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RESEARCH ARTICLE

# Youth as Moral Opportunity

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**Abstract**

Minors should not be punished as harshly as adults for any given crimes they commit. The most common explanation of why is that youths have diminished responsibility-relevant capacities. Recently, Gideon Yaffe has defended the revisionist view that the reason to give juvenile offenders a break in sentencing derives from their political disempowerment. Here, I defend a third alternative: youth is a developmental stage between legal infancy and adulthood during which people are owed special opportunities to cultivate their moral capacities and otherwise fortify themselves against engaging in criminal wrongdoing. Given that minors have not yet received all those opportunities they are owed, they have a claim to mitigated punishment on account of lacking a fully fair opportunity to protect themselves against criminal liability and punishment. They also have distinctive grounds to object to any punishment that would thwart their continued receipt of the developmental opportunity they are owed as youths.

## I. Introduction

Minors generally ought not to be punished as harshly as adults for any given crimes they commit. That much is clear by consensus. Yet the near-universal agreement on that point is overdetermined and undertheorized.

It is perhaps unsurprising that courts and commentators frequently jump from psychological differences between adults and juveniles to conclude that the latter are entitled to special solicitude without rigorously explaining which differences matter morally or why. But given that such character traits as immaturity, impulsivity, and susceptibility to peer pressure are plausibly vices rather than mitigating factors when found in adults, it should be clear that neither folk psychological nor neuroscientific assertions about adolescent offenders can justify treating them differently than adults unless such empirical claims are appropriately connected to compelling premises about their moral significance.

Moreover, suppose an offender's youth were important only as a proxy for aspects of her agential constitution such as diminished capacity to recognize and respond to moral reasons. Then as Gideon Yaffe has recently emphasized, the case for lenience toward minors would be empirically contingent because some youths are more capable than some adults. Hence, we would need additional considerations of

institutional design to justify categorical lenience for offenders below a certain age (which would be over- and underinclusive of everyone with diminished capacity), rather than a case-by-case assessment of each offender's capacities.[1]

To account for his intuition that youth offenders have a categorical claim to mitigation not reducible to the contingent relationship between an offender's youth and psychological constitution, Yaffe has developed a novel, revisionist theory. In his view, the reason we should give "a break" even to precocious youths—a break we should not give to psychologically similar adults—is that minors have less "say" over the law, mainly because they do not, and should not, have the right to vote.[2] Yaffe's provocative arguments are original, insightful, and rigorous. Ironically, however, Yaffe arguably replicates at least part of what he thinks is the mistake of traditional views of the relevance of youth to criminal sentencing: treating youth as important *qua* stand-in for something else with which it is only contingently related—in his case, diminished entitlement to influence the law. Though the claim to mitigation that Yaffe imputes to minors on account of their disenfranchisement is categorical (in that it applies to all offenders below the age of eligibility to vote), it remains indirect and contingent (because it does not apply in democratic states in which even minors are enfranchised, or in nondemocratic states in which almost no one is).

In this article, I develop an alternative theory of the mitigating force of youth that is capable of explaining why an offender's youth *as such* gives him a categorical and noncontingent claim to lenience in criminal sentencing.[3] We should punish juveniles less harshly than adults who commit comparably serious crimes, not because young people necessarily have diminished responsibility-relevant capacities or entitlement to influence the law but rather because youth is a developmental stage between legal infancy and adulthood during which people are owed special opportunities for "moral fortification."[4] These are opportunities to cultivate their capacities to recognize and respond to the reasons to refrain from crime and to take proactive steps to structure their choice environments to facilitate giving other people their due and adhering to the law. Someone who has not yet passed through the developmental stage that is youth will not yet have received all the opportunities she is owed as a youth to learn, grow, and exert control over her environment in ways that will fortify her against resorting or succumbing to criminal wrongdoing. She will therefore not yet have had a fully fair opportunity to avoid punishment by refraining from culpable crime.

The theory of youth as moral opportunity has the resources not only to vindicate a categorical, noncontingent mitigating force for youth but also to integrate in a single coherent perspective both backward- and forward-looking reasons why juvenile

[1]Gideon Yaffe, The Age of Culpability: Children and the Nature of Criminal Responsibility 18–43 (2018). Even assuming that youth is merely a good proxy for diminished culpability, the difficulty and costliness of accurately assessing culpability, coupled with the importance of erring on the side of underpunishment rather than overpunishment, might still support the use of "bright-line rules" in the treatment of juvenile offenders. *See, e.g.*, Amy Berg, *Bright Lines in Juvenile Justice*, 29 J. Pol. Phil. 330 (2021).

[2]*See* Yaffe, *supra* note 1 at 158–184.

[3]I take it for granted that infants and very young children should be exempt from criminal responsibility entirely because they are not yet responsible agents at all. Throughout this article I use such terms as youths, juveniles, minors, and young people to refer to individuals who are above the age of legal infancy (and are thus eligible to be criminally responsible) but have not yet reached adulthood.

[4]I draw the helpful term "moral fortification" from Jeffrey W. Howard, *Punishment as Moral Fortification*, 36 Law & Phil. 45 (2017).

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offenders have a pro tanto claim to distinctive treatment in criminal sentencing. From a backward-looking perspective, because youths have not yet received all the developmental opportunities they are owed to fortify themselves against succumbing to criminal wrongdoing, they have not had a fully fair opportunity to protect themselves against criminal liability and punishment. And from a forward-looking perspective, youths' continuing claim to opportunities for moral fortification means they also have a pro tanto claim against any punishment that would preclude or interfere with receiving the developmental opportunities to which they are entitled as youths.

In Section II of the article, I review the most familiar accounts of why minors should be punished less harshly than adults, which construe youth as relevant *qua agential constitution*—especially as a proxy for diminished capacity and therefore diminished culpability. In Section III, I reconstruct and critique Yaffe's heterodox alternative view, which understands youth *qua political disempowerment* and grounds youths' claim to penal lenience in the fact that they have one less reason to obey the criminal law because of their lack of a "say" over it. In Section IV, I develop my account of youth, according to which the mistake of traditional views of juvenile justice is subtler than Yaffe's critique implies. The problem is not that they focus on child development but, rather, that they focus on youth as a proxy for present capacity rather than youth as an entitlement to developmental opportunity. According to the theory I put forward of youth *qua developmental stage*, it is a time between legal infancy and adulthood during which people are owed, and have not yet received, special opportunities for moral development and fortification. In Section V, I explain why, so understood, youth as such generates both a backward-looking claim to mitigation based on a lack of fully fair opportunity to avoid punishment and a forward-looking claim to mitigation grounded in the special developmental opportunities that youth offenders continue to be owed so long as they remain youths. In Section VI, I take stock of the distinctive advantages that the moral opportunity theory of the mitigating force of youth has over its rivals.

Ultimately, I suggest that as a theory of the mitigating force of youth, my account of youth as *moral opportunity* exhibits a greater array of theoretical virtues than competing views of youth as *diminished capacity* or *justified disenfranchisement*. To help ensure that we assess all three theories evenhandedly, before turning to them it is worth attempting to define in advance the standards by which we ought to assess them (and to which we can refer throughout the article). In my view, all else equal, we should favor a theory of youth's mitigating force at sentencing to the extent that it better displays the following theoretical virtues:

(1) *Extensional Adequacy*. The theory vindicates our considered judgments about when youths should be treated more leniently than adults in criminal sentencing.
(2) *The Right Kind of Reason*. The theory explains why youth offenders' claim to mitigation is not merely prudent or efficient but something we owe to them as a matter of fairness, and may warrant punishments for youths that differ qualitatively, and not merely quantitatively, from those that are appropriate for adults.
(3) *Parsimony*. The theory offers a more direct and less contingent explanation of the mitigating force of youth than rival theories.

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(4) *Consilience.* The theory stands in satisfying harmony with youths' systematically diminished rights and responsibilities across a range of domains beyond criminal law.

There is one other important methodological point to clarify and insist upon from the outset. Though I claim some novelty for my argument, it is important not to overestimate its ambition or the degree to which it is revisionist. My aim is not to itemize the many mitigating factors with which youth may be correlated but to explain the mitigating force that is most distinctive or characteristic of youth. I conclude that the best explanation of that force can be found in the moral opportunity theory of youth I develop. But to endorse that conclusion is not to deny that juvenile offenders may often also have claims to mitigated punishment for other reasons, whether because they typically manifest less deficient regard for other people,[5] have one less reason to obey the criminal law owing to their political disempowerment,[6] or have diminished responsibility-relevant capacities.[7] Put differently, the perspective I defend here does not require us to reject, *tout court*, the conventional wisdom about juvenile justice, or, for that matter, Yaffe's alternative to it. Each may still help to explain and justify our general disposition to show lenience toward youth offenders, even if neither explains why an offender's youth *as such* gives him a claim to exceptional treatment in criminal sentencing.

