*Final Report and Recommendations of the Commission on Juvenile Sentencing for Heinous Crimes*

# Appendix - Table of Contents

**Appendix materials are online at** www.mnbar.org/commission-appendix


A. Commission Members (p.2)
B. January 9, 2017 Materials - Presentation by Leslie J. Rosenberg
    1. Agenda (p.4)
    2. Rosenberg Presentation (p.6)
    3. Grisso & Kavanaugh, Prospects for Developmental Evidence in Juvenile Sentencing Based on *Miller v. Alabama* (p.16)
    4. Nat'l Juv. Just. Prosec. Ctr., Juv. Prosec. Policy/Guidelines (p.31)
    5. Nat'l Dist. Attys. Assoc. Juvenile Prosecution Standards (p.55)
    6. Scott et al., The Supreme Court and the Transformation of Juvenile Sentencing (2015) (p.60)
    7. Backstrom Email Correspondence RE: *Miller* (p.97)
    8. Backstrom, America's Juvenile Justice System is Unjustifiably Under Attack (p. 100)
C. Presentation by Professor Perry Moriearty and Jean Burdorf: MN Inmates Serving Life without Release for Murders Committed under 18yo (p.109)
D. February 6, 2017 Materials - Presentation by Tom Arneson
    1. Agenda (p. 111)
    2. Arneson Presentation (p.113)
    3. Selected MN Statutes (p. 119)
E. Presentation by Shelley McBride
    1. Fact Sheet: Correctional Delivery Systems (p.131)
    2. Sample Detention Hearing Report (p.133)
    3. Summary Guide to MN Juv. Certification Procedure (p.135)
    4. Sample Adult Certification Report (p.142)
    5. Sample Presentence Investigation Report (p.146)
    6. MN Sentencing Guidelines Grid (p.150)
    7. MN Aggravating/Mitigating Factors (p.152)
    8. Juv. Probation Officer Job Description (p.156)
F. February 27, 2017 Materials - Presentation by Francis Shen
    1. Agenda (p.158)
    2. Shen Presentation (p.160)
    3. Shen Suggested Resources (p.169)
    4. Law&Neuro: How Should Justice Policy Treat Young Offenders?(p.171)
G. Presentation by Kelly Mitchell
    1. State Statutes Containing Miller Factors (p.175)
    2. Incorporation of *Miller* Factors into Statutes (p.190)
    3. Campaign for Fair Sentencing of Youth Report (p.197)
    4. Map - Campaign for Fair Sentencing of Youth (p.221)
H. April 3, 2017 Materials - Presentation by Dr. Dawn Peuschold
    1. Agenda (p.222)
    2. Peuschold Presentation (p.223)
I. *Roper v. Simmons* (p.229)
J. *Graham v. Florida* (p.275)
K. *Miller v. Alabama (*p.320)
L. *Montgomery v. Louisiana* (p.351)

**Members of the Commission on Juvenile Sentencing for Heinous Crimes**

Co-Chairs:
The Honorable Kathleen Gearin
JAMS
333 S Seventh St #2550
Minneapolis, MN 55402-2470
krgearin@jamsadr.com

John Kingrey, Minnesota Court Attorneys Assn (ret.)
jkingrey6849@gmail.com

Members:
The Honorable Paul Anderson
425justice@gmail.com

Thomas Arneson
Hennepin Co Attorneys Office
300 S Sixth St #A2000
Minneapolis, MN 55487
tom.arneson@co.hennepin.mn.us

James Backstrom
Dakota County Attorneys Office
1560 Hwy 55
Hastings, MN 55033-2392
jim.backstrom@co.dakota.mn.us

Jean Burdorf
Hennepin County Attorney's Office
C-2000 Government Center
300 South 6th Street
Minneapolis, MN 55487
jean.burdorf@hennepin.us

The HonorableHon. Bradford Delapena,
Minnesota Tax Court
25 Rev Dr Martin Luther King Jr Blvd #245
St Paul, MN 55155
brad.delapena@state.mn.us

Senator Dan Hall
Minnesota Senate
3111 Minnesota Senate Bldg.
95 University Ave West
St. Paul, MN 55155
sen.dan.hall@senate.mn

Senator Jeff Hayden
Minnesota Senate
2209 Minnesota Senate Bldg.
95 University Ave West
St. Paul, MN 55155
sen.jeff.hayden@senate.mn

Representative John Lesch
Minnesota House of Representatives
217 State Office Building
St. Paul, MN 55155
rep.john.lesch@house.mn

6 West Fifth Street, Suite 700A
Saint Paul, MN 55102
Madeleine.Garces@house.mn

Shelley McBride, independent consultant and LMFT
smac1107@gmail.com

Kelly Mitchell
Robina Institute of Criminal Law and Criminal Justice
University of Minnesota Law School
229 19th Av S Room N160B
Minneapolis, MN 55455
mitch093@umn.edu

Perry Moriearty
University of Minnesota Law School
229 19th Av S
Minneapolis, MN 55455
pmoriear@umn.edu

Representative Marion O'Neill
Minnesota House of Representatives
549 State Office Building
St. Paul, MN 55155
rep.marion.oneill@house.mn

Dr. Dawn Peuschold
Fourth Judicial District Psychological Services
300 S Sixth Street, Suite C-509
Minneapolis, MN 55487
612-348-3658
Dawn.Peuschold@courts.state.mn.us

Francis Shen
University of Minnesota Law School
Mondale Hall, #330
229 19th Avenue South
Minneapolis, MN 55455
fxshen@umn.edu

John Turnipseed
Urban Ventures
2924 Fourth Avenue South
Minneapolis, MN 55408
johnturnipseed@urbanventures.org

William Ward
Minnesota Board of Public Defense
331 Second Ave S #900
Minneapolis, MN 55401
612-279-3512
William.ward@mnpd.us

Robin Wolpert
Minnesota State Bar Association
rwolpert@comcast.net

Reporters:
Brittany Lawonn
Hennepin County Attorney's Office
300 S Sixth St, C-200
Minneapolis, MN 55415
brittany.lawonn@gmail.com

Alexis Watts
815 13th Ave. SE #214
Minneapolis, MN 55414
watts117@umn.edu

MSBA

# Meeting Agenda

## COMMISSION ON JUVENILE SENTENCING FOR HEINOUS CRIMES

**Monday, January 9, 2017**
**4:30-6:30 p.m.**

**Law Offices of Larson King**
**30 East Seventh Street • Suite 2800 • St. Paul**

**Co-Chairs**: **Hon. Kathleen Gearin and John Kingrey**

## AGENDA

1. Introductions
2. Case overview, including *Miller v. Alabama* and *Montgomery v. Louisiana* (Leslie Rosenberg)
3. Overview of pending Minnesota post-conviction cases (Jean Burdorf and Perry Moriarty)
4. U.S. Supreme Court update on juvenile sentencing and the 8th Amendment (Lyle Denniston, Scotusblog)

Future Meeting Dates for 2017:
February 6 and 27
April 3 and 24
June 5

Location and Time:
Meetings will be held in St. Paul at a location to be determined.
The meetings will begin at 4:30 and end at 6:30 pm.

**FUTURE MEETINGS**

Agenda for February 6, 2017:

1. Sentencing system overview, including role of community corrections, presentence investigations, and sentencing guidelines

2. Juvenile justice system overview, including EJJ, certification, and presentence investigations

3. Neuroscience and juvenile sentencing

Agenda for February 27, 2017:

1. 50 state survey regarding *Miller* hearings and factors

2. Current criteria for presentence investigations in Minnesota for juvenile homicide offenders

3. Identifying the disconnect, if any, between U.S. Supreme Court decisions and Minnesota's presentence investigation criteria

Agendas for April and June meetings to be determined

# Juvenile Justice Case Developments:

## A Decade of the United State's Supreme Court's Jurisprudence

**Leslie J. Rosenberg**
**Assistant State Appellate Defender**
**leslie.rosenberg@pubdef.state.mn.us**






- **Until 1800's, children punished as adults**
- **1825, House of Refuge exclusively for children**
- **Mid-19th century, training schools in response to overcrowding, etc.**
- **1899 first juvenile court- Cook County, IL- rehabilitation was focus**
- **1960's due process reforms (Gault)**
- **1980's get tough**
- **Large number of juveniles in an institution - still the model**

## NY Juvenile Offender Act 1978

**Five year sentence for two subway murders at age 15**

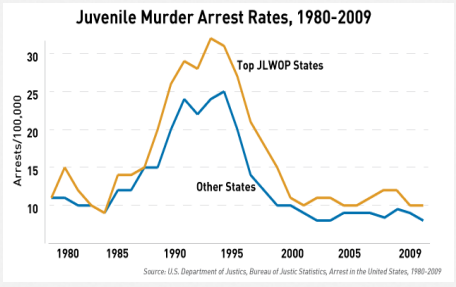
## State v. McFee,

### 721 N.W.2d 607 (Minn. 2006)

**Public Safety** - MAJORITY

**REHABILITATIVE** - DISSENT



## 8th Amendment

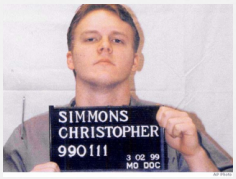
 

## Roper v. Simmons, 543 U.S. 551 (2005)

Christopher Simmons in 1993 at 17



- Missouri
- Plan to kill Shirley Crook
- With younger friend
- Broke in, tied her up
- Tossed off bridge



National consensus
International consensus
Adolescent brain science

vs.

Legislation
Individualized vs. categorical sentencing

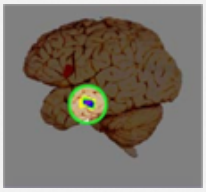


**"The adolescent's mind works differently from ours. Parents know it. This Court has said it. legislatures have presumed it for decades or more. And now, new scientific evidence sheds light on the difference."**

American Medical Association, Amicus Brief.



("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds")

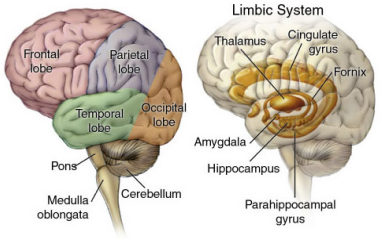


**Adolescent brain uses less of frontal (thinking) region and more of the emotional region of the brain**

**Adult brain uses more of frontal region**

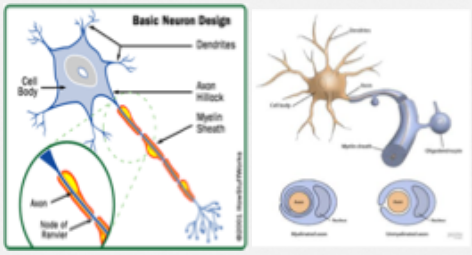


## Anatomy of the Brain



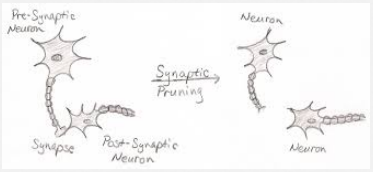



## Nerve Cells in the Brain






**Scientists believe that the loss of synapses as a child matures is part of the process by which the brain becomes more efficient.**






**When we enter adolescence, the brain is still plastic. As more of the brain's circuits become hardened, they become less easily modified. This makes the brain more efficient – it makes the electrical impulses travel faster – but also makes the brain less able to change as a consequence of experience.**



## Adolescent Brain

**Frontal lobe last area of brain to go through this process, ending in mid-20s**

## Youth and its characteristics



Children "are more vulnerable ... To negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment"

and lack the ability to extricate themselves from horrific, crime-producing settings. .. .



And third a child's character is not as "well formed" as an adult's; his traits are "less fixed and his actions less likely to be "evidence of irretrievabl[e] deprav[ity].



Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." ...



("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood"). *Roper v. Simmons*, 543 U.S. 551, 570 (2005)

**This does not mean that juveniles are incapable of making moral judgments, but instead that their ability to reliably control "emotional response and impulsivity" is reduced as compared to adults.**

 25

**It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. See Steinberg & Scott 1014–1016.**

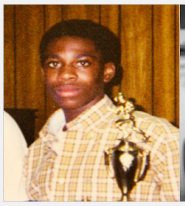


**As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others**

***Roper v. Simmons*, 543 U.S. 551, 573 (2005)**



## *Graham v. Florida*
**560 U.S. 48 (2011)**



**Terrance Graham at 15. He was sentenced for a home invasion robbery.**

**Joe Sullivan at 31. He was convicted at 13 for rape.**

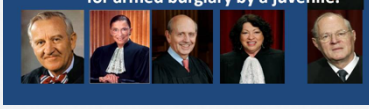
 28

## *Graham v. Florida*

**Life imprisonment without parole for a non-homicidal crime committed by a juvenile**

***Vote*: 6-3**

***Court's ruling*: such a sentence is cruel and unusual for armed burglary by a juvenile.**



 29

**Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use.**

***Graham v. Florida*, 560 U.S. 48, 62 (2010), *as modified* (July 6, 2010)**

- Graham resentenced to 25 years
- Juveniles need reasonable chance to mature

## *J.D.B. v. North Carolina*

564 U.S. 261 (2011)



13 year old –

No Miranda

Not allowed to call grandmother

Age is a factor

No longer a one-size-fits-all reasonable-person test



## Reasonable Juvenile Standard



Indeed, even where a "reasonable person" standard otherwise applies, the common law has reflected the reality that children are not adults. In negligence suits, for instance, where liability turns on what an objectively reasonable person would do in the circumstances, "[a]ll American jurisdictions accept the idea that a person's childhood is a relevant circumstance" to be considered.

*J.D.B. v. N. Carolina*, 564 U.S. 261, 274 (U.S. 2011)

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



## Miller

Jackson

 38

**No throw-away children**

 39

**Proportionality**
**Evolving standards of decency**
**Prior categorical bans (mental deficiency)**
**Individualized sentences**

**vs.**

**Methods of punishment**
**Original intent – not precedent**
**Evolution/Devolution**
**Will of the people as expressed through legislature**

 40

**And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.**

***Miller v. Alabama*, 132 S. Ct. 2455, 2468, 183 L. Ed. 2d 407 (2012)**



***Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles**

***Miller v. Alabama*, 132 S. Ct. 2455, 2475, 183 L. Ed. 2d 407 (2012)**

## Miller Sentencing Considerations

- Immaturity
- Home environment
- Circumstances of offense (peer pressure)
- Inexperience with adult system
- Potential for rehabilitation



**"But none of what it [Graham] said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific."**



## Individualized Sentencing

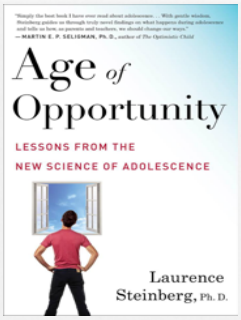


**Miller, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." ...**



**Because "'[t]he heart of the retribution rationale" relates to an offender's blameworthiness, "the case for retribution is not as strong with a minor as with an adult.'"**





**Irreparable corruption might, arguably, be proved by a diagnosis of psychopathy –**

**A personality construct consisting of traits that are known to be associated with both disregard for the illegality of one's behavior and resistance to change by current psychological intervention.**



**"Measures of psychopathy, however, are likely to be of little use for making 'irreparable corruption' or 'sophistication-maturity' judgments in most juvenile homicide cases.**

**First, there is no evidence that measures of psychopathic traits during adolescence can estimate the likelihood that they constitute enduring and unchangeable traits."**



**Montgomery v. Louisiana, 136 S.Ct. 718 (2016)**



**HENRY MONTGOMERY had just turned 17 in November 1963, when he shot a sheriff's deputy in East Baton Rouge, Louisiana.**

**The teenager would tell police he "panicked," shooting the deputy dead with a stolen .22-caliber pistol.**



***Miller* therefore announced a substantive rule of constitutional law, which, like other substantive rules, is retroactive because it "'necessarily carr[ies] a significant risk that a defendant'"—here, the vast majority of juvenile offenders—"'faces a punishment that the law cannot impose upon him.' "**

***Montgomery v. Louisiana*, 136 S. Ct. 718, 724, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016)**



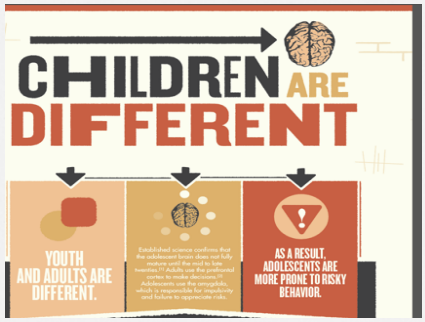
**A juvenile has the right to possibility of parole UNLESS it is proved that the juvenile is incapable of rehabilitation**

**It is not just a right to have a court exercise discretion in sentencing or a right to a hearing but it is a substantive right not to be sentenced to LWOP unless the applicable legal standard (irreparable corruption/permanent incorrigibility/psychopathy) is proved**

("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences").

***Montgomery v. Louisiana*, 136 S. Ct. 718, 735, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016)**








**BOTTOM LINE:**

Because of the difference in their brains, the impact of childhood trauma, and the U.S. Supreme Court rulings based on those facts, children who commit crimes should be held accountable in age-appropriate ways that focus on rehabilitation and reintegration into society.

Psychology, Public Policy, and Law
2016, Vol. 22, No. 3, 235–249


1076-8971/16/$12.00 http://dx.doi.org/10.1037/law0000090

# Prospects for Developmental Evidence in Juvenile Sentencing Based on *Miller v. Alabama*

Thomas Grisso
University of Massachusetts Medical School

Antoinette Kavanaugh
Northwestern University

Recent U.S. Supreme Court decisions barred mandatory life without parole for juvenile homicide (*Miller v. Alabama*, 2012) and applied *Miller* retroactively (*Montgomery v. Louisiana*, 2016). *Miller* identified several developmental factors to consider in mitigation, but left many questions unanswered about their application. The authors offer several sentencing contexts to frame the types of developmental and clinical evidence that may be relevant for *Miller* hearings under various circumstances. Within these contexts, they explore types and sources of relevant developmental evidence and raise questions about quality and limitations. Their analysis identifies areas in which appellate court clarification is needed to determine how developmental evidence will be used in *Miller* cases, and they alert developmental experts to prospects and cautions for providing relevant evidence, as well as areas in need of research.

*Keywords:* juvenile, sentencing, development, forensic, evidence

In four recent cases, the U.S. Supreme Court reached decisions that limited sentencing for serious crimes by juveniles. The Court set aside the death penalty for juveniles (*Roper v. Simmons*, 2005), prohibited life without parole (LWOP) for nonhomicide juvenile cases (*Graham v. Florida*, 2010), and prohibited mandatory LWOP in juvenile homicide cases (*Miller v. Alabama*, 2012). Most recently, the Court ruled that *Miller* applies retroactively, requiring resentencing for many persons now serving mandatory LWOP sentences (*Montgomery v. Louisiana*, 2016).

Developmental psychological and neuroscience research played a significant role in the Court's decisions in these four cases. Research offered evidence that adolescence is distinguished by developmental immaturity in comparison to adults in ways that offer mitigation for juveniles' culpability. *Miller* and *Montgomery* will require sentencing practices in juvenile homicide cases nationwide that take into account developmental maturation. In addition to new sentencing cases, resentencing will occur possibly for thousands of people now serving that sentence under earlier mandatory LWOP sentencing schemes.

Developmental science now faces a new challenge. Its research served well to provide normative information with which the U.S. Supreme Court distinguished adolescence as an immature class. Now we must consider what role developmental science can play when applied, case by case, to describe legally relevant developmental characteristics of young people as evidence for individual mitigation in *Miller* sentencing and resentencing cases.

This article examines the types, probable sources, and anticipated quality of developmental and clinical psychological evidence that is likely to be required in "new" *Miller* sentencing cases (for convictions subsequent to *Miller/Montgomery*) and resentencing cases (juvenile LWOP sentences given before *Miller*). After briefly reviewing the U.S. Supreme Court's opinions in *Miller* and *Montgomery*, we offer an analysis of two *Miller* "sentencing contexts" that will differ in their use of developmental evidence: (a) arguments for LWOP in new sentencing and resentencing cases, and (b) if LWOP is not appropriate, arguments offering mitigation/aggravation regarding various alternative sentences. We also consider legal ambiguities associated with the use of developmental evidence retrospectively in *Miller* resentencing cases as directed by *Montgomery*. After establishing these contexts for *Miller* cases, we examine the types of developmental evidence, as well as the sources of evidence and their limitations, relevant for each of those contexts.

## *Miller* and *Montgomery*

The U.S. Supreme Court established in *Roper*, *Graham*, and *Miller* that adolescent offenders' immaturity requires special consideration in sentencing. The Court's three decisions were influenced in part by the convergence of recent normative research on brain development and on behavioral functioning of adolescents (for reviews, see Scott & Steinberg, 2008; Steinberg & Scott, 2003). That body of research described adolescents' immaturity compared to adults in risk-taking, sensation-seeking, and capacities for self-regulation. Other scientific evidence consistent with neurological and psychosocial changes during adolescence has identified a general desistance in risk-taking and offending with increasing maturity (e.g., Moffitt, 1993; Mulvey, Steinberg, Piquero et al., 2010; Piquero & Moffitt, 2014). In its juvenile

This article was published Online First June 23, 2016.

Thomas Grisso, Department of Psychiatry, Law and Psychiatry Program, University of Massachusetts Medical School; Antoinette Kavanaugh, Feinberg School of Medicine, Northwestern University.

We acknowledge Jake Howard (McDuff & Byrd, Jackson, MS) for consultation on parts of the analysis of the legal context for evidence in *Miller* cases.

Correspondence concerning this article should be addressed to Thomas Grisso, Department of Psychiatry, Law and Psychiatry Program, University of Massachusetts Medical School, 55 Lake Avenue North, Worcester, MA 01655. E-mail: thomas.grisso@umassmed.edu

sentencing cases, the U.S. Supreme Court reasoned that adolescents' immaturity indicated lesser culpability as a class and a greater potential for future behavioral change compared to adults.

*Miller v. Alabama* (2012) interpreted the Eighth Amendment to require that in juvenile homicide cases an LWOP sentence could not be mandatory. The Court's reasoning emphasized that "the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations" (mitigating factors of adolescent immaturity) and "assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender" (*Miller v. Alabama*, 2012, p. 2466). The Court allowed LWOP to stand as a possible sentence for juvenile homicide cases but required special considerations: "We do not foreclose a sentencer's ability to make that judgment in homicide cases, [but] we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" (*Miller v. Alabama*, 2012, p. 2469).

After *Miller*, a number of states changed their laws and procedures for juvenile homicide sentencing. A few states went beyond *Miller* to abolish LWOP in juvenile cases (Boone, 2015; Scott, Grisso, Levick, & Steinberg, 2016). Others retained LWOP and, as described later, began determining how sentencing would incorporate *Miller's* developmental concerns.

*Miller* did not address whether states were required to apply its decision retroactively for people serving mandatory LWOP sentences in juvenile homicide cases tried before *Miller*. According to a nationwide survey, between 2,000 and 2,500 individuals were serving mandatory LWOP terms for juvenile homicide when *Miller* was announced, a disproportionate number concentrated in a handful of states (Mills, Dorn, & Hritz, in press). Within a few years after *Miller*, at least six state supreme courts concluded that *Miller* did not require retroactive resentencing, reasoning that *Miller* had simply provided a new rule of criminal procedure for future cases (Scott et al., 2016). Twelve states, however, decided that *Miller* established a new substantive rule of sentencing that would require resentencing of pre-*Miller* juvenile cases that had received mandatory LWOP.

*Montgomery v. Louisiana* (2016) settled the state courts' disagreements by deciding that *Miller* established a substantive rule nullifying all previous mandatory LWOP sentences for juvenile homicides, requiring either of two remedies. States could simply decide to provide parole hearings for all individuals currently serving mandatory LWOP for juvenile homicide. Alternatively, those cases would have to be resentenced applying *Miller*.

But *Montgomery* did much more in its emphatic descriptions of what *Miller* had said about the relevance of developmental immaturity. The Court explained that *Miller* had "established that the penological justifications for life without parole *collapse* in light of the distinctive attributes of youth" (*Montgomery v. Louisiana*, 2016, slip op., p. 16; emphasis added). *Montgomery* emphasized the anticipated rarity with which LWOP would be a proportionate punishment for a juvenile. It noted that *Miller* had limited LWOP to the "rare juvenile offender whose crime reflects irreparable corruption" (citing *Miller v. Alabama*, 2012, p. 2469; elsewhere, "irretrievably depraved," at p. 2475) and added that LWOP could be applied only to "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," which would exclude "the vast majority of juveniles" (*Montgomery v. Louisiana*, 2016, slip op., p. 17). So strong was the implied rarity of juveniles eligible for LWOP that Justice Scalia, in his dissent, concluded that "this whole exercise, this whole distortion of *Miller* . . . [is] just a devious way of eliminating life without parole for juvenile offenders" (*Montgomery v. Louisiana*, 2016, J. Scalia dissent, slip op., p. 14).

Neither *Miller* nor *Montgomery* defined specifically the evidence that would support "irreparable corruption" for purposes of identifying the exceptionally rare juvenile eligible for LWOP. *Miller* did, however, identify several developmental reasons that juveniles constituted a class with special protection in homicide cases. It described five characteristics or consequences of juveniles' immaturity relevant for mitigation of culpability. These five "*Miller* factors" appear in *Miller v. Alabama* (2012) at pages 2464 and 2468. The factors are reviewed in detail later but introduced here with labels borrowed from Scott et al. (2016) for ease of reference: (a) Decisional—adolescents' greater propensity for sensation-seeking, risk-taking, and poor judgment during decision making because of their developmental immaturity; (b) Dependency—their dependency and consequent lesser ability to avoid negative influences on their lives (such as family abuse and peer influences); (c) Offense Context—the potential relation of those risk-taking and dependency factors to the youth's involvement in the homicide; (d) Rehabilitation Potential—adolescents' greater potential for change in light of their developmental immaturity; and (e) Legal Competency—their lesser general capacities for making decisions in the context of their arrest (e.g., interrogations) and adjudication (e.g., capacities to assist legal counsel).

*Miller's* five factors were offered as the indicia of immaturity identifying juveniles as a protected class. It seems likely that these factors also will frame arguments about mitigation on a case-by-case basis in *Miller* cases, although later we will explain why this presumption may be questioned. Soon after *Miller*, Larson, DiCataldo and Kinscherff (2013) considered several alternative ways to frame immaturity criteria in *Miller* cases (e.g., using factors typically employed in a state's transfer proceedings). They concluded, however, that such options were likely to encounter arguments that they lack relevance in *Miller* cases because of *Miller's* specific identification of the five factors.

Neither *Miller* nor any other court has offered much guidance regarding application of the *Miller* factors or other developmental evidence to examine mitigation in individual cases. A recent California decision (*People v. Gutierrez*, 2014) described appellate cases in a number of states that had begun to fashion their own lists and categories of developmental factors much like *Miller's*. But those cases have not described how courts are to use or apply those developmental indicia in *Miller* sentencing or resentencing cases (Boone, 2015; Scott et al., 2016).

We propose that the first step in examining the future role of developmental evidence in *Miller* cases requires an identification of the sentencing contexts within which such evidence would be applied. In our following analysis, we describe those contexts and explain why different types and sources of developmental evidence might be required for each of them. After that analysis, we examine the courts' potential to obtain relevant and reliable information on an individual's developmental status within these various sentencing contexts.

### The Sentencing Contexts in "*Miller* Cases"

We presume that *Miller* hearings will have two main objectives in states that allow LWOP sentences as an option: (a) in new sentencing and resentencing cases, to determine whether a youth manifests *Miller's* and *Montgomery's* concept of "irreparable corruption" qualifying for LWOP, and, (b) if LWOP is not appropriate, then to determine an alternative sentence. We do not imply that these are two separate legal procedures, but merely two sentencing contexts or purposes for developmental evidence within a *Miller* hearing. The following two subsections describe the potential role of developmental evidence in those two contexts. A third subsection then considers additional issues associated with developmental evidence offered in retroactive resentencing cases.

Our analysis explains how the five *Miller* factors will be applied differently in these two contexts. Regarding context (a), the possibility of LWOP (in sentencing or resentencing), the five *Miller* factors serve to establish a class that is protected from LWOP sentencing. Then only one of the factors—Rehabilitation Potential—becomes the focus of the inquiry, with an LWOP sentence requiring a categorical conclusion that the individual is the "irreparably corrupt" exception to that class, having no prospects for rehabilitation. By our analysis, the other four factors will have little or no role in arguing for LWOP. In contrast, regarding context (b) that involves consideration of alternative sentences, all five factors will be in play when weighing the degree to which this individual youth's level of maturity offers mitigation in sentencing.

### Evidence to Support Life Without Parole in New Sentencing and Re-Sentencing

In a *Miller* hearing in which LWOP is sought, defense counsel will have identified the youth's age at offense as placing her in the protected class, defining her as having rehabilitation potential under *Miller's* characterization of the class. The hearing thus begins with this presumption, as well as the expectation that exceptions to this rehabilitative presumption will be exceptionally rare (*Miller v. Alabama*, 2012; *Montgomery v. Louisiana*, 2016; see also *State v. Seats*, 2015, and *Veal v. State*, Georgia, 2016).

If this is accepted, then the youth's membership in the class creates a burden on the state to overcome the presumption. This will require showing that the youth is one of *Miller's* "rarest" of juveniles, an "irretrievably depraved," "permanently incorrigible" or—the term that we will use to represent these legal concepts—"irreparably corrupt" juvenile not capable of rehabilitation. The state seeks the court's categorical conclusion that there is no prospect for rehabilitation.

The state will be seriously limited in the type of evidence it can offer to show "irreparable corruption." The heinousness of the crime cannot by itself be offered as evidence of the character of the juvenile. *Roper v. Simmons* (2005, p. 573) explained that looking at the offense alone would present an "unacceptable likelihood . . . that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments." And *Montgomery* (2016, slip op., p. 21) affirmed that "children who commit even heinous crimes are capable of change." The youth's character cannot be judged by the crime itself.

The state might consider arguing for "irreparable corruption" using *Miller's* five developmental factors or similar indicia that might have been incorporated into local juvenile LWOP sentencing statutes (e.g., Fla. Stat. Ann, 2014). Yet whether and how the state can use those factors to support "irreparable corruption" is unclear for the following reasons.

First, legal arguments may be made that the developmental factors are not relevant in determining eligibility for LWOP. For example, less than 2 months after *Montgomery*, the Georgia Supreme Court concluded that "The *Montgomery* majority explains . . . that *Miller* meant exceptionally rare, and that determining whether a juvenile falls into that exclusive realm turns not on the sentencing court's consideration of his age and the qualities that accompany youth . . . but rather on a specific determination that he is *irreparably corrupt"* (*Veal v. State*, Georgia, 2016, slip op., pp. 21–22) (emphasis in the original). *Veal's* interpretation makes "irreparable corruption" a conclusion that *Miller's* developmental indicia do not function to decide; they establish the presumption that the youth, as a member of the class, has rehabilitation potential.

Second, if *Miller's* developmental factors could be used in considering LWOP sentences for juveniles, several courts have decided that the state cannot use them as aggravating circumstances. For example, in *State v. Null* (2013), the court interpreted *Roper* and *Miller* to caution that the very characteristics of immaturity that offer mitigation cannot be used as aggravating circumstances to seek LWOP for juveniles. Similarly, in *State v. Seats* (2015), the court reversed a juvenile LWOP sentence because the sentencing court "appeared to use Seat's family and home environment vulnerabilities together with his lack of maturity, underdeveloped sense of responsibility, and vulnerability to peer pressure as aggravating, not mitigating, factors" (p. 557).

Cases may arise in which the state claims that the absence of mitigating developmental circumstances suggests the youth's greater maturity in relation to most juveniles. For example, a particular case may offer no evidence that the youth has ever engaged in the reckless behavior typical of adolescents (Decisional factor), suggesting a calculated and especially dangerous character (and less modifiable) in light of the heinousness of the present offense committed at so young an age. In addition, we are aware of one unreported case in which the youth's legal emancipation prior to the offense was used as evidence suggesting maturity (Dependency factor). Similarly, a relatively fortunate upbringing devoid of any abuse or neglect might be used to argue a lack of mitigation. Such cases might arise, although they are likely to be quite rare in light of the usual characteristics of youths convicted of homicide. Even so, defense could use the same set of facts to support an argument for Rehabilitation Potential (e.g., less "recklessness" to treat, and less abusive damage to overcome during rehabilitation).

Therefore, if the above analysis has merit, its conclusion has a counterintuitive appearance. The *Miller* Court ordered that an LWOP sentence requires "taking account" (*Miller v. Alabama*, 2012, p. 2466) of youths' immaturity represented by *Miller*'s developmental factors. Yet our analysis suggests that courts will not be "taking account" of those factors on an individual basis when deciding on "irreparable corruption," the standard *Miller* set for LWOP. In effect, immaturity is taken into account when the individual is identified by age as a member of an immature class

that has been created on the basis of the five factors. Beyond that, the matter hinges on a categorical application of the Rehabilitation Potential factor alone to identify the individual's potential "irreparable corruption." We consider later what developmental science can offer to prove "irreparable corruption" devoid of any possibility for rehabilitation.

Before proceeding further, it is worth noting that attempts to seek LWOP in *Miller* cases may be relatively uncommon. Prosecutors might consider that the language of *Graham*, *Miller*, and *Montgomery*, as noted earlier, sets the bar extremely high for showing "irreparable corruption." In addition, the U.S. Supreme Court (*Apprendi v. New Jersey*, 2000; *Blakely v. Washington*, 2004) has interpreted the Sixth Amendment to require that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury. Moreover, the evidence must convince the jury beyond a reasonable doubt (*U.S. v. Booker*, 2005). Courts may read the *Miller* decision to indicate that life *with* parole is the statutory maximum sentence for juveniles except in the face of additional evidence. A Michigan court recently applied these requirements to LWOP sentencing of juveniles (*People v. Skinner*, 2015; see also Russell, 2015, for an analysis applying Sixth Amendment requirements to juvenile LWOP cases). In summary, the prospects associated with jury trials, proof of categorical "irreparable corruption" beyond a reasonable doubt, and court dockets with large numbers of pending *Miller* cases may combine to discourage efforts to seek LWOP.

## Evidence in Mitigation or Aggravation for Sentences Less Than LWOP

Failure of the state to provide, or attempt to provide, evidence to support LWOP in juvenile homicide cases, whether at sentencing or resentencing, will turn the *Miller* hearing to consideration of alternative available sentences. Generally the alternative sentences will include life with parole with a specified time until one is eligible to be considered for parole. At issue in some cases will be the assignment of consecutive or concurrent sentences for multiple offenses.

After *Miller*, states began fashioning alternative sentences to LWOP for juvenile homicide, and they vary considerably across states. As reviewed by Scott et al. (2016), minimum time to eligibility for consideration for parole in juvenile homicide sentencing can range from 15 or 20 years to minimums so high that they could exceed the statistical life expectancy of most juveniles convicted of homicide. Sentencing options often allow for judicial discretion in lengths of time to eligibility for parole. For example, for first degree murder in juvenile cases, Massachusetts instructs that "the court shall fix a minimum term of not less than 20 years nor more than 30 years," although the minimum must be 25 years if the court finds that the murder was committed "with deliberately premeditated malice aforethought" (Mass. Gen. Laws Ann., ch. 279, § 24). Judicial discretion and relevant mitigation will arise also when judges have the option to frame sentences for multiple convictions so that they are served consecutively or concurrently. Sometimes consecutive sentences will be longer than life. A case of this type recently led a federal appeals court to decide that a 100-year consecutive term of sentences for a juvenile with homicide plus firearms convictions was the unconstitutional equivalent of a life-without-parole sentence (*McKinley v. Butler*, 2016).

*Miller's* five developmental factors are most likely to come into play in shaping mitigating or aggravating arguments regarding these alternative sentencing decisions. Given that adolescents as a class demonstrate a range of degrees of maturation, evidence will focus on whether this particular youth is more mature than most adolescents, or less mature than most, in the variety of ways that the developmental factors in *Miller* recognize legally relevant developmental immaturity. Later we will examine the prospects for providing reliable evidence of this type.

It is not certain, however, that all courts will interpret *Miller* to require developmental mitigation regarding sentences *other* than LWOP. *Miller's* and *Montgomery's* description of the five developmental factors offered the Court's mitigating rationale for forming a class (juveniles) with special protection from LWOP without explicitly requiring their application to other sentences. Some federal or state courts have decided that *Miller's* developmental concerns were intended only to establish a class to set the context for decisions about LWOP (e.g., *James v. United States*, 2013; *People v. Perez*, 2013). Others, however, have ruled that the same developmental concerns raised in *Miller* apply to mitigating arguments regarding alternative life-with-parole sentences (e.g., *People v. Argeta*, 2012; *People v. Thomas*, 2012), and one state recently incorporated this presumption into its judicial guidelines for sentencing juveniles as adults (State of Delaware, 2016). An Iowa case (*State v. Lyle*, 2014) interpreted *Miller* to require that sentencing of juveniles in all cases (not only homicide) must take *Miller*'s factors into account, thus rendering mandatory minimum sentences of any kind a violation of the state's constitution when applied to juveniles. (But see *State v. Anderson*, 2016, for a rejection of *Lyle*'s reasoning.) The rationale for applying *Miller*'s factors to sentences other than LWOP was best articulated in *State v. Null* (2013), interpreting the four U.S. Supreme Court cases as having developed a constitutional principle of immaturity mitigation that is "not crime-specific" (citing *Miller v. Alabama*, 2012, p. 2465) and, therefore, is necessary to consider in all juvenile sentences, especially in light of "nearly life" sentences less than LWOP. We will follow *Null's* interpretation of this issue in our later analysis of prospects for developmental evidence relevant for alternative sentences.

## Special Issues Associated With Re-Sentencing Cases

For both the LWOP context and alternative sentence context, resentencing cases will offer differences in the way developmental evidence will be acquired or applied compared to new sentencing cases. One difference, of course, will be the need to obtain developmental information on individuals as they were at original sentencing, which may be many years earlier. In some cases, defendants will have been given LWOP sentences a few years before the 2012 *Miller* or 2016 *Montgomery* cases. At the other extreme will be cases like that of Henry Montgomery himself; he was 17 years old at the time of his offense in 1963, and his successful appeal now requires a rehearing regarding the LWOP sentence that he received about 50 years earlier. Many of these cases will have been adjudicated during the 1990s, when annual juvenile homicide rates in some years were three times greater than in recent years (Sickmund & Puzzanchera, 2014). Whether a

meaningful developmental picture of an individual's juvenile years can be built retrospectively after many interim years raises numerous questions of reliability and integrity of the information, as we will discuss later.

A more fundamental question in resentencing cases is whether the information offered will be restricted to that which could have been available at the original sentencing, or whether information about the individual's current status can be admitted as well. Courts have not yet offered much guidance on the temporal boundaries of developmental evidence in *Miller* resentencing cases. Some language suggests, but does not specifically state, that the evidence offered in resentencing cases regarding "irreparable corruption" or mitigation for alternative defenses is evidence that was or could have been available at the time of the first sentencing. For example, Justice Scalia writing in *Montgomery* certainly presumed so: "Under *Miller*, bear in mind, the inquiry is whether the inmate was seen to be incorrigible when he was sentenced—not whether he has proven corrigible [at a later time] and so can safely be paroled today" (*Montgomery v. Louisiana*, 2016, J. Scalia, in dissent, slip op., p. 14). As a dissent, though, Justice Scalia's opinion does not establish requirements for lower courts.

The contrasting possibility is represented by a pre-*Montgomery* case, *State v. Ragland* (2013), decided by the Iowa Supreme Court. It upheld the decision of a lower court's *Miller* resentencing that had included very little evidence on the developmental characteristics of the individual at the time of the offense. The hearing had focused primarily on evidence that the individual was now rehabilitated and had people in the community available to assist him if he were to be paroled. (See also *People v. Lozano*, 2016.)

We anticipate that the question of current rehabilitative status as evidence in *Miller* resentencing may raise concern (and appeals) in the future. As noted by Boone (2015), excluding or including such evidence offers problems both ways. If current rehabilitation evidence is included, then individuals who have not rehabilitated themselves may be unfairly disadvantaged because their original LWOP sentence offered them little incentive to make an effort to improve. If current rehabilitation evidence is excluded, however, cases may arise in which resentencing based only on characteristics at the time of the offense supports the original LWOP sentence, yet at the time of resentencing the person has been successfully rehabilitated. (See also *People v. Gutierrez*, 2014, for a discussion of this issue.)

Similar questions might arise regarding the use of *Miller's* developmental factors in mitigation in resentencing hearings regarding alternative sentences. For example, can evidence from a current intellectual or personality evaluation of an adult prisoner be used to reflect on the individual's intellectual or clinical status during the offense in adolescence? (We will discuss later the clinical rationale for using current clinical conditions as an adult to infer conditions earlier in development.) If certain general scientific knowledge (e.g., general neuroscience findings or studies of desistance from crime) became available only in years subsequent to a youth's original sentencing, can that information be used to inform resentencing even though it could not have informed the court at the time the youth was sentenced originally?

In conclusion, much remains unknown regarding how courts will decide on the application of developmental evidence in *Miller* cases, both for new sentencing and for retrospective resentencing cases. As we wait for these matters of evidence to be sorted out, it is important for us to attend to the potential for courts to obtain relevant information regarding the individual's developmental status under various potential circumstances and within the context of various sentencing and resentencing options. What are the prospects for a relevant and reliable description of a youth's developmental characteristics that *Miller* directs the court to consider?

The next three sections examine this question. Consistent with our previous analysis, we consider first the prospects for developmental evidence regarding "irreparable corruption" in support of LWOP, then with regard to evidence for weighing *Miller's* five developmental factors when applied to alternative sentences. Both sections review evidentiary prospects for new sentencing cases only. A final section revisits the prospects for *Miller* resentencing cases.

## Prospects for Evidence to Address "Irreparable Corruption" Supporting LWOP in New Sentencing Cases

In new sentencing cases in which LWOP is sought, our analysis presumes the state's burden to identify the rare youth who, unlike the protected class, cannot be rehabilitated. The state must show that the individual has been, and in great likelihood always will be, unchangeable by any means of punishment, therapeutic intervention, or course of maturation.

*Graham* concluded that "[I]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption" (*Graham v. Florida*, 2010, p. 68). *Miller* cited *Graham* in agreement (*Miller v. Alabama*, 2012, p. 2469), consistent with *amici* in *Miller* (the American Psychological Association, American Psychiatric Association and National Association of Social Workers). *Amici* were even more emphatic: "There is *no reliable way* to determine that a juvenile's offenses are the result of an irredeemably corrupt character" (Brief for the American Psychological Association et al., 2012, p. 25; emphasis added).

Why were *amici* so pessimistic? As explained earlier, the claim of "irreparable corruption" cannot depend merely on the heinousness of the crime (*Roper v. Simmons*, 2005, p. 573; *Montgomery v. Louisiana*, 2016, slip op., p. 21). Some substantial part of the claim must attend to the individual's psychological character. Other commentators (e.g., Larson et al., 2013) have suggested that evidence might focus on an individual's likelihood to reoffend, such as a risk estimate of future recidivism or violent reoffending. What prosecutors must show in *Miller* cases, however, is that there is no prospect for rehabilitation. Even a relatively high likelihood of reoffending based empirically on validated methods does not tell us whether an individual's behavior can be modified, either by intervention or maturation.

The most likely psychological evidence in cases in which "irreparable corruption" is alleged is a diagnosis of psychopathy. *Psychopathy* is a personality construct consisting of traits (e.g., "callous-unemotional," "antisocial lifestyle") that are known to be associated with both disregard for the illegality of one's behavior and, like some other personality disorders, resistant to change by current psychological interventions (Frick & White, 2008; Vincent, Kimonis, & Clark, 2016). Measures of psychopathy and of traits within the concept exist for both adults (e.g., Hare, 2003) and

adolescents (e.g., Forth, Koson, & Hare, 2003; Frick & Hare, 2001).

A legal/forensic concept labeled "sophistication and maturity" has a history of use in determining transfer of juveniles to criminal court (Larson & Grisso, 2016), and it bears some similarity to the psychological concept of psychopathy. As explained by Salekin, McDougall, and Harrison (2016), "sophistication and maturity" as a concept refers to the juvenile who is (a) "mature" in the psychological developmental sense (e.g., advanced in abilities to consider consequences, manage self-control, and make careful independent judgments) yet (b) "criminally sophisticated" in the sense of using his maturity in ways that that are antisocial, consistent with traits of psychopathy.

Measures of psychopathy, however, are likely to be of little use for making "irreparable corruption" or "sophistication-maturity" judgments in most juvenile homicide cases. First, there is no evidence that measures of psychopathic traits during adolescence can estimate the likelihood that they constitute enduring and unchangeable traits when applied to individual cases (for reviews, see DeMatteo, Edens, & Hart, 2010; Vincent, Kimonis, & Clark, 2016). There is evidence that psychopathy measures during adolescence have unacceptable false positive rates when used to make individual predictions about future psychopathy in adulthood (Cauffman, Skeem, Dmitrieva, & Cavanaugh, 2016; Lynam, Caspi, Moffit, Loeber, & Stouthamer-Loeber, 2007). A recent comprehensive review of research on the use of psychopathy measures in adolescence concluded that their indicators "have not established a sufficiently high level of stability . . . to warrant testimony about whether a youth has psychopathic personality disorder" (Vincent, Kimonis, & Clark, 2016, p. 219).

Some juvenile homicide offenders, however, are no longer adolescents when they are assessed for sentencing hearings. Many homicide cases require several years for their adjudication, so that the individual who offended during adolescence might be well over age 18 when assessed. In such cases, evidence for the stability of scores on psychopathy measures is somewhat better, as reviewed by DeMatteo, Edens, and Hart (2010). Yet there are two complications in the use of psychopathy scores in such cases. First, one can question the relevance of a psychopathy score two or three years after the offense, in light of *Miller*'s language that limited LWOP to the "rare juvenile offender *whose crime reflects* irreparable corruption" (*Miller v. Alabama*, 2012, p. 2469; emphasis added). According to one perspective, the current psychopathy measure several years after the crime does not indicate that the youth was psychopathic at the time of the crime. An alternative perspective, however, would assert that the current psychopathy score (e.g., at age 19) strongly suggests that the youth had psychopathic characteristics (e.g., callous-unemotional traits) at the time of the crime (e.g., age 16) that were not merely transient adolescent developmental characteristics. The second complication, a more salient one in our opinion, was raised in the DeMatteo et al. (2010) review noted earlier, cautioning us that that current research questions the validity of psychopathy tools when used with racial and ethnic minorities. This is especially relevant for *Miller* sentencing cases, because (as described later) racial and ethnic minorities comprise the great majority of juvenile homicide offenders.

Second, even if callous-unemotional and antisocial traits are reliably identified, they need not be considered signs of intractability. Some recent studies (reviewed by Vincent, Kimonis, & Clark, 2016) have identified gains in prosocial behaviors with interventions tailored specifically for youth with psychopathic-like traits. The reviewers concluded: "There is no evidence that youths with psychopathic features are incapable of benefitting from treatment or that treatment is contraindicated" (p. 220).

One of the more promising, well-researched instruments for assessing rehabilitation potential among juveniles is the Risk-Sophistication-Treatment Inventory (Salekin, 2004). Its Amenability to Treatment scale has been validated for various uses, including its ability to predict which youth are transferred to criminal court because of courts' judgments about lesser amenability to treatment. As noted later, the instrument has potential for use in *Miller* cases when alternative sentences are considered. But a current review (Salekin et al., 2016) offers no research indicating that its scores would predict categorical failure to respond to rehabilitation efforts.

Thus, based on the most recent psychological efforts to identify adolescents with intractable criminogenic traits ("irreparable corruption"), developmental and clinical science offers little to assist the state in identifying such youths and a great deal that defense counsel can use to challenge such efforts.

## Prospects for Evidence Regarding *Miller's* Five Developmental Factors in New Sentencing Cases

For reasons explained earlier in our analysis, *Miller's* five developmental factors are likely to play a key role when *Miller* sentencing cases turn to the alternative sentences less than LWOP. *Miller* found all juveniles less culpable due to immaturity, yet it recognized variability within the class in degrees of maturity, requiring individualized judgments regarding culpability and sentencing. Here we consider the prospects for obtaining and using data to describe individual youths on each of the five *Miller* factors. Our review does not offer a detailed examination of specific evaluation methods or research on them, because we focus primarily on exploring the types of data that may be relevant, general sources of those data, and cautions about their limitations.

Before proceeding, four basic points require mention. First, although we focus here on evidence about a specific individual's status on the *Miller* factors, many *Miller* cases will call also for more general testimony about developmental science itself. Such testimony can offer a framework within which to understand developmental evidence about the specific youth.

Second, *Miller's* five developmental factors are not the only way to describe adolescents' immaturity and they do not describe all the ways in which adolescents may be immature. As reviewed by Salekin et al. (2016), developmental psychology has produced several ways to conceptualize developmental maturity, and they do not always sit comfortably alongside the law's definitions (Grisso, Tomkins, & Casey, 1988; Salekin, Yff, Neuman, Leistico, & Zalot, 2002). Moreover, as reviewed in *People v. Gutierrez* (2014), a few states have begun to fashion their own lists and categories of developmental factors, some of which depart from *Miller's* specific definitions. Whatever evidence is offered, though, we presume it must at least allow consideration of the concerns represented in *Miller's* five factors.

Third, *maturity* and *immaturity* are relative terms, representing degrees on dimensions and meaningful only in reference to a

comparison group. For example, on a specific developmental factor, a particular 14-year-old might be "more mature" compared to peers of her age but relatively "immature" compared to the average for juveniles 14–18. Sometimes a youth might be compared to the general population of adolescents and at other times to a population of juveniles charged with serious crimes. All points of comparison might be relevant in various cases for various purposes. Courts and experts might avoid misunderstanding by carefully identifying their point of reference when describing a youth as relatively "mature" or "immature" on a developmental factor.

Finally, when examining sources of developmental evidence, we must keep in mind that racial minority youth comprise about 70–80% of juvenile homicide offenders. Sickmund and Puzzanchera (2014), for example, report that among juvenile homicide offenders in 2010, about 60% were black and 40% were white (including Hispanic and white non-Hispanic youth). As the following analysis notes, many of our validated assessment tools for developmental and clinical features of adolescents have been challenged regarding their validity when applied to racial and ethnic minority youth.

## Decisional Factor

*Miller's* first immaturity factor focused on the propensity for juveniles' decisions and actions to reflect immature "recklessness, impulsivity and heedless risk-taking" (*Miller v. Alabama*, 2012, p. 2458), as well as lesser autonomy in decision making—that is, greater susceptibility to influence by others, especially peers, when making decisions. A significant body of behavioral research as well as neuroscientific studies of brain development provides a solid basis for establishing youths' greater tendency, as a class, to risk-taking and impulsive reactions (for reviews of this evidence, see Scott & Steinberg, 2008; Steinberg, 2004, 2008; Steinberg & Scott, 2003).

The point of the Decisional factor is to recognize characteristics of adolescence that make their decisional judgment developmentally different from that of adults. Many psychological functions are relevant for assessing decisional judgment from a developmental perspective: (a) developmental maturation of cognitive and intellectual capacities (e.g., capacities to think abstractly, form goals, reason about contingencies, working memory), (b) emotional characteristics and abilities for self-control (e.g., delaying gratification, regulating emotions, dealing with frustration), and (c) development of autonomous thinking (e.g., independence vs. influence by others, confidence, stability of self-identity and personal values) (Salekin et al., 2016).

Neuroscience research relied on MRI studies to document age-normed development of brain areas associated with decisional self-regulation. Although sufficient to offer reliable normative data, MRI and fMRI scans currently are not able to identify reliably an individual youth's status in terms of brain maturity (Luna & Wright, 2016; Steinberg, 2013). Evidence regarding individuals' developmental status on the Decisional factor will require behavioral measures, of which there are four types to consider.

One class of tools measures performance in laboratory tasks (e.g., Go/No-Go Association Task, Nosek & Banaji, 2001; Stroop Color and Word Test, Golden, 1978; Tower of London, Culbertson & Zillmer, 2005; Shallice, 1982) studying impulsive responding and deficiencies in self-regulation associated with adolescents' immature impulsivity and heedless risk-taking. These measures have less often been used in forensic contexts, when stresses associated with one's legal circumstances may have uncertain affective and motivational effects on performance on measures such as these. In addition, age-graded norms are not always available for these tools. There remains uncertainty also regarding their interpretation when used with forensic populations with racial and cultural proportions that often are not represented in development of the methods' norms or studies of their reliability or validity.

A second class of tools comprises "self-report" paper-and-pencil or interview measures asking youths to describe their behaviors, emotions or preferences that have conceptual relevance for maturity of decisional abilities and self-regulation. Many of these tools have been used in developmental research on age-normative decisional behavior to measure, for example, a person's consideration of short- versus long-range consequences (Consideration of Future Consequences Scale, Strathman, Gleicher, Boninger, & Edwards, 1994; Future Outlook Inventory, Cauffman & Woolard, 1999) and resistance to peer influence in decision-making (Resistance to Peer Influence; Steinberg & Monahan, 2007). A new self-report version of the Risk-Sophistication-Treatment Inventory (RSTI-Self Report: Salekin & Iselin, 2010), currently in development, includes a developmental maturity scale that assesses autonomy, cognitive skills, and emotion regulation skills in decision making. A review of the available tools of this type (Salekin et al., 2016) notes that many of them have been used primarily in research studies with either delinquent or nondelinquent samples. The reviewers urge caution regarding their use in forensic clinical cases because of questions about adequate normative data and reliability, as well as validity for comparing individual youth to relevant age, race and gender samples. The Developmental Maturity scale within the full RSTI (Salekin, 2004), which is interview-based rather than self-report, may offer a promising option given its focus on delinquent samples.

A third class of tools relevant for the Decisional factor comprises validated measures of intellectual, cognitive and achievement abilities, both generally and with regard to specific learning disabilities (Sattler, 2008). Well-validated intelligence tests, for example, include specific subscales to assess the development of capacities relevant for decisional processes, such as abstract reasoning (important for anticipating potential consequences before taking action). The field offers guidance to clinicians for interpreting these tools with minority adolescents (e.g., Valencia & Suzuki, 2000).

Finally, clinical psychology offers a significant inventory of tools for use with adolescents that identify various mental disorders and their symptoms, as well as Developmental Disability (Mash & Barkley, 2007). These are relevant in developmental analyses of adolescents' decision making because mental disorders can further reduce already immature decisional functioning. In addition, if disorders are persistent and chronic, they can delay the development of abilities relevant for the Decisional factor (Grisso, 2006; Mash & Barkley, 2014; Nagel, Guarnera, & Reppucci, 2016). The primary caution associated with the use of measures of disorders and disabilities in juvenile forensic contexts is their tendency to have been validated primarily with youth in clinical settings (Archer & Baum, 2016). Sometimes there is insufficient research to determine possible differences in their validity and

meaning in forensic settings and when applied with populations of youth with racial and ethnic minority proportions that may be different from those on which the tools were validated.

This brief survey suggests the great diversity of specific abilities, and of the tools to measure them, potentially related to "recklessness, impulsivity and heedless risk-taking" (*Miller v. Alabama*, 2012, p. 2458) in immature adolescent decision making. Many have promise for *Miller* cases, but we have noted limitations within each class of tools, offering much room for research to improve their use. Even with further research, however, experts will face a conceptual challenge precisely because of the diversity of both relevant functions and tools. There is a need for a protocol, framework, or model designed to target abilities and select assessment methods that fit conceptually the specific demands of *Miller's* Decisional factor. Currently there is no model for guiding the collection of evidence specifically for this purpose, but strategies for constructing such forensic assessment models are available (Grisso, 2003).

Structured psychological measures are not the only source of evidence regarding youths' decisional capacities or their ability to employ them. Indeed, when used alone, those measures assess performance in a context (the formal evaluation milieu) quite different from the streets, homes, schools and social peer groups in which adolescents apply their abilities. Structured tools often may be valid for assessing capacity (the extent to which a youth can achieve a level of performance on some aspect of decision making under optimal conditions). Yet they might not reflect the youth's ability to access that level of performance in real-world circumstances (e.g., due to stress, peer pressure, distractions, and lack of structure to alert them to the need to "stop and think"). Therefore, information regarding everyday decisional performance is likely to require observations from other sources. Among these are interviews with the defendant, parents, teachers or peers, as well as review of school, clinic, and other social service records that might help to identify the youth's degree of decisional maturity in everyday life in relation to peers.

As important as interviews, collateral informants and records may be, their use offers significant challenges as reliable evidence. As in many other forensic contexts, defendants and families in *Miller* cases sometimes have personal motives that influence the information they provide. In addition, the legal context of divided interests (juvenile and state) encourages selective identification and interpretation of evidence. Forensic developmental and clinical experts, of course, are not immune to such bias (Murrie, Boccaccini, Zapf, Warren, & Henderson, 2008; Neal & Brodsky, 2016; Neal & Grisso, 2014). Using both structured tools and evidence from interviews and records offers a multimethod approach that can improve accuracy by requiring evidence for any inference from more than one source of data, thus reducing error associated with any single source (Heilbrun, 2001).

## Dependency Factor

*Miller* noted that "Children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings" (*Miller v. Alabama*, 2012, p. 2458, in part citing *Roper v. Simmons*, 2005). In addition, courts must "take into account the family and home environment that surrounds him—and from which he cannot extricate himself—no matter how brutal or dysfunctional" (*Miller v. Alabama*, 2012, p. 2458). The Court's reference to the appellant Miller provides an example of information relevant for this factor: "Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten" (*Miller v. Alabama*, 2012, p. 2469).

We have found no appellate cases since *Miller* that provide guidance for identifying the structure of the Dependency factor when applied to individual cases. A straightforward attempt to make sense of it could find two dimensions.

First, the Dependency factor could be interpreted to refer to *adverse conditions of childhood and adolescence* over which youth have little or no control because of developmental lack of autonomy (dependency). By inference, those adverse conditions might create a burden contributing to the youth's likelihood of becoming criminally involved, warranting lesser culpability for offending because the adverse influences could not personally be avoided. If interpreted in this way, inquiry would focus primarily on the degree to which the youth's family and social environment exposed the youth to damaging, criminogenic conditions (e.g., the trauma of abuse, and conditions of neglect or other environmental circumstances).

The second possible meaning is quite different. If "limited control" and "lack of ability to extricate themselves" are taken as conditional terms that can vary across adolescents, then *degree of autonomy* becomes a potential dimension within the Dependency factor. If that is accepted, then the Dependency factor turns in part on the youth's capacity for autonomy, control, or ability to "self-extricate" from the adverse conditions. Certainly that personal control will be meager in preadolescent years by the mere nature of children's inability to fend for themselves or seek and find ways to remove themselves from abusive conditions. Yet *Miller's* reference to "lack[ing] the ability to extricate themselves from horrific, crime-producing settings" could be taken to refer not only to a child's inability to avoid the familial abuse that produced propensity to crime, but also to the adolescent's ability (or inability) to resist specific crime settings as they unfolded. Considered in the latter way, the Dependency question would call for evidence about the youth's maturity or immaturity for autonomous choice in decision making (overlapping in this sense with the autonomy component of the Decisional factor).

Without legal authority to clarify these two interpretations of the Dependency factor, we can only speculate regarding evidence relevant for its consideration in *Miller* cases. The first interpretation, "adverse conditions," would likely hinge primarily on historical records and interview evidence of familial abuse/neglect and criminal influences, as well as neighborhood and other environmental circumstances of the youth's childhood that might have had a traumatizing effect. Developmental psychology has accumulated foundational research on the prevalence of trauma among delinquent adolescents (e.g., Abram et al., 2004; Dierkhising et al., 2013), as well as the relation of delinquency to traumas arising in early childhood and adolescence (for a review, see Zelechoski, 2016). Evidence for the effects of those traumatizing conditions might be acquired with methods to evaluate whether such conditions have had lasting emotional consequences (e.g., clinical mea-

sures of trauma-related anxiety disorders; see, e.g., Strand, Sarmiento, & Pasquale, 2005; Wevodau, 2016). Many of these methods have been used successfully with delinquent populations.

The second interpretation, "degree of personal autonomy," could not rest merely on evidence about the youth's relative independence from family, because adolescents living outside the home may remain quite dependent on others (e.g., criminal adults, delinquent peers) in ways that influence their offending (Tatar, Cavanagh, & Cauffman, 2016). Evidence of autonomy "to extricate oneself from crime-producing settings" might require a type of information considered earlier regarding the Decisional factor, referring to degree of capacity for independent judgment versus influence by others, self-confidence, and stability of self-identity and personal values. That information might be derived from structured instruments (described in the Decisional Factor section) as well as records and observations of the quality of a youth's independent judgment, compared to other juveniles, in past situations. As noted in the Decisional factor discussion, the Dependency factor also is in need of a model for systematic collection of relevant data.

## Offense Context Factor

This factor calls for consideration of "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him" (*Miller v. Alabama*, 2012, p. 2468). The Court seemed to anticipate using data on the youth's Decisional and Dependency status to analyze the offense circumstances, examining the nature of the youth's involvement as this might or might not offer mitigation. How planned or impulsive was the youth's participation? To what extent was the youth's decision making prior to and during the offense related to past abuses or present peer influences? The quality of developmental evidence for this analysis requires two considerations: (a) the data that are obtained to inform inferences about the "circumstances of the homicide" and (b) the inferential process itself.

Regarding data, we refer to concrete evidence on which inferences will be made about how the offense unfolded and about the emotions, thoughts and intentions that were at play. In *Miller*, for example, the Court reflected on Miller's coappellant Jackson, noting that he "learned on the way to the video store that his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point" (*Miller v. Alabama*, 2012, p. 2468). Similarly, in a recent case of which we are aware, a juvenile was a younger "employee" of an older "boss." The circumstances of the crime, gleaned from police records, were consistent with an interpretation that the more dependent character of the youth caused him to be easily influenced by the older peer, offering an argument for his lesser culpability. In such analyses, though, how will attorneys and experts obtain the factual evidence to infer what a youth "knew" or "learned" as the offense unfolded, his "calculation of the risk" during the process, his more "dependent" role in relation to cohorts, and the evidence of his degree of "willingness" to alter the course of the event?

Any factual evidence (data) for making inferences about how the offense event may have unfolded is likely to be of two kinds: (a) the abilities, characteristics, and history of the youth as assessed for the Decisional and Dependency factor, and (b) what is said by observers (including those who observed the youth before, during or after the offense), officers responding to the offense and questioning the youth subsequently, the defendant's cohorts if there were any, and the defendant. The quality of the evidence from any of these sources will depend not only on the informants, but substantially on the efforts and expertise of those who elicit it.

Although much could be said about the quality of evidence from all these sources, developmental considerations about quality of the data are relevant especially with regard to what the defendant and any cohorts (if they are juveniles) can provide. This is because the same age-related factors of immaturity with which *Miller* was concerned (reviewed in relation to the Decisional and Dependency factors) may influence the quality of evidence obtained from the defendant and juvenile cohorts regarding the emotions, thoughts, and intentions that were at play in the offense. For example, if questioning of youths about planning of the offense is performed without care to developmental concerns, questioning might elicit a clear "plan" from the defendant or cohorts that could be construed as "intention," yet without any consideration of whether their planning included an awareness not only of short-term but also long-term potential consequences (LaVigne & Rybroek, 2013). Similarly, a youth's immaturity might impair her ability to recognize the effects of peer pressures during the event, or her immature wish to be perceived as self-assured might make her reluctant to acknowledge peer influences. Thus the quality of evidence obtained from defendants and their adolescent peers may suffer because of the very developmental factors that examiners seek to assess.

Regarding the inferential process, clinical forensic experts have engaged in offense analyses of this type in various other forensic circumstances. They engage in clinical analyses of the role of defendants' mental disorders in insanity cases (Packer, 2009; Rogers, 1984) and adolescents' roles in offenses that might offer mitigation or aggravation regarding their transfer to criminal court (Grisso, 2013). As Packer (2009) has noted, both structured and unstructured methods for making causal inferences about offense circumstances rely on the fact that "logic employed in scientific reasoning can be applied to the data" (p. 127). Yet scientific reasoning often allows for competing views of causation that can lead to disparate conclusions. Moreover, recent research has found less than satisfactory agreement between forensic examiners when drawing conclusions about the role of mental disorders in offenses in insanity cases (Gowensmith, Murrie, & Boccaccini, 2013, finding that independent insanity opinions of triads of examiners had three-way agreement in 55% of cases).

This is not to say that forensic developmental and clinical experts have nothing to offer when assisting courts to understand the relevance of Decisional and Dependency factors in the context of the offense. For example, research supports a theoretical role for adolescents' trauma symptoms (related to the Dependency factor) as mediators that result in deficits in self-regulation during decision-making in emotionally charged circumstances (related to the Decisional factor; e.g., Ford, 2005; Ford & Blaustein, 2013; Maschi, Bradley, & Morgen, 2008). Other examples include research that can guide offense analyses regarding the effects of peers on behavior (Chein et al., 2011; Steinberg & Monahan, 2007) or the effects of specific symptoms of disorders (e.g., dissociative symptoms related to posttraumatic stress disorder;

American Psychiatric Association, 2013). Experts' use of such empirically based concepts in offense analyses may or may not make their conclusions more correct. But they can assist courts to identify science-based developmental and clinical characteristics (not within the usual grasp of nonexperts) that are relevant for making inferences about the circumstances of the offense (Bonnie & Slobogin, 1980).

## Rehabilitation Potential Factor

The fourth factor refers to the potential for a juvenile's rehabilitation. "A child's character," the Court said, citing *Graham*, "is not as well formed as an adult's; his traits are less fixed" (*Miller v. Alabama*, 2012, p. 2458) and "Life without parole forswears altogether the rehabilitative ideal [and is] at odds with a child's capacity for change" (*Miller v. Alabama*, 2012, p. 2465). The Court referred to evidence that most juveniles with delinquency records do not continue their offending into adulthood, but rather desist as they mature beyond adolescence (Moffitt, 1993; see also Monahan, Steinberg, Cauffman, & Mulvey, 2009; Mulvey et al., 2010). When applied as a variable to describe a specific youth, this factor suggests the need for evidence to compare a youth to other youths on a *continuum* of rehabilitation potential. This is different from the question of "irreparable corruption" supporting LWOP, which requires a categorical conclusion that a youth cannot be rehabilitated.

Developmental and clinical examiners in juvenile forensic cases have some well-considered guidelines and strategies for collecting theoretically relevant data to make judgments about degree of "amenability to treatment" (e.g., Grisso, 2013; Kinscherff, 2016). These guidelines may be helpful when bringing together case information derived from a range of sources (e.g., interviews, records, others' observations). Their empirical reliability and validity, however, are largely unknown.

Recent years have seen substantial advances in the use of structured, validated tools to assess juveniles' risk of recidivism (for reviews, see DeMatteo, Wobransky, & LaDuke, 2016; Edens, Campbell, & Weir, 2007). Indices of risk of recidivism, however, are likely to be of little practical relevance in *Miller* cases. The available tools typically have been validated only for recidivism while in the community and for projected time periods of about 3 or 4 years (DeMatteo, Edens, & Hart, 2010). In contrast, alternative sentences in juvenile homicide cases are likely to involve incarceration for at least a decade (Scott et al., 2016). Moreover, as noted earlier, an estimate of risk of recidivism offers little direct evidence regarding rehabilitation potential.

A structured assessment tool noted earlier, the Risk-Sophistication-Treatment Inventory (Salekin, 2004), has a Treatment Amenability scale with sufficient validation to assist in judgments about whether a youth is more or less likely, compared to other youths, to respond to rehabilitation efforts (Salekin et al., 2016). In addition, some risk tools for adolescents do more than merely estimate risk of recidivism and may have considerable relevance for assessing rehabilitation potential. For example, the Youth Level of Services/Case Management Inventory (YLS/CMI; Hoge & Andrews, 2010) assesses risk of recidivism but also identifies specific needs associated with the youth's criminal behavior, facilitating a description of the types of intervention that may be required and the challenges posed by the extent of need. The YLS/CMI also has strength-based indicators of the youth's likely "responsivity" to rehabilitation efforts, which can be translated to offer further information on prospects for rehabilitation. (See also the Structured Assessment for Violence Risk in Youth, or SAVRY; Borum et al., 2010). Many homicide cases require several years to adjudicate, so that the individual who offended during adolescence might be over age 18 by the time of assessment for the sentencing hearing. Depending in part on how much above age 18 the individual is, experts might use the above tools or various adult versions with needs, responsivity and rehabilitation potential features; for example, Level of Services/Case Management Inventory (LS/CMI; Andrews, Bonta, & Wormith, 2004) and Inventory of Offender Risks, Needs, and Strengths (IORNS; Miller, 2006).

Clinical conditions of adolescents may also be relevant for the Rehabilitation Potential factor. Researchers are uncertain about the role mental disorders play in delinquency rehabilitation (e.g., Skeem et al., 2014). Mental disorder appears not to provide unique predictive value for estimating risk of recidivism among adolescents (Schubert, Mulvey, & Glasheen, 2011). Yet when an adolescent has a serious and chronic mental disorder, its description would seem to be relevant for evaluating rehabilitation prospects, because some symptoms of mental disorders may impair broader rehabilitation efforts. Thus the likelihood that a youth's symptoms would respond to treatment may be an important part of the rehabilitation potential analysis. In clinical (nonforensic) practice, experts routinely prescribe specific psychosocial or pharmacological treatments and consider their probable lengths of time to succeed with a reasonable degree of medical certainty. But child pharmacology experts recognize that this level of certainty is not "certain," often requiring experimentation and titration in the process of adjusting their clinical judgment (American Psychological Association, 2006). Courts seeking Rehabilitation Potential evidence sometimes may require greater confidence, in light of the gravity of their sentencing decisions in *Miller* cases.

Some youths with previous offenses will have records of services or programs that were provided to them. In *Miller* cases, records of earlier efforts to reform or treat the individual (together with the individual's current homicide) may be offered as evidence for a poor likelihood to respond to rehabilitation in the future. Yet sometimes a lack of past rehabilitation success may be less a matter of the youth's amenability to rehabilitation than parents' failure to have complied with courts' rehabilitation orders (Dependency factor) or the questionable quality of services or programs that were provided. Youths' chances of rehabilitation are less if the programs or services they experience fail to match the specific criminogenic factors (in type or number) that contribute to the youth's delinquency (e.g., Singh et al., 2014; Vieira et al., 2009). Inappropriate program assignments, as well as variable quality of the programs themselves at the time the youth encountered them (Greenwood, 2006; Grisso, 2013), offer reasons for rehabilitation failures or successes apart from youths' degree of amenability.

## Legal Competency Factor

*Miller* recognized that "[Mandatory sentencing] ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including a plea agreement) or his incapacity to assist his own attorneys" (*Miller v.*

*Alabama*, 2012, p. 2468, citing *Graham*). The Court's concern was with immature characteristics of adolescence that create a disadvantage for adolescents during the adjudicative process, potentially placing them in the position of eligibility for a lengthy sentence they might not otherwise have faced.

The Legal Competency factor offers a different type of mitigation than the other *Miller* factors. It pertains not to the effects of immaturity on juveniles' offending or rehabilitation, but to potential developmentally related errors in their legal processing. There is much research demonstrating adolescents' lesser capacities on average compared to adults in the context of police interrogations (e.g., Goldstein et al., 2003; Grisso, 1981; Kassin et al., 2010), pleading and attorney collaboration (e.g., Peterson-Badali & Abramovitch, 1993; Richardson, Gudjonsson, & Kelly, 1995; Viljoen, Klaver, & Roesch, 2005), and understanding and decision making in the trial process (e.g., Abramovitch, Higgins-Bliss, & Bliss, 1993; Abramovitch, Peterson-Badali, & Rohan, 1995; Grisso et al., 2003). The relevant research regarding juveniles' competencies of these types has been reviewed by Kruh and Grisso (2009) for juveniles' competence to stand trial and Goldstein et al. (2016) for waiver of *Miranda* rights. The studies reviewed in these sources offer substantial evidence for the potential effects of immaturity on youths' capacities, compared to adults' capacities, creating a greater risk of error during legal processing. *Miller's* concerns are warranted.

It is unclear, however, what role this factor will play when applied to individual cases to weigh mitigation in *Miller* sentencing. Would a lesser sentence be warranted, given evidence that a youth had disabilities that *might* have impaired her capacity to manage police interrogation or to make a reasoned decision about a plea or plea agreement? If so, that would require identifying the risk of prior errors in legal processing, based on evidence of the youth's deficient abilities and earlier courts' lack of attention to them. If this were applied as mitigation, it would seem to be a sort of judicial correction for a risk of earlier due process oversights.

We are uncertain whether there is legal precedent for using "potential legal incompetence" as evidence for mitigation in a sentencing hearing. We note only that if assessments of youths' abilities related to the various legal competencies are needed in *Miller* cases, experts have resources for framing legal competency evaluations of juveniles and selecting appropriate tools (for reviews, see Goldstein et al., 2016; Grisso, 2013; Kruh & Grisso, 2009; Warren, Jackson, & Coburn, 2016).

## Prospects for Developmental Evidence in *Miller* Re-Sentencing Cases

As explained earlier, courts have yet to sort out whether evidence in *Miller* resentencing will be constrained to information that was (or could have been) available at the time of the original sentencing or may include information about the current status of the individual. Those ambiguities allow only tentative observations about developmental evidence in *Miller* resentencing hearings. Here we review the implications for offering developmental evidence in resentencing cases, first to address "irreparable corruption" and eligibility for LWOP, then regarding alternative sentences.

### Evidence for "Irreparable Corruption" to Support LWOP at Re-Sentencing

Some states may decide (as did Iowa in *State v. Ragland*, 2013) that current evidence of the degree of rehabilitation of the prisoner will be admissible in resentencing cases. Writing in the *Minnesota Law Review* pre-*Montgomery*, Boone (2015) proposed a "hybrid" model for *Miller* resentencing cases in such circumstances. That model would combine evidence of current rehabilitation typical for parole hearings along with considerations of mitigating characteristics of youthfulness at the time of the offense.

Were this the objective at *Miller* resentencing, and if expert evidence is needed, it could include whatever information experts provide when assisting in adult parole hearings. Of relevance would be assessments of recent performance in prison, evaluation for psychopathic traits, and assessments of risk of recidivism and prospects for case management during parole (perhaps using risk, needs and responsivity tools described earlier). The state would have difficulty simply using a prisoner's misbehavior during incarceration to suggest intractable psychopathic traits (or "irreparable corruption"). Research suggests that prison misbehavior derives from many different causes, offering little value in identifying psychopathy (DeMatteo, Edens, & Hart, 2010). If an expert's structured evaluation of an adult nonrehabilitated prisoner arrives at a diagnosis of psychopathy (e.g., with the Psychopathy Checklist—Revised; Hare, 2003), prosecution could argue that the original LWOP sentence was not mistakenly presumptive about "irreparable corruption." This argument, however, would not be immune to the counterclaim that even prisoners diagnosed with psychopathy might be influenced by the fact that their original LWOP sentence offered them little incentive to make an effort to improve.

Note that most of the matters of evidence we have just described require no developmental expertise. The search is for evidence, based on the adult prisoner's current rehabilitation status, to determine whether the individual was correctly identified as "irreparably corrupt" at the time of resentencing. A developmental perspective might become relevant, however, in cases in which a present *lack* of rehabilitation is used to reflect on "irreparable corruption." Juveniles serving LWOP often are disadvantaged in prison by lack of services to meet their developmental needs and by victimization because of their immaturity (Kaba et al., 2014; Lambie & Randell, 2013). Developmental expertise, then, might be helpful to examine the nonrehabilitated individual's prison history framed within this context. Expert opinion regarding the effects on a specific prisoner, however, often would be speculative unless supported by records of the prisoner's mental status throughout the period of incarceration.

Alternatively, some courts eventually might require *Miller* resentencing to use only information that was, or could have been, available at the time of original sentencing. The prospects for obtaining evidence of "irreparable corruption" in such circumstances would be no better than we described earlier in our analysis of new sentencing cases, reflecting on the difficulty in showing categorical intractability. Indeed, the prospects would be even more discouraging because of (a) problems associated with reconstructing a youth's adolescent status years later and (b) the obvious inability to assess the "juvenile in vivo," as we address in the next discussion.

## Developmental Evidence for Alternative-Sentence Mitigation at Re-Sentencing

Applying the five *Miller* factors in mitigation regarding alternative (non-LWOP) sentences in resentencing cases raises many of the prospects and ambiguities already reviewed for new sentencing cases. Here we focus only on additional questions associated with the retrospective nature of resentencing cases.

If the individual's current status may be used as evidence for resentencing, the individual's current clinical (mental health) status sometimes might provide evidence relevant for inferring clinical status during adolescence (or at the time of the offense). When diagnosed in adulthood, a number of clinical conditions have known etiologies and typical courses that strongly support or suggest their probable existence during the individual's childhood or adolescence. Among these, for example, are the neurodevelopmental disorders (e.g., intellectual disabilities, attention-deficit/hyperactivity disorder, specific learning disorder), some schizophrenia spectrum disorders, and some personality disorders (American Psychiatric Association, 2013). Their potential relevance is of two types. First, they suggest that as an adolescent, the individual might have had a disorder with symptoms that could have impaired decisional- or dependency-related abilities, generally or especially in stressful situations. Second, the earlier presence of many of these disorders can be argued to have delayed the individual's development during adolescence, increasing her immaturity in relation to adolescents in general.

Whether or not evidence from current evaluation of the prisoner is allowed in resentencing, the chief difficulty in applying *Miller's* five developmental factors will be the obvious unavailability of the "juvenile in vivo" for direct observation of the developmental characteristics in question. Largely the evidence must rely on a reconstruction of those abilities from records, documents and interviews.

Records and documents in some cases will offer rich information from health, mental health and education sources. Some records might provide teachers' descriptions of the youth's school behavior and performance, results of psychological testing and clinical evaluations, and descriptions of treatment efforts and outcomes. Police and probation records sometimes yield substantial information, including offense descriptions during original investigations. Documented evidence can be supplemented by information from interviews with legal professionals, relatives and acquaintances regarding their recollections of the individual as an adolescent, as well as the prisoner's own reflections on past events.

The difficulties in relying on these sources of retrospective information will be (a) their degree of availability in cases that occurred many years ago, (b) their questionable reliability, and (c) their susceptibility to interest-based bias in their interpretation. These difficulties are obvious and need little explanation. Availability will vary considerably, depending on the time since the original sentencing, the care with which documents have been preserved, and the resources expended in the search for them. Reliability will depend on the quality of the educational or clinical documents at the time they were produced, as well as the expertise of individuals who produced them. Because interpretations will not be guided by structured and standardized data collection methods, they will be more susceptible to all sources of interest-based bias created by diverse allegiances as well as heuristic error (Neal & Brodsky, 2016; Neal & Grisso, 2014).

Whether developmental experts can interpret retrospective documents and interviews any better or more reliably than lay persons can be questioned. The chief reason that developmental or clinical experts have something to offer, however, is their special knowledge of adolescent development and psychopathology. This allows them to process the retrospective information within the framework of developmental science and clinical expertise, offering empirically guided insights that would not necessarily be grasped by others without this special knowledge. Whether this offers a benefit to the courts in *Miller* resentencing cases, however, will depend on experts' adherence to their professional obligations. They must go no further in their expression of confidence in their interpretations than the reliability of their data and the scientific foundation of their opinion can support (American Psychological Association, 2013).

## Conclusions

Developmental science has successfully provided the research evidence that the law needed to make its normative decisions about juveniles' lesser maturity and culpability. We now face the task of creating models and methods to provide relevant developmental and clinical data about individuals in cases involving *Miller* sentencing and resentencing.

The present analysis has identified many current ambiguities in the law's future application of developmental evidence in *Miller* cases. We are entering a post-*Miller/Montgomery* period when we are likely to see much legislative and appellate activity to clarify the types and relevance of developmental evidence required in juvenile homicide sentencing and resentencing. As appellate cases evolve, we must give them close scrutiny from a developmental science perspective, offering scholarly analyses as guidance for the courts' efforts to identify the proper use of developmental evidence. In addition, some researchers may find opportunities to study individuals released from LWOP by way of *Miller/Montgomery* cases, offering data that might generate hypotheses about rehabilitation potential under adverse prison conditions.

As we watch for legal clarification, there is much we can do to increase our ability to provide relevant developmental evidence in *Miller/Montgomery* cases. Perhaps of greatest importance is the creation of psychological measures of developmental abilities related to *Miller*'s Decisional and Dependency factors. For example, the research tools that produced the evidence for adolescents' decisional immaturity offer prototypes that could be refined, validated and normed for clinical forensic use. In addition, much more research is needed on the characteristics of adolescents associated with rehabilitation potential. Finally, the field needs structured models to guide the collection of developmental evidence in *Miller* cases involving both new sentencing and resentencing.

Borrowing the syntax of Wigmore's (1909) response to Münsterberg (1908), when the courts are ready for developmental experts in *Miller* cases, developmental experts (we hope) will be ready for the courts. We can best ready ourselves if we move quickly in our research on appropriate ways to assess developmental characteristics related to *Miller's* five factors and, until the law is more settled, not so much quickly as cautiously in our presumptions as experts.

## References

Abram, K. M., Teplin, L. A., Charles, D. R., Longworth, S. L., McClelland, G. M., & Dulcan, M. K. (2004). Posttraumatic stress disorder and trauma in youth in juvenile detention. *Archives of General Psychiatry, 61,* 403–410. http://dx.doi.org/10.1001/archpsyc.61.4.403

Abramovitch, R., Higgins-Bliss, K., & Bliss, S. (1993). Young persons' comprehension of waivers in criminal proceedings. *Canadian Journal of Criminology, 35,* 309–322.

Abramovitch, R., Peterson-Badali, M., & Rohan, M. (1995). Young people's understanding and assertion of rights to silence and legal counsel. *Canadian Journal of Criminology, 37,* 1–18.

American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders* (5th ed.). Washington, DC: Author.

American Psychological Association. (2006). *Report of the working group on psychotropic medications for children and adolescents*. Washington, DC: Author.

American Psychological Association. (2013). Specialty guidelines for forensic psychology. *American Psychologist, 68,* 7–19. http://dx.doi.org/10.1037/a0029889

Andrews, D., Bonta, J., & Wormith, S. (2004). *The Level of Service/Case Management Inventory (LS/CMI*). Toronto, Canada: Multi-Health Systems.

Apprendi v. New Jersey, 530 U.S. 466 (2000).

Archer, R., & Baum, L. (2016). Forensic uses of clinical assessment instruments. In K. Heilbrun, D. DeMatteo, & N. Goldstein (Eds.), *APA handbook of psychology and juvenile justice* (pp. 425–443). Washington, DC: American Psychological Association. http://dx.doi.org/10.1037/14643-020

Blakely v. Washington, 542 U.S. 296 (2004).

Bonnie, R., & Slobogin, C. (1980). The role of mental health professionals in the criminal process: The case for informed speculation. *Virginia Law Review, 66,* 427–522. http://dx.doi.org/10.2307/1072659

Boone, B. (2015). Treating adults like children: Re-Sentencing adult juvenile lifers after Miller v. Alabama. *Minnesota Law Review, 99,* 1159–1194.

Borum, R., Bartel, P., & Forth, A. (2010). *Manual for the Structured Assessment for Violence Risk in Youth (SAVRY)*. Odessa, FL: Psychological Assessment Resources.

Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners. *Evan Miller v. State of Alabama* and *Kuntrell Jackson v. Ray Hobbs*, Nos 10-9646 and 10-9647 (January 17, 2012). In the Supreme Court of the United States. WL 174239.

Cauffman, E., Skeem, J., Dmitrieva, J., & Cavanaugh, C. (2016). Comparing the stability of psychopathy scores in adolescence and adulthood: How often is "fledgling psychopathy" misdiagnosed? *Psychology, Public Policy, and Law, 22,* 77–91. http://dx.doi.org/10.1037/law0000078

Cauffman, E., & Woolard, J. (1999). *The Future Outlook Inventory*. Unpublished manuscript.

Chein, J., Albert, D., O'Brien, L., Uckert, U., & Steinberg, L. (2011). Peers increase adolescent risk taking by enhancing activity in the brain's reward circuitry. *Developmental Science, 14,* F1–F10. http://dx.doi.org/10.1111/j.1467-7687.2010.01035.x

Culbertson, W., & Zillmer, E. (2005). *Tower of London* (2nd ed.). Lutz, FL: Psychological Assessment Resources.

DeMatteo, D., Edens, J., & Hart, A. (2010). The use of measures of psychopathy in violence risk assessment. In R. Otto & K. Douglas (Eds.), *Handbook of violence risk assessment* (pp. 19–40). New York, NY: Rutledge, Taylor and Francis.

DeMatteo, D., Wobransky, M., & LaDuke, C. (2016). Risk assessment with juveniles. In K. Heilbrun, D. DeMatteo, & N. Goldstein (Eds.), *APA handbook of psychology and juvenile justice* (pp. 365–384). Washington, DC: American Psychological Association. http://dx.doi.org/10.1037/14643-017

Dierkhising, C. B., Ko, S. J., Woods-Jaeger, B., Briggs, E. C., Lee, R., & Pynoos, R. S. (2013). Trauma histories among justice-involved youth: Findings from the National Child Traumatic Stress Network. *European Journal of Psychotraumatology, 4,* 1–12. http://dx.doi.org/10.3402/ejpt.v4i0.20274

Edens, J. F., Campbell, J. S., & Weir, J. M. (2007). Youth psychopathy and criminal recidivism: A meta-analysis of the psychopathy checklist measures. *Law and Human Behavior, 31,* 53–75. http://dx.doi.org/10.1007/s10979-006-9019-y

Fla. Stat. Ann. § 921.1401 and § 921.1402 (West 2014).

Ford, J. (2005). Implications for psychiatric treatment of altered neurobiology, affect regulation, and information processing after child maltreatment. *Psychiatric Annals, 35,* 410–419.

Ford, J., & Blaustein, M. (2013). Systemic self-regulation: A framework for trauma-informed services in residential juvenile justice programs. *Journal of Family Violence, 28,* 665–677. http://dx.doi.org/10.1007/s10896-013-9538-5

Forth, A., Kosson, D., & Hare, R. (2003). *The Psychopathy Checklist: Youth Version manual*. Toronto, Canada: Multi-Health Systems.

Frick, P., & Hare, R. (2001). *The antisocial process screening device*. Toronto, Canada: Multi-Health Systems.

Frick, P. J., & White, S. F. (2008). Research review: The importance of callous-unemotional traits for developmental models of aggressive and antisocial behavior. *Journal of Child Psychology and Psychiatry, 49,* 359–375. http://dx.doi.org/10.1111/j.1469-7610.2007.01862.x

Golden, C. (1978). *Stroop Color and Word Test: Manual for clinical and experimental uses*. Chicago, IL: Stoetling.

Goldstein, N. E., Condie, L. O., Kalbeitzer, R., Osman, D., & Geier, J. L. (2003). Juvenile offenders' Miranda rights comprehension and self-reported likelihood of offering false confessions. *Assessment, 10,* 359–369. http://dx.doi.org/10.1177/1073191103259535

Goldstein, N., Kelley, S., Peterson, L., Brogan, L., Zelle, H., & Romaine, C. (2016). Evaluation of Miranda waiver capacity. In K. Heilbrun, D. DeMatteo, & N. Goldstein (Eds.), *APA handbook of psychology and juvenile justice* (pp. 467–488). Washington, DC: American Psychological Association. http://dx.doi.org/10.1037/14643-022

Gowensmith, W. N., Murrie, D. C., & Boccaccini, M. T. (2013). How reliable are forensic evaluations of legal sanity? *Law and Human Behavior, 37,* 98–106. http://dx.doi.org/10.1037/lhb0000001

Graham v. Florida, 130 S. Ct. 2011 (2010).

Greenwood, P. (2006). *Changing lives: Delinquency prevention and crime-control policy*. Chicago, IL: University of Chicago Press.

Grisso, T. (1981). *Juveniles' waiver of rights: Legal and psychological competence*. New York, NY: Plenum Press. http://dx.doi.org/10.1007/978-1-4684-3815-4

Grisso, T. (2003). *Evaluating competencies: Forensic assessments and instruments* (2nd ed.). New York, NY: Kluwer Academic/Plenum Press Publishers.

Grisso, T. (2006). Adolescents' decision making: A developmental perspective on constitutional provisions in delinquency cases. *New England Journal on Criminal and Civil Confinement, 32,* 3–14.

Grisso, T. (2013). *Forensic evaluation of juveniles* (2nd ed.). Sarasota, FL: Professional Resource Press.

Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., . . . Schwartz, R. (2003). Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants. *Law and Human Behavior, 27,* 333–363.

Grisso, T., Tomkins, A., & Casey, P. (1988). Psychosocial concepts in juvenile law. *Law and Human Behavior, 12,* 403–437. http://dx.doi.org/10.1007/BF01044626

Hare, R. (2003). *The Hare Psychopathy Checklist—Revised*. Toronto, Canada: Multi-Health Systems.

Heilbrun, K. (2001). *Principles of forensic mental health assessment*. New York, NY: Kluwer Academic/Plenum Press Publishers.

Hoge, R., & Andrews, D. (2010). *Youth level of Service/Case Management Inventory 2.0 (YLS/CMI) users' manual*. North Tonawanda, NY: Multi-Health Systems.

James v. United States, 59 A. 3d 1233 (D. C. 2013).

Kaba, F., Lewis, A., Glowa-Kollisch, S., Hadler, J., Lee, D., Alper, H., . . . Venters, H. (2014). Solitary confinement and risk of self-harm among jail inmates. *American Journal of Public Health, 104*, 442–447. http://dx.doi.org/10.2105/AJPH.2013.301742

Kassin, S. M., Drizin, S. A., Grisso, T., Gudjonsson, G. H., Leo, R. A., & Redlich, A. D. (2010). Police-induced confessions: Risk factors and recommendations. *Law and Human Behavior, 34*, 3–38.

Kinscherff, R. (2016). Distinguishing and assessing treatment needs and amenability to rehabilitation. In K. Heilbrun, D. DeMatteo, & N. Goldstein (Eds.), *APA handbook of psychology and juvenile justice* (pp. 385–404). Washington, DC: American Psychological Association. http://dx.doi.org/10.1037/14643-018

Kruh, I., & Grisso, T. (2009). Evaluation of juveniles' competence to stand trial. New York, NY: Oxford.

Lambie, I., & Randell, I. (2013). The impact of incarceration on juvenile offenders. *Clinical Psychology Review, 33*, 448–459. http://dx.doi.org/10.1016/j.cpr.2013.01.007

Larson, K., DiCataldo, F., & Kinscherff, R. (2013). Miller v. Alabama: Implications for forensic mental health assessment at the intersection of social science and the law. *New England Journal of Civil and Criminal Confinement, 39*, 319–345.

Larson, K., & Grisso, T. (2016). Transfer and commitment of youth in the United States: Law, policy, and forensic practice. In K. Heilbrun, D. DeMatteo, & N. Goldstein (Eds.), *APA handbook of psychology and juvenile justice* (pp. 445–466). Washington, DC: American Psychological Association. http://dx.doi.org/10.1037/14643-021

LaVigne, M., & Rybroek, G. (2013). "He got in my face so I shot him:" How defendants' language impairments impair attorney-client relationships. *City University of New York Law Review, 17*, 69–111.

Luna, B., & Wright, C. (2016). Adolescent brain development: Implications for the juvenile criminal justice system. In K. Heilbrun, D. DeMatteo, & N. Goldstein (Eds.), *APA handbook of psychology and juvenile justice* (pp. 91–116). Washington, DC: American Psychological Association. http://dx.doi.org/10.1037/14643-005

Lynam, D. R., Caspi, A., Moffitt, T. E., Loeber, R., & Stouthamer-Loeber, M. (2007). Longitudinal evidence that psychopathy scores in early adolescence predict adult psychopathy. *Journal of Abnormal Psychology, 116*, 155–165. http://dx.doi.org/10.1037/0021-843X.116.1.155

Maschi, T., Bradley, C., & Morgen, K. (2008). Unraveling the link between trauma and delinquency. *Youth Violence and Juvenile Justice, 6*, 136–157. http://dx.doi.org/10.1177/1541204007305527

Mash, E., & Barkley, R. (2007). *Assessment of childhood disorders*. New York, NY: Guilford Press.

Mash, E., & Barkely, R. (Eds.). (2014). *Child psychopathology* (third edition). New York: NY, Guilford.

McKinley v. Butler, 7th Circuit Court of Appeals Case No. 14–1944, 1/4/16 (2016).

Miller, H. (2006). *Inventory of Offender Risks, Needs, and Strengths (IORNS*). Lutz, FL: Professional Assessment Resources.

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

Mills, J., Dorn, A., & Hritz, A. (in press). Juvenile life without parole in law and practice: The end of superpredator era sentencing. *American University Law Review*. Retrieved from http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2663834_code1143552.pdf?abstractid&eq;2663834

Moffitt, T. E. (1993). Adolescence-limited and life-course-persistent antisocial behavior: A developmental taxonomy. *Psychological Review, 100*, 674–701. http://dx.doi.org/10.1037/0033-295X.100.4.674

Monahan, K. C., Steinberg, L., Cauffman, E., & Mulvey, E. P. (2009). Trajectories of antisocial behavior and psychosocial maturity from adolescence to young adulthood. *Developmental Psychology, 45*, 1654–1668. http://dx.doi.org/10.1037/a0015862

Montgomery v. Louisiana, 577 U.S. No. 14-280 (2016). slip op., U.S. Supreme Court.

Mulvey, E. P., Steinberg, L., Piquero, A. R., Besana, M., Fagan, J., Schubert, C., & Cauffman, E. (2010). Trajectories of desistance and continuity in antisocial behavior following court adjudication among serious adolescent offenders. *Development and Psychopathology, 22*, 453–475. http://dx.doi.org/10.1017/S0954579410000179

Münsterberg, H. (1908). *On the witness stand*. New York, NY: McClure Company. http://dx.doi.org/10.1037/a0013578

Murrie, D., Boccaccini, J., Zapf, P., Warren, J., & Henderson, C. (2008). Clinician variation in findings of competence to stand trial. *Psychology, Public Policy, and Law, 14*, 177–193. http://dx.doi.org/10.1037/a0013578

Nagel, A., Guarnera, L., & Reppucci, N. (2016). Adolescent development, mental disorders, and decision making in delinquent youths. In K. Heilbrun, D. DeMatteo, & N. Goldstein (Eds.), *APA handbook of psychology and juvenile justice* (pp. 117–138). Washington, DC: American Psychological Association. http://dx.doi.org/10.1037/14643-006

Neal, T., & Brodsky, S. (2016). Forensic psychologists' perceptions of bias and potential correction strategies in forensic mental health evaluations. *Psychology, Public Policy, and Law, 22*, 58–76. http://dx.doi.org/10.1037/law0000077

Neal, T., & Grisso, T. (2014). The cognitive underpinnings of bias in forensic mental health evaluations. *Psychology, Public Policy, and Law, 20*, 200–211. http://dx.doi.org/10.1037/a0035824

Nosek, B., & Banaji, M. R. (2001). The go/no-go association task. *Social Cognition, 19*, 161–176.

Packer, I. (2009). *Evaluation of criminal responsibility*. New York, NY: Oxford.

People v. Argeta, 149 Cal. Rptr. 3d 243 (Ct. App. 2012).

People v. Gutierrez, 324 P. 3d 245 (Cal. 2014).

People v. Lozano, 2nd Appellate District, Los Angeles County Super. Ct. No. NA023984 (2016).

People v. Perez, 154 Cal. Rptr. 3d 114 (Ct. App. 2013).

People v. Skinner, WL 4945986 (Mich. Ct. App. Aug. 20, 2015).

People v. Thomas, 150 Cal. Rptr. 3d 361 (Ct. App. 2012).

Peterson-Badali, M., & Abramovitch, R. (1993). Grade-related changes in young people's reasoning about plea decisions. *Law and Human Behavior, 17*, 537–552. http://dx.doi.org/10.1007/BF01045072

Piquero, A., & Moffitt, T. (2014). Moffitt's developmental taxonomy of antisocial behavior. In G. Bruinsma & D. Weisburd (Eds.), *Encyclopedia of criminology and criminal justice* (pp. 3121–3127). New York, NY: Springer. http://dx.doi.org/10.1007/978-1-4614-5690-2_506

Richardson, G., Gudjonsson, G., & Kelly, T. (1995). Interrogative suggestibility in an adolescent forensic population. *Journal of Adolescence, 18*, 211–216. http://dx.doi.org/10.1006/jado.1995.1014

Rogers, R. (1984). *Rogers Criminal Responsibility Assessment Scales and test manual*. Odessa, FL: Psychological Assessment Resources.

Roper v. Simmons, 125 S. Ct. 1183 (2005).

Russell, S. (2015). Jury sentencing and juveniles: Eighth Amendment and Sixth Amendment rights. *Boston College Law Review Boston College Law School, 56*, 553–615.

Salekin, R. (2004). *Risk-Sophistication-Treatment Inventory*. Lutz, FL: Psychological Assessment Resources.

Salekin, R., & Iselin, A. (2010). *The Risk-Sophistication-Treatment Inventory—Self Report*. Unpublished manuscript, University of Alabama.

Salekin, R., MacDougall, E., & Harrison, N. (2016). Developmental maturity and sophistication-maturity: Learning more about its purpose and assessment. In K. Heilbrun, D. DeMatteo, & N. Goldstein (Eds.), *APA handbook of psychology and juvenile justice* (pp. 405–424). Washington, DC: American Psychological Association. http://dx.doi.org/10.1037/14643-019

Salekin, R., Yff, R., Neumann, C., Leistico, A., & Zalot, A. (2002). Juvenile transfer to adult court: A look at the prototypes for dangerousness, sophistication-maturity, and amenability to treatment through a legal lens. *Psychology, Public Policy, and Law, 8,* 373–410. http://dx.doi.org/10.1037/1076-8971.8.4.373

Sattler, J. (2008). *Assessment of children: Cognitive foundations*. La Mesa, CA: Sattler Publisher.

Schubert, C. A., Mulvey, E. P., & Glasheen, C. (2011). Influence of mental health and substance use problems and criminogenic risk on outcomes in serious juvenile offenders. *Journal of the American Academy of Child & Adolescent Psychiatry, 50,* 925–937. http://dx.doi.org/10.1016/j.jaac.2011.06.006

Scott, E., Grisso, T., Levick, M., & Steinberg, L. (2016). *The Supreme Court and the transformation of juvenile sentencing*. Chicago, IL: John D. and Catherine T. MacArthur Foundation.

Scott, E., & Steinberg, L. (2008). *Rethinking juvenile justice*. Cambridge, MA: Harvard University Press.

Shallice, T. (1982). Specific impairments of planning. *Philosophical Transactions of the Royal Society of London, 298,* 199–209. http://dx.doi.org/10.1098/rstb.1982.0082

Sickmund, M., & Puzzanchera, C. (Eds.). (2014). *Juvenile offenders and victims: 2014 national report*. Pittsburgh, PA: National Center for Juvenile Justice.

Singh, J. P., Desmarais, S. L., Sellers, B. G., Hylton, T., Tirotti, M., & Van Dorn, R. A. (2014). From risk assessment to risk management: Matching interventions to adolescent offenders' strengths and vulnerabilities. *Children and Youth Services Review, 47,* 1–9. http://dx.doi.org/10.1016/j.childyouth.2013.09.015

Skeem, J. L., Winter, E., Kennealy, P. J., Louden, J. E., & Tatar, J. R., II. (2014). Offenders with mental illness have criminogenic needs, too: Toward recidivism reduction. *Law and Human Behavior, 38,* 212–224. http://dx.doi.org/10.1037/lhb0000054

State of Delaware. (2016). *Delaware Sentencing Accountability Commission benchbook*. Retrieved from http://cjc.delaware.gov/sentac/2016_BenchbookRevision_1_80615_OrigRevised_011416_SDH_FINAL_FINAL_FINAL.pdf

State v. Anderson, Appell. Case 26525, January 15, 2016 (Ohio 2nd District Court of Appeals).

State v. Lyle, 854 N. W. 2d 378 (Iowa 2014).

State v. Null, 836 N. W. 2d 41 (Iowa 2013).

State v. Ragland, 836 N. W. 2d 107 (Iowa 2013).

State v. Seats, 865 N. W. 2d 545 (Iowa 2015).

Steinberg, L. (2004). Risk-taking in adolescence: What changes, and why? *Annals of the New York Academy of Sciences, 1021,* 51–58. http://dx.doi.org/10.1196/anals.1308.005

Steinberg, L. (2008). A social neuroscience perspective on adolescent risk-taking. *Developmental Review, 28,* 78–106. http://dx.doi.org/10.1016/j.dr.2007.08.002

Steinberg, L. (2013). The influence of neuroscience on US Supreme Court decisions about adolescents' criminal culpability. *Nature Reviews Neuroscience, 14,* 513–518. http://dx.doi.org/10.1038/nrn3509

Steinberg, L., & Monahan, K. C. (2007). Age differences in resistance to peer influence. *Developmental Psychology, 43,* 1531–1543. http://dx.doi.org/10.1037/0012-1649.43.6.1531

Steinberg, L., & Scott, E. S. (2003). Less guilty by reason of adolescence: Developmental immaturity, diminished responsibility, and the juvenile death penalty. *American Psychologist, 58,* 1009–1018. http://dx.doi.org/10.1037/0003-066X.58.12.1009

Strand, V. C., Sarmiento, T. L., & Pasquale, L. E. (2005). Assessment and screening tools for trauma in children and adolescents: A review. *Trauma, Violence & Abuse, 6,* 55–78. http://dx.doi.org/10.1177/1524838004272559

Strathman, A., Gleicher, F., Boninger, D., & Edwards, C. (1994). The consideration of future consequences: Weighing immediate and distance outcomes of behavior. *Journal of Personality and Social Psychology, 66,* 742–752. http://dx.doi.org/10.1037/0022-3514.4.742

Tatar, J., Cavanagh, C., & Cauffman, E. (2016). The importance of (anti)social influence in serious juvenile offenders with psychopathic traits. *Psychology, Public Policy and Law, 22,* 92–104. http://dx.doi.org/10.1037/law0000074

United States v. Booker, 543 U.S. 220 (2005).

Valencia, R., & Suzuki, L. (2000). *Intelligence testing and minority students: Foundations, performance factors, and assessment issues*. New York, NY: Sage.

Veal v. State, Supreme Court of Georgia No. S15A1721 (2016).

Vieira, T., Skilling, T., & Peterson-Badali, M. (2009). Matching court-ordered services with youths' treatment needs: Predicting treatment success with young offenders. *Criminal Justice and Behavior, 36,* 385–401. http://dx.doi.org/10.1177/0093854808331249

Viljoen, J. L., Klaver, J., & Roesch, R. (2005). Legal decisions of preadolescent and adolescent defendants: Predictors of confessions, pleas, communication with attorneys, and appeals. *Law and Human Behavior, 29,* 253–277. http://dx.doi.org/10.1007/s10979-005-3613-2

Vincent, G., Kimonis, E., & Clark, A. (2016). Juvenile psychopathy: Appropriate and inappropriate uses in legal proceedings. In K. Heilbrun, D. DeMatteo, & N. Goldstein (Eds.), *APA handbook of psychology and juvenile justice* (pp. 197–232). Washington, DC: American Psychological Association. http://dx.doi.org/10.1037/14643-010

Warren, J., Jackson, S., & Coburn, J. (2016). Evaluation and restoration of competency to stand trial. In K. Heilbrun, D. DeMatteo, & N. Goldstein (Eds.), *APA handbook of psychology and juvenile justice* (pp. 489–514). Washington, DC: American Psychological Association. http://dx.doi.org/10.1037/14643-023

Wevodau, A. (2016). Review of trauma screening tools for children and adolescents. Retrieved from http://www.nysap.us/Products.html

Wigmore, J. (1909). Professor Muensterberg and the psychology of testimony being a report of the case of Cokestone v. Muensterberg. *Illinois Law Review, 3,* 399–445.

Zelechoski, A. (2016). Trauma, adverse experience, and offending. In K. Heilbrun, D. DeMatteo, & N. Goldstein (Eds.), *APA handbook of psychology and juvenile justice* (pp. 325–342). Washington, DC: American Psychological Association. http://dx.doi.org/10.1037/14643-015

Received March 24, 2016
Revision received April 23, 2016
Accepted April 25, 2016 ■

# National Juvenile Justice Prosecution Center

# Juvenile Prosecution Policy Positions and Guidelines[1]

July 5, 2016

[Contains Provisions of the National District Attorneys Association's National Prosecution Standards Addressing Juvenile Justice and Related Issues]

[1] Prepared by Caren Harp; training and policy consultant to the NJJPC and Associate Professor at Liberty University School of Law; Susan Broderick; former Manhattan Assistant District Attorney and Project Director of NJJPC; and Jennifer White, Program Manager at the National District Attorneys Association. James C. Backstrom, Dakota County Attorney, Hastings, Minnesota, and former Co-Chair of the National District Attorneys Association's Juvenile Justice Committee, also assisted in preparing this document. Members of the Juvenile Prosecution Leadership Network provided input and reviewed the working drafts.

*These Policy Positions were developed by the National District Attorneys Association, and then updated with support from Grant # 2014-MU-FX_K004 awarded by the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice. The opinions, findings and conclusions or recommendations expressed in this presentation are those of the author(s) and do not necessarily reflect those of the Department of Justice.*

## INTRODUCTION/BACKGROUND

Since juvenile court was first established in the late 1800s, the juvenile justice system has had an ever-changing, pendulum swing response to delinquent behavior. The early *parens patriae* approach to intervention with young offenders focused on rehabilitation, had little structure and offered very few procedural rights to juveniles. This well-intentioned approach gradually evolved into a harsher, more detention-oriented system that in some instances resulted in physical and emotional abuse of incarcerated youth. In response to these problems, the United States Supreme Court handed down a series of decisions[2] addressing the constitutional rights of court-involved youth. These decisions became the foundation for a formal and adversarial juvenile court system that is similar, in some respects, to its criminal court counterpart.

With constitutional rights in place, the early courts made use of the "best interests of the child" theory to guide decision-making. While this theory is similarly well intentioned, the "best interests of the child" concept is difficult to define and fails to take into account the needs of communities or crime victims.

A more complete model for juvenile justice was developed in the 1990s. The Balanced and Restorative Justice (BARJ) approach directs juvenile court systems to give balanced consideration to three goals: community safety, offender accountability, and competency development in offenders. Offender accountability focuses on accountability both to the community and to the crime victim. Competency development typically involves delivering restorative, skill-building services to youthful offenders to equip them to live safely and crime-free in their communities.

Balanced consideration of these three goals as a philosophical model for working with court-involved youth resonated with juvenile justice professionals throughout the court system. Many states adopted the BARJ model or similar restorative language into the purpose clauses of their juvenile codes or other policy documents.[3] In the Juvenile Delinquency Guidelines book produced by The National Council of Juvenile and Family Court Judges (NCJFCJ), NCJFCJ embraced enhancing community safety, holding offenders accountable to their victims and communities, and advancing responsible living skills in offenders as "goals of a juvenile delinquency court of excellence."[4] Likewise, the National District Attorneys

[2] Kent v. U.S., 383 U.S. 541 (1966); In Re Gault, 387 U.S. 1 (1967); Fare v. Michael C., 442 U.S. 707 (1979). These cases provide for meaningful waiver and transfer hearings, procedural due process rights and competence to waive Miranda, respectively.

[3] *See generally* Sandra Pavelka O'Brien, Ph.D. *Restorative Juvenile Justice in the States: A National Assessment of Policy Development and Implementation* BALANCED AND RESTORATIVE JUSTICE MONOGRAPH, Oct. 2000, ncjrs.gov/pdffiles1/Digitization/197629NCJRS.pdf (unpublished).

[4] *Juvenile Delinquency Guidelines; Improving Court Practice in Juvenile Delinquency Cases* National Council of Juvenile and Family Court Judges, Spring 2005, at 22.

Association (NDAA) incorporated similar language in the sentencing section of the 2002 update to their policy positions manual.[5]

Prosecutors are encouraged to adopt this balanced approach as a philosophical model to guide the juvenile court system in their jurisdictions. These goals offer a comprehensive, articulable approach to juvenile justice. Additionally, established principles that guide decision-making are essential to fairness, efficiency and assessment. As discussed in *Bringing Balance to Juvenile Justice,* a Special Topic bulletin from the American Prosecutors Research Institute:

> "Clearly defined values and principles can:
> - Guide decision-making by prosecutors and other system participants;
> - Enhance consistency and fairness in the system;
> - Be readily measured;
> - Inform communities about system successes; and
> - Help prosecutors explain how they exercise their considerable discretionary powers."[6]

These three overarching goals of the balanced approach speak to every aspect of delinquency, punishment, treatment and prevention.[7] Even if a jurisdiction has best interest of the child language in its purpose clause, "These three principles, fully implemented create a juvenile justice system that truly operates in the best interest of the child and the community."[8] Although these principles emerged in the 1990s, they fully support the current juvenile justice system that is refocusing on adolescent development, trauma-informed care, diversion and community-based supervision.

Given the limits placed upon the length of time that the court has jurisdiction over a youth adjudicated in juvenile court, issues surrounding adolescent brain development, and the importance of continued educational needs of youth involved in the juvenile or criminal justice systems, it is also important for prosecutors to seek to resolve juvenile prosecutions as quickly as possible, without compromising due process, fairness, and thoroughness.

