Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: *Roper*, *Graham*, *Miller/Jackson*, and the Youth Discount

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The Supreme Court in *Roper v. Simmons*[1] prohibited states from executing offenders for murders committed when younger than eighteen years of age. *Roper* found a national consensus existed against executing adolescents based on state statutes and jury practices.[2] The Justices also conducted an independent proportionality analysis and concluded that youths' immature judgment, susceptibility to negative peer influences, and transitory personality development reduced their culpability and precluded the most severe sentence.[3]

Graham v. Florida[4] extended *Roper*'s diminished responsibility rationale to prohibit states from imposing life without parole (LWOP) sentences on youth convicted of non-homicide offenses. The Court noted that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[5] *Graham* prohibited a term-of-years sentence for the entire class of juveniles[6] *and* repudiated the Court's earlier Eighth Amendment position that "death is different."[7] The developmental features that reduced youths' culpability for the death penalty mitigated sentences they received for other crimes as well.[8]

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1. 543 U.S. 551 (2005).
2. *Id.* at 560–69.
3. *Id.* at 570–74.
4. 130 S. Ct. 2011 (2010).
5. *Id.* at 2016.
6. *Id.* at 2030–33.
7. *Id.* at 2046 (Thomas, J., dissenting).
8. *See id.* at 2027 (majority opinion); *see, e.g.*, Terry A. Maroney, *Adolescent Brain Science After* Graham v. Florida, 86 NOTRE DAME L. REV. 765, 765 (2011) (noting that "the *Graham* Court easily applied to juvenile life without parole the developmental conclusions that had partially underlain its earlier abolition of the

In *Miller v. Alabama*[9] and *Jackson v. Hobbs*[10] (*Miller/Jackson*), the Court extended *Roper* and *Graham*'s diminished responsibility rationale to youths convicted of murder and barred *mandatory* LWOP sentences. The Court found "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.'"[11] *Miller/Jackson* drew on the Court's death penalty jurisprudence to require judges to make individualized assessments and emphasized the importance of youthfulness as a mitigating factor.

This Article uses *Roper* and *Graham*'s categorical treatment of adolescents' diminished responsibility and *Miller/Jackson*'s focus on the "mitigating qualities of youth" to propose a Youth Discount—a proportional reduction of adult sentence lengths. *Graham* provided very limited relief—"some meaningful opportunity to obtain release"—and *Miller/Jackson* required only individualized consideration of youthfulness and culpability. By contrast, a Youth Discount provides a straight-forward way for legislatures to recognize juveniles' categorically diminished responsibility and to incorporate youthfulness as a mitigating factor in sentencing.

Part I briefly analyzes the juvenile death penalty cases culminating in *Roper*. It reviews the developmental psychological research on judgment and self-control that bolsters *Roper*'s conclusion that adolescents' culpability differs from that of adults. Part II examines how *Graham* altered the Court's non-death penalty proportionality framework to acknowledge the reduced culpability of young non-homicide offenders. Part III considers *Miller/Jackson*'s application of the Court's death penalty jurisprudence to repudiate mandatory LWOP sentences for juveniles who murder, to require individualized assessments, and to weigh youthfulness heavily. Part IV proposes a Youth Discount to formally mitigate the sentences of all young offenders. Rather than require judges to provide "some meaningful opportunity to obtain release"[12] or to grapple with "the mitigating qualities of

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juvenile death penalty").

9. 132 S. Ct. 2455 (2012).

10. 132 S. Ct. 548 (2011) (mem.).

11. *Miller*, 132 S. Ct. at 2467 (quoting Woodson v. North Carolina 428 U.S. 280, 304 (1976)).

12. *Graham*, 130 S. Ct. at 2030.

youth,"[13] state legislators should use age as a conclusive proxy for reduced culpability and provide substantial reductions in sentence lengths.

I. The Death Penalty and Youths' Diminished Responsibility

States try about 200,000 youths as adults each year because juvenile courts' jurisdiction ends at fifteen or sixteen years of age, rather than at seventeen.[14] States use several types of statutes—judicial waiver, legislative offense exclusion, and prosecutorial direct file[15]—to transfer another 50,000 youths annually to criminal courts.[16] A juvenile court judge may conduct a hearing

13. *Miller*, 132 S. Ct. at 2467 (citing Johnson v. Texas 509 U.S. 350, 367 (1993)).

14. *See, e.g.*, Barry C. Feld & Donna Bishop, *Transfer of Juveniles to Criminal Court*, *in* OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 801, 815 (Oxford University Press 2012) (describing trend to transfer more and younger juveniles to criminal court) [hereinafter Feld & Bishop, *Transfer of Juveniles*]; EILEEN POE-YAMAGATA & MICHAEL A. JONES, NAT'L COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME 5 (2007), *available at* http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf (reporting that in thirteen states, juveniles sixteen and seventeen years of age automatically are in criminal court because of jurisdictional age thresholds); *see also* CAMPAIGN FOR YOUTH JUSTICE, THE CONSEQUENCES AREN'T MINOR 6 (2006), *available at* http://www.campaignforyouthjustice.org/documents/CFYJNR_ConsequencesMinor.pdf (declaring that in some states in which juvenile court jurisdiction ends at sixteen or seventeen years of age, the vast majority of youths (seventy to ninety-six percent) are prosecuted for non-violent offenses); HOWARD SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUST., JUVENILE OFFENDERS AND VICTIMS 110–16 (2006) (chronicling states' age jurisdiction of juvenile courts).

15. PATRICK GRIFFIN, PATRICIA TORBET & LINDA SZYMANSKI, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT 3–11 (1998); *see also* Feld & Bishop, *Transfer of Juveniles*, *supra* note 14, at 815–25 (summarizing and describing transfer mechanisms); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 488 (1987) [hereinafter Feld, *Juvenile Waiver Statutes*]; Patrick Griffin, *Legal Boundaries Between Juvenile and Criminal Justice Systems in the United States*, *in* FROM JUVENILE DELINQUENCY TO ADULT CRIME 184, 187–99 (Rolf Loeber & David P. Farrington eds., 2012); SNYDER & SICKMUND, *supra* note 14, at 112–14 (discussing judicial waiver, concurrent jurisdiction, and statutory offense exclusion as three legislative methods to transfer juveniles for criminal prosecution); Amanda M. Kellar, *They're Just Kids: Does Incarcerating Juveniles with Adults Violate the Eighth Amendment?*, 40 SUFFOLK U. L. REV. 155, 163 (2006) ("While state legislatures generally follow three basic juvenile transfer models, many states combine them, resulting in unique variations."); Ellen Marrus & Irene Merker Rosenberg, *After* Roper v. Simmons*: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1172–79 (2005) (describing details of states' judicial, prosecutorial, and legislative waiver provisions); Enrico Pagnanelli, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of* Roper v. Simmons, 44 AM. CRIM. L. REV. 175, 181–83 (2007) (depicting legislative changes in waiver laws in the 1990s).

16. AMNESTY INT'L & HUM. RTS. WATCH, THE REST OF THEIR LIVES 19 n.30

and waive jurisdiction if she finds that a youth is not amenable to treatment or poses a threat to public safety.[17] Legislatures may exclude serious offenses from juvenile court jurisdiction and youths charged with those crimes are tried in criminal court without any hearing.[18] A dozen states give prosecutors discretion to direct file or charge some youths in either juvenile or criminal court without any review of their forum-selection decision.[19]

In the late 1980s and early 1990s, states adopted get-tough laws to transfer more and younger juveniles to criminal court in response to increases in youth violence and homicide.[20] The

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(2005), *available at* http://www.amnestyusa.org/sites/default/files/pdfs/therestoftheirlives.pdf (estimating that states tried 27,000 juveniles as adults in 1996, of whom 9,760 had been transferred from juvenile court, and 55,000 juveniles in 2000, of whom 7,100 had been transferred from juvenile courts).

17. *See* Kent v. United States, 383 U.S. 541, 562 (1966) (requiring procedural due process in judicial waiver hearings); Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314, 330–33 (1990) (providing empirical study of waiver decisions); Feld, *Juvenile Waiver Statutes*, *supra* note 15, at 487–94 (discussing criteria trial courts consider during waiver hearings); Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 83, 89–90 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter Feld, *Legislative Exclusion*].

18. *See* Feld, *Legislative Exclusion*, *supra* note 17, at 83–98, 102–03; Benjamin Steiner et al., *Legislative Waiver Reconsidered: General Deterrent Effects of Statutory Exclusion Laws Enacted Post-1979*, 23 JUST. Q. 34, 49–50 (2006) (describing deterrent rationale of legislative offense exclusion and reporting that adoption of such laws has no effect).

19. Griffin, *supra* note 15, at 191–95; *see also* Manduley v. Super. Ct. of San Diego, 41 P.3d 3, 33 (Cal. 2002) (upholding Proposition 21 creating prosecutorial direct file statute against due process and equal protection challenges); SNYDER & SICKMUND, *supra* note 14, at 113–14 (summarizing prosecutorial "direct file" laws); Donna M. Bishop & Charles S. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 284–85 (1991) (criticizing administration of "direct file" laws); Feld, *Legislative Exclusion*, *supra* note 17, at 117–19; Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 629 (1994) (arguing that prosecutors can act as more objective gatekeepers than either "soft" judges or "get tough" legislators); Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1467–68 (2006) (reporting states that adopted prosecutorial direct file laws, analyzing juvenile arrest rates before and after adoption, and concluding that such laws have no deterrent effect).

20. *See, e.g.*, NAT'L RES. COUNCIL AND INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE, 204–09, 214–18 (2001) [hereinafter NAT'L RES. COUNCIL]; Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 194 (1998) [hereinafter Feld, *Responses to Youth Violence*]; Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 966–97 (1995) [hereinafter Feld, *Violent Youth*]; Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1556–58 (2003) [hereinafter Feld, *Race, Politics, and Juvenile Justice*]; Barry C. Feld, *Unmitigated Punishment:*

narrative of a young generation of "super-predators" and predictions of an impending blood-bath of youth violence propelled punitive policies.[21] States lowered the age for transfer, increased the number of offenses excluded from juvenile court jurisdiction, and shifted discretion from a judge in a waiver hearing to a prosecutor making a charging decision.[22] Fourteen is the minimum age for transfer in most jurisdictions, but some states permit waiver of youths as young as ten or specify no minimum age, and others require criminal prosecution of children as young as thirteen.[23] By 1999, half the states had enacted mandatory transfer provisions for some serious offenses.[24] Most states have

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Adolescent Criminal Responsibility and LWOP Sentences, 10 J.L. & FAM. STUD. 11, 31–38 (2007) [hereinafter Feld, *Unmitigated Punishment*]; JESSICA SHORT & CHRISTY SHARP, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 7 (2005), *available at* http://www.cwla.org/programs/juvenilejustice/disproportionate.pdf ("Between 1992 and 1999, 49 states and the District of Columbia passed laws making it easier for juveniles to be tried as adults through statutory exclusion, mandatory waiver, direct file by prosecutors, or presumptive waiver legislation.").

21. WILLIAM BENNETT & JOHN DILULIO, BODY COUNT: MORAL POVERTY AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 21–34 (1996) (providing a racialized interpretation and prediction of massive increases in youth violence committed by "super-predators" based on demographic trends). Analysts debunked the demographic predictions at the time, see, e.g., FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE (1998), and the predicted crime wave never materialized. However, the intersection of youth, race, and crime fueled punitive policies. *See* Feld, *Race, Politics, and Juvenile Justice*, *supra* note 20, at 1523 (arguing that politicians exploited the super-predator myth for political advantage); Perry L. Moriearty, *Framing Justice, Media Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 850–51 (2011) (analyzing the impact of the super-predator narrative in media and political rhetoric).

22. *See* AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 3 (contending that politicians sought electoral advantage by "lowering the minimum age for criminal court jurisdiction, authorizing automatic transfers from juvenile to adult courts, and increasing the authority of prosecutors to file charges against children directly in criminal court rather than proceeding in the juvenile justice system"); JOLANTA JUSZKIEWICZ, YOUTH CRIME/ADULT TIME 1 (2000), *available at* http://www.cclp.org/documents/BBY/Youth_Crime_Adult_Time.pdf; Feld, *Legislative Exclusion*, *supra* note 17, at 124–29.

23. Griffin, *supra* note 15, at 189–92; *see* CAMPAIGN FOR YOUTH JUSTICE, *supra* note 14, at 71 (reporting North Carolina transfer law requiring mandatory prosecution of youths thirteen years or older charged with Class A felonies for which they can receive life without parole sentences); SNYDER & SICKMUND, *supra* note 14, at 112–14 (summarizing minimum ages for transfer by judges and prosecutors).

24. Feld, *Race, Politics, and Juvenile Justice*, *supra* note 20, at 1519–23 (describing role of race, crack cocaine, and gun violence in providing impetus for conservative get tough policies); Kellar, *supra* note 15, at 155–56 (depicting "get tough" waiver legislative changes of the 1990s); Julie Rowe, *Mourning the Untimely Death of the Juvenile Death Penalty: An Examination of* Roper v. Simmons *and the Future of the Juvenile Justice System*, 42 CAL. W. L. REV. 287, 294 (2006) (detailing get tough legislative changes in the 1990s).

judicial waiver statutes, but prosecutors' charging decisions determine the adult status of most youths without any hearing.[25] By some estimates, prosecutors rather than judges determined the adult status of eighty-five percent of youths based on age and offense.[26] As a consequence, juvenile court judges do not assess the culpability or competence of most juveniles whom states prosecute as adults.[27]

Once states convict youths in criminal court, judges sentence them as if they were adults and send them to the same prisons.[28]

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25. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 19 (estimating that of the juveniles tried as adults in 1996, about thirty-six percent had a judicial transfer hearing compared with only thirteen percent in 2000); SNYDER & SICKMUND, *supra* note 14, at 110–14 (summarizing statutory waiver mechanisms and processes).

In some states, prosecutors employed direct filing to charge about ten percent of juveniles as adults. *See, e.g.*, U.S. GEN. ACCT. OFF., JUVENILE JUSTICE 16 (1995); Feld, *Responses to Youth Violence*, *supra* note 20, at 208. Florida prosecutors transferred as many juveniles to criminal courts as did juvenile court judges via waiver hearings in the entire country. *See* Vincent Schiraldi & Jason Ziedenberg, *The Florida Experiment: Transferring Power From Judges to Prosecutors*, 15 CRIM. JUST. 46, 47 (2000) ("In 1995 alone . . . Florida prosecutors sent 7,000 cases to adult court, nearly matching the number of cases judges sent to the criminal justice system nationwide that year."); Charles E. Frazier et al., *Juveniles in Criminal Court: Past and Current Research in Florida*, 18 QLR 573, 579 (1999) (noting that after Florida's adopting direct file laws, "[t]ransfers increased from roughly 1.3% of the total juvenile filings per year prior to 1979 to a high of 9.6% in 1993").

26. JUSZKIEWICZ, *supra* note 22, at 5 ("First, 85% of determinations of whether tocharge [sic] a juvenile as an adult were not made by judges, but by prosecutors or by legislatures through statutory exclusions from juvenile court."). *Id.* at 31 (in forty-five percent of cases, prosecutors simply filed charges against youths in criminal court—a rate three times that of judicial waiver; in another forty percent of cases, prosecutors charged youths with statutorily excluded offenses).

27. *See, e.g.*, PATRICIA TORBET ET AL., NAT'L CTR. FOR JUVENILE JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME, at xii (1996) (describing the trend in the early 1990s for more states to exclude serious offenses from juvenile court jurisdiction); Katherine Hunt Federle, *Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 WIS. L. REV. 447, 487–94 (questioning the adequacy of waiver procedures to conduct individualized culpability assessments); Feld, *Legislative Exclusion*, *supra* note 17, at 85–86, (describing legislative trends and providing a statutory table of offenses excluded from juvenile court jurisdiction). Moreover, waiver statutes typically focus on "amenability to treatment" or "public safety" rather than maturity or culpability. *See* Feld, *Violent Youth*, *supra* note 20, at 1029–34 (analyzing changes in statutory waiver criteria from "amenability to treatment" to "public safety").

28. *See* JAMES AUSTIN ET AL., U.S. DEP'T OF JUST., JUVENILES IN ADULT PRISONS AND JAILS, at x (2000), *available at* https://www.ncjrs.gov/pdffiles1/bja/182503.pdf (reporting that about 14,500 juveniles are confined in adult facilities); Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. REV. 1083, 1089 (2006) ("[O]nce children are prosecuted as adults, they become subject to the same penalties as adults, including life without the possibility of parole."); Victor Streib & Bernadette Schrempp, *Life Without Parole for Children*, 21 CRIM. JUST. 4, 7 (2007) ("[Apart

Moreover, the same get-tough politics that affected juvenile policies influenced criminal sentences as well. States extended sentence lengths, adopted mandatory minimum sentences, and imposed mandatory life without parole for homicide and other offenses.[29] In the 1980s and 1990s, get-tough justice policies extended no formal recognition of youthfulness as a mitigating factor at sentencing.[30] Some deny young juveniles tried as adults the protection of the common law infancy defense and judges have imposed mandatory LWOP sentences on children twelve or thirteen years of age.[31] Until 2005, some states executed youths for crimes committed at sixteen or seventeen years of age[32] and until *Miller/Jackson* most imposed mandatory LWOPs on juveniles.[33]

Studies have reported racial disparities in waiver decisions for decades,[34] and get-tough laws have exacerbated racial differences.[35] Racial stereotypes taint culpability assessments,

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from the death penalty], essentially every other criminal sentence is available. Indeed, one of the political arguments to abolish the death penalty for juveniles was that they would remain eligible for LWOP, a sufficiently harsh punishment even without the death penalty."); Rowe, *supra* note 24, at 294 ("Once a juvenile offender is in adult court, sentences may be more severe, and the worst offenders may be sentenced to life in prison without possibility of parole.").

29. *See, e.g.*, MICHAEL TONRY, SENTENCING MATTERS (1996); MICHAEL TONRY, THINKING ABOUT CRIME (2010).

30. *See* Feld, *Legislative Exclusion*, *supra* note 17, at 129; AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 20.

31. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 14, at 13 ("Youth tried as adults face the same punishments as adults. They can be placed in adult jails pre- and post-trial, sentenced to serve time in adult prisons, or be placed on adult probation with few to no rehabilitative services. Youth also are subject to the same sentencing guidelines as adults and may receive mandatory minimum sentences or life without parole."); MARC MAUER ET AL., THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 17 (2004) ("A life sentence mandated for any *adult* defendant who committed a particular crime applied in full force to *juveniles* convicted in adult court for that crime."); Feld, *Responses to Youth Violence*, *supra* note 20, at 212–20 (summarizing state correctional responses to juveniles sentenced as adults).

32. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

33. *Miller v. Alabama*, 132 S. Ct. 2455, 2471 (2012).

34. *See, e.g.*, AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 15–16 (explaining that, since 1984, Black juveniles have comprised the majority of juveniles admitted to prison); U.S. GEN. ACCT. OFF., *supra* note 25, at 59 (examining the impact of race on judicial waiver decisions); M. A. Bortner et al., *Race and Transfer: Empirical Research and Social Context*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 17, at 277 (analyzing racial disparity in juvenile transfer proceedings); Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 276 (1987) ("[I]t appears that the effects of race are indirect, but visible nonetheless.").

35. POE-YAMAGATA & JONES, *supra* note 14, at 4; *see also* CAMPAIGN FOR YOUTH

reduce the mitigating value of youthfulness for children of color, and contribute to disproportionate numbers of minority youths tried and sentenced as adults.[36] Successive screenings, differential processing, and cumulative disadvantage compound until minority youths comprise the majority of juveniles tried in criminal court and three-quarters of those who enter prison.[37] Despite declining

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JUSTICE, *supra* note 14, at 11 ("In every state profiled in this report for which data are available, youth of color are disproportionately affected by these [get-tough] statutes."); JUSZKIEWICZ, *supra* note 22, at 6 (reporting that in some jurisdictions, Black juveniles accounted for approximately three out of ten felony arrests, but eight out of ten felony cases filed in criminal court); MIKE MALES & DAN MACALLAIR, THE COLOR OF JUSTICE 7–8 (2000) (studying juvenile transfer and criminal court sentencing practices and reporting that "[c]ompared to [W]hite youths, minority youths are 2.8 times as likely to be arrested for a violent crime, 6.2 times as likely to wind up in adult court, and 7 times as likely to be sent to prison by adult courts"); NAT'L RES. COUNCIL, *supra* note 20, at 216 ("A high proportion of the juveniles transferred to adult court are minorities. . . . The preponderance of minorities among transferred juveniles may be explained in part by the fact that minorities are disproportionately arrested for serious crimes."); Bortner, *supra* note 34, at 277 (analyzing sources of racial disparity in juvenile transfer proceedings).

36. *See* Feld, *Race, Politics, and Juvenile Justice*, *supra* note 20, at 1552–58 (illustrating how coded language can evoke racist sentiments without appearing explicitly racist); Moriearty, *supra* note 21, at 850–51 (2011) (arguing that media-driven fear of minority youth exacerbated punitive policies). Juveniles' race activates negative stereotypes and denies youths of color the mitigation otherwise accorded to adolescents. *See* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 488–95 (2004). Researchers surveyed police and probation officers and reported that "unconscious biases trigger the belief that [Black offenders] are adult-like and therefore as blameworthy as adults who commit similar crimes." *Id.* at 500. Similarly, probation officers made different attributions of the sources of Black and White youths criminal misconduct. *See* George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments in Juveniles Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 561 (1998) (detailing that "officers describe[d] Black and White youths differently, referring to negative personality traits for Black youths and more to negative environmental influences for Whites").

