why Help Offenders? Arguments for Rehabilitation as a Penal Strategy*, 1 EUROPEAN JOURNAL OF PROBATION 3, 12 (2009).

90. Lewis, *supra* note 80, at 124.

91. *Id.* Consider the instant case of Gregory Diatchenko.

92. *Id.*

be necessary in the penal context, “moral agency,” or, in essence, dignity, must be protected wherever possible.⁹³ These guiding principles, along with a humanist lens, will be used to analyze where Massachusetts can improve its current approach to rehabilitation of those it incarcerates.

E. *Rehabilitation in Massachusetts*

The prison system in this country was informed by the ideal of rehabilitation.⁹⁴ As it was in the context of developing a juvenile justice system, Massachusetts was once a leader in rehabilitating those it incarcerated by preparing them for reentry.⁹⁵ Furlough programs were popular in the 1980s and allowed incarcerated individuals to interview for jobs, search for housing, and reconnect with their families and communities before release.⁹⁶ From a utilitarian lens, this reentry programming clearly lends itself to increased productive citizenry—those who previously did not contribute to society, or the economy, in positive ways are now operating in compliance with societal norms and contributing. However, furlough programs can also be viewed as humanistic in that they loosen the restraints on incarcerated individuals and allow spatial and temporal separateness from the criminal justice system in which individuals can rebuild their independence and idea of self. Unfortunately, participation in these programs dwindled in the subsequent decades when the Commonwealth’s, and the country’s, focus shifted to the War on Drugs⁹⁷ and those presently

93. *Id.* at 127.

94. David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 105 (Norval Morris & David J. Rothman, eds., 1995).

Following independence, Americans repudiated British approaches to criminal justice. Correctional reform based on rehabilitative ideals and prison reform became a central concern of the newly formed legislatures. However, those ideals quickly collapsed as prisons became overcrowded and pragmatic magistrates pursued conformity with the law above all else. Not until after the Civil War would rehabilitation recapture the nation’s attention.

Id. at 102–05.

95. MASSINC, *supra* note 19, at 17.

96. *Id.*

97. In 1971, President Richard Nixon declared a War on Drugs, naming drug abuse as “public enemy number one in the United States.” *Thirty Years of America’s Drug War*, PUBLIC BROADCASTING SERVICE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> [https://perma.cc/DV9J-Y4FB] (last visited Feb. 29, 2016). While funds were initially funneled into treatment during the Nixon administration, the next thirty years witnessed the majority of funding going towards enforcement of the new drug laws. *Id.*

incarcerated were moved to the fiscal and media back burner.⁹⁸

In addition to furlough programs, more than one-quarter of those incarcerated individuals discharged in 1985 came out of pre-release centers—lower-security detention facilities with a specific focus on rehabilitation.⁹⁹ This number fell to just fourteen percent in 2011, as funding for pre-release centers and programs was beginning to be cut.¹⁰⁰ Because the prevention of on-going criminal activity, namely drug-related offenses, was deemed to be of greater societal importance than the reform of those currently incarcerated, the number of those incarcerated in Massachusetts steadily rose¹⁰¹ as the funding of rehabilitative programs continued to drastically decrease.¹⁰² These statewide reductions went so far as to ultimately eliminate the education line item entirely from the Department of Correction's ("DOC") budget.¹⁰³ Despite the research that shows education's positive effect on recidivism, numbers of participation in post-secondary courses have also plummeted from over 2000 Massachusetts inmates in 1992 to only 302 in 2010.¹⁰⁴

In order to illustrate that Massachusetts is capable of satisfying a legal obligation to provide dignity-centric rehabilitative services, consider three of the eighteen correctional facilities¹⁰⁵ and their approaches to rehabilitation.¹⁰⁶ By far, one of the most successful

Liberal advocates and social commentators . . . have long maintained that the war on drugs has been a costly failure. The litany of critiques is familiar: it does not stem the use of drugs, it disproportionately targets racial minorities, and it destroys the livelihoods of farmers around the world. Yet only recently, in a climate of steep state budget deficits, have lawmakers called drug law enforcement into question in the name of saving scarce state resources.

Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315, 316 (2012) (internal citations omitted).

98. MASSINC, *supra* note 19, at 16.

99. *Id.* at 17.

100. *Id.* at 17.

101. *Prison Population Trends*, MASS. DEP'T OF CORR., 10–11 (May 9, 2014), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpoptrends-2013-final-5-21-2014.pdf> [<https://perma.cc/6M6J-YT59>].

102. MASSINC, *supra* note 19, at 18.

103. *Id.*

104. *Id.* at 17–18. Some of this decline may be due to federal policy changes regarding financial aid available to those incarcerated. *Id.* at 18.

105. *See generally DOC Facilities*, EXEC. OFFICE OF PUB. SAFETY & SEC., <http://www.mass.gov/eopss/law-enforce-and-cj/prisons/doc-facilities/> [<https://perma.cc/2XX8-25V7>] (last visited Feb. 29, 2015).

106. AMY L. SOLOMON ET AL., URBAN INST., *LIFE AFTER LOCKUP: IMPROVING REENTRY FROM JAIL TO THE COMMUNITY* 64–66 (2008),

facilities, in terms of a humanist approach, is located in Hampden County, Massachusetts. The Re-Entry Continuum program was developed and overseen by Sheriff Michael Ashe for over thirty years.¹⁰⁷ During this time, Re-Entry Continuum has grown its capacity to serve over 6,500 individuals annually (4,000 pre-trial and 2,600 sentenced inmates).¹⁰⁸ The Hampden County Sheriff's Department serves as our base for creating an amalgamated model of what rehabilitation could look like in Massachusetts. Clearly, the theory of state-obligated rehabilitation hinges on there being a state-recognized right, which is here missing and being advocated for.¹⁰⁹ However, the second principle, that the amount of state intervention be separate from rehabilitative goals, is here satisfied;¹¹⁰ Re-Entry Continuum provides rehabilitative services to all those who cross their threshold regardless of age, offense, sentence term, or even conviction.¹¹¹ Additionally, comprehensive¹¹² rehabilitative services are administered throughout an incarcerated individual's sentence as opposed to limiting rehabilitation to brief transitional programming immediately before release or detaining a person deemed eligible for parole for longer to satisfy the reform requirement.¹¹³ The main

http://www.urban.org/research/publication/life-after-lockup-improving-reentry-jail-community/view/full_report [<https://perma.cc/7VKL-EN33>]. Discussion of three of the facilities follow, but the fourth, Suffolk County Sheriff's Department's Offender Re-entry Program, while successful, offers nothing unique for this analysis. *Id.*

107. *Hampden County Sheriff Michael Ashe celebrated at White House as 'Champion of Change,'* MASSLIVE (June 30, 2014), http://www.masslive.com/news/index.ssf/2014/06/hampden_county_sheriff_michael_4.html []; *see also The Brothers Keepers: In Hampden County, Mike and Jay Ashe make a House of Correction live up to its name*, HAMPDEN CTY. SHERIFF'S DEP'T AND CORR. CTR., <http://www.hcsdmass.org/brotherskeepers.htm> [<https://perma.cc/V98U-ANXM>] (last visited Feb. 29, 2015).