## PURPOSE

These policy positions were developed to strengthen and support the work of juvenile prosecution. While every state has its own juvenile code, this position paper

[5] NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NDAA RESOURCE MANUAL AND POLICY POSITIONS ON JUVENILE CRIME ISSUES 13-14. "The best interest of the child concept, as practiced, is not working. Balancing community protection, offender accountability and competency development in offenders is the recommended philosophical approach to juvenile justice." Id. at 14.
[6] Caren Harp, *Bringing Balance to Juvenile Justice*, APRI SPECIAL TOPIC SERIES BULLETIN, November 2002; (citing Caren Harp and John Delaney, 5 IN Re, no. 1, 2002).
[7] Id.
[8] Id. at 1.

can be used as a guidepost in developing local policies guidelines. Recognizing juvenile prosecution as a specialized practice not only helps prosecutors but also elevates the practice of juvenile law. This can and will result in better outcomes for our youth and our communities.

## GOALS OF PROSECUTION

- **Policy:** The primary duty of a prosecutor is to seek justice. [9]

- **Policy:** Prosecutors have a duty to give effect to the purpose clause of the juvenile code in their jurisdictions. [10]

- **Policy:** Prosecutors are encouraged to adopt balanced consideration of community safety, offenders' accountability to victims and communities, and competency development in offenders, or similar articulable guidelines, as a philosophical approach to juvenile prosecution.[11]

- **Policy:** Prosecutors should seek to resolve juvenile prosecutions as quickly as possible, without compromising due process, fairness, and thoroughness.

[9] NDAA NATIONAL PROSECUTION STANDARDS §4-11.1 (NAT'L DIST. ATT'YS ASS'N, Third Edition, 2009) (hereinafter NATIONAL PROSECUTION STANDARDS).

> "To the extent possible, a prosecutor should appear at all hearings concerning a juvenile accused of an act that would constitute a crime if he or she were an adult. The primary duty of the prosecutor is to seek justice while fully and faithfully representing the interests of the state. While the safety and welfare of the community, including the victim, is their primary concern, prosecutors should consider the special circumstances and rehabilitative potential of the juvenile to the extent they can do so without unduly compromising their primary concern. Formal charging documents for all cases referred to juvenile or adult court should be prepared or reviewed by a prosecutor." Id.

*See also,* NATIONAL PROSECUTION STANDARDS §1-1.1.

> "The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected." Id.

MODEL RULES OF PROFESSIONAL CONDUCT, (Am. Bar Ass'n 2013) § 3.8 Special Responsibilities of a Prosecutor Comment [1] states:

> "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and to rectify the conviction of innocent persons." Id.

[10] New York City Law Department: Family Court Division, *Ethics for Prosecutor of Juvenile Delinquency Cases: Attorney Orientation Program 2012* "Juvenile prosecutors have an additional responsibility to promote the purpose of the Family Court Act, by focusing on the 'needs and best interests of the respondent as well as the need for protection of the community.' Family Court Act Section 301.1

[11] *See generally* NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES (2005); NAT'L DIST. ATTORNEYS ASS'N, *supra* note 5.

### *Commentary*

Support for these policies is found in the Background Section of this Policy manual, in the ABA Model Rules of Professional Conduct, and the NDAA Policy Positions Manual.

## ORGANIZATIONAL PRIORITIES

- **Policy:** Elected prosecutors are encouraged to make juvenile court a priority in their offices.[12]

- **Policy:** Juvenile court should be staffed with prosecutors who desire to work in that court; who desire to intervene effectively in the lives of youth and deter them from future criminal conduct.[13]

- **Policy:** Office assignments should provide for stability of prosecutors assigned to juvenile court and minimize turnover.[14]

- **Policy:** Prosecutors in juvenile court should receive ongoing specialized training and professional development.[15]

### *Commentary*

Historically, juvenile court was often used as a training ground for newly hired assistants. Many elected prosecutors believed that lawyers assigned to juvenile court were exposed to a wide variety of low-level offenses in a venue where any mistakes made were relatively inconsequential. Frequently, less experienced assistants were assigned to juvenile court and juvenile court assignments were made for short term duration.

Perceiving the juvenile courts and juvenile crime as insignificant is not only completely inaccurate, but also provides a disservice to all involved in the system. While the National Center for Juvenile Justice (NCJJ) reports an overall decline in

[12] NAT'L DIST. ATT'YS ASS'N, *supra* note 5. p 4-5. *See also*, NATIONAL PROSECUTION STANDARDS, *supra* note 9, §4-11.2 ("The prosecutor's office should devote specific personnel and resources to fulfill its responsibilities with respect to juvenile delinquency proceedings, and all prosecutors' offices should have an identified juvenile unit or attorney responsible for representing the state in juvenile matters. For smaller and/or rural jurisdictions, it may be appropriate to combine resources when possible to do so.") Id.

[13] NATIONAL PROSECUTION STANDARDS, *supra* note 9, §4-11.3.

> "Specialized training and experience should be required for prosecutors assigned to juvenile delinquency cases. Chief prosecutors should select prosecutors for juvenile court on the basis of their skill and competence, including knowledge of juvenile law, interest in children and youth, education, and experience. Entry-level attorneys in the juvenile unit should be as qualified as any entry-level attorney, and receive special, ongoing training regarding juvenile matters, including adolescent development." Id.

[14] Id. *See also*, NATIONAL PROSECUTION STANDARDS, *supra* note 9, §4-11.2

[15] NATIONAL PROSECUTION STANDARDS, *supra* note 9, §4-11.3.

juvenile delinquency cases from 1997 through 2013(44%),[16] it also reports that in 2013, juvenile courts in the United States handled more than 1 million delinquency cases."[17] More than 278,000 were person crimes including, 900 homicides, 7,500 rapes, 22,000 robberies, 26,900 aggravated assaults, 186,400 simple assaults and 9,700 other violent sex offenses.[18]

In the mid-1990s, NDAA recognized the serious nature of juvenile crime and developed policy positions to elevate juvenile court assignments to desirable positions within prosecutors' offices. With NDAA prosecutors taking the lead, perceptions of juvenile court evolved and juvenile prosecution is now considered a specialized practice. In addition to a thorough understanding of criminal law and procedure, prosecutors must be knowledgeable about child development and the impact of childhood trauma, adolescent brain research, their state's juvenile code, the juvenile corrections system, community resources and empirically validated interventions with youth and families that can deter future criminal behavior. NDAA renewed its commitment to juvenile justice issues in 2002 when it adopted an updated version of the policies.

While the NDAA policy positions recommend that experienced prosecutors be assigned to juvenile court, NJJPC also recommends that only those prosecutors who desire juvenile court practice be assigned there. An experienced prosecutor who has no desire to be in juvenile court, who is suffering from burnout, or who is otherwise disengaged, can do more harm than good in juvenile court. Conversely, a newly hired prosecutor may have a passion to work with court-involved youth but lack the necessary experience to strike the right balance between public safety, offender accountability and rehabilitation efforts. Combinations of experienced and newly hired prosecutors that are energetic, dedicated, and convinced of the importance of early intervention, are best suited to juvenile court assignments.

Ideally, prosecutors should minimize turnover in juvenile court as much as possible. Facing the same prosecutor upon reoffending adds a degree of accountability for juveniles. High turnover in court personnel can lead juveniles to feel as though they are not accountable to anyone, making it easier for them to disengage from the process. Additionally, the nuances of cases and family dynamics are rarely captured in the record, but it is often those subtleties that provide the best information for sentencing recommendations. Prosecutors newly assigned to the court may lack insight into a juvenile's behavior or that of the family and miss opportunities to intervene effectively.

Juvenile prosecutors play an important role with regard to prevention and early intervention. As community leaders, prosecutors should work with other stakeholders to raise awareness of the risks associated with juvenile delinquency.

[16] S. Hockenberry and C Puzzanchera, *Juvenile Court Statistics 2013*, NATIONAL CENTER FOR JUVENILE JUSTICE, 2015, http://www.ncjj.org/Publication/Juvenile-Court-Statistics-2013.aspx. (last visited June 30, 2016)
[17] Id.
[18] Id.

This includes making presentations at schools and to other community groups to increase awareness on preventable issues such as truancy, underage alcohol and drug use. Sharing information and statistics on juvenile delinquency cases in their jurisdiction and working together to develop strategies for reducing delinquency based on the specific needs of that jurisdiction is key.

Finally, juvenile court prosecutors should be properly trained. Unlike criminal court prosecutors who typically receive offense-based training, juvenile prosecutors would benefit from both offense-based training and offender-based training. Not only do they need to know how to prosecute various criminal offenses, they must have an understanding of factors specific to juvenile offenders such as adolescent brain development, adjudicative competency, the effects of exposure to violence on children, and effective, evidence-based interventions with youth. Training in prevention and early intervention should also be included. The family dynamic is an inescapable component of juvenile court, which makes specialized training in family violence and adolescent sex offending, which is often interfamilial, an essential aspect of juvenile prosecutor training.

## INTAKE
## CHARGING DECISIONS/DIVERSION

- **Policy:** A prosecutor should make all charging decisions in cases involving juvenile offenders.[19] The decision to divert a case is a charging decision,[20] thus a prosecutor should make it.[21]

- **Policy:** Diversion should be considered for appropriate low-level and first time offenders.[22]

- **Policy:** Charges should only be filed in cases supported by legally sufficient evidence.[23] Cases unsupported by legally sufficient evidence should be

[19] NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 6. *See also*, NATIONAL PROSECUTION STANDARDS, *supra* note 9, §4-11.1.
[20] NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 7("The decision to divert a case is a charging decision because it is a determination that sufficient evidence exists to file a charge in court but that the goals of prosecution can be reasonably reached through diversion.").
[21] Because it is important to ensure that legally sufficient evidence exists before a case is diverted from prosecution, in those jurisdictions where police or probation agencies make decisions to place youth in diversion programs, such agencies should seek input from the prosecuting authority before diversion decisions are made. The determination of whether legally sufficient evidence exists in a case is a prosecutorial decision.
[22]NAT'L DIST. ATT'YS ASS'N. *See also*, NATIONAL PROSECUTION STANDARDS, *supra* note 5, §4-11.5.

> "The prosecutor or a designee should be responsible for recommending which cases should be diverted from formal adjudication. No case should be diverted unless the prosecutor reasonably believes that he or she could substantiate the criminal or delinquency charge against the juvenile by admissible evidence at a trial. Treatment, restitution, or public service programs developed in his or her office may be utilized, or the case can be referred to existing probation or community service agencies. To the extent possible, when determining the conditions of diversion, prosecutors should consider the individual treatment needs of the juvenile in order to tailor services accordingly." Id.

[23] MODEL RULES OF PROFESSIONAL CONDUCT §3.8, (Am. Bar Ass'n 2013); *See also,* NATIONAL PROSECUTION STANDARDS, *supra* note 9, §4-11.7

dismissed with no further action. They should not be diverted.

- **Policy:** Diversion policies should be in writing and set forth general guidelines for participation in the diversion process.

- **Policy:** The factors in deciding whether to divert a case from formal prosecution in juvenile court should include the seriousness of the alleged offense; the role of the juvenile in that offense; prior offenses committed by the juvenile; the juvenile's age, maturity and mental status; the existence of appropriate treatment services available; the acceptance of responsibility by the juvenile for the offense; the dangerousness or threat posed by the juvenile to persons or property; consistency with other similar cases; the provision of financial restitution to victims; and recommendations of the referring law enforcement agency, victim and advocates for the juvenile.[24]

- **Policy:** Participation in diversion should be voluntary and youth and their parent/guardian must sign all agreements.

- **Policy:** Diversion programs should utilize validated screening and assessments to determine the risk and needs of the individual youth, including the assessment of possible commercial sexual exploitation and human trafficking issues.

- **Policy:** Victims must be notified of all charging decisions, including a referral to diversion.

[24]National Prosecution Standards 4-11.6.

"The prosecutor or a designee must further review legally sufficient cases not appropriate for transfer to criminal court to determine whether they should be filed formally with the juvenile court or diverted for treatment, services, or probation. In determining whether to file formally or, where allowed by law, divert, the prosecutor or designated case reviewer should consider the following factors in deciding what result best serves the interests of the community and the juvenile:

a. The seriousness of the alleged offense, including whether the conduct involved violence or bodily injury to others, including the victim;
b. The role of the juvenile in that offense;
c. The nature and number of previous cases presented by law enforcement or others against the juvenile, and the disposition of those cases;
d. The juvenile's age, maturity, and mental status;
e. The existence of appropriate treatment or services available through the juvenile court, child protective services, or through diversion;
f. Whether the juvenile admits guilt or involvement in the offense charged, and whether he or she accepts responsibility for the conduct;
g. The dangerousness or threat posed by the juvenile to the person or property of others;
h. The decision made with respect to similarly-situated juveniles; and
i. Recommendations of the referring agency, victim, law enforcement, and advocates for the juvenile, in consideration of the juvenile's rehabilitative potential." Id.

- **Policy:** Protocol should be in place to identify youth who have been or are currently involved in child welfare system.

### *Commentary*

Charging decisions are at the heart of the prosecutorial function.[25] Prosecutors have the statutory authority and responsibility to file charges and they have knowledge of the elements of offenses and rules of evidence necessary to determine legal sufficiency. While it may be tempting to divert cases not supported by legally sufficient evidence in order to obtain services for the juvenile, this should be avoided and it is for this reason that in those jurisdictions where police or probation agencies make decisions to divert youth from prosecution that these agencies should seek input from the prosecuting authority before such decisions are made. If the juvenile fails to successfully complete the program, the case will be referred to the prosecutor for formal charges. If none are filed, the juvenile is not held accountable for failure to comply with the program. Additionally, diversion is a form of government restriction on a citizen. Without legally sufficient evidence to support a charge, there is no legal basis for such restrictions. Diversion in the absence of legally sufficient evidence may well be a violation of Model Rules of Professional Conduct.[26]

Proper factors to consider when filing charges or diverting cases include, but are not limited to:[27]

- Sufficiency of the evidence;
- Nature, severity or classification of the offense;
- Harm to the victim or property;
- Restitution to victim;
- Victim input;
- Offender's role in the offense (primary or accomplice);
- Offender's prior contact with the justice system;
- Parental involvement in offense;
- Parental support of juvenile offender;
- Potential commercial sexual exploitation and human trafficking;
- Existence of diversion program appropriate to the offender; and
- Diversion decisions with respect to similarly situated offenders.

The above list is not exhaustive but provides a starting point for consideration.

[25] NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 6, citing Brown v. Dayton Hudson, 314 N.W.2d 210 (Minn. 1981).
[26] MODEL RULES OF PROFESSIONAL CONDUCT §3.8(a), (Am. Bar Ass'n 2013).
[27] List reprinted from New York City Law Department Family Court Division Policies and Procedures that includes factors from the NDAA National Prosecution Standards 3rd Edition.

Improper factors to consider include:[28]

- Prosecutor's or the office's conviction rate;
- Personal advantages which filing charges may bring to the prosecutor or the office;
- Political advantages which filing may bring to the prosecutor or the office;
- Prosecutor's personal relationship with offender or others involved in the case;
- Factors about the accused that are legally recognized to be discriminatory (insofar as those factors are not pertinent to the elements of the case, such as in bias incidents or hate crimes) including but not limited to:

    - Race
    - Gender
    - Religion
    - Ethnic background, and
    - Sexual orientation.

Programs that divert youth from involvement in the juvenile justice system have increased in response to the growing recognition that such involvement is often not necessary and can even adversely affect young people and communities. Diversion programs provide an opportunity to address problematic behavior while at the same time avoiding the stigma of adjudication. Very often, this involvement can connect youth with positive peers, adults and activities that build upon their strengths and promote resiliency.

Because of the high proliferation of youth who cross from the child welfare system to the juvenile system, protocols should be put in place that allow for early identification of such youth. These cases require extensive collaboration and efforts should be made to implement coordinated case assignment, joint assessment processes and coordinated case plans and supervision.[29]

## SCREENING AND ASSESSMENT

- **Policy:** Prosecutors should utilize validated screening and assessment instruments to assess the risk of re-offense, the needs, strengths and/or behavioral health issues of youth referred to the system, including the risk of commercial sexual exploitation and human trafficking.

- **Policy**: Prosecutors should support and/or adopt policies that address the use of statements made during screening and assessment.

[28] Id.
[29] GEORGETOWN UNIVERSITY'S CENTER FOR JUVENILE JUSTICE REFORM, THE CROSSOVER YOUTH PRACTICE MODEL: AN ABBREVIATED GUIDE 5 (2015).

### *Commentary*

During the initial stages of screening and assessment, there may be interviews and communications between youth, family members and juvenile court personnel. In order to encourage youth to share information openly and truthfully during these processes, it is recommended that prosecutors support and/or adopt policies regarding statements made during these processes. Provisions that encourage the free exchange of information when addressing potential behavioral issues can lead to better outcomes for youth and for the community as well.[30]

## ADJUDICATION

- **Policy:** Prosecutors should appear and represent the interests of the state at every hearing involving a juvenile defendant.[31]

- **Policy:** Prosecutors should comply with all discovery obligations and are encouraged to implement open file policies wherever possible.

### *Commentary*

Juvenile court is a formal, fully adversarial system that requires legal representation for the state and the offender at every stage of the court process. Prosecutors are the only voice victims and communities have in court. It is incumbent on prosecutors to attend every hearing to protect the community and advance the rights of crime victims, while insuring that justice is done for the offender.

Discovery obligations are generally the same in juvenile court as they are in criminal court. Absent statutory authority specific to juvenile court matters, NDAA's National Prosecution Standards provide that "Prosecutors should carry out their discovery obligations in a manner that furthers the goals of discovery, namely, to minimize surprise, afford the opportunity for effective cross-examination, expedite trials, and meet the requirements of due process."[32] Prosecutors in juvenile court should be well-schooled in their discovery obligations and have a full understanding of the consequences of failure in this area of practice.[33]

[30] JUVENILE DIVERSION GUIDEBOOK, MODELS FOR CHANGE INITIATIVE 53 (2011).
[31] NATIONAL PROSECUTION STANDARDS, *supra note 9,* §4-11.9 ("At the adjudicatory hearing, the prosecutor should assume the traditional adversarial role of a prosecutor, acting in the best interests of justice and community safety.") Id. *See also*, NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 6-7.
[32] NATIONAL PROSECUTION STANDARDS, *supra* note 9, §4-9.1.
[33] *See generally* MODEL RULES OF PROFESSIONAL CONDUCT §3.8(d) *Special Responsibilities of a Prosecutor*, (Am. Bar Ass'n 2013); Brady v. Maryland, 373 U.S. 83 (1963).

## PLEA NEGOTIATIONS

- **Policy:** Prosecutors should engage in plea negotiations in juvenile court cases.[34]

- **Policy:** Similarly situated juvenile offenders should be offered substantially similar plea agreement opportunities[35] taking into consideration the special needs of the juvenile, family support and other appropriate factors relevant to juvenile sentencing, including victim input.

- **Policy:** Alford[36] pleas should be avoided in juvenile court.

### *Commentary*

Plea agreements in juvenile court are a good way to help offenders accept responsibility for their conduct. The guilty plea is often the beginning of rehabilitation and prosecutors should find suitable ways to settle juvenile cases. Prosecutors are encouraged not to allow Alford pleas in juvenile court because they do not require personal acceptance of responsibility for the illegal conduct. The offender gains access to programs while maintaining that they never committed any illegal acts. The message conveyed to offenders is that juvenile court is a game. This is particularly true in sex offense cases. Treatment often involves offenders admitting they have engaged in inappropriate behavior. An Alford plea allows the offender to continue in their denial potentially decreasing the likelihood of a successful treatment outcome.

Proper factors to consider while negotiating pleas in juvenile court include, but are not limited to:

- Nature, severity or classification of the offense;
- Harm to the victim or property;
- Restitution to victim;
- Victim input;
- Safety of the community;
- Age of the offender;
- Physical, developmental, social and psychological needs of the offender;
- Offender's role in the offense (primary or accomplice);

[34] NATIONAL PROSECUTION STANDARDS, *supra* note 9, §4-11.8.
"The decision to enter into a plea agreement should be governed by both the interests of the state and those of the juvenile, although the primary concern of the prosecutor should be protection of the community as determined in the exercise of traditional prosecutorial discretion. The prosecutor should also consider the juvenile's potential for rehabilitation." *See also* National Prosecution Standards 5-2.1 which states: "The prosecutor should make known a policy of willingness to consult with the defense concerning disposition of charges by plea and should set aside times and places for plea negotiations, in addition to pre-trial hearings." Id.

[35] *See generally*, NATIONAL PROSECUTION STANDARDS, 3rd Edition *supra* note 9, §5-1.4 Uniform Plea Opportunities

[36] North Carolina v. Alford, 400 U.S. 25 (1970).

- Offender's prior contact with the justice system, including any previous cases that have been disposed of through a diversion program;
- Level of success with prior probation or sentencing conditions
- Parental involvement in offense;
- Parental support of juvenile offender;
- Offense was committed in an especially heinous, cruel, or depraved manner;
- Victim or victims were particularly vulnerable;
- Level of cooperation on the part of the offender as well as victims and witnesses;
- What can be proven at trial.

When engaging in plea negotiations, the following factors are **not** appropriate to consider:

- Prosecutor's or the office's conviction rate;
- Personal advantages which guilty plea may bring to the prosecutor or the office;
- Political advantages which guilty plea may bring to the prosecutor or the office;
- Prosecutor's personal relationship with offender or others involved in the case;
- Race or ethnicity, gender, religion, sexual orientation or other personal characteristics.

## DISPOSITIONS

- **Policy:** The primary factors affecting a juvenile's sentence should be the seriousness of the crime, the protection of the community from harm, and accountability to the victim and the public for the juvenile's behavior.[37]

- **Policy:** Prosecutors should make recommendations at the time of sentencing as to appropriate dispositional alternatives to juvenile offenders, which should include age appropriate rehabilitative efforts for re-entry.[38]

- **Policy:** A juvenile's sentence should emphasize provisions for community safety, offender accountability, and competency development so that offenders can re-enter the community capable of pursuing non-criminal paths.[39]

- **Policy:** Prosecutors should take an active role in dispositional hearings and make recommendations after reviewing all case reports and considering the interests and needs of the juvenile offender and the safety of the

[37] NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 13.
[38] Id.
[39] Id.

community.[40]

- **Policy:** Dispositions should be tailored to the individual risk level of reoffending of the youth. Interventions should be developmentally appropriate and build upon the specific needs and strengths of the youth.

- **Policy:** Accountability must be promoted. Incentives can be incorporated to acknowledge positive progress. In cases of non-compliance sanctions should be graduated, immediate and certain.

- **Policy:** Dispositions should include conditions and programs that are consistent with best practices and evidence-based interventions. When possible and in the interests of public safety, community based interventions should be utilized.

- **Policy:** Family involvement should be encouraged whenever possible, and appropriate.

- **Policy:** The prosecutor should periodically review dispositional programs to ensure that they provide appropriate supervision, treatment, and services for the juvenile and provide restitution to victims.[41]

- **Policy:** Balancing community protection, offender accountability and competency development in offenders is the recommended philosophical approach to juvenile justice.[42]

### *Commentary*

Over the past 20 years there have been many advances regarding effective and ineffective approaches to juvenile offending. Based on neuroscience and social science studies, policies and practices can be designed that are effective in not only decreasing recidivism but also improving positive outcomes for young people.

[40] NATIONAL PROSECUTION STANDARDS, *supra* note 9, §4-11.10.
"The prosecutor should take an active role in the dispositional hearing and make a recommendation consistent with community safety to the court after reviewing reports prepared by prosecutorial staff, the probation department, and others. In making a recommendation, the prosecutor should seek the input of the victim and consider the rehabilitative needs of the juvenile offender, provided that they are consistent with community safety and welfare." Id.

[41] NATIONAL PROSECUTION STANDARDS, *supra* note 9, §4-11.12:
"The prosecutor should periodically review diversion and dispositional programs, both within and outside the prosecutor's office, to ensure that they provide appropriate supervision, treatment, restitution requirements, or services for the juvenile. The prosecutor should maintain a working relationship with all outside agencies providing diversion and dispositional services to ensure that the prosecutor's decisions are consistent and appropriate. If the prosecutor discovers that a juvenile or class of juveniles is not receiving the care and treatment envisioned in disposition or diversion decisions, the prosecutor should inform the court of this fact." Id.

[42] NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 13-14.

When considering the dispositional alternatives, it is important to analyze the needs and strengths of each young person. Dispositions should be tailored in a way that will encourage pro-social behavior and outcomes. The importance of connecting youth to positive peers, adults and activities cannot be overstated.

Proper factors to consider when making disposition recommendations include, but are not limited to:

- Nature, severity or classification of the offense;
- Harm to the victim or property;
- Restitution to victim;
- Victim input;
- Safety of the community;
- Age of the offender;
- Physical, developmental, social and psychological needs of the offender;
- Offender's role in the offense (primary or accomplice);
- Offender's prior contact with the justice system, including any previous cases that have been disposed of through a diversion program;
- Parental involvement in offense;
- Parental support of juvenile offender;
- Offense was committed in an especially heinous, cruel, or depraved manner;
- Victim or victims were particularly vulnerable;
- Any pre-disposition reports that may have been completed;
- Offender scores, where applicable;
- Level of success with prior probation or sentencing conditions

When contemplating disposition recommendations, the following factors are **not** appropriate to consider:

- Personal advantages which certain dispositions may bring to the prosecutor or the office;
- Political advantages which certain dispositions may bring to the prosecutor or the office;
- Prosecutor's personal relationship with offender or others involved in the case;
- Race or ethnicity, gender, religion, sexual orientation or other personal characteristics

The recommended philosophical approach to juvenile justice involves balancing community protection, offender accountability and competency development in offenders.

## WAIVER/TRANSFER

- **Policy:** Prosecutors should have discretion to seek to prosecute cases in criminal court when appropriate for serious and violent criminal offenses.[43]

- **Policy:** Prosecutors should make transfer decisions on a case-by-case basis and take into account the individual factors of each case, including, among other factors, the gravity of the current alleged offense, the record of previous delinquent behavior of the juvenile charged, and the availability of adequate treatment and dispositional alternatives in juvenile court.[44]

- **Policy:** Prosecutors should consider using a "blended sentencing" approach if state legislation authorizes this to occur.[45]

### *Commentary*

There were just over one million delinquency cases handled in juvenile court in 2013, approximately half of which were formal petitions or waiver requests. [46] While there is no national data available for direct file cases in criminal court, data does exist for judicial waiver and transfer. In 2013, juvenile courts waived over 4,000, or approximately 1% of the petitioned delinquency cases into criminal court.[47]

Some prosecutors use direct file discretion to transfer all juvenile offenders of a certain age to criminal court, without any case-by-case consideration of the individual needs of the offender, community or victim. This unfortunate practice often results in first offenders and other youth appropriate for the rehabilitative practices of juvenile court being processed through the criminal court system with its attendant long-term consequences. These misguided policies are fodder for advocacy groups striving to eliminate prosecutors' direct file charging discretion.

Prosecutors should, however, retain the authority to transfer serious and violent offenders to criminal court and such decisions should be made on a case by

[43] NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 8. *See also,* NATIONAL PROSECUTION STANDARDS, *supra* note 9, §4-11.7. "The transfer of cases to criminal court should be reserved for the most serious, violent, and chronic offenders. Prosecutors should make transfer decisions on a case-by-case basis and take into account the individual factors of each case including, among other factors, the gravity and violent nature of the current alleged offense, the record of previous delinquent behavior of the juvenile charged, and the availability of adequate treatment, services and dispositional alternatives in juvenile court." Id.

[44] Id.

[45] NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 10. "Blended sentencing" is defined for the purposes of this document as the imposition of juvenile and/or adult correctional sanctions to cases involving serious, violent or habitual offenders who have been adjudicated in juvenile court or convicted in criminal court. Id.

[46] Sarah Hockenberry and Charles Puzzanchera, *Delinquency Cases Waived to Criminal Court,* OJJDP JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT SERIES FACT SHEET (2014), http://www.ojjdp.gov/pubs/248410.pdf (last visited June 28, 2016)

[47] Robert L. Listenbee, *Delinquency Cases in Juvenile Court*, 2013, Juv. Offenders and Victims Nat'l Rep. Series, October 2015 at 1, 3. http://www.ojjdp.gov/pubs/248899.pdf (last visited June 23, 2016)

case basis. Taking into account the individual factors of each case in making the decision as to whether a case should be transferred to criminal court, prosecutors should evaluate which system best furthers public safety, holds the offender accountable in the community and develops the offender's skills in reducing future delinquency or criminal behavior. Specific factors which should be considered in the waiver decision include the seriousness of the alleged offense; the role of the juvenile in that offense; the nature and number of previous cases against the juvenile and the disposition of those cases; the juvenile's age and maturity; the availability of appropriate treatment or service potentially available in each court; and the dangerousness or threat posed by a juvenile to the person or property of others.[48]

Prosecutors are encouraged to review research and juvenile crime data in the area of juvenile reoffending and consider if their existing policies are supported by the research and data. Evidence-based policies are not only more likely to achieve the desired result, but such policies also provide a defensible basis for the exercise of prosecutorial discretion.

In making a decision as to whether a case should be direct filed in, or transferred to, criminal court, consideration should be given to prosecution of such offenders under a "blended sentencing" approach. A number of states have enacted laws in recent years expanding juvenile court disposition and available sanction alternatives. These laws are designed for youth who have committed a serious offense which does not initially warrant adult prosecution, but which requires greater sanctions and/or longer supervision by the juvenile courts than is provided in a traditional juvenile system. Commonly referred to as "blended sentencing" these laws may combine some juvenile and adult sanctions, provide for stayed adult sanctions to be imposed at a later date should the offender not conform to the conditions of the juvenile court disposition, provide incentives for such youth to remain law abiding in the future and/or lengthen the period of supervision over the youth by the juvenile court. Blended sentencing models are appropriate and necessary in the continuum of sanctions available for more serious and violent juvenile offenders, especially for younger youth committing very serious crimes. [49] When using blended sentencing options, prosecutors must ensure that the results are logical, fair and consistent.[50]

## DISPROPORTIONATE MINORITY CONTACT

- **Policy:** Prosecutors should continue their efforts to participate with other juvenile court stakeholders to address disproportionate minority contact (DMC).

[48] NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 10.
[49] NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 10.
[50] Id.

- **Policy:** Prosecutors should maintain a well-qualified staff that is reflective of the community and promote policies that discourage any type of disparate treatment among minorities.

### *Commentary*

The juvenile justice system has made steady progress in addressing the problem with disproportionate minority contacts (DMC) with the juvenile court system. When the Juvenile Justice and Delinquency Prevention Act (JJDPA) was reauthorized in 2002, it expanded the DMC core requirement from "confinement" to "contact."[51] With this expansion came the requirement that states receiving formula grant money actively address DMC issues in their jurisdictions.[52] OJJDP's DMC Reduction Model, or some element of it, is being used by 41 states.[53]

## VICTIMS

- **Policy:** Crime victims should have the same rights in juvenile court that they have in adult criminal court.[54]

- **Policy:** Prosecutors should make the court aware of the impact of the juvenile's conduct on the victim and the community.[55]

- **Policy:** Prosecutors must be familiar with and comply with all victims' rights legislation in their jurisdictions.

- **Policy:** Victims should be kept informed of proceedings and their input should be considered when developing dispositions, including diversion.

- **Policy:** Prosecutors should work to ensure confidentiality laws do not hinder victims' rights or prevent victims from accessing important information.

### *Commentary*

Every state and the District of Columbia have some form of victims' rights legislation. It is not only essential for prosecutors to understand their responsibility to victims but also to put it into practice on a daily basis. When victim advocates are

[51] Melodee Hanes, *Disproportionate Minority* Contact OJJDP IN FOCUS, at 1, (Nov. 2012), http://www.ojjdp.gov/pubs/239457.pdf
[52] Id.
[53] Id. at 3.
[54] *See,* NAT'L DIST. ATT'YS ASS'N, *supra* note 5.
[55] NATIONAL PROSECUTION STANDARDS, *supra* note 9, §4-11.11, "The prosecutor should consider the victim's input at all phases of the juvenile delinquency process. At the dispositional hearing, the prosecutor should make the court aware of the impact of the juvenile's conduct on the victim and the community" Id.

available, prosecutors should cultivate a good working relationship with them, and take advantage of their expertise in protecting the rights of victims.

While a victim's right might include procedural notifications, a request restitution and the opportunity to make victim impact statements, the most basic right of every victim of crime is being treated with dignity, respect, and sensitivity throughout the criminal justice process.[56] Confidentiality laws may adversely impact crime victims and prosecutors should support legislation that allows victims access to relevant information involving their cases.

## **GANGS**[57]

Obviously, the impact of organized criminal activity by juveniles requires the criminal justice system to address the problem. The following policy statements are designed as an overview of major factors that should be considered when developing a response to gang-related activity within a prosecutor's jurisdiction.

- Policy: Prosecutors should establish as priorities the identification, prosecution and punishment of gangs and gang behavior.

- Policy: Individuals who commit crimes for the benefit of a gang should be subject to enhanced penalties.

- Policy: Adequate resources should be provided to prosecutors to assist in the prosecution of gang-related crimes and the protection of witnesses.

- Policy: Specialized prosecution is necessary to assist in the effective prosecution and punishment of crimes committed for the benefit of gangs. Prosecutors should be encouraged to share information and provide technical assistance regarding gang prosecution with small jurisdictions.

### ***Commentary***

Prosecutors need to set a high priority within their offices concerning gang issues. Depending on the size of the jurisdiction and the gang problems in existence, community programs may vary. The error most often made by the prosecutor and other law enforcement officials in a community is to ignore the developmental stages of gang activity. According to the National Youth Gang Survey in 2012, an estimated 30,700 gangs were operating in the United States, with an estimated 850,000 members, of which an estimated 35% are under 18 years old. Gangs exist in cities, smaller cities, rural, and suburban environments. [58]

[56] MD CONST. art 47.
[57] This section is substantially the same as the language contained in NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 24-26.
[58] *National Youth Gang Survey Analysis* OJJDP, NATIONAL GANG CENTER. http://www.nationalgangcenter.gov/Survey-Analysis. (last visited July 10, 2015)

Gang activity is not mere delinquency. Gang exploits have become increasingly more criminal in nature. According to the National Gang Intelligence Center "gangs continue to commit violent and surreptitious crimes – both on the street and in prison – that pose a significant threat to public safety in most US jurisdictions across the nation." [59] It is important that the consequences imposed reflect the serious level of behavior. Prosecutors must recognize the need for public safety and the goal of deterrence. As a gang becomes organized to commit crimes for profit, control and reputation, its members and "wannabe's" likely are directed to perform criminal acts. The gang itself then reaps the profits. This harms the victim and society as a whole.

Even if prosecutors assign the gang issue a high priority, little can be accomplished unless adequate resources are provided to assist them. This can be done by providing sufficient detention space, appropriate prevention programs and human resources to enable all personnel within the juvenile justice system to do their jobs efficiently and effectively. The success of preventive programs in curtailing gang activity within a community must be able to rely on the prosecutor taking action against those who, in spite of preventive intervention, continue their gang involvement. There are those individuals who must be isolated from their peers by institutional detention. Only those prosecutors with adequate staff, court support and placement opportunities have achieved some success in curbing gang activity.

One issue often overlooked is the ability to protect witnesses who testify against gang members from retribution by the gang. Whether real or imagined, a witness must feel that taking the witness stand will not result in retaliation by the gang members against themselves or their families. The ability of the prosecutor to provide protection, move a witness, or otherwise arrange for relocation and similar services can go a long way in promoting the cooperation of a frightened witness. This is one area in which the federal government can provide both technical and financial resource assistance to local prosecutors.[60]

Current studies indicate that specialized task force units composed of prosecutors and law enforcement agents have the greatest chance of successfully proceeding against gangs and gang members. Small and medium size jurisdictions (the majority of offices) do not have the staff and resources to create such units. To provide the most reasonable alternatives for these offices, it is hoped that larger offices can provide assistance. The experience and information available to the larger office, if shared, could allow smaller offices to avoid re-inventing the wheel when trying to address gang-related issues. Some of the specific areas in which such aid can be made available include the following:

[59] *2013 National Gang Report,* FEDERAL BUREAU OF INVESTIGATION, NATIONAL GANG INTELLIGENCE CENTER, 2013 https://www.fbi.gov/stats-services/publications/national-gang-report-2013/view (last visited June 30 2016)

[60] For federal resources see The National Gang Center at https://www.nationalgangcenter.gov/

- Evidentiary matters--briefs, experts, demonstrative models;
- Charging--forms, history, approaches;
- Restrictions on ability to gather intelligence--access; and
- Other technical assistance.[61]

## GUNS AND DANGEROUS WEAPONS[62]

The availability, distribution and use of guns by juveniles in the commission of crimes continues to impact the community. Prosecutors should continue to take a firm stance on offenders who possess or use dangerous weapons.

- Policy: Serious, violent, or habitual juvenile offenders who illegally use or possess firearms or dangerous weapons should face enhanced penalties.

### *Commentary*

The issue of guns and juveniles is a politically charged and controversial topic. The discussion is often presented as an effort of gun control when the real issue is one of safety in the community. Individual prosecutors have varying views on gun control, but there should be no dispute that individuals who illegally use dangerous weapons should face serious consequences in both the criminal and juvenile justice systems. In 2013 1,220 juveniles were the victims of homicide by a firearm.[63] Four hundred ninety-eight offenders under the age of 18 used a firearm to commit a homicide.[64]

Several states have already enacted new laws relating to the illegal possession and criminal use of weapons by juveniles. One component of this legislation is enhanced penalties for gun use. These penalties involve longer juvenile sentences or trial in adult court. Some legislation also attaches criminal responsibility to adults who provide the juvenile with a weapon or with access to a weapon.[65]

[61] For examples of legislation concerning gangs, *see* CAL. PENAL CODE §186.20 (Deering 1995); FLA. STAT. CH. 874.01 (1994); MINN. STAT. §609.229 (1994).
[62] This section is substantially the same as the language contained in NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 23-24.
[63] C. Puzzanchera, G. Chamberlin, and W. Kang, *Easy access to the FBI's Supplementary Homicide Reports: 1980-2014,* EZASHR, http://www.ojjdp.gov/ojstatbb/ezashr/ (last visited June 23, 2016)
[64] Id.
[65] For sample legislation in this area, see: COLO. REV. STAT. § 18-12-108.5 (1995) *et seq*; FLA. STAT. CH. 790.22 (1994 & Supp. 1995); MINN. STAT. §624.713 (1994 & Supp. 1995); TEX. EDUC. CODE ANN. § 21.3011 (1995).

## HUMAN TRAFFICKING AND SEXUAL EXPLOITATION OF YOUTH

Human trafficking and commercial exploitation of youth for sexual purposes is a growing problem in America. Prosecutors should work closely with law enforcement, child protection, and other agencies to address sexual exploitation and human trafficking of youth to protect these vulnerable victims of these crimes.

- **Policy:** Prosecutors should consider a multi-systemic approach to addressing sexual exploitation and human trafficking involving juveniles through partnerships with law enforcement, child protection and family services, medical and mental health providers and other groups and agencies working to keep youth safe from such exploitation.

- **Policy:** Prosecutors should consider juveniles involved in prostitution as victims and not criminals. Such conduct by youth should be addressed in the child protection system to the extent possible and not the juvenile delinquency system.

### *Commentary*

In the United States, the Department of Justice estimates that between 100,000 and 300,000 children between the ages of twelve and fourteen are at risk for sexual exploitation.[66] The victims are mostly girls.[67] If youth have had contact with the child welfare system, they are at a higher risk of sexual exploitation than youth not involved in the system.[68]

The average age that juveniles are being targeted for prostitution is 12-14 years of age.[69] Human traffickers use a variety of tactics to coerce or control the victims they sell for sex. These include:

- Sexual, physical and emotional abuse
- Threat of criminal prosecution
- Withholding of money or identification documents
- Enabling or inducing a chemical addiction
- Threats toward family or friends
- Pressure or guilt
- Gang rape and sadistic torture[70]

[66] *See generally,* http://www.trafficking.org/learn/child-sex-trafficking.aspx (last visited July 4, 2016)
[67] Id.
[68]http://www.missingkids.org/en_US/publications/missingchildrenstatecare.pdf; *National Report on Domestic Minor Sex Trafficking: America's Prostituted Children*, Shared Hope International. (2009).
[69] *Combating Human Trafficking*, FEDERAL BUREAU OF INVESTIGATION, https://www.fbi.gov/news/testimony/combating-human-trafficking. (last visited June 28, 2016)
[70] *See generally*, https://traffickingresourcecenter.org/type-trafficking/human-trafficking (last visited July 4, 2016)

Several states have enacted "safe harbor" laws aimed at treating juveniles involved in prostitution as crime victims and not juvenile delinquents.[71] These laws are premised on the fact that youth are not voluntarily engaged in this conduct, but are rather often being forced or coerced into it by sexual predators and human traffickers. Prosecutors should treat sexually exploited youth as victims, not criminals, and such youth should be referred to the child protection system, to the extent the law allows for it, or to qualified service providers rather than the juvenile delinquency system.

## CRIME PREVENTION[72]

The prosecutor can serve a valuable role in educating the public concerning juvenile justice issues and in coordinating or participating in crime prevention initiatives. Education and prevention go hand in hand with effective law enforcement and prosecution efforts, especially in the area of juvenile offending.

- Policy: Prosecutors should take an active role in juvenile crime prevention efforts.

- Policy: Prosecutors should work with other community leaders to ensure community involvement in crime prevention efforts.

  Policy: Prosecutors should be involved in truancy prevention efforts whenever possible.

### *Commentary*

Efforts aimed at education, prevention and early intervention are a critical part of any community's war on crime. Young people at early ages must be taught the dangers of using illegal drugs and abusing alcohol. Youth must also learn to confront their problems in non-violent ways. Prosecutors can coordinate or participate in such crime prevention efforts.

While there will never be a complete consensus concerning all of the reasons for the growing juvenile crime problem in our society, few would disagree that the reasons are varied and complex. This is precisely why the response to this problem must be multifaceted. One important way to formulate these types of multiple responses is the development of community coalitions and partnerships to address this widespread problem. Such coalitions can play an important role in helping to curb youth violence and crime. Everyone in the community needs to be involved in these efforts, including parents, teachers, school administrators, faith communities, civic and business leaders, law enforcement officials, prosecutors, local elected

[71] *Safe Harbor – Protecting Sexually Exploited Minors,* POLARIS PROJECT: 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS 33, (2013), https://polarisproject.org/sites/default/files/2013-State-Ratings-Analysis.pdf. (2013). These states include Minnesota. *See,* MINN. STAT. §§ 260C.007 and 609.321(2015).

[72] This section is substantially similar to the language contained in the NAT'L DIST. ATT'YS ASS'N, *supra* note 5 at 22-23

officials and youth themselves. Coupled with effective enforcement and prosecution efforts, crime prevention initiatives are important and necessary.

Truancy intervention efforts are important and can help reduce crime. As demonstrated in OJJDP's *Truancy Reduction: Keeping Students in School*, "Truancy, or unexcused absence from school, has been linked to serious delinquent activity in youth and to significant negative behavior and characteristics in adults."[73] Additionally, the bulletin asserts that "As a risk factor for delinquent behavior in youth, truancy has been found to be related to substance abuse, gang activity, and involvement in criminal activities such as burglary, auto theft and vandalism."[74] Prosecutors should consider designating a specialized truancy unit or juvenile prosecutor who is sensitive to the needs of youth engaged in truancy.

[73] Myriam L. Baker, Jane Nady Sigmon and M. Elaine Nugent, *Truancy Reduction: Keeping Students in School*, OJJDP JUVENILE JUSTICE BULLETIN at 1, (September 2001), https://www.ncjrs.gov/pdffiles1/ojjdp/188947.pdf.
[74] Id. at 2.

## 11. Juvenile Justice

**4-11.1 Prosecutorial Responsibility**
To the extent possible, a prosecutor should appear at all hearings concerning a juvenile accused of an act that would constitute a crime if he or she were an adult. The primary duty of the prosecutor is to seek justice while fully and faithfully representing the interests of the state. While the safety and welfare of the community, including the victim, is their primary concern, prosecutors should consider the special circumstances and rehabilitative potential of the juvenile to the extent they can do so without unduly compromising their primary concern. Formal charging documents for all cases referred to juvenile or adult court should be prepared or reviewed by a prosecutor.

**4-11.2 Personnel and Resources**
The prosecutor's office should devote specific personnel and resources to fulfill its responsibilities with respect to juvenile delinquency proceedings, and all prosecutors' offices should have an identified juvenile unit or attorney responsible for representing the state in juvenile matters. For smaller and/or rural jurisdictions, it may be appropriate to combine resources when possible to do so.

**4-11.3 Qualification and Training of Prosecutors in Juvenile Court**
Specialized training and experience should be required for prosecutors assigned to juvenile delinquency cases. Chief prosecutors should select prosecutors for juvenile court on the basis of their skill and competence, including knowledge of juvenile law, interest in children and youth, education, and experience. Entry-level attorneys in the juvenile unit should be as qualified as any entry-level attorney, and receive special, ongoing training regarding juvenile matters, including adolescent development.

**4-11.4 Screening Juvenile Cases**
If the facts of the case are not legally sufficient to warrant action, the matter should be terminated or returned to the referral source pending further investigation or receipt of additional reports. The prosecutor or a designee should review all legally sufficient cases to decide whether a case will be diverted, formally petitioned with the juvenile court, or transferred to criminal court.

**4-11.5 Diversion**
The prosecutor or a designee should be responsible for recommending which cases should be diverted from formal adjudication. No case should be diverted unless the prosecutor reasonably believes that he or she could substantiate the criminal or delinquency charge against the juvenile by admissible evidence at a trial. Treatment, restitution, or public service programs developed in his or her office may be utilized, or the case can be referred to existing probation or community service agencies. To the extent possible, when determining the conditions of diversion, prosecutors should consider the individual treatment needs of the juvenile in order to tailor services accordingly.

**4-11.6 Charging and Diversion Criteria**
The prosecutor or a designee must further review legally sufficient cases not appropriate for transfer to criminal court to determine whether they should be filed formally with the juvenile court or diverted for treatment, services, or probation. In determining whether to file formally or, where allowed by law, divert, the prosecutor or designated case reviewer should consider the following factors in deciding what result best serves the interests of the community and the juvenile:

a. The seriousness of the alleged offense, including whether the conduct involved violence or bodily injury to others, including the victim;
b. The role of the juvenile in that offense;
c. The nature and number of previous cases presented by law enforcement or others against the juvenile, and the disposition of those cases;
d. The juvenile's age, maturity, and mental status;
e. The existence of appropriate treatment or services available through the juvenile court, child protective services, or through diversion;
f. Whether the juvenile admits guilt or involvement in the offense charged, and whether he or she accepts responsibility for the conduct;
g. The dangerousness or threat posed by the juvenile to the person or property of others;
h. The decision made with respect to similarly-situated juveniles; and
i. Recommendations of the referring agency, victim, law enforcement, and advocates for the juvenile, in consideration of the juvenile's rehabilitative potential.

**4-11.7 Transfer to Criminal Court**
The transfer of cases to criminal court should be reserved for the most serious, violent, and chronic offenders. Prosecutors should make transfer decisions on a case-by-case basis and take into account the individual factors of each case including, among other factors, the gravity and violent nature of the current alleged offense, the record of previous delinquent behavior of the juvenile charged, and the availability of adequate treatment, services and dispositional alternatives in juvenile court.

**4-11.8 Plea Agreements**
The decision to enter into a plea agreement should be governed by both the interests of the state and those of the juvenile, although the primary concern of the prosecutor should be protection of the community as determined in the exercise of traditional prosecutorial discretion. The prosecutor should also consider the juvenile's potential for rehabilitation.

**4-11.9 Prosecutor's Role in Adjudication (Trial)**
At the adjudicatory hearing, the prosecutor should assume the traditional adversarial role of a prosecutor, acting in the best interests of justice and community safety.

**4-11.10 Dispositions**
The prosecutor should take an active role in the dispositional hearing and make a recommendation consistent with community safety to the court after reviewing reports prepared by prosecutorial staff, the probation department, and others. In making a recommendation, the prosecutor should seek the input of the victim and consider the rehabilitative needs of the juvenile offender, provided that they are consistent with community safety and welfare.

**4-11.11 Victim Impact**
The prosecutor should consider the victim's input at all phases of the juvenile delinquency process. At the dispositional hearing, the prosecutor should make the court aware of the impact of the juvenile's conduct on the victim and the community.

**4-11.12 Evaluation of Programs**
The prosecutor should periodically review diversion and dispositional programs, both within and outside the prosecutor's office, to ensure that they provide appropriate supervision, treatment, restitution requirements, or services for the juvenile. The prosecutor should maintain a working relationship with all outside agencies providing diversion and dispositional services to ensure that the prosecutor's decisions are consistent and appropriate. If the prosecutor discovers that a

juvenile or class of juveniles is not receiving the care and treatment envisioned in disposition or diversion decisions, the prosecutor should inform the court of this fact.

**4-11.13 Duty to Report**

If the prosecutor becomes aware that the directives and/or sanctions imposed by the court are not being administered by an agency to which the court assigned the juvenile or that a treatment provider is engaging in unethical or questionable practices, the prosecutor, at minimum, should report the concerns to the court.

**Commentary**

Over the last twenty years, there has been significant attention paid to the field of juvenile justice. The decline in the number of juvenile delinquency cases since 1997, coupled with the increase in alternatives to incarceration and strategies based on research have created greater opportunities for prosecutors to serve a more expansive role in their respective communities. No longer confined to the courtroom, juvenile prosecutors play an important and influential role in delinquency prevention and early intervention efforts. They serve as leaders by creating innovative programs and policies that make crime prevention a key component of the community safety mission.

The prosecutor is charged to seek justice just as he does in criminal prosecutions. The prosecutor in the juvenile system, however, is further charged to give special attention to the circumstances and needs of the accused juvenile to the extent that it does not conflict with the duty to fully and faithfully represent the interests of the state. This balanced approach reflects the philosophy that the safety and welfare of the community is enhanced when juveniles, through counseling, restitution, or more extensive rehabilitative efforts and sanctions, are dissuaded from further criminal activity.

To efficiently carry out his or her duties, it is desirable that the prosecutor appear at all stages of the proceedings. In so doing, the prosecutor maintains a focus on the safety and well-being of the community at each decision-making level. Further, because the juvenile system is increasingly adversarial, the prosecutor fulfills an important role in addressing the positions of juvenile and social service advocates. The prosecutor's presence guarantees the opportunity to exercise continuous monitoring at each stage and broad discretion to ensure fair and just results.

These standards further emphasize professionalism in juvenile court work. They provide that attorneys in juvenile court should be experienced, competent, and interested. Because of the adversarial nature of juvenile proceedings, the prosecutor should be responsible for screening to determine whether there is sufficient evidence to believe that a crime was committed and that the juvenile committed it. A case should only be further processed if it is legally sufficient. "Legally sufficient" means a case in which the prosecutor believes that he can reasonably substantiate the charges against the juvenile by admissible evidence at trial. These determinations should be made by the prosecutor.

After a determination of legal sufficiency, the next decision to be made is whether the case should be diverted, referred to juvenile court or transferred to criminal court. This decision has both legal and social implications. It should be made either by an experienced prosecutor who has an interest in juveniles or by other case screeners under the guidance of a prosecutor. The prosecutor, in exercising this function, should consider the rehabilitative needs of the juvenile while upholding the safety and welfare of the community. These decisions should be made without unreasonable delay. Prompt determinations generally promote confidence in the system and fairness to the victim, the community, and the juvenile. Further, prompt decisions are more likely to result in rehabilitation of the juvenile by providing more immediate attention.

Diversion of cases in juvenile court from the formal charging, adjudication, and disposition procedure has become common for less serious offenses. The impetus for such a procedure is that because juveniles are in the process of cognitive, moral, and social development, there is a unique opportunity presented at the juvenile court level to dissuade them from criminal activity. Advances in neuroscience confirm that the adolescent brain is undergoing significant development, and the neuroplasticity creates tremendous opportunity to influence youth in a positive way. However, science also confirms the tremendous vulnerability of the adolescent brain to drugs and alcohol. This is a concern for juvenile prosecutors. Many first-time or minor offenders will never enter the justice system again if their cases are handled properly through a robust diversion program. Treatment, restitution, or service programs often are viable alternatives to court processing. These standards describe the opportunity for prosecutors to be involved either in diversion programs based in their offices or through referral to existing probation or community service agencies.

In many jurisdictions, transfer of juveniles to criminal court is controlled by statute or practice. This standard simply provides guidance for prosecutors in using discretion to the extent that they participate in this process, and includes consideration of the rehabilitative potential of a juvenile offender. Given the general decline in the number of cases being transferred, this option should be reserved for serious, violent, and chronic offenders.

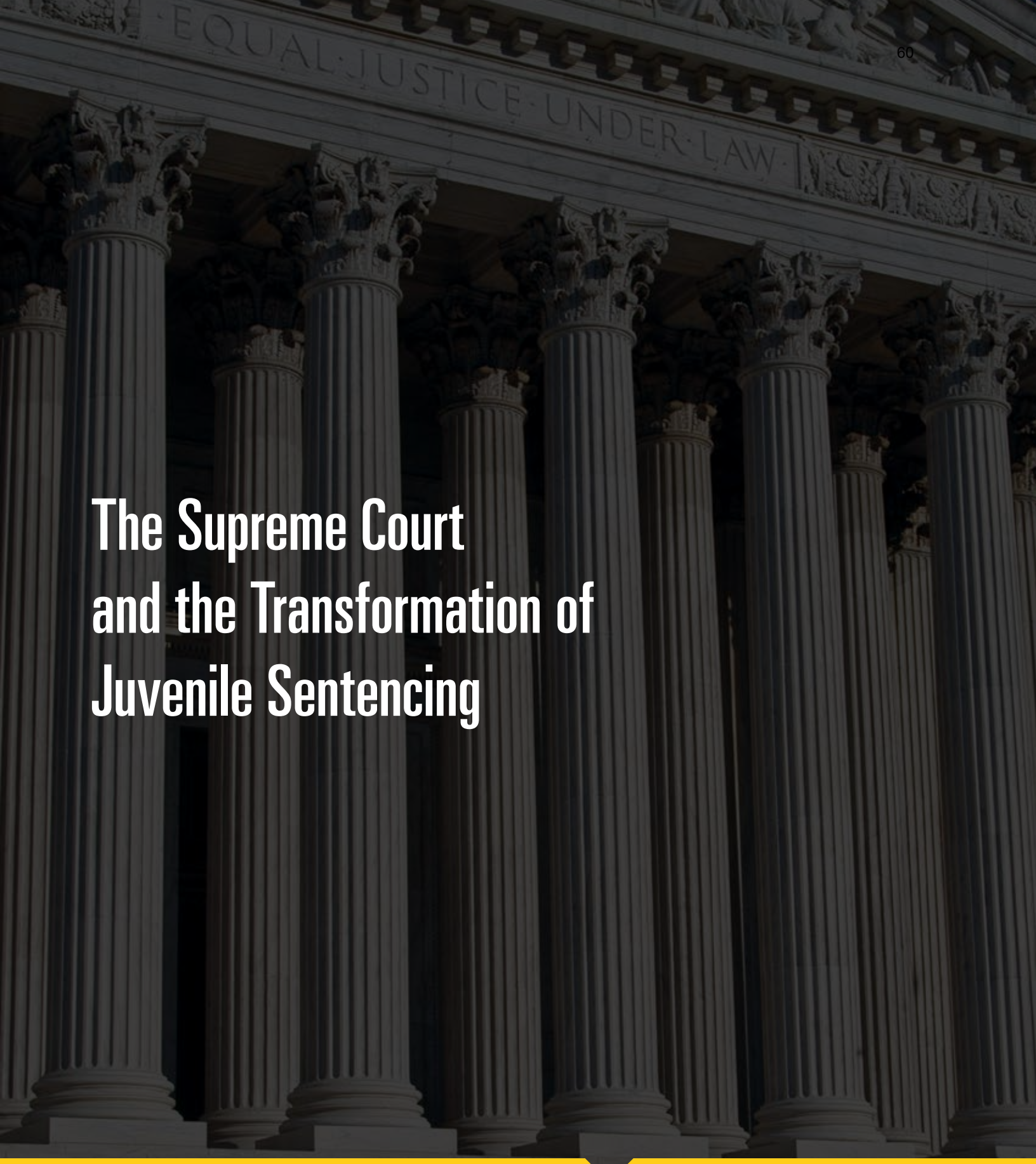
These standards reflect the consensus that plea agreements are appropriate for juvenile court. A plea agreement should only be entered into when there is sufficient admissible evidence to demonstrate a *prima facie* case that the juvenile has committed the acts alleged in the petition to which he is pleading guilty. The appropriateness and extent to which plea agreements are used are matters of office policy to be determined by the chief prosecutor. The prosecutor should always take steps to ensure that the resulting disposition is in the interest of the community with due regard being given to the rehabilitative needs of the juvenile.

In those matters that are not diverted or disposed of without trial the prosecutor should assume the traditional prosecution role in the adversarial process with respect to determination of guilt or innocence. This standard, therefore, suggests that the rules of evidence apply. Prosecutors should strive in the juvenile court setting to maintain a distinction between a factual determination of innocence or guilt and a determination of disposition. This approach promotes fairness to both the victim and the community and enhances the integrity of juvenile court findings.

Prosecutors should offer dispositional alternatives to the court that reduce risk and increase the protective factors that will make a juvenile successful in the future. When a juvenile presents a danger to the safety and welfare of the community, the prosecutor should voice this concern. On the other hand, when appropriate, the prosecutor may offer a dispositional recommendation that is less restrictive than what the juvenile court judge may contemplate imposing.

Given the unique role that prosecutors play across the justice continuum, they have a responsibility to ensure that all decisions are fair and just. They must base decisions on factors such as community safety, offender accountability, and rehabilitation. Race, ethnicity, and/or gender are never appropriate factors in decision-making. In order to ensure that decisions and policies are fair and equal, it is important to track case processing and outcomes. Data-driven practices are an important component of the fair administration of justice. Prosecutors should examine strategies and alternatives that decrease racial, ethnic, and gender disparities while maintaining community safety.

This standard also suggests that, to the extent possible, the prosecutor should take a leadership role in the community in assuring that a wide range of appropriate dispositional alternatives are available for youth who are adjudicated delinquents. In addition, the prosecutor is encouraged to follow up on cases to ensure that dispositions are upheld, court ordered sanctions are administered, and treatment is provided. Similarly, prosecutors, to the extent possible, should take an active role in prevention and early intervention efforts.




# The Supreme Court and the Transformation of Juvenile Sentencing

Elizabeth Scott, Thomas Grisso,
Marsha Levick, and Laurence Steinberg

ModelsforChange
Systems Reform in Juvenile Justice

This publication was prepared by: Elizabeth Scott, Thomas Grisso, Marsha Levick, and Laurence Steinberg

The preparation of this document was supported by the John D. and Catherine T. MacArthur Foundation through its Models for Change initiative. 

September 2015


ModelsforChange
Systems Reform in Juvenile Justice

## Models for Change

All young people should have the opportunity to grow up with a good education, get a job and participate in their communities. Creating more fair and effective juvenile justice systems that support learning and growth and promote accountability can ensure that every young person grows up to be a healthy, productive member of society.

*Models for Change: Systems Reform in Juvenile Justice*, a MacArthur Foundation initiative, began by working comprehensively on juvenile justice reform in four states, and then by concentrating on issues of mental health, juvenile indigent defense, and racial and ethnic disparities in 16 states. Through collaboration with the Substance Abuse and Mental Health Services Administration (SAMHSA) and the Office of Juvenile Justice and Delinquency Prevention (OJJDP), *Models for Change* expanded its reach and its work of replicating and disseminating successful models for juvenile justice reform to 40 states.

# Introduction

In the past decade, the Supreme Court has transformed the constitutional landscape of juvenile crime regulation. In three strongly worded opinions, the Court held that imposing harsh criminal sentences on juvenile offenders violates the Eighth Amendment prohibition against cruel and unusual punishment. Roper v Simmons in 2005 prohibited the imposition of the death penalty for a crime committed by a juvenile.[1] Five years later, *Graham v. Florida* (2010) held that no juvenile could be sentenced to life without the possibility of parole (LWOP) for a non-homicide offense.[2] Then in 2012, *Miller v. Alabama* struck down statutes that required courts to sentence juveniles convicted of murder to LWOP.[3] The three decisions present a remarkably coherent and consistent account; indeed, the Court's analysis and rationale are virtually identical across the opinions. In combination, these cases create a special status for juveniles under Eighth Amendment doctrine as a category of offenders whose culpability is mitigated by their youth and immaturity, even for the most serious offenses. The Court also emphasized that juveniles are more likely to reform than adult offenders, and that most should be given a meaningful opportunity to demonstrate that they have done so. In short, because of young offenders' developmental immaturity, harsh sentences that may be suitable for adult criminals are seldom appropriate for juveniles.

These opinions announce a powerful constitutional principle—that "children are different"[4] for purposes of criminal punishment.[5] In articulating this principle, the Supreme Court has also provided general guidance to courts sentencing juveniles and to lawmakers charged with implementing the rulings. At the same time, the Court did not directly address the specifics of implementation and it left many questions unanswered about the implications of the opinions for juvenile sentencing regulation. In the years since *Roper, Graham, and Miller*, courts and legislatures have struggled to interpret the opinions and to create procedures and policies that are compatible with constitutional principles and doctrine. Some reforms were straightforward; states have abolished the juvenile death penalty and restricted the use of LWOP as directed by the Court. But lawmakers sometimes have disagreed about what reforms are required and about how broadly the Court's vision of justice for juvenile offenders should extend in shaping youth sentencing policies.

The impact and reach of these developments in Eighth Amendment doctrine are particularly important because punitive law reforms in the 1990s brought into the adult justice system many youths who previously would have been processed in the separate more lenient juvenile system.[6] At the same time, adult sentencing and parole regulation generally became much harsher. Not only did LWOP, including mandatory LWOP, become more available as a sentence for serious crimes, but many jurisdictions adopted lengthy mandatory minimum terms for a range of offenses. Further, some states abolished parole altogether for many felonies.[7] Although these policies have been moderated somewhat, juveniles who are convicted of serious felonies risk lengthy mandatory prison terms in many states. Against this backdrop, many lawmakers have concluded that the analysis and principles at the heart of the Supreme Court' constitutional framework have important implications for sentencing and parole beyond the death penalty and LWOP.

1 543 U.S.551 (2005).
2 560 U.S. 48(2010).
3 132 S.Ct 2455 (2012).
4 Miller v. Alabama, 132 S.Ct 2455, 2470 (2012).
5 In 2011, the Court also ruled in *JDB v North Carolina* (564 U.S. _ (2011) that a child's age must be taken into account during a police interrogation for the purposes of determining whether or not the child is "in custody" and must be given "Miranda" warnings under Miranda v Arizona (cite). In JDB the Court relied on the same research findings which informed the juvenile sentencing decisions, demonstrating other implications of the research. Those implications are beyond the scope of this paper.
6 Elizabeth Scott and Laurence Steinberg, Rethinking Juvenile Justice, Harvard University Press (2008).
7 For a discussion of increased severity in sentencing in the 1990s, see Paula Ditton & Doris Wilson, Truth in Sentencing in State Prisons, Bureau of Justice Statistics (1999).

This report addresses the key issues facing courts and legislatures under this new constitutional regime, and provides guidance based on the Supreme Court's Eighth Amendment analysis and on the principles the Court has articulated. Part I begins with the constitutional sentencing framework, grounded in the opinions and embodying the key elements of the Court's analysis. It then explains the underlying developmental knowledge that supports the constitutional framework and the "children are different" principle. As the Court noted, but did not explain fully, its conclusion that juveniles are less culpable and have a greater potential for reform than their adult counterparts is supported by developmental evidence from both psychology and neuroscience.[8] Part II examines how courts and legislatures have responded to the Eighth Amendment opinions, through reforms of state laws regulating juvenile LWOP (JLWOP). While some state lawmakers appear to ignore or subvert the Supreme Court's holdings, others have responded in ways that clearly embody the principles underlying *Miller* and *Graham*. A complex, and much-litigated, question is whether *Miller* should be applied retroactively to offenders sentenced before the Court's decision; a majority of courts have said "yes," but courts have divided on this issue, which likely will be resolved by the Supreme Court.[9] Other key issues raised by *Miller* include how to incorporate into the sentencing decision the required mitigating evidence of the offender's youth and immaturity, as well as how the state can negate the empirical assumption of youthful immaturity. These issues are critically important whenever a sentence of LWOP is considered, of course, but they are also relevant when juveniles face other harsh sentences.

Part III translates *Miller's* directive that specific factors be considered in making individualized sentencing decisions. Our aim is to guide courts and clinicians in structuring sentencing hearings that incorporate sound developmental research and other evidence supporting or negating mitigation, without going beyond the limits of science. Part IV explores the broader implications of the Supreme Court's developmental framework for juvenile sentencing and parole, implications that have already sparked law reforms beyond the relatively narrow holdings of *Graham* and *Miller.* Finally, the paper ends on a cautionary note, pointing to evidence that constitutionally sound, developmentally-based policies may be vulnerable to political and other pressures. Aside from mandates in the holdings themselves, reforms can be dismantled or discounted if conditions change. Measures to sustain the current trend in law reform are discussed.

8 Laurence Steinberg (2008). The influence of neuroscience on U.S. Supreme Court decisions involving adolescents' criminal culpability. Nature Reviews Neuroscience, 14, 513-518.

9 In 2015, the Court accepted certiorari on a retroactivity decision. Montgomery v. Louisiana, grant of petition for certiorari,No. 14-280, March 23, 2015.

# I. Fair Juvenile Sentencing in a Developmental Framework

Although the Supreme Court has not produced a detailed blueprint for courts and lawmakers to guide the sentencing of juvenile offenders, it has provided a coherent framework grounded in conventional criminal law principles and scientific research on adolescence. To be sure, both the principles and the scientific foundation of the developmental framework require some elaboration. But the juvenile sentencing opinions contain several clearly elaborated themes and offer compelling lessons that can inform a fair sentencing regime for juveniles. Indeed, the Court's consistent analysis across the three opinions provides a robust developmental framework that already has had far-reaching effects on juvenile sentencing and parole.

## A. The Key Themes in the Court's Sentencing Opinions

**The Reduced Culpability of Juveniles.** The most prominent lesson for lawmakers (and the heart of the Court's analysis) is that the criminal choices of juveniles are influenced by developmental factors and therefore most young offenders are less culpable than are their adult counterparts.[10] For this reason, the challenged sentencing statutes violated proportionality, a bedrock principle of criminal law, because they required or allowed harsh adult sentences to be imposed on juveniles. Proportionality holds that criminal punishment should be based not only on the harm caused by the crime, but also on the culpability of the offender. The Court did not did not question that juvenile offenders are responsible for their criminal conduct. Instead, its developmental model recognizes that adolescent offenders can and should be held accountable for their crimes. However, because of their developmental immaturity, juveniles deserve less punishment that their adult counterparts, even when they commit murder, the crime involving the greatest harm.

**The most prominent lesson for lawmakers (and the heart of the Court's analysis) is that the criminal choices of juveniles are influenced by developmental factors and therefore most young offenders are less culpable than are their adult counterparts.**

The Court's proportionality analysis is firmly grounded in conventional sources of mitigation in criminal law,[11] although this point is not made explicitly in the opinions. Three dimensions of adolescence mitigate blameworthiness in young offenders. First, the culpability of youths is reduced because developmental factors characteristic of adolescence limit their decision-making capacities in ways that influence juveniles' criminal choices. The Court points to an "inability to assess consequences"[12] and to the "recklessness, impulsivity, and heedless risk-taking" that contribute to an "underdeveloped sense of responsibility"[13] in adolescents. These factors mitigate youthful culpability under long established doctrine holding that individuals with reduced decision-making capacity are deemed less culpable than other criminals.[14] Second, mitigation also applies to crimes committed in response to external pressure or coercion; the criminal law defense of duress is an example of this kind of reduced culpability. This is relevant to juvenile offending because, as the Court explains, adolescents are

10 Elizabeth Scott and Laurence Steinberg, Rethinking Juvenile Justice (2008).
11 Steinberg & Scott (2003). Less Guilty by Reason of Adolescence, Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty, American Psychologist, 58, 1009-119.
12 Miller 132 S.Ct. 2455, 2464
13 Id.
14 Note 10.

vulnerable to negative pressures and influences, including peer pressure; moreover, teenagers, as legal minors, have limited control over their environment or ability to extricate themselves from their homes and other settings (such as their neighborhood and school) that can contribute to their criminal activity.[15] Finally, the Court points to the unformed nature of adolescents' character, observing that because much juvenile offending is the product of "transient immaturity,"[16] it is less likely than an adult's to be "evidence of irretrievable depravity."[17] Again the Court's analysis tracks conventional mitigation doctrine: Some criminal sentencing statutes allow defendants to introduce mitigating evidence to show that their criminal activity was "out of character;" or, put another way, was not the product of bad character.[18] Similarly, the crimes of most juveniles are the product of immaturity and not of bad character. Together these rationales strongly support a response to juvenile crime that is based on mitigation and a sentencing regime that is more lenient than that which is applied to adult criminals.

**An Opportunity to Reform** The second prominent theme in the opinions is grounded in the criminal law's goal of reducing crime and promoting public safety. Juveniles should not automatically be sentenced to LWOP because they are more likely to reform than are adult criminals. Juveniles have a greater potential for reform for two reasons: First, adolescent brains are more malleable than are those of adults and thus juveniles are more likely to respond positively to rehabilitative efforts.[19] And second, because the offending of most teenagers is the product of "unfortunate yet transient immaturity,"[20] juveniles are likely to desist from involvement in criminal activity as they mature into adulthood. The likelihood that most youths will mature out of their criminal tendencies means that the need for public protection usually cannot justify long criminal sentences. In other words, lengthy incarceration of juveniles seldom serves the preventive purposes of the criminal law. In both *Graham* and *Miller,* the Court reiterated forcefully that LWOP completely denies young offenders a meaningful *opportunity* to reform; in most youths, the Court assumes, reform will in fact occur, through rehabilitation and with maturation.

**Reduced Trial Competence** The Court also emphasizes in *Graham* and *Miller* that severe sentences might result from juvenile defendants' relative incapacity to deal effectively with the police, execute plea agreements, or participate competently in their trials. The issue of "developmental" incompetence has become very salient in the past generation.[21] As more juveniles were transferred to criminal court and tried as adults in the 1990s, reformers raised the concern that juveniles, due to developmental immaturity, might not meet adult standards for competence to stand trial. This is important because defendants' trial competence is required under the Due Process clause of the Fourteenth Amendment to ensure fair criminal proceedings.[22] In response to this concern, many states have responded by creating special procedures to evaluate developmental competence in juveniles.[23] In the Eighth Amendment opinions, the Supreme Court's attention to juveniles' reduced procedural competence (as opposed to their lesser culpability) was directed specifically at how a teenage defendant's immature capabilities might lead to a harsh sentence. This might be due to an impulsive confession, a rash rejection of a plea offer or the inability to assist counsel by challenging witnesses or pointing to relevant exculpatory or mitigating evidence; it might also result because immature teenage defendants in court may create negative impressions, to their detriment.

15 Miller, 132 S.Ct. 2455, 2462; Scott & Steinberg, note 5 at 818.
16 Miller, 132 S.Ct. 2455, 2469 (2012).
17 Roper, 543 U.S. 551, 579 (2005).
18 Steinberg and Scott, note 10 at 827.
19 Laurence Steinberg, Age of Opportunity: Lessons From the New Science of Adolescence, New York: Houghton Mifflin Harcourt (2014).
20 Miller, 132 S.Ct 2455, 2469.
21 Elizabeth Scott & Thomas Grisso (2005). Developmental Incompetence, Due Process and Juvenile Justice Policy, 83, 793-846.
22 Dusky v. U.S. 362 U.S.402 (1960)
23 Kimberly Larson and Thomas Grisso, Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings (2011); Thomas Grisso, Forensic Evaluation of Juveniles (2013).

In general, the Court's view was that a juvenile may simply be less able than an adult to navigate a high-stakes encounter with the police and a criminal proceeding in which his entire future life is on the line.

A general point is worth noting. A core problem with the mandatory LWOP sentence under consideration in *Miller* was that juveniles were *automatically* subject to the same harsh sentence as an adult counterpart. The sentencing court had no opportunity or ability to consider the mitigating factors that usually reduce youthful culpability, indicate the juvenile's potential to reform, or impede effective participation in the justice system. Since most juveniles do *not* deserve to be punished as severely as adults, the mandatory imposition of LWOP amounted to a routine violation of proportionality and, in most cases, an unjust punishment.

**Two Final Lessons** The Court underscored two key points about its developmentally based sentencing framework that are important in interpreting the opinions and implementing justice policy in accordance with the new constitutional framework. First, in *Miller*, the Court emphasized that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."[24] In other words, mitigation applies not just to non-homicide offenses (as in *Graham*), but also to murder (as in *Miller*). Here the Court explicitly rejects the view implicitly held by many prosecutors and some courts that juveniles who cause the grave harm of murder warrant adult treatment simply on that basis. But the implication of the Court's statement is broader than it explicitly recognizes. As Justice Roberts points out in his *Miller* dissent, the Court, in emphasizing that "children are different," has announced a *general* principle of reduced culpability that applies not only to the crimes at issue in the cases, but generally to the criminal conduct of young offenders.[25] In other words, the same developmental factors that mitigate culpability for murder or armed robbery also influence adolescents committing less serious crimes.

The second point is just as important: The Court recognizes that developmental variation exists in adolescence and suggests that occasional juvenile offenders might be sufficiently mature to deserve harsh adult sentencing, but it insisted emphatically that the offending of *most* adolescents is driven by developmental influences. A statute that imposed LWOP on a mandatory basis (even for homicide) categorically excluded evidence about the defendant's youthful immaturity that, in *most* cases, would mitigate culpability and justify a reduced sentence. Thus, although *Miller* allows a juvenile to receive a sentence of LWOP on a discretionary basis, the Court predicts that LWOP will be "uncommon,"[26] given the reduced culpability of youth. This word choice is noteworthy, as Justice Roberts noted in dissent, because it is indistinguishable from the prohibition of "unusual" sentences in the Eighth Amendment itself. Moreover, the Court repeatedly underscored that it was extraordinarily difficult to distinguish in adolescence the typical youth whose crime was the product of transient immaturity" from the "rare" juvenile whose crime reflected "irreparable corruption."[27] This potential for error, which is likely to be exacerbated in the wake of a brutal crime, led the Court to categorically prohibit the death penalty and JLWOP in *Roper* and *Graham*, and to warn that JLWOP should be rarely imposed, even for homicide, in *Miller.* As discussed below, the Court's insistence that most juveniles are less culpable than are their adult counterparts, and that the sentence of JLWOP should be uncommon, suggests that the state carries a substantial burden when it seeks to demonstrate that LWOP is an appropriate sentence for a juvenile.[28]

**[T]he Court repeatedly underscored that it was extraordinarily difficult to distinguish in adolescence the typical youth whose crime was the product of "transient immaturity" from the "rare" juvenile whose crime reflected "irreparable" corruption.**

24 Miller, 132 S.Ct. 2455, 2458.
25 Miller, 132 S.Ct. 2455, 2482 (Roberts, C.J., dissenting).
26 Miller, 132 S.Ct. 2455, 2469.
27 Miller, 132 S.Ct. 2455, 2469.
28 As discussed below, some courts have determined that the Supreme Court has effectively created a presumption against JLWOP. *State v. Riley*, No. 19109, 315 Conn. 637, 2015 WL 854827, at *8 (Conn. Mar. 10, 2015). See discussion below at page _.

The Supreme Court has clearly delineated a special status for juvenile offenders under Eighth Amendment doctrine and provided a coherent framework for lawmakers and sentencing courts going forward. The Court's opinions defining new Eighth Amendment protections for juveniles on the basis of their reduced culpability and potential for reform dealt only with the youths facing the harshest sentences. However, the opinions make clear that the principles that form its developmental framework apply generally to juvenile offenders and to the broad range of criminal offenses.

## B. Developmental Science and Adolescent Immaturity

In its juvenile sentencing decisions, the Supreme Court has increasingly relied on findings from studies of behavioral and brain development to support the position that adolescents are less mature than adults in ways that mitigate their criminal culpability and indicate their potential for reform. Although the Court had previously acknowledged that adolescents and adults are different in legally relevant ways, these opinions were the first to look to science for confirmation of what "any parent knows."[29] As described above, the Court pointed to three characteristics of adolescence that distinguish youths from those of adults—immature and impetuous decision-making with little regard for consequences, vulnerability to external coercion (particularly by peers), and unformed character, which made it difficult to judge an adolescent's crime as "irretrievably depraved." In support of this analysis, first offered in *Roper,* the Court increasingly relied on developmental science, and particularly on neuroscience. The body of adolescent brain research has expanded dramatically in the past decade: During this period, references to neuroscience in the Court's opinions analyzing adolescent culpability have become more frequent, and neuroscience has generally become more influential in legal policy and criminal practice.[30]

The evolution of the Court's use of adolescent brain science to support its reasoning is worthy of comment. Before *Roper*, neuroscience played no part in decisions about developmental differences between adolescents and adults. This is not surprising, since little published research existed on adolescent brain development before 2000. In *Roper*, adolescent brain development was mentioned during oral arguments, and presented to the court through Amici, but it was not referenced in the Court's opinions, which instead emphasized behavioral differences between adolescents and adults. *Graham* alluded to adolescent brain development—but only in remarking on the maturation in late adolescence of brain regions important for "behavior control."[31] But in *Miller,* neuroscience was front and center. The Court underscored that its conclusions in the earlier opinions continued to be strengthened by neuroscience research, pointing to adolescent immaturity in higher-order executive functions such as impulse control, planning ahead and risk avoidance.[32]

**From a psychological perspective, adolescents' involvement in criminal activity is a specific instance of a more general propensity for risk-taking.**

From a psychological perspective, adolescents' involvement in criminal activity is a specific instance of a more general propensity for risk-taking; thus, the science on which the Court relied in these opinions situates criminal behavior within the broader context of adolescent risk-taking. Patterns of age differences in criminal activity are similar to those of many other types of risky behavior—including those that have nothing to do with crime, such as self-inflicted injury or accidental drowning—and many of the hallmarks

29 Miller , 132 S.Ct. 2455, 2464 (2012)(quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).
30 Steinberg, The Influence of Neuroscience, note 8.
31 Graham, 560 U.S. 48, 65.
32 Miller, 132 S.Ct. 2455, 2464, fn 5.

of juvenile offending are similar to those that characterize adolescent recklessness more generally. Most juvenile crimes, like most forms of adolescent risk-taking, are impulsive acts that are committed without full consideration of their possible long-term consequences.

Developmental research on age differences in risk-taking is extensive and consistent. Many studies have found that adolescents and individuals in their early 20s are more likely than either children or somewhat older adults to engage in risky behavior; most forms of risk-taking follow an inverted U-shaped curve with age, increasing between childhood and adolescence, peaking in either mid- or late adolescence and declining thereafter.[33] The peak age varies depending on the specific type of risky activity; thus the peak for criminal involvement is age 18,[34] while the peak for binge drinking is age 21.[35] Involvement in both violent and non-violent crime follows this pattern and is referred to as the "age–crime curve." This relationship between age and crime is robust and has been found in many different countries and over historical time.[36]

In recent years, psychologists have theorized that the relationship between age and risk-taking is best understood by considering the contrasting developmental trajectories of sensation-seeking and impulse control.[37] Sensation-seeking—the tendency to pursue novel, exciting and rewarding experiences—increases substantially around the time of puberty and remains high well into the early 20s, when it begins to decline. In contrast, performance on measures of what psychologists refer to as "executive functions," such as planning, thinking ahead, and self-regulation, is low during childhood and improves *gradually* over the course of adolescence and early adulthood; individuals do not evince adult levels of impulse control until their early or mid-20s. Mid-adolescence, therefore, is a time of high sensation-seeking but still immature ability to control impulses—a combination that predisposes individuals towards risky behavior and that distinguishes adolescents' decision-making from that of adults. Before adolescence, individuals are typically impulsive, but they are not especially prone towards sensation-seeking. In young adulthood, sensation-seeking is still relatively high, but by then, individuals have developed a more mature level of impulse control. By the mid-20s, both sensation-seeking and impulsivity are much lower, which accounts for the steep drop-off in criminal activity that generally occurs at this age.

Scientific data supporting this account influenced the Court's characterization of adolescents in *Roper*, and consistent research findings were even more extensive by the time *Graham* and *Miller* were decided. Numerous self-report and behavioral studies have shown that, compared with adults, adolescents are more impulsive, less likely to consider the future consequences of their actions, more likely to engage in sensation-seeking and more likely than adults to attend to the potential rewards of a risky decision rather than to the potential costs.[38] Other studies have provided support for the contention that adolescents are more vulnerable to coercive pressure than adults and that the presence of peers increases risky decision-making among adolescents but not older individuals.

The evidence with respect to the relatively unformed character of adolescents is a bit more limited, although numerous reviews have been published showing that more than 90% of all juvenile offenders desist from crime by their mid-20s and that the prediction of future violence from adolescent criminal behavior, even serious criminal behavior, is unreliable and prone to error. Moreover, longitudinal studies of

33 Steinberg, The Influence of Neuroscience, note 8.

34 Id.

35 Substance Abuse and Mental Health Services Administration, National Institutes of Health. "Report to Congress on the Prevention and Reducation of Underage Drinking." Washington: U.S. Department of Health and human Services (2013).

36 Alex Piquero, Taking stock of developmental trajectories of criminal activity over the life course. In A. Liberman (Ed.), The Long View of Crime: A synthesis of Longitudinal Research, 23-78. New York: Springer, 2008.

37 Laurence Steinberg (2008). A Social Neuroscience Perspective on Adolescent Risk Taking, Developmental Review, 28, 78-106.

38 Steinberg, Id.

personality development have found that personality becomes increasingly stable during late adolescence, especially with respect to qualities such as self-control and responsibility. This research supports the Court's conclusion that juvenile offenders have a greater potential for reform than do adults.

The biological and psychological factors discussed by the Court that can contribute to teenage offending are *normative*, that is, typical of adolescence as a developmental stage. This does not mean, of course, that all adolescents will be inclined to commit crimes due to these developmental influences. Many other factors influence teenage offending, including, most importantly, social context, a factor indirectly alluded to by the Court.[39]

Findings from developmental neuroscience align well with those from behavioral and psychological studies of age differences in traits like sensation-seeking and impulsivity. Neuroscientists have described a maturational imbalance during adolescence that is characterized by relative immaturity in brain systems that are involved in self-regulation during a time of relatively heightened neural responsiveness to appetitive, emotional and social stimuli.[40] With respect to self-regulation, structural imaging studies using diffusion tensor imaging (DTI) indicate immaturity in neural connections within a fronto–parietal–striatal brain system (localized primarily in the lateral prefrontal cortex, inferior parietal lobe and anterior cingulate cortex) that supports various aspects of executive function.[41] These connections become stronger over the course of adolescence as a result of both maturation and experience, and the strength of these connections is positively correlated with impulse control. Maturation of the structural connectivity (i.e., the physical connections between brain structures) in this brain system is paralleled by increases in functional connectivity (i.e., concurrent activation of multiple brain regions) and by changes with age in patterns of activation during tasks that measure aspects of "executive function," including working memory, planning, and response inhibition (all of which are important for impulse control and thinking ahead), as revealed by functional magnetic resonance imaging (fMRI).[42]

By contrast, numerous fMRI studies show relatively greater neural activity during adolescence than in childhood or adulthood in a brain system that is located mainly in the ventral striatum and ventromedial prefrontal cortex.[43] This system is known to have an important role in the processing of emotional and social information and in the valuation and prediction of reward and punishment. According to what has been referred to as a "dual systems model," the heightened responsiveness of this socio-emotional, incentive-processing system is thought to overwhelm or, at the very least, tax the capacities of the self-regulatory system, compromising adolescents' abilities to temper strong positive and negative emotions and inclining them towards sensation-seeking, risk-taking and impulsive antisocial acts.[44] Although it is less well developed, a growing literature on the development of the "social brain,"[45] which was presented to the Court in *Miller*, provides evidence of functional changes that are consistent with heightened attention to the opinions of others, which may be linked to adolescents' greater susceptibility to peer influence, one of the hallmark characteristics of this age group that was highlighted by the Court in the sentencing opinions.

39 The Court alluded to the inability of youths to extricate themselves from environments that may contribute to their offending. Family influence was also noted as potentially a mitigating factor in *Miller*.

40 BJ Casey, Sarah Getz, and Adriana Galvan (2008). The adolescent brain. Developmental Review, 28, 62–77.

41 Steinberg, The Influence of Neuroscience, note 8.

42 Beatrix Luna, Aarthi Padmanabhan, and Kirsten O'Hearn (2010). What has fMRI told us about the development of cognitive control through adolescence? Brain and Cognition, 72, 101–113.

43 Monica Luciana and Paul Collins (2012). Incentive Motivation, Cognitive Control, and the Adolescent Brain: Is it time for a Paradigm Shift? Child Development Perspectives, 6, 392-299.

44 Steinberg, A Social Neuroscience Perspective, note 36.

45 Stephanie Burnett, Catherine Sebastian, Kathrin Kadosh and Sarah-Jayne Blakemore (2011). The social brain in adolescence: evidence from functional magnetic resonance imaging and behavioral studies. Neuroscience and Biobehavioral Reviews, 35, 1654–1664.

To date, the relevant science on brain and behavioral development has been used primarily to bolster arguments about adolescents' diminished responsibility relative to adults. And it is clear that the scientific research described above supports the Court's description of adolescence as a period of great developmental change, in which individuals are impulsive decision makers with weak behavioral controls who are highly sensitive to their peers. But in recent years, findings indicating that adolescence is a second period of heightened *neuroplasticity* (the first such period includes infancy and early childhood) support the view that juveniles not only are less culpable than adults, but also are likely to be better candidates for rehabilitation. Neuroplasticity refers to the capacity of the brain to change in response to experience. Although the brain is always plastic to some degree (learning would not be possible if the brain were not malleable), it is far more so in adolescence than in adulthood. Recent studies point to the impact of sex hormones at puberty on fundamental processes that contribute to changes in the brain's anatomy, including synaptogenesis (the development of new connections between neurons), synaptic pruning (the elimination of unused neural connections), and myelination (the growth of white matter sheathes around neural circuits), all of which improve the brain's efficiency and effectiveness.[46]

Of particular importance is the finding that brain regions that comprise the self-regulatory brain system described earlier are especially plastic in adolescence.[47] This has two important implications for the justice system's response to juvenile offending. First, in light of the well-established link between poor self-control and recidivism,[48] the fact that brain systems that support self-regulation are still changing in adolescence supports the conclusion that most adolescents are likely to mature out of antisocial behavior as the functioning of these systems continues to improve. Thus the brain research sheds light on studies showing that very few juvenile offenders become hardened adult criminals and that, in the aggregate, crime declines sharply during the decade of the 20s.[49] This research also supports the Court's insistence that, with maturity, juvenile offenders are likely to reform.

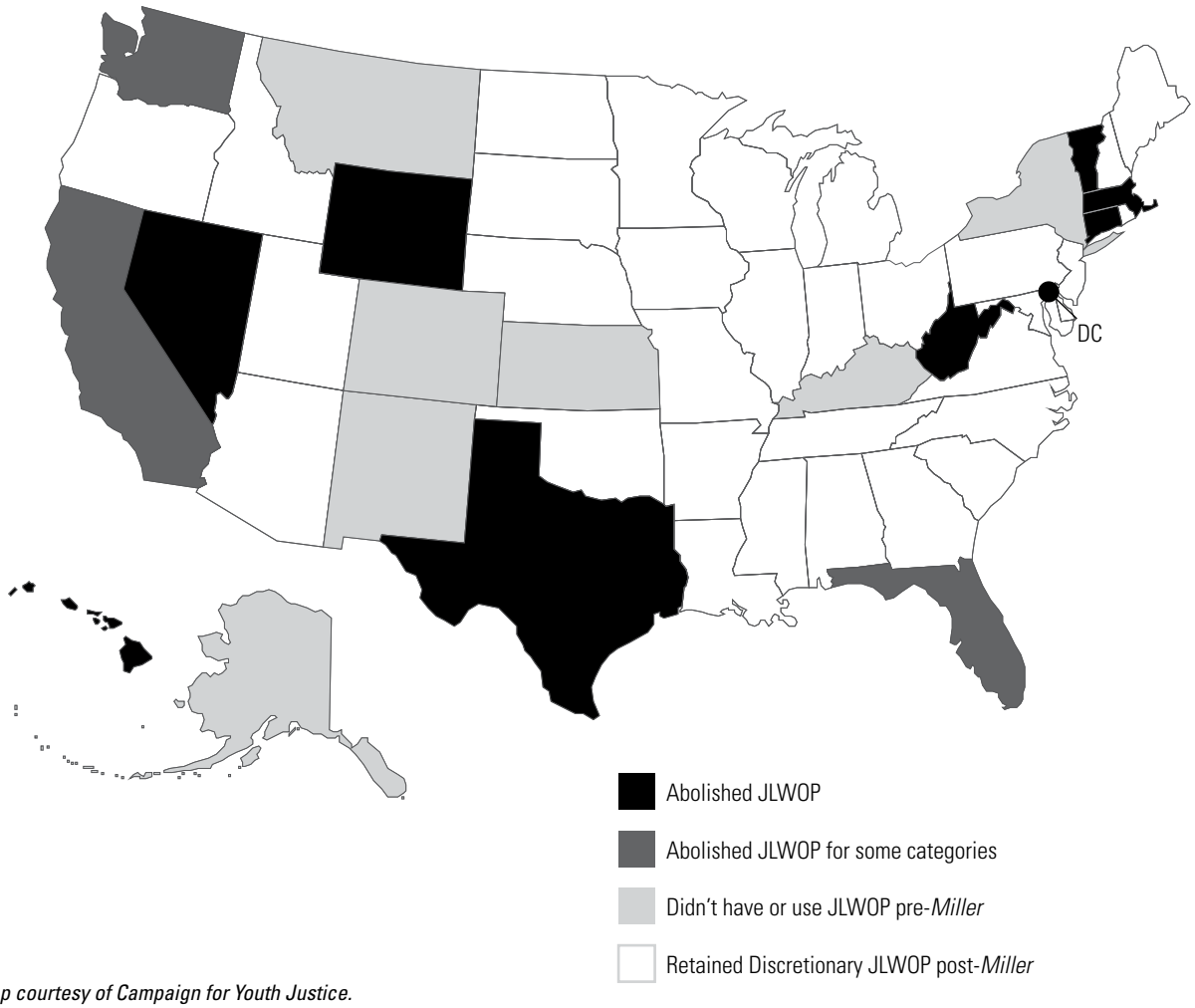
Second, because the heightened neuroplasticity characteristic of adolescence makes the brain susceptible to both positive and negative influences, the correctional setting in which juvenile offenders are placed as a result of sentencing takes on special significance. Neuroscientists are fond of saying that plasticity cuts both ways. Developmentally-appropriate interventions and placements that are designed to strengthen adolescents' self-regulation can take advantage of the malleability of the relevant brain systems during adolescence and their susceptibility to positive influence. On the other hand, programs and settings that do not support the development of self-regulation can actually stunt its development, and may contribute to recidivism, by impeding the normal maturation of impulse control. In one recent study that tracked the behavior of serious juvenile offenders over seven years, the strongest psychological predictor of continued offending was failure to show the gains in impulse control that typically occur in mid- to late adolescence. In contrast, the offenders who evinced the most significant improvements in impulse control during the course of the study were most likely to desist from crime.[50] This research, on the links between normative psychological development and recidivism, can inform the implementation of the Supreme Court's mandate that juvenile offenders be given an opportunity to reform, because not all correctional environments will likely provide the opportunity for the sort of psychological maturation that will lead to desistence from crime.

46 Steinberg, Age of Opportunity, note 19.
47 Id.
48 Kathryn C. Monahan, Laurence Steinberg, Elizabeth Cauffman, and Edward P. Mulvey, E. (2009). Trajectories of antisocial behavior and psychosocial maturity from adolescence to young adulthood. Developmental Psychology, 45, 1654-1668.
49 Piquero, note 35.
50 Monahan et al. Trajectories of Antisocial Behavior, note 47.

# II. JLWOP in the Post-*Miller* Era

The three Supreme Court sentencing opinions have generated a wave of law reform that has dramatically altered the landscape of juvenile sentencing. Some legal changes were directly mandated by the constitutional rulings; all states that had allowed the death penalty or JLWOP for non-homicide offenses abolished those laws, and JLWOP can no longer be mandatory even for homicide. But some courts and legislatures have taken further steps, adopting reforms not explicitly ordered in the opinions, but implied in the Supreme Court's analysis and firmly grounded in its constitutional framework. To be sure, the responses have not been uniform: The California legislature and the Supreme Court of Iowa, for example, have embraced the Court's framework, while other lawmakers have interpreted the opinions narrowly, implicitly (or explicitly) challenging the developmental principle on which the opinions rest. This Part examines the sentencing reforms undertaken in the wake of the Court's rulings. It first focuses on the post-*Miller* status of LWOP for juveniles, and then addresses courts' and legislatures' responses to the complex question of whether *Miller* applies retroactively to prisoners whose LWOP sentences were finalized before the case was decided. The final set of issues involves reforms to lengthy term-of-years sentencing schemes directly in response to the Eighth Amendment rulings.

## Reforms Since *Miller*




*Map courtesy of Campaign for Youth Justice.*

# A. State Responses—Interpreting *Miller*

*Miller* did not require states to abolish the sentence of LWOP for juveniles convicted of homicide. But the Court makes clear that this sentence is seldom acceptable—and only after full consideration of the juvenile's age, immaturity and other mitigating factors, together with an assessment of their impact on his offending.

## The Mitigating Factors Required by *Miller*

**1) The juvenile's age and its hallmark features—including immaturity, impetuosity, and a failure to appreciate consequences.**

**2) Family and home environment, from which youth cannot extricate himself.**

**3) The circumstances of the offense, including the role of the juvenile and the extent to which peer pressure was involved.**

**4) The incompetencies of youth that may have disadvantaged him in dealing with the police or participating in the criminal proceedings.**

**5) The youth's potential for rehabilitation.[1]**

1 Miller 132 S.Ct. at 2468

Several states have drawn from the Supreme Court's analysis the lesson that LWOP is inherently problematic under the Eighth Amendment. Since *Roper* was decided, many states have abolished the sentence altogether for juveniles, often explicitly in response to the Supreme Court opinions.[51] In at least one state, Massachusetts, the state's highest court relied heavily on *Miller* in abolishing LWOP under its state constitution as a disproportionate sentence for juveniles, due to their reduced culpability.[52] LWOP is constitutionally flawed as well, the Massachusetts court insisted, because it categorically denies the juvenile the opportunity to reform, as most youths would do with maturity. This court pointed to research showing that the adolescent brain is not fully developed, either structurally or functionally, in concluding that a court in an individualized hearing could *never*, with sufficient certainty, find a youth to be possessed of an irretrievably depraved character, so as to deserve the harsh sentence of life without parole.

*Miller* suggests that courts, in fact, may be able to make this judgment. However, to conform to the Court's ruling, jurisdictions that retain the sentence of LWOP for juveniles convicted of homicide will need to adopt reforms that go beyond simply converting LWOP to a discretionary sentence. Procedures and guidelines are essential to assure that the mitigating factors that reduce the culpability of juveniles and make them more likely to reform are considered in the sentencing decision. *Miller* specified several factors, all linked to youthful immaturity and the sources of mitigation discussed above. [See Box on this page.] But *Miller* goes beyond simply directing that mitigating evidence be considered. Two elements of the Court's analysis are key to implementing the Court's direction to sentencing courts—it's conclusion that the sentence of LWOP will be "uncommon" because *most* juveniles, due to their developmental immaturity, are less culpable than are adults, and its emphasis on the risk of an erroneous LWOP sentence. Together, these points effectively create a presumption of immaturity.[53] To be sure, *Miller* did not formally create a legal presumption against the sentence of JLWOP. But a fair reading of the opinion supports the conclusion that the state bears the substantial burden of demonstrating that the convicted juvenile is one of the rare youths who deserves this sentence—

51 Alaska Stat. Ann. § 12.55.015(g) (West 2008)(but mandatory sentence of 99 years can be imposed under aggravating conditions); Colo. Rev. Stat. § 18-1.3-401(4)(b) (West 2009); Haw. Rev. Stat. § 706-656 (West 2014); Kan. Stat. Ann. § 21-6618 (West 2007); Ky. Rev. Stat. Ann. § 640.040 (West 2008); Mass. Gen. Laws Ann. ch. 265, § 2 (West 2014); Mont. Code Ann. § 46-18-222 (West 2009); Or. Rev. Stat. Ann. § 163.115 (West)(but LWOP can be imposed if offender knew victim was pregnant); Tex. Penal Code Ann. § 12.31 (West 2013); W. Va. Code Ann. § 61-11-23 (West 2014); Wyo. Stat. Ann. § 6-2-101 (West 2013). In Hawaii, the statute expressly points to Roper, Graham, and Miller for the idea that children are different from adults. H.B. NO. 2116.

52 Diatchenko v Commonwealth, 1 N.E.3rd270 (Mass. 2013).

53 *State v. Riley*, No. 19109, 315 Conn. 637, 2015 WL 854827, at *8 (Conn. Mar. 10, 2015)([Miller's conclusion, 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon'] "suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances."

even for the grave offense of murder.[54] We postpone to Part III a discussion of juvenile sentencing evaluations and hearings, including the type of evidence the state appropriately might bring to support an LWOP sentence, as well as the kind of evidence that supports mitigation.

For present purposes, it should be noted that there is substantial variation in the extent to which lawmakers have provided the kind of guidance that the Supreme Court indicated is needed. Some courts have minimized the importance of the mitigating factors, casually directing sentencing courts to consider "*Miller* factors," or "factors in mitigation," with little elaboration or description.[55] But other courts and legislatures have sought to ensure that the mitigating evidence that the Supreme Court found so important is considered by the sentencing judge, by providing a comprehensive list of factors based on those described in *Miller*.[56] Particularly helpful is the guidance provided by the California Supreme Court in *Gutierrez v. State*, a case that struck down a judicial presumption favoring JLWOP for homicide.[57] *Gutierrez* provides a substantive analysis of the five mitigating factors described in *Miller*, and directs sentencing courts to give each factor full consideration. But little attention has been directed toward issues of burden of proof, or toward the scope of the state evidence that might negate the implicit presumption of immaturity. Sentencing courts need guidance in executing the Court's mandate; state law that allows unstructured discretion create a high risk that judges will impose sentences that fail to recognize that the reduced culpability of youthful offenders applies even to the crime of murder.

California has retained JLWOP, but provides a statutory mechanism to correct erroneous decisions by sentencing courts. Youths sentenced to LWOP can petition for resentencing after serving fifteen years.[58] This statute preceded *Miller*, but it reflects the concern voiced by the Supreme Court in *Graham* that LWOP might be imposed erroneously on a juvenile.[59] The risk is that retributive impulses might drive the sentencing decision, in response to a violent murder, with little weight assigned the mitigating factors associated with immaturity. This response, although it is understandable, may well result in a disproportionately harsh sentence. Thus, the California statute directs the re-sentencing court to take a "second look," considering *retrospectively* mitigating factors at the time of the offense, at least 15 years earlier, and subsequent evidence of rehabilitation. The challenges created by this assignment are addressed below in Part III.

Some jurisdictions have recognized that mitigating factors associated with youth and immaturity should be considered, not only when LWOP is an option, but when a youth faces a life sentence *with* the possibility of parole or other harsh adult sentences. The new Florida statute, for example (which applies to juveniles facing a life sentence with the possibility of parole for homicide), includes multiple factors that require an inquiry into psychological immaturity and its impact on the youth's involvement in the offense.[60] Further, as discussed below, a few states have adopted special parole guidelines for juveniles convicted of serious crimes.

54 Some courts and legislatures have recognized the state's burden. Note 83 and discussion in text.

55 Jackson v. Norris, 426 S.W.2d 906, 907 (Ark. 2013) (instructing that a sentencing hearing be held where Jackson may present evidence of his "'age, age-related characteristics, and the nature of' his crime." (quoting Miller v. Alabama, 132 S.Ct. 2455, 2475 (2012)). *Id.* at 910 (holding that at the sentencing hearing "Jackson may present *Miller* evidence for consideration."); Mich. Comp. Laws Ann. § 769.25 (West 2014) (stating that at a hearing on the motion to sentence an individual under the age of 18 at the time of the crime to life imprisonment without parole, "the trial court shall consider the factors listed in Miller v. Alabama . . ."); State v. Riley, 140 Conn.App. 1, 17–21 (Con App. Ct. 2013), *cert. granted*, 308 Conn. 910 (Conn. 2013) (holding that trial courts have broad discretion in what factors to consider, and as long as defendants have the opportunity to present mitigating factors, courts do not need to explicitly consider "juvenile deficiencies"); S.D. Codified Laws § 23A-27-1 (2013) (establishing that at a presentence hearing for a juvenile the defendant shall have the opportunity "to present any information in mitigation of punishment."); Parker v. State, 119 So.3d 987, 998 (Miss. 2013) (reversing a sentence and remanding for a hearing where the trial court "is required to consider the *Miller* factors before determining sentence."); People v. Woolfolk, 848 N.W.2d 169, 200 (Mich. Ct. App. 2014) ("We therefore hold that *Miller* applies to this case and that resentencing is required . . . [We] remand for resentencing in accordance with *Miller*.").

56 Alabama directs sentencing courts to consider 14 factors, including the "hallmark features of youth," the juvenile's diminished culpability, emotional maturity, past exposure to violence, ability to deal with the police and others. Ex Parte Henderson, WL 4873077 (September 13, 2013).

57 People v. Gutierrez, 324 P.3d 245 (Cal. 2014).

58 Cal. Penal Code § 3070 (West 2011). Some prisoners are excluded under the statute.

59 Graham, 560 U.S. 48, 79 (2010).

60 Fla. Stat. Ann. § 921.1401 (West 2014); Fla. Stat. Ann. § 921.1402 (West 2014).

Lawmakers emphasize that these regulations are grounded in the developmental framework established by *Miller* and *Graham*.

## B. Should *Miller* be Applied Retroactively?

At the time *Miller* was decided, there were many prisoners serving mandatory LWOP terms for homicide, who had been sentenced as juveniles before the Supreme Court ruled that the sentence was unconstitutional, and others whose cases were on appeal. For those whose cases were still on direct appeal, *Miller* rendered their sentence unconstitutional, resulting in a new sentencing proceeding. But for prisoners who had exhausted their appeals, the question arose of whether *Miller* applies retroactively to their sentences. A flood of JLWOP prisoners, some having been incarcerated for decades, have petitioned state and federal courts on collateral review, arguing that the Court's ruling must be applied retroactively to their cases. If *Miller* applies retroactively, these prisoners' mandatory LWOP sentences should be set aside and they should be resentenced (or eligible for parole). Across the country, courts have addressed this issue—with a majority finding that *Miller* should be retroactively applied.

In these cases, most state and federal courts have applied the test adopted by the Supreme Court in a 1989 opinion, *Teague v. Lane,* to determine whether a constitutional ruling by the Supreme Court applies retroactively to state criminal cases already settled, or to decisions in state and federal post-conviction proceedings.[61] Under the *Teague* test, a decision that establishes a new rule of *substantive* constitutional law is applied retroactively, while a new procedural rule is not, *unless* it constitutes a watershed rule of criminal procedure implicating fundamental fairness or the accuracy of the proceeding. (An example of a case creating a watershed rule is *Gideon v. Wainwright*, which established the right to an attorney for indigent criminal defendants[62]). Most procedural rules "regulate only the manner of determining the defendant's culpability."[63] In contrast, a new substantive rule includes one that prohibits a particular sentence from being imposed on a category of offenders: On this ground, courts have ruled that *Roper* and *Graham* should be applied retroactively: Each prohibited a particular sentence (death and LWOP for non-homicide offenses) for a category of offenders (juveniles).[64] Prisoners receiving these sentences as juveniles were entitled to new sentencing hearings or parole, because those sentences were constitutionally prohibited for juveniles.

A minority of courts have held that *Miller* does not apply retroactively, concluding that the opinion, in contrast to *Graham* and *Roper*, simply creates a procedural rule. [65] These courts reason that *Miller* does not prohibit the particular sentence of LWOP for juveniles as a category of offenders; it only requires an individualized sentencing proceeding before the sentence can be ordered on a discretionary basis. On this view, *Miller* simply announces a new rule of criminal procedure, and under *Teague*, it should not be applied retroactively on collateral review.

A majority of courts, however, have found such a mechanistic interpretation of *Miller* to be inconsistent with the meaning and rationale of the opinion. The courts that have held that *Miller* applies retroactively

61 489 U.S. 288 (1989).
62 Gideon v. Wainwright, 372 U.S. 335, 339–44 (1963).
63 Schriro v Summerlin, 542 U.S. 348, 353 (2004).
64 In re Moss, 703 F.3d 1301, 1302–03 (11th Cir. 2013) (holding that *Graham* is retroactive as a new substantive rule of law); In re Sparks, 657 F.3d 258 (5th Cir. 2011) (holding that *Graham* announced a substantive rule under *Teague* and therefore applies retroactively); Little v. Dretke, 407 F.Supp.2d 819, 823 (W.D. Tex. 2005) (holding that the right recognized in *Roper* is substantive).
65 State v. Tate, 2013 WL 5912118 (La. Nov. 5 2013); People v. Carp, 496 Mich. 440 (Mich. 2014); Chambers v. State, 831 N.W.2d 311 (Minn. 2013); Commonwealth v. Cunningham, 81 A.3d 1 (Pa. 2013).

have concluded that it creates a new substantive rule of constitutional law (although a few have held that it creates a watershed rule of criminal procedure).[66] *Miller* creates a substantive rule, these courts reason, because it prohibits a particular sentence (mandatory LWOP) from being imposed on a category of offenders (juveniles). This prohibition is firmly grounded in the same substantive proportionality analysis as *Roper* and *Graham,* and rests on the (substantive) principle that "children are different." Moreover, the creation of a new rule of individualized sentencing for juveniles in *Miller* is comparable to the Court's substantive rule requiring individualized sentencing for adults facing the death penalty.[67]

A few courts have also stressed the fact that a discretionary LWOP sentence differs significantly from a mandatory sentence, expanding the options available to the sentencing court. Supreme Court caselaw counsels that such a change in sentencing options must be applied retroactively.[68] Additionally, because *Miller* directed sentencers to consider specific factors when considering life without parole sentences for juveniles, such instructions from the Court likewise place *Miller's* rule in the substantive category.[69]

Finally, the Supreme Court implicitly assumed that *Miller* should be applied retroactively, given its treatment of the companion case of Kuntrell Jackson. Jackson had long since exhausted his direct appeals and came to the Supreme Court by way of a federal habeas petition. The fact that the Supreme Court directed that his sentence be set aside and the case sent back to the state court for resentencing strongly indicates the Court's intention that its ruling be applied retroactively.[70]

Disputes over whether *Miller* should be applied retroactively continue to be the focus of much litigation. Given the division among courts, the Supreme Court agreed to resolve this issue, accepting the case of *Montgomery v. Louisiana* in 2015.[71] Thus, in the near future, the Supreme will decide whether Miller applies retroactively.

A finding that *Miller* should be applied retroactively produces a challenge. Courts have provided little guidance about the basis for resentencing or the evidence to be considered at these hearings. In theory, the resentencing hearing should result in the same sentence the offender would have received if sentenced appropriately at the time of the crime. But a retrospective judgment about a prisoner's immaturity at the time of an offense that may have occurred decades earlier may be fraught with difficulty. In Kuntrell Jackson's case, the Arkansas Supreme Court directed that Jackson be allowed to present evidence of his "age, age-related characteristics and the nature" of his crime.[72] These challenges are considered in Part III below.

## C. Term-of-Years Sentencing and Parole Eligibility after *Graham* and *Miller*

The Supreme Court in its emphatic statement that "children are different" from adult offenders indirectly raised the question of whether lengthy adult sentences that are not specifically prohibited by *Graham*

66 People v. Davis, 6 N.E.3d 709 (Ill. 2014); State v. Ragland, 836 N.W.2d 107 (Iowa 2013); Diatchenko v. Suffolk Cnty. Dist. Atty.., 1 N.E.3d 270 (Mass. 2013); Jones v. Mississippi, 122 So.3d 698 (Miss. 2013); Ex parte Maxwell, 424 S.W.3d 66 (Tex. Crim. App. 2014).

67 Woodson v. North Carolina, 428 U.S. 280 (1976)(striking down mandatory death penalty because it failed to allow sentencing court to consider mitigating evidence) See *Miller*, 132 S. Ct. at 2466 n.6 ("*Graham* established one rule (a flat ban) for non-homicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.").

68 Schriro v. Summerlin, 542 U.S. 348, 358 (2004); Alleyne v. United States, 133 S. Ct. 2151, 2155, 2160 (2013).

69 Summerlin, 542 U.S. at 354

70 Miller, 132 S. Ct. 2455, 2475; Schriro v. Summerlin, 542 U.S. 348 (2004). See State v. Ragland, 836 N.W.2d 107 (Iowa 2013)(making this point).