37. *See, e.g.*, POE-YAMAGATA & JONES, *supra* note 14, at 34 (reporting that in 2002, minorities made up nearly three-quarters of juveniles admitted to adult state prisons, with Blacks accounting for fifty-eight percent, Hispanics ten percent, and other youth of color five percent); Bortner, *supra* note 34, at 277 (analyzing cumulative consequences of racial disparities in transfer decisions). One study reported that criminal court judges imprisoned transferred Black youths at a rate eighteen times greater than that of White and Hispanic youths at seven times the rate of White youths. MALES & MACALLAIR, *supra* note 35, at 9. A study of waiver practices in eighteen urban counties in eleven states reported that minority youths comprised eighty-two percent of all juveniles tried in criminal courts. JUSZKIEWICZ, *supra* note 22, at 18 (reporting that African-American youths constituted more than half (fifty-seven percent) of youths prosecuted in criminal courts and Latino youths constituted another quarter (twenty-three percent)); *see also* POE-YAMAGATA & JONES, *supra* note 14, at 25–26 (providing numbers to support the claim that a disproportionate number of minorities were in adult prison in 1996). Moreover, the rate for Black youths sentenced to life without parole exceeds that of White youths

homicide rates for youths of all races since the mid-1990s, judges imposed LWOP sentences on Black youths more frequently than they did White youths.[38]

A. Roper v. Simmons *and Youths' Diminished Responsibility*

Christopher Simmons was seventeen years of age—older than Missouri's juvenile court jurisdiction—when he was tried, convicted, and sentenced to death for murder. Simmons proposed to two friends that they commit burglary and murder by breaking and entering, tying up a victim, and throwing her off a bridge. After one youth backed out, Simmons and the other boy entered the victim's home, bound her eyes and mouth with duct tape, drove her minivan to a state park, tied her hands and feet with electrical wire, and threw her into a river where she drowned.[39] Several years after his conviction, Simmons filed a petition for state post-conviction relief based on *Atkins v. Virginia*.[40] He argued that the federal Constitution prohibited states from executing a juvenile who was under eighteen when he committed his crime.[41] The Missouri Supreme Court agreed, set aside his

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in every state that imposed juvenile LWOP sentences. *See* HUM. RTS. WATCH, FOR THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR YOUTH OFFENDERS IN THE UNITED STATES IN 2008 at 6 (2008), *available at* http://www.hrw.org/sites/default/files/reports/the_rest_of_their_lives_execsum_table.pdf.

38. HUM. RTS. WATCH, *supra* note 37, at 6–7 (reporting Black LWOPs at 1.59 times the rate of White LWOPs).

39. Roper v. Simmons, 543 U.S. 551, 556–57 (2005).

40. 536 U.S. 304, 321 (2002) (barring states from executing defendants with mental retardation). *Atkins* found a national consensus existed because thirty-one states barred the practice and few states actually executed offenders with mental retardation. *Id.* at 313–16 (counting state statutes and emphasizing that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change" that enabled the Court to find the existence of a national consensus). The *Atkins* Justices' independent proportionality analysis concluded that mentally impaired defendants lacked the culpability to warrant execution. *Id.* at 315–16. Commentators noted the constitutional implications of *Atkins*' proportionality analyses for executing juvenile offenders. *See, e.g.*, Jeffrey Fagan, Atkins, *Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles From Capital Punishment*, 33 N.M. L. REV. 207, 207 (2003) ("The *Atkins* decision, though welcomed by both popular and legal policy audiences, naturally raises the question: what about juveniles?"); Barry C. Feld, *Competence, Culpability, and Punishment: Implications of* Atkins *for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 463–64 (2003) [hereinafter Feld, *Competence, Culpability, and Punishment*] ("[T]he same psychological and developmental characteristics that render mentally retarded offenders less blameworthy than competent adult offenders also characterize the immaturity of judgment and reduced culpability of adolescents and should likewise prohibit their execution.").

41. *Roper*, 543 U.S. at 559.

death sentence, and resentenced him to life without parole.[42]

Prior to *Roper v. Simmons*, the United States Supreme Court thrice addressed whether the Eighth Amendment prohibited states from executing juvenile offenders.[43] In *Eddings v. Oklahoma*,[44] the Court reversed a sixteen-year-old youth's death sentence because the trial court failed to consider youthfulness as a mitigating factor. In *Thompson v. Oklahoma*,[45] a plurality of justices concluded that fifteen-year-old offenders lacked sufficient culpability to warrant execution. In 1989, *Stanford v. Kentucky* upheld the death penalty for sixteen or seventeen-year-old youths convicted of murder.[46] *Stanford* acknowledged that most juveniles were less criminally responsible than adults, but rejected a categorical ban and allowed juries to decide whether a youth's culpability warranted execution.[47]

Roper v. Simmons overruled *Stanford* and prohibited states from executing youths for crimes committed prior to eighteen

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42. *Id.* at 559–60.

43. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Earlier decisions adverted to the importance of considering youthfulness as a mitigating factor in capital sentencing. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 115–17 (1982) (remanding sixteen-year-old defendant for resentencing after trial court's failure to properly consider youthfulness as a mitigating factor and noting that "youth is more than a chronological fact" and "minors, especially in their earlier years, generally are less mature and responsible than adults"); Lockett v. Ohio, 438 U.S. 586, 608–09 (1978) (requiring sentencing jury to consider all relevant mitigating factors including age of defendant); Roberts v. Louisiana, 431 U.S. 633, 637 (1977) (per curiam) (holding that a statute allowing for no consideration of particularized mitigating factors violated the Eighth and Fourteenth Amendments).

44. 455 U.S. 104, 115–17 (1982). The Court found that the trial judge did, however, consider age as a mitigating factor. *Id.* at 115.

45. 487 U.S. 815, 822–23 (1988) (plurality opinion). The *Thompson* plurality's proportionality analysis considered both objective factors—e.g., state statutes, jury practices, and the views of national and international organizations—and the Justices' own subjective sense of "civilized standards of decency." *Id.* at 822–31. The *Thompson* Court emphasized that deserved punishment must reflect individual culpability and concluded that "[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." *Id.* at 834. The Court asserted:

> [L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.... Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The 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.

46. *Stanford*, 492 U.S. at 380.

47. *Id.* at 375.

years of age.[48] State laws and jury sentencing decisions provided evidence of a national consensus against executing juveniles.[49] The *Roper* Justices also conducted an independent proportionality analysis and offered three reasons why states could not punish juveniles as severely as adults.[50] First, juveniles' immature judgment and limited self-control cause them to act impulsively and without full appreciation of consequences.[51] Second, juveniles' susceptibility to negative peer influences,[52] dependence on parents, and inability to escape criminogenic environments reduced responsibility for their crimes.[53] Third, their personalities are more transitory and less well-formed than adults', and their crimes provide less reliable evidence of depraved character.[54] These developmental features correspond with other criminal law doctrines that mitigate punishment—e.g., diminished capacity, duress or provocation, or lack of bad character.[55] Immature judgment and susceptibility to social influences also negate

48. *Roper*, 543 U.S. 551, 575 (2005).

49. *Id.* at 564–66 (noting that legislative trends prohibiting executing children corresponded with those in *Atkins* in which the Court held that the Eighth Amendment barred execution of defendants with mental retardation); *see also* Feld, *Competence, Culpability, and Punishment*, *supra* note 40, at 489–98 (analogizing between state laws and jury practices in executing defendants with mental retardation and juveniles). Even after *Stanford*, no states lowered the age of death eligibility and five states raised it. *Roper*, 543 U.S. at 565. In the decade prior to *Roper*, only three states executed offenders for crimes committed as juveniles. *Id.* at 564–65. National and international legal, professional, and religious organizations opposed executing juveniles. *Id.* at 575–78.

50. *Id.* at 569–72.

51. *Id.* at 569 ("[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.") (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

52. *Id.* at 569 ("[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.").

53. *Id.* (noting that juveniles are more susceptible to negative influences because they "have less control, or less experience with control, over their own environment"). The Court explained that "[t]heir 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." *Id.* at 570.

54. *Id.* at 570 ("[T]he character of a juvenile is not as well formed as that of an adult."). Because juveniles' character is transitional, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a great possibility exists that a minor's character deficiencies will be reformed." *Id.*

55. *See, e.g.*, Elizabeth F. Emens, *Aggravating Youth:* Roper v. Simmons *and Age Discrimination*, 2005 SUP. CT. REV. 51, 73 (2005); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1016 (2003).

retributive and deterrent justifications for the death penalty.[56] *Roper* spared seventy youths on death row, and states converted their sentences to life without the possibility of parole.[57]

Justice O'Connor's dissent acknowledged that juveniles generally are less culpable than adults, but questioned whether the differences between a seventeen-year-old juvenile and an eighteen-year-old adult justified a bright-line rule.[58] She believed that some seventeen-year-old murderers were sufficiently culpable to deserve execution[59] and argued that juries could weigh

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56. *Roper*, 543 U.S. at 571–72. *Roper* noted the two penal functions served by the death penalty—retribution and deterrence—and concluded that:

> 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.

Id. at 571. Similarly, the Court concluded that juveniles' immature judgment decreased the likelihood that the threat of execution would deter them, arguing that "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." *Id.*

57. *See* Elizabeth Cepparulo, Roper v. Simmons: *Unveiling Juvenile Purgatory: Is Life Really Better than Death?*, 16 TEMP. POL. & CIV. RTS. L. REV. 225, 225 (2006) (noting that the impact of *Roper* was to convert capital sentences to sentences of life without the possibility of parole because "in many states, life without parole and death are the only two options when sentencing homicide offenders"); *see also* Davis v. Jones, 441 F. Supp. 2d 1138, 1149 (M.D. Ala. 2006) (finding that defendant was seventeen years old at the time of his conviction and capital sentence, and, as a result of *Roper*, "the sentence of death is no longer constitutionally valid, [so] the only sentencing alternative is life without parole"); Duncan v. State, 925 So. 2d 245, 281 (Ala. Crim. App. 2005) (holding that, because of *Roper*, this case was remanded with instructions to "set aside the appellant's death sentence and resentence him to imprisonment for life without the possibility of parole"); Duke v. State, 922 So. 2d 179, 181 (Ala. Crim. App. 2005) (holding that, following *Roper*, the case of a sixteen-year-old convicted of capital crime must be remanded "to set aside Duke's sentence of death and to resentence him to life imprisonment without the possibility of parole—the only other sentence available for a defendant convicted of capital murder"); Lecroy v. State, 954 So. 2d 747, 748 (Fla. Dist. Ct. App. 2007) (affirming the trial court's decision to conform the defendant's sentence to the state supreme court's specifications: life without the possibility of parole for twenty-five years); State v. Craig, 944 So. 2d 660, 662 (La. Ct. App. 2006) (rejecting seventeen-year-old capital defendant's claim that post-*Roper* resentencing to life imprisonment at hard labor without benefit of parole violated state constitutional prohibition of excessive punishment).

58. *Roper*, 543 U.S. at 590–92, 601 (O'Connor, J., dissenting) (distinguishing her votes in *Thompson* and *Stanford* and reaffirming her adherence to the latter rationale).

59. *Id.* at 588. Justice O'Connor elaborated:

> [T]he Court adduces no evidence whatsoever in support of its sweeping conclusion that it is only in 'rare' cases, if ever, that seventeen-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

youthfulness as a mitigating factor.[60] Justice Scalia's dissent derided the social science research on which the majority relied to find that all juveniles lacked culpability to warrant execution[61] and argued for individualized assessments rather than a categorical prohibition.[62]

Although the *Roper* majority and dissents differed on several issues,[63] their fundamental disagreement concerned whether to

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> 17-year-old murderer cannot be *sufficiently* culpable to merit the death penalty. . . . But an especially depraved juvenile offender may nevertheless be just as culpable as many adult offenders considered bad enough to deserve the death penalty.

Id. at 599–600.

60. *Id.* at 602–03. Justice O'Connor objected that the Court's rejection of individualized culpability assessments was contrary to its death penalty jurisprudence that rejected arbitrary, categorical rules in favor of "individualized 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." *Id.* at 602–03.

61. *Id.* at 617–18 (Scalia, J., dissenting).

62. *Roper*, 543 U.S. at 620 (Scalia, J., dissenting). He chided the majority for providing no evidence that "juries cannot be trusted with the delicate task of weighing a defendant's youth" and objected that such a view "undermines the very foundations of our capital sentencing system, which entrusts juries with 'mak[ing] the difficult and uniquely human judgments that defy codification.'" *Id.* (quoting McCleskey v. Kemp, 481 U.S. 279, 311 (1987)); *see also* Wayne Myers, Roper v. Simmons: *The Collision of National Consensus and Proportionality Review*, 96 J. CRIM. L. & CRIMINOLOGY 947, 991 (2006) ("[T]he central defect in the majority's . . . analysis [is] its complete failure to support the contention that a jury cannot adequately account for youth as a mitigating factor in sentencing decisions.").

63. The majority and dissents disagreed about the proper denominator to use to calculate the existence of a national consensus against executing juveniles—all states or only those with death penalty laws. *Roper*, 543 U.S. at 595–96 (O'Connor, J., dissenting) (contrasting state laws rejecting execution of defendants with mental retardation in *Atkins* with laws regarding executing juveniles); *id.* at 609–11 (Scalia, J., dissenting) (arguing that relevant reference groups are policies of states that employ the death penalty for some offenders).

They also differed over the role of international law in interpreting domestic constitutional provisions. *Compare id.* at 575–78 (majority opinion) (noting that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty" and referring to "the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment"), *with id.* at 604–05 (O'Connor, J., dissenting) (acknowledging limited role of international law because the "Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries"), *and id.* at 624 (Scalia, J., dissenting) (arguing that the majority's premise that American law should reflect views of the rest of the world "ought to be rejected out of hand").

Finally, the dissenters criticized the majority for failing to condemn the Missouri Supreme Court for anticipatorily overruling *Stanford*. *Id.* at 593–94 (O'Connor, J., dissenting) (criticizing Court's failure to reprove Missouri Supreme Court for failing to follow *Stanford*); *id.* at 628–29 (Scalia, J., dissenting) ("To add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its flagrant disregard of our precedent in *Stanford*.").

impose a categorical bar on the death penalty or to allow juries to evaluate youths' culpability individually.[64] Justice Kennedy opted for a categorical ban:

> The 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. 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.[65]

Clinicians do not diagnose people younger than eighteen with antisocial personality disorder,[66] and *Roper* declined to let jurors make such culpability assessments. A brutal murder could overwhelm the mitigating role of youthfulness,[67] and *Roper* used age as a conclusive proxy for reduced culpability to prevent jurors from treating it as an aggravating factor.[68]

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64. *Compare id.* at 572–73 (majority opinion) ("The 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."), *with id.* at 602–03 (O'Connor, J., dissenting) ("[T]hese [Eighth Amendment] concerns may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized 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."), *and id.* at 620 (Scalia, J., dissenting) ("[The majority's] 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." (quoting McCleskey v. Kemp, 481 U.S. 279, 311 (1987) (internal quotation marks omitted))).

65. *Roper*, 543 U.S. at 572–73 (majority opinion) (emphasis added).

66. *Id.* at 573 (noting that psychologists cannot differentiate between an immature juvenile's crime and the "rare juvenile offender whose crime reflects irreparable corruption").

67. Emens, *supra* note 55, at 83 ("[T]o the extent we see or want to see childhood as a time of innocence, cognitive dissonance may prompt us to reconceive a child who does terrible things as an adult.").

68. *Id.* at 52–53 (noting that the prosecutor in *Roper* improperly argued the defendant's age was an aggravating, rather than mitigating, factor); Norman J. Finkel, *Prestidigitation, Statistical Magic, and Supreme Court Numerology in Juvenile Death Penalty Cases*, 1 PSYCHOL. PUB. POL'Y & L. 612, 636 (1995) (reporting social science studies showing that "[w]hen heinousness increases, it exerts a more powerful effect than age"); Rowe, *supra* note 24, at 311 ("By taking these sentencing decisions out of a jury's hands, the Court implicitly doubted American citizens' ability to weigh a body of evidence and recommend an appropriate sentence for a sixteen-year-old or seventeen-year-old defendant who kills in cold blood.").

The vehemence with which some post-*Roper* commentators used egregious juvenile crimes to criticize the decision bolsters the accuracy of Justice Kennedy's intuition. *See, e.g.*, Mitchel Brim, *A Sneak Preview Into How the Court Took Away*

B. Developmental Psychology and Adolescent Culpability

Roper gave three reasons why adolescents are less culpable than adults: immature judgment, susceptibility to negative peer influences, and transitional identities. But the Court relied more on intuition—"as any parent knows"[69]—than on scientific evidence.[70] Several *amicus* briefs presented developmental psychological and neuroscientific research about youths' diminished culpability, but the Court did not analyze or identify the decisive evidence.[71] Immature judgment, impulsivity, and limited self-control bear directly on evaluations of criminal responsibility, and developmental and neuroscientific research inform those assessments.[72]

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a State's Right to Execute Sixteen and Seventeen Year Old Juveniles: The Threat of Execution Will No Longer Save an Innocent Victim's Life, 82 DENV. U. L. REV. 739, 753 (2005) (beginning with a recitation of a horrific crime committed by juveniles and concluding that "[i]t is a grave injustice, not only to the victim and the victim's family, but also to society as a whole because the Court is able to disrespect the victim and the victim's family by not basing its decision on the respondent's moral culpability but rather on the Justices' individual perceptions and biases"); Moin A. Yahya, *Deterring* Roper*'s Juveniles Using a Law and Economics Approach to Show that the Logic of* Roper *Implies that Juveniles Require the Death Penalty More Than Adults*, 111 PENN ST. L. REV. 53, 106 (2006) ("If *Roper* is correct in assuming that juveniles are reckless, voracious consumers of the present, who have little fear of punishment because of their underdeveloped brains, then harsher punishments are needed to control them."); Benyomin Forer, *Juveniles and the Death Penalty: An Examination of* Roper v. Simmons *and the Future of Capital Punishment*, 35 SW. U. L. REV. 161, 171–75, 180 (2006) (summarizing facts of egregious cases and concluding that "the Court's analysis and determinations were deficient" and "overruled existing case law on flimsy grounds"); Steven J. Wernick, *Constitutional Law: Elimination of the Juvenile Death Penalty—Substituting Moral Judgment for a True National Consensus*, 58 FLA. L. REV. 471, 481–82 (2006).

69. *Roper*, 543 U.S. at 569 (observing summarily that juveniles are immature, impulsive, and irresponsible).

70. *Id.* at 617–19 (Scalia, J., dissenting) (criticizing the majority's selective and inconsistent use of social science studies as "look[ing] over the heads of the crowd and pick[ing] out its friends"); Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379, 396 (2006) ("[A]lthough *Roper* was correct in its result, the Court's use of social science research was, at times, limited and flawed. Even when the Court attempts to examine research that is widely accepted and highly regarded, the Court does not always appear to have the tools necessary to provide a sufficiently firm social science foundation.").

71. Denno, *supra* note 70, at 381–87 (arguing that while the Court relies on the "scientific and sociological studies respondent and his *amici* cite," it fails to identify which studies or data supported its conclusions about the differences between adolescents and adults).

72. Elizabeth Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 229–35 (1995) [hereinafter Scott et al., *Legal Contexts*]; Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764, 1764 (2008); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 816 (2003).

Retributive sentencing theory proportions punishment to a crime's seriousness.[73] Two elements—harm and culpability—define how serious a crime is and how much punishment the actor deserves:[74]

> [T]he degree of blameworthiness of an offense is generally assessed according to two kinds of elements: the nature and seriousness of the harm caused or threatened by the crime; and the offender's degree of culpability in committing the crime, in particular, his or her degree of intent (*mens rea*), motives, role in the offense, and mental illness or other diminished capacity.[75]

An offender's age does not change the nature of the harm caused—a fifteen-year-old can inflict the same injuries as an adult.[76] However, a youth's inability to fully appreciate

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73. *See* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 161 (2009) (arguing that "the offender's blameworthiness for an offense is generally assessed according to two elements: the nature and seriousness of the harm foreseeably caused or threatened by the crime and the offender's culpability in committing the crime [in particular, the offender's degree of intent (*mens rea*), motives, role in the offense, and mental illness or other diminished capacity]"); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 48 (1976) ("[P]unishing someone conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it."); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 589–91 (2005) (summarizing principles of retributive sentencing theory); *see also* ANDREW VON HIRSCH, CENSURE AND SANCTIONS 15 (1993); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 31 (1985).

74. *See* Stanford v. Kentucky, 492 U.S. 361, 393 (1989) (Brennan, J., dissenting) ("[T]he proportionality principle takes account not only of the 'injury to the person and to the public' caused by a crime, but also of the 'moral depravity' of the offender." (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977))); Enmund v. Florida, 458 U.S. 782, 815 (1982) (O'Connor, J., dissenting) (arguing that the offender's culpability—"the degree of the defendant's blameworthiness"—is central to determining the penalty); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 707 (1998) ("[A] sentence must correspond to the crime—not just to the harm caused by the offense, but also to the culpability of the offender."); Scott & Steinberg, *supra* note 72, at 822 ("Only a blameworthy moral agent deserves punishment at all, and blameworthiness (and the amount of punishment deserved) can vary depending on the attributes of the actor or the circumstances of the offense."); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 271 (Thomas Grisso & Robert Schwartz eds., 2000) ("But desert is a measure of fault that will attach very different punishment to criminal acts that cause similar amounts of harm.").

75. Frase, *supra* note 73, at 590 (emphasis added).

76. *See, e.g.*, ERNEST VAN DEN HAAG, PUNISHING CRIMINALS 174 (1975) (arguing that the victim of a crime is just as victimized, regardless of the age of the perpetrator, and the need for social defense is the same).

wrongfulness or to control behavior may reduce culpability.[77] Youths' limited understanding of consequences and truncated impulse control lessen the blameworthiness of the harms they cause.[78] States may hold them accountable for those harms, but should not punish them as severely as adults.[79]

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77. Just deserts theory and criminal law grading principles base the degree of deserved punishment on the actor's culpability. For example, a person may cause the death of another individual with premeditation and deliberation, intentionally, "in the heat of passion," recklessly, negligently, or accidentally. *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 105–45 (2d ed. 1960). The criminal law treats the same objective harm—for example, the death of a person—quite differently depending on the actor's culpability. *Id.*

Offender culpability is central to ensuring rational and proportional sentencing. *See* Tison v. Arizona, 481 U.S. 137, 156 (1987) (reasoning that "[d]eeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished"). *See also* David O. Brink, *Immaturity, Normative Competence and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1557 (2004) ("[J]uveniles tend to be less competent in discriminating right from wrong and in being able to regulate successfully their actions in accord with these discriminations. If they are less competent, then they are less responsible.").

