THE EIGHTH AMENDMENT EVOLVES: DEFINING CRUEL AND UNUSUAL PUNISHMENT THROUGH THE LENS OF CHILDHOOD AND ADOLESCENCE

MARSHA LEVICK, JESSICA FEIERMAN, SHARON MESSENHEIMER KELLEY,

NAOMI E. S. GOLDSTEIN, KACEY MORDECAI*

* Marsha L. Levick is the Deputy Director and Chief Counsel for the Juvenile Law Center, a national public interest law firm for children based in Philadelphia, Pennsylvania, which Ms. Levick co-founded in 1975. Ms. Levick is a graduate of the University of Pennsylvania and Temple University School of Law, and is an adjunct faculty member at the University of Pennsylvania and Temple University Law Schools. Ms. Levick acknowledges the generous support of the Tow Foundation in the preparation of this article.

Jessica Feierman is a Supervising Attorney at Juvenile Law Center, and an adjunct faculty member at the University of Pennsylvania and Temple University Law Schools. Ms. Feierman is a graduate of Wesleyan University and the University of Pennsylvania Law School.

Sharon Messenheimer Kelley is a graduate student in the J.D./Ph.D. Program in Law and Psychology at Villanova University School of Law and Drexel University. Ms. Kelley is a graduate of St. Mary's College of Maryland.

Naomi E. S. Goldstein, Ph.D., is Associate Professor of Psychology at Drexel University and a member of the faculty of the J.D./Ph.D. Program in Law and Psychology. Dr. Goldstein is a graduate of Wesleyan University, obtained her doctoral degree in Clinical Psychology from the University of Massachusetts at Amherst, and completed her clinical internship at the University of Massachusetts Medical School.

Kacey Mordecai is a Stoneleigh Fellow at the Juvenile Law Center and works on the Integrating International Human Rights Law in Juvenile Justice Jurisprudence project. Ms. Mordecai is a graduate of the University of Chicago and Georgetown University Law Center.

Recent decisions by the United States Supreme Court striking the imposing of certain adult sentences on juveniles suggest a shift in the Court's traditional Eighth Amendment analysis of sentencing practices involving juveniles in the criminal justice system. Relying on settled research outlining the developmental differences between children and adults, the Court has modified its longstanding Eighth Amendment jurisprudence from one that hinged primarily on the nature of the sentence to a doctrinal approach that places greater emphasis on the age and characteristics of the offender upon whom the sentence is imposed. As the Court increasingly relies upon the principle that youth are different to inform its decisions involving children's constitutional rights, we suggest that the sentencing of juveniles as adults, as well as the conditions under which juvenile offenders are incarcerated, will face greater scrutiny. While adult crime may indeed warrant adult time, the punishment of juvenile crime—whether in the juvenile or adult justice systems—must yield to a different set of constitutional principles. In the Article that follows, we propose a distinct juvenile definition of cruel and unusual punishment that will produce divergent outcomes depending upon whether the litigant challenging the sentence or other aspects of his punishment is a juvenile or an adult.

We start with a historical overview of the American juvenile justice system, showing how the system has been transformed over time by both internal and external influences, and how the current wave of constitutional reform fits within that historical context. We then summarize the developmental and neuroscientific research establishing that youth are different in constitutionally relevant ways, to underscore how these differences and the underlying research are driving contemporary constitutional analysis. This review is followed by a discussion of Supreme Court case law involving challenges to sentencing practices and conditions of confinement under the Eighth Amendment. Finally, we summarize applicable international and human rights principles, as the Supreme Court has increasingly demonstrated its willingness to consider international law to inform its own independent judgment regarding the country's evolving, contemporary moral standards.

INTRODUCTION: LOOKING BACKWARDS, LOOKING FORWARD

Over 100 years ago, the first juvenile court was established in Cook County, Illinois.[1] The original purpose of the court was to separate juvenile offenders from adult offenders, to provide opportunities for rehabilitation and treatment, to create a more informal setting in which to adjudicate criminal conduct by children, and to limit the consequences of engaging in such

[1] The Juvenile Court Act of 1899, 1899 Ill. Laws 131. *See also* DEAN JOHN CHAMPION, THE JUVENILE JUSTICE SYSTEM, DELINQUENCY, PROCESSING, AND THE LAW 13 (5th ed. 1992). Although the first Juvenile Court Act was passed in Illinois, many commentators credit Judge Ben Lindsey of the Denver Juvenile Court for his visionary approach to juvenile justice and for having the greatest influence on the development of the early juvenile court in this country. *See* H. TED RUBIN, JUVENILE JUSTICE, POLICIES, PRACTICES AND PROGRAMS 1-1 (2003).

conduct.[2] Within twenty-five years, almost every state in the country had established a juvenile justice system.[3] The basic premise of the juvenile court—that youth are different from adults, and uniquely capable of rehabilitation—would eventually be echoed in the Court's current Eighth Amendment jurisprudence, though now supported by contemporary behavioral and neuroscientific research in adolescent development, and with more robust procedural protections.

The early juvenile justice system left procedural due process behind, favoring informality over process and the best interests of the children over consideration for their rights.[4] Prior to 1966, the nation's juvenile courts functioned with little scrutiny from outsiders—either by members of the public or even appellate courts.[5] Except for two instances in which the Supreme Court acknowledged the particular vulnerability of youth with respect to police interrogations and confessions,[6] juvenile courts for the most part operated far outside constitutional boundaries.

In 1966, the Supreme Court decided *Kent v United States.*[7] *Kent* involved a challenge to transfer proceedings under the District of Columbia's Juvenile Court Act. For the first time in juvenile court history, the Court held that certain due process protections were required before a child could be removed from juvenile court jurisdiction to adult criminal court.[8] The *Kent* Court recognized the substantial consequences of criminal court prosecution for a juvenile, from significantly enhanced sentencing to other collateral consequences with potentially lasting impact.[9]

---

[2] FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 5–8 (2005); *see also* Catherine J. Ross, *Disposition In A Discretionary Regime: Punishment And Rehabilitation In The Juvenile Justice System*, 36 B.C. L. REV. 1037, 1038 (1995) (explaining how discretion preserved flexibility in juvenile justice jurisprudence).

[3] *Juvenile Justice History*, CENTER ON JUVENILE AND CRIMINAL JUSTICE, http://www.cjcj.org/juvenile/justice/juvenile/justice/history/0 (last visited Feb. 6, 2012). "In 1899, the first juvenile court was finally established in Cook County, Illinois, and by 1925, all but two states had followed." *Id. See also* HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 86 (1999), *available at* https://www.ncjrs.gov/html/ojjdp/nationalreport99/chapter4.pdf (explaining that by 1925, all but two states had established a juvenile court).

[4] Ross, *supra* note 2, at 1039.

[5] Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9–31 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter YOUTH ON TRIAL].

[6] Gallegos v. Colorado, 370 U.S. 49 (1962) (holding that the confession obtained from a fourteen-year-old boy, who had been held for five days without seeing his parents, a lawyer, or any other adult friend, was obtained in violation of due process); Haley v. Ohio, 332 U.S. 596 (1948) (holding that a murder confession by a fifteen-year-old boy after five hours of interrogation, starting at midnight, by police officers working in relays without advising him of his rights, and without the advice of friends, family or counsel, should have been excluded as involuntary in violation of due process). In *Gallegos*, the Court observed that an adolescent "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had." *Gallegos*, 370 U.S. at 54. The Court also explained, "Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them." *Haley*, 332 U.S. at 601.

[7] 383 U.S. 541 (1966).

[8] *Id.* at 561–62 ("[A]n opportunity for a hearing which may be informal, must be given the child prior to entry of a waiver order. . . . [T]he hearing must measure up to the essentials of due process and fair treatment.").

[9] *Id.* at 550 (recounting that the juvenile defendant in *Kent* was originally sentenced to thirty to ninety years in prison).

Kent ushered in a period of profound change for the juvenile justice system.[10] One year after *Kent*, the Court decided *In re Gault*,[11] a landmark decision setting forth the Court's broadest statement at that time about the need to protect children's constitutional rights. Eschewing labels of civil versus criminal and rejecting the elevation of form over process, the Court was unequivocal in its view that courts which possess the power to strip children of their liberty, however benevolently intentioned, must operate within the mandates of the Due Process clause of the Fourteenth Amendment.[12] *Gault* was quickly followed by decisions requiring the state to prove delinquency charges against a juvenile on proof beyond a reasonable doubt[13] and extending the protections of the double jeopardy clause to juveniles.[14] Although the Court declined to extend the right to jury trial to juveniles in *McKeiver v. Pennsylvania*,[15] a case decided in 1971, the inexorable march toward a more constitutional juvenile court system was underway.[16] Throughout the next few years, every state amended its juvenile court act to ensure full compliance with the Court's constitutional mandates.[17]

This constitutionalization of the juvenile court was the dominant story in juvenile justice until the late 1980s and early 1990s, when increases in violent juvenile crime caused by the lethal combination of crack cocaine and guns[18] spread throughout the country.[19] The prominence

---

[10] Ross, *supra* note 2, at 1039 ("Beginning in 1966, the Supreme Court attempted to define a balance between the promise of the rehabilitative ideal, which appeared to demand and justify judicial discretion, and the claim for sufficient procedural protections under the Constitution to ensure fundamental fairness.").

[11] 387 U.S. 1 (1967).

[12] *Id*. at 27–29.

[13] In re Winship, 397 U.S. 358, 368 (1970).

[14] Breed v. Jones, 421 U.S. 519, 541 (1975).

[15] 403 U.S. 528, 545 (1971).

[16] Ross, *supra* note 2, at 1040–41.

> The juvenile courts that have resulted in most states are hybrids that reflect the series of compromises underlying their unique structure. They exist in a twilight, neither wholly bound by the constitutional norms of criminal procedure nor convincingly 'civil' and rehabilitative as envisioned by their founders. The post-Gault juvenile court is characterized by unresolved conflicts between the urge to allow judicial discretion where it serves the purposes of rehabilitation and demands for procedural protections; between the rehabilitative goal and societal demands for retribution; and between idealistic hopes and realistic disappointments.

Id.

[17] *See, e.g.*, The Juvenile Act, 42 PA CONST. STAT. §§ 6301–6365 (2008), *available at* http://www.pajuvdefenders.org/file/Juvenile_Act_2008.pdf.

[18] ALFRED BLUMSTEIN, YOUTH, GUNS, AND VIOLENT CRIME 39, *available at* http://futureofchildren.org/futureofchildren/publications/docs/12_02_03.pdf.

> The increase in violence in the United States during the late 1980s and early 1990s was due primarily to an increase in violent acts committed by people under age 20. Similarly, dramatic declines in homicide and robbery in recent years are attributable primarily to a decline in youth violence.
>
> The increase in youth homicide was predominantly due to a significant increase in the use of handguns, which converted ordinary teenage fights and other violent encounters into homicides.

accorded to images and stories about violent juvenile offenders sparked a new wave of juvenile justice "reform," one aimed at limiting the jurisdiction of juvenile court and expanding the jurisdiction of the adult criminal justice system over young offenders. Convinced that the country was headed toward a generation of increasingly violent teens,[20] legislators quickly enacted laws that sought to ensure that youth charged with the most serious offenses would be prosecuted as adults.[21] As yet another period of transformation swept over the juvenile court, concerns for due process and the constitutional rights of juvenile offenders were almost completely eclipsed by concerns for public safety, incapacitation and retribution—the latter being core attributes of the adult criminal justice system.[22] Whatever lingering fealty to principles of rehabilitation and treatment the juvenile court retained was now reserved for an increasingly dwindling number of juveniles charged with crimes.[23] At the same time, youthful offenders in the criminal justice

> Several other interrelated factors also fueled the rise in youth violence, including the rise of illegal drug markets, particularly for crack cocaine, the recruitment of youth into those markets, and an increase in gun carrying among young people.

Id.

[19] *Id.*

[20] John Dilulio is largely credited with creating the "super-predator" myth. Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html?pagewanted=all&src=pm.

> Based on all that we have witnessed, researched and heard from people who are close to the action, . . . here is what we believe: America is now home to thickening ranks of juvenile 'super-predators' – radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders.

Dilulio subsequently retracted this 'belief.' *Id*. *See also* WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 27 (1996); Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, N.Y.U. L. REV. 159 (2000) (arguing that rejections to the infancy defense are unfounded and unsupported by empirical data).

[21] YOUTH ON TRIAL, *supra* note 5, at 13–14; *see also* PATRICIA TORBET ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME xi (1996), *available at* https://www.ncjrs.gov/pdffiles/statresp.pdf (reporting on the five major changes in the way that serious and violent juvenile offenders are being handled in the criminal justice system).

[22] Graham v Florida, 130 S. Ct. 2011, 2028–30 (2010).

[23] *See* Paul Holland & Wallace J. Mlyniec, *Whatever Happened To The Right To Treatment?: The Modern Quest For A Historical Promise*, 68 TEMP. L. REV. 1791, 1794 (1995).