71 Montgomery v. Louisiana, U.S. Supreme Court, grant of petition for certiorari, No. 14-280.

72 Jackson v. Norris, 426 S.W.3d 906, 907 (Ark. 2013).

and *Miller* might nonetheless also violate the constitutional principles on which the decisions are based. In response to the opinions, some lawmakers have sought to retain harsh sentences not specifically prohibited by the Court. But other states have revised their laws by moderating term-of-years sentences for juveniles: These reforms are grounded firmly in the new constitutional framework with its insistence that juveniles are less culpable than adult criminals and should be given a meaningful opportunity to reform.

A key distinction between states that have embraced the lessons of *Graham* and *Miller* and those that have responded grudgingly is in the approach to mandatory minimum terms of imprisonment before youthful offenders are released or eligible to petition for parole. Since the 1990s, many juveniles, in fact, have received long mandatory sentences. This is due in part to punitive criminal sentencing reforms in many states during that period, aimed at increasing the harshness of sanctions and limiting judicial sentencing discretion.[73] Many states abolished parole altogether (one reason that LWOP became more prevalent), or made it contingent on serving a long prison term. This trend was also a response to the federal Truth in Sentencing statute that tied states' eligibility for certain federal grants to a requirement that prisoners serve 85% of announced sentences.[74] During this period, the judicial practice of ordering sentences for multiple offenses to be served consecutively rather than concurrently also increased.[75]

## Sentences for Juveniles Convicted of Murder in Several States

**CALIFORNIA: LWOP or 25 years to life. Cal. Penal Code § 190.5 (West 2014).**

**FLORIDA: 40 years minimum, with parole review after 25 years. Fla. Stat. Ann. § 921.1402(2) (West 2014).**

**ILLINOIS: 20 to 60 years, or 60 to 100 years with aggravating factors. 730 Ill. Comp. Stat. Ann. 5/5-4.5-20 (West 2013).**

**MASSACHUSETTS: 20 to 30 years. Mass. Gen. Laws Ann. ch. 279, § 24 (West 2014).**

**PENNSYLVANIA: For age 15 to 18—LWOP or minimum 35 years to life. Age under 15—LWOP or minimum 25 years to life. 18 Pa. Cons. Stat. Ann. § 1102.1 (West 2012).**

**TEXAS: Life, with parole eligibility after 40 years. Tex. Penal Code Ann. § 12.31 (West 2013). Tex. Gov't Code Ann. § 508.145 (West 2013).**

Some states that have been required to abolish the mandatory sentence of LWOP for juveniles convicted of murder have adopted lengthy term-of-year sentences to be imposed either when LWOP is not deemed appropriate for an offender, or instead of LWOP. Even states that do not impose LWOP on juveniles may mandate long minimum sentences for youths convicted of murder. For example, all Texas juveniles convicted of murder are sentenced to 40 year minimum sentences.[76] Even a state such as Massachusetts, in which the state's highest court found JLWOP to be unconstitutional, imposes a minimum 20 year sentence on these young offenders.[77] Thus the abolition of mandatory LWOP, or even the abolition of this sentence altogether, does not signify a policy of leniency toward juveniles who commit homicide. [See Box for sentences in several states.] Given the seriousness of the crime, these statutes are likely to pass constitutional muster, but only if the mandatory term-of-years sentences provide a meaningful opportunity to reform.[78]

The punitive sentencing reforms of the 1990s have sometimes resulted in mandatory sentences of juveniles that predictably would extend beyond or through the individual's expected life span. Appellate courts have

73 Kevin Reitz, Sentencing, in James Q. Wilson & Joan Petersilia (eds.), Crime and Public Policy, 467 (2011).
74 Ditton & Wilson, note 7.
75 Id.
76 Tex. Gov't Code Ann. § 508.145 (West 2013).
77 Mass. Gen. Laws Ann. ch. 279, § 24 (West 2014).
78 As some courts have found, long *consecutive* sentences may effectively constitute LWOP. People v. Caballero, 282 P.3d 291, 295 (Cal. 2012).

been asked to review these sentences in both homicide and non-homicide cases under *Graham* and *Miller*. Petitioners have argued that lengthy mandatory adult sentences imposed on juveniles are the functional equivalent of LWOP and that they violate or subvert constitutional principles in two ways. First the duration can effectively deny the young offender an opportunity to reform, because release from prison in the future is either biologically foreclosed or unlikely to happen at a time when the reformed prisoner can rejoin society in a meaningful way. Second, the mandatory nature of the sentence precludes the introduction of mitigating evidence on youth and immaturity that may indicate that the youth deserves a lesser sentence than an adult counterpart or than a more culpable juvenile.

Courts have divided on the question of whether these long sentences are acceptable under constitutional sentencing principles. Some courts have allowed lengthy, mandatory sentences for juveniles to the extent not explicitly prohibited by the Supreme Court. Terms of 50, 70 and 90 years for non-homicide offenses have been upheld by courts that read *Graham* literally to only prohibit the sentence of LWOP.[79] Other courts, however, have rejected excessively long sentences as the equivalent of LWOP and contrary to *Graham* and *Miller*.[80] These courts have emphasized that a sentence that, at best, anticipates release from incarceration when the young offender is advanced in age is an implicit rejection of *Graham* and *Miller,* because it fails to recognize the reduced culpability of juvenile offenders or to provide them with a meaningful opportunity for release when their sentences are completed. Most offensive, of course, is the sentence that extends beyond the juvenile offender's life expectancy. Such lengthy punishment is the functional equivalent of LWOP and violates any sensible reading of the constitutional limits on punishment of juveniles. The California Supreme Court reached this conclusion in *People v. Caballero*, in striking down a juvenile's sentence of 110 years in a non-homicide case on Eighth Amendment grounds.[81] Under *Graham*, the court held, the state may not deprive the youth of a meaningful opportunity to demonstrate his rehabilitation and fitness to reenter society in the future.[82]

The Iowa Supreme Court has offered the most comprehensive rationale for rejecting lengthy mandatory sentences as inconsistent with the principles of *Graham* and *Miller*. This court struck down an order by Iowa's Governor, who, after *Miller*, commuted the sentences of all juveniles serving LWOP to life with parole eligibility after 60 years.[83] The court held that this executive act violated *Miller* because it amounted to the equivalent of LWOP for a 16 year old, imposed automatically with no consideration of the critically important mitigating factors associated with youth. A year later, the same court, in *Lyle v. State*, found *all* mandatory minimum adult sentences to be unconstitutional for juveniles.[84] This case and other reforms of mandatory sentences for juveniles are discussed in Part IV.

79 Bunch v Smith, 685 F3d 546 (6th Cir. 2012)(89 years)

80 People v. Caballero, 282 P.3d 291, 295 (Cal. 2012); State v. Ragland, 836 N.W.2d 107, 121–22 (Iowa 2013); Bear Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014. Recently the Florida Supreme Court reversed a lower court and found that a 70 year sentence for a non-homicide offense provided no opportunity for reform and was therefore unconstitutional. Gridine v State, __So.3d__(2015)(unreleased opinion; 2015 WL 1239504).

81 People v. Caballero, 282 P.3d 291, 295 (Cal. 2012).

82 Id. at 269.

83 State v. Ragland, 836 N.W. 2d. 107 (Iowa 2013).

84 State v. Lyle, 854 N.W.2d 378, 400 (Iowa 2014).

# III. Evaluating Mitigation in a Constitutional Framework: The *Miller* Factors

Jurisdictions that retain the sentence of LWOP for juveniles convicted of homicide must conduct a sentencing hearing to consider the five mitigating factors described by the Supreme Court in *Miller* (See Part II above). These hearings will involve expert testimony by clinicians for defendants and for the state; indeed, a clear implication of the court's mandate is that a juvenile facing LWOP has a right to a psychological assessment in connection with sentencing. Because the *Miller* factors are based on developmental constructs, expert assessment by forensic *child* clinical psychologists or psychiatrists will be required to inform courts making sentencing decisions. General forensic mental health professionals who evaluate adults for criminal courts will usually not be qualified to undertake these assessments. This Part translates each *Miller* factor into terms and concepts that can be examined objectively and discusses relevant and reliable clinical information about those factors. Its aim is to inform both clinicians and sentencing courts on the appropriate scope of expert testimony in juvenile LWOP cases.

*Miller* assumes that adolescents as a class have developmental characteristics (embodied in the five factors) that weigh in favor of mitigation, even for homicide; this is clear from the prediction that LWOP will be "uncommon." Yet, by requiring individualized sentencing decisions, *Miller* recognizes that some youths, despite their status as adolescents, may be different from adolescent developmental norms. Thus, defendants' evidence in mitigation will aim to demonstrate that the offender conforms to developmental norms, while the prosecutor must persuade the judge that the youth is more adult-like than the norm, and that his crime is *not* the product of transient developmental influences. Given the background principle embraced by the Supreme Court that most youths are immature, the prosecutor carries a substantial burden.[85]

## A. The *Miller* Factors and Their Application in Sentencing

*Miller* described five factors for courts to consider in deciding whether to impose a LWOP sentence on a juvenile.

**Decisional Factor** The first factor refers to juveniles' age and immaturity, "impetuosity" and compromised capacity to consider future consequences. These are all characteristics of adolescent decision-making and are linked to the typical sensation-seeking and impulsiveness of this developmental period (discussed in Part I). Psychological constructs representing *Miller's* decisional factor are the capacity for abstract thinking (relevant to imagining hypothetical future consequences), the ability to delay impulsive reactions when that would be adaptive, and perceptions of risk and risk-taking. The nature of the inquiry—a sentencing hearing following a conviction of guilt—focuses attention on the youth's capacities to apply these abilities in unstructured and stressful conditions.

Forensic mental health experts (hereinafter, FMH experts) will generally follow three steps in performing *Miller* assessments of adolescents' decisional capacity. The first step uses validated assessment methods

85 Some states have recognized the state's burden. State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013)("A juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances."); Conley v. Indiana, 972 N.E.2d 864, 871 (Ind. 2012); Ind. Code Ann. § 35-50-2-9 (West 2014) (state bears the burden of proving beyond a reasonable doubt the existence of an aggravating factor, which would lead to a sentence of life without parole)

under optimal test conditions. Several validated tools are available to assess cognitive and behavioral capacities for various aspects of decision making, including abstract reasoning, planning and foresight, capacity to delay responding when it is adaptive to do so, and abilities to process and interpret information.[86] These tests typically are standardized and offer norms that allow for comparison of the youth's performance to youths of specific ages.

A second step examines the youth's facility under real-life conditions that may reduce the ability to exercise capacities optimally. This often can be done with a comprehensive review of records of the youth's past behavior in various social situations (e.g., school, rehabilitative settings), and through skilled interviewing of the youth, and of family members, teachers, and peers who have observed the youth's functioning. Youths' capacities to exercise their decisional abilities in real-life contexts can also be impaired by certain behavioral disorders such as Attention Deficit-Hyperactivity Disorder and Post-Traumatic Stress Disorder. FMH experts have measures[87] and clinical diagnostic abilities to detect mental disorders of childhood and adolescence.

Third, the FMH expert can use developmental and clinical knowledge and experience to integrate information from psychometric and real life sources to describe consistencies and inconsistencies, and to characterize the degree to which the youth's decisional abilities may depart from adolescent norms. Sometimes information in descriptions of the offense will allow the expert to offer potential explanations for the youth's decision making before and during the offense.

Burgeoning interest in developmental neuroscience and its potential application to discussions of adolescent psychological development has led many practitioners and policy-makers to ask about its relevance to assessments of immaturity in the sentencing context. Experts on adolescent brain development can assist sentencing courts by describing general trends in brain development and providing information about the implications of those general trends for various aspects of functioning during adolescence. But currently, it is *not* possible to use brain imaging to assess immaturity in an individual adolescent, either alone or in combination with psychological assessment: Experts who offer such opinions exceed the limits of current scientific knowledge, for several reasons.

**[C]urrently, it is *not* possible to use brain imaging to assess immaturity in an individual adolescent, either alone or in combination with psychological assessment.**

First, conclusions about the neurobiological immaturity of adolescents, relative to adults, derive from comparisons of *composite* scans that average images taken from samples of adolescents and compare these to composites created from samples of adults. Just as an average derived from multiple measurements of *any* construct is inherently more reliable than a single measure, these composite brain scans allow for far more reliable conclusions than could be made from assessments of individuals. Assessments of individuals are helpful when gross abnormalities (e.g., brain lesions or tumors) are visible, but it is far more difficult to spot the more subtle changes in the brain that occur during development.

Second, there is not yet sufficient evidence linking age differences in specific aspects of brain structure to real-world behaviors that might mitigate adolescent culpability. It simply is not possible to point to a scan of a normally developing brain and identify a structural feature that clearly marks the brain as an "adolescent"

86 Examples include intelligence tests such as the Wechsler Intelligence Scale for Children-V (2014), the Wisconsin Card Sorting Test (1981), and the Behavior Rating Inventory of Executive Function (2004).

87 Examples include the Child Behavior Checklist (2001), the Minnesota Multiphasic Personality Inventory-Adolescent (1992), the DSM-5 ADHD Symptom Child Adolescent Checklist (2014), and the UCLA Post-traumatic Stress Disorder Reaction Index (1999).

brain rather than an "adult" brain. Moreover, different brain regions mature at different rates, so that an individual's brain is likely to be more mature in some respects than in others.

Finally, many of the most important changes in the brain that occur over the course of adolescence and young adulthood are changes in how the brain functions, rather than simply changes in brain anatomy, or structure. But the assessment of brain function requires capturing a brain image while the individual is performing a specific task designed to activate a particular brain region. Even minor modifications in how such tasks are administered, and in how imaging data are analyzed and interpreted, can have tremendous effects on the conclusions one might draw. Current knowledge about age differences in how the brain functions come from multiple studies in which multiple tasks have been administered to multiple individuals of different ages, and from which overall patterns can be discerned.

**Dependency Factor** A second factor considers the circumstances of familial dependncy and vulnerability that are a part of adolescence. *Miller* commented on negative family circumstances and influences from which a juvenile "cannot usually extricate himself, no matter how brutal or dysfunctional." Youths' dependence on family may vary, of course, depending on their own degree of independence and self-direction. Psychological constructs with similar focus are autonomy in making choices, as well as capacity to meet one's needs independent of external controls.

Evaluating these characteristics, the FMH expert can identify autonomy or dependency as a general characteristic for the youth, using psychometric measures of those abilities. Some of those measures, called "social maturity scales," assess the youth's degree of independence and self-direction in everyday functioning according to age norms. In addition, interviews with family members and inspection of school and clinical records for a youth provide other evidence of self-directed and autonomous functioning in everyday life. Skilled clinical interviewing of the youth also will provide the FMH expert data with which to compare the youth to other adolescents.

**Offense Context Factor** This factor requires consideration of the circumstances of the offense, with special attention to the youth's role in the events. *Miller* points to the potential for peer pressure because enhanced susceptibility to peer influence is a hallmark of adolescence. This factor will be particularly significant in offenses involving multiple youths acting as a group, wherein some youths may have been involved due to peer pressure, while others have played a more initiating role. The key evidence in weighing this factor will be the actual evidence of the youth's role in the offense, although evidence of the youth's tendency to be a "follower" in everyday life will also be relevant in some cases. But peer influence can play a more subtle role in adolescent behavior, as when teenagers engage in behavior that they think will win peer approval ("showing off," for example), or simply encourage one another through group interaction.

Discerning the role of peer influence typically will require a detailed forensic examination of reports of the youth's involvement in the crime. Experienced forensic experts typically have developed the ability to engage in psychological reconstruction of offenses so as to obtain the necessary information. In some cases the youth's involvement as a product of peer influence will be almost self-evident. In other cases influence will be difficult to discern, and occasionally it will not be proper even to speculate whether the youth could have extricated himself from the situation.

**Legal Competency Factor** This factor reflects concern that juveniles may have lesser capacities than adults on average to resist police interrogations, or to be competent to stand trial, as discussed in Part I above. This general assumption is supported by empirical evidence), but some adolescents, especially older teens, may

have capacities that are roughly equivalent to most young adults.[88] A number of psychological constructs may be relevant for this factor, such as cognitive and intellectual capacities, tendencies toward dependence and acquiescence, impulsiveness and short-sightedness in decision making, and general lack of knowledge about the legal process.

An inquiry into a youth's capacities during police interrogation requires a retrospective analysis based on an assessment of the youth's current capacities and a consideration of their implications for the youth's functioning under the conditions of the arrest and police interrogation. Forensic psychology and psychiatry have developed systematic ways to perform such inquiries, using standardized assessment tools for comprehension of *Miranda* rights and susceptibility to acquiescence,[89] together with guidance for applying those results to retrospective analysis of the interrogation event.[90]

Inquiry into competence to stand trial in theory should be of less relevance at sentencing, because due process requires evaluating the youth's competence to stand trial if it was in question during the adjudication. But if this issue is raised at sentencing, FMH experts have well-developed assessment tools for evaluating abilities specifically relevant for competence to stand trial, as well as measures mentioned above for assessing "decisional abilities" and cognitive, emotional or developmental deficits that may impair trial participation.[91]

**Rehabilitation Factor** Finally, the "rehabilitation factor" is perhaps the most complex. Youths' potential for rehabilitation can be interpreted in two ways.

First, as the Supreme Court recognized, maturation will usually modify the characteristics that have contributed to the youth's offending. For many adolescents, offending is a consequence of transient developmental conditions. Research has demonstrated that the majority of youth involved in the juvenile justice system "desist" from delinquency as they approach adulthood.[92] Desistence occurs relatively independent of interventions to modify youths' behavior, although effective therapeutic interventions are likely to enhance the effect. However, a smaller proportion of delinquent youth do not "age out" of delinquency and continue to offend as adults. *Miller*'s intent in raising the rehabilitation factor might be to try to identify this minority of juvenile offenders.

The research evidence indicates that the seriousness of the offense (even homicide) is not a reliable predictor of future offending or rehabilitation failure.[93] Serious offending in adolescence occurs for many different reasons that may or may not reflect the character of the youth. However, research also provides FMH experts with some indicators for youths who are somewhat more likely to persist in criminal behavior into adulthood. Among these, for example, is early onset of aggression and delinquent behavior (e.g., before adolescence), together with the persistence and frequency of offending throughout adolescence. But psychological instruments, such as measures of psychopathy that can assess the character of adults who are

88 Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci, and Robert Schwartz (2003). Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants, Law and Hum. Beh. 27, 333.

89 Naomi Goldstein, Heather Zelle, and Thomas Grisso, Miranda Rights Comprehension Instruments: Manual (2012). Gisli Gudjonsson, Gudjonsson Suggestibility Scales (1997).

90 Alan Goldstein and Naomi Goldstein, Evaluating Capacity to Waive Miranda Rights (2010).

91 For descriptions, see Ivan Kruh and Thomas Grisso, Evaluation of Juveniles' Competence to Stand Trial (2009).

92 Terrie Moffit (1993). Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, Psychol. Rev., 100, 674; Edward Mulvey, Laurence Steinberg, Alex Piquero, Michelle Besana, Jeffrey Fagan, Carol Schubert, and Elizabeth Cauffman (2010). Longitudinal Offending Trajectories among Serious Adolescent Offenders, Dev. and Psychopathology, 22, 453.

93 Magda Stouthamer-Loeber, Evelyn Wei, Rolf Loeber, and Ann Masten (2004), Desistance from Persistent Serious Delinquency in the Transition to Adulthood, Dev. and Psychopathology, 16, 897.

more likely to be long-term offenders, are not useful when applied in individual cases to try to identify such persons during adolescence.[94]

Second, *Miller's* rehabilitation factor also likely refers to the potential that interventions—whether penal or therapeutic—can decrease the likelihood of future offending. The developmental basis for this factor rests on the assumption that adolescents offer more malleable conditions than adults for modifying their abilities, perspectives and behavior. When applied to the individual case, however, "potential for rehabilitation" does not depend simply on the characteristics of youth, but also on the availability of potential interventions in the legal system. Intervention options vary a great deal in their quality and purpose. For example, substance abuse problems are associated with re-offending and are treatable; but only if youths receive a well-designed substance abuse intervention will the risk of re-offending be reduced.[95]

Adolescents vary considerably in ways that can influence their malleability and openness to change through therapeutic interventions. Some psychological constructs are related generally to potential for change, such as degree of discomfort with one's current condition, potential for attachments to persons who offer help, and the persistence and chronicity of the youth's current adaptations to life. Other relevant conditions involve specific clinical disabilities that challenge remediation, such as intellectual deficits, mental disorders, and neurological conditions related to injury or to toxic or malnourished conditions in early childhood. The FMH literature describes systematic procedures for evaluating rehabilitation potential as well as reliable ways to assess various specific characteristics of youths noted above. Currently, however, research examining the validity of judgments about rehabilitation potential is sparse. FMH experts also can describe past rehabilitation programs that a youth has been provided, their outcome and reasons if those efforts have failed, as well various general characteristics that are known to be related to greater potential for change.

It is worth noting that *Miller* does not direct courts to examine specifically the juvenile's risk of future offending. To some extent, this assessment is incorporated in factors dealing with the youth's potential for rehabilitation. Beyond this, the likely duration of the sentence facing the offender, even if LWOP is not ordered, diminishes the relevance of this consideration at the time of sentencing, because risk assessment is only valid for a relatively brief period.

In summary, many of the features of *Miller's* five developmental factors can be translated into psychological constructs to anchor their use in sentencing hearings. Moreover, FMH experts have systematic and reliable ways to assess many of the developmental and psychological concepts relevant for the *Miller* factors. Their opinions based on their assessments can be useful in juvenile LWOP sentencing cases, under conditions and within the limits described. However, clinicians cannot *directly* answer the general question of whether a juvenile is "mature" or "immature," either psychologically or neurologically. In addition, FMH experts sometimes will not be able to state with confidence whether a juvenile is likely to reform.

It should be noted that assessment of the *Miller* factors and testimony by an appropriately trained child FMH expert should play a key role in other sentencing hearings involving juvenile offenders, as well as in JLWOP hearings. The clear message of *Miller* and *Graham* is that mitigation applies generally to juvenile offending (especially for all serious crimes), and not simply to homicide. Thus, whenever a juvenile offender faces a lengthy sentence, expert testimony on *Miller*'s developmental factors can guide the court.

94 For example, one study found that if diagnostic scores on a measure of juvenile psychopathy were used to predict adult psychopathy, the prediction that juveniles who scored in the top 20 percent of psychopathic traits at age 13 would be psychopathic at age 24 would be wrong in 86 percent of cases. Donald R. Lynam, Avshalom Caspi, Terrie Moffit, Rolf Loeber, and Magda Stouthamer-Loeber (2007). Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy, 116 J. Abnormal Psychol. 155, 160, 162.

95 Laurie Chassin, George Knight, Delfino Vargas-Chanes, Sandra Losoya, and Diana Naranjo (2009). Substance Use Treatment Outcomes in a Sample of Male Serious Juvenile Offenders. J. Subst. Abuse Treatment, 36, 183.

## B. Application of the Factors to Re-Sentencing and Parole Hearings

As discussed in Part II, where *Miller* has been found to apply retroactively, many states have begun to require re-sentencing of offenders serving JLWOP, examining factors that were not reviewed at the time of mandatory LWOP sentencing. Resentencing requires a retrospective analysis, because the original sentencing may have occurred years or decades prior to the re-sentencing hearing.

In resentencing hearings, FMH experts can describe the "average" developmental characteristics of youths of the age that the prisoner was when he or she committed the offense. This evidence can offer a developmental baseline; the defense attorney and the state can then offer evidence that the youth conformed to or departed from developmental norms on relevant *Miller* factors.

The retrospective analysis required in a resentencing hearing will restrict the FMH expert's ability to describe the individual youth's status on the five factors at the time of the offense. Assessment of the adult prisoner's intellectual, cognitive, emotional, personality, or mental health functioning typically will be of limited value for inferring those characteristics in the juvenile offender; the utility declines as the time between offense and the re-sentencing increases.

In some cases, nonetheless, useful evidence may be available. First, the FMH expert's current assessment may discover disabilities (e.g., developmental disability [mental retardation], brain damage, or certain developmental disorders such as ADHD) that typically precede adulthood in their development. When this is so, there is often reason to infer that those disabilities were likely to have existed when the individual was an adolescent. Second, in some cases evaluations may have been performed on the individual at or near the time of the offense, although it is unlikely, of course, that evaluations will have been conducted for the original mandatory LWOP sentencing (which involve no consideration of individual characteristics). Available assessments might include mental health evaluations in the community, school-based evaluations, competence to stand trial evaluations prior to adjudication, and evaluations for discretionary transfer hearings. Concerns may be raised, however, about the reliability and quality of the original assessment, and many tools available today for assessing youth's developmental abilities and legal competencies did not exist until the past decade.[96] Finally, FMH experts sometimes may be able to obtain data from collateral sources such as school records, health and mental health records, offense data, and perhaps parents' or peers' recollections of the youth's behavior and attitudes during adolescence. In some cases, these data might lead to relatively reliable evidence related to the factors, such as mental disorders and learning disabilities.

Some states, as discussed in Part IV, provide special parole hearings for offenders serving life or other lengthy sentences. Where these regulations require consideration of *Miller* factors, the problems that impede re-sentencing evaluations are likely to arise. Parole hearings, however, often are more concerned with evidence of the adult inmate's current state of rehabilitation than with his potential for rehabilitation when he was a juvenile. Similarly, whether the individual as a youth would or would not have desisted from offending may be less relevant for parole boards than the individual's current likelihood of offending if released on parole. FMH experts can assist in these matters as well, using validated risk assessment instruments, but they require a different evaluation than one based on *Miller's* developmental mitigation factors.

96 For example, specialized tools for performing developmentally-relevant competence to stand trial evaluations of adolescents did not exist until about 2005. Thomas Grisso, Evaluating Juveniles' Adjudicative Competence (2005).

# IV. Looking Forward: Justice for Juveniles in a Constitutional Framework

The three Supreme Court opinions prohibiting harsh sentences for juveniles directly affect only a narrow category of the most serious offenders. But, as many lawmakers have recognized, the Court's developmental framework applies more broadly than the narrow rulings specify to sentencing and parole policies affecting all juveniles in the criminal justice system. Justice Roberts understood the potentially far-reaching impact of the principle that "children are different," and of the Court's insistence that those differences reduced youthful culpability, regardless of the crime. He observed in his *Miller* dissent, "[The p]rinciple behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently…. [There is] no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive."[97] Whether or not the Supreme Court interprets the "children are different" principle as expansively as Justice Roberts fears under Eighth Amendment doctrine, the constitutional framework is likely to have a broad impact as a matter of *policy.* This is so particularly because regulations grounded in the framework are not only fairer to juveniles but also more effective at reducing crime at lower cost than laws that punish juveniles as severely as adults. This Part explores the broader influence of the opinions on the regulation of juvenile sentencing. The analysis is an effort to offer modest predictions, on the basis of the constitutional framework described above and legal reforms that are already underway, about the direction of law reform in the decade ahead. Predictions beyond this time frame seem highly speculative.

**[The p]rinciple behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently…. [There is] no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive.**

**JUSTICE ROBERTS' DISSENTING OPINION, *MILLER V. ALABAMA* (2012).**

## A. The Future of LWOP for Juveniles

Although *Miller* allowed states to retain JLWOP on a discretionary basis, the opinion opened the door to two constitutional challenges that ultimately may result in a categorical ban. First, the Court declined to abolish JLWOP for felony murder, the offense of petitioner Kuntrell Jackson. But allowing this sentence to be imposed on juveniles is inconsistent with the logic of both *Graham* and *Miller,* an anomaly likely to be corrected by future courts and legislatures. More broadly, as Justice Roberts lamented, the sentence of JLWOP itself may be unable to withstand constitutional scrutiny under the Court's analysis. This is so particularly because the prescribed regime of individualized sentencing is likely to prove unsatisfactory as a means to producing fair and accurate outcomes, given the high stakes and the cost of error.

**JLWOP for Felony Murder** Scholars have long argued that felony murder is generally problematic on fairness grounds because it results in a conviction of first degree murder, the most serious criminal offense, without requiring that the actor killed or intended to kill.[98] Under felony murder doctrine, a defendant can be

97 Miller, 132 S.Ct. 2455, 2482 (Roberts, C.J., dissenting).
98 State v. Hoang,, 755 P.2d 7 (Kan. 1988).

convicted of murder when a death (even a death accidentally caused by a co-defendant) occurs during the commission of a dangerous felony. This doctrine is justified under a theory of "transferred intent," which holds that the intent to commit the underlying dangerous felony can be transferred to the killing itself.[99] But, as Justice Breyer argued in his *Miller* concurrence, to allow a youth convicted of felony murder to be sentenced to LWOP, the harshest sanction available for juveniles, is doubly concerning; first, the young offender who did not kill or intend to kill is less culpable than the actor who intends to cause the victim's death, and second, the juvenile's immaturity independently mitigates culpability. [100] Moreover, the transferred intent theory is particularly dubious as applied to juveniles. The Court emphasized in *Miller* that one feature of developmental immaturity that mitigates juveniles' culpability is a reduced ability to foresee consequences. Thus, young offenders are less likely than are adults to anticipate that a death could result from an armed robbery or other felony.

The Supreme Court's refusal in *Miller* to categorically ban LWOP for felony murder surprised many observers, because this move seemed like a modest application of the proportionality framework embraced in the earlier opinions. *Graham* had emphasized the "twice diminished moral culpability" of young offenders convicted of non-homicide offenses in terms similar to those invoked by Justice Breyer in *Miller*.[101] First, the immaturity of youth made it unlikely that the criminal act was evidence of a "depraved character." But beyond this, the young offender who did not kill was "categorically less deserving of the most severe forms of punishment than are murderers."[102] Justice Roberts, who concurred in *Graham*, rejected a categorical ban because he reasoned that LWOP might be appropriate for the non-homicide offense of attempted murder, where the juvenile aimed, but failed, to kill the victim. Based on this reasoning, the abolition of felony murder (in cases in which there was no intent to kill) would be a straightforward application of the Court's proportionality analysis.

**The Abolition of JLWOP** In allowing courts to continue to impose JLWOP on a discretionary basis for murder, the Supreme Court warned that the sentence should be "uncommon," because very few juveniles have the maturity and depraved character that might justify this severe sanction. The Court also admonished that the risk of an erroneous LWOP decision was great. To reduce the risk of error and to be true to the principles of *Miller*, the state should bear the burden of demonstrating that the juvenile offender deserves this sentence. But ultimately, *Miller's* analysis supports abolishing JLWOP altogether, given the inclination to punish murderers harshly, regardless of age, and the difficulty evaluating youthful immaturity. Some states, as mentioned in Part II, have taken this step already. Further, the Model Penal Code, which has been the dominant influence on criminal law over the past 50 years, was revised by the American Law Institute in 2011 to prohibit LWOP for juveniles.[103] It seems likely that JLWOP will be subject to a strong constitutional challenge in the future.

In *Roper* and *Graham,* the Court found that only a categorical ban of the death penalty and JLWOP (for non-homicide offenses) would protect adequately against an unacceptable risk that juvenile offenders would wrongly be subject to unconstitutionally harsh sentences. *Roper* acknowledged the argument that a "rare" juvenile might have the maturity and "irredeemably depraved character" to deserve the death penalty, but emphasized that the possibility of error was simply too great to allow youthful immaturity to be considered on an individualized basis. Further, as the Court recognized, even expert psychologists may find it difficult to evaluate maturity with sufficient accuracy to distinguish the immature youth from one whose crime demon-

99 Richard Bonnie, Ann Coughlin, John Jeffries, Peter Low, Criminal Law 3rd. ed., 939, Foundation Press (2010).
100 Miller, 132 S.Ct. 2455, 2475–76 (Breyer, J., concurring).
101 Graham v. Florida, 560 U.S. 48, 69 (2010).
102 Id.
103 Model Penal Code Sentencing, Sect. 6.11A, Tentative Draft No. 2 (approved May 17, 2011).

strates "irreparable corruption." The Court noted that under the official diagnostic manual of the American Psychiatric Association, antisocial personality disorder could not be diagnosed before age 18. Moreover, the distortions created by public outrage aroused by a brutal crime increase the likelihood of error. In *Graham*, the Court also noted that the risk of an erroneous decision is further increased by impairments in juveniles' ability to participate effectively as defendants in criminal proceedings. Finally, *Graham* acknowledged that some juvenile offenders might never qualify for parole and should rightly spend their lives in prison, but urged that every juvenile should be given the *opportunity* to mature and reform, an opportunity foreclosed by LWOP. These arguments against discretion were decisive in *Roper* and *Graham*; their logic is just as powerful in supporting the abolition of LWOP altogether as a sentencing option for juveniles. The "children are different" principle that underlies the developmental framework points to this conclusion.

The risks associated with individualized judgments about whether a juvenile deserves this most severe sentence are even greater than the Court recognized. As indicated above, substantial evidence supports that juveniles as a group are less mature than adults in ways relevant to their criminal culpability, and that, in general, individuals mature gradually as they move from childhood through adolescence and into young adulthood. But evaluating *individual* immaturity poses substantial challenges even for skilled child forensic experts. At this point, we simply lack the tools to conclude that a particular youth has a mature or immature brain. And the challenge of discerning, at the time of the crime, the "uncommon" adolescent offender who lacks the potential to reform is simply beyond current knowledge. Thus, the concern for avoiding error in severe sentencing cases that was articulated in *Roper* and *Graham* supports a categorical ban of JLWOP. Moreover, some prosecutors and sentencing courts may disregard the *Miller* factors entirely, presuming that LWOP is an appropriate sentence for murder, regardless of the age of the offender.[104] In this environment, and under these conditions of uncertainty, a sentence that precludes the opportunity of the young offender to attain maturity and reform his criminal inclinations undermines the core principles of fair punishment announced by the Supreme Court. Further, given that most juveniles will reform and cease their criminal activity, LWOP serve little social benefit.

## B. Sentencing Reforms—Beyond LWOP

The principle that "children are different," has implications for sentencing of juveniles that go well beyond restrictions on the death penalty and LWOP. The principle rests on the empirical assumption that developmental factors associated with the teenage years play an important role generally in the criminal activity of most juveniles. For this reason, both the preventive and retributive justifications for long sentences are weaker as applied to juveniles. The trajectory of maturation in adolescence and its implications for criminal sentencing is as relevant to the justice system's response to other crimes and sanctions as to those severe sentences examined by the Supreme Court. Thus, the Court's developmental principle supports broader reforms that either provide juvenile offenders sentenced as adults with the opportunity to introduce mitigating evidence or that categorically impose less severe sanctions on juveniles than on their adult counterparts.

When the Court in *Miller* announced that the differences between adults and children were not "crime-specific," it meant to clarify that the principle applied to murder, the most harmful offense, as well as to non-homicide offenses at issue in *Graham*. But juveniles' immaturity also reduces their culpability for crimes that are subject to *less* severe sanctions than those that the Supreme Court found disproportionate under the

104 The evidence on this point is anecdotal. What is clear is that prosecutors often emphasize the brutality of the crime (rather than the maturity of the offender). Carl Hessler, Stahley Sentenced to Life in Prison for Killing Girlfriend, http://www.pottsmerc.com/general-news/20141217/skippack-teen-tristan-stahley-sentenced-to-life-in-prison-for-killing-julianne-siller-of-royersford.

Eighth Amendment. Indeed, the differential treatment of juvenile offenders has been far less controversial for less serious crimes; for example, transfer to adult criminal court is limited to the most serious crimes. Thus, if juveniles who commit murder (a transferrable offense in all states) are less culpable than their adult counterparts, it follows that young offenders who commit less serious crimes also deserve more lenient sentences. In short, the "children are different" principle should inform policies regulating the sentencing of juveniles whenever they are dealt with in the adult system.

**Mandatory Minimum Sentences in the Post-*Miller* Era.** This conclusion implies that laws that subject juveniles to mandatory minimum sentences on the same basis as adult offenders are problematic on proportionality grounds and such laws are likely to be the focus of future reforms. As discussed above, lengthy mandatory sentences have become part of the sentencing regime in many states. But the requirement that adults and juveniles be subject to the same fixed sentence implicitly rejects the core principle that most juveniles are less culpable than their adult counterparts and deserve less punishment. Moreover, lengthy mandatory sentences for serious crimes deny young offenders the opportunity to reform and rejoin society as productive citizens. As the Iowa Supreme Court recognized in *State v. Lyle*,[105] mandatory adult sentences exclude the consideration of juvenile offenders' immaturity, in clear violation of the constitutional values embodied in the Supreme Court opinions. In rejecting all mandatory minimum adult sentences imposed on juveniles, *Lyle* emphasized two features of the Supreme Court's analysis in *Miller*. First the Iowa court reiterated that the reduced culpability of juvenile offenders is not "crime-specific;" mitigation applies generally to youthful criminal conduct, including the armed robbery offense at issue in the case. Second, the court found the automatic nature of the sentence, with the consequent exclusion of mitigating evidence, to constitute a grievous deficiency. In a strong denunciation of Iowa's sentencing scheme, the court stated "We conclude that the sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability [citing Graham]. First and foremost, the time when a seventeen-year-old could seriously be considered to have adult-like culpability has passed."[106]

**[W]e conclude that the sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability. First and foremost, the time when a seventeen-year-old could seriously be considered to have adult-like culpability has passed."**

***LYLE V STATE*, IOWA SUPREME COURT (2014).**

Not all courts are likely to interpret *Miller* as broadly as the Iowa court has, but other courts have also found constitutional flaws in long mandatory sentences for juveniles,[107] and legislatures have also begun to consider reforms. States aiming to undertake reforms consonant with the Court's developmental framework could respond in several ways. First, they could adopt a presumption against imposing lengthy minimum adult sentences on juvenile offenders, and provide individualized sentencing hearings for juveniles facing such terms; such hearings could allow for the introduction of the kind of mitigating evidence captured by the *Miller* factors, as well state evidence favoring the imposition of the term. Under such a regime, courts could be guided by sentencing guidelines tailored to young offenders' ages. A simpler alternative is a system of minimum sentences for juvenile offenders that are shorter in duration than those imposed on their adult counterparts, a regime that would likely pass constitutional muster.[108]

105 State v. Lyle, 854 N.W.2d 378, 400–02 (Iowa 2014).

106 State v. Lyle, 854 N.W.2d at 398 (Iowa 2014)

107 A Missouri trial court recently found a mandatory sentence imposed on a juvenile for committing a felony with a dangerous instrument (a knife) to be unconstitutional under Miller. State v Smiley, Case No. 1331-CR04069-01 Greene Co. Circ. Ct, 1\6\ 2015.

108 This approach was proposed by Barry Feld. Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court (1999).

**Juvenile Criminal Records and Three Strikes Laws** Another area of likely reform under the new constitutional sentencing framework involves the collateral long-term consequences of juvenile offending. Mitigating the harmful impact of young offenders' criminal records is essential if they are to have meaningful opportunities to reform and become productive adult citizens. The stigma of a criminal record severely impedes an offender's ability to succeed in adult life, undermining the ability to obtain employment or educational services. Limiting the costly consequences for ex-offenders whose crimes were a product of youthful immaturity serves their interests and that of society—and is compatible with the Court's constitutional framework. Traditionally juvenile court records have been sealed and expunged when young offenders became adults, unless their offending continued. But a recent comprehensive study found that many states do not maintain the confidentiality of juvenile records or provide procedures for expungement.[109] Although the justification for retaining adult court criminal records is more powerful on public safety grounds, the criminal records of offenders sentenced as juveniles can be subject to a special policy under which they are maintained and available only to the extent that public protection warrants. In the developmental framework, minor offenses should be expunged from young offenders' records; beyond this, a process of allowing juvenile offenders to petition for expungement of more serious offenses, after a period in which they have maintained a clean record, is consistent with research showing that juvenile offending is not predictive of adult criminality. Along these lines, many states exclude juveniles from regulations requiring public lifetime registration for sex offenders.[110] Recently, several courts have found lifetime registration requirements to violate the Eighth Amendment when applied to juveniles, citing the Supreme Court juvenile sentencing opinions.[111]

Sentencing regulation grounded in the developmental framework will also limit the extent to which offenses committed by juveniles can count to enhance later sentences. A federal appellate court recently reversed a life sentence for a routine drug distribution offense as "unreasonable," because it relied on the offender's criminal record as a juvenile.[112] The court cited *Miller, Graham* and *Roper*, and underscored the reduced culpability of juveniles in rejecting the harsh sentence. The same reasoning applies to sentencing enhancement schemes such as three-strikes laws, under which offenders are sentenced to life for a third felony conviction. Three strikes laws have been harshly criticized as applied to adult offenders, but they are even more discordant with ideas of fair punishment when a juvenile conviction is included as a predicate offense. The likelihood that the youthful offense was the product of immaturity is too compelling to allow it to be the basis for a later draconian sentence.

**Parole Eligibility and Hearings: The Opportunity for Reform**. Parole hearings have taken on heightened importance after *Miller* and *Graham*, in light of the Court's insistence that juveniles are more likely to reform than adult criminals. Thus, statutes that either provide no opportunity for parole or prescribe long minimum sentences for offenders (both adult or juvenile) have created a major obstacle to implementing the Court's developmental framework. In response to the Eighth Amendment cases, some states have reformed their sentencing and parole laws to incorporate consideration of juveniles' special status. For example, in states that have abolished LWOP for juveniles, youths convicted of murder are eligible for parole after serving sentences that range from 15 to 40 years.[113] Other states have created special juvenile offender parole boards or parole eligibility provisions for juvenile offenders convicted of a wide range of crimes.[114] In some jurisdictions, the parole board is directed, by statute, to focus not only on

109 New Study Reveals Majority of U.S. States Fail to Protect Juvenile Records, Juvenile Law Center at http://jlc.org/blog/new-study-reveals-majority-us-states-fail-protect-juvenile-records, November 13, 2014

110 The Ohio Supreme Court pointed to this pattern among states in finding unconstitutional as Cruel and Unusual Punishment such a registration requirement imposed on a juvenile. *In re C.P.,* 967 N.E.2d 729 (Ohio 2012).

111 Id. See also In re J.B., 87-93 MAP 2013 (Pa. S. Ct. 2014); State; State v. Dull, 2015 Kan. LEXIS 359.

112 United States v. Howard, 2014 WL 6807270 (C.A.4th (N.C.))

113 Fla. Stat. Ann. § 921.1402(2) (West 2014); Mass. Gen. Laws Ann. ch. 265, § 2 (West 2014); Mass. Gen. Laws Ann. ch. 279, § 24 (West 2014).

114 Leanne Alarid, Community Based Corrections, 320 (10th Ed. 2014)(describing juvenile offender parole boards in several states).

the offender's current dangerousness and the extent of rehabilitation, but also on his immaturity at the time of the offense and the circumstances surrounding the crime.[115] In the brief period since *Miller*, a substantial number of states have begun to undertake both substantive and procedural reforms of their parole regulations as applied to offenders sentenced as juveniles.

California's comprehensive juvenile parole statute, which became operative in 2014 warrants careful examination; it has already begun to influence lawmakers in other states.[116] In its preamble, the statute explicitly points to *Miller* in noting the developmental immaturity of youth, their reduced culpability and enhanced prospects for becoming "contributing members of society."[117] It then announces the statutory purpose of providing offenders sentenced as juveniles with "a process by which growth and maturity can be assessed and a meaningful opportunity for release established."[118] The statute provides expedited parole hearings for many juvenile offenders: Prisoners serving determinate (not life) sentences of any duration are eligible for parole consideration after a maximum of 15 years of incarceration.[119] Moreover, the legislature has sought to implement its commitment to providing the juvenile offender with a meaningful opportunity for reform by requiring that appropriate measures to promote rehabilitation be identified (and discussed with the prisoner) several years before she is eligible for parole consideration. At the Youthful Offender Parole Hearing, the panel is instructed by statute to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner." A Parole Board directive also indicates that any psychological evaluations should take these factors into consideration, but it does not provide further instruction about how this should be done.[120]

The California youthful offender parole statute takes to heart the message that young criminals are likely to reform and should be given the opportunity to do so. Moreover, in directing the parole board to consider the prisoner's diminished culpability and youthful attributes at the time of the offense, the statute implicitly recognizes that sentencing courts may fail to give appropriate consideration to mitigating factors associated with youth and immaturity. In effect, as under California's LWOP resentencing statute (described in Part II), the parole board can function to correct excessively harsh sentences imposed on juveniles. The parole assessment can be undertaken in an environment in which the reduced culpability of the offender can be evaluated with less distortion than may be possible in the midst of the anger and outrage following brutal crimes. However, as discussed in Part III, retrospective assessment of immaturity poses daunting challenges for clinicians and courts.

In general, special juvenile parole statutes are premised on the prediction, endorsed by the Supreme Court, that most young offenders will mature out of their inclination to get involved in criminal activity and will be able to reenter society as non-criminal adults. [Optimally parole regulation would provide for periodic review to evaluate the offender's progress toward maturity]. Other states have created special clemency boards for juvenile offenders, another way of recognizing that prisoners sentenced as juveniles should receive different treatment from those sentenced as adults.[121] These laws acknowledge the reduced culpability of juvenile offenders and provide them with a meaningful opportunity for reform. In contrast, states that retain sentencing

115 W. Va. Code Ann. § 62-12-13b (West 2014).

116 Cal. Penal Code §§ 3041, 3046, 3051, 4801 (West 2014). Washington state adopted a statute somewhat similar to California's in 2014. Wash. Rev. Code Ann. §10.95.030 (West 2014). Other states considering legislation that creates special parole regime for prisoners sentenced as juveniles, including factors related to immaturity at the time of the offense include Vermont and Connecticut. Vt. House Bill 774 (2014); Ct. House Bill No. 6581 (2013).

117 2013 Cal. Legis. Serv. Ch. 312 (S.B. 260) (West)

118 Id.

119 Prisoners serving sentences of 20 years to life are eligible after 20 years. Cal. Penal Code § 3051 (West 2014).

120 Board of Parole Hearings Administrative Directive No. 2013-07 e

121 Colorado Executive Order B-009-07, The Juvenile Clemency Board, Aug. 29, 2007, http://www.njjn.org/uploads/digital-library/resource_555.pdf.

regimes that allow juveniles to receive long sentences that offer no possibility of release from incarceration until the juvenile is advanced in age represent an implicit subversion of *Miller*.

**Other Areas of Reform** This report has focused on the potential impact of the Supreme Court's developmental framework on adult sentencing of juveniles and parole regulation. But the influence of the principles embodied in this framework on the regulation of juvenile crime is likely to be far broader. Three area of emerging reform are worth noting in conclusion; in each, lawmakers have already begun to adopt legal changes inspired by *Miller*. First, laws that automatically transfer juveniles to criminal court when charged with specific serious offenses subvert the lessons of *Miller* and *Graham*. Some legislatures have restricted these laws, recognizing that, due to their immaturity, most juveniles belong in the separate juvenile system, and that transfer decisions should be made on an individualized basis that allows consideration of youthful immaturity and potential for rehabilitation.[122] Second, in the developmental framework, the importance of the content of correctional programs and the conditions under which the juvenile offender are confined become particularly salient. The science of adolescent development (discussed in Part I) makes clear that a meaningful opportunity to reform requires a correctional setting that promotes healthy psychological development. Increasingly, over the past decade, this lesson has shaped correctional policies in the juvenile system;[123] and it is likely to begin to influence the treatment of young offenders in the adult system as well. Third, developmental science indicates that older adolescents, although they are legal adults, are not fully mature and that their immaturity may contribute to their criminal activity. This does not necessarily argue for raising the age of criminal court jurisdiction above age eighteen,[124] but it does suggest that these older teenagers, like their younger counterparts, are less culpable and more likely to reform than older adults. Policies that attend to their status as still-developing individuals will maximize their likelihood of reform. These areas of emerging reform, and others, clarify that the Court's constitutional framework is shaping the regulation of juvenile crime in ways that go well beyond its impact on sentencing and parole.

122 The Texas Court of Criminal Appeals has required individualized consideration of juvenile's attributes before transfer to adult court. Moon v. State, NO. PD-1215-13 (Tx. Ct. Crim. App 2014). A substantial number of states have reformed their transfer laws and made transfer more difficult, including Delaware (Del. SB 200); Colorado (SB 1271 (2012); Maryland (SB 515 2014) and Ohio (SB 86 2011). Some states such as Missouri have created Task Forces to evaluate transfer laws. The Campaign for Youth Justice maintains a list of statutory reforms. See Legislative Trends, at www.campaignforyouthjustice.org.

123 Reforming Juvenile Justice: A Developmental Approach, National Research Council (2012). The Models for Change initiative, sponsored by the John D. and Catherine T. MacArthur Foundation, applies a developmental approach and has influenced policy in 35 states. About, Models for Change, http://www.modelsforchange.net/about/index.html?utm_source=%2fabout&utm_medium=web&utm_campaign=redirect.

124 Connecticut and Illinois have recently raised the age of general criminal court jurisdiction to age 18, in response to arguments supported by developmental knowledge. Conn. Gen. Stat. Ann. §§ 46b-120, 46b-121, 46b-127, 46b-133, 46b-133c, 46b-133d, 46b-137, 46b-140, 46b-146, 10-19m, 46b-150f (West 2014); Ill. Comp. Stat. Ann. 405/1-7, 1-8, 1-9, 2-10, 3-12, 4-9, 5-105, 5-120, 5-130, 5-401.5, 5-410, 5-901, 5-905, 5-915 (West 2014).

# A Cautionary Note: Threats to the Constitutional Framework

This analysis of the Supreme Court's juvenile sentencing opinions and the influence of its developmental framework on justice policy ends on a cautionary note. Although, in many respects, the current law reform trend is both consonant with constitutional values and more effective than policies that promote lengthy incarceration, several challenges lie ahead. First as discussed earlier, the emphasis on adolescent immaturity as a key consideration in sentencing is likely to be resisted by some prosecutors and rejected by some courts, particularly when juveniles are convicted of serious crimes. More generally, public and political attitudes toward crime are volatile and, predictably, policies based on the "children are different" principle almost certainly will come under pressure in the future. In fact, as this report suggests, endorsement of this principle is far from firmly established. Many punitive statutes of the 1990s are still in place. For example, although the transfer of juveniles to criminal courts has declined substantially in the past decade, many transfer statutes stand ready to be invoked against a broad range of youths.[125] Moreover, the variations among courts in responding to the question of *Miller*'s retroactivity suggest that not all lawmakers accept the "children are different" principle, and some are reluctant to apply the constitutional framework.

Other more systemic forces could destabilize the current approach as well. First crime rates have been relatively low since the mid-1990s, calming anxiety about public safety and facilitating a less punitive, more pragmatic approach to juvenile crime regulation.[126] Should violent juvenile crime rates increase substantially, tolerant public attitudes might shift in a punitive direction. The "moral panics" of the 1990s, in which young criminals were labeled as "super-predators,"[127] demonstrate how public fears can readily be aroused, often by media coverage of violent juvenile crimes.[128] These stories often have resulted in outrage directed at specific offenders and hostility toward at juvenile offenders generally. In this climate, judges have felt the pressure to severely sanction offenders, and politicians, eager to demonstrate that they are "tough on crime" have been inclined to quickly enact harsh laws. Background economic issues can also influence justice policy. The budgetary impact of the punitive reforms was substantial; in recent years, lawmakers have moderated policies, partly in an effort to reduce the financial burden on state budgets during the recession.[129] Under these conditions, regulators have been more receptive to policies based on developmental knowledge, which are both less costly and, with most offenders, more effective at reducing recidivism than regulation that promotes lengthy incarceration.[130] States' straitened financial circumstances could change; ironically, a return to prosperity might undermine empirically-based and constitutionally sound policies.

Thus, adhering to the Court's developmental framework and limiting the impact of punitive impulses toward juvenile offenders generally poses an ongoing challenge. But as the framework becomes more firmly entrenched over time, courts and legislatures may be less inclined to abandon policies that are sound on both social welfare and constitutional grounds. The lessons of developmental science are becoming increasingly familiar to lawmakers, making it more difficult to simply ignore differences between adult and juvenile offenders. Moreover, the contemporary developmental model holds youths accountable and applies a mitigation

125 For example, transfer rates today are low in California, but the transfer statute describes 30 transferrable offenses and has not been reformed. Cal. Welfare & Institutions Code Sect. 707. Jeffrey A. Butts, Transfer of Juveniles to Criminal Court Is Not Correlated with Falling Youth Violence, John Jay College of Criminal Justice, Mar. 16, 2012 (describing relatively low transfer rates compared to other states) , http://johnjayresearch.org/wp-content/uploads/2012/03/databit2012_05.pdf.
126 Elizabeth Scott (2013). *Miller v. Alabama* and the Past and Future of Juvenile Crime Regulation, Mn. J. L. & Inequality, 31, 535-558.
127 John Dilullio (1995). The Coming of the Super-predators, Weekly Standard 1, 23.
128 Id. at 337-341.
129 Id at 542.
130 Elizabeth Scott, "Children are Different:" Constitutional Values and Justice Policy, 11 Oh St. J. Crim L. 71, 91 (2013).

principle to their crimes, but does not *excuse* juvenile offenders from responsibility.[131] Thus it is likely more palatable on both public safety and retribution grounds than the traditional rehabilitative model of juvenile justice, which ignored the realities of adolescent development.

Some constitutionally grounded reforms can mitigate the political volatility of crime policy. For example, more restrictive transfer laws that limit the category of transferable offenses and exclude younger juveniles insulate "front line" decision makers-- prosecutors and courts—from pressure to prosecute and punish juveniles as adults. Other strategies have been invoked to make the legislative process more deliberative when politicians rush to enact tough laws. The requirement of a cost-benefit analysis, built into the legislative and regulatory process in some states, encourages regulators to calculate the predicted financial costs of proposed changes.[132] Lawmakers in the 1990s seldom considered the long term budgetary impact of the punitive sentencing reforms, which later became a source of concern over time. Further, sometimes legislative committees considering juvenile justice reforms have required reports that incorporate developmental knowledge to evaluate the likely effect of the proposed regulatory change on the trajectory of the future lives of the youths affected by the law, together with its impact on incarceration rates and duration, and on recidivism.[133] These analyses and reports can improve regulators' decision-making by promoting consideration of consequences that otherwise might be ignored. Both of these requirements may also slow the lawmaking process, contributing to more deliberation. Finally, "second look" sentencing and parole statutes, discussed above, permit the retrospective examination of sentences at a time when the emotional outrage surrounding the crime has dissipated.

The enactment of Autrie's law in California provides an example of how high profile juvenile crimes can lead to precipitous legislative action—but also how regulatory procedures that encourage deliberation can mitigate the impact of punitive responses. In 2012, in response to the suicide of a teenager who had been sexually assaulted and video-recorded while intoxicated at a party, the California Assembly acted quickly to consider a bill facilitating transfer to criminal court for this offense, which previously had not fallen within the definition of forcible rape, a transferable offense.[134] The bill also provided for a mandatory minimum sentence in the juvenile system and for sentencing enhancement where the perpetrator of a sexual offense afterwards used social media communications to intimidate or humiliate the victim. Although the bill initially had substantial momentum, the enacted statute was far more limited and included *none* of these provisions. (It allowed for public hearings and mandated sex offender treatment for convicted youths).[135] A possible explanation lies in the work of two legislative committees: The Senate Committee on Public Safety issued a report, similar to the "impact statement' suggested above, that focused on adolescent brain research, the logic of the Supreme Court's framework and evidence that long sentences were ineffective at reducing juvenile crime. The Senate Appropriations Committee analyzed the cost of the proposed bill and expressed concern about its impact on California's overcrowded prisons.[136] In combination, these reports encouraged deliberation and consideration of the long term impact of the proposed law. Perhaps the outcome demonstrates the growing influence that the developmental framework on lawmakers, even during times of moral panic.

131 Reforming Juvenile Justice, National Research Council, note 120.

132 The Washington State Institute of Public Policy performs this function for the state legislature, issuing reports on proposed juvenile justice and other legislation. See www.wsipp.wa.gov.

133 See discussion of California's Audrie's law below.

134 Melody Gutierrez, Audrie's Law Goes Too Far, Some Legislators Insist, San Francisco Chronicle, June 22, 2014, http://www.sfgate.com/crime/article/Audrie-s-Law-goes-too-far-some-legislators-insist-5570164.php#photo-5989649.

135 Don Thompson, Modified "Audrie's Law" Clears Senate Committee, NBC Bay Area, June 24, 2014, http://www.nbcbayarea.com/news/local/Lawmaker-Modifies-Sex-Assault-Bill-Targeting-Teens-Audrie-Pott-Jim-Beall-264465921.html; Khalida Sarwari, Saratoga: Pott Family Is Calling Passage of Audrie's Law a "Huge Victory," San Jose Mercury News, Oct. 8, 2014, http://www.mercurynews.com/saratoga/ci_26690531/saratoga-pott-family-is-calling-passage-audries-law.

136 See Committee analysis at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0801-0850/sb_838_cfa_20140523_130619_sen_comm.html. (describing $210,000 to $260,000 cost per juvenile of the 2 year minimum term in juvenile facility).

# Conclusion

The three recent Supreme Court opinions dealing with juvenile sentencing directly affect the sentences of a small group of offenders convicted of serious crimes and subject to the harshest sentences. But these opinions and the developmental sentencing framework offered by the Supreme Court as the basis of its Eighth Amendment analysis have already had a far broader impact on justice policy than was dictated by the cases' narrow holdings. The framework is solidly grounded in the science of adolescence and in legal and constitutional principles. Lawmakers, including legislatures, governors, judges, and corrections agencies increasingly accept that youthful criminal activity is driven by developmental factors, and that, with maturity most juveniles will desist. In both the juvenile and adult systems, this assumption has had a growing impact on policies regulating youth crime.

ModelsforChange

Systems Reform in Juvenile Justice

www.modelsforchange.net

An initiative supported by the John D.
and Catherine T. MacArthur Foundation
www.macfound.org

# EMAIL CORRESPONDENCE CONCERNING THE MILLER V. ALABAMA DECISION

On Fri, Nov 18, 2016 at 11:49 AM, Backstrom, Jim <Jim.Backstrom@co.dakota.mn.us> wrote:

Dear Mr. Mangalji

Your recent email to Jenifer White was referred to me for a reply. For your information, I am a member of the Board of Directors of the National District Attorneys Association (NDAA) and for many years served as chair of the Juvenile Justice Committee of this organization. I have written a number of articles regarding juvenile crime and prosecution over the years, copies of which can be accessed on my office's website if you are interested in reviewing them.

As to your question regarding the impact of the U.S. Supreme Court's decision in Miller v. Alabama which, as you know, is the decision where the Court held that the Eighth Amendment of the U.S. Constitution forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders (the Court had previously ruled that death sentences for juveniles in those states with the death penalty are unconstitutional).

The Miller v. Alabama decision would seem to allow the sanction of life without parole to be imposed upon a juvenile prosecuted and convicted as an adult provided that it is a discretionary decision made by a judge after a finding that sufficient aggravating factors have been proven to warrant such a severe penalty. However, each state that allows such a sanction for a juvenile convicted as an adult for murder or other offenses carrying the sanction of life w/o parole has the legislative authority to revise its statutes to reflect how its statutory scheme will respond to the implications of this case.

Minnesota is one of 28 states (according to this decision) that has a statutory scheme which makes life without parole the mandatory punishment for some form of murder, and would apply the relevant sentencing provision to juveniles age 14 or older (in 26 states) who are prosecuted and convicted as adults (similar statutes would apply to juveniles age 15 or older in Louisiana and age 17 or older in Texas).

To my knowledge, there has been no uniformity in how these 28 states are approaching revision of their sentencing laws to incorporate the requirements of Miller v. Alabama and I am unaware of any compilation of the various approaches taken. I suspect that some of these states, like Minnesota, have not yet finalized statutory amendments pertaining to this issue.

In Minnesota, we have had bills introduced on this topic for several years, but no legislation has been finalized. Without legislative action, the matter would rest with the sentencing judge, who could upon motion of the prosecutor find that sufficient aggravating factors have been proven beyond a reasonable doubt to warrant the juvenile offender tried and convicted as an adult for a murder (or other offense) to receive the sanction of life w/o parole. Similarly, the sentencing judge could choose to sentence the offender to life in prison with a possibility of parole. I expect legislation to be introduced in our state again next year to clarify the legislative intent regarding the sentencing of juveniles convicted as adults for murder offenses in light of the Miller v. Alabama decision.

Sentencing of juvenile offenders, whether convicted in juvenile court or tried and convicted as adults, is something that prosecutors take very seriously. We have long supported a balanced approach to juvenile justice that considers not only public safety and the offenders' accountability to victims and communities, but also the competency development of juvenile offenders. For more details regarding policy positions concerning juvenile justice supported by America's prosecutors, I would encourage you to see the recently completed Juvenile Prosecution Policy Positions and Guidelines compiled by the National Juvenile Justice Prosecution Center at Georgetown University. The NDAA Board just last week passed a resolution of support for this document. There is an entire section in this document that relates to disposition in juvenile cases that you may find of interest, among other areas. I am told that this document can be accessed on NDAA's website.

I hope this information is helpful to you. Thank you for your inquiry.

James Backstrom

Dakota County Attorney

Hastings, Minnesota

---

**From:** Hussain Mangalji [mailto:hmangalj@usc.edu]
**Sent:** Tuesday, November 15, 2016 10:37 PM
**To:** Jennifer White
**Subject:** Implications of Miller V. Alabama

Ms. White,

I was hoping to ask you a few questions concerning the greater implications and impact of the Miller V. Alabama Supreme Court Case. Namely, on how it effects the position District Attorneys will take in future similar cases as well as alternatives for sentencing.

Thank you for your time.

Sincerely,

Hussain Mangalji

**James C. Backstrom** |Dakota County Attorney

Dakota County Attorney's Office

1560 Highway 55 | Hastings MN 55033

651-438-4438 | www.co.dakota.mn.us/attorney

# America's Juvenile Justice System Is Unjustifiably Under Attack

James C. Backstrom*
Dakota County Attorney
August 15, 2012

America's system of juvenile justice is under attack from several groups and on many fronts today. The MacArthur Foundation's Model for Change Initiative, focusing in part on juvenile competency in our justice system, argues that failing to take into consideration the fact that there are significant differences in cognitive development of adolescents and adults that affect the ability to make judgments has led to a counterproductive system that too frequently treats young offenders as adults.[1]

Amnesty International has had a campaign for many years to eliminate life without parole as a sanction for juvenile offenders who have committed violent crimes. This campaign resulted in court challenges to this penalty (which exists in the laws of 28 states and the federal government)[2] culminating in a recent U.S. Supreme Court decision on June 25, 2012 which held that a juvenile cannot constitutionally be sentenced to life without parole if such sentence is a statutory mandate.[3]

The Campaign for Youth Justice is a nationwide group urging juvenile justice reform which is dedicated to ending the practice of trying, sentencing and incarcerating youth under the age of 18 in the adult criminal system.[4] Often cited in support of this effort is a January, 2007 public opinion poll commissioned by the National Council on Crime & Delinquency which seemingly shows the public overwhelmingly supports rehabilitation and treatment for young people in trouble and not incarceration in adult jails or prisons.[5]

Many states also have organizations dedicated to making similar changes or other reforms to their jurisdiction's juvenile justice systems. For example, the Juvenile Justice Coalition of Minnesota has been established in our state. This group describes itself as a systems change and advocacy based organization that promotes state level juvenile justice reform. Its stated goals include:

- distinguishing between youth who pose risks to public safety and those who would be better served in less restrictive settings;
- ensuring access to quality counsel to represent youth involved in the juvenile justice system;
- creating a range of community-based programs to serve the needs of youth involved in the juvenile justice system;

---

* James C. Backstrom has served as the Dakota County Attorney in Hastings, Minnesota since 1987. He is a member of the Board of Directors of the Minnesota County Attorneys Association and the National District Attorneys Association. He currently co-chairs NDAA's Juvenile Justice Advisory Committee and also did so previously from 1993-2001 and 2003-2008. Legal intern Melissa Brown assisted in compiling the information in this article.

- Improving aftercare and reentry for youth confined in the juvenile justice system;
- maximizing youth, family and community participation to aid young people in their own rehabilitation;
- reducing racial disparity in the juvenile justice system; and
- keeping youth out of the adult prison system.[6]

While the first six of these goals are laudable, the last indicates that this organization also promotes efforts to reduce or eliminate the prosecution of youth as adults, similar to some of the efforts by the national organizations referenced above.

Other groups are encouraging reforms which are not necessarily attacks upon the juvenile justice system, but which do involve changes in the way the system operates. For example, the Annie E. Casey Foundation has for years sponsored juvenile justice reform through its Juvenile Detention Alternatives Initiative (JDAI), which Dakota, Ramsey and Hennepin counties in Minnesota are pleased to be a part of. Any jurisdiction's juvenile justice system should be insuring that it is detaining youth for the right reasons and utilizing alternative placements and programming whenever the public safety is not adversely impacted by doing so.

While I do not have fundamental disagreements with all of the underlying principles of the work of these organizations, I strongly disagree with the efforts of the Campaign for Youth Justice to prohibit the prosecution of juvenile offenders as adults under any circumstance and the representations of many of these organizations that far too many youth are improperly being imprisoned as adults for their crimes.

I also do not agree with Amnesty International's belief that life without parole should never be a sanction available to a juvenile offender. Such a sanction should be used very sparingly and only in the most egregious cases, but there may well be occasions where this penalty is appropriate and warranted.

Even the United States Supreme Court recognized this by recently holding that a sentence of life without parole for a juvenile offender is a valid sanction provided that it is not a mandate required by law.[7] In essence, the U.S. Supreme Court concluded that such a sentence could be imposed in appropriate circumstances if such a sanction is a discretionary decision made by a judge after a finding that sufficient aggravating factors have been proven to warrant such a severe penalty.

I also quarrel with the general implication put forth by many of these organizations that our system of juvenile justice in America is somehow out of control and in need of major reform. To the contrary, I believe that the system of juvenile justice today throughout our nation is properly balanced and is not in need of major reform or overhaul.

While almost all juvenile codes in our country were modernized in the mid to late 1990's, including right here in Minnesota,[8] contrary to the belief of most of the organizations mentioned above, these changes were not overly harsh on juvenile

offenders. It was time for the juvenile codes of America to strike a proper balance between protecting the public safety, holding youth appropriately accountable for their crimes and rehabilitating youthful offenders – and that's exactly what these changes did.

There is nothing wrong with a system of juvenile justice that emphasizes the need to protect the public safety, rather than primarily looking at what's in the best interests of the child, as juvenile court had traditionally done before these juvenile code revisions occurred. We need a balanced approach to juvenile justice in America – and such a balanced approach has long been supported by our nation's prosecutors. The National District Attorneys Association passed a resolution to this effect over a decade ago.[9]

There is a common misperception among some in our society that prosecutors have too much authority and enjoy locking people up for as long as we possibly can, including juvenile criminal offenders. It needs to be kept in mind that as ministers of justice prosecutors exercise the broad discretion we appropriately have in the criminal justice arena with fairness and equity each and every day.

As any prosecutor can tell you, we don't take joy in locking people up, most particularly kids, but we do it when it needs to be done. We do it to protect our communities. We do it to bring a measure of justice to the victims of crime. We do it to hold offenders properly accountable for the crimes they have committed, and though most offenders don't realize it at the time, we do it to provide incentive to those who break our laws to not do so again. And we don't do it alone – most sentencing authority properly rests with the judge under our system of justice.

When the decision is made to lock a juvenile up (or an adult for that matter), it is in essence a reflection of failure. Some child has failed to develop an adequate moral compass in their formative years needed to safely and lawfully navigate their way through life. Or some adult has abused or neglected a child, leaving behind someone with deep rooted anger and emotional problems. Or chemical addictions and/or mental health problems have at some point led an individual down a road to self-destruction and crime. As prosecutors, we see such failures and problems all too often in the people we prosecute for committing crimes.

That is why I, and many prosecutors across our state and nation, emphasize prevention and early intervention programs. I have created several youth accountability programs (this is the name we use for what are commonly known as diversion programs) for first time juvenile offenders – programs that emphasize it is wrong to break the law and hold youth accountable in alternative ways outside of our court system. My hope of preventing crime is also why I have spoken to over 16,000 young people in my community in the past decade about the negative impacts of bullying behavior, chemical abuse and the importance of having respect for our laws and for each other.

It is also why I am an active member of an organization called Fight Crime: Invest in Kids and have served in the past as a board member of Minnesota's Youth Intervention

Programs Association. These organizations encourage active early intervention and prevention efforts, such as funding quality preschool education programs, parenting programs for those who are at-risk, and mentorship programs for troubled youth. Studies show that programs such as these are effective, save money and reduce crime in the long run.[10]

No prosecutor in America would rather charge, convict and lock up a criminal offender, than to prevent the crime from occurring in the first place. It is through early intervention and prevention efforts such as those described above that we can reduce crime in America and keep prosecutors and judges from having to make the tough calls about prosecuting kids as adults for serious, violent or habitual criminal acts.

One common misperception regarding our system of juvenile justice in America is that prosecutors are seeking to charge juvenile offenders as adults all the time. This perception, which is often fueled by extensive media coverage of juvenile crimes of violence, is simply wrong.

Few jurisdictions in our country prosecute more than 1 to 2 percent of juvenile offenders as adults and in some jurisdictions this statistic is even lower. In my jurisdiction, for example, we prosecute as adults less than half of 1% of the juveniles referred to our Office for committing crimes. And very few jurisdictions in America prosecute misdemeanor-level juvenile offenders in the adult court system. This would be warranted if the juvenile has a long history of adjudications for criminal behavior – for sooner or later you reach the point that enough is enough and more significant sanctions are warranted for habitual criminal behavior. Adult court prosecution is also appropriate if a juvenile offender has already been prosecuted and convicted of a felony offense as an adult and a later misdemeanor occurs.[11]

Another significant misperception is that prosecutors frequently prosecute juveniles as adults for misdemeanor offenses. A 2007 study sanctioned by the Center for Disease Control)[12] which is frequently put forth by various organizations as evidence of prosecutors abusing their discretion by seeking to prosecute too many youth in adult court, indicates that there are over 200,000 youth under the age of 18 prosecuted as adults every year in America for misdemeanor-level crimes.

What is never explained, however, is that these statistics include 13 states in America that have statutes creating a lower age of majority for criminal behavior than age 18.[13] Clearly in those states, 16 or 17 year old youth who are charged with misdemeanor-level crimes are treated as adults, but this has nothing to do with any certification or transfer of otherwise juvenile offenders to the adult system – these youth are considered to be adults by virtue of their state's laws. You can argue that such laws are inappropriate in these states, but you can't use statistics from these jurisdictions to suggest that prosecutors are transferring hundreds of thousands of juveniles to the adult court system for low-level misdemeanor criminal offenses, for this is simply not the case.

Another fallacy that persists in reference to the juvenile competency arguments put forth by the MacArthur Foundation and others is that the competency of young offenders is not now being properly weighed and considered in the decisions of whether such youth should be prosecuted as adults. The reality of the matter is that a juvenile's age and maturity are always taken into consideration in the disposition of a case. In fact, that is the reason why we have a juvenile court in the first place – a system which has long been and continues to be supported by America's prosecutors.[14]

A juvenile's age and maturity is properly considered at all stages of a criminal case, including the decision to seek adult court prosecution and the determination of the ultimate sentence to be handed down for the crime upon conviction. Age and maturity, however, are not the only factors to be considered – so too must we consider the threat to public safety, the seriousness of the crime, the juvenile's level of culpability and criminal history, the juvenile's failure to participate in and complete prior juvenile programing, and the adequacy of punishment or future programming available in the juvenile justice system.[15] All of these factors are carefully weighed and considered by prosecutors and judges who must make the tough calls of whether a juvenile should face adult court prosecution and sanctions for a crime. When this is done, as it is each and every day across our country, I would submit that our nation's system of juvenile justice is in proper balance.

Another important distinction that is often lost in the discussion of human brain development and competency is that there is a fundamental difference between weighing the risks associated with one's actions and understanding right from wrong. A teenager may well make decisions without fully considering the risks involved (which involves thought processing formulated in the frontal lobe of a person's brain, the last area to fully develop according to experts)[16], but few teenagers who are 14 years of age or older do not fully understands that it is wrong to rape or kill someone. Prosecutors and judges must, therefore, weigh this level of understanding of the wrongfulness of the action with the juvenile's age and maturity, and the other appropriate factors previously noted, in deciding whether or not prosecution as an adult is warranted.

The simple fact of the matter is that juveniles who commit serious and violent crimes, particularly older youth, should in most instances face adult court sanctions. So too must this remedy remain available for youth who have committed less serious offenses who have a long history of convictions for crime after crime for which no juvenile court disposition has been effective. I believe that if this issue is fairly framed, as it seldom is in discussions of this important topic, most Americans would agree.

Caution must be exercised when reaching conclusions based upon opinion polls, for the answer to the question often hinges on how the issue is framed. For example, if a question is asked whether or not you support rehabilitation and treatment for youth committing crimes rather than prosecuting them as adults and incarcerating them for long periods, most persons would probably agree that rehabilitation and treatment is the preferable option. But if the question asked is whether you would support adult court sanctions for a 14-17 year old youth who ties up, tortures and kills an elderly

woman in an effort to steal her identity and money, few would say we should prosecute such a case in the juvenile system. Most would understandably want such a violent offender put away for a long time, if not forever.

I am a firm believer that our nation's prosecutors and judges who exercise discretion in our system of juvenile justice must be given ample options from which to choose when making the difficult decisions they face. Minnesota has been a leader in this area by being one of the first states in America to adopt a "blended sentencing" model. At least seventeen states have similar middle ground approaches or "one last chance" options as they are sometimes called.[17]

Minnesota's blended sentencing model, known as Extended Juvenile Jurisdiction (EJJ),[18] and others like it are designed for those youth who have committed a serious offense which does not initially warrant adult court prosecution, but which requires greater sanctions and/or longer supervision by the juvenile court than is provided in the traditional juvenile court system. Blended sentencing models, which are supported by America's prosecutors,[19] combine some juvenile and adult sanctions for appropriate offenders, provide for stayed adult sanctions to be imposed at a later date should the offender not conform to the conditions of the juvenile court disposition, provide incentives for the youth to remain law abiding in the future and lengthen the period of supervision over the youth by the juvenile court. Blended sentencing models are appropriate and necessary in the continuum of sanctions available for serious, violent and habitual juvenile offenders, especially for younger youth committing very serious crimes.

As prosecutors, we often face tough calls concerning the decision of whether or not to prosecute juveniles as adults. In making these difficult decisions, a case-by-case analysis which weighs all appropriate factors in the decision making process should be adhered to. Most systems of juvenile justice across our country, including Minnesota, provide exactly that, as it should be. While these decisions are not always easy, we must insure the continuation of a process where sufficient discretion exists in the professionals (prosecutors and judges) who are empowered to make them.

One challenge yet to be addressed in many states' juvenile codes is how should we address extreme acts of violence committed by very young offenders? For example, we all recall the tragic circumstances in Jonesboro, Arkansas where a school shooting occurred involving two boys, ages 11 and 13, who gunned down multiple victims. In March of 1998, these two youth set off their school fire alarm and hid outside with guns and shot their classmates and a teacher as they evacuated the building.[20]

Are you adequately prepared for such a tragedy involving very young offenders occurring in your jurisdiction? While Minnesota is not, in my opinion, the solution is not necessarily to authorize the prosecution of youth younger than 14 as adults (14 is the earliest age in Minnesota that a youth can be transferred to adult court for prosecution). A bill was put before the Minnesota Legislature in 2010-2011 to lower the age of possible adult court prosecution to 13, as a result of a recent tragedy in northern

Minnesota where a 13-year old boy intentionally killed a younger child. This change was opposed by Minnesota's County Attorneys – for prosecuting kids younger than 14 as adults is not, in the opinion of Minnesota's prosecutors, the answer to deal with these types of tragedies.

However, something needs to be done to address these concerns. Several years ago I proposed a Serious Youthful Offender category for youth 10-13 years of age who commit extremely violent crimes in our state. Under my proposal, such 10-13 year old youth would not face adult court prosecution or even stayed adult prison sentences, but would remain under the oversight of the juvenile court for a longer period of time than would be the case in a standard juvenile prosecution.

There are certainly other options for dealing with the problem of very young offenders committing extreme acts of violence. If your state does not already have options to address this problem, I believe it is important for you to consider adopting laws that provide for some sanctions beyond what would otherwise be available in a traditional juvenile court prosecution when these types of egregious acts of violence are committed by very young offenders. Maintaining public confidence in our juvenile justice system requires that something more be done than traditional juvenile court prosecution with jurisdiction automatically ending at age 19 in such extreme situations, as it would currently in Minnesota.

There are no simple solutions to the problem of youth violence. Traditional law enforcement efforts must continue with new tools to deal with today's violent juvenile criminals and to effectively deal with non-violent offenders before it is too late. Juvenile criminals must be prosecuted and dealt with appropriately by our system of criminal justice, including adult court sanctions when appropriate for serious, violent and habitual offenders. We must send a clear message that violence such as that seen in school shootings will not be tolerated in America. We must also look for every means possible to prevent these crimes from occurring in the first place. Our nation's juvenile justice system is not in need of replacement or major overhaul as many organizations claim it to be. Every day prosecutors and judges across our country exercise the appropriate discretion they have been given by law to insure fairness and just outcomes for youth who have committed crimes.

[1] MacArthur Foundation, Info Sheet on Juvenile Justice, found at: http://www.macfound.org/press/info-sheets/juvenile-justice/.

[2] *Miller v. Alabama,* 567 U.S. ___ (2012), p. 20, footnote 9.

[3] *Miller v. Alabama,* 567 U.S. ___ (2012).

[4] http://www.campaignforyouthjustice.org

[5] Barry Krisberg, PhD and Susan Marchionna, *Attitudes of US Voters toward Youth Crime and the Justice System* (2007), http://www.cfjj.org/pdf/zogby2007.pdf. or at: http://www.nccdglobal.org/sites/default/files/publication_pdf/focus-voters-and-youth.pdf; see also: http://www.campaignforyouthjustice.org/Downloads/PressReleases/CFYJ_California_Feb2007.pdf.

[6] Juvenile Justice Coalition of Minnesota, Nine Tenets, found at: http://www.jjcmn.com/about-us/nine-tenants.

[7] *Miller v. Alabama,* 567 U.S. ___ (2012), p.16.

[8] Juveniles – Delinquency and Child Protection – Provisions (Juvenile Court Act), chap. 139, S.F. No. 184 (1999). See also National District Attorneys Association, Resource Manual and Policy Positions on Juvenile Crime Issues, Adopted: July 14, 2002, p. 1; and Minn. Stat. Chap. 260B.

[9] National District Attorney's Association Res. 98-013.SPR (March 21, 1998). *See also* James C. Backstrom and Gary L. Walker, *A Balanced Approach to Juvenile Justice: The Work of the Juvenile Justice Advisory Committee*, The Prosecutor, July-Aug. 1998, at 36-39.

[10] The following studies should be reviewed in this regard:

- Schweinhart, L.J., H.V. Barnes and D.P. Weikart, *Significant Benefits: The High/Scope Perry Preschool Study Through Age 27* (Ypsilanti, MI: High-Scope Press, 1993).
- Lally, J.R., P.L. Mangione and A.S. Honig, "The Syracuse University Family Development Research Program: Long-Range Impact of an Early Intervention with Low-Income Children and Their Families" in D.R. Powell, ed., Parent Education as Early Childhood Intervention: Emerging Directions in Theory, Research and Practice (Norwood, NJ: Ablex Publishing, 1988).
- Jones, M.A. and D.R. Offord, "Reduction of Antisocial Behavior in Poor Children by Nonschool Skill Development," Journal of Child Psychology and Psychiatry and Allied Disciplines 30 (1989), 737-750.
- Miller, B.M., Out-of-School Time: Effects on Learning in the Primary Grades (Wellesley, MA: School-Age Child Care Project [now called the National Institute on Out-of-School Time], Center for Research on Women, Wellesley College, 1995); and Posner, J.K. and D.L. Vandell, "Low-Income Children's After-School Care: Are there Beneficial Effects of After-School Programs," Child Development 65 (Society for Research in Child Development, 1994) 440-456.
- Olds, D.L., et al., "Long-term Effects of Home Visitation on Maternal Life Course and Child Abuse and Neglect: Fifteen-year Follow-up of a Randomized Trial," Journal of the American Medical Association, Vol. 278, No. 8, August 27, 1997, pp. 637-652. and Olds, et al., "Long-term Effects of Nurse Home Visitation on Children's Criminal and Antisocial Behavior: 15-Year Follow-up of a Randomized Controlled Trial," Journal of the American Medical Association, Vol. 280, No. 14, October 14, 1998, pp. 1238-1244.
- National Institute of Justice, "Helping to Prevent Child Abuse — Future Criminal Consequences: Hawaii Healthy Start" (October 1995

[11] National District Attorneys Association, Resource Manual and Policy Positions on Juvenile Crime Issues, Adopted: July 14, 2002, p. 8.

[12] Barry Krisberg, PhD and Susan Marchionna, *Attitudes of US Voters toward Youth Crime and the Justice System* (2007), http://www.cfjj.org/pdf/zogby2007.pdf.

[13] Campaign For Youth Justice, Home, State Policy, Trend 2, found at: http://www.campaignforyouthjustice.org/state-legislation.html.

[14] National District Attorneys Association, Resource Manual and Policy Positions on Juvenile Crime Issues, Adopted: July 14, 2002.

[15] National District Attorneys Association, Resource Manual and Policy Positions on Juvenile Crime Issues, Adopted: July 14, 2002, p.8.

[16] *Are teenage brains really different from adult brains?*, Discovery Health, found at: http://health.howstuffworks.com/human-body/systems/nervous-system/teenage-brain1.htm; and ACT for Youth: Upstate Center of Excellence, Research Facts and Findings, *Adolescent Brain Development*, May 2002, found at: http://www.actforyouth.net/resources/rf/rf_brain_0502.pdf.

[17] The Future of Children, Journal Issue: Juvenile Justice, Vol. 18, No. 2, Fall 2008, found at: http://futureofchildren.org/publications/journals/article/index.xml?journalid=31&articleid=43&sectionid=126.

[18] Minn. Stat. § 260B.130 (2012).

[19] National District Attorneys Association, Resource Manual and Policy Positions on Juvenile Crime Issues, Adopted: July 14, 2002, p. 8.

[20] B. Drummond Ayers, Jr., *Bloodshed in a Schoolyard: The Teacher; Stunned Residents find Solace in Act of Heroism*, nytimes.com (March 26, 1998), http://www.nytimes.com/1998/03/26/us/bloodshed-in-a-schoolyard-the-teacher-stunned-residents-find-solace-in-act-of-heroism.html.

**INMATES SERVING LIFE WITHOUT RELEASE (LWOR) FOR MURDERS THEY COMMITTED WHEN THEY WERE UNDER 18-YEARS OF AGE**

**Mahdi Hassan Ali (Hennepin County) (16-years old at time of murders)**

Mahdi Ali was convicted of two counts of 1st degree Intentional Murder during the commission of an Aggravated Robbery and one count of 1st Degree Premeditated Murder for killing three men at the Seward Market in Minneapolis. For facts see *State v. Ali*, 855 N.W.2d 235 (Minn. 2014).

Ali was sentenced to consecutive sentences for each of his three victims – two life terms (with release eligibility at 30 years) and a LWOR term. The two consecutive life terms were affirmed on appeal and the LWOR sentence was remanded to resentencing on direct appeal. On remand, a third consecutive life term was imposed. The legality of Ali's new sentence is currently pending before Minnesota Supreme Court. The Minnesota Supreme Court is asked to decide whether *Miller* and *Montgomery* apply to the discretionary imposing of consecutive life sentences for multiple murders.

**2. Stafon Thompson (Hennepin) (17-years, 1 month)**
**3. Brian Lee Flowers DOB 6-21-1991 (Hennepin) (16-years, 11 months)**

Stafon Thompson and Brian Flowers murdered a woman and her 10-year-old son. For facts see *State v. Flowers,* 788 N.W.2d 120 (Minn. 2010) and *State v. Thompson,* 788 N.W.2d 485 (Minn. 2010). Both Thompson and Flowers received consecutive LWOR terms for the two murders.

Flowers was granted habeas relief by the federal district court which held that *Miller* was retroactive to final state convictions on collateral review. This ruling was made prior to *Montgomery.* Flowers case was remanded to the state court in Hennepin County. The district court has heard argument (like *Ali*) about whether consecutive sentencing is permissible for two murders. Sentencing is currently scheduled for February 3, 2017.

Thompson filed for habeas relief in federal court but the district court and 8th Circuit held *Miller* was not retroactive to his case. After *Montgomery,* the federal district court ordered Thompson's case to return to state court for resentencing compliant with *Miller.* The case has been assigned to a district court judge but no court hearings have been scheduled.

**4. Prentis Jackson DOB 1-24-1989 (Hennepin) (17 years, 1 month)**

Prentis Cordell Jackson murdered a 15-year-old boy in Minneapolis. For facts see *State v. Jackson,* 746 N.W.2d 894 (Minn. 2008). He was convicted of 1st Degree Premeditated Murder and sentenced to LWOR.

Jackson's LWOR sentence was vacated on appeal and the Minnesota Supreme Court ruled that no *Miller* hearing was possible given the passage of time since the commission of the murder. *Jackson v. State,* 883 N.W.2d 272 (Minn. 2016). Jackson was resentenced in district court on October 3, 2016 to a life term with release eligibility after 30 years.

**5. Lamonte Martin DOB 6-27-1988 (Hennepin) (17 years, 10 months)**

Lamonte Martin and a co-defendant shot and killed another 19 year-old man. For facts see *State v. Martin*, 773 N.W.2d 89 (Minn. 2009). He was convicted of 1st Degree Premeditated Murder and sentenced to LWOR.

After *Miller*, Martin filed for habeas relief in federal district court. Relief was denied and the denial was affirmed by the 8th Circuit. The writ was granted after *Montgomery* and Martin's case was returned to state court. Martin was resentenced on November 23, 2016 to a life sentence with release eligibility after 30 years and a consecutive 12-month term for Crime Committed for the Benefit of a Gang.

**6. Timothy Chambers DOB 9-21-1978 (Rice) (17 years, 7 months)**

Timothy Chambers killed a Rice County Sheriff's Deputy after Chambers hit the deputy with his car. For facts see *State v. Chambers*, 589 N.W.2d 466 (Minn. 1999). He was convicted of 1st Degree Intentional Murder of a Peace Officer and sentenced to LWOR.

Chambers appealed his LWOR sentence to the Minnesota Supreme Court after *Miller* was decided. The court ruled that *Miller* was not retroactive. *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013). After *Montgomery* was issued, resentencing was scheduled in Chambers' case for January 20, 2017.

**7. Jeffrey Pendleton DOB 10-3-1988 (Redwood County) (15 years, 11 months)**

Jeffrey Pendleton and four accomplices stabbed a man to death. For facts see *State v. Pendleton*, 759 N.W.2d 900 (Minn. 2009). Pendleton was convicted of 1st Degree Premeditated Murder and 1st Degree Intentional Felony Murder. He was sentenced to LWOR for premeditated murder.

Pendleton filed a postconviction petition in state court in 2013 seeking the benefit of *Miller*. The petition appears to have been dormant until *Montgomery* ruled that *Miller* was fully retroactive. At the resentencing hearing, on September 16, 2016, Pendleton was resentenced on the first-degree felony murder conviction to life with release eligibility at 30 years.

**8. Tony Roman Nose DOB 9-11-1982 (Washington County) (17 years, 10 months)**

Tony Roman Nose sexually assaulted and stabbed a 17-year-old girl to death with a screwdriver. For facts see *State v. Roman Nose*, 667 N.W.2d 386 (Minn. 2003). He was convicted of 1st Degree Pre-Meditated Murder and 1st Degree Intentional Murder While Committing Sexual Assault and sentenced to LWOR.

Roman Nose sought resentencing after *Miller* but the Minnesota Supreme Court ruled (as in *Chambers*) that *Miller* was not retroactive to final sentences. *Roman Nose v. State*, 845 N.W.2d 193 (Minn. 2014). After *Montgomery*, on October 12, 2016, Roman Nose was resentenced to life with release eligibility after 30 years.

MSBA

# Meeting Agenda

## COMMISSION ON JUVENILE SENTENCING FOR HEINOUS CRIMES

**Monday, February 6, 2017**
**4:30-6:30 p.m.**

**Minnesota County Insurance Trust Offices**
**100 Empire Drive • Room 208 • St. Paul**

**Co-Chairs**: **Hon. Kathleen Gearin and John Kingrey**

## AGENDA

1. Juvenile justice system overview, including EJJ, certification, and presentence investigations (Tom Arneson)

2. Sentencing system overview, including role of community corrections, presentence investigations, and sentencing guidelines (Shelley McBride)

Future Meeting Dates for 2017:
February 27
April 3 and 24
June 5

Location and Time:
Meetings will be held in St. Paul at the Minnesota County Insurance Trust offices, 100 Empire Drive, St Paul.
The meetings will begin at 4:30 and end at 6:30 pm.

**FUTURE MEETINGS**

Agenda for February 27, 2017:

1. Neuroscience and juvenile sentencing (Professor Francis Shen)

2. 50 state survey regarding *Miller* hearings and factors

3. Current criteria for presentence investigations in Minnesota for juvenile homicide offenders

4. Identifying the disconnect, if any, between U.S. Supreme Court decisions and Minnesota's presentence investigation criteria

Agendas for April and June meetings to be determined

# Juvenile Life Without Release Applicable Crimes – 609.106, subd. 2

- Premeditated Homicide – 609.185(a)(1)
- Homicide During a Sexual Assault – 609.185(a)(2)
- Intentional Homicide During a Kidnapping – 609.185(a)(3)
- Intentional Homicide of Peace Officer, Judge, Prosecutor, or Corrections Officer – 609.185(a)(4)
- Homicide During a Felony that Furthers Terrorism – 609.185(a)(7)
- Any other 1st Degree Murder if Previously Convicted of a Heinous Crime – 609.185(a)(3), (5) or (6)

# Juvenile Jurisdiction Overview

| | Juvenile | EJJ | Adult Certification |
|---|---|---|---|
| Applicable Age at Time of Offense | 10-17 | 14-17 | 14-17 |
| Offense Level | Petty, Misdemeanor, Gross Misdemeanor and Felony | Felony | Felony |
| Longest Possible Length of Jurisdiction | Age 19 | Age 21 | Statutory Maximum of Offense |
| Dispositions Available | Juvenile | Juvenile and Stayed Adult Sentence | Adult Sentence |
| Private or Public | Private unless 16 or 17 charged with a Felony | Private unless 16 or 17 charged with a Felony | Private unless 16 or 17 charged with a Felony |

# Certification Overview



| | Non-Presumptive Certification | Presumptive Certification | "Automatic Certification" |
|---|---|---|---|
| Applicable Age | 14-17 | 16-17 | 16-17 |
| Applicable Offenses | Felony | Felony that carries a presumptive prison sentence or committed with a firearm | 1st Degree Murder |
| How Initiated | Prosecutor Motion in Juvenile Court | Prosecutor Motion in Juvenile Court | Complaint/Indictment in Adult Court |
| Standard | Retaining the proceeding in juvenile court does not serve public safety* | Retaining the proceeding in juvenile court does not serve public safety* | N/A |
| Burden of Proof | Prosecutor by Clear and Convincing Evidence | Juvenile by Clear and Convincing Evidence | N/A |
| Potential Outcomes | Juvenile<br>EJJ<br>Adult Jurisdiction | EJJ<br>Adult Jurisdiction | Adult Jurisdiction |

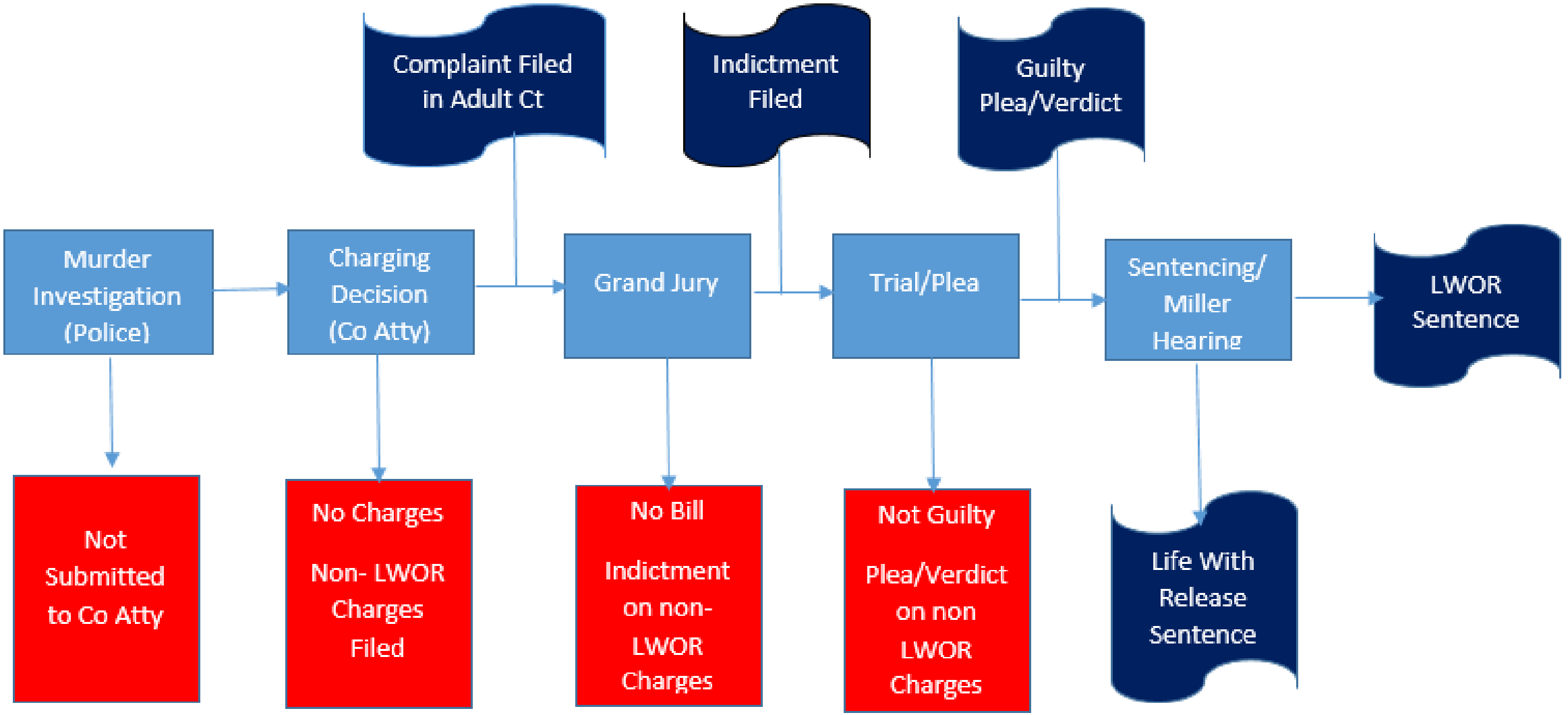
* Determined by the Juvenile Court Judge based upon Statutory Public Safety Factors

# Certification/EJJ Public Safety Factors
# 609.125, subd. 4

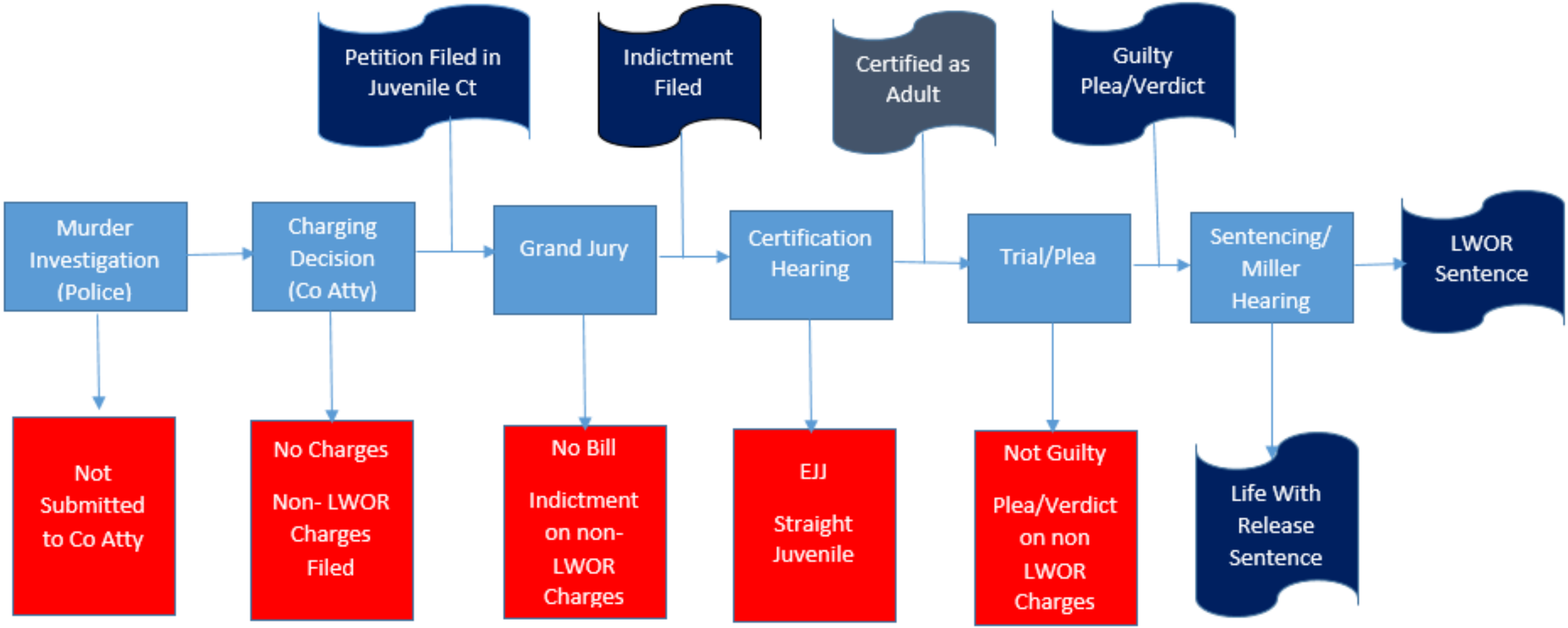
(a) Seriousness of the offense*
(b) Culpability in committing the offense
(c) Prior record of delinquency*
(d) Programming history including willingness to participate
(e) Adequacy of punishment/programming in juvenile court
(f) Dispositional options available

* Greater weight is to be given to (a) and (c)

# Juvenile Life Without Release Process Flowchart (16 and 17- year-olds)



# Juvenile Life Without Release Process Flowchart (14 and 15- year-olds)



**609.106 HEINOUS CRIMES.**

Subdivision 1. **Terms.** (a) As used in this section, "heinous crime" means:

(1) a violation or attempted violation of section 609.185 or 609.19;

(2) a violation of section 609.195 or 609.221; or

(3) a violation of section 609.342, 609.343, or 609.344, if the offense was committed with force or violence.

(b) "Previous conviction" means a conviction in Minnesota for a heinous crime or a conviction elsewhere for conduct that would have been a heinous crime under this chapter if committed in Minnesota. The term includes any conviction that occurred before the commission of the present offense of conviction, but does not include a conviction if 15 years have elapsed since the person was discharged from the sentence imposed for the offense.

Subd. 2. **Life without release.** The court shall sentence a person to life imprisonment without possibility of release under the following circumstances:

(1) the person is convicted of first-degree murder under section 609.185, paragraph (a), clause (1), (2), (4), or (7);

(2) the person is convicted of committing first-degree murder in the course of a kidnapping under section 609.185, paragraph (a), clause (3); or

(3) the person is convicted of first-degree murder under section 609.185, paragraph (a), clause (3), (5), or (6), and the court determines on the record at the time of sentencing that the person has one or more previous convictions for a heinous crime.

***[See Note.]***

**History:** *1998 c 367 art 2 s 6; art 6 s 3,15; 2002 c 401 art 1 s 13; 2005 c 136 art 2 s 5; art 17 s 9; 2015 c 21 art 1 s 98*

**NOTE:** Subdivision 2 as applied to juvenile defendants was severed and the previous version of that subdivision revived in Jackson v. State, 883 N.W.2d 272 (Minn. 2016).

**609.185 MURDER IN THE FIRST DEGREE.**

(a) Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:

(1) causes the death of a human being with premeditation and with intent to effect the death of the personor of another;

(2) causes the death of a human being while committing or attempting to commit criminal sexual conduct in the first or second degree with force or violence, either upon or affecting the person or another;

(3) causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit burglary, aggravated robbery, kidnapping, arson in the first or seconddegree, a drive-by shooting, tampering with a witness in the first degree, escape from custody, or any felonyviolation of chapter 152 involving the unlawful sale of a controlled substance;

(4) causes the death of a peace officer, prosecuting attorney, judge, or a guard employed at a Minnesotastate or local correctional facility, with intent to effect the death of that person or another, while the personis engaged in the performance of official duties;

(5) causes the death of a minor while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon a child and the death occurs under circumstances manifesting an extreme indifference to human life;

(6) causes the death of a human being while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse upon the victim or upon another family or household member and the death occurs under circumstances manifesting an extreme indifference to human life; or

(7) causes the death of a human being while committing, conspiring to commit, or attempting to commita felony crime to further terrorism and the death occurs under circumstances manifesting an extremeindifference to human life.

(b) For the purposes of paragraph (a), clause (4), "prosecuting attorney" has the meaning given in section 609.221, subdivision 2, paragraph (c), clause (4).

(c) For the purposes of paragraph (a), clause (4), "judge" has the meaning given in section 609.221, subdivision 2, paragraph (c), clause (5).

(d) For purposes of paragraph (a), clause (5), "child abuse" means an act committed against a minor victim that constitutes a violation of the following laws of this state or any similar laws of the United States or any other state: section 609.221; 609.222; 609.223; 609.224; 609.2242; 609.342; 609.343; 609.344; 609.345; 609.377; 609.378; or 609.713.

(e) For purposes of paragraph (a), clause (6), "domestic abuse" means an act that:

(1) constitutes a violation of section 609.221, 609.222, 609.223, 609.224, 609.2242, 609.342, 609.343, 609.344, 609.345, 609.713, or any similar laws of the United States or any other state; and

(2) is committed against the victim who is a family or household member as defined in section 518B.01, subdivision 2, paragraph (b).

(f) For purposes of paragraph (a), clause (7), "further terrorism" has the meaning given in section 609.714, subdivision 1.

**History:** *1963 c 753 art 1 s 609.185; 1975 c 374 s 1; 1981 c 227 s 9; 1986 c 444; 1988 c 662 s 2; 1989 c 290 art 2 s 11; 1990 c 583 s 4; 1992 c 571 art 4 s 5; 1994 c 636 art 2 s 19; 1995 c 244 s 12; 1995 c 259 art 3 s 12; 1998 c 367 art 2 s 7; 2000 c 437 s 5; 2002 c 401 art 1 s 15; 2005 c 136 art 17 s 10; 2014 c 302 s 1*

**260B.125 CERTIFICATION.**

Subdivision 1. **Order.** When a child is alleged to have committed, after becoming 14 years of age, an offense that would be a felony if committed by an adult, the juvenile court may enter an order certifying the proceeding for action under the laws and court procedures controlling adult criminal violations.

Subd. 2. **Order of certification; requirements.** Except as provided in subdivision 5 or 6, the juvenile court may order a certification only if:

(1) a petition has been filed in accordance with the provisions of section 260B.141;

(2) a motion for certification has been filed by the prosecuting authority;

(3) notice has been given in accordance with the provisions of sections 260B.151 and 260B.152;

(4) a hearing has been held in accordance with the provisions of section 260B.163 within 30 days of the filing of the certification motion, unless good cause is shown by the prosecution or the child as to why the hearing should not be held within this period in which case the hearing shall be held within 90 days of the filing of the motion;

(5) the court finds that there is probable cause, as defined by the Rules of Criminal Procedure promulgated pursuant to section 480.059, to believe the child committed the offense alleged by delinquency petition; and

(6) the court finds either:

(i) that the presumption of certification created by subdivision 3 applies and the child has not rebutted the presumption by clear and convincing evidence demonstrating that retaining the proceeding in the juvenile court serves public safety; or

(ii) that the presumption of certification does not apply and the prosecuting authority has demonstrated by clear and convincing evidence that retaining the proceeding in the juvenile court does not serve public safety. If the court finds that the prosecutor has not demonstrated by clear and convincing evidence that retaining the proceeding in juvenile court does not serve public safety, the court shall retain the proceeding in juvenile court.

Subd. 3. **Presumption of certification.** It is presumed that a proceeding involving an offense committed by a child will be certified if:

(1) the child was 16 or 17 years old at the time of the offense; and

(2) the delinquency petition alleges that the child committed an offense that would result in a presumptive commitment to prison under the Sentencing Guidelines and applicable statutes, or that the child committed any felony offense while using, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm.

If the court determines that probable cause exists to believe the child committed the alleged offense, the burden is on the child to rebut this presumption by demonstrating by clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety. If the court finds that the child has not rebutted the presumption by clear and convincing evidence, the court shall certify the proceeding.

Subd. 4. **Public safety.** In determining whether the public safety is served by certifying the matter, the court shall consider the following factors:

(1) the seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim;

(2) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines;

(3) the child's prior record of delinquency;

(4) the child's programming history, including the child's past willingness to participate meaningfully in available programming;

(5) the adequacy of the punishment or programming available in the juvenile justice system; and

(6) the dispositional options available for the child.

In considering these factors, the court shall give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency than to the other factors listed in this subdivision.

Subd. 5. **Prior certification; exception.** Notwithstanding the provisions of subdivisions 2, 3, and 4, the court shall order a certification in any felony case if the prosecutor shows that the child has been previously prosecuted on a felony charge by an order of certification issued pursuant to either a hearing held under subdivision 2 or pursuant to the waiver of the right to such a hearing, other than a prior certification in the same case.

This subdivision only applies if the child is convicted of the offense or offenses for which the child was prosecuted pursuant to the order of certification or of a lesser-included offense which is a felony.

This subdivision does not apply to juvenile offenders who are subject to criminal court jurisdiction under section 609.055.

Subd. 6. **Adult charged with juvenile offense.** The juvenile court has jurisdiction to hold a certification hearing on motion of the prosecuting authority to certify the matter if:

(1) an adult is alleged to have committed an offense before the adult's 18th birthday; and

(2) a petition is filed under section 260B.141 before expiration of the time for filing under section 628.26.

The court may not certify the matter under this subdivision if the adult demonstrates that the delay was purposefully caused by the state in order to gain an unfair advantage.

Subd. 7. **Effect of order.** When the juvenile court enters an order certifying an alleged violation, the prosecuting authority shall proceed with the case as if the jurisdiction of the juvenile court had never attached.

Subd. 8. **Written findings; options.** (a) The court shall decide whether to order certification within 15 days after the certification hearing was completed, unless additional time is needed, in which case the court may extend the period up to another 15 days. If the juvenile court orders certification, and the presumption described in subdivision 3 does not apply, the order shall contain in writing, findings of fact and conclusions of law as to why public safety is not served by retaining the proceeding in the juvenile court. A child certified under this paragraph may be detained pending the outcome of criminal proceedings in a secure juvenile detention facility.

(b) If the juvenile court, after a hearing conducted pursuant to subdivision 2, decides not to order certification, the decision shall contain, in writing, findings of fact and conclusions of law as to why certification is not ordered. If the juvenile court decides not to order certification in a case in which the presumption described in subdivision 3 applies, the court shall designate the proceeding an extended jurisdiction juvenile prosecution and include in its decision written findings of fact and conclusions of law as to why the retention of the proceeding in juvenile court serves public safety, with specific reference to the factors listed in subdivision 4. If the court decides not to order certification in a case in which the presumption described in subdivision 3 does not apply, the court may designate the proceeding an extended jurisdiction juvenile prosecution, pursuant to the hearing process described in section 260B.130, subdivision 2.

Subd. 9. **First-degree murder.** When a motion for certification has been filed in a case in which the petition alleges that the child committed murder in the first degree, the prosecuting authority shall present the case to the grand jury for consideration of indictment under chapter 628 within 14 days after the petition was filed.

Subd. 10. **Inapplicability to certain offenders.** This section does not apply to a child excluded from the definition of delinquent child under section 260B.007, subdivision 6, paragraph (b).

**History:** *1999 c 139 art 2 s 11; 2011 c 72 s 1*

**260B.130 EXTENDED JURISDICTION JUVENILE PROSECUTIONS.**

Subdivision 1. **Designation.** A proceeding involving a child alleged to have committed a felony offense is an extended jurisdiction juvenile prosecution if:

(1) the child was 14 to 17 years old at the time of the alleged offense, a certification hearing was held, and the court designated the proceeding an extended jurisdiction juvenile prosecution;

(2) the child was 16 or 17 years old at the time of the alleged offense; the child is alleged to have committed an offense for which the Sentencing Guidelines and applicable statutes presume a commitment to prison or to have committed any felony in which the child allegedly used a firearm; and the prosecutor designated in the delinquency petition that the proceeding is an extended jurisdiction juvenile prosecution; or

(3) the child was 14 to 17 years old at the time of the alleged offense, the prosecutor requested that the proceeding be designated an extended jurisdiction juvenile prosecution, a hearing was held on the issue of designation, and the court designated the proceeding an extended jurisdiction juvenile prosecution.