78. *See* AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 113 (explaining that penal proportionality requires consideration of both the nature of the offense and the culpability of the offender). The report also noted:

> Children can commit the same acts as adults, but by virtue of their immaturity, they cannot be as blameworthy or as culpable. They do not have adults' developed abilities to think, to weigh consequences, to make sound decisions, to control their impulses, and to resist group pressures; their brains are anatomically different, still evolving into the brains of adults.

Id.; *see also*, Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHIL. & POL'Y 59, 67–68 (1990) (arguing that the criminal law treats children differently than adults because they are not "full moral agents, despite their capacity for practical reason and their freedom to act on the basis of their reasoned choices"); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 176 (1997) ("[Adolescents'] criminal choices are presumed less to express individual preferences and more to reflect the behavioral influences characteristic of a transitory developmental stage that are generally shared with others in the age cohort. This difference supports drawing a line based on age, and subjecting adolescents to a categorical presumption of reduced responsibility."); Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 407–09 (1999) (explaining that youths lack "ability to control [their] impulses, to manage [their] behavior in the face of pressure from others to violate the law, or to extricate [themselves] from a potentially problematic situation," and that these deficiencies render them less blameworthy).

79. Zimring uses the term "diminished responsibility" to refer to adolescents who possess "the minimum abilities for blameworthiness and thus for punishment . . . [whose] immaturity . . . still suggests that less punishment is justified . . . ." Zimring, *supra* note 74, at 273; *see also* FRANKLIN ZIMRING, AMERICAN YOUTH VIOLENCE 75 (1998) (contending that "even after a youth passes the minimum threshold of competence, this barely competent youth is not as culpable and therefore not as deserving of a full measure of punishment as a fully

Developmental psychologists study how children's thinking and behavior change as they mature.[80] By mid-adolescence, most youths can distinguish right from wrong and reason similarly to adults.[81] For example, adolescents and adults make informed consent decisions in medical settings similarly.[82] However, the

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qualified adult offender"); Scott & Steinberg, *supra* note 72, at 830 (reporting that compared with adults, youths act more impulsively, weigh consequences differently from adults, and discount risks because of normal developmental processes that "undermine [their] decisionmaking capacity in ways that are accepted as mitigating culpability").

80. *See, e.g.*, Steinberg & Cauffman, *supra* note 78, at 391:

> Developmental psychology, broadly defined, concerns the scientific study of changes in physical, intellectual, emotional, and social development over the life cycle. Developmental psychologists are mainly interested in the study of 'normative' development (i.e., patterns of behavior, cognition, and emotion that are regular and predictable within the vast majority of the population of individuals of a given chronological age), but they are also interested in understanding normal individual differences in development (i.e., common variations within the range of what is considered normative for a given chronological age) as well as the causes and consequences of atypical or pathological development (i.e., development that departs significantly from accepted norms).

Id.

81. *See, e.g.*, Cynthia V. Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 434–36 (2006) (arguing that the cognitive competence of adolescents enables them to form the *mens rea* to commit a crime and essentially refutes claims that the criminal law should treat them differently than adults); Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOLOGIST 99, 100 (1983). Developmental psychological research on adolescents' cognitive decision-making ability suggests that "for most purposes, adolescents cannot be distinguished from adults on the ground of competence in decision making alone." *Id. But see* Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 406–07 (1999) (condemning cognitive studies as methodologically limited and failing to assess real-life decision-making); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1609 (1992) (criticizing researchers who find no differences between adolescents' and adults' decision-making for focusing too narrowly on cognitive as opposed to judgmental factors).

82. Roper v. Simmons, 543 U.S. 551, 617–21 (2005) (Scalia, J., dissenting) (arguing that the Court cited research on adolescents' competence to make informed consent decisions in the context of abortion); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 52–53 (1998) (concluding that cognitive capacity and formal reasoning ability of mid-adolescents does not differ significantly from that of adults). Research on young peoples' abilities to make informed medical decisions tends to support equating adolescents' and adults' cognitive abilities. *See* Thomas Grisso & Linda Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOL. 412, 423 (1978) (finding that little research evidence exists to support that adolescents aged fifteen or older possess less competence than adults to provide knowing, intelligent, and voluntary informed consent); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1595 (1982) (noting that fourteen-year-olds' choices did not differ significantly from those of adults in terms of "evidence of choice, reasonable[ness of] outcome, rational[ity of] reason[ing], and understanding" when responding to

ability to make reasonable decisions after reflection under laboratory conditions is significantly different from the ability to make responsible choices spontaneously in stressful circumstances.[83] Emotions influence youths' judgment to a greater extent than adults, and researchers distinguish between decisions made under conditions of "cold" and "hot" cognition.[84] Excitement and stress cause youths to make riskier decisions than adults do.[85]

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medical and psychological treatment hypotheticals).

83. *See* Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1770 (1995) [hereinafter Cauffman & Steinberg, *Cognitive and Affective Influences*]; Scott & Steinberg, *supra* note 72, at 812–13 ("These findings from laboratory studies are only modestly useful, however, in understanding how youths compare to adults in making choices that have salience to their lives or that are presented in stressful unstructured settings (such as the street) in which decisionmakers must rely on personal experience and knowledge."); L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVIEWS 417, 423 (2000) ("[T]he decision making capacity of adolescents may be more vulnerable to disruption by the stresses and strains of everyday living than that of adults. That is, unlike adults, adolescents may exhibit considerably poorer cognitive performance under circumstances involving everyday stress and time-limited situations than under optimal test conditions."); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 250 (1996) [hereinafter Steinberg & Cauffman, *Maturity of Judgment*] ("[T]he informed consent model is too narrow in scope . . . because it overemphasizes cognitive functioning (e.g., capacity for thinking, reasoning, understanding) and minimizes the importance of noncognitive, psychosocial variables that influence the decision-making process (i.e., aspects of development and behavior that involve personality traits, interpersonal relations, and affective experience).").

84. *See, e.g.*, Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 PSYCHOL. PUB. POL'Y & L. 115, 119 (2007):

> [A]dolescents are much less capable of making sound decisions when under stressful conditions or when peer pressure is strong. Psychosocial researchers have referred to cognition in these different contexts as *cold* versus *hot*. The traits that are commonly associated with being an adolescent—short-sightedness (i.e., inability to make decisions based on long-term planning), impulsivity, hormonal changes, and susceptibility to peer influence—can quickly undermine one's ability to make sound decisions in periods of hot cognition.

Id. *See also* Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 60, 61 (2001) (detailing that "*[c]old cognition* refers to thinking under conditions of low emotion and/or arousal, whereas *hot cognition* refers to thinking under conditions of strong feelings or high arousal. The cognitive processes involved in hot cognition may, in fact, be much more important for understanding why people make risky choices in real-life situations" especially amongst youths).

85. *See, e.g.*, Bernd Figner et al., *Affective and Deliberative Processes in Risky Choice*, 35 J. EXPERIMENTAL PSYCHOL. 709, 726–28 (2009) (reporting that adolescents are more heavily influenced by the emotional limbic system and make riskier decisions under stressful conditions); Scott, *supra* note 81, at 1645 (arguing that youthfulness impairs consideration of alternatives or weighing and comparing consequences); Dahl, *supra* note 84, at 62 ("[D]ecision-making sequences regarding risky behavior in adolescence cannot be fully understood without considering the

Beginning in the mid-1990s, the John D. and Catherine T. MacArthur Foundation sponsored the Adolescent Development and Juvenile Justice (ADJJ) Research Network to study juvenile decision-making, judgment, and adjudicative competence. Over the next decade, the ADJJ Research Network produced a substantial body of research on adolescent development and its implications for juvenile and criminal justice policies.[86]

The ADJJ research distinguishes between youths' cognitive abilities and maturity of judgment.[87] Although sixteen-year-olds exhibit cognitive abilities comparable with adults,[88] their ability to make adult-quality decisions or exercise self-control does not emerge for several more years.[89] The ADJJ describes the "Immaturity Gap" as the disconnect between cognitive ability and

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role of emotions . . . ."); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 83, at 259 ("[S]ensation seeking increases during adolescence, leading to increased risk taking as a means of achieving excitement.").

86. *See* MACARTHUR FOUND. RES. NETWORK ON ADOLESCENT DEV. & JUV. JUST., http://www.adjj.org/downloads/552network_overview.pdf (last visited Mar. 3, 2013); *see, e.g.*, PETER W. GREENWOOD, DELINQUENCY PREVENTION AS CRIME-CONTROL POLICY (2006); THOMAS GRISSO, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS (2004)); OUR CHILDREN, THEIR CHILDREN (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005); THE CHANGING BORDERS OF JUVENILE JUSTICE (Jeffrey Fagan & Franklin E. Zimring eds., 2000); Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 73 (Thomas Grisso & Robert G. Schwartz eds., 2000) (analyzing adjudicative competencies of adolescents and their implications for justice administration); FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING (2004); ELIZABETH SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE (2008).

87. *Development and Criminal Blameworthiness*, MACARTHUR FOUND. RES. NETWORK ON ADOLESCENT DEV. & JUV. JUST. (Oct. 4, 2006, 10:40 AM), http://www.adjj.org/downloads (follow "3030PPT- Adolescent . . >" hyperlink) [hereinafter MACARTHUR FOUND. RES. NETWORK] (reporting a disjunction between youths' cognitive ability and their maturity of judgment). "By age sixteen, individuals show adult levels of performance on tasks of basic information processing and logical reasoning. Yet in the real world, adolescents show poorer judgment than adults." *Id.*

88. *See id.* (graph entitled "Basic Intellectual Abilities Are Mature by Age 16").

89. *See* Scott & Steinberg, *supra* note 72, at 813 ("Psycho-social development proceeds more slowly than cognitive development. As a consequence, even when adolescent cognitive capacities approximate those of adults, youthful decision-making may still differ due to immature judgment."); Scott et al., *Legal Contexts*, *supra* note 72, at 224; Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 152 (2003) ("[F]or all the importance of cognitive development, aspects of behavior that involve interpersonal and affective experience may offer even more information about an adolescent's decision-making processes."). *Contra* Ward, *supra* note 81, at 446–56 (arguing that even very young children possess sufficient rationality to act instrumentally, and therefore no reasons exist to punish them differently than adults).

mature judgment.[90] Youths' immature judgment reflects differences in risk perception, appreciation of future consequences, capacity for self-control, and experience with autonomy.[91] The general discrepancy between youth and adults in knowledge and experience, time perspective, risk proclivity, and impulsivity renders their bad choices less blameworthy.[92]

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90. MACARTHUR FOUND. RES. NETWORK, *supra* note 87 (graph entitled "The Immaturity Gap"); *see, e.g.*, Cauffman & Steinberg, *Cognitive and Affective Influences*, *supra* note 83, at 1765; Scott et al., *Legal Contexts*, *supra* note 72, at 227; Scott & Grisso, *supra* note 78, at 157. Psycho-social factors affecting adolescents' decisions to engage in crime include "peer influence, temporal perspective (a tendency to focus on short-term versus long-term consequences), and risk perception and preference. . . . We designate these psychosocial influences as 'judgment' factors, and argue that immature judgment in adolescence may contribute to choices about involvement in crime." *Id.; see also* Steinberg & Cauffman, *supra* note 78, 407–08 (explaining that the quality of adolescent decision-making subsumes three categories of psycho-social factors: "responsibility (the capacity to make a decision in an independent, self-reliant fashion), perspective (the capacity to place a decision within a broader temporal and interpersonal context), and temperance (the capacity to exercise self-restraint and control one's impulses)").

91. *See, e.g.*, Morse, *supra* note 82, at 53 (describing characteristics of youths that distinguish their decision-making capabilities from those of adults); Scott & Steinberg, *supra* note 72, at 813 ("[E]ven when adolescent cognitive capacities approximate those of adults, youthful decisionmaking may still differ due to immature judgment. The psycho-social factors most relevant to differences in judgment include: (a) peer orientation, (b) attitudes toward and perception of risk, (c) temporal perspective, and (d) capacity for self-management. . . . [I]mmature judgment can affect outcomes because these developmental factors influence adolescent values and preferences that drive the cost-benefit calculus in the making of choices."); Scott et al., *Legal Contexts*, *supra* note 72, at 229–35 (depicting psycho-social and developmental factors that contribute to juveniles' immature judgment); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 83, at 252 (emphasizing temperance, perspective, and judgment as ways in which adolescents' thinking diverges from adults); Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008) (noting that "considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices").

92. *See* Scott & Steinberg, *supra* note 91, at 20 (suggesting that because youths assess and weigh risks differently than adults, they are less likely to anticipate that someone might get hurt or killed in the commission of a felony); Scott & Grisso, *supra* note 78, at 160–61 (noting that psycho-social developmental factors affecting judgment and criminal responsibility in adolescents include: "(1) conformity and compliance in relation to peers, (2) attitude toward and perception of risk, and (3) temporal perspective"); Scott & Steinberg, *supra* note 72, at 813; Scott et al., *Legal Contexts*, *supra* note 72, at 227 (proposing "judgment" framework to evaluate quality of adolescent decision-making that includes not only cognitive capacity, but also influence of factors such as "conformity and compliance in relation to peers and parents, attitude toward and perception of risk, and temporal perspective").

1. Immature Judgment and Impulse Control

Adolescents' propensity to engage in risky behavior[93] is reflected in higher rates of accidents, suicide, drug use, unsafe sex, and criminal activity.[94] To assess risks, a person has to be able to identify potential outcomes, estimate their likelihood of occurring, and make valuations of possible consequences.[95] Adolescents underestimate the amount and likelihood of risks, emphasize immediate outcomes, and focus on gains rather than losses to a greater extent than do adults.[96] Younger teens are more impulsive

93. *See* Scott & Steinberg, *supra* note 72, at 814 ("Future orientation, the capacity and inclination to project events into the future, may also influence judgment, since it will affect the extent to which individuals consider the long-term consequences of their actions in making choices. Over an extended period between childhood and young adulthood, individuals become more future-oriented."); Spear, *supra* note 83, at 421 (noting that "[r]elative to individuals at other ages, . . . adolescents . . . exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking.").

94. *See* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, *in* ADOLESCENT RISK TAKING 66, 67 (Nancy J. Bell & Robert W. Bell eds., 1993); Marrus & Rosenberg, *supra* note 15, at 1162–63 (describing various ways in which juveniles engage in risky behavior—for example, unprotected sex, drugs, drinking, driving recklessly). Teenagers' greater proclivity to engage in unprotected sex and to speed and drive recklessly reflects various forms of risk-taking with respect to health and safety. *See* John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 38–48 (2001) (summarizing criminological research reporting peak of criminal involvement in mid-to-late adolescence with sharp desistance thereafter and attributing youthful involvement to normal developmental transition to adulthood); Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 291 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Scott, *Lessons*]:

> Many adolescents become involved in criminal activity in their teens and desist by the time they reach young adulthood. . . . [C]riminologists . . . conclude that participation in delinquency is 'a normal part of teen life.' For most adolescent delinquents, desistance from antisocial behavior also seems to be a predictable part of the maturation process.

Id. at 300; *see also* Spear, *supra* note 83, at 421 ("[W]ith half or more of adolescents exhibiting drunk driving, sex without contraception, use of illegal drugs, and minor criminal activities, 'reckless behavior becomes virtually a normative characteristic of adolescent development.'" (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence*, 12 DEVELOPMENTAL REV. 339, 344 (1992))).

95. *See* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 3–4 (1992); *see also* Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 LAW & HUM. BEHAV. 229, 241 (1996) ("We need to examine the extent to which midadolescents typically might not yet have achieved adultlike ways of framing problems . . . and generating alternative responses to stressful situations or weighing the potential consequences of their alternatives.").

96. *See* Furby & Beyth-Marom, *supra* note 95, at 19 ("[A]dolescents [may] judge some negative consequences in the distant future to be of lower probability than do adults or to be of less importance than adults do."); Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 139 (Thomas Grisso & Robert

than their older peers or adults.[97] Adolescents may possess less information[98] or consider fewer options than adults which affects their risk calculus.[99] Youths and adults use the same amount of time to solve simple problems, but adults take more time to solve complex problems.[100]

Youths' perception of risk declines during mid-adolescence and then gradually increases into adulthood. Sixteen and seventeen-year-olds anticipate fewer risks than do younger or older research subjects.[101] They are more present-oriented and discount future consequences.[102] They weigh costs and benefits differently than adults and apply different subjective values to outcomes.[103] Adolescents prefer an immediate, albeit smaller,

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G. Schwartz eds., 2000) ("[A]dolescents . . . may differ from adults in the weights that they give to potential positive and negative outcomes . . . [and] are more likely than adults to give greater weight to anticipated gains than to possible losses or negative risks."); Scott, *Lessons*, *supra* note 94, at 306 ("[A]dolescents . . . could differ from adults in the subjective value that is assigned to perceived consequences . . . [and] may weigh costs and benefits differently, sometimes even viewing as a benefit what adults would consider to be a cost.").

97. MACARTHUR FOUND. RES. NETWORK, *supra* note 87 (graph entitled "Impulsivity Declines with Age").

98. *See* Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) ("Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."); Scott, *Lessons*, *supra* note 94, at 304–05 ("Adolescents, perhaps because they have less knowledge and experience, are less aware of risks than are adults. . . . [T]he fact that adolescents have less experience and knowledge than adults seems likely to affect their decision making in tangible and intangible ways." (citation omitted)); Taylor-Thompson, *supra* note 89, at 153 ("Adolescents assess risk differently than adults. This may result from adolescents being unaware of risks that adults typically perceive, having incorrect information about risks, or calculating the probability or magnitude of the risk in ways that adults would not." (footnotes omitted)).

99. *See* Taylor-Thompson, *supra* note 89, at 153 ("In situations where adults will likely perceive and weigh multiple alternatives as part of rational decision-making, adolescents typically see only one option. This inflexible 'either-or-mentality' becomes especially acute under stressful conditions.").

100. MACARTHUR FOUND. RES. NETWORK, *supra* note 87 (graph entitled "With Age, Longer Time Spent Thinking Before Acting").

101. *Id.* (graph entitled "Risk Perception Declines and Then Increases After Mid-Adolescence").

102. *Id.* (graph entitled "Future Orientation Increases With Age").

103. *See* Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1608, 1645–47 (1992) (discussing how youths' perceptions of and preferences for risk differ from those of adults). Young people may discount negative future consequences because they have more difficulty than adults integrating it because of their more limited experience. *See* William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, *in* ADOLESCENTS AND THE AIDS EPIDEMIC 17, 17–19 (William Gardner et al. eds., 1990); Taylor-Thompson, *supra* note 89, at 154 ("Adolescents, more than adults, tend to discount the future and to afford greater weight to short-

reward, whereas adults delay gratification unless the present payout is only slightly discounted.[104] Additionally, youths view not engaging in risky behaviors differently than adults.[105] They crave sensation and excitement—the adrenaline rush.[106] Risk-taking and sensation-seeking peak around sixteen or seventeen and then decline in adulthood.[107] The divergence between perception of and appetite for risk corresponds with increases in youths' criminal activity. Feelings of invulnerability and immortality heighten youths' risk propensity.[108]

2. Neuroscience and Adolescent Brain Development

The human brain does not mature until the early twenties, and the differences that social scientists observe in youths' and adults' thinking and behavior reflect these developmental features.[109] Youths do not have the physiological capacity of adults

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term consequences of decisions.").

104. MACARTHUR FOUND. RES. NETWORK, *supra* note 87 (graph entitled "Older Individuals Are More Willing to Delay Gratification").

105. *See* Scott & Steinberg, *supra* note 72, at 815 ("[A]dolescents are less risk-averse than adults, generally weighing rewards more heavily than risks in making choices. In part, this may be due to limits on youthful time perspective; taking risks is more costly for those who focus on the future."); Scott & Grisso, *supra* note 78, at 163; Taylor-Thompson, *supra* note 89, at 153 ("[A]dolescents experience greater concern—and anxiety—over the consequences of *refusing* to engage in risky conduct than adults do, thanks to greater fear of being socially ostracized.").

106. *See* Scott & Grisso, *supra* note 78, at 163 (contending that adolescents are more willing than adults to take physical and social risks for the sake of experiencing novel and complex sensations); Spear, *supra* note 83, at 422:

> Individuals engaging in risk taking may do so to attain the positive arousal produced by the sensations of novelty, complexity, change or intensity of experience. . . . Perceived risks of risk taking decline with age during adolescence, so it is possible that the level of risk taking necessary to attain an 'adrenaline rush' of danger may rise as well, perhaps leading to an escalation of risk-taking behaviors in certain individuals, particularly those with poor prospects for attaining other reinforcers.

Id. (quoting D. Wilson & M. Daly, *Lethal Confrontational Violence Among Young Men*, *in* ADOLESCENT RISK TAKING, *supra* note 94 , at 84); *see also* Taylor-Thompson, *supra* note 89, at 153 (arguing that sensation-seeking activity increases for youths between sixteen and nineteen years of age).

107. MACARTHUR FOUND. RES. NETWORK, *supra* note 87 (graph entitled "Preference for Risk Peaks in Mid-Adolescence"); *id.* (graph entitled "Sensation-Seeking Declines With Age"); *see also* Steinberg et al., *supra* note 72, at 1764.