> While some of the most egregious abuses described in the pleadings and opinions of the 1970s have abated, many training schools remain ill-equipped to provide children living in them with the education, behavior modification, counseling, substance abuse treatment, and the mental and physical health care they need. The laws of most states still promise such care. In recent years, however, a wave of legislation increasing the severity with which children who break the law are treated has compromised that promise. Legislatures have introduced punishment into juvenile codes, authorized mandatory minimum commitments in the juvenile justice system, and expanded the possibilities for prosecuting children in criminal courts. Some juvenile courts now have the power to impose a criminal sentence as part of a juvenile disposition, with the criminal sentence stayed—either temporarily or permanently—depending upon the youth's performance during the course of the juvenile disposition.

Id.

system bore the full brunt of adult punishment, receiving not only lengthy term of years sentences, but sentences of life without parole and even death.[24]

As a result of this adultification of juvenile offending in the public discourse and, increasingly, in state legislation, researchers associated with the MacArthur Foundation's Research Network on Adolescent Development and Juvenile Justice began conducting studies and compiling research that demonstrated striking and highly relevant differences between children and adolescents on the one hand, and adults on the other.[25] In particular, this research highlighted key traits among juveniles that illustrated their reduced blameworthiness for their criminal conduct.[26] Specifically, researchers focused on three distinct qualities of adolescence—immaturity of judgment, susceptibility to negative peer pressure, and a capacity for change and rehabilitation based on the inherently transient nature of adolescence.[27] In 2005, this research took center stage before the United States Supreme Court when it was asked to review the constitutionality of the juvenile death penalty in *Roper v. Simmons*.[28]

Importantly, the notion that certain offenders might be less blameworthy for their criminal conduct had already found traction with the Court in 2003, when the Court reconsidered its prior caselaw upholding the death penalty for mentally retarded offenders. In *Atkins v. Virginia*,[29] the Court overruled *Penry v. Lynaugh*[30] and held that mentally retarded defendants were categorically less blameworthy for their criminal conduct, including murder, than unimpaired adult offenders.[31] They were thus ineligible for the death penalty.[32] *Roper* followed *Atkins*' blueprint in persuading the Court that all juveniles under the age of eighteen were likewise categorically less blameworthy than adults, and could not receive the most serious sentence

---

[24] At the time of the Supreme Court's decision in *Roper v Simmons*, 543 U.S. 551 (2005), in which the Court struck the juvenile death penalty under the Eighth Amendment, seventy-two children were being held on death row in the United States. Also, nineteen states allowed executions of people under age eighteen: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, Utah, Texas and Virginia. *Roper*, 543 U.S. at 564.

[25] The MacArthur Foundation formally convened the Research Network in 1995. YOUTH ON TRIAL, *supra* note 5, at 3–4. The Foundation saw a need for "a scientific initiative that would address the implications of adolescent development for the construction of rational juvenile justice policy and law." *Id*. at 4. Led by distinguished Temple University Psychology Professor Laurence Steinberg, the Research Network brought a developmental lens to issues such as competence to stand trial, culpability, and the impact of different interventions. *Id*. at 4–5.

[26] *See generally* YOUTH ON TRIAL, *supra* note 5.

[27] *See generally* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants,* 27 L. & HUM. BEHAV. 333 (2003) (studying whether youths can pass the standard competency tests used in the criminal justice system); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 L. & HUM. BEHAV. 249 (1996) (analyzing research to explore what constitutes psychosocial maturity); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) [hereinafter Steinberg & Scott, *Less Guilty by Reason of Adolescence*] (explaining that the lack of psychosocial maturity in juveniles makes them especially vulnerable to coercion and outside influences); Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & HUM. BEHAV. 221 (1995) (explaining factors linked to teenage development that may affect decision making capabilities in adolescents).

[28] 543 U.S. 551 (2005).

[29] 536 U.S. 304 (2002).

[30] 492 U.S. 302 (1989).

[31] *Atkins*, 536 U.S. at 318–20.

[32] *Id*. at 321.

available—a sentence of death reserved for the worst of the worst criminals.[33] The Court embraced the developmental research articulating the differences between juvenile and adult offenders,[34] and reversed its prior 1989 decision in *Stanford v Kentucky*[35] which had left the death penalty in place for sixteen- and seventeen-year-old juvenile offenders.[36]

Five years later, the Court was presented with another opportunity to consider the constitutional relevance of juvenile developmental traits in *Graham v. Florida*,[37] where petitioner challenged the constitutionality of a life without parole sentence for a juvenile convicted of a non-homicide offense. The *Graham* court echoed *Roper* in its reliance on developmental research as well as emerging neuroscientific research to ban the imposition of this adult sentence on juvenile offenders as violative of the Eighth Amendment. The Court reiterated its findings about the developmental characteristics of youth cited in *Roper* in support of its decision.[38] One year later, in *J.D.B. v. North Carolina*,[39] the Court extended the application of this research beyond sentencing cases, citing it once again to hold that a juvenile's age is a relevant factor in the *Miranda* custody analysis.[40] In a span of just six years, the Court handed down three decisions

---

[33] *Roper*, 543 U.S. at 568–70.

[34] *Id*. at 569–70. *See generally* ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968) (describing and defining the notion of an identity crisis within the context of youth identities); Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992) (explaining the underlying factors behind reckless behavior in adolescents); Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra* note 27, at 1013 (exploring the research and theories behind concerns raised by the criminal culpability of children).

[35] Stanford v. Kentucky, 492 U.S. 361 (1989).

[36] *Id.* One year prior to *Stanford*, the Court handed down *Thompson v. Oklahoma*, 487 U.S. 815, 818–38 (1988), in which a plurality (including Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun) determined that "standards of decency" did not permit the execution of an individual who commits a crime while under the age of sixteen. *Id*. at 830.

[37] 130 S. Ct. 2011 (2010).

[38] *Id*. at 2026 ("No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles.").

[39] 131 S. Ct. 2394 (2011). In *J.D.B. v North Carolina*, the Court had the opportunity to review its concerns underlying its decision in *Miranda v Arizona*, 384 U.S. 436 (1966), in the context of the interrogation of a thirteen-year-old middle school student who was questioned in a closed-door school conference room by members of law enforcement and school administrators. *Id*. at 2399. In *J.D.B.*, the Supreme Court ruled that a child's age was relevant to determining when a suspect has been taken into custody and is consequently entitled to a *Miranda* warning. *Id.* at 2046. Writing for the majority, Justice Sotomayor stated, "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." *Id*. Justice Sotomayor effectively characterized youth as an unambiguous fact that "generates commonsense conclusions about behavior and perception," *id*. at 2403, and said that such "conclusions" are "self-evident to anyone who was once a child himself, including any police officer or judge." *Id*.

[40] *Id*. at 2406. *Miranda v Arizona*, 384 U.S. 436, 478–79 (1966), is the Supreme Court's seminal decision adopting a set of prophylactic warnings to be given to suspects prior to custodial interrogation by law enforcement. Specifically, the *Miranda* Court instructed that, prior to questioning, a suspect "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Id.* The *Miranda* warnings were adopted to protect the Fifth Amendment privilege against self-incrimination from the "inherently compelling pressures" of questioning by the police. *Id*. at 467. While any police interview has "coercive aspects to it," *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (*per curiam*), interviews which take place in police custody have a "heighte[ned] risk' that statements are not the product of the suspect's free choice." J.D.B. v North Carolina, 131 S. Ct 2394, 2401 (2011) (citing *Dickerson v. United States*, 530 U.S. 428, 435 (2000)). *Miranda* expressly recognized that custodial interrogation in an "unfamiliar . . . police dominated

that have re-shaped our thinking about the rights of juvenile offenders under the Constitution.[41]

At the same time, the Court's decisions in *Roper*, *Graham*, and *J.D.B.* are juxtaposed with a largely contrary legislative mood that has persisted in treating juvenile offenders like adults.[42] Just as legislatures nationwide were embracing the now debunked premise that juvenile crime was synonymous with adult crime and should be punished accordingly,[43] the Supreme Court placed its own constitutional breaks on this trend. In *Roper*, *Graham*, and *J.D.B.*, the Court made an abrupt turn, forcing a reexamination of juvenile and criminal justice policy and practices.

Through these cases, the Court has articulated a distinct view of children's legal status that heralds a novel Eighth Amendment jurisprudence for children. The Eighth Amendment has itself historically bent to "evolving standards of decency" as reflected in both objective indicia of those standards and the Court's own subjective analysis.[44] It now appears clear that the Court is taking cognizance of society's own evolving and disparate views of children and adults to break the Eighth Amendment into two strands: there will be different answers to the question of what constitutes cruel and unusual punishment depending on the age and characteristics of the litigant asking the question. We submit that this doctrinal development signals yet another period of reform in how we manage and treat juvenile offenders, suggesting a return to the early Twentieth Century view that kids are different—a view now fully backed by scientific research—while retaining the constitutional protection that children have had since *Kent* and *Gault*.

---

atmosphere," *Miranda*, 384 U.S. at 445, creates psychological pressures "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467.

[41] In its October 2011 Term, the Supreme Court granted certiorari in two cases challenging the imposition of a sentence of life without parole on juvenile offenders convicted of homicide offenses. Jackson v. Hobbs, 132 S. Ct. 548 (2011) (No. 10-9647); Miller v. Alabama, 132 S. Ct. 548 (2011) (No. 10-9646). Both Jackson and Miller were fourteen-years-old at the time of their offenses. Jackson v. Norris, No. 09-145, 2011 WL 478600, at *7 (Ark. 2011) (Danielson, J., dissenting); Miller v. State, 63 So. 3d 676, 682–83 (Ala. Crim. App. 2010). Jackson, whose case arose in Arkansas, was convicted of felony murder following the killing of a video store clerk by one of Jackson's co-defendants during the course of an attempted robbery. *Jackson v. State*, 359 Ark. 87, 89 (Ark. 2004). Miller, whose case arose in Alabama, was convicted of first degree murder. *Miller*, 63 So. 3d at 682. Both boys received mandatory life without parole sentences upon conviction under the applicable state laws, and the Alabama and Arkansas appellate courts rejected Petitioners' challenges to their sentences under the Eighth Amendment. *See* Miller v. State, 63 So. 3d 676 (Ala. Crim. App. 2010); Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. 2011). In their challenges before the U.S. Supreme Court, Petitioners argue that the sentences are prohibited under *Graham v. Florida*. *See* Petition for Writ of Certiorari, *Jackson v. Norris*, 2011 Ark. 49 (Ark. 2011) (No. 10-9647), 2011 WL 5322575; Petition for Writ of Certiorari, *Miller v. Alabama*, 63 So. 3d 676 (Ala. Crim. App. 2010) (No. 10-9646), 2011 WL 5322568. In addition to challenging the sentences outright, Petitioners also assert that their young age at the time of the offense, as well as the mandatory nature of the sentence, compounds the constitutional infirmity of the sentence. *See id.* The cases will be argued in March 2012; a decision is expected by the end of the Court's term. *Supreme Court of the United States October 2011 Term*, SUPREME COURT OF THE UNITED STATES (last updated Feb. 12, 2012), http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentViewer.aspx?Filename=MonthlyArgumentCalMar2012.html.

[42] *See* TORBET ET AL., *supra* note 21, at xv (demonstrating that state legislatures toughened laws "targeting serious and violent juvenile offenders").

[43] *See* BENNETT ET AL., *supra* note 20, at 27 (arguing that youth labeled "superpredators" are capable of equally heinous crimes as adults).

[44] Trop v. Dulles, 356 U.S. 86, 100–101 (1958).

I. DEVELOPMENTAL IMMATURITY: RESEARCH ON ADOLESCENT DEVELOPMENT

Researchers in the field of developmental psychology use the concept of "developmental immaturity" to describe an adolescent's still-developing neurological, cognitive, behavioral, emotional, and social capacity.[45] Emerging research in this area indicates that developmental immaturity consists of four components distinguishing adolescents from adults: independent functioning, decision-making, emotion regulation, and general cognitive processing.[46]

Research documenting the differences between juveniles and adults suggests that developmental immaturity may necessitate different treatment of adolescents under the Eighth Amendment. Using the construct of developmental immaturity as a guide, the discussion that follows reviews four areas of functioning most relevant to our understanding of the application of the Eighth Amendment to adolescent sentencing and conditions: decision-making, impulsivity, vulnerability, and the transitory nature of adolescence.

A. Decision-Making

Broadly, decision-making refers to the various cognitive, emotional, and social factors that influence how individuals process information and arrive at conclusions. Some core components involved in decision-making include the capacity to consider future consequences, weigh costs and benefits, and recognize risks.[47] As the evidence research below demonstrates, juveniles are less capable of making developmentally mature decisions than adults.

