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Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents

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COMPETENCE, CULPABILITY, AND
PUNISHMENT:
IMPLICATIONS OF *ATKINS* FOR EXECUTING AND
SENTENCING ADOLESCENTS

*Barry C. Feld**

ABSTRACT

The Supreme Court has explored the issues of culpability, proportionality, and deserved punishment most fully in the context of capital punishment. In death penalty decisions addressing developmental impairments and culpability, the Court has considered the cases of defendants with mental retardation and older adolescents, and has created an anomalous inconsistency by reaching opposite conclusions about the deserved punishment for each group of defendants. Recently, in *Atkins v. Virginia*, the Court relied on both empirical and normative justifications to categorically prohibit states from executing defendants with mental retardation. *Atkins* reasoned that mentally retarded offenders lacked the reasoning, judgment, and impulse control necessary to equate their culpability with that of other death-eligible criminal defendants. This Article contends that the same psychological and developmental

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characteristics that render mentally retarded offenders less blameworthy than competent adult offenders also characterize the immaturity of judgment and reduced culpability of adolescents and should likewise prohibit their execution. Moreover, the diminished criminal responsibility of adolescents has broader implications for proportionality in sentencing young offenders. Because the generic culpability of adolescents differs from that of responsible adults, penal proportionality requires formal, categorical recognition of youthfulness as a mitigating factor in sentencing.

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INTRODUCTION

Proportionality between the seriousness of the harm, the culpability of the actor, and the severity of punishment constitutes the foundation of

the criminal sanction.¹ In its noncapital proportionality analyses, the Supreme Court has primarily emphasized the relationship between the seriousness of the offense or recidivism and the sentence imposed, rather than the culpability of the offender.² By contrast, the Court's death penalty jurisprudence has repeatedly emphasized that defendants must receive an individualized culpability assessment before a state may impose the ultimate penalty.³

The criminal law assumes that rational actors possess free will and choose to violate the law based on their own preferences and values. Because moral blameworthiness provides legitimacy to the criminal sanction, the criminal law must account for the quality of choices made by actors who deviate substantially from its model of personal autonomy. Some nominally responsible actors are not as blameworthy as other offenders, and the criminal law formally or informally mitigates

1. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 343 (1989) (Brennan, J., concurring in part, and dissenting in part) ("We gauge whether a punishment is disproportionate by comparing 'the gravity of the offense,' understood to include not only the injury caused, but also the defendant's moral culpability, with the 'harshness of the penalty.'"); *Weems v. United States*, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense."); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 800 (2003) ("Proportionality holds that fair criminal punishment is measured not only by the amount of harm caused or threatened by the actor, but also by his blameworthiness."); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 271 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[T]he criminal law needs to make sense as a language of moral desert, punishing only those who deserve condemnation, punishing the guilty only to the extent of their individual moral desert, and punishing the range of variously guilty offenders it apprehends in an order that reflects their relative blameworthiness.").

2. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 995-96 (1991) (rejecting proportionality analyses in non-death penalty cases and approving imposition of mandatory life without parole for drug offense); *Solem v. Helm*, 463 U.S. 277, 290-91 (1983) (focusing on three factors to assess disproportionality of penalty in noncapital cases: (1) severity of penalty in relation to gravity of offense, (2) comparison with sentences imposed for other offenses in same jurisdiction, and (3) comparison with sentence imposed for same crime in other jurisdictions). See also *Ewing v. California*, 538 U.S. 11, 30 (2003) (approving sentence of twenty-five years to life for "three strike" sentence for theft); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 116 n.124 (1997) (describing the *Solem* Court's Eighth Amendment analysis in noncapital cases); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 696-97 (1998). See *infra* notes 284-96 and accompanying text.

3. See, e.g., *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (recognizing defendant's youthfulness as a mitigating factor); *Lockett v. Ohio*, 438 U.S. 586, 604-05, 607-08 (1978) (considering any aspect of defendant's character as a mitigating factor).

the punishment of those with “diminished capacity.” Because the idea of deserved punishment emphasizes culpability and blameworthiness, the criminal law confronts the special cases of those who are criminally responsible and yet manifestly impaired, mentally ill, or developmentally different from competent adult offenders.⁴ The criminal law distinguishes doctrinally between the profound disabilities that fully excuse actors from criminal liability, such as insanity,⁵ which the law defines very narrowly, and doctrines of “diminished responsibility” or “reduced culpability,” which allow even seriously impaired actors to be convicted and punished for their crimes.⁶ The relationship between culpability and deserved punishment implicates interrelated notions of blameworthiness, responsibility, and personal accountability. What types of impairments mitigate or reduce criminal culpability? How much impairment must be present to warrant a reduction in severity of sanctions? How are impairments of judgment and culpability to be defined and proved? Should the law assess and treat such impairments individually or categorically?

The Supreme Court most thoroughly explored culpability, proportionality, and deserved punishment in the context of the death penalty because “death is different.”⁷ In decisions involving the culpability of defendants with mental retardation and older adolescents,

4. See, e.g., COL. REV. STAT. ANN. § 16-8-103.5(5), -115(1) (West 1998) (requiring a court to commit a defendant found not guilty by reason of mental impairment to the custody of a state department which will send the defendant to a state facility for treatment); CONN. GEN. STAT. ANN. § 17a-582 (West 1998) (requiring the court to commit an “acquittee” (by reason of mental illness) into the custody of the state mental health commissioner, who will arrange for the defendant’s psychiatric treatment); see also, e.g., Zimring, *supra* note 1, at 271-72 (proposing that youthfulness and immaturity mitigates the blameworthiness of juvenile offenders); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 53, 55, 58-61 (1997) (recognizing that other theories of criminal responsibility require reduction in severity of sanctions for youthful offenders, while proposing that adolescent offenders are no less culpable than adults who have similar psychological, developmental deficiencies).

5. See, e.g., COL. REV. STAT. ANN. § 16-8-105(4) (West 1998) (requiring a court to commit a defendant found not guilty by reason of insanity to the custody of a state department which will send the defendant to a state facility for treatment). *But see*, e.g., IDAHO CODE § 18-207(1) (Michie 1997) (barring a defendant from raising insanity as a defense to any criminal charges).

6. See *Atkins v. Virginia*, 536 U.S. 304, 306 (2002).

7. See, e.g., *Harmelin*, 501 U.S. at 995 (asserting that there exists a “qualitative difference between death and all other penalties”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”); *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring) (emphasizing that the death penalty is “unusual in its pain, in its finality, and in its enormity”).

the Court has reached opposite conclusions about the deserved punishments of each category and produced an anomalous inconsistency.⁸ In 1989, the Court in *Penry v. Lynaugh* held that mentally retarded defendants could be found as culpable as other criminal offenders facing the death penalty.⁹ Although a plurality of justices in *Thompson v. Oklahoma*¹⁰ had earlier concluded that fifteen-year-old offenders lacked the culpability necessary to impose the death penalty,¹¹ the Court in *Stanford v. Kentucky*, decided at the same time as *Penry*, upheld the death penalty for youths who were sixteen or seventeen years of age at the time of their offenses.¹² More recently, the Court in *Atkins v. Virginia* overruled *Penry* and held that the Eighth Amendment barred states from executing mentally retarded defendants.¹³ *Atkins* found that mentally retarded defendants lacked the reasoning, judgment, and impulse control necessary to equate their moral culpability with that of ordinary adult criminal defendants.¹⁴ In addition, their mental impairments detracted from the fairness and

8. Compare *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (upholding the constitutionality of imposing the death penalty on mentally retarded defendants) and *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (plurality opinion) (upholding the death penalty for sixteen- and seventeen-year-old adolescents), with *Atkins*, 536 U.S. at 321 (2002) (holding that execution of mentally retarded defendants violates the Eighth Amendment); *In re Stanford*, 537 U.S. 968, 968 (2002) (Stevens J., dissenting) (urging the Court to reconsider *Stanford* in light of its decision in *Atkins*).

Analysts have noted the inconsistency between the Court's earlier decision in *Stanford* and its recent *Atkins* ruling. See, e.g., Jamie Hughes, *For Mice or Men or Children? Will the Expansion of the Eighth Amendment in Atkins v. Virginia Force the Supreme Court to Re-Examine the Minimum Age for the Death Penalty?*, 93 J. CRIM. L. & CRIMINOLOGY 973, 994-98 (2003) (analyzing changes in the way in which the Court finds a consensus against executing particular categories of offenders); Victor L. Streib, *Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia*, 33 N.M. L. REV. 183, 183 (2003) ("[T]he death penalty's Siamese twins: juvenile offenders and mentally retarded offenders."); Amanda M. Raines, Note, *Prohibiting the Execution of the Mentally Retarded*, 53 CASE W. RES. L. REV. 171, 172 (2002) (arguing that the Court's analysis in *Atkins* should also support a categorical bar of the execution of juveniles); John F. Romano, Note, *Kinder, Gentler, and More Capricious: The Death Penalty After Atkins v. Virginia*, 77 ST. JOHN'S L. REV. 123, 125 (2003) (noting that the "Court's recent jurisprudence regarding the death penalty as imposed on the mentally retarded and on juveniles . . . is fundamentally inconsistent with its Eighth Amendment death penalty jurisprudence" (footnote omitted)); Robin M. A. Weeks, Note, *Comparing Children to the Mentally Retarded: How the Decision in Atkins v. Virginia Will Affect the Execution of Juvenile Offenders*, 17 BYU J. PUB. L. 451, 481 (2003) (noting a gradual process of exclusion from death eligibility "first for the type or crime or because of complete incompetence, then because certain justices believed that group to be less culpable than the rest").

9. See *Penry*, 492 U.S. at 335.

10. 487 U.S. 815 (1988) (plurality opinion).

11. See *id.* at 822-23.

12. See *Stanford*, 492 U.S. at 371-72.

13. See *Atkins*, 536 U.S. at 321.

14. See *id.* at 306.

reliability of capital trials and increased the likelihood of erroneous death sentences.¹⁵

In this Article, I argue that the Court's culpability analyses in *Atkins* apply equally to the execution of adolescents and should prohibit the practice. Moreover, the rationale of diminished criminal responsibility of adolescents has broader implications for proportionality in sentencing all younger offenders in criminal courts. Part I analyzes the *Atkins* decision, which relied on empirical and normative justifications to prohibit executing mentally retarded offenders. Empirically, *Atkins* analyzed state death penalty laws and jury practice and found a national consensus that executing defendants with mental retardation violated "evolving standards of decency." Normatively, the Court examined the psychological and developmental characteristics of mentally retarded offenders that render them less blameworthy than more competent adult offenders. Part II reviews the Court's juvenile death penalty analyses in *Thompson* and *Stanford*, follows the framework of *Atkins*' empirical analysis, and assesses recent legislative and judicial activity regarding execution of sixteen- and seventeen-year-old offenders. Part III builds on *Atkins*' normative description of developmental characteristics of mentally retarded offenders, compares them with the developmental, psychological, and neuro-biological characteristics of adolescents, and argues that their similar limitations of judgment reduce their culpability as well. Adolescents' limitations in adjudicative competence also increase their risks of erroneous convictions. Based on these empirical and normative comparisons, I argue that *Stanford* is inconsistent with the Court's more enlightened appraisal of culpability in *Atkins* and logical consistency should preclude states from executing youths for crimes they committed when sixteen or seventeen years of age. Part IV extends the culpability and proportionality analyses to the sentencing of noncapital young offenders as well. Because adolescents' competence and culpability differ qualitatively from those of adults, courts and legislatures should formally recognize youthfulness as a mitigating factor. I argue for a bright-line, rather than an individualized discretionary approach, because the generic culpability of adolescents differs from that of adults and categorical treatment of penal proportionality reduces the risks of error and injustice in sentencing.

15. See *id.* at 306-07.

I. CULPABILITY, MENTAL RETARDATION, AND *ATKINS*

The Supreme Court has interpreted the Eighth Amendment's¹⁶ prohibition on "cruel and unusual punishment" to bar sentences that are "excessive,"¹⁷ that fail to contribute to the penal goals of retribution and deterrence,¹⁸ and that violate "evolving standards of decency."¹⁹ For more than a quarter of a century, the Court has required state death penalty statutes to channel jury discretion and consider the circumstances of the defendant.²⁰ Trial courts must allow defendants to present to the jury any evidence that humanizes them or mitigates their culpability before the jury renders its verdict.²¹ The Court endorses

16. The Eighth Amendment provides "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

17. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (stating that a "punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (requiring that "the punishment must not involve the unnecessary and wanton infliction of pain" and "must not be grossly out of proportion to the severity of the crime.").

18. See *Gregg*, 428 U.S. at 183-86 (finding that retribution and deterrence comprise the two legitimate penal goals advanced by the death penalty); *Enmund v. Florida*, 458 U.S. 782, 798-99 (1982) (finding that execution of felony-murder accomplice who did not take or intend to take life would not advance legitimate goals of retribution and deterrence).

19. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (prohibiting execution of a defendant who is insane at the time of his or her execution). In assessing "evolving standards of decency," the Court looks to the existence of a national consensus against a particular practice as reflected in statutes passed by legislatures, jury practices, and the like. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 369-70 (1989); *Hughes*, *supra* note 8, at 994-1003 (analyzing Court's "numerology" and the disputes between majority and dissenting opinions in death penalty cases about which states to include in the numerator and denominator when calculating existence of national consensus).

20. See *Gregg*, 428 U.S. at 197 ("[T]he jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment . . . [sic]"); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion) (requiring provision to sentencer of information about the defendant adequate "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"). See generally, Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995) (discussing the evolution of capital punishment law by analyzing landmark cases, state regulations, and the legal processes that influence sentencing decisions).

21. See, e.g., *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (plurality opinion) ("A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."); *Woodson*, 428 U.S. at 303-04; *Romano*, *supra* note 8, at 131-32 (summarizing the requirements of individualized capital sentencing to allow defendants to present all evidence that could mitigate culpability and to enable jury to give effect to the mitigating evidence).

structured, individualized discretion in capital sentencing and only rarely has excluded whole classes of offenders from death eligibility.²²

The Supreme Court in *Penry v. Lynaugh*²³ held that the Eighth Amendment did not categorically bar executing mentally retarded criminal defendants.²⁴ The Court looked to state statutes as “objective evidence of how our society views a particular punishment today” and found that only two states and the federal government prohibited execution of mentally retarded offenders.²⁵ Even when coupled with the fourteen states that rejected capital punishment, the Court concluded that Penry had failed to “provide sufficient evidence at present of a national consensus” opposed to executing mentally retarded defendants.²⁶ Although the Court rejected Penry’s plea for a categorical ban on executing defendants with mental retardation, it remanded his case for individualized reconsideration of his death sentence.²⁷ “[I]t is precisely

22. See, e.g., *Enmund*, 458 U.S. at 796, 801 (holding that the death penalty is an excessive punishment for a defendant convicted of felony murder who personally did not take, attempt to take, or intend to take life of the victim); *Coker*, 433 U.S. at 592 (conducting proportionality analysis, categorically prohibiting execution of defendant convicted of rape of adult woman, and concluding that “a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment”).

23. 492 U.S. 302 (1989).

24. Penry argued that executing mentally retarded defendants categorically violated the Eighth Amendment because their disability precluded the moral culpability necessary to justify capital punishment. See *id.* at 328-29. In order to ascertain whether executing the mentally retarded offended “evolving standards of decency,” the Court reviewed the states’ death penalty legislation and sentencing juries’ practices to obtain objective evidence of the existence of a national consensus rejecting the practice. See *id.* at 331. Unlike the common law and statutory prohibition on executing the insane and incompetent, see *id.* at 332-34, the Court found only two states, Georgia and Maryland, that barred execution of a competent, mentally retarded defendant. See *id.* at 334. “[A]t present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.” *Id.* at 335. Justices Brennan and Marshall dissented from this portion of the Court’s decision and concluded that the Eighth Amendment categorically barred execution of the mentally retarded because “[t]he impairment of a mentally retarded offender’s reasoning abilities, control over impulsive behavior, and moral development . . . limits his or her culpability” and thus renders capital punishment disproportionate to the crime. *Id.* at 346.

25. *Id.* at 331, 334.

26. *Id.* at 334.

27. See *id.* at 340. Despite Penry’s moderate mental retardation—organic brain damage and child abuse, IQ of fifty-four, mental age of a six-and-a-half-year-old, and social maturity and ability to function of a nine- or ten-year-old—the trial court found him competent to stand trial, the jury rejected his insanity defense, and it sentenced him to death for a brutal rape and murder. See *id.* at 307-08, 310. At the death penalty phase of his trial, the jury affirmatively answered four “special issues”—whether the defendant’s conduct that caused the victim’s death was deliberate, whether the victim’s death was reasonably foreseeable, whether the defendant posed a future danger to society, and whether the defendant’s conduct was an unreasonable response to the victim’s provocation, if any. See *id.* at 310. The defendant alleged that the instructions lacked adequate definition of key

because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense."²⁸ However, the *Penry* Court acknowledged that "a national consensus against execution of the mentally retarded may someday emerge."²⁹

Thirteen years later, the Court in *Atkins v. Virginia*³⁰ reconsidered its decision in *Penry*, found that a national consensus had emerged, and held that executing mentally retarded defendants categorically violated the Eighth Amendment.³¹ The Court used both empirical evidence and normative judgments to support its conclusion that executing mentally retarded offenders violated "evolving standards of decency." It relied on objective indicators of a national consensus, such as state laws and jury practices.³² The justices also relied on their own judgments about

terms, such as "deliberately," and failed to allow the jury to exercise mercy if it found mitigating evidence such as *Penry*'s mental retardation and history of abuse. *See id.* at 312.