108. Solomon, *supra* note 106, at 133.

109. Lewis, *supra* note 80, at 119.

110. *Id.*

111. Solomon, *supra* note 106, at 133.

112. Incarcerated individuals are expected to participate in forty hours of activity per week in programming areas such as: substance abuse education and treatment, educational development, criminal thinking, victim impact, a responsible parenting initiative geared toward fathers, and anger management. *Id.* at 134. Further, the department provides case management, health care, and counseling services *to all those who enter* the facility. *Id.*

113. *Id.* at 132. In addition to services throughout an individual's sentence, those with ninety days or less remaining on their sentence begin meeting in the Correctional Center's reentry resource room with an array of community service providers, including an education reintegration counselor, mentors, and case workers and some inmates spend the last thirty days of their sentence in the newly created community reentry unit. *Id.* at 134.

drawback, and a difficult one to reconcile with the program's effectiveness, is that sentenced inmates are *required* to participate in mandatory programming to encourage productivity.¹¹⁴ Establishing a system with voluntary participation, thus honoring an incarcerated individual's "moral agency," is a guiding principle of rights-based rehabilitation.¹¹⁵

Another especially effective feature of rehabilitative efforts in Massachusetts is found in the intake process of Re-Entry Matrix System at the Essex County Sheriff's Department.¹¹⁶ Re-Entry Matrix System serves 1,500 of its 1,700 incarcerated individuals annually.¹¹⁷ At intake, inmates have an initial meeting that includes a comprehensive screening process that allows staff to become personally acquainted with each inmate.¹¹⁸ Clinical and program staff meet to determine placement of each individual in the facility and the suitability of certain programs and then develop a reentry plan.¹¹⁹ While participation is incentivized—eligibility for step-down programs and "good time" credit—it is not mandatory as it is in Hampden County.¹²⁰ Voluntary participation serves to recognize the moral agency and autonomy of those incarcerated and brings us closer to a workable model for rehabilitation once it is recognized as a state obligation.¹²¹

Periodic review of reentry plans and communication with the incarcerated individual makes the Repeat Offender Public Safety Initiative of Norfolk County Sheriff's Office another source from which to pull for our combined Massachusetts rehabilitation model.¹²² Serving approximately 100 of those 600 it incarcerates each year, Norfolk also creates a transition plan from the time an individual first enters the facility.¹²³ Norfolk presents the plan to the inmates, so they understand why they are placed at a specific security level and how they can work to change their classification.¹²⁴ Most notably, "an inmate undergoes classification review every 60 days to determine progress and whether any changes to the classification status or transition plan need to be

114. *Id.* at 133.

115. Lewis, *supra* note 80, at 119, 125.

116. Solomon, *supra* note 106, at 136.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 136–37.

121. *Id.*

122. *Id.* at 141.

123. *Id.*

124. *Id.*

made.”¹²⁵ Such interactive, consistent meetings emphasize the program’s rehabilitative focus on agency and human dignity.

Pulling together the key elements of the state-obligated rehabilitation model, or rights-based model, it is evident that Massachusetts can satisfy such a standard if it were to recognize a free-standing right to rehabilitation, as is argued for in Part IV. Hampden County has shown the effectiveness of providing a wide breadth of services to not only those sentenced in its facility but also those being detained pre-trial.¹²⁶ Essex County adds to our best practice model by offering robust programming on a voluntary basis, thus recognizing the autonomy of those incarcerated in its facility and allowing such a free-willed choice to bolster self-worth.¹²⁷ Lastly, Norfolk County’s adaptive approach includes not only providing services at the time of entry, but also consistent evaluation of progress so as to best place individuals incarcerated in its facility to enable optimal growth.¹²⁸ Again, these examples of best practices show that with a recognized right to rehabilitation, and the governance for compliance with a recognized right, that consistent rehabilitative services are possible for those incarcerated in Massachusetts state penal facilities.

II. THE CURRENT STATE OF REHABILITATION AND PAROLING IN MASSACHUSETTS

A. *Empty Promises: Massachusetts Paroling Guidelines for Life Sentences*

In the absence of an actionable right to rehabilitation, there lies a perplexing juxtaposition between the expectations of the parole board and the reality for those trying to meet said expectations.¹²⁹ Massachusetts paroling guidelines for those serving life sentences includes eight direct references to rehabilitated behavior or character; rehabilitation being the primary focus of two of the three main questions in the guidelines.¹³⁰ Paroling numbers

125. *Id.*

126. *Id.* at 132.

127. *Id.* at 136.

128. *Id.* at 141–42.

129. *Massachusetts Guidelines for Life Sentence Decisions*, EXEC. OFFICE OF PUB. SAFETY AND SEC., <http://www.mass.gov/eopss/agencies/parole-board/guidelines-for-life-sentence-decisions.html> [<https://perma.cc/MD4X-922R>] (last viewed Feb. 29, 2016).

130. *Id.*

I. Has the inmate’s period of incarceration been of sufficient length to adequately protect the public, punish him for his conduct, deter others, and

further support the inference that without the right to meaningfully access rehabilitative services, inmates are not satisfying the rehabilitation requirements for release.¹³¹

In 1990, 69.9% of those eligible for parole in Massachusetts were released.¹³² The grant rate dropped to 40.5% in 2000 and by 2013 was a mere 26%.¹³³ When considering numbers that pertain to those serving life sentences, the numbers are yet lower. In 2012, on initial hearing, that is after serving fifteen years of a life sentence, only 19% of those eligible were paroled and the numbers drop to 12% upon review after a designated period of time, set at five years but at the parole board's discretion.¹³⁴

Lower paroling rates means that more individuals are released directly to the street.¹³⁵ Of those incarcerated in Massachusetts state facilities, over 90% will be released during their lifetimes.¹³⁶ The cost of keeping those eligible for release incarcerated for longer terms detracts from funding for other services, such as rehabilitative programming.¹³⁷ While at times opposed, utilitarian concerns here interplay with desired humanist outcomes and recognizing a free-standing right to rehabilitation would force officials to allocate funds to rehabilitation and, in turn, incentivize paroling.

Parole board hearings are notoriously adversarial. The achievements of prisoners are often minimalized, “[t]he tenor of the hearings discourages prisoners from continuing and/or embarking on a path of change and rehabilitation, as evidenced by the number of prisoners who choose to waive their hearings, rather than face the parole board.”¹³⁸ A recognized right to rehabilitation

allow for rehabilitation? . . . II. Is the inmate rehabilitated? . . . III. Are there reasons to conclude that the inmate will live outside prison as a sober, law-abiding, employed, productive person who is making positive contributions to his family and his community?

Id.

131. LESLIE WALKER, ET AL., PRISONERS' LEGAL SERVICES, WHITE PAPER: THE CURRENT STATE OF PAROLE IN MASSACHUSETTS 1, 3 (2013), <http://www.cjpc.org/2013/White-Paper-Addendum-2.25.13.pdf> [<https://perma.cc/LRG2-FH5W>].