Recent research on adolescent decision-making suggests that youth are heavily influenced by social and emotional factors.[48] Adolescents are overwhelmingly more likely than adults to engage in risky behavior despite a similar ability to appraise risk. This can be explained, in part, through the psychosocial factors that are likely to influence decision-making, particularly among adolescents: 1) *responsibility*, which refers to acting independently and having a clear understanding of one's self; 2) *perspective*, which involves understanding multiple viewpoints of a situation; and 3) *temperance*, which is the ability to modulate impulsive thoughts and behaviors.[49] Empirical research on these factors reveals that psychosocial maturity continues to develop into early adulthood.[50] Thus, the evidence suggests that adolescents have pronounced deficits in areas that can influence how they act in high-risk or criminal contexts.

Adolescents' decision-making is also likely to be influenced by affective, or emotional, factors. Research has identified three different ways in which emotions can shape the decision-making process: 1) anticipated emotional outcomes; 2) anticipatory emotions; and 3) incidental

---

[45] *See generally* Kathleen Kemp et al., Characteristics of Developmental Immaturity: A Cross-Disciplinary Survey of Psychologists (Aug. 2010) (unpublished Ph.D. dissertation, Drexel University) (on file with Hagerty Library, Drexel University) (arguing that developmental immature contains the above characteristics).

[46] *Id.* at viii.

[47] *Id.* at 16.

[48] *See* Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211, 217 (2011) (explaining that "socioemotional stimuli" has an impact on adolescent decision-making).

[49] Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 744–745 (2000).

[50] *Id.* at 752–53.

emotions.[51] First, individuals may choose to perform particular behaviors in a given situation by evaluating the anticipated emotional outcomes of various behavioral options. Behaviors that seem likely to increase positive emotions tend to become more desirable, even if they carry with them a degree of risk.[52] Second, individuals' direct emotional responses to various behaviors also may guide their decision-making.[53] For instance, individuals tend to approach behavioral situations to which they have positive emotional responses and avoid those situations that evoke negative emotions. Finally, incidental, or background, emotions can influence judgments about the risk or desirability of certain behavioral options.[54] Because adolescence is a period of emotional instability, these emotional influences are particularly salient in adolescents' decision-making.[55]

Moreover, adolescent decision-making is characterized by sensation- and reward-seeking behavior,[56] which tends to intensify from childhood to adolescence before declining from late adolescence through the mid-20s.[57] This curvilinear trend in reward-seeking—peaking in adolescence before declining—may be partially based on adolescents' differing sensitivity to reward and punishment. Recent research suggests that while sensitivity to punishment develops in a linear manner (steadily increasing throughout adolescence), reward sensitivity follows a curvilinear, developmental path that parallels the reward-seeking pattern—peaking in adolescence before declining in adulthood.[58]

In sum, empirical research has revealed that juveniles have different decision-making *abilities* than adults in that they are less able to engage in psychosocially mature evaluations of situations and consequences of their decisions, and that they simultaneously have an increased sensitivity to the affective and reward components of behavior. This research suggests that, as a group, juveniles are less responsible and, therefore, may be less culpable for their decisions than adults. Although each juvenile develops at his or her own rate, and may respond uniquely to different contexts, these differences in decision-making processes broadly distinguish the functioning of adolescents, as a class, from that of adults.

B. Impulsivity

Impulsivity has been defined as "a predisposition toward rapid, unplanned reactions to internal or external stimuli without regard to the negative consequences of these reactions to the impulsive individuals or others."[59] As mentioned above, one psychosocial factor likely to influence behavior is *temperance*, or the ability to regulate one's behavior and evaluate a situation

---

[51] *See* Albert & Steinberg, *supra* note 48, at 216-17 (defining anticipated emotional outcomes, anticipatory emotions, and incidental emotions).

[52] *Id.* at 217.

[53] *Id.* at 217.

[54] *Id.*

[55] Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra* note 27, at 1013.

[56] Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 217 (2010).

[57] *Id.* at 219–20.

[58] Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCHOL. 193, 193 (2010).

[59] Matthew S. Stanford et al., *Fifty Years of the Barratt Impulsiveness Scale: An Update and Review*, 47 PERSONALITY & INDIVIDUAL DIFFERENCES 385, 385 (2009).

before one acts.[60] In other words, impulsivity can be thought of as actions in the absence of formal decision-making. Because "impulsivity" describes behaviors with minimal or complete lack of forethought, it merits consideration in discussions of culpability.

Adolescents' tendencies to act impulsively are well documented in the psychological literature. Recent research demonstrates that impulsivity declines steadily throughout adolescence and early adulthood, with appreciable declines evident into the mid-twenties.[61] Greater levels of impulsivity during adolescence may be based on adolescents' weak future orientation and disinclination to consider or anticipate the consequences of decisions.[62] The tendency to choose small immediate rewards over larger delayed rewards declines steadily throughout adolescence.[63] Research also demonstrates significant age differences in planning ahead (e.g., adolescents are more likely to think that planning ahead is a "waste of time"); time perspective (e.g., adolescents are more likely to report that they "would rather be happy today than take their chances on what might happen in the future"); and anticipation of future consequences (e.g., adolescents are more likely to report that they "don't think it's necessary to think about every little possibility before making a decision").[64] This focus on immediate benefits contributes to the high rates of impulsivity among adolescents that distinguishes adolescent and adult culpability.

C. Vulnerability

Immaturity in independent functioning, decision-making, and emotional regulation can make adolescents particularly susceptible to risky decision-making, peer influence and adult coercion, and greater sensitivity to invasions of privacy. Consequently, in many legal contexts, adolescents are recognized as a vulnerable population.[65]

Adolescent vulnerability is well-documented in developmental research. First, research suggests that adolescents demonstrate lower levels of independent functioning, as manifested in their poor self-reliance and weak self-concept.[66] Poor self-reliance is evidenced in adolescents' difficulty demonstrating independence from peers and authority figures and their concomitant need for social validation. Weak self-concept can be seen in adolescents' difficulty recognizing personal strengths and weaknesses and developing individual values.[67] This murky sense of self can heighten adolescents' vulnerability through their reliance on others (either peers or adults) to

---

[60] Cauffman & Steinberg, *supra* note 49, at 745.

[61] Steinberg, *supra* note 56, at 220–21.

[62] Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD. DEV. 28, 29–30 (2009).

[63] *Id.* at 28, 36.

[64] *Id.* at 34–35.

[65] *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (abolishing life without parole for juveniles convicted of non-homicide offenses); Roper v. Simmons, 543 U.S. 551, 575 (2005) (abolishing the death penalty for juvenile offenders); Richard E. Redding, *Children's Competence to Provide Informed Consent for Mental Health Treatment*, 50 WASH. & LEE L. REV. 695, 697 (1993) (noting the traditional view that children cannot consent to treatment); Naomi E. Sevin Goldstein et al., *Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, 10 ASSESSMENT 359, 359 (2003) (discussing juveniles' *Miranda* comprehension deficits and vulnerability during interrogations).

[66] Kemp et al., *supra* note 45, at 16.

[67] *Id.* at 16.

guide their decision-making and behavior.

This compromised independent functioning can make adolescents particularly vulnerable to peer pressure and compliance with authority. According to Steinberg and Scott, "Peer influence affects adolescent judgment both directly and indirectly. In some contexts, adolescents make choices in response to direct peer pressure to act in certain ways. More indirectly, adolescents' desire for peer approval—and fear of rejection—affect their choices, even without direct coercion."[68] Early research on direct peer pressure suggests that adolescents' tendency to choose an antisocial activity suggested by their peers over a prosocial activity of their own choosing peaks in early- to mid-adolescence and declines slowly into adulthood.[69] Adolescents are far more likely to take risks in the presence of peers, including instances without direct pressure or coercion. For example, in one study, adolescents took twice as many risks on a driving task when peers were present than when they were alone, running yellow lights at the risk of being hit by an unseen car.[70]

Also, youth tend to yield to the demands of authority figures,[71] complying with adults based on a blanket acceptance of their authority, rather than as a result of the youths' reasoning about an adult's request.[72] Thus, adolescents' decision-making skills can be further compromised when confronted with a demand or request by an authority figure.

In addition to cognitive characteristics that differentiate adolescents' functioning from that of adults, developmental immaturity is characterized by differences in the ability to regulate emotions. Adolescents tend to demonstrate difficulties recognizing and expressing feelings, managing their emotions, and coping with undesirable feelings.[73] This places adolescents at a disadvantage in high stress situations, and consistent or chronic exposure to stressful stimuli can, in turn, reduce adolescents' opportunities to develop successful emotional regulation abilities.[74] Factors such as childhood maltreatment,[75] maternal depression,[76] exposure to violence,[77] and economic deprivation[78] are associated with poor emotion regulation (i.e., emotion "dysregulation") in children and adolescents. Empirical evidence also has shown that adolescents with poor emotion regulation often demonstrate both internalizing (e.g., depression and anxiety)

---

[68] Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra* note 27, at 1012.

[69] Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEV. PSYCHOL. 608, 615 (1979).

[70] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCHOL. 625, 629–30 (2005).

[71] Lila Ghent Braine et al., *Conflicts with Authority: Children's Feelings, Actions, and Justifications*, 27 DEV. PSYCHOL. 829, 834 (1991).

[72] *Id.* at 835.

[73] Kemp et al., *supra* note 45, at 28.

[74] Liliana J. Lengua, *The Contribution of Emotionality and Self-Regulation to the Understanding of Children's Response to Multiple Risk*, 73 CHILD DEV. 144, 156 (2002).

[75] Angeline Maughan & Dante Cicchetti, *Impact of Child Maltreatment and Interadult Violence on Children's Emotion Regulation Abilities and Socioemotional Adjustment*, 73 CHILD DEV. 1525, 1534 (2002).

[76] Angeline Maughan et al., *Early-occurring Maternal Depression and Maternal Negativity in Predicting Young Children's Emotion Regulation and Socioemotional Difficulties*, 35 J. ABNORMAL CHILD PSYCHOL. 685, 695 (2007).

[77] Maughan & Cicchetti, *supra* note 75, at 1534–35.

[78] *Id.* at 1540.

and externalizing (e.g., aggressive behaviors) symptoms,[79] and rates of these symptoms and associated mental health diagnoses are elevated among youth involved in the justice system.[80]

Compared with adults, juveniles are particularly vulnerable to the influence and manipulation of others. Youths' underdeveloped sense of personal identity and independence, coupled with their compromised decision-making abilities, place them at-risk for susceptibility to direct and indirect coercion by peers and authority figures. Furthermore, juveniles have trouble regulating their emotions and have a heightened sensitivity to invasions of privacy—particularly when they have experienced economic or social disadvantages. Together, these findings suggest that juveniles, as a class, have unique needs for protection and guidance that are greater than and different from the needs of adults.

D. Transitory Nature of Adolescence

Adolescence is inherently transitory; this period ultimately ends as do the deficits that are uniquely associated with developmental immaturity. As researchers Scott and Steinberg have explained, "The period is transitional because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships. . . . Even the word 'adolescence' has origins that connote its transitional nature: it derives from the Latin verb *adolescere*, to grow into adulthood."[81]

As much of the research outlined above reveals, different components of developmental immaturity either peak in adolescence and then decline into early adulthood (e.g., reward-seeking), or steadily decline throughout childhood and adolescence (e.g., impulsivity).[82] In sum, as youth grow, so do their self-management skills and ability for long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward.[83] Thus, many of the factors associated with antisocial, risky, or criminal behavior lose their intensity as individuals become more developmentally mature.

There is also empirical evidence directly relating the transitory nature of adolescence to delinquent and criminal behavior. The distinction between individuals who offend only during adolescence and those who persist in offending into adulthood is well established in the psychological literature.[84] One researcher estimated that "chronic" juvenile offenders (i.e., those with five or more arrests) account for only about six percent of the juvenile offender population.[85] A more recent study followed over one thousand serious male adolescent offenders (i.e., those who had committed felony offenses with the exception of less serious property crimes and misdemeanor weapons or sexual assault offenses) over the course of three years and revealed that

---

[79] Jungmeen Kim & Dante Cicchetti, *Longitudinal Pathways Linking Child Maltreatment, Emotion Regulation, Peer Relations, and Psychopathology*, 51 J. CHILD PSYCHOL. & PSYCHIATRY 706, 712–13 (2010).

[80] *See* Naomi E. Sevin Goldstein et al., *Mental Health Disorders: The Neglected Risk Factor in Juvenile Delinquency*, *in* JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT AND INTERVENTION 85, 85 (Kirk Heilbrun, Naomi E. Sevin Goldstein, & Richard E. Redding eds., 2005).

[81] ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 31 (2008).

[82] See, e.g., Steinberg, *supra* note 56, at 220–21.

[83] Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra* note 27, at 1011.

[84] Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993).

[85] Peter W. Greenwood, *Responding to Juvenile Crime: Lessons Learned*, 6 FUTURE OF CHILD. 75, 77–78 (1996).

only 8.7% of participants were found to be "persisters" in that their offending remained constant throughout the thirty-six-month period.[86] The vast majority of youth who engage in delinquent acts desist, and "the typical delinquent youth does not grow up to become an adult criminal."[87] In other words, not only are youth developmentally capable of change, research also demonstrates that, when given a chance, even youth with histories of violent crime can and do become productive and law abiding citizens, without any intervention.