## II. Youth as Agential Constitution

In the past twenty years, the Supreme Court of the United States has issued a series of rulings finding it to be "cruel and unusual" under the Eighth Amendment of the Constitution of the United States, and thus unconstitutional, to impose certain punishments for crimes committed before the offender's eighteenth birthday: the death penalty,[8] life without parole for nonhomicide offenders,[9] and mandatory life without parole.[10] In those rulings, the Court has encapsulated and relied on several pieces of conventional wisdom about young people's capacities and their significance for criminal responsibility. In *Roper v. Simmons*, in addition to pointing to an emerging "national consensus against the death penalty for juveniles,"[11] the Supreme Court majority led by Justice Kennedy exercised its independent judgment to find

[5]*Cf.* Peter Westen, *An Attitudinal Theory of Excuse*, 25 Law & Phil. 289, 364 (2006).

[6]*See* Yaffe, *supra* note 1 at 158–184.

[7]*See, e.g.*, Stephen J. Morse, *Against the Received Wisdom: Why the Criminal Justice System Should Give Kids a Break*, 14 Crim. L. & Phil. 257 (2020) (defending, against Yaffe's critique, what Morse calls "The Received Wisdom" endorsed by "[v]irtually all important juvenile law scholars," that young people should receive a break in sentencing because their age is a good proxy for diminished responsibility-relevant capacities); David O. Brink, *The Moral Asymmetry of Juvenile and Adult Offenders*, 14 Crim. L. & Phil. 223, 228–230 (2020); Michael Tiboris, *Blaming the Kids: Children's Agency and Diminished Responsibility*, 31 J. Applied Phil. 77, 85–88 (2014); David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 Tex. L. Rev. 1555, 1569–1573 (2004); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799 (2003); and Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. Crim. L. & Criminology 15, 60–61 (1997).

[8]Roper v. Simmons, 543 U.S. 551 (2005).

[9]Graham v. Florida, 560 U.S. 48 (2010).

[10]Miller v. Alabama, 567 U.S. 460 (2012).

[11]*Roper*, 543 U.S. at 564–568.

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that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders."[12] Relative to adults, youths are (1) less mature and more given to impulsive decisions, (2) "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" and less able to exert control over their environments to mitigate such pressures, and (3) not as fully formed or hardened in their character and therefore more likely to be susceptible to rehabilitation.[13] According to the Court, not only are youth offenders generally less culpable, but their greater penchant for hasty, risky behavior makes punishment less likely to be an effective deterrent.[14] In *Graham v. Florida*, again writing for the majority, Justice Kennedy added that the incapacitation rationale for punishment has less application for youths than adults because we are less warranted in writing youths off as "incorrigible" such that their confinement is necessary to prevent future crime.[15]

An initial problem with this "received wisdom,"[16] as formulated by Justice Kennedy, is that it does not adequately distinguish *capacities* from *manifested attitudes* and *dispositions*. One reason that youths' immaturity, impulsivity, and susceptibility to peer pressure might matter is that they might lead an offender to act with a lesser mens rea (or none at all)—whether because immaturity made it harder to assess the risks of her conduct, impulsivity contributed to her failure to advert to those risks, or susceptibility to peer pressure induced her to risk harm to another that she did not intend. But once we have controlled for the contingent impact an offender's youth may have on the attitudes manifested in her conduct (i.e., the forbidden intentions on which she was willing to act and the unjustified risks she was willing to run, and for what reasons)[17]—which can be separated from youth and assessed directly—what we are left to consider is how youths' immaturity, impulsivity, and susceptibility to peer pressure may make it more difficult for them to manifest attitudes of adequate regard for other people. And we must distinguish between true *difficulty* owing to *diminished capacity* and a merely *poor disposition* owing to different priorities of young people (such as experimentation and immediate gratification).

But let us assume that we can isolate diminished capacity from its contingent effects on the attitudes an offender manifests, and that we can distinguish diminished capacity from a poor disposition to exercise one's capacity. We still need to distinguish two perspectives on why differences in young people's capacities would affect what punishments they should receive for crimes they commit. On the one hand, it is frequently assumed that the capacities required for moral responsibility are a matter both of threshold and degree, and that whereas (young) "children" lack them

[12] *Id.* at 569.

[13] *Id.* at 569–570.

[14] *Id.* at 571–572.

[15] *Graham*, 560 U.S. at 72–73.

[16] I borrow this useful phrase from Morse, *Against the Received Wisdom*, *supra* note 7.

[17] For accounts of criminal culpability that conceive of it predominantly in terms of the degree of insufficient concern for others' protected interests that is manifested in a crime, *see* especially Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 Cal. L. Rev. 931 (2000); Westen, *supra* note 5; Larry Alexander & Kimberly Kessler Ferzan (with Stephen J. Morse), Crime and Culpability: A Theory of Criminal Law 23–68 (2009); and Alexander Sarch, *Who Cares What You Think? Criminal Culpability and the Irrelevance of Unmanifested Mental States*, 36 Law & Phil. 707 (2017).

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altogether (and ought to be exempt from criminal liability and punishment), older "youths" pass the minimal threshold for criminal responsibility but their capacities are so clearly at the low end above that threshold that they merit a categorical assumption of lesser blameworthiness. On the other hand, alternatively or in addition, it may be argued that because young people's diminished capacities are normal for their life stage, and their capacities will usually develop further to a level that puts them within the normal range of adult variation, punishment for crime is less necessary or useful for them than for adults.[18]

### A. Youth as Backward-looking Diminished Capacity

Although minors will tend to have less knowledge and experience than adults and may have less developed cognitive capacities, we do not generally think that adults are less culpable for their crimes merely on account of being less informed, worldly, or cognitively capable—unless, of course, it contingently produces a diminution in inculpating knowledge or intention (in which case the lack of knowledge or intention would be the real issue, not the diminished capacity). Stephen Morse has suggested that young people might be less culpable for their crimes because they have a less developed "capacity for empathy" or morally rich understanding of the consequences of their conduct for other people.[19] But as Morse recognizes, even the extreme incapacity to feel empathy that is characteristic of the psychopath is not generally recognized as exculpatory in criminal law.[20] It appears that Morse believes it ought to be because, like some but not all moral philosophers, he thinks that the capacity to recognize *moral* reasons, specifically, is a requirement of moral responsibility.[21] It would be odd, however, if the mitigating force most central to, or distinctive of, youth should come from an underlying condition that young people allegedly share (at least to some extent) with psychopaths. Even if we should mitigate (or perhaps withhold altogether) punishment for psychopaths, their claim to mitigation seems different in kind—and much less widely accepted—than that of adolescents.

Still, it is quite plausible that moral responsibility requires the capacity to recognize and respond to moral reasons, and that minors tend to be less capable of fully appreciating moral reasons and responding to them (because, for instance, they are less able to exert executive control over strong immediate impulses).[22] Perhaps criminal responsibility can vary with the strength or weakness of an offender's moral capacities, or even her capacity to recognize and respond to nonmoral, prudential reasons to avoid crime. And maybe the issue is not merely young people's generally

[18]Cynthia Ward draws a similar distinction between "culpability" and "corrigibility" as alternative reasons to mitigate the punishment of young people. Cynthia V. Ward, *Punishing Children in the Criminal Law*, 82 Notre Dame L. Rev. 429, 466–468 (2006).

[19]Morse, *Immaturity and Irresponsibility*, *supra* note 7 at 60–61.

[20]*Id.* at 61. *See also* Ward, *Punishing Children*, *supra* note 18 at 447 n. 76, 453 n. 101.

[21]*See* Morse, *Immaturity and Irresponsibility*, *supra* note 7 at 60–61. For contrasting views of whether moral responsibility requires the capacity to recognize *moral* reasons specifically or only a more general capacity to recognize reasons, *cf.* R. Jay Wallace, Responsibility and the Moral Sentiments 154–194 (1994), and Susan Wolf, *Sanity and the Metaphysics of Responsibility*, *in* Free Will 372, 379–386 (Gary Watson ed., 2d ed. 2003) with T. M. Scanlon, What We Owe to Each Other 282–290, 401 n. 27 (1998).

[22]*See, e.g.*, Brink, *The Moral Asymmetry*, *supra* note 7 at 228–230; Brink, *Immaturity, Normative Competence*, *supra* note 7 at 1569–1573; and Tiboris, *supra* note 7 at 85–88.

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diminished capacity to recognize and respond to reasons not to engage in crime, but the fact that diminished capacity is "developmentally normal" for them.[23] There are various reasons that the developmental normality of youths' diminished capacity might matter. For one thing, it might show that youths' crimes not only were more difficult for them to avoid but are weaker evidence of entrenched bad character. Given that youths are still growing up, their characters are not yet as fully formed as those of adults.