132. *Id.* at 1.

133. *Id.* at 1–2.

134. THE MASSACHUSETTS PAROLE BOARD, 2012 ANNUAL STATISTICAL REPORT 4 (2012), <http://archives.lib.state.ma.us/bitstream/handle/2452/208128/ocn711074206-2012.pdf?sequence=1&isAllowed=y>.

135. MASSINC, *supra* note 19, at 16.

136. *Id.*

137. *Id.* at 2, 18.

138. WALKER ET AL., *supra* note 131, at 11.

would not only require availability and universality of programming, but also uniformity in evaluating those up for parole based on their compliance with or participation in available programming. When there is uniformity with available rehabilitative services, and meaningful access to said services, paroling proceedings can become more predictable, encouraging inmate engagement.

B. *Recommendations Ignored*

In 2004, after the suicide of a high-profile inmate, Governor Mitt Romney ordered a commission to evaluate the Massachusetts DOC and compare their findings to national best practices.¹³⁹ The Governor's Commission on Corrections Reform found, among other concerns, that the DOC did not adequately prepare inmates for release back to the community and that models of effective reentry planning did in fact exist and could be effectively adopted.¹⁴⁰ The Commission's report included, *inter alia*, the following recommendations: shifting the rate of re-offense to a top priority, adopting a comprehensive reentry strategy, and establishing external review of inmate health and mental health services.¹⁴¹

In 2013, the Massachusetts Institute for a New Commonwealth¹⁴² ("MassINC") published updated findings on the

139. GOVERNOR'S COMMISSION ON CORRECTIONS REFORM, STRENGTHENING PUBLIC SAFETY, INCREASING ACCOUNTABILITY, AND INSTITUTING FISCAL RESPONSIBILITY IN THE DEPARTMENT OF CORRECTIONS (2004), <http://www.mass.gov/eopss/docs/eops/govcommission-corrections-reform.pdf> [<https://perma.cc/U43P-787U>].

140. *Id.* at vi–vii. See generally Solomon, *supra* note 107 (proposing other models of reentry planning).

141. GOVERNOR'S COMMISSION ON CORRECTION REFORM, *supra* note 139, at vii. See also Patricia Garin, *A Measure of the Bar: Prison Conditions in Massachusetts*, 49 Oct. BOS. B.J. 19 (2005) (“[A]pproximately 25% of all prisoners are seriously mentally ill. The vast majority of these prisoners receive[] little treatment. When they are eventually released back into their communities, as 97% of all prisoners will be, they will likely be in much worse condition, become homeless, and fuel high recidivism rates.”).

142. MassINC is an independent, non-partisan think tank established to fill the gap in research on the issues facing the Commonwealth. *About Us*, MASSINC, <http://massinc.org/about-us/> [<https://perma.cc/8NL9-9THH>] (last visited Feb. 29, 2016). The report on the DOC was authored by a well-known coalition of experts, including prosecutors, corrections practitioners, defense lawyers, community organizers, and business people, who work towards reforming the criminal justice system in Massachusetts. *Criminal Justice Reform Initiative*, MASSINC, <http://www.massinc.org/Programs/Criminal-Justice.aspx> [<https://perma.cc/B86D-SWLL>] (last visited Feb. 29, 2016).

status of Massachusetts corrections that illustrated a notable lack of progress on all the 2004 concerns and more.¹⁴³ The report, while primarily concerned with the fiscal costs of incarceration, also addresses negative outcomes through analysis of recidivism.¹⁴⁴ Again, the findings call for an extensive survey of conditions of confinement, programming and program quality across the state, and the expansion and uniformity of reentry programming.¹⁴⁵

Waiting lists for rehabilitative services also continue to be an issue in Massachusetts, despite evidence that such programming reduces the rates of recidivism, and thus the costs of incarceration.¹⁴⁶ At the time of the MassINC report, hundreds of incarcerated individuals were waiting for basic education programs and substance abuse programs, while thousands were waiting for behavioral therapy and violence reduction courses.¹⁴⁷ The report calls for a moratorium on the construction of new penal facilities and a concerted effort to direct limited funds towards improving outcomes—albeit for economic efficiency—for those currently incarcerated.¹⁴⁸

C. *The Failure of, and Mistake in Relying on, Federal Initiatives*

Decidedly utilitarian in nature, the federal statute popularly titled the Second Chance Act¹⁴⁹ (“SCA”), signed into law by President George Bush in 2008 and reauthorized in 2013, was enacted to fund “services designed to reduce recidivism by improving outcomes for people returning from prisons, jails, and juvenile facilities.”¹⁵⁰ However, the SCA falls short in its approach by waiting until reentry to address the negative effects of incarceration. Under this approach, a seventeen-year-old like Gregory Diachenko or Philip Chism convicted of first degree

143. MASSINC, *supra* note 19, at 7.

144. *Id.*

145. *Id.*

146. *Id.* at 7, 31.

147. *Id.* at 18. Program waitlist numbers at the time of publication were as follows: Adult Basic Education, 359; English as a Second Language, 304; GED, 279; Pre-GED, 379; Substance Abuse, 813; Behavioral Therapy, 1102; Violence Reduction, 1592; Employment Readiness, 489. *Id.*

148. *Id.* at 27.

149. Second Chance Act of 2007: Community Safety Through Recidivism Prevention, Pub. L. No. 110-199, 122 Stat. 657 (2008).

150. *Second Chance Act*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, <http://csgjusticecenter.org/nrc/projects/second-chance-act/> [<https://perma.cc/9C9X-MUFG>] (last visited Feb. 29, 2016).

murder may need to wait until the age of thirty-seven,¹⁵¹ an age when character is unquestionably more fixed, before receiving vital social and emotional support or educational and vocational services.¹⁵² A rights-based approach to rehabilitation would allocate SCA dollars to neutralize the negative effects of incarceration beginning at the time of incarceration.

“[F]ederal government spending on [SCA] programs amounts to less than \$100 a year for each” released inmate.¹⁵³ In the previous fiscal year, \$68 million was awarded for the SCA, compared to the \$115 million requested and the annual federal prison budget of \$8.5 billion.¹⁵⁴ This discrepancy illustrates why government programs, no matter how enlightened, are insufficient when not coupled with a recognized right to rehabilitation.¹⁵⁵

151. After the *Diatchenko* decision, An Act Relative to Juvenile Life Sentences for First Degree Murder was amended to prevent the paroling of juveniles after the standard fifteen years:

In the case of a sentence of life imprisonment for murder in the first degree committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not less than 20 years nor more than 30 years; provided, however, that in the case of a sentence of life imprisonment for murder in the first degree with extreme atrocity or cruelty committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of 30 years; and provided further, that in the case of a sentence of life imprisonment for murder in the first degree with deliberately premeditated malice aforethought committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not less than 25 years nor more than 30 years.