Although the mere process of physiological and psychological growth will rehabilitate most adolescents, more than fifteen years of research on interventions for juvenile offenders has yielded rich data on the effectiveness of programs to reduce recidivism and cut costs, underscoring rehabilitation as a realistic goal for the overwhelming majority of juvenile offenders, including violent and repeat offenders. Examples of programs shown to be effective with violent and aggressive youth include Functional Family Therapy (FFT), Multidimensional Therapeutic Foster Care (MTFC), and Multi-Systemic Therapy (MST).[88] All three have been shown to reduce recidivism rates significantly, even for serious violent offenders.[89] Thus, many juvenile offenders have the potential to achieve rehabilitation and become productive citizens.

E. Neurological Differences Between Youth and Adults

Recent research using advances in neuro-imaging has revealed that many of the components of developmental immaturity, reviewed above, have a neurological basis. First, brain-imaging research has revealed that the brain's frontal lobes are structurally immature into late adolescence, making them one of the last parts of the brain to fully develop.[90] Because the frontal lobes are primarily responsible for executive functions, their structural immaturity during much of adolescence is partially responsible for youths' deficits in response inhibition, planning ahead, and weighing risks and rewards.[91] Not only is this area of the brain underdeveloped in adolescence, research has shown that this area is less *active* in adolescents than it is in adults.[92]

---

[86] Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. PSYCHOL. 453, 462 (2010).

[87] Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra* note 27, at 1015.

[88] *See* PETER W. GREENWOOD, CHANGING LIVES: DELINQUENCY PREVENTION AS CRIME-CONTROL POLICY 70 (2006).

[89] *See* Charles M. Borduin et al., *Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence*, 63 J. CONSULTING & CLINICAL PSYCHOL. 569, 573 (1995) (describing the effectiveness of MST in reducing recidivism rates even for serious offenders with histories of repeat felonies); J. Mark Eddy et al., *The Prevention of Violent Behavior by Chronic and Serious Male Juvenile Offenders: A 2-Year Follow-up of a Randomized Clinical Trial*, 12 J. EMOTIONAL & BEHAV. DISORDERS 2, 2–7 (2004) (describing reduced recidivism rates for violent and chronically offending youth who participated in MTFC); W. Jeff Hinton et al., *Juvenile Justice: A System Divided*, 18 CRIM. JUST. POL'Y REV. 466, 475 (2007) (describing FFT's success with drug-abusing youth, violent youth, and serious juvenile offenders); Carol M. Schaeffer & Charles M. Borduin, *Long-Term Follow-Up to a Randomized Clinical Trial of Multisystemic Therapy With Serious and Violent Juvenile Offenders*, 73 J. CONSULTING & CLINICAL PSYCHOL. 445, 449–452 (2005) (finding that the benefits of MST often extend into adulthood).

[90] *See* 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, 197 (1999); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS NAT'L ACAD. SCI. 8174, 8174 (2004).

[91] Steinberg, *supra* note 56, at 217.

[92] K. Rubia et al., *Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with*

And, as adolescents move into early adulthood, increasing amounts of brain activity shift to the frontal lobes.[93] Researchers understand these patterns to be linked to the steady decline of impulsivity throughout adolescence and into adulthood.[94] That is, decreased levels of impulsivity seem to coincide with increased levels of frontal lobe maturity.

Second, the limbic system changes during puberty and is particularly active in adolescent brains.[95] The limbic system is generally regarded as the socio-emotional center of the brain, and, therefore, its changes and activity level during this time are particularly relevant to the discussion of adolescent decision-making.[96] Far from acting in isolation, adolescents' underdeveloped frontal lobes and highly active and changing limbic systems interact. Therefore, while adolescents are still maturing, the frontal lobes are less able to exert control over behavior and emotions, making adolescents even more vulnerable to social and emotional cues in decision-making.[97]

Finally, the dopaminergic system, the system involved in the transmission of the chemical dopamine which plays an important role in processing rewards, is restructured during adolescence.[98] The dopaminergic system's connections to the limbic system and frontal lobes increase during mid- and late-adolescence and then decline.[99] These changes may lead to the increase in reward-seeking behavior and heightened responsiveness to rewards observed among adolescents.

Youths' developmental immaturity leads them to function differently than adults in independent functioning, decision-making, emotion regulation, and general cognitive processing. These differences have been observed in behavioral studies as well as studies documenting the neurological changes that take place during adolescence and early adulthood. Adolescents' resulting deficits in certain areas, such as decision-making and impulsivity, along with their heightened vulnerability and the inherently transitory nature of adolescence, suggest that they should be treated differently under the Eighth Amendment.

II. GRAHAM V. FLORIDA AND ROPER V. SIMMONS: THE UNITED STATES SUPREME COURT EMBEDS ITS EIGHTH AMENDMENT ANALYSIS OF JUVENILE SENTENCES IN RESEARCH

On May 17, 2010, in *Graham v. Florida*,[100] the United States Supreme Court ruled that sentences of life without the possibility of parole imposed on juveniles convicted of non-homicide offenses violate the Cruel and Unusual Punishment clause of the Eighth Amendment.[101] In an opinion written by Justice Kennedy, the Court held that such a severe and irrevocable punishment

fMRI, 24 NEUROSCIENCE & BIOBEHAV. REVS. 13, 18 (2000).

93 *Id.*

94 Steinberg, *supra* note 56, at 217.

95 Rubia, *supra* note 92, at 18.

96 Albert & Steinberg, *supra* note 48, at 217.

97 *Id.* at 219.

98 *See* Steinberg, *supra* note 56, at 217.

99 *Id.*

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

101 *Id*. at 2034.

was not appropriate for a less culpable juvenile offender.[102] In banning the sentence, Justice Kennedy underscored that case law, developmental research, and neuroscience all recognize that children are different from adults—they are less culpable for their actions and at the same time have a greater capacity to change and mature.[103] Justice Kennedy's opinion was rooted in the Court's earlier analysis in *Roper v. Simmons*,[104] which had held the death penalty unconstitutional as applied to juveniles. The *Graham* Court echoed the reasoning in *Roper* that three essential characteristics distinguish youth from adults for culpability purposes: youth lack maturity and responsibility; they are vulnerable and susceptible to peer pressure; and their characters are unformed.[105] Justice Kennedy reasoned:

> No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults.[106]

The majority made clear in *Graham* and *Roper* that the constitutionality of a particular punishment for juveniles (i.e., whether it is cruel and unusual) is directly tied to prevailing research on adolescent development, and that juvenile status is central to the constitutional analysis.

A. A New Look at Juvenile Sentencing

Together, *Graham* and *Roper* provide the framework for a novel, developmentally driven Eighth Amendment jurisprudence that should force a more rigorous examination of permissible sentencing options for juvenile offenders in the criminal justice system.[107] In *Graham*, the Court

---

[102] *Id*. at 2027–28.

[103] *Id*. at 2026.

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

[105] *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569–70).

[106] *Id*. (citing *Roper*, 543 U.S. at 570) (internal citations omitted).

[107] These decisions should also be read against the backdrop of a series of Supreme Court decisions over the last several decades in which the Court has repeatedly accorded children and youth distinct treatment under the Constitution. While the Court's consideration of juvenile status is particularly pronounced in cases involving children in the juvenile and criminal justice systems, the characteristics of youth have also led to a specialized jurisprudence under the First and Fourth Amendments, as well as the due process clauses of the Fifth and Fourteenth Amendments. *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2404 (2011) (determining that age of juvenile is relevant to a *Miranda v. Arizona* custody analysis under the Fourth Amendment). In civil cases, as well, the Supreme Court has frequently expressed its view that children are different from adults, and has tailored its constitutional analysis accordingly. Reasoning that "during the formative years of childhood and adolescence, minors often lack . . . experience, perspective, and judgment," Bellotti v. Baird, 443 U.S. 622, 635 (1979), the Court has upheld greater state restrictions on minors' exercise of reproductive choice. *Id. See also* Hodgson v. Minnesota, 497 U.S. 417, 444 (1990); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990). The Court has also held that different obscenity standards apply to children than to adults under the First Amendment in *Ginsburg v. New York*, 390 U.S. 629, 637 (1968), and has concluded that the state has a compelling interest in protecting children from images that are "harmful to minors." Denver Area Educ.

held that an indefinite sentence was inherently at odds with the transient nature of adolescence. Justice Kennedy explained:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her some realistic opportunity to obtain release before the end of that term.[108]

In deciding challenges to sentencing practices under the Eighth Amendment, the Court applies a two-part test: it considers objective indicia—including both state legislation and sentencing practices, and it then brings its own judgment to bear on the issue.[109] The question of objective indicia depends, by definition, on external factors. Conversely, the notion that the Court must use its own judgment to determine whether a sentence conforms to the "'evolving standards of decency that mark the progress of a maturing society'"[110] has created the opening for the Court's unique treatment of juvenile offenders.[111] We therefore focus on this second prong of the

---

Telecomms. Consortium, Inc. v. Fed. Commc'ns Comm'n, 518 U.S. 727, 743 (1996). Similarly, the Court has upheld a state's right to restrict when a minor can work, guided by the premise that "[t]he state's authority over children's activities is broader than over the actions of adults." Prince v. Massachusetts, 321 U.S. 158, 168 (1944). The Court's school prayer cases similarly take into account the unique vulnerabilities of youth, and their particular susceptibility to coercion. *See* Lee v. Weisman, 505 U.S. 577, 593 (1992) (observing that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."). *See also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12, 317 (2000).

[108] *See* Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

[109] *See Graham*, 130 S. Ct. at 2023 ("The analysis begins with objective indicia of national consensus."); *id.* at 2026 (quoting *Roper*, 543 U.S. at 575) ("In accordance with the constitutional design, 'the task of interpreting the Eighth Amendment remains our responsibility."). The Court has long recognized the independent role it plays in evaluating sentences under the Eighth Amendment. In *Coker v Georgia*, 433 U.S. 584, 597 (1977), where the Court held that a sentence of death was impermissible in cases of rape, the Court specifically acknowledged that the objective evidence, while important, did not "wholly determine" the issue, "for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *See also* Enmund v. Florida, 458 U.S. 782, 797 (1982).

> Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

Id.

[110] *Graham*, 130 S. Ct. at 2021 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

[111] In *Roper*, Justice Kennedy specifically noted the Court's "rule" that "'the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" 543 U.S. at 563 (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)) (internal quotations omitted). Justice Kennedy wrote, "Last, to the extent *Stanford [v. Kentucky]* was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, it suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions." *Roper*, 543 U.S. at 574 (internal citations omitted). *See also Graham*, 130 S. Ct. at 2036 (quoting *Roper*, 543 U.S. at 575) (internal citations omitted) ("Community consensus, while 'entitled to great weight,' is not itself determinative of whether a punishment is cruel and unusual. . . . In accordance with the constitutional design, 'the task of interpreting the Eighth

analysis to examine the Court's exercise of its own judgment, in light of evolving standards, regarding the constitutionality of a particular punishment.

The Court's perception of proportionality is central to its judgment about whether a certain punishment is cruel and unusual.[112] The Court in *Graham* explained that cases addressing the proportionality of sentences "fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case."[113] Under the first classification, the Court considers the circumstances of the case in its determination whether the sentence is "unconstitutionally excessive."[114] Justice Kennedy directs courts to first compare "the gravity of the offense and the severity of the sentence."[115] In the rare case where this "'threshold comparison . . . leads to an inference of gross disproportionality,' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions."[116] If this comparative analysis "'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual."[117]

The second, "categorical" classification of cases assesses the proportionality of a sentence as compared to the nature of the offense or the "*characteristics of the offender*."[118] In "categorical" cases, the Court may deem a particular sentence unconstitutional for an entire class

---

Amendment remains our responsibility."). In *Thompson v. Oklahoma*, the Court, in exercising its independent judgment to determine whether the imposition of the death penalty on juvenile offenders under the age of sixteen was unconstitutional under the Eighth Amendment, wrote, "[W]e first ask whether the juvenile's culpability should be measured by the same standard as that of an adult, and then consider whether the application of the death penalty to this class of offenders 'measurably contributes' to the social purposes that are served by the death penalty." 487 U.S. 815, 833 (1988).

[112] As the *Graham* court wrote, "Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for the crime should be graduated and proportioned to [the] offense." 130 S. Ct. at 2021 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

[113] *Graham*, 130 S. Ct. at 2021.

[114] *Id*. In *Solem v. Helm*, 463 U.S. 277 (1983), the Court invalidated under the Eighth Amendment a life without parole sentence imposed on an adult offender following his conviction for a seventh non-violent felony, passing a bad check. This followed the Court's upholding a life *with* parole sentence imposed on an adult offender following the defendant's third conviction for a non-violent felony in *Rummel v. Estelle*, 445 U.S. 263 (1980) (defendant was convicted of obtaining money under false pretenses). The Court distinguished *Solem*, noting that the defendant's sentence was "far more severe than the life sentence we considered in *Rummel v. Estelle*," since it gave the defendant no chance for parole. *Solem*, 463 U.S. at 297.