Subd. 2. **Hearing on prosecutor's request.** When a prosecutor requests that a proceeding be designated an extended jurisdiction juvenile prosecution, the court shall hold a hearing under section 260B.163 to consider the request. The hearing must be held within 30 days of the filing of the request for designation, unless good cause is shown by the prosecution or the child as to why the hearing should not be held within this period in which case the hearing shall be held within 90 days of the filing of the request. If the prosecutor shows by clear and convincing evidence that designating the proceeding an extended jurisdiction juvenile prosecution serves public safety, the court shall grant the request for designation. In determining whether public safety is served, the court shall consider the factors specified in section 260B.125, subdivision 4. The court shall decide whether to designate the proceeding an extended jurisdiction juvenile prosecution within 15 days after the designation hearing is completed, unless additional time is needed, in which case the court may extend the period up to another 15 days.

Subd. 3. **Proceedings.** A child who is the subject of an extended jurisdiction juvenile prosecution has the right to a trial by jury and to the effective assistance of counsel, as described in section 260B.163, subdivision 4.

Subd. 4. **Disposition.** (a) If an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall:

(1) impose one or more juvenile dispositions under section 260B.198; and

(2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the offender not violate the provisions of the disposition order and not commit a new offense.

(b) If a child prosecuted as an extended jurisdiction juvenile after designation by the prosecutor in the delinquency petition is convicted of an offense after trial that is not an offense described in subdivision 1, clause (2), the court shall adjudicate the child delinquent and order a disposition under section 260B.198. If the extended jurisdiction juvenile proceeding results in a guilty plea for an offense not described in subdivision 1, clause (2), the court may impose a disposition under paragraph (a) if the child consents.

***[See Note.]***

Subd. 5. **Execution of adult sentence.** (a) When it appears that a person convicted as an extended jurisdiction juvenile has violated the conditions of the stayed sentence, or is alleged to have committed a

new offense, the court may, without notice, revoke the stay and probation and direct that the offender be taken into immediate custody. The court shall notify the offender in writing of the reasons alleged to exist for revocation of the stay of execution of the adult sentence. If the offender challenges the reasons, the court shall hold a summary hearing on the issue at which the offender is entitled to be heard and represented by counsel.

(b) If a person described in paragraph (a) is taken into custody, the person may be detained in a secure juvenile detention facility. If there is no secure juvenile detention facility or existing acceptable detention alternative available for juveniles within the county, the child may be detained up to 24 hours, excluding Saturdays, Sundays, and holidays, or for up to six hours in a standard metropolitan statistical area, in a jail, lockup, or other facility used for the confinement of adults who have been charged with or convicted of a crime. In this instance, the person must be confined in quarters separate from any adult confined in the facility that allow for complete sight and sound separation for all activities during the period of the detention, and the adult facility must be approved for the detention of juveniles by the commissioner of corrections.

If the person is 18 years of age or older and is to be detained prior to the revocation hearing, the person may be detained in a local adult correctional facility without the need for sight and sound separation.

(c) After the hearing, if the court finds that reasons exist to revoke the stay of execution of sentence, the court shall treat the offender as an adult and order any of the adult sanctions authorized by section 609.14, subdivision 3, except that no credit shall be given for time served in juvenile facility custody prior to a summary hearing. If the offender was convicted of an offense described in subdivision 1, clause (2), and the court finds that reasons exist to revoke the stay, the court must order execution of the previously imposed sentence unless the court makes written findings regarding the mitigating factors that justify continuing the stay.

(d) Upon revocation, the offender's extended jurisdiction status is terminated and juvenile court jurisdiction is terminated. The ongoing jurisdiction for any adult sanction, other than commitment to the commissioner of corrections, is with the adult court.

***[See Note.]***

Subd. 6. **Inapplicability to certain offenders.** This section does not apply to a child excluded from the definition of delinquent child under section 260B.007, subdivision 6, paragraph (b).

**History:** *1999 c 139 art 2 s 12; 2000 c 255 s 1; 2010 c 330 s 1*

**NOTE:** Subdivision 4, paragraph (b), was found unconstitutional in the case of In re Welfare of T.C.J., 689 N.W.2d 787 (Minn. Ct. App. 2004), petition for review dismissed (2005).

**NOTE:** Subdivision 5, paragraph (c), with regard to denial of credit for time served in a juvenile facility was found unconstitutional in the case of State v. Garcia, 683 N.W.2d 294 (Minn. 2004).

**609.115 PRESENTENCE INVESTIGATION.**

Subdivision 1. **Presentence investigation.** (a) When a defendant has been convicted of a misdemeanor or gross misdemeanor, the court may, and when the defendant has been convicted of a felony, the court shall, before sentence is imposed, cause a presentence investigation and written report to be made to the court concerning the defendant's individual characteristics, circumstances, needs, potentialities, criminal record and social history, the circumstances of the offense and the harm caused by it to others and to the community. At the request of the prosecutor in a gross misdemeanor case, the court shall order that a presentence investigation and report be prepared. The investigation shall be made by a probation officer of the court, if there is one; otherwise it shall be made by the commissioner of corrections. The officer conducting the presentence or predispositional investigation shall make reasonable and good faith efforts to contact and provide the victim with the information required under section 611A.037, subdivision 2. Presentence investigations shall be conducted and summary hearings held upon reports and upon the sentence to be imposed upon the defendant in accordance with this section, section 244.10, and the Rules of Criminal Procedure.

(b) When the crime is a violation of sections 609.561 to 609.563, 609.5641, or 609.576 and involves a fire, the report shall include a description of the financial and physical harm the offense has had on the public safety personnel who responded to the fire. For purposes of this paragraph, "public safety personnel" means the state fire marshal; employees of the Division of the State Fire Marshal; firefighters, regardless of whether the firefighters receive any remuneration for providing services; peace officers, as defined in section 626.05, subdivision 2; individuals providing emergency management services; and individuals providing emergency medical services.

(c) When the crime is a felony violation of chapter 152 involving the sale or distribution of a controlled substance, the report may include a description of any adverse social or economic effects the offense has had on persons who reside in the neighborhood where the offense was committed.

(d) The report shall also include the information relating to crime victims required under section 611A.037, subdivision 1. If the court directs, the report shall include an estimate of the prospects of the defendant's rehabilitation and recommendations as to the sentence which should be imposed. In misdemeanor cases the report may be oral.

(e) When a defendant has been convicted of a felony, and before sentencing, the court shall cause a sentencing worksheet to be completed to facilitate the application of the Minnesota Sentencing Guidelines. The worksheet shall be submitted as part of the presentence investigation report.

(f) When a person is convicted of a felony for which the Sentencing Guidelines presume that the defendant will be committed to the commissioner of corrections under an executed sentence and no motion for a sentencing departure has been made by counsel, the court may, when there is no space available in the local correctional facility, commit the defendant to the custody of the commissioner of corrections, pending completion of the presentence investigation and report. When a defendant is convicted of a felony for which the Sentencing Guidelines do not presume that the defendant will be committed to the commissioner of corrections, or for which the Sentencing Guidelines presume commitment to the commissioner but counsel has moved for a sentencing departure, the court may commit the defendant to the commissioner with the consent of the commissioner, pending completion of the presentence investigation and report. The county of commitment shall return the defendant to the court when the court so orders.

Subd. 1a. **Contents of worksheet.** The Supreme Court shall promulgate rules uniformly applicable to all district courts for the form and contents of sentencing worksheets. These rules shall be promulgated by and effective on January 2, 1982.

Subd. 1b. [Repealed, 1987 c 331 s 13]

Subd. 1c. [Repealed, 1987 c 331 s 13]

Subd. 2. **Life imprisonment report.** If the defendant has been convicted of a crime for which a mandatory sentence of life imprisonment is provided by law, the probation officer of the court, if there is one, otherwise the commissioner of corrections, shall forthwith make a postsentence investigation and make a written report as provided by subdivision 1.

Subd. 2a. **Sentencing worksheet; sentencing guidelines commission.** If the defendant has been convicted of a felony, including a felony for which a mandatory life sentence is required by law, the court shall cause a sentencing worksheet as provided in subdivision 1 to be completed and forwarded to the Sentencing Guidelines Commission.

For the purpose of this section, "mandatory life sentence" means a sentence under section 609.106, subdivision 2; 609.185; 609.3455; 609.385, subdivision 2; or Minnesota Statutes 2004, section 609.109, subdivision 3, and governed by section 244.05.

Subd. 3. **Criminal justice agency disclosure requirements.** All criminal justice agencies shall make available at no cost to the probation officer or the commissioner of corrections the criminal record and other relevant information relating to the defendant which they may have, when requested for the purposes of subdivisions 1 and 2.

Subd. 4. **Confidential sources of information.** (a) Any report made pursuant to subdivision 1 shall be, if written, provided to counsel for all parties before sentence. The written report shall not disclose confidential sources of information unless the court otherwise directs. On the request of the prosecuting attorney or the defendant's attorney a summary hearing in chambers shall be held on any matter brought in issue, but confidential sources of information shall not be disclosed unless the court otherwise directs. If the presentence report is given orally the defendant or the defendant's attorney shall be permitted to hear the report.

(b) Any report made under subdivision 1 or 2 shall be provided to counsel for the defendant for purposes of representing the defendant on any appeal or petition for postconviction relief. The reports shall be provided by the court and the commissioner of corrections at no cost to the defendant or the defendant's attorney.

Subd. 5. **Report to commissioner or local correctional agency.** If the defendant is sentenced to the commissioner of corrections, a copy of any report made pursuant to this section and not made by the commissioner shall accompany the commitment. If the defendant is sentenced to a local correctional agency or facility, a copy of the report must be provided to that agency or facility.

Subd. 6. **Report disclosure prohibited.** Except as provided in subdivisions 4 and 5 or as otherwise directed by the court any report made pursuant to this section shall not be disclosed.

Subd. 7. **Stay of imposition of sentence.** If imposition of sentence is stayed by reason of an appeal taken or to be taken, the presentence investigation provided for in this section shall not be made until such stay has expired or has otherwise been terminated.

Subd. 8. **Chemical use assessment required.** (a) If a person is convicted of a felony, the probation officer shall determine in the report prepared under subdivision 1 whether or not alcohol or drug use was a

contributing factor to the commission of the offense. If so, the report shall contain the results of a chemical use assessment conducted in accordance with this subdivision. The probation officer shall make an appointment for the defendant to undergo the chemical use assessment if so indicated.

(b) The chemical use assessment report must include a recommended level of care for the defendant in accordance with the criteria contained in rules adopted by the commissioner of human services under section 254A.03, subdivision 3. The assessment must be conducted by an assessor qualified under rules adopted by the commissioner of human services under section 254A.03, subdivision 3. An assessor providing a chemical use assessment may not have any direct or shared financial interest or referral relationship resulting in shared financial gain with a treatment provider, except as authorized under section 254A.19, subdivision 3. If an independent assessor is not available, the probation officer may use the services of an assessor authorized to perform assessments for the county social services agency under a variance granted under rules adopted by the commissioner of human services under section 254A.03, subdivision 3.

Subd. 9. **Compulsive gambling assessment required.** (a) If a person is convicted of theft under section 609.52, embezzlement of public funds under section 609.54, or forgery under section 609.625, 609.63, or 609.631, the probation officer shall determine in the report prepared under subdivision 1 whether or not compulsive gambling contributed to the commission of the offense. If so, the report shall contain the results of a compulsive gambling assessment conducted in accordance with this subdivision. The probation officer shall make an appointment for the offender to undergo the assessment if so indicated.

(b) The compulsive gambling assessment report must include a recommended level of treatment for the offender if the assessor concludes that the offender is in need of compulsive gambling treatment. The assessment must be conducted by an assessor qualified either under Minnesota Rules, part 9585.0040, subpart 1, item C, or qualifications determined to be equivalent by the commissioner, to perform these assessments or to provide compulsive gambling treatment. An assessor providing a compulsive gambling assessment may not have any direct or shared financial interest or referral relationship resulting in shared financial gain with a treatment provider. If an independent assessor is not available, the probation officer may use the services of an assessor with a financial interest or referral relationship as authorized under rules adopted by the commissioner of human services under section 245.98, subdivision 2a.

(c) The commissioner of human services shall reimburse the assessor for each compulsive gambling assessment at a rate established by the commissioner. To the extent practicable, the commissioner shall standardize reimbursement rates for assessments. The commissioner shall reimburse the assessor after receiving written verification from the probation officer that the assessment was performed and found acceptable.

Subd. 10. **Military veterans.** (a) When a defendant appears in court and is convicted of a crime, the court shall inquire whether the defendant is currently serving in or is a veteran of the armed forces of the United States.

(b) If the defendant is currently serving in the military or is a veteran and has been diagnosed as having a mental illness by a qualified psychiatrist or clinical psychologist or physician, the court may:

(1) order that the officer preparing the report under subdivision 1 consult with the United States Department of Veterans Affairs, Minnesota Department of Veterans Affairs, or another agency or person with suitable knowledge or experience, for the purpose of providing the court with information regarding treatment options available to the defendant, including federal, state, and local programming; and

(2) consider the treatment recommendations of any diagnosing or treating mental health professionals together with the treatment options available to the defendant in imposing sentence.

**History:** *1963 c 753 art 1 s 609.115; 1978 c 723 art 2 s 3; 1979 c 233 s 23,24; 1981 c 312 s 1,2; 1983 c 262 art 2 s 3-5; 1986 c 444; 1987 c 331 s 8; 1988 c 669 s 1; 1989 c 117 s 1; 1990 c 602 art 8 s 1; 1991 c 279 s 26; 1991 c 336 art 2 s 42; 1993 c 339 s 23; 1994 c 636 art 6 s 25; 1997 c 239 art 8 s 30; 1998 c 407 art 8 s 7; 1999 c 126 s 11; 2000 c 468 s 28; 2005 c 136 art 14 s 14; 2007 c 13 art 3 s 37; 2007 c 147 art 8 s 32; art 12 s 12; 2008 c 299 s 18; 2010 c 236 s 1; 2012 c 212 s 7*

Fact Sheet

# Correctional Delivery Systems

## Introduction

The network of local correctional systems in Minnesota is large and uniquely designed to allow for local control. Approximately 122,000 offenders – on supervised release, probation, or parole – are being supervised in Minnesota's communities. By comparison, approximately 9,700 offenders are incarcerated in Minnesota's prisons. This reflects Minnesota's commitment to serving offenders at the local level when possible and reserving prison beds for the most serious, chronic offenders. Locally-delivered programs are a significant part of the state's correctional services.

There are three systems that are responsible for community supervision of offenders. This fact sheet provides a brief description of each system.

## Minnesota Department of Corrections (DOC)

The DOC provides adult felony probation and supervised release supervision in the 55 counties that are not part of the Minnesota Community Corrections Act. State-provided services are under the direction of 14 district supervisors, and the full cost is borne by the State of Minnesota.

In addition to felony services, the DOC also provides juvenile and misdemeanant services to the court in 28 counties. These counties, referred to as contract counties, are billed for service costs, including agent salary and fringe benefits. Counties are reimbursed for a portion of these costs with funds appropriated by the state legislature.

The DOC also provides intensive supervised release services through contracts with counties.

## Community Corrections Act (CCA)

Since its 1973 approval by the legislature, any Minnesota county or group of contiguous counties with a population exceeding 30,000 may elect to enter the CCA. Under this system, the county provides community supervision services. Funding is provided by a combination of state subsidy and county tax dollars. This system is overseen by a local Corrections Advisory Board and must submit comprehensive plans to the DOC for approval.

Currently, 32 counties representing 17 jurisdictions participate in the CCA.

## County Probation Officers (CPO)

CPOs work at the pleasure of the county's chief judge and are supervised by the county's court services director. State law allows the DOC to reimburse a portion of salary and fringe benefits of the director and CPOs with funds appropriated by the state legislature.

In these counties, felony offenders are supervised by the DOC, and CPOs supervise juvenile and most adult misdemeanant offenders. There are currently 27 counties utilizing this method of correctional delivery.

### *Delivery Systems Statutory Citations*

| | |
|---|---|
| Minnesota Department of Corrections | M.S. 241 and 244.19 |
| Community Corrections Act | M.S. 401 |
| County Probation Reimbursement | M.S. 244.19 |

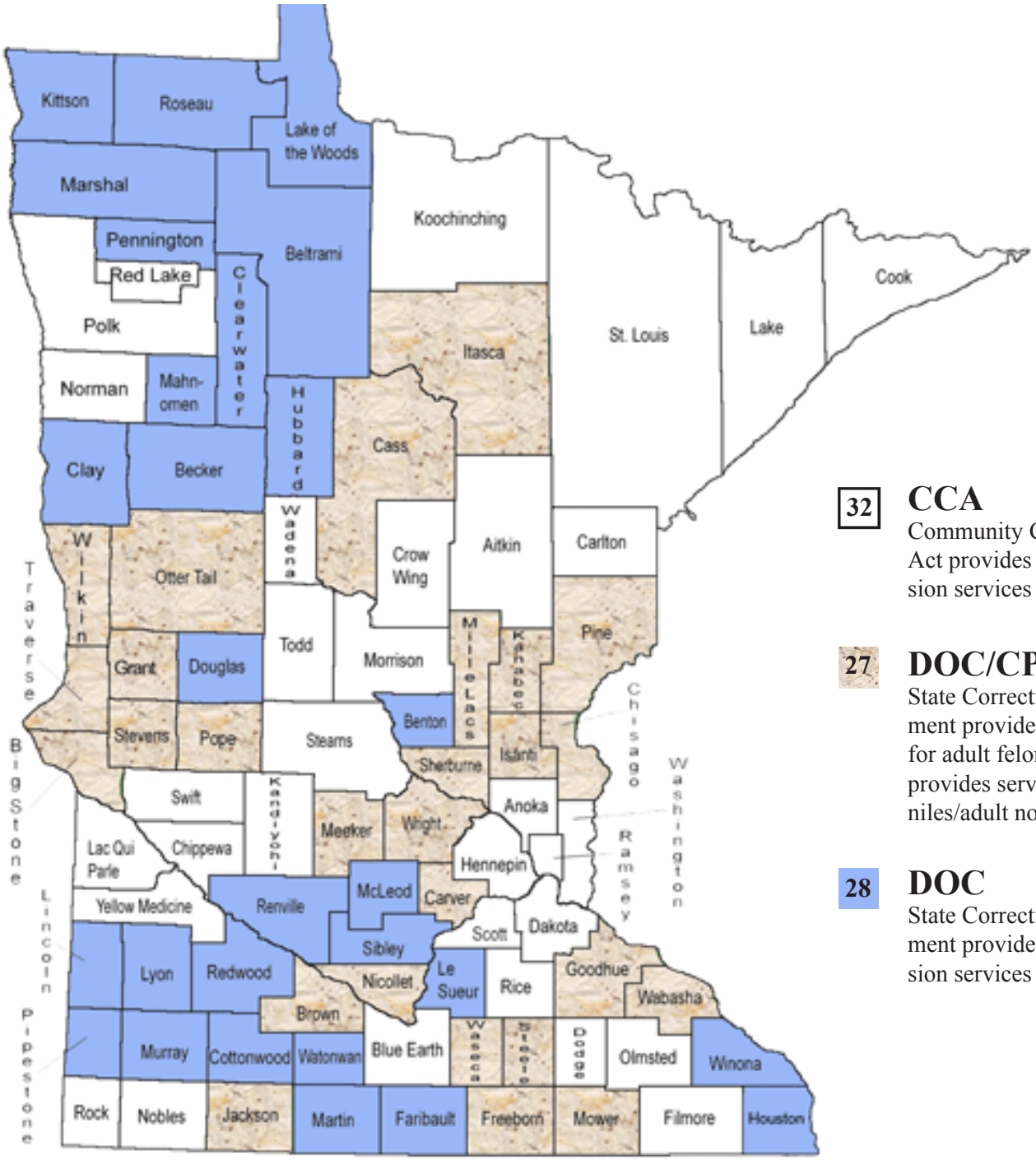
### Types of Community Supervision

*Supervised release:* Community supervision for felony offenders released from prison on their court-ordered release date. In Minnesota, state law requires most offenders serve two-thirds of their sentence in prison and one-third in the community under supervision. Some offenders who require greater supervision are placed on intensive supervised release.

*Probation:* A community supervision sanction imposed on an offender by the court as an alternative to or in conjunction with confinement or intermediate sanctions. Offenders may be convicted of felony, gross misdemeanor, or misdemeanor offenses.

*Parole:* An indeterminate form of sentencing whereby offenders are released to community supervision after serving at least the minimum sentence imposed by the court. In Minnesota, only juvenile offenders and some life-sentenced inmates are eligible for parole. The commissioner of corrections is the paroling authority.

# Correctional Delivery Systems




**32** **CCA**
Community Corrections Act provides all supervision services

**27** **DOC/CPO**
State Corrections Department provides services for adult felons; county provides services for juveniles/adult non-felons

**28** **DOC**
State Corrections Department provides all supervision services

January 2014

Minnesota Department of Corrections
1450 Energy Park Drive, Suite 200
St. Paul, Minnesota 55108-5219
651/361-7200
TTY 800/627-3529
www.doc.state.mn.us

**COURT SERVICES PROGRAM**
**JUVENILE DIVISION**
**Government Center**
**151 4th Street SE**
**Rochester, MN 55904**

Shelley McBride, Supervisor
(507) 285-8972

September 16, 2002

The Honorable Courtroom #2 Judge
Judge of District Court
Government Center
151 4th Street SE
Rochester, MN 55904

RE: **DOE, John Xavier** DOB: **01-01-2002**
FILE(s)/ICR: **J0-00-00000**
**DETENTION HEARING**

Dear Courtroom #2 Judge:

John Xavier Doe was arrested on September 15, 2002 by the Rochester Police Department for Terroristic Threats and Fifth Degree Assault. John was transported to the Many Rivers Detention Center where he is awaiting a detention hearing on this matter. A detention hearing has been scheduled for Monday, September 16, 2002 at 1:30 pm in Courtroom #2. The following criteria need to be considered for the continued detention of John Xavier Doe (according to Minnesota Juvenile Code 260B.176.)

**Child would endanger self or others:** John is currently being charged with a very serious felony level offense, as well as with a misdemeanor offense. It is alleged that John threatened bodily harm to three peers, as well as hit another peer in the stomach. The alleged offense also could have endangered him due to possible retaliation of his threats.

**Child would not appear for a Court hearing:** Due to the fact that John has never been charged with any offenses in the past, this does not appear to be a concern at this time.

**Child would not remain in the care or control of the person into whose lawful custody the is released:** It is this agent's belief that there is too little information available to adequately assess whether or not John will remain in the care or custody to those to whom he is released.

**Child's health or welfare would be immediately endangered:** This does not appear to be a concern at this time.

**RECOMMENDATION RATIONALE:**
This agent spoke with John's father, Ozzie, on September 16, 2002 and he stated that he was shocked to find out about the current alleged offenses. He states that he has few problems with John at home, but he does not believe that he surrounds himself with positive peers. Ozzie reports that he works long hours and John is many times unsupervised at home and in the community.

Based on the information that has been gathered up to this point, Court Services would respectfully recommend that John Doe be held pending more information. Additionally, this agent will staff this case with the Juvenile Division on Tuesday, September 17, 2002 to come up with possible recommendations for a safety plan before returning John to his home.

**RECOMMENDATION:**
Court Services respectfully recommends that John Xavier Doe remain in secure detention at the Many Rivers Detention Center, with 8-day Informal Reviews, until a release plan can be prepared.

Respectfully Submitted,

Juvenile Probation Officer

cc: County Attorney
Attorney for Child
File

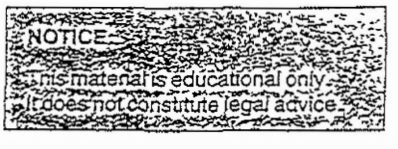
# Summary Guide to Minnesota Juvenile Certification Procedure

*Overview of Process and Procedure*

Honorable Leslie M. Metzen
First Judicial District Court
Hastings, Minnesota

Tonja J. Rolfson
Law Clerk for the
Honorable Leslie M. Metzen
First Judicial District
Hastings, Minnesota

published by
Minnesota Continuing Legal Education
A division of the Minnesota State Bar Association






94-04.04-S3

# Juvenile Certification

## I. Overview of the Process

A WHEN A CHILD WILL BE TRIED IN ADULT COURT WITHOUT A CERTIFICATION DETERMINATION

1 Upon filing of the complaint or indictment, a child will automatically be under the jurisdiction of the Adult Court where the child is alleged to have committed Murder 1 and was 16 or 17 years old at the time of the offense *R Juv P 32.08, subd. 1*

2 The court shall automatically order certification of a child in a felony case when the prosecution shows that the child was previously convicted in adult proceedings that were certified. *R Juv P 32.05, subd 4*

B CERTIFICATION

Certification proceedings are initiated by the prosecuting authority. Depending upon the child's age and the acts alleged to have been committed, certification of a child to Adult Court is either presumed or not presumed.

1. Presumptive Certification

a. Upon a finding of PROBABLE CAUSE that the child committed the offense alleged, certification to district court is presumed where

1) The child was 16 or 17 years old at the time of the alleged offense, and

2) The alleged offense is

a) a presumptive adult commit to prison offense under the Adult Sentencing Guidelines (i.e., an offense for which the minimum sentence is a commitment to prison), or

b) a felony offense in which the child used a firearm.

*R Juv. P 32 05, subd 1*

b Burden of Proof: Defense may rebut the presumption by showing by CLEAR AND CONVINCING EVIDENCE that "public safety" will be served by keeping the child in Juvenile Court Id.

1) If Defense rebuts the presumption, the matter automatically becomes an Extended Jurisdiction Juvenile ("EJJ") case, R. Juv. P. 32.05, subd 5(A), and proceeds to EJJ prosecution pursuant to R. Juv P 32A.07. *R. Juv P. 32.06, subd 1(C).*

2) If Defense fails to rebut the presumption, the Court must certify the matter to Adult Court. *R Juv P 32.05, subd. 1.*

2. Non-Presumptive Certification

a Where factors of PRESUMPTIVE CERTIFICATION ARE NOT MET, but the child is

1) At least 14 but under 18 years old; and

2) Is alleged to have committed a felony, *Minn Stat § 260 125, subd 1.*

b The Court has THREE OPTIONS

1) Order certification of the child to Adult Court

a) but only if the PROSECUTION proves by CLEAR AND CONVINCING EVIDENCE that doing so would serve "public safety," *R Juv P. 32 05, subd. 2,* or

2) Designate the proceeding EJJ

a) but only if the PROSECUTION proves by CLEAR AND CONVINCING EVIDENCE that having the matter proceed as EJJ would best serve "public safety," *R Juv P 32.05, subd. 5(B),* or

3) Deny the prosecution's motion and let the matter proceed as a REGULAR DELINQUENCY MATTER *Id*

3 New Certification Criteria – "Public Safety".

a. Factors:

1) Seriousness of the offense in terms of community protection, use of a firearm, or impact on the victim

a) taking into account any AGGRAVATING factors recognized in the Minnesota Sentencing Guidelines;

2) Culpability of the child in committing alleged offense, including the level of the child's participation in planning and carrying out the offense

a) taking into account any MITIGATING factors recognized in the Minnesota Sentencing Guidelines;

3) Child's prior record of delinquency;

4) Child's programming history, including child's past willingness to participate meaningfully in available programming,

5) Adequacy of the punishment or programming available in the juvenile justice system; and

6) Dispositional options available for the child.

*R Juv. P 32.05, subd 3*

b The Court must give GREATER WEIGHT to

1) The seriousness of the alleged offense; and

2) The child's prior record of delinquency than to the other factors.

*Id*

c The "Public Safety" factors replace the previous factors which focused on the child's "suitability for treatment" The current emphasis on public safety was designed to accomplish two things

1) To respond to the public's concern about violent juvenile offenders by placing an emphasis on public safety and

2) To provide a more objective basis for determining whether a child should be certified to Adult Court.

The determination of "suitability for treatment" often involved highly subjective assessments leading to different results in factually similar cases. The new objective factors still take into account the child's programming history and the dispositional options available but place more of an emphasis on public safety. This will hopefully lead to uniform treatment of juveniles across the state by helping to assure that similarly situated children are assessed in the same way.

## II. Procedure

### A. When Certification Motion May Be Made

After the filing of Delinquency Petition, the prosecuting authority may make a motion for Certification·

- At the First Appearance of the child pursuant to R. Juv P 18 (Detention Hearing) or R Juv. P 20 (Arraignment); or
- Within 10 days of the First Appearance of the child pursuant to R. Juv P. 18 or 20 or before Jeopardy attaches, whichever occurs first.

*R Juv P 32.01.*

1 Rule 20 Hearing

The Arraignment is a hearing at which the child admits or denies the allegations of the Delinquency Petition. R. Juv. P 20 01. The child must be served with a copy of the Delinquency Petition at least 3 days before the Arraignment. R. Juv P 20 02 The Rules do not prohibit waiver of the 3 day notice The Arraignment is scheduled upon the filing of the Delinquency Petition, R Juv. P 19.06 (b), and must occur:

- For Child Not in Custody: within 20 days after being served with the Delinquency Petition *R. Juv P 20.02, subd. 2,*
- For Child in Custody within 5 days of child being taken into custody *R. Juv P 20 02, subd 1*

2. Rule 18 Hearing

A child in custody may have a Detention Hearing before being arraigned. A child taken into custody without a court order cannot be held longer than 24 hours unless 1) a Detention Hearing has been held and the court orders continued detention; or 2) a request for a Detention Hearing is made within the 24 hours and the court orders continued detention. R Juv. P 18.05, subd 1. A child taken into custody with a court order cannot be held longer than 36 hours unless a Detention Hearing has commenced, and the court orders continued detention. *R Juv P 18 02, subd. 1(B).*

NOTE: Jeopardy will attach when the child admits to the petition. Where a certification motion is not made by or at the child's arraignment, a child fearing certification may want to admit to the petition at the arraignment, thereby remaining under the jurisdiction of Juvenile Court for disposition and avoiding the risk of an adult criminal sentence. It is likely, however, that the certification motion will be served and filed at the same time as the delinquency petition.

### B Form and Content of Motion For Certification and Service

1. Form and Content of Motion

- In writing;
- Signed by person making the motion;
- Include, with particularity, a statement of the grounds supporting certification; and
- Filed with the Court.

*R Juv. P. 32 01*

2. Service of Motion

Prosecuting authority must serve pursuant to R Juv. P 9 the following documents upon the child and file proof of service with the Court:

- Notice of the Initial Appearance in the certification proceeding under R. Juv. P. 32.04, subd. 2;

# ELINQUENCY:

All offenses
10 - 14 years

All offenses
14 - 17 years

No
Certification
Motion filed

No EJJ
Prosecution
Designation

No EJJ
Motion

Prosecution does not meet Burden of Proof for EJJ

Not Certified

If Prosecution meets Burden of Proof for EJJ, Court <u>may</u> designate EJJ

No Presumptive Certification

Burden of Proof: Prosecution

# CERTIFICATION:

Any felony

14 - 17 years

Certifcation
Motion filed

Initial Appearance

Probable Cause Hearing

or

Grand Jury Indictment

Certification Hearing

Certified

Certified

Presumptive Certification

Burden of Proof Defense

Not Certified

Rasmussen Hearing

*automatic*

- Copy of the Certification Motion, and
- Copy of the Delinquency Petition

*R Juv P 32.02*

NOTE: Although the Rules do not seem to require it, **Notice of the Initial Appearance** should probably be filed with the Court as well.

Service by mail is acceptable as the Rules do not specify whether personal service or service by mail is preferred.

## C STATEMENT OF INTENT TO PROSECUTE

Within 10 days after the Certification Motion is made, the prosecuting authority must

- File a Statement of Intent to prosecute the accusation if the proceedings are certified (Statement of Intent must be signed by prosecutor in county with jurisdiction over the offense).

*R Juv P 32.01*

NOTE: Filing of **Statement of Intent** must be timely! Failure to timely file will result in dismissal of certification motion. R. Juv. P 32.01.

The **Statement of Intent** may be included in the motion for certification if the county having jurisdiction over the offense is the same county in which the certification motion is filed. Comment to R. Juv. P. 32

## D. INITIAL APPEARANCE IN THE CERTIFICATION PROCEEDING

The Court shall

- Verify name, age, and residence of the child,
- Determine whether all necessary persons are present and identify those present for the record;
- Appoint counsel, if not previously appointed;
- Determine whether notice requirements are met and if not, whether affected persons waive notice;
- Schedule further hearings including
  - A Probable Cause Hearing pursuant to R Crim. P 11 (R. Juv. P. 32.04, subd 3(B)) unless waived (*See* R. Juv P. 32 04, subd. 3(D) or based upon an indictment;
  - The Certification Hearing set out in R. Juv. P 32.04, subd. 4, unless waived (*See* R. Juv. P. 32.04, subd. 1(C);
  - Pre-hearing Conference (for Certification Hearing), if requested.
- Order social, psychiatric or psychological studies pursuant to R. Juv P. 32.03, if appropriate.

*R. Juv P 32.04, subd. 2.*

## E GRAND JURY INDICTMENT

After the filing of the Certification Motion and within 14 days of the filing of the Delinquency Petition, prosecutor must

- Present the case to the Grand Jury for consideration of an indictment where the child is
  - Under Age 16; and
  - Is alleged to have committed Murder 1.

*R. Juv. P 32.08, subd. 2*

## F PROBABLE CAUSE HEARING

Within 14 days of the filing of the Certification Motion,

- A Probable Cause Hearing must be held, unless probable cause is waived (*See* R. Juv P 32 04, subd 3(D)) or based upon an indictment.

*R. Juv P 32.04, subd 3.*

## G. FILING OF AND ACCESS TO SOCIAL, PSYCHIATRIC AND PSYCHOLOGICAL STUDIES

The person making the study must

- File the report with the Court, and
- Provide copies to child's counsel and prosecuting authority at least 48 before the hearing.

*R. Juv P 32.03, subd. 3.*

NOTE: Matters disclosed by the child to the examiner during the course of the study may not be used as evidence or the source of evidence against the child in any subsequent trial. R. Juv. P. 32.03, subd. 4.

## H. CERTIFICATION HEARING

Unless the child waives the right to timely scheduling of the Certification Hearing or waives the right to the Certification Hearing itself, it must be held

- Within 30 days of filing of the Certification Motion; or
- Within 90 days of filing of the Certification Motion (for good cause shown by child or prosecuting authority).

*R. Juv P 32.04, subd 1(B).*

NOTE: If there is no waiver of time limits by the child and the Certification Hearing is not held within the specified time limits, child will be released from custody, except in extraordinary circumstances. Id.

NOTE: The general public is only admitted to those Certification Hearings where the child was at least 16 at the time of the alleged offense and the alleged offense is a felony. As to those hearings, the public may be excluded from portions that would not be accessible to the public in an adult proceeding. R. Juv. P. 32.04, subd. 1(A).

## CERTIFICATION HEARING ORDER

Within 15 days of the Certification Hearing (unless, for good cause, the court extends the time to issue the Order by an additional 15 days), the Court must issue a written Order with Findings of Fact and Conclusions of Law. *R Juv P. 32.06, subd. 1 and subd 2*

1. Where certification is ordered, the Order shall state
   - Adult prosecution shall occur on the alleged offense specified in the Certification Order, *R Juv P 32.06, subd. 1(A)(1),*
   - A finding of probable cause, unless presented by an indictment, *R. Juv P 32.06, subd. 1(A)(2);*
   - The child's date of birth, *R. Juv P 32 06, subd. 1(A)(3),*
   - The date of the alleged offense, *Id.*,
   - Why the court upheld the presumption for certification, if applicable, *Id.*,
   - Where presumption for certification was not applicable, why "public safety" is served by certifying the child, *Id.;*
   - If the child is in custody, that the child shall be detained in an adult correctional facility and brought before the appropriate court (*See* R. Juv. P. 32.07) not less than 36 hours after the entry of the Certification Order, *R Juv P. 32.06, subd 1(A)(4);*
   - The time the child spent in custody in connection with the offense on which further proceedings are to occur *(R. Juv P. 32 06, subd 1(D))*
2. Where the Court orders that the matter proceed EJJ, the Order shall state
   - Where Certification Was Presumed: why certification was not ordered with reference to why "public safety" is served by retaining the matter in juvenile court as an EJJ, *R. Juv P. 32.06, subd. 1(C)(1),*
   - Where Certification Was Not Presumed: why the court decided to designate the matter EJJ, *R. Juv. P 32.06, subd 1(C)(2),*
     - i.e , that the prosecution proved by clear and convincing evidence that having the matter proceed as EJJ would serve "public safety," *R. Juv. P 32 05, subd 5(B),*
   - The time the child spent in custody in connection with the offense on which further proceedings are to occur, *R. Juv. P 32.06, subd 1(D).*
3. Where the Court orders that the matter proceed as a regular delinquency proceeding,
   - Why certification was not ordered. *R Juv P 32 06, subd. 1(C)*

NOTE: Where the child does not waive the time limits and the Certification Hearing Order is not entered within the time limits set forth, the child shall be released from custody, except in extraordinary circumstances. R Juv. P 32.06, subd. 2.

NOTE: Where a child is certified or designated EJJ, the time the child spent in custody in connection with the offense or behavioral incident shall be automatically deducted from a subsequent sentence pursuant to R. Crim P. 27.03, subd. 4(B). R. Juv P. 32.06, subd. 1(D).

NOTE: Unless both parties consent, judge presiding over contested Certification Hearing may not hear subsequent court trial on the same offense R. Juv P. 32.06, subd. 3

## J CERTIFICATION ORDERED: WHEN DOES JUVENILE COURT JURISDICTION TERMINATE?

1 Child NOT in Detention

Upon entry of the certification order.

2. Child in Detention, Certification Ordered in Same County as Alleged Offense Occurred

Upon entry of the certification order.

- Prosecuting authority must file adult criminal complaint at or before child's next appearance as set out in the Certification Hearing Order.

3. Child in Detention, Offense Occurred in County Other Than Where Certification Ordered

Within 10 days of entry of certification order or before if prosecuting authority files an adult criminal complaint pursuant to R. Crim P 2.

*R. Juv. P 32 07*

## K. EFFECT OF APPEAL ON TERMINATION OF JUVENILE COURT JURISDICTION AND CERTIFICATION

The Certification Hearing Order is a Final Order for purposes of appeal by either the child, the prosecuting authority and, in limited circumstances, the parent(s) or guardian ad litem. *R. Juv. P 32.06, subd. 4; R. Juv. P. 31.03, subd. 1, 31.04, subd. 1, and R Juv P. 31.05*

Appeal is taken pursuant to R. Juv. P. 31.

1 Where certification is ordered and appeal is taken, the district court

- Shall stay further adult criminal proceedings;
- Upon agreement of the parties, the adult proceedings may proceed through the omnibus hearing

*R Juv P. 32.07, subd. 3; R. Juv P. 31.03, subd 3(A),*

- May stay certification orders pending filing of final decision on appeal. *Id* ,

2 Where certification is <u>not</u> ordered and appeal is taken,

- Any stay must be sought first by motion before trial court. Stay may be granted by either trial court or court of appeals.

*R. Juv P 32.07, subd. 3; R Juv P 31.03, subd 3(A).*

BIBLIOGRAPHY

Honorable Philip D. Bush, 1994 Juvenile Justice Changes (Speech), Hennepin County, Minnesota (1995).

Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform* (1994 Draft) (to be published Spring 1995 in 79 Minn. L. Rev.).

Minnesota Supreme Court Advisory Task Force on the Juvenile Justice System, Final Report (January 1994).

# DODGE-FILLMORE-OLMSTED
# COMMUNITY CORRECTIONS PROGRAM
**507-328-7200**

# ADULT CERTIFICATION REPORT
(Date)

**PERSONAL DATA**

**NAME: Johnny Be Test1**

**ADDRESS:**

**PARENTS:**

**BIRTHPLACE:**

**RACE:**

**HEIGHT:**

**WEIGHT:**

**EYES:**

**HAIR:**

**SSN:**

**OFFICIAL DATA**

**JUDGE:**

**FILE #:**

**COUNTY:**

**OFFENSE:** -

**OFFENSE DATE:**

**CODEFENDANTS:**

**DEFENSE ATTY:**

**COUNTY ATTY:**

**REPORT BY:**

**DATE OF HEARING:**

**TIME OF HEARING:**

**PRESUMPTIVE CERTIFICATION OR NON-PRESUMPTIVE CERTIFICATION:**
According to the Minnesota Sentencing Guidelines,

**OFFICIAL VERSION:**
*PLEASE REFER TO COMPLAINT/PETITION*

**VICTIM/COMMUNITY IMPACT:**

**DEFENDANT'S VERSION OF OFFENSE:**

**PARENT'S VIEW OF OFFENSE:**

**PRIOR CRIMINAL RECORD:**

| File/ICR# | Offense: | Date of offense: | Disposition date: | Disposition: |
|---|---|---|---|---|

**FAMILY:**

**SOCIAL SERVICES HISTORY:**

History No Known History

**PLACEMENT HISTORY:**

History No Known History

**EDUCATION/EMPLOYMENT:**

Current School: Current Grade:

Ever suspended/expelled: Special Learning Needs:

Employed Unemployed

**PEERS/LEISURE:**

**PHYSICAL/PSYCHOLOGICAL HEALTH:**

Physical Health Concerns: Yes

Psychological/Psychiatric Concerns:

**SUBSTANCE USE HISTORY:**

Directly related to this offense:

Treatment history:

**SUMMARY:**

If a juvenile is to be considered for Certification the Court is required to consider public safety: "In determining whether the public safety is served by certifying a child to district Court, or in designating the proceeding an extended jurisdiction juvenile proceeding the Court shall consider the following factors, (According to Juvenile Code 260.125, Subd. 2B):

a) **"The seriousness of the offense in terms of community protection including the existence of any aggravating factors recognized by the Minnesota Sentencing Guideline, the use of a firearm, and the impact on any victim;"**

b) **"The culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Minnesota Sentencing Guidelines;"**

c) **"The juvenile's prior record of delinquency."**

d) **"The child's programming history, including the child's past willingness to participate meaningfully in available programming;"**

e) **"The adequacy of the punishment or programming available in the juvenile justice system;"**

## EXISTING OPTIONS AND PLACEMENTS AVAILABLE TO THE JUVENILE COURT:

Historically, Dodge-Fillmore-Olmsted Community Corrections has utilized a number of different programs based upon the severity of the offense and a youth's specific risk and needs.

Some different types of placement options include: foster home, group home, short-term consequence, long-term residential, etc. When appropriate we attempt to place youth within the community, or in close proximity to family to assist with treatment. However, many of the placement options available are located outside of the Rochester community. Some programs that could be considered (not an exhaustive list) include:

- Von Wald Group Home/Shelter, Rochester, MN
- Many Rivers Juvenile Detention Center, Rochester, MN
- Woodland Hills Residential Treatment Program in Duluth, MN
- Volunteers of America, Anoka, MN
- Dakota County Juvenile Service Center, Hastings, MN
- Prairie Lakes Youth Programs, Willmar, MN
- MCF-Red Wing, Red Wing, MN
- Anoka County Juvenile Center, Lino Lakes, MN

## RECOMMENDATION RATIONALE:

The following are dispositional options to be considered in this matter:

**RETAIN IN THE JUVENILE JUSTICE SYSTEM:** This may be utilized when the offender has not received needed programming and appears amenable to probation services. The Court would retain jurisdiction until the client's 19th birthday.

**EXTENDED JURISDICTION JUVENILE:** As an Extended Jurisdiction Juvenile, Johnny Be Test1 could enter into a correctional-based program. would also be sentenced as an adult and could potentially have an adult . If no violations occur, at age 21, Johnny would be discharged from the Court's jurisdiction. This option attempts to treat the juvenile for a longer period of time, with the adult sentence being executed, should the conditions of the juvenile sentence by violated.

**CERTIFICATION AS AN ADULT:** This is utilized when the offender is perceived as not being amenable to treatment or if the treatment within the juvenile justice system is not available. This option allows the charges to be addressed in adult Court, and if convicted of the alleged offense, the offender would be committed to the Commissioner of Corrections as an adult. Certification can ensure public safety during the period of incarceration; attempts at

rehabilitation would be addressed when amenability is further reassessed as the individual progresses through the adult system.

**DISCUSSION:**

In summary, the statutes before the Court are premised on public safety and request that The Court give greater weight to the seriousness of the offense(s) and the juvenile's prior record of delinquency. Community Corrections has taken into consideration the seriousness of this offense, including the existence of any aggravating and mitigating factors and the impact this offense had on the victim. Community Corrections has also considered the culpability of the child, including the level of participation in planning and carrying out this offense; the child's prior record and programming history, the adequacy of the punishment or programming available, and the dispositional options available.

**RECOMMENDATION:**

At this time, DFO Community Corrections respectfully recommends that Johnny Be Test1 .

Respectfully Submitted,

Senior Probation Officer

**DODGE-FILLMORE-OLMSTED**
**COMMUNITY CORRECTIONS PROGRAM**
**151 4th ST. SE, ROCHESTER, MN 55904**
**(507) 328-7200**

# PRESENTENCE INVESTIGATION REPORT

Date: February 03, 2017

| PERSONAL DATA | OFFICIAL DATA |
|---|---|
| **NAME:** | **JUDGE:** |
| **ADDRESS:** | **FILE #:** |
| **DOB:** | **COUNTY:** |
| **BIRTHPLACE:** | **OFFENSE:** |
| **CITIZEN:** Yes No | **OFFENSE DATE:** |
| **RACE:** | **ARREST AGENCY:** |
| **HEIGHT:** | **ACCOMPLICES:** |
| **WEIGHT:** | **JAIL TIME:** |
| **EYES:** | |
| **HAIR:** | **PLEA:** **DATE:** |
| **COMPLEXION:** | **DEFENSE ATTY:** |
| | **COUNTY ATTY:** |
| | **REPORT BY:** |

---

## OFFICIAL VERSION:

## PLEA NEGOTIATION:

## VICTIM/COMMUNITY IMPACT:

No response from victim has been received. Request made on:
Restitution claimed in the amount of:
Affidavits attached Affidavits previously submitted to Court.
Victim Impact Statement provided:Attached Previously submitted Verbal(See below)
Community Impact Statements attached.
**Comments:**

## DEFENDANT'S VERSION OF OFFENSE:

--sic

## PRIOR RECORD:

**Juvenile:**

| OFFENSE DATE | OFFENSE | COUNTY | DISPOSITION |
|---|---|---|---|
| MISDEMEANOR | | | |
| | | | |
| FELONY | | | |
| | | | |

**Adult:**

| | | | |
|---|---|---|---|
| MISDEMEANOR | | | |
| | | | |
| FELONY | | | |
| | | | |

## SOCIAL HISTORY:

**Family:**

**Marital/Children:**

**Residence:**

**Companions/Leisure:**

## EDUCATION:

**Last school attended:** **Last grade completed:** **GED:**

**Ever suspended/expelled:** **Special learning needs:**

**Comments:**

## EMPLOYMENT:

**Present employer:** **Status:** FT PT Temp **Salary/Wage:**

**Length of current:** **Duties:**

**Comments:**

## FINANCIAL:

**Income Source:** **Consumer Debt:** $0 **Home Mortgage:** $0

**Assets:** $0 **Gambling Debt:** $0 **Medical Debt:** $0

**Child Support:** $0

**Comments:**

## PERSONAL HEALTH:

**Chronic Health Condition:** No
**Psychological/Psychiatric Condition:** No
**Comments:**

## ALCOHOL/DRUGS:

**Directly related to this offense:** **If yes, specify type(s):**
**Treatment history:** **Current Drug/Alcohol Problem:**
**Comments:**

## RECOMMENDATION RATIONALE:

**Sanction:** In accordance with the Minnesota Sentencing Guidelines, is a severity level offense. The defendant acquires criminal history points, thus the guidelines presume sentence of months state imprisonment. The mandatory minimum fine is $ .

**Public Safety:**
**Victim/Community Reparations:**
**Offender Programming:**

**RECOMMENDATION:**

DFO Community Corrections respectfully recommends that the defendant be committed to the Commissioner of Corrections for a period of months.

DFO Community Corrections respectfully recommends the defendant receive a stay of imposition of sentence for a period of years and be placed on probation under the following terms and conditions.

**GENERAL:**

1. Follow all State and Federal criminal laws.
2. Contact your probation officer as directed.
3. Tell your probation officer within 72 hours if you have contact with law enforcement.
4. Tell your probation officer within 72 hours if you are charged with any new crime.
5. Tell your probation officer within 72 hours if you change your address, employment, or telephone number.
6. Cooperate with the search of your person, residence, vehicle, workplace, property, and things as directed by your probation officer.
7. Sign releases of information as directed.
8. Give a DNA sample when directed.
9. Do not use or possess firearms, ammunition or explosives.
10. Do not register to vote or vote until discharged from probation and your civil rights are fully restored.

**SPECIFIC:**

1. Fully comply with reasonable rules and directives of DFO Community Corrections, including participation in all classes, counseling and/or evaluations as directed.
2.

**CONFINEMENT:**

Serve up to in jail however may be released upon entry to inpatient chemical dependency treatment.

**FINE, RESTITUTION AND/OR COMMUNITY WORK SERVICE:**

1. Pay the mandatory minimum fine of $50 plus surcharges.
2. Complete hours of community work service
3. Pay restitution in the amount of $ . Set up monthly payment schedule as directed by probation agent.

The court is alerted to requirements pursuant to §609.117 Subd.1 (1) relating to notice that must be provided by the court concerning DNA Analysis.

Respectfully submitted,

Probation Officer

## 4.A. Sentencing Guidelines Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

| SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics) | | CRIMINAL HISTORY SCORE | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | **0** | **1** | **2** | **3** | **4** | **5** | **6 or more** |
| *Murder, 2nd Degree (intentional murder; drive-by-shootings)* | **11** | 306 *261-367* | 326 *278-391* | 346 *295-415* | 366 *312-439* | 386 *329-463* | 406 *346-480* [2] | 426 *363-480* [2] |
| *Murder, 3rd Degree Murder, 2nd Degree (unintentional murder)* | **10** | 150 *128-180* | 165 *141-198* | 180 *153-216* | 195 *166-234* | 210 *179-252* | 225 *192-270* | 240 *204-288* |
| *Assault, 1st Degree* | **9** | 86 *74-103* | 98 *84-117* | 110 *94-132* | 122 *104-146* | 134 *114-160* | 146 *125-175* | 158 *135-189* |
| *Agg. Robbery, 1st Degree; Burglary, 1st Degree (w/ Weapon or Assault)* | **8** | 48 *41-57* | 58 *50-69* | 68 *58-81* | 78 *67-93* | 88 *75-105* | 98 *84-117* | 108 *92-129* |
| *Felony DWI; Financial Exploitation of a Vulnerable Adult* | **7** | 36 | 42 | 48 | 54 *46-64* | 60 *51-72* | 66 *57-79* | 72 *62-84* [2, 3] |
| *Assault, 2nd Degree Burglary, 1st Degree (Occupied Dwelling)* | **6** | 21 | 27 | 33 | 39 *34-46* | 45 *39-54* | 51 *44-61* | 57 *49-68* |
| *Residential Burglary; Simple Robbery* | **5** | 18 | 23 | 28 | 33 *29-39* | 38 *33-45* | 43 *37-51* | 48 *41-57* |
| *Nonresidential Burglary* | **4** | 12[1] | 15 | 18 | 21 | 24 *21-28* | 27 *23-32* | 30 *26-36* |
| *Theft Crimes (Over $5,000)* | **3** | 12[1] | 13 | 15 | 17 | 19 *17-22* | 21 *18-25* | 23 *20-27* |
| *Theft Crimes ($5,000 or less) Check Forgery ($251-$2,500)* | **2** | 12[1] | 12[1] | 13 | 15 | 17 | 19 | 21 *18-25* |
| *Assault, 4th Degree Fleeing a Peace Officer* | **1** | 12[1] | 12[1] | 12[1] | 13 | 15 | 17 | 19 *17-22* |

[1] 12[1]=One year and one day

Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from the Guidelines under Minn. Stat. § 609.185. See section 2.E, for policies regarding those sentences controlled by law.

Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

[2] Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2.

[3] The stat. max. for Financial Exploitation of Vulnerable Adult is 240 months; the standard range of 20% higher than the fixed duration applies at CHS 6 or more. (The range is 62-86.)

**Examples of Executed Sentences (Length in Months) Broken Down by:**

**Term of Imprisonment and Supervised Release Term**

*Under Minn. Stat. § 244.101, offenders committed to the Commissioner of Corrections for crimes committed on or after August 1, 1993 will receive an executed sentence pronounced by the court consisting of two parts: a specified minimum term of imprisonment equal to two-thirds of the total executed sentence and a supervised release term equal to the remaining one-third. The court is required to pronounce the total executed sentence and explain the amount of time the offender will serve in prison and the amount of time the offender will serve on supervised release, assuming the offender commits no disciplinary offense in prison that results in the imposition of a disciplinary confinement period. The court must also explain that the amount of time the offender actually serves in prison may be extended by the Commissioner if the offender violates disciplinary rules while in prison or violates conditions of supervised release. This extension period could result in the offender's serving the entire executed sentence in prison.*

| Executed Sentence | Term of Imprisonment | Supervised Release Term | Executed Sentence | Term of Imprisonment | Supervised Release Term |
|---|---|---|---|---|---|
| 12 and 1 day | 8 and 1 day | 4 | 78 | 52 | 26 |
| 13 | 8 2/3 | 4 1/3 | 86 | 57 1/3 | 28 2/3 |
| 15 | 10 | 5 | 88 | 58 2/3 | 29 1/3 |
| 17 | 11 1/3 | 5 2/3 | 98 | 65 1/3 | 32 2/3 |
| 18 | 12 | 6 | 108 | 72 | 36 |
| 19 | 12 2/3 | 6 1/3 | 110 | 73 1/3 | 36 2/3 |
| 21 | 14 | 7 | 122 | 81 1/3 | 40 2/3 |
| 23 | 15 1/3 | 7 2/3 | 134 | 89 1/3 | 44 2/3 |
| 24 | 16 | 8 | 146 | 97 1/3 | 48 2/3 |
| 27 | 18 | 9 | 150 | 100 | 50 |
| 28 | 18 2/3 | 9 1/3 | 158 | 105 1/3 | 52 2/3 |
| 30 | 20 | 10 | 165 | 110 | 55 |
| 33 | 22 | 11 | 180 | 120 | 60 |
| 36 | 24 | 12 | 190 | 126 2/3 | 63 1/3 |
| 38 | 25 1/3 | 12 2/3 | 195 | 130 | 65 |
| 39 | 26 | 13 | 200 | 133 1/3 | 66 2/3 |
| 42 | 28 | 14 | 210 | 140 | 70 |
| 43 | 28 2/3 | 14 1/3 | 220 | 146 2/3 | 73 1/3 |
| 45 | 30 | 15 | 225 | 150 | 75 |
| 48 | 32 | 16 | 230 | 153 1/3 | 76 2/3 |
| 51 | 34 | 17 | 240 | 160 | 80 |
| 54 | 36 | 18 | 306 | 204 | 102 |
| 57 | 38 | 19 | 326 | 217 1/3 | 108 2/3 |
| 58 | 38 2/3 | 19 1/3 | 346 | 230 2/3 | 115 1/3 |
| 60 | 40 | 20 | 366 | 244 | 122 |
| 66 | 44 | 22 | 386 | 257 1/3 | 128 2/3 |
| 68 | 45 1/3 | 22 2/3 | 406 | 270 2/3 | 135 1/3 |
| 72 | 48 | 24 | 426 | 284 | 142 |

MN SENTENCING GUIDELINES MITIGATING.AGGRAVATING FACTORS*

2.D.203. It follows from the Commission's use of the conviction offense to determine offense severity that departures from the Guidelines should not be permitted for elements of alleged offender behavior not within the definition of the conviction offense. For example, if an offender is convicted of simple robbery, a departure from the Guidelines to increase the severity of the sentence should not be permitted because the offender possessed a firearm or used another dangerous weapon.

3. Factors that may be used as Reasons for Departure.

The following is a nonexclusive list of factors that may be used as reasons for departure:

a. Mitigating Factors.
(1) The victim was an aggressor in the incident.

(2) The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress.

(3) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.

(4) The offender's presumptive sentence is a commitment but not a mandatory minimum sentence, and either of the following exist:

(a) The current conviction offense is at Severity Level 1 or Severity Level 2 and the offender received all of his or her prior felony sentences during fewer than three separate court appearances; or

(b) The current conviction offense is at Severity Level 3 or Severity Level 4 and the offender received all of his or her prior felony sentences during one court appearance.

(5) Other substantial grounds exist that tend to excuse or mitigate the offender's culpability, although not amounting to a defense.

(6) The court is ordering an alternative placement under Minn. Stat. § 609.1055 for an offender with a serious and persistent mental illness. (7) The offender is particularly amenable to probation. This factor may, but need not, be supported by the fact that the offender is particularly amenable to a relevant program of

individualized treatment in a probationary setting.

(8) In the case of a controlled substance offense conviction, the offender is found by the district court to be particularly amenable to probation based on adequate evidence that the offender is chemically dependent and has been accepted by, and can respond to, a treatment program in accordance with Minn. Stat. § 152.152 (2014).

b. Aggravating Factors.
(1) The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, and the offender knew or should have known of this vulnerability.

(2) The victim was treated with particular cruelty for which the individual offender should be held responsible. MN Sentencing Guidelines and Commentary

(3) The current conviction is for a criminal sexual conduct offense, or an offense in which the victim was otherwise injured, and is the offender has a prior felony conviction for a criminal sexual conduct offense or an offense in which the victim was otherwise injured.

(4) The offense was a major economic offense, identified as an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage. The presence of two or more of the circumstances listed below is an aggravating factor with respect to the offense:

a. the offense involved multiple victims or multiple incidents per victim;
b. the offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified in the statutes;
c. the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time;
d. the defendant used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships; or
e. the defendant has been involved in other conduct similar to the current offense as evidenced by the findings of civil or administrative law proceedings or the imposition of professional sanctions.

(5) The offense was a major controlled substance offense, identified as an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense. The presence of two or more of the circumstances listed below is an aggravating factor with respect to the offense:

a. the offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to sell or transfer;
b. the offender or an accomplice possessed equipment, drug paraphernalia, or monies evidencing the offense was committed as part of wholesale trafficking of a controlled substance;
c. the offense involved the manufacture of controlled substances for use by other parties; (d) the offender or an accomplice knowingly possessed a firearm or other dangerous weapon, as defined by Minn. Stat. § 609.02, during the commission of the offense;
d. the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy;
e. the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement;
f. the offender used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence or fiduciary relationships (e.g., pharmacist, physician or other medical professional);
g. the offense involved separate acts of sale or possession of a controlled substance in three or more counties;
h. the offender has a prior conviction for a crime of violence, as defined in Minn. Stat. § 609.1095, subd. 1(d), other than a violation of a provision under Minn. Stat. chapter 152, including attempt or conspiracy, or was convicted of a similar offense by the United States or another state;
i. the offense involved the sale of a controlled substance to a minor or vulnerable adult; and (k) the defendant, or an accomplice, manufactured, possessed or sold a controlled substance in a school zone, park zone, public housing zone, federal, state, or local correctional facility, or drug treatment facility.

(6) The offender committed, for hire, a crime against the person.

(7) The offender is being sentenced as an "engrained offender" under Minn. Stat. § 609.3455, subd. 3a. MN Sentencing Guidelines and Commentary

(8) The offender is being sentenced as a "dangerous offender who commits a

third violent crime" under Minn. Stat. § 609.1095, subd. 2.

(9) The offender is being sentenced as a "career offender" under Minn. Stat. § 609.1095, subd. 4.
(10) The offender committed the crime as part of a group of three or more offenders who all actively participated in the crime

(11) The offender intentionally selected the victim or the property against which the offense was committed, in whole or in part, because of the victim's, the property owner's, or another's actual or perceived race, color, religion, sex, sexual orientation, disability, age, or national origin.

(12) The offender used another's identity without authorization to commit a crime. This aggravating factor may not be used when use of another's identity is an element of the offense.

(13) The offense was committed in the presence of a child. (14) The offense was committed in a location in which the victim had an expectation of privacy.

Comment 2.D.301. The Commission provides a non-exclusive list of factors that may be used as departure reasons. The factors are intended to describe specific situations involving a small number of cases. The Commission rejects factors that are general in nature, and that could apply to large numbers of cases, such as intoxication at the time of the offense. The factors cited are illustrative and are not intended to be an exclusive or exhaustive list. Some of these factors may be considered in establishing conditions of stayed sentences, even though they may not be used as reasons for departure. For example, whether an offender is employed at time of sentencing may be an important factor in deciding whether restitution should be used as a condition of probation, or in deciding the terms of restitution payment.

*Taken directly from pages 45-49 of the MN Sentencing Guidelines and Commentary 2016
Effective August 1, 2016

COUNTY OF Olmsted

# JOB DESCRIPTION

| | |
|---|---|
| Job Title: | **PROBATION OFFICER** |
| Title Code: | C42PRO |
| Supervisor Title: | Community Services Supervisor |
| Department: | Corrections |
| FLSA Status: | Non-Exempt |
| EEO Job Category | Professionals |
| Labor Group: | Employees Association |
| Date Reviewed: | 11/29/2016 |

## Minimum Qualifications of Education and Experience:

Bachelor's degree from an accredited college or university in corrections or related social science field and two (2) years of full time, paid experience providing case management services.

OR

Master's degree from an accredited college or university in corrections or related social sciences field and one (1) year of full time, paid experience providing direct case management services.

Regular and reliable attendance is a necessary component of job/position. Individuals required to use County vehicles and equipment must have a valid driver's license and be free of any major traffic violations for the last three (3) years.

## Nature of Work:

Under general supervision of the Director of DFO Community Corrections and direct supervision from a Community Services Supervisor, and within State and locally developed policies, supervises a caseload of clients placed on supervision. Writes court reports as needed and participates on specialized teams, which can involve non-traditional hours, group facilitation and close contact with local law enforcement agencies, social services and the criminal justice system. Provides case management, case planning, risk assessment, and other related services. Completes special projects and/or formalized training of staff and may serve on multidisciplinary committees as required.

## Essential Work Functions (Illustrative Only):

1 Provides case management, supervision and evidence-based correctional interventions to high risk probationer and/or supervised release clients to ensure they are meeting case planning goals and court ordered obligations

2 Interviews and counsels individual clients and supports to determine and identify problems or needs for services. Develops and writes individual case plans to address criminogenic needs and make appropriate case management decisions and referrals

3 Prepares a variety of reports for the court and/or Department of Corrections

4 Works closely with the criminal justice system to develop and implement model programming for clients who have committed criminal offenses

5 Identifies and initiates collaborative partnerships with service providers, employers, landlords, criminal justice partners and other community based cohorts

6 Consults and staffs cases to determine appropriate referrals to community based treatment programs and monitors those referrals. Collaborates with referral agencies to provide information on clients needing services

7 Lawfully apprehends or arrests clients who cannot be safely managed in the community

8 Collaborates with a broad range of justice, mental health, law enforcement and social services systems partners.

9 Recommends improvements to department practices, policies and procedures. Participates and may lead teams and projects to address improvements to programming and operations

10 Assesses the appropriateness of providing supervision for clients from other jurisdictions who are requesting to reside in Olmsted County, as well as arranges effective supervision for clients sentenced by Olmsted County District Courts who are residing or request to reside outside of Olmsted County; follows appropriate Interstate Compact and Intrastate Transfer process

**Other Work Functions (Illustrative Only):**

| | | |
|---|---|---|
| 1 | Attends training/conferences to continual gain knowledge around case management best practices | As Needed |
| 2 | Performs related duties as assigned | As Needed |
| 3 | Attends and participates in pertinent meetings | As Needed |
| 4 | Serves as liaison with other community agencies and counties | As Needed |

**Knowledge, Skills, and Abilities Required:**

- Considerable knowledge of Corrections and correctional programming
- Considerable knowledge of the social sciences and criminal justice system
- Knowledge of motivating factors of human behavior, particularly in the area of substance abuse
- Some knowledge of the principles of social work and psychology
- Some knowledge of community resources
- Some knowledge of federal, state and local programs and relevant laws
- Knowledge of chemical dependency and mental health issues, including supervision and treatment modalities
- Knowledge of relevant treatment strategies, tests and assessments, and risk classification tools for adult clients
- Ability to consider clients' problems with empathy and objectivity
- Ability to exercise good judgment in recommending possible solutions for clients' difficulties, and when utilizing conflict management and advocacy skills
- Ability to establish and maintain
- good working relationships with clients, co-workers, systems professionals, public officials and citizens of the community
- Ability to organize efficiently and keep records systematically
- Ability to work on a computer with documents, data/information systems, email, internet, etc.
- Some officer safety awareness
- Should possess strong writing skills with the ability to complete a large number of reports
- Provide written and oral reports/testimony to the courts

# COMMISSION ON JUVENILE SENTENCING FOR HEINOUS CRIMES

**Monday, February 27, 2017**
**4:30-6:30 p.m.**

**Minnesota County Insurance Trust Offices**
**100 Empire Drive • Room 208 • St. Paul**

**Co-Chairs: Hon. Kathleen Gearin and John Kingrey**

## AGENDA

1. Neuroscience and juvenile sentencing (Professor Francis Shen)

2. 50 state survey regarding sentencing factors (discussion)

3. Identifying the disconnect, if any, between U.S. Supreme Court decisions and Minnesota's presentence investigation criteria (discussion)

Future Meeting Dates for 2017:
April 3 and 24
June 5

Location and Time:
Meetings will be held in St. Paul at the Minnesota County Insurance Trust offices, 100 Empire Drive, St Paul.
The meetings will begin at 4:30 and end at 6:30 pm.

**FUTURE MEETINGS**

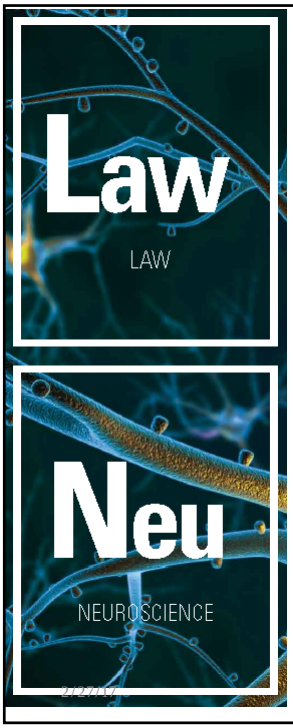
Agenda for April 3, 2017:

1. Current neuropsychology criteria for presentence investigations in Minnesota for juvenile homicide offenders (Dr. Dawn Peuschold)

2. Developing sentencing factors under *Miller* and *Montgomery* (discussion)

Agendas for April 24 and June 5

1. Developing sentencing factors under Miller and Montgomery (discussion)




# Neuroscience and Individualized Sentencing of Juveniles

**:: Dr. Francis X. Shen, JD, PhD**

*University of Minnesota Law School*
*MacArthur Foundation Research Network on Law & Neuroscience*
*Massachusetts General Hospital Center for Law, Brain and Behavior*

February 27, 2017
MSBA Commission on Juvenile Sentencing for Heinous Crimes

Shen Neurolaw Lab
*Every story is a brain story*
www.fxshen.com

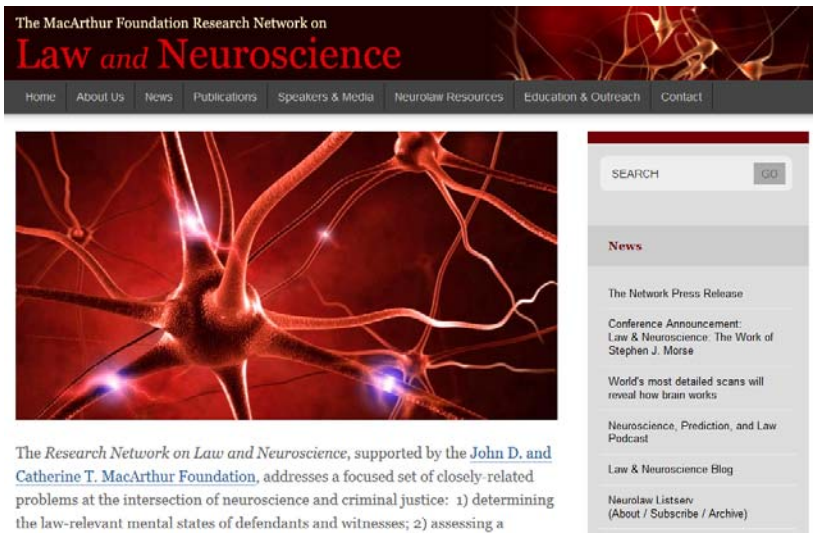
UNIVERSITY OF MINNESOTA
Driven to Discover℠

## Shen Neurolaw Lab

*Every story is a brain story*

www.fxshen.com

2/27/17




2/27/17

**www.lawneuro.org**


2/27/17

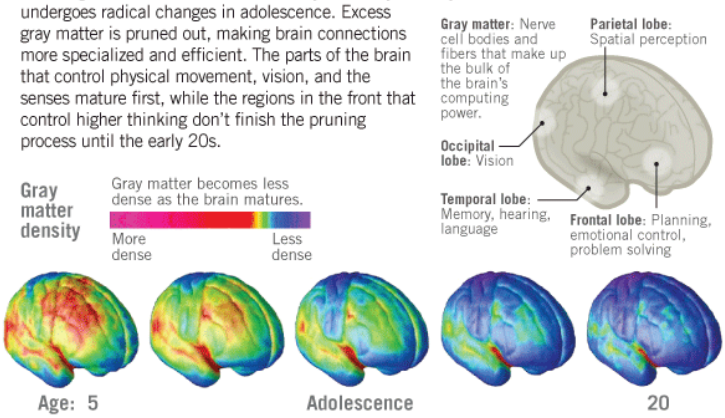

http://clbb.mgh.harvard.edu/juvenilejustice/

2/27/17

**Although much remains unknown, there is general scientific agreement that different brain circuits develop over different time courses, with some continuing to develop into the early 20s.**

## Growing a Grown-up Brain

Scientists have long thought that the human brain was formed in early childhood. But by scanning children's brains with an MRI year after year, they discovered that the brain undergoes radical changes in adolescence. Excess gray matter is pruned out, making brain connections more specialized and efficient. The parts of the brain that control physical movement, vision, and the senses mature first, while the regions in the front that control higher thinking don't finish the pruning process until the early 20s.




Source: "Dynamic mapping of human cortical development during childhood through early adulthood," Nitin Gogtay et al., *Proceedings of the National Academy of Sciences*, May 25, 2004; California Institute of Technology

2/27/17

**There is less agreement about whether and how this scientific knowledge about adolescent brain development can / should be meaningfully used in <u>legal</u> contexts.**

2/27/17

Three arguments in favor of using neuroscience evidence in individual juvenile sentencing are.

1. **Bolstering – it makes departure more difficult to justify.** Because the neuroscience converges with behavioral evidence and conventional wisdom, the case is even stronger that the default should be NOT to treat <18 year olds as adults.

2. **It's relevant – so use it (similar to how you use other imperfect, but relevant and admissible evidence).** Even acknowledging the many limitations of the evidence, it meets the relevance bar and is thus appropriate for the sentencing judge to consider.

3. **It might be especially effective or persuasive.** Pragmatically, the brain evidence might capture the imagination of the sentencing judge, and/or allow the judge a more politically and socially palatable rationale for a less punitive sentence.

2/27/17

## Two major challenges are:

1. **We don't know enough.** We don't have sufficient scientific knowledge about how the brain enables complex mental states (of the type the law requires us to consider).

2. **What we do know may not be useful for individual adjudication.** To date, neuroscience has not yet been able to provide clinicians with meaningful data about particular *individuals*. This creates a Group to Individual (G2i) inference challenge.

2/27/17

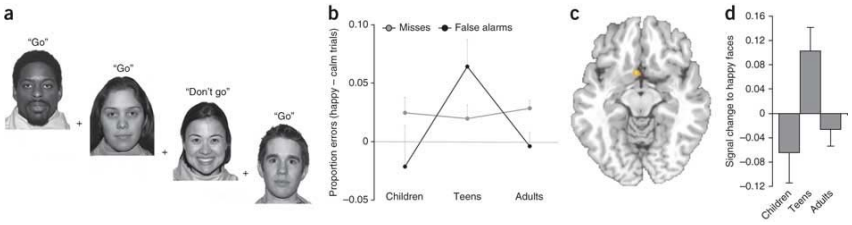
## What we DON'T know:

> The brain-mind-action relation is a mystery. ... Despite the astonishing advances in neuroimaging and other neuroscientific methods, we still do not have sophisticated causal knowledge of how the brain works generally and we have little information that is legally relevant. ... virtually no studies have been performed to address specifically legal questions.
>
> Stephen J. Morse, *Avoiding Irrational Neurolaw Exuberance: A Plea for Neuromodesty*, 62 Mercer L. Rev. 837, 849 (2011)

2/27/17

## Where does brain data about adolescent risk taking come from?

## Example: a neuroscience "go no-go task"




Sarah-Jayne Blakemore & Trevor W Robbins, Decision-making in the adolescent brain, Nature Neuroscience, 15, 1184–1191(2012), doi:10.1038/nn.3177

2/27/17

Here's an example of a peer influence brain scanning study by Temple scientists Jason Chein and Larry Steinberg:

2/27/17


2/27/17

## Such research is impressive!

## But … it's only a beginning.

These are just the beginning findings from an emerging field … One very clear direction for future work is to ascertain the particular qualities of an individual that are most closely associated with preference for risk in general, and with vulnerability to social influence in particular. **At this point we know very little about makes a given individual "at-risk" for susceptibility to peer influence, or what attributes or experiences might protect an adolescent from being unduly influenced**. – *Dr. Jason Chein*

2/27/17

## The Challenge of Group to Individual (G2i) Inference

"While science attempts to discover the universals hiding among the particulars, trial courts attempt to discover the particulars hiding among the universals."

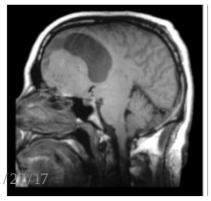
David L. Faigman, Legal Alchemy 69 (1999).

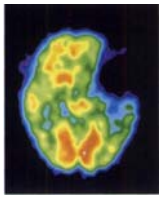
2/27/17

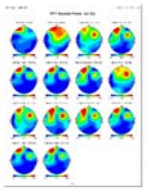
## Illustrative Cases: Individual Brain Data

We will NOT have this kind of data in the heinous crime juvenile cases.


**His tumor did it?** **He couldn't stop himself?** **A "broken brain"?**







2/27/17

## Conclusion: What can we say about the possible use of neuroscientific information in sentencing the cases this Commission has discussed?

1. If brain data is used at all, it will be NOT be brain data from any of the actual offenders. It will be group-averaged brain data from brains of adolescents in research studies.

2. There is disagreement in the scholarly community about whether and how this group-averaged information can be meaningfully applied in individual cases.

3. It would be reasonable not to consider the neuroscience. It would also be reasonable to consider it—but only if attorneys and courts should proceed with appropriate caution.

2/27/17

# Background resources related to neuroscience and *Miller* sentencing

*Compiled by Francis Shen for the Minnesota State Bar Association Commission on Juvenile Sentencing for Heinous Crimes*

Prepared for Commission meeting on February 27, 2017

For general background on the intersection of law and neuroscience, see:

- ebsite of the MacArthur Foundation esearch Network on Law and Neuroscience, which includes educational resources and a searchable bibliography: www.lawneuro.org
- ebsite of the Harvard MGH Center on Law, Brain, and Behavior, which includes a focus on juvenile justice: http://clbb.mgh.harvard.edu/juvenilejustice/
- O EN D. JONES, JEFF EY D. SCHALL & F ANCIS . SHEN, LA AND NEU OSCIENCE (2014) (casebook on law and neuroscience, which includes 2 chapter on the adolescent brain).

For accessible introductions to relevant adolescent brain science, watch and read:

- Neuroscientist BJ Casey presents **Juvenile Justice: Adolescent Decision Making and the Law**, as part of the anderbilt Judicial Collo uium sponsored by the MacArthur Foundation esearch Network on Law and Neuroscience (Feb 2014) Link: https://youtu.be/ Y NYeOf3SU (27 minutes)
- Laurence Steinberg presents **Using Brain Science to Explain Adolescent Risk-Taking**, emphasi ing the role of peer influence on adolescent decision-making (2012) Link: https://youtu.be/A71Kms6Mvhc (12 minutes)
- B.J. Casey & Kristina Caudle, *The Teenage Brain: Self Control*, 22 CU ENT DI ECTIONS IN PSYCHOLOGICAL SCIENCE 82 (2013).

For discussion of the Group to Individual inference challenge, see:

- David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. E . 417 (2014).
- Carl E. Fisher et. al., *Toward A Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group Data in Psychiatry to Individual Decisions in the Law*, 6 U. MIAMI L. E . 685 (2015).

For discussion of the legal implications of adolescent brain science, see:

- Alexandra O. Cohen et. al., *When Does A Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. E . 76 (2016).

- Stephen J. Morse, *Avoiding Irrational NeuroLaw Exuberance: A Plea for Neuromodesty*, 62 ME CE L. E . 837 (2011).

- Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on* Miller v. Alabama, 22 PSYCHOLOGY, PUBLIC POLICY, AND LA 235 (2016).

- ichard J. Bonnie & Eli abeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law,* 22 CU ENT DI ECTIONS PSYCHOL. SCI. 158 (2013).

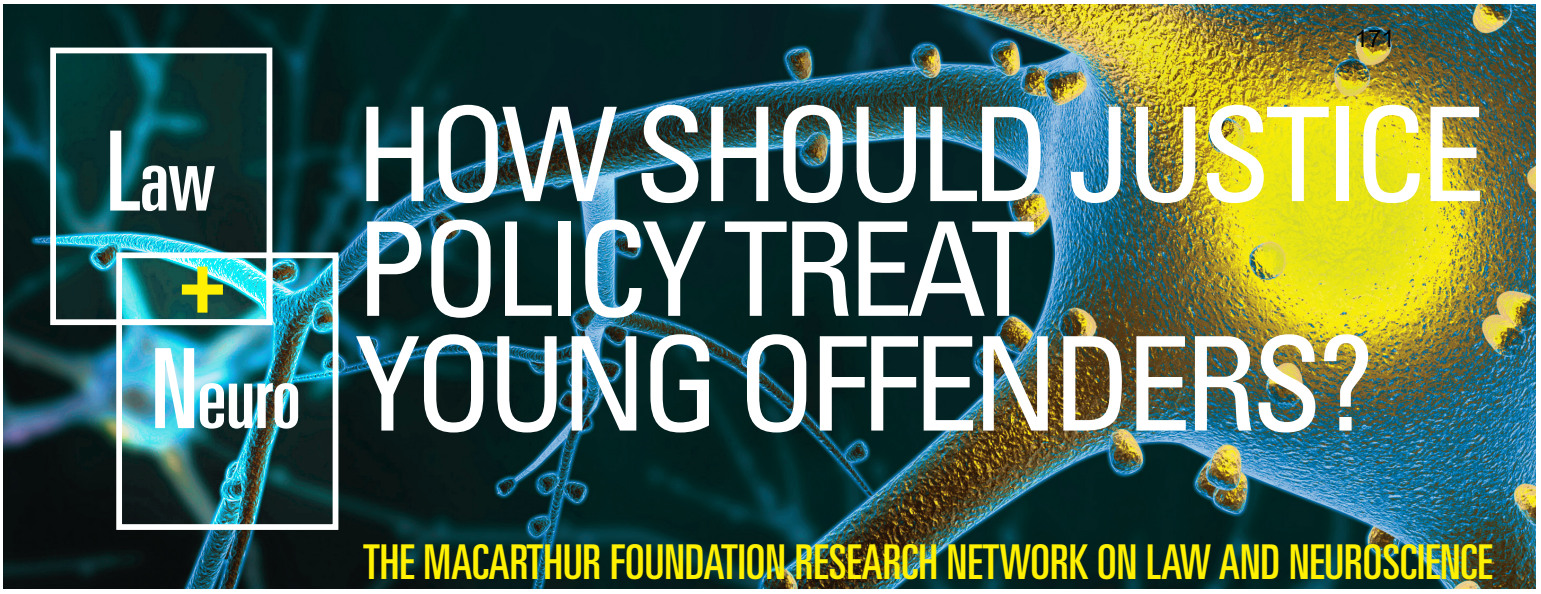
- Eli abeth Scott, et al., *The Supreme Court and the Transformation of Juvenile Sentencing*, Models for Change (2015).

- Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 28 ISSUES SCI. & TECH. 67 (2012).

- Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions About Adolescents' Criminal Culpability*, 14 NATU E E S. NEU OSCIENCE 513 (2013).

- Francis . Shen, *Legislating Neuroscience: The Case of Juvenile Justice*, 46 LOY. L.A. L. E . 85 (2013).

- Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOT E DAME L. E . 8 (200 ).




# HOW SHOULD JUSTICE POLICY TREAT YOUNG OFFENDERS?

THE MACARTHUR FOUNDATION RESEARCH NETWORK ON LAW AND NEUROSCIENCE

At least since the early 1900s, the justice system in the United States has recognized that juvenile offenders are not the same as adults, and has tried to incorporate those differences into law and policy. But only in recent decades have behavioral scientists and neuroscientists, along with policymakers, looked rigorously at developmental differences, seeking answers to two overarching questions: Are young offenders, *purely by virtue of their immaturity*, different from older individuals who commit crimes? And if they are, how should justice policy take this into account?

A growing body of research on adolescent development now confirms that teenagers are indeed inherently different from adults, not only in their behaviors, but also (and of course relatedly) in the ways their brains function. These findings have influenced a series of Supreme Court decisions relating to the treatment of adolescents, and have led legislators and other policymakers across the country to adopt a range of developmentally informed justice policies. Now research is beginning to identify differences in the brains of young adults, ages 18 to 21, suggesting that they too may be immature in ways that are relevant to justice policy.

## HOW ADOLESCENTS ARE DIFFERENT

Any parent can tell you that adolescents are different from adults. In recent decades, studies of adolescents' behavior under varying circumstances, along with studies of brain structure, function, and neurochemistry, have shed light on some of the processes underlying those differences.

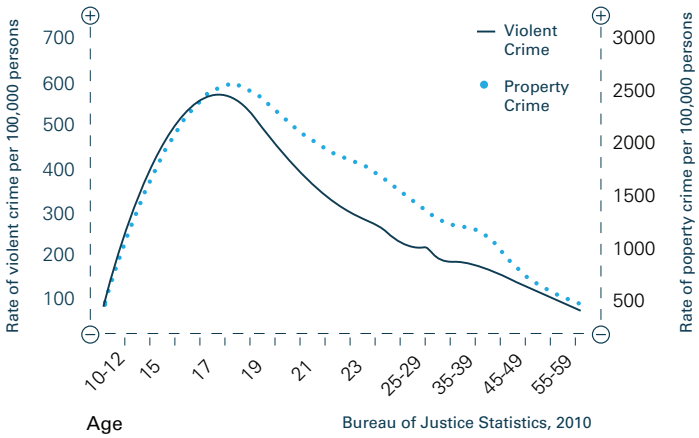
**What behavioral science has shown.** Adolescents are more likely than children or adults to engage in risky behavior—a category that includes, but is by no means limited to, involvement in crime. Behavioral studies looking at the components of this behavior point out that teens are typically more impulsive than adults and more inclined to seek out novel and exciting experiences, especially in the presence of peers. Adolescents are less likely than adults to consider the future consequences of their acts, or to weigh the potential costs as heavily as the anticipated rewards. Importantly, risky behaviors tend to peak in late adolescence and early adulthood, then

decline through the twenties. Long-term studies have shown that delinquency in adolescence is usually not an indication of an indelible personality trait: most adolescents, even those who commit serious crimes, will age out of offending and will not become career criminals.

**Neuroscience looks at the underpinnings.** Over the past decade and more, researchers—including members of the MacArthur Foundation Research Network on Law and Neuroscience—have looked closely at the neuroscience underlying adolescent behavior. What they have found is that different regions of the adolescent brain, and the functional connections among them, develop along distinct timelines, resulting in asymmetry among different brain systems. The emotional centers develop relatively early, making adolescents highly responsive to emotional and social stimuli. By contrast, brain regions that regulate self-control, such as the prefrontal cortex, take a while to catch up and continue to develop even beyond adolescence.

The differential pace of development in these systems can lead to an imbalance in communication among them, allowing those regions that support rational behavior to be overpowered by brain centers involved in emotion. This finding explains the pattern behavioral scientists had previously described: adolescents, especially in emotionally charged contexts or in the presence of peers, are more apt than adults to be impulsive, to disregard future consequences, and to take risks.

Offending drops steeply after age 18




Bureau of Justice Statistics, 2010

Ongoing development of the adolescent brain has another important component: plasticity, or the capacity of the brain to change in response to the environment. Because the brain is undergoing such rapid, fundamental changes at this stage of life, adolescents have a heightened capacity to learn and to alter how they behave as they age out of risky behavior. Given an environment and supports appropriate to their developmental stage, most young offenders have the potential to become law-abiding adults.

## NEW KNOWLEDGE INFORMS JUSTICE POLICY

The emerging knowledge about adolescent development has had a growing influence on justice policy. In 2005, in the case of *Roper v. Simmons*, the Supreme Court banned the death sentence for youth who were under 18 at the time of the crime. The case marked the first time the Court had grounded its opinion in developmental science. Citing behavioral research supported by the MacArthur Foundation and others, Justice Kennedy noted that adolescents, by virtue of their developmental stage, are less culpable—less blameworthy—than adults, and that even a heinous crime committed by an adolescent is not evidence of an "irretrievably depraved character." Thus, the Court declared, the death penalty is a "disproportionate punishment for juveniles."

Although adolescent brain development was mentioned in oral arguments, it did not appear in the Court's opinions in *Roper*. At that time, the neuroscientific research on adolescents was simply too limited. That changed significantly over the next decade, as new work, by the Research Network on Law and Neuroscience and others, added validity to arguments based in developmental psychology and showed that adolescents' behaviors were at least partly a result of the immaturity of their brains.

The growing influence of this emerging research on the Supreme Court can be seen in a series of opinions that strictly limited the use of life without parole for juveniles. In 2010, in *Graham v. Florida*, the Court described explicitly the development of brain regions involved in "behavior control." Two years later, in *Miller v. Alabama*, the Court expanded

its use of brain science, citing *amicus* briefs by a number of scientific organizations and pointing out that new findings strengthened the earlier opinions. These opinions found the use of life without parole almost always to be inappropriate for adolescents, even for homicide, because of their inherently limited culpability and their capacity for change. In *Montgomery v. Louisiana* in 2016, the Court underscored the importance of the principle at the heart of the earlier opinions—that "children are different"—announcing that *Miller* created a substantive rule of constitutional law. Adolescents, the Court said, deserve to have a meaningful opportunity for reform and a chance to demonstrate that they have matured and changed.

Beyond the Supreme Court, policymakers across the country began looking at adolescents through different lenses. State courts and legislatures have undertaken a wide range of legal reforms, including restrictions on adult prosecution of juveniles, protections in the courtroom, special sentencing and parole policies, and developmentally based correctional programs in secure facilities and in the community. Such policies recognize that justice systems can get better results—for the young offenders and for society—by treating adolescents less harshly and by providing them with opportunities to become productive citizens. It seems likely that continuing advances in neuroscience will strengthen these reforms and lead to wider acceptance of them and others.

## YOUNG ADULTHOOD: THE NEXT FRONTIER?

When developmental scientists—and to a large extent policymakers—speak of adolescents they usually mean teenagers up to the age of 18. Today, though, neuroscientists, as well as behavioral scientists, are beginning to look more closely at young adulthood—the period between ages 18 and 21—and to differentiate it from later stages of adulthood.

**Why it matters.** Young adulthood has changed dramatically over the past half century. Fifty years ago most young men and women left their parents' home around the age of 18, went to college or started work, then got married and had children. Today these milestones on the road toward independent adulthood are far more uncertain, and the dividing line between youth and adult has become less clear and less fixed. Economic hardship has made achieving the markers of adulthood especially difficult for those with fewer resources.

Young adults do commit a disproportionate amount of the nation's crime. In fact, arrests and recidivism peak in this age group. Yet we know relatively little about the developmental factors that may contribute to this phenomenon. What is happening to the developing brain during this period? How do biological and psychological development interact with the surrounding culture? What are the individual's capacities and needs as he or she prepares for adulthood? And what are the special challenges facing disadvantaged young adults? Answering questions like these will help meet the urgent need for programs that can help young adults at risk prepare for successful adulthood.

**What brain science is revealing.** Very few brain studies have compared individuals in the age group 18 to 21 with younger adolescents or with people in their mid-20s. What evidence there is, however, suggests that young adulthood is a distinct developmental period, and that young adults are different both from adolescents and from somewhat older adults in ways that are potentially relevant to justice policy.

Researchers have found that in young adulthood, as in adolescence, areas of the brain that regulate functions like judgment and self-control are still not fully mature. In certain emotionally charged situations, the capacity of young adults to regulate their actions and emotions appears more like that of teens than adults in their mid 20s or older. Work by members of the MacArthur Foundation Research Network on Law and Neuroscience suggests that young adults' propensity for risky behaviors, in particular, depends on emotional context.

When young adults feel threatened, they become more impulsive and more likely to take risks. However, their decision-making appears less influenced by peers than is that of adolescents. These new findings are especially important to justice

policy, which often addresses emotionally charged situations. Still to be explored are questions of brain development that could shed light on young adults' potential for rehabilitation.

## JUSTICE POLICY AND YOUNG ADULTS

Viewing young adulthood as a distinct and critical developmental period suggests the need to consider justice policies tailored to this group of young offenders. This is especially important in light of the economic and demographic changes described earlier and their disproportionate harmful impact on low-income youth and youth of color. Ongoing brain maturation in young adulthood has implications for policies related to culpability and punishment, and especially for rehabilitation—policies that give young adults the opportunity to stop offending and become contributing members of society.

At this time there is not a lot of evidence about what kinds of reforms will work best for young adults. We can say with some confidence, however, that treating young adults like older prisoners does not reduce recidivism. Reforms could begin by using less harsh sanctions (such as limited sentences and community-based alternatives) for less serious, non-violent crimes, and by investing in correctional programs and settings specifically designed to address the needs of this group of offenders. Perhaps more challenging will be to design effective educational, vocational, and social skills programs to prepare these individuals for the future. Shielding young adults from the collateral consequences of having a criminal record would facilitate their access to education, employment, and housing.

Finally, because of young offenders' capacity for change, and the likelihood that many of them will stop committing crimes as they mature, it makes sense to consider special, expedited parole policies that allow young adults to demonstrate that they are no longer a threat to society. For the same reason, lawmakers should consider excluding people between 18 and 21 from the mandatory minimum sentences currently imposed on adults.

## CONCLUSION

Developmental knowledge continues to grow in depth and breadth. It has already had a significant impact on juvenile law and policy, and has the potential to influence policy responses to young adult crime. While researchers are just beginning to look at young adulthood as a distinct phase of development, the work is providing a basis for rethinking the ways in which young adults who break the law are treated. Understanding the processes that underlie youthful offending will help policymakers and the public make better decisions about how young offenders should be treated in the justice system, with the goal of helping them reach their full potential while reducing crime and enhancing public safety. Research on young offenders is an investment in their future and ours.

### For further reading

*When Does a Juvenile Become an Adult? Implications for Law and Policy,* A. Cohen, R. Bonnie, K. Taylor-Thompson, & B.J. Casey, 88 *Temple Law Review 769* (2016).

*When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Context,* A. Cohen, K. Breiner, L. Steinberg, R. Bonnie, E. Scott, K. Taylor-Thompson, M. Rudolph, J. Chein, J. Richeson, A. Heller, M. Silverman, D. Dellarco, D. Fair, A. Galván, & B.J. Casey, *Psychological Science* (2016).

***Young Adulthood as a Transitional Legal Category: Science, Social Change and Justice Policy,*** E. Scott, 85 *Fordham Law Review* (forthcoming 2016).

*Juvenile Sentencing Reform in a Constitutional Framework,* E. Scott, T. Grisso, M. Levick, & L. Steinberg, 88 *Temple Law Review* 657 (2016).

The Research Network on Law and Neuroscience is funded by the John D. and Catherine T. MacArthur Foundation and directed by Owen Jones, New York Alumni Chancellor's Professor of Law and Professor of Biological Sciences, Vanderbilt University. For more information, contact Sarah Grove, sarah.e.grove@vanderbilt.edu.

# Statutory Factors to Consider in Sentencing Juveniles

**Florida**

Fla. Stat. Ann. 921.1401 (West 2016).

(1) Upon conviction or adjudication of guilt of an offense described in s. 775.082(1)(b), s. 775.082(3)(a) 5., s. 775.082(3)(b) 2., or s. 775.082(3)(c) which was committed on or after July 1, 2014, the court may conduct a separate sentencing hearing to determine if a term of imprisonment for life or a term of years equal to life imprisonment is an appropriate sentence.

(2) In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:

(a) The nature and circumstances of the offense committed by the defendant.
(b) The effect of the crime on the victim's family and on the community.
(c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
(d) The defendant's background, including his or her family, home, and community environment.
(e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.
(f) The extent of the defendant's participation in the offense.
(g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
(h) The nature and extent of the defendant's prior criminal history.
(i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.
(j) The possibility of rehabilitating the defendant.

**Illinois**
730 Ill. Comp. Stat. Ann. 5/5-4.5-105 (West 2016).

(a) On or after the effective date of this amendatory Act of the 99th General Assembly, when a person commits an offense and the person is under 18 years of age at the time of the commission of the offense, the court, at the sentencing hearing conducted under Section 5-4-1, shall consider the following additional factors in mitigation in determining the appropriate sentence:

(1) the person's age, impetuosity, and level of maturity at the time of the offense, including the ability to consider risks and consequences of behavior, and the presence of cognitive or developmental disability, or both, if any;
(2) whether the person was subjected to outside pressure, including peer pressure, familial pressure, or negative influences;
(3) the person's family, home environment, educational and social background, including any history of parental neglect, physical abuse, or other childhood trauma;
(4) the person's potential for rehabilitation or evidence of rehabilitation, or both;
(5) the circumstances of the offense;
(6) the person's degree of participation and specific role in the offense, including the level of planning by the defendant before the offense;
(7) whether the person was able to meaningfully participate in his or her defense;
(8) the person's prior juvenile or criminal history; and
(9) any other information the court finds relevant and reliable, including an expression of remorse, if appropriate. However, if the person, on advice of counsel chooses not to make a statement, the court shall not consider a lack of an expression of remorse as an aggravating factor.

*  *  *

**Iowa**
Iowa Code Ann. § 902.1 (West 2016).

*  *  *

2. a. Notwithstanding subsection 1, a defendant convicted of murder in the first degree in violation of section 707.2, and who was under the age of eighteen at the time the offense was committed shall receive one of the following sentences:

(1) Commitment to the director of the department of corrections for the rest of the defendant's life with no possibility of parole unless the governor commutes the sentence to a term of years.
(2) Commitment to the custody of the director of the department of corrections for the rest of the defendant's life with the possibility of parole after serving a minimum term of confinement as determined by the court.
(3) Commitment to the custody of the director of the department of corrections for the rest of the defendant's life with the possibility of parole.

b. (1) The prosecuting attorney shall provide reasonable notice to the defendant, after conviction and prior to sentencing, of the state's intention to seek a life sentence with no possibility of parole under paragraph “a”, subparagraph (1).

(2) In determining which sentence to impose, the court shall consider all circumstances including but not limited to the following:

(a) The impact of the offense on each victim, as defined in section 915.10, through the use of a victim impact statement, as defined in section 915.10, under any format permitted by section 915.13. The victim impact statement may include comment on the sentence of the defendant.
(b) The impact of the offense on the community.
(c) The threat to the safety of the public or any individual posed by the defendant.
(d) The degree of participation in the murder by the defendant.
(e) The nature of the offense.
(f) The defendant's remorse.
(g) The defendant's acceptance of responsibility.
(h) The severity of the offense, including any of the following:
(i) The commission of the murder while participating in another felony.
(ii) The number of victims.
(iii) The heinous, brutal, cruel manner of the murder, including whether the murder was the result of torture.
(i) The capacity of the defendant to appreciate the criminality of the conduct.
(j) Whether the ability to conform the defendant's conduct with the requirements of the law was substantially impaired.
(k) The level of maturity of the defendant.
(l) The intellectual and mental capacity of the defendant.
(m) The nature and extent of any prior juvenile delinquency or criminal history of the defendant, including the success or failure of previous attempts at rehabilitation.
(n) The mental health history of the defendant.
(o) The level of compulsion, duress, or influence exerted upon the defendant, but not to such an extent as to constitute a defense.

(p) The likelihood of the commission of further offenses by the defendant.
(q) The chronological age of the defendant and the features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences.
(r) The family and home environment that surrounded the defendant.
(s) The circumstances of the murder including the extent of the defendant's participation in the conduct and the way familial and peer pressure may have affected the defendant.
(t) The competencies associated with youth, including but not limited to the defendant's inability to deal with peace officers or the prosecution or the defendant's incapacity to assist the defendant's attorney in the defendant's defense.
(u) The possibility of rehabilitation.
(v) Any other information considered relevant by the sentencing court.

3. a. Notwithstanding subsections 1 and 2, a defendant convicted of a class “A” felony, other than murder in the first degree in violation of section 707.2, and who was under the age of eighteen at the time the offense was committed shall receive one of the following sentences:

(1) Commitment to the custody of the director of the department of corrections for the rest of the defendant's life with the possibility of parole after serving a minimum term of confinement as determined by the court.
(2) Commitment to the custody of the director of the department of corrections for the rest of the defendant's life with the possibility of parole.

b. In determining which sentence to impose, the court shall consider all circumstances including but not limited to the following:

(1) The impact of the offense on each victim, as defined in section 915.10, through the use of a victim impact statement, as defined in section 915.10, under any format permitted by section 915.13. The victim impact statement may include comment on the sentence of the defendant.
(2) The impact of the offense on the community.
(3) The threat to the safety of the public or any individual posed by the defendant.
(4) The degree of participation in the offense by the defendant.
(5) The nature of the offense.
(6) The defendant's remorse.
(7) The defendant's acceptance of responsibility.
(8) The severity of the offense, including any of the following:
(a) The commission of the offense while participating in another felony.
(b) The number of victims.
(c) The heinous, brutal, cruel manner of the offense, including whether the offense involved torture.
(9) The capacity of the defendant to appreciate the criminality of the conduct.
(10) Whether the ability to conform the defendant's conduct with the requirements of the law was substantially impaired.
(11) The level of maturity of the defendant.
(12) The intellectual and mental capacity of the defendant.
(13) The nature and extent of any prior juvenile delinquency or criminal history of the defendant, including the success or failure of previous attempts at rehabilitation.
(14) The mental health history of the defendant.

(15) The level of compulsion, duress, or influence exerted upon the defendant, but not to such an extent as to constitute a defense.
(16) The likelihood of the commission of further offenses by the defendant.
(17) The chronological age of the defendant and the features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences.
(18) The family and home environment that surrounded the defendant.
(19) The circumstances of the offense including the extent of the defendant's participation in the conduct and the way the familial and peer pressure may have affected the defendant.
(20) The competencies associated with youth, including but not limited to the defendant's inability to deal with peace officers or the prosecution or the defendant's incapacity to assist the defendant's attorney in the defendant's defense.
(21) The possibility of rehabilitation.
(22) Any other information considered relevant by the sentencing court.

*  *  *

**Louisiana**
La. Code Crim. Proc. Ann. art. 878.1 (2016).

A. In any case where an offender is to be sentenced to life imprisonment for a conviction of first degree murder (R.S. 14:30) or second degree murder (R.S. 14:30.1) where the offender was under the age of eighteen years at the time of the commission of the offense, a hearing shall be conducted prior to sentencing to determine whether the sentence shall be imposed with or without parole eligibility pursuant to the provisions of R.S. 15:574.4(E).

B. At the hearing, the prosecution and defense shall be allowed to introduce any aggravating and mitigating evidence that is relevant to the charged offense or the character of the offender, including but not limited to the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, social history, and such other factors as the court may deem relevant. Sentences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases.

**Michigan**
Mich. Comp. Laws § 769.25 (2016).

(1) This section applies to a criminal defendant who was less than 18 years of age at the time he or she committed an offense described in subsection (2) if either of the following circumstances exists:

(a) The defendant is convicted of the offense on or after the effective date of the amendatory act that added this section.
(b) The defendant was convicted of the offense before the effective date of the amendatory act that added this section and either of the following applies:

(*i*) The case is still pending in the trial court or the applicable time periods for direct appellate review by state or federal courts have not expired.
(*ii*) On June 25, 2012 the case was pending in the trial court or the applicable time periods for direct appellate review by state or federal courts had not expired.

(2) The prosecuting attorney may file a motion under this section to sentence a defendant described in subsection (1) to imprisonment for life without the possibility of parole if the individual is or was convicted of any of the following violations:

(a) A violation of section 17764(7) of the public health code, 1978 PA 368, MCL 333.17764.
(b) A violation of section 16(5), 18(7), 316, 436(2)(e), or 543f of the Michigan penal code, 1931 PA 328, MCL 750.16, 750.18, 750.316, 750.436, and 750.543f.
(c) A violation of chapter XXXIII of the Michigan penal code, 1931 PA 328, MCL 750.200 to 750.212a.
(d) Any violation of law involving the death of another person for which parole eligibility is expressly denied under state law.

* * *

(6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in Miller v Alabama, 576 US .....; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.

* * *

(7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.

(9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.

**Missouri**
Mo. Ann. Stat. § 565.033 (West 2016).

1. A person found guilty of murder in the first degree who was under the age of eighteen at the time of the commission of the offense shall be sentenced to a term of life without eligibility for probation or parole as provided in section 565.034, life imprisonment with eligibility for parole, or not less than thirty years and not to exceed forty years imprisonment.

2. When assessing punishment in all first degree murder cases in which the defendant was under the age of eighteen at the time of the commission of the offense or offenses, the judge in a jury-waived trial shall consider, or the judge shall include in instructions to the jury for it to consider, the following factors:

(1) The nature and circumstances of the offense committed by the defendant;
(2) The degree of the defendant's culpability in light of his or her age and role in the offense;
(3) The defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense;
(4) The defendant's background, including his or her family, home, and community environment;
(5) The likelihood for rehabilitation of the defendant;
(6) The extent of the defendant's participation in the offense;
(7) The effect of familial pressure or peer pressure on the defendant's actions;
(8) The nature and extent of the defendant's prior criminal history, including whether the offense was committed by a person with a prior record of conviction for murder in the first degree, or one or more serious assaultive criminal convictions;
(9) The effect of characteristics attributable to the defendant's youth on the defendant's judgment; and
(10) A statement by the victim or the victim's family member as provided by section 557.041 until December 31, 2016, and beginning January 1, 2017, section 595.229.

**Nebraska**
Neb. Rev. Stat. § 28-105.02 (2016).

(1) Notwithstanding any other provision of law, the penalty for any person convicted of a Class IA felony for an offense committed when such person was under the age of eighteen years shall be a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment.

(2) In determining the sentence of a convicted person under subsection (1) of this section, the court shall consider mitigating factors which led to the commission of the offense. The convicted person may submit mitigating factors to the court, including, but not limited to:

(a) The convicted person's age at the time of the offense;
(b) The impetuosity of the convicted person;
(c) The convicted person's family and community environment;
(d) The convicted person's ability to appreciate the risks and consequences of the conduct;
(e) The convicted person's intellectual capacity; and
(f) The outcome of a comprehensive mental health evaluation of the convicted person conducted by an adolescent mental health professional licensed in this state. The evaluation shall include, but not be limited to, interviews with the convicted person's family in order to learn about the convicted person's prenatal history, developmental history, medical history, substance abuse treatment history, if any, social history, and psychological history.

**Nevada**

Nev. Rev. Stat. §§ 176.017 (2016)

> If a person is convicted as an adult for an offense that the person committed when he or she was less than 18 years of age, in addition to any other factor that the court is required to consider before imposing a sentence upon such a person, the court shall consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth.

Nev. Rev. Stat. §§ 176.025 (2016)

> A sentence of death or life imprisonment without the possibility of parole must not be imposed or inflicted upon any person convicted of a crime now punishable by death or life imprisonment without the possibility of parole who at the time of the commission of the crime was less than 18 years of age. As to such a person, the maximum punishment that may be imposed is life imprisonment with the possibility of parole.

**North Carolina**
N.C. Gen. Stat. § 15A-1340.19B (West 2016).

(a) In determining a sentence under this Part, the court shall do one of the following:

(1) If the sole basis for conviction of a count or each count of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole.
(2) If the court does not sentence the defendant pursuant to subdivision (1) of this subsection, then the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in G.S. 14-17, or a lesser sentence of life imprisonment with parole.

(b) The hearing under subdivision (2) of subsection (a) of this section shall be conducted by the trial judge as soon as practicable after the guilty verdict is returned. The State and the defendant shall not be required to resubmit evidence presented during the guilt determination phase of the case. Evidence, including evidence in rebuttal, may be presented as to any matter that the court deems relevant to sentencing, and any evidence which the court deems to have probative value may be received.

(c) The defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors:

(1) Age at the time of the offense.
(2) Immaturity.
(3) Ability to appreciate the risks and consequences of the conduct.
(4) Intellectual capacity.
(5) Prior record.
(6) Mental health.
(7) Familial or peer pressure exerted upon the defendant.
(8) Likelihood that the defendant would benefit from rehabilitation in confinement.
(9) Any other mitigating factor or circumstance.

(d) The State and the defendant or the defendant's counsel shall be permitted to present argument for or against the sentence of life imprisonment with parole. The defendant or the defendant's counsel shall have the right to the last argument.

(e) The provisions of Article 58 of Chapter 15A of the General Statutes apply to proceedings under this Part.

**Pennsylvania**
18 Pa. Const. Stat. Ann. § 1102.1 (West 2016).

**(a) First degree murder.--**A person who has been convicted after June 24, 2012, of a murder of the first degree, first degree murder of an unborn child or murder of a law enforcement officer of the first degree and who was under the age of 18 at the time of the commission of the offense shall be sentenced as follows:

(1) A person who at the time of the commission of the offense was 15 years of age or older shall be sentenced to a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 35 years to life.
(2) A person who at the time of the commission of the offense was under 15 years of age shall be sentenced to a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 25 years to life.

* * *

**(c) Second degree murder.--**A person who has been convicted after June 24, 2012, of a murder of the second degree, second degree murder of an unborn child or murder of a law enforcement officer of the second degree and who was under the age of 18 at the time of the commission of the offense shall be sentenced as follows:

(1) A person who at the time of the commission of the offense was 15 years of age or older shall be sentenced to a term of imprisonment the minimum of which shall be at least 30 years to life.
(2) A person who at the time of the commission of the offense was under 15 years of age shall be sentenced to a term of imprisonment the minimum of which shall be at least 20 years to life.

**(d) Findings.--**In determining whether to impose a sentence of life without parole under subsection (a), the court shall consider and make findings on the record regarding the following:

(1) The impact of the offense on each victim, including oral and written victim impact statements made or submitted by family members of the victim detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. A victim impact statement may include comment on the sentence of the defendant.
(2) The impact of the offense on the community.
(3) The threat to the safety of the public or any individual posed by the defendant.
(4) The nature and circumstances of the offense committed by the defendant.
(5) The degree of the defendant's culpability.
(6) Guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing.
(7) Age-related characteristics of the defendant, including:

(i) Age.
(ii) Mental capacity.
(iii) Maturity.
(iv) The degree of criminal sophistication exhibited by the defendant.
(v) The nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant.
(vi) Probation or institutional reports.
(vii) Other relevant factors.

* * *

**Washington**
Rev. C. Wash. Ann. § 10.95.030 (West 2016).

*  *  *

(3)(a)(i) Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

(b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

*  *  *

**West Virginia**
W. Va. Code. Ann. § 61-11-23 (2016).

(a) Notwithstanding any other provision of law to the contrary, a sentence of life imprisonment without the possibility of parole may not be imposed on a person who:

(1) Is convicted of an offense punishable by life imprisonment; and
(2) Was less than eighteen years of age at the time the offense was committed.

(b) Unless otherwise provided by this code, the provisions of article twelve, chapter sixty-two of this code shall govern the eligibility for parole of a person who is convicted of an offense and sentenced to confinement if he or she was less than eighteen years of age at the time the offense was committed, except that a person who is convicted of one or more offenses for which the sentence or any combination of sentences imposed is for a period that renders the person ineligible for parole until he or she has served more than fifteen years shall be eligible for parole after he or she has served fifteen years if the person was less than eighteen years of age at the time each offense was committed.

(c) In addition to other factors required by law to be considered prior to the imposition of a sentence, in determining the appropriate sentence to be imposed on a person who has been transferred to the criminal jurisdiction of the court pursuant to section ten, article five, chapter forty-nine of this code and who has been subsequently tried and convicted of a felony offense as an adult, the court shall consider the following mitigating circumstances:

(1) Age at the time of the offense;
(2) Impetuosity;
(3) Family and community environment;
(4) Ability to appreciate the risks and consequences of the conduct;
(5) Intellectual capacity;
(6) The outcomes of a comprehensive mental health evaluation conducted by an mental health professional licensed to treat adolescents in the State of West Virginia: *Provided,* That no provision of this section may be construed to require that a comprehensive mental health evaluation be conducted;
(7) Peer or familial pressure;
(8) Level of participation in the offense;
(9) Ability to participate meaningfully in his or her defense;
(10) Capacity for rehabilitation;
(11) School records and special education evaluations;
(12) Trauma history;
(13) Faith and community involvement;
(14) Involvement in the child welfare system; and
(15) Any other mitigating factor or circumstances.