The Court reversed *Penry*'s death sentence and remanded for resentencing because the instructions did not adequately allow the jury to give effect to his mitigating evidence of retardation and abuse in answering the special questions. *See id.* at 328. The Court emphasized that apart from the evidence's relevance to answer the four special questions, the jury also must be able to consider his overall personal and moral culpability as a mitigating factor. *See id.* at 322-25.

28. *Id.* at 327-328.

29. *Id.* at 340.

30. 536 U.S. 304 (2002). The Court granted certiorari in *McCarver v. North Carolina* to reconsider its holding in *Penry*. 532 U.S. 941 (2001). However, after North Carolina adopted a law prohibiting executing mentally retarded offenders, *McCarver* became moot, and the Court dismissed the case. 533 U.S. 975 (2001). It granted certiorari in *Atkins* to reconsider whether the Eighth Amendment required a categorical ban on executing mentally retarded offenders. 534 U.S. 809 (2001).

31. *See Atkins*, 536 U.S. at 321. The Court's Eighth Amendment proportionality analyses focus on whether a particular punishment is "excessive" or offends "the evolving standards of decency that mark the progress of a maturing society." *Id.* at 311-12 (internal quotations omitted). The Eighth Amendment's prohibition includes both those sanctions that were considered "cruel and unusual punishment" at the time of the adoption of the Bill of Rights as well as those that violate contemporary society's standards of decency. *See Ford v. Wainwright*, 477 U.S. 399, 405 (1986) ("[T]here is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted."); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("[T]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

For further commentary on *Atkins*, see generally Lyn Entzeroth, *Constitutional Prohibition on the Execution of the Mentally Retarded Criminal Defendant*, 38 TULSA L. REV. 299 (2002); Jaime L. Henshaw, Comment, *Atkins v. Virginia: The Court's Failure to Recognize What Lies Beneath*, 37 U. RICH. L. REV. 1185 (2003); and Jennifer J. van Dulmen-Krantz, Comment, *The Changing Face of the Death Penalty in America: The Strengths and Weaknesses of Atkins v. Virginia and Policy Consideration for States Reacting to the Supreme Court's Eighth Amendment Interpretation*, 24 HAMLINE J. PUB. L. & POL'Y 185 (2002).

32. *See Atkins*, 536 U.S. at 313-16.

diminished culpability and deserved punishment to support their proportionality determination.³³ In its empirical analysis, the Court surveyed the trend of states' laws on the execution of retarded offenders.³⁴ In its normative assessment, the Court drew on several clinical definitions of mental retardation to identify the characteristics of mentally impaired offenders that rendered them qualitatively less culpable than ordinary adult offenders and thus justified the blanket prohibition against executing the mentally retarded.³⁵

First, the Court analyzed death penalty laws regarding the execution of the mentally retarded. While only two states and the Federal government prohibited executing mentally retarded defendants when the Court decided *Penry*,³⁶ by the time the Court reconsidered its holding in *Atkins*, sixteen additional states had prohibited the practice, and prohibition bills had passed at least one house in several other states.³⁷

33. See *id.* at 313; *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (“[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”). But see *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (proportionality analysis relies on “objective factors to the maximum possible extent”); *Penry*, 492 U.S. at 331 (“[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”).

34. See *Atkins*, 536 U.S. at 313-16.

35. See *id.* at 308, n.3. The American Association on Mental Retardation (“AAMR”) defines mental retardation as follows:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

AM. ASS’N ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS* 5 (9th ed. 1992). The American Psychiatric Association uses a similar definition:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 41 (4th ed. 2000).

36. See *Penry*, 492 U.S. at 334.

37. See *Atkins*, 536 U.S. at 314-15 (noting that in addition to Georgia’s and Maryland’s earlier enactments, the legislative trend in the aftermath of *Penry* included Kentucky (1990), Tennessee (1990), New Mexico (1991); Arkansas (1993), Colorado (1993), Washington (1993), Indiana (1994), Kansas (1994), New York (1995), Nebraska (1998), South Dakota (2000), Arizona (2001), Connecticut (2001), Florida (2001), Missouri (2001), and North Carolina (2001)); Entzeroth, *supra*

The Court suggested that several other states had not adopted explicit legislation because they had not executed a mentally retarded defendant in decades.³⁸

It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.³⁹

The Court attributed the states' emerging legislative consensus to the normative recognition that mentally retarded defendants are less culpable or deserving of retributive punishment and less susceptible to the deterrent threat of execution than ordinary offenders.⁴⁰ *Atkins* examined the penal functions presumably served by the death penalty—retribution and deterrence—and concluded that executing a mentally

note 31, at 316-18 (summarizing legislative activity proscribing execution of mentally retarded defendants in response to *Penry*); Alexis Krulish Dowling, Comment, *Post-Atkins Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 773, 784 (2003) (summarizing legislative trend in prohibiting execution of mentally retarded offenders). See also statutory table *infra* following text accompanying note 121.

38. See *Atkins*, 536 U.S. at 316 (“The practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it.” (footnote omitted)). In the thirteen years following *Penry*, states had executed only five defendants known to have an IQ of less than 70. See *id.*

39. *Id.* at 315-16. The Court also noted that in the states that had adopted prohibition statutes, “the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.” *Id.*

40. See *id.* at 317 (noting that legislative consensus reflects “widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty.”). The Court noted that retribution and deterrence constitute the primary penal justifications for imposing the death penalty. See *id.* at 319. The severity of the retributive response “necessarily depends on the culpability of the offender” and an exclusion of the mentally retarded appropriately reflects their lesser culpability. *Id.* Similarly, the deterrence theory of capital punishment assumes that rational actors will include the severity of the sanction in their criminal calculus.

Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded.

Id. at 320.

retarded defendant accomplished neither goal. Even though states could find mentally retarded offenders competent and punish them for their crimes, they lacked the culpability necessary to justify the ultimate penalty.⁴¹ Similarly, they lacked the deliberative capacity that would respond to the deterrent threat of execution.⁴² Moreover, their developmental limitations substantially increased the likelihood that they erroneously might receive the death penalty.⁴³ Thus, mental retardation simultaneously reduced offenders' culpability and adversely affected their adjudicative competence.

The Court relied on several professional definitions of mental retardation to identify the clinical characteristics that reduced the criminal responsibility and hampered the adjudicative competence of defendants with mental retardation.⁴⁴ Findings of

mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. . . . Because of their impairments . . . they have diminished capacities to *understand and process information*, to communicate, to abstract from mistakes and learn from experience, to *engage in logical reasoning*, to *control impulses*, and to understand the reactions of others. . . . [T]hey often act on *impulse* rather than pursuant to a premeditated plan, and . . . *in group settings they are followers* rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.⁴⁵

41. *See id.* at 319 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."). Some commentators criticized *Atkins*' categorical exclusion of the mentally retarded from death eligibility as producing arbitrary outcomes and argued that it effectively makes normal intelligence an "aggravating factor" for purposes of capital punishment. *See, e.g., Romano, supra* note 8, at 145 ("By requiring that a defendant belong to the class of non-mentally retarded individuals before a death sentence may be imposed, the Court, in effect, made that status an aggravating factor.").

42. *See Atkins*, 536 U.S. at 320.

43. *See id.* at 320-21. "Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants." *Id.* at 306-07. The Court in *Atkins* found that mental retardation increased the risk of false confession, limited the ability of defendants to assist counsel, rendered them less effective witnesses on their own behalf, and increased the likelihood that a jury would find they posed a danger in the future. *See id.* at 320-21. *See also infra* notes 51-52 and accompanying text.

44. *See supra* note 35 and accompanying text.

45. *Atkins*, 536 U.S. at 318 (emphasis added) (footnotes omitted).

In addition to significant subaverage intellectual functioning,⁴⁶ a retarded individual also demonstrates actual disability in “adaptive skill areas” that affect every day life, such as the capacity to use and process information, to reason logically, to control impulses, and to resist peer pressure.⁴⁷ While a low IQ provides one indicator of mental retardation, *Atkins* emphasized a broader range of social, psychological, and mental skills deficits to justify its conclusion that such offenders lacked the requisite culpability.⁴⁸ The features that *Atkins* found to reduce culpability of mentally retarded defendants—possessing, understanding, and using information; exercising impulse control; and responding to negative peer influences⁴⁹—are normal developmental characteristics of ordinary adolescent offenders as well.⁵⁰

In addition to reducing culpability, mental retardation also adversely affects defendants’ adjudicative competence and increases the likelihood that they erroneously might receive the death penalty.⁵¹

46. At the time the Court decided *Atkins*, the AAMR defined “significantly sub-average intellectual functioning” as measured with IQ tests as a score below 70 on a normed mean of 100, which includes only the lowest 2.5 % of the population. See *id.* at 308 n.3; see also AM. PSYCHIATRIC ASS’N, *supra* note 35, at 41. Since *Atkins*, the AAMR has redefined mental retardation as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.” AAMR: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002). The new definition eliminates specific IQ scores and instead describes a more flexible score that is “approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments’ strengths and limitations.” *Id.* at 13.

47. See *Atkins*, 536 U.S. at 318.

48. See *id.* at 306; Entzeroth, *supra* note 31, at 310 (describing the impact of mental retardation on defendant’s dealings with the criminal justice system and noting that “one attribute of mental retardation is an incomplete or immature concept of blame and/or causation. This characteristic can distort the mentally retarded criminal defendant’s understanding of his or her participation in a criminal act.” (footnote omitted)); Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 214 (2003) (arguing that *Atkins*’ reasoning presupposes that “mentally retarded individuals are not as psychologically, mentally, and socially developed as normal adults and, therefore, do not display the same abilities of reason or culpability.”).

49. See *Atkins*, 536 U.S. at 318.

50. See *infra* notes 237-78 and accompanying text; see also Fagan, *supra* note 48, at 215 (suggesting that “*Atkins* specifically referenced characteristics common to both the mentally retarded and juveniles: a susceptibility to influence, a lack of maturity and perspective, and a lower degree of moral culpability.”).

51. See *Atkins*, 536 U.S. at 317-18, 320. Entzeroth notes that defendants with mental retardation have

limited communication skills, a desire to answer questions so as to please the questioner, a desire to hide one’s mental retardation, the tendency to be easily led, a poor understanding of the consequences of one’s actions, poor impulse control, and a tendency to be submissive. . . . These characteristics . . . may lead a mentally retarded defendant to

Mentally retardation increased defendants' susceptibility to interrogation and proclivity to give false confessions, reduced the assistance they could provide to their lawyers, and adversely affected their demeanor and effectiveness as witnesses.⁵² Because the Court recognized that mental retardation and diminished culpability are matters of degree on a continuum, it left the task to the states to develop legislative definitions and criteria, procedures, and clinical indicators to identify which defendants its categorical ban protected.⁵³

confess to an act he or she did not commit, or to accept greater blame or responsibility for criminal activity than he or she realistically should.

Entzeroth, *supra* note 31, at 310-11 (footnotes omitted). *See also* Note, *Implementing Atkins*, 116 HARV. L. REV. 2565, 2569 (2003) (“[I]ntellectual limitations of the mentally retarded suggest that they face a ‘special risk of wrongful execution,’ because they are less able to participate in their own defense, have a reduced capacity to assist counsel, make for poor witnesses, and may perplex the jury with a demeanor that ‘may create an unwarranted impression of lack of remorse for their crimes.’”).

52. *See Atkins*, 536 U.S. at 320-21 (finding categorical prohibition against executing mentally retarded defendants because of “the possibility of false confessions, . . . the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation, [and because m]entally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.” (footnote omitted)).

Atkins provides a graphic example of how these disabilities affect the conduct of a trial and the imposition of the death penalty. *Atkins* and Jones abducted, robbed, and murdered their victim. *See id.* at 307. When the police arrested them, *Atkins* made a statement, while *Jones* declined. *See id.* at 307 n.2. The prosecution permitted *Jones* to plead guilty and avoid the death penalty in exchange for his testimony against *Atkins*. *See id.* at 307 n.1. At trial, both *Jones* and *Atkins* testified, each confirmed the details of the incident, except that each asserted that the other killed the victim. *See id.* at 307. “*Jones*’ testimony, which was both more coherent and credible than *Atkins*’, was obviously credited by the jury and was sufficient to establish *Atkins*’ guilt.” *Id.* Given a choice between *Atkins*, who gave an incriminating statement and “bumbled on the witness stand” and *Jones*, who knew enough not to confess initially and to plea bargain with the prosecution, the jury chose *Atkins*. *See Dowling, supra* note 37, at 785 n.114 (internal quotes omitted).

53. *See Atkins*, 536 U.S. at 317 (“To the extent that there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. . . . [W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.”). Courts ordinarily would find the most severely and profoundly retarded defendants incompetent to stand trial. *See Entzeroth, supra* note 31, at 309 (noting that “mental retardation is a permanent disability that cannot be ameliorated with medication, and a mentally retarded defendant who is incompetent to stand trial due to his retardation will not be amenable to medical treatment so as to be rendered competent.”). Identifying which offenders are mildly or moderately mentally retarded and immune from the death penalty may be the most difficult aspects of the decision. *See, e.g., Dowling, supra* note 37, at 776 (2003) (“Currently, numerous statutory and organizational definitions for mental retardation exist. Although most definitions have similar features, variability among statutory definitions is so great that it can result in one state classifying a defendant as mentally retarded while others do not. Further, while the use of valid and reliable psychological testing measures is a central feature of the professional

In separate dissenting opinions, Justices Rehnquist and Scalia, each joined by the other and by Justice Thomas, criticized the Court's categorical ban on executing mentally retarded defendants. Justice Rehnquist objected to the proportionality analysis the majority used to find a national consensus against executing mentally retarded offenders.⁵⁴ He insisted that state laws provide the most objective and reliable basis on which to ascertain the existence of a national consensus and to avoid the Justices imposing their own subjective preferences on the states' power to legislate.⁵⁵ He decried the majority's reliance on foreign laws, opinion polls, and the positions of professional and religious groups reported in amici briefs as "a *post hoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency."⁵⁶ Justice Scalia derided the majority's conclusion as "nothing but the personal views of its [m]embers."⁵⁷ He insisted that legislation provides the only objective basis for identifying a national consensus and disputed the mathematical calculations that the majority used to find a consensus against executing the mentally retarded.⁵⁸

organizational definitions of mental retardation, few statutory definitions mandate the use of these readily available testing methods." (footnote omitted)); *Implementing Atkins*, *supra* note 51, at 2587 ("[L]egislators who wish to respond seriously to the consensus the Supreme Court discerned cannot take lightly their responsibility to guide courts and juries in determining which defendants possess the culpability and mental capacity to face execution for their crimes."). Statutory definitions of mental retardation differ considerably, but many include IQ scores below 65 or 70 in addition to significant subaverage intellectual and adaptive functioning. *See Dowling*, *supra* note 37, at 789-93.

54. *See Atkins*, 536 U.S. at 322.

55. *See id.* at 322-23. ("[L]egislation is the 'clearest and most reliable objective evidence of contemporary values.' . . . [D]ata concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, 'is a significant and reliable objective index of contemporary values,' because of the jury's intimate involvement in the case and its function of 'maintain[ing] a link between contemporary community values and the penal system.'" (citations omitted)).

56. *Id.* at 322. In contrast to the data of public opinion polls, the laws of foreign nations, or the position of professional groups, Justice Rehnquist insisted that "these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment." *Id.* at 324. Because the constitutional inquiry is a quest for an American national consensus, "we have since explicitly rejected the idea that the sentencing practices of other countries could 'serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.'" *Id.* at 325 (citation omitted). Similarly, Rehnquist noted that opinion polls may suffer from a variety of methodological deficiencies and do not provide an adequate basis for constitutional adjudication. *See id.* at 326.

57. *Id.* at 338.