108. *See* Lawrence D. Cohn et al., *Risk-Perception: Differences Between Adolescents and Adults*, 14 HEALTH PSYCHOL. 217, 221 (1995) (reporting that adolescents engage in "health-threatening activities" because they "do not regard [such] behavior as extremely risky or unsafe," rather than because of "unique feelings of invulnerability"); Furby & Beyth-Marom, *supra* note 95, at 19–21.

109. *See* Scott & Steinberg, *supra* note 72, at 816 (summarizing research on brain development and its implications for adolescent self-control):

> [R]egions of the brain implicated in processes of long-term planning, regulation of emotion, impulse control, and the evaluation of risk and

to exercise mature judgment or control impulses effectively.[110] Two neurobiological systems underlie youths' propensity to engage in risky behavior. The prefrontal regulatory system is responsible for judgment and impulse control, and the limbic system is responsible for emotional and reward-seeking behavior.[111] The prefrontal cortex (PFC) of the frontal lobe of the brain operates as the chief executive officer.[112] Executive functions include

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> reward continue to mature over the course of adolescence, and perhaps well into young adulthood. At puberty, changes in the limbic system—a part of the brain that is central in the processing and regulation of emotion—may stimulate adolescents to seek higher levels of novelty and to take more risks; these changes also may contribute to increased emotionality and vulnerability to stress. At the same time, patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving planning and decision-making, suggest that these higher-order cognitive capacities may be immature well into middle adolescence.

Id.; *see also* Dahl, *supra* note 84, at 69 ("Regions in the PFC [prefrontal cortex] that underpin higher cognitive-executive functions mature slowly, showing functional changes that continue well into late adolescence/adulthood."). For a scientific analysis on the development of the teenage brain, see Nat'l Inst. of Mental Health, *Teenage Brain*, http://www.nimh.nih.gov/health/publications/teenage-brain-a-work-in-progress.shtml (last visited Jan. 28, 2008). *See also* Tomáš Paus et al., *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCI. 1908, 1908 (1999); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859 (1999) [hereinafter Sowell et al., *In Vivo Evidence*]; Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819 (2001) [hereinafter Sowell et al., *Mapping Continued Brain Growth*] (discussing significant changes in brain structure prior to adulthood); Spear, *supra* note 83, at 438 ("[T]he adolescent brain is a brain in flux, undergoing numerous regressive and progressive changes in mesocorticolimbic regions.").

110. *See* Dahl, *supra* note 84, at 60 (arguing that affect regulation relates to the control of feelings and behavior and "involves some inhibition, delay, or intentional change of emotional expression or behavior to conform with learned social rules, to meet long-term goals, or to avoid future negative consequences"); Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice*, 3 OHIO ST. J. CRIM. L. 321, 330 (2006) ("An adolescent's level of cortical development may therefore be directly related to her or his ability to perform well in situations requiring executive cognitive skills. Younger, less cortically mature adolescents may be more at risk for engaging in impulsive behavior than their older peers . . . .").

111. Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 217 (2010); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 91–92 (2008).

112. *See* PRINCIPLES OF NEURAL SCIENCE 9 (Eric R. Kandel et al. eds., 4th ed. 2000) (describing specialized functions of lobes of the brain and reporting that "[t]he frontal lobe is largely concerned with planning future action and with the control of movement"); Gruber & Yurgelun-Todd, *supra* note 110, at 323 ("The frontal cortex has been shown to play a major role in the performance of executive functions including short term or working memory, motor set and planning,

reasoning, planning, and impulse control.[113] During late-adolescence, increased myelination[114] and synaptic pruning[115] of the PFC increase cognitive function, reasoning ability, and impulse control.[116]

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attention, inhibitory control and decision making."); Sowell et al., *Mapping Continued Brain Growth*, *supra* note 109, at 8819 (describing brain growth in post-adolescents "in the superior frontal regions that control executive cognitive functioning"); *Frontline: Inside the Teenage Brain—Interview with Jay Giedd* (PBS television broadcast, Mar. 31, 2002), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html ("The frontal lobe is often called the CEO, or the executive of the brain. It's involved in things like planning and strategizing and organizing, initiating attention and stopping and starting and shifting attention."); B.J. Casey, et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 68 (2008) (declaring that the brain's ability to control behavior continues to mature through late adolescence).

113. The prefrontal cortex (PFC) operates as the CEO of the brain and controls planning, goal-directed responses, risk assessment, and impulse control. *See, e.g.*, B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 244 (2000) (associating PFC with a variety of cognitive abilities and behavior control); Deborah Yurgelun-Todd, *Emotional and Cognitive Changes During Adolescence*, 17 CURRENT OPINION IN NEUROBIOLOGY 251, 253 (2007); R.K. Lenroot & Jay N. Giedd, *Brain Development in Children and Adolescents: Insights from Anatomical Magnetic Resonance Imaging*, 30 NEUROSCIENCE & BIOBEHAVIORAL REVIEWS 718, 723 (2006) (reporting that adolescents are less able to self-regulate or control behavior).

114. Myelin is a white, fatty substance that forms a sheath that insulates the neural axons and facilitates more rapid and efficient neurotransmission. Myelination in the frontal cortex improves brain function by acting like the insulation of a wire to increase the speed of neural electro-conductivity. Zoltan Nagy, Helena Westerberg & Torkel Klingberg, *Maturation of White Matter is Associated with the Development of Cognitive Functions During Childhood*, 16 J. COGNITIVE NEUROSCIENCE 1227, 1231 (2004); ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND 144 (2001) (explaining that "the presence of myelin makes communication between different parts of the brain faster and more reliable").

115. The gray matter or brain cell neurons that cover the top layer of the brain begin to thin through a process of synaptic pruning which eliminates unused neuronal connections. The elimination of unused connections promotes greater efficiency and strengthens the brain's ability to process complex information. B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 241 (2000) (reporting that "increasing cognitive capacity during childhood may coincide with a gradual loss [of grey matter] rather than formation of new synapses"); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8175 (2004).

116. *See* PRINCIPLES OF NEURAL SCIENCE, *supra* note 112, at 147–48 (describing the role of myelination of axons in speeding conduction velocity and noting that "conduction in myelinated axons is typically faster than in nonmyelinated axons of the same diameter"); Gruber & Yurgelun-Todd, *supra* note 110, at 325:

> The significant correlations between white matter volume and processing speed are consistent with evidence suggesting that increased myelination of axons produces faster conduction velocity of neural signals and more efficient processing of information, and further suggests that some of the increased cognitive abilities characteristic of adult maturation may be associated with developmental increases in relative white matter volume.

The limbic system controls instinctual behavior, such as the fight-or-flight response.[117] Adolescents rely more heavily on the limbic system and less heavily on the PFC than do adults.[118] During adolescence, the two systems are out of balance as limbic system activity increases while the prefrontal regulatory system lags behind. Pleasure-seeking and emotional reward responses develop more rapidly than does the system for self-control and self-regulation. Youths' impulsive behavior reflects a gut response rather than sober reflection.[119] The presence of peers stimulates greater neural activity in the reward centers of the brain and further increases risk-taking.[120] The slower development of the

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Id.; *see also* Paus et al., *supra* note 109, at 1908:

> The smooth flow of neural impulses throughout the brain allows for information to be integrated across the many spatially segregated brain regions involved in these functions. The speed of neural transmission depends not only on the synapse, but also on structural properties of the connecting fibers, including the axon diameter and the thickness of the insulating myelin sheath.

Id.; *see also* Sowell et al., *Mapping Continued Brain Growth*, *supra* note 109, at 8828 ("[I]t is likely that the visuospatial functions typically associated with parietal lobes are operating at a more mature level earlier than the executive functions typically associated with frontal brain regions.").

117. *See, e.g.*, PRINCIPLES OF NEURAL SCIENCE, *supra* note 112, at 986–93 (describing role of amygdala in mediating between emotions and cognition); Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 195, 195 (1999) (reporting that the amygdala is "a neural system that evolved to detect danger and produce rapid protective responses without conscious participation").

118. *See* Baird et al., *supra* note 117, at 198 (showing that processing of emotions shifted from the amygdala to the frontal lobe over the course of the teenage years); Stephanie Burnett et al., *Development During Adolescence of the Neural Process of Social Emotion*, 21 J. COGNITIVE NEUROSCIENCE 173, 173 (2009); S.J. Blakemore, *Adolescent Development of the Neural Circuitry for Thinking About Intentions*, 2 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 130 (2007).

119. *See* David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System*, 14 STAN. L. & POL'Y REV. 13, 15 (2003):

> Adolescents tend to process emotionally charged decisions in the limbic system, the part of the brain charged with instinctive (and often impulsive) reactions. Most adults use more of their frontal cortex, the part of the brain responsible for reasoned and thoughtful responses. This is one reason why adolescents tend to be more intensely emotional, impulsive, and willing to take risks than their adult counterparts.

Id.; *see also* Dahl, *supra* note 84, at 64:

> These affective influences are relevant . . . to many day-to-day 'decisions' that are made at the level of gut feelings about what to do in a particular situation (rather than any conscious computation of probabilities and risk value). These gut feelings appear to be the products of affective systems in the brain that are performing computations that are largely outside conscious awareness (except for the feelings they evoke).

Id.

120. Albert Chein, et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 DEVELOPMENTAL SCI. at F8 (noting

PFC impulse-control system in relation to the limbic reward-seeking system likely contributes to youths' risk taking, poor judgment, and criminal involvement.[121]

The neuroscience helps to explain adolescents' impulsive behavior. Scientists have not established a direct link between brain development and real-life behavior, nor found a way to individualize among young offenders on the basis of brain development.[122] However, the research helps explain why adolescents make risky decisions and respond more robustly to peer influences.[123]

3. Peer Group and Community Influences

Roper also attributed youths' reduced culpability to their greater susceptibility to negative peer influences.[124] Normal adolescent risk-taking and delinquent behavior interact with environmental features. Juveniles commit crimes in groups to a greater extent than do adults, which increases risks of accessorial liability for crimes they did not intend or personally commit.[125]

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that with adolescents, "awareness of peers selectively amplifies activity in the brain's incentive processing system, which in turn influences subsequent decisions about risk").

121. Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 161–62 (2010).

122. Terry A. Maroney, *Adolescent Brain Science After* Graham v. Florida, 86 NOTRE DAME L. REV. 765, 769 (2011) (contending that "the data support conclusions only at the aggregate level, [but] they shed little light on the developmental status of any given young person, except insofar as she is a member of the group. While links between structural attributes, brain-level functional data, and externalized behaviors are strengthening, they remain largely speculative."); Aronson, *supra* note 84, at 136 (emphasizing "lack of clear causal pathway from brain structure to behavior"); Stephen J. Morse, *New Neuroscience, Old Problems*, *in* NEUROSCIENCE AND THE LAW: BRAIN, MIND AND THE SCALES OF JUSTICE 157 (Brent Garland ed., 2004) (explaining that as long as the law assumes that people are rational, the biological causes of their behavior are legally irrelevant).

123. *See* Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 405–06 (2006) (arguing that the simple fact of neuron-anatomical differences between adolescent and adult brains do not compel differences in how the law responds to them).

124. *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (noting adolescent susceptibility to negative peer influences); Scott, *supra* note 81, at 1643–44 (describing adolescent responsiveness to peer influences); Scott & Steinberg, *supra* note 72, at 813 ("[T]eens are more responsive to peer influence than are adults. Susceptibility to peer influence increases between childhood and early adolescence as adolescents begin to individuate from parental control. This susceptibility peaks around age fourteen and declines slowly during the high-school years.").

125. Police arrest two or more juveniles for committing a single crime more often than they do adults. *See, e.g.*, Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 870 (1981) (noting that sixty-four percent of robberies committed by people under age twenty-one were committed in groups while only thirty-nine percent of robberies

Susceptibility to peer influences interacts with risk propensity and youths engage in riskier behavior together than they would when alone.[126] A juvenile may make a spur-of-the-moment decision to commit a crime with accomplices fearing social rejection if he refuses.[127] Significantly, the defendants in *Roper*, *Graham*, *Miller*, and *Jackson* all committed their crimes with one or more co-offenders. Youths' ability to resist peer influences approaches that of adults in the late teens and early twenties.[128] Youths' reduced

committed by people twenty-one and older were committed in groups). Group offending increases youths' prospects for prosecution as accessories and exposes them to the same criminal penalties as principals. *See, e.g.*, ZIMRING, *supra* note 21, at 152 (1998) ("Accessorial liability can interact with the vulnerability of adolescents to group pressure to create very marginal conditions for extensive criminal sanctions."); Scott & Grisso, *supra* note 78, at 162 ("Peer influence seems to operate through two means: social comparison and conformity. Through social comparison, adolescents measure their own behavior by comparing it to others. Social conformity . . . influences adolescents to adapt their behavior and attitudes to that [sic] of their peers."); Taylor-Thompson, *supra* note 89, at 153–54 ("The choice to engage in antisocial conduct is often linked to the adolescent's desire for peer approval. Prodding by peers can substitute for, and even overwhelm, an adolescent's own 'better' judgment about whether to engage in certain conduct.").

126. *See* Scott & Steinberg, *supra* note 72, at 815 ("[A] synergy likely exists between adolescent peer orientation and risk-taking; considerable evidence indicates that people generally make riskier decisions in groups than they do alone."). One scholar argues:

> That social settings account for the majority of all youth crime suggests that the capacity to deflect or resist peer pressure is a crucially necessary dimension of being law-abiding in adolescence. . . . Kids who do not know how to deal with such pressure lack effective control of the situations that place them most at risk of crime in their teens.

Zimring, *supra* note 74, at 282; *see also* Margo Gardner & Laurence Steinberg, *Peer Influence on Risk-Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood*, 4 DEVELOPMENTAL PSYCHOL. 625, 625–26 (2005) ("[A]dolescents are usually accompanied by one or more persons when committing crimes. . . . This is not, however true of adults; when adults commit crimes, they typically do so alone.").

127. Scott & Steinberg, *supra* note 72, at 22.

128. Zimring contends:

> A teen may know right from wrong and may even have developed the capacity to control his or her impulses while alone, but resisting temptation while alone is a different task than resisting the pressure to commit an offense when adolescent peers are pushing for misbehavior and waiting to see whether or not the outcome they desire will occur.

Zimring, *supra* note 74, at 280; *see also* Gardner & Steinberg, *supra* note 126, at 626 ("When confronted with risky decisions in the context of a peer group, adolescents, and perhaps even young adults, may be less able than older adults to resist the influence of their risk-prone age mates."); Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1531 (2007) (reporting that "[t]here is little doubt that peers actually influence each other and that the effects of peer influence are stronger during adolescence than in adulthood"); Franklin E. Zimring, *Toward a Jurisprudence of Youth Violence*, 24 CRIME & JUST. 477, 488–490 (1998) (noting that "[t]he ability to resist peer pressure is yet another social skill that is a necessary part of legal obedience and is not fully developed in many adolescents").

ability to resist peer pressures diminishes criminal responsibility compared with adults.[129]

II. *Graham v. Florida*: Reframing Proportionality for Juvenile Offenders

Roper prohibited executing adolescents because of immature judgment and limited self-control.[130] Before *Graham*, the Court's Eighth Amendment jurisprudence asserted that "death is different."[131] However, the diminished responsibility that precludes the death penalty reduces youths' blameworthiness for all other sentences as well.[132]

A. Graham v. Florida: *"Death is Different" No Longer*

Prior to *Graham*, the Court had not applied proportionality principles to length-of-year sentences for juveniles or set a minimum age for LWOP sentences.[133] As a result, appellate courts

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129. *See, e.g.*, Zimring, *supra* note 74, at 282 ("But if social experience in matters such as anger and impulse-management also counts, and a fair opportunity to learn to deal with peer pressures is regarded as important, expecting the experience-based ability to resist impulses and peers to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking.").

130. Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

131. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994 (1991) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (recognizing "'that the imposition of death by public authority is . . . profoundly different from all other penalties'" (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978))); Rummel v. Estelle, 445 U.S. 263, 272 (1980) (noting the Court's death penalty cases have limited applicability "[b]ecause a sentence of death differs in kind from any sentence of imprisonment, no matter how long"); *see also* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishment Clause*, 97 VA. L. REV. 899 (2011) (analyzing the Court's dual-track proportionality analyses and distinction between capital and non-capital sentence review).

132. Professor Zimring argues:

> Doctrines of diminished responsibility have their greatest impact when large injuries have been caused by actors not fully capable of understanding and self-control. The visible importance of diminished responsibility in these cases arises because the punishments provided for the fully culpable are quite severe, and the reductive impact of mitigating punishment is correspondingly large. But if the doctrine of diminished responsibility means anything in relation to the punishment of immature offenders, its impact cannot be limited to trivial cases. Diminished responsibility is either generally applicable or generally unpersuasive as a mitigating principle.

ZIMRING, *supra* note 21, at 84.

133. *See* Graham v. Florida, 130 S. Ct. 2011, 2022 (2010) ("The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence."); CAMPAIGN FOR YOUTH JUSTICE, *supra* note 14, at 5 (noting various state statutes which allow youths to be tried in adult courts);

did not review the mandatory minimum or LWOP sentences that judges imposed on juveniles.[134] Although penal proportionality relates the seriousness of a crime—harm and culpability—to the sentence imposed,[135] courts used a circular logic, and reasoned that a crime is serious because of the injury inflicted, and focused on harm rather than culpability.[136]

In *Graham v. Florida*, sixteen-year-old Terrance Graham and three companions attempted to rob a restaurant, for which he pled guilty and received a three-year probationary term with an initial twelve months in jail.[137] Shortly after his release from jail and while on probation, Graham and two companions committed two armed home invasion robberies.[138] The trial judge revoked Graham's earlier probation, rejected the state's recommendation

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CAMPAIGN FOR YOUTH JUSTICE, *supra* note 14, at 69 (summarizing a North Carolina statute allowing children as young as thirteen to be transferred to adult courts where they could be sentenced to life without parole). *But cf.* Naovarath v. State, 779 P.2d 944, 947 (Nev. 1989) (questioning the constitutionality of imposing a LWOP sentence on any thirteen-year-old, but overturning sentence on narrower grounds).

134. *See* Cepparulo, *supra* note 57, at 225 ("Because adults are still subject to the possibility of death, they are afforded this proportionality analysis. For juveniles no longer facing death, the opportunity to introduce mitigating evidence is lost."); Logan, *supra* note 74, at 708–09 ("[S]tates are free to impose . . . LWOP on those under sixteen . . . . As a result youths . . . can be required to spend the rest of their lives in an adult prison without a chance of meaningful appellate review of their sentences. And from the perspective of a majority of American appellate courts, this mandatory decision is immune from review because, by definition, the sentence cannot . . . qualify as 'grossly disproportionate.'").

135. Stinneford, *supra* note 131, at 916 (2011) ("From a retributive point of view, a punishment is proportionate to the offense if it matches the offender's moral culpability or desert."); *see also* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 73 (2005) (contending retribution is the theory that "offenders should be punished in proportion to their blameworthiness (or desert) in committing the crime being sentenced").

136. *See, e.g.*, State v. Massey, 803 P.2d 340 (Wash. Ct. App. 1991). The court upheld a mandatory sentence of life without parole imposed on a thirteen-year-old convicted of aggravated murder, stating:

> The test is whether in view of contemporary standards of elemental decency, the punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness. That test does not embody an element or consideration of the defendant's age, only a balance between the crime and the sentence imposed. Therefore, there is no cause to create a distinction between a juvenile and an adult who are sentenced to life without parole for first degree aggravated murder.

Id. at 348 (citations omitted); *see also* State v. Stinnett, 497 S.E.2d 696, 701–02 (N.C. Ct. App. 1998) (upholding mandatory LWOP sentence imposed on fifteen-year-old convicted of murder and noting that "when a punishment does not exceed the limits fixed by statute, the punishment cannot be classified as cruel and unusual in a constitutional sense").

137. *Graham*, 130 S. Ct. at 2018.

138. *Id.* at 2018–19.

for a thirty-year term, and sentenced him to life without possibility of parole.[139] Graham claimed that life without parole for a non-homicide offense violated the Eight Amendment and *Roper*'s recognition of youths' reduced responsibility.[140]

In *Graham*, Justice Kennedy identified two lines of Eighth Amendment proportionality cases. One line of cases involved challenges to length-of-year sentences that greatly exceeded the gravity of the offense—"gross disproportionality."[141] The other line of cases barred the death penalty for classes of offenders or offenses—"categorical disproportionality"—e.g., juveniles in *Roper*, defendants with mental retardation in *Atkins*, and non-homicide offenses.[142] Although the language and history of the Eighth Amendment do not dictate different tests for capital and non-capital sentences, the Court employed dual tracks of proportionality analyses based on its view that "death is different."[143]

When defendants challenged length-of-years sentences, the Court considered whether the Eighth Amendment contains a "narrow proportionality principle" that "applies to non-capital sentences."[144] *Rummel v. Estelle* held that a state did not violate the Eighth Amendment when it sentenced a three-time, minor property offender to life in prison *with* the possibility of parole.[145] Three years later, *Solem v. Helm* held that a sentence of life *without* possibility of parole for a recidivist convicted of a property

139. *Id.* at 2019–20.

140. *Id.* at 2020–22.

141. *Id.* at 2021–22.

142. *Id.* at 2021, 2022. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (prohibiting execution for raping a child); Enmund v. Florida, 458 U.S. 782 (1982) (barring execution for felony murderer who did not kill or intend to kill victim); Coker v. Georgia, 433 U.S. 584 (1977) (stopping execution for rape of an adult woman); Lockett v. Ohio, 438 U.S. 586 (1978) (banning execution for felony murderer who did not kill or intend to kill).

143. Rachel E. Barkow, *Categorizing Graham*, 23 FED. SENT'G REP. 49, 49 (2010); Richard S. Frase, *Graham's Good News - and Not*, 23 FED. SENT'G REP. 54, 54 (2010) (noting the "Court's previous two-track distinction between death and prison sentences"); Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT'G REP. 58, 58 (2010) (noting that the Court's Eighth Amendment jurisprudence "proceeded along two tracks—capital and noncapital, with the two tracks applying different tests and leading to different outcomes").