(d)(1) Prior to the imposition of a sentence on a person who has been transferred to the criminal jurisdiction of the court pursuant to section ten, article five, chapter forty-nine of this code and who has been subsequently tried and convicted of an felony offense as an adult, the court shall consider the outcomes of any comprehensive mental health evaluation conducted by an mental health

professional licensed to treat adolescents in the State of West Virginia. The comprehensive mental health evaluation must include the following:

(A) Family interviews;
(B) Prenatal history;
(C) Developmental history;
(D) Medical history;
(E) History of treatment for substance use;
(F) Social history; and
(G) A psychological evaluation.

(2) The provisions of this subsection are only applicable to sentencing proceedings for convictions rendered after the effective date of this section and shall not constitute sufficient grounds for the reconsideration of sentences imposed as the result of convictions rendered after the effective date of this section.

**Introduction**

The U.S. Supreme Court in *Miller v. Alabama*, held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders."[1] The Court further clarified that life without parole sentences are not wholly precluded for juvenile offenders. Rather, *Miller* requires that the court, in making the judgement as to an appropriate sentence, "take into account how children are different, and how those differences counsel against irrevocably sentencing [juveniles] to a lifetime in prison."[2]

**Question Presented**

How have state laws incorporated the guidance from *Miller* regarding the factors to consider when determining whether a sentence of life without parole is appropriate for a juvenile offender?

**Methodology**

A sentencing scheme that mandates the imposition of a sentence of life without parole for a juvenile offender clearly violates *Miller*. However, a sentencing scheme that permits the discretionary imposition of a life without parole sentence is permissible so long it allows for the consideration of how children are different. The following passage from *Miller* is generally viewed as setting forth the *Miller* factors; that is, the factors that courts should consider when determining an appropriate sentence.[3] One way that states have chosen to comply with *Miller* is to incorporate these factors into their sentencing laws.

> So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. See, *e.g., Graham,* 560 U.S., at ——, 130 S.Ct., at 2032 ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J.D.B. v. North Carolina,* 564 U.S. ——, ——, 131 S.Ct. 2394, 2400–2401, 180 L.Ed.2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

In order to determine the extent to which these concepts have been incorporated into law, the paragraph was parsed into the following ten discrete factors. These factors were then compared to state laws, and the results were documented in the chart starting on page 3 of this document. In some cases, factors other than those listed in *Miller* have been incorporated into state law. Where that is the case, the additional criteria have been listed in the column labeled "other factors."

[1] *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012).
[2] *Id.*
[3] *Miller v Alabama*, 132 S.Ct. 2455, 2468 (2012).

1. Age
2. Immaturity and/or impetuosity
3. Failure to appreciate risks and consequences
4. Family and home environment
5. Circumstances of the offense
6. Extent of his participation in the conduct
7. Familial and peer pressures
8. Inability to deal with polices officers or prosecutors
9. Incapacity to assist his own attorneys
10. Possibility of rehabilitation

It should be noted that not all states that require consideration of Miller have retained life without parole sentences. Nine states have retained the possibility of a life without parole sentence[4] while three states have abolished life without parole sentences for juveniles.[5]

[4] Florida, Illinois, Iowa, Louisiana, Michigan, Missouri, North Carolina, Pennsylvania, Washington
[5] Nebraska, Nevada, West Virginia

| State | Miller Factors | | | | | | | | | | Other Factors |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Age | Immaturity, Impetuosity | Apprec. Risks | Family, Home Env. | Circumstances of Offense | Degree of Participation | Familial, Peer Pressure | Inability to Deal w/Police, Pros. | Capacity to Assist in Defense | Poss. Rehab. | |
| FL[6] | X | X | X | X | X | X | X | | | X | • Intellectual capacity, and mental and emotional health at time of offense<br>• Effect on the victim's family and on the community<br>• Nature and extent of prior criminal history<br>• Effect of characteristics attributable to the defendant's youth on the defendant's judgment |
| IL[7] | X | X | X | X | X | X | X* | | X | X | • Presence of cognitive or developmental disability<br>• Prior juvenile or criminal history<br>• Any other information the court finds relevant and reliable, including an expression of remorse<br>*Family/home env. includes history of parental neglect, physical abuse, or other childhood trauma |

[6] Fla. Stat. Ann. §§ 775.082; 921.1401 (West 2016).
[7] 730 Ill. Comp. Stat. Ann. 5/5-4.5-105 (West 2016).

| State | Miller Factors | | | | | | | | | | Other Factors |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Age | Immaturity, Impetuosity | Apprec. Risks | Family, Home Env. | Circumstances of Offense | Degree of Participation | Familial, Peer Pressure | Inability to Deal w/Police, Pros. | Capacity to Assist in Defense | Poss. Rehab. | |
| IA[8] | | X | X | | X | X | | | | X | • Intellectual and mental capacity<br>• Victim and community impact<br>• Threat to public safety or any individual<br>• Defendant's remorse<br>• Acceptance of responsibility<br>• Severity of offense including commission of the murder while participating in another felony, number of victims, heinous nature of offense<br>• Whether ability of defendant to conform conduct with the law was substantially impaired<br>• Nature and extent of any prior juvenile delinquency or criminal history |
| LA[9] | | | | X | X | | | | | | • Criminal history<br>• Other factors the court deems relevant |
| MI[10] | X | X | X | X | X | X | X | X | X | X | *Note:* The factors are not listed in statute. Rather, the statute *cites Miller and* requires consideration of the factors in that case. |

[8] Iowa Code Ann. § 902.1 (West 2016).
[9] La. Code Crim. Proc. Ann. art. 878.1 (2016).
[10] Mich. Comp. Laws § 769.25 (2016).

| State | Miller Factors | | | | | | | | | | Other Factors |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Age | Immaturity, Impetuosity | Apprec. Risks | Family, Home Env. | Circumstances of Offense | Degree of Participation | Familial, Peer Pressure | Inability to Deal w/Police, Pros. | Capacity to Assist in Defense | Poss. Rehab. | |
| MO[11] | X | X | | X | X | X | X | | | X | • Intellectual capacity, and mental and emotional health and development at time of offense<br>• Degree of defendant's culpability in light of his or her age and role in the offense<br>• Nature and extent of the defendant's prior criminal history<br>• Effect of characteristics attributable to the defendant's youth on the defendant's judgment<br>• Victim impact |
| NE[12] | X | X | X | X | | | | | | | • Intellectual capacity<br>• Outcome of a comprehensive mental health evaluation that includes prenatal history, developmental history, medical history, substance abuse treatment history, social history, and psychological history |
| NV[13] | | | | | | | | | | | • Diminished culpability of juveniles as compared to adults<br>• Typical characteristics of youth |

[11] Mo. Ann. Stat. § 565.033 (West 2016).
[12] Neb. Rev. Stat. § 28-105.02 (2016).
[13] Nev. Rev. Stat. §§ 176.017; 176.025 (2016).

| State | Miller Factors | | | | | | | | | | Other Factors |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Age | Immaturity, Impetuosity | Apprec. Risks | Family, Home Env. | Circumstances of Offense | Degree of Participation | Familial, Peer Pressure | Inability to Deal w/Police, Pros. | Capacity to Assist in Defense | Poss. Rehab. | |
| NC[14] | X | X | X | | | | X | | | X | • Intellectual capacity<br>• Prior record<br>• Mental health<br>• Any other mitigating factor or circumstance |
| PA[15] | X | X | | | X | | | | | X | • Defendant's culpability<br>• Mental capacity<br>• Victim impact and community impact<br>• Threat to the safety of the public or any individual<br>• Guidelines for sentencing and resentencing<br>• Degree of criminal sophistication exhibited by defendant<br>• Prior delinquent or criminal history<br>• Other relevant factors |
| WA[16] | X | | | X | | X | | | | X | *Note*: Statute specifically references *Miller* case, and then lists these factors explicitly. |

[14] N.C. Gen. Stat. § 15A-1340.19B (West 2016).
[15] 18 Pa. Const. Stat. Ann. § 1102.1 (West 2016).
[16] Rev. C. Wash. Ann. § 10.95.030 (West 2016).

| State | Miller Factors | | | | | | | | | | Other Factors |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Age | Immaturity, Impetuosity | Apprec. Risks | Family, Home Env. | Circumstances of Offense | Degree of Participation | Familial, Peer Pressure | Inability to Deal w/Police, Pros. | Capacity to Assist in Defense | Poss. Rehab. | |
| WV[17] | X | X | X | X | | X | X | | X | X | • Intellectual capacity<br>• Outcomes of a comprehensive mental health evaluation conducted by an mental health professional licensed to treat adolescents in the State of West Virginia<br>• School records and special education evaluations<br>• Trauma history<br>• Faith and community involvement<br>• Involvement in the child welfare system<br>• Any other mitigating factor or circumstances |

[17] W. Va. Code. Ann. § 61-11-23 (2016).

the Campaign for the Fair Sentencing of Youth

# RIGHTING WRONGS

THE FIVE-YEAR GROUNDSWELL OF STATE BANS ON LIFE WITHOUT PAROLE FOR CHILDREN

SEPTEMBER **2016**

A Publication by the Campaign for the Fair Sentencing of Youth

the CAMPAIGN for the FAIR SENTENCING of YOUTH

The Campaign for the Fair Sentencing of Youth is a national coalition and clearinghouse that leads, coordinates, develops, and supports efforts to implement fair and age-appropriate sentences for youth, with a focus on abolishing life without parole sentences for youth.



Cover image: Ralph Brazel, pictured with his son in 2016. Ralph was given three life-without-parole sentences at 17 for his role in a drug ring operated by an adult. He became eligible for relief following 2010's U.S. Supreme Court decision in *Graham v. Florida*. He served nearly 22 years in prison, and was released in 2013, shortly before his 40th birthday. His son was born last year.

# TABLE OF CONTENTS

3 . . . A MESSAGE OF HOPE
4 . . . EXECUTIVE SUMMARY
5 . . . STATE LEGISLATIVE CHAMPIONS
6 . . . MAP: BANS TRIPLE IN 5 YEARS
7 . . . BROAD SUPPORT FOR REFORM
8 . . . SNAPSHOT: WEST VIRGINIA
9 . . . SNAPSHOT: NEVADA
10 . . . A CONSERVATIVE PERSPECTIVE
11 . . . PROSECUTORS FOR REFORM
13 . . . CHILDREN CAN CHANGE
16 . . . A PATH FORWARD
20 . . . STATEMENT OF PRINCIPLES
21 . . . OFFICIAL SUPPORTERS
22 . . . DEDICATION

# RIGHTING WRONGS

## THE FIVE-YEAR GROUNDSWELL OF STATE BANS ON LIFE WITHOUT PAROLE FOR CHILDREN

## A MESSAGE OF HOPE

The Campaign for the Fair Sentencing of Youth was launched in 2009 to coordinate, bolster, and build new strategies to end the practice of sentencing children to life in prison without parole—the most punitive sentence imposed on our children. It is a sentence to die in prison, imposed only in the United States.

Sentencing children to die in prison declares them irredeemable, defining their lives based on their worst mistakes. All children—even those convicted of the most serious crimes—are different from adults and should be held accountable for harm they have caused in age-appropriate ways. In addition, children who receive the harshest treatment are frequently the most vulnerable children in our society: children from poor communities, children of color, and children who have endured extensive trauma.

Our vision is to help create a society that respects the dignity and human rights of children through a justice system that operates with consideration of the child's age, provides youth with opportunities to return to the community, and bars the imposition of life without parole for children under age eighteen. This vision is turning into reality as states change their policies and individuals previously sentenced to life without parole as children begin to return home as productive members of society.

We are privileged to lead and work alongside a robust national alliance committed to banning life-without-parole sentences for children. Our partners include conservative and liberal policymakers alike, faith leaders from every major world religion, medical professionals, defense attorneys, prosecutors, judges, formerly incarcerated youth, victims' families, and child advocates. Together, we utilize advocacy, public education, and legal strategies to end the practice of sentencing our children to die in prison. The multi-faceted movement to ban life without parole for children has resulted in a culture shift, visible in the recent momentum to scale back these extreme sentences.

As a result, the United States is on course to replace life-without-parole sentences for children with less punitive and more age-appropriate accountability measures, informed by individuals and communities directly impacted by youth violence. This publication provides a glimpse of our recent progress in state legislatures, the widespread support for ending life without parole for children, and most importantly, the lives touched by this crucial work.

I invite you to join this growing movement of giving hope of a second chance to *all* of our children.

Onward,

Jody Kent Lavy
Executive Director
Campaign for the Fair Sentencing of Youth

# AN EVOLVING STANDARD OF DECENCY

## FIVE YEARS OF POSITIVE SENTENCING REFORM FOR CHILDREN

## EXECUTIVE SUMMARY

In just five years—from 2011 to 2016—the number of states that ban death-in-prison sentences for children has more than tripled. In 2011, only five states did not permit children to be sentenced to life without parole. Remarkably, between 2013 and 2016, three states per year have eliminated life-without-parole as a sentencing option for children. Seventeen states now ban the sentence.

This rapid rate of change, with twelve states prohibiting the penalty in the last four years alone, represents a dramatic policy shift, and has been propelled in part by a growing understanding of children's unique capacity for positive change. Several decades of scientific research into the adolescent brain and behavioral development have explained what every parent and grandparent already know—that a child's neurological and decision-making capacity is not the same as those of an adult.[1] Adolescents have a neurological proclivity for risk-taking, making them more susceptible to peer pressure and contributing to their failure to appreciate long-term consequences.[2] At the same time, these developmental deficiencies mean that children's personalities are not as fixed as adults, making them predisposed to maturation and rehabilitation.[3] In other words, children can and do change. In fact, research has found that most children grow out of their criminal behaviors by the time they reach adulthood.[4]

Drawing in part from the scientific research, as well as several recent U.S. Supreme Court cases ruling that life-without-parole sentences violate the U.S. Constitution for the overwhelming majority of children,[5] there is growing momentum across state legislatures to reform criminal sentencing laws to prohibit children from being sentenced to life without parole and to ensure that children are given meaningful opportunities to be released based on demonstrated growth and positive change. This momentum has also been fueled by the examples set by formerly incarcerated individuals who were once convicted of serious crimes as children, but who are now free, contribute positively to their communities, and do not pose a risk to public safety.

In addition to the rapid rate of change, legislation banning life without parole for children is notable for the geographic, political, and cultural diversity of states passing these reforms, as well as the bipartisan nature in which bills have passed, and the overwhelming support within state legislatures.

Currently, Nevada, Utah, Montana, Wyoming, Colorado, South Dakota, Kansas, Kentucky, Iowa, Texas, West Virginia, Vermont, Alaska, Hawaii, Delaware, Connecticut, and Massachusetts all ban life without parole sentences for children. Additionally California, Florida, New York, New Jersey, and the District of Columbia ban life without parole for children in nearly all cases.

It is also important to note that three additional states—Maine, New Mexico, and Rhode Island—have never imposed a life-without-parole sentence on a child. Several other states have not imposed the sentence on a child in the past five years, as states have moved away from this inappropriate sentence both in law and in practice.

[1] Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009).
[2] *Id*; Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 DEVELOPMENTAL REV. 78 (2008).
[3] Jay N. Giedd, The Teen Brain: Insights from Neuroimaging, 42 J. OF ADOLESCENT HEALTH 335 (2008); Mark Lipsey et al., Effective Intervention for Serious Juvenile Offenders, JUV. JUST. BULL. 4-6 (2000).
[4] Terrie E. Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 PSYCHOL. REV. 674, 675 (1993).
[5] See *Miller v. Alabama*, 132 S. Ct. 2455 (2012); and *Montgomery v. Louisiana* 136 S. Ct. 718 (2016).

# STATE LEGISLATIVE CHAMPIONS

"I believe that children, even children who commit terrible crimes, can and do change. And I believe they deserve a chance to demonstrate that change and become productive citizens. In the end, I gathered a very diverse set of legislators from across the political spectrum and passed the bill with solid margins."

***Senator Craig Tieszen***
South Dakota State Senator (R), Chair of the South Dakota Senate Judiciary Committee and former Police Chief of Rapid City, South Dakota

"In many aspects of our culture and society, we recognize the recklessness and impulsivity in children, which is why we don't allow them to make adult-decisions relating to voting, buying alcohol or tobacco products, entering into contracts, marrying, or joining the military. HB 2116 creates parity in our laws by recognizing that children are different from adults when it comes to criminal sentencing and that they should not be subject to our state's toughest penalties.

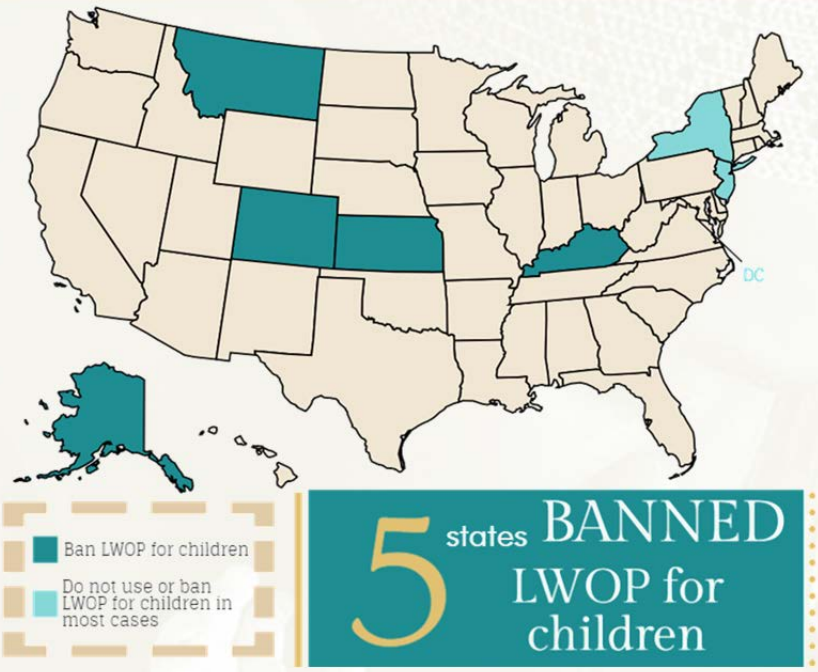
***Representative Karen Awana***
Former Hawaii State Representative (D)

"Utah's criminal justice system has long recognized the fundamental difference between children and adult offenders. Passage of HB 405 is an expression of that important recognition and it provides a clear statement of Utah's policy regarding the treatment of children placed in custody for serious offenses."

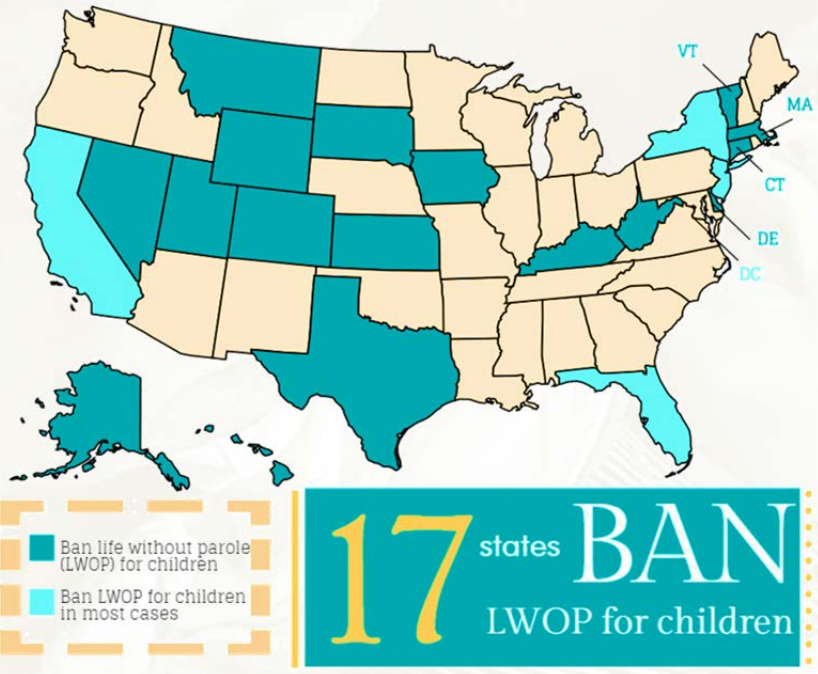
***Representative V. Lowry Snow***
Utah State Representative (R)

# BANS **TRIPLE** IN 5 YEARS

## 2011




## 2016



# BROAD SUPPORT FOR REFORM

**LEGISLATIVE MOMENTUM TOWARD AGE-APPROPRIATE ACCOUNTABILITY**

## REFORM IN EVERY REGION

Legislative reform has passed in every region in the country, including New England, the Mid-Atlantic, the South, the Midwest, the West, and the Pacific.

Legislation to prohibit life without parole for children has passed in states that historically have been Republican-led, including Utah and Wyoming, and states that historically have been Democratic-led, including Connecticut and Delaware.

## BIPARTISAN SUPPORT FOR REFORM

Sentencing reform to end life-without-parole sentences for children has gained the support and co-sponsorship of Republicans and Democrats, resulting in robust passage rates. In Delaware, Wyoming, Hawaii, West Virginia, and Utah legislation passed in one chamber unanimously, and in Nevada, legislation passed both chambers unanimously. In many states, legislation has passed with retroactive application.

## HIGHLIGHTS OF REFORM

Several states have led the movement for age-appropriate accountability for children. In addition to banning life without parole for children, these states have enacted legislation that ensures all children receive an opportunity for review and the possibility of release. For example, laws enacted in Delaware, West Virginia, Connecticut, and Nevada have allowed hundreds of individuals who were sentenced to lengthy prison terms distinct from life without parole for crimes committed as children a chance to demonstrate how they have matured and changed. Each law prioritizes giving individuals opportunities to lead meaningful lives where they can finish school, establish careers, and start families. As a result of these laws, individuals who were once told as children that they would die in prison have returned home and now are contributing members of their communities.

Legislation from states has included:

- consideration of factors related to a child's age, maturity, life circumstances, and capacity for rehabilitation at the time of sentencing for all children tried in adult court
- judicial discretion to depart from mandatory minimums, sentencing enhancements, and lengthy terms of years for children being sentenced in adult court
- meaningful and periodic reviews for all children sentenced in adult court
- due process protections, including legal representation during parole and resentencing proceedings

West Virginia and Nevada are geographically and politically diverse states which can serve as examples for other states to follow.

# SNAPSHOT: WEST VIRGINIA

**HB 4210 (2014)**

## VOTE MARGIN

House: 89 yeas, 9 nays

Senate: 34 yeas, 0 nays

"We all fall short at times, and, as a person of faith, I believe we all can be redeemed, particularly our children. Young people, often exposed to violence, poverty, and neglect in home environments they cannot escape, sometimes make tragic mistakes. We should and can still hold them accountable for the harm they have caused but in an age-appropriate way that motivates them to learn from their mistakes and work toward the possibility of release. As minority chair on the Judiciary Committee, I can report that we passed this bill with widespread bipartisan support. I hope it will serve as a model for other state legislatures."
*Former Delegate John Ellem (R)*

## SENTENCING PROVISIONS

In 2014, West Virginia passed HB 4210 which, among other things, banned the use of life without parole as a sentencing option for children. On the "sentencing front-end," the bill also specified that anytime a child is being sentenced for a felony offense as an adult in criminal court, a judge must consider the following mitigating circumstances:

*(1) Age at the time of the offense;*
*(2) Impetuosity;*
*(3) Family and community environment;*
*(4) Ability to appreciate the risks and consequences of the conduct;*
*(5) Intellectual capacity;*
*(6) The outcomes of a comprehensive mental health evaluation conducted by an mental health professional licensed to treat adolescents in the State of West Virginia;*
*(7) Peer or familial pressure;*
*(8) Level of participation in the offense;*
*(9) Ability to participate meaningfully in his or her defense;*
*(10) Capacity for rehabilitation;*
*(11) School records and special education evaluations;*
*(12) Trauma history;*
*(13) Faith and community involvement;*
*(14) Involvement in the child welfare system; and*
*(15) Any other mitigating factor or circumstances.*

## REVIEW PROVISIONS

West Virginia established parole eligibility for all children convicted of any offense or offenses after no more than 15 years. Additionally, the parole board is required to take into consideration "*the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration.*" The parole board also must consider the following mitigating factors when determining whether or not to grant parole to an individual who was a child at the time of their offense(s):

*(1) A review of educational and court documents;*
*(2) Participation in available rehabilitative and educational programs while in prison;*
*(3) Age at the time of the offense;*
*(4) Immaturity at the time of the offense;*
*(5) Home and community environment at the time of the offense;*
*(6) Efforts made toward rehabilitation;*
*(7) Evidence of remorse; and*
*(8) Any other factors or circumstances the board considers relevant.*

Under existing law, individuals who are eligible for parole in West Virginia must be reviewed no later than every three years. This, coupled with the provisions outlined in HB 4210, make West Virginia's laws one of the national models that states should seek to imitate when holding children accountable for committing serious crimes.

# SNAPSHOT: NEVADA

**AB 267 (2015)**

## VOTE MARGIN

Assembly: 42 yeas, 0 nays

Senate: 21 yeas, 0 nays

"When we sentence a child to die in prison, we forestall the possibility that he or she can change and find redemption. In doing so, we ignore Jesus' fundamental teachings of love, mercy, and forgiveness."

*Nevada Assembly Speaker John Hambrick (R)*

## SENTENCING PROVISIONS

In 2015 Nevada unanimously passed AB 267 with the support of the Nevada District Attorneys Association. The new law bans the use of life-without-parole sentences for children and requires judges to consider *"the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth"* any time a child under the age of 18 is being sentenced as an adult in criminal court.

## REVIEW PROVISIONS

AB 267 also specifies parole eligibility guidelines for individuals who committed their crimes under the age of 18, as follows:

*(a) For a prisoner who is serving a period of incarceration for having been convicted of an offense or offenses that did not result in the death of a victim, after the prisoner has served 15 calendar years of incarceration, including any time served in a county jail.*

*(b) For a prisoner who is serving a period of incarceration for having been convicted of an offense or offenses that resulted in the death of only one victim, after the prisoner has served 20 calendar years of incarceration, including any time served in a county jail.*

As a result of AB 267, nearly every child who had been given a sentence that would have made them ineligible for release on parole for more than 20 years will now be eligible for parole after either 15 or 20 years. More than 100 people serving life or other life-equivalent sentences were directly impacted by the passage of this law.

# A CONSERVATIVE PERSPECTIVE

**by Nevada Assembly Speaker John Hambrick (R) and former West Virginia Delegate John Ellem (R)**

It is time to ban life-without-parole sentences for children.

As conservative Republican legislators, we helped lead the efforts in our states to end these sentences and replace them with age-appropriate sentences that consider children's capacity to change and become rehabilitated. In West Virginia and Nevada, the states we represent, the legislatures overwhelmingly passed these measures.

The impact of serious crimes is no less tragic because a child is involved and youth must be held accountable for their conduct. However, as a modern society we must balance protecting public safety and justice for victims with the psychological and developmental differences between children and adults. In fact, many victims' families, who have come to know the child offenders in their cases, have found healing when the child was given the possibility of a second chance. Not everyone should be released from prison, but those children who change and become rehabilitated should be given that hope, and we should support healing for the victims' families and their communities.

Adolescent development research has shown children do not possess the same capacity as adults to think through the consequences of their behaviors, control their responses, or avoid peer pressure. Often times the children who commit serious offenses have suffered abuse, neglect, and trauma, which affects their development and plays a role in their involvement in the justice system. Drawing in part on this research, the U.S. Supreme Court has said children are "constitutionally different" and should not be subject to our harshest penalties.

But our motivation goes beyond what the Court said. Redemption is a basic tenet of nearly every religion. When we sentence a child to die in prison, we forestall the possibility that he or she can change and find redemption. In doing so, we ignore Jesus' fundamental teachings of love, mercy, and forgiveness. As Father Bernard Healey recently pointed out—Moses, David, and the Apostle Paul were all guilty of killing, but found redemption and purpose through the grace of God. Shouldn't we show this same mercy to our nation's children, allowing them a chance at redemption?

Seventeen states have banned life-without-parole sentences for children. The time has come for all states to do so. As Congress looks to criminal justice reform, they would do well to make banning these sentences a priority.

(This article first appeared in CQ *Researcher*).

# PROSECUTORS FOR REFORM

## PROTECTING PUBLIC SAFETY AND PROMOTING AGE-APPROPRIATE ACCOUNTABILITY

**by Salt Lake County District Attorney Sim Gill**

For the fourth time in just over ten years, the U.S. Supreme Court has weighed in on the constitutional sentencing parameters for juveniles who commit serious violent offenses. These four cases represent a major paradigm shift in how the state can and will pursue just outcomes in cases involving juveniles who commit serious crimes.

In *Roper v. Simmons,* 543 U.S. 551 (2005), the Court said that sentencing a juvenile to death violates the Eighth Amendment. In *Graham v. Florida*, 560 U.S. 48 (2010), the Court said that sentencing a juvenile to life without parole for a nonhomicide offense—even a serious, violent nonhomicide—violates the Eighth Amendment. In *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the Court said that a mandatory life-without-parole sentence imposed on a juvenile for a homicide offense violates the Eighth Amendment, because the sentencer must take into account the unique factors of youth before sentencing a juvenile to life in prison. And on January 25, 2016 in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), the Court said that the *Miller* decision applies retroactively and that life without parole is unconstitutional for the vast majority of juveniles who commit homicide. In its 2016 General Session, the Utah Legislature overwhelmingly passed H.B. 405, which eliminated life without the possibility of parole in cases where the offender was under the age of 18 at the time of the offense and where the offender is sentenced after May 10, 2016. I supported that bill because it was based on sound policy.

Juveniles and adults are treated differently under the law in the United States in any number of ways: juveniles can't vote, serve in the military, buy cigarettes or alcohol, or enter into contracts. And now the Supreme Court has made clear that juveniles and adults must be treated differently for sentencing purposes as well, at least as regards the use of extreme sentences, like the death penalty and life imprisonment without the possibility of parole. It's worth noting that with the exception of *Graham* (which involved an armed burglary with assault or battery), all of these cases involved juveniles convicted of serious homicide offenses. So when the Court assessed the constitutional uniqueness of juveniles at sentencing, the Court did so in the context of some of the most violent and terrible crimes that come through our courts.

In *Roper*, *Graham*, *Miller*, and *Montgomery*, the Supreme Court looked to the underlying research for why juveniles and adults are treated differently under the law—namely, that juveniles are physiologically impulsive, impressionable, and engage in risky behavior, but that given time, juveniles can outgrow antisocial adolescent behavior. According to the Court, brain science shows that "ordinary adolescent development diminishes the likelihood that a juvenile offender [who commits a serious homicide] forever will be a danger to society." *Montgomery*, 136 S.Ct. at 733. The Court also emphasized that the "relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside. . . For most teens, risky or antisocial behaviors are fleeting; they cease with maturity as individual identity becomes settled." *Roper*, 543 U.S. at 570.

The constitutional uniqueness of juveniles for sentencing purposes highlights new and challenging responsibilities for prosecutors, and *Miller* and *Montgomery* in particular have created a complex landscape for prosecutors to navigate. Whereas *Roper* and *Graham* instituted a categorical bar on a particular punishment, *Miller* did not. However, *Montgomery* clarified that "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. . . Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence. The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right." *Montgomery,* 136 S. Ct. at 734.

The state must uphold the laws and Constitution on behalf of all its citizenry—and that includes criminal defendants. Following *Roper*, the state no longer pursued death for juveniles who committed homicide. Doing so would have undermined the very law we as prosecutors strive to uphold. The same is now true for pursuing life without parole for juveniles. To seek life without parole in the vast majority of cases in which we are statutorily permitted is not justice under the Constitution.

In jurisdictions where life without the possibility of parole is still a sentencing option for juvenile offenders, *Miller* and *Montgomery* present significant practical challenges for prosecutors in addition to ethical ones. Not only must prosecutors divine which crimes reflect irreparable corruption and which do not, the burden now rests on the state to prove irreparable corruption in order to secure a constitutional life-without-parole sentence. This is a high, if not impossible, burden to meet, given what we know about juveniles' biological capacity for positive change.

Therefore, instead of wasting resources prosecuting the thorny issue of which juveniles who commit homicide are irreparably corrupt and which are not, prosecutors should come out in support of ending the practice of life without parole for juveniles altogether. I supported the legislative effort in Utah because I believe our law must demand accountability and rehabilitation from juveniles who commit terrible crimes. Public safety will be served best when the law empowers parole boards (or judges in states without a parole system) to make release determinations based on a juvenile offender's actual—rather than future hypothetical—maturation and rehabilitation. As prosecutors, it is our responsibility to uphold the Constitution and to seek just outcomes. It is time for us to seek just and age-appropriate outcomes for the juveniles we prosecute.

"I am proud of our legislators for acknowledging that the minds of children are different from those of adults in very specific ways. Certainly, when children commit serious crimes, we in law enforcement must respond and protect the community; however, putting a child in prison and throwing away the key is not a humane or cost-effective solution to this problem."

*Kauai County Prosecuting Attorney Justin Kollar*

"I supported the legislative effort in Utah because I believe our law must demand accountability and rehabilitation from juveniles who commit terrible crimes. Public safety will be served best when the law empowers parole boards (or judges in states without a parole system) to make release determinations based on a juvenile offender's actual—rather than future hypothetical—maturation and rehabilitation."

*Sim Gill, Salt Lake County District Attorney*

# CHILDREN CAN CHANGE

## INCARCERATED CHILDREN'S ADVOCACY NETWORK (ICAN)

As an initiative of the Campaign for the Fair Sentencing of Youth, the Incarcerated Children's Advocacy Network (ICAN), is a national network of leaders who were formerly incarcerated as youth and who are living proof of the unique capacity for change that resides within every child. Members humbly recognize their responsibility to humanity and serve as a source of motivation to others that it is never too late to become a positive force in the community. Every ICAN member was previously convicted or pled guilty to a homicide-related offense and/or was sentenced to life without parole for a crime committed as a child. ICAN members champion the cause for age-appropriate and trauma-informed alternatives to the extreme sentencing of America's youth.

ICAN has played a central role in advocating for and informing recent youth sentencing policy reforms. Featured below are profiles of current ICAN members who have been involved in advocacy efforts to end the practice of sentencing children to life without parole.

## PROFILES OF ICAN MEMBERS

**XAVIER** At the age of 13, Xavier McElrath-Bey was sent to prison for murder, but, through faith and maturation, turned his life around.

While he was incarcerated, Xavier earned both his Associates and Bachelor's degrees from Roosevelt University. Upon his release, he worked as a barista at Starbucks, earned a Master's Degree, and worked in various youth intervention and juvenile justice research positions.

Much of Xavier's advocacy efforts have been highlighted by various media sources and news outlets, such as the *New York Times*, *Chicago Tribune*, PBS NewsHour, The Steve Wilkos Show, the *Huffington Post*, Al Jazeera America, the podcast *Undisclosed*, and many others. He also delivered a powerful TEDx Talk at Northwestern University, titled "No Child is Born Bad," in which he shared about his childhood experiences of abuse, neglect, incarceration, and the unique capacity for change that exists within every child, demonstrating that children should never be defined by their worse act. He currently serves as Youth Justice Advocate and ICAN Coordinator at the Campaign, and is a founding member of ICAN.

**DOLPHY** Dolphy Jordan's early life was challenging. Born in San Diego, Dolphy grew up in Seattle in an impoverished and abusive home environment. His father was addicted to drugs, and Dolphy's mother relied on public benefits to raise him and his sister.

By the 9th grade, Dolphy had attended 15 or 16 different schools. He acted out and was kicked out of some schools for truancy and bad behavior. At one point, his mother also kicked him out of the house. For a while, Dolphy bounced between the streets and various foster homes.

At 16, Dolphy was convicted of murder in Washington State. After serving 21 years he received a second chance. Upon release, he enrolled in college and graduated with honors, earning the Presidential Award at commencement. He currently works full time with King County Drug Diversion Court as a Resource Specialist connecting people

dealing with substance use disorders and mental health issues to community resources. He also works with another nonprofit and talks with youth at truancy workshops.

He is very active in the community, loves the outdoors, and is an avid Seahawks fan.

*"Through my experiences, I have learned to truly appreciate the value of life and know that people have the capacity to change despite whatever circumstances they may face."*

**SEAN** Sean Ahshee Taylor's formative years in Denver were filled with challenges: his mother battled crack addiction, and his father, who was not a major presence in his life, was incarcerated.

When he was about 14, Sean joined the Bloods street gang. To adolescent Sean, the gang offered the potential of financial stability. In 1990, at 17, a jury convicted Sean of first-degree homicide.

While in prison, Sean taught fellow incarcerated people adult basic education. Sean, who speaks some Spanish, also taught English as a Second Language. In 2011, a juvenile clemency board created by Colorado Gov. Bill Ritter (D) granted clemency to Sean and three other people who were minors at the time of their crimes. Sean was released at age 38.

Shortly after he gained his freedom, Sean found work as a case worker by the Second Chance Center in Aurora. The center aspires to reduce the recidivism rates of men and women who have been incarcerated by helping them transition into successful lives in society. Sean is a role model for the people he works with and has worked his way up and is now the organization's deputy director. He is also a gang intervention specialist.

*"Those of us who are formerly incarcerated are modeling what is possible. The ones we left behind are saying, if we can get out and be successful so can they. That's priceless seed planting."*

**FRANCESCA** Francesca Duran learned from her abusive, alcoholic mother to respond to problems not with dialogue, but with violence.

At 13, during a fight with several other teenagers, Francesca's cousin pulled a knife and stabbed one of the girls, killing her. New Mexico authorities charged Francesca with accessory to commit first-degree murder, conspiracy, and harboring a felon.

At 16, Francesca eventually pled to lesser charges, including battery resulting in great bodily harm, and was sentenced to two years in juvenile detention. She gave birth to her son, Joedamien, while incarcerated. Francesca's mother, who had received treatment for alcoholism, took care of the baby while Francesca served her time. She was released in 2003, when Joedamien was a year old.

In 2006, Francesca began work at PB & J Family services, which provides social

services to families in the Albuquerque area. Francesca started as a home visitor, conducting home visits to ensure that children were in healthy environments. Today she supervises six workers in that unit.

*"All families matter, all parents are human beings who deserve respect, people are greater than their circumstances people can change. It's strong leaders like ICAN and the Campaign that exemplify these values."*

**ELLIS** Ellis Curry was convicted of murder in Florida at 16 years old. He is currently an entrepreneur and small business owner in Jacksonville and volunteers with Compassionate Families, where he travels around the state with Glen Mitchell, the father of the victim, talking to at-risk youth about the perils of bad choices. He is also a loving husband.

*"I believe that every child should get a second chance because, if you would have met me at the age of 16, you would have thought I was a monster, but now I'm a business owner and a law-abiding citizen."*

**ERIC** Eric Alexander was sent to prison at 17 for aggravated robbery and murder in Tennessee. Since his release he has a become a mentor to other at-risk youth and currently serves as the Program Director for the YMCA Community Project in Nashville, Tennessee. He is happily married and recently became a father to a baby girl. He and his wife have also adopted a teenage boy.

*"There is not a greater gift than to be given a second chance and then use that opportunity to give back to youth who are in desperate need of someone who they can relate to while helping them to navigate through brokenness."*

# A PATH FORWARD

## JOIN THE MOVEMENT

As a nation built on second chances, the United States shines as a beacon of hope to people all around the world. But that hope has been stripped from children in this country told they were worth nothing more than dying in prison. Fortunately, with the leadership of courageous policymakers from diverse geographic, political, and ideological backgrounds, that message is being replaced by an affirmation that there is no such thing as a throwaway child. The extraordinary rate of legislative change banning life-without-parole sentences for children across the U.S. in the past five years reflects an emerging consensus that no child should be sentenced to die in prison. The momentum demonstrates a shift from draconian punishment toward approaches that hold our children accountable for harm they have caused in age-appropriate ways.

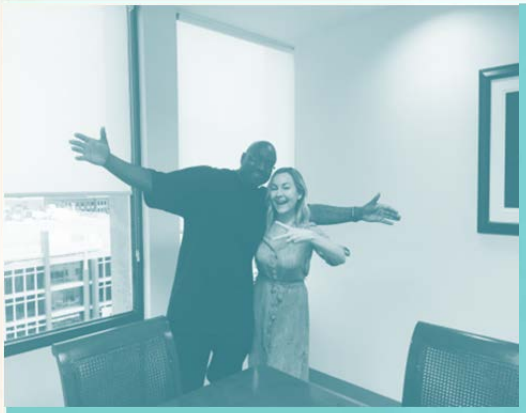
Now is the time to join the movement to end life sentences for children and ensure all children have an opportunity to demonstrate positive growth and a second chance at life.

## LIVES TOUCHED

Assembly Speaker John Hambrick (R) watches as Governor Sandoval (R) signs AB 267 into law

*The work that the Campaign for the Fair Sentencing of Youth is doing is changing the lives, the hopes and aspirations of men, women and families across America. I have witnessed first-hand how families rejoice and celebrate when their loved ones have benefited from their work."*

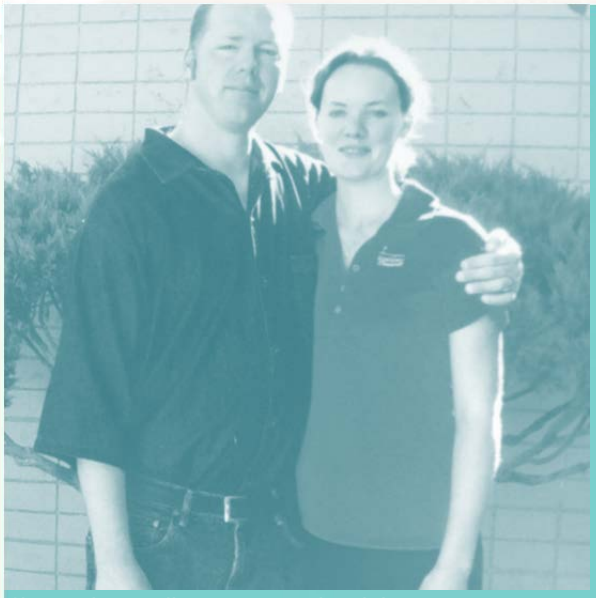
*-Assembly Speaker John Hambrick (R)*



Donald Lee with his attorney Maggie Lambrose after being released as a result of AB 267

*I wish there was something I could say that would adequately express how grateful I am, but there simply are no words to describe the feeling that comes from breathing fresh air as a free man or hugging your aunt in your grandmother's kitchen. I grew up in prison. I spent 31 years incarcerated, to be exact, and I still cannot believe you [the Campaign] have made it possible for me to have kids, get married, and help others. We cannot stop until every child sentenced to life without has the chance to one day sit in their grandmother's kitchen and hear their aunt say, 'I love you.'"*

*Donald Lee*



Christopher Williams, pictured with his sister LeAnna Williams, was given hope of a second chance because of AB 267

*"AB 267 has enabled me to truly see hope; hope in what was an impossibly hopeless set of circumstances that I had realized as my life; hope that even though I spent three years on Death Row and the last 20 years serving life without parole, that all was not lost, as I now have the hope of a future life outside of prison."*

*-Christopher Williams, sentenced to life without parole*

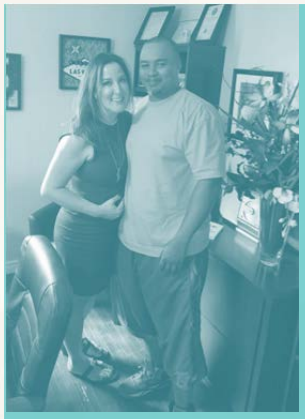
*"Instead of counting days he is there, now we are counting days till his next parole hearing. I want to thank everyone at the Campaign for the Fair Sentencing of Youth, Speaker John Hambrick, and everyone involved with AB 267 not only for changing the future of Christopher's life, but for also changing the quality of my own life as well. I will be forever grateful."*

*-LeAnna Williams*

*Jon Hawkins was recently granted parole under AB 267*

*"AB 267 is a big deal. Never did I expect to see a Parole Board, let alone anticipate the full scale of what being in the "free world" means. This bill has allowed many incarcerated persons to have an opportunity to be heard by the Parole Board, a feat that was never to be accomplished by those of us who had juvenile life without the possibility of parole, such as myself. All of my adult life has been in prison, until about a month and a half ago. Now, I have a job, I am learning to drive a car, and I can choose what I would like to eat for my meals. These things are taken for granted by John Q. Public, but to be without them is no way to exist."*

*- Jon Hawkins*



Defense Attorney, Kristina Wildeveld, with her client Richard Gaston.

*In one fell swoop, this piece of legislation literally saved so many men and women and gave them new life. I have been proud to be a part of it and honored to watch as these individuals who lived without hope in the law, but filled with hope in their hearts, get released and become contributing members of society. Working with the professionals at the Campaign for the Fair Sentencing of Youth has been a great experience. They are always available and ready to step into any state at any time to help. The professionalism, experience, and knowledge they offer navigating the legislative system is invaluable and impressive."*

*-Kristina Wildeveld*

Senator Craig Tieszen with members of CFSY and Coalition partners Libby Skarin and Lindsey Riter-Rapp

*"The Campaign for the Fair Sentencing of Youth provided important testimony and support. As important as the sentencing reform is, I think it is equally valuable that legislators had the opportunity to think differently about how and why we incarcerate children."*

*-South Dakota State Senator Craig Tieszen (R)*

Dr. Linda White, whose daughter Cathy was murdered by two teenagers

*I'm incredibly grateful to the Campaign for all the work they've done to change the dialogue regarding youthful offenders. In spite of being the mother of a young woman who was killed by two 15-year-olds, I see only waste - wasted lives and wasted funds better spent on prevention - in keeping children locked up until they die behind bars. It also seems really cruel to their families who become one more set of victims."*

*-Dr. Linda White*

*Representative Barbara Rachelson (D) watches as Governor Shumlin (D) signs H. 62 into law*

*Working with the Campaign for the Fair Sentencing of Youth to pass legislation to ban life-without-parole sentences for children in Vermont was so very helpful. Their knowledge, availability and rapport with legislators made all the difference. I can honestly say that without CFSY's help, this never would have happened."*

*-Vermont State Representative Barbara Rachelson (D)*


Sara Kruzan with her daughter

*"The Campaign for the Fair Sentencing of Youth has been a tremendous pillar of support. It's with great admiration to say from the very core of my being I am not an Exception but a Reflection! It is an honor to be a pro-social advocate alongside the Campaign as well as ICAN. They are the Epitome of HOPE!"*

*-Sara Kruzan. At 16, Sara was sentenced to life without parole for first degree murder, and has been home for nearly three years and is a loving mother and advocate.*


Ralph Brazel, Jr., with his son

*"'Invaluable' and 'heaven sent' are words that come to mind when I think about the tremendous blessing the Campaign for the Fair Sentencing of Youth has been in my life. What better description is there for a people who pick up the shovel to uncover children who have been buried alive?"*

*-Ralph Brazel, Jr. At 17 was sentenced to life without parole for a non-violent drug offense, and has been home for more than 3 years now and is married with children.*


Billy Harris with his sister Lisa

*"The Campaign for the Fair Sentencing of Youth's support and guidance with regards to juvenile sentencing reform in the Missouri Legislature has been instrumental in my personal growth as an advocate for others like me, who deserve a second chance at a normal life."*

*-Billy Harris. At 16 Billy was sent to prison for second degree murder, and has been home for more than a decade now advocating for his sister, Lisa, who at the age of 17 was sentenced to life without parole.*

# STATEMENT OF PRINCIPLES

We believe that young people convicted of serious crimes should be held accountable for the harm they have caused in a way that reflects their capacity to grow and change. We believe in fair sentencing for youth that reflects our human rights, values and moral beliefs, and as such, the fundamental difference between youth and adults. Research has proven that youth are still developing both physically and emotionally and their brains, not just their bodies, are not yet fully mature. Because of these differences, youth have greater potential to become rehabilitated. Therefore, we believe that youth under the age of 18 should never be sentenced to prison for the rest of their lives without hope of release.

We believe that a just alternative to life in prison without parole is to provide careful reviews to determine whether, years later, individuals convicted of crimes as youth continue to pose a threat to the community. There would be no guarantee of release—only the opportunity to demonstrate that they are capable of making responsible decisions and do not pose a threat to society. This alternative to life without parole sentencing appropriately reflects the harm that has been done, as well as the special needs and rights of youth, and focuses on rehabilitation and reintegration into society.

We know that victims and survivors of serious crimes committed by youth endure significant hardship and trauma. They deserve to be provided with supportive services, and should be notified about sentencing reviews related to their cases. We believe in restorative practices that promote healing for the crime victims as well as the young people who have been convicted of crimes.

Sentencing minors to life terms sends an unequivocal message to young people that they are beyond redemption. We believe that society should not be in the practice of discarding young people convicted of crimes for life, but instead, should provide motivations and opportunities for healing, rehabilitation, and the potential for them to one day return to our communities as productive members of society.

# OFFICIAL SUPPORTERS

American Civil Liberties Union • American Correctional Association • American Correctional Chaplains Association • American Humanist Association • American Probation and Parole Association • American Psychological Association • Amnesty International • Association of Paroling Authorities International (APAI) • Association of Women Executives in Corrections • Baha'is of the United States • Baltimore Ethical Society • Boys Scouts of America • Buddhist Peace Fellowship • Campaign for Youth Justice • Catholic Mobilizing Network • Center for Children's Law and Policy • Central Juvenile Defender Center • Centro Pedro Claver, Inc. • Child Rights International Network (CRIN) • Child Welfare League of America • Children & Family Justice Center • Children's Action Alliance • Children's Defense Fund • Children's Law Center of Massachusetts, Inc. • Christ & St. Ambrose Episcopal Church, Philadelphia, PA • Church of the Brethren, Global Partnerships • Coalition for Juvenile Justice • Coalition on Human Needs • Colorado Juvenile Defender Coalition • Conference of Major Superiors of Men • Council for Educators of At-Risk and Delinquent Youth • Council of Juvenile Correctional Administrators • The Defender Association of Philadelphia • Doctors for Global Health • Engaged Zen Foundation • Equal Justice Initiative • Evangelical Lutheran Church in America • Every Child Matters • Faith Communities for Families and Children • Families & Allies of Virginia's Youth • First Focus • Friends & Families of Inmates, Omaha, Nebraska • From Death to Life • The General Synod of the United Church of Christ • Georgetown Center for Juvenile Justice Reform • Hispanic Clergy of Philadelphia and Vicinity • Human Rights Watch • International Association of Forensic Nurses • International Community Corrections Association • Jesuit Conference • Jewish Council on Urban Affairs • Journey of Hope • Just Detention International • JustFaith Ministries • Justice Policy Institute • Juvenile Justice Coalition of Ohio • Juvenile Justice Initiative of Illinois • Juvenile Justice Project of Louisiana • Juvenile Justice Trainers Association • Juvenile Law Center • Mental Health America • Michigan Council on Crime and Delinquency • Mid-Atlantic Juvenile Defender Center • Midwest Juvenile Defender Center • Mississippi Youth Justice Project • Mothers Against Murderers Association • Muslim Public Affairs Council • Muslims for Progressive Values • NAACP • NAACP Legal Defense and Educational Fund, Inc. • NAMI Colorado • National Advocacy Center of the Sisters of the Good Shepherd • National African American Drug Policy Coalition, Inc. • National Alliance of Faith and Justice • National Alliance of Sentencing Advocates and Mitigation Specialists • National Association for Children of Incarcerated Parents • National Association of Counsel for Children • National Association of Criminal Defense Lawyers • National Association of Juvenile Correctional Agencies • National Association of School Psychologists • National Association of Social Workers • National Black Police Association • National Center for Youth Law • National Disability Rights Network • National Juvenile Defender Center • National Juvenile Detention Association • National Juvenile Justice Network • National Legal Aid and Defender Association • National Partnership for Juvenile Services (NPJS) • National PTA • Office of Restorative Justice, Archdiocese of Los Angeles • Pacific Juvenile Defender Center • Partnership for Safety & Justice • PeacePathways • Penal Reform International • The Pendulum Foundation • Pennsylvania Prison Society • Prison Mindfulness Institute • Save the Kids • The Sentencing Project Southern Juvenile Defenders Center • Southern Poverty Law Center • TheyThinkAloud • UDC David A. Clarke School of Law, Took Crowell Institute for At-Risk Youth • Union for Reform Judaism • Unitarian Universalist Association of Congregations • United Methodist Church, General Board of Church and Society • United States Conference of Catholic Bishops • United States Psychiatric Rehabilitation Association • University of Iowa Students for Human Rights • University of Oregon Prison Justice • Voices for America's Children • Voices for Children in Nebraska • The W. Haywood Burns Institute • Western Juvenile Defender Center • The William Kellibrew Foundation • Wisconsin Council on Children and Families • The Youth Advocacy Project, Roxbury, MA • Youth Advocate Programs, Inc. • Youth Justice Coalition • Youth Law Center • Youth Sentencing & Reentry Project

To become an official supporter, please contact the Campaign at info@fairsentencingofyouth.org

Dedicated to those still serving life-without-parole sentences for crimes they committed as children.

Campaign staff and ICAN members. 2016.

A special thanks to our official supporters, donors, and partners that make our work possible.

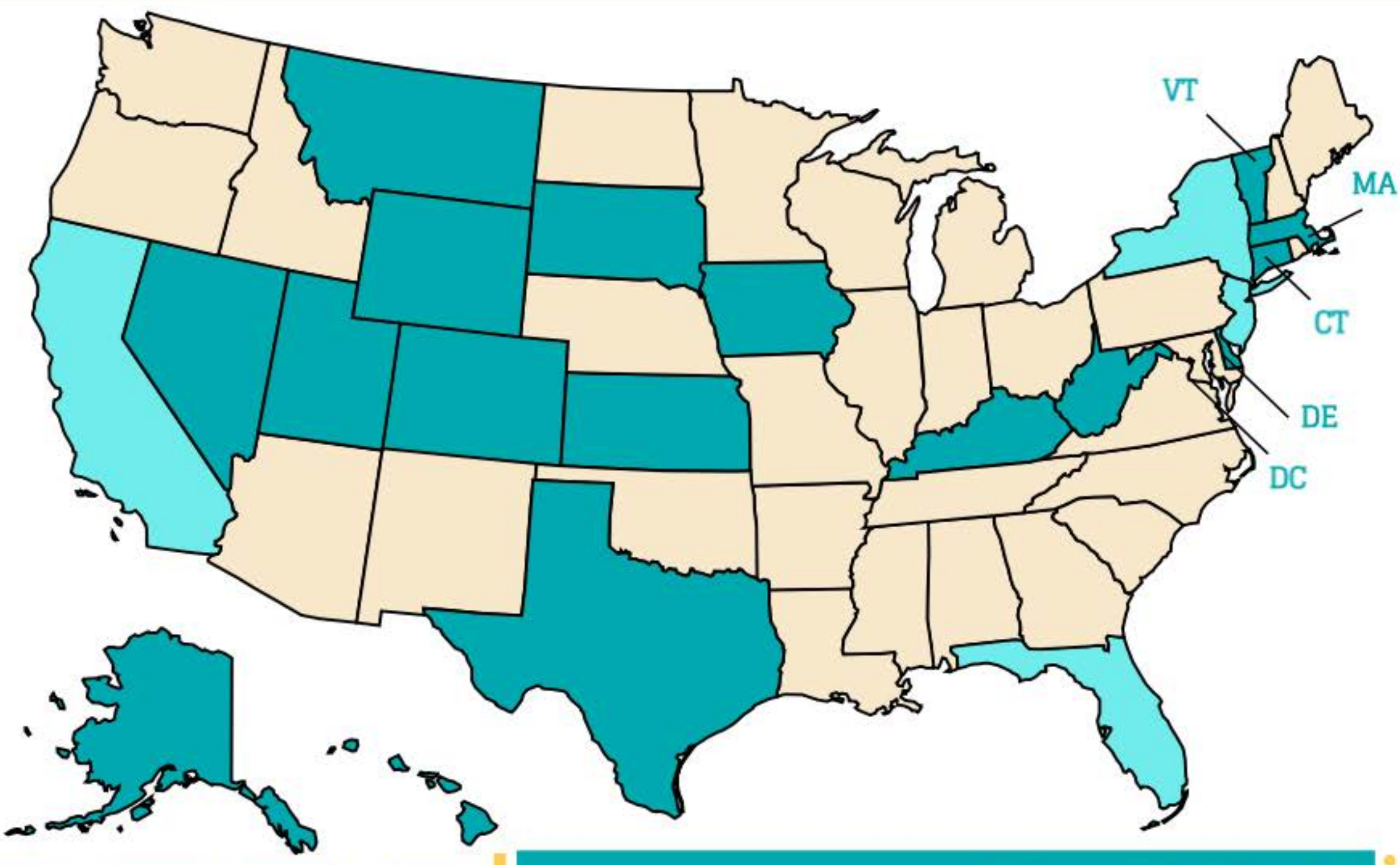

**CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH**
1319 F STREET NW, SUITE 303
WASHINGTON, DC 20004

(202) 289-4677

**FAIRSENTENCINGOFYOUTH.ORG**

# the CAMPAIGN for the FAIR SENTENCING of YOUTH

# States that BAN life without parole for children




Ban life without parole (LWOP) for children

Ban LWOP for children in most cases

**17** states and DC **BAN** LWOP for children

**4** states ban LWOP for children in most cases

fairsentencingofyouth.org

MSBA

# Meeting Agenda

## COMMISSION ON JUVENILE SENTENCING FOR HEINOUS CRIMES

**Monday, April 3, 2017**
**4:30-6:30 p.m.**

**Minnesota County Insurance Trust Offices**
**100 Empire Drive • Room 208 • St. Paul**

**Co-Chairs**: **Hon. Kathleen Gearin and John Kingrey**

## AGENDA

1. Current neuropsychology criteria for presentence investigations in Minnesota for juvenile homicide offenders (Dr. Dawn Peuschold)

2. Developing sentencing factors under *Miller* and *Montgomery* (discussion)

Future Meeting Dates for 2017:
April 24
June 5

Location and Time:
Meetings will be held in St. Paul at the Minnesota County Insurance Trust offices, 100 Empire Drive, St Paul.
The meetings will begin at 4:30 and end at 6:30 pm.

## FUTURE MEETINGS

Agendas for April 24 and June 5

1. Developing sentencing factors under Miller and Montgomery (discussion)

## Conducting Forensic Psychological Assessments For Juveniles Who Have Been Charged With Serious Offenses: Certification and Miller Evaluations

Minnesota Commission on Juvenile Sentencing for Heinous Crimes

Dawn M. Peuschold, PhD, ABPP, LP
Fourth Judicial District
Dawn.Peuschold@courts.state.mn.us
612.348.3658
763.957.0039

## Evaluation For Certification Into The Adult Criminal Justice System (260B.125)

- Respondent is 14 to 17 years old and is alleged to have committed an offense that would be a felony if committed by an adult
- Presumptive versus nonpresumptive certification motions
- Court determines if public safety is served by certifying the matter based upon examination of six factors

## Public Safety Factors (Factor 1)

- The seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim
- Aggravating factors pertinent to this issue include
  - A particularly vulnerable victim
  - A victim who was treated with particular cruelty
  - Participation of three or more people in the crime
  - A crime that was committed in a location where the victim had an expectation of privacy

## Public Safety Factors (Factor 1) Case Law

- A.J.F.: Roper is not relevant to the issue of culpability under the certification statute
- State v. Burrell: Juvenile's statement to the police can be used in adult court
- D.M.D.: Certification factors must be applied but do not provide a rigid mathematical formula

## Public Safety Factors (Factor 1) Case Law

- K.A.P.: Pending delinquency actions can be considered when assessing the risk to public safety
- L.M.: Failure to place proper weight on the seriousness of the alleged offense is a basis for reversal
- S.J.T.: Requirement that juvenile participate in certification evaluation did not violate his fifth amendment privilege against self-incrimination

## Public Safety Factors (Factor 2)

- Culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines
- Examples of mitigating factors include
  - A victim who was an aggressor in the incident
  - An offender who played a minor or passive role in the crime or participated under circumstances of coercion or distress

## Public Safety Factors (Factor 3)

- The child's prior record of delinquency
- N.J.S.: Prior record of delinquency unambiguously refers to records of petitions to juvenile court and the adjudications of alleged violations of the law by minors
- ***Greater weight is given to the seriousness of the alleged offense and the child's prior record of delinquency***

## Public Safety Factors (Factor 4)

- The child's programming history, including the child's past willingness to participate meaningfully in available programming

## Public Safety Factors (Factor 6)

- The dispositional options available for the child

## Public Safety Factors (Factor5)

- The adequacy of the punishment or programming available in the juvenile justice system
- This is where the juvenile's strengths and weaknesses, his amenability for treatment, and his risk for reoffense is examined
- Risk for different types of concerns (e.g., violence, criminal behavior, sexual offending, and targeted threat) may be examined

## Risk Factors for Violent Reoffense

- Historical
  - Early onset of violence
  - Recency, frequency, severity, and escalation of violent behavior
  - Nonviolent offending
  - Past intervention failures
  - History of self-harm or suicide attempt
  - Exposure to violence in the home
  - Childhood history of maltreatment
  - Parental/caregiver criminality
  - Early caregiver disruption
  - Poor school achievement

## Risk Factors for Violent Reoffense

- Social/Contextual Factors
  - Peer delinquency
  - Peer rejection
  - Stress and poor coping
  - Poor parental management
  - Lack of personal/social support
  - Community disorganization

## Risk Factors for Violent Reoffense

- Individual/Clinical Factors
  - Negative attitudes
  - Risk taking/impulsivity
  - Substance use difficulties
  - Anger management problems
  - Low empathy/remorse
  - Attention deficit/hyperactivity difficulties
  - Low interest in school
  - Low interest in programming

## Risk Factors for Violent Reoffense

- Protective Factors
  - Prosocial involvement
  - Strong social support
  - Strong attachments and bonds
  - Positive attitude towards intervention and authority
  - Strong commitment to school
  - Resilient personality traits

## There is, of course, some overlap between the public safety factors for certification and the factors identified in Miller

## Factors From Miller v. Alabama

- Mandatory LWOP "precludes consideration of [the juvenile's] chronological age and its hallmark features - among them, immaturity, impetuosity, and failure to appreciate risks and consequences"
- It prevents taking into account "the family and home environment that surrounds him - and from which he can not usually extricate himself - no matter how brutal or dysfunctional"

## Factors From Miller v. Alabama

- It "neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"

## Factors From Miller v. Alabama

- It "ignores that he might have been charged and convicted of a lesser offense if not for in competencies associated with youth - for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or fusing capacity to assist his own attorneys"
- Mandatory LWOP "disregards the possibility of rehabilitation even when the circumstances most suggest it"

## Considerations

- Punishment should be “graduated and proportioned to both the offender and the offense”
- The juvenile’s character is not yet fully formed so his offense is less likely than an adult’s to be evidence of “irretrievable depravity” (Roper)

## Considerations

- Roper v. Simmons (2005) and Graham v. Florida (2010) established that juveniles are “constitutionally different from adults for sentencing purposes”

## Considerations

- Data from the behavioral sciences suggest that juveniles (as compared to adults) are
  - More impulsive
  - Less likely to consider future consequences
  - More likely to engage in sensation-seeking behaviors
  - More likely to attend to reward over cost
  - More vulnerable to coercive pressure
  - More easily influenced by peers

## Considerations

- Given the findings in Roper, the State’s harshest penalty for juveniles who committed a heinous offense is LWOP
- Juveniles who should receive sentences of LWOP are "uncommon” and “rare”

## Considerations

- There will be "great difficulty" in distinguishing the juvenile offender whose crime reflects unfortunate yet transient immaturity from the "rare" juvenile offender whose crime reflects “irreparable corruption”
- A violence risk assessment is not explicitly requested

## Factors From Miller v. Alabama (Unpacked)

- Age and its hallmark features (e.g., immaturity, impetuosity, and failure to appreciate consequences)
- Family and home environment (from which juvenile cannot extricate himself)
- Circumstances of the offense (including the juvenile’s role and the extent to which peer pressure was involved)

## Factors From Miller v. Alabama (Unpacked)

- Incompetencies of the juvenile that may have disadvantaged him in dealing with the police or participating in the criminal proceedings

(In the Matter of the Welfare of D.D.N (1998): The level of competence required to permit participation of a child in juvenile court proceedings is no less in nature or degree than the competence demanded for trial or sentencing of an adult")

- The juvenile's potential for rehabilitation

## Where The Rubber Meets The Road: How Are These Factors Defined And Assessed?

- Decisional Factor
  - Immaturity
  - Impetuosity
  - Impairment in ability to consider future consequences
  - Impulsivity
  - Sensation-seeking
  - Capacity for abstract thinking

## Where The Rubber Meets The Road: How Are These Factors Defined And Assessed?

- Decisional Factor
  - Validated assessment methods under optimal test conditions
    - Wechsler Intelligence Scale for Children-V
    - Wisconsin Card Sort
    - Behavior Rating Inventory of Executive Function
  - Juvenile's abilities under real-life conditions
    - Records from school or programming
    - Diagnoses (e.g., Attention-Deficit/Hyperactivity Disorder or Posttraumatic Stress Disorder)
  - Departure from adolescent norms
    - Descriptions of the offense

## Where The Rubber Meets The Road: How Are These Factors Defined And Assessed?

- Dependency Factor
  - Psychometric measures
    - Personality and emotional functioning (e.g., MMPI-2-RF, PAI, MMPI-A-RF or PAI-A)
    - Social maturity scales
  - Record review
    - School
    - Child Protective Services
  - Clinical interview of the juvenile
  - Collateral interviews (e.g. parents, teachers, probation officers, or mental health professionals)

## Where The Rubber Meets The Road: How Are These Factors Defined And Assessed?

- Offense Context Factor
  - Official data about the offense
  - Clinical interview
    - Places the offense within a developmental context (e.g., juvenile's calculation of the risk that was posed)
    - Examines the juvenile's current feelings about the offense
  - Record review
    - General tendencies to be a "follower" in everyday life

## Where The Rubber Meets The Road: How Are These Factors Defined And Assessed?

- Legal Competency Factor
  - Assessment of decisional abilities and susceptibility to acquiescence (e.g., clinical interview and/or standardized assessment tools to examine, for example, competence to proceed and/or understanding of Miranda rights)

## Where The Rubber Meets The Road: How Are These Factors Defined And Assessed?

- Rehabilitation Factor
  - Probably the most complex concept
  - Two possible interpretations for 'potential for rehabilitation'
    - Maturation that modifies the characteristics of the juvenile that contributed to his offending
      - Most juveniles "age out" of delinquency
      - Seriousness of the offense is not a reliable predictor of future offending
      - Some variables, such as early onset of aggression, do help estimate risk of persistence of offending
      - Again, assessment of risk of future violence is not specifically requested

## Where The Rubber Meets The Road: How Are These Factors Defined And Assessed?

- Rehabilitation Factor
  - Two possible interpretations for "potential for rehabilitation"
    - Interventions
      - Characteristics of the juvenile
        - Belief that juveniles are more malleable than adults
        - Results of prior programming
        - Discomfort with status quo
        - Openness to programming
        - Potential for attachment
        - Intellectual deficits, mental illness, or neurological impairment

## Additional Factors That Could Be Included

- Intellectual deficits
- Mental illness
- History of trauma, neglect, or abuse
- Prior history of delinquency
- Level of sophistication
- Expression of remorse/acceptance of responsibility
- Impact on the victim and/or the community
- Threat to public safety

**543 U.S. 551**
**ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER**
**v.**
**SIMMONS**
**No. 03-633.**
**Supreme Court of United States.**
**Argued October 13, 2004.**
**Decided March 1, 2005.**

At age 17, respondent Simmons planned and committed a capital murder. After he had turned 18, he was sentenced to death. His direct appeal and subsequent petitions for state and federal postconviction relief were rejected. This Court then held, in *Atkins* v. *Virginia*, 536 U.S. 304, that the Eighth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the execution of a mentally retarded person. Simmons filed a new petition for state postconviction relief, arguing that *Atkins*' reasoning established that the Constitution prohibits the execution of a juvenile who was under 18 when he committed his crime. The Missouri Supreme Court agreed and set aside Simmons' death sentence in favor of life imprisonment without eligibility for release. It held that, although *Stanford* v. *Kentucky*, 492 U. S. 361, rejected the proposition that the Constitution bars capital punishment for juvenile offenders younger than 18, a national consensus has developed against the execution of those offenders since *Stanford*.

*Held:* The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. Pp. 560-579.

(a) The Eighth Amendment's prohibition against "cruel and unusual punishments" must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework this Court has established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual." *Trop* v. *Dulles*, 356 U. S. 86, 100-101. In 1988, in *Thompson* v. *Oklahoma*, 487 U. S. 815, 818-838, a plurality determined that national standards of decency did not permit the execution of any offender under age 16 at the time of the crime. The next year, in *Stanford*, a 5-to-4 Court referred to contemporary standards of decency, but concluded the Eighth and Fourteenth Amendments did not proscribe the execution of offenders over 15 but under 18 because 22 of 37 death penalty States permitted that penalty for 16-year-old offenders, and 25 permitted it for 17-year-olds, thereby indicating there was no national consensus. 492 U. S., at 370-371. A plurality

[543 U.S. 552]

also "emphatically reject[ed]" the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty. *Id.*, at 377-378. That same day the Court held, in *Penry* v. *Lynaugh*, 492 U. S. 302, 334, that the Eighth Amendment did not mandate a categorical exemption from the death penalty for mentally retarded persons because only two States had enacted laws banning such executions. Three Terms ago in *Atkins*, however, the Court held that standards of decency had evolved since *Penry* and now demonstrated that the execution of the mentally retarded is cruel and unusual punishment. The *Atkins* Court noted that objective indicia of society's standards, as expressed in pertinent legislative enactments and state practice, demonstrated that such executions had become so truly unusual that it was fair to say that a national consensus has developed against them. 536 U. S., at 314-315. The Court also returned to the rule, established in decisions predating *Stanford*, that the Constitution contemplates that the Court's own judgment be brought to bear on the question of the acceptability of the death

penalty. *Id.*, at 312. After observing that mental retardation diminishes personal culpability even if the offender can distinguish right from wrong, *id.*, at 318, and that mentally retarded offenders' impairments make it less defensible to impose the death penalty as retribution for past crimes or as a real deterrent to future crimes, *id.*, at 319-320, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders, and that the Eighth Amendment places a substantive restriction on the State's power to take such an offender's life, *id.*, at 321. Just as the *Atkins* Court reconsidered the issue decided in *Penry*, the Court now reconsiders the issue decided in *Stanford*. Pp. 560-564.

(b) Both objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question, and the Court's own determination in the exercise of its independent judgment, demonstrate that the death penalty is a disproportionate punishment for juveniles. Pp. 564-575.

(1) As in *Atkins*, the objective indicia of national consensus here — the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice — provide sufficient evidence that today society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal," 536 U. S., at 316. The evidence of such consensus is similar, and in some respects parallel, to the evidence in *Atkins:* 30 States prohibit the juvenile death penalty, including 12 that have rejected it altogether and 18 that maintain it but, by express provision

[543 U.S. 553]

or judicial interpretation, exclude juveniles from its reach. Moreover, even in the 20 States without a formal prohibition, the execution of juveniles is infrequent. Although, by contrast to *Atkins*, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been less dramatic, the difference between this case and *Atkins* in that respect is counterbalanced by the consistent direction of the change toward abolition. Indeed, the slower pace here may be explained by the simple fact that the impropriety of executing juveniles between 16 and 18 years old gained wide recognition earlier than the impropriety of executing the mentally retarded. Pp. 564-567.

(2) Rejection of the imposition of the death penalty on juvenile offenders under 18 is required by the Eighth Amendment. Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Atkins*, 536 U. S. at 319. Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. Juveniles' susceptibility to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson* v. *Oklahoma*, 487 U. S. 815, 835. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford, supra*, at 395. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. The *Thompson* plurality recognized the import of these characteristics with respect to juveniles under 16. 487 U. S., at 833-838. The same reasoning applies to all juvenile offenders under 18. Once juveniles' diminished culpability is recognized, it is evident that neither of the two penological justifications for the death penalty —

retribution and deterrence of capital crimes by prospective offenders, *e. g., Atkins,* 536 U. S., at 319 — provides adequate justification for imposing that penalty on juveniles. Although the Court cannot deny or overlook the brutal crimes too many juvenile offenders have committed, it disagrees with petitioner's contention that, given the Court's own insistence on individualized consideration in capital sentencing, it is arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on an offender under 18. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's

[543 U.S. 554]

objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. When a juvenile commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity. While drawing the line at 18 is subject to the objections always raised against categorical rules, that is the point where society draws the line for many purposes between childhood and adulthood and the age at which the line for death eligibility ought to rest. *Stanford* should be deemed no longer controlling on this issue. Pp. 568-575.

(c) The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18. See, *e. g., Thompson, supra,* at 830-831, and n. 31. The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom. Pp. 575-578.

112 S. W. 3d 397, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG, J., joined, *post,* p. 587. O'CONNOR, J., filed a dissenting opinion, *post,* p. 587. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post,* p. 607.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

*James R. Layton,* State Solicitor of Missouri, argued the cause for petitioner. With him on the briefs were *Jeremiah W. (Jay) Nixon,* Attorney General, and *Stephen D. Hawke* and *Evan J. Buchheim,* Assistant Attorneys General.

*Seth P. Waxman* argued the cause for respondent. With him on the brief were *David W. Ogden* and *Jennifer Herndon,* by appointment of the Court, 541 U. S. 1040.*

[543 U.S. 555]

JUSTICE KENNEDY delivered the opinion of the Court.

This case requires us to address, for the second time in a decade and a half, whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older

[543 U.S. 556]

than 15 but younger than 18 when he committed a capital crime. In *Stanford* v.

*Kentucky*, 492 U. S. 361 (1989), a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group. We reconsider the question.

I

At the age of 17, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder. About nine months later, after he had turned 18, he was tried and sentenced to death. There is little doubt that Simmons was the instigator of the crime. Before its commission Simmons said he wanted to murder someone. In chilling, callous terms he talked about his plan, discussing it for the most part with two friends, Charles Benjamin and John Tessmer, then aged 15 and 16 respectively. Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could "get away with it" because they were minors.

The three met at about 2 a.m. on the night of the murder, but Tessmer left before the other two set out. (The State later charged Tessmer with conspiracy, but dropped the charge in exchange for his testimony against Simmons.) Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, "Who's there?" In response Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad

[543 U.S. 557]

trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.

By the afternoon of September 9, Steven Crook had returned home from an overnight trip, found his bedroom in disarray, and reported his wife missing. On the same afternoon fishermen recovered the victim's body from the river. Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman "because the bitch seen my face."

The next day, after receiving information of Simmons' involvement, police arrested him at his high school and took him to the police station in Fenton, Missouri. They read him his *Miranda* rights. Simmons waived his right to an attorney and agreed to answer questions. After less than two hours of interrogation, Simmons confessed to the murder and agreed to perform a videotaped reenactment at the crime scene.

The State charged Simmons with burglary, kidnaping, stealing, and murder in the first degree. As Simmons was 17 at the time of the crime, he was outside the criminal jurisdiction of Missouri's juvenile court system. See Mo. Rev. Stat. §§ 211.021 (2000) and 211.031 (Supp. 2003). He was tried as an adult. At trial the State introduced Simmons' confession and the videotaped reenactment of the crime, along with testimony that Simmons discussed the crime in advance and bragged about it later. The defense called no witnesses in the guilt phase. The jury having returned a verdict of murder, the trial proceeded to the penalty phase.

The State sought the death penalty. As aggravating factors, the State submitted that the murder was committed for the purpose of receiving money; was committed for the

purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman.

[543 U.S. 558]

The State called Shirley Crook's husband, daughter, and two sisters, who presented moving evidence of the devastation her death had brought to their lives.

In mitigation Simmons' attorneys first called an officer of the Missouri juvenile justice system, who testified that Simmons had no prior convictions and that no previous charges had been filed against him. Simmons' mother, father, two younger half brothers, a neighbor, and a friend took the stand to tell the jurors of the close relationships they had formed with Simmons and to plead for mercy on his behalf. Simmons' mother, in particular, testified to the responsibility Simmons demonstrated in taking care of his two younger half brothers and of his grandmother and to his capacity to show love for them.

During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures have wisely decided that individuals of a certain age aren't responsible enough." Defense counsel argued that Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what sort of punishment to make." In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

The jury recommended the death penalty after finding the State had proved each of the three aggravating factors submitted to it. Accepting the jury's recommendation, the trial judge imposed the death penalty.

Simmons obtained new counsel, who moved in the trial court to set aside the conviction and sentence. One argument was that Simmons had received ineffective assistance at trial. To support this contention, the new counsel called

[543 U.S. 559]

as witnesses Simmons' trial attorney, Simmons' friends and neighbors, and clinical psychologists who had evaluated him.

Part of the submission was that Simmons was "very immature," "very impulsive," and "very susceptible to being manipulated or influenced." The experts testified about Simmons' background including a difficult home environment and dramatic changes in behavior, accompanied by poor school performance in adolescence. Simmons was absent from home for long periods, spending time using alcohol and drugs with other teenagers or young adults. The contention by Simmons' postconviction counsel was that these matters should have been established in the sentencing proceeding.

The trial court found no constitutional violation by reason of ineffective assistance of counsel and denied the motion for postconviction relief. In a consolidated appeal from Simmons' conviction and sentence, and from the denial of post-conviction relief, the Missouri Supreme Court affirmed. *State* v. *Simmons*, 944 S. W. 2d 165, 169 (en banc), cert. denied, 522 U. S. 953 (1997). The federal courts denied Simmons' petition for a writ of habeas corpus. *Simmons* v. *Bowersox*, 235 F.3d 1124, 1127 (CA8), cert. denied, 534 U. S. 924 (2001).

After these proceedings in Simmons' case had run their course, this Court held that the Eighth and Fourteenth Amendments prohibit

the execution of a mentally retarded person. *Atkins* v. *Virginia,* 536 U. S. 304 (2002). Simmons filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.

The Missouri Supreme Court agreed. *State ex rel. Simmons* v. *Roper,* 112 S. W. 3d 397 (2003) (en banc). It held that since *Stanford,*

"a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles,

[543 U.S. 560]

that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford,* that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade." 112 S. W. 3d, at 399.

On this reasoning it set aside Simmons' death sentence and resentenced him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor." *Id.,* at 413.

We granted certiorari, 540 U. S. 1160 (2004), and now affirm.

II

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. *Furman* v. *Georgia,* 408 U. S. 238, 239 (1972) *(per curiam); Robinson* v. *California,* 370 U. S. 660, 666-667 (1962); *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459, 463 (1947) (plurality opinion). As the Court explained in *Atkins,* the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "`precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" 536 U. S., at 311 (quoting *Weems* v. *United States,* 217 U. S. 349, 367 (1910)). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this

[543 U.S. 561]

framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop* v. *Dulles,* 356 U. S. 86, 100-101 (1958) (plurality opinion).

In *Thompson* v. *Oklahoma,* 487 U. S. 815 (1988), a plurality of the Court determined that our standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime. *Id.,* at 818-838 (opinion of STEVENS, J., joined by Brennan, Marshall, and Blackmun, JJ.). The plurality opinion explained that no death penalty State that had given express consideration to a minimum age for the death penalty had set the age lower than 16. *Id.,* at 826-829. The plurality also observed that "[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is

consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community." *Id.*, at 830. The opinion further noted that juries imposed the death penalty on offenders under 16 with exceeding rarity; the last execution of an offender for a crime committed under the age of 16 had been carried out in 1948, 40 years prior. *Id.*, at 832-833.

Bringing its independent judgment to bear on the permissibility of the death penalty for a 15-year-old offender, the *Thompson* plurality stressed that "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.*, at 835. According to the plurality, the lesser culpability of offenders under 16 made the death penalty inappropriate as a form of retribution, while the low likelihood that offenders under 16 engaged in "the kind of cost-benefit analysis that

[543 U.S. 562]

attaches any weight to the possibility of execution" made the death penalty ineffective as a means of deterrence. *Id.*, at 836-838. With JUSTICE O'CONNOR concurring in the judgment on narrower grounds, *id.*, at 848-859, the Court set aside the death sentence that had been imposed on the 15-year-old offender.

The next year, in *Stanford* v. *Kentucky*, 492 U. S. 361 (1989), the Court, over a dissenting opinion joined by four Justices, referred to contemporary standards of decency in this country and concluded the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under 18. The Court noted that 22 of the 37 death penalty States permitted the death penalty for 16-year-old offenders, and, among these 37 States, 25 permitted it for 17-year-old offenders. These numbers, in the Court's view, indicated there was no national consensus "sufficient to label a particular punishment cruel and unusual." *Id.*, at 370-371. A plurality of the Court also "emphatically reject[ed]" the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty. *Id.*, at 377-378 (opinion of SCALIA, J., joined by REHNQUIST, C. J., and White and KENNEDY, JJ.); see also *id.*, at 382 (O'CONNOR, J., concurring in part and concurring in judgment) (criticizing the plurality's refusal "to judge whether the `"nexus between the punishment imposed and the defendant's blameworthiness"' is proportional").

The same day the Court decided *Stanford*, it held that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded. *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). In reaching this conclusion it stressed that only two States had enacted laws banning the imposition of the death penalty on a mentally retarded person convicted of a capital offense. *Id.*, at 334. According to the Court, "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely,

[543 U.S. 563]

[did] not provide sufficient evidence at present of a national consensus." *Ibid.*

Three Terms ago the subject was reconsidered in *Atkins*. We held that standards of decency have evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment. The Court noted objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions of the mentally retarded. When *Atkins* was decided only a minority of States permitted the practice, and even in

those States it was rare. 536 U.S., at 314-315. On the basis of these indicia the Court determined that executing mentally retarded offenders "has become truly unusual, and it is fair to say that a national consensus has developed against it." *Id.*, at 316.

The inquiry into our society's evolving standards of decency did not end there. The *Atkins* Court neither repeated nor relied upon the statement in *Stanford* that the Court's independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead we returned to the rule, established in decisions predating *Stanford,* that "`the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" 536 U.S., at 312 (quoting *Coker* v. *Georgia,* 433 U. S. 584, 597 (1977) (plurality opinion)). Mental retardation, the Court said, diminishes personal culpability even if the offender can distinguish right from wrong. 536 U. S., at 318. The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect. *Id.,* at 319-320. Based on these considerations and on the finding of national consensus against executing the mentally retarded, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders,

[543 U.S. 564]

and that the Eighth Amendment "`places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id.,* at 321 (quoting *Ford* v. *Wainwright,* 477 U. S. 399, 405 (1986)).

Just as the *Atkins* Court reconsidered the issue decided in *Penry,* we now reconsider the issue decided in *Stanford.* The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.

III

A

The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. 536 U. S., at 313-315. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. See Appendix A, *infra*. *Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. Since *Penry,* only five States had executed offenders known to have an IQ under 70. 536 U. S., at 316. In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford,* six States have executed prisoners for crimes committed as juveniles.

[543 U.S. 565]

In the past 10 years, only three have done so: Oklahoma, Texas, and Virginia. See V. Streib, The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2004, No. 76, p. 4 (2005), available at

http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf (last updated Jan. 31, 2005) (as visited Feb. 25, 2005, and available in Clerk of Court's case file). In December 2003 the Governor of Kentucky decided to spare the life of Kevin Stanford, and commuted his sentence to one of life imprisonment without parole, with the declaration that "`[w]e ought not be executing people who, legally, were children.'" Lexington Herald Leader, Dec. 9, 2003, p. B3, 2003 WL 65043346. By this act the Governor ensured Kentucky would not add itself to the list of States that have executed juveniles within the last 10 years even by the execution of the very defendant whose death sentence the Court had upheld in *Stanford* v. *Kentucky*.

There is, to be sure, at least one difference between the evidence of consensus in *Atkins* and in this case. Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded. Sixteen States that permitted the execution of the mentally retarded at the time of *Penry* had prohibited the practice by the time we heard *Atkins*. By contrast, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower. Five States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years — four through legislative enactments and one through judicial decision. Streib, *supra*, at 5, 7; *State* v. *Furman*, 122 Wash. 2d 440, 858 P. 2d 1092 (1993) (en banc).

Though less dramatic than the change from *Penry* to *Atkins* ("telling," to borrow the word *Atkins* used to describe this difference, 536 U. S., at 315, n. 18), we still consider the change from *Stanford* to this case to be significant. As noted in *Atkins*, with respect to the States that had abandoned

[543 U.S. 566]

the death penalty for the mentally retarded since *Penry*, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." 536 U. S., at 315. In particular we found it significant that, in the wake of *Penry*, no State that had already prohibited the execution of the mentally retarded had passed legislation to reinstate the penalty. 536 U. S., at 315-316. The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry;* yet we think the same consistency of direction of change has been demonstrated. Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation, *Atkins*, *supra*, at 315, and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects, see H. Snyder & M. Sickmund, National Center for Juvenile Justice, Juvenile Offenders and Victims: 1999 National Report 89, 133 (Sept. 1999); Scott & Grisso, The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88 J. Crim. L. & C. 137, 148 (1997). Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change.

The slower pace of abolition of the juvenile death penalty over the past 15 years, moreover, may have a simple explanation. When we heard *Penry*, only two death penalty States had already prohibited the execution of the mentally retarded. When we heard *Stanford*, by contrast, 12 death penalty States had already prohibited the execution of any juvenile under 18, and 15 had prohibited the execution of any juvenile under 17. If anything, this shows that the impropriety of executing juveniles between 16 and 18 years of age

[543 U.S. 567]

gained wide recognition earlier than the impropriety of executing the mentally retarded. In the words of the Missouri Supreme Court: "It would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for the mentally retarded were to become a reason to continue the execution of juveniles now that the execution of the mentally retarded has been barred." 112 S. W. 3d, at 408, n. 10.

Petitioner cannot show national consensus in favor of capital punishment for juveniles but still resists the conclusion that any consensus exists against it. Petitioner supports this position with, in particular, the observation that when the Senate ratified the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U. N. T. S. 171 (entered into force Mar. 23, 1976), it did so subject to the President's proposed reservation regarding Article 6(5) of that treaty, which prohibits capital punishment for juveniles. Brief for Petitioner 27. This reservation at best provides only faint support for petitioner's argument. First, the reservation was passed in 1992; since then, five States have abandoned capital punishment for juveniles. Second, Congress considered the issue when enacting the Federal Death Penalty Act in 1994, and determined that the death penalty should not extend to juveniles. See 18 U. S. C. § 3591. The reservation to Article 6(5) of the ICCPR provides minimal evidence that there is not now a national consensus against juvenile executions.

As in *Atkins*, the objective indicia of consensus in this case — the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice — provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal." 536 U. S., at 316.

[543 U.S. 568]

B

A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.

Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. *Thompson*, 487 U. S., at 856 (O'CONNOR, J., concurring in judgment). Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Atkins*, *supra*, at 319. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. *Godfrey* v. *Georgia*, 446 U. S. 420, 428-429 (1980) (plurality opinion). In any capital case a defendant has wide latitude to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110-112 (1982); see also *Johnson* v. *Texas*, 509 U. S. 350, 359-362 (1993) (summarizing the Court's jurisprudence after *Furman* v. *Georgia*, 408 U. S. 238 (1972) (*per curiam*), with respect to a sentencer's consideration of aggravating and mitigating factors). There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. *Coker* v. *Georgia*, 433 U. S. 584 (1977) (rape of an adult woman); *Enmund* v. *Florida*, 458 U. S. 782 (1982) (felony murder where defendant did not kill, attempt to kill, or intend to kill). The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. *Thompson* v.

*Oklahoma*, *supra; Ford* v. *Wainwright*, 477 U. S. 399 (1986); *Atkins*, *supra*. These rules vindicate the underlying principle

[543 U.S. 569]

that the death penalty is reserved for a narrow category of crimes and offenders.

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson*, *supra*, at 367; see also *Eddings*, *supra*, at 115-116 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B-D, *infra*.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings*, *supra*, at 115 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) (hereinafter Steinberg & Scott) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting").

[543 U.S. 570]

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968).

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson*, *supra*, at 835 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford*, 492 U. S., at 395 (Brennan, J., dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson*, *supra*, at 368; see also Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who

experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

In *Thompson*, a plurality of the Court recognized the import of these characteristics with respect to juveniles under 16, and relied on them to hold that the Eighth Amendment prohibited the imposition of the death penalty on juveniles

[543 U.S. 571]

below that age. 487 U. S., at 833-838. We conclude the same reasoning applies to all juvenile offenders under 18.

Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: "`retribution and deterrence of capital crimes by prospective offenders.'" *Atkins*, 536 U. S., at 319 (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.)). As for retribution, we remarked in *Atkins* that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." 536 U. S., at 319. The same conclusions follow from the lesser culpability of the juvenile offender. Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged at oral argument. Tr. of Oral Arg. 48. In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes, see *Harmelin* v. *Michigan*, 501 U. S. 957, 998-999 (1991) (KENNEDY, J., concurring in part and concurring in judgment). Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. In particular, as the plurality observed in

[543 U.S. 572]

*Thompson*, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." 487 U. S., at 837. To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

In concluding that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders, we cannot deny or overlook the brutal crimes too many juvenile offenders have committed. See Brief for Alabama et al. as *Amici Curiae*. Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death. Indeed, this possibility is the linchpin of one contention pressed by petitioner and his *amici*. They assert that even assuming the truth of the observations we have made about juveniles' diminished culpability in general, jurors nonetheless should be allowed to consider mitigating arguments related to youth on a case-by-case basis, and in some cases to impose the death penalty if justified. A

central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender. The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case. Given this Court's own insistence on individualized consideration, petitioner maintains that it is both arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on any offender under 18 years of age.

We disagree. The differences between juvenile and adult offenders are too marked and well understood to risk allowing

[543 U.S. 573]

a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating. *Supra,* at 558. While this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address our larger concerns.

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. See Steinberg & Scott 1014-1016. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701-706 (4th ed. text rev. 2000); see also Steinberg & Scott 1015. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation — that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the State can exact forfeiture of some

[543 U.S. 574]

of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

These considerations mean *Stanford* v. *Kentucky* should be deemed no longer controlling on this issue. To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, 492 U. S., at 370-371, it suffices to note that those

indicia have changed. *Supra,* at 564-567. It should be observed, furthermore, that the *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty, 492 U. S., at 370, n. 2; a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles. Last, to the extent *Stanford* was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, *id.,* at 377-378 (plurality opinion), it suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions, *Thompson,* 487 U. S., at 833-838

[543 U.S. 575]

(plurality opinion); *Enmund,* 458 U. S., at 797; *Coker,* 433 U. S., at 597 (plurality opinion). It is also inconsistent with the premises of our recent decision in *Atkins.* 536 U. S., at 312-313, 317-321.

In holding that the death penalty cannot be imposed upon juvenile offenders, we take into account the circumstance that some States have relied on *Stanford* in seeking the death penalty against juvenile offenders. This consideration, however, does not outweigh our conclusion that *Stanford* should no longer control in those few pending cases or in those yet to arise.

IV

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop,* the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U. S., at 102-103 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"); see also *Atkins, supra,* at 317, n. 21 (recognizing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *Thompson, supra,* at 830-831, and n. 31 (plurality opinion) (noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," and observing that "[w]e have previously recognized the relevance of the views of the international community

[543 U.S. 576]

in determining whether a punishment is cruel and unusual"); *Enmund, supra,* at 796-797, n. 22 (observing that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); *Coker, supra,* at 596, n. 10 (plurality opinion) ("It is ... not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue").

As respondent and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U. N. T. S. 3, 28 I. L. M. 1448, 1468-1470 (entered into

force Sept. 2, 1990); Brief for Respondent 48; Brief for European Union et al. as *Amici Curiae* 12-13; Brief for President James Earl Carter, Jr., et al. as *Amici Curiae* 9; Brief for Former U. S. Diplomats Morton Abramowitz et al. as *Amici Curiae* 7; Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 13-14. No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. See ICCPR, Art. 6(5), 999 U. N. T. S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5), as noted, *supra*, at 567); American Convention on Human Rights: Pact of San José, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U. N. T. S. 146 (entered into force July 19, 1978) (same); African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/ 24.9/49 (1990) (entered into force Nov. 29, 1999) (same).

[543 U.S. 577]

Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. Brief for Respondent 49-50. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.

Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: "[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 W. & M., ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1770); see also *Trop, supra*, at 100 (plurality opinion). As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. In 1930 an official committee recommended that the minimum age for execution be raised to 21. House of Commons Report from the Select Committee on Capital Punishment (1930), 193, p. 44. Parliament then enacted the Children and Young Person's Act of 1933, 23 Geo. 5, ch. 12, which prevented execution of those aged 18 at the date of the sentence. And in 1948, Parliament enacted the Criminal Justice Act, 11 & 12 Geo. 6, ch. 58, prohibiting the execution of any person under 18 at the time of the offense. In the 56 years that have passed

[543 U.S. 578]

since the United Kingdom abolished the juvenile death penalty, the weight of authority against it there, and in the international community, has become well established.

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 10-11. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. See The Federalist No. 49, p. 314 (C. Rossiter ed. 1961). The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. 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.

* * *

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment

[543 U.S. 579]

of the Missouri Supreme Court setting aside the sentence of death imposed upon Christopher Simmons is affirmed.

*It is so ordered.*

APPENDIX A TO OPINION OF THE COURT

I. STATES THAT PERMIT THE IMPOSITION OF THE DEATH PENALTY ON JUVENILES

Alabama Ala. Code § 13A-6-2(c) (West 2004) (no express minimum age)

Arizona Ariz. Rev. Stat. Ann. § 13-703(A) (West Supp. 2004) (same)

Arkansas Ark. Code Ann. § 5-4-615 (Michie 1997) (same)

Delaware Del. Code Ann., Tit. 11 (Lexis 1995) (same)

Florida Fla. Stat. § 985.225(1) (2003) (same)

Georgia Ga. Code Ann. § 17-9-3 (Lexis 2004) (same)

Idaho Idaho Code § 18-4004 (Michie 2004) (same)

Kentucky Ky. Rev. Stat. Ann. § 640.040(1) (Lexis 1999) (minimum age of 16)

Louisiana La. Stat. Ann. § 14:30(C) (West Supp. 2005) (no express minimum age)

Mississippi Miss. Code Ann. § 97-3-21 (Lexis 2000) (same)

Missouri Mo. Rev. Stat. Ann. § 565.020 (2000) (minimum age of 16)

Nevada Nev. Rev. Stat. § 176.025 (2003) (minimum age of 16)

New Hampshire N. H. Rev. Stat. Ann. § 630:1(V) (West 1996) (minimum age of 17)

North Carolina N. C. Gen. Stat. § 14-17 (Lexis 2003) (minimum age of 17, except that those under 17 who commit murder while serving a prison sentence for a previous murder may receive the death penalty)

Oklahoma Okla. Stat. Ann., Tit. 21, § 701.10 (West 2002) (no express minimum age)

Pennsylvania 18 Pa. Cons. Stat. § 1102 (2002) (same)

South Carolina S. C. Code Ann. § 16-3-20 (West Supp. 2004 and main ed.) (same)

Texas Tex. Penal Code Ann. § 8.07(c) (West Supp. 2004-2005) (minimum age of 17)

Utah Utah Code Ann. § 76-3-206(1) (Lexis 2003) (no express

minimum age)

[543 U.S. 580]

Virginia Va. Code Ann. § 18.2-10(a) (Lexis 2004) (minimum age
of 16)

II. STATES THAT RETAIN THE DEATH PENALTY, BUT SET THE MINIMUM AGE AT 18

California Cal. Penal Code Ann. § 190.5 (West 1999)
Colorado Colo. Rev. Stat. § 18-1.4-102(1)(a) (Lexis 2004)
Connecticut Conn. Gen. Stat. § 53a-46a(h) (2005)
Illinois Ill. Comp. Stat., ch. 720, § 5/9-1(b) (West Supp. 2003)
Indiana Ind. Code Ann. § 35-50-2-3 (2004)
Kansas Kan. Stat. Ann. § 21-4622 (1995)
Maryland Md. Crim. Law Code Ann. § 2-202(b)(2)(i) (Lexis 2002)
Montana Mont. Code Ann. § 45-5-102 (2003)
Nebraska Neb. Rev. Stat. § 28-105.01(1) (Supp. 2004)
New Jersey N. J. Stat. Ann. § 2C:11-3(g) (West Supp. 2003)
New Mexico N. M. Stat. Ann. § 31-18-14(A) (2000)
New York N. Y. Penal Law Ann. § 125.27 (West 2004)
Ohio Ohio Rev. Code Ann. § 2929.02(A) (Lexis 2003)
Oregon Ore. Rev. Stat. §§ 161.620, 137.707(2) (2003)
South Dakota S. D. Codified Laws § 23A-27A-42 (West 2004)
Tennessee Tenn. Code Ann. § 37-1-134(a)(1) (1996)
Washington Minimum age of 18 established by judicial decision.
*State* v. *Furman*, 122 Wash. 2d 440, 858 P. 2d 1092
(1993)
Wyoming Wyo. Stat. § 6-2-101(b) (Lexis Supp. 2004)
* * *

During the past year, decisions by the highest courts of Kansas and New York invalidated provisions in those States' death penalty statutes. *State* v. *Marsh*, 278 Kan. 520, 102 P. 3d 445 (2004) (invalidating provision that required imposition of the death penalty if aggravating and mitigating circumstances were found to be in equal balance); *People* v. *LaValle*, 3 N. Y. 3d 88, 817 N. E. 2d 341 (2004) (invalidating mandatory requirement to instruct the jury that, in the case of jury deadlock as to the appropriate sentence in a capital case, the defendant would receive a sentence of life imprisonment with parole eligibility after serving a minimum of 20 to 25 years). Due to these decisions, it would appear that in these States the death penalty remains on the books, but that as a practical matter it might not be imposed on anyone until there is a change of course in these decisions, or until the respective state legislatures remedy the problems the courts have identified. *Marsh*, *supra*, at 524-526, 544-546, 102 P. 3d, at 452, 464; *LaValle*, *supra*, at 99, 817 N. E 2d, at 344.

[543 U.S. 581]

III. STATES WITHOUT THE DEATH PENALTY

Alaska
Hawaii
Iowa
Maine
Massachusetts
Michigan
Minnesota
North Dakota
Rhode Island
Vermont
West Virginia
Wisconsin

APPENDIX B TO OPINION OF THE COURT
STATE STATUTES ESTABLISHING A MINIMUM AGE TO VOTE

| STATE | AGE | STATUTE |
|---|---|---|
| Alabama | 18 | Ala. Const., Amdt. No. 579 |

Alaska 18 Alaska Const., Art. V, § 1; Alaska Stat. § 15-05.010
(Lexis 2004)
Arizona 18 Ariz. Const., Art. VII, § 2; Ariz. Rev. Stat. § 16-101
(West 2001)
Arkansas 18 Ark. Code Ann. § 9-25-101 (Lexis 2002)
California 18 Cal. Const., Art. 2, § 2
Colorado 18 Colo. Rev. Stat. § 1-2-101 (Lexis 2004)
Connecticut 18 Conn. Const., Art. 6, § 1; Conn. Gen. Stat. § 9-12
(2005)
Delaware 18 Del. Code Ann., Tit. 15, § 1701 (Michie Supp.
2004)
District of 18 D. C. Code § 1-1001.02(2)(B) (West Supp. 2004)
Columbia
Florida 18 Fla. Stat. ch. 97.041 (2003)
Georgia 18 Ga. Const., Art. 2, § 1, ¶ 2; Ga. Code Ann. § 21-2-216
(Lexis 2003)
Hawaii Haw. Const., Art. II, § 1; Haw. Rev. Stat. § 11-12
(1995)
Idaho 18 Idaho Code § 34-402 (Michie 2001)
Illinois 18 Ill. Const., Art. III, § 1; Ill. Comp. Stat. ch. 10,
§ 5/3-1 (West 2002)
Indiana 18 Ind. Code Ann. § 3-7-13-1 (2004)
Iowa 18 Iowa Code § 48A.5 (2003)

[543 U.S. 582]

Kansas 18 Kan. Const., Art. 5, § 1
Kentucky 18 Ky. Const., § 145
Louisiana 18 La. Const., Art. I, § 10; La. Rev. Stat. Ann.
§ 18:101 (West 2004)
Maine 18 Me. Const., Art. II, § 1 (West Supp. 2004); Me.
Rev. Stat. Ann., Tit. 21-A, §§ 111, 111-A (West
1993 and Supp. 2004)
Maryland 18 Md. Elec. Law Code Ann. § 3-102 (Lexis 2002)
Massachusetts 18 Mass. Gen. Laws Ann., ch. 51, § 1 (West Supp.
2005)
Michigan 18 Mich. Comp. Laws Ann. § 168.492 (West 1989)
Minnesota 18 Minn. Stat. § 201.014(1)(a) (2004)
Mississippi 18 Miss. Const., Art. 12, § 241
Missouri 18 Mo. Const., Art. VIII, § 2
Montana 18 Mont. Const., Art. IV, § 2; Mont. Code Ann.
§ 13-1-111 (2003)
Nebraska 18 Neb. Const., Art. VI, § 1; Neb. Rev. Stat. § 32-110
(2004)
Nevada 18 Nev. Rev. Stat. § 293.485 (2003)
New 18 N. H. Const., Pt. 1, Art. 11
Hampshire
New Jersey 18 N. J. Const., Art. II, § 1, ¶ 3
New Mexico 18 [no provision other than U. S. Const., Amdt.
XXVI]
New York 18 N. Y. Elec. Law Ann. § 5-102 (West 1998)
North 18 N. C. Gen. Stat. Ann. § 163-55 (Lexis 2003)
Carolina
North Dakota 18 N. D. Const., Art. II, § 1
Ohio 18 Ohio Const., Art. V, § 1; Ohio Rev. Code Ann.
§ 3503.01 (Anderson 1996)
Oklahoma 18 Okla. Const., Art. III, § 1
Oregon 18 Ore. Const., Art. II, § 2
Pennsylvania 18 25 Pa. Cons. Stat. Ann. § 2811 (1994)
Rhode Island 18 R. I. Gen. Laws § 17-1-3 (Lexis 2003)
South 18 S. C. Code Ann. § 7-5-610 (West Supp. 2004)
Carolina
South Dakota 18 S. D. Const., Art. VII, § 2; S. D. Codified Laws
Ann. § 12-3-1 (West 2004)
Tennessee 18 Tenn. Code Ann. § 2-2-102 (2003)

Texas 18 Tex. Elec. Code Ann. § 11.002 (West 2003)
Utah 18 Utah Const., Art. IV, § 2; Utah Code Ann.
§ 20A-2-101 (Lexis 2003)
Vermont 18 Vt. Stat. Ann., Tit. 17, § 2121 (Lexis 2002)

[543 U.S. 583]

Virginia 18 Va. Const., Art. II, § 1
Washington 18 Wash. Const., Art. VI, § 1
West Virginia 18 W. Va. Code § 3-1-3 (Lexis 2002)
Wisconsin 18 Wis. Const., Art. III, § 1; Wis. Stat. § 6.02 (West
2004)
Wyoming 18 Wyo. Stat. Ann. §§ 22-1-102, 22-3-102 (Lexis
Supp. 2004)
* * *

The Twenty-Sixth Amendment to the Constitution of the United States provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

APPENDIX C TO OPINION OF THE COURT
STATE STATUTES ESTABLISHING A MINIMUM AGE FOR JURY SERVICE

STATE AGE STATUTE

Alabama 19 Ala. Code § 12-16-60(a)(1) (West 1995)
Alaska 18 Alaska Stat. § 09.20.010(a)(3) (Lexis 2004)
Arizona 18 Ariz. Rev. Stat. § 21-301(D) (West 2002)
Arkansas 18 Ark. Code Ann. §§ 16-31-101, 16-32-302 (Lexis
Supp. 2003)
California 18 Cal. Civ. Proc. § 203(a)(2) (West Supp. 2005)
Colorado 18 Colo. Rev. Stat. § 13-71-105(2)(a) (Lexis 2004)
Connecticut 18 Conn. Gen. Stat. § 51-217(a) (2005)
Delaware 18 Del. Code Ann., Tit. 10, § 4509(b)(2) (Michie
1999)
District of 18 D. C. Code § 11-1906(b)(1)(C) (West 2001)
Columbia
Florida 18 Fla. Stat. § 40.01 (2003)
Georgia 18 Ga. Code Ann. §§ 15-12-60, 15-12-163 (Lexis
2001)
Hawaii 18 Haw. Rev. Stat. § 612-4(a)(1) (Supp. 2004)
Idaho 18 Idaho Code § 2-209(2)(a) (Michie 2004)
Illinois 18 Ill. Comp. Stat., ch. 705, § 305/2 (West 2002)
Indiana 18 Ind. Code § 33-28-4-8 (2004)
Iowa 18 Iowa Code § 607A.4(1)(a) (2003)
Kansas 18 Kan. Stat. Ann. § 43-156 (2000) (jurors must be
qualified to be electors); Kan. Const., Art. 5, § 1
(person must be 18 to be qualified elector)

[543 U.S. 584]

Kentucky 18 Ky. Rev. Stat. Ann. § 29A.080(2)(a) (Lexis Supp.
2004)
Louisiana 18 La. Code Crim. Proc. Ann., Art. 401(A)(2)
(West 2003)
Maine 18 Me. Rev. Stat. Ann., Tit. 14, § 1211 (West 1980)
Maryland 18 Md. Cts. & Jud. Proc. Code Ann. § 8-104 (Lexis
2002)
Massachusetts 18 Mass. Gen. Laws Ann., ch. 234, § 1 (West 2000)
(jurors must be qualified to vote); ch. 51, § 1
(West Supp. 2005) (person must be 18 to vote)
Michigan 18 Mich. Comp. Laws Ann. § 600.1307a(1)(a) (West
Supp. 2004)

Minnesota 18 Minn. Dist. Ct. Rule 808(b)(2) (2004)
Mississippi 21 Miss. Code Ann. § 13-5-1 (Lexis 2002)
Missouri 21 Mo. Rev. Stat. § 494.425(1) (2000)
Montana 18 Mont. Code Ann. § 3-15-301 (2003)
Nebraska 19 Neb. Rev. Stat. § 25-1601 (Supp. 2004)
Nevada 18 Nev. Rev. Stat. § 6.010 (2003) (juror must be qualified elector); § 293.485 (person must be 18 to vote)
New Hampshire 18 N. H. Rev. Stat. Ann. § 500-A:7-a(I) (Lexis Supp. 2004)
New Jersey 18 N. J. Stat. Ann. § 2B:20-1(a) (West 2004 Pamphlet)
New Mexico 18 N. M. Stat. Ann. § 38-5-1 (1998)
New York 18 N. Y. Jud. Law Ann. § 510(2) (West 2003)
North Carolina 18 N. C. Gen. Stat. Ann. § 9-3 (Lexis 2003)
North Dakota 18 N. D. Cent. Code § 27-09.1-08(2)(b) (Lexis Supp. 2003)
Ohio 18 Ohio Rev. Code Ann. § 2313.42 (Anderson 2001)
Oklahoma 18 Okla. Stat. Ann., Tit. 38, § 28 (West Supp. 2005)
Rhode Island 18 R. I. Gen. Laws § 9-9-1.1(a)(2) (Lexis Supp. 2005)
South Carolina 18 S. C. Code Ann. § 14-7-130 (West Supp. 2004)
South Dakota 18 S. D. Codified Laws § 16-13-10 (2004)
Tennessee 18 Tenn. Code Ann. § 22-1-101 (1994)
Texas 18 Tex. Govt. Code Ann. § 62.102(1) (West 1998)
Utah 18 Utah Code Ann. § 78-46-7(1)(b) (Lexis 2002)
Vermont 18 Vt. Stat. Ann., Tit. 4, § 962(a)(1) (Lexis 1999);
(jurors must have attained age of majority);
Tit. 1, § 173 (Lexis 2003) (age of majority is 18)

[543 U.S. 585]

Virginia 18 Va. Code Ann. § 8.01-337 (Lexis 2000)
Washington 18 Wash. Rev. Code Ann. § 2.36.070 (West 2004)
West Virginia 18 W. Va. Code § 52-1-8(b)(1) (Lexis 2000)
Wisconsin 18 Wis. Stat. § 756.02 (West 2001)
Wyoming 18 Wyo. Stat. Ann. § 1-11-101 (Lexis 2003) (jurors must be adults); § 14-1-101 (person becomes an adult at 18)

APPENDIX D TO OPINION OF THE COURT

STATE STATUTES ESTABLISHING A MINIMUM AGE FOR MARRIAGE WITHOUT PARENTAL OR JUDICIAL CONSENT

| STATE | AGE | STATUTE |
|---|---|---|
| Alabama | 18 | Ala. Code § 30-1-5 (West Supp. 2004) |
| Alaska | 18 | Alaska Stat. §§ 25.05.011, 25.05.171 (Lexis 2004) |
| Arizona | 18 | Ariz. Rev. Stat. Ann. § 25-102 (West Supp. 2004) |
| Arkansas | 18 | Ark. Code Ann. §§ 9-11-102, 9-11-208 (Lexis 2002) |
| California | 18 | Cal. Fam. Code Ann. § 301 (West 2004) |
| Colorado | 18 | Colo. Rev. Stat. Ann. § 14-2-106 (Lexis 2004) |
| Connecticut | 18 | Conn. Gen. Stat. § 46b-30 (2005) |
| Delaware | 18 | Del. Code Ann., Tit. 13, § 123 (Lexis 1999) |
| District of | 18 | D. C. Code § 46-411 (West 2001) |

Columbia
Florida 18 Fla. Stat. §§ 741.04, 741.0405 (2003)
Georgia 16 Ga. Code Ann. §§ 19-3-2, 19-3-37 (Lexis 2004)
(those under 18 must obtain parental consent
unless female applicant is pregnant or both applicants
are parents of a living child, in which
case minimum age to marry without consent is
16)
Hawaii 18 Haw. Rev. Stat. § 572-2 (1993)
Idaho 18 Idaho Code § 32-202 (Michie 1996)
Illinois 18 Ill. Comp. Stat., ch. 750, § 5/203 (West 2002)
Indiana 18 Ind. Code Ann. §§ 31-11-1-4, 31-11-1-5, 31-11-2-1,
31-11-2-3 (2004)
Iowa 18 Iowa Code § 595.2 (2003)
Kansas 18 Kan. Stat. Ann. § 23-106 (Supp. 2003)
Kentucky 18 Ky. Rev. Stat. Ann. §§ 402.020, 402.210 (Lexis
1999)
Louisiana 18 La. Children's Code Ann., Arts. 1545, 1547
(West 2004) (minors may not marry without

[543 U.S. 586]

consent); La. Civ. Code Ann., Art. 29 (West
1999) (age of majority is 18)
Maine 18 Me. Rev. Stat. Ann., Tit. 19-A, § 652 (West 1998
and Supp. 2004)
Maryland 16 Md. Fam. Law Code Ann. § 2-301 (Lexis 2004)
(those under 18 must obtain parental consent
unless female applicant can present proof of
pregnancy or a child, in which case minimum
age to marry without consent is 16)
Massachusetts 18 Mass. Gen. Laws Ann., ch. 207, §§ 7, 24, 25
(West 1998)
Michigan 18 Mich. Comp. Laws Ann. § 551.103 (West 2005)
Minnesota 18 Minn. Stat. § 517.02 (2004)
Mississippi 15/17 Miss. Code Ann. § 93-1-5 (Lexis 2004) (female
applicants must be 15; male applicants must be
17)
Missouri 18 Mo. Rev. Stat. § 451.090 (2000)
Montana 18 Mont. Code Ann. §§ 40-1-202, 40-1-213 (2003)
Nebraska 19 Neb. Rev. Stat. § 42-105 (2004) (minors must
have parental consent to marry); § 43-2101 (defining
"minor" as a person under 19)
Nevada 18 Nev. Rev. Stat. § 122.020 (2003)
New Hampshire 18 N. H. Rev. Stat. Ann. § 457:5 (West 1992)
New Jersey 18 N. J. Stat. Ann. § 37:1-6 (West 2002)
New Mexico 18 N. M. Stat. Ann. § 40-1-6 (1999)
New York 18 N.Y. Dom. Rel. Law Ann. § 15 (West Supp.
2005)
North Carolina 18 N. C. Gen. Stat. Ann. § 51-2 (Lexis 2003)
North Dakota 18 N. D. Cent. Code § 14-03-02 (Lexis 2004)
Ohio 18 Ohio Rev. Code Ann. § 3101.01 (2003)
Oklahoma 18 Okla. Stat. Ann., Tit. 43, § 3 (West Supp. 2005)
Oregon 18 Ore. Rev. Stat. § 106.060 (2003)
Pennsylvania 18 23 Pa. Cons. Stat. § 1304 (1997)
Rhode Island 18 R. I. Gen. Laws § 15-2-11 (Supp. 2004)

South Carolina 18 S. C. Code Ann. § 20-1-250 (West Supp. 2004)
South Dakota 18 S. D. Codified Laws § 25-1-9 (West 2004)
Tennessee 18 Tenn. Code Ann. § 36-3-106 (1996)
Texas 18 Tex. Fam. Code Ann. §§ 2.101-2.103 (West 1998)
Utah 18 Utah Code Ann. § 30-1-9 (Lexis Supp. 2004)
Vermont 18 Vt. Stat. Ann., Tit. 18, § 5142 (Lexis 2000)

[543 U.S. 587]

Virginia 18 Va. Code Ann. §§ 20-45.1, 20-48, 20-49 (Lexis 2004)
Washington 18 Wash. Rev. Code Ann. § 26.04.210 (West 2005)
West Virginia 18 W. Va. Code § 48-2-301 (Lexis 2004)
Wisconsin 18 Wis. Stat. § 765.02 (2001)
Wyoming 18 Wyo. Stat. Ann. § 20-1-102 (Lexis 2003)

---

Notes:

* A brief of *amici curiae* urging reversal was filed for the State of Alabama et al. by *Troy King*, Attorney General of Alabama, *Kevin C. Newsom*, Solicitor General, and *A. Vernon Barnett IV*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *M. Jane Brady* of Delaware, *W. A. Drew Edmondson* of Oklahoma, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, and *Jerry W. Kilgore* of Virginia.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eliot Spitzer*, Attorney General of New York, *Caitlin J. Halligan*, Solicitor General, *Daniel Smirlock*, Deputy Solicitor General, and *Jean Lin* and *Julie Loughran*, Assistant Solicitors General, and by the Attorneys General for their respective States as follows: *Thomas J. Miller* of Iowa, *Phill Kline* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Patricia A. Madrid* of New Mexico, *Hardy Myers* of Oregon, and *Darrell V. McGraw, Jr.*, of West Virginia; for the American Bar Association by *Dennis W. Archer*, *Amy R. Sabrin*, and *Matthew W. S. Estes;* for the American Psychological Association et al. by *Drew S. Days III*, *Beth S. Brinkmann*, *Sherri N. Blount*, *Timothy C. Lambert*, *Nathalie F. P. Gilfoyle*, and *Lindsay Childress-Beatty;* for the Coalition for Juvenile Justice by *Joseph D. Tydings;* for the Constitution Project by *Laurie Webb Daniel* and *Virginia E. Sloan;* for the Human Rights Committee of the Bar of England and Wales et al. by *Michael Bochenek*, *Audrey J. Anderson*, *William H. Johnson*, and *Thomas H. Speedy Rice;* for the Juvenile Law Center et al. by *Marsha L. Levick*, *Lourdes M. Rosado*, *Steven A. Drizin*, *Barbara Bennett Woodhouse*, *Michael C. Small*, and *Jeffrey P. Kehne;* for the Missouri Ban Youth Executions Coalition by *Joseph W. Luby;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Theodore M. Shaw*, *Norman J. Chachkin*, *Miriam Gohara*, *Christina A. Swarns*, *Steven R. Shapiro*, and *Diann Y. Rust-Tierney;* for the United States Conference of Catholic Bishops et al. by *Mark E. Chopko* and *Michael F. Moses;* and for Former U. S. Diplomats Morton Abramowitz et al. by *Harold Hongju Koh*, *Donald Francis Donovan*, and *Stephen B. Bright*.