A problem, though, is that among adults, diminished capacity to recognize and respond to the reasons not to engage in crime, even if it is accorded some mitigating force, appears to lack the weight and consensus appeal of youth as a mitigating factor. Something similar seems true of adult conduct that is "out of character." Even if the fact that it is aberrant for the agent has some mitigating force, it is marginal. Just as we would intuitively treat a young person's diminished capacity differently than an equally capable adult's (even if we could be confident of the comparability of their capacities), so too would we treat the "out of character" claim to mitigation differently for young people than adults (even when comparing adults and youths whose crimes are equally out of character). Thus, if youth were important merely because it is correlated with diminished responsibility-relevant capacities, or because youths' offenses tend to be weaker evidence of fixed bad character, we should expect there to be some further explanation of why mitigation for diminished capacity or "out of character" offending should be endorsed more widely, and weighted more heavily, for adolescents than adults.

The issue could be epistemic. It might be that, in principle, an offender's diminished capacity or the "out of character" nature of an offense matters for adults no less than minors but, because it is so difficult to distinguish unexercised capacity from diminished capacity in adults, we can more confidently identify diminished capacity by relying on youth as a key proxy for it. Alternatively, or in addition, because it is normal (i.e., common to observe and reasonable to expect) that adolescents have less well-developed responsibility-relevant capacities, there is less reason to worry that deeming them to have diminished capacity would be patronizing or stigmatizing for them in the way that it might be for adults.

Nevertheless, I believe there remains something unsatisfying about accounts of the mitigating force of youth that depend on (a) treating youth as a proxy for other things that are mitigating and (b) offering a supplementary explanation of why the factors for which youth is a proxy should receive wider acceptance and greater weight for youths than adults.

Like most theorists who have responded to Yaffe's potentially pathbreaking work,[24] I do not believe we should rule out from the start the possibility that the

[23] *See, e.g.*, Yaffe, *supra* note 1 at 44–65. Yaffe considers the possibility that the developmental normality of diminished capacity for youths might make them less culpable because it shows that their offending is (a) too normal or (b) too much a part of healthy youthful experimentation. *Id.* at 51–54. Yet he (in my view rightly) rejects both ideas on the grounds that (a) the abnormality of conduct is not a prerequisite for fitness for punishment (and criminal behavior is, anyway, not normal) and (b) too little juvenile crime can be characterized as part and parcel of valuable youthful experimentation.

[24] *See, e.g.*, Douglas Husak, *The Age of Culpability: Children and the Nature of Criminal Responsibility*, Notre Dame Phil. Rev. (June 4, 2018), https://ndpr.nd.edu/reviews/the-age-of-culpability-children-and-the-nature-of-criminal-responsibility/ (book review); Cynthia V. Ward, *Criminal Culpability and the Political Meaning of Age*, 38 Crim. J. Ethics 123, 130–134 (2019) (book review); Craig K. Agule, *Yaffe, Gideon.* The Age of Culpability: Children and the Nature of Criminal Responsibility*, Oxford: Oxford University Press, 2018. Pp. 256. $42.95 (cloth).* 130 Ethics 271, 272–273 (2020) (book review); Brink, *The Moral Asymmetry*, *supra* note 7 at 236–237; Alexander Guerrero, *Children, Political Power, and Punishment*, 24 J. Ethics

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best theory of the mitigating force of youth treats youth as a proxy for other mitigating factors such as diminished responsibility-relevant capacities or enhanced rehabilitative potential. But I do think we should meet Yaffe's skepticism of proxy theories of youth halfway by insisting that, all else equal, we ought to prefer a theory of youth's mitigating force that exhibits the virtue of PARSIMONY. After all, we are seeking a theory of the mitigating force *of youth*. Perhaps youth *as such* does not have mitigating force, and youth matters merely as a proxy for an array of mitigating factors with which it is closely (but contingently) related. That would be a deflationary conclusion, however (and it would make youth's significance at sentencing less direct and more complex). So before accepting that conclusion, we should search for a theory that explains youth's mitigating force more directly and less contingently.

Furthermore, even assuming proxy theories of youth can be adequately supplemented to explain why we accord greater weight to youth (the proxy) than the mitigating factors for which it is supposedly just a stand-in, proxy theories will remain less than optimal from the standpoint of EXTENSIONAL ADEQUACY. To see this, imagine two different offenders whose agential constitutions are identical in all relevant respects (e.g., their responsibility-relevant capacities are equally diminished, and their offenses are equally "out of character"). It is my considered judgment that if one of these offenders is a youth and the other an adult, although both offenders may have claims to mitigation, the youth qua youth has a claim to special solicitude at sentencing that the adult offender lacks. A theory capable of explaining why youth matters to criminal sentencing in and of itself, and not merely as a proxy for something else, would better satisfy EXTENSIONAL ADEQUACY as well as PARSIMONY.

Moreover, if youths merit sentence mitigation merely insofar as they tend to differ from adults in their agential constitution, and if their different agential constitution is assumed to be relevant only to the extent that it diminishes their blameworthiness, then a further shortcoming of EXTENSIONAL ADEQUACY arises. For as Yaffe points out, intuitively kids should receive "a break" relative to adults even when it comes to offenses that are not morally culpable at all and ought not to have been criminalized in the first place.[25]

### B. Youth as Forward-looking Enhanced Potential

As Justice Kennedy suggested in *Graham v. Florida*, apart from any impact it might have on culpability, the less-than-fully-formed identities of young people and their greater amenability to rehabilitation might be taken to be reasons why it is less necessary or useful to punish them from the standpoint of incapacitation, such that it is sensible to spare them some of the punishment we take to be needed for adults.[26] However, in light of research suggesting that criminal offending by young children may reflect a relatively intractable antisocial disposition, Cynthia Ward has argued that it may be wrong to assume that minors are systematically less hardened in

269, 272–273 (2020); and Morse, *Against the Received Wisdom*, *supra* note 7 at 262–264. *See also* Tiboris, *supra* note 7 at 88; and Scott & Steinberg, *Blaming Youth*, *supra* note 7 at 835–839.

[25]YAFFE, *supra* note 1 at 7. This observation of Yaffe's is reminiscent of H. L. A. Hart's insight that conditioning criminal responsibility on relatively informed, uncoerced choices to engage in conduct proscribed in advance should matter to us even—indeed, perhaps especially—when the criminal law prohibits conduct that is morally permissible and should not be criminalized. *See* H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 12–13, 47 (2d ed. 2008).

[26]*Graham*, 560 U.S. at 72–73.

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criminal dispositions than adults.[27] Moreover, even if it is often true that kids "will grow out of it,"[28] a version of the same point can be made with respect to adults, who notoriously tend to age out of crime.

A deeper reason not to ground young people's claim to mitigation in their putatively greater capacity for reform is that such greater capacity, even assuming it is present, would seem to show only that we should mitigate young people's punishment for the sake of penal efficiency (i.e., to avoid useless or unnecessary punishment). And many factors besides an offender's age will affect our estimation of how necessary or useful is his punishment. Scaling punishment to its predicted utility on a case-by-case basis might be justified on the grounds that it would reduce unnecessary or counterproductive punishment, thereby helping us to achieve the highest level of crime control with the lowest level of punishment. But intuitively mitigating minors' punishment is something that we owe to them as a matter of fairness and not merely insofar as their punishment is less efficient or effective at reducing crime than adults' punishment. Hence, theories that assign mitigating force to youth on the grounds that punishment is likely to be less necessary or efficacious for youths fail to offer *The Right Kind of Reason* for mitigating youths' sentences—i.e., a compelling explanation of why such mitigation is owed to youth offenders *as a matter of fairness*. It would also be odd if youths' strong, consensus claim to penal lenience were to depend on the more controversial principle that we should punish specific offenders to a greater or lesser extent depending upon how useful their punishment would be in bringing about crime control or rehabilitation.

## III. Youth as Political Disempowerment

Over a decade before Yaffe's noteworthy recent book on the criminal responsibility of juvenile offenders, Cynthia Ward published a provocative critique of the received wisdom that Yaffe's book and my foregoing discussion echo in multiple important respects. Moreover, although Ward confined the discussion of it to an evocative, underdeveloped conclusion of her article, her promising view of the mitigating force of youth had a structure that is shared by Yaffe's theory. In her closing remarks, Ward asked, given the shortcomings of familiar answers to the question: "What explains the enduring strength of that intuition" that "children should not be punished criminally, at least to the same degree and in the same way as adults"?[29] "[T]o suggest one possible answer," Ward emphasized that there is an obvious tension if minors are treated as adults for the purposes of criminal responsibility notwithstanding that their rights are pervasively limited in ways that adults' are not, and minors are subject to the authority and control of parents and guardians (who may prevent minors from escaping, should they find themselves in criminogenic social environments).[30] I read Ward, in effect, to be suggesting that we should seek a theory of the mitigating force of youth that shows *Consilience*—i.e., takes stock of, and harmonizes with, the overall regime of diminished rights and responsibilities to which youths are subject across a range of contexts.