After *Solem*, adult defendants have had difficulty sustaining a challenge to the proportionality of a term of years sentence under the Eighth Amendment. In *Harmelin v. Michigan*, a closely divided Court upheld a life without parole sentence for possession of a large quality of cocaine. The controlling opinion wrote that the Eighth Amendment contains a "narrow proportionality principle" that "does not require strict proportionality between crime and sentence," but instead "forbids only extreme sentences that are 'grossly disproportionate' to the crime." 501 U.S. 957, 997, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment). *See also* Ewing v. California, 538 U.S. 11 (2003) (upholding sentence of twenty-five years to life for the theft of a few golf clubs under California's "Three Strikes Law"); Lockyer v. Andrade, 538 U.S. 63 (2003) (upholding sentence of life in prison for two convictions of petty theft under California's "Three Strikes Law.").

[115] *Graham*, 130 S. Ct. at 2022.

[116] *Id*. (quoting *Harmelin*, 501 U.S. at 1005).

[117] *Id*. (quoting *Harmelin*, 501 U.S. at 1005).

[118] *Id*. (emphasis added).

of offenders, due to shared characteristics that make them categorically less culpable than other offenders who commit similar or identical crimes.[119] As part of this proportionality analysis, the Court has tied the legitimacy of any particular sentence to a determination of whether the sentence serves the acceptable purposes, or "legitimate goals," of punishment—retribution, deterrence, incapacitation, and rehabilitation.[120] As demonstrated in *Graham*, a sentence disproportionate to the penological objectives it claims to serve will doom many adult sentences imposed on juveniles. It is this second strand of the Court's proportionality analysis, focused on the characteristics of the offender, which invites a distinctive application of the Eighth Amendment to juveniles.

As the *Graham* Court explained, "a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense" and therefore unconstitutional.[121] Relying on developmental and scientific research, the *Graham* Court held that none of the four accepted rationales for the imposition of criminal sanctions was served by imposing a life without parole sentence on a juvenile.[122] The Court first rejected both retribution and deterrence as proffered rationales for the sentence, echoing its earlier holding in *Roper* that emphasized the reduced blameworthiness of juvenile offenders.[123] It then rejected incapacitation as a justification for life without parole sentences, further underscoring the folly of making irrevocable judgments about youth:

> To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. . . . Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity.[124]

The goal of rehabilitation was likewise rejected, as the Court found the punishment simply at odds with the rehabilitative ideal.[125] The Court stated, "By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society"—a judgment inconsistent with a juvenile non-homicide offender's "capacity for change

---

[119] *Id*. For other instances of the Court applying this sort of categorical approach, *see, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (applying the approach for defendants convicted of rape where the crime was not intended to and did not result in the victim's death); Roper v. Simmons, 543 U.S. 551 (2005) (applying the approach to ban the death penalty for defendants who committed crimes before turning 18); Atkins v. Virginia, 536 U.S. 304 (2002) (applying the approach to ban the death penalty for defendants who are mentally retarded).

[120] *Graham*, 130 S. Ct. at 2028.

[121] *Id*.

[122] *Id*. at 2030.

[123] *Id*. at 2028–29.

[124] *Id*. at 2029.

[125] *Id*. at 2029–30.

and limited moral culpability."[126]

In prohibiting the execution of juvenile offenders in *Roper* five years earlier, the Court expressly relied on many of the medical, psychological and sociological studies cited above, as well as common experience. This evidence showed, and the majority held, that children under age eighteen are "'categorically less culpable'" and more amenable to rehabilitation than adults who commit similar crimes.[127] The Court reasoned that because juveniles have reduced culpability, they cannot be subjected to the harshest penalty reserved for the most depraved adult offenders; punishment for juveniles must be moderated to some degree to reflect their lesser blameworthiness.[128]

As in *Graham*, the *Roper* Court stressed the incongruity of imposing a final and irrevocable penalty on an adolescent who had the capacity to change and grow. "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[129] The Court underscored that the State was not permitted to extinguish the juvenile's "potential to attain a mature understanding of his own humanity."[130] It noted that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive" a sentence of life without parole for a non-homicide crime. [131] The *Graham* Court then expounded on this point:

> These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.' A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'"[132]

Like *Roper*, the Court adopted a categorical ban on life without parole sentences for juveniles convicted of non-homicide offenses. Without a categorical rule, the Court noted that an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course . . . ."[133] Were the Court to allow a case-by-case assessment of culpability, courts might not "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change."[134] Juvenile nonhomicide offenders are "not sufficiently culpable to merit that punishment."[135] The categorical rule "gives all juvenile nonhomicide offenders a chance to

---

126 *Id*. at 2030.

127 Roper v. Simmons, 543 U.S. 551, 567 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

128 *Id*. at 571.

129 *Id*. at 570.

130 *Id*. at 574.

131 *Id*. at 572–73.

132 *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 573, 569; Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)).

133 *Roper*, 543 U.S. at 573.

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

demonstrate maturity and reform."[136]

Justice Kennedy's opinion in *Graham* is an expansive statement about constitutional limits on the wholesale extension of adult sentencing policies and practices to juvenile offenders. Given the sharp differences between juvenile and adult offenders, rote application of adult sentences will fail to pass constitutional muster. While the Court engaged in a routine Eighth Amendment analysis—considering objective indicia of national consensus but then applying its own independent judgment—it ultimately crafted a developmentally driven approach that broadened its prior case law that "death is different"[137] under the Eighth Amendment to include a further guiding principle that "kids are different."

Additionally, the Court's reluctance to impose adult sentences on juveniles derives from its growing belief that punishment for youth must be individualized. The Court made clear that the juvenile must be given an opportunity to demonstrate the capacity to change—not only at the time of sentencing, but even over the course of time as he or she matures. The Court explained:

> Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity.[138]

Interestingly, this idea of individualized assessment is already embedded in the Court's capital jurisprudence. The opportunity to show mitigation prior to the imposition of a sentence of death is central to the Court's case law assessing the constitutionality of various death penalty schemes.[139]

This well-developed jurisprudence on mitigation in death penalty cases has been understood to apply because of the extraordinary nature of the punishment. The Court has recognized that unique protections apply because "death is a punishment different from all other sanctions in kind rather than degree."[140] *Graham*, however, eliminated the "death is different" adult sentencing distinction—at least when juveniles are involved. This consequence of *Graham* was expressly noted by the dissent.[141] Under *Graham* and *Roper*, sentences that would be deemed

---

[135] *Id*. at 2030.

[136] *Id*. at 2032.

[137] Ford v. Wainwright, 477 U.S. 399, 411 (1986).

[138] *Graham*, 130 S. Ct. at 2029.

[139] The Court has held that, in adult death penalty cases, "the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence." Sumner v. Shuman, 483 U.S. 66, 85 (1987). The sentencer must consider all mitigating evidence and allow for individualized sentencing that hypothetically takes into account the full context in which the crime occurred. *See generally* Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345 (1998) (arguing that the present capital sentencing scheme is paradoxical insofar as it is both arbitrary and mandatory).

[140] Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976).

[141] *Graham*, 130 S. Ct. at 2046 (Thomas, J., dissenting) ("Today's decision eviscerates that distinction [between capital and noncapital sentencing]. 'Death is different' no longer.").

appropriate for adult offenders would be unconstitutional for a child who committed like offenses. In the wake of these cases, courts should similarly look to mitigating factors that may justify a less harsh sentence whenever a child receives a sentence designed for an adult.[142] To ensure that sentences for juveniles are not unconstitutionally disproportionate, courts should evaluate mitigating factors including the juvenile's age, level of involvement in the offense, external or coercive pressures surrounding the criminal conduct, and other relevant characteristics. These factors should be considered in light of the juvenile's diminished capacity, increased impulsivity, and capacity for change or rehabilitation.

As Justice Frankfurter wrote over fifty years ago in *May v. Anderson*,[143] "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children."[144] Today, adult sentencing practices that take no account of youth—indeed permit no consideration of youth—are unconstitutionally disproportionate as applied to juveniles. This approach builds upon recent Supreme Court jurisprudence that recognizes that juveniles who commit crimes—even serious or violent crimes—can outgrow this behavior and become responsible adults, and therefore courts cannot make judgments about their irredeemability at the outset.[145]

B. A New Look at Juvenile Conditions of Confinement

With the shift in focus from the constitutional procedural protections of the 1960s and 1970s to the harsher penalties of the 1980s and 1990s, the constitutional analysis of juvenile conditions cases also changed. The 1970s saw a spate of cases striking down juvenile conditions as unconstitutional, resting on the same premise as the juvenile court itself—juveniles deserved treatment and rehabilitation.[146] The cases also recognized juveniles' unique vulnerability and the resulting trauma that harsh conditions could impose on them.[147] More recently, however, courts have rarely struck down conditions as interfering with the right to treatment.[148]

The reasoning of both *Roper* and *Graham*, however, may now create new opportunities in juvenile conditions cases. The underlying recognition that youth are more vulnerable, more susceptible to outside pressures, and more capable of change than their adult counterparts suggests that courts may be more protective of incarcerated juveniles. Harmful or deplorable

---

[142] Because youth are categorically less culpable than adults, courts should always treat their youth as a mitigating factor that may justify a lesser sentence. *See, e.g.*, *Roper*, 543 U.S. at 553 (finding that youths' irresponsible conduct is not as morally reprehensible as that of an adult and that juveniles' own vulnerability and comparative lack of control over their immediate surroundings mean that they have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment). Other mitigating factors that courts typically consider may also be affected by a youth's age, immaturity, and development.

[143] 345 U.S. 528, 536 (1953).

[144] *Id*. at 536 (Frankfurter, J., concurring).

[145] Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

[146] For a thoughtful discussion of the history of juvenile conditions cases and a more detailed consideration of how the courts protected a right to treatment, see Holland & Mlyniec, *supra* note 23.

[147] *See, e.g.*, Lollis v. N.Y. State Dep't of Soc. Servs., 322 F. Supp. 473, 482 (1970) (relying heavily on expert testimony that isolation would be uniquely damaging to an adolescent); *see also* Nelson v. Heyne, 491 F.2d 352, 357 (7th Cir. 1974).

[148] Holland & Mlyniec, *supra* note 23, at 1801–1812.

conditions, which have been found constitutional in cases involving adults, may therefore be unconstitutional when imposed on juveniles—both because the impact of the harm is more significant for juveniles, and because the expectation of treatment and rehabilitation is higher.

1. Problems Facing Confined Youth

Whether in juvenile or adult institutions, confined juveniles face harsh conditions. One report, for example, identified maltreatment of youth in juvenile facilities in thirty-nine states, plus the District of Columbia since 1970, as evidenced by federal investigations, class-action lawsuits or authoritative reports.[149] Juveniles in these states faced excessive use of isolation or restraints, systemic violence, and physical and sexual abuse.[150] Moreover, such maltreatment has been documented in twenty-two states since 2000.[151] These numbers may reflect significant under-reporting because youth have little access to counsel, members of the media, or other ways of having their stories heard—and because youth may often fear retaliation if they report abuse.

In adult facilities, conditions may be even more dangerous for youth. Youth confined with adults are more likely to be physically or sexually abused, and to commit suicide than those in juvenile facilities.[152] In fact, suicide is the number one cause of death for juveniles in adult jails.[153] Attempts by facilities' staff to protect youth—generally by placing youth in isolation or administrative segregation, can cause even further damage:

> An individual held in solitary confinement for 23 hours a day typically begins to lose his sense of reality, and becomes paranoid, anxious and despondent, all of which can exacerbate existing mental health conditions. Given that many of the youth being held in adult jails have experienced some serious trauma in their lives or have undiagnosed or untreated mental illness, they are particularly vulnerable.[154]

Moreover, even under similar conditions, and without increased risk of abuse, youth are uniquely vulnerable to the trauma of incarceration in poor conditions. "From a developmental perspective, . . . juveniles need to be with family members and are perhaps more vulnerable to emotional harm from incarceration than adults."[155] The harsh, and even potentially fatal, conditions for youth in

---

[149] RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 5–7 (2011).

[150] *Id*.

[151] *Id*. at 5.

[152] Emily Ray, Comment, *Waiver, Certification and Transfer of Juveniles to Adult Court: Limiting Juvenile Transfers in Texas*, 13 SCHOLAR 317, 320 (2010).

[153] MARGARET NOONAN, U.S. DEP'T OF JUSTICE, MORTALITY IN LOCAL JAILS, 2000-2007 9 (2010).

[154] Terry F. Hickey & Camilla Roberson, *Pretrial Detention of Youth Prosecuted as Adults*, 44-DEC MD. B.J. 44, 48 (2011).

[155] Margaret Beyer, *Juvenile Detention to "Protect" Children from Neglect*, 3 D.C. L. REV. 373, 373 (1995); *see also* N.G. v. Connecticut, 382 F.3d 225 (2d Cir. 2004) (noting that a strip search would be uniquely damaging to a juvenile, but upholding some of the strip searches at issue). In her dissenting opinion, then Judge Sotomayor underscored the harm from such a search that would be "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive." *Id*. at 239 (Sotomayor, J., dissenting in part) (quoting Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983)).

both juvenile and adult facilities, and their unique vulnerability to harm, highlight the importance of the constitutional standard.