2014 Mass. Acts ch. 189, § 6.

152. Many facilities, unlike Hampden County, only make available rehabilitative programs to those with certain sentences shortly before their release. Solomon, *supra* note 106, at 64–66.

153. THE EDITORIAL BD., *The Second Chance Act Proves Its Worth*, N.Y. TIMES, (June 27, 2014), http://www.nytimes.com/2014/06/28/opinion/committed-states-have-reduced-recidivism-rates.html?_r=0.

154. Compare U.S. Dep't of Justice, *Fiscal Year 2016 Request: State, Local and Tribal Law Enforcement Assistance*, https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/3_2016_state_and_local_chart.pdf [<https://perma.cc/W9CW-F2A3>]; with U.S. Dep't of Justice *Fiscal Year 2015 Budget Request, State, Local and Tribal Assistance*, 5, <https://www.justice.gov/sites/default/files/jmd/legacy/2013/08/29/state-local.pdf> [<https://perma.cc/MQR7-8PPH>]; and U.S. Dep't of Justice, *Fiscal Year 2015 Budget Request, Prisons and Detention*, 1, <https://www.justice.gov/sites/default/files/jmd/legacy/2013/09/07/prisons-detention.pdf> [<https://perma.cc/L7Q8-CSH2>].

155. Rotman, *supra* note 73, at 1067 (“[R]ehabilitative action should not remain merely a goal of governmental policies, however enlightened and humanistic. Rehabilitation will be fully realized only when it is recognized as a

“[T]he description of rehabilitation as a right implies granting the rehabilitative claim a ‘certain threshold weight against collective goals in general.’”¹⁵⁶

The Mentally Ill Offender Treatment and Crime Reduction Act¹⁵⁷ (“MIOTCRA”), initially enacted in 2004 with over \$50 million in funding, was also put on the budgetary back burner.¹⁵⁸ MIOTCRA is designed to fund mental health courts and diversion programs and generally to assist the states with “collaboration between criminal justice, juvenile justice, and mental health . . . systems.”¹⁵⁹ A second explicit function of MIOTCRA is to fund programs that offer training to juvenile justice officers to identify symptoms of mental illness.¹⁶⁰ While Congress reauthorized MIOTCRA in 2008 for an additional five years,¹⁶¹ President Barack Obama requested no funding for this program for fiscal year 2013 and instead attempted to combine the funding with other drug and mental health programs.¹⁶² The condensed proposed bill, The Justice and Mental Health Collaboration Act of 2013, while under review since 2012 and endorsed by over 200 organizations nationwide, has been stalled for three years.¹⁶³ The result in the

right of the offender, independent of utilitarian considerations and of transient penal strategies.”).

156. *Id.* at 1027.

157. Mentally Ill Offender Treatment and Crime Reduction Act of 2004, Pub. L. No. 108-414, 118 Stat. 2327.

158. *Support Comprehensive Legislation that helps Counties Reduce the Number of Individuals with Mental Health Conditions in Jails*, NATIONAL ASSOCIATION OF COUNTIES, <http://www.naco.org/sites/default/files/documents/2016%20MIOTCRA3.pdf> [HTTPS://PERMA.CC/J2D9-P6PX] (last visited Mar. 4, 2016).

159. *Mentally Ill Offender Treatment and Crime Reduction Act*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, http://csgjusticecenter.org/wp-content/uploads/2012/12/MIOTCRA_Fact_Sheet_2_21_12.pdf [https://perma.cc/24GL-S9MR] (last viewed Feb. 29, 2016).

160. *Id.*

161. Mentally Ill Offender Treatment and Crime Reduction Reauthorization and Improvement Act of 2008 Pub. L. No. 110-416, 122 Stat. 4352.

162. *President’s Budget Proposes Continued Funding for Second Chance Act and Justice Reinvestment Initiative*, JUSTICE CENTER (Mar. 5, 2014), <http://csgjusticecenter.org/jc/presidents-budget-proposes-continued-funding-for-second-chance-act-and-justice-reinvestment-initiative/> [https://perma.cc/X9WJ-FQYA]. The Justice and Mental Health Collaboration Act of 2013 passed the Senate Judiciary Committee with bipartisan support, and would reauthorize MIOTCRA. *Reauthorize the Mentally Ill Offender Treatment and Crime Reduction Act*, NATIONAL ASSOCIATION OF COUNTIES, <http://www.naco.org/sites/default/files/dh%20%20-%20%20Mentally%20Ill.pdf> [https://perma.cc/3Q6S-LRJA] (last visited on March 4, 2016).

163. Matt Goldenberg, *Two Stalled Mental Health Bills Are Essential for All of Us*, HUFFINGTON POST (Dec. 17, 2014), <http://www.huffingtonpost.com/dr->

meantime is a de-emphasis on the specific rehabilitative and mental health needs of those incarcerated. A state-obligated right to access of these types of rehabilitative services is needed—a right that cannot be undermined by budgetary constraints.

The federal government cannot be relied on to provide consistent, adequate funding for rehabilitating those incarcerated in state facilities, and it should not be, as such a field is clearly within the state's police powers.¹⁶⁴ With the SCA, rehabilitation efforts begin too late, an especially problematic feature for those detained since youth.¹⁶⁵ Realistically, as priorities shift, funding is redistributed and vital services needed during incarceration are put off until a later date.¹⁶⁶ The Commonwealth itself does boast a number of educational and vocational opportunities for inmates, and a designated budget that has come to rely on largely state-based funds.¹⁶⁷ However, as it has been established at the federal level, without a right to these rehabilitative resources and meaningful access, such utilitarian opportunities are unreliable and do not enforce a dignity-centric model of reform.

III. THE EFFECTS OF INCARCERATION

A. *Outcomes for Incarcerated Youth*

Philosopher Immanuel Kant warned of “punishments that dishonor humanity itself,” which would “make a spectator blush with shame at belonging to a species that can be treated that way.”¹⁶⁸ To incarcerate someone as young as fourteen for an indeterminate amount of time without guaranteeing long-term rehabilitative services should cause the Commonwealth to reddem.

While it is difficult to control for confounding factors—such as the severity of the crime committed, issues pertaining to poverty, educational attainment and so forth—it has been found that those involved with the criminal justice system early in their lives are

[matt-goldenberg-do-/two-bills-prove-the-feder_b_6336796.html](http://www.mass.gov/eopss/law-enforce-and-cj/prisons/offender-progs/education-and-training.html) [<https://perma.cc/PT4P-JSW8>].

164. U.S. CONST. amend. X. The Tenth Amendment of the U.S. Constitution reserves for the states, or the people, those powers not expressly delegated to the federal government. *Id.*

165. *See supra* Part II.C.

166. *See Lewis, supra* note 80, at 119.

167. *Education and Training*, OFFICE OF PUB. SAFETY AND SEC., <http://www.mass.gov/eopss/law-enforce-and-cj/prisons/offender-progs/education-and-training.html> [<https://perma.cc/M8R9-QHGU>] (last visited Feb. 29, 2016).