144. *See* Harmelin v. Michigan, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in judgment) (elaborating upon principles of "narrow proportionality" review in non-capital cases); Frase, *supra* note 73, at 576–88 (reviewing Supreme Court's criminal sentencing proportionality decisions).

145. 445 U.S. 263, 284–85 (1980) (approving Rummel's sentence, under a recidivism statute, for his third conviction for relatively minor property crimes).

crime violated the Constitution.[146] *Solem*'s proportionality analysis focused on three factors: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[147] *Harmelin v. Michigan* upheld a life *without* parole sentence imposed on a first-time drug dealer, although the fractured Court could not agree on a constitutional rationale.[148] Justice Kennedy's *Harmelin* concurrence provided the operative rule to assess disproportionate sentences.[149] After *Harmelin*, courts conduct *Solem*'s comparative review only if a length-of-years sentence crosses a "grossly disproportionate" threshold.[150] The Court applied those factors in *Ewing v. California* and upheld a sentence of twenty-five years to life for theft of three golf clubs.[151]

The Court's death penalty proportionality cases examined the constitutionality of capital punishment for certain categories of

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146. 463 U.S. 277, 281–82, 303 (1983). The Court noted that the Eighth Amendment's ban on cruel and unusual punishment "prohibits . . . sentences that are disproportionate to the crime committed" and that "the constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." *Id.* at 284, 286.

147. *Id.* at 292. Despite the elements of recidivism, the distinguishing factor in *Solem* was the imposition of a LWOP sentence for a minor property crime. *See id.* at 297.

148. *Compare Harmelin*, 501 U.S. at 994 (Scalia, J.) (announcing the opinion of the Court and arguing that proportionality principle only limited application of the death penalty but did not constitute a general feature of Eighth Amendment analysis), *with id.* at 997, 1009 (Kennedy, J., concurring) (upholding sentence by finding it proportional under an Eighth Amendment analysis).

149. *Id.* at 1001 (arguing that the Eighth Amendment prohibits "only extreme sentences that are 'grossly disproportionate' to the crime"); Frase, *supra* note 73, at 581–83 (analyzing *Harmelin* and the factors Justice Kennedy proposed).

150. *See Harmelin*, 501 U.S. at 998–1001 (Kennedy J., concurring). According to Justice Kennedy:

> All of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: 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.

Id. at 1001. *See* Barkow, *supra* note 143, at 49 (noting that "the Court applied an exceedingly deferential proportionality test" based on Kennedy's *Harmelin* concurrence); Frase, *supra* note 73, at 581–83 (analyzing the factors Kennedy proposed in *Harmelin* and the limited utility they provide defendants challenging a disproportionate sentence).

151. *See* Ewing v. California, 538 U.S. 11, 19–20, 30–31 (2003) ("We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments.").

offenses or offenders.[152] Some decisions barred capital punishment for non-homicide crimes and less culpable felony-murderers.[153] Others, such as *Roper* and *Atkins*, prohibited states from executing less culpable offenders—juveniles and defendants with mental retardation.[154]

Graham arose at the intersection of these two lines of cases—"a categorical challenge to a term-of-years sentence."[155] Rather than review whether an individual's sentence was grossly disproportionate, the Court considered the validity of a sentencing practice—life without parole—as applied "to an entire class of offenders who have committed a range of crimes."[156] *Graham* repudiated the Court's historical "death is different" distinction, extended *Roper*'s categorical reduced culpability rationale, and "declare[d] an entire class of offenders immune from a noncapital sentence . . . ."[157] The Court distinguished *Harmelin* because *Graham* raised a categorical rather than individual sentence proportionality challenge.[158]

Once the Court framed *Graham*'s challenge in categorical terms, it replicated its *Roper* proportionality analyses and found a national consensus against sentencing non-homicide juvenile offenders to LWOP.[159] Although thirty-seven states authorized LWOP sentences for juvenile non-homicide offenders, few states,

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152. Frase, *supra* note 143, at 54 (noting that "death is different" for categories of offenders—e.g., juveniles—and categories of offenses—e.g., non-homicide crimes).

153. *See supra* note 142 and accompanying text.

154. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (barring execution of youths who committed their crimes while younger than eighteen); Atkins v. Virginia, 536 U.S. 301 (2002) (denying execution of defendants with mental retardation).

155. Graham v. Florida, 130 S. Ct. 2011, 2023 (2010); Leslie Patrice Wallace, *"And I Don't Know Why It Is That You Threw Your Life Away": Abolishing Life Without Parole, the Supreme Court in* Graham v. Florida *Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 53–57 (2010) (analyzing the two lines of cases).

156. *Graham*, 130 S. Ct. at 2022–23.

157. *See id.* at 2046 (Thomas, J., dissenting) (complaining that "[t]oday's decision eviscerates that distinction. 'Death is different' no longer.").

158. *Id.* at 2022; Barkow, *supra* note 143, at 49 (reporting that "the Court concluded that *Harmelin*'s threshold test that required a finding of gross disproportionality between the gravity of the offense and the severity of the penalty 'does not advance the analysis'"). Instead, the Court summarily asserted that "'the appropriate analysis is the one used in cases that involved the categorical approach.'" *Id.*; Tamar R. Birckhead, Graham v. Florida*: Justice Kennedy's Vision of Childhood and the Role of Judges*, 6 DUKE J. CONST. L. & PUB. POL'Y 66, 67 (2010) (noting the Court's application of capital punishment analysis to a term-of-years sentencing practice to exempt an entire class of offenders).

159. *Graham*, 130 S. Ct. at 2023.

other than Florida, actually imposed it.[160] *Graham* reiterated a concern earlier expressed in *Thompson v. Oklahoma*, that the interaction of laws that allowed transfer of juveniles to criminal court and generic sentencing provisions that exposed juvenile non-homicide offenders to life without parole "does not justify a judgment that many States intended to subject such offenders to life without parole sentences."[161]

Graham rested on three features—the offender, the offense, and the length of sentence. *Graham*'s proportionality analysis considered "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question."[162] It reiterated the three reasons why juveniles' reduced culpability warrants less severe punishment than adults convicted of the same crime.[163] Although *Roper* cited scant social science evidence, *Graham* explicitly endorsed developmental psychological and neuroscience research to bolster its conclusions about youths' diminished responsibility: "[D]evelopments 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."[164]

Drawing on its felony-murder death-penalty decisions, *Graham* concluded that even the most serious non-homicide crimes "cannot be compared to murder in their severity and

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160. *Id.* at 2024. The Court notes:

> [T]here are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just 10 States. . . . 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 . . . do not impose them despite apparent statutory authorization.

Id. (citations omitted).

161. *Id.* at 2025; Thompson v. Oklahoma, 487 U.S. 815, 826 n.24 (1988) (noting transfer laws demonstrate "that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes, . . . but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders").

162. *Graham*, 130 S. Ct. at 2026.

163. The Court states:

> [J]uveniles 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.' . . . A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult.

Id. (citations omitted).

164. *Id.*

irrevocability."[165] The criminal responsibility of juveniles who did not murder was "doubly-diminished" and could not support a LWOP sentence.[166]

Graham reviewed the penal justifications for LWOP sentences for non-homicide juvenile offenders—retribution, deterrence, incapacitation, and rehabilitation—and concluded that none justified the penultimate sanction.[167] Although execution differs from imprisonment, death sentences and LWOP for juveniles were similarly ultimate sanctions—"the sentence alters the offender's life by a forfeiture that is irrevocable."[168] It denies the offender hope or the prospect of redemption.[169] Moreover, a juvenile who receives a LWOP sentence will serve more years and a larger percentage of his or her life in prison than would an older offender.[170] *Graham* concluded that the marginal deterrent effect of a LWOP sentence on a juvenile cannot justify the sentence.[171] While incapacitation might reduce risk of future offending, a judge cannot predict at the time of sentencing that a "juvenile offender forever will be a danger to society" or will remain irredeemably incorrigible.[172] Finally, a LWOP sentence deprives a young offender of incentive or opportunity to grow and change.[173] Many

165. *Id.* at 2027. *See also* Kennedy v. Louisiana, 128 S. Ct. 2641, 2646 (2008) (barring the death penalty for rape of a child); Coker v. Georgia, 433 U.S. 584, 592 (1977) (banning the death penalty for rape of an adult woman).

166. *Graham*, 130 S. Ct. at 2027 (noting 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.").

167. *Id.* at 2028.

168. *Id.* at 2027.

169. *Id.* (reporting that a LWOP sentence "deprives the convict of the most basic liberties without giving hope of restoration, . . . [T]his 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'"); *see also* Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT'G REP. 75, 76 (2010) (arguing that "[h]ope, or its denial, distinguishes LWOP from other prison sentences – not irrevocability, and not any necessary difference in the actual length of incarceration").

170. *Graham*, 130 S. Ct. at 2028 (arguing that "[u]nder 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.").

171. *Id.* at 2029.

172. *Id.*

173. *Id.* The Court noted that "[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. . . . 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." *Id.* at

states deny offenders sentenced to LWOP access to vocational training programs or rehabilitative services afforded to those who may return to the community.[174] Largely as a result of "the limited culpability of juvenile nonhomicide offenders . . . and the severity of life without parole sentences," *Graham* held that states may not impose a life without parole sentence on a juvenile offender who did not commit homicide.[175]

The Court applied its rule categorically to all juveniles and denied judges and juries the opportunity to impose LWOP sentences on a case-by-case basis.[176] *Graham* re-emphasized the inability of clinicians or jurists to distinguish between the incorrigible few and the vast majority of juveniles who have the capacity to change.[177] Moreover, youths' immaturity and compromised competence increase the risk of error in fact-finding and assessments of culpability.[178]

> [T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understanding 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. 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 . . . . [and] impair the quality of a juvenile defendant's representation.[179]

Trial competence requires a person to be able to understand proceedings, make rational decisions, and assist counsel.[180]

2032–33.

174. *Id.* at 2033 ("It is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration."); *see also* ASHLEY NELLIS, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 4 (2012) (describing how most juvenile lifers do not participate in vocational training or rehabilitative programs because of state or prison policies).

175. *Graham*, 130 S. Ct. at 2030.

176. *Id.* at 2030–33.

177. *Id.* at 2029, 2032.

178. Birckhead, *supra* note 158, at 69 (arguing that juveniles' mistrust of authority figures and limited understanding of the justice system impair their ability to work effectively with counsel, putting them at a distinct disadvantage in criminal proceedings); HUM. RTS. WATCH, "WHEN I DIE . . . THEY'LL SEND ME HOME": YOUTH SENTENCED TO LIFE IN PRISON WITHOUT PAROLE IN CALIFORNIA, AN UPDATE 5 (2012) [hereinafter WHEN I DIE . . . THEY'LL SEND ME HOME] (reporting that "[y]outh are often poorly represented and do not always adequately understand legal proceedings").

179. *Graham*, 130 S. Ct. at 2032.

180. *See* Drope v. Missouri, 420 U.S. 162, 171 (1975) (holding that "a person whose mental condition is such that he lacks the capacity to understand the nature

Developmental limitations impair youths' competence similarly to how mental illness or retardation renders adults incompetent.[181] Psychologists report significant age-related differences between adolescents' and adults' competence, quality of judgment, and legal decisions.[182] Developmental differences impair youths' ability to communicate with counsel, to concentrate, to provide information about the crime, to recognize exculpatory facts, and to make legal decisions.[183] Age and intelligence interact and produce higher levels of incompetence to stand trial among adolescents with low IQs than adults with low IQs.[184] Even nominally competent

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and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial"); Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (holding that a defendant must possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and have] a rational as well as factual understanding of the proceedings against him"); Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 73, 76 (Thomas Grisso & Robert G. Schwartz eds., 2000); *see also* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 335 (2003) [hereinafter Grisso et al., *Juvenile's Competence to Stand Trial*] (contending that adjudicative competence requires "a basic comprehension of the purpose and nature of the trial process (Understanding), the capacity to provide relevant information to counsel and to process information (Reasoning), and the ability to apply information to one's own situation in a manner that is neither distorted nor irrational (Appreciation)").

181. Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 374–78 (2001); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 76 N.C. L. REV. 793, 796 (2005); *see* Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 6 (1997) [hereinafter Grisso, *The Competence of Adolescents*].

182. Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 180, at 344. Thirty percent of eleven to thirteen year olds and nineteen percent of fourteen to fifteen year olds exhibited deficits of reasoning and understanding comparable to that of adults found incompetent. *Id.* A significant proportion of those younger than sixteen were incompetent, and many older youths exhibited substantial impairments. *Id.*; *see also* Bonnie & Grisso, *supra* note 180, at 87–88; Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 652 (1995); Redding & Frost, *supra* note 181, at 374–78.

183. *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 47, 63 (2009); Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 180, at 343; Frase, *supra* note 143, at 56 (noting that juvenile defendants pose greater risks of unwise litigation choices, poorer communication with counsel, and an increased risk of ineffective defense representation and likelihood that they will receive an unconstitutionally harsher sentence).

184. *See* Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 180, at 356:

> [A]pproximately one fifth of 14- to 15-year-olds are as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial by

adolescents often made poorer decisions than did young adults.[185] Youths' compromised competence bears on their ability to exercise *Miranda* rights.[186] Juveniles' propensity to confess falsely buttresses the Court's concern that their vulnerability may undermine the reliability of criminal proceedings.[187]

Graham opted for a categorical rule to give juveniles an opportunity to change and demonstrate maturity. Like the death penalty, a LWOP sentence effectively extinguishes the offender's life.[188] However, *Graham* gave the 123 non-homicide youths serving LWOP sentences very limited relief. It required states to provide them with "some meaningful opportunity to obtain release

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> clinicians who perform evaluations for courts.... Not surprisingly, juveniles of below-average intelligence are more likely than juveniles of average intelligence to be impaired in abilities relevant for competence to stand trial. Because a greater proportion of youths in the juvenile justice system than in the community are of below-average intelligence, the risk for incompetence to stand trial is therefore even greater among adolescents who are in the justice system than it is among adolescents in the community.

Id.

185. *See* Scott & Grisso, *The Evolution of Adolescence*, *supra* note 78, at 159–60; Steinberg & Cauffman, *The Elephant in the Courtroom*, *supra* note 78, at 409.

186. *See, e.g.*, BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM (2013) (pointing out problems for juveniles fifteen and under in understanding Miranda rights, especially because many delinquents already suffer from educational deficits, learning disabilities and other limitations); THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS 124 (1981) (observing how juveniles' understanding of the right to remain silent was qualified by their perceptions of court hearings as disallowing or taking away that right); Grisso, *supra* note 181, at 12 (discussing a study where forty-five percent of adolescents, compared with seventy-four percent of adults, demonstrated partial understanding of Miranda warnings); Jodi Viljoen et al., *Adjudicative Competence and Comprehension of Miranda Rights in Adolescent Defendants*, 25 BEHAV. SCI. & L. 1, 9 (2007) (showing significantly higher impairment for defendants fifteen and under in basic understanding of Miranda rights).

187. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 945 (2004) (detailing that police elicited one-third of all false confessions from offenders under eighteen); Samuel L. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544–45 (2006) (noting that among 340 exonerees, juveniles were three times more likely to have confessed falsely than adults); Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 904 (2010) (reporting that youths are almost twice as likely as wrongfully convicted adults to have confessed falsely).

188. Graham v. Florida, 130 S. Ct. 2011, 2032 (2010) (noting that "[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope"); Eva S. Nilsen, *From* Harmelin *to* Graham *– Justice Kennedy Stakes out a Path to Proportional Punishment*, 23 FED. SENT'G REP. 67, 69 (2010) (acknowledging the inconsistency between rehabilitation and LWOP sentences that "forswear[] altogether the idea that the defendant can change"); Wallace, *supra* note 155, at 58 (explaining that the rationale of *Graham* should also preclude lengthy term of year sentences that deny juveniles hope of release as well as LWOP).

based on demonstrated maturity and rehabilitation."[189] However, the Court did not define states' responsibilities to provide youths with the means to change or identify when they would become eligible for parole.[190] Must a state provide youths with rehabilitative programs to give them a "meaningful opportunity" to mature and change?[191] Would a parole review hearing after forty years satisfy the Court's expectation of "some meaningful opportunity to obtain release?"[192] *Graham* emphasized that parole consideration would not guarantee an offender's eventual release,[193] and remitted to the states responsibility to develop "the means and mechanisms for compliance."[194]

Chief Justice Roberts concurred that Graham's LWOP sentence was disproportionate to his crime and culpability, but insisted that sentences should be individualized, rather than applied to the entire category of young offenders.[195] The Court's

189. *Graham,* 130 S. Ct. at 2030; *see also* Nilsen, *supra* note 188, at 69 (discussing that "[t]he state is required to give juveniles a chance to reform themselves and must revisit the life sentencing in something akin to a parole hearing").

190. *See Graham*, 130 S. Ct. at 2057 (Thomas, J., dissenting) ("[W]hat, exactly, does . . . a 'meaningful' opportunity [to obtain release] 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 . . . ."); *see also* Ristroph, *supra* note 169, at 76 (noting that *Graham* "requires only the opportunity to obtain release, not a guarantee of eventual release. Much will depend on the nature of parole review as established by the states, and on the decision makers in individual cases . . . ."); Wallace, *supra* note 155, at 66 (summarizing questioning during oral argument in which Graham's counsel conceded that parole eligibility after forty years or grant of parole to one out of twenty applicants would be constitutional).

191. *See, e.g.*, Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation? How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 12 (2011) (arguing that states "must employ a rehabilitative model for incarceration of juveniles" in separate youth prisons to realistically comply with Graham's requirement of "meaningful opportunity" for reform).

192. Wallace, *supra* note 155, at 66.

193. *Graham*, 130 S. Ct. at 2034. The Court asserted that:

> It bears emphasis, however, that while the Eighth Amendment forbids 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 forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

Id. at 2030.

194. *Id.*

195. *Id.* at 2036–37.

previous non-capital proportionality decisions defined the seriousness of the crime on the basis of the harm caused[196] and did not include individualized assessment of an offender's culpability.[197] To find Graham's penalty disproportionate, Chief Justice Roberts had to modify the Court's proportionality analyses to include "culpability of the offender."[198] His case-specific proportionality inquiry incorporated "*Roper*'s conclusion that juveniles are typically less blameworthy than adults . . . ."[199] Because Graham's youthfulness supported an inference of gross disproportionality, Roberts compared his LWOP sentence with those imposed on others convicted of similar crimes in Florida, sentences imposed on those convicted of more serious crimes, and sentences imposed on similar offenders in other jurisdictions.[200] Although he viewed Graham's sentence as "exceptional,"[201] Roberts rejected a categorical bar of LWOPs for all non-homicide juvenile offenders.[202] However, he did not explain how Graham's sentence differed from those imposed on other youths who might constitutionally receive LWOP sentences for non-homicide crimes.[203]

Justice Thomas' dissent strongly criticized the *Graham* majority for repudiating prior Eighth Amendment jurisprudence that "death is different."[204] He castigated the majority's categorical

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196. *See supra* note 135 and accompanying text.

197. Harris v. Wright, 93 F.2d 581, 585 (9th Cir. 1996). The court rejected a fifteen-year-old juvenile's proportionality challenge to a mandatory LWOP sentence and held that the Eighth Amendment bars only "grossly disproportionate" sentences. *Id.* at 584–85. Judge Alex Kozinski asserted:

> Youth has no obvious bearing on this problem: If we can discern no clear line for adults, neither can we for youths. Accordingly, while capital punishment is unique and must be treated specially, mandatory life without parole is, for young and old alike, only an outlying point on the continuum of prison sentences.

Id. at 585.

198. *Graham*, 130 S. Ct. at 2039. Justice Roberts asserted that the Court's prior proportionality analyses included only consideration of the "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 2037.

199. *Id.* at 2039.

200. *Id.* at 2040–41.

201. *Id.* at 2041–42 (noting that "Florida is an outlier in its willingness to impose sentences of life without parole on juveniles convicted of nonhomicide crimes").

202. *Id.* at 2042 (arguing that "[s]ome 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").

203. *See, e.g.*, Frase, *supra* note 143, at 54 (noting that "Justice Roberts' concurrence continued to apply a standard of 'gross disproportionality' without saying what that means—disproportionate relative to what?").

204. *Graham*, 130 S. Ct. at 2046. Justice Thomas objected that:

ban of a non-capital sentence.[205] He condemned its disregard of the laws of thirty-seven states that authorized LWOPs for non-homicide offenders, emphasized the increased use of LWOP sentences, and noted its imposition on 123 juveniles in eleven states.[206] While adolescents as a class may be less culpable than adults, Justice Thomas rejected the conclusion that every youth always lacks the culpability to warrant a LWOP sentence.[207] He argued that judges or juries could individualize sentences and balance the heinousness of a crime and a youth's diminished responsibility.[208] Finally, he pointed to the anomaly of finding youths' culpability diminished for non-homicide crimes, but leaving "intact state and federal laws that permit life-without-parole sentences for juveniles who commit homicide."[209] This amounted to disproportionality based on categories of crimes rather than characteristics of offenders.[210] Although *Graham* involved a less culpable offender, a less culpable offense, and a LWOP sentence,[211] the Court quickly addressed this inconsistency.

> 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." . . . 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,'" *but also* to declare that "less culpable" persons are categorically exempt from the "*second* most severe penalty."

Id. (Thomas, J., dissenting).

205. *Id.* at 2047. Justice Thomas complained that the majority's reinvigorated non-capital proportionality analysis "impose[s] 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." *Id.*

206. *Id.* at 2050.

207. *Id.* at 2055.

208. *Id.* (arguing that "[t]he 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 presented").

209. *Id.*

210. *Id.* at 2056. Justice Thomas objected that:

> [T]he Court's 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.