58. *See id.* at 341-43. According to Scalia, fewer than half of the states—eighteen of thirty-eight—that practice capital punishment execution have barred execution of the mentally retarded: "How is it possible that agreement among 47% of the death penalty jurisdictions amounts to

II. CULPABILITY, ADOLESCENCE, AND THE RATIONALE OF *THOMPSON* AND *STANFORD*

Characteristics that reduce the culpability of mentally retarded offenders—susceptibility to peer influences, a propensity to act impulsively without thinking about consequences, and immaturity of judgment—have relevance to the criminal responsibility of adolescents.⁵⁹ Although earlier decisions adverted to youthfulness as a mitigating factor in capital sentencing,⁶⁰ the Court in *Thompson v. Oklahoma*⁶¹ analyzed the criminal responsibility of youths older than the common law infancy threshold of age fourteen. *Thompson* presented the issue of whether executing a fifteen-year-old offender for a heinous murder in which he actively participated violated the prohibition on “cruel and unusual punishments.”⁶² A four-justice plurality held that the Eighth Amendment categorically precluded executing youths who were fifteen years of age or younger at the time they committed their offense.⁶³ Justice O’Connor wrote a separate concurrence on the grounds that the Oklahoma legislature may not specifically have considered that fifteen-year-old youths would be death eligible.⁶⁴

As the Court would later in *Atkins*, the *Thompson* plurality looked both to objective indicators of “evolving standards of decency,” such as state statutes and jury practices and the views of national and international organizations, and to the justices’ own subjective sense of “civilized standards of decency” when it conducted its proportionality analysis.⁶⁵ Of the states that explicitly had considered a minimum age for death penalty eligibility, all had established it at sixteen, seventeen, or eighteen years of age.⁶⁶ Similarly, the Court found that juries rarely

‘consensus’? Our prior cases have generally required a much higher degree of agreement before finding a punishment cruel and unusual on ‘evolving standards’ grounds.” *Id.* at 342-43.

59. *See id.* at 318, 320.

60. *See, e.g.,* *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (remanding sixteen-year-old defendant for resentencing after trial court’s failure properly to consider youthfulness as a mitigating factor and noting that “[y]outh is more than a chronological fact. . . . [M]inors, especially in their earlier years, generally are less mature and responsible than adults.”); *Lockett v. Ohio*, 438 U.S. 586, 608-09 (1978) (requiring sentencing jury to consider all relevant mitigating factors including age of defendant); *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977) (per curiam).

61. 487 U.S. 815 (1988) (plurality opinion).

62. *See id.* at 818-19.

63. *See id.* at 822-23.

64. *See id.* at 857.

65. *See id.* at 830.

66. *See id.* at 829. The Court found that fourteen state legislatures barred capital punishment altogether. *See id.* at 826. Eighteen states had established a minimum age for execution of sixteen, seventeen, or eighteen years of age. *See id.* at 829. The remaining nineteen state statutes did not

imposed the death penalty on juveniles.⁶⁷ *Thompson* noted that legal, professional, religious, and social organizations—nationally and internationally—opposed executing young people.⁶⁸ Moreover, international law and treaties also condemned the practice.⁶⁹ Based on these objective indicators, the Court concluded that executing offenders who committed their crimes before they turned sixteen-years-old was “generally abhorrent to the conscience of the community.”⁷⁰

In addition to the objective factors, the plurality concluded that “a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty,” and vacated *Thompson*’s capital sentence.⁷¹ The justices asserted that

[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. . . . Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time

expressly set a minimum age, but no jurisdiction explicitly approved the execution of youths below age sixteen. *See id.* at 826-27.

67. *See id.* at 832-33 (noting that in the twentieth century, states had conducted only eighteen to twenty executions of offenders for crimes committed when they were less than sixteen years of age and more recently, juries had sentenced only five young people to death between 1982 and 1986).

68. *See id.* at 830 (noting that “the American Bar Association and the American Law Institute have formally expressed their opposition to the death penalty for juveniles”).

69. *See id.* at 830-31. (observing that other countries of Anglo-American heritage and “leading members of the Western European community” shared the Court’s view that executing youths under the age of sixteen “would offend civilized standards of decency”); *see also* Rachel J. Avery, “Killing Kids Who Kill” – *An International Perspective on the Juvenile Death Penalty in the United States*, 7 UCLA J. INT’L L. & FOREIGN AFF. 303, 304-05 (2002) (“The United States is one of the few countries left in the world that continues to execute juvenile offenders. . . . [I]n so doing, the United States is not only in breach of its obligations under international treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention on the Rights of the Child, but is also in breach of a rule of customary international law which has attained the status of a *jus cogens* norm.” (footnotes omitted)); Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 486, 489 (2002) (“Of the approximately 193 nations in the world, only seven (including the United States) have executed juvenile offenders since 1990, and even some of these nations have recently moved to eliminate the practice. Moreover, the other six countries—the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen—are not necessarily the best of company with respect to human rights issues.” (footnotes omitted)).

70. *Thompson*, 487 U.S. at 832.

71. *Id.* at 823, 833-34. The *Thompson* Court emphasized that deserved punishment must reflect individual culpability and concluded that “[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults.” *Id.* at 834. Earlier juvenile death penalty decisions also emphasized the youthfulness of an offender as a mitigating factor at sentencing. In *Eddings v. Oklahoma*, the Court noted that “just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.” 455 U.S. 104, 116 (1982).

he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.⁷²

Even though Thompson could be found criminally responsible for his crime, he could not be punished as severely as an adult simply because of his age—"adolescents as a class are less mature and responsible than adults."⁷³ Even though youths may inflict blameworthy harms, their choices evidence less culpability than do those of adults.⁷⁴ The legal system treats adolescents differently from adults in numerous areas of life—for example, serving on a jury, voting, marrying, driving, and drinking—because of youths' inexperience and immature judgment.⁷⁵ In all these instances, the state acts paternalistically and imposes legal disabilities because of youths' presumptive incapacity to "exercise choice freely and rationally."⁷⁶ It would be inconsistent and cruelly ironic to find juveniles' culpability and criminal capacity equivalent to that of adults for purposes of capital punishment.⁷⁷ The

72. *Thompson*, 487 U.S. at 835.

73. *Id.* at 834. The Court asserted that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Id.* at 835.

74. *See id.* at 835.

75. *See id.* at 835, 839-48 (detailing a wide variety of state statutes on the rights to vote, to serve on a jury, to drive, to marry, to purchase pornography, and to gamble).

76. *Id.* at 823-25 & n.23; *see also* *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"); *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) (noting that children lack the "maturity, experience, and capacity for judgment required for making life's difficult decisions. . . . Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment."); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 552 (2000) (noting that the law restricts children's rights and privileges "[b]ecause they are assumed to lack the capacity for reasoning, understanding, and mature judgment [As such,] children cannot vote, make most medical decisions, drink alcohol, or drive motor vehicles.").

77. *See Thompson*, 487 U.S. at 825 n.23. The Court noted that "the very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent." *Id.* Later in the opinion, Justice Stevens, writing for the plurality reasoned that

[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent. And, even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century.

Id. at 837-38.

plurality concluded that categorically exempting younger adolescents from the death penalty would not erode the retributive and deterrent justifications for capital punishment.⁷⁸ Some commentators criticized the Court's categorical ban on executing children as contrary to its insistence on individualized consideration of the culpability of offenders.⁷⁹

Justice O'Connor concurred in the reversal of Thompson's capital sentence.⁸⁰ She acknowledged the likelihood of the existence of a national consensus that persons who commit crimes before the age of sixteen should not be executed, but questioned the sufficiency of the evidence to support that conclusion.⁸¹ She noted that every state that *had established* a minimum age for the death penalty had set it at sixteen years of age or older.⁸² She joined the plurality on the narrower grounds

78. *See id.* at 836-38 (concluding that the lesser culpability of adolescents reduced the retributive justification for execution and their immaturity rendered them less likely to consider the possibility of execution for their criminal behavior and hence less likely to be deterred). The Court reasoned that most other areas of the law treated children differently than adults because they were not fully rational or capable of controlling their own lives. *See id.* at 825 n.23. The plurality concluded that "it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance." *Id.*

Most commentators applauded the Court's categorical ban on executing juveniles younger than sixteen years of age. *See, e.g.,* Elisabeth Gasparini, *Juvenile Capital Punishment: A Spectacle of a Child's Injustice*, 49 S.C. L. REV. 1073, 1090 (1998) (arguing that the culpability of adolescents is not equivalent to that of adults); Sherri Jackson, Note, *Too Young to Die – Juveniles and the Death Penalty – A Better Alternative to Killing Our Children: Youth Empowerment*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 391, 416 (1996) ("Juveniles lack the degree of blameworthiness that is a constitutional prerequisite for the imposition of the death penalty under the Eighth Amendment proportionality analysis."); *cf.* Mike Farrell, *On the Juvenile Death Penalty*, 21 WHITTIER L. REV. 207, 209-10, 212 (1999) (advocating that American politics should look to international standards banning the death penalty against a "protected person who was under 18 years of age at the time of the offense.").

79. *See, e.g.,* Joseph L. Hoffman, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 274-75 (1989) (arguing that age is an indirect and imperfect indicator of the poor judgment, lack of maturity, and reduced criminal responsibility that make the death penalty inappropriate in a particular case); Romano, *supra* note 8, at 150-51 ("[A] system that exempts juveniles and the mentally retarded from the death penalty suffers from the same deficiencies as the mandatory death penalty. . . . [T]he jury is given no discretion to decide, based on the particular circumstances of the case, whether the death penalty is an appropriate punishment." (footnote omitted)); Sherri Ann Carver, Note, *Retribution – A Justification for the Execution of Mentally Retarded and Juvenile Murderers*, 16 OKLA. CITY U. L. REV. 155, 224 (prohibiting execution based on age constitutes arbitrary line drawing).

80. *See Thompson*, 487 U.S. at 859 (O'Connor, J., dissenting).

81. *See id.* at 853 (citing the plurality's failure to demonstrate how many death-eligible juveniles were spared due to prosecutorial or jury discretion).

82. *See id.* at 849 ("The most salient statistic that bears on this case is that every single American legislature that has expressly set a minimum age for capital punishment has set that age at 16 or above.").

that states with no minimum age for death-eligibility may not have adequately considered the interaction of provisions that waive juveniles of any age for adult criminal prosecution and statutes that permit the state to execute any youth convicted as an adult.⁸³ As a result, Oklahoma may not have affirmatively decided to execute very young offenders.⁸⁴

The following year, in *Stanford v. Kentucky*,⁸⁵ the three justices who dissented in *Thompson*,⁸⁶ joined by Justices O'Connor and Kennedy, mustered a majority to uphold the death penalty for youths who were sixteen or seventeen at the time of their offenses.⁸⁷ While *Stanford* recognized that juveniles as a class possess less culpability than do adult offenders, the Court's decision rested on the narrow grounds that no clear national consensus existed that such executions violated "evolving standards of decency."⁸⁸ According to Justice Scalia, "statutes passed by society's elected representatives" provide the only reliable indicator of a national consensus and the majority of states that employ capital punishment approve it for youths who were sixteen or seventeen years of age at the time of their offense.⁸⁹ The Court rejected a

83. See *id.* at 857-59. O'Connor rejected the plurality's proportionality analysis, which concluded that juveniles' lesser culpability exempted them from execution. Adolescents' reduced criminal responsibility does not lead to the conclusion "that all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment." *Id.* at 853. Rather, O'Connor feared that Oklahoma and other states with no minimum age had not "give[n] the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility." *Id.* at 857.

84. See *id.* at 852 ("[T]here is no indication that any legislative body in this country has rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of 16 at the time of the offense.").

85. 492 U.S. 361 (1989).

86. 487 U.S. at 859 (Scalia, Rehnquist, and White, JJ., dissenting). The *Thompson* dissent argued that the general state legislative trend was to lower, rather than to raise, the age of eligibility for criminal prosecution. See *id.* at 867. It also argued that states with no minimum age for death eligibility should be included among those that approved of executing youths for crimes committed at fifteen years of age and that a proper evaluation of state legislation precluded finding the existence of a national consensus against executing juveniles. See *id.* at 868.

87. See *Stanford*, 492 U.S. at 371. The Court decided *Stanford* the same day it decided *Penry*, maintained a macabre symmetry in its treatment of the culpability of adolescents and of mentally retarded offenders, and required an individualized assessment of eligibility for execution in both instances. See *supra* notes 23-29 and accompanying text.

88. *Stanford*, 492 U.S. at 361-80.

89. *Id.* at 370. The Court rejected the relevance of international law to answer questions about the constitutional propriety of executing juveniles. When assessing evolving standards of decency, it is "American conceptions of decency that are dispositive [T]he practices of other nations . . . cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people." *Id.* at 369 n.1 (citations omitted) (internal quotation marks omitted). For Justice Scalia, the only relevant statistics were those related to state legislation, and of the thirty-seven states that impose the death penalty, only twelve (32 %) declined to execute offenders younger than age eighteen and an additional three (for a total of 15 or 40.5 %) declined to execute those younger

categorical ban on all such executions because it regarded at least some older adolescents as capable of acting with the culpability necessary to justify the death penalty.⁹⁰ The Court distinguished other types of bright-line classifications of youths, for example, the right to vote, drink, or drive, because the criminal justice system provided youths with an individualized culpability assessment prior to imposing the death penalty.⁹¹ Indeed, Justice Scalia erroneously asserted that juvenile court judges made an initial culpability determination prior to transferring youths to criminal court for prosecution as adults.⁹² Because most states

than seventeen. See *id.* at 369-70 & n.2. Such rigid deference to legislative enactments may inappropriately delegate the Court's power to interpret the Eighth Amendment to state legislatures. See Jennifer L. Whitney, Note, *When Something Wicked This Way Comes: Evolving Standards of Indecency – Thompson and Stanford Revisited*, 46 CLEV. ST. L. REV. 801, 802-03 (1998).

90. See *Stanford*, 492 U.S. at 375-76 (arguing that juvenile waiver and capital sentencing procedures were adequate to determine individual culpability unless there was a national consensus “not that 17 or 18 is the age at which most persons, or even almost all persons, achieve sufficient maturity to be held fully responsible for murder; but that 17 or 18 is the age before which *no one* can reasonably be held fully responsible”).

91. According to the Court

[i]t is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong. . . . These laws set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests for each driver, drinker, or voter. The criminal justice system, however, does provide individualized testing. In the realm of capital punishment in particular, “individualized consideration [is] a constitutional requirement.”

Id. at 374-75 (citation omitted).

92. *Stanford* suggested that juveniles received a “double” culpability determination because a juvenile court judge made an individualized evaluation prior to transfer for criminal prosecution. “[T]he determinations required by juvenile transfer statutes to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibility of 16- and 17-year-old offenders before they are even held to stand trial as adults.” *Id.* at 375. The *Stanford* dissent questioned whether individualized assessments, either in waiver hearings or capital sentencing, could adequately discern the heightened culpability of some young murderers. See *id.* at 396-402 (Brennan, J. dissenting). “The individualized consideration of an offender’s youth and culpability at the transfer stage and at sentencing has not operated to ensure that the only offenders under 18 singled out for the ultimate penalty are exceptional individuals whose level of responsibility is more developed than that of their peers.” *Id.* at 403.

Justice Scalia’s assertion that juveniles received an individualized culpability assessment prior to transfer was factually incorrect at the time he made it and even more erroneous today. Jurisdictions long have excluded the most serious offenses committed by older youths from the jurisdiction of juvenile courts. See, e.g., PATRICIA TORBET ET AL., NAT’L CTR. FOR JUV. JUST., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT, at xii (1996) (describing trend in early 1990s for more states to exclude serious offenses from juvenile court jurisdiction); Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 85-86 & app. 3.1 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter Feld, *Legislative Exclusion*] (analyzing legislative trends and providing

now “automatically” prosecute older juveniles charged with capital crimes as adults, courts have relied on Justice Scalia’s assertion to invalidate death sentences imposed on youths who did not receive an individualized assessment of their maturity and culpability prior to trial.⁹³ Justice O’Connor concurred to uphold the death penalty for

statutory table of offenses excluded from juvenile court jurisdiction); Katherine Hunt Federle, *Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 WIS. L. REV. 447, 487-94 (1996) (questioning adequacy of waiver procedures to conduct individualized culpability assessment). Moreover, waiver statutes typically focus on “amenability to treatment” or “public safety” rather than maturity or culpability. See *Kent v. United States*, 383 U.S. 541, 566-67 (1966) (appendix); Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1029-34 (1995) [hereinafter Feld, *Violent Youth and Public Policy*] (analyzing changes in statutory waiver criteria from “amenability to treatment” to “public safety”).

At the time that the Court decided *Stanford*, the majority of states that executed sixteen- and seventeen-year-old youths automatically excluded those charged with murder without any individualized evaluation, and only seven states conducted a waiver hearing prior to transfer. See, e.g., ARIZ. REV. STAT. §§ 13-501(A)(1)-(2), -1105(C) (West 2001); DEL. CODE ANN. tit. 10 § 1010(a)(1), (b) (1999); KY. REV. STAT. ANN. §§ 635.020(2), 640.010 (Michie 1987); OKLA. STAT. ANN. tit. 21, § 701.9 (West 2002); OKLA. STAT. ANN. tit. 10, § 7306-1.1(A) (West 1998); 42 PA. CONS. STAT. Ann. §§ 6302, 6355(a) (West 2000 & Supp. 2003); UTAH CODE ANN. § 78-3a-601(1)(a) (2002). Moreover, several states that gave juveniles a hearing at the time of *Stanford* subsequently amended their codes to exclude death-eligible offenses from juvenile court jurisdiction without any judicial waiver hearing. See, e.g., ALA. CODE § 12-15-34.1(a)(1) (1995); IDAHO CODE § 20-509 (Michie Supp. 2003); LA. REV. STAT. ANN. art. 305(A) (1995); S.D. CODIFIED LAWS § 26-11-3.1 (Michie 1999).