168. KANT, *supra* note 66, at 255.

more likely than their peers to struggle later in life.¹⁶⁹ By deduction, a juvenile, eligible for parole after serving twenty years¹⁷⁰ in prison, possibly all of which was served in an adult facility depending on pretrial detainment, is even more likely to struggle given the length of the sentence, time removed from the community during formative years, and the lack of age-appropriate services available in those facilities which predominately house adults.

A principle reason for the holdings in *Miller* and *Diatchenko*, is that a child's character is not yet fully formed,¹⁷¹ which is equally a reason why the Commonwealth has a duty to foster the juvenile offender's development by way of guaranteeing rehabilitative services, even once juvenile offenders are moved to adult facilities. Studies have shown, that "[c]ompared [to] other kids with a similar history of bad behavior, those who entered the juvenile-justice system were nearly seven times more likely to be arrested for crimes as adults."¹⁷² Given that this fact is in the context of the juvenile system and not the adult system, it stands to reason that the outcomes for those sentences as juveniles who develop in adult facilities are likely to have more dire outcomes. Similarly, those youths sentenced to juvenile prison were "37 times more likely to be arrested again as adults, compared with similarly misbehaved kids who were either not caught or not put into the system."¹⁷³ Even the tamey punitive intervention of community service, limiting exposure to other troubled kids, doubles a child's likelihood of being arrested as an adult.¹⁷⁴

Educational programs have been shown to serve a utilitarian purpose—releasing a competent worker ready to contribute to the economy—but more importantly they also lend to the humanist goal of promoting self-worth.¹⁷⁵ While education has been shown to significantly decrease rates of recidivism, its positive effect on

169. Anna Aizer & Joseph Doyle, *What is the long-term impact of incarcerating juveniles?*, VOX (July 16, 2013), <http://www.voxeu.org/article/what-long-term-impact-incarcerating-juveniles>.

170. Depending on the severity of the crime, this could be twenty-five years. 2014 Mass. Acts ch. 189, § 6.

171. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 277 (2013).

172. Maria Szalavitz, *Why Juvenile Detention Makes Teens Worse*, TIME (Aug. 7, 2009), <http://content.time.com/time/health/article/0,8599,1914837,00.html>.

173. *Id.*

174. *Id.*

175. LAURA WINTERFIELD ET AL., URBAN INSTITUTE, *THE EFFECTS OF POSTSECONDARY CORRECTIONAL EDUCATION*, 13 (2009).

future outlook and attitudes towards incarceration make it not only the moral thing to do, but also a logical decision from the perspective of Commonwealth lawmakers.¹⁷⁶

The most common report across all stakeholder groups at all facilities was that involvement in [educational programming] affects inmate behavior and creates a safer prison environment . . . students recognized the privilege of being enrolled in these courses, and reported being careful to avoid situations that could result in disciplinary infractions and subsequently jeopardize their continued participation.¹⁷⁷

Turning out workers that can weld, plumb, or cook has its merits, but releasing individuals back into society who have developed a sense of belonging, pride, and self is likely to pay out in spades.

Incarcerated individuals have higher rates of mental illness than the average population, and incarceration itself is known to exacerbate or even cause mental illness.¹⁷⁸ Post Incarceration Syndrome (“PICS”) is defined as, “a set of symptoms that are present in many currently incarcerated and recently released prisoners that are caused by being subjected to prolonged incarceration in environments of punishment with few opportunities for education, job training, or rehabilitation.”¹⁷⁹ Treatment providers have noted a rise in the number of clients experiencing this combination of post-release symptoms.¹⁸⁰ Experts believe the rise in PICS is largely related to the reduction of access to education, vocational training, and rehabilitation programs.¹⁸¹ One such expert prescribes an “antidote” for PICS which includes, “converting 80% of our federal, state, and county correctional facilities into rehabilitation programs with daily involvement in educational, vocational, and rehabilitation programs” and “[i]nstitut[ing] universal prerelease programs for all offenders with the goal of preparing them to transition into community based addiction and mental health programs.”¹⁸²

176. *Id.*

177. *Id.* at 12.

178. Terrence Gorski, *Post Incarceration Syndrome and Relapse*, THE ADDICTION WEBSITE OF TERRENCE T. GORSKI, http://www.tgorski.com/criminal_justice/cjs_pics_&_relapse.htm [https://perma.cc/EWJ2-XXFU] (last visited Feb. 29, 2016).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

Education, job training, and life skills are viewed as beneficial to those incarcerated¹⁸³ adults who presumably had some opportunities for such engagement prior to incarceration. The case for granting such opportunities as a right to juveniles is that much stronger since those incarcerated in their youth are required to start from the ground up when looking towards reentry. Mental health concerns also step to the foreground when one considers the reality that an incarcerated juvenile will be forming his attitude, character, self-worth, and entire identity through the lens of incarceration.¹⁸⁴ The Commonwealth's only option to give these juveniles a chance at returning to society for a real "second chance" is to prioritize rehabilitation at the conception of incarceration and the neutralizing efforts cannot end when a juvenile is sentenced as an adult or transferred to an adult facility.

IV. RECOGNIZING A RIGHT TO REHABILITATION

There are a multitude of sources from which Massachusetts courts and legislators could find a freestanding right to rehabilitation. This assertion has as its foundation the basic premise that the SJC has "the inherent authority 'to interpret [S]tate constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'"¹⁸⁵ The court has done this in holding that even discretionary life sentences without the possibility of parole unto juveniles violates the prohibition against cruel and unusual punishment.¹⁸⁶ As explored in Part I.E of this Note, successful

183. *In re* Gregory Diatchenko, W38579, (Mass. Parole Bd. Oct. 31, 2014); *In re* Joseph Donovan, W55313, (Mass. Parole Bd. Aug. 7, 2014); *In re* Anthony Rolon, W62684, (Mass. Parole Bd. Aug. 6, 2014); *In re* Frederick Christian, W64758, (Mass. Parole Bd. June 5, 2014); *In re* Thappi Phomphakdy, W69124, (Mass. Parole Bd. Dec. 11, 2013); *In re* Jason Clements, W64045, (Mass. Parole Bd. Dec. 10, 2013); *In re* Michael Diaz, W66797, (Mass. Parole Bd. Dec. 3, 2013); *In re* Daniel Mendoza, W62695, (Mass. Parole Bd. Aug. 12, 2013); *In re* Sadiq Palmer, W62664, (Mass. Parole Bd. Aug. 12, 2013).

184. WINTERFIELD, *supra* note 175, at 13; *see also* *Barker v. Wingo*, 407 U.S. 514, 520 (1972) ("Lengthy exposure to [confinement] has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult." (internal citation omitted)).

185. *Libertarian Ass'n of Mass. v. Sec'y of the Commw.*, 969 N.E.2d 1095, 1111 (Mass. 2012) (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 959 (Mass. 2003)). *See also* *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008) (quoting *Oregon v. Hass*, 420 U.S. 714, 719 (1975)) ("[T]he State . . . may grant its citizens broader protection than the Federal Constitution requires by enacting appropriate legislation or by judicial interpretation of its own Constitution . . .").

186. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 275–76 (2013); *see also supra* note 10.

programs in Massachusetts are practicable.¹⁸⁷ Rather, what is lacking is the recognition that rehabilitation is a right owed to those incarcerated based on their inherent human dignity.¹⁸⁸ While arguments for a free-standing right to rehabilitation have previously failed,¹⁸⁹ this Note suggests that since then our standards of decency have in fact evolved to allow for reconsideration of the right to rehabilitation. Those offenders taken from the community in their youth can serve as a starting point to progressively realize this right in this Commonwealth.

The Massachusetts Legislature requires that the Commissioner of Corrections,

[E]stablish, maintain and administer programs of rehabilitation, including but not limited to education, training and employment, of persons committed to the custody of the department, designed as far as practicable to prepare and assist each such person to assume the responsibilities and exercise the rights of a citizen of the commonwealth.¹⁹⁰

The language “as far as practicable” is deferential to a degree that renders the administration of meaningful rehabilitative programming anything but certain. An argument for its enforcement comes by way of analysis of the article twenty-six prohibition against cruel and unusual punishment¹⁹¹ and article one’s equal protection guarantee.¹⁹²

A. *The Lack of a Right to Rehabilitation as a Violation of the*

187. See generally *supra* Part I.E.

188. *Cepulonis v. Maloney*, 15 Mass. L. Rptr. 683, 684 (Super. Ct. 2003). It is well settled law that a prison inmate does not have a constitutional right to an educational, vocational or rehabilitation program. *Wishon v. Gammon*, 978 F.2d 446, 450 (8th Cir. 1992); *Smith v. Bingham*, 914 F.2d 740, 742 (5th Cir. 1990); *Garza v. Miller*, 688 F.2d 480, 485-86 (7th Cir. 1982). However, a right to an entitlement in a program may be created by statute. Here, the Legislature has instructed the Commissioner to ‘establish, maintain and administer programs of rehabilitation including . . . education, training and employment of persons committed to the custody of the Department [of Correction].’ The language of the statute mandating that the Commissioner establish such programming creates more than a ‘mere hope or expectancy’ of an educational program; it creates an actual entitlement in the program.

Id. (quoting MASS. GEN. LAWS c. 124 § 1(e) and Ass’n for Reduction of Violence v. Hall, 558 F.Supp. 661, 663-64 (D.Mass. 1983).

189. *Ladetto v. Comm’r of Corr.*, 385 N.E.2d 273, 274 (Mass. App. Ct. 1979).

190. MASS. GEN. LAWS c. 124 § 1(e).

191. MASS. CONST. art. XXVI.

192. MASS. CONST. art. I.

Prohibition on Cruel and Unusual Punishment

What constitutes cruel and unusual punishment changes as society's notions of decency evolve, "the words of the [Eighth] Amendment are not precise, and . . . their scope is not static."¹⁹³ The analogous state provision to the Eighth Amendment, article twenty-six of the Massachusetts Constitution, equally is shaped by constituents and officials in Massachusetts and their notions of decency.¹⁹⁴

After the prisoners' rights movement of the 1960s, incarcerated individuals were transformed from slaves of the state into legal persons.¹⁹⁵ The previous deference given by courts to administrators, known as the "hands off" doctrine, was gradually abandoned as courts began to mandate norms and minimum standards for penal institutions.¹⁹⁶ Deprivation of rights seen as nontrivial continued to be allowed, as required for incarceration, but arbitrary deprivations or additional punishment other than incarceration itself began to be viewed as excessively punitive and a violation of the freedom from cruel and unusual punishment.¹⁹⁷

The seminal case of *Holt v. Sarver*¹⁹⁸ created a standard for courts around the country when it held, "[t]he absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation."¹⁹⁹ The test for constitutional prison conditions evolved into a totality of conditions test.²⁰⁰ This test views rehabilitative programs as a component of confinement so that if, in their absence, confinement becomes cruel and unusual, a negative indirect right to rehabilitative programs must be found.²⁰¹ Incarceration alone degenerates, even when conditions are otherwise "fair."²⁰² Rehabilitation by way of participation in educational or vocational programs, such as those funded by the SCA or even those inconsistently offered by various state facilities,

193. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

194. MASS. CONST. art. XXVI.

195. James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960–80*, 2 CRIME AND JUSTICE 429, 434 (1980).

196. *Id.* at 435–36.

197. Rotman, *supra* note 73, at 1039.

198. *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

199. *Id.* at 379.

200. *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976).

201. Rotman, *supra* note 73, at 1043.

202. *Id.* at 1049.

is thus insufficient in a system where degradation is a daily experience.

The idea of rehabilitation continues to play a central role in the court's analysis of the conditions of confinement.²⁰³ A well-known, persuasive New Hampshire case²⁰⁴ illustrates the extent to which a court may go in regulating unconstitutional prison conditions:

Where the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration, a federal court must conclude that imprisonment under such conditions does violence to our societal notions of the intrinsic worth and dignity of human beings and, therefore, contravenes the Eighth Amendment's proscription against cruel and unusual punishment.²⁰⁵

Based on the totality of conditions analysis, courts have held that a prisoner has a constitutional right to rehabilitation programs in certain situations where the absence of programming would allow for inhumane confinement.²⁰⁶ A humanist framework allows one to consider how being stripped from the natural right, the moral right, to dignity, could be considered inhumane.

B. *Right to Rehabilitation based on Equal Protection Grounds*

A right to rehabilitation based on equal protection is rooted in the idea that an incarcerated individual retains "all basic rights not incompatible with incarceration."²⁰⁷ One groundbreaking case that opened the door to equal protection claims for those incarcerated is *Morales v. Schmidt*.²⁰⁸ In *Morales*, the court held that "the equal protection clause applies not only within the group of persons

203. *Id.* at 1039.

204. *Laaman v. Helgemoe*, 437 F. Supp. 269, 323 (D.N.H. 1977) (issuing seventy-five separate orders to correct prison conditions such as: offering vocational training in marketable skills, effective religious and educational programs, therapy, and individual counseling).

205. *Id.*

206. *Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 208–09 (8th Cir. 1974); *Palmigiano v. Garrahy*, 443 F.Supp. 956, 981 (D.R.I. 1977); *Laaman v. Helgemoe*, 437 F.Supp. 269, 316 (D.N.H. 1977); *Ahrens v. Thomas*, 434 F.Supp. 873, 898 (W.D.Mo. 1977), *aff'd in part, modified in part*, 570 F.2d 286 (8th Cir. 1978); *James v. Wallace*, 382 F.Supp. 1177, 1181–82 (M.D.Ala. 1974); *Holt v. Sarver*, 309 F.Supp. 362, 378–79 (E.D.Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

207. *Rotman*, *supra* note 73, 1055 (citing *Hudson v. Palmer*, 468 U.S. 517, 547–48 (1984) (Stevens, J., concurring in part and dissenting in part)).