Briefs of *amici curiae* were filed for the European Union et al. by *Richard J. Wilson;* for the American Medical Association et al. by *Joseph T. McLaughlin*, *E. Joshua Rosenkranz*, and *Stephane M. Clare;* for the Justice for All Alliance by *Dan Cutrer;* for Murder Victims' Families for Reconciliation by *Kate Lowenstein;* for the National Legal Aid and Defender Association by *Michael Mello;* and for President James Earl Carter, Jr., et al. by *Thomas F. Geraghty*.

---

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. See *Stanford* v. *Kentucky*, 492 U. S. 361, 368 (1989) (describing the common law at the time of the Amendment's adoption). The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment. In the best tradition of the common law, the pace of that evolution is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day—Alexander Hamilton, for example—were sitting with us today, I would expect them to join JUSTICE KENNEDY's opinion for the Court. In all events, I do so without hesitation.

JUSTICE O'CONNOR, dissenting.

The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense. Neither the objective evidence of contemporary societal values, nor the Court's moral proportionality analysis, nor the two in tandem suffice to justify this ruling.

[543 U.S. 588]

Although the Court finds support for its decision in the fact that a majority of the States now disallow capital punishment of 17-year-old offenders, it refrains from asserting that its holding is compelled by a genuine national consensus. Indeed, the evidence before us fails to demonstrate conclusively that any such consensus has emerged in the brief period since we upheld the constitutionality of this practice in *Stanford* v. *Kentucky*, 492 U. S. 361 (1989).

Instead, the rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender. I do not subscribe to this judgment. Adolescents *as a class* are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least *some* 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth.

On this record—and especially in light of the fact that so little has changed since our recent decision in *Stanford*—I would not substitute our judgment about the moral propriety of capital punishment for 17-year-old murderers for the judgments of the Nation's legislatures. Rather, I would demand a clearer showing that our society truly has set its face against this practice before reading the Eighth Amendment categorically to forbid it.

I

A

Let me begin by making clear that I agree with much of the Court's description of the general principles that guide our Eighth Amendment jurisprudence. The Amendment

[543 U.S. 589]

bars not only punishments that are inherently "`barbaric,'" but also those that are "`excessive' in relation to the crime

committed." *Coker* v. *Georgia,* 433 U. S. 584, 592 (1977) (plurality opinion). A sanction is therefore beyond the State's authority to inflict if it makes "no measurable contribution" to acceptable penal goals or is "grossly out of proportion to the severity of the crime." *Ibid.* The basic "precept of justice that punishment for crime should be ... proportioned to [the] offense," *Weems* v. *United States,* 217 U. S. 349, 367 (1910), applies with special force to the death penalty. In capital cases, the Constitution demands that the punishment be tailored both to the nature of the crime itself and to the defendant's "personal responsibility and moral guilt." *Enmund* v. *Florida,* 458 U. S. 782, 801 (1982); see also *id.,* at 825 (O'CONNOR, J., dissenting); *Tison* v. *Arizona,* 481 U. S. 137, 149 (1987); *Eddings* v. *Oklahoma,* 455 U. S. 104, 111-112 (1982).

It is by now beyond serious dispute that the Eighth Amendment's prohibition of "cruel and unusual punishments" is not a static command. Its mandate would be little more than a dead letter today if it barred only those sanctions—like the execution of children under the age of seven—that civilized society had already repudiated in 1791. See *ante,* at 587 (STEVENS, J., concurring); cf. *Stanford, supra,* at 368 (discussing the common law rule at the time the Bill of Rights was adopted). Rather, because "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles,* 356 U. S. 86, 100-101 (1958) (plurality opinion). In discerning those standards, we look to "objective factors to the maximum possible extent." *Coker, supra,* at 592 (plurality opinion). Laws enacted by the Nation's legislatures provide the "clearest and most reliable objective evidence of contemporary values." *Penry* v. *Lynaugh,* 492 U. S. 302, 331 (1989).

[543 U.S. 590]

And data reflecting the actions of sentencing juries, where available, can also afford "`a significant and reliable objective index'" of societal mores. *Coker, supra,* at 596 (plurality opinion) (quoting *Gregg* v. *Georgia,* 428 U. S. 153, 181 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.)).

Although objective evidence of this nature is entitled to great weight, it does not end our inquiry. Rather, as the Court today reaffirms, see *ante,* at 563, 574-575, "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment," *Coker, supra,* at 597 (plurality opinion). "[P]roportionality—at least as regards capital punishment—not only requires an inquiry into contemporary standards as expressed by legislators and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness." *Enmund, supra,* at 815 (O'CONNOR, J., dissenting). We therefore have a "constitutional obligation" to judge for ourselves whether the death penalty is excessive punishment for a particular offense or class of offenders. See *Stanford,* 492 U. S., at 382 (O'CONNOR, J., concurring in part and concurring in judgment); see also *Enmund, supra,* at 797 ("[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty").

B

Twice in the last two decades, the Court has applied these principles in deciding whether the Eighth Amendment permits capital punishment of adolescent offenders. In *Thompson* v. *Oklahoma,* 487 U. S. 815 (1988), a plurality of four Justices concluded that the Eighth Amendment barred capital punishment of an offender for a crime committed before the age of 16. I concurred in that judgment on narrower grounds. At the

time, 32 state legislatures had "definitely concluded that no 15-year-old should be exposed to the threat

[543 U.S. 591]

of execution," and no legislature had affirmatively endorsed such a practice. *Id.*, at 849 (O'CONNOR, J., concurring in judgment). While acknowledging that a national consensus forbidding the execution of 15-year-old offenders "very likely" did exist, I declined to adopt that conclusion as a matter of constitutional law without clearer evidentiary support. *Ibid.* Nor, in my view, could the issue be decided based on moral proportionality arguments of the type advanced by the Court today. Granting the premise "that adolescents are generally less blameworthy than adults who commit similar crimes," I wrote, "it does not necessarily follow that all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment." *Id.*, at 853. Similarly, we had before us no evidence "that 15-year-olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty." *Ibid.* I determined instead that, in light of the strong but inconclusive evidence of a national consensus against capital punishment of under-16 offenders, concerns rooted in the Eighth Amendment required that we apply a clear statement rule. Because the capital punishment statute in *Thompson* did not specify the minimum age at which commission of a capital crime would be punishable by death, I concluded that the statute could not be read to authorize the death penalty for a 15-year-old offender. *Id.*, at 857-858.

The next year, in *Stanford* v. *Kentucky*, *supra*, the Court held that the execution of 16- or 17-year-old capital murderers did not violate the Eighth Amendment. I again wrote separately, concurring in part and concurring in the judgment. At that time, 25 States did not permit the execution of under-18 offenders, including 13 that lacked the death penalty altogether. See *id.*, at 370. While noting that "[t]he day may come when there is such general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear national consensus can be said to have developed," I concluded that that day had not yet arrived. *Id.*,

[543 U.S. 592]

at 381-382. I reaffirmed my view that, beyond assessing the actions of legislatures and juries, the Court has a constitutional obligation to judge for itself whether capital punishment is a proportionate response to the defendant's blameworthiness. *Id.*, at 382. Nevertheless, I concluded that proportionality arguments similar to those endorsed by the Court today did not justify a categorical Eighth Amendment rule against capital punishment of 16- and 17-year-old offenders. See *ibid.* (citing *Thompson*, *supra*, at 853-854 (O'CONNOR, J., concurring in judgment)).

The Court has also twice addressed the constitutionality of capital punishment of mentally retarded offenders. In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), decided the same year as *Stanford*, we rejected the claim that the Eighth Amendment barred the execution of the mentally retarded. At that time, only two States specifically prohibited the practice, while 14 others did not have capital punishment at all. 492 U. S., at 334. Much had changed when we revisited the question three Terms ago in *Atkins* v. *Virginia*, 536 U. S. 304 (2002). In *Atkins*, the Court reversed *Penry* and held that the Eighth Amendment forbids capital punishment of mentally retarded offenders. 536 U. S., at 321. In the 13 years between *Penry* and *Atkins*, there had been a wave of legislation prohibiting the execution of such offenders. By the time we heard *Atkins*, 30 States barred the death penalty for the mentally retarded, and even among those States theoretically permitting such punishment, very few had executed a mentally retarded offender in recent history. 536 U. S., at 314-316. On the

basis of this evidence, the Court determined that it was "fair to say that a national consensus ha[d] developed against" the practice. *Id.*, at 316.

But our decision in *Atkins* did not rest solely on this tentative conclusion. Rather, the Court's independent moral judgment was dispositive. The Court observed that mentally retarded persons suffer from major cognitive and behavioral

[543 U.S. 593]

deficits, *i. e.*, "subaverage intellectual functioning" and "significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.*, at 318. "Because of their impairments, [such persons] by definition ... have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Ibid.* We concluded that these deficits called into serious doubt whether the execution of mentally retarded offenders would measurably contribute to the principal penological goals that capital punishment is intended to serve—retribution and deterrence. *Id.*, at 319-321. Mentally retarded offenders' impairments so diminish their personal moral culpability that it is highly unlikely that such offenders could ever deserve the ultimate punishment, even in cases of capital murder. *Id.*, at 319. And these same impairments made it very improbable that the threat of the death penalty would deter mentally retarded persons from committing capital crimes. *Id.*, at 319-320. Having concluded that capital punishment of the mentally retarded is inconsistent with the Eighth Amendment, the Court "`le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Id.*, at 317 (quoting *Ford* v. *Wainwright*, 477 U. S. 399, 416-417 (1986)).

II

A

Although the general principles that guide our Eighth Amendment jurisprudence afford some common ground, I part ways with the Court in applying them to the case before us. As a preliminary matter, I take issue with the Court's failure to reprove, or even to acknowledge, the Supreme Court of Missouri's unabashed refusal to follow our

[543 U.S. 594]

controlling decision in *Stanford*. The lower court concluded that, despite *Stanford*'s clear holding and historical recency, our decision was no longer binding authority because it was premised on what the court deemed an obsolete assessment of contemporary values. Quite apart from the merits of the constitutional question, this was clear error.

Because the Eighth Amendment "draw[s] its meaning from ... evolving standards of decency," *Trop*, 356 U. S., at 101 (plurality opinion), significant changes in societal mores over time may require us to reevaluate a prior decision. Nevertheless, it remains "*this* Court's prerogative *alone* to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997) (emphasis added). That is so even where subsequent decisions or factual developments may appear to have "significantly undermined" the rationale for our earlier holding. *United States* v. *Hatter*, 532 U. S. 557, 567 (2001); see also *State Oil Co., supra*, at 20; *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). The Eighth Amendment provides no exception to this rule. On the contrary, clear, predictable, and uniform constitutional standards are especially desirable in this sphere. By affirming the lower court's judgment without so much as a slap on the hand, today's decision threatens to invite frequent and disruptive reassessments of our Eighth Amendment precedents.

B

In determining whether the juvenile death penalty comports with contemporary standards of decency, our inquiry begins with the "clearest and most reliable objective evidence of contemporary values"—the actions of the Nation's legislatures. *Penry*, *supra,* at 331. As the Court emphasizes, the overall number of jurisdictions that currently disallow the execution of under-18 offenders is the same as the number that forbade the execution of mentally retarded offenders when *Atkins* was decided.

[543 U.S. 595]

*Ante,* at 564. At present, 12 States and the District of Columbia do not have the death penalty, while an additional 18 States and the Federal Government authorize capital punishment but prohibit the execution of under-18 offenders. See *ante,* at 27-28 (Appendix A). And here, as in *Atkins,* only a very small fraction of the States that permit capital punishment of offenders within the relevant class has actually carried out such an execution in recent history: Six States have executed under-18 offenders in the 16 years since *Stanford,* while five States had executed mentally retarded offenders in the 13 years prior to *Atkins.* See *Atkins,* 536 U. S., at 316; V. Streib, The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2004, No. 76, pp. 15-23 (2005), available at http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf (last updated Jan. 31, 2005) (as visited Feb. 25, 2005, and available in Clerk of Court's case file) (hereinafter Streib). In these respects, the objective evidence in this case is, indeed, "similar, and in some respects parallel to" the evidence upon which we relied in *Atkins. Ante,* at 564.

While the similarities between the two cases are undeniable, the objective evidence of national consensus is marginally weaker here. Most importantly, in *Atkins* there was significant evidence of *opposition* to the execution of the mentally retarded, but there was virtually no countervailing evidence of affirmative legislative *support* for this practice. Cf. *Thompson,* 487 U. S., at 849 (O'CONNOR, J., concurring in judgment) (attributing significance to the fact that "no legislature in this country has affirmatively and unequivocally endorsed" capital punishment of 15-year-old offenders). The States that permitted such executions did so only because they had not enacted any prohibitory legislation. Here, by contrast, at least eight States have current statutes that specifically set 16 or 17 as the minimum age at which

[543 U.S. 596]

commission of a capital crime can expose the offender to the death penalty. See *ante,* at 579-580 (Appendix A).* Five of these eight States presently have one or more juvenile offenders on death row (six if respondent is included in the count), see Streib 24-31, and four of them have executed at least one under-18 offender in the past 15 years, see *id.,* at 15-23. In all, there are currently over 70 juvenile offenders on death row in 12 different States (13 including respondent). See *id.,* at 11, 24-31. This evidence suggests some measure of continuing public support for the availability of the death penalty for 17-year-old capital murderers.

Moreover, the Court in *Atkins* made clear that it was "not so much the number of [States forbidding execution of the mentally retarded] that [was] significant, but the consistency of the direction of change." 536 U. S., at 315. In contrast to the trend in *Atkins,* the States have not moved uniformly towards abolishing the juvenile death penalty. Instead, since our decision in *Stanford,* two States have expressly reaffirmed their support for this practice by enacting statutes setting 16 as the minimum age for capital punishment. See Mo. Rev. Stat. § 565.020.2 (2000); Va. Code Ann. § 18.2-

10(a) (Lexis 2004). Furthermore, as the Court emphasized in *Atkins* itself, 536 U. S., at 315, n. 18, the pace of legislative action in this context has been considerably slower than it was with regard to capital punishment of the mentally retarded.

[543 U.S. 597]

In the 13 years between our decisions in *Penry* and *Atkins*, no fewer than 16 States banned the execution of mentally retarded offenders. See *Atkins*, *supra*, at 314-315. By comparison, since our decision 16 years ago in *Stanford*, only four States that previously permitted the execution of under-18 offenders, plus the Federal Government, have legistlatively reversed course, and one additional State's high court has construed the State's death penalty statute not to apply to under-18 offenders, see *State* v. *Furman*, 122 Wash. 2d 440, 458, 858 P. 2d 1092, 1103 (1993) (en banc). The slower pace of change is no doubt partially attributable, as the Court says, to the fact that 12 States had already imposed a minimum age of 18 when *Stanford* was decided. See *ante*, at 566-567. Nevertheless, the extraordinary wave of legislative action leading up to our decision in *Atkins* provided strong evidence that the country truly had set itself against capital punishment of the mentally retarded. Here, by contrast, the halting pace of change gives reason for pause.

To the extent that the objective evidence supporting today's decision is similar to that in *Atkins*, this merely highlights the fact that such evidence is not dispositive in either of the two cases. After all, as the Court today confirms, *ante*, at 563, 574-575, the Constitution requires that "`in the end our own judgment ... be brought to bear'" in deciding whether the Eighth Amendment forbids a particular punishment, *Atkins*, *supra*, at 312 (quoting *Coker*, 433 U. S., at 597 (plurality opinion)). This judgment is not merely a rubber stamp on the tally of legislative and jury actions. Rather, it is an integral part of the Eighth Amendment inquiry — and one that is entitled to independent weight in reaching our ultimate decision.

Here, as in *Atkins*, the objective evidence of a national consensus is weaker than in most prior cases in which the Court has struck down a particular punishment under the Eighth Amendment. See *Coker*, *supra*, at 595-596 (plurality opinion) (striking down death penalty for rape of an adult

[543 U.S. 598]

woman, where only one jurisdiction authorized such punishment); *Enmund*, 458 U. S., at 792 (striking down death penalty for certain crimes of aiding and abetting felony-murder, where only eight jurisdictions authorized such punishment); *Ford* v. *Wainwright*, 477 U. S., at 408 (striking down capital punishment of the insane, where no jurisdiction permitted this practice). In my view, the objective evidence of national consensus, standing alone, was insufficient to dictate the Court's holding in *Atkins*. Rather, the compelling moral proportionality argument against capital punishment of mentally retarded offenders played a *decisive* role in persuading the Court that the practice was inconsistent with the Eighth Amendment. Indeed, the force of the proportionality argument in *Atkins* significantly bolstered the Court's confidence that the objective evidence in that case did, in fact, herald the emergence of a genuine national consensus. Here, by contrast, the proportionality argument against the juvenile death penalty is so flawed that it can be given little, if any, analytical weight — it proves too weak to resolve the lingering ambiguities in the objective evidence of legislative consensus or to justify the Court's categorical rule.

C

Seventeen-year-old murderers must be categorically exempted from capital punishment, the Court says, because they "cannot with reliability be classified among the

worst offenders." *Ante,* at 569. That conclusion is premised on three perceived differences between "adults," who have already reached their 18th birthdays, and "juveniles," who have not. See *ante,* at 569-570. First, juveniles lack maturity and responsibility and are more reckless than adults. Second, juveniles are more vulnerable to outside influences because they have less control over their surroundings. And third, a juvenile's character is not as fully formed as that of an adult. Based on these characteristics, the Court determines that 17-year-old capital murderers are not as

[543 U.S. 599]

blameworthy as adults guilty of similar crimes; that 17-year-olds are less likely than adults to be deterred by the prospect of a death sentence; and that it is difficult to conclude that a 17-year-old who commits even the most heinous of crimes is "irretrievably depraved." *Ante,* at 570-572. The Court suggests that "a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death." *Ante,* at 572. However, the Court argues that a categorical age-based prohibition is justified as a prophylactic rule because "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Ante,* at 572-573.

It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and that these differences bear on juveniles' comparative moral culpability. See, *e. g., Johnson* v. *Texas,* 509 U. S. 350, 367 (1993) ("There is no dispute that a defendant's youth is a relevant mitigating circumstance"); *id.,* at 376 (O'CONNOR, J., dissenting) ("[T]he vicissitudes of youth bear directly on the young offender's culpability and responsibility for the crime"); *Eddings,* 455 U. S., at 115-116 ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults"). But even accepting this premise, the Court's proportionality argument fails to support its categorical rule.

First, the Court adduces no evidence whatsoever in support of its sweeping conclusion, see *ante,* at 572, that it is only in "rare" cases, if ever, that 17-year-old murderers are sufficiently mature and act with sufficient depravity to warrant the death penalty. The fact that juveniles are generally *less* culpable for their misconduct than adults does not necessarily mean that a 17-year-old murderer cannot be *sufficiently* culpable to merit the death penalty. At most, the

[543 U.S. 600]

Court's argument suggests that the average 17-year-old murderer is not as culpable as the average adult murderer. But an especially depraved juvenile offender may nevertheless be just as culpable as many adult offenders considered bad enough to deserve the death penalty. Similarly, the fact that the availability of the death penalty may be *less* likely to deter a juvenile from committing a capital crime does not imply that this threat cannot *effectively* deter some 17-year-olds from such an act. Surely there is an age below which no offender, no matter what his crime, can be deemed to have the cognitive or emotional maturity necessary to warrant the death penalty. But at least at the margins between adolescence and adulthood — and especially for 17-year-olds such as respondent — the relevant differences between "adults" and "juveniles" appear to be a matter of degree, rather than of kind. It follows that a legislature may reasonably conclude that at least *some* 17-year-olds can act with sufficient moral culpability, and can be sufficiently deterred by the threat of execution, that capital punishment may be warranted in an appropriate case.

Indeed, this appears to be just such a case. Christopher Simmons' murder of Shirley Crook was premeditated, wanton, and cruel in the extreme. Well before he committed this crime, Simmons declared that he wanted to kill someone. On several occasions, he discussed with two friends (ages 15 and 16) his plan to burglarize a house and to murder the victim by tying the victim up and pushing him from a bridge. Simmons said they could "`get away with it'" because they were minors. Brief for Petitioner 3. In accord with this plan, Simmons and his 15-year-old accomplice broke into Mrs. Crook's home in the middle of the night, forced her from her bed, bound her, and drove her to a state park. There, they walked her to a railroad trestle spanning a river, "hog-tied" her with electrical cable, bound her face completely with duct tape, and pushed her, still alive, from the trestle. She drowned in the water below. *Id.*, at 4. One can

[543 U.S. 601]

scarcely imagine the terror that this woman must have suffered throughout the ordeal leading to her death. Whatever can be said about the comparative moral culpability of 17-year-olds as a general matter, Simmons' actions unquestionably reflect "`a consciousness materially more "depraved" than that of' . . . the average murderer." *Atkins*, 536 U. S., at 319 (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980)). And Simmons' prediction that he could murder with impunity because he had not yet turned 18 — though inaccurate — suggests that he *did* take into account the perceived risk of punishment in deciding whether to commit the crime. Based on this evidence, the sentencing jury certainly had reasonable grounds for concluding that, despite Simmons' youth, he "ha[d] sufficient psychological maturity" when he committed this horrific murder, and "at the same time demonstrate[d] sufficient depravity, to merit a sentence of death." *Ante*, at 572.

The Court's proportionality argument suffers from a second and closely related defect: It fails to establish that the differences in maturity between 17-year-olds and young "adults" are both universal enough and significant enough to justify a bright-line prophylactic rule against capital punishment of the former. The Court's analysis is premised on differences *in the aggregate* between juveniles and adults, which frequently do not hold true when comparing individuals. Although it may be that many 17-year-old murderers lack sufficient maturity to deserve the death penalty, some juvenile murderers may be quite mature. Chronological age is not an unfailing measure of psychological development, and common experience suggests that many 17-year-olds are more mature than the average young "adult." In short, the class of offenders exempted from capital punishment by today's decision is too broad and too diverse to warrant a categorical prohibition. Indeed, the age-based line drawn by the Court is indefensibly arbitrary — it quite likely will protect a number of offenders who are mature enough to

[543 U.S. 602]

deserve the death penalty and may well leave vulnerable many who are not.

For purposes of proportionality analysis, 17-year-olds as a class are qualitatively and materially different from the mentally retarded. "Mentally retarded" offenders, as we understood that category in *Atkins*, are *defined* by precisely the characteristics which render death an excessive punishment. A mentally retarded person is, "by definition," one whose cognitive and behavioral capacities have been proved to fall below a certain minimum. See *Atkins*, 536 U.S., at 318; see also *id.*, at 308, n. 3 (discussing characteristics of mental retardation); *id.*, at 317, and n. 22 (leaving to the States the development of mechanisms to determine which offenders fall within the class exempt from capital punishment). Accordingly, for purposes of our decision in *Atkins*, the mentally retarded are not merely *less* blameworthy for their

misconduct or *less* likely to be deterred by the death penalty than others. Rather, a mentally retarded offender is one whose demonstrated impairments make it so highly unlikely that he is culpable enough to deserve the death penalty or that he could have been deterred by the threat of death, that execution is not a defensible punishment. There is no such inherent or accurate fit between an offender's chronological age and the personal limitations which the Court believes make capital punishment excessive for 17-year-old murderers. Moreover, it defies common sense to suggest that 17-year-olds as a class are somehow equivalent to mentally retarded persons with regard to culpability or susceptibility to deterrence. Seventeen-year-olds may, on average, be less mature than adults, but that lesser maturity simply cannot be equated with the major, lifelong impairments suffered by the mentally retarded.

The proportionality issues raised by the Court clearly implicate Eighth Amendment concerns. But these concerns may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized

[543 U.S. 603]

sentencing in which juries are required to give appropriate mitigating weight to the defendant's immaturity, his susceptibility to outside pressures, his cognizance of the consequences of his actions, and so forth. In that way the constitutional response can be tailored to the specific problem it is meant to remedy. The Eighth Amendment guards against the execution of those who are "insufficient[ly] culpab[le]," see *ante*, at 573, in significant part, by requiring sentencing that "reflect[s] a reasoned *moral* response to the defendant's background, character, and crime." *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring). Accordingly, the sentencer in a capital case must be permitted to give full effect to all constitutionally relevant mitigating evidence. See *Tennard* v. *Dretke*, 542 U. S. 274, 283-285 (2004); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). A defendant's youth or immaturity is, of course, a paradigmatic example of such evidence. See *Eddings*, 455 U. S., at 115-116.

Although the prosecutor's apparent attempt to use respondent's youth as an aggravating circumstance in this case is troubling, that conduct was never challenged with specificity in the lower courts and is not directly at issue here. As the Court itself suggests, such "overreaching" would best be addressed, if at all, through a more narrowly tailored remedy. See *ante*, at 573. The Court argues that sentencing juries cannot accurately evaluate a youthful offender's maturity or give appropriate weight to the mitigating characteristics related to youth. But, again, the Court presents no real evidence — and the record appears to contain none — supporting this claim. Perhaps more importantly, the Court fails to explain why this duty should be so different from, or so much more difficult than, that of assessing and giving proper effect to any other qualitative capital sentencing factor. I would not be so quick to conclude that the constitutional safeguards, the sentencing juries, and the trial judges upon

[543 U.S. 604]

which we place so much reliance in all capital cases are inadequate in this narrow context.

D

I turn, finally, to the Court's discussion of foreign and international law. Without question, there has been a global trend in recent years towards abolishing capital punishment for under-18 offenders. Very few, if any, countries other than the United States now permit this practice in law or in fact. See *ante*, at 576-577. While acknowledging that the actions and views of other countries do not

dictate the outcome of our Eighth Amendment inquiry, the Court asserts that "the overwhelming weight of international opinion against the juvenile death penalty ... does provide respected and significant confirmation for [its] own conclusions." *Ante*, at 578. Because I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such *confirmatory* role to the international consensus described by the Court. In short, the evidence of an international consensus does not alter my determination that the Eighth Amendment does not, at this time, forbid capital punishment of 17-year-old murderers in all cases.

Nevertheless, I disagree with JUSTICE SCALIA'S contention, *post*, at 622-628 (dissenting opinion), that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. See *Atkins*, 536 U.S., at 317, n. 21; *Thompson*, 487 U. S., at 830-831, and n. 31 (plurality opinion); *Enmund*, 458 U. S., at 796-797, n. 22; *Coker*, 433 U.S., at 596, n. 10 (plurality opinion); *Trop*, 356 U. S., at 102-103 (plurality opinion). This inquiry reflects the special character of the Eighth

[543 U.S. 605]

Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society. Obviously, American law is distinctive in many respects, not least where the specific provisions of our Constitution and the history of its exposition so dictate. Cf. *post*, at 624-625 (SCALIA, J., dissenting) (discussing distinctively American rules of law related to the Fourth Amendment and the Establishment Clause). But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement — expressed in international law or in the domestic laws of individual countries — that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.

* * *

In determining whether the Eighth Amendment permits capital punishment of a particular offense or class of offenders, we must look to whether such punishment is consistent with contemporary standards of decency. We are obligated to weigh both the objective evidence of societal values and our own judgment as to whether death is an excessive sanction in the context at hand. In the instant case, the objective evidence is inconclusive; standing alone, it does not demonstrate that our society has repudiated capital punishment of 17-year-old offenders in all cases. Rather, the actions of the Nation's legislatures suggest that, although a clear and durable national consensus against this practice may in time

[543 U.S. 606]

emerge, that day has yet to arrive. By acting so soon after our decision in *Stanford*, the Court both pre-empts the democratic debate through which genuine consensus might develop and simultaneously runs a considerable risk of

inviting lower court reassessments of our Eighth Amendment precedents.

To be sure, the objective evidence supporting today's decision is similar to (though marginally weaker than) the evidence before the Court in *Atkins*. But *Atkins* could not have been decided as it was based solely on such evidence. Rather, the compelling proportionality argument against capital punishment of the mentally retarded played a decisive role in the Court's Eighth Amendment ruling. Moreover, the constitutional rule adopted in *Atkins* was tailored to this proportionality argument: It exempted from capital punishment a defined group of offenders whose proven impairments rendered it highly unlikely, and perhaps impossible, that they could act with the degree of culpability necessary to deserve death. And *Atkins* left to the States the development of mechanisms to determine which individual offenders fell within this class.

In the instant case, by contrast, the moral proportionality arguments against the juvenile death penalty fail to support the rule the Court adopts today. There is no question that "the chronological age of a minor is itself a relevant mitigating factor of great weight," *Eddings,* 455 U. S., at 116, and that sentencing juries must be given an opportunity carefully to consider a defendant's age and maturity in deciding whether to assess the death penalty. But the mitigating characteristics associated with youth do not justify an absolute age limit. A legislature can reasonably conclude, as many have, that some 17-year-old murderers are mature enough to deserve the death penalty in an appropriate case. And nothing in the record before us suggests that sentencing juries are so unable accurately to assess a 17-year-old defendant's

[543 U.S. 607]

maturity, or so incapable of giving proper weight to youth as a mitigating factor, that the Eighth Amendment requires the bright-line rule imposed today. In the end, the Court's flawed proportionality argument simply cannot bear the weight the Court would place upon it.

Reasonable minds can differ as to the minimum age at which commission of a serious crime should expose the defendant to the death penalty, if at all. Many jurisdictions have abolished capital punishment altogether, while many others have determined that even the most heinous crime, if committed before the age of 18, should not be punishable by death. Indeed, were my office that of a legislator, rather than a judge, then I, too, would be inclined to support legislation setting a minimum age of 18 in this context. But a significant number of States, including Missouri, have decided to make the death penalty potentially available for 17-year-old capital murderers such as respondent. Without a clearer showing that a genuine national consensus forbids the execution of such offenders, this Court should not substitute its own "inevitably subjective judgment" on how best to resolve this difficult moral question for the judgments of the Nation's democratically elected legislatures. See *Thompson, supra,* at 854 (O'CONNOR, J., concurring in judgment). I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary ... ha[s] neither FORCE nor WILL but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961). But Hamilton had in mind a traditional judiciary, "bound down by strict rules and precedents which serve to define

[543 U.S. 608]

and point out their duty in every particular case that comes before them." *Id.*, at 471. Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years — not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," *ante*, at 561 (internal quotation marks omitted), of our national society. It then finds, on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists. Worse still, the Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: "[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Ante*, at 563 (internal quotation marks omitted). The Court thus proclaims itself sole arbiter of our Nation's moral standards — and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

I

In determining that capital punishment of offenders who committed murder before age 18 is "cruel and unusual" under the Eighth Amendment, the Court first considers, in accordance with our modern (though in my view mistaken) jurisprudence, whether there is a "national consensus," *ibid.* (internal quotation marks omitted), that laws allowing such

[543 U.S. 609]

executions contravene our modern "standards of decency,"[1] *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958). We have held that this determination should be based on "objective indicia that reflect the public attitude toward a given sanction" — namely, "statutes passed by society's elected representatives." *Stanford* v. *Kentucky*, 492 U. S. 361, 370 (1989) (internal quotation marks omitted). As in *Atkins* v. *Virginia*, 536 U. S. 304, 312 (2002), the Court dutifully recites this test and claims halfheartedly that a national consensus has emerged since our decision in *Stanford*, because 18 States — or 47% of States that permit capital punishment — now have legislation prohibiting the execution of offenders under 18, and because all of 4 States have adopted such legislation since *Stanford*. See *ante*, at 565.

Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus. See *Atkins*, *supra*, at 342-345 (SCALIA, J., dissenting). Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time. In *Coker* v. *Georgia*, 433 U. S. 584, 595-596 (1977), a plurality concluded the Eighth Amendment prohibited capital punishment for rape of an adult woman where only one jurisdiction authorized such punishment. The plurality also observed that "[a]t no time in the last 50 years ha[d] a majority of

[543 U.S. 610]

States authorized death as a punishment for rape." *Id.*, at 593. In *Ford* v. *Wainwright*, 477 U. S. 399, 408 (1986), we held execution of the insane unconstitutional, tracing the roots of this prohibition to the common law and noting that "no State in the union permits the execution of the insane." In *Enmund* v. *Florida*, 458 U. S. 782, 792 (1982), we invalidated capital punishment imposed for participation in a robbery in which an

accomplice committed murder, because 78% of all death penalty States prohibited this punishment. Even there we expressed some hesitation, because the legislative judgment was "neither `wholly unanimous among state legislatures,' . . . nor as compelling as the legislative judgments considered in *Coker*." *Id.*, at 793. By contrast, agreement among 42% of death penalty States in *Stanford*, which the Court appears to believe was correctly decided at the time, *ante*, at 574, was insufficient to show a national consensus. See *Stanford*, *supra*, at 372.

In an attempt to keep afloat its implausible assertion of national consensus, the Court throws overboard a proposition well established in our Eighth Amendment jurisprudence. "It should be observed," the Court says, "that the *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty ...; a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." *Ante*, at 574. The insinuation that the Court's new method of counting contradicts only "the *Stanford* Court" is misleading. *None* of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely. See *Ford*, *supra*, at 408, n. 2; *Enmund*, *supra*, at 789; *Coker*, *supra*, at 594. And with good reason. Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty

[543 U.S. 611]

for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of *course* they don't like it, but that sheds no light whatever on the point at issue. That 12 States favor *no* executions says something about consensus against the death penalty, but nothing — absolutely nothing — about consensus that offenders under 18 deserve special immunity from such a penalty. In repealing the death penalty, those 12 States considered *none* of the factors that the Court puts forth as determinative of the issue before us today — lower culpability of the young, inherent recklessness, lack of capacity for considered judgment, etc. What might be relevant, perhaps, is how many of those States permit 16- and 17-year-old offenders to be treated as adults with respect to noncapital offenses. (They all do;[2] indeed, some even *require* that juveniles as young as 14 be tried as adults if they are charged with murder.[3]) The attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation.

Recognizing that its national-consensus argument was weak compared with our earlier cases, the *Atkins* Court found additional support in the fact that 16 States had prohibited execution of mentally retarded individuals since

[543 U.S. 612]

*Penry* v. *Lynaugh*, 492 U. S. 302 (1989). *Atkins*, *supra*, at 314-316. Indeed, the *Atkins* Court distinguished *Stanford* on that very ground, explaining that "[a]lthough we decided *Stanford* on the same day as *Penry*, apparently *only two* state legislatures have raised the threshold age for imposition of the death penalty." 536 U. S., at 315, n. 18 (emphasis added). Now, the Court says a legislative change in four States is "significant" enough to trigger a constitutional prohibition.[4] *Ante*, at 566. It is amazing to think that this subtle shift in numbers can take the issue entirely off the table for legislative debate.

I also doubt whether many of the legislators who voted to change the laws in those four States would have done so if they

had known their decision would (by the pronouncement of this Court) be rendered irreversible. After all, legislative support for capital punishment, in any form, has surged and ebbed throughout our Nation's history. As JUSTICE O'CONNOR has explained:

"The history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics like those relied on in this case. In 1846, Michigan became the first State to abolish the death penalty . . . . In succeeding decades, other American States continued the trend towards abolition . . . . Later, and particularly after World War II, there ensued a steady and dramatic decline in executions . . . . In the 1950's and 1960's, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968....

[543 U.S. 613]

"In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus.... We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject." *Thompson* v. *Oklahoma*, 487 U. S. 815, 854-855 (1988) (opinion concurring in judgment).

Relying on such narrow margins is especially inappropriate in light of the fact that a number of legislatures and voters have expressly affirmed their support for capital punishment of 16- and 17-year-old offenders since *Stanford*. Though the Court is correct that no State has lowered its death penalty age, both the Missouri and Virginia Legislatures — which, at the time of *Stanford*, had no minimum age requirement — expressly established 16 as the minimum. Mo. Rev. Stat. § 565.020.2 (2000); Va. Code Ann. § 18.2-10(a) (Lexis 2004). The people of Arizona[5] and Florida[6] have

[543 U.S. 614]

done the same by ballot initiative. Thus, even States that have not executed an under-18 offender in recent years unquestionably favor the possibility of capital punishment in some circumstances.

The Court's reliance on the infrequency of executions, for under-18 murderers, *ante*, at 564-565, 567, credits an argument that this Court considered and explicitly rejected in *Stanford*. That infrequency is explained, we accurately said, both by "the undisputed fact that a far smaller percentage of capital crimes are committed by persons under 18 than over 18," 492 U. S., at 374, and by the fact that juries are required at sentencing to consider the offender's youth as a mitigating factor, see *Eddings* v. *Oklahoma*, 455 U. S. 104, 115-116 (1982). Thus, "it is not only possible, but overwhelmingly probable, that the very considerations which induce [respondent] and [his] supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed." *Stanford*, *supra*, at 374.

It is, furthermore, unclear that executions of the relevant age group have decreased since we decided *Stanford*. Between 1990 and 2003, 123 of 3,599 death sentences, or 3.4%, were given to individuals who committed crimes before reaching age 18. V. Streib, The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-September 30, 2004, No. 75, p. 9 (Table 3) (last updated Oct. 5, 2004), http://www.law.onu.edu/faculty/streib/documentsJuvDeathSept302004.pdf (all Internet

materials as visited Jan. 12, 2005, and available in Clerk of Court's case file) (hereinafter Juvenile Death Penalty Today).

[543 U.S. 615]

By contrast, only 2.1% of those sentenced to death between 1982 and 1988 committed the crimes when they were under 18. See *Stanford, supra,* at 373 (citing V. Streib, Imposition of Death Sentences for Juvenile Offenses, January 1, 1982, Through April 1, 1989, p. 2 (paper for Cleveland-Marshall College of Law, April 5, 1989)). As for actual executions of under-18 offenders, they constituted 2.4% of the total executions since 1973. Juvenile Death Penalty Today 4. In *Stanford,* we noted that only 2% of the executions between 1642 and 1986 were of under-18 offenders and found that that lower number did not demonstrate a national consensus against the penalty. 492 U. S., at 373-374 (citing V. Streib, Death Penalty for Juveniles 55, 57 (1987)). Thus, the numbers of under-18 offenders subjected to the death penalty, though low compared with adults, have either held steady or slightly increased since *Stanford*. These statistics in no way support the action the Court takes today.

II

Of course, the real force driving today's decision is not the actions of four state legislatures, but the Court's "`"own judgment"'" that murderers younger than 18 can never be as morally culpable as older counterparts. *Ante,* at 563 (quoting *Atkins,* 536 U. S., at 312 (in turn quoting *Coker,* 433 U. S., at 597 (plurality opinion))). The Court claims that this usurpation of the role of moral arbiter is simply a "retur[n] to the rul[e] established in decisions predating *Stanford*," *ante,* at 563. That supposed rule — which is reflected solely in dicta and never once in a *holding* that purports to supplant the consensus of the American people with the Justices' views[7] — was repudiated in *Stanford* for the very good reason

[543 U.S. 616]

that it has no foundation in law or logic. If the Eighth Amendment set forth an ordinary rule of law, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of "the evolving standards of decency" of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?[8]

The reason for insistence on legislative primacy is obvious and fundamental: "`[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'" *Gregg* v. *Georgia,* 428 U. S. 153, 175-176 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (quoting *Furman* v. *Georgia,* 408 U. S. 238, 383 (1972) (Burger, C. J., dissenting)). For a similar reason we have, in our determination of society's moral standards, consulted the practices of sentencing juries: Juries "`maintain a link between contemporary community values and the penal system'" that this Court cannot claim for itself. *Gregg, supra,* at 181 (quoting *Witherspoon* v. *Illinois,* 391 U. S. 510, 519, n. 15 (1968)).

Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death

[543 U.S. 617]

penalty on anyone who committed murder before age 18, the Court looks to scientific and

sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding. As THE CHIEF JUSTICE has explained:

"[M]ethodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results." *Atkins, supra,* at 326-327 (dissenting opinion) (citing R. Groves, Survey Errors and Survey Costs (1989); 1 C. Turner & E. Martin, Surveying Subjective Phenomena (1984)).

In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends. Cf. *Conroy* v. *Aniskoff,* 507 U. S. 511, 519 (1993) (SCALIA, J., concurring in judgment).

We need not look far to find studies contradicting the Court's conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in *Hodgson* v. *Minnesota,* 497 U. S. 417 (1990), the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. Brief for APA as *Amicus Curiae,* O. T. 1989, No. 88-805 etc., p. 18. The APA brief, citing psychology treatises and studies too numerous to list here, asserted: "[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning

[543 U.S. 618]

about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems." *Id.,* at 19-20 (citations omitted). Given the nuances of scientific methodology and conflicting views, courts — which can only consider the limited evidence on the record before them — are ill equipped to determine which view of science is the right one. Legislatures "are better qualified to weigh and `evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'" *McCleskey* v. *Kemp,* 481 U. S. 279, 319 (1987) (quoting *Gregg, supra,* at 186).

Even putting aside questions of methodology, the studies cited by the Court offer scant support for a categorical prohibition of the death penalty for murderers under 18. At most, these studies conclude that, *on average,* or *in most cases,* persons under 18 are unable to take moral responsibility for their actions. Not one of the cited studies opines that all individuals under 18 are unable to appreciate the nature of their crimes.

Moreover, the cited studies describe only adolescents who engage in risky or antisocial behavior, as many young people do. Murder, however, is more than just risky or antisocial behavior. It is entirely consistent to believe that young people often act impetuously and lack judgment, but, at the same time, to believe that those who commit premeditated murder are — at least sometimes — just as culpable as adults. Christopher Simmons, who was only seven months shy of his 18th birthday when he murdered Shirley Crook, described to his friends *beforehand* — "[i]n chilling, callous terms," as the Court puts it, *ante,* at 556 — the murder he planned to commit. He then broke into the home of an innocent woman, bound her with duct tape and electrical wire, and

threw her off a bridge alive and conscious. *Ante,* at 556-557. In their *amici* brief, the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia offer additional examples

[543 U.S. 619]

of murders committed by individuals under 18 that involve truly monstrous acts. In Alabama, two 17-year-olds, one 16-year-old, and one 19-year-old picked up a female hitchhiker, threw bottles at her, and kicked and stomped her for approximately 30 minutes until she died. They then sexually assaulted her lifeless body and, when they were finished, threw her body off a cliff. They later returned to the crime scene to mutilate her corpse. See Brief for Alabama et al. as *Amici Curiae* 9-10; see also *Loggins* v. *State,* 771 So. 2d 1070, 1074-1075 (Ala. Crim. App. 1999); *Duncan* v. *State,* 827 So. 2d 838, 840-841 (Ala. Crim. App. 1999). Other examples in the brief are equally shocking. Though these cases are assuredly the exception rather than the rule, the studies the Court cites in no way justify a constitutional imperative that prevents legislatures and juries from treating exceptional cases in an exceptional way — by determining that some murders are not just the acts of happy-go-lucky teenagers, but heinous crimes deserving of death.

That "almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent," *ante,* at 569, is patently irrelevant — and is yet another resurrection of an argument that this Court gave a decent burial in *Stanford.* (What kind of Equal Justice under Law is it that — without so much as a "Sorry about that" — gives as the basis for sparing one person from execution arguments *explicitly rejected* in refusing to spare another?) As we explained in *Stanford,* 492 U. S., at 374, it is "absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards." Serving on a jury or entering into marriage also involve decisions far more sophisticated than the simple decision not to take another's life.

[543 U.S. 620]

Moreover, the age statutes the Court lists "set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests." *Ibid.* The criminal justice system, by contrast, provides for individualized consideration of each defendant. In capital cases, this Court requires the sentencer to make an individualized determination, which includes weighing aggravating factors and mitigating factors, such as youth. See *Eddings,* 455 U.S., at 115-117. In other contexts where individualized consideration is provided, we have recognized that at least some minors will be mature enough to make difficult decisions that involve moral considerations. For instance, we have struck down abortion statutes that do not allow minors deemed mature by courts to bypass parental notification provisions. See, *e. g., Bellotti* v. *Baird,* 443 U. S. 622, 643-644 (1979) (opinion of Powell, J.); *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52, 74-75 (1976). It is hard to see why this context should be any different. Whether to obtain an abortion is surely a much more complex decision for a young person than whether to kill an innocent person in cold blood.

The Court concludes, however, *ante,* at 572-573, that juries cannot be trusted with the delicate task of weighing a defendant's youth along with the other mitigating and aggravating factors of his crime. This startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with "mak[ing] the difficult and uniquely human judgments that defy codification and that `buil[d] discretion,

equity, and flexibility into a legal system.'" *McCleskey, supra,* at 311 (quoting H. Kalven & H. Zeisel, The American Jury 498 (1966)). The Court says, *ante,* at 573, that juries will be unable to appreciate the significance of a defendant's youth when faced with details of a brutal crime. This assertion is based on no evidence; to the contrary, the Court itself acknowledges that the execution of under-18 offenders is "infrequent" even in the States "without

[543 U.S. 621]

a formal prohibition on executing juveniles," *ante,* at 564, suggesting that juries take seriously their responsibility to weigh youth as a mitigating factor.

Nor does the Court suggest a stopping point for its reasoning. If juries cannot make appropriate determinations in cases involving murderers under 18, in what other kinds of cases will the Court find jurors deficient? We have already held that no jury may consider whether a mentally deficient defendant can receive the death penalty, irrespective of his crime. See *Atkins,* 536 U. S., at 321. Why not take other mitigating factors, such as considerations of childhood abuse or poverty, away from juries as well? Surely jurors "overpower[ed]" by "the brutality or cold-blooded nature" of a crime, *ante,* at 573, could not adequately weigh these mitigating factors either.

The Court's contention that the goals of retribution and deterrence are not served by executing murderers under 18 is also transparently false. The argument that "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished," *ante,* at 571, is simply an extension of the earlier, false generalization that youth *always* defeats culpability. The Court claims that "juveniles will be less susceptible to deterrence," *ibid.,* because "`[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent,'" *ante,* at 572 (quoting *Thompson,* 487 U. S., at 837). The Court unsurprisingly finds no support for this astounding proposition, save its own case law. The facts of this very case show the proposition to be false. Before committing the crime, Simmons encouraged his friends to join him by assuring them that they could "get away with it" because they were minors. *State ex rel. Simmons* v. *Roper,* 112 S. W. 3d 397, 419 (Mo. 2003) (Price, J., dissenting). This fact may have influenced the jury's decision to impose capital punishment despite Simmons' age.

[543 U.S. 622]

Because the Court refuses to entertain the possibility that its own unsubstantiated generalization about juveniles could be wrong, it ignores this evidence entirely.

III

Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.

The Court begins by noting that "Article 37 of the United Nations Convention on the Rights of the Child, [1577 U. N. T. S. 3, 28 I. L. M. 1448, 1468-1470, entered into force Sept. 2, 1990,] which every country in the world has ratified *save for the United States* and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18." *Ante,* at 576 (emphasis added). The Court also discusses the International Covenant on Civil and Political Rights (ICCPR), December 19, 1966, 999 U. N. T. S. 175, *ante,* at 567, 576, which the Senate ratified only subject to a reservation that reads:

"The United States reserves the right, subject to its Constitutional constraints, to

impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." Senate Committee on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, p. 11 (1992).

Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position. That the Senate and the President — those actors our Constitution empowers to enter into treaties, see Art. II, § 2 — have declined to join and ratify treaties prohibiting

[543 U.S. 623]

execution of under-18 offenders can only suggest that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. That the reservation to the ICCPR was made in 1992 does not suggest otherwise, since the reservation still remains in place today. It is also worth noting that, in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release. If we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is really not needed, since "the punishment of life imprisonment without the possibility of parole is itself a severe sanction," *ante*, at 572, gives little comfort.

It is interesting that whereas the Court is not content to accept what the States of our Federal Union *say*, but insists on inquiring into what they *do* (specifically, whether they in fact *apply* the juvenile death penalty that their laws allow), the Court is quite willing to believe that every foreign nation — of whatever tyrannical political makeup and with however subservient or incompetent a court system — in fact *adheres* to a rule of no death penalty for offenders under 18. Nor does the Court inquire into how many of the countries that have the death penalty, but have forsworn (on paper at least) imposing that penalty on offenders under 18, have what no State of this country can constitutionally have: a *mandatory* death penalty for certain crimes, with no possibility of mitigation by the sentencing authority, for youth or any other reason. I suspect it is most of them. See, *e. g.*, R. Simon & D. Blaskovich, A Comparative Analysis of Capital Punishment: Statutes, Policies, Frequencies, and Public Attitudes the World Over 25, 26, 29 (2002). To forbid the death penalty for juveniles under such a system may be a good idea, but it says nothing about our system, in which the sentencing authority, typically a jury, always can, and almost

[543 U.S. 624]

always does, withhold the death penalty from an under-18 offender except, after considering all the circumstances, in the rare cases where it is warranted. The foreign authorities, in other words, do not even speak to the issue before us here.

More fundamentally, however, the basic premise of the Court's argument — that American law should conform to the laws of the rest of the world — ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law — including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. The Court-pronounced exclusionary rule, for example, is distinctively American. When we adopted that rule in *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961), it was "unique to American jurisprudence." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 415 (1971) (Burger, C. J., dissenting). Since then a categorical exclusionary rule has

been "universally rejected" by other countries, including those with rules prohibiting illegal searches and police misconduct, despite the fact that none of these countries "appears to have any alternative form of discipline for police that is effective in preventing search violations." Bradley, *Mapp* Goes Abroad, 52 Case W. Res. L. Rev. 375, 399-400 (2001). England, for example, rarely excludes evidence found during an illegal search or seizure and has only recently begun excluding evidence from illegally obtained confessions. See C. Slobogin, Criminal Procedure: Regulation of Police Investigation 550 (3d ed. 2002). Canada rarely excludes evidence and will only do so if admission will "bring the administration of justice into disrepute." *Id.*, at 550-551 (internal quotation marks omitted). The European Court of Human Rights has held that introduction of illegally seized evidence does not violate the "fair trial" requirement in Article 6, § 1, of the European Convention on

[543 U.S. 625]

Human Rights. See Slobogin, *supra,* at 551; Bradley, *supra,* at 377-378.

The Court has been oblivious to the views of other countries when deciding how to interpret our Constitution's requirement that "Congress shall make no law respecting an establishment of religion. . . ." Amdt. 1. Most other countries — including those committed to religious neutrality — do not insist on the degree of separation between church and state that this Court requires. For example, whereas "we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 842 (1995) (citing cases), countries such as the Netherlands, Germany, and Australia allow direct government funding of religious schools on the ground that "the state can only be truly neutral between secular and religious perspectives if it does not dominate the provision of so key a service as education, and makes it possible for people to exercise their right of religious expression within the context of public funding." S. Monsma & J. Soper, The Challenge of Pluralism: Church and State in Five Democracies 207 (1997); see also *id.*, at 67, 103, 176. England permits the teaching of religion in state schools. *Id.*, at 142. Even in France, which is considered "America's only rival in strictness of church-state separation," "[t]he practice of contracting for educational services provided by Catholic schools is very widespread." C. Glenn, The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies 110 (2000).

And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability. See Larsen, Importing Constitutional Norms from a "Wider Civilization": *Lawrence* and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 Ohio St. L. J. 1283, 1320 (2004); Center for Reproductive

[543 U.S. 626]

Rights, The World's Abortion Laws (June 2004), http://www.reproductiverights.org/pub_fac_abortion_laws.html. Though the Government and *amici* in cases following *Roe* v. *Wade*, 410 U. S. 113 (1973), urged the Court to follow the international community's lead, these arguments fell on deaf ears. See McCrudden, A Part of the Main? The Physician-Assisted Suicide Cases and Comparative Law Methodology in the United States Supreme Court, in Law at the End of Life: The Supreme Court and Assisted Suicide 125, 129-130 (C. Schneider ed. 2000).

The Court's special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion. It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the

meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought. If we applied that approach today, our task would be an easy one. As we explained in *Harmelin* v. *Michigan*, 501 U. S. 957, 973-974 (1991), the "Cruell and Unusuall Punishments" provision of the English Declaration of Rights was originally meant to describe those punishments "`out of [the Judges'] Power'" — that is, those punishments that were not authorized by common law or statute, but that were nonetheless administered by the Crown or the Crown's judges. Under that reasoning, the death penalty for under-18 offenders would easily survive this challenge. The Court has, however — I think wrongly — long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) *our* Nation's *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War — and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental

[543 U.S. 627]

jurists — a legal, political, and social culture quite different from our own. If we took the Court's directive seriously, we would also consider relaxing our double jeopardy prohibition, since the British Law Commission recently published a report that would significantly extend the rights of the prosecution to appeal cases where an acquittal was the result of a judge's ruling that was legally incorrect. See Law Commission, Double Jeopardy and Prosecution Appeals, LAW COM No. 267, Cm 5048, p. 6, ¶ 1.19 (Mar. 2001); J. Spencer, The English System in European Criminal Procedures 142, 204, and n. 239 (M. Delmas-Marty & J. Spencer eds. 2002). We would also curtail our right to jury trial in criminal cases since, despite the jury system's deep roots in our shared common law, England now permits all but the most serious offenders to be tried by magistrates without a jury. See D. Feldman, England and Wales, in Criminal Procedure: A Worldwide Study 91, 114-115 (C. Bradley ed. 1999).

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.[9]

[543 U.S. 628]

The Court responds that "[i]t 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." *Ante*, at 578. To begin with, I do not believe that approval by "other nations and peoples" should buttress our commitment to American principles any more than (what should logically follow) disapproval by "other nations and peoples" should weaken that commitment. More importantly, however, the Court's statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our "fidelity" to the Constitution, our "pride in its origins," and "our own [American] heritage." To the contrary, they are cited *to set aside* the centuries-old American practice — a practice still engaged in by a large majority of the relevant States — of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources "affirm," rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. The Court's parting attempt to downplay the

significance of its extensive discussion of foreign law is unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment* — which is surely what it parades as today.

IV

To add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its

[543 U.S. 629]

flagrant disregard of our precedent in *Stanford*. Until today, we have always held that "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997). That has been true even where "`changes in judicial doctrine' ha[ve] significantly undermined" our prior holding, *United States* v. *Hatter*, 532 U. S. 557, 567 (2001) (quoting *Hatter* v. *United States*, 64 F. 3d 647, 650 (CA Fed. 1995)), and even where our prior holding "appears to rest on reasons rejected in some other line of decisions," *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). Today, however, the Court silently approves a state-court decision that blatantly rejected controlling precedent.

One must admit that the Missouri Supreme Court's action, and this Court's indulgent reaction, are, in a way, understandable. In a system based upon constitutional and statutory text democratically adopted, the concept of "law" ordinarily signifies that particular words have a fixed meaning. Such law does not change, and this Court's pronouncement of it therefore remains authoritative until (confessing our prior error) we overrule. The Court has purported to make of the Eighth Amendment, however, a mirror of the passing and changing sentiment of American society regarding penology. The lower courts can look into that mirror as well as we can; and what we saw 15 years ago bears no necessary relationship to what they see today. Since they are not looking at the same text, but at a different scene, why should our earlier decision control their judgment?

However sound philosophically, this is no way to run a legal system. We must disregard the new reality that, to the extent our Eighth Amendment decisions constitute something more than a show of hands on the current Justices' current personal views about penology, they purport to be nothing more than a snapshot of American public opinion at a particular point in time (with the timeframes now shortened to a mere 15 years). We must treat these decisions

[543 U.S. 630]

just as though they represented *real* law, real prescriptions democratically adopted by the American people, as conclusively (rather than sequentially) construed by this Court. Allowing lower courts to reinterpret the Eighth Amendment whenever they decide enough time has passed for a new snapshot leaves this Court's decisions without any force — especially since the "evolution" of our Eighth Amendment is no longer determined by objective criteria. To allow lower courts to behave as we do, "updating" the Eighth Amendment as needed, destroys stability and makes our case law an unreliable basis for the designing of laws by citizens and their representatives, and for action by public officials. The result will be to crown arbitrariness with chaos.

---

Notes:

* In 12 other States that have capital punishment, under-18 offenders can be subject to the death penalty as a result of transfer statutes that permit such offenders to be tried as adults for certain serious crimes. See *ante*, at 579-580 (Appendix A). As I

observed in *Thompson* v. *Oklahoma*, 487 U. S. 815, 850-852 (1988) (opinion concurring in judgment): "There are many reasons, having nothing whatsoever to do with capital punishment, that might motivate a legislature to provide as a general matter for some [minors] to be channeled into the adult criminal justice process." Accordingly, while these 12 States clearly cannot be counted as *opposing* capital punishment of under-18 offenders, the fact that they permit such punishment through this indirect mechanism does not necessarily show affirmative and unequivocal legislative support for the practice. See *ibid.*

1. The Court ignores entirely the threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment: whether it is one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford* v. *Wainwright*, 477 U. S. 399, 405 (1986). As we have noted in prior cases, the evidence is unusually clear that the Eighth Amendment was not originally understood to prohibit capital punishment for 16- and 17-year-old offenders. See *Stanford* v. *Kentucky*, 492 U. S. 361, 368 (1989). At the time the Eighth Amendment was adopted, the death penalty could theoretically be imposed for the crime of a 7-year-old, though there was a rebuttable presumption of incapacity to commit a capital (or other) felony until the age of 14. See *ibid.* (citing 4 W. Blackstone, Commentaries *23-*24; 1 M. Hale, Pleas of the Crown 24-29 (1800)).

2. See Alaska Stat. § 47.12.030 (Lexis 2002); Haw. Rev. Stat. § 571-22 (1999); Iowa Code § 232.45 (2003); Me. Rev. Stat. Ann., Tit. 15, § 3101(4) (West 2003); Mass. Gen. Laws Ann., ch. 119, § 74 (West 2003); Mich. Comp. Laws Ann. § 764.27 (West 2000); Minn. Stat. § 260B.125 (2004); N. D. Cent. Code § 27-20-34 (Lexis Supp. 2003); R. I. Gen. Laws § 14-1-7 (Lexis 2002); Vt. Stat. Ann., Tit. 33, § 5516 (Lexis 2001); W. Va. Code § 49-5-10 (Lexis 2004); Wis. Stat. § 938.18 (2003-2004); see also National Center for Juvenile Justice, Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws 1 (Oct. 2003). The District of Columbia is the only jurisdiction without a death penalty that specifically exempts under-18 offenders from its harshest sanction — life imprisonment without parole. See D. C. Code § 22-2104 (West 2001).

3. See Mass. Gen. Laws Ann., ch. 119, § 74 (West 2003); N. D. Cent. Code § 27-20-34 (Lexis Supp. 2003); W. Va. Code § 49-5-10 (Lexis 2004).

4. As the Court notes, Washington State's decision to prohibit executions of offenders under 18 was made by a judicial, not legislative, decision. *State* v. *Furman*, 122 Wash. 2d 440, 459, 858 P. 2d 1092, 1103 (1993), construed the State's death penalty statute — which did not set any age limit — to apply only to persons over 18. The opinion found that construction necessary to avoid what it considered constitutional difficulties, and did not purport to reflect popular sentiment. It is irrelevant to the question of changed national consensus.

5. In 1996, Arizona's Ballot Proposition 102 exposed under-18 murderers to the death penalty by automatically transferring them out of juvenile courts. The statute implementing the proposition required the county attorney to "bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is fifteen, sixteen or seventeen years of age and is accused of . . . first degree murder." Ariz. Rev. Stat. Ann. § 13-501 (West 2001). The Arizona Supreme Court has added to this scheme a constitutional requirement that there be an individualized assessment of the juvenile's maturity at the time of the offense. See *State* v. *Davolt*, 207 Ariz. 191, 214-216, 84 P. 3d 456, 479-481 (2004).

6. Florida voters approved an amendment to the State Constitution, which changed the wording from "cruel *or* unusual" to "cruel *and*

unusual," Fla. Const., Art. I, § 17 (2003). See Commentary to 1998 Amendment, 25B Fla. Stat. Ann., p. 180 (West 2004). This was a response to a Florida Supreme Court ruling that "cruel *or* unusual" excluded the death penalty for a defendant who committed murder when he was younger than 17. See *Brennan* v. *State*, 754 So. 2d 1, 5 (Fla. 1999). By adopting the federal constitutional language, Florida voters effectively adopted our decision in *Stanford* v. *Kentucky*, 492 U. S. 361 (1989). See Weaver, Word May Allow Execution of 16-Year-Olds, Miami Herald, Nov. 7, 2002, p. 7B.

7. See, *e. g., Enmund* v. *Florida*, 458 U. S. 782, 801 (1982) ("[W]e have no reason to disagree with th[e] judgment [of the state legislatures] for purposes of construing and applying the Eighth Amendment"); *Coker* v. *Georgia*, 433 U. S. 584, 597 (1977) (plurality opinion) ("[T]he legislative rejection of capital punishment for rape strongly confirms our own judgment").

8. JUSTICE O'CONNOR agrees with our analysis that no national consensus exists here, *ante*, at 594-598 (dissenting opinion). She is nonetheless prepared (like the majority) to override the judgment of America's legislatures if it contradicts her own assessment of "moral proportionality," *ante*, at 598. She dissents here only because it does not. The votes in today's case demonstrate that the offending of selected lawyers' moral sentiments is not a predictable basis for law — much less a democratic one.

9. JUSTICE O'CONNOR asserts that the Eighth Amendment has a "special character," in that it "draws its meaning directly from the maturing values of civilized society." *Ante*, at 604-605. Nothing in the text reflects such a distinctive character — and we have certainly applied the "maturing values" rationale to give brave new meaning to other provisions of the Constitution, such as the Due Process Clause and the Equal Protection Clause. See, *e. g., Lawrence* v. *Texas*, 539 U. S. 558, 571-573 (2003); *United States* v. *Virginia*, 518 U. S. 515, 532-534 (1996); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 847-850 (1992). JUSTICE O'CONNOR asserts that an international consensus can at least "serve to confirm the reasonableness of a consonant and genuine American consensus." *Ante*, at 605. Surely not unless it can also demonstrate the *un*reasonableness of such a consensus. Either America's principles are its own, or they follow the world; one cannot have it both ways. Finally, JUSTICE O'CONNOR finds it unnecessary to consult foreign law in the present case because there is "no ... domestic consensus" to be confirmed. *Ibid.* But since she believes that the Justices can announce their own requirements of "moral proportionality" despite the absence of consensus, why would foreign law not be relevant to *that* judgment? If foreign law is powerful enough to supplant the judgment of the American people, surely it is powerful enough to change a personal assessment of moral proportionality.

---

**560 U.S. 48**
**130 S.Ct. 2011**
**176 L.Ed.2d 825**

**Terrance Jamar GRAHAM, Petitioner,**
**v.**
**FLORIDA.**

**No. 08–7412.**

**Supreme Court of the United States**

**Argued Nov. 9, 2009.**
**Decided May 17, 2010.**
**As Modified July 6, 2010.**

Bryan S. Gowdy, appointed by this Court, Jacksonville, FL, for petitioner.

Scott D. Makar, Solicitor General, Tallahassee, FL, for respondent.

Drew S. Days, III, Brian R. Matsui, Seth M. Galanter, Morrison & Foerster LLP, Washington, DC, George C. Harris, Morrison & Foerster LLP, San Francisco, CA, Bryan S. Gowdy, Counsel of Record, John S. Mills, Rebecca Bowen Creed, Jessie L. Harrell, Mills Creed & Gowdy, P.A., Jacksonville, FL, for petitioner.

Bill McCollum, Attorney General of Florida, Scott D. Makar, Solicitor General, Counsel of Record, Louis F. Hubener, Chief Deputy Solicitor General, Timothy D. Osterhaus, Craig D. Feiser, Courtney Brewer, Ronald A. Lathan, Deputy Solicitors General, Tallahassee, FL, for respondent.

**Opinion**

Justice KENNEDY delivered the opinion of the Court.

[560 U.S. 52]

The issue before the Court is whether the Constitution permits a juvenile offender to be sentenced to life in prison

[560 U.S. 53]

without

[130 S.Ct. 2018]

parole for a nonhomicide crime. The sentence was imposed by the State of Florida. Petitioner challenges the sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

I

Petitioner is Terrance Jamar Graham. He was born on January 6, 1987. Graham's parents were addicted to crack cocaine, and their drug use persisted in his early years. Graham was diagnosed with attention deficit hyperactivity disorder in elementary school. He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13.

In July 2003, when Graham was age 16, he and three other school-age youths attempted to rob a barbeque restaurant in Jacksonville, Florida. One youth, who worked at the restaurant, left the back door unlocked just before closing time. Graham and another youth, wearing masks, entered through the unlocked door. Graham's masked accomplice twice struck the restaurant manager in the back of the head with a metal bar. When the manager started yelling at the assailant and Graham, the two youths ran out and escaped in a car driven by the third accomplice. The restaurant manager required stitches for his head injury. No money was taken.

Graham was arrested for the robbery attempt. Under Florida law, it is within a prosecutor's discretion whether to charge 16– and 17–year–olds as adults or juveniles for most felony crimes. Fla. Stat. § 985.227(1)(b) (2003) (subsequently renumbered at §

985.557(1)(b) (2007)). Graham's prosecutor elected to charge Graham as an adult. The charges against Graham were armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole, §§ 810.02(1)(b), (2)(a) (2003); and attempted armed robbery, a second-degree

[560 U.S. 54]

felony carrying a maximum penalty of 15 years' imprisonment, §§ 812.13(2)(b), 777.04(1), (4)(a), 775.082(3)(c).

On December 18, 2003, Graham pleaded guilty to both charges under a plea agreement. Graham wrote a letter to the trial court. After reciting "this is my first and last time getting in trouble," he continued "I've decided to turn my life around." App. 379–380. Graham said "I made a promise to God and myself that if I get a second chance, I'm going to do whatever it takes to get to the [National Football League]." *Id.*, at 380.

The trial court accepted the plea agreement. The court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent 3–year terms of probation. Graham was required to spend the first 12 months of his probation in the county jail, but he received credit for the time he had served awaiting trial, and was released on June 25, 2004.

Less than 6 months later, on the night of December 2, 2004, Graham again was arrested. The State's case was as follows: Earlier that evening, Graham participated in a home invasion robbery. His two accomplices were Meigo Bailey and Kirkland Lawrence, both 20–year–old men. According to the State, at 7 p.m. that night, Graham, Bailey, and Lawrence knocked on the door of the home where Carlos Rodriguez lived. Graham, followed by Bailey and Lawrence, forcibly entered the home and held a pistol to Rodriguez's chest. For the next 30 minutes, the three held Rodriguez and another man, a friend of Rodriguez, at gunpoint while they ransacked the home searching for money. Before leaving, Graham and his accomplices

[130 S.Ct. 2019]

barricaded Rodriguez and his friend inside a closet.

The State further alleged that Graham, Bailey, and Lawrence, later the same evening, attempted a second robbery, during which Bailey was shot. Graham, who had borrowed his father's car, drove Bailey and Lawrence to the hospital and left them there. As Graham drove away, a police sergeant

[560 U.S. 55]

signaled him to stop. Graham continued at a high speed but crashed into a telephone pole. He tried to flee on foot but was apprehended. Three handguns were found in his car.

When detectives interviewed Graham, he denied involvement in the crimes. He said he encountered Bailey and Lawrence only after Bailey had been shot. One of the detectives told Graham that the victims of the home invasion had identified him. He asked Graham, "Aside from the two robberies tonight how many more were you involved in?" Graham responded, "Two to three before tonight." *Id.*, at 160. The night that Graham allegedly committed the robbery, he was 34 days short of his 18th birthday.

On December 13, 2004, Graham's probation officer filed with the trial court an affidavit asserting that Graham had violated the conditions of his probation by possessing a firearm, committing crimes, and associating with persons engaged in criminal activity. The trial court held hearings on Graham's violations about a year later, in December 2005 and January 2006. The judge who presided was not the same judge who had

accepted Graham's guilty plea to the earlier offenses.

Graham maintained that he had no involvement in the home invasion robbery; but, even after the court underscored that the admission could expose him to a life sentence on the earlier charges, he admitted violating probation conditions by fleeing. The State presented evidence related to the home invasion, including testimony from the victims. The trial court noted that Graham, in admitting his attempt to avoid arrest, had acknowledged violating his probation. The court further found that Graham had violated his probation by committing a home invasion robbery, by possessing a firearm, and by associating with persons engaged in criminal activity.

The trial court held a sentencing hearing. Under Florida law the minimum sentence Graham could receive absent a

[560 U.S. 56]

downward departure by the judge was 5 years' imprisonment. The maximum was life imprisonment. Graham's attorney requested the minimum nondeparture sentence of 5 years. A presentence report prepared by the Florida Department of Corrections recommended that Graham receive an even lower sentence—at most 4 years' imprisonment. The State recommended that Graham receive 30 years on the armed burglary count and 15 years on the attempted armed robbery count.

After hearing Graham's testimony, the trial court explained the sentence it was about to pronounce:

> "Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. I don't know why.
>
> "But you did, and that is what is so sad about this today is that you have actually been given a chance to get

[130 S.Ct. 2020]

> through this, the original charge, which were very serious charges to begin with .... The attempted robbery with a weapon was a very serious charge.
>
> . . . . .
>
> "[I]n a very short period of time you were back before the Court on a violation of this probation, and then here you are two years later standing before me, literally the—facing a life sentence as to—up to life as to count 1 and up to 15 years as to count 2.
>
> "And I don't understand why you would be given such a great opportunity to do something with your life and

[560 U.S. 57]

> why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to

> lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do.
>
> "So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And, unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice.
>
> "I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions." *Id.*, at 392–394.

The trial court found Graham guilty of the earlier armed burglary and attempted armed robbery charges. It sentenced him to the maximum sentence authorized by law on each charge: life imprisonment for the armed burglary and 15 years for the attempted armed robbery. Because Florida has abolished its parole system, see Fla. Stat. § 921.002(1)(e) (2003), a life sentence gives a defendant no possibility of release unless he is granted executive clemency.

[560 U.S. 58]

Graham filed a motion in the trial court challenging his sentence under the Eighth Amendment. The motion was deemed denied after the trial court failed to rule on it within 60 days. The First District Court of Appeal of Florida affirmed, concluding that Graham's sentence was not grossly disproportionate to his crimes. 982 So.2d 43 (2008). The court took note of the seriousness of Graham's offenses and their violent nature, as well as the fact that they "were not committed by a pre-teen, but a seventeen-year-old who was ultimately sentenced at the age of nineteen." *Id.*, at 52. The court concluded further that Graham was incapable of rehabilitation. Although Graham "was given an unheard of probationary sentence for a life felony, ... wrote a letter expressing his remorse and promising to refrain from the commission of further crime, and ... had a strong family structure to support him," the court noted, he "rejected his second chance and chose to continue committing crimes at an escalating pace." *Ibid.* The Florida Supreme Court denied review. 990 So.2d 1058, 2008 WL 3896182 (2008) (table).

We granted certiorari. 556 U.S. 1220, 129 S.Ct. 2157, 173 L.Ed.2d 1155 (2009).

[130 S.Ct. 2021]

II

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." To determine whether a

punishment is cruel and unusual, courts must look beyond historical conceptions to " 'the evolving standards of decency that mark the progress of a maturing society.' " *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' " *Kennedy v. Louisiana*, 554 U.S. 407, ––––, 128 S.Ct. 2641, 2649, 171 L.Ed.2d 525 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Burger, C.J., dissenting)).

[560 U.S. 59]

The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. See, *e.g., Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). "[P]unishments of torture," for example, "are forbidden." *Wilkerson v. Utah*, 99 U.S. 130, 136, 25 L.Ed. 345 (1879). These cases underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes.

For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910).

The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. Under this approach, the Court has held unconstitutional a life without parole sentence for the defendant's seventh nonviolent felony, the crime of passing a worthless check. *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). In other cases, however, it has been difficult for the challenger to establish a lack of proportionality. A leading case is *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), in which the offender was sentenced under state law to life without parole for possessing a large quantity of cocaine. A closely divided Court upheld the sentence. The controlling opinion concluded that the Eighth Amendment contains a "narrow

[560 U.S. 60]

proportionality principle," that "does not require strict proportionality between crime and sentence" but rather "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.*, at 997, 1000–1001, 111 S.Ct. 2680 (KENNEDY, J., concurring in part and concurring in judgment). Again closely divided, the Court rejected a challenge to a sentence of 25 years to life for the theft of a few golf clubs under California's so-called three-strikes recidivist sentencing

[130 S.Ct. 2022]

scheme. *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003); see also *Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). The Court has also upheld a sentence of life with the

possibility of parole for a defendant's third nonviolent felony, the crime of obtaining money by false pretenses, *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), and a sentence of 40 years for possession of marijuana with intent to distribute and distribution of marijuana, *Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) *(per curiam)*.

The controlling opinion in *Harmelin* explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. 501 U.S., at 1005, 111 S.Ct. 2680 (opinion of KENNEDY, J.). "[I]n the rare case in which [this] threshold comparison ... leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. *Ibid.* If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual. *Ibid.*

The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty. The classification in turn consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender. With respect to the nature of the

[560 U.S. 61]

offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. *Kennedy*, 551 U.S., at 437-438, 128 S.Ct., at 2660; see also *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), or whose intellectual functioning is in a low range, *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). See also *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

In the cases adopting categorical rules the Court has taken the following approach. The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. *Roper, supra*, at 572, 125 S.Ct. 1183. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," *Kennedy*, 554 U.S., at ––––, 128 S.Ct., at 2650, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. *Roper, supra*, at 572, 125 S.Ct. 1183.

The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence. The approach in cases such as *Harmelin* and *Ewing* is suited for considering a gross proportionality challenge to a particular defendant's sentence, but here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of

[130 S.Ct. 2023]

offenders who have committed a range of crimes. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question

presented, the appropriate analysis is the one used in cases that involved

[560 U.S. 62]

the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*.

III

A

The analysis begins with objective indicia of national consensus. "[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.' " *Atkins*, *supra*, at 312, 122 S.Ct. 2242 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)). Six jurisdictions do not allow life without parole sentences for any juvenile offenders. See Appendix, *infra*, Part III. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. *Id.*, Part II. Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. *Id.*, Part I. Federal law also allows for the possibility of life without parole for offenders as young as 13. See, *e.g.*, 18 U.S.C. §§ 2241 (2006 ed. and Supp. II), 5032 (2006 ed.). Relying on this metric, the State and its *amici* argue that there is no national consensus against the sentencing practice at issue.

This argument is incomplete and unavailing. "There are measures of consensus other than legislation." *Kennedy*, *supra*, at ––––, 128 S.Ct., at 2657. Actual sentencing practices are an important part of the Court's inquiry into consensus. See *Enmund*, *supra*, at 794–796, 102 S.Ct. 3368; *Thompson*, *supra*, at 831–832, 108 S.Ct. 2687 (plurality opinion); *Atkins*, *supra*, at 316, 122 S.Ct. 2242; *Roper*, *supra*, at 572, 125 S.Ct. 1183; *Kennedy*, *supra*, at ––––, 128 S.Ct., at 2657–58. Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use. Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent. According to a recent study, nationwide there are only 109 juvenile offenders serving sentences of life without

[560 U.S. 63]

parole for nonhomicide offenses. See P. Annino, D. Rasmussen, & C. Rice, Juvenile Life without Parole for Non–Homicide Offenses: Florida Compared to Nation 2 (Sept. 14, 2009) (hereinafter Annino).

The State contends that this study's tally is inaccurate because it does not count juvenile offenders who were convicted of both a homicide and a nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide. See Brief for Respondent 34; Tr. of Oral Arg. in *Sullivan v. Florida*, O. T. 2009, No. 08–7621, pp. 28–31. This distinction is unpersuasive. Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

Florida further criticizes this study because the authors were unable to obtain complete information on some States and

[130 S.Ct. 2024]

because the study was not peer reviewed. See Brief for Respondent 40. The State does not, however, provide any data of its own. Although

in the first instance it is for the litigants to provide data to aid the Court, we have been able to supplement the study's findings. The study's authors were not able to obtain a definitive tally for Nevada, Utah, or Virginia. See Annino 11–13. Our research shows that Nevada has five juvenile nonhomicide offenders serving life without parole sentences, Utah has none, and Virginia has eight. See Letter from Alejandra Livingston, Offender Management Division, Nevada Dept. of Corrections, to Supreme Court Library (Mar. 26, 2010) (available in Clerk of Court's case file); Letter from Steve Gehrke, Utah Dept. of

[560 U.S. 64]

Corrections, to Supreme Court Library (Mar. 29, 2010) (same); Letter from Dr. Tama S. Celi, Virginia Dept. of Corrections, to Supreme Court Library (Mar. 30, 2010) (same). Finally, since the study was completed, a defendant in Oklahoma has apparently been sentenced to life without parole for a rape and stabbing he committed at the age of 16. See Stogsdill, Delaware County Teen Sentenced in Rape, Assault Case, Tulsa World, May 4, 2010, p. A12.

Thus, adding the individuals counted by the study to those we have been able to locate independently, there are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. Annino 2. The other 46 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia. *Id.*, at 14; *supra*, at 12–13; Letter from Thomas P. Hoey, Dept. of Corrections, Government of the District of Columbia, to Supreme Court Library (Mar. 31, 2010) (available in Clerk of Court's case file); Letter from Judith Simon Garrett, U.S. Dept. of Justice, Federal Bureau of Prisons (BOP), to Supreme Court Library (Apr. 9, 2010) (available in Clerk of Court's case file). Thus, only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while 26 States, the District of Columbia, and the Federal Governmentdo not impose them despite apparent statutory authorization.*

[560 U.S. 65]

The numbers cited above reflect all current convicts in a jurisdiction's penal system, regardless of when they were convicted. It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades. Thus, these statistics likely reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years. It is not certain that this opinion has identified every juvenile nonhomicide offender nationwide serving a life without parole sentence, for the statistics are not precise. The available data, nonetheless, are sufficient to demonstrate how rarely these sentences are imposed even if there are isolated cases that have not been included in the presentations of the parties or the analysis of the Court.

It must be acknowledged that in terms of absolute numbers juvenile life without parole sentences for nonhomicides are more common than the sentencing practices

[130 S.Ct. 2025]

at issue in some of this Court's other Eighth Amendment cases. See, *e.g.*, *Enmund*, 458 U.S., at 794, 102 S.Ct. 3368 (only six executions of nontriggerman felony murderers between 1954 and 1982) *Atkins*, 536 U.S., at 316, 122 S.Ct. 2242 (only five executions of mentally retarded defendants in 13–year period). This contrast can be instructive, however, if attention is first given to the base number of certain types of offenses. For

example, in the year 2007 (the most recent year for which statistics are available), a total of 13,480 persons, adult and juvenile, were arrested for homicide crimes. That same year, 57,600 juveniles were arrested for aggravated assault; 3,580 for forcible rape; 34,500 for robbery; 81,900 for burglary; 195,700 for drug offenses; and 7,200 for arson. See Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book, online at http://ojjdp.ncjrs.org/ojstatbb/ (as visited May 14, 2010, and available in Clerk of Court's case file). Although it is not certain how many of these numerous juvenile offenders were eligible for life without parole

[560 U.S. 66]

sentences, the comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual.

The evidence of consensus is not undermined by the fact that many jurisdictions do not prohibit life without parole for juvenile nonhomicide offenders. The Court confronted a similar situation in *Thompson*, where a plurality concluded that the death penalty for offenders younger than 16 was unconstitutional. A number of States then allowed the juvenile death penalty if one considered the statutory scheme. As is the case here, those States authorized the transfer of some juvenile offenders to adult court; and at that point there was no statutory differentiation between adults and juveniles with respect to authorized penalties. The plurality concluded that the transfer laws show "that the States consider 15–year–olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders*." 487 U.S., at 826, n. 24, 108 S.Ct. 2687. Justice O'Connor, concurring in the judgment, took a similar view. *Id.*, at 850, 108 S.Ct. 2687 ("When a legislature provides for some 15–year–olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants .... [H]owever, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate").

The same reasoning obtains here. Many States have chosen to move away from juvenile court systems and to allow juveniles to be transferred to, or charged directly in, adult court under certain circumstances. Once in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole

[560 U.S. 67]

sentence. But the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences.

For example, under Florida law a child of any age can be prosecuted as an adult for certain crimes and can be sentenced to life without parole. The State acknowledged at oral argument that even a 5–year–old, theoretically, could receive such

[130 S.Ct. 2026]

a sentence under the letter of the law. See Tr. of Oral Arg. 36–37. All would concede this to be unrealistic, but the example underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration. Similarly, the many States that allow life without parole for juvenile

nonhomicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate. The sentencing practice now under consideration is exceedingly rare. And "it is fair to say that a national consensus has developed against it." *Atkins, supra,* at 316, 122 S.Ct. 2242.

B

Community consensus, while "entitled to great weight," is not itself determinative of whether a punishment is cruel and unusual. *Kennedy*, 554 U.S., at ––––, 128 S.Ct., at 2658. In accordance with the constitutional design, "the task of interpreting the Eighth Amendment remains our responsibility." *Roper,* 543 U.S., at 575, 125 S.Ct. 1183. The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. *Id.,* at 568, 125 S.Ct. 1183; *Kennedy, supra,* at ––––, 128 S.Ct., at 2659–60; cf. *Solem*, 463 U.S., at 292, 103 S.Ct. 3001. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals. *Kennedy*, *supra,* at ––––, 128 S.Ct., at 2661–65;

[560 U.S. 68]

*Roper, supra,* at 571-572, 125 S.Ct. 1183; *Atkins*, 536 U.S., at 318–320, 122 S.Ct. 2242.

*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. 543 U.S., at 569, 125 S.Ct. 1183. As compared to adults, juveniles have a " 'lack of maturity and an underdeveloped sense of responsibility' "; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are " not as well formed." *Id.,* at 569–570, 125 S.Ct. 1183. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.,* at 573, 125 S.Ct. 1183. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.*, at 569, 125 S.Ct. 1183. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Thompson, supra,* at 835, 108 S.Ct. 2687 (plurality opinion).

No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. as *Amici Curiae* 16–24; Brief for American Psychological Association et al. as *Amici Curiae* 22–27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper,* 543 U.S., at 570, 125 S.Ct. 1183. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's

[130 S.Ct. 2027]

character deficiencies will be reformed." *Ibid.* These matters relate to the status of the offenders in question; and it is relevant to consider

[560 U.S. 69]

next the nature of the offenses to which this harsh penalty might apply.

The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of

the most serious forms of punishment than are murderers. *Kennedy, supra; Enmund,* 458 U.S. 782, 102 S.Ct. 3368; *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); *Coker,* 433 U.S. 584, 97 S.Ct. 2861. There is a line "between homicide and other serious violent offenses against the individual." *Kennedy,* 554 U.S., at ––––, 128 S.Ct., at 2659–60. Serious nonhomicide crimes "may be devastating in their harm ... but 'in terms of moral depravity and of the injury to the person and to the public,' ... they cannot be compared to murder in their 'severity and irrevocability.' " *Id.,* at ––––, 128 S.Ct., at 2660 (quoting *Coker,* 433 U.S., at 598, 97 S.Ct. 2861 (plurality opinion)). This is because "[l]ife is over for the victim of the murderer," but for the victim of even a very serious nonhomicide crime, "life ... is not over and normally is not beyond repair." *Ibid.* (plurality opinion). Although an offense like robbery or rape is "a serious crime deserving serious punishment," *Enmund, supra,* at 797, 102 S.Ct. 3368, those crimes differ from homicide crimes in a moral sense.

It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.

As for the punishment, life without parole is "the second most severe penalty permitted by law." *Harmelin,* 501 U.S., at 1001, 111 S.Ct. 2680 (opinion of KENNEDY, J.). It is true that a death sentence is "unique in its severity and irrevocability," *Gregg v. Georgia,* 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives

[560 U.S. 70]

the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. *Solem,* 463 U.S., at 300–301, 103 S.Ct. 3001. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Naovarath v. State,* 105 Nev. 525, 526, 779 P.2d 944 (1989).

The Court has recognized the severity of sentences that deny convicts the possibility of parole. In *Rummel,* 445 U.S. 263, 100 S.Ct. 1133, the Court rejected an Eighth Amendment challenge to a life sentence for a defendant's third nonviolent felony but stressed that the sentence gave the defendant the possibility of parole. Noting that "parole is an established variation on imprisonment of convicted criminals," it was evident that an analysis of the petitioner's sentence "could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." *Id.,* at 280–281, 100 S.Ct. 1133 (internal quotation marks omitted). And in *Solem,* the only previous case striking down a sentence for

[130 S.Ct. 2028]

a term of years as grossly disproportionate, the defendant's sentence was deemed "far more severe than the life sentence we considered in *Rummel,*" because it did not give the defendant the possibility of parole. 463 U.S., at 297, 103 S.Ct. 3001.

Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16–year–old and a 75–year–old each sentenced to life without parole receive the same punishment in

name only. See *Roper, supra,* at 572, 125 S.Ct. 1183; cf. *Harmelin, supra,* at 996, 111 S.Ct. 2680 ("In some cases ... there will be negligible difference between life without parole and other sentences of imprisonment—for example, ... a lengthy term

[560 U.S. 71]

sentence without eligibility for parole, given to a 65–year–old man"). This reality cannot be ignored.

The penological justifications for the sentencing practice are also relevant to the analysis. *Kennedy, supra,* at ––––, 128 S.Ct., at 2661–65; *Roper,* 543 U.S., at 571–572, 125 S.Ct. 1183; *Atkins*, 536 U.S., at 318–320, 122 S.Ct. 2242. Criminal punishment can have different goals, and choosing among them is within a legislature's discretion. See *Harmelin, supra,* at 999, 111 S.Ct. 2680 (opinion of KENNEDY, J.) ("[T]he Eighth Amendment does not mandate adoption of any one penological theory"). It does not follow, however, that the purposes and effects of penal sanctions are irrelevant to the determination of Eighth Amendment restrictions. A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense. With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation, see *Ewing,* 538 U.S., at 25, 123 S.Ct. 1179 (plurality opinion)—provides an adequate justification.

Retribution is a legitimate reason to punish, but it cannot support the sentence at issue here. Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison, supra,* at 149, 107 S.Ct. 1676. And as *Roper* observed, "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." 543 U.S., at 571, 125 S.Ct. 1183. The case becomes even weaker with respect to a juvenile who did not commit homicide. *Roper* found that "[r]etribution is not proportional if the law's most severe penalty is imposed" on the juvenile murderer. *Ibid.* The considerations underlying that holding support as well the conclusion

[560 U.S. 72]

that retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender.

Deterrence does not suffice to justify the sentence either. *Roper* noted that "the same characteristics that render juveniles less culpable than adults suggest ... that juveniles will be less susceptible to deterrence." *Ibid.* Because juveniles' "lack of maturity and underdeveloped sense of responsibility ... often result in impetuous and ill-considered actions and decisions," *Johnson v. Texas,* 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993), they are less likely to take a possible punishment into consideration when

[130 S.Ct. 2029]

making decisions. This is particularly so when that punishment is rarely imposed. That the sentence deters in a few cases is perhaps plausible, but "[t]his argument does not overcome other objections." *Kennedy,* 554 U.S., at ––––, 128 S.Ct., at 2661–62. Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered. Here, in light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent

effect provided by life without parole is not enough to justify the sentence.

Incapacitation, a third legitimate reason for imprisonment, does not justify the life without parole sentence in question here. Recidivism is a serious risk to public safety, and so incapacitation is an important goal. See *Ewing, supra,* at 26, 123 S.Ct. 1179 (plurality opinion) (statistics show 67 percent of former inmates released from state prisons are charged with at least one serious new crime within three years). But while incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide. To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that

[560 U.S. 73]

judgment questionable. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper, supra,* at 572, 125 S.Ct. 1183. As one court concluded in a challenge to a life without parole sentence for a 14–year–old, "incorrigibility is inconsistent with youth." *Workman v. Commonwealth,* 429 S.W.2d 374, 378 (Ky.1968).

Here one cannot dispute that this defendant posed an immediate risk, for he had committed, we can assume, serious crimes early in his term of supervised release and despite his own assurances of reform. Graham deserved to be separated from society for some time in order to prevent what the trial court described as an "escalating pattern of criminal conduct," App. 394, but it does not follow that he would be a risk to society for the rest of his life. Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a ity.

Finally there is rehabilitation, a penological goal that forms the basis of parole systems. See *Solem,* 463 U.S., at 300, 103 S.Ct. 3001; *Mistretta v. United States,* 488 U.S. 361, 363, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). The concept of rehabilitation is imprecise; and its utility and proper implementation are the subject of a substantial, dynamic field of inquiry and dialogue. See, *e.g.,* Cullen & Gendreau, Assessing Correctional Rehabilitation: Policy, Practice, and Prospects, 3 Criminal Justice 2000, pp. 119–133 (2000) (describing scholarly debates regarding the effectiveness of rehabilitation over the last several decades). It is

[560 U.S. 74]

for legislatures to determine what rehabilitative techniques are appropriate and effective.

A sentence of life imprisonment without parole, however, cannot be justified by the

[130 S.Ct. 2030]

goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability. A State's rejection of rehabilitation, moreover, goes beyond a mere expressive judgment. As one *amicus* notes,

defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. See Brief for Sentencing Project *Amicus Curiae* 11–13. For juvenile offenders, who are most in need of and receptive to rehabilitation, see Brief for J. Lawrence Aber et al. as *Amici Curiae* 28–31 (hereinafter Aber Brief), the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.

In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to

[560 U.S. 75]

life without parole for a nonhomicide crime. *Roper*, 543 U.S., at 574, 125 S.Ct. 1183.

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.

C

Categorical rules tend to be imperfect, but one is necessary here. Two alternative approaches are not adequate to address the relevant constitutional concerns. First, the State argues that the laws of Florida and other States governing criminal procedure take sufficient account of the age of a juvenile offender. Here, Florida notes that under its law prosecutors are required to charge 16– and 17–year–old offenders as adults only for certain serious felonies; that prosecutors have discretion to charge those offenders as adults for other felonies; and that prosecutors may not charge nonrecidivist 16– and 17–year–

[130 S.Ct. 2031]

old offenders as adults for misdemeanors. Brief for Respondent 54 (citing Fla. Stat. § 985.227 (2003)). The State also stresses that "in only the narrowest of circumstances" does Florida law impose no

[560 U.S. 76]

age limit whatsoever for prosecuting juveniles in adult court. Brief for Respondent 54.

Florida is correct to say that state laws requiring consideration of a defendant's age in charging decisions are salutary. An offender's

age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed. Florida, like other States, has made substantial efforts to enact comprehensive rules governing the treatment of youthful offenders by its criminal justice system. See generally Fla. Stat. § 958 *et seq.* (2007).

The provisions the State notes are, nonetheless, by themselves insufficient to address the constitutional concerns at issue. Nothing in Florida's laws prevents its courts from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an "irretrievably depraved character." *Roper, supra,* at 572, 125 S.Ct. 1183. This is inconsistent with the Eighth Amendment. Specific cases are illustrative. In Graham's case the sentencing judge decided to impose life without parole—a sentence greater than that requested by the prosecutor—for Graham's armed burglary conviction. The judge did so because he concluded that Graham was incorrigible: "[Y]ou decided that this is how you were going to lead your life and that there is nothing that we can do for you. ... We can't do anything to deter you." App. 394.

Another example comes from *Sullivan v. Florida,* No. 08–7621. *Sullivan* was argued the same day as this case, but the Court has now dismissed the writ of certiorari in *Sullivan* as improvidently granted. *Post,* p. ––––. The facts, however, demonstrate the flaws of Florida's system. The petitioner, Joe Sullivan, was prosecuted as an adult for a sexual assault committed when he was 13 years old. Noting Sullivan's past encounters with the law, the sentencing judge concluded that, although Sullivan had been "given opportunity after opportunity to upright himself and take advantage

[560 U.S. 77]

of the second and third chances he's been given," he had demonstrated himself to be unwilling to follow the law and needed to be kept away from society for the duration of his life. Brief for Respondent in *Sullivan v. Florida,* O. T. 2009, No. 08–7621, p. 6. The judge sentenced Sullivan to life without parole. As these examples make clear, existing state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability.

Another possible approach would be to hold that the Eighth Amendment requires courts to take the offender's age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the seriousness of the crime. This approach would allow courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes. Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society.

The case-by-case approach to sentencing must, however, be confined by some

[130 S.Ct. 2032]

boundaries. The dilemma of juvenile sentencing demonstrates this. For even if we were to assume that some juvenile nonhomicide offenders might have "sufficient psychological maturity, and at the same time demonstrat [e] sufficient depravity," *Roper,* 543 U.S., at 572, 125 S.Ct. 1183, to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile

offenders from the many that have the capacity for change. *Roper* rejected the argument that the Eighth Amendment required only that juries be told they must consider

[560 U.S. 78]

the defendant's age as a mitigating factor in sentencing. The Court concluded that an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Id.*, at 573, 125 S.Ct. 1183. Here, as with the death penalty, "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive" a sentence of life without parole for a nonhomicide crime "despite insufficient culpability." *Id.*, at 572–573, 125 S.Ct. 1183.

Another problem with a case-by-case approach is that it does not take account of special difficulties encountered by counsel in juvenile representation. As some *amici* note, the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Brief for NAACP Legal Defense & Education Fund et al. as *Amici Curiae* 7–12; Henning, Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases, 81 Notre Dame L.Rev. 245, 272–273 (2005). Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. Aber Brief 35. These factors are likely to impair the quality of a juvenile defendant's representation. Cf. *Atkins*, 536 U.S., at 320, 122 S.Ct. 2242 ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel"). A categorical rule avoids the risk that, as a result of these difficulties, a court or jury will

[560 U.S. 79]

erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide.

Finally, a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. In *Roper*, that deprivation resulted from an execution that brought life to its end. Here, though by a different dynamic, the same concerns apply. Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. In some prisons, moreover, the system itself

[130 S.Ct. 2033]

becomes complicit in the lack of development. As noted above, see *supra*, at 2029 – 2030, it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration. A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term.

Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.

[560 U.S. 80]

D

There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over. This observation does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But " '[t]he climate of international opinion concerning the acceptability of a particular punishment' " is also " 'not irrelevant.' " *Enmund*, 458 U.S., at 796, n. 22, 102 S.Ct. 3368. The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. See, *e.g.*, *Roper*, 543 U.S., at 575–578, 125 S.Ct. 1183; *Atkins*, *supra*, at 317–318, n. 21, 122 S.Ct. 2242; *Thompson*, 487 U.S., at 830, 108 S.Ct. 2687 (plurality opinion); *Enmund*, *supra*, at 796–797, n. 22, 102 S.Ct. 3368; *Coker*, 433 U.S., at 596, n. 10, 97 S.Ct. 2861 (plurality opinion); *Trop*, 356 U.S., at 102–103, 78 S.Ct. 590 (plurality opinion).

Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question. A recent study concluded that only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the United States and Israel, ever impose the punishment in practice. See M. Leighton & C. de la Vega, Sentencing Our Children To Die in Prison: Global Law and Practice 4 (2007). An updated version of the study concluded that Israel's "laws allow for parole review of juvenile offenders serving life terms," but expressed reservations about how that parole review is implemented. De la Vega & Leighton, Sentencing Our Children To Die in Prison: Global Law and Practice, 42 U.S.F.L.Rev. 983, 1002–1003 (2008). But even if Israel is counted as allowing life without parole for juvenile offenders, that nation does not appear to impose that sentence for nonhomicide crimes; all of the seven Israeli prisoners whom commentators have identified as serving life sentences for juvenile crimes were

[560 U.S. 81]

convicted of homicide or attempted homicide. See Amnesty International, Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 106, n. 322 (2005); Memorandum and Attachment from Ruth Levush, Law Library of Congress, to Supreme Court Library (Feb. 16, 2010) (available in Clerk of Court's case file).

[130 S.Ct. 2034]

Thus, as petitioner contends and respondent does not contest, the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders. We also note, as petitioner and his *amici* emphasize, that Article 37(a) of the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), ratified by every nation except the United States and Somalia, prohibits the imposition of "life imprisonment without possibility of release ... for offences committed by persons below eighteen years of age." Brief for Petitioner 66; Brief for Amnesty International et al. as *Amici Curiae* 15–17. As

we concluded in *Roper* with respect to the juvenile death penalty, "the United States now stands alone in a world that has turned its face against" life without parole for juvenile nonhomicide offenders. 543 U.S., at 577, 125 S.Ct. 1183.

The State's *amici* stress that no international legal agreement that is binding on the United States prohibits life without parole for juvenile offenders and thus urge us to ignore the international consensus. See Brief for Solidarity Center for Law and Justice et al. as *Amici Curiae* 14–16; Brief for Sixteen Members of United States House of Representatives as *Amici Curiae* 40–43. These arguments miss the mark. The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, "the overwhelming weight of international opinion against" life without parole for nonhomicide offenses committed by juveniles "provide[s] respected and significant confirmation for our own conclusions." *Roper, supra,* at 572, 125 S.Ct. 1183.

[560 U.S. 82]

The debate between petitioner's and respondent's *amici* over whether there is a binding *jus cogens* norm against this sentencing practice is likewise of no import. See Brief for Amnesty International 10–23; Brief for Sixteen Members of United States House of Representatives 4–40. The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.

* * *

The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

APPENDIX

I. JURISDICTIONS THAT PERMIT LIFE WITHOUT PAROLE FOR JUVENILE NONHOMICIDE OFFENDERS

| | |
|---|---|
| Alabama | Ala.Code § 12–15–203 (Supp.2009); §§ 13A–3–3, 13A–5–9(c), 13A–6–61 (2005); § 13A–7–5 (Supp.2009) |
| Arizona | Ariz.Rev.Stat. Ann. §§ 13–501, § 13–1423 (West 2010) |
| Arkansas | Ark.Code § 9–27–318(b) (2009); § 5–4–501(c) (Supp.2009) |
| California | Cal.Penal Code Ann. § 667.7(a)(2) (1999); § 1170.17 (2004) |
| Delaware | Del.Code Ann., Tit., 10, § 1010 (Supp.2008); *id.*, Tit., 11, § 773(c) (2003) |
| District of Columbia | D.C.Code § 16–2307 (2009 Supp. Pamphlet); § 22–3020 (Supp.2007) |
| Florida | Fla. Stat. §§ 810.02, 921.002(1)(e), 985.557 (2007) |
| Georgia | Georgia Code Ann. § 15–11–30.2 (2008); § 16–6–1(b) (2007) |
| Idaho | Idaho Code § 18–6503 (Lexis 2005); §§ 19–2513, 20–509 (Lexis Supp.2009) |

| | |
|---|---|
| Illinois | Ill. Comp. Stat., ch. 705, §§ 405/5–805, 405/5–130 (West 2008); *id.*, ch. 720, § 5/12–13(b)(3) (West 2008); *id.,* ch. 730, § 5/3–3–3(d) (West 2008) |
| Indiana | Ind.Code § 31–30–3–6(1); § 35–50–2–8.5(a) (West 2004) |
| Iowa | Iowa Code §§ 232.45(6), 709.2, 902.1 (2009) |
| Louisiana | La. Child. Code Ann., Arts. 305, 857(A), (B) (West Supp.2010); La. Stat. Ann. § 14:44 (West 2007) |
| Maryland | Md. Cts. & Jud. Proc.Code Ann. §§ 3–8A–03(d)(1), 3–8A–06(a)(2) (Lexis 2006); Md.Crim. Law Code Ann. §§ 3–303(d)(2),(3) (Lexis Supp.2009) |
| Michigan | Mich. Comp. Laws Ann. § 712A.4 (West 2002); § 750.520b(2)(c) (West Supp.2009); § 769.1 (West 2000) |
| Minnesota | Minn.Stat. §§ 260B.125(1), 609.3455(2) (2008) |
| Mississippi | Miss.Code Ann. § 43–21–157 (2009); §§ 97–3–53, 99–19–81 (2007); § 99–19–83 (2006) |
| Missouri | Mo.Rev.Stat. §§ 211.071, 558.018 (2000) |
| Nebraska | Neb.Rev.Stat. §§ 28–105, 28–416(8)(a), 29–2204(1), (3), 43–247, 43–276 (2008) |
| Nevada | Nev.Rev.Stat. §§ 62B.330, 200.366 (2009) |
| New Hampshire | N.H.Rev.Stat. Ann. § 169–B:24; § 628:1 (2007); §§ 632–A:2, 651:6 (Supp.2009) |
| New York | N.Y. Penal Law Ann. §§ 30.00, § 60.06 (West 2009); § 490.55 (West 2008) |
| North Carolina | N.C. Gen.Stat. Ann. §§ 7B–2200, 15A–1340.16B(a) (Lexis 2009) |
| North Dakota | N.D. Cent.Code Ann. § 12.1–04–01 (Lexis 1997); § 12.1–20–03 (Lexis Supp.2009); § 12.1–32–01 (Lexis 1997) |
| Ohio | Ohio Rev.Code Ann. § 2152.10 (Lexis 2007); § 2907.02 (Lexis 2006); § 2971.03(A)(2) (2010 Lexis Supp. Pamphlet) |
| Oklahoma | Okla. Stat., Tit. 10A, §§ 2–5–204, 2–5–205, 2–5–206 (2009 West Supp.); *id.*, Tit. 21, § 1115 (2007 West Supp.) |
| Oregon | Ore.Rev.Stat. §§ 137.707, 137.719(1) (2009) |
| Pennsylvania | 42 Pa. Cons.Stat. § 6355(a) (2000); 18 *id.*, § 3121(e)(2) (2008); 61 *id.*, § 6137(a) (2009) |
| Rhode Island | R.I. Gen. Laws §§ 14–1–7, 14–1–7.1, 11–47–3.2 (Lexis 2002) |
| South Carolina | S.C.Code Ann. § 63–19–1210 (2008 Supp. Pamphlet); § 16–11–311(B)(Westlaw 2009) |
| South Dakota | S.D. Codified Laws § 26–11–3.1 (Supp.2009); § 26–11–4 (2004); §§ 22–3–1, 22–6–1(2),(3) (2006); § 24–15–4 (2004); §§ 22–19–1, 22–22–1 (2006) |
| Tennessee | Tenn.Code Ann. §§ 37–1–134, 40–35–120(g) (Westlaw 2010) |
| Utah | Utah Code Ann. §§ 78A–6–602, 78A–6–703, 76–5–302 (Lexis 2008) |
| Virginia | Va.Code Ann. §§ 16.1–269.1, § 18.2–61, § 53.1–151(B1) (2009) |
| Washington | Wash. Rev.Code § 13.40.110 (2009 Supp.); §§ 9A.04.050, 9.94A.030(34), 9.94A.570 (2008) |
| West Virginia | W. Va.Code Ann. § 49–5–10 (Lexis 2009); § 61–2–14a(a) (Lexis 2005) |
| Wisconsin | Wis. Stat. §§ 938.18, 938.183 (2007–2008); § 939.62(2m)(c) (Westlaw 2005) |

| | |
|---|---|
| Wyoming | Wyo. Stat. Ann. §§ 6–2–306(d),(e), 14–6–203 (2009) |
| Federal | 18 U.S.C. § 2241 (2006 ed. and Supp. II); § 5032 (2006 ed.) |

II. JURISDICTIONS THAT PERMIT LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS CONVICTED OF HOMICIDE CRIMES ONLY

| | |
|---|---|
| Connecticut | Conn. Gen.Stat. § 53a–35a (2009) |
| Hawaii | Haw.Rev.Stat. § 571–22(d) (2006); § 706–656(1) (2008 Supp. Pamphlet) |
| Maine | Me.Rev.Stat. Ann., Tit. 15, § 3101(4) (Supp.2009); *id.*, Tit. 17–a, § 1251 (2006) |
| Massachusetts | Mass Gen. Laws ch. 119, § 74; *id.*, ch. 265, § 2 (2008) |
| New Jersey | N.J. Stat. Ann. § 2A:4A–26 (West Supp.2009); § 2C:11–3(b)(2) (West Supp.2009) |
| New Mexico | N.M. Stat. Ann. § 31–18–14 (Supp.2009); § 31–18–15.2(A) (Westlaw 2010) |
| Vermont | Vt. Stat. Ann., Tit. 33, § 5204 (2009 Cum.Supp.); *id.*, Tit. 13, § 2303 (2009) |

III. JURISDICTIONS THAT FORBID LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS

| | |
|---|---|
| Alaska | Alaska Stat. § 12.55.015(g) (2008) |
| Colorado | Colo.Rev.Stat. Ann. § 18–1.3–401(4)(b) (2009) |
| Montana | Mont.Code Ann. § 46–18–222(1) (2009) |
| Kansas | Kan. Stat. Ann. § 21–4622 (West 2007) |
| Kentucky | Ky.Rev.Stat. Ann. § 640.040 (West 2008); *Shepherd v. Commonwealth*, 251 S.W.3d 309, 320–321 (Ky.2008) |
| Texas | Tex. Penal Code Ann. § 12.31 (West Supp.2009) |

[130 S.Ct. 2036]

Justice STEVENS, with whom Justice GINSBURG and Justice SOTOMAYOR join, concurring.