Currently only four states that execute juveniles conduct an individualized waiver hearing prior to transfer to criminal court, and death-eligibility and “culpability” are not explicit criteria that judges must consider. See, e.g., ARK. CODE ANN. § 9-27-318 (Michie 2003); S.C. CODE ANN. § 20-7-7605(5) (Law Co-op 2003); VA. CODE ANN. § 16.1-269.1 (A) (Michie 2003); WYO. STAT. ANN. § 14-6-237(b) (Michie 2003). Nevada, which previously excluded capital murder, has bucked the legislative trend and adopted legislation to provide an individualized waiver hearing. NEV. REV. STAT. § 62.040 (Michie 2002), *repealed by* S. 197, 72d Reg. Sess. (Nev. 2003). Contrary to the legislative trend, which clearly belies Justice Scalia’s confident claims, commentators advocate strengthening the waiver process to assure that juvenile courts transfer only those older juveniles whose culpability deserves imposition of the death penalty. Romano, *supra* note 8, at 154 (encouraging the Court to require “that every juvenile defendant be screened on the basis of his individual culpability alone before waiving him into criminal court”).

93. In *State v. Davolt*, 84 P.3d 456 (Ariz. 2004), the Arizona Supreme Court analyzed the effect of changes in the state’s waiver law on the validity of a subsequent death penalty imposed on a sixteen-year-old convicted of capital murder. See *id.* at 478-81. Justice Scalia had previously cited Arizona as an example of a state that conducted an individualized waiver hearing prior to adult prosecution. See *supra* note 92. However, after Arizona voters passed Proposition 102 in 1996, constitutional and legislative amendments required county attorneys automatically to prosecute as adults all juveniles aged fifteen, sixteen, or seventeen years and charged with first degree murder. See *Davolt*, 84 P.3d at 479; see also ARIZ. CONST. art. IV, pt. 2, § 22; ARIZ. REV. STAT. ANN. § 13-501 (2001). As a result of the Automatic Filing Law, a sixteen- or seventeen-year-old juvenile tried as an adult for first degree murder could receive the death penalty without any waiver hearing or individualized culpability assessment other than in the capital proceeding. Davolt argued that the “automatic filing” procedures violated the Eighth Amendment because “the statute fails to provide

sixteen- and seventeen-year-old offenders because the majority of states that endorsed capital punishment authorized it for those below the age of eighteen.⁹⁴

for individualized consideration of a juvenile defendant's maturity and moral responsibility before subjecting the juvenile to trial as an adult for capital murder." *Davolt*, 84 P.3d at 479.

The Arizona Supreme Court relied on *Atkins* and *Stanford* to require a judge to make an individualized determination of a juvenile's culpability prior to the trial to decide the youth's guilt and ultimate penalty. *See id.* at 479-81. Although *Davolt* acknowledged that *Stanford* did not categorically ban execution of juveniles who were aged sixteen or seventeen years at the time of their crimes, it noted that

[i]n upholding death sentences imposed under the Missouri and Kentucky juvenile death penalty statutes, the Court emphasized that these states provided the individualized consideration that is constitutionally required in the "realm of capital punishment."

The Court reasoned that the constitutionality of the imposition of the death penalty on a juvenile depends not on general state laws defining ages of legal disability, but on individualized consideration applied to the circumstances of each juvenile defendant. The Court noted that the statutory schemes at issue in *Stanford* satisfied the constitutional mandate for individualized consideration because 1) both schemes specifically designated age as a statutory mitigating factor and 2) both required a juvenile transfer hearing that provided for a consideration of that individual's maturity and moral responsibility as a pre-condition to transfer for trial as an adult.

Id. at 480 (citations omitted). The court in *Davolt* distinguished between allowing a sentencing jury to consider youthfulness as a mitigating factor for leniency in capital sentencing, and an individualized judicial determination prior to trial that the

juvenile defendant has the requisite moral responsibility and culpability to be held accountable to the same degree as an adult. We therefore conclude that, in the context of our capital sentencing scheme, the consideration of a juvenile defendant's age as a statutory mitigating factor, standing alone, is insufficient to provide the individualized consideration required by the *Stanford* decision.

Id. at 480-81. Although it upheld his conviction, the Court remanded *Davolt* to the trial judge to determine whether "he possessed the requisite responsibility and culpability to be constitutionally eligible for the death penalty" at the time he committed the murders. *Id.* at 481. If the trial judge is unable to make this determination or concludes that *Davolt* lacked the moral responsibility and culpability necessary for the death penalty, then it must vacate his death sentence.

[B]ecause we find that the consideration of age alone as a statutory mitigating factor is insufficient in the context of our capital sentencing scheme to provide juvenile defendants with the individualized consideration mandated by the Eighth Amendment, we hold that the State may not seek the death penalty against a juvenile pursuant to Arizona's Automatic Filing Statute without an individual assessment of the juvenile's maturity and moral responsibility at the time of the offense.

Id. (citation omitted).

94. *See Stanford*, 492 U.S. at 381 ("[T]here is no national consensus forbidding the imposition of capital punishment for crimes committed at the age of 16 and older. As the Court indicates, 'a majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above.'" (citations omitted)). Unlike the majority, however, Justice O'Connor insisted that the Court also had a responsibility to conduct proportionality analyses and to assess the "nexus between the punishment imposed and the defendant's blameworthiness." *Id.* at 382 (O'Connor, J. dissenting) (citation omitted).

The four *Stanford* dissenters reviewed the evidence relied on in *Thompson* to argue for a national consensus against executing children.⁹⁵ In its calculus, the dissent counted both those states that did not authorize the death penalty for any offender as well as those which restricted it only to those eighteen years of age or older, and found that “the governments in fully 27 of the States have concluded that no one under 18 should face the death penalty” and that “a total of 30 States . . . would not tolerate the execution” of the sixteen-year-old petitioner in *Stanford’s* companion case.⁹⁶ Unlike the majority, the dissent would consider other “indicators of contemporary standards of decency” besides state laws and jury practices.⁹⁷ The Eighth Amendment requires the Court to conduct an independent proportionality analysis to determine whether a punishment was disproportionate or served the goals of punishment.⁹⁸ Such a proportionality analysis precludes “punishment that is wholly disproportionate to the blameworthiness of the offender,”⁹⁹ and juveniles categorically lacked the requisite culpability for capital punishment.¹⁰⁰ Moreover, the procedural safeguards on which the *Stanford* majority relied did not adequately address the substantive questions of whether *any* youth can possess the requisite culpability for execution or whether states accurately can distinguish them from less blameworthy offenders.¹⁰¹

95. See *id.* at 383-405 (Brennan, J., dissenting).

96. *Id.* at 384-85. *Stanford* was heard by the Supreme Court together with *Wilkins v. Missouri*. The dissent in *Stanford* regarded state laws and jury decisions as informative, but not determinative, of the Eighth Amendment question of “evolving standards of decency.” See *id.* at 383 (describing how they must “begin the task of deciding whether a punishment is unconstitutional by reviewing legislative enactments and the work of sentencing juries Our judgment about the constitutionality of a punishment under the Eighth Amendment is informed, though not determined, by an examination of contemporary attitudes toward the punishment, as evidenced in the actions of legislatures and of juries.” (citation omitted)).

97. *Id.* at 388. The dissent proposed that the views of professional organizations and international law also affect the Court’s assessments. See *id.* at 388-89.

98. See *id.* at 390-91.

99. *Id.* at 393 (noting that proportionality principle “takes account not only of the ‘injury to the person and to the public’ caused by a crime, but also of the ‘moral depravity’ of the offender”) (citations omitted).

100. See *id.* at 394 (“Proportionality analysis requires that we compare ‘the gravity of the offense,’ understood to include not only the injury caused, but also the defendant’s culpability, with ‘the harshness of the penalty.’ In my view, juveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty.”).

101. See, e.g., Fagan, *supra* note 48, at 234 (arguing that “[t]he danger in this approach is that the role of procedural due process is conflated with the deliberation required for substantive factual determination such as maturity or culpability, and the result would be an incomplete examination of the substantive constitutional issues underlying the application of the death penalty on juveniles.”).

Atkins has revived questions about the constitutionality of executing adolescents. In *Patterson v. Texas*, the dissent to a denial of a stay of execution of a juvenile urged the Court to reconsider *Stanford* in light of the “apparent [national] consensus that exists among the States . . . against the execution of a capital sentence imposed on a juvenile offender.”¹⁰² Two months after *Patterson*, Stanford exhausted his state and federal remedies and filed a final writ of habeas corpus, which the Court denied.¹⁰³ The four justices, who dissented from the denial of the writ, argued that a national consensus had emerged against executing juveniles, and urged the Court to reconsider the issue in light of *Atkins*.¹⁰⁴ Justice Stevens noted that nearly the same number of states prohibited executing adolescents as proscribed the death penalty for defendants with mental retardation.¹⁰⁵ Justice Stevens also cited recent neurobiological research that indicates that the immature adolescent brain lacked the reasoning abilities of adults.¹⁰⁶ On January 5, 2004, the Supreme Court granted certiorari in *Roper v. Simmons* to consider again

102. *Patterson v. Texas*, 536 U.S. 984, 984 (2002) (Stevens, J., dissenting).

103. See *In re Stanford*, 537 U.S. 968, 968 (2002); see also Jeffrey M. Banks, Comment, *In re Stanford: Do Evolving Standards of Decency Under Eighth Amendment Jurisprudence Render Capital Punishment Inapposite for Juvenile Offenders?*, 48 S.D. L. REV. 327, 328 (2003) (approving Court’s denial of habeas petition and arguing that the applicable “standards of decency” were those the Court originally employed in 1989 and not those subsequently developed in *Atkins*). Following *In re Stanford*, the Supreme Court denied a third petition from a juvenile for habeas corpus relief. See *Hain v. Mullin*, 537 U.S. 1173 (2003). After the Court rejected Stanford’s habeas petition, outgoing Kentucky Governor Paul Patton, as one of his final acts in office, commuted Stanford’s death sentence because he “believed sentencing a juvenile to death is an excessive punishment.” Tom Loftus, *Patton Has Short, Quiet Last Day as Governor*, LOUISVILLE COURIER-J., Dec. 9, 2003, at 1B.

104. See *In re Stanford*, 537 U.S. at 968 (Stevens, J., dissenting). Justice Stevens, with whom Justices Souter, Ginsberg and Breyer joined, quoted from Justice Brennan’s dissenting opinion in *Stanford v. Kentucky*, emphasizing that:

Proportionality analysis requires that we compare “the gravity of the offense,” understood to include not only the injury caused, but also the defendant’s culpability, with the “harshness of the penalty.” . . . [J]uveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty that the Eighth Amendment forbids that they receive that punishment.

Id. at 969 (quoting *Stanford*, 492 U.S. at 394-96).

Justice Stevens emphasized the implications of *Atkins* for executing juveniles by noting that in the thirteen years since the Court’s *Stanford* decision, “a national consensus has developed that juvenile offenders should not be executed. No State has lowered the age of eligibility to either 16 or 17 since our decision in 1989 [and] the movement is in exactly the opposite direction.” *Id.* at 971-72.

105. See *id.* at 968 (incorporating Justice Brennan’s dissent in *Stanford* and noting that “the number of States expressly forbidding the execution of juvenile offenders (28) is slightly fewer than the number forbidding the execution of the mentally retarded (30)”).

106. See *id.* at 971; see also *infra* notes 201-25 and accompanying text.

whether the Eighth Amendment bars the execution of offenders for crimes they committed prior to age eighteen.¹⁰⁷

A. *The Empirical Foundation of Stanford*

Atkins relied on legislative changes and jury behavior as empirical evidence to prohibit states from executing mentally retarded defendants.¹⁰⁸ In the decade and a half since *Stanford*, several state supreme courts have barred the execution of youths under eighteen,¹⁰⁹ or at least under seventeen years of age.¹¹⁰ In *Simmons v. Roper*,¹¹¹ the Missouri Supreme Court applied the Supreme Court's *Atkins* analysis to prohibit execution of a youth for a crime committed at seventeen years of age:

Applying the approach taken in *Atkins*, this Court finds that, in the fourteen years since *Stanford* was decided, a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum

107. 124 S. Ct. 1171 (2004); see also *infra* notes 111-21 and accompanying text (discussing the Missouri Supreme Court's decision in *Simmons v. Roper*).

108. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

109. See, e.g., *State v. Furman*, 858 P.2d 1092, 1103 (Wash. 1993) (holding that although the waiver statute allowed judges to try juveniles of any age as adults, and the death penalty authorized capital punishment for offenders convicted of certain offenses, neither statute specifically considered application of the death penalty to juveniles. "The statutes therefore cannot be construed to authorize imposition of the death penalty for crimes committed by juveniles. Absent such authorization, appellant's death sentence cannot stand.").

110. *Brennan v. State*, 754 So. 2d 1, 7 (Fla. 1999) ("[T]he death penalty is cruel or unusual if imposed on a defendant under the age of seventeen."). The Court in *Stanford v. Kentucky* noted that "the determinations required by juvenile transfer statutes to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibility of 16- and 17-year old offenders before they are even held to stand trial as adults." 492 U.S. 361, 375 (1989). By contrast, the Florida waiver law provided that a child of any age may be indicted for a capital crime and tried as an adult, and the death penalty statute failed to provide any minimum age for death eligibility. See *Brennan*, 754 So. 2d at 9.

[As a consequence] [t]he Legislature's failure to impose a minimum age, the legislative mandate that a child of any age indicted for a capital crime shall be subject to the death penalty, and the failure to set up a system through our juvenile transfer statutes that "ensure[s] individualized consideration of the maturity and moral responsibility" render our statutory scheme suspect under the federal constitution and the reasoning of *Stanford* as it applies to sixteen-year-old offenders.

Id. (alteration in original).

111. 112 S.W.3d 397 (Mo. 2003) (en banc).

age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade.¹¹²

Significantly, the Missouri Supreme Court based its decision on federal constitutional grounds and found that “the Supreme Court would today hold that such executions are prohibited by the Eighth and Fourteenth Amendments.”¹¹³ By ruling on the federal, rather than state, constitution, *Simmons* frontally challenged the continuing vitality of *Stanford*.¹¹⁴

Simmons replicated the Supreme Court’s empirical and normative analyses in *Thompson*¹¹⁵ and *Atkins*¹¹⁶ and concluded that the Court today would prohibit executing offenders under the age of eighteen.¹¹⁷ The same legislative trend that *Atkins* found to provide a “national consensus” against executing mentally retarded defendants also existed with respect to state laws prohibiting executing juveniles.¹¹⁸ Although twenty-one other states theoretically authorized the death penalty for juveniles, only six states had executed a juvenile since the *Stanford*

112. *Id.* at 399.

113. *Id.* at 400.

114. See *supra* notes 106, 110-13 and accompanying text (noting Court’s grant of certiorari in *Roper v. Simmons*).

115. See *Simmons*, 112 S.W.3d at 401-03 (noting that *Thompson*’s assessment of “evolving standards of decency” focused on legislative enactments, jury behavior, the views of professional organizations, and the Court’s own normative judgments).

116. See *id.* at 404 (reasoning that *Atkins*’ decision to overrule *Penry* more closely resembled the Court’s analysis in *Thompson* than in *Stanford*).

117. See *id.* at 407-13 (examining changes in state laws, jury behavior, the policy positions of national and international legal and religious organizations, and the culpability of juveniles).

118. See *id.* at 408. Noting the legislative parallelisms between executing mentally retarded in *Atkins* and juvenile offenders, the Missouri Court found that:

That same consistency of change has been shown in opposition to the juvenile death penalty. . . . Since *Stanford* . . . five more states have banned the practice of executing juvenile offenders. Two have done so by adopting legislation raising the age of execution to 18, and two have done so by newly reinstating the death penalty, but only for those offenders who were 18 or older at the time of their offense. The Washington Supreme Court has also held that its death penalty statute cannot be construed to authorize imposition of the death penalty for crimes committed by juvenile offenders Thus, a total of sixteen states—to which should be added federal civilian and military courts—require a minimum age of 18 for imposition of the death penalty, only two fewer than the eighteen states *Atkins* identified as prohibiting the execution of the mentally retarded. If the twelve states and the District of Columbia that bar the death penalty entirely are added, the combined total is twenty-eight states that prohibit juvenile executions—two fewer than the thirty states that prohibited executions of the mentally retarded at the time *Atkins* was decided.