208. *Morales v. Schmidt*, 340 F. Supp. 544 (W.D. Wis. 1972).

convicted of a crime, but also to governmental treatment that distinguishes this group from the general population.”²⁰⁹ Here the court reasoned that the difference between categories, between those convicted of a crime and those not, “should not escape the judicial scrutiny borne by other governmental classifications for the purpose of differential treatment.”²¹⁰ The court decided that if the distinction between the two groups is one that is a fundamental interest, then “the burden will be upon the government to show a compelling state interest in the differential treatment.”²¹¹ While courts have not held that the right to rehabilitation is a fundamental one for incarcerated adults,²¹² the argument ought to be different in the case of an incarcerated individual ripped from the community as a juvenile and being sentenced as an adult, given the science and social science recognized by the courts in the thirty years since *Morales*.

There are two points of comparison when considering an equal protection argument that the lack of rehabilitation services is constitutionally impermissible: first in regard to the general non-incarcerated population, and second in relation to those incarcerated in other state penal facilities.²¹³ The general population may experience treatment, self-improvement, or rehabilitation by way of seeking out counseling or treatment groups, by accessing religious communities, and more.²¹⁴ By removing an incarcerated individual’s ability to seek out these types of treatment or restorative services for himself, the penal system arguably becomes responsible for ensuring the availability of such services.²¹⁵ Denying these services can then be viewed as overly punitive; individuals are “not sent to a penal institution to receive additional punishment The fact of incarceration itself is the punishment.”²¹⁶

Further, a certain level of public education is also a right available to juveniles in the general incarcerated population, but not necessarily those incarcerated as adults.²¹⁷ This point is

209. Rotman, *supra* note 73, 1054.

210. *Morales*, 340 F. Supp. at 550.

211. *Id.*

212. *Ladetto v. Comm’r of Corr.*, 385 N.E.2d 273, 274 (Mass. App. Ct. 1979).

213. *See* Rotman, *supra* note 73, at 1026.

214. *Id.*

215. *Id.*

216. *Barnes v. Virgin Is.*, 415 F. Supp. 1218, 1224 (D.V.I. 1976).

217. MASS. CONST. part II, ch. 5, § 2. The SJC has interpreted the Education Clause as placing an enforceable duty on the Commonwealth to provide public education for its children regardless of personal or communal fiscal

especially relevant in the instance of juveniles who may have been removed from the education system as early as fourteen and were then sentenced as adults after long pre-trial periods. This missed educational experience is an impermissible result of their confinement. “[D]epriving prisoners of rehabilitation . . . would deny them equal protection if an almost identical right to rehabilitation applies to similarly situated non-prisoners.”²¹⁸ Or in other words,

If punishment is to conform to its overt legal objectives, the state must guarantee the equal protection of inmates’ basic rights. Meaningful rehabilitative programs must be developed to counteract the degrading and socially detrimental situation of incarcerated prisoners. This legal obligation of the state should correspond to the rights of inmates to education, vocational instruction and maintenance of acquired skills, mental health and remunerated work in the same way they belong to other citizens.²¹⁹

The second facet of the equal protection argument pertains to those services afforded inconsistently to other incarcerated youth in the Commonwealth’s facilities. Juveniles who are tried for less egregious crimes are processed via the juvenile justice system, as opposed to the criminal justice system, which again bears a maximum penalty of incarceration until twenty-one years of age.²²⁰ Juveniles that enter into the juvenile justice system receive treatment until they are twenty-one whereas those who commit more egregious crimes, arguably an increased reason for rehabilitation, are denied that benefit when tried and sentenced as adults. And even further, different facilities offer different ranges and depths of programming, creating a situation where some individuals have substantial access to rehabilitative services while others are indefinitely wait-listed. The varying discrepancies in access and treatment could constitute impermissible discrimination under the Commonwealth’s equal protection clause should

capability. *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 621 (Mass. 1993). In order to accomplish this constitutional duty, the Massachusetts Legislature has enacted a compulsory education statute. See MASS. GEN. LAWS ch. 76, § 1 (1994).

218. Rotman, *supra* note 73, at 1054 (quoting Peter Dwyer & Michael Botein, *The Right to Rehabilitation for Prisoners—Judicial Reform of the Correctional Process*, 20 N.Y.L.F. 273, 284 (1974)).

219. Rotman, *supra* note 73, at 1057.

220. In September of 2013, Massachusetts Governor Deval Patrick signed into law a bill expanding the juvenile court’s jurisdiction to seventeen-year-olds. St. 2013 c. 84.

Massachusetts endeavor to provide a free-standing right to rehabilitation.

C. *International Law Expectations of Rehabilitation and Juvenile Protections*

The Commonwealth of Massachusetts should look to the numerous international laws, treaties, and norms to find a right to rehabilitation for those it incarcerates, especially in the context of juvenile offenders tried and sentenced as adults. Looking internationally to fill in gaps or bolster domestic law has become increasingly acceptable. Justice Kennedy famously opined in *Roper*, “It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”²²¹

Similarly, the decision in *Miller* included consideration of international customary law.²²² Customary international law is one of the sources of international law and refers to international obligations arising from established state practice, as opposed to those created by formal treaties.²²³ In other words, customary international law results from a general and consistent practice of states that they follow from a sense of legal obligation.²²⁴

The United Nations Standard Minimum Rules for the Treatment of Prisoners (“SMR”), while not legally binding, sets forth,

The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but

221. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

222. Brief for Amnesty Int’l et al. as Amici Curiae Supporting Petitioners at 22, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647); G.A. Res. 44/25, Convention on the Rights of the Child, at 37 (Nov. 20, 1989) [hereinafter “Convention on the Rights of the Child”] (stating explicit ban on sentencing children to life in prison without the possibility of parole).

223. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, art. 38(1)(b), <http://www.icj-cij.org/documents/?p1=4&p2=2>. [<https://perma.cc/UD44-6PWW>]; MALCOLM N. SHAW, INTERNATIONAL LAW 80 (5th ed. 2003).

224. SHAW, *supra* note 223, at 80.

able to lead a law-abiding and self-supporting life.²²⁵

In Connecticut, the court used the SMR, which is actually adopted in the preamble to the Administrative Directives to the Connecticut Department of Corrections, as a basis for declaring overcrowded conditions in its state prisons unconstitutional.²²⁶

The United Nations International Covenant on Civil and Political Rights (“ICCPR”), passed in 1966, but not ratified until 1976, entreats, “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”²²⁷ Similarly, the American Convention of Human Rights (“ACHR”) article 5, section 6 implores, “[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.”²²⁸

The Convention on the Rights of the Child (“CRC”) was used in both the *Miller* and *Diatchenko* decisions for its explicit ban on sentencing children to life without the possibility of parole.²²⁹ Section one of the same convention implores taking a child’s age into account when considering not only the punishment, as Massachusetts has done, but also the measure of rehabilitation.²³⁰ Similar language is found in several other international documents that implore taking into account the child’s age not only for sentencing but also rehabilitation and the desirability of promoting the child’s reintegration into society.²³¹

Lastly, multiple international sources also support the notion that lack of rehabilitation is a form of cruel, unusual, or degrading treatment or punishment.²³² ICCPR prohibits physical and non-

225. UN Doc. A/CONF/611, annex 1, ESC Res. 663C, (XXIV) (1957), UN ESCOR, Supp. No. 1, at 11, UN Doc. E/3048 (1957), amended by ESC Res. 2076, (LXII) (1977), UN ESCOR, Supp. No. 1, at 35, UN Doc. E/5988 (1977).