[27]Ward, *Punishing Children*, *supra* note 18 at 471–475.

[28]Yaffe uses the label "They'll Grow Out of It" to describe one argument for mitigating kids' punishment. *See* Yaffe, *supra* note 1 at 55–64.

[29]Ward, *Punishing Children*, *supra* note 18 at 477.

[30]*Id.* at 477–479.

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Yaffe's argument can be seen as one example of the kind of theory of the mitigating force of youth that Ward imagined—i.e., a theory grounded in a conception of youth as a subordinate political status. Partly because of his intuition that each youth offender necessarily merits "a break," irrespective of whether her responsibility-relevant capacities were diminished, or her rehabilitative potential is enhanced, Yaffe seeks to ground the mitigating force of youth in something that is true categorically of people below a certain age: they lack the right to vote. Why would minors' disenfranchisement reduce their culpability for their crimes, or otherwise warrant punishing them less harshly? Although Yaffe's answer to that question involves elaborate detours in which he develops intricate and distinctive theories of criminal culpability and desert of punishment, for present purposes it is best to give an answer for Yaffe that is maximally ecumenical and avoids stirring unnecessary controversies. Broadly speaking, Yaffe thinks minors' disenfranchisement justifies punishing them less harshly for their crimes because it means they lack one important reason that adults generally have for obeying the criminal law: the "say" over the law that they are entitled to exercise by virtue of their right to vote.[31]

Lest we conclude that mitigating minors' punishment is only the second-best solution to the preferred alternative of enfranchising them, Yaffe takes it as his burden to show that minors *ought* to be disenfranchised.[32] He recognizes that he cannot appeal to minors' diminished capacity to justify their disenfranchisement, because his view would then bottom out in youths' differing psychological constitution, which he rejects as incapable of vindicating the categorical significance that he insists upon for youth.[33] But Yaffe has an alternative justification for disenfranchising youths. In his view, it is justified because if minors were allowed to vote, then their parents—who have special entitlements to influence their children when they are minors—would have an unequally large say over the law relative to nonparents.[34] Others have raised powerful objections to Yaffe's argument for the disenfranchisement of young people.[35] However, I will not regurgitate their concerns here because for present purposes other issues are more important to emphasize.

Yaffe is to be applauded for highlighting a plausibly sound (and hitherto underappreciated) basis for lenience toward offenders above the age of criminal responsibility but below the age of majority. Like the received wisdom, Yaffe's heterodox alternative may well be one important part of a comprehensive justification of our disposition to show lenience toward juvenile offenders in criminal sentencing. Yaffe's theory also has certain virtues that more familiar accounts of the mitigating force of youth lack. To its credit, Yaffe's approach vindicates a categorical significance for youth in the sense that it explains why all youth offenders below the age of voting eligibility (and not merely those who suffer from diminished capacity) have a pro tanto claim to mitigation. And Yaffe's theory explains the categorical significance of

[31]*See* Yaffe, *supra* note 1 at 158–184.

[32]*Id.* at 171–182.

[33]*Id.* at 172.

[34]*Id.* at 175.

[35]*See* Ward, *Criminal Culpability*, *supra* note 24 at 128–129; Michael Cholbi, *Equality, Self-Government, and Disenfranchising Kids: A Reply to Yaffe*, 7 Moral Phil. & Pol. 281 (2020); Jeffrey W. Howard, *Yaffe on Democratic Citizenship and Juvenile Justice*, 14 Crim. L. & Phil. 241, 247–252 (2020); and Erin I. Kelly, *Comments on Gideon Yaffe,* The Age of Culpability: Children and the Nature of Criminal Responsibility *(Oxford: Oxford University Press, 2018)*, 24 J. Ethics 281, 284–285 (2020).

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youth without having to appeal to epistemic limitations or other considerations of institutional design. Consequently, it can validate the intuition that even if a thirty-year-old has the same responsibility-relevant capacities and agential constitution as a fifteen-year-old, the latter has a claim to mitigation based on her youth that the former lacks. Yaffe's account also has the merit of explaining why youths ought to be punished less harshly than adults for the same crimes even when the crimes in question are not morally culpable in the first place (because, say, they are wrongfully criminalized). In addition to boasting *Extensional Adequacy* in those important respects, Yaffe's theory seems to offer *The Right Kind of Reason* why youth should be mitigating, at least in the sense that it explains why mitigation is owed to youths and not merely something that has good policy consequences.

Nevertheless, Yaffe's view also has distinctive theoretical shortcomings of its own. And like youths' frequently diminished capacity, their disenfranchisement and broader political disempowerment do not show youth *as such* to be appropriately mitigating—nor do they offer the best explanation of the claim to mitigation that is most central to, or characteristic of, youth.

To begin with, there are reasons to question whether Yaffe's theory *entirely* succeeds in offering *The Right Kind of Reason* why youth should be a mitigating factor in criminal sentencing. I take it to be a widely and firmly held intuition—which a theory of the mitigating force of youth would ideally vindicate—that on account of their youth, offenders below the age of majority have claims at sentencing not merely to minor reductions in the degree of punishment but to significantly different treatment. Even if we grant that one reason for enfranchised adults to obey the law is their entitlement to exert influence over it by voting, and disenfranchised youths lack that reason to obey the law, we must ask ourselves, how *weighty* is that reason?[36] And when we try to answer that question, I think we are immediately confronted with the thought that the predominant reason not to commit any core, malum in se crime is its moral wrongfulness. Are the reasons not to murder, rape, rob, kidnap, or assault others greatly diminished in nondemocratic societies that do not accord people the right to vote, or for disenfranchised members of democratic societies? I doubt it. The strongest reasons to refrain from serious crimes appear to be those moral reasons that justify their criminalization—not the fact that they are criminalized, let alone that their criminalization was democratically authorized by those to whom it applies. Youth offenders' disenfranchisement also strikes me as of only marginal significance where core mala in se crimes are concerned because we do not typically think of their criminalization as something that is, or ought to be, genuinely up for democratic debate and reconsideration.[37]

Furthermore, there are distinctive concerns to have about the *Extensional Adequacy* of Yaffe's theory that may outweigh its extensional virtues that we noted earlier. In nondemocratic societies in which almost everyone not only lacks the right

[36]Other theorists have agreed, for essentially the same reasons I outline here, that the weight of youths' disenfranchisement-based claim to mitigation seems vanishingly small compared with the weight we intuitively attribute to youth in criminal sentencing. *See, e.g.*, Husak, *supra* note 24; Agule, *supra* note 24 at 275; and Guerrero, *supra* note 24 at 271.

[37]Even where now codified, substantive criminal law is largely inherited from the common law. *See, e.g.*, Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 Va. L. Rev. 965, 967 (2019). *Cf.* Guerrero, *supra* note 24 at 276 ("Almost all extant criminal law has been on the books in substantially the form that it is prior to the adults who currently live in the jurisdiction coming to live as adults in that jurisdiction").

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to vote but also lacks meaningful political power, youths and adults may not systematically differ in their political empowerment. And yet I believe—and suspect most readers will agree—that youth offenders merit mitigation on account of their youth even in those societies in which their political disempowerment does not distinguish them from adults (because most adults have comparably little say over the law).[38] More generally, youth offenders' claim to special consideration seems continuous across the criminal law and ordinary interpersonal practices of moral accountability.[39] We do and should respond differently, and more leniently, to youths as compared with adults, even when it comes to moral wrongdoing that does not fall afoul of the law. Youths' lack of a "say" over the law cannot explain this, because our reasons to avoid conduct that is merely *morally* wrongful independent of the content of the law do not depend on whether we have a say over what is *legally* proscribed. It, therefore, appears that Yaffe must either reject youth's mitigating force outside the law or contend that the exceptional treatment we owe to youth offenders has a markedly different source in the criminal law than in interpersonal practices of moral accountability outside it.[40] Either approach to this dilemma would call into question the *Parsimony*, *Consilience*, and *Extensional Adequacy* of his theory.

Yaffe's theory does display *Consilience* insofar as it links youths' claim to lenience in criminal sentencing to their broader status of political subordination—especially as manifested in their disenfranchisement. However, Yaffe's argument grounds youths' claim to mitigation in their political disempowerment specifically—especially their disenfranchisement—rather than in a broader characterization of the distinctive regime of diminished rights and responsibilities applicable to youths. It would be peculiar if the core, or most distinctive, mitigating force of youth (a strong, consensus mitigating factor) were to turn out simply to be the mitigating force of legitimate political disempowerment (which is neither intuitive nor widely recognized).[41] I believe that youths' claim to mitigation is more securely grounded in our contemporary conception of youth and the overall regime of paternalistic limitation and entitlement constitutive of it across a range of domains.