Id. (footnotes omitted); see also Hughes, *supra* note 8, at 1004-06 (noting the role that the trend in state legislation had on the Court’s ultimate decision in *Atkins*).

decision, and only three had done so within the preceding decade.¹¹⁹ *Simmons* found that national and international professional, social, and religious organizations opposed executing offenders for crimes committed when they were younger than eighteen years of age.¹²⁰ Because of juveniles' reduced culpability, categorically exempting them from the death penalty would not erode the retributive or deterrent functions of the death penalty.¹²¹

	States Barring Execution of Mentally Retarded Defendants, cited in <i>Atkins</i> <i>v. Virginia</i> .*	States Currently Barring Execution of Juvenile Defendants (16-17 Years Old).**
Alabama	N/A.	N/A.
Alaska	No Death Penalty.	No Death Penalty.
Arizona	ARIZ. REV. STAT. ANN. § 13-703.02 (West 2001).	N/A.
Arkansas	ARK. CODE ANN. § 5-4- 618 (Michie 1997).	N/A.
California	N/A.	No Juvenile Execution: CAL. PENAL CODE § 190.5 (West 1999).
Colorado	COLO. REV. STAT. Ann. § 16-9-401 (West 1999).	No Juvenile Execution: COLO. REV. STAT. ANN. § 18-1.3-1201(1)(a) (West Supp. 2003).
Connecticut	CONN. GEN. STAT. § 53a- 46a(h)(2) (West 2001).	No Juvenile Execution: CONN. GEN. STAT. ANN. § 53a-46a(h)(1) (West 2001).

119. See *Simmons*, 112 S.W.3d at 409. The Court noted that the infrequency of the practice obviated the need for legislatures formally to prohibit executing juveniles. "[I]n light of the small number of executions of juvenile offenders carried out in the last decade, legislatures in states with a juvenile death penalty may have seen little reason to pass legislation barring it." *Id.* at 410.

120. See *id.* at 410-11.

121. See *id.* at 411-12. ("[A]s to juveniles, neither retribution nor deterrence provides an effective rationale for the imposition of the juvenile death penalty, and the risk of wrongful execution of juveniles is enhanced for reasons similar to that [sic] set out in *Atkins* in regard to the mentally retarded."). In addition to juveniles' lesser culpability, the *Simmons* court reasoned that because the death penalty is imposed so infrequently, the remote threat of execution could not be part of a "rational" juvenile's deterrent calculus. See *id.* at 413.

Delaware	N/A.	N/A.
Florida	FLA. STAT. ANN. § 921.137 (West Supp. 2002).	No Juvenile Execution for Defendants Under Seventeen: Brennan v. State, 754 So. 2d 1, 11 (Fla. 1999).
Georgia	GA. CODE ANN. § 17-7- 131(j) (1997).	No Juvenile Execution for Defendants Under Seventeen: GA. CODE ANN. § 17-9- 3 (1997).
Hawaii	No Death Penalty.	No Death Penalty.
Idaho	N/A.	N/A.
Illinois	N/A.	No Juvenile Execution: 720 ILL. COMP. STAT. ANN. 5/9-1(b) (West 2002).
Indiana	IND. CODE ANN. §§ 35-36- 9-2 to 35-36-9-6 (West 1998).	No Juvenile Execution: IND. CODE ANN. § 35- 50-2-3(3)(b)(1)(A) (West Supp. 2003).
Iowa	No Death Penalty.	No Death Penalty.
Kansas	KAN. STAT. ANN. § 21- 4623 (1995).	No Juvenile Execution: KAN. STAT. ANN. § 21- 4622 (1997).
Kentucky	KY. REV. STAT. ANN. §§ 532.130-140 (Michie 1999).	N/A.
Louisiana	N/A.	N/A.
Maine	No Death Penalty.	No Death Penalty.
Maryland	MD. ANN. CODE. art. 27, § 412(g)(1) (1996).	No Juvenile Execution: MD. CODE ANN., CRIM. § 2-202(b)(2)(i) (2000).

Massachusetts	No Death Penalty.	No Death Penalty.
Michigan	No Death Penalty.	No Death Penalty.
Minnesota	No Death Penalty.	No Death Penalty.
Mississippi	N/A.	N/A.
Missouri	MO. ANN. STAT. § 565.030 (West Supp. 2002).	No Juvenile Execution: Simmons v. Roper, 112 S.W.3d 397, 399-400 (Mo. 2003).
Montana	N/A.	No Juvenile Execution: MONT. CODE ANN. § 45-5-102(2) (2003).
Nebraska	NEB. REV. STAT. ANN. § 28-105.01 (Michie Supp. 2001).	No Juvenile Execution: NEB. REV. STAT. ANN. § 28-105.01(1)-(2) (Michie 2003).
Nevada	A.B. 353, 71st Reg. Sess. (2001); this legislation had passed the state Assembly, but died when the legislative session adjourned; the Court in <i>Atkins</i> listed it as support for a national consensus on barring the execution of mentally retarded defendants. <i>See Atkins v.</i> <i>Virginia</i> , 536 U.S. 304, 315 n.17 (2002).	N/A.

New Hampshire	N/A.	No Juvenile Executions for Defendants Under Seventeen: N.H. REV. STAT. ANN. § 630:1(V) (1996). On February 19, 2004, the state senate passed S.B. 513, 2004 Sess., which would increase the death-eligible age to eighteen years old. The bill was passed by the state house of representatives on April 22, 2004. It is currently awaiting action by the Governor.
New Jersey	N/A.	No Juvenile Execution: N.J. STAT. ANN. § 2C:11-3(b), (g) (West 1995).
New Mexico	N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000).	No Juvenile Execution: N.M. STAT. ANN. §§ 31-18-14(A), 28-6-1(A) (Michie 2003).
New York	N.Y. CRIM. PROC. LAW § 400.27(12) (McKinney Supp. 2002).	No Juvenile Execution: N.Y. PENAL LAW § 125.27(1)(b) (McKinney 1998); NY SENTENCE CHARTS, CHART IA: CLASS A-1 FELONY (McKinney 2004).
North Carolina	S.B. 173, 2001 Gen. Assm., 1st Sess., 2001 N.C. Sess. Laws 346, later codified at N.C. GEN. STAT. § 15A-2005.	No Juvenile Execution for Defendants Under Seventeen: N.C. GEN. STAT. § 14-17 (2003).
North Dakota	No Death Penalty.	No Death Penalty.

Ohio	N/A.	No Juvenile Execution: OHIO REV. CODE ANN. § 2929.02 (Anderson 1996).
Oklahoma	N/A.	N/A.
Oregon	N/A.	No Juvenile Execution: OR. REV. STAT. § 161.620 (2001).
Pennsylvania	N/A.	N/A.
Rhode Island	No Death Penalty.	No Death Penalty.
South Carolina	N/A.	N/A.
South Dakota	S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie Supp. 2001).	No Juvenile Execution: S.B. 182, 79th Leg., 2004 Reg. Sess. (S.D. Mar. 3, 2004).
Tennessee	TENN. CODE ANN. § 39- 13-203 (1997).	No Juvenile Execution: TENN. CODE ANN. § 37- 1-134(a)(1) (2001).
Texas	H.B. 236, 77th Leg. passed in the House on April 24, 2001; S.B. 686, 77th Leg. passed in the Senate on May 16, 2001. Governor Perry then vetoed the legislation, but the Court in <i>Atkins</i> listed it as support for a national consensus on barring the execution of mentally retarded defendants. <i>See</i> <i>Atkins v. Virginia</i> , 536 U.S. 304, 315 n.16 (2002).	No Juvenile Execution for Defendants Under Seventeen: TEX. PENAL CODE ANN. § 8.07(c) (Vernon 2003).
Utah	N/A.	N/A.
Vermont	No Death Penalty.	No Death Penalty.

Virginia	S.B. 497, 2002 Leg. (2002), House Bill No. 957, 2002 Leg. (2002); although this legislation was not yet in effect when <i>Atkins</i> was decided, the Court listed it as support for a national consensus on barring the execution of mentally retarded defendants. <i>See Atkins v. Virginia</i> , 536 U.S. 304, 315 n.17 (2002).	N/A.
Washington	WASH. REV. CODE § 10.95.030(2) (Supp. 2001).	No Juvenile Execution: <i>State v. Furman</i> , 858 P.2d 1092, 1103 (Wash. 1993).
West Virginia	No Death Penalty.	No Death Penalty.
Wisconsin	No Death Penalty.	No Death Penalty.
Wyoming	N/A.	No Juvenile Execution: H.E.A. 19, 57th Leg., 2004 Budget Sess. (Wyo. Mar. 3, 2004).
Totals	Twenty-one states (excludes states that do not impose the death penalty on any defendant).	Nineteen states do not execute any defendant under the age of eighteen at the time of the capital offense (plus one state with legislation pending) and five states do not execute any defendant under the age of seventeen at the time of the capital offense) for a total of twenty-four states—excluding states that do not impose the

		death penalty on any defendant—restricting juvenile executions.
Federal Government	18 U.S.C. § 3596(c).	No Juvenile Execution: 18 U.S.C. § 3591(a) (2000).

* All of the statutes listed in the *Atkins v. Virginia* column were cited by the Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 314-16 (2002), and appear here as in effect at the time *Atkins* was decided. States designated as “N/A” either permitted execution of the mentally retarded at the time *Atkins* was decided, or prohibited it but were not cited in that decision.

** The Supreme Court held that the execution of a defendant that was under sixteen years of age when he committed his crime was unconstitutional in *Thompson v. Oklahoma*, 487 U.S. 815 (1988). States in this column designated as “N/A” do not bar the execution of sixteen and seventeen year olds.

Following the *Simmons* ruling, two more states—South Dakota and Wyoming—passed laws banning the execution of juveniles, and the New Hampshire house and senate also passed a prohibition bill. Of the thirty-eight state death penalty jurisdictions and the two federal government (civil and military) jurisdictions, twenty-one (52.5 %) expressly provide that eighteen years of age is the minimum age for death eligibility, another five (12.5 %) specify seventeen years of age as the minimum age for death eligibility, and fourteen (35 %) use sixteen years of age as the minimum age either by statute or by court ruling relying on *Stanford*.¹²² Even after *Stanford* approved executing sixteen- or seventeen-year-old offenders, no death penalty state which previously allowed executing only eighteen-year-old offenders lowered its statutory minimum age.¹²³ Like the clear national trend observed in *Atkins*, states

122. See Streib, *supra* note 8, at 191; VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973–APRIL 30, 2004, at 7 (2004) [hereinafter STREIB, JUVENILE DEATH PENALTY TODAY 2004], available at <http://www.law.onu.edu/faculty/streib/JuvDeathApr302004.pdf>.

123. See STREIB, THE JUVENILE DEATH PENALTY TODAY 2004, *supra* note 122, at 8; see also *In re Stanford*, 537 U.S. 968, 972 (2002) (Stevens, J., dissenting) (“[T]he treatment of this issue by the legislatures has led to a trend in only one direction—toward [the] abolition of the death penalty for juveniles offenders—the fact that the legislatures are paying attention to this issue is remarkable. Juvenile offenders make up only 2 % of the total population of death row and about that same percentage of the executions that are carried out. As a result of such small numbers, one might

consistently have moved only to raise the minimum age for death eligibility. In the post-*Stanford* era, several states have adopted or raised their minimum age from sixteen to eighteen,¹²⁴ and several other legislatures have come close to amending their death penalty statutes to prohibit executing juveniles.¹²⁵

The dissent in *Atkins* and the *Thompson* Court viewed jury sentencing practices as another indicator of “evolving standards of decency.”¹²⁶ Even in states that nominally approve the death penalty for juveniles, juries seldom impose them and states even less frequently carry them out thereby reducing the impetus to amend their laws. Although twenty-two states officially sanctioned the death penalty for juveniles, at the time *Simmons v. Roper* was decided, only seven states have executed a juvenile during the post-*Furman* era, and since *Stanford*, only Texas, Oklahoma, and Virginia have executed youths with any regularity.¹²⁷ In Texas, between 1982 and 2003, of the three hundred and thirteen persons executed, thirteen (4.2 %) were juvenile offenders, and an additional twenty-eight youths remain on death row.¹²⁸ During the same period in Virginia, three (3.4 %) of eighty-nine people executed were juveniles.¹²⁹ The decision by the jury in Virginia to spare

expect that this issue would draw little public attention and even less interest from the state legislatures. But the legislatures have acted, and those actions are uniformly against the execution of those who were under 18 when they committed their offenses.”)

124. See STREIB, JUVENILE DEATH PENALTY TODAY 2004, *supra* note 122, at 7 (noting that, in recent years, New York (1994) and Kansas (1995) enacted death penalty statutes with minimum ages for execution of eighteen, and Montana (1999), Indiana (2002), South Dakota (2004), and Wyoming (2004) raised the minimum age for execution to eighteen).

125. See VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973–JUNE 30, 2003, at 8 (2003) (noting that legislative efforts to raise the statutory minimum age to eighteen “ha[ve] progressed at least partway to adoption in Arizona, Arkansas, Delaware, Florida, Kentucky, Mississippi, Missouri, Nevada, Pennsylvania, South Dakota and Texas. This is the most legislative attention to this issue since the early- to mid-1980s”).

126. See *Atkins v. Virginia*, 536 U.S. 304, 323 (2002) (Rehnquist, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 821-22 (1988) (plurality opinion).

127. See *Simmons v. Roper*, 112 S.W.3d 397, 409 (Mo. 2003) (“Although twenty-two states theoretically permit the death penalty for juveniles, only six (Missouri, Texas, Virginia, Georgia, Oklahoma, and Louisiana) have actually executed a juvenile offender since *Stanford* was decided fourteen years ago. Of these six states, only three have executed juvenile offenders since 1993—Texas, Virginia, and Oklahoma.”) (citations omitted); JUVENILE JUSTICE CENTER, ABA, FACTSHEET: THE JUVENILE DEATH PENALTY 1 (2003), available at http://www.abanet.org/crimjust/juvjus/factsheet_general.pdf (“[Twenty-two] states permit the juvenile death penalty, but only Texas, Virginia, and Oklahoma have executed more than one juvenile offender (13, 3, and 2 respectively). Four other states have each executed one.”).

128. See VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973–DECEMBER 31, 2003, at 5, 12 (2004).

129. See *id.* at 5.

the life of seventeen-year-old Washington, D.C.-area sniper, Lee Boyd Malvo, also evidences the erosion of popular support for the practice.¹³⁰

III. ATKINS AND ADOLESCENTS RECONSIDERED: COMPETENCE AND CULPABILITY

The developmental limitations that reduce the culpability of mentally retarded defendants characterize most normal adolescent offenders as well.¹³¹ When states punish young offenders, they assume that adolescents possess sufficient cognitive capacity and volitional controls to hold them responsible and accountable for their criminal behavior.¹³² However, even criminally responsible young offenders *deserve* less severe penalties than do mature offenders.¹³³ Every other

130. See Tom Jackman, *Malvo Is Spared Death Penalty: Jury Gives Teen Life Sentence for His Role in Sniper Slayings*, WASH. POST, Dec. 24, 2003, at A1, A8; Adam Liptak, *Penalty for Young Sniper Could Spur Change in Law*, N.Y. TIMES, Dec. 25, 2003, at A12 (“The Malvo verdict should be taken as a signal that the public has little enthusiasm for executing juveniles, . . . even for the most horrendous of crimes, and that people understand that young offenders are less culpable than adults.”) (quoting Elizabeth Scott); Adam Liptak, *Younger Sniper Given Sentence of Life Term*, N.Y. TIMES, Dec. 24, 2003, at A1 (“[T]he jury’s decision to spare Mr. Malvo’s life showed that it was reluctant to put a young murderer to death even though it had rejected his insanity defense.”); Andrea F. Siegel, *Sniper Malvo Eludes Death Penalty: Jurors Cite Age in Life Sentence*, CHI. TRIB., Dec. 24, 2003, at I5 (“Swayed by the youthfulness and troubled past of Lee Boyd Malvo, a jury voted Tuesday to spare the younger of two snipers.”). *But see* Michelle Boorstein, *Mistaken Belief About Mistrial Troubles Jurors*, WASH. POST, Dec. 25, 2003, at B1 (reporting that “[j]urors deciding whether to sentence Lee Boyd Malvo to life in prison or death said yesterday they had feared that if they did not come to a unanimous decision, a mistrial would be declared—an erroneous belief that led several who believed Malvo should die to vote to spare his life.”).

131. The cognitive deficits that characterize people with mental retardation include “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” *Atkins*, 536 U.S. at 318. For the adolescent analogues, see *infra* notes 142-43 and accompanying text.

132. See Feld, *supra* note 2, at 97. In contrast, Zimring uses the term “diminished responsibility” to refer to adolescents who possess “the minimum abilities for blameworthiness and thus for punishment . . . [whose] immaturity still suggests that less punishment is justified.” Zimring, *supra* note 1, at 273.