Id.

211. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, Graham *Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT'G REP. 79 (2010) (noting that the combination of three factors led to the result in *Graham*—juvenile offenders, conviction for a non-homicide crime, and a LWOP

III. *Miller v. Alabama* and *Jackson v. Hobbs*: No Mandatory LWOP Sentences Because "Children Are Different"

Forty-two states permit judges to impose LWOP sentences on all offenders—adults or juveniles—convicted of murder.[212] Twenty-seven states make a LWOP sentence for any offender—juvenile or adult—convicted of murder mandatory.[213] Mandatory LWOP sentences preclude individualized consideration of culpability or the circumstances of the crime, and create a non-rebuttable presumption that the criminal responsibility of juveniles and adults are equal.[214] Some states abrogated the common-law infancy defense and removed the only substantive criminal law protection for youth prior to conviction.[215] Courts rarely found juvenile LWOP sentences disproportional,[216] and the vast majority

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sentence); Wallace, *supra* note 155, at 59 (2010) ("The very essence of *Graham's* reasoning should also preclude life without parole even for juvenile murderers. . . . [B]y stating that juveniles are less culpable than adults . . . [t]he Court's reasoning does not distinguish between the *non-homicide* and *homicide* juvenile offender.").

212. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 25 n.44 (listing states' LWOP sentencing provisions).

213. *Id.*

214. *See, e.g.*, Harris v. Wright, 93 F.3d 581, 583–85 (9th Cir. 1996) (rejecting a fifteen-year-old juvenile's constitutional challenge to a mandatory LWOP sentence imposed for murder); Rice v. Cooper, 148 F.3d 747, 752 (7th Cir. 1998) (affirming a mandatory LWOP sentence imposed on an illiterate, mildly retarded sixteen-year-old murderer, even though the statute excluded consideration of any mitigating factors, including youthfulness, and holding that "we cannot find any basis in decisions interpreting the Eighth Amendment, or in any other source of guidance to the meaning of 'cruel and unusual punishments,' [sic] for concluding that the sentence in this case was unconstitutionally severe").

Defining the seriousness of an offense solely by the harm caused excludes from a proportionality review any individualized consideration of diminished responsibility. *See* Brink, *supra* note 77, at 1576 ("[E]ven if juveniles cause the same harm as their adult counterparts, they are less culpable, because less responsible, because less normatively competent."); Logan, *supra* note 74, at 703 ("By divorcing 'crime' from offender culpability in proportionality analysis, these courts subscribe to an essentially circular inquiry: because murder, for instance, is a very 'serious' crime in the eyes of the legislature, it can be met with a very 'serious' statutory punishment."); *In re* Stanford, 537 U.S. 968, 969 (2002) (Stevens, J., dissenting) (advocating proportionality analyses that include an evaluation of the offender's culpability).

215. Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 KAN. L. REV. 687, 689–92 (reporting that several states—Washington, Florida, North Carolina, Illinois, and Colorado—expressly bar consideration of infancy defense and deem twelve and thirteen-year-old defendants the moral equals of adults). Carter reports that in four of these states, sentencing statutes require judges to impose mandatory sentences without regard to the age of the defendant even if the child was less than fourteen years of age at the time of the crime. *Id.* at 740–41.

216. *See, e.g.*, Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) (prohibiting life sentence for fourteen-year-old convicted of rape because "[t]he

upheld them against juveniles' pleas to consider youthfulness as a mitigating factor.[217] States that do not formally impose LWOP sentences on juveniles allow judges to create virtual life sentences with stacked consecutive terms.[218]

Courts regularly uphold mandatory LWOP sentences and extremely long terms of imprisonment imposed on twelve- through

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intent of the legislature in providing a penalty of life imprisonment without benefit of parole . . . was to deal with dangerous and incorrigible individuals who would be a constant threat to society. We believe that incorrigibility is inconsistent with youth."); Naovarath v. State, 779 P.2d 944, 947 (Nev. 1989) (finding that LWOP sentence imposed on thirteen-year-old convicted of murder violated state constitution provisions against cruel and unusual punishment but granting only limited right to be considered for parole eligibility in the distant future).

A few courts have reduced youths' lengthy sentences because of their age or immaturity. *See, e.g.*, People v. Dillon, 668 P.2d 697, 726–27 (Cal. 1983) (reducing life sentence imposed on seventeen-year-old convicted of felony murder because he "was an unusually immature youth"); People v. Miller, 781 N.E.2d 300, 308 (Ill. 2002) (rejecting as disproportional a LWOP sentencing imposed on a fifteen-year-old, passive accessory to a felony-murder and holding that "a mandatory sentence of natural life in prison with no possibility of parole grossly distorts the factual realities of the case and does not accurately represent defendant's personal culpability such that it shocks the moral sense of the community").

217. *See, e.g.*, Tate v. State, 864 So. 2d 44, 54 (Fla. Ct. App. 2003) (opposing the argument that "a life sentence without the possibility of parole is cruel or unusual punishment on a twelve-year-old child"); Edmonds v. State, 955 So. 2d 864, 895–97 (Miss. Ct. App. 2006) (approving a LWOP sentence imposed on a youth convicted of murder committed at thirteen years of age); State v. Foley, 456 So. 2d 979, 984 (La. 1984) (affirming LWOP sentence imposed on fifteen-year-old juvenile convicted of rape); State v. Pilcher, 655 So. 2d 636, 644 (La. Ct. App. 1995) (upholding LWOP sentence imposed on fifteen-year-old); Swinford v. State, 653 So. 2d 912, 918 (Miss. 1995) (endorsing LWOP sentence imposed on fourteen-year-old convicted of aiding and abetting murder); State v. Green, 502 S.E.2d 819, 832 (N.C. 1998) (upholding life imprisonment sentence for thirteen-year-old convicted of rape, recognizing that "the chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime," but emphasizing that Green was morally responsible for the crime because he possessed sufficient mental capacity to form criminal intent); State v. Standard, 569 S.E.2d 325, 329 (S.C. 2002) (confirming a "two-strike" LWOP sentence imposed on a fifteen-year-old convicted of burglary based on his prior juvenile conviction for a serious felony, a sentence presumably invalid after *Graham*); Paul G. Morrissey, *Do the Adult Crime, Do the Adult Time: Due Process and Cruel and Unusual Implications for a 13-Year-Old Sex Offender Sentenced to Life Imprisonment in* State v. Green, 44 VILL. L. REV. 707, 738 (1999); AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 1 (noting that when courts sentence children as adults, "the punishment is all too often no different from that given to adults").

218. After the court of appeals overturned an invalid LWOP sentence imposed on a fifteen-year-old juvenile, the trial judge in *People v. Demirdjian* simply resentenced him to two consecutive life sentences. People v. Demirdjian, 50 Cal. Rptr. 3d 184, 188–89 (Ct. App. 2006) (explaining that while California law prohibits sentencing juveniles under sixteen years of age to life without parole, the court dismissed the juvenile's reliance on *Roper v. Simmons* and emphasized the clear difference between death and lesser sentences); Hawkins v. Hargett, 200 F.3d 1279, 1284 (10th Cir. 1999) (upholding a 100-year sentence imposed on a thirteen-year-old juvenile for burglary, rape, and robbery).

sixteen-year-old youths.[219] One of every six juveniles who received a LWOP sentence was fifteen years of age or younger when they committed the crime for which they were sentenced.[220] More than half (fifty-nine percent) of juveniles received a LWOP sentence for the first crime for which they were convicted.[221] One-quarter (twenty-six percent) received a LWOP sentence for a felony murder in which they were an accessory, rather than the principal, as the defendant in *Jackson*.[222] Although the Court's death penalty decisions—*Eddings*, *Thompson*, and *Roper*—treated youthfulness as a mitigating factor, many trial judges treat it as an aggravating factor and sentence juvenile murderers more severely than their adult counterparts.[223] Youths convicted of

219. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 1–6. *See, e.g.*, People v. Moya, 899 P.2d 212, 219–20 (Colo. App. 1994) (affirming that sentence of life imprisonment with possibility of parole after forty years was not cruel and unusual punishment when imposed on a juvenile convicted of robbery and murder); Brennan v. State, 754 So. 2d 1, 11 (Fla. 1999) (vacating death penalty imposed on sixteen-year-old convicted of murder and reducing sentence to life imprisonment without a possibility of parole); State v. Broadhead, 814 P.2d 401, 406–07 (Idaho 1991) (overruled on other grounds) (affirming life sentence with fixed minimum of fifteen years imposed on fourteen-year-old convicted of murdering his father); State v. Shanahan, 994 P.2d 1059, 1061–63 n.1 (Idaho Ct. App. 1999) (holding that life sentence for murder imposed on fifteen-year-old did not constitute cruel and unusual punishment); State v. Pilcher, 655 So. 2d 636, 642–44 (La. App. 1955) (approving life without parole sentence of fifteen-year-old convicted of murder); State v. Mitchell, 577 N.W.2d 481, 488–90 (Minn. 1998) (confirming that mandatory life imprisonment for fifteen-year-old convicted of first-degree murder was not cruel and unusual punishment); State v. Ira, 43 P.3d 359, 365–70 (N.M. Ct. App. 2002) (affirming sentence of ninety-one years imposed on fifteen-year-old for rape); State v. Jensen, 579 N.W.2d 613, 623–25 (S.D. 1998) (deciding that life imprisonment without possibility of parole for fourteen-year-old convicted of murder is not cruel and unusual punishment); State v. Taylor, No. 02C01-9501-CR-00029, 1996 WL 580997, at 22–24 (Tenn. Crim. App. Oct. 10, 1996) (sentence of life without parole plus sixty years imposed on sixteen-year-old convicted of robbery, rape, and felony murder); State v. Massey, 803 P.2d 340, 348 (Wash. Ct. App. 1990) (endorsing mandatory LWOP sentence imposed on youth convicted of committing murder at thirteen years of age).

220. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 1.

221. *Id.*

222. *Id.* at 1–2.

223. In *Roper v. Simmons*, defense counsel urged the jury to consider the defendant's youthfulness as a mitigating factor "in deciding just what sort of punishment to make." 543 U.S. 551, 558 (2005). In rebuttal, the prosecutor responded "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." *Id.* The prosecutor's view of youthfulness as an aggravating factor is reflected in sentencing practices. Donna Bishop & Charles Fraizer, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 227, 236–37 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (comparing the sentences imposed on youths transferred to criminal courts with those of adults and noting that "transferred youths are sentenced *more* harshly, both in terms of the probability of receiving a prison sentence and the length of the sentences they receive. In other

murder are more likely to enter prison with LWOP sentences than are adults convicted of murder.[224]

Prior to the 1970s, few states imposed LWOP sentences and most had indeterminate sentencing laws that allowed for parole release.[225] Get-tough policies that gathered momentum in the 1970s included both resumption of capital punishment *and* adoption of LWOP sentences.[226] During the 1980s and 1990s, states reduced judicial discretion, enacted mandatory minimum and LWOP sentences, and reduced or eliminated parole eligibility.[227] By 2005, forty-eight states and the District of Columbia had enacted LWOP sentences.[228] Death penalty abolitionists had supported LWOP sentences as an alternative to capital punishment.[229] Despite widespread adoption of LWOP

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words, we see no evidence that criminal courts recognize a need to mitigate sentences based on considerations of age and immaturity."); *see also* David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. CRIMINOLOGY 641, 665 (citing the impact of "get tough" politics and arguing that "[b]y the mid-1990's [sic], youth had ceased to be a mitigating factor in adult court, and instead had become a liability").

224. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 33 (reporting that judges imposed LWOP sentences on juveniles convicted of murder more frequently than they did adults and concluding that "states have often been more punitive toward children who commit murder than adults," and that "age has not been much of a mitigating factor in the sentencing of youth convicted of murder"); WHEN I DIE . . . THEY'LL SEND ME HOME, *supra* note 178, at 4 (reporting that "in more than half the cases where there was an adult co-defendant, the adult received a lower sentence than the young person who was sentenced to life without parole").

225. MAUER ET AL., *supra* note 31, at 5–8 (explaining that indeterminate sentences and parole meant that many prisoners sentenced to "life" typically served terms of five, fifteen, or twenty years); MICHAEL TONRY, SENTENCING MATTERS 6–13 (1996) (describing indeterminate sentencing systems and the shift to determinate sentencing and elimination of parole).

226. *See* Gregg v. Georgia, 428 U.S. 153, 154–55 (1976) (reauthorizing the death penalty after the Court's earlier decision invalidated state death penalty statutes (citing Furman v. Georgia, 408 U.S. 238 (1972))); *see supra* note 19 and accompanying text (describing politics of "get tough" on crime); ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 5–11 (2009) (describing expanded use of life and LWOP sentences increase of people serving life sentences from 34,000 in 1984 to 140,610 in 2008), *available at* http://www.sentencingproject.org/doc/pulibcations/publications/inc_noexitseptembe r2009.pdf.

227. *See,* MAUER ET AL., *supra* note 31, at 1 (attributing increase in length of prisoners' sentences since the 1970s to police changes such as "mandatory sentencing, 'truth in sentencing,' and cutbacks in parole release"); TONRY, *supra* note 225, at 6–13 (summarizing changes in sentencing laws in the 1970s and 1980s).

228. *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1842 (2006) [hereinafter *Life and Death*].

229. *Id.* at 1938 (arguing that death penalty abolitionists promoted life without parole sentences as an alternative to executions); *see also* MAUER ET AL., *supra* note

sentences, the number of people sentenced to death remained relatively stable, and judges imposed LWOP sentences on many more defendants who were never death-eligible.[230] Thus, LWOP sentences had a net-widening effect.[231]

As of 2004, 2,225 people were serving LWOP sentences for crimes they committed as children, and *Roper* added more youths to their cumulative ranks.[232] By 2009, the number had risen to more than 2,500.[233] Before 1980, judges rarely imposed LWOP sentences on children; they now sentence youths to LWOP three times as often as they did in 1990.[234] Although juveniles averaged sixteen years of age at the time they committed the crimes for which they received LWOP sentences, judges have imposed LWOP sentences on children as young as twelve or thirteen.[235] We can safely assume that the number of juveniles serving virtual life sentences—i.e., stacked consecutive terms totaling 50–100 years or more—is much larger than those who received LWOP sentences.[236] Most juveniles who received a LWOP sentence had no prior adult or juvenile convictions.[237] States may not execute a felony-

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31, at 5 (suggesting increased imposition of LWOP sentences as an alternative to the death penalty).

230. *Life and Death*, *supra* note 228, at 1848–51 (attributing decline in capital sentences to decreased public and jury support for the death penalty because of greater sense of safety associated with a reduction in violent crime).

231. *See id.* at 1839 ("Twenty years of experience with life-without-parole statutes shows that although they have only a small effect on reducing executions, they have doubled and tripled the lengths of sentences for offenders who never would have been sentenced to death or even been eligible for the death penalty."); *Id.* at 1851–52 (reporting that from 1992 and 2003, the number of inmates on death row increased from 2,575 to 3,374, a thirty-one percent rise, while the number of prisoners serving life without parole sentences grew from 12,453 to 33,633, a 170% increase); Steiker & Steiker, supra note 211, at 79 (2010) (noting that "many inmates who would not have received death sentences now languish under LWOP sentences as a result of death penalty reform efforts").

232. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 1.

233. *See, e.g.*, HUM. RTS. WATCH, 2009 WORLD REPORT, *available at* http://www.hrw.org/en/node/79365 (estimating 2,502 youths serving LWOP sentences for crimes committed while younger than eighteen years of age); WHEN I DIE . . . THEY'LL SEND ME HOME, *supra* note 178, at 2 (reporting that "the number of youth sentenced to life without parole in the US as risen to 2570"); ASHLEY NELLIS & RYAN S. KING, *supra* note 226 at 17–25 (summarizing number, location, and ethnic composition of offenders serving life sentences for crimes committed as juveniles).

234. *Id.* at 2.

235. *Id.* at 25 (extrapolating and estimating that about 354 youths are serving LWOP sentences for crimes committed at age fifteen or younger).

236. *See, e.g.*, ASHLEY NELLIS & RYAN S. KING, *supra* note 226 at 3, 17 (reporting that 6,807 juveniles serving life sentences are serving life with the possibility of parole).

237. *Id.* at 28.

murderer who did not kill or intend to kill,[238] but more than one-quarter of juveniles who received LWOP sentences were convicted for felony-murders.[239] In Michigan, courts convicted nearly half the juveniles serving LWOP sentences as accessories rather than as principals.[240] Judges impose LWOP sentences on Black juveniles at rates ten times greater than they do White youths, and Blacks comprise the majority of all youths serving LWOP sentences.[241] The LWOP disparity reflects every prior discretionary decision that juvenile and criminal justice personnel make that treat Black youths more harshly than White offenders.[242] Despite comprising fifteen percent of the youth population, Black juveniles make up more than two-thirds (sixty-nine percent) of all juveniles serving LWOP sentences.[243]

A. Miller v. Alabama *and* Jackson v. Hobbs*: "Children are constitutionally different from adults"*[244]

Evan Miller was fourteen years old at the time of his crime and had lived a chaotic childhood.[245] After a neighbor came to make a drug deal with Miller's mother, Miller and a companion returned to the neighbor's trailer, smoked marijuana, and consumed alcohol.[246] The neighbor subsequently passed out, and

238. Enmund v. Florida, 458 U.S. 782, 788 (1982) (holding the death penalty unconstitutional when imposed on felony murder defendant who did not kill, attempt to kill, or intend to kill).

239. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 27–28; WHEN I DIE . . . THEY'LL SEND ME HOME, *supra* note 178, at 4 (reporting that nearly half of youths sentenced to LWOP did not actually commit the murder).

240. DEBORAH LABELLE, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 4 (2004), *available at* www.aclumich.org/pubs/juvenilelifers.pdf; WHEN I DIE . . . THEY'LL SEND ME HOME, *supra* note 178, at 4 (depicting substantial racial disparities in California: "African American youth are sentenced to life without parole at a rate that is 18.3 times the rate for [W]hite youth").

241. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 39.

242. *See* MALES & MACALLAIR, *supra* note 35, at 8 (explaining that judges are eight times more likely to sentence Black youths than White youths to imprisonment); JOAN MCCORD ET AL., JUVENILE CRIME, JUVENILE JUSTICE 229–60 (2001) (documenting cumulative effect of racially disparate decisions at each stage of the juvenile justice system); POE-YAMAGATA & JONES, *supra* note 35 (finding disproportionate minority overrepresentation at each stage of the juvenile justice system).

243. LABELLE, *supra* note 240, at 6.

244. Miller v. Alabama, 132 S. Ct. 2455, 2459 (2012).

245. *Id.* Miller had been in and out of foster care, suffered abuse by his step-father, regularly used drugs and alcohol, and had attempted suicide four times beginning when he was six years old. *Id.* at 2462.

246. *Id.*

Miller stole his wallet and split $300 with his companion.[247] When he tried to return the wallet, the neighbor awoke and grabbed him. Miller's confederate hit the victim with a baseball bat and once freed, Miller grabbed the bat and struck him repeatedly. Miller covered his victim's head with a sheet, told him "'I am God, I've come to take your life,'" and struck a final blow.[248] The boys left the trailer, but soon returned to cover up their crime by setting it on fire. Their victim died from his injuries and smoke inhalation.[249] The prosecutor charged Miller as an adult with murder in the course of arson which carried a mandatory LWOP sentence.[250]

Kuntrell Jackson, then fourteen years old, accompanied two other boys who decided to rob a store.[251] While en route, Jackson discovered that one of the boys had a sawed-off shotgun.[252] While Jackson remained outside the store, the other boys went in, pointed the gun at the clerk, and demanded money. After Jackson entered and found his companion demanding money, the clerk threatened to call the police and the other boy shot and killed her.[253] The prosecutor charged Jackson with capital felony murder and aggravated robbery, and following his conviction, the court imposed a mandatory LWOP sentence.[254] Jackson subsequently filed a state habeas corpus petition based on *Roper* and *Graham*, and argued that a mandatory LWOP sentence for a fourteen-year-old violates the Eighth Amendment.[255] The Arkansas Supreme Court dismissed his petition.[256] Two dissenting justices argued that a mandatory LWOP sentence violated *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.'"[257]

The Court in *Miller v. Alabama* and *Jackson v. Hobbs* followed the rationale of *Roper* and *Graham* to their logical conclusion and banned mandatory LWOP sentences for youths

247. *Id.*
248. *Id.*
249. Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012).
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012).
256. *Id.* at 2461 (reasoning that "*Roper* and *Graham* were 'narrowly tailored' to their contexts: 'death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for non-homicide offenses involving a juvenile'").
257. *Id* at 2462.

convicted of murder.[258] Responding to Justice Thomas' *Graham* dissent, Justice Kagan emphasized that "none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific."[259] She postulated that "[t]he concept of proportionality is central to the Eighth Amendment," and precludes "sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty."[260] *Roper* barred the death penalty for all children and *Graham* equated a non-homicide juvenile's LWOP sentence with the death penalty.[261] *Miller/Jackson* invoked the Court's death penalty precedents and required an individualized culpability assessment to impose a LWOP sentence on a youth convicted of murder.[262] For more than three decades, the Court barred mandatory imposition of the death penalty and required individualized assessments.[263] Mandatory capital sentences precluded consideration of the crime, the offender, and relevant mitigating circumstances.[264]

Miller/Jackson reaffirmed the constitutional premise that

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258. *Id.* at 2458 (noting that "[Graham's] reasoning implicates any life without parole sentence for a juvenile, even as its categorical bar relates only to nonhomicide offenses").

259. Miller v. Alabama, 132 S. Ct. 2455, 2462 (2012).

260. *Id.* at 2463.

261. *Id.* at 2466 (explaining that *Graham* "viewed this ultimate penalty for juveniles as akin to the death penalty, [and] we treated it similarly to that most severe punishment").