2. The Adult Standard: A Tough Bar

As applied to adult prisoners, the Supreme Court's Eighth Amendment jurisprudence calls for significant deference to prison officials. In early cases, the Court applied the Eighth Amendment to address sentencing rather than prison conditions. In 1910, for example, the Supreme Court held a sentence unconstitutional as applied to a defendant who had falsified documents regarding a small sum of money.[156] The defendant had been sentenced to a minimum of twelve years of prison with hard labor, followed by voting disqualification, ongoing surveillance and restrictions on his residency after his release.,[157] The Court, observing that the sentence was highly disproportionate to the crime, concluded that it violated the Eighth Amendment.[158] Since then, the Court has established that certain sentences violate the Eighth Amendment—the denial of citizenship,[159] the imposition of the death penalty without proper procedural protections,[160] or, as discussed above, the imposition of the death penalty[161] or life without parole to certain categories of less culpable individuals.[162]

In 1976, petitioners in *Estelle v. Gamble* asked the Court to consider whether the Eighth Amendment protects prisoners from harsh prison conditions—in that case the provision of inadequate medical care—even when the initial sentence imposed was constitutional.[163] The Court held that the Eighth Amendment did govern such behavior, concluding that "deliberate indifference to serious medical needs" by prison staff could constitute the "'unnecessary wanton infliction of pain' proscribed by the Eighth Amendment."[164] To hold to the contrary, the Court observed, would allow "the infliction of . . . unnecessary suffering," and would be "inconsistent with contemporary standards of decency . . . ."[165] Ultimately, however, the Court held that the Eighth Amendment had not been violated when prison doctors prescribed painkillers and rest for the prisoner's back pain, but did not seek an x-ray or take other steps to identify and treat his pain. Although an x-ray might have revealed a more accurate diagnosis, the failure to provide one was, at most, cause for a malpractice claim and did not constitute cruel and unusual punishment.[166] In *Estelle*, as a result, the Court established the possibility of Eighth Amendment claims for pure conditions cases, but also set a high bar for what would constitute such a violation. The Court further solidified this approach in *Rhodes v. Chapman*, holding that the double celling of prisoners did not violate the Constitution.[167] The Court concluded that, at most, double celling "inflicts

156 Weems v. United States, 217 U.S. 349, 382 (1910).

157 *Id*. *at* 364.

158 *Id*. at 382.

159 Trop v. Dulles, 356 U.S. 86, 103 (1958) (plurality opinion).

160 Furman v. Georgia, 408 U.S. 238, 283 (1972) (Brennan, J., concurring).

161 Roper v. Simmons, 543 U.S. 551, 575 (2005).

162 Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

163 Estelle v. Gamble, 429 U.S. 97 (1976).

164 *Id*. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 182–83 (1976) (plurality opinion)).

165 *Id*. at 103.

166 *Id*. at 106.

167 Rhodes v. Chapman, 452 U.S. 337, 347–48 (1981).

pain," but concluded that it did not constitute the "*unnecessary or wanton*" infliction of pain that violates the Eighth Amendment.[168] "[T]he Constitution," the Court stated, "does not mandate comfortable prisons."[169] Thus, the prisoners' additional complaints regarding limited job and educational opportunities did not rise to the level of constitutional violations.[170] Scholars have noted that *Rhodes* initiated a line of cases curtailing the use of the Eighth Amendment to challenge prison conditions.[171] Indeed the *Rhodes* Court explicitly asserted that "[t]o the extent that such conditions are restrictive or even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[172]

In subsequent cases, the Court further defined the standard for Eighth Amendment conditions cases—and established a uniquely high burden on prisoners seeking relief through the Eighth Amendment. In particular, the Court held that the Constitution was violated in conditions cases only if the prison official had a sufficiently culpable state of mind.[173] In 1994, in *Farmer v. Brennan*, the Court clarified the precise level of intent prison officials must demonstrate to warrant liability under the Eighth Amendment. *Farmer* involved a male-to-female transsexual prisoner's complaint that the prison had failed to protect her from assault by the male inmates with whom she was placed.[174] The Court clarified that "deliberate indifference" to the prisoner's need depended on both an objective and subjective component.[175] The harm to the prisoner must be objectively sufficiently serious, denying a prisoner "the minimal civilized measure of life's necessities . . . ."[176] It must also be based on the subjective state of mind of the prison official, which, *Farmer* clarified, must be more than mere negligence, though it could fall short of intent to harm.[177] The Court concluded that liability under the Eighth Amendment would apply when a prison official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[178] Under this standard, "[i]nmates have the difficult task of exposing the prison official's state of mind."[179] Although not a complete bar to relief, this standard has imposed significant obstacles to establishing liability in adult prison conditions cases.

---

168 *Id*. at 348 (emphasis added).

169 *Id*. at 349.

170 *Id*. at 348.

171 Holland & Mlyniec, *supra* note 23, at 1806.

172 *Rhodes*, 452 U.S. at 347.

173 Wilson v. Seiter, 501 U.S. 294, 297 (1991).

174 Farmer v. Brennan, 511 U.S. 825, 829 (1994).

175 *Id*. at 838.

176 *Id*. at 834 (quoting *Rhodes*, 452 U.S. at 347).

177 *Id*. at 835.

178 *Id*. at 837.

179 Christine Rebman, Comment, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 602 (1999). *See also* Higgins v. Corr. Med. Servs. of Ill., 178 F.3d 508 (7th Cir. 1999) (finding that medical staff did not "consciously disregard" the risk of harm when they failed to treat Plaintiff's dislocated shoulder—even though he had informed them that the shoulder had "popped out of joint" and a nurse testified that it was hanging "forward and lower than right"). The fact that the Plaintiff had not seemed to be in great pain convinced the court that the medical staff did not consciously disregard the risk.

> As currently understood, the Fourteenth and Eighth Amendments require only freedom from unnecessary restraint and minimally humane conditions of confinement. Food, clothing, shelter and medical care must only be adequate enough to avoid harm. In the main, treatment or training is directed at little more than preserving the peace within the training school.
>
> Moreover, to the extent that a violation of even these minimal standards occurs, federal judges are precluded from issuing sweeping corrective injunctions by the "hands off" doctrine. As early as 1974, the United States Supreme Court began to show great deference to prison administrators and to tell trial court judges to refrain from interfering with the day-to-day operations of prisons.[180]

The trajectory of adult Eighth Amendment cases, as a result, has established a high bar for prisoners alleging unconstitutional conditions.

In excessive use of force cases, deference to safety concerns makes the subjective standard even more stringent; the Court will not hold the behavior unconstitutional unless officials act "maliciously and sadistically."[181] In adult isolation cases, courts have also applied an extraordinarily high bar, holding, for example, that the mere infliction of "psychological pain" does not rise to the level of constitutional harm.[182] The recent Supreme Court case of *Brown v. Plata*, however, provides some hope for prisoners seeking redress through the Eighth Amendment. Affirming the lower court's order that prisoners be released to prevent overcrowding, *Plata* held that the overcrowding was so severe that it led to the violation of prisoners' rights to medical and mental health care and safe conditions.[183] Because overcrowding, rather than an individual correctional staff person's action, led to the conditions at issue, the Court did not touch upon the subjective inquiry. Instead, the Court simply concluded that "[j]ust as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."[184] While this reasoning may be limited to overcrowding cases, it does open the door to arguments that focus on the effect on prisoners, rather than the intent of the officials. Because the Court not only addressed medical care, but also made significant mention of the highly troubling situation in which mentally ill inmates were held in administrative segregation for months at a time, *Plata* also opens the door to applying this analysis to a broader array of conditions.[185]

3. A New Juvenile Standard

The adult standard, although evolving, is still not appropriate for juveniles. As one scholar explained,

---

[180] Holland & Mlyniec, *supra* note 23, at 1807.

[181] *Substantive Rights Retained by Prisoners*, 91 GEO. L.J. 887, 910 (2003).

[182] *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146, 1263–64 (N.D. Cal. 1995) (recognizing, however, that isolation can violate the Eighth Amendment when it inflicts serious mental illness).

[183] Brown v. Plata, 131 S. Ct. 1910, 1924–26 (2011).

[184] *Id*. at 1928.

[185] *Id*. at 1933; *see also* Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives & Sanity*, N.Y TIMES, Mar. 10, 2012, http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html?pagewanted=all.

> The constitutional protection available to a child in detention should be more extensive than the protection against punishment applicable to an adult pre-trial detainee in a criminal case. After all, the state's purpose is different. The end result of a juvenile delinquency case is not simply punishment but, based upon state statute, some form of rehabilitation combined with protection of the public. Furthermore, on a practical level children differ from adults. Their needs are different. The injuries that can befall them in detention are both different and greater than adults. Public officials cannot rely upon the maturity of a child as they can an adult. [186]

The recognition in *Roper* and *Graham* that juveniles are categorically less mature in their decision-making capacity, more vulnerable to outside pressures including peer pressure, and have personalities that are more transitory and less fixed,[187] underscores that courts cannot simply apply the adult constitutional standard to juveniles. And, indeed, the Court has long explicitly recognized the need for tailoring the Constitutional analysis to youth, observing that "[l]egal theories and their phrasing in other cases readily lead to fallacious reasoning i[f] uncritically transferred to determination of a state's duty toward children."[188]

The Supreme Court has never squarely established the constitutional standard for juvenile conditions cases.[189] The Court has clarified, however, that a less deferential Fourteenth Amendment standard applies in situations in which punishment is not the primary goal.[190] For example, individuals confined for treatment purposes, such as those involuntarily confined to mental health facilities, "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[191] Similarly, for adults in pre-trial detention not yet convicted of a crime, challenged conditions are unconstitutional under the Fourteenth Amendment if they amount to punishment.[192]

Applying a similar analysis, the majority of jurisdictions have therefore applied the Fourteenth rather than the Eighth Amendment to juvenile conditions cases.[193] This approach is further supported by the numerous Supreme Court cases applying a Fourteenth Amendment standard generally to challenged practices and policies of the juvenile justice system, in recognition of the system's uniquely rehabilitative and non-criminal nature.[194]

---

[186] Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675, 702 (1998).

[187] Graham v. Florida, 130 S. Ct. 2011, 2038 (2010) (quoting Roper v. Simmons, 543 U.S. 551, 569–70).

[188] May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

[189] *See* Ingraham v. Wright, 430 U.S. 651, 669 (1977) ("We find . . . an inadequate basis for wrenching the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in the public schools.").

[190] *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 314–25 (holding as erroneous instructions given to the jury that the proper standard of liability was that of the Eighth Amendment in a case regarding the substantive rights of involuntarily committed mentally retarded persons).

[191] *Id*. at 322.

[192] *See* Bell v. Wolfish, 441 U.S. 520 (1979).

[193] *See, e.g.*, A.J. v. Kierst, 56 F.3d 849, 854 (8th Cir. 1995); Gary H. v. Hegstrom, 831 F.2d 1430, 1431–32 (9th Cir. 1987); H.C. *ex rel*. Hewett v. Jarrard, 786 F.2d 1080, 1084–85 (11th Cir. 1986); Alexander S. v. Boyd, 876 F. Supp. 773, 795-96 (D. S.C. 1995).

[194] For example, in *In re Gault*, the Court applied the Fourteenth, rather than the Sixth Amendment to hold that juveniles have a right to counsel. 387 U.S. 1, 36 (1967) (quoting Powell v. State of Alabama, 287 U.S. 45, 69 (1953))

Under both the Fourteenth and the Eighth Amendment analysis, however, there remains a significant lack of clarity on precisely how juvenile conditions should be assessed. For example, the Ninth Circuit has established that "the more protective fourteenth amendment standard" applies to juvenile justice cases, at least when the goal of the jurisdiction's juvenile justice system is rehabilitative rather than punitive,[195] but the court has not spelled out the contours of that right. Without significant discussion as to the standards applied, the Seventh Circuit held in *Nelson v. Heyne* that juveniles' Eighth Amendment right to be free from cruel and unusual punishment was violated when they were beaten and involuntarily administered drugs, but that their Fourteenth Amendment due process right was violated by the failure to provide them with treatment.[196] In contrast, the First Circuit has held that juveniles have no right to rehabilitation, but that their conditions of confinement must be analyzed under the Fourteenth Amendment.[197]

Whether under a Fourteenth or Eighth Amendment analysis, the standard for conditions cases applied to juveniles should be appropriately tailored to their developmental status, and not simply a reiteration of adult standards. To incorporate developmental status into the existing structure for conditions claims, a juvenile deliberate indifference standard would require courts to consider: (1) the seriousness of the harm in light of juvenile vulnerability; and (2) the intent of the correctional official in light of the heightened duty to protect juveniles.