226. *Lareau v. Manson*, 507 F. Supp. 1177, 1187–89 n.9 (D. Conn. 1980).

227. G.A. Res. 2200A (XXI), Int’l Covenant on Civil and Political Rights, ¶ 38 (Dec. 16, 1966) [hereinafter “Int’l Covenant on Civil and Political Rights”].

228. Am. Convention of Human Rights, “Pact of San Jose, Costa Rica” (B-32), art. 5(6), Nov. 22, 1969, Stat. 17955, O.A.S.T.S. No. 36.

229. Convention on the Rights of the Child, *supra* note 222, at art. 37.

230. *Id.*

231. Am. Declaration on the Rights and Duties of Man, art. 7, 1948, OEA/Ser.L./V.II.23, doc. 21, rev. 6, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17; Int’l Covenant on Civil and Political Rights, *supra* note 227, at ¶ 38; Convention on the Rights of the Child, *supra* note 222, at art. 40(1).

232. Int’l Covenant on Civil and Political Rights, *supra* note 227, at ¶ 27; G.A. Res. 39/46, (XVII), Convention Against Torture (Dec. 10, 1984); Am. Declaration on the Rights and Duties of Man, *supra* note 231, at art. 36.

physical harm and abusive forms of detention and requires that age be taken into account in determining what constitutes cruel, inhumane, infamous, and unusual punishment.²³³ Again, a lack of contemporaneous rehabilitation may not have previously been recognized as cruel and unusual punishment in the context of adult offenders,²³⁴ but in the context of a juvenile detained for egregious crimes in adult facilities since youth, such a practice bends towards the indecent.²³⁵

D. *Non-Legal Sources Supporting the Right to Rehabilitation*

In Massachusetts, as well as many other states, a right to rehabilitation can be inferred from the purpose of the correctional system and its general directives as how to treat those they incarcerate.²³⁶ The Massachusetts DOC reports its vision moving forward as, “provid[ing] safe, secure and humane custody while preparing inmates to return to society in a way that makes it less likely that they will re-offend.”²³⁷ Similarly, the juvenile justice system itself implies the desire for and goal of rehabilitation. Since the creation of the Juvenile Court in 1906, the Commonwealth has recognized that children differ from adults in their legal capacity and culpability and require different treatment.²³⁸

The American Bar Association’s recommendations for the treatment of prisoners also illustrates the desire for a dignity-centric approach to incarceration and thus rehabilitation. Standard 23-7.1, Respect for Prisoners, endorses, “[c]orrectional authorities should treat prisoners in a manner that respects their human dignity, and should not subject them to harassment, bullying, or disparaging language or treatment”²³⁹ Standard 23-8.2(a),

233. Int’l Covenant on Civil and Political Rights, *supra* note 227, at ¶ 27; Convention Against Torture, *supra* note 232, at art. 16; Declaration on the Rights and Duties of Man, *supra* note 231, at art. 36.

234. *Ladetto v. Comm’r of Corr.*, 385 N.E.2d 273, 274–75 (Mass. App. Ct. 1979).

235. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (What punishment is barred by the Eighth Amendment must be determined based “from the evolving standards of decency that mark the progress of a maturing society.”); *see also* *Dist. Att’y for the Suffolk Dist. v. Watson*, 411 N.E.2d 124, 1283 (Mass. 1980) (holding that article XXVI of state constitution equally non-static and thus capital punishment is impermissibly cruel in Massachusetts given contemporary standards of decency).

236. *Rotman*, *supra* note 73, at 1065 (citing MASS. GEN. LAWS ch. 24, § 1 (e)–(f)).

237. GOVERNOR’S COMMISSION ON CORRECTIONS REFORM, *supra* note 139, at 4.

238. *MONAHON & KABAN*, *supra* note 6, at 12.

239. *ABA STANDARDS FOR CRIMINAL JUSTICE* 201 (3rd ed. 2011).

Rehabilitative programs, furthers:

For the duration of each prisoner's confinement, the prisoner—including a prisoner in long-term segregated housing or incarcerated for a term of life imprisonment—should be engaged in constructive activities that provide opportunities to develop social and technical skills, prevent idleness and mental deterioration, and prepare the prisoner for eventual release. Correctional authorities should begin to plan for each prisoner's eventual release and reintegration into the community from the time of that prisoner's admission into the correctional system and facility.²⁴⁰

The Boston Bar Association has also echoed this standard.²⁴¹

CONCLUSION

“If rehabilitation is the goal for teenagers who are tried and sentenced as adults, then prison is not the answer.”²⁴² Or, at least, not prison as we know it. The Commonwealth must treat those it incarcerates as the holders of rights, including the right to rehabilitation, not so that the Commonwealth may reap a benefit from employable post-release skills, but so that those released may reenter society as a whole person, able and willing to participate in a dignified society.²⁴³

Massachusetts should, as many states have,²⁴⁴ incorporate the goal of rehabilitation into the state constitution and further expand constitutional protections by recognizing that goal as a state obligation. We need to move away from what a state should refrain from doing, and towards what a state should affirmatively

240. *Id.* at 246.

241. See Edward P. Leibensperger, *Constructive Return of Inmates is Integral to Public Safety*, 49 NOV./DEC. BOS. B.J. 2 (2005); Patricia Garin, *A Measure of the Bar: Prison Conditions in Massachusetts*, 49 SEPT./OCT. BOS. B.J. 18 (2005).

242. Gary Scott, *Prison is too violent for young offenders*, N.Y. TIMES, (June 5, 2012), <http://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/prison-is-too-violent-for-young-offenders> [<https://perma.cc/5VQ4-GXZL>].

243. *Cf. Coffin v. Reichard*, 148 F.2d 278 (6th Cir. 1945) (holding that prisoners retain all civil rights except those expressly taken by law or those whose removal is necessary to the attainment of legitimate penal goals), *cert. denied*, 325 U.S. 887 (1945).

244. See N.H. CONST. art. XVIII (“The true design of all punishments being to reform, not to exterminate mankind.”); OR. CONST. art I, § 15 (Punishment must be based on “principles of reformation, and not of vindictive justice.”); WYO. CONST. art. I, § 15 (“The penal code shall be framed on human principles of reformation and prevention.”).

do for its incarcerated citizens. The Commonwealth of Massachusetts can and should recognize an actionable right to rehabilitation for those incarcerated in its state penal facilities beginning with those removed from society in their youth.