## IV. Youth as Developmental Stage

Existing accounts of the mitigating force of youth tend, in effect, to explain that force away, rather than explain it, insofar as they reduce an offender's youth to a proxy for something else—whether that be diminished capacity, heightened rehabilitative potential, or political disempowerment. In one sense, it is natural that theorists attempting to explain the significance of youth for criminal responsibility should fall prey to that pattern of reasoning. After all, one might wonder, how are we to

[38]In their paper "Punishing Youth Fairly" (draft of 16 January 2025) (on file with the author), Angelo Ryu and Trenton Sewell also suggest this intuition poses a problem for Yaffe's theory.

[39]I thank Patrick Tomlin for raising this important point with me, which is also made by Agule, *supra* note 24 at 275.

[40]*Cf.* Husak, *supra* note 24 (noting that Yaffe's theory does not obviously justify differential treatment of kids in other, noncriminal legal matters involving contracts, property, officeholding, marriage, or jury service, which implies that in those contexts we may have to fall back on the idea that youth is a proxy for capacity).

[41]*Cf.* Guerrero, *supra* note 24 at 279 ("It is worth noting that the core intuition that kids are owed a break seems much stronger than the conclusion that many of us [those who are relatively less politically powerful] are owed a break").

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explain youth's significance, in a noncircular way, if not by reducing youth to something other than itself? But there is another way to approach things. Rather than looking for morally relevant correlates of youth, we might instead interrogate youth itself. What *is* youth? Or, put differently, what understanding of youth might vindicate the idea that youth as such generates a claim to mitigation in criminal sentencing?

Youth can be understood quantitatively, as purely a matter of chronological age. But it can also be conceived of qualitatively: as a special stage of life between legal infancy and adulthood during which people are owed special opportunities for agential development. In suggesting this, I take inspiration from Tamar Schapiro's insightful distinction between an "empirical" and a "status" concept of a "child."[42] To treat the concept of youth as a "status" concept is to say that the distinction between "youth" and "adult" is not merely about empirical differences of degree in people's age or development but normative differences of kind in their roles, rights, and responsibilities.

As I see it, the special developmental opportunities owed to youths are partially constitutive of their youth and exist in a symbiotic relationship with the special limitations on youths' rights. The distinctive opportunities owed to them help to justify limitations on their rights, and vice versa. Because youth is a stage of special opportunity for agential development, on the one hand, a juvenile offender, on account of his youth, will not yet have received all the distinctive opportunities he is owed to develop his capacities and to fortify himself against succumbing to crime. On the other hand, youth offenders are still in a stage of development during which they continue to be owed special attention, resources, and opportunities to help support their moral and agential development.

When I say that youth matters to criminal responsibility qua developmental stage, I am *not* conceiving of an individual's youth as a function of how far she has progressed in developing her capacities. Rather, a person's youth is measured by how far she has passed through the developmental window of time between legal infancy and adulthood during which her state and society have special duties to help her to cultivate her agential and moral capacities. This is not merely a technical or stipulative sense of "youth." It does a good job of accounting for our various intuitions about youth—including that (a) below a certain age even a precocious youth as capable as many adults is still a youth, (b) above a certain age even a developmentally challenged adult is still an adult, and (c) the age of adulthood has appropriately increased over time, as life has grown longer and more complex, and it has made sense to extend the period during which society stands in a position of distinctive obligation to young people. The actual lived experiences of adolescents vary considerably, both for idiosyncratic reasons and because of patterns of inequality in childhood.[43] Not all youths will receive what they are owed, and some adults therefore will not have received all the developmental opportunities to which they were entitled as youths. But all youths, qua youths, have been, and continue to be, owed special developmental opportunities. By contrast, adults who never received

[42] *See* Tamar Schapiro, *What Is a Child?* 109 Ethics 715 (1999).

[43] For instance, Annette Lareau has famously identified a significant class divide in American child-rearing between the "concerted cultivation" strategy of middle-class parents and the "natural growth" approach of poor and working-class parents. *See* Annette Lareau, Unequal Childhoods: Class, Race, and Family Life (2d ed. 2011).

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their developmental due as minors are now adults nevertheless, so their relationship with their state and society has changed.[44]

Why are youths owed special developmental opportunities, and how are the duties owed to them to be distributed among, and discharged by, states, societies, and families, respectively?[45] I cannot, perforce, offer fully satisfying answers to those important questions in the context of this article, the focus of which is the criminal responsibility of juvenile offenders, rather than the political morality of childhood. To my mind, however, a belief that young people are owed distinctive developmental opportunities is sufficiently intuitive and implicit in the practices of societies like ours that I suspect most readers will already be convinced of it. Nevertheless, I do want to offer at least a few brief remarks to reinforce the plausibility of the idea that minors have special rights to developmental opportunities—including opportunities to fortify themselves as moral agents. We might initially observe that adults take on duties to provide for minors' material and developmental needs partly because they are under the systematic control of adults. Of course, that raises the question of why youths should be subject to a regime of paternalism in the first place.

To begin to answer that question, we might observe that children grow gradually from a state of infant dependence to adult independence. They require an immense array of opportunities, which must be furnished by other human beings if they are to develop into capable, well-socialized adults. Implicit in such practices as the abolition of child labor and the introduction of compulsory schooling, and in parents' obligations to provide for their children without abuse or neglect, is an assumption of minors' plasticity and vulnerability.[46] Moreover, in modern, liberal democratic societies like ours, the assumption is that adults should relate to one another as free and equal moral agents. As I have argued elsewhere, opportunities to develop one's capacity to recognize and respond to moral reasons should be included in the bundle of goods that Rawls referred to as "primary social goods"—i.e., goods that are useful across all reasonable conceptions of a good life.[47] We all have a strong interest in our development as moral agents and in our fortification against temptations and other pressures that lead us sometimes to fail to give other people what we owe to them.

A skeptic might wonder: if youth is a stage of life partly constituted by youths' entitlement to special developmental opportunities, why should the appropriate cutoff between youth and adulthood be standardized by age, rather than determined by how far any given individual has progressed in development or by how much developmental opportunity she has received? I believe that the case for

[44]Because they are no longer youths, any developmental opportunity deficit they have is no longer grounded in the fact that they are youths (which they are not). And being now adults, they are not, and should not be, any longer subject to the regime of paternalistic developmental solicitude applicable to minors—even if the state has distinct remedial duties connected to their unfairly disadvantaged upbringings.

[45]For an overview of some of the issues implicated by the latter question, *see* Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. Chi. Legal F. 27.

[46]For discussion of the distinctive plasticity or malleability of the adolescent brain, in particular, *see* Laurence Steinberg, Age of Opportunity: Lessons from the New Science of Adolescence 18–45 (2014).

[47]*See* Benjamin Ewing, *Criminal Responsibility and Fair Moral Opportunity*, 17 Crim. L. & Phil. 291, 312 (2023) (citing John Rawls, A Theory of Justice 78–81 [rev. ed. 1999]).

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demarcating youth by age becomes clearer when we remember that the line we draw between youth and adulthood is our answer to the following question: how long should we extend the regime of paternalism to which minors are subject and at what point must our interest in developmental opportunity give way to our interest in eventually occupying the role of an autonomous adult?[48] Extending paternalistic developmental solicitude to a class of "minors" below a certain (somewhat arbitrarily determined) age ensures neither equal developmental outcomes nor qualitatively equal developmental opportunity. But such a standardized approach does achieve equality of treatment along at least one important dimension: the duration of time during which each person is subject to paternalism in the service of her own development. And as we have already observed, the developmental opportunities we owe to youths are symbiotic with the limits we place on their rights. So long as the state has strong interests in depriving youths of various rights (e.g., rights to vote, drive, drink, marry, and so forth) in a standardized fashion based on age, this puts considerable normative pressure on it similarly to recognize youths as entitled to distinctive developmental opportunity until they reach a standardized age of majority.

I am therefore skeptical that fortunate minors with exceptional capacities or developmental opportunities should be treated as having entered adulthood prematurely and thereby lost their youth-based entitlement to continuing developmental opportunities. My objection is especially strong when, for the select purpose of determining criminal responsibility and punishment, a state retrospectively reclassifies as an adult someone it had considered to be a minor for most intents and purposes at the time he offended. In my view, anyone the state predominantly treats as a minor for the purposes of determining her rights is someone the state has a duty to treat as a minor for the purposes of assessing the developmental opportunities she is owed.[49]

[48] *Cf.* Andrew Franklin-Hall, *On Becoming an Adult: Autonomy and the Moral Relevance of Life's Stages*, 63 Phil. Q. 223 (2013) (arguing that it can be appropriate to treat a youth paternalistically on account of her age-based life stage—even if her capacities are as developed as adults'—and that grounding paternalism in an age-based life stage rather than capacities better reconciles respect for autonomy with our appropriate ambition to facilitate youths' development well beyond mere basic thresholds of competence).