133. See Zimring, *supra* note 1, at 273. Developmental psychology and criminal sentencing policy justify sentencing young people less severely than their adult counterparts. The common law infancy defense recognized that young people may lack criminal capacity. The classical criminal law assumed that rational actors make blameworthy choices and deserve to suffer the consequences of their freely chosen acts. See Richard Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL*, *supra* note 1, at 80; Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 262 (1987). The common law recognized and mitigated the punishments of actors who lacked the requisite moral and criminal responsibility, for example, the insane and the young. See *id.*; ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 199-202 (1967). *But see* Sanford J. Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 659 (1970) (“Insanity and infancy constituted the only substantive law defenses exculpating juvenile criminals on grounds of irresponsibility.”). It conclusively presumed that children less than seven years old lacked

area of law recognizes that young people have limited judgment, are less competent decision-makers because of their immaturity, and require greater protection than do adults.¹³⁴ Applying the same principle of diminished responsibility in the criminal law requires a categorical ban on executing youths *and* shorter sentences for youths than for adults convicted of the same offenses.

Deserved punishment entails condemnation for making blameworthy choices and imposes proportional sentences commensurate with the seriousness of the offense.¹³⁵ Two elements define the seriousness of a crime—harm and culpability.¹³⁶ An offender's age has little bearing on assessments of harm—the quality of the injury inflicted or the value taken¹³⁷—but youthfulness and immaturity bear quite

criminal capacity, and treated those fourteen years of age and older as fully responsible. Between the ages of seven and fourteen years, the law created a rebuttable presumption that youths lacked criminal capacity. *See id.* at 660; Francis Barry McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REFORM 181, 184-85 (1977); Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 510-11 (1984); James C. Weissman, *Toward an Integrated Theory of Delinquency Responsibility*, 60 DENV. L.J. 485, 490 (1983).

134. *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) (describing limitations on juveniles' rights to drink, drive, vote, marry, contract as a result of immaturity); FRANKLIN ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENTS* 35-36 (1982); Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 89-91 (1999) (analyzing the inconsistency between punishing adolescents like adults while denying their autonomy claims in areas outside of the criminal law); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 *Hastings L.J.* 1265, 1268 (2000) (arguing that presumption of decisional incapacity pervades most areas of law and conflicts with model of adolescent autonomy); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 *VILL. L. REV.* 1607, 1608, 1611 (1992); Zimring, *supra* note 1, at 287.

135. *See* ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 48 (1976) (“[P]unishing someone conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it.”); *see also* ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 15 (1993); ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* 31 (1985) [hereinafter VON HIRSCH, *PAST OR FUTURE CRIMES*].

136. *See* *Stanford v. Kentucky*, 492 U.S. 361, 393 (1989) (Brennan, J., dissenting) (“[T]he proportionality principle takes account not only of the ‘injury to the person and to the public’ caused by a crime, but also of the ‘moral depravity’ of the offender.”) (citation omitted); *Enmund v. Florida*, 458 U.S. 782, 815 (1982) (O’Connor, J., dissenting) (arguing that the offender’s culpability—“the degree of the defendant’s blameworthiness”—is central to determining the penalty) (footnote omitted); Logan, *supra* note 2, at 707 (“[A] sentence must correspond to the crime—not just to the harm caused by the offense, but also to the culpability of the offender.”); Scott & Steinberg, *supra* note 1, at 822 (“Only a blameworthy moral agent deserves punishment at all, and blameworthiness (and the amount of punishment deserved) can vary depending on the attributes of the actor or the circumstances of the offense.”); Zimring, *supra* note 1, at 271 (“But desert is a measure of fault that will attach very different punishment to criminal acts that cause similar amounts of harm.”).

137. Ernest van den Haag contends that:

directly on the quality of choices, the culpability of the actor, and the moral seriousness of the crime.¹³⁸

In the context of homicide gradations, for example, criminal law arrays actors' culpability and blameworthiness along a continuum from a premeditated killer for hire at one end to the minimally responsible actor barely capable of discerning right from wrong at the other end, even though each caused the same harm.¹³⁹ Assigning sentences proportional to culpability attempts to gauge the actor's location along this continuum of responsibility. Although determinations of culpability reflect complex moral evaluations, judgments about blameworthiness also reflect an actor's response to external factors, such as provocation, and to individual psychological, developmental, or emotional features, subsumed as "diminished responsibility."¹⁴⁰ Because the criminal law

There is little reason left for not holding juveniles responsible under the same laws that apply to adults. The victim of a fifteen-year-old muggers [sic] is as much mugged as the victim of a twenty-year-old mugger, the victim of a fourteen-year-old murderer or rapist is [just] as dead or as raped as the victim of an older one. The need for social defense or protection is the same.

ERNEST VAN DEN HAAG, PUNISHING CRIMINALS 174 (1975).

138. Just deserts theory and criminal law grading principles base the degree of deserved punishment on the actor's culpability. For example, a person may cause the death of another individual with premeditation and deliberation, intentionally, "in the heat of passion," recklessly, negligently, or accidentally. See JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 105-45 (2d ed. 1960). The criminal law treats the same objective consequence or harm—for example, the death of a person—differently depending on the nature of the choices made. In a framework of deserved punishment, to impose the same penalty upon offenders who do not share equal culpability would be unjust. When gauging the culpability of choices, youthfulness has central importance because young people are neither fully responsible nor the moral equals of adults. See Feld, *supra* note 2, at 121-23.

139. See GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 235-320 (1978) (summarizing gradations of criminal liability for unlawfully causing the death of another); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW §§ 7.1-7.13 (2d ed. 1986) (describing degrees of homicide and relationship to culpability); VON HIRSCH, PAST OR FUTURE CRIMES, *supra* note 135, at 73 (describing "half madness," where the defendant is not completely exculpated by reason of insanity, as mitigating the degree of deserved punishment because the "actor is less blameworthy because his own psychic disabilities significantly diminished his capacity to comprehend and be guided by the law's requirements").

140. See, e.g., FLETCHER, *supra* note 139, at 242-53 (describing reasonable provocation as a mitigating factor because the actor under the circumstances "is not expected completely to control himself" and the increased reliance on diminished capacity as a "progressive recognition that the impaired psychological condition of the accused," short of insanity, provides a proper basis for mitigating punishment); VON HIRSCH, PAST OR FUTURE CRIMES, *supra* note 135, at 31-34 (arguing the relevance of culpability and excuse to sentencing decisions as well as to definitions of offense); Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 973 (2002) (arguing that the "provocation defense is based to a considerable extent on the law's concession to ordinary human frailty; the ultimate question, therefore, is whether we (or the jury) consider the provoked party's anger within the range of expected human responses to the provocative situation. Put somewhat differently, we must decide if the provocative event

presumes free-willed moral actors—those who morally can be blamed for wrong-doing—it deems less culpable those whose capacity to make rational choices or whose ability to exercise self-control is significantly constrained by external circumstances or individual impairments.¹⁴¹ Youthfulness affects the actor's abilities to reason instrumentally and freely to choose behavior, and locates an offender closer to the diminished responsibility end of the continuum than to the fully autonomous free-willed actor.¹⁴²

might cause an ordinary person—one of ordinary and neither short nor saintly temperament—to become enraged or otherwise emotionally overcome.” (footnote omitted)); Kadish, *supra* note 133, at 264 (describing proper attribution of criminal blameworthiness as “express[ion of] a moral criticism”); Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 5-20 (1984) (describing and advocating “complete mens rea” approach to diminished capacity); see also *infra* notes 356-59 and accompanying text.

141. See FLETCHER, *supra* note 139, at 461-62 (describing the theory of deserved punishment and arguing that “[i]f the actor is fully accountable, he ought to be fully punished. Yet if his culpability is partial, he ought to be punished less. Lesser culpability justifies a mitigated punishment.”); VON HIRSCH, *PAST OR FUTURE CRIMES*, *supra* note 135, at 71-74 (summarizing principles of culpability in substantive criminal law); Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, SOC. PHIL. & POL'Y, Spring 1990, at 59, 61 (arguing that “the individual's capacity for moral responsiveness encompasses several distinct but interrelated abilities to react to moral norms in thought, feeling, perception, and behavior. In assessing whether individuals deserve moral blame for their acts when they lack such attributes or fail to exercise them competently, we should consider whether these agents can control those aspects of their character that impair their capacity for moral responsiveness.”).

142. Peter Arenella argues that the criminal law treats children differently than adults because, even though it expects them to adhere to moral norms, it recognizes that they only gradually will develop the capacity to understand their normative significance and abide by their dictates. And when they make a rational and voluntary choice to engage in morally objectionable conduct . . . , we may hold them accountable to some sanction to teach them the significance of the rule they have broken.

But we do not treat young children as full moral agents, despite their capacity for practical reason and their freedom to act on the basis of their reasoned choices. . . .

. . . [T]hey have not yet fully developed this capacity to respond appropriately to moral reasons for action. This capacity for *moral responsiveness* presupposes that moral agents appreciate the normative significance of the moral norms governing their behavior. It also assumes that moral agents can exercise *moral judgment* about how these norms apply in a particular context. Acting on the basis of moral judgment also requires *moral motivation*: the capacity to use the applicable moral norm as the basis for acting.

Aranella, *supra* note 141, at 67-68; see also Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 176 (1997) (arguing that adolescents' “criminal choices are presumed less to express individual preferences and more to reflect the behavioral influences characteristic of a transitory developmental stage that are generally shared with others in the age cohort. This difference supports drawing a line based on age, and subjecting adolescents to a categorical presumption of reduced responsibility.”); Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 407-09 (1999) (arguing that youths lack “ability to control [their] impulses, to

Criminal responsibility and moral blameworthiness hinge on cognitive and volitional competence. In a framework of deserved punishment, it is unjust to impose the same penalty on offenders who do not possess comparable culpability. Younger offenders are not as blameworthy as adults because they have not yet fully internalized moral norms, developed sufficient empathic identification with others, acquired adequate moral comprehension, or had sufficient opportunity to learn to control their actions.¹⁴³ In short, they possess neither the rationality—cognitive capacity—nor the self-control—volitional capacity—to justify equating their criminal responsibility with that of adults.

Developmental psychology studies changes across the life-cycle in physical, social, intellectual, and emotional development,¹⁴⁴ and, from its earliest foundation, has posited that young people move through a sequence of stages in legal reasoning and moral decision making.¹⁴⁵

manage [their] behavior in the face of pressure from others to violate the law, or to extricate [themselves] from a potentially problematic situation,” and these deficiencies render them less blameworthy).

143. See Fagan, *supra* note 48, at 235 (arguing that adolescents’ “judgment is immature because they have not yet attained several dimensions of psychosocial development that characterize adults as mature, including the capacity for autonomous choice, self-management, risk perception, and the calculation of future consequences”); Scott & Steinberg, *supra* note 1, at 823 (“[A]ctors, whose decisionmaking capacities are less severely impaired, or who are subject to compelling (but not overwhelming) pressures and constraints that limit their freedom of choice, may pass the minimum threshold of responsibility but be judged less culpable and deserving of less punishment than the typical criminal actor.”).

144. See, e.g., Steinberg & Cauffman, *supra* note 142, at 391 (“Developmental psychology, broadly defined, concerns the scientific study of changes in physical, intellectual, emotional, and social development over the life cycle. Developmental psychologists are mainly interested in the study of ‘normative’ development (i.e., patterns of behavior, cognition, and emotion that are regular and predictable within the vast majority of the population of individuals of a given chronological age), but they are also interested in understanding normal individual differences in development (i.e., common variations within the range of what is considered normative for a given chronological age) as well as the causes and consequences of atypical or pathological development (i.e., development that departs significantly from accepted norms.”).

145. See, e.g., JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 26-28 (Marjorie Gabain trans., First Free Press Paperback ed. 1965) (1932) (describing four stages of development); JEAN PIAGET & BÄRBEL INHELDER, *THE PSYCHOLOGY OF THE CHILD* 152 (Helen Weaver trans., 1969) (1966) (“[T]he mental development of the child appears as a succession of three great periods.”); Lawrence Kohlberg, *Development of Moral Character and Moral Ideology*, in 1 *REVIEW OF CHILD DEVELOPMENT RESEARCH* 383, 394-409 (Martin L. Hoffman & Lois Wladis Hoffman eds., 1964); Lawrence Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, in *HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH* 347, 347-472 (David A. Goslin ed., 1969); Lawrence Kohlberg, *The Development of Children’s Orientations Toward a Moral Order*, 6 *VITA HUMANA* 11, 11-14 (1963); June Louin Tapp & Lawrence Kohlberg, *Developing Senses of Law and Legal Justice*, in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY* 89, 90 (June Louin Tapp & Felice J. Levine eds., 1977); June Louin Tapp & Felice J. Levine, *Legal Socialization: Strategies*

Some of the developmental changes parallel the imputations of responsibility associated with the common law infancy defense, and by mid-adolescence most youths acquire cognitive reasoning capacity roughly comparable to that of adults.¹⁴⁶ When, for example, youths make informed consent decisions for psychotherapy or medical treatment, few bases exist to distinguish between mid-adolescents and adults in terms of the information used or the reasoning processes employed.¹⁴⁷ Studies that equate adolescent and adult cognitive ability derive primarily from informed consent research that emphasizes subjective preferences.¹⁴⁸ But

for an Ethical Legality, 27 STAN. L. REV. 1, 12-15 (1974). But see Scott, *supra* note 134, at 1632 (summarizing criticisms of the early research on stage and sequence of development and arguing that "recent research has revealed that similar skills develop at different rates in different task domains").

146. See PIAGET, *supra* note 145, at 314-25 (discussing the development toward an adult standard of youths' sense of justice through age twelve); June Louin Tapp, *Psychology and the Law: An Overture*, 27 ANN. REV. PSYCHOL. 359, 374 (1976); *supra* note 133 (summarizing common law infancy defense). Somewhere between about eleven and fourteen years of age, children achieve the "formal operations" stage, in which they can begin to think abstractly and hypothetically, weigh and compare consequences, and consider alternative solutions to problems. See ROBERT S. SIEGLER, CHILDREN'S THINKING 41-42 (1986).

147. Developmental psychological research on adolescents' cognitive decisionmaking ability suggests that "for most purposes, adolescents cannot be distinguished from adults on the ground of competence in decisionmaking alone." Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOLOGIST 99, 100 (1983). When youths solve problems or make informed consent decisions, social psychologists find the quality of judgments made by adolescents fourteen years of age or older comparable to that of adults' judgments. See *id.* at 100-01; Gary B. Melton, *Children's Competence to Consent: A Problem in Law and Social Science*, in CHILDREN'S COMPETENCE TO CONSENT 1, 15 (Gary B. Melton et al. eds., 1983). But see Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 406-07 (1999) (criticizing cognitive studies as methodologically limited and relying on "small, unrepresentative, usually white, middle class samples of youth taking part in laboratory studies rather than in studies that compare adolescent and adult performance under conditions that adequately resemble daily life"); Scott, *supra* note 134, at 1609 (criticizing researchers who contend that "no differences distinguish adults and adolescents in their capacity for rational decisionmaking" and arguing that they focus too narrowly on cognitive as opposed to judgmental factors).

148. Research on young peoples' ability to make informed medical decisions tends to support equating adolescents' and adults' cognitive abilities. See Thomas Grisso & Linda Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOL. 412, 423 (1978) (finding that little research evidence exists that adolescents aged fifteen or older possess less competence than adults to provide knowing, intelligent, and voluntary informed consent); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1595 (1982) (fourteen-year-olds' choices did not differ significantly from those of adults in terms of "evidence of choice, reasonable[ness of] outcome, rational[ity of] reason[ing], and understanding" when responding to medical and psychological treatment hypotheticals). A review of several psychological studies of adolescents' reasoning processes, and understanding and use of medical information about their conditions and treatment options, found that adolescents and adults generally made qualitatively comparable decisions. See Scott, *supra* note 134, at 1627-30.

the ability to make hypothetical decisions under structured laboratory conditions with complete information differs significantly from the ability to exercise mature judgment when equipped with incomplete knowledge, under stressful conditions, and with real-life consequences.¹⁴⁹

From a clinical and social policy perspective, there is increasing recognition of the importance of emotions in decision making, relevant to a wide range of risk-taking behaviors. In many ways, this perspective increasingly blurs the traditional boundaries of cognitive vs. emotional processes. This is important because the “decision” to engage in a specific behavior that has long-term health consequences—e.g., smoking a cigarette, drinking alcohol, or engaging in unprotected sex—cannot be completely understood within the framework of “cold” cognitive processes. *Cold cognition* refers to thinking under conditions of low emotion and/or arousal, whereas *hot cognition* refers to thinking under conditions of strong feelings or high arousal. The cognitive processes involved in hot cognition may, in fact, be much more important for understanding why people[—especially youths—] make risky choices in real-life situations.¹⁵⁰

While adolescents’ cognitive abilities to think and to reason may be comparable to adults’, youths’ interpersonal context, emotional

149. See Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1770 (1995) [hereinafter Cauffman & Steinberg, *Cognitive and Affective Influences*]; Scott & Steinberg, *supra* note 1, at 812-13 (“These findings from laboratory studies are only modestly useful, however, in understanding how youths compare to adults in making choices that have salience to their lives or that are presented in stressful unstructured settings (such as the street) in which decisionmakers must rely on personal experience and knowledge.”); L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 423 (2000) (“Given the only small differences in decision making capacity between individuals from mid-adolescence onward, the question arises as to why the decision making efforts of adolescents result in substantially more risk-taking behavior than is characteristics of adults. . . . [O]ne little explored possibility is that the decision making capacity of adolescents may be more vulnerable to disruption by the stresses and stains of everyday living than that of adults. That is, unlike adults, adolescents may exhibit considerably poorer cognitive performance under circumstances involving everyday stress and time-limited situations than under optimal test conditions.”); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 250 (1996) [hereinafter Steinberg & Cauffman, *Maturity of Judgment*] (“[T]he informed consent model is too narrow in scope to adequately illuminate differences between adolescents’ and adults’ decision making, because it overemphasizes cognitive functioning (e.g., capacity for thinking, reasoning, understanding) and minimizes the importance of noncognitive, psychosocial, [sic] variables that influence the decision-making process (i.e., aspects of development and behavior that involve personality traits, interpersonal relations, and affective experience.” (citation omitted)).

150. Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 60, 61 (2001) (citations omitted).

responsivity, and inexperience affect the quality of their choices and behavior.¹⁵¹

While psycho-social development proceeds through a series of stages, decision-making competencies emerge unevenly rather than as a uniform increase in overall capacity, and young people use different reasoning processes in different task domains.¹⁵² Differences in language ability, knowledge, experience, and culture affect the ages at which youths' various competencies emerge.¹⁵³ Many characteristics of delinquent youths—lower intellectual ability, poverty, social disadvantage, and cultural isolation—further hamper cognitive development and competent legal decision-making.¹⁵⁴

A. *Atkins, Adolescents, and Reduced Culpability*

Atkins prohibited executing mentally retarded defendants because “their disabilities in areas of reasoning, judgment, and control of their

151. Many developmental psychologists question the appropriateness of advocating for legal equality based on adolescents' cognitive parity with adults to make informed medical decisions. See William Gardner et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOLOGIST 895, 897-98 (1989); Scott, *supra* note 134, at 1631-36; Elizabeth Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 224 (1995); Scott & Steinberg, *supra* note 1, at 813 (“Psycho-social development proceeds more slowly than cognitive development. As a consequence, even when adolescent cognitive capacities approximate those of adults, youthful decisionmaking may still differ due to immature judgment.”); Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 152 (2003) (“[F]or all the importance of cognitive development, aspects of behavior that involve interpersonal and affective experience may offer even more information about an adolescent's decision-making processes.” (footnote omitted)).

152. See Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 139, 145 (Thomas Grisso & Robert G. Schwartz eds., 2000) (“Youths may begin to manifest certain cognitive or social abilities in one context (for example, school or peer interactions) while failing to apply it to a new context until some time later in their development.”); Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 291, 302-03 (Thomas Grisso & Robert G. Schwartz eds., 2000) (“[S]kills seem to develop at different rates in different domains, and competence to make one kind of decision can not [sic] be generalized.”); Scott & Steinberg, *supra* note 1, at 813.

153. See Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 LAW & HUM. BEHAV. 229, 233 (1996) (“Progress toward completion of cognitive and moral developmental stages can be detoured or delayed by cultural, intellectual, and social disadvantages.” (citation omitted)); Taylor-Thompson, *supra* note 151, at 152 (“[D]ifferences in both comprehension and reasoning emerge between adolescents and adults from lower socio-economic backgrounds and with lower IQ levels.”).

154. See Grisso, *supra* note 152, at 145; Grisso, *supra* note 153, at 233; Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 348-50 (2003) (reporting that juveniles in the justice system have lower IQs than a sample of youths drawn from the community and arguing that youths with lower IQs are more likely to lack adjudicative competence).

impulses” prevented them from acting “with the level of moral culpability that characterizes the most serious adult criminal conduct.”¹⁵⁵ Similarly, adolescents think qualitatively differently than adults, and their poor judgment, psycho-social immaturity, and truncated self-control also require a different criminal sentencing policy.¹⁵⁶ It is important to distinguish between cognitive competencies, which affect decision-making processes, and maturity of judgment, which affects the quality of decisions.

This is so because psycho-social developmental factors influence values and preferences, which in turn shape the cost-benefit calculus, which determines outcomes. The influence of these factors will change as the individual matures and values and preferences change—resulting in different choices. . . . [T]he intuition is that developmentally linked predispositions and responses systematically affect youthful decision making in ways that may lead to harmful choices.¹⁵⁷

While adolescents possess sufficient cognitive competency to justify some degree of punishment, psycho-social maturity of judgment and temperance provide a broader framework through which to assess their culpability.¹⁵⁸ Most youths lack the maturity of judgment

155. *Atkins v. Virginia*, 536 U.S. 304, 306 (2002).

156. See Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 149, at 251. “[T]he intuition behind paternalistic policies is that developmentally linked traits and responses systematically affect the decision making of adolescents in a way that may incline them to make choices that threaten harm to their own and others’ health, life, or welfare, to a greater extent than do adults.” Scott et al., *supra* note 151, at 227; see also Scott & Steinberg, *supra* note 1, at 801 (“[T]eens are simply less competent decisionmakers than adults, largely because typical features of adolescent psycho-social development contribute to immature judgment. Adolescent capacities for autonomous choice, self-management, risk perception and calculation of future consequences are deficient as compared to those of adults, and these traits influence decisionmaking in ways that can lead to risky conduct.”); Taylor-Thompson, *supra* note 151, at 143 (“An adolescent’s poor choice to engage in unlawful conduct is different from an adult’s poor decision, although each may cause harm.”).

157. Scott, *supra* note 152, at 303-04.

158. See Cauffman & Steinberg, *Cognitive and Affective Influences*, *supra* note 149, at 1765; Scott et al., *supra* note 151, at 227; Scott & Grisso, *supra* note 142, at 157 (arguing that psycho-social factors affecting adolescents’ decisions to engage in crime include “peer influence, temporal perspective (a tendency to focus on short-term versus long-term consequences), and risk perception and preference. . . . We designate these psychosocial influences as ‘judgment’ factors, and argue that immature judgment in adolescence may contribute to choices about involvement in crime.”); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 149, at 252; Steinberg & Cauffman, *supra* note 142, at 407-08 (explaining that the quality of adolescent decision-making subsumes three categories of psycho-social factors: “responsibility (the capacity to make a decision in an independent, self-reliant fashion), perspective (the capacity to place a decision within a broader temporal and interpersonal context), and temperance (the capacity to exercise self-restraint and control one’s impulses)”).

characteristic of adulthood in a variety of areas—perceptions of risk, appreciation of future consequences, capacity for self-management, and ability to make autonomous choices.¹⁵⁹ Their decision-making preferences and values are in a state of transition, and they are prone to make poorer judgments than they would make several years later.¹⁶⁰

Youths differ from adults in their breadth of experience, short-term versus long-term time perspective, attitude toward risk, impulsivity, and the importance they attach to peer influence.¹⁶¹ These differences are linked to developmental process and affect their qualities of judgment and ability to appreciate the consequences of their actions. These generic developmental differences justify a less punitive stance toward younger offenders, which allows them to survive the mistakes of adolescence.¹⁶²

159. See, e.g., Scott et al., *supra* note 151, at 229-35. (describing psycho-social and developmental factors that contribute to juveniles' immature judgment); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 149, at 252 (emphasizing temperance, perspective and judgment as ways in which adolescents' thinking diverges from adults); Taylor-Thompson, *supra* note 151, at 144 (arguing that "adolescents think differently than mature adults. Adolescents may, for example, perceive and calculate the probability of risk differently than adults do, or be less aware of—and less alert to—information. In any event, adolescents use what information they have less effectively in making choices: They fixate on an initial possibility in the decision-making process and fail to adjust as new information becomes available.").

160. See Scott et al., *supra* note 151, at 232-35; Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 149, at 268.

161. See Scott, *supra* note 134, at 1610; Scott & Grisso, *supra* note 142, at 160-61 (noting that psycho-social developmental factors affecting judgment and criminal responsibility in adolescents include "(1) conformity and compliance in relation to peers, (2) attitude toward and perception of risk, and (3) temporal perspective"); Scott & Steinberg, *supra* note 1, at 813 ("The psycho-social factors most relevant to differences in judgment [between youths and adults] include: (a) peer orientation, (b) attitudes toward and perception of risk, (c) temporal perspective, and (d) capacity for self-management."); Scott et al., *supra* note 151, at 227 (proposing "judgment" framework to evaluate quality of adolescent decisionmaking that includes not only cognitive capacity, but also influence of factors such as "conformity and compliance in relation to peers and parents, attitude toward and perception of risk, and temporal perspective"); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 149, at 258-62.

162. See Zimring, *supra* note 1, at 272 ("[E]ven when a particular young person possesses the cognitive capacities and social controls necessary to eligibility for punishment, immaturity should continue to be a mitigating circumstance for some time."). A developmentally informed youth sentencing policy would emphasize qualities of "judgment" rather than narrow cognitive capacity, ask whether young people characteristically make poorer quality choices than they would when they are somewhat older (because of adolescent-specific emotional, psychosocial, or developmental differences) and reflect young people's lesser developmental capacities. If adolescents likely will make better, adult-quality decisions with maturity, "then the case for protecting the opportunities and prospects of that future adult from the costs of her immature youthful judgment and choices seems powerful." Scott et al., *supra* note 151, at 228 (citation omitted).

1. Risky Behavior

Young people act more impulsively, exercise less self-control, more frequently fail adequately to calculate long-term consequences, and therefore engage in more risky behavior than do adults.¹⁶³ Risky behavior may be developmentally necessary for adolescents to acquire the skills needed to negotiate successfully the transition to adulthood.¹⁶⁴ Adolescents need to learn to function independently of parental caretakers.¹⁶⁵ Acquiring these skills entails certain characteristic behaviors such as “increases in peer-directed social interactions and elevations in novelty-seeking and risk-taking behaviors.”¹⁶⁶

This developmental transition is disruptive and entails opportunities for growth as well as dangers. “Adolescents are risk takers. Relative to individuals at other ages, human adolescents as a group exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking”¹⁶⁷ Compared to adults, adolescents generally underestimate the magnitude or probability of risks, use a shorter time-frame, and focus on opportunities for gains rather than possibilities of losses.¹⁶⁸ The

163. See Scott & Steinberg, *supra* note 1, at 814 (“Future orientation, the capacity and inclination to project events into the future, may also influence judgment, since it will affect the extent to which individuals consider the long-term consequences of their actions in making choices. Over an extended period between childhood and young adulthood, individuals become more future-oriented.” (citation omitted)).

164. See Spear, *supra* note 149, at 147 (“Certain behavioral features common among adolescents of a variety of species may have evolved to promote attainment of the necessary skills for independence; these age-related behaviors, such as an adolescent-associated increase in risk taking, may be promoted less by increases in pubertal hormones than by developmental events occurring in brain during adolescence. These age-related neural alterations provide a partial biological basis for the unique behavioral strategies of adolescence [T]hese transient neuronal features may predispose adolescents to behave in particular ways”).

165. See *id.* at 421 (“Risk taking may allow the adolescent to explore adult behavior and privileges, to accomplish normal developmental tasks, and to develop and express mastery of hierarchal challenges associated with certain risky behaviors.” (references omitted)).

166. *Id.* at 418 (“Increased affiliation with peers and the taking of risks via exploring novel areas, behaviors and reinforcers may also help facilitate the dispersal of adolescents away from the natal family unit.”).

167. *Id.* at 421.

168. Lita Furby and Ruth Beyth-Marom, speculate that “adolescents [may] judge some negative consequences in the distant future to be of lower probability than do adults or to be of less importance than adults do.” Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 19 (1992); see also Grisso, *supra* note 152, at 161 (“[A]dolescents on average may differ from adults in the weights that they give to potential positive and negative outcomes . . . [and] are more likely than adults to give greater weight to anticipated gains than to possible losses or negative risks.”); Scott, *supra* note 152, at 305-06 (“[A]dolescents, for developmental reasons, could differ from adults in the subjective value that is assigned to perceived consequences . . . [and] may weigh costs and benefits differently, sometimes even viewing as a benefit what adults would consider to be a cost.”); Spear, *supra* note 149, at 446

greater prevalence of accidents, suicides, and homicides as causes of death of the young reflects greater "risk-taking" behavior.¹⁶⁹ Criminal behavior is a particularly risky form of behavior, and every theory of crime attempts to account for its greater prevalence during adolescence.¹⁷⁰

Risk entails a chance of loss, as well as gain, and risky behavior exposes the actor to potential adverse consequences.¹⁷¹ A decision-maker must identify possible outcomes, identify consequences that may follow from each option, evaluate the desirability of positive or negative results, estimate the likelihood of those various events occurring, and make a choice to optimize outcomes.¹⁷² Adolescents may approach these decision-making steps differently than adults when they engage in riskier behavior. Youths may possess or use different amounts of information when they make decisions.¹⁷³ Unlike informed consent studies conducted under laboratory conditions, in less-structured, real-life circumstances, adolescents simply may know less about risks than

("In terms of their expectations for future rewards, adolescents (12-18 years of age) are less optimistically biased when compared with either college students or adults (18-65 years of age).")

169. See William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, in ADOLESCENT RISK TAKING 66, 67 (Nancy J. Bell & Robert W. Bell eds., 1993); Spear, *supra* note 149, at 421 ("Other potential negative outcomes from adolescent risk taking include incarceration, AIDS infection, unwanted pregnancy, and alcohol or drug dependence."). Teenagers' greater proclivity to engage in unprotected sex and to speed and drive recklessly reflect various forms of risk taking with respect to health and safety. See Scott et al., *supra* note 151, at 230; Spear, *supra* note 149, at 421 ("[W]ith half or more of adolescents exhibiting drunk driving, sex without contraception, use of illegal drugs, and minor criminal activities, 'reckless behavior becomes virtually a normative characteristic of adolescent development.'" (citation omitted)).

170. See, e.g., MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 123-44 (1990); Scott, *supra* note 152, at 300-01 ("Many adolescents become involved in criminal activity in their teens and desist by the time they reach young adulthood . . . leading criminologists to conclude that participation in delinquency is 'a normal part of teen life.' For most adolescent delinquents, desistance from antisocial behavior also seems to be a predictable part of the maturation process." (citation omitted)); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 38-48 (2001) (summarizing criminological research reporting peak of criminal involvement in mid-to-late adolescence with sharp desistance thereafter and attributing youthful involvement to normal developmental transition to adulthood).

171. See Furby & Beyth-Marom, *supra* note 168, at 3.

172. See *id.* at 3-4; see also Grisso, *supra* note 153, at 241 ("We need to examine the extent to which midadolescents typically might not yet have achieved adultlike ways of framing problems . . . and generating alternative responses to stressful situations or weighing the potential consequences of their alternatives.").

173. See Scott, *supra* note 152, at 304 ("Adolescents, perhaps because they have less knowledge and experience, are less aware of risks than are adults." (citation omitted)); Taylor-Thompson, *supra* note 151, at 153 (arguing that adolescents approach risky decisions differently than adults because of youths "being unaware of risks that adults typically perceive, having incorrect information about risks, or calculating the probability or magnitude of the risk in ways that adults would not" (footnotes omitted)).

do adults.¹⁷⁴ They may perceive fewer alternative options than do adults.¹⁷⁵ Young people may discount negative future consequences because they have more limited experience. Disadvantaged youths, in particular, may feel a sense of “futurelessness,” fatalism, and despair, which inclines them to discount future consequences even more than do other teenagers.¹⁷⁶

Even when adolescents possess and use comparable information, they may assign different subjective values to the alternative consequences.¹⁷⁷ Youths may weigh benefits and consequences differently and discount negative future consequences in ways that skew the quality of their choices.¹⁷⁸ In some instances, youths simply may estimate negative consequences of risky behavior as having lower probabilities of occurring than do adults. In others cases, youths’ subjective valuations of risks and consequences may cause them to make

174. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (“Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.”); Scott, *supra* note 152, at 305 (“[T]he fact that adolescents have less experience and knowledge than adults seems likely to affect their decision making in tangible and intangible ways.”).

175. See Taylor-Thompson, *supra* note 151, at 153 (“In situations where adults will likely perceive and weight multiple alternatives as part of rational decision-making, adolescents typically see only one option. This inflexible ‘either-or-mentality’ becomes especially acute under stressful conditions.”).

176. See Grisso, *supra* note 153, at 234 (“Numerous studies describe the sense of ‘futurelessness’ and fatalism that is experienced by adolescents whose dependent status does not allow them to escape neighborhoods in which violent death is a daily occurrence, and they suggest that many urban youths who murder believe that there is no future to consider. Such conditions are said to influence their decision making negatively, producing a tendency to discount the future when weighing potential gains and losses of anticipated consequences.” (citations omitted)).

177. See *id.*; see also Scott, *supra* note 134, at 1645-47 (discussing how youths’ perceptions of and preferences for risk differ from those of adults).