262. Justice Kagan emphasized that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 2464. She invoked the Court's death penalty jurisprudence to require "individualized sentencing for defendants facing the most serious penalties." *Id.* at 2461. She noted that "[i]n 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 offense before sentencing him to death." *Id.* at 2463–64. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978).

263. *See, e.g.*, *Woodson*, 428 U.S. at 304 (holding that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense . . ."). *Woodson* condemned:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense [which] excludes . . . the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass . . . .

Id.

264. *See* Sumner v. Shuman, 483 U.S. 66, 74 (1987) (requiring the sentencing authority to consider mitigating circumstances relative to the offense and the defendant as an individual); Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (mandating "reasoned moral response" that reflects offender's individual culpability).

youths' reduced culpability warranted less severe punishment than adults' because of immaturity, susceptibility to peer influences, and transitional personality development.[265] Mandatory LWOP sentences prevent the sentencing judge from considering youthfulness or other mitigating factors and thereby disproportionally equate the culpability of juveniles and adults.[266]

> 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 [sic] 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. And finally, this mandatory punishment disregards the possibility of rehabilitation even

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265. 132 S. Ct. 2455, 2464 (2012).

> Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." . . . First, children have a "lack of maturity and 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 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]."

Id. (citations omitted). The Court also reasoned that developmental psychology and neuroscience bolstered its conclusion that youths' crimes were less blameworthy or deterrable. *Id.* at 2465.

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

Id. (citations omitted) (quoting Graham v. Florida, 130 S. Ct. 2011, 2028 (2010)).

266. *Id.* at 2467 ("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."); *see also* Johnson v. Texas, 509 U.S. 350, 367 (1993) (requiring the sentencer to consider "the mitigating qualities of youth").

The Court noted that the fifteen jurisdictions in which judges have discretion to impose LWOP sentences on juveniles only accounted for fifteen percent of youths, whereas the twenty-nine jurisdictions in which LWOP is mandatory accounted for eighty-five percent of all youths sentenced. *Miller*, 132 S. Ct. at 2471.

when the circumstances most suggest it.[267]

An individualized culpability assessment coupled with youths' generic diminished responsibility should severely restrict instances in which a LWOP sentence could be imposed.[268]

Justice Thomas' *Miller/Jackson* dissent observed that *Harmelin v. Michigan* previously upheld a mandatory LWOP sentence for an adult and did not require individualized sentencing.[269] However, Justice Kagan distinguished *Harmelin* on the grounds that a sentencing scheme appropriate for adults could still violate the constitution when applied to children. "We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children. . . . So if (as *Harmelin* recognized) 'death is different,' children are different too."[270]

Chief Justice Roberts' dissent objected that the majority of states approved mandatory LWOP sentences for adults *and* juveniles convicted of murder, hence no national consensus against the practice existed.[271] The majority responded that *Miller/Jackson* did not bar the practice, but only required individualized evaluations that take youthfulness into account before meting out the most severe penalties.[272] It reiterated the concern expressed in *Thompson v. Oklahoma* that the interaction of two separate statutes—waiver of youths to criminal court and sentencing of convicted criminals—could produce a harsher outcome than the legislature intended.[273] In many jurisdictions,

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267. *Miller*, 132 S. Ct. at 2468.

268. *Id.* at 2481, 2471 n.10 ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. . . . When given the choice, sentencers impose life without parole on children relatively rarely.").

269. *Id.* at 2483.

270. *Id.* at 2470 (stating that *Roper* and *Graham* invalidated punishments for children that could be imposed on adults).

271. *Id.*

272. *Id.* at 2471 (noting that "[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime . . . [but] mandates only that a sentence follow a certain process—considering an offender's youth and attendant characteristics before imposing a particular penalty.").

273. *Id.* at 2472 (recognizing that the interaction of independent statutes—transfer to adult court and penalties for people convicted in criminal court—made it "impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice)"). Justice Kagan observed that:

> Most States do not have separate penalty provisions for those [waived] 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. 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.

transfer is automatic for youths charged with murder.[274] Even in jurisdictions that conduct judicial waiver hearings, the issues of waiver—amenability to treatment—and the age limits of juvenile court jurisdiction pose different questions than the amount of punishment a youth convicted of murder deserved.[275]

Although Jackson was convicted of felony-murder as an accomplice rather than as the shooter, his mandatory sentence precluded consideration of his "intentions, expectations, and actions."[276] *Graham* already recognized the "twice diminished" moral culpability of youths "who do not kill, intend to kill, or foresee that life will be taken," and this rationale applies equally to youths convicted of felony murder who did not kill or intend to kill.[277] Following *Graham*'s logic,[278] Justice Breyer's concurrence in *Miller/Jackson* reasoned that a juvenile who neither killed nor intended to kill is no more culpable than a youth convicted of a non-homicide felony.[279] "Given *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim. . . . [W]here the juvenile neither kills nor intends to kill, both features emphasized in *Graham* as extenuating apply."[280] The concurrence endorsed the Court's felony-murder decisions that limited the death penalty to those who killed or intended to kill.[281]

Id. at 2473.

The dissent questioned the majority's contention that a "legislature is so ignorant of its own laws that it does not understand that two of them interact with each other. . . . [H]ere the widespread and recent imposition of the sentence makes it implausible to characterize this sentencing practice as a collateral consequence of legislative ignorance." *Id.* at 2479–80.

274. *See, e.g.*, PATRICK GRIFFIN, SEAN ADDIE, BENJAMIN ADAMS & KATHY FIRESTINE, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 5 (2011).

275. *Miller*, 132 S. Ct. at 2475 (noting that "the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing[,]" and judges confront an extreme forced choice between lenient sanctions as a juvenile and standard punishment as an adult).

276. Enmund v. Florida, 458 U.S. 782, 800 (1982).

277. Graham v. Florida, 130 S. Ct. 2011, 2027 (2010).

278. *Id.* at 2027 (finding that children "who did not kill or intend to kill" have a "twice diminished" culpability based on their age and the nature of their crime).

279. *Id.* at 2475–76.

280. *Id.*

281. *See, e.g.*, *Enmund*, 458 U.S. at 782; Tison v. Arizona, 481 U.S. 137 (1987); Lockett v. Ohio, 438 U.S. 586 (1978).

IV. Youth Discount: Categorical Recognition of Youthfulness as a Mitigating Factor in Sentencing

Miller/Jackson requires courts to conduct individualized culpability assessments and to recognize the mitigating role of youthfulness in sentencing.[282] However, like *Graham*'s earlier instructions to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,"[283] the decisions provide judges and parole boards with no practical guidance on how to consider youthfulness in sentencing or release decisions. Instead, states should formally incorporate the principle of youthfulness as a mitigating factor as part of their sentencing statutes.[284]

Roper, *Graham,* and *Miller/Jackson* affirm that the principle of youthfulness as a mitigating factor applies both to capital and non-capital sentences.[285] States can hold youths accountable and recognize their diminished responsibility without excusing their criminal conduct.[286] Youths who produce the same harms as adults

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282. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (instructing judges "to consider mitigating circumstances before imposing the harshest possible penalty for juveniles").

283. *Id.* at 2469.

284. As the Court repeatedly has recognized:

> [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. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982)).

285. *Miller*, 132 S. Ct. at 2482 (Roberts, C.J., dissenting). Chief Justice Roberts noted:

> The principle behind today's decisions 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.

Id.

286. *See* Scott & Grisso, *supra* note 78, at 174 (arguing that youthfulness does not excuse criminal liability, but that liability should not be equivalent to that of adults); Scott, *Lessons*, *supra* note 94, at 309:

> Adolescents' choices] reflect immaturity and inexperience and are driven by developmental factors that will change in predictable and systemic ways. A legal response that holds young offenders accountable, while recognizing that they are less culpable than their adult counterparts, serves the purposes of criminal punishment without violating the underlying principle of proportionality.

Id.; *see also* Zimring, *supra* note 74, at 278 ("[E]ven after a youth passes the minimum threshold of competence that leads to a finding of capacity to commit

are not their moral equals.[287] Countries other than the United States routinely recognize youthfulness as a mitigating factor as a "principle of fundamental justice."[288] States' sentencing laws can recognize developmental differences and protect young people from the full consequences of immature decisions.[289]

Despite the Court's preference for individualized culpability assessments, *Roper* and *Graham* opted for a categorical prohibition 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."[290] The Court feared that when confronted with a heinous crime a jury could not properly consider youthfulness as a mitigating factor.[291] *Roper* and *Graham* concluded that because clinicians cannot distinguish between the vast majority of immature juveniles who deserve leniency and the rare youth who might exhibit adult-like culpability, it would not allow a jury to do so.[292]

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crime, the barely competent youth is not as culpable and therefore not as deserving of a full measure of punishment as a fully qualified adult offender.").

287. *See* ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 21, at 144 ("[W]henever a young offender's need for protection, education, and skill development can be accommodated without frustrating community security, there is a government obligation to do so."); Feld, *Legislative Exclusion*, *supra* note 17, at 99; Scott & Grisso, *supra* note 78, at 182 ("Subjecting thirteen-year-old offenders to the same criminal punishment that is imposed on adults offends the principles that define the boundaries of criminal responsibility."); ABA, THE STATE OF CRIMINAL JUSTICE 329 (2007) ("[Adolescents'] crimes may be the same as those of adults, but these offenders simply are not adults and should not be sentenced as if they were.").

288. *See, e.g.*, R. v. D.B., [2008] S.C.C. 25 (Can.) (reasoning that "young people are entitled to a presumption of diminished moral blameworthiness or culpability flowing from the fact that, because of their age, they have heightened vulnerability, less maturity, and a reduced capacity for moral judgment").

289. *See* Scott, *supra* note 81, at 1656 ("[I]f the values that drive risky choices are associated with youth, and predictably will change with maturity, then our paternalistic inclination is to protect the young decisionmaker . . . from his or her bad judgment."); *see also* ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 21, at 96, 142–45.

290. Graham v. Florida, 130 S. Ct. 2011, 2032 (2010) (citing Roper v. Simmons, 543 U.S. 551, 572–73 (2004)).

291. *Roper*, 543 U.S. at 573 ("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.").

292. *See Graham*, 130 S. Ct. at 2026 ("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.") (citing *Roper*, 543 U.S. at 573).

Some commentators,[293] Chief Justice Roberts in *Graham*,[294] and the dissents in all three cases advocate individualized culpability assessments prior to imposing a LWOP sentence. However, a categorical rule that treats youthfulness as an unconditional mitigating factor is preferable to a system of guided discretion.[295] *Graham*,[296] as well as *Roper*, endorsed categorical treatment even though the Justices recognized individual variability in culpability.

> 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. . . . 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.[297]

The Court reasoned that a clear-cut rule which occasionally under-punishes the rare, fully-culpable adolescent still will produce less aggregate injustice than a discretionary system that improperly, harshly sentences many more undeserving youths.[298]

Categorical treatment of adolescents' reduced culpability rests on the moral principle that all youths deserve less punishment than adults because of their lesser

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293. *See, e.g.*, Cepparulo, *supra* note 57, at 253 (arguing against mandatory LWOPs for juveniles and proposing that "[n]o juvenile should be given a punishment as solemn as LWOP without an individual assessment of proportionality in relation to the crime committed"); Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309, 312–14 (2012) (criticizing *Graham* for failing to recognize that some non-homicide offenders commit such horrific crimes that they deserve LWOP sentences); ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 21, at 149–52 (contending that age is an incomplete proxy for culpability and proposing individualized culpability assessments without specifying the factors judges would consider); Massey, *supra* note 28, at 1109–14 (advocating for individualized proportionality review prior to imposition of a LWOP sentence).

294. 130 S. Ct. at 2042 (Roberts, C.J., concurring) (cautioning that "[o]ur system depends upon sentencing judges applying their reasoned judgment to each case that comes before them").

295. Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 57 (2008) ("Although some commentators advocate individualized culpability assessments prior to imposing an LWOP sentence on a juvenile, a bright-line rule like *Roper's* that categorically treats youthfulness as a mitigating factor is preferable to a system of guided discretion.").

296. *Graham*, 130 S. Ct. at 2016–17.

297. *Roper*, 543 U.S. at 574.

298. *Id.* at 573 ("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.").

blameworthiness.[299] All adolescents share similar characteristics of immature judgment and lack of self-control that reduce their culpability and all young offenders should receive categorical reductions of adult sentences.[300] To treat youthfulness as a mitigating factor represents a moral and criminal policy judgment that no child deserves to be sentenced as severely as an adult who causes the same harm.[301] "Even if there are a few juveniles who could be among the worst of society's offenders, jurors will make errors of unacceptable frequency and magnitude. For this reason, we cannot trust ourselves to decide that a child is culpable enough to be punished as an adult. . . ."[302]

There are two reasons to prefer a categorical rule of mitigation over individualized sentencing discretion.[303] The first is the inability to define or identify what constitutes adult-like culpability among offending youths.[304] Culpability is not an

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299. In contemporary criminal law theory, penal proportionality may reflect either the quality of an actor's choice or what that choice indicates about the actor's moral character. The former focuses on the blameworthiness of the choices made, while the latter focuses on what that choice indicates about the actor's bad character. *See* Scott & Steinberg, *supra* note 72, at 801–02; *see also* R.A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345, 367–68 (1993); Michael Moore, *Choice, Character, and Excuse*, *in* PLACING BLAME 548, 574–92 (1997); Morse, *New Neuroscience, Old Problems*, *supra* note 122, at 405 ("The criteria for responsibility are behavioral and normative, not empirically demonstrable states of the brain."); Ward, *supra* note 81, at 461.

300. *See* Morse, *supra* note 122; Scott & Steinberg, *supra* note 72, at 801 ("Because these developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults under conventional criminal law conceptions of mitigation.").

301. *See, e.g.*, Fagan, *supra* note 40, at 242.

> [Adolescence, per se, is a mitigating status because youths' developmental deficits] are not the deficits of an atypical adolescent but are "normal" developmental processes common to all adolescents. To the degree that there is variation among adolescents, whether offenders or not, these differences are predictable and subject to a variety of contextual, circumstantial and intra-individual factors. In this jurisprudence, the crimes of adolescents are a function of immaturity, compared to the crimes of adults, which are the acts of morally responsible, yet possibly cognitively and emotionally deficient actors.

Id.

302. Emens, *supra* note 55, at 87.

303. Brink, *supra* note 77, at 1578 (arguing that age provides an imperfect boundary marker for immaturity and proposing to use age as a rebuttable presumption of incapacity to achieve individualized justice).

304. *See* Stanford v. Kentucky, 492 U.S. 361, 396–99 (1989) (Brennan, J., dissenting); AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 48 ("[While] the rate at which the adolescent brain acquires adult capabilities differs from individual to individual . . . researchers have identified broad patterns of change in adolescents that begin with puberty and continue into young adulthood."); Morse, *supra* note 82, at 62 (observing that "there are no reliable and valid measures" of culpability that accurately can distinguish adolescents from adults).

objectively measurable object, but a normative construct about criminal responsibility.[305] It is a policy judgment based on reliable evidence while a few youths may appear mature prior to becoming eighteen years of age, many others will not be mature even as adults.[306] Despite individual developmental variability, clinicians lack the tools with which to assess impulsivity, foresight, and preference for risk, or a metric by which to relate maturity of judgment with criminal responsibility.[307] The vast majority of juveniles' crimes are less blameworthy than adults and the inability to define immaturity or to validly identify a few responsible ones could introduce a systematic bias that over-punishes less-culpable youths.[308] A categorical rule reduces the risk of over-punishment of less blameworthy youths.[309] Other

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305. *See* Feld, *Competence, Culpability, and Punishment*, *supra* note 40, at 500.

306. *See* Brink, *supra* note 77, at 1570 (arguing that the development of normative competence is part of the maturation process from childhood to adulthood). "Though not all individuals mature at the same rate, and some individuals never mature, this sort of normative maturation is strongly correlated with age. The reduced normative competence of juveniles provides a retributive justification for reduced punishment for juveniles." *Id.*; *see also* ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 21, at 148 ("The range of individual variation among youths of the same age is notoriously large."); Fagan, *supra* note 40, at 209 ("The age at which adolescents realize the developmental competencies that constitute culpability will vary: a significant number of juveniles will be immature and lacking in the developmental attributes of culpability well before age eighteen, and some may still lack these competencies after age eighteen . . . .").

307. Roper v. Simmons, 543 U.S. 551, 573 (2005); ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 21, at 148 ("[We lack] good data on the social skills and social experience of adolescent offenders. The important elements of penal maturity have yet to be agreed upon, let alone assessed in large numbers of cases.").

308. *See, e.g.*, Fagan, *supra* note 40, at 248 ("The difficulties and statistical error rates in measuring immaturity for juveniles invite complexity in the consistent application of the law."). Fagan contends:

> Even when individualized assessments are conducted using modern scientific and clinical tools, the risks of error due to measurement and diagnostic limitations suggest that it is neither reliable nor efficient for each court to assess the competency of each juvenile individually. The precise conditions of immaturity, incapacity, and incompetency are difficult to consistently and fairly express in a capital sentencing context. Further, cognitive and volitional immaturity might be easily concealed by demeanor or physical appearance and, more importantly, obscured by the gruesome details of a murder and its emotional impact on the victim's family.

Id. at 253; *see also* Robin M.A. Weeks, *Comparing Children to the Mentally Retarded: How the Decision in* Atkins v. Virginia *Will Affect the Execution of Juvenile Offenders*, 17 BYU J. PUB. L. 451, 479 (2003) (noting that when the Court requires individualized culpability assessments it raises difficult definitional questions: "What is the 'normal' adult level of culpability? How do we measure it?").

309. Scott & Steinberg, *supra* note 72, at 836–37 ("[W]e currently lack the diagnostic tools to evaluate psycho-social maturity reliably on an individualized basis or to distinguish young career criminals from ordinary adolescents who, as

areas of law use age-based categorical lines to approximate the level of maturity required for particular activities—e.g., voting, driving, and consuming alcohol—and restrict youths because of immaturity and presumptive inability to make competent decisions.[310]

The other reason to adopt a categorical rule of youthfulness as a mitigating factor is the inability of judges or juries to fairly weigh that abstraction against the aggravating reality of a terrible crime.[311] *Roper* recognized 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."[312] The Court rightly feared that jurors could not distinguish between a person's responsibility for causing the harm and the harm itself when they evaluated culpability. Surveys of jurors report that the heinousness of a crime invariably trumped a youth's immaturity.[313] Although *Miller/Jackson* requires individualized culpability assessments, the Court did not identify relevant factors to consider

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adults, will repudiate their reckless experimentation. Litigating maturity on a case-by-case basis is likely to be an error-prone undertaking, with the outcomes determined by factors other than immaturity.") (citation omitted).

310. *See, e.g.*, *Roper*, 543 U.S. at 581–87 (providing statutory appendices listing limits on juveniles' rights to vote, marry, and serve on a jury as a result of immaturity); FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 35–36 (1982); Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 88–91 (1999) (analyzing the inconsistency between punishing adolescents like adults while denying their autonomy claims in areas outside of the criminal law); Richard O. Brooks, *"The Refurbishing": Reflections Upon Law and Justice Among the Stages of Life*, 54 BUFF. L. REV. 619 (2006) (noting that the designation of diminished responsibility for juveniles is an example of our legal system's provision of legal duties and immunities based upon stages of life); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1268 (2000) (arguing that presumption of decisional incapacity pervades most areas of law and conflicts with a model of adolescent autonomy); Scott, *supra* note 81, at 1608, 1611; Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 271, 287 (Thomas Grisso & Robert G. Schwartz eds., 2000).

311. Stanford v. Kentucky, 492 U.S. 361, 398 (1989) (Brennan, J., dissenting) ("It is thus unsurprising that individualized consideration at transfer and sentencing has not in fact ensured that juvenile offenders lacking an adult's culpability are not sentenced to die.").

312. *Roper*, 543 U.S. at 553–54.