Assessing the Seriousness of the Harm in Juvenile Cases

In establishing a constitutional violation under the Eighth or Fourteenth Amendment, courts must initially consider the seriousness of the harm.[198] In light of adolescent vulnerability, conditions may rise to this level in the juvenile context even when they do not for adults. As described in Section I of this Article, and recognized by the Supreme Court in both *Roper* and *Graham*, juveniles are both more vulnerable to pressures and more malleable than adults. This means that the effects of a harmful condition may take a unique toll on a juvenile, even when the same punishment is constitutional for an adult. For example, such practices as isolation or strip-searching may inflict heightened trauma on youth. Similarly, the failure to provide education and rehabilitation may be particularly harmful to a juvenile by depriving him or her of the opportunity for age-appropriate growth and development. Indeed, even before *Roper*, courts recognized that certain institutional conditions might be unconstitutional as applied to a juvenile even when they fall within constitutional bounds for an adult.[199]

(observing that juveniles have more need than adults for "the guiding hand of counsel"). In *McKeiver v. Pennsylvania*, the Court underscored that the Fourteenth rather than the Sixth Amendment governed the functioning of juvenile court. 403 U.S. 528, 543 (1976) (holding that juveniles are not entitled to trial by jury). Failing to distinguish between juvenile and adult court, the Supreme Court explained, "chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." *Id*. at 550. In *Schall v. Martin*, the Supreme Court applied the Fourteenth Amendment to a challenge to juvenile pre-trial detention practices, emphasizing the importance of the State's "'*parens patriae* interest in preserving and promoting the welfare of the child'" 467 U.S. 253, 263 (1984) (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

[195] *Gary H*., 831 F.2d at 1432.

[196] Nelson v. Heyne, 491 F.2d 352, 357, 360 (7th Cir. 1974).

[197] Santana v. Collazo, 714 F.2d 1172, 1177, 1179 (1st Cir. 1983).

[198] Farmer v. Brennan, 511 U.S. 825, 878 (1994).

[199] A.M. *ex rel*. J.M.K. v. Luzerne Cnty. Juvenile Detention Ctr., 372 F.3d 572 (3d Cir. 2004) (remanding to the lower court). The Juvenile Law Center represented A.M. in this matter.

Since *Roper* and *Graham*, this argument carries even more weight. Recently, the United States District Court for New Jersey explicitly recognized that juvenile status may impact the protections owed to incarcerated individuals, and that isolation of youth may be unconstitutional even if it would be constitutional for adults.[200] This recognition of the unique harm to youth is consistent with developmental research on adolescent vulnerability, specifically in the areas of emotion regulation and independent functioning.[201] Harsh penalties imposed on juveniles are likely to evoke a range of negative emotions (e.g., anger, fear, distress) that adolescents cannot effectively regulate, thereby leading to psychological distress and potentially psychopathology.[202] Further, this type of treatment could undermine adolescents' developing sense of self by evoking a sense of powerlessness and challenging their bodily integrity. For youth who have experienced trauma, the vulnerability is even further magnified.[203] Thus, the appropriate "seriousness of the harm" test for juveniles must account for the unique juvenile vulnerability to harm in confinement.

Assessing Official Intent in Juvenile Cases

As described above, in adult cases the Court generally requires proof of the prison official's subjective intent to hold a prison condition unconstitutional: a finding that the prison official knew of or consciously disregarded an excessive risk of harm. Even under this standard, liability should attach for juveniles when it would not for adults; it is not unreasonable to expect that juvenile corrections staff understand—or are at least aware of—juveniles' unique vulnerability to harm and that they act accordingly.[204] Ultimately, however, the standard itself is inapt for juvenile offenders—an objective standard that imposes liability when the prison official disregards an obvious risk of harm better responds to adolescent developmental immaturity. [205] This heightened standard, whether the objective test or the heightened subjective test, is supported by the Supreme Court's acknowledgement in *Graham* and *Roper* that the Constitution must protect youth from harm even when it would not do so for adults.[206]

This approach is further supported by the literature on developmental immaturity. Adolescents' decision-making deficits, impulsivity, and overall vulnerability make them dependent on adults for rational decisions regarding their welfare. More specifically, adolescents'

---

[200] Troy D. v. Mickens, No. 10-2092, 2011 WL 3793920, at *12 (D.N.J. Aug. 25, 2011). The court applied the same theory to the right to counsel at a parole hearing, noting that it may be needed to protect juveniles from harsh conditions. *Id*. at *8. The Juvenile Law Center currently represents Troy D., along with co-counsel Dechert LLP.

[201] *See, e.g*., Cauffman & Steinberg, *supra* note 49, at 745.

[202] Elizabeth Thompson Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, 128 PSYCHOL. BULL. 539, 542, 554 (2002).

[203] For a broad discussion of the role of trauma in juvenile vulnerability, see SANDRA BLOOM, CREATING SANCTUARY: TOWARDS THE EVOLUTION OF SANE SOCIETIES 25–33 (1997).

[204] While neither the *Troy D*. nor *A.M*. cases mentioned above, *supra* note 199–200, explicitly address this point, the issues they raise about treating juveniles differently from adults support such an interpretation.

[205] This test has been applied outside the prison context in Fourteenth Amendment cases. *See, e.g*., Kennedy v. City of Ridgefield, 439 F.3d 1055, 1062 (9th Cir. 2006); Board v. Farnham, 394 F.3d 469, 478 (7th Cir. 2005); Christiansen v. City of Tulsa, 332 F.3d 1270, 1281 (10th Cir. 2003); *see also* Kaucher v. Cnty. of Bucks, 455 F.3d 418, 427–28 (3rd Cir. 2006) (recognizing that an objective deliberate indifference standard might apply under the Fourteenth Amendment).

[206] *See generally* Graham v. Florida, 130 S.Ct. 2011 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

limited independent functioning and weak self-concept suggests that they may be less able to identify risks to their development and to protect themselves.[207] A heightened standard would appropriately protect youth from the risk of treatment that could harm youth and interfere with their development into healthy adults. For youth in the juvenile rather than criminal justice system, the explicit purposes of treatment and rehabilitation further support the heightened standard. To hold staff liable only if they consciously disregard a risk undermines the requirement implicit in a rehabilitative system that staff proactively engage youth.

III. INTERNATIONAL LAW SUPPORTS DISTINCTIVE TREATMENT OF JUVENILE OFFENDERS

The United States Supreme Court has long recognized that international law informs the domestic law of the United States.[208] Specifically, the Supreme Court has consistently looked to international law and practice to interpret the broad language of the Eighth Amendment's cruel and unusual punishment clause. In 1958, the Court held that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[209] and went on to analyze the opinions of the "civilized nations of the world."[210] Since then, the Court has repeatedly found relevant to its Eighth Amendment analyses the laws, practices, and opinions of the world's countries, as well as the evolving attitudes of the global community as evidenced by international treaties and conventions.[211]

Recently, the impact of international law on the Court's opinions has been particularly evident in its death penalty and juvenile sentencing cases. In holding that the death penalty was unconstitutional for those with mental disabilities, the Court noted that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[212] Three years later, in *Roper v. Simmons*, the Court held the death penalty unconstitutional for juveniles. To support its holding, the Court cited to the United Nation's Convention on the Rights of the Child (which is ratified by every nation in the

---

[207] *See* Kemp et al., *supra* note 45.

[208] The Paquete Habana, 175 U.S. 677, 700 (1900) ("[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination").

[209] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[210] *Id*. at 102.

[211] *See, e.g*., Lawrence v. Texas, 539 U.S. 558, 576 (2003) ("[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."); Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002) ("within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."); Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988) ("[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982) ("the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) ("[i]t is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.").

[212] *Atkins*, 536 U.S. at 317 n.21.

world except the United States and Somalia), other "significant international covenants,"[213] and the practices of specific countries as evidence of "the overwhelming weight of international opinion against the juvenile death penalty."[214] In the 2010 case *Graham v. Florida*, the Supreme Court reiterated the importance of international practice when it used the fact that the United States was the only nation to maintain the practice of sentencing juvenile offenders to life in prison for non-homicide offences as support for declaring the practice unconstitutional.[215] In 2012, the Court will consider the constitutionality of imposing a life sentence without parole on juveniles in a murder case.[216] International law and practice overwhelmingly oppose this practice, which will prove instructive if the Court continues its recent trend of reliance on international opinion.

A. International Law and Juvenile Sentencing

International law provides further support for a new look at other juvenile sentencing issues. Regarding the sentencing of youth in general, the Committee on the Rights of the Child, the oversight body of the Convention on the Rights of the Child, advocates for the proportionality of any disposition "not only to the circumstances and the gravity of the offense," but also to "the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society."[217] The Committee also reemphasizes that the detention or imprisonment of juveniles should only be used as a means of last resort.[218] Many of the non-child-specific treaties also advocate for special protection of children in conflict with the law throughout the judicial process.[219]

Further, many of the international treaties that the Supreme Court has relied on in the past specifically prohibit the imposition of a sentence of life without parole on juveniles. In addition to reminding states of the child's need for "special safeguards and care including appropriate legal protection," the Convention on the Rights of the Child explicitly bans the imposition of imprisonment without possibility of release for offenses committed by those under eighteen.[220] The International Covenant on Civil and Political Rights (ICCPR), part of the International Bill of Rights,[221] recommends that governments consider age and desirability of

---

[213] Roper v. Simmons, 543 U.S. 551, 576 (2005).

[214] *Id*. at 578.

[215] Graham v. Florida, 130 S. Ct. 2011, 2034 (2011).

[216] *See* SUPREME COURT OF THE UNITED STATES, ORDERS IN PENDING CASES (Nov. 7, 2011), *available at* http://www.supremecourt.gov/orders/courtorders/110711zor.pdf (showing that Jackson v. Hobbs, 132 S. Ct. 548 (2011) (No. 10-9647), and Miller v. Alabama, 132 S. Ct. 548 (2011) (No. 10-9646), have been granted certiorari and will be heard by the United States Supreme Court). For a discussion of the facts of Miller and Jackson, see *supra* note 41.

[217] Comm. on the Rights of the Child, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, ¶ 71, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) [hereinafter CRC, *General Comment 10*].

[218] *Id*. at ¶ 70.

[219] *See, e.g*., International Covenant on Civil and Political Rights, art. 14, ¶ 4, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (specifying that procedures for juveniles should take account of their age and the desirability of promoting their rehabilitation).

[220] Convention on the Rights of the Child art. 37, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter Convention on the Rights of the Child].

[221] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www2.ohch.org/english/law/ (last visited Feb. 8, 2012).

rehabilitation when sentencing juveniles,[222] and grants special protection to minors on account of their age.[223] The Human Rights Committee, the body responsible for overseeing the implementation of the ICCPR, has stated in its observations of United States compliance with the treaty that "the committee is of the view that sentencing children to life sentence without parole is of itself not in compliance with article 24(1) [the right to a child's measures of protection] of the Covenant."[224] International practice is equally disapproving of the practice. The United States is the only nation in the world that currently imposes life without parole sentences on juveniles.[225] Even in countries where the laws allowing the practice remain on the books, these sentences are not imposed.[226]

The United States also has a legal obligation to enforce international treaties it has ratified that forbid harsh sentencing practices for youth. The Supremacy Clause of the United States Constitution declares that treaties are "the supreme Law of the Land,"[227] and by signing international treaties, all courts of the United States are bound to give effect to them.[228] Even if an international agreement is not self-executing and does not have the effect of law without necessary implementation,[229] the United States is still bound by international law to respect the "object and purpose"[230] of the treaty, pending implementation. Thus, the United States is required to respect the provisions of treaties it has signed, and their enforcement bodies' interpretations of the treaties, with respect to life without parole sentences for juveniles. The United States has ratified and must therefore honor the International Convention on Civil and Political Rights (ICCPR),[231] the Convention on the Elimination of all Forms of Racial Discrimination (CERD),[232]

---

[222] ICCPR, *supra* note 219, at art. 14.

[223] *Id*. at art. 24.

[224] Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, ¶ 34, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006).

[225] Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 985 (2008).

[226] *Id*. at 990.

[227] U.S. CONST., art. VI, cl. 2.

[228] Restatement (Third) of The Foreign Relations Law of the United States § 115(1)-(2) (1986).

[229] *Id*. at § 111(3).

[230] Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) (recognizing the VCLT as *jus cogens*, a fundamental norm from which no derogation is permitted); Restatement (Third) of The Foreign Relations Law of the United States § 102 (1986). The United States considers "many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties." *Vienna Convention on the Law of Treaties*, U.S. DEPARTMENT OF STATE, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Feb. 8, 2012).

[231] *See* ICCPR, *supra* note 219, at art. 14, ¶ 4 ("In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."); *Id*. at art. 24, ¶ 1 ("Every child shall have . . . the right to such measures of protection as are required by his status as a minor."). In signing the treaty, the United States made significant reservations to the International Covenant on Civil and Political Rights including "[t]hat the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eights and/or Fourteenth Amendments to the Constitution of the United States"; and "[t]he United States reserves the right, in exceptional circumstances, to treat juveniles as adults." UNITED STATES OF AMERICA'S RESERVATIONS TO THE ICCPR, THE INTERNATIONAL JUSTICE PROJECT, http://www.internationaljusticeproject.org/juvICCPR.cfm (last visited Feb. 25, 2012). The Human Rights Committee, the ICCPR's enforcement body, has stated that it views these reservations as

and the Convention Against Torture (CAT),[233] all of which support a prohibition against the use of harsh sentences for juveniles.