[49] *Cf.* Ward, *Punishing Children*, *supra* note 18 at 478 (critiquing the inconsistency in the fact that American law "enforces the control of children by the family" yet "increasingly treats children as autonomous adults for the purposes of criminal conviction and punishment"); Christopher D. Berk, *Children, Development, and the Troubled Foundations of* Miller v. Alabama, 44 Law & Soc. Inquiry 752, 765 (2019) ("The purchase price of paternalism, minimally, is an affirmative obligation to maintain children's physical and psychological well-being" and "lengthy sentences, solitary confinement, and lack of access to basic educational programming, on their face, appear irreconcilable with this duty"); and Ryu & Sewell "Punishing Youth Fairly," *supra* note 38 (emphasizing the importance of consistency in the state's assumptions about youths across different contexts in which they encounter special burdens and benefits). It is worth noting that although I favor a standardized age range for youth as a stage of special entitlement to developmental opportunity, allowing some young people to exit that stage early would not undermine my contention that youths have a categorical and noncontingent moral opportunity-based claim to sentence mitigation. The upshot would simply be that certain people below the presumptive age of majority would be characterized and treated as adults rather than youths, as some jurisdictions assume to be the case already when they allow for some minors to be sentenced as adults. Although I oppose sentencing chronological youths "as adults," ironically the very notion pays implicit tribute to the idea that youth offenders, *qua* youths, categorically merit mitigation.

## V. The Moral Opportunity Theory of the Mitigating Force of Youth

Treating youth as relevant to criminal sentencing qua developmental opportunity enables us to integrate into a single coherent theory both backward- and forward-looking reasons to mitigate minors' punishment.

### A. Youths' Backward-looking Claim: Lack of Fair Opportunity to Avoid Punishment

Even if an adult shares the same responsibility-relevant capacities as a minor, by the very nature of her youth as I am conceiving of it the minor will not yet have had a fully fair opportunity to develop her responsibility-relevant capacities and otherwise fortify herself against engaging in criminal wrongdoing. Moreover, it is an already well-recognized principle of criminal law—a principle that helps to explain, for instance, the importance of confining punishment to conduct proscribed in advance—that the fairness of punishment depends partly on the fairness of people's opportunities to avoid the conduct that would make them liable to punishment.

In the work of H. L. A. Hart one finds the canonical expression of the idea that various principles of criminal law—e.g., the principle of legality, the importance of mens rea, and such defenses as necessity and duress—help to ensure that subjects of the law have a fair opportunity to avoid falling afoul of it and incurring liability to punishment.[50] Inspired by Hart's work, many contemporary philosophers have also stressed that the fairness of offenders' opportunity to avoid criminal liability plays a crucial role in justifying their punishment.[51] As a corollary, if an offender lacked a fully fair opportunity to avoid criminal liability, this strengthens the reasonableness of his complaint against punishment.

However, proponents of the fair opportunity paradigm tend to treat fair opportunity as a threshold and scale for *culpability* specifically, and to treat fair opportunity as a "synchronic" rather than "historical" idea (to use David Brink's helpful terminology).[52] From this perspective, to have a fair opportunity to avoid criminal wrongdoing is to be free of immediate constraints on one's choice—such as nonculpable factual ignorance (i.e., lack of mens rea), emergency circumstances, or coercive pressure—that would make it unfairly challenging or burdensome to avoid prima facie criminal conduct. But fair opportunity to avoid criminal wrongdoing has not traditionally been thought to require that background opportunities for moral development and fortification be equally or fairly distributed among all subjects of the law.[53] This may be why Yaffe summarily rejects in the span of less than three

[50] Hart, *supra* note 25 at 14–24, 28–53, 180–185.

[51] *See especially* David O. Brink, Fair Opportunity and Responsibility (2021); Scanlon, *supra* note 21 at 251–267; T. M. Scanlon, *Punishment and the Rule of Law*, *in* The Difficulty of Tolerance: Essays in Political Philosophy 219, 224–233 (2003); Erin I. Kelly, *Criminal Justice without Retribution*, 106 J. Phil. 440 (2009); and Victor Tadros, The Ends of Harm: The Moral Foundations of Criminal Law 54–59, 170–173 (2011).

[52] *See especially* Brink, *supra* note 51 at 103–116.

[53] *See e.g.*, *id.* at 112–116 (suggesting that a wrongdoer who suffered from "unfortunate formative circumstances," is no less blameworthy—and no less equipped with fair opportunity to avoid wrongdoing—unless those circumstances led him to have diminished "normative competence" or "situational control" at the time of action); and Kelly, *Criminal Justice without Retribution*, *supra* note 51 at 453–454 ("Clearly the notion of fair opportunity [to avoid liability to criminal punishment] I have endorsed, together with its

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pages of his book the idea that kids might have a claim to mitigation in criminal sentencing "because they have not had a fair opportunity to become good people."[54] Yaffe submits that if "fair opportunity" for moral development is conceived to require a particular period of development (e.g., eighteen years), then fair opportunity in that sense is not a prerequisite for full criminal responsibility, because someone still in the relevant developmental period might have nevertheless attained an adequate level of capacity for full criminal responsibility.[55] Yaffe appears to ignore or discount the possibility that an agent could be fully responsible in the sense of fully culpable or blameworthy for his crime yet, owing to a lack of fair developmental opportunity, *not* fully responsible in the sense of being fully fit for punishment.[56]

Whereas traditional reconstructions of the fair opportunity paradigm treat *fair opportunity to avoid wrongdoing* as a prerequisite for *culpability*, in prior work on which the present article builds, I have developed an extension of the fair opportunity paradigm that treats *fair opportunity to avoid culpability* (by fortifying oneself against culpable wrongdoing) as a prerequisite for the *fairness of punishment*. In that connection, I have previously argued that the importance of fair opportunity for moral development and fortification helps to explain why first-time offenders and offenders who come from backgrounds of unfair criminogenic disadvantage have claims to mitigation at sentencing.[57] The principle of legality gives us the threshold level of protection against liability offered by constructive notice of criminal prohibitions. More ambitiously, mitigation in the sentencing of first-time offenders and unfairly disadvantaged offenders can be a way of calibrating punishment to the strength or quality of offenders' opportunities to fortify themselves against the temptations and other pressures that lead people to succumb to crime. Criminal wrongdoing should set off an offender's alarm bells and serve as a crucial moral opportunity to learn about the sources of his moral fallibility and to fortify himself against them. Hence, all else equal, we should have a better

limited range of excusing conditions, falls considerably short of the fair opportunities for education, employment, health care, and the like demanded by social justice").

[54]*See* Yaffe, *supra* note 1 at 24.

[55]*Id.* at 24–26. Indeed, Yaffe opines that there is no "feature" that kids lack as "a conceptual, analytic, or metaphysical truth" that is also a prerequisite for full responsibility for wrongdoing.

[56]This seems evident from a suggestion Yaffe makes by way of analogy that I find puzzling and unconvincing. Yaffe contends that if a person is entitled to one hour for a test but is capable of finishing it in thirty minutes, although he might be "owed an apology, or even another chance to take the test" he is not owed "*a break*" if he fails to complete the test because "he is fully responsible for his failure. The reason he did not finish is because he failed to exercise his capacities in a situation in which he knew full well that he was required, albeit unfairly, to do so." *Id.* at 25–26. The analogy Yaffe constructs seems to me to support the opposite conclusion from the one he draws. In my view, intuitively, even if a test-taker was capable of finishing in the time he received, if he received less than the time to which he was entitled, then he has a claim to some form of compensation ("a break") as a remedy. And it might well reasonably take the form of special solicitude in grading, such as by giving the student the benefit of any doubt or adjusting one's reasonable expectations about the quality and quantity of the student's writing to reflect the lesser time given.

[57]*See especially* Benjamin Ewing, *Prior Convictions as Moral Opportunities*, 46 Am. J. Crim. L. 283 (2019); and Ewing, *Criminal Responsibility and Fair Moral Opportunity*, *supra* note 47. Broader context for the views developed in those articles can be found in Benjamin Ewing & Lisa Kerr, *Reconstructing* Gladue, 74 U. Toronto L.J. 156 (2024); Benjamin Ewing, *Mitigating Factors: A Typology*, *in* The Palgrave Handbook of Applied Ethics and the Criminal Law 423 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019); and Benjamin Ewing, *Recent Work on Punishment and Criminogenic Disadvantage*, 37 Law & Phil. 29 (2018).

opportunity to avoid a second offense than a first, and thus greater protection against punishment for a second crime than a first.[58] By contrast, offenders who come from backgrounds of what I call "unfair criminogenic disadvantage" have experienced some combination of fewer and poorer opportunities to flourish without taking wrongful advantage of others, and more and stronger pressures to engage in crime. Their backgrounds may put them at greater risk of facing certain exculpatory circumstances, such as duress. But my point is that even when they do not face imminent exculpatory pressures, they will have had a poor set of opportunities in life to take affirmative steps to cultivate their capacities and dispositions not to offend and to put themselves in social environments that will reinforce rather than subvert habits of legal obedience.