313. Brink, *supra* note 77, at 1581; Simona Ghetti & Allison D. Redlish, *Reactions to Youth Crime: Perceptions of Accountability and Competency*, 19 BEHAV. SCI. & L. 33, 45–47 (2001).

when evaluating the blameworthiness of a youth.[314]

In light of these problems—the abstract meaning of culpability, the inability to measure or compare the moral agency of a youth, and the tendency to overweigh harm—state legislatures should enact a categorical Youth Discount that gives all adolescents fractional reductions in sentence-lengths based on age-as-a-proxy for culpability.[315] In youths' diminished responsibility a Youth Discount recognizes that same-length sentences exact a greater penal bite from younger offenders than older ones.[316] A Youth Discount would require a judge to give a substantial reduction off of the sentence that she would impose on an adult convicted of the same crime. A youth would need only a birth certificate to determine the appropriate amount of discount. The Youth Discount creates a sliding scale of diminished responsibility and gives the largest sentence reductions to the

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

315. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 315–21 (1999) (supplying a rationale for youth discount and describing its administration); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 121–33 (1997) (providing rationale for categorical "youth discount") [hereinafter Feld, *Abolish*]; Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 520–28 (1987) (arguing that proportional sentencing requires recognition of youths' reduced culpability). *But see* Joseph L. Hoffman, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L. J. 229, 233 (1989) (describing age as an imperfect proxy for a complex of factors, "includ[ing] maturity, judgment, responsibility, and the capability to assess the possible consequences of one's conduct," that constitute culpability); ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 21, at 150 (objecting to categorical youth discount because "age is an incomplete proxy for levels of maturity during the years from age twelve to eighteen"). Zimring argues that "[t]he variation among individuals of the same age is great, and individualized determinations of immaturity are thus superior to averages based on aggregate patterns." *Id.*

316. The Court in *Miller/Jackson* struck down the mandatory LWOP because "every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old. . ." *Miller*, 132 S. Ct. at 2467; *see* Andrew von Hirsch, *Proportionate Sentences for Juveniles: How Different than for Adults?*, 3 PUNISHMENT & SOC'Y 221, 227 (2001) ("A given penalty is said to be more onerous when suffered by a child than by an adult. Young people, assertedly, are psychologically less resilient, and the punishments they suffer interfere more with opportunities for education and personal development.") (citation omitted); *see also* Arredondo, *supra* note 119, at 19 ("Because of differences in the experience of time, any given duration of sanction will be experienced subjectively as longer by younger children."); Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 21–22 (2002) (describing substantive quality of punishment adolescents experience in adult incarceration as far harsher than the sanctions they experience as delinquents); Feld, *Abolish*, *supra* note 315, at 113 ("[Y]ouths experience objectively equal punishment subjectively as more severe.").

youngest, least mature offenders.[317] On a sliding scale correlated with developmental differences of diminished responsibility, a fourteen-year-old offender would receive a maximum sentence that is substantially reduced from the sentence an adult would receive—e.g., perhaps twenty or twenty-five percent the length. On a sixteen-year-old, a judge might impose a maximum sentence no more than half the adult length. The deeper discounts for younger offenders correspond with their developmental differences in maturity of judgment and self-control compared with older youths and adults.[318] As *Miller/Jackson* foreshadow, "occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[319] A Youth Discount would preclude imposing LWOP, lengthy mandatory-minimum, or de facto life sentences—e.g., lengthy terms of years stacked consecutively.[320] Shortly after

317. Feld, *Abolish*, *supra* note 315, at 118–21; *see also* MODEL PENAL CODE § 6.11A(a) comment c. (providing that "offenders under 18 should be judged less blameworthy for their criminal acts than older offenders and age-based mitigation should increase in correspondence with the youthfulness of individual defendants."); SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 86, at 231 (arguing for sentences proportionate to the seriousness of the offense and culpability of the offender and insisting that "immaturity and the arm of the offense should count, such that younger offenders should be punished less severely than older youths . . . ."); Scott & Steinberg, *supra* note 72, at 837 ("[A] systematic sentencing discount for young offenders in adult court[] might satisfy the demands of proportionality."); Zimring, *supra* note 310, at 288 (suggesting that the penal law of youth crime should develop "a sliding scale of responsibility based on both judgment and the practical experience of impulse management and peer control").

318. Brink, *supra* note 77, at 1572 ("[A] juvenile is less responsible for her crime than her adult counterpart is for the same crime and that, all else being equal, the younger the juvenile the less responsible she is for her crime."); FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 68 ("[A]dolescents learn their way toward adult levels of responsibility gradually. This notion is also consistent with . . . long periods of diminished responsibility that incrementally approach adult standards in the late teens . . . [and with] less-than-adult punishments that gradually approach adult levels during the late teen years.").

319. *Miller*, 132, S. Ct. at 2469; *see also id.* at 2489 (Alito, J., dissenting) (criticizing the majority for going "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").

320. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 8 (recommending that states abolish LWOP sentences for crimes committed by juveniles); MODEL PENAL CODE § 6.11A(f) (suggesting that for youth sentences "[t]he court shall have authority to impose a sentence that deviates from any mandatory minimum term of imprisonment"); MAUER ET AL., *supra* note 31, at 32 (recommending categorical exemption of juveniles from life sentences because they "represent an entire rejection of the longstanding traditions of our treatment of juvenile offenders, which is that rehabilitation should be considered as a primary objective when sentencing children"); SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 86, at 246 (concluding that after *Roper* "youths also should be excluded from the criminal sentence of Life Without Parole (LWOP)"); Wallace, *supra* note 155, at 53 (arguing that any lengthy term of year sentence denies juvenile offender a meaningful opportunity to reenter society). Wallace argues that "[t]he rationale for

Miller/Jackson, the California Supreme Court in *People v. Caballero* found that stacked, consecutive sentences that resulted in a 110-year-to-life sentence imposed on a juvenile convicted of several non-homicide offenses violated *Graham* because parole eligibility after 100 years did not provide the offender with "a meaningful opportunity to . . . reenter society in the future."[321] "[S]entencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. . . . [T]he state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future."[322] Similarly, a lengthy mandatory minimum sentence imposed on a juvenile may violate *Miller/Jackson's* injunction that the sentence take account of youthfulness as a mitigating factor.[323] Because the length of a LWOP sentence is indeterminate, states should apply a Youth Discount to a presumptive life sentence length of about forty years—i.e., the average age at which adult murderers enter prison and their projected, albeit reduced, life expectancy.[324] Apart from

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the Court's categorical abolishment of life without parole, however, also supports abolishing lengthy term of year sentences, both with and without parole eligibility. . . . [A] sentence of forty, fifty, or sixty years received at age sixteen will still yield the same problem—a disproportionate amount of time served." *Id.* at 60.

321. People v. Caballero, 55 Cal. 4th 262, 268 (2012). In *Caballero*, the defendant was convicted of three counts of attempted first degree murder plus a consecutive term for firearm enhancement, all of which were stacked consecutively to yield a sentence of 110-years-to-life. The California Supreme Court rejected the state's claim that cumulative sentences that were not explicitly designated as life without parole did not violate *Graham*'s categorical rule with respect to juvenile non-homicide offenders. *Id.* at 266–67.

322. *Id.* at 268. In setting a date for parole eligibility, the *Caballero* court noted that:

> Under Graham's nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board.

Id. at 268–69.

323. *See, e.g.*, Nilsen, *supra* note 188, at 69. Nilsen argues that:

> The expansion of an individualized sentencing requirement from the death penalty to life without parole for juveniles calls into question any mandatory minimum sentencing for juveniles, because by definition such sentences do not afford any discretion to the sentence based on individual characteristics of the offender, then or in the future.

Id.

324. *See* Alfonso A. Castillo, *Guilty Plea in Gruesome Murder Deal Slammed*, NEWSDAY, Sep. 13, 2007, at A4 (noting that life expectancy of prison inmates is

adolescents' diminished responsibility, the likelihood of recidivism decreases with age while the costs of confining geriatric inmates increase substantially.[325] The specific amount by which to substantially discount sentences for youths is a political and legislative value choice. Although some legislators may find it tempting to engage in penal demagoguery,[326] states can achieve their legitimate penal goals by sentencing youths to no more than twenty or twenty-five years for even the most serious crimes.[327]

The principle of the Youth Discount is supported by professional organizations and academic analysts.[328] The

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shorter than that of the civilian population "because of unhealthy living conditions and violence"). *Cf.* Ernest Drucker, *Population Impact of Mass Incarceration Under New York's Rockefeller Drug Laws*, 79 J. URBAN HEALTH 5 (2002) (discussing the reduced life expectancies of prisoners in New York convicted of non-violent drug offenses); *see also* Edward L. Glaeser & Bruce Sacerdote, *Sentencing in Homicide Cases and the Role of Vengeance*, 32 J. LEGAL STUD. 363, 367 (2003) (summarizing data on murder cases in thirty-three large urban counties). Data from the United States Department of Justice reports that over half (52.7%) of all homicide offenders committed their crimes between ages eighteen and thirty-four. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., HOMICIDE TRENDS IN THE U.S., http://www.bjs.gov/content/pub/pdf/htius.pdf (graph entitled "Homicide Type by Age, 1976–2005") (last visited Feb. 8, 2013). Although the average life expectancy for children born today is 77.8 years, it is lower for men, for minorities, and significantly reduced for prison inmates who are exposed to a variety of diseases. *See, e.g.*, ELIZABETH ARIAS, CTRS. FOR DISEASE CONTROL, NAT. VITAL STATISTICS REP.: U.S. LIFE TABLES, 2003, at 3 (last modified Mar. 28, 2007), *available at* http://www.cdc.gov/nchs/data/dvs/Revised_Tables_2003.pdf.

325. AMNESTY INT'L & HUM. RTS. WATCH, *supra* note 16, at 81–85; LABELLE, *supra* note 240, at 22; NELLIS, *supra* note 174, at 33 (2012) (noting that before LWOP inmates grow old and die in prison, "they will require substantially greater health care and medical services. Thus, life sentences add to the rising geriatric prison population and place heavy financial burdens on states").

326. Feld, *Race, Politics, and Juvenile Justice*, *supra* note 20, at 1538–39 (describing the politicization of crime policies, politician's use of racial code words for electoral advantage, and the substitution of sound-bites—"adult crime, adult time"—for responsible legislation).

327. *See, e.g.*, MODEL PENAL CODE § 6.11A(g) (providing that "[n]o sentence of imprisonment longer than [25] years may be imposed for any offense or combination of offenses. For offenders under the age of 16 at the time of commission of their offenses, no sentences of imprisonment longer that [20] years may be imposed. For offenders under the age of 14 at the time of commission of their offenses, no sentence of imprisonment longer than [10] years may be imposed.").

328. Several academic analysts have explicitly endorsed my proposal for the Youth Discount. *See, e.g.*, MODEL PENAL CODE § 6.11A reporter's note (acknowledging that the framework of the MPC's recommendation for "specialized sentencing rules and mitigated treatment of juvenile offenders sentenced in adult courts, owes much" to Feld's proposal for a Youth Discount—"a sliding scale of developmental and criminal responsibility"); SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 86, at 246 (concluding that "[p]roportionality supports imposing statutory limits on the maximum duration of adult sentences impose[d] on juveniles—a 'youth discount,' to use Feld's term."); Tanenhaus & Drizin, *supra* note 223, at 698 ("We endorse Feld's proposals [for a youth discount]

American Bar Association condemned LWOP sentences for juveniles and endorsed the principle that sentences for juveniles should be less than those imposed on adults, should formally recognize youthfulness as a mitigating factor, and should provide for earlier parole release consideration.[329] The American Law Institute's revised Model Penal Code (MPC) sentencing provisions explicitly adopted the principle of the Youth Discount. The MPC provides that when states sentence offenders convicted of crimes committed prior to the age of eighteen, "the offender's age shall be presumed a mitigating factor, to be assigned greater weight for offenders of younger ages."[330] The MPC recommends that sentencing and correctional authorities give priority to young offenders "rehabilitation and reintegration into the law-abiding community" and that judges have authority to impose blended sentences which give youths access to juvenile programs rather than to prison.[331]

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because they respect the notion that juveniles are developmentally different than adults and that these differences make juveniles both less culpable for their crimes and less deserving of the harsh sanctions, which now must be imposed on serious and violent adult offenders."); von Hirsch, *supra* note 316, at 226–27 (arguing for categorical penalty reductions based on juveniles' reduced culpability).

> While actual appreciation of consequences varies highly among youths of the same age, the degree of appreciation we should demand depends on age: we may rightly expect more comprehension and self-control from the 17-year-old than a 14-year-old, so that the 17-year-old's penalty reduction should be smaller. Assessing culpability on the basis of individualized determinations of a youth's degree of moral development would be neither feasible nor desirable.

Id. at 226. A study group funded by the National Institute of Justice determined that "[y]ouths' diminished responsibility requires mitigated sanctions to avoid permanently life-changing penalties and provide room to reform." James C. Howell, Barry C. Feld & Daniel P. Mears, *Young Offenders and an Effective Justice System Response*, *in* ROLF LOEBER & DAVID P. FARRINGTON, FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 213 (2012). Following the rationale of *Roper* and *Graham*, it concluded that "[a] categorical rule of youthfulness as a mitigating factor in sentencing is preferable to individualized discretion." *Id.* at 229.

329. ABA, REPORT WITH RECOMMENDATION #105C, at 6–9 (2008), *available at* http://www.americanbar.org/content/dam/aba/migrated/leadership/2008/midyear/updated_reports/hundredfivec.authcheckdam.doc.

330. MODEL PENAL CODE § 6.11A(a).

331. MODEL PENAL CODE § 6.11A(b). Blended sentencing provisions allow a criminal court judge to impose a juvenile sentence in lieu of a criminal disposition or to stay imposition of a criminal sentence pending successful completion of a juvenile commitment. *See* BARRY C. FELD & DONNA M. BISHOP, THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 806 (2012) (explaining variations of blended sentencing provisions); Marcy R. Podkopacz & Barry C. Feld, *The Back-door to Prison: Waiver Reform, "Blended Sentencing," and the Law of Unintended Consequences*, 91 J. CRIM. L. CRIMINOLOGY 997, 1028–30 (describing net-widening effects of juvenile blended sentencing, but approving criminal court blended sentencing alternatives). The MPC proposes that a criminal court judge

Although a small subset of chronic offenders may pose a heightened risk of future recidivism, *Roper* observed that "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."[332] Similarly, *Graham* and *Miller/Jackson* recognized the inability of judges to identify those high-risk individuals at the time of their trial and conviction.[333] This difficulty is compounded by the inability of adolescents to participate effectively in criminal proceedings designed for adults.[334] Moreover, proportionality is a retributive concept, not a utilitarian one,[335] and the Court decided *Roper*, *Graham*, and *Miller/Jackson* firmly on retributive grounds—reduced culpability—even after examining the relevant utilitarian justifications for punishment.[336] Accordingly, there is no basis on which to disregard the categorical mitigating role of youthfulness at sentencing to incapacitate some youths who may be deemed to be life-course persistent offenders.[337]

Roper, *Graham*, and *Miller/Jackson* emphasized that juveniles' personalities are more transitory and less-fixed, their crimes provide less reliable evidence of "irretrievably depraved character," and that "a greater possibility exists that a minor's character deficiencies will be reformed."[338] Because adolescence is

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may impose any disposition that would have been available if the offender had been adjudicated delinquent for the same conduct in the juvenile court. Alternatively, the court may impose a juvenile-court disposition while reserving power to impose an adult sentence if the offender violates the conditions of the juvenile-court disposition. MODEL PENAL CODE § 6.11A(d).

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

333. *See* Miller v. Alabama, 132 S. Ct. 2455, 2474 (2012); Graham v. Florida, 130 S. Ct. 2011, 2042 (2010).

334. Grisso et al., *supra* note 180, at 334–35.

335. *See* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011).

336. *See* Youngjae Lee, *supra* note 143, at 59 (noting that the Court in Coker v. Georgia, 433 U.S. 584 (1977), struck down the death penalty for rape while acknowledging that "*it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so*").

337. *But see* MODEL PENAL CODE §6.11A(c) (providing that "[w]hen an offender has been convicted of a serious violent offense, and there is a reliable basis for belief that the offender presents a high risk of serious violent offending in the future, the court may give priority may to the goal of incapacitation . . ."). MODEL PENAL CODE comment c. recognizes utilitarian sentencing goals—incapacitation—as a basis on which to override the mitigation due adolescents' diminished responsibility. While a small subset of serious and chronic offenders may be at heightened risk of future offending, courts lack valid or reliable bases on which to predict future dangerousness. *Id.*

338. Roper v. Simmons, 543 U.S. 551, 570 (2005). *See Graham*, 130 S. Ct. at

a period of rapid growth and transition, we can expect youths to change more quickly and to a greater degree in the years following an offense than more hardened, older offenders.[339] Although rates of criminal behavior increase rapidly among males in their teenage years, rates of desistance are equally high as youths mature into their early twenties.[340] States should avoid the iatrogenic consequences of immediately incarcerating more malleable young offenders with adult offenders.[341]

A Youth Discount enables young offenders to survive serious mistakes with the possibility of reconstructing their lives.[342] We can hold juveniles accountable, manage the risks they pose to others, and provide them with "a meaningful opportunity to reform," without extinguishing their lives.[343] The characteristics of

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2026; *Miller*, 132 S. Ct. at 2475 (Breyer, J., concurring).

339. ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 21, at 82 (observing that "the high prevalence of offenses in the teen years and the rather high rates of incidence for those who offend are transitory phenomena associated with a transitional status and life period"). Because some degree of criminal offending is normal for adolescents, major interventions may not be necessary to change them and punitive sanctions may be counter-productive. *Id.*

340. *See, e.g.*, SNYDER & SICKMUND, *supra* note 14, at 71 (noting that "most of the youth who reported committing an assault in the later juvenile years stopped the behavior, reporting none in the early adult years"). Criminologists have noted the phenomenon of adolescents' "spontaneous" desistance from delinquency for decades. *See, e.g.*, MARVIN E. WOLFGANG, ROBERT M. FIGLIO & THORSTEN SELLIN, DELINQUENCY IN A BIRTH COHORT 160–63 (1972) (reporting that almost half of youths desisted after a single offense, one-third desisted after a second offense, and the seriousness of the present offense was not predictive of the next offense); PAUL E. TRACY, MARVIN E. WOLFGANG & ROBERT M. FIGLIO, DELINQUENCY CAREERS IN TWO BIRTH COHORTS 104 tbl.8.3 (1990) (reporting that forty-two percent of youths desisted after one offense and an additional twenty-eight percent desisted after a second offense).

341. *See, e.g.*, MODEL PENAL CODE §6.11A comment j. (recommending prohibition on housing juveniles in adult institutions).

> Youths are especially vulnerable to victimization in adult institutions, and are at greater risk than adult inmates of psychological harm and suicide. They are often in need of age-specific programming that is unavailable in adult institutions. Research indicates that incarceration in adult prison substantially increases the risk that a young person will reoffend in the future.

Id. Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUSTICE 189 (1998) (noting that most states do not provide age-segregated dispositional facilities for youths convicted as adults); *see also* DEPARTMENT OF HEALTH AND HUMAN SERVICES, YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 118 (2001) (reporting that "young people placed in adult correctional institutions, compared to those placed in institutions designed for youths, are eight time as likely to commit suicide, five times as likely to be sexually assaulted, twice as likely to be beaten by staff, and 50 percent as likely to be attacked with a weapon") (citations omitted).

342. *See* Franklin E. Zimring, *Background Paper*, *in* CONFRONTING YOUTH CRIME 27, at 66–69 (1978).

343. *See* ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 21, at 49–83, 142–45;

youth that increase their propensity for wrongdoing—immaturity and plasticity—also provide the mechanisms for learning, growth, and change. The adolescent who committed a crime at fourteen or fifteen years of age is a very different person than the adult incarcerated decades later. Because young offenders eventually will return to the community, states should provide them with resources then require them to demonstrate maturity and rehabilitation.

Conclusion

Roper, *Graham*, and *Miller/Jackson*'s reduced culpability and diminished responsibility rationale provides the bases to categorically recognize youthfulness as a mitigating factor in sentencing. Adolescents lack the judgment, appreciation of consequences, and self-control of adults, and they deserve shorter sentences when they cause the same harms. Their personalities are in transition and it is unjust and irrational to continue harshly punishing a fifty- or sixty-year-old person for a crime that an irresponsible child committed many decades earlier.[344]

Roper and *Graham*'s categorical holdings provide the rationale for a Youth Discount when criminal courts sentence young offenders. The Court used age as a proxy for culpability because no better, more reliable or accurate bases exist on which to individualize sentences. Culpability is a normative construct; it is not an objective thing. Proportioning sentences to culpability involves a moral judgment about deserved punishment, and there is nothing that clinicians, jurors, or judges can measure or quantify to determine how much culpability a young offender possesses. *Roper* and *Graham* feared that efforts to individualize and refine culpability judgments when no objective bases exist on which to do so would introduce a systematic bias—youthfulness might function as an aggravating, rather than mitigating, factor. A substantial Youth Discount of the sentences imposed on adults provides a sliding scale of severity that corresponds with the increasingly diminished responsibility of younger offenders. A Youth Discount provides a reasonable approximation of "what any parent knows"—kids are different and engage in stupid and dangerous behavior because they are kids.

Zimring, *Toward a Jurisprudence of Youth Violence*, *supra* note 128, at 490–93.

344. Streib & Schrempp, *supra* note 28, at 12 ("To decide today whether or not this adolescent offender should continue to be imprisoned into those adult years and even into old age is to assume extrahuman powers to predict human behavior generations into the future.").

Legislators must exhibit political courage to enact laws that benefit easily demonized groups, such as serious young offenders. They must demonstrate even greater political courage or their opponent may charge them with being "soft on crime." During the crime-panic of the 1990s, politicians over-reacted and passed get-tough waiver and criminal sentencing laws that are irrational, inhumane, unjust, and counterproductive. They are responsible to restore rationality, humanity, and decency to juvenile and sentencing laws. Public opinion supports policies to rehabilitate serious young offenders rather than simply to incarcerate them for longer periods.[345] Greater understanding of adolescent development, positive public support for less punitive policies, *and* low crime rates may strengthen legislators' resolve to promote just and sensible youth crime policies.[346]

345. BARRY KRISBERG & SUSAN MARCHIONNA, ATTITUDES OF U.S. VOTERS TOWARD YOUTH CRIME AND THE JUSTICE SYSTEM 3 (2007), *available at* http://www.nccdglobal.org/sites/default/files/publication_pdf/focus-voters-and-youth.pdf (reporting strong public support for rehabilitation as a strategy to prevent and reduce juvenile crime); Brink, *supra* note 77, at 1585 ("[T]here is support for treating youthful offenders as juveniles and for sentencing that is rehabilitative. . . ."); Daniel S. Nagin et al., *Public Preferences for Rehabilitation Versus Incarceration of Juvenile Offenders: Evidence from a Contingent Valuation Survey*, 5 CRIMINOLOGY & PUB. POL'Y 627, 644 (2006) ("[M]embers of the public are concerned about youth crime and want to reduce its incidence, but they are ready to support effective rehabilitative programs as a means of accomplishing that end—and indeed favor this response to imposing more punishment through longer sentences.").

346. Donna M. Bishop, *Public Opinion and Juvenile Justice Policy: Myths and Misconceptions*, 5 CRIMINOLOGY & PUB. POL'Y 653, 656–57 (2006) (summarizing survey results of public opinion regarding support for rehabilitation); Francis T. Cullen, *It's Time to Reaffirm Rehabilitation*, 5 CRIMINOLOGY & PUB. POL'Y 665, 666–68 (2006) (reporting the continuing public support for the idea of rehabilitation, and offering that rehabilitation provides a cultural and criminological alternative to simply locking up offenders); Nagin et al., *supra* note 345, at 645–46.