In his dissenting opinion, Justice THOMAS argues that today's holding is not entirely consistent with the controlling opinions in *Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003), *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003), *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), and *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). *Post*, at 2046 – 2047. Given that "evolving standards of decency" have played a central role in our Eighth Amendment jurisprudence for at least a century, see *Weems v. United States*, 217 U.S. 349, 373–378, 30 S.Ct. 544, 54 L.Ed. 793 (1910), this argument suggests the dissenting opinions in those cases more accurately describe the law today than does Justice THOMAS' rigid interpretation of the Amendment. Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete, *post*, at 2046 – 2047, and n. 2.

While Justice THOMAS would apparently not rule out a death sentence for a $50 theft by a 7–year–old, see *post*, at 2044, 2047 – 2048, n. 3, the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so.

[560 U.S. 86]

Chief Justice ROBERTS, concurring in the judgment.

I agree with the Court that Terrance Graham's sentence of life without parole violates the Eighth Amendment's prohibition on "cruel and unusual punishments." Unlike the majority, however, I see no need to invent a new constitutional rule of dubious provenance in reaching that conclusion. Instead, my analysis is based on an application of this Court's precedents, in particular (1) our cases requiring "narrow proportionality" review of noncapital sentences and (2) our conclusion in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), that juvenile offenders are generally less culpable than adults who commit the same crimes.

These cases expressly allow courts addressing allegations that a noncapital sentence violates the Eighth Amendment to consider the particular defendant and particular crime at issue. The standards for relief under these precedents are rigorous, and should be. But here Graham's juvenile status—together with the nature of his criminal conduct and the extraordinarily severe punishment imposed—lead me to conclude that his sentence of life without parole is unconstitutional.

I

Our Court has struggled with whether and how to apply the Cruel and Unusual Punishments Clause to sentences for noncapital crimes. Some of my colleagues have raised serious and thoughtful questions

[130 S.Ct. 2037]

about whether, as an original matter, the Constitution was understood to require any degree of proportionality between noncapital offenses and their corresponding punishments. See, *e.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 962–994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (principal opinion of SCALIA, J.); *post*, at 2044 – 2045, and n. 1 (THOMAS, J., dissenting). Neither party here asks us to reexamine our precedents requiring such proportionality, however, and so I approach this case by trying to apply our past decisions to the facts at hand.

[560 U.S. 87]

A

Graham's case arises at the intersection of two lines of Eighth Amendment precedent. The first consists of decisions holding that the Cruel and Unusual Punishments Clause embraces a "narrow proportionality principle" that we apply, on a case-by-case basis, when asked to review noncapital sentences. *Lockyer v. Andrade*, 538 U.S. 63, 72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (internal quotation marks omitted); *Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); *Ewing v. California*, 538 U.S. 11, 20, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (plurality opinion); *Harmelin*, *supra*, at 996–997, 111 S.Ct. 2680 (KENNEDY, J., concurring in part and concurring in judgment). This "narrow proportionality principle" does not grant judges blanket authority to second-guess decisions made by legislatures or sentencing courts. On the contrary, a reviewing court will only "rarely" need "to engage in extended analysis to determine that a sentence is *not* constitutionally disproportionate," *Solem*, *supra*, at 290, n. 16, 103 S.Ct. 3001 (emphasis added), and "successful challenges" to noncapital sentences will be all the more "exceedingly rare," *Rummel v. Estelle*, 445 U.S. 263, 272, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980).

We have "not established a clear or consistent path for courts to follow" in applying the highly deferential "narrow proportionality" analysis. *Lockyer*, *supra*, at 72, 123 S.Ct. 1166. We have, however, emphasized the primacy of the legislature in setting sentences, the variety of legitimate penological schemes, the state-by-

state diversity protected by our federal system, and the requirement that review be guided by objective, rather than subjective, factors. *Ewing, supra,* at 23, 123 S.Ct. 1179 (plurality opinion); *Harmelin, supra,* at 998–1001, 111 S.Ct. 2680 (opinion of KENNEDY, J.). Most importantly, however, we have explained that the Eighth Amendment " 'does not require strict proportionality between crime and sentence' "; rather, " 'it forbids only extreme sentences that are "grossly disproportionate" to the crime.' " *Ewing, supra,* at 23, 123 S.Ct. 1179 (plurality opinion) (quoting *Harmelin, supra,* at 1001, 111 S.Ct. 2680 (opinion of KENNEDY, J.)).

[560 U.S. 88]

Our cases indicate that courts conducting "narrow proportionality" review should begin with a threshold inquiry that compares " the gravity of the offense and the harshness of the penalty." *Solem,* 463 U.S., at 290–291, 103 S.Ct. 3001. This analysis can consider a particular offender's mental state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history. *Id.,* at 292–294, 296–297, and n. 22, 103 S.Ct. 3001 (considering motive, past criminal conduct, alcoholism, and propensity for violence of the particular defendant); see also *Ewing, supra,* at 28–30, 123 S.Ct. 1179 (plurality opinion) (examining defendant's criminal history);

[130 S.Ct. 2038]

*Harmelin,* 501 U.S., at 1001–1004, 111 S.Ct. 2680 (opinion of KENNEDY, J.) (noting specific details of the particular crime of conviction).

Only in "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," *id.,* at 1005, 111 S.Ct. 2680, should courts proceed to an "intrajurisdictional" comparison of the sentence at issue with those imposed on other criminals in the same jurisdiction, and an "interjurisdictional" comparison with sentences imposed for the same crime in other jurisdictions. *Solem, supra,* at 291–292, 103 S.Ct. 3001. If these subsequent comparisons confirm the inference of gross disproportionality, courts should invalidate the sentence as a violation of the Eighth Amendment.

B

The second line of precedent relevant to assessing Graham's sentence consists of our cases acknowledging that juvenile offenders are *generally*—though not necessarily in every case—less morally culpable than adults who commit the same crimes. This insight animated our decision in *Thompson v. Oklahoma,* 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), in which we invalidated a capital sentence imposed on a juvenile who had committed his crime under the age of 16. More recently, in *Roper,* 543 U.S. 551, 125 S.Ct. 1183, we extended the prohibition on executions to those who committed their crimes before the age of 18.

[560 U.S. 89]

Both *Thompson* and *Roper* arose in the unique context of the death penalty, a punishment that our Court has recognized "must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' " 543 U.S., at 568, 125 S.Ct. 1183 (quoting *Atkins v. Virginia,* 536 U.S. 304, 319, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)). *Roper* 's prohibition on the juvenile death penalty followed from our conclusion that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." 543 U.S., at 569, 125 S.Ct. 1183. These differences are a lack of maturity and an underdeveloped sense of responsibility, a heightened susceptibility to negative influences and

outside pressures, and the fact that the character of a juvenile is "more transitory" and "less fixed" than that of an adult. *Id.*, at 569–570, 125 S.Ct. 1183. Together, these factors establish the "diminished culpability of juveniles," *id.*, at 571, 125 S.Ct. 1183, and "render suspect any conclusion" that juveniles are among "the worst offenders" for whom the death penalty is reserved, *id.*, at 570, 125 S.Ct. 1183.

Today, the Court views *Roper* as providing the basis for a new categorical rule that juveniles may never receive a sentence of life without parole for nonhomicide crimes. I disagree. In *Roper*, the Court tailored its analysis of juvenile characteristics to the specific question whether juvenile offenders could constitutionally be subject to capital punishment. Our answer that they could not be sentenced to death was based on the explicit conclusion that they "cannot with reliability be classified among the *worst* offenders." *Id.*, at 569, 125 S.Ct. 1183 (emphasis added).

This conclusion does not establish that juveniles can never be eligible for life without parole. A life sentence is of course far less severe than a death sentence, and we have never required that it be imposed only on the very worst offenders, as we have with capital punishment. Treating juvenile life sentences as analogous to capital punishment is at

[560 U.S. 90]

odds with our longstanding view that "the death penalty is different from other punishments in kind

[130 S.Ct. 2039]

rather than degree." *Solem, supra*, at 294, 103 S.Ct. 3001. It is also at odds with *Roper* itself, which drew the line at capital punishment by blessing juvenile sentences that are "less severe than death" despite involving "forfeiture of some of the most basic liberties." 543 U.S., at 573–574, 125 S.Ct. 1183. Indeed, *Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders. *Id.*, at 572, 125 S.Ct. 1183.

But the fact that *Roper* does not support a categorical rule barring life sentences for all juveniles does not mean that a criminal defendant's age is irrelevant to those sentences. On the contrary, our cases establish that the "narrow proportionality" review applicable to noncapital cases itself takes the personal "culpability of the offender" into account in examining whether a given punishment is proportionate to the crime. *Solem, supra*, at 292, 103 S.Ct. 3001. There is no reason why an offender's juvenile status should be excluded from the analysis. Indeed, given *Roper* 's conclusion that juveniles are typically less blameworthy than adults, 543 U.S., at 571, 125 S.Ct. 1183, an offender's juvenile status can play a central role in the inquiry.

Justice THOMAS disagrees with even our limited reliance on *Roper* on the ground that the present case does not involve capital punishment. *Post*, at 2056 (dissenting opinion). That distinction is important—indeed, it underlies our rejection of the categorical rule declared by the Court. But *Roper* 's conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases, and rightly informs the case-specific inquiry I believe to be appropriate here.

In short, our existing precedent already provides a sufficient framework for assessing the concerns outlined by the majority. Not every juvenile receiving a life sentence will prevail under this approach. Not every juvenile should. But all will receive the protection that the Eighth Amendment requires.

[560 U.S. 91]

II

Applying the "narrow proportionality" framework to the particular facts of this case, I conclude that Graham's sentence of life without parole violates the Eighth Amendment.*

A

I begin with the threshold inquiry comparing the gravity of Graham's conduct to the harshness of his penalty. There is no question that the crime for which Graham received his life sentence—armed burglary of a nondomicile with an assault or battery—is "a serious crime deserving serious punishment." *Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). So too is the home invasion robbery that was the basis of Graham's

[130 S.Ct. 2040]

probation violation. But these crimes are certainly less serious than other crimes, such as murder or rape.

As for Graham's degree of personal culpability, he committed the relevant offenses when he was a juvenile—a stage at which, *Roper* emphasized, one's "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." 543 U.S., at 571, 125 S.Ct. 1183. Graham's age places him in a significantly different category from the defendants in *Rummel*, *Harmelin*, and *Ewing*, all of whom committed their crimes as adults. Graham's youth made

[560 U.S. 92]

him relatively more likely to engage in reckless and dangerous criminal activity than an adult; it also likely enhanced his susceptibility to peer pressure. See, *e.g.*, *Roper*, *supra*, at 572, 125 S.Ct. 1183; *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993); *Eddings v. Oklahoma*, 455 U.S. 104, 115–117, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). There is no reason to believe that Graham should be denied the general presumption of diminished culpability that *Roper* indicates should apply to juvenile offenders. If anything, Graham's in-court statements—including his request for a second chance so that he could "do whatever it takes to get to the NFL"—underscore his immaturity. App. 380.

The fact that Graham committed the crimes that he did proves that he was dangerous and deserved to be punished. But it does not establish that he was *particularly* dangerous—at least relative to the murderers and rapists for whom the sentence of life without parole is typically reserved. On the contrary, his lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing noted by the majority, *ante*, at 2018, all suggest that he was markedly less culpable than a typical adult who commits the same offenses.

Despite these considerations, the trial court sentenced Graham to life in prison without the possibility of parole. This is the second-harshest sentence available under our precedents for *any* crime, and the most severe sanction available for a nonhomicide offense. See *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008). Indeed, as the majority notes, Graham's sentence far exceeded the punishment proposed by the Florida Department of Corrections (which suggested a sentence of four years, Brief for Petitioner 20), and the state prosecutors (who asked that he be sentenced to 30 years in prison for the armed burglary, App. 388). No one in Graham's case other than the sentencing judge appears to have believed that Graham deserved to go to prison for life.

Based on the foregoing circumstances, I conclude that there is a strong inference that Graham's sentence of life

[560 U.S. 93]

imprisonment without parole was grossly disproportionate in violation of the Eighth Amendment. I therefore proceed to the next steps of the proportionality analysis.

B

Both intrajurisdictional and interjurisdictional comparisons of Graham's sentence confirm the threshold inference of disproportionality.

Graham's sentence was far more severe than that imposed for similar violations of Florida law, even without taking juvenile status into account. For example, individuals who commit burglary or robbery offenses in Florida receive average sentences of less than 5 years and less than 10 years, respectively. Florida Dept. of Corrections, Annual Report FY 2007–2008: The Guidebook to Corrections in Florida 35. Unsurprisingly, Florida's juvenile

[130 S.Ct. 2041]

criminals receive similarly low sentences—typically less than five years for burglary and less than seven years for robbery. *Id.*, at 36. Graham's life without parole sentence was far more severe than the average sentence imposed on those convicted of murder or manslaughter, who typically receive under 25 years in prison. *Id.*, at 35. As the Court explained in *Solem*, 463 U.S., at 291, 103 S.Ct. 3001, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."

Finally, the inference that Graham's sentence is disproportionate is further validated by comparison to the sentences imposed in other domestic jurisdictions. As the majority opinion explains, Florida is an outlier in its willingness to impose sentences of life without parole on juveniles convicted of nonhomicide crimes. See *ante*, at 2024.

III

So much for Graham. But what about Milagro Cunningham, a 17–year–old who beat and raped an 8–year–old girl before leaving her to die under 197 pounds of rock in a recycling

[560 U.S. 94]

bin in a remote landfill? See Musgrave, Cruel or Necessary? Life Terms for Youths Spur National Debate, Palm Beach Post, Oct. 15, 2009, p. 1A. Or Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12–year–old son? See 3 Sentenced to Life for Gang Rape of Mother, Associated Press, Oct. 14, 2009. The fact that Graham cannot be sentenced to life without parole for his conduct says nothing whatever about these offenders, or others like them who commit nonhomicide crimes far more reprehensible than the conduct at issue here. The Court uses Graham's case as a vehicle to proclaim a new constitutional rule—applicable well beyond the particular facts of Graham's case—that a sentence of life without parole imposed on *any* juvenile for *any* nonhomicide offense is unconstitutional. This categorical conclusion is as unnecessary as it is unwise.

A holding this broad is unnecessary because the particular conduct and circumstances at issue in the case before us are not serious enough to justify Graham's sentence. In reaching this conclusion, there is no need for the Court to decide whether that same sentence would be constitutional if imposed for other more heinous nonhomicide crimes.

A more restrained approach is especially appropriate in light of the Court's apparent recognition that it is perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder. This means that there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders; rather, the constitutionality of such sentences depends on the particular crimes for which

they are imposed. But if the constitutionality of the sentence turns on the particular crime being punished, then the Court should limit its holding to the particular offenses that Graham committed here, and should decline to consider other hypothetical crimes not presented by this case.

[560 U.S. 95]

In any event, the Court's categorical conclusion is also unwise. Most importantly, it ignores the fact that some nonhomicide crimes—like the ones committed by Milagro Cunningham, Nathan Walker, and Jakaris Taylor—are especially heinous or grotesque, and thus may be deserving of more severe punishment.

Those under 18 years old may as a general matter have "diminished" culpability relative to adults who commit the same crimes,

[130 S.Ct. 2042]

*Roper*, 543 U.S., at 571, 125 S.Ct. 1183, but that does not mean that their culpability is always insufficient to justify a life sentence. See generally *Thompson*, 487 U.S., at 853, 108 S.Ct. 2687 (O'Connor, J., concurring in judgment). It does not take a moral sense that is fully developed in every respect to know that beating and raping an 8–year–old girl and leaving her to die under 197 pounds of rocks is horribly wrong. The single fact of being 17 years old would not afford Cunningham protection against life without parole if the young girl had died—as Cunningham surely expected she would—so why should it do so when she miraculously survived his barbaric brutality?

The Court defends its categorical approach on the grounds that a "clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." *Ante*, at 2030. It argues that a case-by-case approach to proportionality review is constitutionally insufficient because courts might not be able "with sufficient accuracy [to] distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Ante*, at 2032.

The Court is of course correct that judges will never have perfect foresight—or perfect wisdom—in making sentencing decisions. But this is true when they sentence adults no less than when they sentence juveniles. It is also true when they sentence juveniles who commit murder no less than when they sentence juveniles who commit other crimes.

[560 U.S. 96]

Our system depends upon sentencing judges applying their reasoned judgment to each case that comes before them. As we explained in *Solem*, the whole enterprise of proportionality review is premised on the "justified" assumption that "courts are competent to judge the gravity of an offense, at least on a relative scale." 463 U.S., at 292, 103 S.Ct. 3001. Indeed, " courts traditionally have made these judgments" by applying "generally accepted criteria" to analyze "the harm caused or threatened to the victim or society, and the culpability of the offender." *Id.*, at 292, 294, 103 S.Ct. 3001.

* * *

Terrance Graham committed serious offenses, for which he deserves serious punishment. But he was only 16 years old, and under our Court's precedents, his youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive. In my view, Graham's age—together with the nature of his criminal activity and the unusual severity of his sentence—tips the constitutional balance. I thus concur in the Court's judgment that Graham's sentence of life without parole violated the Eighth Amendment.

I would not, however, reach the same conclusion in every case involving a juvenile offender. Some crimes are so heinous, and some juvenile offenders so highly culpable, that a sentence of life without parole may be entirely justified under the Constitution. As we have said, "successful challenges" to noncapital sentences under the Eighth Amendment have been—and, in my view, should continue to be—"exceedingly rare." *Rummel,* 445 U.S., at 272, 100 S.Ct. 1133. But Graham's sentence presents the exceptional case that our precedents have recognized will come along. We should grant Graham the relief to which he is entitled under the Eighth Amendment. The Court errs, however, in using this case as a vehicle for unsettling our established jurisprudence and fashioning a categorical rule applicable to far different cases.

[560 U.S. 97]

[130 S.Ct. 2043]

Justice THOMAS, with whom Justice SCALIA joins, and with whom Justice ALITO joins as to Parts I and III, dissenting.

The Court holds today that it is "grossly disproportionate" and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old, unless he has committed a homicide. Although the text of the Constitution is silent regarding the permissibility of this sentencing practice, and although it would not have offended the standards that prevailed at the founding, the Court insists that the standards of American society have evolved such that the Constitution now requires its prohibition.

The news of this evolution will, I think, come as a surprise to the American people. Congress, the District of Columbia, and 37 States allow judges and juries to consider this sentencing practice in juvenile nonhomicide cases, and those judges and juries have decided to use it in the very worst cases they have encountered.

The Court does not conclude that life without parole itself is a cruel and unusual punishment. It instead rejects the judgments of those legislatures, judges, and juries regarding what the Court describes as the "moral" question whether this sentence can ever be "proportionat[e]" when applied to the category of offenders at issue here. *Ante,* at 2021 (internal quotation marks omitted), *ante,* at 2036 (STEVENS, J., concurring).

I am unwilling to assume that we, as members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority.

I respectfully dissent.

I

The Court recounts the facts of Terrance Jamar Graham's case in detail, so only a summary is necessary here. At age

[560 U.S. 98]

16 years and 6 months, Graham and two masked accomplices committed a burglary at a small Florida restaurant, during which one of Graham's accomplices twice struck the restaurant manager on the head with a steel pipe when he refused to turn over money to the intruders. Graham was arrested and charged as an adult. He later pleaded guilty to two offenses, including armed burglary with assault or battery, an offense punishable by life imprisonment under Florida law. Fla. Stat. §§ 810.02(2)(a), 810.02(2)(b) (2007). The trial court withheld adjudication on both counts, however, and sentenced Graham to probation, the first 12 months of which he spent in a county detention facility.

Graham reoffended just six months after his release. At a probation revocation hearing, a judge found by a preponderance of the evidence that, at age 17 years and 11 months, Graham invaded a home with two accomplices and held the homeowner at gunpoint for approximately 30 minutes while his accomplices ransacked the residence. As a result, the judge concluded that Graham had violated his probation and, after additional hearings, adjudicated Graham guilty on both counts arising from the restaurant robbery. The judge imposed the maximum sentence allowed by Florida law on the armed burglary count, life imprisonment without the possibility of parole.

Graham argues, and the Court holds, that this sentence violates the Eighth Amendment's Cruel and Unusual Punishments Clause because a life-without-parole sentence is always "grossly disproportionate" when imposed on a person under 18 who commits any crime short of a homicide.

[130 S.Ct. 2044]

Brief for Petitioner 24; *ante,* at 2028 – 2029.

II

A

The Eighth Amendment, which applies to the States through the Fourteenth, provides that "[e]xcessive bail shall

[560 U.S. 99]

not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It is by now well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous " '*methods* of punishment,' " *Harmelin v. Michigan,* 501 U.S. 957, 979, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J.) (quoting Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Cal. L.Rev. 839, 842 (1969))—specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted, *Baze v. Rees,* 553 U.S. 35, 99, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (THOMAS, J., concurring in judgment). With one arguable exception, see *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910); *Harmelin, supra,* at 990–994, 111 S.Ct. 2680 (opinion of SCALIA, J.) (discussing the scope and relevance of *Weems* ' holding), this Court applied the Clause with that understanding for nearly 170 years after the Eighth Amendment's ratification.

More recently, however, the Court has held that the Clause authorizes it to proscribe not only methods of punishment that qualify as "cruel and unusual," but also any punishment that the Court deems "grossly disproportionate" to the crime committed. *Ante,* at 2022 (internal quotation marks omitted). This latter interpretation is entirely the Court's creation. As has been described elsewhere at length, there is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing. See *Harmelin,* 501 U.S., at 975–985, 111 S.Ct. 2680 (opinion of SCALIA, J.). Here, it suffices to recall just two points. First, the Clause does not expressly refer to proportionality or invoke any synonym for that term, even though the Framers were familiar with the concept, as evidenced by several founding-era state constitutions that required (albeit without defining) proportional punishments. See *id.,* at 977–978, 111 S.Ct. 2680. In addition, the penal statute adopted by the First Congress demonstrates that proportionality in sentencing was not considered

[560 U.S. 100]

a constitutional command.[1] See *id.,* at 980–981, 111 S.Ct. 2680 (noting that the statute prescribed capital punishment for offenses

ranging from " 'run[ning] away with ... goods or merchandise to the value of fifty dollars,' " to "murder on the high seas" (quoting 1 Stat. 114)); see also

[130 S.Ct. 2045]

Preyer, Penal Measures in the American Colonies: An Overview, 26 Am. J. Legal Hist. 326, 348–349, 353 (1982) (explaining that crimes in the late 18th-century colonies generally were punished either by fines, whipping, or public "shaming," or by death, as intermediate sentencing options such as incarceration were not common).

The Court has nonetheless invoked proportionality to declare that capital punishment—though not unconstitutional *per se*—is categorically too harsh a penalty to apply to certain types of crimes and certain classes of offenders. See *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion) (rape of an adult woman); *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (rape of a child); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (felony murder in which the defendant participated in the felony but did not kill or intend to kill); *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion) (juveniles

[560 U.S. 101]

under 16); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (juveniles under 18); *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (mentally retarded offenders). In adopting these categorical proportionality rules, the Court intrudes upon areas that the Constitution reserves to other (state and federal) organs of government. The Eighth Amendment prohibits the government from inflicting a cruel and unusual method of punishment upon a defendant. Other constitutional provisions ensure the defendant's right to fair process before any punishment is imposed. But, as members of today's majority note, "[s]ociety changes," *ante*, at 2037 (STEVENS, J., concurring), and the Eighth Amendment leaves the unavoidably moral question of who "deserves" a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty, the prosecutors who seek it, and the judges and juries that impose it under circumstances they deem appropriate.

The Court has nonetheless adopted categorical rules that shield entire classes of offenses and offenders from the death penalty on the theory that "evolving standards of decency" require this result. *Ante*, at 2021 (internal quotation marks omitted). The Court has offered assurances that these standards can be reliably measured by " 'objective indicia' " of "national consensus," such as state and federal legislation, jury behavior, and (surprisingly, given that we are talking about "national" consensus) international opinion. *Ante*, at 2022 (quoting *Roper*, *supra*, at 572, 125 S.Ct. 1183); see also *ante*, at 2021 – 2025, 2033 – 2034. Yet even assuming that is true, the Framers did not provide for the constitutionality of a particular type of punishment to turn on a "snapshot of American public opinion" taken at the moment a case is decided. *Roper*, *supra*, at 572, 125 S.Ct. 1183 (SCALIA, J., dissenting). By holding otherwise, the Court pretermits in all but one direction the evolution of the standards it describes, thus "calling a constitutional halt to what may well be a pendulum swing in social attitudes," *Thompson*, *supra*, at 869, 108 S.Ct. 2687 (SCALIA, J., dissenting), and "stunt[ing]

[560 U.S. 102]

legislative consideration" of new questions of penal policy as they emerge, *Kennedy*, *supra*, at ––––, 128 S.Ct., at 2665–66 (ALITO, J., dissenting).

But the Court is not content to rely on snapshots of community consensus in any event. *Ante,* at 2026 ("Community consensus, while 'entitled to great weight,' is not itself determinative") (quoting *Kennedy, supra,* at ––––, 128 S.Ct., at 2658). Instead, it reserves the right to reject the evidence of consensus it finds whenever its own "independent judgment" points in a

[130 S.Ct. 2046]

different direction. *Ante,* at 2026. The Court thus openly claims the power not only to approve or disapprove of democratic choices in penal policy based on evidence of how society's standards *have* evolved, but also on the basis of the Court's "independent" perception of how those standards *should* evolve, which depends on what the Court concedes is " ' "necessarily ... a moral judgment" ' " regarding the propriety of a given punishment in today's society. *Ante,* at 2021 (quoting *Kennedy, supra,* at ––––, 128 S.Ct., at 2645).

The categorical proportionality review the Court employs in capital cases thus lacks a principled foundation. The Court's decision today is significant because it does not merely apply this standard—it remarkably expands its reach. For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone.

B

Until today, the Court has based its categorical proportionality rulings on the notion that the Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are "most deserving of execution." *Atkins, supra,* at 319, 122 S.Ct. 2242; see *Roper, supra,* at 572, 125 S.Ct. 1183; *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Of course, the Eighth Amendment itself makes no

[560 U.S. 103]

distinction between capital and noncapital sentencing, but the " 'bright line' " the Court drew between the two penalties has for many years served as the principal justification for the Court's willingness to reject democratic choices regarding the death penalty. See *Rummel v. Estelle,* 445 U.S. 263, 275, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980).

Today's decision eviscerates that distinction. "Death is different" no longer. The Court now claims not only the power categorically to reserve the "most severe punishment" for those the Court thinks are " 'the most deserving of execution,' " *Roper,* 543 U.S., at 568, 125 S.Ct. 1183 (quoting *Atkins,* 536 U.S., at 319, 122 S.Ct. 2242), *but also* to declare that "less culpable" persons are categorically exempt from the "*second* most severe penalty." *Ante,* at 2028 (emphasis added). No reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law's third, fourth, fifth, or fiftieth most severe penalties as well.

The Court's departure from the "death is different" distinction is especially mystifying when one considers how long it has resisted crossing that divide. Indeed, for a time the Court declined to apply proportionality principles to noncapital sentences at all, emphasizing that "a sentence of death differs in kind from any sentence of imprisonment, *no matter how long*." *Rummel,* 445 U.S., at 272, 100 S.Ct. 1133 (emphasis added). Based on that rationale, the Court found that the excessiveness of one prison term as compared to another was "properly within the province of legislatures, not courts," *id.,* at 275–276, 100 S.Ct. 1133, precisely because it involved an "*invariably ... subjective determination,* there being no clear way to make 'any constitutional distinction between one term of years and a

shorter or longer term of years,' " *Hutto v. Davis*, 454 U.S. 370, 373, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) *(per curiam)* (quoting *Rummel*, *supra*, at 275, 100 S.Ct. 1133; emphasis added).

Even when the Court broke from that understanding in its 5–to–4 decision in

[130 S.Ct. 2047]

*Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (striking

[560 U.S. 104]

down as "grossly disproportionate" a life-without-parole sentence imposed on a defendant for passing a worthless check), the Court did so only as applied to the facts of that case; it announced no categorical rule. *Id.*, at 288, 303, 103 S.Ct. 3001. Moreover, the Court soon cabined *Solem* 's rationale. The controlling opinion in the Court's very next noncapital proportionality case emphasized that principles of federalism require substantial deference to legislative choices regarding the proper length of prison sentences. *Harmelin*, 501 U.S., at 999, 111 S.Ct. 2680 (opinion of KENNEDY, J.) ("[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure"); *id.*, at 1000, 111 S.Ct. 2680 ("[D]iffering attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes"). That opinion thus concluded that "*successful* challenges to the proportionality of [prison] sentences [would be] exceedingly rare." *Id.*, at 1001, 111 S.Ct. 2680 (internal quotation marks omitted).

They have been rare indeed. In the 28 years since *Solem*, the Court has considered just three such challenges and has rejected them all, see *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003); *Harmelin*, *supra*, largely on the theory that criticisms of the "wisdom, cost-efficiency, and effectiveness" of term-of-years prison sentences are "appropriately directed at the legislature[s]," not the courts, *Ewing*, *supra*, at 27, 28, 123 S.Ct. 1179 (plurality opinion). The Court correctly notes that those decisions were "closely divided," *ante*, at 2022, but so was *Solem* itself, and it is now fair to describe *Solem* as an outlier.[2]

[560 U.S. 105]

Remarkably, the Court today does more than return to *Solem* 's case-by-case proportionality standard for noncapital sentences; it hurtles past it to impose a *categorical* proportionality rule banning life-without-parole sentences not just in this case, but in *every* case involving a juvenile nonhomicide offender, no matter what the circumstances. Neither the Eighth Amendment nor the Court's precedents justify this decision.

III

The Court asserts that categorical proportionality review is necessary here merely because Graham asks for a categorical rule, see *ante*, at 2022 – 2023, and because the Court thinks clear lines are a good idea, see *ante*, at 2030 – 2031. I find those factors wholly insufficient to justify the Court's break from past practice. First, the Court fails to acknowledge that a petitioner seeking to exempt an entire category of offenders from a sentencing practice carries a much heavier burden than one

[130 S.Ct. 2048]

seeking case-specific relief under *Solem*. Unlike the petitioner in *Solem*, Graham must establish not only that his own life-without-parole sentence is "grossly disproportionate," but also that such a sentence is always grossly disproportionate whenever it is applied to a

juvenile nonhomicide offender, no matter how heinous his crime. Cf. *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Second, even applying the Court's categorical "evolving standards" test, neither objective evidence of national consensus nor the notions of culpability on which the Court's "independent judgment" relies can justify the categorical rule it declares here.

[560 U.S. 106]

A

According to the Court, proper Eighth Amendment analysis "begins with objective indicia of national consensus,"[3] and "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," *ante*, at 2023 (internal quotation marks omitted). As such, the analysis should end quickly, because a national "consensus" in favor of the Court's result simply does not exist. The laws of all 50 States, the Federal Government, and the District of Columbia provide that juveniles over a certain age may be tried in adult court if charged with certain crimes.[4] See *ante*, at 2034 – 2036 (appendix to opinion of the Court). Forty-five States, the Federal Government, and the District of Columbia expose juvenile offenders charged

[560 U.S. 107]

in adult court to the very same range of punishments faced by adults charged with the same crimes. See *ante*, at 2034 – 2035, Part I. Eight of those States do not make life-without-parole sentences available for any nonhomicide offender, regardless of age.[5] All remaining jurisdictions—the Federal Government, the other 37 States,

[130 S.Ct. 2049]

and the District—authorize life-without-parole sentences for certain nonhomicide offenses, and authorize the imposition of such sentences on persons under 18. See *ibid*. Only *five* States prohibit juvenile offenders from receiving a life-without-parole sentence that could be imposed on an adult convicted of the same crime.[6]

No plausible claim of a consensus against this sentencing practice can be made in light of this overwhelming legislative evidence. The sole fact that federal law authorizes this practice singlehandedly refutes the claim that our Nation finds it morally repugnant. The additional reality that 37 out of 50 States (a supermajority of 74%) permit the practice makes the claim utterly implausible. Not only is there no consensus against this penalty, there is a clear legislative consensus *in favor* of its availability.

Undaunted, however, the Court brushes this evidence aside as "incomplete and unavailing," declaring that " '[t]here

[560 U.S. 108]

are measures of consensus other than legislation.' " *Ante*, at 2023 (quoting *Kennedy*, 554 U.S., at ––––, 128 S.Ct., at 2657). This is nothing short of stunning. Most importantly, federal civilian law approves this sentencing practice.[7] And although the Court has never decided how many state laws are necessary to show consensus, the Court has never banished into constitutional exile a sentencing practice that the laws of a majority, let alone a supermajority, of States expressly permit.[8]

Moreover, the consistency and direction of recent legislation—a factor the Court previously has relied upon when crafting

[130 S.Ct. 2050]

categorical proportionality rules, see *Atkins*, 536 U.S., at 315–316, 122 S.Ct. 2242; *Roper*, 543 U.S., at 565–566, 125 S.Ct. 1183—underscores

[560 U.S. 109]

the consensus*against* the rule the Court announces here. In my view, the Court cannot point to a national consensus in favor of its rule without assuming a consensus in favor of the two penological points it later discusses: (1) Juveniles are always less culpable than similarly-situated adults, and (2) juveniles who commit nonhomicide crimes should always receive an opportunity to demonstrate rehabilitation through parole. *Ante,* at 2026, 2029 – 2030. But legislative trends make that assumption untenable.

First, States over the past 20 years have consistently *increased* the severity of punishments for juvenile offenders. See 1999 DOJ National Report 89 (referring to the 1990's as "a time of unprecedented change as State legislatures crack[ed] down on juvenile crime"); *ibid.* (noting that, during that period, "legislatures in 47 States and the District of Columbia enacted laws that made their juvenile justice systems more punitive," principally by "ma[king] it easier to transfer juvenile offenders from the juvenile justice system to the [adult] criminal justice system"); *id.*, at 104. This, in my view, reveals the States' widespread agreement that juveniles can sometimes act with the same culpability as adults and that the law should permit judges and juries to consider adult sentences—including life without parole—in those rare and unfortunate cases. See Feld, Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences, 10 J. Law & Family Studies 11, 69–70 (2007) (noting that life-without-parole sentences for juveniles have increased since the 1980's); Amnesty International & Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 2, 31 (2005) (same).

Second, legislatures have moved away from parole over the same period. Congress abolished parole for federal offenders in 1984 amid criticism that it was subject to "gamesmanship and cynicism," Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sentencing Rep. 180 (1999) (discussing the Sentencing Reform Act of 1984, 98 Stat.

[560 U.S. 110]

1987), and several States have followed suit, see T. Hughes, D. Wilson, & A. Beck, Dept. of Justice, Bureau of Justice Statistics, Trends in State Parole, 1990–2000, p. 1 (2001) (noting that, by the end of 2000, 16 States had abolished parole for all offenses, while another 4 States had abolished it for certain ones). In light of these developments, the argument that there is nationwide consensus that parole must be available to offenders less than 18 years old in *every* nonhomicide case simply fails.

B

The Court nonetheless dismisses existing legislation, pointing out that life-without-parole sentences are rarely imposed on juvenile nonhomicide offenders—123 times in recent memory[9] by the Court's calculation, spread out across 11 States.[10] *Ante,* at 2023 – 2024. Based on this rarity of use,

[560 U.S. 111]

the Court proclaims a consensus against the practice, implying that laws allowing it either reflect the consensus of a prior, less civilized time or are the work of legislatures tone-deaf to moral values of their constituents that this

[130 S.Ct. 2051]

Court claims to have easily discerned from afar. See *ante,* at 2023.

This logic strains credulity. It has been rejected before. *Gregg v. Georgia,* 428 U.S. 153, 182, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("[T]he relative infrequency of jury verdicts imposing the death sentence does

not indicate rejection of capital punishment *per se*. Rather, [it] ... may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases"). It should also be rejected here. That a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that—rarely imposed. It is not proof that the punishment is one the Nation abhors.

The Court nonetheless insists that the 26 States that authorize this penalty, but are not presently incarcerating a juvenile nonhomicide offender on a life-without-parole sentence, cannot be counted as approving its use. The mere fact that the laws of a jurisdiction permit this penalty, the Court explains, "does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration." *Ante*, at 2026.

But this misapplies the Court's own evolving standards test, "[i]t is not the burden of [a State] to establish a national consensus *approving* what their citizens have voted to do; rather, it is the 'heavy burden' of petitioners to establish a national consensus *against* it." *Stanford v. Kentucky*, 492 U.S. 361, 373, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (quoting *Gregg*, *supra*, at 175, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.); some emphasis added). In light of this fact, the Court is wrong to equate a jurisdiction's disuse of a

[560 U.S. 112]

legislatively authorized penalty with its moral opposition to it. The fact that the laws of a jurisdiction permit this sentencing practice demonstrates, at a minimum, that the citizens of that jurisdiction find tolerable the possibility that a jury of their peers could impose a life-without-parole sentence on a juvenile whose nonhomicide crime is sufficiently depraved.

The recent case of 16–year–old Keighton Budder illustrates this point. Just weeks before the release of this opinion, an Oklahoma jury sentenced Budder to life without parole after hearing evidence that he viciously attacked a 17–year–old girl who gave him a ride home from a party. See Stogsdill, Teen Gets Life Terms in Stabbing, Rape Case, Tulsa World, Apr. 2, 2010, p. A10; Stogsdill, Delaware County Teen Sentenced in Rape, Assault Case, Tulsa World, May 4, 2010, p. A12. Budder allegedly put the girl's head " 'into a headlock and sliced her throat,' " raped her, stabbed her about 20 times, beat her, and pounded her face into the rocks alongside a dirt road. Teen Gets Life Terms in Stabbing, Rape Case, at A10. Miraculously, the victim survived. *Ibid.*

Budder's crime was rare in its brutality. The sentence the jury imposed was also rare. According to the study relied upon by this Court, Oklahoma had no such offender in its prison system before Budder's offense. P. Annino, D. Rasmussen,

[130 S.Ct. 2052]

& C. Rice, Juvenile Life Without Parole for Non–Homicide Offenses: Florida Compared to Nation 2, 14 (Sept. 14, 2009) (Table A). Without his conviction, therefore, the Court would have counted Oklahoma's citizens as morally opposed to life-without-parole sentences for juveniles nonhomicide offenders.

Yet Oklahoma's experience proves the inescapable flaw in that reasoning: Oklahoma citizens have enacted laws that allow Oklahoma juries to consider life-without-parole sentences in juvenile nonhomicide cases. Oklahoma juries invoke those laws rarely—in the unusual cases that they find exceptionally depraved. I cannot agree with the Court that

[560 U.S. 113]

Oklahoma citizens should be constitutionally disabled from using this sentencing practice merely because they have not done so more frequently. If anything, the rarity of this penalty's use underscores just how judicious sentencing judges and juries across the country have been in invoking it.

This fact is entirely consistent with the Court's intuition that juveniles *generally* are less culpable and more capable of growth than adults. See *infra*, at 2028 – 2029. Graham's own case provides another example. Graham was statutorily eligible for a life-without-parole sentence after his first crime. But the record indicates that the trial court did not give such a sentence serious consideration at Graham's initial plea hearing. It was only after Graham subsequently violated his parole by invading a home at gunpoint that the maximum sentence was imposed.

In sum, the Court's calculation that 123 juvenile nonhomicide life-without-parole sentences have been imposed nationwide in recent memory, even if accepted, hardly amounts to strong evidence that the sentencing practice offends our common sense of decency.[11]

[130 S.Ct. 2053]

[560 U.S. 114]

Finally, I cannot help but note that the statistics the Court finds inadequate to justify the penalty in this case are stronger than those supporting at least one other penalty this Court has upheld. Not long ago, this Court, joined by the author of today's opinion, upheld the application of the death penalty against a 16–year–old, despite the fact that no such punishment had been carried out on a person of that age in this country in nearly 30 years. See *Stanford*, 492 U.S., at 374, 109 S.Ct. 2969. Whatever the statistical frequency with which life-without-parole sentences have been imposed on juvenile nonhomicide offenders in the last 30 years, it is surely greater than zero.

In the end, however, objective factors such as legislation and the frequency of a penalty's use are merely ornaments in the Court's analysis, window dressing that accompanies its judicial fiat.[12] By the Court's own decree, "[c]ommunity

[560 U.S. 115]

consensus ... is not itself determinative." *Ante*, at 2026. Only the independent moral judgment of this Court is sufficient to decide the question. See *ibid.*

C

Lacking any plausible claim to consensus, the Court shifts to the heart of its argument: its "independent judgment" that this sentencing practice does not "serv[e] legitimate penological goals." *bid*. The Court begins that analysis with the obligatory preamble that " '[t]he Eighth Amendment does not mandate adoption of any one penological theory,' " *ante*, at 2028 (quoting *Harmelin*, 501 U.S., at 999, 111 S.Ct. 2680 (opinion of KENNEDY, J.)), then promptly mandates the adoption of the theories the Court deems best.

First, the Court acknowledges that, at a minimum, the imposition of life-without-parole sentences on juvenile nonhomicide offenders serves two "legitimate" penological goals: incapacitation and deterrence. *Ante*, at 2028 – 2029. By definition, such sentences serve the goal of incapacitation by ensuring that juvenile offenders who commit armed burglaries, or those who commit the types of grievous sex crimes described by THE CHIEF JUSTICE, no longer threaten their communities. See *ante*, at 2041 (opinion concurring in judgment). That should settle the matter, since the Court acknowledges

[560 U.S. 116]

that incapacitation is an "important" penological goal. *Ante*, at 2029. Yet, the Court finds this goal "*inadequate* " to justify the life-

without-parole sentences here. *Ante,* at 2029 (emphasis added). A similar fate befalls deterrence. The Court acknowledges that such sentences will deter future juvenile

[130 S.Ct. 2054]

offenders, at least to some degree, but rejects that penological goal, not as illegitimate, but as insufficient. *Ante,* at 2029 ("[A]ny limited deterrent effect provided by life without parole is *not enough* to justify the sentence." (emphasis added)).

The Court looks more favorably on rehabilitation, but laments that life-without-parole sentences do little to promote this goal because they result in the offender's permanent incarceration. *Ante,* at 2029 – 2030. Of course, the Court recognizes that rehabilitation's "utility and proper implementation" are subject to debate. *Ante,* at 2030. But that does not stop it from declaring that a legislature may not "forswea[r] ... the rehabilitative ideal." *Ibid.* In other words, the Eighth Amendment does not mandate "any one penological theory," *ante,* at 2028 (internal quotation marks omitted), just one the Court approves.

Ultimately, however, the Court's "independent judgment" and the proportionality rule itself center on retribution—the notion that a criminal sentence should be proportioned to " 'the personal culpability of the criminal offender.' " *Ante,* at 2026, 2028 (quoting *Tison v. Arizona,* 481 U.S. 137, 149, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)). The Court finds that retributive purposes are not served here for two reasons.

1

First, quoting *Roper,* 543 U.S., at 569–570, 125 S.Ct. 1183, the Court concludes that juveniles are less culpable than adults because, as compared to adults, they "have a ' "lack of maturity and an underdeveloped sense of responsibility," ' " and "their characters are 'not as well formed.' " *Ante,* at 2026. As a general matter, this statement is entirely consistent with the

[560 U.S. 117]

evidence recounted above that judges and juries impose the sentence at issue quite infrequently, despite legislative authorization to do so in many more cases. See Part III–B, *supra*. Our society tends to treat the average juvenile as less culpable than the average adult. But the question here does not involve the average juvenile. The question, instead, is whether the Constitution prohibits judges and juries from *ever* concluding that an offender under the age of 18 has demonstrated sufficient depravity and incorrigibility to warrant his permanent incarceration.

In holding that the Constitution imposes such a ban, the Court cites "developments in psychology and brain science" indicating that juvenile minds "continue to mature through late adolescence," *ante,* at 2026 (citing Brief for American Medical Association et al. as *Amici Curiae* 16–24; Brief for American Psychological Association et al. as Amici *Curiae* 22–27 (hereinafter APA Brief)), and that juveniles are "more likely [than adults] to engage in risky behaviors," *id.,* at 7. But even if such generalizations from social science were relevant to constitutional rulemaking, the Court misstates the data on which it relies.

The Court equates the propensity of a fairly substantial number of youths to engage in "risky" or antisocial behaviors with the propensity of a much smaller group to commit violent crimes. *Ante,* at 2031. But research relied upon by the *amici* cited in the Court's opinion differentiates between adolescents for whom antisocial behavior is a fleeting symptom and those for whom it is a lifelong pattern. See Moffitt, Adolescence–Limited and Life–Course–Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychological Rev. 674, 678 (1993) (cited in APA Brief 8, 17, 20) (distinguishing between

adolescents who are "antisocial only during adolescence" and a smaller group who engage in antisocial behavior "at every life stage" despite "drift[ing] through successive systems aimed at curbing their deviance"). That research further suggests

[130 S.Ct. 2055]

that the pattern of behavior in the

[560 U.S. 118]

latter group often sets in before 18. See Moffitt, *supra,* at 684 ("The well-documented resistance of antisocial personality disorder to treatments of all kinds seems to suggest that the life-course-persistent style is fixed sometime before age 18"). And, notably, it suggests that violence itself is evidence that an adolescent offender's antisocial behavior is *not* transient. See Moffitt, A Review of Research on the Taxonomy of Life–Course Persistent Versus Adolescence–Limited Antisocial Behavior, in Taking Stock: the Status of Criminological Theory 277, 292–293 (F. Cullen, J. Wright, & K. Blevins eds.2006) (observing that "life-course persistent" males "tended to specialize in serious offenses (carrying a hidden weapon, assault, robbery, violating court orders), whereas adolescence-limited" ones "specialized in non-serious offenses (theft less than $5, public drunkenness, giving false information on application forms, pirating computer software, etc.)").

In sum, even if it were relevant, none of this psychological or sociological data is sufficient to support the Court's " 'moral' " conclusion that youth defeats culpability in *every* case. *Ante,* at 2026 (quoting *Roper,* 543 U.S., at 570, 125 S.Ct. 1183); see *id.,* at 618, 125 S.Ct. 1183 (SCALIA, J., dissenting); R. Epstein, The Case Against Adolescence 171 (2007) (reporting on a study of juvenile reasoning skills and concluding that "most teens are capable of conventional, adult-like moral reasoning").

The Court responds that a categorical rule is nonetheless necessary to prevent the " 'unacceptable likelihood' " that a judge or jury, unduly swayed by " 'the brutality or cold-blooded nature' " of a juvenile's nonhomicide crime, will sentence him to a life-without-parole sentence for which he possesses " 'insufficient culpability,' " *ante,* at 2032 (quoting *Roper, supra,* at 572, 125 S.Ct. 1183). I find that justification entirely insufficient. The integrity of our criminal justice system depends on the ability of citizens to stand between the defendant and an outraged public and dispassionately determine his guilt and the proper amount of punishment based on the evidence

[560 U.S. 119]

presented. That process necessarily admits of human error. But so does the process of judging in which we engage. As between the two, I find far more "unacceptable" that this Court, swayed by studies reflecting the general tendencies of youth, decree that the people of this country are not fit to decide for themselves when the rare case requires different treatment.

2

That is especially so because, in the end, the Court does not even believe its pronouncements about the juvenile mind. If it did, the categorical rule it announces today would be most peculiar because it leaves intact state and federal laws that permit life-without-parole sentences for juveniles who commit homicides. See *ante,* at 2029 – 2030. The Court thus acknowledges that there is nothing inherent in the psyche of a person less than 18 that prevents him from acquiring the moral agency necessary to warrant a life-without-parole sentence. Instead, the Court rejects overwhelming legislative consensus only on the question of which *acts* are sufficient to demonstrate that moral agency.

The Court is quite willing to accept that a 17–year–old who pulls the trigger on a firearm can demonstrate sufficient depravity and irredeemability to be denied reentry into society, but insists that a 17–year–old who rapes an 8–year–old and leaves her for dead does not. See *ante,* at 2026 – 2028; cf. *ante,* at 2041 (ROBERTS, C.J., concurring in judgment) (describing the crime of life-without-parole offender Milagro Cunningham). Thus, the Court's

[130 S.Ct. 2056]

conclusion that life-without-parole sentences are "grossly disproportionate" for juvenile nonhomicide offenders in fact has very little to do with its view of juveniles, and much more to do with its perception that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Ante,* at 2027.

[560 U.S. 120]

That the Court is willing to impose such an exacting constraint on democratic sentencing choices based on such an untestable philosophical conclusion is remarkable. The question of what acts are "deserving" of what punishments is bound so tightly with questions of morality and social conditions as to make it, almost by definition, a question for legislative resolution. It is true that the Court previously has relied on the notion of proportionality in holding certain classes of offenses categorically exempt from capital punishment. See *supra,* at 2044. But never before today has the Court relied on its own view of just deserts to impose a categorical limit on the imposition of a lesser punishment. Its willingness to cross that well-established boundary raises the question whether any democratic choice regarding appropriate punishment is safe from the Court's ever-expanding constitutional veto.

IV

Although the concurrence avoids the problems associated with expanding categorical proportionality review to noncapital cases, it employs noncapital proportionality analysis in a way that raises the same fundamental concern. Although I do not believe *Solem* merits *stare decisis* treatment, Graham's claim cannot prevail even under that test (as it has been limited by the Court's subsequent precedents). *Solem* instructs a court first to compare the "gravity" of an offender's conduct to the "harshness of the penalty" to determine whether an "inference" of gross disproportionality exists. 463 U.S., at 290–291, 103 S.Ct. 3001. Only in "the rare case" in which such an inference is present should the court proceed to the "objective" part of the inquiry—an intra– and interjurisdictional comparison of the defendant's sentence with others similarly situated. *Harmelin,* 501 U.S., at 1000, 1005, 111 S.Ct. 2680 (opinion of KENNEDY, J.).

[560 U.S. 121]

Under the Court's precedents, I fail to see how an "inference" of gross disproportionality arises here. The concurrence notes several arguably mitigating facts—Graham's "lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing." *Ante,* at 2040 (ROBERTS, C.J., concurring in judgment). But the Court previously has upheld a life-without-parole sentence imposed on a first-time offender who committed a *nonviolent* drug crime. See *Harmelin, supra,* at 1002–1004, 111 S.Ct. 2680. Graham's conviction for an actual violent felony is surely more severe than that offense. As for Graham's age, it is true that *Roper* held juveniles categorically ineligible for capital punishment, but as the concurrence explains, *Roper* was based on the " explicit conclusion that [juveniles] 'cannot with reliability be classified among the *worst* offenders' "; it did "not establish that juveniles can never be eligible for life without parole." *Ante,* at 2039 (ROBERTS, C.J., concurring in judgment) (quoting *Roper,* 543 U.S., at 569,

125 S.Ct. 1183 (emphasis added in opinion of ROBERTS, C.J.)). In my view, *Roper* 's principles are thus not generally applicable outside the capital sentencing context.

By holding otherwise, the concurrence relies on the same type of subjective judgment as the Court, only it restrains itself to a case-by-case rather than a categorical ruling. The concurrence is quite ready to

[130 S.Ct. 2057]

hand Graham "the general presumption of diminished culpability" for juveniles, *ante,* at 2040, apparently because it believes that Graham's armed burglary and home invasion crimes were "certainly less serious" than murder or rape, *ibid.* It recoils only from the prospect that the Court would extend the same presumption to a juvenile who commits a sex crime. See *ante,* at 2041. I simply cannot accept that these subjective judgments of proportionality are ones the Eighth Amendment authorizes us to make.

The "objective" elements of the *Solem* test provide no additional support for the concurrence's conclusion. The concurrence compares Graham's sentence to "similar" sentences

[560 U.S. 122]

in Florida and concludes that Graham's sentence was "far more severe." *Ante,* at 2040 (ROBERTS, C.J., concurring in judgment). But strangely, the concurrence uses average sentences for burglary or robbery offenses as examples of "similar" offenses, even though it seems that a run-of-the-mill burglary or robbery is not at all similar to Graham's criminal history, which includes a charge for armed burglary with assault, *and* a probation violation for invading a home at gunpoint.

And even if Graham's sentence is higher than ones he might have received for an armed burglary with assault in other jurisdictions, see *ante,* at 2041, this hardly seems relevant if one takes seriously the principle that " '[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will *always* bear the distinction of treating particular offenders more severely than any other State.' " *Harmelin, supra,* at 1000, 111 S.Ct. 2680 (opinion of KENNEDY, J.) (quoting *Rummel,* 445 U.S., at 282, 100 S.Ct. 1133; emphasis added). Applying *Solem,* the Court has upheld a 25–years–to–life sentence for theft under California's recidivist statute, despite the fact that the State and its *amici* could cite only "a single instance of a similar sentence imposed outside the context of California's three strikes law, out of a prison population [then] approaching two million individuals." *Ewing,* 538 U.S., at 47, 123 S.Ct. 1179 (BREYER, J., dissenting). It has also upheld a life-without-parole sentence for a first-time drug offender in Michigan charged with possessing 672 grams of cocaine despite the fact that only one other State would have authorized such a stiff penalty for a first-time drug offense, and even that State required a far greater quantity of cocaine (10 kilograms) to trigger the penalty. See *Harmelin, supra,* at 1026, 111 S.Ct. 2680 (White, J., dissenting). Graham's sentence is certainly less rare than the sentences upheld in these cases, so his claim fails even under *Solem*.

* * *

[560 U.S. 123]

Both the Court and the concurrence claim their decisions to be narrow ones, but both invite a host of line-drawing problems to which courts must seek answers beyond the strictures of the Constitution. The Court holds that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," but must provide the offender with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Ante,* at 2030. But what, exactly, does such a "meaningful" opportunity entail? When must

it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years.[13]

[130 S.Ct. 2058]

V

The ultimate question in this case is not whether a life-without-parole sentence 'fits' the crime at issue here or the crimes of juvenile nonhomicide offenders more generally, but to whom the Constitution assigns that decision. The Florida Legislature has concluded that such sentences should be available for persons under 18 who commit certain crimes, and the trial judge in this case decided to impose that legislatively authorized sentence here. Because a life-without-parole prison sentence is not a "cruel and unusual" method

[560 U.S. 124]

of punishment under any standard, the Eighth Amendment gives this Court no authority to reject those judgments.

It would be unjustifiable for the Court to declare otherwise even if it could claim that a bare majority of state laws supported its independent moral view. The fact that the Court categorically prohibits life-without-parole sentences for juvenile nonhomicide offenders in the face of an overwhelming legislative majority *in favor* of leaving that sentencing option available under certain cases simply illustrates how far beyond any cognizable constitutional principle the Court has reached to ensure that its own sense of morality and retributive justice pre-empts that of the people and their representatives.

I agree with Justice STEVENS that "[w]e learn, sometimes, from our mistakes." *Ante,* at 2036 (concurring opinion). Perhaps one day the Court will learn from this one.

I respectfully dissent.

Justice ALITO, dissenting.

I join Parts I and III of Justice THOMAS's dissenting opinion. I write separately to make two points.

*First,* the Court holds only that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of *life without parole*." *Ante,* at 2030 (emphasis added). Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole "probably" would be constitutional. Tr. of Oral Arg. 6–7; see also *ante,* at 2057, n. 12 (THOMAS, J., dissenting).

*Second,* the question whether petitioner's sentence violates the narrow, as-applied proportionality principle that applies to noncapital sentences is not properly before us in this case. Although petitioner asserted an as-applied proportionality challenge to his sentence before the Florida courts, see 982 So.2d 43, 51–53 (Fla.App.2008), he did not include

[560 U.S. 125]

an as-applied claim in his petition for certiorari or in his merits briefs before this Court. Instead, petitioner argued for only a categorical rule banning the imposition of life without parole on *any* juvenile convicted of a nonhomicide offense. Because petitioner abandoned his as-applied claim, I would not reach that issue. See this Court's Rule 14.1(a);

[130 S.Ct. 2059]

*Yee v. Escondido,* 503 U.S. 519, 534–538, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

---

Notes:

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

[*] When issued, the Court's opinion relied on a report from the BOP stating that there are six juvenile nonhomicide offenders serving life without parole in the federal system. The Acting Solicitor General subsequently informed the Court that further review revealed that none of the six prisoners referred to in the earlier BOP report is serving a life without parole sentence solely for a juvenile nonhomicide crime completed before the age of 18. Letter from Neal Kumar Katyal, Acting Solicitor General, to William K. Suter, Clerk of Court (May 24, 2010) (available in Clerk of Court's case file). The letter further stated that the Government was not aware of any other federal prisoners serving life without parole sentences solely for juvenile nonhomicide crimes. *Ibid.* The opinion was amended in light of this new information.

[*] Justice ALITO suggests that Graham has failed to preserve any challenge to his sentence based on the "narrow, as-applied proportionality principle." *Post*, at 2058 (dissenting opinion). I disagree. It is true that Graham asks us to declare, categorically, that no juvenile convicted of a nonhomicide offense may ever be subject to a sentence of life without parole. But he claims that this rule is warranted under the narrow proportionality principle we set forth in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), and *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). Brief for Petitioner 30, 31, 54–64. Insofar as he relies on that framework, I believe we may do so as well, even if our analysis results in a narrower holding than the categorical rule Graham seeks. See also Reply Brief for Petitioner 15, n. 8 ("[T]he Court could rule narrowly in this case and hold only that petitioner's sentence of life without parole was unconstitutionally disproportionate").

[1] THE CHIEF JUSTICE's concurrence suggests that it is unnecessary to remark on the underlying question whether the Eighth Amendment requires proportionality in sentencing because "[n]either party here asks us to reexamine our precedents" requiring "proportionality between noncapital offenses and their corresponding punishments." *Ante*, at 2037 (opinion concurring in judgment). I disagree. Both the Court and the concurrence do more than apply existing noncapital proportionality precedents to the particulars of Graham's claim. The Court radically departs from the framework those precedents establish by applying to a noncapital sentence the categorical proportionality review its prior decisions have reserved for death penalty cases alone. See Part III, *infra*. The concurrence, meanwhile, breathes new life into the case-by-case proportionality approach that previously governed noncapital cases, from which the Court has steadily, and wisely, retreated since *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). See Part IV, *infra*. In dissenting from both choices to expand proportionality review, I find it essential to reexamine the foundations on which that doctrine is built.

[2] Courts and commentators interpreting this Court's decisions have reached this conclusion. See, *e.g.*, *United States v. Polk*, 546 F.3d 74, 76 (C.A.1 2008) ("[I]nstances of gross disproportionality [in noncapital cases] will be hen's-teeth rare"); Barkow, The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity, 107 Mich. L.Rev. 1145, 1160 (2009) ("*Solem* now stands as an outlier"); Note, The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law, 104 Colum. L.Rev. 426, 445 (2004) (observing that outside of the capital context, "proportionality review has been virtually dormant"); Steiker & Steiker,

Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly, 11 U. Pa. J. Const. L. 155, 184 (2009) ("Eighth Amendment challenges to excessive incarceration [are] essentially non-starters").

[3] The Court ignores entirely the threshold inquiry of whether subjecting juvenile offenders to adult penalties was one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). As the Court has noted in the past, however, the evidence is clear that, at the time of the Founding, "the common law set a rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted [even] capital punishment to be imposed on anyone over the age of 7." *Stanford v. Kentucky*, 492 U.S. 361, 368, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (citing 4 W. Blackstone, Commentaries *23–*24; 1 M. Hale, Pleas of the Crown 24–29 (1800)). It thus seems exceedingly unlikely that the imposition of a life-without-parole sentence on a person of Graham's age would run afoul of those standards.

[4] Although the details of state laws vary extensively, they generally permit the transfer of a juvenile offender to adult court through one or more of the following mechanisms: (1) judicial waiver, in which the juvenile court has the authority to waive jurisdiction over the offender and transfer the case to adult court; (2) concurrent jurisdiction, in which adult and juvenile courts share jurisdiction over certain cases and the prosecutor has discretion to file in either court; or (3) statutory provisions that exclude juveniles who commit certain crimes from juvenile-court jurisdiction. See Dept. of Justice, Juvenile Offenders and Victims: 1999 National Report 89, 104 (1999) (hereinafter 1999 DOJ National Report); Feld, Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences, 10 J. Law & Family Studies 11, 38–39 (2007).

[5] Alaska entitles all offenders to parole, regardless of their crime. Alaska Stat. § 12.55.015(g) (2008). The other seven States provide parole eligibility to all offenders, except those who commit certain homicide crimes. Conn. Gen.Stat. § 53a–35a (2009); Haw.Rev.Stat. §§ 706–656(1)–(2) (1993 and 2008 Supp. Pamphlet); Me.Rev.Stat. Ann., Tit. 17–a, § 1251 (2006); Mass. Gen. Laws Ann., ch. 265, § 2 (West 2008); N.J. Stat. Ann. §§ 2C:11–3(b)(2)–(3) (West 2005); N.M. Stat. Ann. § 31–18–14 (Supp.2009); Vt. Stat. Ann., Tit. 13, § 2303 (2009).

[6] Colo.Rev.Stat. Ann. § 18–1.3–401(4)(b) (2009) (authorizing mandatory life sentence with possibility for parole after 40 years for juveniles convicted of class 1 felonies); Kan. Stat. Ann. §§ 21–4622, 4643 (2007); Ky.Rev.Stat. Ann. § 640.040 (West 2006); *Shepherd v. Commonwealth*, 251 S.W.3d 309, 320–321 (Ky.2008); Mont.Code Ann. § 46–18–222(1) (2009); Tex. Penal Code Ann. § 12.31 (West Supp.2009).

[7] Although the Court previously has dismissed the relevance of the Uniform Code of Military Justice to its discernment of consensus, see *Kennedy v. Louisiana*, 554 U.S. 407, ––––, 128 S.Ct. 2641, ––––, 171 L.Ed.2d 525 (2008) (statement of KENNEDY, J., respecting denial of rehearing), juveniles who enlist in the military are nonetheless eligible for life-without-parole sentences if they commit certain nonhomicide crimes. See 10 U.S.C. §§ 505(a) (permitting enlistment at age 17), 856a, 920 (2006 ed., Supp. II).

[8] *Kennedy v. Louisiana*, 554 U.S., 407, 423, 434, 128 S.Ct., at 2651–52, 2657–58(2008) (prohibiting capital punishment for the rape of a child where only six States had enacted statutes authorizing the punishment since *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) *(per curiam)* ); *Roper v. Simmons*, 543 U.S. 551, 564, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (prohibiting capital punishment for offenders younger than 18 where 18 of 38 death-penalty States

precluded imposition of the penalty on persons under 18 and the remaining 12 States did not permit capital punishment at all); *Atkins v. Virginia*, 536 U.S. 304, 314–315, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (prohibiting capital punishment of mentally retarded persons where 18 of 38 death-penalty States precluded imposition of the penalty on such persons and the remaining States did not authorize capital punishment at all); *Thompson v. Oklahoma*, 487 U.S. 815, 826, 829, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion) (prohibiting capital punishment of offenders under 16 where 18 of 36 death-penalty States precluded imposition of the penalty on such persons and the remaining States did not permit capital punishment at all); *Enmund v. Florida*, 458 U.S. 782, 789, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (prohibiting capital punishment for felony murder without proof of intent to kill where eight States allowed the punishment without proof of that element); *Coker v. Georgia*, 433 U.S. 584, 593, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (holding capital punishment for the rape of a woman unconstitutional where "[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape").

[9] I say "recent memory" because the research relied upon by the Court provides a headcount of juvenile nonhomicide offenders presently incarcerated in this country, but does not provide more specific information about all of the offenders, such as the dates on which they were convicted.

[10] When issued, the Court's opinion relied on a letter the Court had requested from the Bureau of Prisons (BOP), which stated that there were six juvenile nonhomicide offeders then serving life-without-parole sentences in the federal system. After the Court released its opinion, the Acting Solicitor General disputed the BOP's calculations and stated that none of those six offenders was serving a life without parole sentence solely for a juvenile nonhomicide crime completed before the age of 18. See Letter from Neal Kumar Katyal, Acting Solicitor General, U.S. Dept. of Justice, to Clerk of the Supreme Court (May 24, 2010) (available in Clerk of Court's case file) (noting that five of the six inmates were convicted for participation in unlawful conspiracies that began when they were juveniles but continued after they reached the age of 18, and noting that the sixth inmate was convicted of murder as a predicate offense under the Racketeer Influenced and Corrupt Organizations Act). The Court has amended its opinion in light of the Acting Solicitor General's letter. In my view, the inconsistency between the BOP's classification of these six offenders and the Solicitor General's is irrelevant. The fact remains that federal law, and the laws of a supermajority of States, permit this sentencing practice. And, as will be explained, see *infra* this page and 2025-2028, judges and jurors have chosen to impose this sentence in the very worst cases they have encountered.

[11] Because existing legislation plainly suffices to refute any consensus against this sentencing practice, I assume the accuracy of the Court's evidence regarding the frequency with which this sentence has been imposed. But I would be remiss if I did not mention two points about the Court's figures. First, it seems odd that the Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (*e.g.*, 70 or 80 years' imprisonment). It is difficult to argue that a judge or jury imposing such a long sentence—which effectively denies the offender any material opportunity for parole—would express moral outrage at a life-without-parole sentence.

> Second, if objective indicia of consensus were truly important to the Court's analysis, the statistical information presently available would be woefully inadequate to form the basis of an Eighth Amendment rule that can be revoked only by

constitutional amendment. The only evidence submitted to this Court regarding the frequency of this sentence's imposition was a single study completed after this Court granted certiorari in this case. See P. Annino, D. Rasmussen, & C. Rice, Juvenile Life Without Parole for Non–Homicide Offenses: Florida Compared to Nation 2 (Sept. 14, 2009). Although I have no reason to question the professionalism with which this study was conducted, the study itself acknowledges that it was incomplete and the first of its kind. See *id.*, at 1. The Court's questionable decision to "complete" the study on its own does not materially increase its reliability. For one thing, by finishing the study itself, the Court prohibits the parties from ever disputing its findings. Complicating matters further, the original study sometimes relied on third-party data rather than data from the States themselves, see *ibid.;* the study has never been peer reviewed; and specific data on all 123 offenders (age, date of conviction, crime of conviction, etc.), have not been collected, making verification of the Court's headcount impossible. The Court inexplicably blames Florida for all of this. See *ante*, at 2023 – 2024. But as already noted, it is not Florida's burden to collect data to prove a national consensus in favor of this sentencing practice, but Graham's "heavy burden" to prove a consensus *against* it. See *supra*, at 2051.

[12] I confine to a footnote the Court's discussion of foreign laws and sentencing practices because past opinions explain at length why such factors are irrelevant to the meaning of our Constitution or the Court's discernment of any longstanding tradition in *this* Nation. See *Atkins*, 536 U.S., at 324–325, 122 S.Ct. 2242 (Rehnquist, C.J., dissenting). Here, two points suffice. First, despite the Court's attempt to count the actual number of juvenile nonhomicide offenders serving life-without-parole sentences in other nations (a task even more challenging than counting them within our borders), the *laws* of other countries permit juvenile life-without-parole sentences, see Child Rights Information, Network, C. de la Vega, M. Montesano, & A. Solter, Human Rights Advocates, Statement on Juvenile Sentencing to Human Rights Council, 10th Sess. (Nov. 3, 2009) ("Eleven countries have laws with the potential to permit the sentencing of child offenders to life without the possibility of release"), online at http://www.crin.org/resources/infoDetail.asp?ID=19806) (as visited May 14, 2010, and available in Clerk of Court's case file)). Second, present legislation notwithstanding, democracies around the world remain free to adopt life-without-parole sentences for juvenile offenders tomorrow if they see fit. Starting today, ours can count itself among the few in which judicial decree prevents voters from making that choice.

[13] It bears noting that Colorado, one of the five States that prohibit life-without-parole sentences for juvenile nonhomicide offenders, permits such offenders to be sentenced to mandatory terms of imprisonment for up to 40 years. Colo.Rev.Stat. § 18–1.3–401(4)(b) (2009). In light of the volume of state and federal legislation that presently *permits* life-without-parole sentences for juvenile nonhomicide offenders, it would be impossible to argue that there is any objective evidence of agreement that a juvenile is constitutionally entitled to a parole hearing any sooner than 40 years after conviction. See Tr. of Oral Arg. 6–7 (counsel for Graham, stating that "[o]ur

position is that it should be left up to the States to decide. We think that the ... Colorado provision would probably be constitutional").

---

**132 S.Ct. 2455**
**183 L.Ed.2d 407**

**Evan MILLER, Petitioner**
**v.**
**ALABAMA.**

**Kuntrell Jackson, Petitioner**
**v.**
**Ray Hobbs, Director, Arkansas Department of Correction.**

**Nos. 10–9646**
**10–9647.**

**Supreme Court of the United States**

**Argued March 20, 2012.**
**Decided June 25, 2012.**

**Summaries:**

**Source: Justia**

In each of two underlying cases, a 14-year-old was convicted of murder and sentenced to a mandatory term of life imprisonment without possibility of parole. The highest courts of Alabama and Arkansas upheld the sentences. The Supreme Court reversed. The Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders. Children are constitutionally different from adults for sentencing purposes. Their lack of maturity and underdeveloped sense of responsibility lead to recklessness, impulsiveness, and heedless risk-taking. They are more vulnerable to negative influences and lack ability to extricate themselves from horrific, crime-producing settings. A child's actions are less likely to be evidence of irretrievable depravity. The mandatory penalty schemes at issue prevent the sentencing court from considering youth and from assessing whether the harshest term of imprisonment proportionately punishes a juvenile offender. Life-without-parole sentences share characteristics with death sentences, demanding individualized sentencing. The Court rejected the states' argument that courts and prosecutors sufficiently consider a juvenile defendant's age, background and the circumstances of his crime, when deciding whether to try him as an adult. The argument ignores that many states use mandatory transfer systems or lodge the decision in the hands of the prosecutors, rather than courts.

Bryan A. Stevenson, Montgomery, AL, for Petitioner.

John C. Neiman, Jr., Solicitor General, for Respondent.

Bryan A. Stevenson, Counsel of Record, Randall S. Susskind, Alicia A. D'Addario, Equal Justice Initiative, Montgomery, AL, for Petitioner.

John Porter, Clay Crenshaw, Henry Johnson, Stephanie Reiland, Jess R. Nix, Assistant Attorneys General, Luther Strange, Attorney General, John C. Neiman, Jr., Solicitor General, Counsel of Record, Prim F. Escalona, Andrew L. Brasher, Deputy Solicitors General, Office of the Alabama Attorney General, Montgomery, AL, for Respondent.

**Opinion**

Justice KAGAN delivered the opinion of the Court.

The two 14–year–old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate. Such a scheme prevents

those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," *Graham v. Florida*, 560 U.S. 48, ––––, ––––, 130 S.Ct. 2011, 2026–2027, 2029–2030, 176 L.Ed.2d 825 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments."

[132 S.Ct. 2461]

I

A

In November 1999, petitioner Kuntrell Jackson, then 14 years old, and two other boys decided to rob a video store. En route to the store, Jackson learned that one of the boys, Derrick Shields, was carrying a sawed-off shotgun in his coat sleeve. Jackson decided to stay outside when the two other boys entered the store. Inside, Shields pointed the gun at the store clerk, Laurie Troup, and demanded that she "give up the money." *Jackson v. State*, 359 Ark. 87, 89, 194 S.W.3d 757, 759 (2004) (internal quotation marks omitted). Troup refused. A few moments later, Jackson went into the store to find Shields continuing to demand money. At trial, the parties disputed whether Jackson warned Troup that "[w]e ain't playin'," or instead told his friends, "I thought you all was playin'." *Id.*, at 91, 194 S.W.3d, at 760 (internal quotation marks omitted). When Troup threatened to call the police, Shields shot and killed her. The three boys fled empty-handed. See *id.*, at 89–92, 194 S.W.3d, at 758–760.

Arkansas law gives prosecutors discretion to charge 14–year–olds as adults when they are alleged to have committed certain serious offenses. See Ark.Code Ann. § 9–27–318(c)(2) (1998). The prosecutor here exercised that authority by charging Jackson with capital felony murder and aggravated robbery. Jackson moved to transfer the case to juvenile court, but after considering the alleged facts of the crime, a psychiatrist's examination, and Jackson's juvenile arrest history (shoplifting and several incidents of car theft), the trial court denied the motion, and an appellate court affirmed. See *Jackson v. State*, No. 02–535, 2003 WL 193412, *1 (Ark.App., Jan. 29, 2003) ; §§ 9–27–318(d), (e). A jury later convicted Jackson of both crimes. Noting that "in view of [the] verdict, there's only one possible punishment," the judge sentenced Jackson to life without parole. App. in No. 10–9647, p. 55 (hereinafter Jackson App.); see Ark.Code Ann. § 5–4–104(b) (1997) ("A defendant convicted of capital murder or treason shall be sentenced to death or life imprisonment without parole").[1] Jackson did not challenge the sentence on appeal, and the Arkansas Supreme Court affirmed the convictions. See 359 Ark. 87, 194 S.W.3d 757.

Following *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), in which this Court invalidated the death penalty for all juvenile offenders under the age of 18, Jackson filed a state petition for habeas corpus. He argued, based on *Roper* 's reasoning, that a mandatory sentence of life without parole for a 14–year–old also violates the Eighth Amendment. The circuit court rejected that argument and granted the State's motion to dismiss. See Jackson App. 72–76. While that ruling was on appeal, this Court held in *Graham v. Florida* that life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders. After the parties filed briefs addressing that decision, the Arkansas Supreme Court affirmed the dismissal of Jackson's petition. See *Jackson v. Norris*, 2011 Ark. 49, 378 S.W.3d 103. The majority found that *Roper* and *Graham* were "narrowly tailored" to their contexts: "death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile."

*Id.*, at 5, ––– S.W.3d, at ––––. Two justices dissented. They noted that Jackson

[132 S.Ct. 2462]

was not the shooter and that "any evidence of intent to kill was severely lacking." *Id.*, at 10, ––– S.W.3d, at –––– (Danielson, J., dissenting). And they argued that Jackson's mandatory sentence ran afoul of *Graham* 's admonition that " '[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.' " *Id.*, at 10–11, ––– S.W.3d, at –––– (quoting *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2031).[2]

B

Like Jackson, petitioner Evan Miller was 14 years old at the time of his crime. Miller had by then been in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him. Miller, too, regularly used drugs and alcohol; and he had attempted suicide four times, the first when he was six years old. See *E.J.M. v. State*, 928 So.2d 1077, 1081 (Ala.Crim.App.2004) (Cobb, J., concurring in result); App. in No. 10–9646, pp. 26–28 (hereinafter Miller App.).

One night in 2003, Miller was at home with a friend, Colby Smith, when a neighbor, Cole Cannon, came to make a drug deal with Miller's mother. See 6 Record in No. 10–9646, p. 1004. The two boys followed Cannon back to his trailer, where all three smoked marijuana and played drinking games. When Cannon passed out, Miller stole his wallet, splitting about $300 with Smith. Miller then tried to put the wallet back in Cannon's pocket, but Cannon awoke and grabbed Miller by the throat. Smith hit Cannon with a nearby baseball bat, and once released, Miller grabbed the bat and repeatedly struck Cannon with it. Miller placed a sheet over Cannon's head, told him " 'I am God, I've come to take your life,' " and delivered one more blow. *Miller v. State*, 63 So.3d 676, 689 (Ala.Crim.App.2010). The boys then retreated to Miller's trailer, but soon decided to return to Cannon's to cover up evidence of their crime. Once there, they lit two fires. Cannon eventually died from his injuries and smoke inhalation. See *id.*, at 683–685, 689.

Alabama law required that Miller initially be charged as a juvenile, but allowed the District Attorney to seek removal of the case to adult court. See Ala.Code § 12–15–34 (1977). The D.A. did so, and the juvenile court agreed to the transfer after a hearing. Citing the nature of the crime, Miller's "mental maturity," and his prior juvenile offenses (truancy and "criminal mischief"), the Alabama Court of Criminal Appeals affirmed. *E.J.M. v. State*, No. CR–03–0915, pp. 5–7 (Aug. 27, 2004) (unpublished memorandum).[3] The State accordingly

[132 S.Ct. 2463]

charged Miller as an adult with murder in the course of arson. That crime (like capital murder in Arkansas) carries a mandatory minimum punishment of life without parole. See Ala.Code §§ 13A–5–40(9), 13A–6–2(c) (1982).

Relying in significant part on testimony from Smith, who had pleaded to a lesser offense, a jury found Miller guilty. He was therefore sentenced to life without the possibility of parole. The Alabama Court of Criminal Appeals affirmed, ruling that life without parole was "not overly harsh when compared to the crime" and that the mandatory nature of the sentencing scheme was permissible under the Eighth Amendment. 63 So.3d, at 690 ; see *id.*, at 686–691. The Alabama Supreme Court denied review.

We granted certiorari in both cases, see 565 U.S. ––––, 132 S.Ct. 548, 181 L.Ed.2d 395 (2011) (No. 10–9646); 565 U.S. ––––, 132

S.Ct. 548, 181 L.Ed.2d 395 (2011) (No. 10–9647), and now reverse.

II

The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper*, 543 U.S., at 560, 125 S.Ct. 1183. That right, we have explained, "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' " to both the offender and the offense. *Ibid.* (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910) ). As we noted the last time we considered life-without-parole sentences imposed on juveniles, "[t]he concept of proportionality is central to the Eighth Amendment." *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2021. And we view that concept less through a historical prism than according to " 'the evolving standards of decency that mark the progress of a maturing society.' " *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)).

The cases before us implicate two strands of precedent reflecting our concern with proportionate punishment. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. See *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2022–2023 (listing cases). So, for example, we have held that imposing the death penalty for nonhomicide crimes against individuals, or imposing it on mentally retarded defendants, violates the Eighth Amendment. See *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) ; *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Several of the cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, *Roper* held that the Eighth Amendment bars capital punishment for children, and *Graham* concluded that the Amendment also prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offense.*Graham* further likened life without parole for juveniles to the death penalty itself, thereby evoking a second line of our precedents. In those cases, we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his

[132 S.Ct. 2464]

offense before sentencing him to death. See *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.[4]

To start with the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2026. Those cases relied on three significant gaps between juveniles and adults. First, children have a " 'lack of maturity and an underdeveloped sense of responsibility,' " leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S., at 569, 125 S.Ct. 1183. Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.*, at 570, 125 S.Ct. 1183.

Our decisions rested not only on common sense—on what "any parent knows"—but on science and social science as well. *Id.*, at 569, 125 S.Ct. 1183. In *Roper*, we cited studies showing that " '[o]nly a relatively small proportion of adolescents' " who engage in illegal activity " 'develop entrenched patterns of problem behavior.' " *Id.*, at 570, 125 S.Ct. 1183 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). And in *Graham* , we noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." 560 U.S., at ––––, 130 S.Ct., at 2026.[5] We reasoned that those findings—

[132 S.Ct. 2465]

of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his " 'deficiencies will be reformed.' " *Id.*, at ––––, 130 S.Ct., at 2027 (quoting *Roper*, 543 U.S., at 570, 125 S.Ct. 1183).

*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because " '[t]he heart of the retribution rationale' " relates to an offender's blameworthiness, " 'the case for retribution is not as strong with a minor as with an adult.' " *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2028 (quoting *Tison v. Arizona*, 481 U.S. 137, 149, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) ; *Roper*, 543 U.S., at 571, 125 S.Ct. 1183). Nor can deterrence do the work in this context, because " 'the same characteristics that render juveniles less culpable than adults' "—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2028 (quoting *Roper*, 543 U.S., at 571, 125 S.Ct. 1183). Similarly, incapacitation could not support the life-without-parole sentence in *Graham* : Deciding that a "juvenile offender forever will be a danger to society" would require "mak[ing] a judgment that [he] is incorrigible"—but " 'incorrigibility is inconsistent with youth.' " 560 U.S., at ––––, 130 S.Ct., at 2029 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky.App.1968) ). And for the same reason, rehabilitation could not justify that sentence. Life without parole "forswears altogether the rehabilitative ideal." *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2030. It reflects "an irrevocable judgment about [an offender's] value and place in society," at odds with a child's capacity for change. *Ibid.*

*Graham* concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children. To be sure, *Graham* 's flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. See *id.*, at ––––, 130 S.Ct., at 2027. But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham* 's reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.

Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And

in other contexts as well, the characteristics of youth, and the

[132 S.Ct. 2466]

way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. Cf. *id.*, at ––––, 130 S.Ct., at 2028–2032 (generally doubting the penological justifications for imposing life without parole on juveniles). "An offender's age," we made clear in *Graham* , "is relevant to the Eighth Amendment," and so "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Id.*, at ––––, 130 S.Ct., at 2031. THE CHIEF JUSTICE, concurring in the judgment, made a similar point. Although rejecting a categorical bar on life-without-parole sentences for juveniles, he acknowledged "*Roper* 's conclusion that juveniles are typically less culpable than adults," and accordingly wrote that "an offender's juvenile status can play a central role" in considering a sentence's proportionality. *Id.*, at ––––, 130 S.Ct., at 2039; see *id.*, at ––––, 130 S.Ct., at 2042 (Graham's "youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive").[6]

But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham* 's (and also *Roper* 's) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

And *Graham* makes plain these mandatory schemes' defects in another way: by likening life-without-parole sentences imposed on juveniles to the death penalty itself. Life-without-parole terms, the Court wrote, "share some characteristics with death sentences that are shared by no other sentences." 560 U.S., at ––––, 130 S.Ct., at 2027. Imprisoning an offender until he dies alters the remainder of his life "by a forfeiture that is irrevocable." *Ibid.* (citing *Solem v. Helm*, 463 U.S. 277, 300–301, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) ). And this lengthiest possible incarceration is an "especially harsh punishment for a juvenile," because he will almost inevitably serve "more years and a greater percentage of his life in prison than an adult offender." *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2028. The penalty when imposed on a teenager, as compared with an older person, is therefore "the same ... in name only." *Id.*, at ––––, 130 S.Ct., at 2028. All of that suggested a distinctive set of legal rules: In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment. We imposed a categorical ban on the sentence's use, in a way unprecedented for a term of imprisonment. See *id.*, at ––––, 130 S.Ct., at 2022;*id.*, at ––––, 130 S.Ct., at 2046 (THOMAS, J., dissenting) ("For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it

[132 S.Ct. 2467]

previously reserved for death penalty cases alone"). And the bar we adopted mirrored a proscription first established in the death penalty context—that the punishment cannot be imposed for any nonhomicide crimes against individuals. See *Kennedy*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525;*Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

That correspondence—*Graham* 's "[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment," 560 U.S., at ––––, 130 S.Ct., at 2038–2039 (ROBERTS,

C.J., concurring in judgment)—makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty. In *Woodson*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, we held that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment. We thought the mandatory scheme flawed because it gave no significance to "the character and record of the individual offender or the circumstances" of the offense, and "exclud[ed] from consideration ... the possibility of compassionate or mitigating factors." *Id.*, at 304, 96 S.Ct. 2978. Subsequent decisions have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses. See, *e.g.*, *Sumner v. Shuman*, 483 U.S. 66, 74–76, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987) ; *Eddings v. Oklahoma*, 455 U.S. 104, 110–112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) ; *Lockett*, 438 U.S., at 597–609, 98 S.Ct. 2954 (plurality opinion).

Of special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the "mitigating qualities of youth." *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993). Everything we said in *Roper* and *Graham* about that stage of life also appears in these decisions. As we observed, "youth is more than a chronological fact." *Eddings*, 455 U.S., at 115, 102 S.Ct. 869. It is a time of immaturity, irresponsibility, "impetuousness[,] and recklessness." *Johnson*, 509 U.S., at 368, 113 S.Ct. 2658. It is a moment and "condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings*, 455 U.S., at 115, 102 S.Ct. 869. And its "signature qualities" are all "transient." *Johnson*, 509 U.S., at 368, 113 S.Ct. 2658.*Eddings* is especially on point. There, a 16–year–old shot a police officer point-blank and killed him. We invalidated his death sentence because the judge did not consider evidence of his neglectful and violent family background (including his mother's drug abuse and his father's physical abuse) and his emotional disturbance. We found that evidence "particularly relevant"—more so than it would have been in the case of an adult offender. 455 U.S., at 115, 102 S.Ct. 869. We held: "[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered" in assessing his culpability. *Id.*, at 116, 102 S.Ct. 869.

In light of *Graham* 's reasoning, these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from

[132 S.Ct. 2468]

a chaotic and abusive one. And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve.[7] In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.

So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his

chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. See, *e.g.*, *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2032 ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J.D.B. v. North Carolina*, 564 U.S. ––––, ––––, 131 S.Ct. 2394, 2400–2401, 180 L.Ed.2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Both cases before us illustrate the problem. Take Jackson's first. As noted earlier, Jackson did not fire the bullet that killed Laurie Troup; nor did the State argue that he intended her death. Jackson's conviction was instead based on an aiding-and-abetting theory; and the appellate court affirmed the verdict only because the jury could have believed that when Jackson entered the store, he warned Troup that "[w]e ain't playin'," rather than told his friends that "I thought you all was playin'." See 359 Ark., at 90–92, 194 S.W.3d, at 759–760 ; *supra*, at 2461. To be sure, Jackson learned on the way to the video store that his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point. All these circumstances go to Jackson's culpability for the offense. See *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2027 ("[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability"). And so too does Jackson's family background and immersion in violence: Both his mother and his grandmother had previously shot other individuals. See Record in No. 10–9647,

[132 S.Ct. 2469]

pp. 80–82. At the least, a sentencer should look at such facts before depriving a 14–year–old of any prospect of release from prison.

That is true also in Miller's case. No one can doubt that he and Smith committed a vicious murder. But they did it when high on drugs and alcohol consumed with the adult victim. And if ever a pathological background might have contributed to a 14–year–old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten. See 928 So.2d, at 1081 (Cobb, J., concurring in result); Miller App. 26–28; *supra*, at 2461 – 2462. Nonetheless, Miller's past criminal history was limited—two instances of truancy and one of "second-degree criminal mischief." No. CR–03–0915, at 6 (unpublished memorandum). That Miller deserved severe punishment for killing Cole Cannon is beyond question. But once again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty.

We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2030 ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"). By making

youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham* , and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S., at 573, 125 S.Ct. 1183;*Graham*, 560 U.S., at ––––, 130 S.Ct., at 2026–2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.[8]

III

Alabama and Arkansas offer two kinds of arguments against requiring individualized

[132 S.Ct. 2470]

consideration before sentencing a juvenile to life imprisonment without possibility of parole. The States (along with the dissents) first contend that the rule we adopt conflicts with aspects of our Eighth Amendment caselaw. And they next assert that the rule is unnecessary because individualized circumstances come into play in deciding whether to try a juvenile offender as an adult. We think the States are wrong on both counts.

A

The States (along with Justice THOMAS) first claim that *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), precludes our holding. The defendant in *Harmelin* was sentenced to a mandatory life-without-parole term for possessing more than 650 grams of cocaine. The Court upheld that penalty, reasoning that "a sentence which is not otherwise cruel and unusual" does not "becom[e] so simply because it is 'mandatory.' " *Id.*, at 995, 111 S.Ct. 2680. We recognized that a different rule, requiring individualized sentencing, applied in the death penalty context. But we refused to extend that command to noncapital cases "because of the qualitative difference between death and all other penalties." *Ibid.* ; see *id.*, at 1006, 111 S.Ct. 2680 (KENNEDY, J., concurring in part and concurring in judgment). According to Alabama, invalidating the mandatory imposition of life-without-parole terms on juveniles "would effectively overrule *Harmelin* . " Brief for Respondent in No. 10–9646, p. 59 (hereinafter Alabama Brief); see Arkansas Brief 39.

We think that argument myopic. *Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children. Capital punishment, our decisions hold, generally comports with the Eighth Amendment—except it cannot be imposed on children. See *Roper*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1;*Thompson*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702. So too, life without parole is permissible for nonhomicide offenses—except, once again, for children. See *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2030. Nor are these sentencing decisions an oddity in the law. To the contrary, " '[o]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." *J.D.B.*, 564 U.S., at ––––, 131 S.Ct., at 2404 (quoting *Eddings*,

455 U.S., at 115–116, 102 S.Ct. 869, citing examples from criminal, property, contract, and tort law). So if (as *Harmelin* recognized) "death is different," children are different too. Indeed, it is the odd legal rule that does *not* have some form of exception for children. In that context, it is no surprise that the law relating to society's harshest punishments recognizes such a distinction. Cf. *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2040 (ROBERTS, C.J., concurring in judgment) ("*Graham* 's age places him in a significantly different category from the defendan[t] in ... *Harmelin* "). Our ruling thus neither overrules nor undermines nor conflicts with *Harmelin* .

Alabama and Arkansas (along with THE CHIEF JUSTICE and Justice ALITO) next contend that because many States impose mandatory life-without-parole sentences on juveniles, we may not hold the practice unconstitutional. In considering categorical bars to the death penalty and life without parole, we ask as part of the analysis whether " 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' " show a "national consensus" against a sentence for a particular class of offenders.

[132 S.Ct. 2471]

*Graham*, 560 U.S., at ––––, 130 S.Ct., at 2022 (quoting *Roper*, 543 U.S., at 563, 125 S.Ct. 1183). By our count, 29 jurisdictions (28 States and the Federal Government) make a life-without-parole term mandatory for some juveniles convicted of murder in adult court.[9] The States argue that this number precludes our holding.

We do not agree; indeed, we think the States' argument on this score *weaker* than the one we rejected in *Graham* . For starters, the cases here are different from the typical one in which we have tallied legislative enactments. Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham* . Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham* , and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments. See, *e.g.*, *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (relying on *Woodson* 's logic to prohibit the mandatory death penalty for murderers already serving life without parole); *Lockett*, 438 U.S., at 602–608, 98 S.Ct. 2954 (plurality opinion) (applying *Woodson* to require that judges and juries consider all mitigating evidence); *Eddings*, 455 U.S., at 110–117, 102 S.Ct. 869 (similar). We see no difference here.

In any event, the "objective indicia" that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment. In *Graham* , we prohibited life-without-parole terms for juveniles committing nonhomicide offenses even though 39 jurisdictions permitted that sentence. See 560 U.S., at ––––, 130 S.Ct., at 2023. That is 10 *more* than impose life without parole on juveniles on a mandatory basis.[10] And

[132 S.Ct. 2472]

in *Atkins*, *Roper*, and *Thompson*, we similarly banned the death penalty in circumstances in which "less than half" of the "States that permit [ted] capital punishment (for whom the issue exist[ed] )" had previously chosen to do so. *Atkins*, 536 U.S., at 342, 122 S.Ct. 2242 (SCALIA, J., dissenting) (emphasis deleted); see *id.*, at 313–315, 122 S.Ct. 2242 (majority opinion); *Roper*, 543 U.S., at 564–565, 125 S.Ct. 1183;*Thompson*, 487 U.S., at 826–827,

108 S.Ct. 2687 (plurality opinion). So we are breaking no new ground in these cases.[11]

*Graham* and *Thompson* provide special guidance, because they considered the same kind of statutes we do and explained why simply counting them would present a distorted view. Most jurisdictions authorized the death penalty or life without parole for juveniles only through the combination of two independent statutory provisions. One allowed the transfer of certain juvenile offenders to adult court, while another (often in a far-removed part of the code) set out the penalties for any and all individuals tried there. We reasoned that in those circumstances, it was impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice). In *Thompson*, we found that the statutes "t[old] us that the States consider 15–year–olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), but t[old] us nothing about the

[132 S.Ct. 2473]

judgment these States have made regarding the appropriate punishment for such youthful offenders." 487 U.S., at 826, n. 24, 108 S.Ct. 2687 (plurality opinion) (emphasis deleted); see also *id.*, at 850, 108 S.Ct. 2687 (O'Connor, J., concurring in judgment); *Roper*, 543 U.S., at 596, n., 125 S.Ct. 1183 (O'Connor, J., dissenting). And *Graham* echoed that reasoning: Although the confluence of state laws "ma[de] life without parole possible for some juvenile nonhomicide offenders," it did not "justify a judgment" that many States actually "intended to subject such offenders" to those sentences. 560 U.S., at ––––, 130 S.Ct., at 2025.[12]

All that is just as true here. Almost all jurisdictions allow some juveniles to be tried in adult court for some kinds of homicide. See Dept. of Justice, H. Snyder & M. Sickmund, Juvenile Offenders and Victims: 2006 National Report 110–114 (hereinafter 2006 National Report). But most States do not have separate penalty provisions for those juvenile offenders. Of the 29 jurisdictions mandating life without parole for children, more than half do so by virtue of generally applicable penalty provisions, imposing the sentence without regard to age.[13] And indeed, some of those States set no minimum age for who may be transferred to adult court in the first instance, thus applying life-without-parole mandates to children of any age—be it 17 or 14 or 10 or 6.[14] As in *Graham* , we think that "underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration." 560 U.S., at ––––, 130 S.Ct., at 2026. That Alabama and Arkansas can count to 29 by including these possibly (or probably) inadvertent legislative outcomes does not preclude our determination that mandatory life without parole for juveniles violates the Eighth Amendment.

[132 S.Ct. 2474]

B

Nor does the presence of discretion in some jurisdictions' transfer statutes aid the States here. Alabama and Arkansas initially ignore that many States use mandatory transfer systems: A juvenile of a certain age who has committed a specified offense will be tried in adult court, regardless of any individualized circumstances. Of the 29 relevant jurisdictions, about half place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer to juvenile court.[15] Moreover, several States at times lodge this decision exclusively in the hands of prosecutors, again with no statutory mechanism for judicial reevaluation.[16] And those "prosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decisionmaking." Dept. of Justice, Office of Juvenile Justice and

Delinquency Prevention, P. Griffin, S. Addie, B. Adams, & K. Firestine, Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting 5 (2011).

Even when States give transfer-stage discretion to judges, it has limited utility. First, the decisionmaker typically will have only partial information at this early, pretrial stage about either the child or the circumstances of his offense. Miller's case provides an example. As noted earlier, see n. 3, *supra*, the juvenile court denied Miller's request for his own mental-health expert at the transfer hearing, and the appeals court affirmed on the ground that Miller was not then entitled to the protections and services he would receive at trial. See No. CR–03–0915, at 3–4 (unpublished memorandum). But by then, of course, the expert's testimony could not change the sentence; whatever she said in mitigation, the mandatory life-without-parole prison term would kick in. The key moment for the exercise of discretion is the transfer—and as Miller's case shows, the judge often does not know then what she will learn, about the offender or the offense, over the course of the proceedings.

Second and still more important, the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing. Because many juvenile systems require that the offender be released at a particular age or after a certain number of years, transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult (here, life without parole). In many States, for example, a child convicted in juvenile court must be released from custody by the age of 21. See, *e.g.*, Ala.Code § 12–15–117(a) (Cum. Supp. 2011); see generally 2006 National Report 103 (noting limitations on the length of juvenile court sanctions). Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility

[132 S.Ct. 2475]

of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate. For that reason, the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the Eighth Amendment.

IV

*Graham* , *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment. We accordingly reverse the judgments of the Arkansas Supreme Court and Alabama Court of Criminal Appeals and remand the cases for further proceedings not inconsistent with this opinion.

*It is so ordered* .

Justice BREYER, with whom Justice SOTOMAYOR joins, concurring.

I join the Court's opinion in full. I add that, if the State continues to seek a sentence of life without the possibility of parole for Kuntrell Jackson, there will have to be a determination whether Jackson "kill[ed] or intend[ed] to kill" the robbery victim. *Graham v. Florida*, 560 U.S. 48, ––––, 130 S.Ct. 2011, 2027, 176 L.Ed.2d 825 (2010). In my view, without such a finding, the Eighth Amendment as interpreted in *Graham* forbids sentencing

Jackson to such a sentence, regardless of whether its application is mandatory or discretionary under state law.

In *Graham* we said that "when compared to an adult murderer, a juvenile offender *who did not kill or intend to kill* has a twice diminished moral culpability." *Ibid.* (emphasis added). For one thing, "compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." *Id.*, at ––––, 130 S.Ct., at 2026 (internal quotation marks omitted). See also *ibid.* ("[P]sychology and brain science continue to show fundamental differences between juvenile and adult minds" making their actions "less likely to be evidence of 'irretrievably depraved character' than are the actions of adults" (quoting *Roper v. Simmons*, 543 U.S. 551, 570, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) )); *ante*, at 2464. For another thing, *Graham* recognized that lack of intent normally diminishes the "moral culpability" that attaches to the crime in question, making those that do not intend to kill "categorically less deserving of the most serious forms of punishment than are murderers." 560 U.S., at ––––, 130 S.Ct., at 2027 (citing *Kennedy v. Louisiana*, 554 U.S. 407, 434–435, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) ; *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) ; *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) ). And we concluded that, because of this "twice diminished moral culpability," the Eighth Amendment forbids the imposition upon juveniles of a sentence of life without parole for nonhomicide cases. *Graham*, *supra*, at ––––, ––––, 130 S.Ct., at 2027, 2034.

Given *Graham* 's reasoning, the kinds of homicide that can subject a juvenile offender

[132 S.Ct. 2476]

to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim. Quite simply, if the juvenile either kills or intends to kill the victim, he lacks "twice diminished" responsibility. But where the juvenile neither kills nor intends to kill, both features emphasized in *Graham* as extenuating apply. The dissent itself here would permit life without parole for "juveniles who commit the worst types of murder," *post*, at 2480 (opinion of ROBERTS, C.J.), but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.

I recognize that in the context of felony-murder cases, the question of intent is a complicated one. The felony-murder doctrine traditionally attributes death caused in the course of a felony to all participants who intended to commit the felony, regardless of whether they killed or intended to kill. See 2 W. LaFave, Substantive Criminal Law §§ 14.5(a) and (c) (2d ed. 2003). This rule has been based on the idea of "transferred intent"; the defendant's intent to commit the felony satisfies the intent to kill required for murder. See S. Kadish, S. Schulhofer, & C. Streiker, Criminal Law and Its Processes 439 (8th ed. 2007); 2 C. Torcia, Wharton's Criminal Law § 147 (15th ed. 1994).

But in my opinion, this type of "transferred intent" is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole. As an initial matter, this Court has made clear that this artificially constructed kind of intent does not count as intent for purposes of the Eighth Amendment. We do not rely on transferred intent in determining if an adult may receive the death penalty. Thus, the Constitution forbids imposing capital punishment upon an aider and abettor in a robbery, where that individual did not intend to kill and simply was "in the car by the side of the road ..., waiting to help the robbers escape." *Enmund*, *supra*, at 788, 102 S.Ct. 3368. Cf. *Tison*, *supra*, at 157–158, 107 S.Ct. 1676 (capital punishment

permissible for aider and abettor where kidnaping led to death because he was "actively involved" in every aspect of the kidnaping and his behavior showed "a reckless disregard for human life"). Given *Graham* , this holding applies to juvenile sentences of life without parole *a fortiori*. See *ante*, at 2466 – 2467. Indeed, even juveniles who meet the *Tison* standard of "reckless disregard" may not be eligible for life without parole. Rather, *Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who "kill or intend to kill." 560 U.S., at ––––, 130 S.Ct., at 2027.

Moreover, regardless of our law with respect to adults, there is no basis for imposing a sentence of life without parole upon a juvenile who did not himself kill or intend to kill. At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. See 2 LaFave, *supra*, § 14.5(c). Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively. *Ante*, at 2464 – 2465. Justice Frankfurter cautioned, "Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a State's duty toward children." *May v. Anderson*, 345 U.S. 528, 536, 73 S.Ct. 840, 97 L.Ed. 1221 (1953) (concurring opinion). To apply the doctrine of transferred intent here, where the juvenile did not kill, to sentence a juvenile

[132 S.Ct. 2477]

to life without parole would involve such "fallacious reasoning." *Ibid.*

This is, as far as I can tell, precisely the situation present in Kuntrell Jackson's case. Jackson simply went along with older boys to rob a video store. On the way, he became aware that a confederate had a gun. He initially stayed outside the store, and went in briefly, saying something like "We ain't playin' " or " 'I thought you all was playin,' " before an older confederate shot and killed the store clerk. *Jackson v. State*, 359 Ark. 87, 91, 194 S.W.3d 757, 760 (2004). Crucially, the jury found him guilty of first-degree murder under a statute that permitted them to convict if, Jackson "attempted to commit or committed an aggravated robbery, and, in the course of that offense, he, or an accomplice, caused [the clerk's] death under circumstance manifesting extreme indifference to the value of human life."*Ibid.* See Ark.Code Ann. § 5–10–101(a)(1) (1997); *ante*, at 2468. Thus, to be found guilty, Jackson did not need to kill the clerk (it is conceded he did not), nor did he need to have intent to kill or even "extreme indifference." As long as one of the teenage accomplices in the robbery acted with extreme indifference to the value of human life, Jackson could be convicted of capital murder. *Ibid.*

The upshot is that Jackson, who did not kill the clerk, might not have intended to do so either. See *Jackson v. Norris*, 2011 Ark. 49, at 10, 378S.W.3d 103 (Danielson, J., dissenting) ("[A]ny evidence of [Jackson's] intent to kill was severely lacking"). In that case, the Eighth Amendment simply forbids imposition of a life term without the possibility of parole. If, on remand, however, there is a finding that Jackson did intend to cause the clerk's death, the question remains open whether the Eighth Amendment prohibits the imposition of life without parole upon a juvenile in those circumstances as well. *Ante*, at 2469.

Chief Justice ROBERTS, with whom Justice SCALIA, Justice THOMAS, and Justice ALITO join, dissenting.

Determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy. Our role, however, is to apply the

law, not to answer such questions. The pertinent law here is the Eighth Amendment to the Constitution, which prohibits "cruel and unusual punishments." Today, the Court invokes that Amendment to ban a punishment that the Court does not itself characterize as unusual, and that could not plausibly be described as such. I therefore dissent.

The parties agree that nearly 2,500 prisoners are presently serving life sentences without the possibility of parole for murders they committed before the age of 18. Brief for Petitioner in No. 10–9647, p. 62, n. 80 (Jackson Brief); Brief for Respondent in No. 10–9646, p. 30 (Alabama Brief). The Court accepts that over 2,000 of those prisoners received that sentence because it was mandated by a legislature. *Ante,* at 2471 – 2472, n. 10. And it recognizes that the Federal Government and most States impose such mandatory sentences. *Ante,* at 2470 – 2471. Put simply, if a 17–year–old is convicted of deliberately murdering an innocent victim, it is not "unusual" for the murderer to receive a mandatory sentence of life without parole. That reality should preclude finding that mandatory life imprisonment for juvenile killers violates the Eighth Amendment.

Our precedent supports this conclusion. When determining whether a punishment is cruel and unusual, this Court typically begins with " 'objective indicia of society's standards, as expressed in legislative enactments and state practice.' " *Graham v.*

[132 S.Ct. 2478]

*Florida,* 560 U.S. ––––, ––––, 130 S.Ct. 2011, 2022, 176 L.Ed.2d 825 (2010); see also, *e.g., Kennedy v. Louisiana,* 554 U.S. 407, 422, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) ; *Roper v. Simmons,* 543 U.S. 551, 564, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). We look to these "objective indicia" to ensure that we are not simply following our own subjective values or beliefs. *Gregg v. Georgia,* 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Such tangible evidence of societal standards enables us to determine whether there is a "consensus against" a given sentencing practice. *Graham, supra,* at ––––, 130 S.Ct., at 2022–2023. If there is, the punishment may be regarded as "unusual." But when, as here, most States formally require and frequently impose the punishment in question, there is no objective basis for that conclusion.

Our Eighth Amendment cases have also said that we should take guidance from "evolving standards of decency that mark the progress of a maturing society." *Ante,* at 2463 (quoting *Estelle v. Gamble,* 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) ; internal quotation marks omitted). Mercy toward the guilty can be a form of decency, and a maturing society may abandon harsh punishments that it comes to view as unnecessary or unjust. But decency is not the same as leniency. A decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency. As judges we have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty.

In this case, there is little doubt about the direction of society's evolution: For most of the 20th century, American sentencing practices emphasized rehabilitation of the offender and the availability of parole. But by the 1980's, outcry against repeat offenders, broad disaffection with the rehabilitative model, and other factors led many legislatures to reduce or eliminate the possibility of parole, imposing longer sentences in order to punish criminals and prevent them from committing more crimes. See, *e.g.,* Alschuler, The Changing Purposes of Criminal Punishment, 70 U. Chi. L.Rev. 1, 1–13 (2003) ; see generally Crime and Public Policy (J. Wilson & J. Petersilia eds. 2011). Statutes establishing life without parole

sentences in particular became more common in the past quarter century. See *Baze v. Rees*, 553 U.S. 35, 78, and n. 10, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (Stevens, J., concurring in judgment). And the parties agree that most States have changed their laws relatively recently to expose teenage murderers to mandatory life without parole. Jackson Brief 54–55; Alabama Brief 4–5.

The Court attempts to avoid the import of the fact that so many jurisdictions have embraced the sentencing practice at issue by comparing this case to the Court's prior Eighth Amendment cases. The Court notes that *Graham* found a punishment authorized in 39 jurisdictions unconstitutional, whereas the punishment it bans today is mandated in 10 fewer. *Ante*, at 2471. But *Graham* went to considerable lengths to show that although theoretically allowed in many States, the sentence at issue in that case was "exceedingly rare" in practice. 560 U.S., at ––––, 130 S.Ct., at 2026. The Court explained that only 123 prisoners in the entire Nation were serving life without parole for nonhomicide crimes committed as juveniles, with more than half in a single State. It contrasted that with statistics showing nearly 400,000 juveniles were arrested for serious nonhomicide

[132 S.Ct. 2479]

offenses in a single year. Based on the sentence's rarity despite the many opportunities to impose it, *Graham* concluded that there was a national consensus against life without parole for juvenile nonhomicide crimes. *Id.*, at ––––, 130 S.Ct., at 2024–2026.

Here the number of mandatory life without parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, is over 5,000 times higher than the corresponding number in *Graham* . There is thus nothing in this case like the evidence of national consensus in *Graham* .[1]

The Court disregards these numbers, claiming that the prevalence of the sentence in question results from the number of statutes requiring its imposition.*Ante*, at 2471 – 2472, n. 10. True enough. The sentence at issue is statutorily mandated life without parole. Such a sentence can only result from statutes requiring its imposition. In *Graham* the Court relied on the low number of actual sentences to explain why the high number of statutes allowing such sentences was not dispositive. Here, the Court excuses the high number of actual sentences by citing the high number of statutes imposing it. To say that a sentence may be considered unusual *because* so many legislatures approve it stands precedent on its head.[2]

The Court also advances another reason for discounting the laws enacted by Congress and most state legislatures. Some of the jurisdictions that impose mandatory life without parole on juvenile murderers do so as a result of two statutes: one providing that juveniles charged with serious crimes may be tried as adults, and another generally mandating that those convicted of murder be imprisoned for life. According to the Court, our cases suggest that where the sentence results from the interaction of two such statutes, the legislature can be considered to have imposed the resulting sentences "inadvertent[ly]." *Ante*, at 2472 – 2474. The Court relies on *Graham* and *Thompson v. Oklahoma*, 487 U.S. 815, 826, n. 24, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion), for the proposition that these laws are therefore not valid evidence of society's views on the punishment at issue.