Youth is a paradigmatic mitigating factor for structurally similar reasons. When youth is conceived as a stage of life between legal infancy and adulthood throughout which a person is owed special developmental opportunities including opportunities to fortify herself as a moral agent, then by definition a youth is someone who has not yet had a fully fair opportunity to develop her moral capacities and fortify herself against resorting to criminal wrongdoing.[59] Moreover, as academic commentators and the Supreme Court of the United States have observed, minors' legal restrictions and subordination to the control of their parents or guardians mean that all else equal, they have less opportunity than adults to make choices about social environments to inhabit and people with whom to associate.[60] They are consequently

[58]Of course, all else is not always equal. A big problem in the real world is that often the forms of criminal punishment and the collateral consequences of criminal conviction that we impose on offenders are actively hostile to their moral fortification and potentially neutralize or outweigh the positive moral opportunity inherent in wrongdoing and accountability for it. *See* Ewing, *Prior Convictions as Moral Opportunities*, *supra* note 57 at 327–331.

[59]This theory I am sketching and defending, though in some ways novel (and certainly underappreciated), is also meant to be intuitive and capable of vindicating ordinary folk attitudes about the moral significance of youth to punishment. It should therefore be no surprise that although it has not yet been articulated in precisely the terms in which I am developing it, the theory is prefigured or gestured at in the remarks of some commentators. Of the philosophical perspectives I have encountered on youth's significance for punishment, the one that comes closest to mine is Randall Curren's. In a subtle and insightful article, Curren makes clear that he shares much of the core insight I claim for my own view of youth's mitigating force. He does so when he writes: "My thesis is that the morally salient difference between children and adults is that in a society which provides adequate and equitable opportunities for the young to overcome their immaturity, adults will have enjoyed a fair chance to overcome their immaturity and children will not have." Randall Curren, *Moral Education and Juvenile Crime*, 43 Nomos 359, 361 (2002). Nevertheless, perhaps because he is a philosopher of education rather than a criminal law theorist, Curren develops a view of juvenile justice that differs from mine in some important respects. Rather than connecting his perspective to the "fair opportunity to avoid punishment" paradigm of H. L. A. Hart and those influenced by him (as I do), Curren suggests that the importance of moral education for children as a prerequisite to their punishment is connected to (a) the idea that the rule of law requires supporting legal subjects in the possibility of reasoned obedience rather than mere submission by force and (b) the idea that the state might lack the right, authority, or standing to punish citizens unless and until it has discharged its obligations to facilitate their moral development through education. *Id.* at 361–363.

[60]*See* Ward, *Punishing Children*, *supra* note 18 at 477–479; *Roper*, 543 U.S. at 569 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1014 [2003]); and Scott & Steinberg, *Blaming Youth*, *supra* note 7 at 818.

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restricted in their ability to take proactive steps to avoid and mitigate temptations and other pressures to do wrong.[61]

Some readers might object that youth is at best a proxy for lack of fully fair opportunity to fortify oneself against criminal wrongdoing. Obviously being alive for a longer amount of time does not, by itself, ensure that one will receive better opportunities for moral fortification; the quality of a developmental period matters at least as much as the duration of it. All things considered, some adolescents may have already received better opportunities for moral development and fortification than some adults who experienced deprived childhoods.

I agree that youth is only one of a variety of factors affecting the overall quality of a person's opportunity to fortify himself against succumbing to crime. But it would be unreasonable to expect a theory of the mitigating force of youth to show youths always to be less fit for punishment *all things considered.* All we should expect is a showing that a youth offender, on account of her youth, will have a pro tanto claim to special lenience that an otherwise comparable offender who is an adult will lack. Theories that treat youth merely as a proxy for capacity cannot deliver even that relatively modest result, because not all youths have diminished capacity and, if two offenders are equal in all respects except that one is an adult and the other is a youth, the adult will share any claim of diminished capacity that the youth may have.

Yet if we conceptualize a youth as someone who has not yet passed through the stage of life between legal infancy and adulthood throughout which young people are entitled to special developmental opportunities, a youth's very status as such ensures that he will have a claim against punishment that no adults have: that owing to his youth, he has not yet received all the important developmental opportunities he continues to be owed as a youth, and he has thus not yet received a fully fair opportunity to fortify himself against criminal liability and punishment.[62] To be sure, an adult offender may not have received the opportunities she was owed as a youth, and may therefore have a claim to mitigation on account of her unfairly disadvantaged background. But to compare such an adult offender to an otherwise equivalent youth offender, we would have to compare her to a youth offender from a comparably unfairly disadvantaged background. Such a youth offender would have two separate claims to mitigation: one based on her youth and another based on her unfairly disadvantaged background. Hence, an adult's claim to mitigation based on an unfairly disadvantaged background is a distinct claim and not merely a youth's claim to mitigation carried through to adulthood.

Other readers may wonder: why not simply focus on whether an offender had *adequate moral capacity* at the time of her offense, and not whether she had a *fair opportunity to develop* her moral capacities and fortification against crime? Some

[61]One complication is that the limitations on minors' rights in this regard exist in large measure precisely to prevent minors from impulsively or immaturely succumbing to their worst instincts. This suggests that whether and to what extent minors are adversely affected in their opportunity for moral fortification, *all things considered*, will depend in part on whether their parents, guardians, and supervising adults impose limits on their choices that are well-designed to fortify them against wrongdoing.

[62]Even if he has had an especially privileged youth, such that his opportunities for fortification have been, all things considered, better than those of some adults who faced childhood social deprivation, he still will not yet have received all the relevant opportunity he is owed qua youth, and will therefore still have a pro tanto claim to mitigation (even if, all things considered, that claim is counterbalanced by unusually good opportunities he received on account of having a childhood especially conducive to moral fortification).

people, lacking in fully fair opportunity for moral development and fortification will nevertheless make lemonade from lemons, so to speak, and still cultivate a normal level of moral capacity.[63] Moreover, not all crimes committed by minors will be responses to immediate temptations or other pressures such that it is obvious how greater moral fortification might have prevented them.

Readers sympathetic to this line of objection can be interpreted as embracing a conventional, asynchronous view of fair opportunity (as a prerequisite for blameworthiness) and resisting the extended, historical view of fair opportunity (as a prerequisite for the fairness of punishment) that I have developed to help explain the claims to mitigation held not only by minors but also by first-time offenders and unfairly disadvantaged offenders. One thing to be said in favor of my historical conception of fair opportunity to avoid punishment is that it gives us resources we would otherwise lack to explain widely held moral intuitions about how, in fairness, we ought to treat a range of different types of criminal offenders. I would also respond to skeptics of my historical conception of fair opportunity to avoid punishment with a pointed question of my own: why should criminal sentencing ignore or discount some agents' lack of fully fair opportunity for moral fortification merely because they have ended up with "adequate" moral capacity in the end? By hypothesis, their level of moral fortification was insufficient to prevent them from engaging in crime and, by the very nature of what it would have meant for them to have had greater opportunity for moral fortification, having had it would have improved their chance to avoid offending. What is more, some offenders have *had* a fully fair opportunity for moral development and fortification yet made relatively poor use of that opportunity, such that the level of their moral capacities was underdeveloped at the time they criminally offended. It is plausible that they still have a claim to sentence mitigation grounded in their diminished moral capacities. But their claim to mitigation seems weaker than it would be if their diminished moral capacities had been the product of a lack of fully fair opportunity to develop them, rather than a failure to make good use of fair opportunity.

### B. Youths' Forward-looking Claim: A Continuing Entitlement to Developmental Opportunity

There is also a forward-looking side to the mitigating force of youth qua developmental opportunity. If an offender has not yet passed through the developmental stage of life between legal infancy and adulthood during which his state and society owe him distinctive opportunities for moral fortification, then he continues to be owed such opportunities. And the kinds of punishments to which criminal offenders become liable may be so intrusive that, if imposed on minors, they would thwart or interfere with those youths' continuing receipt of the developmental opportunities they are owed. The forward-looking component of the moral opportunity theory of youth's mitigating force tells us that we have a special reason to avoid punishing

[63]Criminal offending is itself evidence that a person has not done enough to fortify herself against criminal wrongdoing. *See* Howard, *Punishment as Moral Fortification*, *supra* note 4. However, all human beings are morally fallible and imperfectly fortified against criminal wrongdoing, so I reject the idea that there is some level of fortification that makes offending impossible. Conversely, being poorly protected against succumbing or resorting to crime is no guarantee that one will engage in it.

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youths in ways that would be inconsistent with them receiving the developmental opportunity to which they continue to be entitled as youths.