The treaties' oversight bodies issue periodic reports on the United States' compliance with the articles of the treaties. Like the Human Rights Committee, the Committee on the Elimination of All Forms of Racial Discrimination has stated that the persistence of the sentencing of juveniles to life without parole is incompatible with the United States' obligations under the CERD in light of the sentencing practice's disproportionate impact on youth of color.[234] The Committee Against Torture also stated that life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment."[235]

International law and practice support sentences for juveniles that are proportional and mindful of the child's need for special safeguards and care and explicitly prohibit the imposition of life without parole sentences for juveniles.

B. International Law and Juvenile Conditions

Just as the Supreme Court has turned to international law in its decisions on questions of sentencing, it can, and should, do so for questions of conditions of confinement. International law underscores the unique protections confined juveniles need under the law. When contemplating treatment or punishment, Article 37 of the Convention of the Rights of the Child requires that every child deprived of his or her liberty "be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age."[236] Moreover, international treaties and conventions make clear that children must be

---

"incompatible with the object and purpose of the Covenant." Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee: United States of America*, ¶ 279, U.N. Doc. CCPR/C/79/Add.50, (Oct. 3, 1995) [hereinafter CCPR Concluding Observations/Comments]. Notably, the United States also entered another reservation to the convention, which allowed the imposition of capital punishment "on any person . . . including such punishment for crimes committed by persons below eighteen years of age." ICCPR, *supra* note 219, at art. 6, ¶ 5. According to the Committee, this reservation also violated the object and purpose of the Covenant. CCPR Concluding Observations/Comments, at ¶ 281. The reservation was effectively voided by the Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), which held that imposing the death penalty upon juveniles under the age of eighteen violates the Eight Amendment.

[232] *See* International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(c), *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969) ("Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."); *Id*. at art. 5(a) ("States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in . . . [t]he right to equal treatment before the tribunals and all other organs administering justice.").

[233] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 165 U.N.T.S. 85 (entered into force June 26, 1987).

[234] Comm. On the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 21, U.N. Doc. CERD/C/USA/CO/b (Feb. 2008).

[235] Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture*: *United States of America*, ¶ 34, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

[236] Convention on the Rights of the Child, *supra* note 220, at art. 37.

treated differently than adults: the law specifically addresses children,[237] promotes the best interest of children,[238] and emphasizes the need to treat confined children differently from adults due to their age and future potential for rehabilitation and reintegration into society.[239] Notably, the United Nations Rules for Juveniles Deprived of their Liberty (JDLs), passed by resolution of the U.N. General Assembly in 1990, establish detailed "minimum standards"[240] for the protection of confined juveniles "with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society."[241] These standards provide a good conceptual framework through which to view the special requirements necessary for juveniles in detention. International law standards also provide insights into some of the specific conditions youth face in confinement.

International law establishes that youth should be separated from adults and should be housed in conditions that best meet their needs. Article 37 of the Convention on the Rights of the Child (CRC) explicitly requires that "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so," an obligation echoed throughout child-specific human rights instruments.[242] General Comment Number 10, issued by the Convention on the Rights of the Child's oversight body, the Committee on the Rights of the Child, further elaborated on the language of the Convention, stating that children who turn eighteen do not have to be immediately moved to an adult facility and should be allowed to remain in a children's facility if it serves the child's best interest.[243] Moreover, the JDLs provide a general guideline that reemphasizes the protection of children: "[t]he principle criterion for the separation of the different categories of juveniles . . . should be the provision of the best type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being."[244]

In contemplating the environment of the confined juvenile, international human rights conventions focus on the rehabilitative and developmental aims of detention. For example, the Committee on the Rights of the Child requires that children are provided with "a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement."[245] The Convention on the Rights of the Child reaffirms the child's right to privacy for children who are alleged or accused to have infringed the penal law.[246] The JDLs stress that

---

[237] This analysis focuses on: the CRC, *General Comment 10*, *supra* note 217, issued by the Committee on the Rights of the Child; the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs), G.A. Res. 45/113, Annex, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49/Annex (Dec. 14, 1990) [hereinafter JDLs]; and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/33 (Nov. 29, 1985) [hereinafter "The Beijing Rules"].

[238] *See, e.g.*, Convention on the Rights of the Child, *supra* note 220, at art. 3.

[239] *See, e.g.*, JDLs, *supra* note 237, at ¶ 3; CRC, *General Comment 10*, *supra* note 217, at ¶ 85.

[240] JDLs, *supra* note 237, at ¶ 3.

[241] *Id*.

[242] Convention on the Rights of the Child, *supra* note 220, at art. 37; *see also* JDLs, *supra* note 237, at ¶ 29 ("In all detention facilities juveniles should be separated from adults, unless they are members of the same family."); The Beijing Rules, *supra* note 237, at ¶ 26.3 ("Juveniles in institutions shall be kept separate from adults . . . ").

[243] CRC, *General Comment 10*, *supra* note 217, ¶ 86.

[244] JDLs, *supra* note 237, at ¶ 28.

[245] CRC, *General Comment 10*, *supra* note 217, at ¶ 89.

[246] Convention on the Rights of the Child, *supra* note 220, at art. 40(2)(vii).

the "possession of personal effects is a basic element of the right to privacy and [is] essential to the psychological well-being of the juvenile."[247]

International law also requires medical and mental health treatment for juveniles to support their reintegration into society. In addition to general provisions that guarantee access to adequate medical care for juveniles upon admission to facilities and throughout their stay,[248] the JDLs specify that juveniles must receive both preventative and remedial care, as well as the medical services required to "detect and . . . treat any physical or mental illness, substance abuse or other condition that may hinder the integration of the juvenile into society."[249]

The importance of family contact for confined juveniles is also explicitly recognized in international law. Article 37 establishes the child's "right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."[250] The Committee on the Rights of the Child specifies "[e]xceptional circumstances that may limit this contact [with the family] should be clearly described in the law and not be left to the discretion of the competent authorities."[251] The JDLs require that detention facilities for juveniles be decentralized and be an appropriate size to facilitate access and contact between the juveniles and their families, at least once a week, but not less than once a month, because communication is "an integral part of the right to fair and humane treatment and is essential to the preparation of juveniles for their return to society."[252]

The Committee on the Rights of the Child is very specific on the use of restraints or force for juveniles. Restraint or force may only be used when the child poses an imminent threat of injury to him or herself or others,[253] when all other means have been exhausted,[254] and under close and direct control of a medical and/or psychological professional.[255] Restraints or force may never be used as a means of punishment.[256] The Committee on the Rights of the Child specifies that corporal punishment, placement in a dark cell, closed or solitary confinement, or "any other punishment that may compromise the physical or mental health or well-being of the child concerned" are strictly forbidden under Article 37.[257]

One of the few standards specifically addressing safety issues for staff states that "[t]he carrying and use of weapons by personnel should be prohibited in any facility where juveniles are detained."[258] This area is less developed in child-specific international human rights instruments,

---

[247] JDLs, *supra* note 237, at ¶ 35.

[248] *See* Convention on the Rights of the Child, *supra* note 220, at art. 25 (recognizing the right of a child to "treatment of his or her physical or mental health"); CRC, *General Comment 10*, *supra* note 217, at ¶ 89 (providing that every child "shall receive adequate medical care throughout his/her stay in the facility . . .").

[249] JDLs, *supra* note 237, at ¶ 51.

[250] Convention on the Rights of the Child, *supra* note 220, at art. 37.

[251] CRC, *General Comment 10*, *supra* note 217, at ¶ 87.

[252] JDLs, *supra* note 237, at ¶¶ 58–60.

[253] CRC, *General Comment 10*, *supra* note 217, at ¶ 87; *see also* JDLs, *supra* note 237, at ¶¶ 65–67 (prohibiting all disciplinary measures that constitute "cruel, inhuman or degrading treatment . . . including corporal punishment").

[254] CRC, *General Comment 10*, *supra* note 217, at ¶ 89.

[255] *Id*.

[256] *Id*.

[257] *Id*.

[258] JDLs, *supra* note 237, at ¶ 65.

which tend to focus on the interests of the child, but an underlying theme seems to be that the best interests of the confined child carry particular weight. When many children are housed together, their interests should be balanced against the best interests of other youth.For example, children should be kept in a juvenile facility past the age of eighteen if such a decision is "not contrary to the best interests of the younger children in the facility."[259] Likewise, the use of restraint or force on a juvenile is only justified when the child poses an imminent threat to him or herself or others.[260] Consideration of the child's inherent dignity and the special needs of his or her age are always relevant.[261]

Human rights instruments place great importance on ensuring that institutional staff is aware of the special condition of juveniles. They require staff to know about relevant national and international legal standards related to the juvenile's confinement, including the causes of juvenile delinquency, adolescent development information, and strategies for dealing with children in conflict without having to resort to judicial proceedings.[262] The JDLs specify that personnel should attend "courses of in-service training, to be organized at suitable intervals throughout their career."[263] The Beijing Rules also emphasize that there is a "necessary professional competence" when "dealing with juvenile cases," which should be established and maintained.[264]

Human rights instruments extend beyond protecting children from harm; they also address the child's rehabilitative needs. Indeed, they recognize education for every child of compulsory school age as critical to the child's development and eventual return to society after release.[265] Education should be suited to the individual child's needs and abilities, and he or she should also be given vocational training in occupations that are likely to prepare him or her for future employment.[266] The JDLs go further by stating that education for children in detention should be integrated with the education system of the country so that reintegration is simpler after release.[267] The JDLs also specify that juveniles should be given the opportunity to perform remunerated labor.[268] Additionally, juveniles with learning difficulties have a right to a special education.[269] The instruments also specify that the juveniles have the right to a suitable amount of time for exercise and appropriate recreation.[270]

International human rights standards provide clear support for a unique Eighth Amendment juvenile standard in conditions of confinement cases. By highlighting the need for reintegration, rehabilitation, and the support of human dignity, and by articulating juveniles'

---

259 CRC, *General Comment 10*, *supra* note 217, at ¶ 86.

260 *Id*. at ¶ 89.

261 *See* Convention on the Rights of the Child, *supra* note 220, at art. 37 (stating that "[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.").

262 CRC, *General Comment 10*, *supra* note 217, at ¶ 97.

263 JDLs, *supra* note 237, at ¶ 85.

264 The Beijing Rules, *supra* note 237, at Rule 22.1.

265 JDLs, *supra* note 237, at ¶ 38; CRC, *General Comment 10*, *supra* note 217, at ¶ 89.

266 CRC, *General Comment 10*, *supra* note 217, at ¶ 89.

267 JDLs, *supra* note 237, at ¶ 38.

268 *Id*. at ¶ 45.

269 *Id*. at ¶ 38.

270 *Id*. at ¶ 47; CRC, *General Comment 10*, *supra* note 217, at ¶ 89.

unique needs as they relate to conditions of confinement, international law clarifies the need for a more protective Eighth Amendment jurisprudence for juveniles.

IV. CONCLUSION

Kids are different. As Justice Sotomayor wrote in *J.D.B v North Carolina*, a child's age "is a fact 'that generates commonsense conclusions about behavior and perception.'"[271] Noting the long history of legal distinctions between children and adults, Justice Sotomayor further observed: "Like this Court's own generalizations, the legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal."[272] How we sentence and punish children must yield to these differences. And while the Court has historically taken note of juvenile status in a broad array of civil and criminal contexts,[273] the Court's most recent decisions in *Roper*, *Graham*, and *J.D.B.* chart a course for a more pronounced doctrinal shift in our analysis of children's rights under the Constitution. The most severe sentences for children have been struck down, but the banning of these sentences raises larger questions about the constitutionality of any sentencing scheme that fails to take account of the commonsense differences between children and adults—differences confirmed by research. "The literature confirms what experience bears out."[274]

These differences also cannot be ignored when evaluating the conditions under which children are incarcerated. While the Constitution may tolerate the solitary confinement of adult inmates, for example, the isolation of children for weeks or months at a time recalls a Dickensian nightmare, which offends our evolving standard of decency and human dignity. Children's unique needs for educational services, physical and behavioral health services, and appropriate interactions with nurturing caregivers to ensure their healthy development raise special challenges—but also place special obligations on those responsible for their confinement. As recent Supreme Court case law has shown, children warrant unique protections under the Constitution. Both the sentences they receive, and the conditions under which they serve those sentences, must be tailored to their developmental status.

---

[271] J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 674 (Breyer, J., dissenting)).

[272] *Id*. at 2403–04.

[273] *See supra* note 107 and accompanying text.

[274] *J.D.B.*, 131 S. Ct. at 2403 n.5.