It is a fair question whether this Court should ever assume a legislature is so ignorant of its own laws that it does not understand that two of them interact

[132 S.Ct. 2480]

with each other, especially on an issue of such importance as the one before us. But in *Graham* and *Thompson* it was at least

plausible as a practical matter. In *Graham* , the extreme rarity with which the sentence in question was imposed could suggest that legislatures did not really intend the inevitable result of the laws they passed. See 560 U.S., at ––––, 130 S.Ct., at 2025–2026. In *Thompson*, the sentencing practice was even rarer—only 20 defendants had received it in the last century. 487 U.S., at 832, 108 S.Ct. 2687 (plurality opinion). Perhaps under those facts it could be argued that the legislature was not fully aware that a teenager could receive the particular sentence in question. But here the widespread and recent imposition of the sentence makes it implausible to characterize this sentencing practice as a collateral consequence of legislative ignorance.[3]

Nor do we display our usual respect for elected officials by asserting that legislators have *accidentally* required 2,000 teenagers to spend the rest of their lives in jail. This is particularly true given that our well-publicized decision in *Graham* alerted legislatures to the possibility that teenagers were subject to life with parole only because of legislative inadvertence. I am aware of no effort in the wake of *Graham* to correct any supposed legislative oversight. Indeed, in amending its laws in response to *Graham* one legislature made especially clear that it *does* intend juveniles who commit first-degree murder to receive mandatory life without parole. See Iowa Code Ann. § 902.1 (West Cum. Supp. 2012).

In the end, the Court does not actually conclude that mandatory life sentences for juvenile murderers are unusual. It instead claims that precedent "leads to" today's decision, primarily relying on *Graham* and *Roper .Ante,* at 2464. Petitioners argue that the reasoning of those cases "compels" finding in their favor. Jackson Brief 34. The Court is apparently unwilling to go so far, asserting only that precedent points in that direction. But today's decision invalidates the laws of dozens of legislatures and Congress. This Court is not easily led to such a result. See, *e.g.*, *United States v. Harris*, 106 U.S. 629, 635, 1 S.Ct. 601, 27 L.Ed. 290 (1883) (courts must presume an Act of Congress is constitutional "unless the lack of constitutional authority ... is clearly demonstrated"). Because the Court does not rely on the Eighth Amendment's text or objective evidence of society's standards, its analysis of precedent alone must bear the "heavy burden [that] rests on those who would attack the judgment of the representatives of the people." *Gregg*, 428 U.S., at 175, 96 S.Ct. 2909. If the Court is unwilling to say that precedent compels today's decision, perhaps it should reconsider that decision.

In any event, the Court's holding does not follow from *Roper* and *Graham* . Those cases undoubtedly stand for the proposition that teenagers are less mature, less responsible, and less fixed in their ways than adults—not that a Supreme Court case was needed to establish that. What they do not stand for, and do not even suggest, is that legislators—who also know that teenagers are different from adults—may not require life without parole for juveniles who commit the worst types of murder.

That *Graham* does not imply today's result could not be clearer. In barring life

[132 S.Ct. 2481]

without parole for juvenile nonhomicide offenders, *Graham* stated that "[t]here is a line 'between homicide and other serious violent offenses against the individual.' " 560 U.S., at ––––, 130 S.Ct., at 2027 (quoting *Kennedy*, 554 U.S., at 438, 128 S.Ct. 2641). The whole point of drawing a line between one issue and another is to say that they are different and should be treated differently. In other words, the two are in different categories. Which *Graham* also said: "defendants who do not kill, intend to kill, or foresee that life will be taken are *categorically* less deserving of the most serious forms of punishment than are murderers." 560 U.S., at ––––, 130 S.Ct., at 2027 (emphasis added). Of course, to be

especially clear that what is said about one issue does not apply to another, one could say that the two issues cannot be compared. *Graham* said that too: "Serious nonhomicide crimes ... cannot be compared to murder." *Ibid.* (internal quotation marks omitted). A case that expressly puts an issue in a different category from its own subject, draws a line between the two, and states that the two should not be compared, cannot fairly be said to control that issue.

*Roper* provides even less support for the Court's holding. In that case, the Court held that the death penalty could not be imposed for offenses committed by juveniles, no matter how serious their crimes. In doing so, *Roper* also set itself in a different category than this case, by expressly invoking "special" Eighth Amendment analysis for death penalty cases. 543 U.S., at 568–569, 125 S.Ct. 1183. But more importantly, *Roper* reasoned that the death penalty was not needed to deter juvenile murderers in part because "life imprisonment without the possibility of parole" was available. *Id.*, at 572, 125 S.Ct. 1183. In a classic bait and switch, the Court now tells state legislatures that—*Roper* 's promise notwithstanding—they do not have power to guarantee that once someone commits a heinous murder, he will never do so again. It would be enough if today's decision proved Justice SCALIA's prescience in writing that *Roper* 's "reassurance ... gives little comfort." *Id.*, at 623, 125 S.Ct. 1183 (dissenting opinion). To claim that *Roper* actually "leads to" revoking its own reassurance surely goes too far.

Today's decision does not offer *Roper* and *Graham* 's false promises of restraint. Indeed, the Court's opinion suggests that it is merely a way station on the path to further judicial displacement of the legislative role in prescribing appropriate punishment for crime. The Court's analysis focuses on the mandatory nature of the sentences in this case. See *ante,* at 2466 – 2469. But then—although doing so is entirely unnecessary to the rule it announces—the Court states that even when a life without parole sentence is not mandatory, "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Ante,* at 2469. Today's holding may be limited to mandatory sentences, but the Court has already announced that discretionary life without parole for juveniles should be "uncommon"—or, to use a common synonym, "unusual."

Indeed, the Court's gratuitous prediction appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges. If that invitation is widely accepted and such sentences for juvenile offenders do in fact become "uncommon," the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits them.

This process has no discernible end point—or at least none consistent with our Nation's legal traditions. *Roper* and *Graham*

[132 S.Ct. 2482]

attempted to limit their reasoning to the circumstances they addressed—*Roper* to the death penalty, and *Graham* to nonhomicide crimes. Having cast aside those limits, the Court cannot now offer a credible substitute, and does not even try. After all, the Court tells us, "none of what [*Graham* ] said about children ... is crime-specific." *Ante,* at 2465. The principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently. See *ante,* at 2467 – 2469. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive. Unless confined, the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults. Learning that an Amendment that bars only "unusual" punishments requires the abolition of this

uniformly established practice would be startling indeed.

* * *

It is a great tragedy when a juvenile commits murder—most of all for the innocent victims. But also for the murderer, whose life has gone so wrong so early. And for society as well, which has lost one or more of its members to deliberate violence, and must harshly punish another. In recent years, our society has moved toward requiring that the murderer, his age notwithstanding, be imprisoned for the remainder of his life. Members of this Court may disagree with that choice. Perhaps science and policy suggest society should show greater mercy to young killers, giving them a greater chance to reform themselves at the risk that they will kill again. See *ante,* at 2464 – 2466. But that is not our decision to make. Neither the text of the Constitution nor our precedent prohibits legislatures from requiring that juvenile murderers be sentenced to life without parole. I respectfully dissent.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

Today, the Court holds that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Ante,* at 2460. To reach that result, the Court relies on two lines of precedent. The first involves the categorical prohibition of certain punishments for specified classes of offenders. The second requires individualized sentencing in the capital punishment context. Neither line is consistent with the original understanding of the Cruel and Unusual Punishments Clause. The Court compounds its errors by combining these lines of precedent and extending them to reach a result that is even less legitimate than the foundation on which it is built. Because the Court upsets the legislatively enacted sentencing regimes of 29 jurisdictions without constitutional warrant, I respectfully dissent.[1]

I

The Court first relies on its cases "adopt[ing] categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Ante,* at 2463. Of these categorical proportionality cases, the Court places particular emphasis on *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), and *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). In *Roper,* the Court held that the Constitution prohibits the execution of an offender who was under 18 at the time of his offense.

[132 S.Ct. 2483]

543 U.S., at 578, 125 S.Ct. 1183. The *Roper* Court looked to, among other things, its own sense of parental intuition and "scientific and sociological studies" to conclude that offenders under the age of 18 "cannot with reliability be classified among the worst offenders." *Id.,* at 569, 125 S.Ct. 1183. In *Graham* , the Court relied on similar considerations to conclude that the Constitution prohibits a life-without-parole sentence for a nonhomicide offender who was under the age of 18 at the time of his offense. 560 U.S., at ––––, 130 S.Ct., at 2030.

The Court now concludes that *mandatory* life-without-parole sentences for duly convicted juvenile murderers "contraven[e] *Graham* 's (and also *Roper* 's) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Ante,* at 2466. But neither *Roper* nor *Graham* held that specific procedural rules are required for sentencing juvenile homicide offenders. And, the logic of those cases should not be extended to create such a requirement.

The Eighth Amendment, made applicable to the States by the Fourteenth Amendment, provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor

cruel and unusual punishments inflicted." As I have previously explained, "the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous *methods* of punishment—specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted." *Graham, supra,* at ––––, 130 S.Ct., at 2044 (dissenting opinion) (internal quotation marks and citations omitted).[2] The clause does not contain a "proportionality principle." *Ewing v. California,* 538 U.S. 11, 32, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (THOMAS, J., concurring in judgment); see generally *Harmelin v. Michigan,* 501 U.S. 957, 975–985, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J.). In short, it does not authorize courts to invalidate any punishment they deem disproportionate to the severity of the crime or to a particular class of offenders. Instead, the clause "leaves the unavoidably moral question of who 'deserves' a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty." *Graham, supra,* at ––––, 130 S.Ct., at 2045 (THOMAS, J., dissenting).

The legislatures of Arkansas and Alabama, like those of 27 other jurisdictions, *ante,* at 2470 – 2471, have determined that all offenders convicted of specified homicide offenses, whether juveniles or not, deserve a sentence of life in prison without the possibility of parole. Nothing in our Constitution authorizes this Court to supplant that choice.

II

To invalidate mandatory life-without-parole sentences for juveniles, the Court also

[132 S.Ct. 2484]

relies on its cases "prohibit[ing] mandatory imposition of capital punishment." *Ante,* at 2463. The Court reasons that, because *Graham* compared juvenile life-without-parole sentences to the death penalty, the "distinctive set of legal rules" that this Court has imposed in the capital punishment context, including the requirement of individualized sentencing, is "relevant" here. *Ante,* at 2466 – 2467. But even accepting an analogy between capital and juvenile life-without-parole sentences, this Court's cases prohibiting mandatory capital sentencing schemes have no basis in the original understanding of the Eighth Amendment, and, thus, cannot justify a prohibition of sentencing schemes that mandate life-without-parole sentences for juveniles.

A

In a line of cases following *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)*(per curiam),* this Court prohibited the mandatory imposition of the death penalty. See *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion); *Roberts v. Louisiana,* 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (same); *Sumner v. Shuman,* 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). *Furman* first announced the principle that States may not permit sentencers to exercise unguided discretion in imposing the death penalty. See generally 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. In response to *Furman,* many States passed new laws that made the death penalty mandatory following conviction of specified crimes, thereby eliminating the offending discretion. See *Gregg v. Georgia,* 428 U.S. 153, 180–181, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). The Court invalidated those statutes in *Woodson, Roberts,* and *Sumner* . The Court reasoned that mandatory capital sentencing schemes were problematic, because they failed "to allow the particularized consideration" of "relevant facets of the character and record of the individual offender or the circumstances of the particular offense." *Woodson,supra,* at 303–304, 96 S.Ct. 2978 (plurality opinion).[3]

In my view, *Woodson* and its progeny were wrongly decided. As discussed above, the Cruel and Unusual Punishments Clause, as originally understood, prohibits "torturous *methods* of punishment." See *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2044 (THOMAS, J., dissenting) (internal quotation marks omitted). It is not concerned with whether a particular lawful method of punishment—whether capital or noncapital—is imposed pursuant to a mandatory or discretionary sentencing regime. See *Gardner v. Florida*, 430 U.S. 349, 371, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (Rehnquist, J., dissenting) ("The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is

[132 S.Ct. 2485]

imposed"). In fact, "[i]n the early days of the Republic," each crime generally had a defined punishment "prescribed with specificity by the legislature." *United States v. Grayson*, 438 U.S. 41, 45, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978). Capital sentences, to which the Court analogizes, were treated no differently. "[M]andatory death sentences abounded in our first Penal Code" and were "common in the several States—both at the time of the founding and throughout the 19th century." *Harmelin*, 501 U.S., at 994–995, 111 S.Ct. 2680; see also *Woodson*,*supra*, at 289, 96 S.Ct. 2978 (plurality opinion) ("At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses"). Accordingly, the idea that the mandatory imposition of an otherwise-constitutional sentence renders that sentence cruel and unusual finds "no support in the text and history of the Eighth Amendment." *Harmelin*, *supra*, at 994, 111 S.Ct. 2680.

Moreover, mandatory death penalty schemes were "a perfectly reasonable legislative response to the concerns expressed in *Furman* " regarding unguided sentencing discretion, in that they "eliminat[ed] explicit jury discretion and treat[ed] all defendants equally." *Graham v. Collins*, 506 U.S. 461, 487, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (THOMAS, J., concurring). And, as Justice White explained more than 30 years ago, "a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that a criminal's character is such that he deserves death." *Roberts*, *supra*, at 358, 96 S.Ct. 3001 (dissenting opinion). Thus, there is no basis for concluding that a mandatory capital sentencing scheme is unconstitutional. Because the Court's cases requiring individualized sentencing in the capital context are wrongly decided, they cannot serve as a valid foundation for the novel rule regarding mandatory life-without-parole sentences for juveniles that the Court announces today.

B

In any event, this Court has already declined to extend its individualized-sentencing rule beyond the death penalty context. In *Harmelin*, the defendant was convicted of possessing a large quantity of drugs. 501 U.S., at 961, 111 S.Ct. 2680 (opinion of SCALIA, J.). In accordance with Michigan law, he was sentenced to a mandatory term of life in prison without the possibility of parole. *Ibid.* Citing the same line of death penalty precedents on which the Court relies today, the defendant argued that his sentence, due to its mandatory nature, violated the Cruel and Unusual Punishments Clause. *Id.*, at 994–995, 111 S.Ct. 2680 (opinion of the Court).

The Court rejected that argument, explaining that "[t]here can be no serious contention ... that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.' " *Id.*, at 995, 111 S.Ct. 2680. In so doing, the Court refused to analogize to its death penalty cases. The Court noted that those cases had "repeatedly suggested that there is no comparable [individualized-sentencing] requirement outside the capital

context, because of the qualitative difference between death and all other penalties." *Ibid.* The Court observed that, "even where the difference" between a sentence of life without parole and other sentences of imprisonment "is the greatest," such a sentence "cannot be compared with death." *Id.,* at 996, 111 S.Ct. 2680. Therefore, the Court concluded that the line of cases requiring individualized sentencing had been drawn at capital cases, and that there was "no basis for extending it further." *Ibid.*

[132 S.Ct. 2486]

*Harmelin* 's reasoning logically extends to these cases. Obviously, the younger the defendant, "the great[er]" the difference between a sentence of life without parole and other terms of imprisonment. *Ibid.* But under *Harmelin* 's rationale, the defendant's age is immaterial to the Eighth Amendment analysis. Thus, the result in today's cases should be the same as that in *Harmelin* . Petitioners, like the defendant in *Harmelin*, were not sentenced to death. Accordingly, this Court's cases "creating and clarifying the individualized capital sentencing doctrine" do not apply. *Id.,* at 995, 111 S.Ct. 2680 (internal quotation marks omitted).

Nothing about our Constitution, or about the qualitative difference between any term of imprisonment and death, has changed since *Harmelin* was decided 21 years ago. What *has* changed (or, better yet, "evolved") is this Court's ever-expanding line of categorical proportionality cases. The Court now uses *Roper* and *Graham* to jettison *Harmelin* 's clear distinction between capital and noncapital cases and to apply the former to noncapital juvenile offenders.[4] The Court's decision to do so is even less supportable than the precedents used to reach it.

III

As THE CHIEF JUSTICE notes, *ante,* at 2481 – 2482 (dissenting opinion), the Court lays the groundwork for future incursions on the States' authority to sentence criminals. In its categorical proportionality cases, the Court has considered " 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." *Graham,* 560 U.S., at ––––, 130 S.Ct.at 2022 (quoting *Roper,* 543 U.S., at 563, 125 S.Ct. 1183). In *Graham* , for example, the Court looked to "[a]ctual sentencing practices" to conclude that there was a national consensus against life-without-parole sentences for juvenile nonhomicide offenders. 560 U.S., at ––––, 130 S.Ct., at 2023–2025; see also *Roper,supra,* at 564–565, 125 S.Ct. 1183;*Atkins v. Virginia,* 536 U.S. 304, 316, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

Today, the Court makes clear that, even though its decision leaves intact the discretionary imposition of life-without-parole sentences for juvenile homicide offenders, it "think[s] appropriate occasions for sentencing juveniles to [life without parole] will be uncommon." *Ante,* at 2469. That statement may well cause trial judges to shy away from imposing life without parole sentences and embolden appellate judges to set them aside when they are imposed. And, when a future petitioner seeks a categorical ban on sentences of life without parole for juvenile homicide offenders, this Court will most assuredly look to the "actual sentencing practices" triggered by this case. The Court has, thus, gone from "merely" divining the societal consensus of today to shaping the societal consensus of tomorrow.

* * *

Today's decision invalidates a constitutionally permissible sentencing system based on nothing more than the Court's belief that "its own sense of morality ...

[132 S.Ct. 2487]

pre-empts that of the people and their representatives." *Graham, supra,* at ––––, 130 S.Ct., at 2058 (THOMAS, J., dissenting). Because nothing in the Constitution grants the Court the authority it exercises today, I respectfully dissent.

Justice ALITO, with whom Justice SCALIA joins, dissenting.

The Court now holds that Congress and the legislatures of the 50 States are prohibited by the Constitution from identifying any category of murderers under the age of 18 who must be sentenced to life imprisonment without parole. Even a 17[1] /2–year–old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a "child" and must be given a chance to persuade a judge to permit his release into society. Nothing in the Constitution supports this arrogation of legislative authority.

The Court long ago abandoned the original meaning of the Eighth Amendment, holding instead that the prohibition of "cruel and unusual punishment" embodies the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion); see also *Graham v. Florida,* 560 U.S. 48, ––––, 130 S.Ct. 2011, 2020–2021, 176 L.Ed.2d 825 (2010);*Kennedy v. Louisiana,* 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) ; *Roper v. Simmons,* 543 U.S. 551, 560–561, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) ; *Atkins v. Virginia,* 536 U.S. 304, 311–312, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) ; *Hudson v. McMillian,* 503 U.S. 1, 8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) ; *Ford v. Wainwright,* 477 U.S. 399, 406, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) ; *Rhodes v. Chapman,* 452 U.S. 337, 346, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981) ; *Estelle v. Gamble,* 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Both the provenance and philosophical basis for this standard were problematic from the start. (Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so, and how did this particular philosophy of history find its way into our fundamental law? And in any event, aren't elected representatives more likely than unaccountable judges to reflect changing societal standards?) But at least at the start, the Court insisted that these "evolving standards" represented something other than the personal views of five Justices. See *Rummel v. Estelle,* 445 U.S. 263, 275, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (explaining that "the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices"). Instead, the Court looked for objective indicia of our society's moral standards and the trajectory of our moral "evolution." See *id.,* at 274–275, 100 S.Ct. 1133 (emphasizing that " 'judgment should be informed by objective factors to the maximum possible extent' " (quoting *Coker v. Georgia,* 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion))).

In this search for objective indicia, the Court toyed with the use of public opinion polls, see *Atkins, supra,* at 316, n. 21, 122 S.Ct. 2242, and occasionally relied on foreign law, see *Roper v. Simmons,supra,* at 575, 125 S.Ct. 1183;*Enmund v. Florida,* 458 U.S. 782, 796, n. 22, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) ; *Thompson v. Oklahoma,* 487 U.S. 815, 830–831, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) ; *Coker,* 433 U.S., at 596, n. 10, 97 S.Ct. 2861 (plurality opinion).

In the main, however, the staple of this inquiry was the tallying of the positions taken by state legislatures. Thus, in *Coker,* which held that the Eighth Amendment prohibits the imposition of the death penalty

[132 S.Ct. 2488]

for the rape of an adult woman, the Court noted that only one State permitted that practice. *Id.,* at 595–596, 97 S.Ct. 2861. In *Enmund,* where the Court held that the Eighth Amendment forbids capital punishment for

ordinary felony murder, both federal law and the law of 28 of the 36 States that authorized the death penalty at the time rejected that punishment. 458 U.S., at 789, 102 S.Ct. 3368.

While the tally in these early cases may be characterized as evidence of a national consensus, the evidence became weaker and weaker in later cases. In *Atkins*, which held that low-IQ defendants may not be sentenced to death, the Court found an anti-death-penalty consensus even though more than half of the States that allowed capital punishment permitted the practice. See 536 U.S., at 342, 122 S.Ct. 2242 (SCALIA, J., dissenting) (observing that less than half of the 38 States that permit capital punishment have enacted legislation barring execution of the mentally retarded). The Court attempted to get around this problem by noting that there was a pronounced trend against this punishment. See *id.*, at 313–315, 122 S.Ct. 2242 (listing 18 States that had amended their laws since 1986 to prohibit the execution of mentally retarded persons).

The importance of trend evidence, however, was not long lived. In *Roper*, which outlawed capital punishment for defendants between the ages of 16 and 18, the lineup of the States was the same as in *Atkins*, but the trend in favor of abolition—five States during the past 15 years—was less impressive. *Roper*, 543 U.S., at 564–565, 125 S.Ct. 1183. Nevertheless, the Court held that the absence of a strong trend in support of abolition did not matter. See *id.*, at 566, 125 S.Ct. 1183 ("Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change").

In *Kennedy v. Louisiana*, the Court went further. Holding that the Eighth Amendment prohibits capital punishment for the brutal rape of a 12–year–old girl, the Court disregarded a nascent legislative trend *in favor of permitting capital punishment* for this narrowly defined and heinous crime. See 554 U.S., at 433, 128 S.Ct. 2641 (explaining that, although "the total number of States to have made child rape a capital offense ... is six," "[t]his is not an indication of a trend or change in direction comparable to the one supported by data in *Roper* "). The Court felt no need to see whether this trend developed further—perhaps because true moral evolution can lead in only one direction. And despite the argument that the rape of a young child may involve greater depravity than some murders, the Court proclaimed that homicide is categorically different from all (or maybe almost all) other offenses. See *id.*, at 438, 128 S.Ct. 2641 (stating that nonhomicide crimes, including child rape, "may be devastating in their harm ... but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their severity and irrevocability" (internal quotation marks and citation omitted)). As the Court had previously put it, "death is different." *Ford*, *supra*, at 411, 106 S.Ct. 2595 (plurality opinion).

Two years after *Kennedy*, in *Graham v. Florida*, any pretense of heeding a legislative consensus was discarded. In *Graham* , federal law and the law of 37 States and the District of Columbia permitted a minor to be sentenced to life imprisonment without parole for nonhomicide crimes, but despite this unmistakable evidence of a national consensus, the

[132 S.Ct. 2489]

Court held that the practice violates the Eighth Amendment. See 560 U.S., at ––––, 130 S.Ct., at 2043–2044 (THOMAS, J., dissenting). The Court, however, drew a distinction between minors who murder and minors who commit other heinous offenses, so at least in that sense the principle that death is different lived on.

Today, that principle is entirely put to rest, for here we are concerned with the imposition of a term of imprisonment on offenders who kill. The two (carefully selected) cases before us concern very young defendants, and despite

the brutality and evident depravity exhibited by at least one of the petitioners, it is hard not to feel sympathy for a 14–year–old sentenced to life without the possibility of release. But no one should be confused by the particulars of the two cases before us. The category of murderers that the Court delicately calls "children" (murderers under the age of 18) consists overwhelmingly of young men who are fast approaching the legal age of adulthood. Evan Miller and Kuntrell Jackson are anomalies; much more typical are murderers like Donald Roper, who committed a brutal thrill-killing just nine months shy of his 18th birthday. *Roper*, 543 U.S., at 556, 125 S.Ct. 1183.

Seventeen-year-olds commit a significant number of murders every year,[1] and some of these crimes are incredibly brutal. Many of these murderers are at least as mature as the average 18–year–old. See *Thompson*, 487 U.S., at 854, 108 S.Ct. 2687 (O'Connor, J., concurring in judgment) (noting that maturity may "vary widely among different individuals of the same age"). Congress and the legislatures of 43 States have concluded that at least some of these murderers should be sentenced to prison without parole, and 28 States and the Federal Government have decided that for some of these offenders life without parole should be mandatory. See *Ante*, at 2471 – 2472, and nn. 9–10. The majority of this Court now overrules these legislative judgments.[2]

It is true that, at least for now, the Court apparently permits a trial judge to make an individualized decision that a particular minor convicted of murder should be sentenced to life without parole, but do not expect this possibility to last very long. The majority goes out of its way to express the view that the imposition of a sentence of life without parole on a "child" (*i.e.*, a murderer under the age of 18) should be uncommon. Having held in *Graham* that a trial judge with discretionary sentencing authority may not impose a sentence of life without parole on a minor

[132 S.Ct. 2490]

who has committed a nonhomicide offense, the Justices in the majority may soon extend that holding to minors who commit murder. We will see.

What today's decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society's standards. Our Eighth Amendment case law is now entirely inward looking. After entirely disregarding objective indicia of our society's standards in *Graham* , the Court now extrapolates from *Graham* . Future cases may extrapolate from today's holding, and this process may continue until the majority brings sentencing practices into line with whatever the majority views as truly evolved standards of decency.

The Eighth Amendment imposes certain limits on the sentences that may be imposed in criminal cases, but for the most part it leaves questions of sentencing policy to be determined by Congress and the state legislatures—and with good reason. Determining the length of imprisonment that is appropriate for a particular offense and a particular offender inevitably involves a balancing of interests. If imprisonment does nothing else, it removes the criminal from the general population and prevents him from committing additional crimes in the outside world. When a legislature prescribes that a category of killers must be sentenced to life imprisonment, the legislature, which presumably reflects the views of the electorate, is taking the position that the risk that these offenders will kill again outweighs any countervailing consideration, including reduced culpability due to immaturity or the possibility of rehabilitation. When the majority of this Court countermands that democratic decision, what the majority is saying is that members of society must be exposed to the risk that these convicted murderers, if released from custody, will murder again.

Unless our cases change course, we will continue to march toward some vision of evolutionary culmination that the Court has not yet disclosed. The Constitution does not authorize us to take the country on this journey.

---

Notes:

[1] Jackson was ineligible for the death penalty under *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion), which held that capital punishment of offenders under the age of 16 violates the Eighth Amendment.

[2] For the first time in this Court, Arkansas contends that Jackson's sentence was not mandatory. On its view, state law then in effect allowed the trial judge to suspend the life-without-parole sentence and commit Jackson to the Department of Human Services for a "training-school program," at the end of which he could be placed on probation. Brief for Respondent in No. 10–9647, pp. 36–37 (hereinafter Arkansas Brief) (citing Ark.Code Ann. § 12–28–403(b)(2) (1999)). But Arkansas never raised that objection in the state courts, and they treated Jackson's sentence as mandatory. We abide by that interpretation of state law. See, *e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684, 690–691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

[3] The Court of Criminal Appeals also affirmed the juvenile court's denial of Miller's request for funds to hire his own mental expert for the transfer hearing. The court pointed out that under governing Alabama Supreme Court precedent, "the procedural requirements of a trial do not ordinarily apply" to those hearings. *E.J.M. v. State*, 928 So.2d 1077 (Ala.Crim.App.2004) (Cobb, J., concurring in result) (internal quotation marks omitted). In a separate opinion, Judge Cobb agreed on the reigning precedent, but urged the State Supreme Court to revisit the question in light of transfer hearings' importance. See *id.*, at 1081 ("[A]lthough later mental evaluation as an adult affords some semblance of procedural due process, it is, in effect, too little, too late").

[4] The three dissenting opinions here each take issue with some or all of those precedents. See *post*, at 2479 – 2480 (opinion of ROBERTS, C.J.); *post*, at 2482 – 2485 (opinion of THOMAS, J.); *post*, at 2487 – 2489 (opinion of ALITO, J.). That is not surprising: their authors (and joiner) each dissented from some or all of those precedents. See, *e.g.*, *Kennedy*, 554 U.S., at 447, 128 S.Ct. 2641 (ALITO, J., joined by ROBERTS, C.J., and SCALIA and THOMAS, JJ., dissenting); *Roper*, 543 U.S., at 607, 125 S.Ct. 1183 (SCALIA, J., joined by THOMAS, J., dissenting); *Atkins*, 536 U.S., at 337, 122 S.Ct. 2242 (SCALIA, J., joined by THOMAS, J., dissenting); *Thompson*, 487 U.S., at 859, 108 S.Ct. 2687 (SCALIA, J., dissenting); *Graham v. Collins*, 506 U.S. 461, 487, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (THOMAS, J., concurring) (contending that *Woodson* was wrongly decided). In particular, each disagreed with the majority's reasoning in *Graham* , which is the foundation stone of our analysis. See *Graham*, 560 U.S., at ––––, 130 S.Ct., at 2036 (ROBERTS, C.J., concurring in judgment); *id.*, at ––––, 130 S.Ct., at 2043–2056 (THOMAS, J., joined by SCALIAand ALITO, JJ., dissenting); *id.*, at ––––, 130 S.Ct., at 2058 (ALITO, J., dissenting). While the dissents seek to relitigate old Eighth Amendment battles, repeating many arguments this Court has previously (and often) rejected, we apply the logic of *Roper*, *Graham* , and our individualized sentencing decisions to these two cases.

[5] The evidence presented to us in these cases indicates that the science and social science supporting *Roper* 's and *Graham* 's conclusions have become even stronger. See, *e.g.*, Brief for American Psychological Association et al. as *Amici Curiae* 3 ("[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions"); *id.*, at 4 ("It is

increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance"); Brief for J. Lawrence Aber et al. as *Amici Curiae* 12–28 (discussing post-*Graham* studies); *id.*, at 26–27 ("Numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency" (footnote omitted)).

[6] In discussing *Graham* , the dissents essentially ignore all of this reasoning. See *post*, at 2478 – 2480 (opinion of ROBERTS, C.J.); *post*, at 2488 – 2489 (opinion of ALITO, J.). Indeed, THE CHIEF JUSTICE ignores the points made in his own concurring opinion. The only part of *Graham* that the dissents see fit to note is the distinction it drew between homicide and nonhomicide offenses. See *post*, at 2480 – 2481 (opinion of ROBERTS, C.J.); *post*, at 2488 – 2489 (opinion of ALITO, J.). But contrary to the dissents' charge, our decision today retains that distinction: *Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.

[7] Although adults are subject as well to the death penalty in many jurisdictions, very few offenders actually receive that sentence. See, *e.g.*, Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, Felony Sentences in State Courts 2006—Statistical Tables, p. 28 (Table 4.4) (rev. Nov. 22, 2010). So in practice, the sentencing schemes at issue here result in juvenile homicide offenders receiving the same nominal punishment as almost all adults, even though the two classes differ significantly in moral culpability and capacity for change.

[8] Given our holding, and the dissents' competing position, we see a certain irony in their repeated references to 17–year–olds who have committed the "most heinous" offenses, and their comparison of those defendants to the 14–year–olds here. See *post*, at 2477 (opinion of ROBERTS, C.J.) (noting the "17–year old [who] is convicted of deliberately murdering an innocent victim"); *post*, at 2478 ("the most heinous murders"); *post*, at 2480 ("the worst types of murder"); *post*, at 2489 (opinion of ALITO, J.) (warning the reader not to be "confused by the particulars" of these two cases); *post*, at 2489 (discussing the "$17^1/_2$–year–old who sets off a bomb in a crowded mall"). Our holding requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes. By contrast, the sentencing schemes that the dissents find permissible altogether preclude considering these factors.

[9] The States note that 26 States and the Federal Government make life without parole the mandatory (or mandatory minimum) punishment for some form of murder, and would apply the relevant provision to 14–year–olds (with many applying it to even younger defendants). See Alabama Brief 17–18. In addition, life without parole is mandatory for older juveniles in Louisiana (age 15 and up) and Texas (age 17). See La. Child. Code Ann., Arts. 857(A), (B) (West Supp. 2012); La.Rev.Stat. Ann. §§ 14:30(C), 14:30.1(B) (West Supp.2012); Tex. Family Code Ann. §§ 51.02(2)(A), 54.02(a)(2)(A) (West Supp.2011); Tex. Penal Code Ann. § 12.31(a) (West 2011). In many of these jurisdictions, life without parole is the mandatory punishment only for aggravated forms of murder. That distinction makes no difference to our analysis. We have consistently held that limiting a mandatory death penalty law to particular kinds of murder cannot cure the law's "constitutional vice" of disregarding the "circumstances of the particular offense and the character and propensities of the offender." *Roberts v. Louisiana*, 428 U.S. 325, 333, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (plurality opinion); see *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). The same analysis applies here, for the same reasons.

[10] In assessing indicia of societal standards, *Graham* discussed "actual sentencing practices" in addition to legislative enactments, noting how infrequently sentencers imposed the statutorily available penalty. 560 U.S., at ––––, 130 S.Ct., at 2023. Here, we consider the constitutionality of mandatory sentencing schemes—which by definition remove a judge's or jury's discretion—so no comparable gap between legislation and practice can exist. Rather than showing whether sentencers consider life without parole for juvenile homicide offenders appropriate, the number of juveniles serving this sentence, see *post,* at 2477, 2478 – 2479 (ROBERTS, C.J., dissenting), merely reflects the number who have committed homicide in mandatory-sentencing jurisdictions. For the same reason, THE CHIEF JUSTICE's comparison of ratios in this case and *Graham* carries little weight. He contrasts the number of mandatory life-without-parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, with "the corresponding number" of sentences in *Graham* (*i.e.,* the number of life-without-parole sentences for juveniles who committed serious nonhomicide crimes, as compared to arrests for those crimes). *Post,* at 2461 – 2462. But because the mandatory nature of the sentences here necessarily makes them more common, THECHIEF JUSTICE's figures do not "correspon[d]" at all. The higher ratio is mostly a function of removing the sentencer's discretion.

> Where mandatory sentencing does not itself account for the number of juveniles serving life-without-parole terms, the evidence we have of practice supports our holding. Fifteen jurisdictions make life without parole discretionary for juveniles. See Alabama Brief 25 (listing 12 States); Cal.Penal Code Ann. § 190.5(b) (West 2008); Ind.Code § 35–50–2–3(b) (2011) ; N.M. Stat. §§ 31–18–13(B), 31–18–14, 31–18–15.2 (2010). According to available data, only about 15% of all juvenile life-without-parole sentences come from those 15 jurisdictions, while 85% come from the 29 mandatory ones. See Tr. of Oral Arg. in No. 10–9646, p. 19; Human Rights Watch, State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP), Oct. 2, 2009, online at http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole (as visited June 21, 2012, and available in Clerk of Court's case file). That figure indicates that when given the choice, sentencers impose life without parole on children relatively rarely. And contrary to THECHIEF JUSTICE's argument, see *post,* at 2462, n. 2, we have held that when judges and juries do not often choose to impose a sentence, it at least should not be mandatory. See *Woodson v. North Carolina,* 428 U.S. 280, 295–296, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion) (relying on the infrequency with which juries imposed the death penalty when given discretion to hold that its mandatory imposition violates the Eighth Amendment).

[11] In response, THE CHIEF JUSTICE complains: "To say that a sentence may be considered unusual *because* so many legislatures approve it stands precedent on its head." *Post,* at 2479. To be clear: That description in no way resembles our opinion. We hold that the sentence violates the Eighth Amendment because, as we have exhaustively shown, it conflicts with the fundamental

principles of *Roper*, *Graham* , and our individualized sentencing cases. We then show why the number of States imposing this punishment does not preclude our holding, and note how its mandatory nature (in however many States adopt it) makes use of actual sentencing numbers unilluminating.

[12] THE CHIEF JUSTICE attempts to distinguish *Graham* on this point, arguing that there "the extreme rarity with which the sentence in question was imposed could suggest that legislatures did not really intend the inevitable result of the laws they passed." *Post*, at 2480. But neither *Graham* nor *Thompson* suggested such reasoning, presumably because the time frame makes it difficult to comprehend. Those cases considered what legislators intended when they enacted, at different moments, separate juvenile-transfer and life-without-parole provisions—by definition, before they knew or could know how many juvenile life-without-parole sentences would result.

[13] See Ala.Code §§ 13A–5–45(f), 13A–6–2(c) (2005 and Cum. Supp. 2011); Ariz.Rev.Stat. Ann. § 13–752 (West 2010), § 41–1604.09(I) (West 2011); Conn. Gen.Stat. § 53a–35a(1) (2011); Del.Code Ann., Tit. 11, § 4209(a) (2007); Fla. Stat. § 775.082(1) (2010) ; Haw.Rev.Stat. § 706–656(1) (1993); Idaho Code § 18–4004 (Lexis 2004) ; Mich. Comp. Laws Ann. § 791.234(6)(a) (West Cum. Supp. 2012); Minn.Stat. Ann. §§ 609.106, subd. 2 (West 2009); Neb.Rev.Stat. § 29–2522 (2008) ; N.H.Rev.Stat. Ann. § 630:1–a (West 2007) ; 18 Pa. Cons.Stat. §§ 1102(a), (b), 61 Pa. Cons.Stat. § 6137(a)(1) (Supp.2012); S.D. Codified Laws § 22–6–1(1) (2006), § 24–15–4 (2004) ; Vt. Stat. Ann., Tit. 13, § 2311(c) (2009); Wash. Rev.Code § 10.95.030(1) (2010).

[14] See Del.Code Ann., Tit. 10, § 1010 (1999 and Cum. Supp. 2010), Tit. 11, § 4209(a) (2007); Fla. Stat. § 985.56 (2010), 775.082(1) ; Haw.Rev.Stat. § 571–22(d) (1993), § 706–656(1) ; Idaho Code §§ 20–508, 20–509 (Lexis Cum. Supp. 2012), § 18–4004 ; Mich. Comp. Laws Ann. § 712A.2d (West 2009), § 791.234(6)(a) ; Neb.Rev.Stat. §§ 43–247, 29–2522 (2008) ; 42 Pa. Cons.Stat. § 6355(e) (2000), 18 Pa. Cons.Stat. § 1102. Other States set ages between 8 and 10 as the minimum for transfer, thus exposing those young children to mandatory life without parole. See S.D. Codified Laws §§ 26–8C–2, 26–11–4 (2004), § 22–6–1 (age 10); Vt. Stat. Ann., Tit. 33, § 5204 (2011 Cum. Supp.), Tit. 13, § 2311(a) (2009) (age 10); Wash. Rev.Code §§ 9A.04.050, 13.40.110 (2010), § 10.95.030 (age 8).

[15] See Ala.Code § 12–15–204(a) (Cum. Supp. 2011); Ariz.Rev.Stat. Ann. § 13–501(A) (West Cum. Supp. 2011); Conn. Gen.Stat. § 46b–127 (2011); Ill. Comp. Stat. ch. 705, §§ 405/5–130(1)(a), (4)(a) (West 2010); La. Child. Code Ann., Art. 305(A) (West Cum. Supp. 2012); Mass. Gen. Laws, ch. 119, § 74 (West 2010) ; Mich. Comp. Laws Ann. § 712A.2(a) (West 2002); Minn.Stat. Ann. § 260B.007, subd. 6(b) (West Cum. Supp. 2011), § 260B.101, subd. 2 (West 2007); Mo.Rev.Stat. §§ 211.021(1), (2) (2011) ; N.C. Gen.Stat. Ann. §§ 7B–1501(7), 7B–1601(a), 7B–2200 (Lexis 2011) ; N.H.Rev.Stat. Ann. § 169–B:2(IV) (West Cum. Supp. 2011), § 169–B:3 (West 2010); Ohio Rev.Code Ann. § 2152.12(A)(1)(a) (Lexis 2011); Tex. Family Code Ann. § 51.02(2) ; Va.Code Ann. §§ 16.1–241(A), 16.1–269.1(B), (D) ( Lexis 2010).

[16] Fla. Stat. Ann. § 985.557(1) (West Supp.2012) ; Mich. Comp. Laws Ann. § 712A.2(a)(1) ; Va.Code Ann. §§ 16.1–241(A), 16.1–269.1(C), (D).

[1] *Graham* stated that 123 prisoners were serving life without parole for nonhomicide offenses committed as juveniles, while in 2007 alone 380,480 juveniles were arrested for serious nonhomicide crimes. 560 U.S., at ––– –, 130 S.Ct., at 2024–2025. I use 2,000 as the number of prisoners serving mandatory life without parole sentences for murders committed as juveniles, because all seem to

accept that the number is at least that high. And the same source *Graham* used reports that 1,170 juveniles were arrested for murder and nonnegligent homicide in 2009. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, C. Puzzanchera & B. Adams, Juvenile Arrests 2009, p. 4 (Dec. 2011).

[2] The Court's reference to discretionary sentencing practices is a distraction. See *ante*, at 2471 – 2472, n. 10. The premise of the Court's decision is that mandatory sentences are categorically different from discretionary ones. So under the Court's own logic, whether discretionary sentences are common or uncommon has nothing to do with whether mandatory sentences are unusual. In any event, if analysis of discretionary sentences were relevant, it would not provide objective support for today's decision. The Court states that "about 15% of all juvenile life-without-parole sentences"—meaning nearly 400 sentences—were imposed at the discretion of a judge or jury. *Ante*, at 2471 – 2472, n. 10. Thus the number of discretionary life without parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, is about 1,000 times higher than the corresponding number in *Graham* .

[3] The Court claims that I "take issue with some or all of these precedents" and "seek to relitigate" them. *Ante*, at 2464, n. 4. Not so: applying this Court's cases exactly as they stand, I do not believe they support the Court's decision in this case.

[1] I join THE CHIEF JUSTICE's opinion because it accurately explains that, even accepting the Court's precedents, the Court's holding in today's cases is unsupportable.

[2] Neither the Court nor petitioners argue that petitioners' sentences would have been among "the 'modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.' " *Graham*, 560 U.S., at ––––, n. 3, 130 S.Ct., at 2048, n. 3 (THOMAS, J., dissenting) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) ). Nor could they. Petitioners were 14 years old at the time they committed their crimes. When the Bill of Rights was ratified, 14–year–olds were subject to trial and punishment as adult offenders. See *Roper v. Simmons*, 543 U.S. 551, 609, n. 1, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (SCALIA, J., dissenting). Further, mandatory death sentences were common at that time. See *Harmelin v. Michigan*, 501 U.S. 957, 994–995, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). It is therefore implausible that a 14–year–old's mandatory prison sentence—of any length, with or without parole—would have been viewed as cruel and unusual.

[3] The Court later extended *Woodson*, requiring that capital defendants be permitted to present, and sentencers in capital cases be permitted to consider, any relevant mitigating evidence, including the age of the defendant. See, *e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 597–608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104, 110–112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) ; *Skipper v. South Carolina*, 476 U.S. 1, 4–5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) ; *Johnson v. Texas*, 509 U.S. 350, 361–368, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993). Whatever the validity of the requirement that sentencers be permitted to consider all mitigating evidence when deciding whether to impose a *nonmandatory* capital sentence, the Court certainly was wrong to prohibit *mandatory* capital sentences. See *Graham v. Collins*, 506 U.S. 461, 488–500, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (THOMAS, J., concurring).

[4] In support of its decision not to apply *Harmelin* to juvenile offenders, the Court also observes that " '[o]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.' " *Ante*, at 2470 (quoting *J.D.B. v. North Carolina*, 564 U.S. ––––, ––––, 131 S.Ct. 2394, 2404, 180 L.Ed.2d 310 (2011) (some internal quotation marks omitted)). That is no doubt true as a general matter, but it does not

justify usurping authority that rightfully belongs to the people by imposing a constitutional rule where none exists.

[1] Between 2002 and 2010, 17–year–olds committed an average combined total of 424 murders and nonnegligent homicides per year. See Dept. of Justice, Bureau of Justice Statistics, § 4, Arrests, Age of persons arrested (Table 4.7).

[2] As the Court noted in *Mistretta v. United States*, 488 U.S. 361, 366, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), Congress passed the Sentencing Reform Act of 1984 to eliminate discretionary sentencing and parole because it concluded that these practices had led to gross abuses. The Senate Report for the 1984 bill rejected what it called the "outmoded rehabilitation model" for federal criminal sentencing. S.Rep. No. 98–225, p. 38 (1983). According to the Report, "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." *Ibid.* The Report also "observed that the indeterminate-sentencing system had two 'unjustifi[ed]' and 'shameful' consequences. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was uncertainty as to the time the offender would spend in prison. Each was a serious impediment to an evenhanded and effective operation of the criminal justice system." *Mistretta, supra,* at 366, 109 S.Ct. 647 (quoting S.Rep. No. 98–225, at 38, 65 (citation omitted)).

---

**136 S.Ct. 718**
**193 L.Ed.2d 599**

**Henry MONTGOMERY, Petitioner**
**v.**
**LOUISIANA.**

**No. 14–280.**

**Supreme Court of the United States**

**Argued Oct. 13, 2015.**
**Decided Jan. 25, 2016.**
**As Revised Jan. 27, 2016.**

**Summaries:**

**Source: Justia**

Montgomery was 17 years old in 1963, when he killed a deputy in Louisiana. The jury returned a verdict of "guilty without capital punishment," which carried an automatic sentence of life without parole. Nearly 50 years later, the Supreme Court decided, in Miller v. Alabama, that mandatory life without parole for juvenile offenders violates the Eighth Amendment's prohibition on cruel and unusual punishments. The trial court denied his motion for relief. His application for a supervisory writ was denied by the Louisiana Supreme Court, which had previously held that Miller does not have retroactive effect in state collateral review. The Supreme Court reversed. Courts must give retroactive effect to new watershed procedural rules and to substantive rules of constitutional law. Substantive constitutional rules include "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." Miller announced a substantive rule of constitutional law, which is retroactive because it necessarily carries a significant risk that a defendant faces a punishment that the law cannot impose. A state may remedy a Miller violation by extending parole eligibility to juvenile offenders. This would neither impose an onerous burden nor disturb the finality of state convictions and would afford someone like Montgomery, who may have evolved from a troubled, misguided youth to a model member of the prison community, the opportunity to demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change.

Richard D. Bernstein, appointed by this Court, as amicus curiae.

Michael R. Dreeben for the United States as amicus curiae, by special leave of the Court, supporting the Petitioner.

S. Kyle Duncan, Washington, DC, for Respondent.

Mark D. Plaisance, Thibodaux, LA, for Petitioner.

Mark Plaisance, Lindsay Jarrell Blouin, Office of the Public Defender, Thibodaux, LA, Sean Collins, Baton Rouge, LA, Marsha Levick, Emily C. Keller, Jean W. Strout, Philadelphia, PA, Jeffrey J. Pokorak, Boston, MA, for Petitioner.

James D. "Buddy" Caldwell, Louisiana Attorney General, Trey Phillips, First Assistant, Attorney General, Colin A. Clark, Assistant Attorney General, Louisiana Department of Justice, Baton Rouge, LA, Hillar C. Moore, III, District Attorney, Dylan C. Alge, Assistant District Attorney, Baton Rouge, LA, S. Kyle Duncan, Duncan PLLC, Washington, DC, for Respondent.

Justice KENNEDY delivered the opinion of the Court.

This is another case in a series of decisions involving the sentencing of offenders who were juveniles when their crimes were committed. In *Miller v. Alabama*, 567 U.S. ––––, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012),

the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing. In the wake of *Miller* , the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided. Courts have reached different conclusions on this point. Compare, *e.g., Martin v. Symmes,* 782 F.3d 939, 943 (C.A.8 2015) ; *Johnson v. Ponton,* 780 F.3d 219, 224–226 (C.A.4 2015) ; *Chambers v. State,* 831 N.W.2d 311, 331 (Minn.2013) ; and *State v. Tate,* 2012–2763, p. 17 (La.11/5/13), 130 So.3d 829, 841, with *Diatchenko v. District Attorney for Suffolk Dist.,* 466 Mass. 655, 661–667, 1 N.E.3d 270, 278–282 (2013) ; *Aiken v. Byars,* 410 S.C. 534, 548, 765 S.E.2d 572, 578 (2014) ; *State v. Mares,* 2014 WY 126, ¶¶ 47–63, 335 P.3d 487, 504–508 ; and *People v. Davis,* 2014 IL 115595, ¶ 41, 379 Ill.Dec. 381, 6 N.E.3d 709, 722. Certiorari was granted in this case to resolve the question.

I

Petitioner is Henry Montgomery. In 1963, Montgomery killed Charles Hurt, a deputy sheriff in East Baton Rouge, Louisiana. Montgomery was 17 years old at the time of the crime. He was convicted of murder and sentenced to death, but the Louisiana Supreme Court reversed his conviction after finding that public prejudice had prevented a fair trial. *State v. Montgomery,* 248 La. 713, 181 So.2d 756, 762 (1966).

Montgomery was retried. The jury returned a verdict of "guilty without capital punishment."

[136 S.Ct. 726]

*State v. Montgomery,* 257 La. 461, 242 So.2d 818 (1970). Under Louisiana law, this verdict required the trial court to impose a sentence of life without parole. The sentence was automatic upon the jury's verdict, so Montgomery had no opportunity to present mitigation evidence to justify a less severe sentence. That evidence might have included Montgomery's young age at the time of the crime; expert testimony regarding his limited capacity for foresight, self-discipline, and judgment; and his potential for rehabilitation. Montgomery, now 69 years old, has spent almost his entire life in prison.

Almost 50 years after Montgomery was first taken into custody, this Court decided *Miller v. Alabama,* 567 U.S. ––––, 132 S.Ct. 2455, 183 L.Ed.2d 407. *Miller* held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on " 'cruel and unusual punishments.' " *Id* ., at ––––, 132 S.Ct., at 2460. "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," mandatory life without parole "poses too great a risk of disproportionate punishment." *Id.,* at ––––, 132 S.Ct., at 2469. *Miller* required that sentencing courts consider a child's "diminished culpability and heightened capacity for change" before condemning him or her to die in prison. *Ibid.* Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect " 'irreparable corruption.' " *Ibid.* (quoting *Roper v. Simmons,* 543 U.S. 551, 573, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) ).

After this Court issued its decision in *Miller* , Montgomery sought collateral review of his mandatory life-without-parole sentence. In Louisiana there are two principal mechanisms for collateral challenge to the lawfulness of imprisonment. Each begins with a filing in the trial court where the prisoner was convicted and sentenced. La.Code Crim. Proc. Ann., Arts. 882, 926 (West 2008). The first procedure permits a prisoner to file an application for postconviction relief on one or more of seven grounds set forth in the statute. Art. 930.3. The Louisiana Supreme Court has

held that none of those grounds provides a basis for collateral review of sentencing errors. See *State ex rel. Melinie v. State*, 93–1380 (La.1/12/96), 665 So.2d 1172 (*per curiam* ). Sentencing errors must instead be raised through Louisiana's second collateral review procedure.

This second mechanism allows a prisoner to bring a collateral attack on his or her sentence by filing a motion to correct an illegal sentence. See Art. 882. Montgomery invoked this procedure in the East Baton Rouge Parish District Court.

The state statute provides that "[a]n illegal sentence may be corrected at any time by the court that imposed the sentence." *Ibid* . An illegal sentence "is primarily restricted to those instances in which the *term* of the prisoner's sentence is not authorized by the statute or statutes which govern the penalty" for the crime of conviction. *State v. Mead*, 2014–1051, p. 3 (La.App. 4 Cir. 4/22/15), 165 So.3d 1044, 1047 ; see also *State v. Alexander*, 2014–0401 (La.11/7/14), 152 So.3d 137 (*per curiam* ). In the ordinary course Louisiana courts will not consider a challenge to a disproportionate sentence on collateral review; rather, as a general matter, it appears that prisoners must raise Eighth Amendment sentencing challenges on direct review. See *State v. Gibbs*, 620 So.2d 296, 296–297 (La.App.1993) ; *Mead*, 165 So.3d, at 1047.

Louisiana's collateral review courts will, however, consider a motion to correct

[136 S.Ct. 727]

an illegal sentence based on a decision of this Court holding that the Eighth Amendment to the Federal Constitution prohibits a punishment for a type of crime or a class of offenders. When, for example, this Court held in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), that the Eighth Amendment bars life-without-parole sentences for juvenile nonhomicide offenders, Louisiana courts heard *Graham* claims brought by prisoners whose sentences had long been final. See, *e.g., State v. Shaffer*, 2011–1756, pp. 1–4 (La.11/23/11), 77 So.3d 939, 940–942 (*per curiam* ) (considering motion to correct an illegal sentence on the ground that *Graham* rendered illegal a life-without-parole sentence for a juvenile nonhomicide offender). Montgomery's motion argued that *Miller* rendered his mandatory life-without-parole sentence illegal.

The trial court denied Montgomery's motion on the ground that *Miller* is not retroactive on collateral review. Montgomery then filed an application for a supervisory writ. The Louisiana Supreme Court denied the application. 2013–1163 (6/20/14), 141 So.3d 264. The court relied on its earlier decision in *State v. Tate*, 2012–2763, 130 So.3d 829, which held that *Miller* does not have retroactive effect in cases on state collateral review. Chief Justice Johnson and Justice Hughes dissented in *Tate* , and Chief Justice Johnson again noted her dissent in Montgomery's case.

This Court granted Montgomery's petition for certiorari. The petition presented the question "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison." Pet. for Cert. i. In addition, the Court directed the parties to address the following question: "Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in *Miller* ?" 575 U.S. ––––, 135 S.Ct. 1546, 191 L.Ed.2d 635 (2015).

II

The parties agree that the Court has jurisdiction to decide this case. To ensure this conclusion is correct, the Court appointed Richard D. Bernstein as *amicus curiae* to brief and argue the position that the Court lacks jurisdiction. He has ably discharged his assigned responsibilities.

*Amicus* argues that a State is under no obligation to give a new rule of constitutional law retroactive effect in its own collateral review proceedings. As those proceedings are created by state law and under the State's plenary control, *amicus* contends, it is for state courts to define applicable principles of retroactivity. Under this view, the Louisiana Supreme Court's decision does not implicate a federal right; it only determines the scope of relief available in a particular type of state proceeding—a question of state law beyond this Court's power to review.

If, however, the Constitution establishes a rule and requires that the rule have retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by this Court. Cf. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (holding that on direct review, a new constitutional rule must be applied retroactively "to all cases, state or federal"). States may not disregard a controlling, constitutional command in their own courts. See *Martin v. Hunter's Lessee*, 1 Wheat. 304, 340–341, 344, 4 L.Ed. 97 (1816) ; see also *Yates v. Aiken*, 484 U.S. 211, 218, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988) (when a State has not "placed any limit on the issues that it will entertain in collateral proceedings ... it has a duty to grant the relief that federal

[136 S.Ct. 728]

law requires"). *Amicus* ' argument therefore hinges on the premise that this Court's retroactivity precedents are not a constitutional mandate.

Justice O'Connor's plurality opinion in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), set forth a framework for retroactivity in cases on federal collateral review. Under *Teague*, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced. *Teague* recognized, however, two categories of rules that are not subject to its general retroactivity bar. First, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include "rules forbidding criminal punishment of certain primary conduct," as well as "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ; see also *Teague, supra*, at 307, 109 S.Ct. 1060. Although *Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, this Court has recognized that substantive rules "are more accurately characterized as ... not subject to the bar." *Schriro v. Summerlin*, 542 U.S. 348, 352, n. 4, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). Second, courts must give retroactive effect to new " ‘ "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.’ " *Id* ., at 352, 124 S.Ct. 2519 ; see also *Teague*, 489 U.S., at 312–313, 109 S.Ct. 1060.

It is undisputed, then, that *Teague* requires the retroactive application of new substantive and watershed procedural rules in federal habeas proceedings. *Amicus*, however, contends that *Teague* was an interpretation of the federal habeas statute, not a constitutional command; and so, the argument proceeds, *Teague* 's retroactivity holding simply has no application in a State's own collateral review proceedings.

To support this claim, *amicus* points to language in *Teague* that characterized the Court's task as " ‘defin[ing] the scope of the writ.’ " *Id* ., at 308, 109 S.Ct. 1060 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) (plurality opinion)); see also 489 U.S., at 317, 109 S.Ct. 1060 (White, J., concurring in part and concurring in judgment) ("If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us ..."); *id*., at 332, 109 S.Ct. 1060 (Brennan, J.,

dissenting) ("No new facts or arguments have come to light suggesting that our [past] reading of the federal habeas statute ... was plainly mistaken").

In addition, *amicus* directs us to *Danforth v. Minnesota,* 552 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008), in which a majority of the Court held that *Teague* does not preclude state courts from giving retroactive effect to a broader set of new constitutional rules than *Teague* itself required. 552 U.S., at 266, 128 S.Ct. 1029. The *Danforth* majority concluded that *Teague* 's general rule of nonretroactivity for new constitutional rules of criminal procedure "was an exercise of this Court's power to interpret the federal habeas statute." 552 U.S., at 278, 128 S.Ct. 1029. Since *Teague* 's retroactivity bar "limit[s] only the scope of *federal* habeas relief," the *Danforth* majority reasoned, States are free to make new procedural rules retroactive on state collateral review. 552 U.S., at 281–282, 128 S.Ct. 1029.

*Amicus,* however, reads too much into these statements. Neither *Teague* nor *Danforth* had reason to address whether

[136 S.Ct. 729]

States are required as a constitutional matter to give retroactive effect to new substantive or watershed procedural rules. *Teague* originated in a federal, not state, habeas proceeding; so it had no particular reason to discuss whether any part of its holding was required by the Constitution in addition to the federal habeas statute. And *Danforth* held only that *Teague* 's general rule of nonretroactivity was an interpretation of the federal habeas statute and does not prevent States from providing greater relief in their own collateral review courts. The *Danforth* majority limited its analysis to *Teague* 's general retroactivity bar, leaving open the question whether *Teague* 's two exceptions are binding on the States as a matter of constitutional law. 552 U.S., at 278, 128 S.Ct. 1029 ; see also *id.,* at 277, 128 S.Ct. 1029 ("[T]he case before us now does not involve either of the '*Teague* exceptions' ").

In this case, the Court must address part of the question left open in *Danforth* . The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague* 's conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. This holding is limited to *Teague* 's first exception for substantive rules; the constitutional status of *Teague* 's exception for watershed rules of procedure need not be addressed here.

This Court's precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final.

The category of substantive rules discussed in *Teague* originated in Justice Harlan's approach to retroactivity. *Teague* adopted that reasoning. See 489 U.S., at 292, 312, 109 S.Ct. 1060 (discussing *Mackey v. United States,* 401 U.S. 667, 692, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (opinion concurring in judgments in part and dissenting in part); and *Desist v. United States,* 394 U.S. 244, 261, n. 2, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting)). Justice Harlan defined substantive constitutional rules as "those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Mackey, supra,* at 692, 91 S.Ct. 1160. In *Penry v. Lynaugh,* decided four months after *Teague,* the Court recognized that "the first exception set forth in *Teague* should be understood to cover not only rules

forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." 492 U.S., at 330, 109 S.Ct. 2934. *Penry* explained that Justice Harlan's first exception spoke "in terms of substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed." *Id.*, at 329, 109 S.Ct. 2934. Whether a new rule bars States from proscribing certain conduct or from inflicting a certain punishment, "[i]n both cases, the Constitution itself deprives the State of the power to impose a certain penalty." *Id.*, at 330, 109 S.Ct. 2934.

Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting

[136 S.Ct. 730]

conviction or sentence is, by definition, unlawful. Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating "the *manner of determining* the defendant's culpability." *Schriro*, 542 U.S., at 353, 124 S.Ct. 2519 ; *Teague, supra*, at 313, 109 S.Ct. 1060. Those rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro, supra*, at 352, 124 S.Ct. 2519. Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful. For this reason, a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction or sentence.

The same possibility of a valid result does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment. "[E]ven the use of impeccable factfinding procedures could not legitimate a verdict" where "the conduct being penalized is constitutionally immune from punishment." *United States v. United States Coin & Currency*, 401 U.S. 715, 724, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971). Nor could the use of flawless sentencing procedures legitimate a punishment where the Constitution immunizes the defendant from the sentence imposed. "No circumstances call more for the invocation of a rule of complete retroactivity." *Ibid.*

By holding that new substantive rules are, indeed, retroactive, *Teague* continued a long tradition of giving retroactive effect to constitutional rights that go beyond procedural guarantees. See *Mackey, supra*, at 692–693, 91 S.Ct. 1160 (opinion of Harlan, J.) ("[T]he writ has historically been available for attacking convictions on [substantive] grounds"). Before *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), "federal courts would never consider the merits of a constitutional claim if the habeas petitioner had a fair opportunity to raise his arguments in the original proceeding." *Desist*, 394 U.S., at 261, 89 S.Ct. 1030 (Harlan, J., dissenting). Even in the pre–1953 era of restricted federal habeas, however, an exception was made "when the habeas petitioner attacked the constitutionality of the state statute under which he had been convicted. Since, in this situation, the State had no power to proscribe the conduct for which the petitioner was imprisoned, it could not constitutionally insist that he remain in jail." *Id.*, at 261, n. 2, 89 S.Ct. 1030 (Harlan, J., dissenting) (citation omitted).

In *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1880), the Court addressed why substantive rules must have retroactive effect regardless of when the defendant's conviction became final.

At the time of that decision, "[m]ere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitute[d] no ground for the issue of the writ." *Id* ., at 375. Before *Siebold*, the law might have been thought to establish that so long as the conviction and sentence were imposed by a court of competent jurisdiction, no habeas relief could issue. In *Siebold*, however, the petitioners attacked the judgments on the ground that they had been convicted under unconstitutional statutes. The Court explained that if "this position is well taken, it affects the foundation of the whole proceedings." *Id.*, at 376. A conviction under an unconstitutional law

> "is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in

[136 S.Ct. 731]

> the sense that there may be no means of reversing it. But ... if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes." *Id.*, at 376–377.

As discussed, the Court has concluded that the same logic governs a challenge to a punishment that the Constitution deprives States of authority to impose. *Penry*, *supra*, at 330, 109 S.Ct. 2934 ; see also Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 151 (1970) ("Broadly speaking, the original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense or because the statute under which the defendant had been prosecuted was unconstitutional or because the sentence was one the court could not lawfully impose" (footnotes omitted)). A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. See *Siebold*, 100 U.S., at 376. It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.

*Siebold* and the other cases discussed in this opinion, of course, do not directly control the question the Court now answers for the first time. These precedents did not involve a state court's postconviction review of a conviction or sentence and so did not address whether the Constitution requires new substantive rules to have retroactive effect in cases on state collateral review. These decisions, however, have important bearing on the analysis necessary in this case.

In support of its holding that a conviction obtained under an unconstitutional law warrants habeas relief, the *Siebold* Court explained that "[a]n unconstitutional law is void, and is as no law." *Ibid*. A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees. Writing for the Court in *United States Coin & Currency*, Justice Harlan made this point when he declared that "[n]o circumstances call more for the invocation of a rule of complete retroactivity" than when "the conduct being penalized is constitutionally immune from punishment." 401 U.S., at 724, 91 S.Ct. 1041. *United States Coin & Currency* involved a case on direct review; yet, for the reasons explained in this opinion, the same principle should govern the application of substantive rules on collateral review. As Justice Harlan explained, where a State lacked the power to proscribe the habeas petitioner's conduct, "it could not constitutionally insist that he remain in jail." *Desist*, *supra*, at 261, n. 2, 89 S.Ct. 1030 (dissenting opinion).

If a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings. Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. If a state collateral proceeding is open to a claim controlled by federal law, the state court "has a duty to grant the relief that federal law requires." *Yates*, 484 U.S., at 218, 108 S.Ct. 534. Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to

[136 S.Ct. 732]

give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.

As a final point, it must be noted that the retroactive application of substantive rules does not implicate a State's weighty interests in ensuring the finality of convictions and sentences. *Teague* warned against the intrusiveness of "*continually* forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." 489 U.S., at 310, 109 S.Ct. 1060. This concern has no application in the realm of substantive rules, for no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose. See *Mackey*, 401 U.S., at 693, 91 S.Ct. 1160 (opinion of Harlan, J.) ("There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose").

In adjudicating claims under its collateral review procedures a State may not deny a controlling right asserted under the Constitution, assuming the claim is properly presented in the case. Louisiana follows these basic Supremacy Clause principles in its postconviction proceedings for challenging the legality of a sentence. The State's collateral review procedures are open to claims that a decision of this Court has rendered certain sentences illegal, as a substantive matter, under the Eighth Amendment. See, *e.g.*, *State v. Dyer*, 2011–1758, pp. 1–2 (La.11/23/11), 77 So.3d 928, 928–929 (*per curiam*) (considering claim on collateral review that this Court's decision in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825, rendered petitioner's life-without-parole sentence illegal). Montgomery alleges that *Miller* announced a substantive constitutional rule and that the Louisiana Supreme Court erred by failing to recognize its retroactive effect. This Court has jurisdiction to review that determination.

III

This leads to the question whether *Miller*'s prohibition on mandatory life without parole for juvenile offenders indeed did announce a new substantive rule that, under the Constitution, must be retroactive.

As stated above, a procedural rule "regulate[s] only the *manner of determining* the defendant's culpability." *Schriro*, 542 U.S., at 353, 124 S.Ct. 2519. A substantive rule, in contrast, forbids "criminal punishment of certain primary conduct" or prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S., at 330, 109 S.Ct. 2934; see also *Schriro, supra*, at 353, 124 S.Ct. 2519 (A substantive rule "alters the range of conduct or the class of persons that the law punishes"). Under this standard, and for the reasons explained below, *Miller* announced a substantive rule that is retroactive in cases on collateral review.

The "foundation stone" for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles. 567 U.S., at ––––, n. 4,

132 S.Ct., at 2464, n. 4. Those cases include *Graham v. Florida, supra,* which held that the Eighth Amendment bars life without parole for juvenile nonhomicide offenders, and *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, which held that the Eighth Amendment prohibits capital punishment for those under the age of 18 at the time of their crimes. Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of

[136 S.Ct. 733]

determining a defendant's sentence. See *Graham, supra,* at 59, 130 S.Ct. 2011 ("The concept of proportionality is central to the Eighth Amendment"); see also *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910) ; *Harmelin v. Michigan,* 501 U.S. 957, 997–998, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (KENNEDY, J., concurring in part and concurring in judgment).

*Miller* took as its starting premise the principle established in *Roper* and *Graham* that "children are constitutionally different from adults for purposes of sentencing." 567 U.S., at ––––, 132 S.Ct., at 2464 (citing *Roper, supra,* at 569–570, 125 S.Ct. 1183 ; and *Graham, supra,* at 68, 130 S.Ct. 2011 ). These differences result from children's "diminished culpability and greater prospects for reform," and are apparent in three primary ways:

> "First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. Second, children 'are more vulnerable to negative influences and outside pressures,' including from their family and peers; they have limited 'control over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievable depravity.' " 567 U.S., at ––––, 132 S.Ct., at 2464 (quoting *Roper, supra,* at 569–570, 125 S.Ct. 1183 ; alterations, citations, and some internal quotation marks omitted).

As a corollary to a child's lesser culpability, *Miller* recognized that "the distinctive attributes of youth diminish the penological justifications" for imposing life without parole on juvenile offenders. 567 U.S., at ––––, 132 S.Ct., at 2465. Because retribution "relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." *Ibid.* (quoting *Graham, supra,* at 71, 130 S.Ct. 2011 ; internal quotation marks omitted). The deterrence rationale likewise does not suffice, since "the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." 567 U.S., at –––– – ––––, 132 S.Ct., at 2465 (internal quotation marks omitted). The need for incapacitation is lessened, too, because ordinary adolescent development diminishes the likelihood that a juvenile offender " 'forever will be a danger to society.' " *Id.*, at ––––, 132 S.Ct., at 2465 (quoting *Graham,* 560 U.S., at 72, 130 S.Ct. 2011 ). Rehabilitation is not a satisfactory rationale, either. Rehabilitation cannot justify the sentence, as life without parole "forswears altogether the rehabilitative ideal." 567 U.S., at ––––, 132 S.Ct., at 2465 (quoting *Graham, supra,* at 74, 130 S.Ct. 2011 ).

These considerations underlay the Court's holding in *Miller* that mandatory life-without-parole sentences for children "pos[e] too great a risk of disproportionate punishment." 567 U.S., at ––––, 132 S.Ct., at 2469. *Miller* requires that before sentencing a juvenile to

life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Ibid.* The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," *Miller* made clear that "appropriate occasions

[136 S.Ct. 734]

for sentencing juveniles to this harshest possible penalty will be uncommon." *Ibid.*

*Miller* , then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." *Id.*, at ––––, 132 S.Ct., at 2465. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity.' " *Id.*, at ––––, 132 S.Ct., at 2469 (quoting *Roper*, 543 U.S., at 573, 125 S.Ct. 1183 ). Because *Miller* determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " 567 U.S., at ––––, 132 S.Ct., at 2469 (quoting *Roper*, *supra*, at 573, 125 S.Ct. 1183 ), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. *Penry*, 492 U.S., at 330, 109 S.Ct. 2934. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it " 'necessarily carr[ies] a significant risk that a defendant' "—here, the vast majority of juvenile offenders—" 'faces a punishment that the law cannot impose upon him.' " *Schriro*, 542 U.S., at 352, 124 S.Ct. 2519 (quoting *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) ).

Louisiana nonetheless argues that *Miller* is procedural because it did not place any punishment beyond the State's power to impose; it instead required sentencing courts to take children's age into account before condemning them to die in prison. In support of this argument, Louisiana points to *Miller* 's statement that the decision "does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham* . Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller*, *supra*, at ––––, 132 S.Ct., at 2471. *Miller* , it is true, did not bar a punishment for all juvenile offenders, as the Court did in *Roper* or *Graham*. *Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*. Before *Miller* , every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller* , it will be the rare juvenile offender who can receive that same sentence. The only difference between *Roper* and *Graham*, on the one hand, and *Miller* , on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.

To be sure, *Miller* 's holding has a procedural component. *Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence. See 567 U.S., at ––––, 132 S.Ct., at

2471. Louisiana contends that because *Miller* requires this process, it must have set forth a procedural rule. This argument, however, conflates a procedural requirement necessary to implement a substantive guarantee with a

[136 S.Ct. 735]

rule that "regulate[s] only the *manner of determining* the defendant's culpability." *Schriro, supra,* at 353, 124 S.Ct. 2519. There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish. See *Mackey*, 401 U.S., at 692, n. 7, 91 S.Ct. 1160 (opinion of Harlan, J.) ("Some rules may have both procedural and substantive ramifications, as I have used those terms here"). For example, when an element of a criminal offense is deemed unconstitutional, a prisoner convicted under that offense receives a new trial where the government must prove the prisoner's conduct still fits within the modified definition of the crime. In a similar vein, when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class. See, *e.g., Atkins v. Virginia,* 536 U.S. 304, 317, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (requiring a procedure to determine whether a particular individual with an intellectual disability "fall[s] within the range of [intellectually disabled] offenders about whom there is a national consensus" that execution is impermissible). Those procedural requirements do not, of course, transform substantive rules into procedural ones.

The procedure *Miller* prescribes is no different. A hearing where "youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. 567 U.S., at ––––, 132 S.Ct., at 2460. The hearing does not replace but rather gives effect to *Miller* 's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

Louisiana suggests that *Miller* cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility. That this finding is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee. When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems. See *Ford v. Wainwright,* 477 U.S. 399, 416–417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences"). Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue. That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.

For this reason, the death penalty cases Louisiana cites in support of its position are inapposite. See, *e.g., Beard v. Banks,* 542 U.S. 406, 408, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (holding nonretroactive the rule that forbids instructing a jury to disregard mitigating factors not found by a unanimous vote); *O'Dell v. Netherland,* 521 U.S. 151, 153, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (holding nonretroactive the rule providing that, if the prosecutor

[136 S.Ct. 736]

cites future dangerousness, the defendant may inform the jury of his ineligibility for parole); *Sawyer v. Smith*, 497 U.S. 227, 229, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) (holding nonretroactive the rule that forbids suggesting to a capital jury that it is not responsible for a death sentence). Those decisions altered the processes in which States must engage before sentencing a person to death. The processes may have had some effect on the likelihood that capital punishment would be imposed, but none of those decisions rendered a certain penalty unconstitutionally excessive for a category of offenders.

The Court now holds that *Miller* announced a substantive rule of constitutional law. The conclusion that *Miller* states a substantive rule comports with the principles that informed *Teague* . *Teague* sought to balance the important goals of finality and comity with the liberty interests of those imprisoned pursuant to rules later deemed unconstitutional. *Miller* 's conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.

Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, *e.g.*, Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller* 's central intuition—that children who commit even heinous crimes are capable of change.

Petitioner has discussed in his submissions to this Court his evolution from a troubled, misguided youth to a model member of the prison community. Petitioner states that he helped establish an inmate boxing team, of which he later became a trainer and coach. He alleges that he has contributed his time and labor to the prison's silkscreen department and that he strives to offer advice and serve as a role model to other inmates. These claims have not been tested or even addressed by the State, so the Court does not confirm their accuracy. The petitioner's submissions are relevant, however, as an example of one kind of evidence that prisoners might use to demonstrate rehabilitation.

* * *

Henry Montgomery has spent each day of the past 46 years knowing he was condemned to die in prison. Perhaps it can be established that, due to exceptional circumstances, this fate was a just and proportionate punishment for the crime he committed as a 17–year–old boy. In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it

[136 S.Ct. 737]

did not, their hope for some years of life outside prison walls must be restored.

The judgment of the Supreme Court of Louisiana is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, dissenting.

The Court has no jurisdiction to decide this case, and the decision it arrives at is wrong. I respectfully dissent.

I. Jurisdiction

Louisiana postconviction courts willingly entertain Eighth Amendment claims but, with limited exceptions, apply the law as it existed when the state prisoner was convicted and sentenced. Shortly after this Court announced *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the Louisiana Supreme Court adopted *Teague* 's framework to govern the provision of postconviction remedies available to *state* prisoners in its *state* courts as a matter of *state* law. *Taylor v. Whitley*, 606 So.2d 1292 (La.1992). In doing so, the court stated that it was "not bound" to adopt that federal framework. *Id.*, at 1296. One would think, then, that it is none of our business that a 69–year–old Louisiana prisoner's state-law motion to be resentenced according to *Miller v. Alabama*, 567 U.S. ––– –, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), a case announced almost half a century after his sentence was final, was met with a firm rejection on state-law grounds by the Louisiana Supreme Court. But a majority of this Court, eager to reach the merits of this case, resolves the question of our jurisdiction by deciding that the Constitution *requires* state postconviction courts to adopt *Teague* 's exception for so-called "substantive" new rules and to provide state-law remedies for the violations of those rules to prisoners whose sentences long ago became final. This conscription into federal service of state postconviction courts is nothing short of astonishing.

A

*Teague* announced that federal courts could not grant habeas corpus to overturn state convictions on the basis of a "new rule" of constitutional law—meaning one announced after the convictions became final—*unless* that new rule was a "substantive rule" or a "watershed rul[e] of criminal procedure." 489 U.S., at 311, 109 S.Ct. 1060. The *Teague* prescription followed from Justice Harlan's view of the "retroactivity problem" detailed in his separate opinion in *Desist v. United States*, 394 U.S. 244, 256, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) (dissenting opinion), and later in *Mackey v. United States*, 401 U.S. 667, 675, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (opinion concurring in judgment in part and dissenting in part). Placing the rule's first exception in context requires more analysis than the majority has applied.

The Court in the mid–20th century was confounded by what Justice Harlan called the "swift pace of constitutional change," *Pickelsimer v. Wainwright*, 375 U.S. 2, 4, 84 S.Ct. 80, 11 L.Ed.2d 41 (1963) (dissenting opinion), as it vacated and remanded many cases in the wake of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Justice Harlan called upon the Court to engage in "informed and deliberate consideration" of "whether the States are constitutionally required to apply [*Gideon* 's] new rule retrospectively, which may well require the reopening of cases long since finally adjudicated in accordance with then applicable decisions of this Court." *Pickelsimer, supra*, at 3, 84 S.Ct. 80. The Court answered that call in

[136 S.Ct. 738]

*Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). *Linkletter* began with the premise "that we are neither required

to apply, nor prohibited from applying, a decision retrospectively" and went on to adopt an equitable rule-by-rule approach to retroactivity, considering "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.*, at 629, 85 S.Ct. 1731.

The *Linkletter* framework proved unworkable when the Court began applying the rule-by-rule approach not only to cases on collateral review but also to cases on direct review, rejecting any distinction "between convictions now final" and "convictions at various stages of trial and direct review." *Stovall v. Denno,* 388 U.S. 293, 300, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). It was this rejection that drew Justice Harlan's reproach in *Desist* and later in *Mackey* . He urged that "all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down." *Desist, supra,* at 258, 89 S.Ct. 1030 (dissenting opinion). "Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from th[e] model of judicial review." *Mackey, supra,* at 679, 91 S.Ct. 1160.

The decision in *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), heeded this constitutional concern. The Court jettisoned the *Linkletter* test for cases pending on direct review and adopted for them Justice Harlan's rule of redressability: "[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of *constitutional* adjudication." 479 U.S., at 322, 107 S.Ct. 708 (emphasis added). We established in *Griffith* that this Court must play by our own "old rules"—rules we have settled before the defendant's conviction and sentence become final, even those that are a "clear break from existing precedent"—for cases pending before us on direct appeal. *Id.,* at 323, 107 S.Ct. 708. Since the *Griffith* rule is constitutionally compelled, we instructed the lower state and federal courts to comply with it as well. *Ibid.*

When *Teague* followed on *Griffith* 's heels two years later, the opinion contained no discussion of "basic norms of constitutional adjudication," *Griffith, supra,* at 322, 107 S.Ct. 708, nor any discussion of the obligations of state courts. Doing away with *Linkletter* for good, the Court adopted Justice Harlan's solution to "the retroactivity problem" for cases pending on collateral review—which he described not as a constitutional problem but as "a problem as to the *scope of the habeas writ* ." *Mackey, supra,* at 684, 91 S.Ct. 1160 (emphasis added). *Teague* held that federal habeas courts could no longer upset state-court convictions for violations of so-called "new rules," not yet announced when the conviction became final. 489 U.S., at 310, 109 S.Ct. 1060. But it allowed for the previously mentioned exceptions to this rule of nonredressability: substantive rules placing "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" and "watershed rules of criminal procedure." *Id.,* at 311, 109 S.Ct. 1060. Then in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the Court expanded this first exception for substantive rules to embrace new rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.,* at 330, 109 S.Ct. 2934.

[136 S.Ct. 739]

Neither *Teague* nor its exceptions are constitutionally compelled. Unlike today's majority, the *Teague*- era Court understood that cases on collateral review are fundamentally different from those pending on direct review because of "considerations of finality in the judicial process." *Shea v. Louisiana,* 470 U.S. 51, 59–60, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985). That line of finality demarcating the constitutionally required rule

in *Griffith* from the habeas rule in *Teague* supplies the answer to the not-so-difficult question whether a state postconviction court must remedy the violation of a new substantive rule: No. A state court need only apply the law as it existed at the time a defendant's conviction and sentence became final. See *Griffith, supra,* at 322, 107 S.Ct. 708. And once final, "a new rule cannot reopen a door already closed." *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 541, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) (opinion of Souter, J.). Any relief a prisoner might receive in a state court after finality is a matter of grace, not constitutional prescription.

B

The majority can marshal no case support for its contrary position. It creates a constitutional rule where none had been before: "*Teague* 's conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises" binding in both federal and state courts. *Ante,* at 729. "Best understood." Because of what? Surely not because of its history and derivation.

Because of the Supremacy Clause, says the majority. *Ante,* at 731. But the Supremacy Clause cannot possibly answer the question before us here. It only elicits another question: What federal law is supreme? Old or new? The majority's champion, Justice Harlan, said the old rules apply for federal habeas review of a state-court conviction: "[T]he habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place," *Desist,* 394 U.S., at 263, 89 S.Ct. 1030 (dissenting opinion), for a state court cannot "toe the constitutional mark" that does not yet exist, *Mackey,* 401 U.S., at 687, 91 S.Ct. 1160 (opinion of Harlan, J.). Following his analysis, we have clarified time and again—recently in *Greene v. Fisher,* 565 U.S. ––––, ––––, 132 S.Ct. 38, 43–44, 181 L.Ed.2d 336 (2011) —that *federal* habeas courts are to review state-court decisions against the law and factual record that existed at the time the decisions were made. "Section 2254(d)(1) [of the federal habeas statute] refers, in the past tense, to a state-court adjudication that 'resulted in' a decision that was contrary to, or 'involved' an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made." *Cullen v. Pinholster,* 563 U.S. 170, 181–182, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). How can it possibly be, then, that the Constitution requires a *state* court's review of its own convictions to be governed by "new rules" rather than (what suffices when federal courts review state courts) "old rules"?

The majority relies on the statement in *United States v. United States Coin & Currency,* 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971), that " '[n]o circumstances call more for the invocation of a rule of complete retroactivity' " than when " 'the conduct being penalized is constitutionally immune from punishment.' " *Ante,* at 729 – 730 (quoting 401 U.S., at 724, 91 S.Ct. 1041 ). The majority neglects to mention that this statement was addressing the "circumstances" of a conviction that "had *not become final,* " *id* ., at 724, n. 13, 91 S.Ct. 1041 (emphasis added), when

[136 S.Ct. 740]

the "rule of complete retroactivity" was invoked. *Coin & Currency,* an opinion written by (guess whom?) Justice Harlan, merely foreshadowed the rule announced in *Griffith,* that all cases pending on direct review receive the benefit of newly announced rules—better termed "old rules" for such rules were announced *before* finality.

The majority also misappropriates *Yates v. Aiken,* 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988), which reviewed a state habeas petitioner's Fourteenth Amendment claim that the jury instructions at his trial lessened the State's burden to prove every element of his offense beyond a reasonable doubt. That case at least did involve a conviction that was

final. But the majority is oblivious to the critical fact that Yates's claim depended upon an *old rule*, settled at the time of his trial. *Id.*, at 217, 108 S.Ct. 534. This Court reversed the state habeas court for its refusal to consider that the jury instructions violated that *old rule* . *Ibid* . The majority places great weight upon the dictum in *Yates* that the South Carolina habeas court " 'ha [d] a duty to grant the relief that federal law requires.' " *Ante,* at 731 (quoting *Yates, supra,* at 218, 108 S.Ct. 534 ). It is simply wrong to divorce that dictum from the facts it addressed. In that context, *Yates* merely reinforces the line drawn by *Griffith* : when state courts provide a forum for postconviction relief, they need to play by the "old rules" announced *before* the date on which a defendant's conviction and sentence became final.

The other sleight of hand performed by the majority is its emphasis on *Ex parte Siebold,* 100 U.S. 371, 25 L.Ed. 717 (1880). That case considered a petition for a federal writ of habeas corpus following a federal conviction, and the initial issue it confronted was its jurisdiction. A federal court has no inherent habeas corpus power, *Ex parte Bollman,* 4 Cranch 75, 94, 2 L.Ed. 554 (1807), but only that which is conferred (and limited) by statute, see, *e.g., Felker v. Turpin,* 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996). As *Siebold* stated, it was forbidden to use the federal habeas writ "as a mere writ of error." 100 U.S., at 375. "The only ground on which this court, or any court, without some special statute authorizing it, [could] give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void." *Ibid.* Turning to the facts before it, the Court decided it was within its power to hear Siebold's claim, which did not merely protest that the conviction and sentence were "erroneous" but contended that the statute he was convicted of violating was unconstitutional and the conviction therefore void: "[I]f the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes." *Id.,* at 376–377. *Siebold* is thus a decision that expands the limits of this Court's power to issue a federal habeas writ for a federal prisoner.

The majority, however, divines from *Siebold* "a general principle" that "a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Ante,* at 731. That is utterly impossible. No "general principle" can rationally be derived from *Siebold* about constitutionally required remedies in state courts; indeed, the opinion does not even speak to constitutionally required remedies in *federal* courts. It is a decision about this Court's statutory power to grant the Original Writ, not about its constitutional obligation to do so. Nowhere in *Siebold* did this Court intimate that relief was constitutionally required—or as the

[136 S.Ct. 741]

majority puts it, that a court would have had "no authority" to leave in place Siebold's conviction, *ante,* at 730 – 731.

The majority's sorry acknowledgment that "*Siebold* and the other cases discussed in this opinion, of course, do not directly control the question the Court now answers for the first time," *ibid.,* is not nearly enough of a disclaimer. It is not just that they "do not directly control," but that the dicta cherry picked from those cases are irrelevant; they addressed circumstances fundamentally different from those to which the majority now applies them. Indeed, we know for sure that the author of some of those dicta, Justice Harlan, held views that flatly contradict the majority.

The majority's maxim that "state collateral review courts have no greater power than federal habeas courts to mandate that a

prisoner continue to suffer punishment barred by the Constitution," *ante,* at 731, begs the question rather than contributes to its solution. Until today, no federal court was *constitutionally obliged* to grant relief for the past violation of a newly announced substantive rule. Until today, it was Congress's prerogative to do away with *Teague* 's exceptions altogether. Indeed, we had left unresolved the question whether Congress had already done that when it amended a section of the habeas corpus statute to add backward-looking language governing the review of state-court decisions. See Antiterrorism and Effective Death Penalty Act of 1996, § 104, 110 Stat. 1219, codified at 28 U.S.C. § 2254(d)(1) ; *Greene,* 565 U.S., at ––––, n., 132 S.Ct., at 44, n. A maxim shown to be more relevant to this case, by the analysis that the majority omitted, is this: The Supremacy Clause does not impose upon state courts a constitutional obligation it fails to impose upon federal courts.

C

All that remains to support the majority's conclusion is that all-purpose Latin canon: *ipse dixit* . The majority opines that because a substantive rule eliminates a State's power to proscribe certain conduct or impose a certain punishment, it has "the automatic consequence of invalidating a defendant's conviction or sentence." *Ante,* at 730. What provision of the Constitution could conceivably produce such a result? The Due Process Clause? It surely cannot be a denial of due process for a court to pronounce a final judgment which, though fully in accord with federal constitutional law at the time, fails to anticipate a change to be made by this Court half a century into the future. The Equal Protection Clause? Both statutory and (increasingly) constitutional laws change. If it were a denial of equal protection to hold an earlier defendant to a law more stringent than what exists today, it would also be a denial of equal protection to hold a later defendant to a law more stringent than what existed 50 years ago. No principle of equal protection requires the criminal law of all ages to be the same.

The majority grandly asserts that "[t]here is no grandfather clause that permits States to *enforce punishments the Constitution forbids* ." *Ante,* at 731 (emphasis added). Of course the italicized phrase begs the question. There most certainly is a grandfather clause—one we have called *finality* —which says that the Constitution does not require States to revise punishments that were lawful when they were imposed. Once a conviction has become final, whether new rules or old ones will be applied to revisit the conviction is a matter entirely within the State's control; the Constitution has nothing to say about that choice. The majority says that there is no "possibility of a valid result" when a new substantive rule is not

[136 S.Ct. 742]

applied retroactively. *Ante,* at 729 – 730. But the whole controversy here arises because many think there *is* a valid result when a defendant has been convicted under the law that existed when his conviction became final. And the States are unquestionably entitled to take that view of things.

The majority's imposition of *Teague* 's first exception upon the States is all the worse because it does not adhere to that exception as initially conceived by Justice Harlan—an exception for rules that "place, as a matter of constitutional interpretation, certain kinds of primary, private individual *conduct* beyond the power of the criminal lawmaking authority to proscribe." *Mackey,* 401 U.S., at 692, 91 S.Ct. 1160 (emphasis added). Rather, it endorses the exception as expanded by *Penry,* to include "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." 492 U.S., at 330, 109 S.Ct. 2934. That expansion empowered and obligated federal (and after today state) habeas courts to invoke this Court's Eighth Amendment "evolving standards of decency" jurisprudence to upset

punishments that were constitutional when imposed but are "cruel and unusual," U.S. Const., Amdt. 8, in our newly enlightened society. See *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). The "evolving standards" test concedes that in 1969 the State had the power to punish Henry Montgomery as it did. Indeed, Montgomery could at that time have been sentenced to death by our yet unevolved society. Even 20 years later, this Court reaffirmed that the Constitution posed no bar to death sentences for juveniles. *Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). Not until our People's "standards of decency" evolved a mere 10 years ago—nearly 40 years after Montgomery's sentence was imposed—did this Court declare the death penalty unconstitutional for juveniles. *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Even then, the Court reassured States that "the punishment of life imprisonment without the possibility of parole is itself a severe sanction," implicitly still available for juveniles. *Id.,* at 572, 125 S.Ct. 1183. And again five years ago this Court left in place this severe sanction for juvenile homicide offenders. *Graham v. Florida,* 560 U.S. 48, 69, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). So for the five decades Montgomery has spent in prison, not one of this Court's precedents called into question the legality of his sentence—until the People's "standards of decency," as perceived by five Justices, "evolved" yet again in *Miller* .

*Teague* 's central purpose was to do away with the old regime's tendency to "*continually* force the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." 489 U.S., at 310, 109 S.Ct. 1060. Today's holding thwarts that purpose with a vengeance. Our ever-evolving Constitution changes the rules of "cruel and unusual punishments" every few years. In the passage from *Mackey* that the majority's opinion quotes, *ante,* at 731 – 732, Justice Harlan noted the diminishing force of finality (and hence the equitable propriety—not the constitutional requirement—of disregarding it) when the law punishes nonpunishable *conduct,* see 401 U.S., at 693, 91 S.Ct. 1160. But one cannot imagine a clearer frustration of the sensible policy of *Teague* when the ever-moving target of impermissible *punishments* is at issue. Today's holding not only forecloses Congress from eliminating this expansion of *Teague* in federal courts, but also foists this distortion upon the States.

II. The Retroactivity of *Miller*

Having created jurisdiction by ripping *Teague* 's first exception from its moorings,

[136 S.Ct. 743]

converting an equitable rule governing federal habeas relief to a constitutional command governing state courts as well, the majority proceeds to the merits. And here it confronts a second obstacle to its desired outcome. *Miller* , the opinion it wishes to impose upon state postconviction courts, simply does not decree what the first part of the majority's opinion says *Teague* 's first exception requires to be given retroactive effect: a rule "set[ting] forth *categorical* constitutional guarantees that place certain criminal laws and punishments *altogether* beyond the State's power to impose." *Ante,* at 729 (emphasis added). No problem. Having distorted *Teague,* the majority simply proceeds to rewrite *Miller* .

The majority asserts that *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Ante,* at 734. It insists that *Miller* barred life-without-parole sentences "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*. " *Ante,* at 734. The problem is that *Miller* stated, quite clearly, precisely the opposite: "Our decision does not categorically

bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham* . Instead, it mandates only that a sentencer *follow a certain process* —considering an offender's youth and attendant characteristics—before imposing a particular penalty." 567 U.S., at ––––, 132 S.Ct., at 2471 (emphasis added).

To contradict that clear statement, the majority opinion quotes passages from *Miller* that assert such things as "mandatory life-without-parole sentences for children 'pos[e] too great a risk of disproportionate punishment' " and " 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.' " *Ante,* at 733 – 734 (quoting *Miller, supra,* at ––––, 132 S.Ct., at 2469 ). But to say that a punishment might be inappropriate and disproportionate for certain juvenile offenders is not to say that it is unconstitutionally void. All of the statements relied on by the majority do nothing more than express the *reason* why the new, youth-protective *procedure* prescribed by *Miller* is desirable: to deter life sentences for certain juvenile offenders. On the issue of whether *Miller* rendered life-without-parole penalties unconstitutional, it is impossible to get past *Miller* 's unambiguous statement that "[o]ur decision does not categorically bar a penalty for a class of offenders" and "mandates only that a sentencer follow a certain process ... before imposing a particular penalty." 567 U.S., at ––––, 132 S.Ct., at 2471. It is plain as day that the majority is not applying *Miller* , but rewriting it.[1]

And the rewriting has consequences beyond merely making *Miller* 's procedural guarantee retroactive. If, indeed, a State is categorically prohibited from imposing life without parole on juvenile offenders whose crimes do not "reflect permanent incorrigibility," then even when the procedures that *Miller* demands are provided the constitutional requirement is not necessarily satisfied. It remains available for

[136 S.Ct. 744]

the defendant sentenced to life without parole to argue that his crimes did not in fact "reflect permanent incorrigibility." Or as the majority's opinion puts it: "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child [2] whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Ante,* at 735.

How wonderful. Federal and (like it or not) state judges are henceforth to resolve the knotty "legal" question: whether a 17–year–old who murdered an innocent sheriff's deputy half a century ago was at the time of his trial "incorrigible." Under *Miller* , bear in mind, the inquiry is whether the inmate was seen to be incorrigible when he was sentenced—not whether he has proven corrigible and so can safely be paroled today. What silliness. (And how impossible in practice, see Brief for National District Attorneys Assn. et al. as *Amici Curiae* 9–17.) When in *Lockett v. Ohio,* 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court imposed the thitherto unheard-of requirement that the sentencer in capital cases must consider and weigh all "relevant mitigating factors," it at least did not impose the substantive (and hence judicially reviewable) requirement that the aggravators must outweigh the mitigators; it would suffice that the sentencer *thought* so. And, fairly read, *Miller* did the same. Not so with the "incorrigibility" requirement that the Court imposes today to make *Miller* retroactive.

But have no fear. The majority does not seriously expect state and federal collateral-review tribunals to engage in this silliness, probing the evidence of "incorrigibility" that existed decades ago when defendants were sentenced. What the majority expects (and intends) to happen is set forth in the following not-so-subtle invitation: "A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."

*Ante,* at 736. Of course. This whole exercise, this whole distortion of *Miller* , is just a devious way of eliminating life without parole for juvenile offenders. The Court might have done that expressly (as we know, the Court can decree *anything* ), but that would have been something of an embarrassment. After all, one of the justifications the Court gave for decreeing an end to the death penalty for murders (no matter how many) committed by a juvenile was that life without parole was a severe enough punishment. See *Roper,* 543 U.S., at 572, 125 S.Ct. 1183. How could the majority—in an opinion written by the very author of *Roper* —now say *that* punishment is *also* unconstitutional? The Court expressly refused to say so in *Miller* . 567 U.S., at ––––, 132 S.Ct., at 2469. So the Court refuses again today, but merely makes imposition of that severe sanction a practical impossibility. And then, in Godfather fashion, the majority makes state legislatures an offer they can't refuse: Avoid all the utterly impossible nonsense we have prescribed by simply "permitting juvenile homicide offenders to be considered for parole." *Ante,* at 736. Mission accomplished.

Justice THOMAS, dissenting.

I join Justice SCALIA's dissent. I write separately to explain why the Court's resolution of the jurisdictional question, *ante,* at 739 – 744, lacks any foundation in the Constitution's text or our historical traditions. We have jurisdiction under 28 U.S.C. § 1257 only if the Louisiana Supreme

[136 S.Ct. 745]

Court's decision implicates a federal right. That condition is satisfied, the Court holds, because the Constitution purportedly requires state and federal postconviction courts to give "retroactive effect" to new substantive constitutional rules by applying them to overturn long-final convictions and sentences. *Ante,* at 729. Because our Constitution and traditions embrace no such right, I respectfully dissent.

I

"[O]ur jurisprudence concerning the 'retroactivity' of 'new rules' of constitutional law is primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies." *Danforth v. Minnesota,* 552 U.S. 264, 290–291, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008). Accordingly, the issue in this case is not whether prisoners who received mandatory life-without-parole sentences for crimes they committed decades ago as juveniles had an Eighth Amendment right not to receive such a sentence. Rather, the question is how, when, and in what forum that newfound right can be enforced. See *ibid.*

The Court answers that question one way: It says that state postconviction and federal habeas courts are constitutionally required to supply a remedy because a sentence or conviction predicated upon an unconstitutional law is a legal ity. See *ante,* at 729 – 733. But nothing in the Constitution's text or in our constitutional tradition provides such a right to a remedy on collateral review.

A

No provision of the Constitution supports the Court's holding. The Court invokes only the Supremacy Clause, asserting that the Clause deprives state and federal postconviction courts alike of power to leave an unconstitutional sentence in place. *Ante,* at 731 – 732. But that leaves the question of what provision of the Constitution supplies that underlying prohibition.

The Supremacy Clause does not do so. That Clause merely supplies a rule of decision: *If* a federal constitutional right exists, that right supersedes any contrary provisions of state law. See Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing

in the Constitution or Laws of any State to the Contrary notwithstanding"). Accordingly, as we reaffirmed just last Term, the Supremacy Clause is no independent font of substantive rights. *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. ––––, ––––, 135 S.Ct. 1378, 1383, 191 L.Ed.2d 471 (2015).

Nor am I aware of any other provision in the Constitution that would support the Court's new constitutional right to retroactivity. Of the natural places to look—Article III, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment—none establishes a right to void an unconstitutional sentence that has long been final.

To begin, Article III does not contain the requirement that the Court announces today. Article III vests "[t]he judicial Power" in this Court and whatever inferior courts Congress creates, Art. III, § 1, and "extend[s]" that power to various "Cases ... and Controversies," Art. III, § 2. Article III thus defines the scope of *federal* judicial power. It cannot compel *state* postconviction courts to apply new substantive rules retroactively.

[136 S.Ct. 746]

Even if the Court's holding were limited to federal courts, Article III would not justify it. The nature of "judicial power" may constrain the retroactivity rules that Article III courts can apply.* But even our broad modern precedents treat Article III as requiring courts to apply new rules only on *direct* review. Thus in *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the Court suggested—based on Justice Harlan's views—that "after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id.*, at 322–323, 107 S.Ct. 708. But, as Justice Harlan had explained, that view of Article III has no force on collateral review: "While the entire theoretical underpinnings of judicial review and constitutional supremacy dictate that federal courts having jurisdiction on direct review adjudicate every issue of law ... fairly implicated by the trial process below and properly presented on appeal, federal courts have never had a similar obligation on habeas corpus." *Mackey v. United States*, 401 U.S. 667, 682, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (opinion concurring in judgment in part and dissenting in part).

The Court's holding also cannot be grounded in the Due Process Clause's prohibition on "depriv[ations] ... of life, liberty, or property, without due process of law." Amdts. V and XIV, § 1. Quite possibly, " '[d]ue process of law' was originally used as a shorthand expression for governmental proceedings according to the 'law of the land' *as it existed at the time of those proceedings* ." *In re Winship*, 397 U.S. 358, 378, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Black, J., dissenting) (emphasis added); accord, *Johnson v. United States*, 576 U.S. ––––, ––––, 135 S.Ct. 2551, 2572–2573, 192 L.Ed.2d 569 (2015) (THOMAS, J., concurring in judgment). Under that understanding, due process excluded any right to have new substantive rules apply retroactively.

Even if due process required courts to anticipate this Court's new substantive rules, it would not compel courts to revisit settled convictions or sentences on collateral review. We have never understood due process to require further proceedings once a trial ends. The Clause "does not establish any right to an appeal ... and certainly does not establish any right to collaterally attack a final judgment of conviction." *United States v. MacCollom*, 426 U.S. 317, 323, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976) (plurality opinion); see *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) ("States have no obligation to provide [postconviction] relief"). Because the Constitution does not require postconviction remedies, it certainly does not require postconviction courts to revisit every potential type of error. Cf. *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528

U.S. 152, 165–166, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (SCALIA, J., concurring in judgment) ("Since a State could ... subject its trial-court determinations to no review whatever, it could *a fortiori* subject them to review which consists of a nonadversarial reexamination of convictions by a panel of government experts").

Nor can the Equal Protection Clause justify requiring courts on collateral review to apply new substantive rules retroactively. That Clause prohibits a State

[136 S.Ct. 747]

from "deny[ing] to any person within its jurisdiction the equal protection of the laws." Amdt. XIV, § 1. But under our precedents "a classification neither involving fundamental rights nor proceeding along suspect lines ... cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. Indianapolis,* 566 U.S. ––––, ––––, 132 S.Ct. 2073, 2080, 182 L.Ed.2d 998 (2012) (internal quotation marks omitted; ellipsis in original).

The disparity the Court eliminates today—between prisoners whose cases were on direct review when this Court announced a new substantive constitutional rule, and those whose convictions had already become final—is one we have long considered rational. "[T]he notion that different standards should apply on direct and collateral review runs throughout our recent habeas jurisprudence." *Wright v. West*, 505 U.S. 277, 292, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) ; see *Brecht v. Abrahamson*, 507 U.S. 619, 633–635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Thus, our precedents recognize a right to counsel on direct review, but not in collateral proceedings. Compare *Douglas v. California,* 372 U.S. 353, 355–358, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (courts must provide counsel on an initial direct appeal), with *Finley, supra,* at 555, 107 S.Ct. 1990 (no such right on habeas). The Fourth Amendment also applies differently on direct and collateral review. Compare *Mapp v. Ohio,* 367 U.S. 643, 654–660, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (courts on direct review must exclude evidence obtained in violation of the Fourth Amendment), with *Stone v. Powell,* 428 U.S. 465, 489–496, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (no relitigation of such claims on collateral review).

These distinctions are reasonable. They reflect the "significant costs" of collateral review, including disruption of "the State's significant interest in repose for concluded litigation." *Wright, supra,* at 293, 112 S.Ct. 2482 (internal quotation marks omitted). Our equal protection precedents, therefore, do not compel a uniform rule of retroactivity in direct and collateral proceedings for new substantive constitutional rules.

B

The Court's new constitutional right also finds no basis in the history of state and federal postconviction proceedings. Throughout our history, postconviction relief for alleged constitutional defects in a conviction or sentence was available as a matter of legislative grace, not constitutional command.

The Constitution mentions habeas relief only in the Suspension Clause, which specifies that "[t]he Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2. But that Clause does not specify the scope of the writ. And the First Congress, in prescribing federal habeas jurisdiction in the 1789 Judiciary Act, understood its scope to reflect "the black-letter principle of the common law that the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 466 (1963). Early cases echoed that understanding. *E.g., Ex parte Watkins,* 3 Pet.

193, 202, 7 L.Ed. 650 (1830) ("An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute ity; and it is not a ity if the court has general jurisdiction of the subject, although it should be erroneous").

For nearly a century thereafter, this Court understood the Judiciary Act and

[136 S.Ct. 748]

successor provisions as limiting habeas relief to instances where the court that rendered the judgment lacked jurisdiction over the general category of offense or the person of the prisoner. See *Wright, supra,* at 285, 112 S.Ct. 2482 (recounting history). Federal habeas courts thus afforded no remedy for a claim that a sentence or conviction was predicated on an unconstitutional law. Nor did States. Indeed, until 1836, Vermont made no provision for any state habeas proceedings. See Oaks, Habeas Corpus in the States 1776–1865, 32 U. Chi. L. Rev. 243, 250 (1965). Even when States allowed collateral attacks in state court, review was unavailable if the judgment of conviction was rendered by a court with general jurisdiction over the subject matter and the defendant. *Id.,* at 261–262.

The Court portrays *Ex parte Siebold,* 100 U.S. 371, 25 L.Ed. 717 (1880), as a departure from this history and as the genesis of a constitutional principle that "a conviction obtained under an unconstitutional law warrants habeas relief." *Ante,* at 731. But *Siebold* —a case construing the scope of federal habeas review under the 1789 Judiciary Act—does not support the Court's position. *Ante,* at 740 – 744 (SCALIA, J., dissenting). *Siebold* did not imply that the Constitution requires courts to stop enforcing convictions under an unconstitutional law. Rather, *Siebold* assumed that prisoners would lack a remedy if the federal habeas statute did not allow challenges to such convictions. 100 U.S., at 377 ("It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it").

Moreover, when Congress authorized appeals as a matter of right in federal criminal cases, the Court renounced *Siebold* and stopped entertaining federal habeas challenges to the constitutionality of the statute under which a defendant was sentenced or convicted. See Bator, *supra,* at 473–474, and n. 77. If the Constitution prevented courts from enforcing a void conviction or sentence even after the conviction is final, this Court would have been incapable of withdrawing relief.

The Court's purported constitutional right to retroactivity on collateral review has no grounding even in our modern precedents. In the 1950's, this Court began recognizing many new constitutional rights in criminal proceedings. Even then, however, the Court did not perceive any constitutional right for prisoners to vacate their convictions or sentences on collateral review based on the Court's new interpretations of the Constitution. To the contrary, the Court derived *Miranda* warnings and the exclusionary rule from the Constitution, yet drew the line at creating a constitutional right to retroactivity. *E.g., Linkletter v. Walker,* 381 U.S. 618, 629, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) ("[T]he Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the Federal Constitution has no voice upon the subject' ").

Only in 1987, in *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649, did this Court change course and hold that the Constitution requires courts to give constitutional rights some retroactive effect. Even then, *Griffith* was a directive only to courts on *direct* review. It held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id .,* at 328, 107 S.Ct. 708. It said nothing about what happens once a case becomes final. That was resolved in *Teague v.*

*Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) —which announced the narrow exceptions to the rule against retroactivity on collateral review—but which did so by

[136 S.Ct. 749]

interpreting the scope of the federal habeas writ, not the Constitution.

II

A

Not only does the Court's novel constitutional right lack any constitutional foundation; the reasoning the Court uses to construct this right lacks any logical stopping point. If, as the Court supposes, the Constitution bars courts from insisting that prisoners remain in prison when their convictions or sentences are later deemed unconstitutional, why can courts let stand a judgment that wrongly decided any constitutional question?

The Court confronted this question when *Siebold* and other cases began expanding the federal habeas statute to encompass claims that a sentence or conviction was constitutionally void. But the Court could not find a satisfactory answer: "A judgment may be erroneous and not void, and it may be erroneous *because* it is void. The distinctions ... are very nice, and they may fall under the one class or the other as they are regarded for different purposes." *Ex parte Lange*, 18 Wall. 163, 175–176, 21 L.Ed. 872 (1874).

The lack of any limiting principle became apparent as the Court construed the federal habeas statute to supply jurisdiction to address prerequisites to a valid sentence or conviction (like an indictment). See Bator, 76 Harv. L. Rev., at 467–468, and n. 56, 471. As Justice Bradley, *Siebold* 's author, later observed for the Court: "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law." *In re Nielsen*, 131 U.S. 176, 183, 9 S.Ct. 672, 33 L.Ed. 118 (1889).

I doubt that today's rule will fare any better. By refashioning *Siebold* as the foundation of a purported constitutional right, the Court transforms an unworkable doctrine into an immutable command. Because Justice Bradley's dicta in *Siebold* was a gloss on the 1789 Judiciary Act, Congress could at least supply a fix to it. But the Court's reinvention of *Siebold* as a constitutional imperative eliminates any room for legislative adjustment.

B

There is one silver lining to today's ruling: States still have a way to mitigate its impact on their court systems. As the Court explains, States must enforce a constitutional right to remedies on collateral review only if such proceedings are "open to a claim controlled by federal law." *Ante*, at 731. State courts, on collateral review, thus must provide remedies for claims under *Miller v. Alabama*, 567 U.S. ––––, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), only if those courts are open to "claims that a decision of this Court has rendered certain sentences illegal ... under the Eighth Amendment." See *ante*, at 732.

Unlike the rule the Court announces today, this limitation at least reflects a constitutional principle. Only when state courts have chosen to entertain a federal claim can the Supremacy Clause conceivably command a state court to apply federal law. As we explained last Term, private parties have no "constitutional ... right to enforce federal laws against the States." *Armstrong*, 575 U.S., at ––––, 135 S.Ct., at 1383. Instead, the Constitution leaves the initial choice to entertain federal claims up to state courts, which are "tribunals over which the government of the Union has no adequate control, and which may be closed to any claim

asserted under a law of the United States." *Osborn v. Bank of United*

[136 S.Ct. 750]

*States*, 9 Wheat. 738, 821, 6 L.Ed. 204 (1824).

States therefore have a modest path to lessen the burdens that today's decision will inflict on their courts. States can stop entertaining claims alleging that this Court's Eighth Amendment decisions invalidated a sentence, and leave federal habeas courts to shoulder the burden of adjudicating such claims in the first instance. Whatever the desirability of that choice, it is one the Constitution allows States to make.

* * *

Today's decision repudiates established principles of finality. It finds no support in the Constitution's text, and cannot be reconciled with our Nation's tradition of considering the availability of postconviction remedies a matter about which the Constitution has nothing to say. I respectfully dissent.

---

Notes:

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

[1] It is amusing that the majority's initial description of *Miller* is the same as our own: "[T]he Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." *Ante*, at 725. Only 15 pages later, after softening the reader with 3 pages of obfuscating analysis, does the majority dare to attribute to *Miller* that which *Miller* explicitly denies.

[2] The majority presumably regards any person one day short of voting age as a "child."

[*] For instance, Article III courts cannot arrive at a holding, refuse to apply it to the case at hand, and limit its application to future cases involving yet-to-occur events. The power to rule prospectively in this way is a quintessentially legislative power. See *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 106–110, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993) (SCALIA, J., concurring).

---