Arguably we owe it even to adults, including those guilty of the most heinous crimes, to punish them only in ways that respect their human potential for growth and reform. But it is one thing for the state to recognize adult offenders' dignity, humanity, and innate capacity for change, by always holding out at least some possibility of release from prison, no matter how serious an offender's crimes may be or how hardened her character may seem. It is another thing for the state to discharge its continuing obligations to facilitate minors' development, partly by refusing to punish them in any way that would prevent the state from discharging those developmental obligations. As Justice Kennedy put it in *Graham v. Florida*: "The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."[64]

Youths' continuing claim to developmental opportunity creates a pro tanto reason not to impose upon them any punishments that would thwart or interfere with receiving their developmental due. That said, it should be acknowledged that the forward-looking part of the moral opportunity theory of youth's mitigating force is secondary to the backward-looking part for several reasons. First, a theory of youth as a mitigating factor in criminal sentencing should speak chiefly to the idea that youths are owed mitigation as a matter of criminal justice—and not merely owed mitigation insofar as criminal justice comes into conflict with other priorities, such as safeguarding the future developmental opportunities to which youth offenders continue to be entitled. Second, youths' developmental opportunities can be adversely affected not only by the punishment of youths themselves but also by the punishment of their parents or caregivers for any offenses those adults commit. Although we have good reason to try to avoid punishing adult offenders in ways that would cause undue harm to their dependent children, this ground of mitigation is not nearly as widely or forcefully recognized as youth offenders' claim to sentence mitigation. Third, though youths, qua youths, necessarily have a continuing claim to developmental opportunity, it is contingent whether and to what extent any given punishment would conflict with a youth offender's developmental entitlement.[65]

That third consideration points to a potential challenge. Punishment itself arguably generates an important opportunity for a punished person to learn and grow as a moral agent.[66] One might therefore wonder whether a society's obligations to minors, rather than justifying sentence mitigation, might justify the unmitigated punishment of youth offenders so as not to deprive them of an important opportunity and resource for moral development.[67]

To that worry, I have two responses. First, it is speculative at best, and dubious at worst, that mitigating the severity of punishment would take away or diminish the value for an offender of simply being held accountable for wrongdoing somehow, as

[64]560 U.S. at 79.

[65]One reason why is that a juvenile offender's forward-looking claim to special treatment by the criminal law will depend on her current age, whereas her backward-looking claim will depend on her age at the time of her offense.

[66]Indeed, Jeffrey Howard has attempted to justify punishment precisely *as* moral fortification. *See* Howard, *Punishment as Moral Fortification*, *supra* note 4.

[67]I thank Will Kymlicka and Jacob Weinrib for independently identifying this issue and pressing me to address it here.

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an opportunity for moral fortification. And if I am right that a minor has a backward-looking pro tanto claim to lesser punishment than an adult for any given crime, overriding that claim for a minor's supposed own developmental good might breed justified cynicism, resentment, and resistance that would hinder, rather than facilitate, moral fortification. Second, suppose for the sake of argument we were to make the questionable assumption that the importance of punishment qua moral opportunity can create a paternalistic reason to punish youths more harshly, which may stand in tension with youths' backward-looking claim to mitigation. Even if that were true, any quantum of punishment of minors justified on purely paternalistic grounds —i.e., to discharge a duty owed to the punished minors themselves—would be subject to a strict moral limit inapplicable to adult criminal punishment: the requirement that the hard treatment involved be a necessary part of the offender's background right to a fair opportunity for moral development and fortification.

In sum, I have argued that youth offenders have a principled claim to mitigation because they have not yet received all the developmental opportunities for moral fortification that they are owed. Although punishment itself is sometimes an important moral opportunity, the obligation to assist young people in their moral development and fortification is unlikely to conflict with a youth offender's backward-looking, fairness-based claim to a mitigated sentence. If anything, the forward-looking need to ensure that minors receive the continuing moral opportunities they are owed throughout their youth is likely to bolster the backward-looking reason of fairness for mitigating youth offenders' punishment.

## VI. Virtues of the Moral Opportunity Theory

Having sketched the moral opportunity theory of youth's mitigating force in criminal sentencing, let us now take stock of its theoretical virtues.

From the standpoint of *Extensional Adequacy*, the theory has the advantage of being able to explain why all youths, qua youths, have a pro tanto claim to mitigation at sentencing. This enables the theory to validate the intuition that even if a thirty-year-old offender were to have the same psychological and agential constitution as a fifteen-year-old offender, the latter would have a distinctive claim to exceptional treatment in criminal sentencing that the former, twice his age, would lack. Theories that treat youth merely as a proxy for diminished capacity cannot explain this intuition.

The theory of youth as moral opportunity can also explain why youths should receive a break, even for crimes that do not presuppose moral culpability (e.g., because they ought not to have been criminalized in the first place). Even when we consider offenses that no one is morally culpable for committing, the fairness of punishments for them depends partly on the fairness of people's opportunities to avoid them. It is therefore important that the offenses at least have been proscribed in advance, to give people constructive notice of the possibility of punishment. But it is also important that people have the opportunities they are owed to fortify themselves against lapses of self-control, excessive discounting of their future interests, and other forms of instrumental irrationality that commonly lurk beneath criminal offending.

The moral opportunity theory of the mitigating force of youth also delivers *The Right Kind of Reason* why youth offenders should receive special treatment in criminal law. It shows why they are owed lenience as a matter of fairness. And it

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vindicates the intuition that youth offenders have a distinctive claim to punishment that is not only less harsh but also more oriented toward rehabilitation. Concern for youths' rehabilitation figures in the theory because the forward-looking component of it instructs us that youths' continuing right to opportunity for moral fortification creates a pro tanto reason to avoid punishment that would interfere with or thwart that right.

The theory of youth as moral opportunity also boasts an important advantage in *Consilience* over Yaffe's theory of youth as political disempowerment. The moral opportunity theory makes the mitigating force of youth continuous across the moral and criminal realms because the fairness of an agent's opportunity to fortify himself against wrongdoing matters to interpersonal moral accountability and not just accountability in the criminal law. In principle, we ought to cut youths a break when we hold them responsible outside the criminal law (much as we give a break in interpersonal as well as institutional accountability to first-time offenders, who have not yet had the opportunity to learn from an initial transgression).

The theory that the mitigating force of youth is most centrally a function of youths' diminished moral opportunity also exhibits a *Consilience* lacking in theories that treat youth's mitigating force as merely a function of youth's correlation with diminished capacity (or, for that matter, disenfranchisement). If we attend to youths' typically diminished capacity (or their disenfranchisement) alone, we fail to recognize and bring to bear upon criminal sentencing the broader array of features of youth that, unlike diminished capacity (and disenfranchisement), are not merely correlated with youth but constitutive of it in an important sense. The moral opportunity theory of youth's mitigating force, by contrast, grounds juveniles' claim to penal lenience in the paternalistic regime of developmental opportunity that is constitutive of youth on a familiar conception of it.

Finally, it is difficult to imagine a theory of youth's mitigating force in criminal sentencing that shows as much *Parsimony* as the theory of youth as moral opportunity. The theory vindicates youth's mitigating force in a direct, simple, and noncontingent way. It tells us that youth is appropriately mitigating, not because of how youths tend to be constituted as agents, or what democratic rights they have, but because of what youth *is*. The claim is noncontingent in the sense that it arises from the very conception of youth on which it depends.

## VII. Conclusion

Gideon Yaffe deserves praise for his bold effort to shake criminal law theorists out of complacent confidence in conventional arguments for the mitigating force of youth. Youths' often diminished capacities may seem to be the most obvious and compelling explanation of their diminished fitness for punishment. But Yaffe is right to seek an explanation of youth's significance for punishment that is more closely, less contingently connected to youth itself. Intuitively, an offender's youth *as such* matters to criminal responsibility, apart from its impact on the offender's capacities or, for that matter, rehabilitative potential.

Nevertheless, Yaffe's theory of the mitigating significance of youth is vulnerable to a variation on the central objection he levels against the "received wisdom" about juvenile justice. Youths' disenfranchisement-based claim to mitigation remains contingent, in the sense that it presupposes a society in which adults are politically

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empowered through such mechanisms as the right to vote, and youths are not. Yaffe's theory has not shown that youth matters for its own sake, but only because of something else to which it happens to be related. Moreover, unlike the more familiar idea that youth is a proxy for diminished capacity, Yaffe's position that minors' political disempowerment is the source of their distinctive claim to mitigation implies a radical and counterintuitive disjunction between youth offenders' claims to lenience in the criminal law and their claims to special solicitude in interpersonal accountability outside the law.

By contrast, I have suggested that we should conceive of youth as a developmental stage between legal infancy and adulthood during which a young person has claims on her state and society to special opportunities to facilitate her agential and moral development. Because youth offenders, qua youths, have not yet received all the opportunities they are owed to fortify themselves against resorting to crime, and because they have rights to continuing developmental assistance throughout their youth, they have strong and distinctive claims to punishment that is less harsh, and more attentive to rehabilitation, than would otherwise be appropriate.

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