178. Rational choice theory helps to explain adolescents’ greater propensity for risk-taking. See Gardner, *supra* note 169, at 70-73. People make utility-maximizing choices within a context of constraints, and people at different stages of their lives assign different valuations to uncertain future events. Knowledge about one’s self, social environment, and life-course trajectory increase with age and affect a person’s short-term versus long-term calculus. Youths’ “focus on the immediate rather than the long-term consequences of a decision is a rational response to uncertainty about the future.” *Id.* at 77. As a result, young people may discount the negative value of future consequences because they have more difficulty than adults in integrating a future consequence into their more limited experiential baseline. Thus, adolescents may discount the cost of longer-term future consequences and weigh shorter-term benefits more heavily than adults. See William Gardner & Janna Herman, *Adolescents’ AIDS Risk Taking: A Rational Choice Perspective*, in *ADOLESCENTS AND THE AIDS EPIDEMIC* 17, 17-19 (William Gardner et al. eds., 1990); Taylor-Thompson, *supra* note 151, at 154 (“Adolescents, more than adults, tend to discount the future and to afford greater weight to short-term consequences of decisions.” (footnote omitted)).

different choices than adults.¹⁷⁹ In addition, adolescents may weigh the consequences of not engaging in risky behaviors differently than adults.¹⁸⁰ Youths' unrealistic optimism and feelings of "invulnerability" and "immortality" further contribute to risk-taking behavior.¹⁸¹

A predisposition toward sensation-seeking inclines adolescents to seek exciting and novel activities. Risk-taking can be fun, and successful experiences may enhance self-esteem.¹⁸² Youths seek novelty and take risks as part of the process of separating from family and becoming autonomous.¹⁸³ They experience more difficulty controlling their impulses than do adults because of physiological changes, mood volatility, and predisposition toward sensation-seeking.¹⁸⁴ Youths

179. See Scott & Steinberg, *supra* note 1, at 815 ("[A]dolescents are less risk-averse than adults, generally weighing rewards more heavily than risks in making choices. In part, this may be due to limits on youthful time perspective; taking risks is more costly for those who focus on the future." (footnote omitted)).

180. See Taylor-Thompson, *supra* note 151, at 153 ("[A]dolescents experience greater concern—and anxiety—over the consequences of *refusing* to engage in risky conduct than adults do, thanks to greater fear of being socially ostracized."); Scott & Grisso, *supra* note 142, at 163.

181. See Lawrence D. Cohn et al., *Risk-Perception: Differences Between Adolescents and Adults*, 14 HEALTH PSYCHOL. 217, 221 (1995) (arguing that adolescents engage in "health-threatening activities" because they "do not regard [such] behavior as extremely risky or unsafe," rather than because of "unique feelings of invulnerability"); Furby & Beyth-Marom, *supra* note 168, at 19-21.

182. See Grisso, *supra* note 152, at 163 (arguing that adolescents are "more willing to take physical and social risks for the sake of experiencing novel and complex sensations."); Spear, *supra* note 149, at 421 ("Risk taking has sometimes but not always been linked to gains in self-esteem, perhaps via reinforcement provided for such behavior among peers engaged in similar activities. Risk takers report that they feel more accepted by peers, and view risk taking as reinforcing ('fun').") (references omitted); Taylor-Thompson, *supra* note 151, at 153 (arguing that sensation-seeking activity increases for youths between sixteen and nineteen years of age).

183. See Spear, *supra* note 149, at 423 ("Evolutionarily, adolescent-associated increases in novelty seeking and risk taking may have facilitated adolescent emigration from the natal group by providing the impetus to explore novel and broader areas away from the home. . . . Such increases in risk taking may also provide the opportunity to explore new behaviors and reinforcers, perhaps facilitating the relinquishing of juvenile patterns of behavior as well as the acquisition of behaviors essential for adult functioning.")

184. See Cauffman & Steinberg, *Cognitive and Affective Influences*, *supra* note 149, at 1780; Scott, *supra* note 134, at 1645 (suggesting that youths' impulsiveness "might affect decisionmaking competence, if impulsiveness disables the young individual from considering alternatives or weighing and comparing consequences according to his or her subjective utility. More likely, impulsiveness might simply affect the care with which actual decisions are made . . ."); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 149, at 259 (suggesting that "sensation seeking increases during adolescence, leading to increased risk taking as a means of achieving excitement. Another viewpoint posits that hormonal and physiological changes that accompany puberty result in higher levels of impulsivity and recklessness. Finally, a third perspective emphasizes the influence of emotion and mood on decision making.").

engage in risky behavior for the excitement of the “adrenaline rush.”¹⁸⁵ As a result of habituation, they may require more intense and novel stimuli to achieve the desired affect.¹⁸⁶ “[D]ecision-making sequences regarding risky behavior in adolescence cannot be fully understood without considering the role of emotions, with key aspects of these ‘decision’ processes involving interactions between thinking and feeling processes.”¹⁸⁷ Adolescents’ predisposition toward risk reflects generic developmental processes rather than malevolent personal choices.

2. Peer Group Influences

Atkins noted that mentally retarded offenders are followers in groups; similarly, adolescents also respond to peer group influences more readily than do adults.¹⁸⁸ Adolescents typically commit their crimes in a group context, and group-offending puts normally law-abiding youth at greater risk to commit crimes and reduces their ability publicly to withdraw.¹⁸⁹ The social setting of adolescent offending

185. See Spear, *supra* note 149, at 422 (“Individuals engaging in risk taking may do so to attain the positive arousal produced by the sensations of novelty, complexity, change or intensity of experience. . . . Perceived risks of risk taking decline with age during adolescence, so it is possible that the level of risk taking necessary to attain an ‘adrenaline rush’ of danger may rise as well, perhaps leading to an escalation of risk-taking behaviors in certain individuals, particularly those with poor prospects for attaining other reinforcers.” (reference omitted)).

186. See *id.* at 446 (“[A]dolescents may generally attain less positive impact from stimuli with moderate to low incentive value, and may pursue new appetitive reinforcers through increases in risk taking/novelty seeking and via engaging in deviant behaviors such as drug taking.”).

187. Dahl, *supra* note 150, at 62 (“[T]he developmental changes in AR [affect regulation] during adolescence involve interactions between thoughts and feelings to modulate complex behavior in emotional situations in ways that are adaptive to serve a goal or purpose.”).

188. See *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (“[T]here is abundant evidence that [the mentally retarded] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.” (footnote omitted)). For discussion of the same characteristics in adolescents, see, for example, Scott, *supra* note 134, at 1643-44 (describing adolescent responsiveness to peer influences); Scott & Steinberg, *supra* note 1, at 813 (“[T]eens are more responsive to peer influence than are adults. Susceptibility to peer influence increases between childhood and early adolescence as adolescents begin to individuate from parental control. This susceptibility peaks around age fourteen and declines slowly during the high-school years.” (footnote omitted)); and Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 149, at 253-54.

189. Youths adjust their behavior and attitudes to conform to those of their contemporaries to garner greater acceptance and approval. See Scott & Grisso, *supra* note 142, at 162 (“Peer influence seems to operate through two means: social comparison and conformity. Through social comparison, adolescents measure their own behavior by comparing it to others. Social conformity . . . influences adolescents to adapt their behavior and attitudes to that [sic] of their peers.” (footnote omitted)); Scott et al., *supra* note 151, at 230; Taylor-Thompson, *supra* note 151, at 153-54 (“The choice to engage in antisocial conduct is often linked to the adolescent’s desire for peer approval. Prodding by peers can substitute for, and even overwhelm, an adolescent’s own ‘better’ judgment about whether to engage in certain conduct.”).

increases youths' difficulty with resisting peer pressure.¹⁹⁰ Indeed, adolescents' proclivity toward risk-taking and susceptibility to peer influences likely interact to produce even riskier behavior in a group setting.¹⁹¹ In some social contexts, youths' struggles to achieve autonomy and to define a social identity may require adherence to subcultural norms that provide powerful pressures to engage in criminal activity.¹⁹² Because of the social setting of youth crime, young people need time, experience, and opportunities to develop the ability to make independent judgments and to resist peer influence.¹⁹³ While an inability

Police arrest a larger proportion of two or more juveniles for involvement in a single criminal event than they do adults. *See, e.g.,* Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 870 tbl.1 (1981) (noting that sixty-four percent of robberies committed by people under age twenty-one were committed in groups while only thirty-nine percent of robberies committed by people twenty-one and older were committed in groups); *see also id.* at 867 (arguing that young people "commit crimes, as they live their lives, in groups."); HOWARD N. SNYDER & MELISSA SICKMUND, *JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 77* (1999) (showing percentages of various crimes committed by juveniles that were committed in groups from 1973 to 1997).

190. *See* Zimring, *supra* note 1, at 282 ("That social settings account for the majority of all youth crime suggests that the capacity to deflect or resist peer pressure is a crucially necessary dimension of being law-abiding in adolescence. . . . Kids who do not know how to deal with such pressure lack effective control of the situations that place them most at risk of crime in their teens.").

191. *See* Scott & Steinberg, *supra* note 1, at 815 ("[A] synergy likely exists between adolescent peer orientation and risk-taking; considerable evidence indicates that people generally make riskier decisions in groups than they do alone.").

192. *See, e.g.,* Jeffrey Fagan, *Context and Culpability of Adolescent Violence*, 6 VA. J. SOC. POL'Y & L. 507, 535-39 (1999) [hereinafter Fagan, *Context and Culpability*]; Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 371, 374 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Fagan, *Choices by Adolescents*] (using a social context framework "to show how the unique demands of adolescence interact with social contexts to motivate decisions to engage in crime and violence"); Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence and Social Identity*, in 24 CRIME & JUST. 105, 124 (1998) ("Violence 'scripts,' developed in a neighborhood context that values toughness and displays of violence, . . . may limit the behavioral and strategic options for resolving disputes . . ."). Fagan argues that

[s]ocial context influences decisions to engage in crime through the interaction of individual developmental needs and functional goals specific to adolescence (such as identity, affinity, mastery, and defiance). Competition over limited resources, including social status, respect, and material goods, by violent or other antisocial means is central to this dynamic. When neighborhood and community contexts are isolated and deprived, social interactions are likely to be dominated by street codes that reward displays of physical domination and social approval for antisocial behavior.

Fagan, *Choices by Adolescents, supra*, at 382.

193. Franklin E. Zimring argues that:

[t]he ability to resist peer pressure is yet another social skill that is a necessary part of legal obedience not fully developed in many adolescents. A teen may know right from wrong and may even have developed the capacity to control his or her impulses while alone, but resisting temptation while alone is a different task than resisting the pressure

to resist peer pressure does not excuse criminal conduct, youths who have not yet learned to manage peer relations successfully are not as responsible for their behavior as we hold adults to be.¹⁹⁴

3. Communities and Dependence

Children depend on adults to care for them and to enable them to develop the capacity for positive behavior and moral action.¹⁹⁵ The ability to exercise self-control is the outcome of a socially constructed developmental process in which families, schools, and communities share responsibility.¹⁹⁶ Community structures affect the conditions within which young people grow, interact with peers, and experience the risks of criminal involvement.¹⁹⁷ Neighborhoods characterized by weak informal social controls provide greater opportunities for criminal activity and contribute to the higher crime rates in inner-city areas.¹⁹⁸

to commit an offense when adolescent peers are pushing for misbehavior and waiting to see whether or not the outcome they desire will occur.

Zimring, *supra* note 1, at 280.

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

195. *See* Arenella, *supra* note 141, at 82 (emphasizing that children depend on others to develop and exercise their moral capacities and that “[t]he capacities of critical self-reflection and self-revision are not simply some individual *properties* that some individuals have the moral luck to possess. Their acquisition and development depend on an interpersonal process between the agent and other human beings. The ability to control one’s character is a process that often requires some form of socially created *transformational opportunity* being made available to an individual who has the capacity to take advantage of it.”); David E. Arredondo, M.D., *Child Development, Children’s Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL’Y REV. 13, 16-17 (2003) (arguing that children require attention as part of normal brain development and that if they become attention-deprived, they will engage in both positive and negative behaviors to satisfy their needs); Scott, *supra* note 76, at 547 (“[C]hildren are assumed to need care, support, and education in order to develop into healthy productive adults. The obligation to provide the services critical to children’s welfare rests first with parents and ultimately with the state.”).

196. *See* Steinberg & Cauffman, *supra* note 142, at 393 (“[A]dolescence is seen as a period of tremendous malleability, during which experiences in family, peer group, school, and other settings have the potential to influence the course of development.”).

197. *See, e.g.,* Fagan, *Choices by Adolescents*, *supra* note 192, at 376 (noting that social context contributes to adolescents’ violent behavior); Fagan, *Context and Culpability*, *supra* note 192, at 535-39 (suggesting that criminogenic social context contributes to young gang members’ criminal behavior); Deanna L. Wilkinson & Jeffrey Fagan, *The Role of Firearms in Violence “Scripts”: The Dynamics of Gun Events Among Adolescent Males*, 59 LAW & CONTEMP. PROBS. 55, 63-66 (1996) (describing how peer interactions create “scripts” that prescribe how youths should respond to disrespect and that lead to violent confrontations).

198. *See* ROBERT J. BURSİK, JR. & HAROLD G. GRASMICK, *NEIGHBORHOODS AND CRIME* 29-59 (1993) (concluding that “low levels of systemic control increase the likelihood of crime, high levels of crime decrease the effectiveness of systemic control, and the entire process spirals

Community settings also affect youths' opportunities to learn and practice responsible behavior.¹⁹⁹ Unlike presumptively mobile adults, juveniles' dependency limits their ability to escape from criminogenic environments.²⁰⁰

4. Adolescent Brain and Neurobiology

Developmental psychologists consistently report differences between the thinking and behavior of children, adolescents, and adults. Recent neuroscience research suggests that these behaviors reflect more fundamental dissimilitude in brain development, biological maturation, and intellectual functioning.²⁰¹ In short, a "hard-science" explanation may exist for the "soft-science" observations of social scientists.²⁰² Neurobiological evidence suggests that the human brain does not achieve physiological maturity until the early twenties and that adolescents simply do not have the same physiologic capability as adults to make mature decisions or to control impulsive behavior.²⁰³

onward"); cf. Philip J. Cook & John H. Laub, *The Unprecedented Epidemic in Youth Violence*, 24 CRIME & JUST. 27, 51, 53-58 (1998) (attributing increase in adolescent homicide rates to increased gun use associated with crack cocaine industry in urban, inner-city neighborhoods).

199. See Arredondo, *supra* note 195, at 16 (arguing that delinquent youths typically come from chaotic homes and unresponsive neighborhoods and that as a result "he has not had the necessary developmental opportunity of internalizing [lessons learned from] consistently benevolent, reliable, and fair adult authority figures").

200. See Scott & Steinberg, *supra* note 1, at 818 ("[A]dolescents are subject to legal and practical restrictions on their ability to escape these criminogenic settings. Financially dependent on their parents or guardians and subject to their legal authority, adolescents cannot escape their homes, schools, and neighborhoods. . . . Because adolescents lack legal and practical autonomy, they are in a real sense trapped in whatever social setting they occupy and are more restricted in their capacity to avoid coercive criminogenic influences than are adults.").

201. See NAT'L INST. OF MENTAL HEALTH, *TEENAGE BRAIN: A WORK IN PROGRESS 2* (2001), available at <http://www.nimh.nih.gov/publicat/teenbrain.pdf>; Tomáš Paus et al., *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCIENCE 1908, 1908 (March 19, 1999); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 859 (1999) [hereinafter Sowell et al., *In Vivo Evidence*]; Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8819 (Nov. 15, 2001) [hereinafter Sowell et al., *Mapping Continued Brain Growth*] (discussing significant changes in brain structure prior to adulthood); Spear, *supra* note 149, at 438 ("[T]he adolescent brain is a brain in flux, undergoing numerous regressive and progressive changes in mesocorticolimbic regions.").

202. See Spear, *supra* note 149, at 417 ("[M]aturational changes in brain contribute to the age-specific behavioral characteristics of adolescence . . .").

203. Elizabeth S. Scott and Laurence Steinberg summarize some of the preliminary research on brain development and its implications for adolescent self-control.

[R]egions of the brain implicated in processes of long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward continue to mature over the course of adolescence, and perhaps well into young adulthood. At puberty, changes

The frontal lobe comprises the largest portion of the brain, and the prefrontal cortex of the frontal lobe functions as the “chief executive officer” and controls most advanced cerebral functions.²⁰⁴ These “executive functions” include impulse control, reasoning, abstract thinking, imagining, planning behavior, and anticipating consequences.²⁰⁵ Brain maturation influences “affect regulation” and the ability to control emotions and behavior.²⁰⁶

Magnetic Resonance Imaging (MRI) studies provide cross-sectional images of the brain and enable neuroscientists to study longitudinal changes in brain structure and function.²⁰⁷ In the womb and during the first eighteen months of life, the human brain consists primarily of gray

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

Scott & Steinberg, *supra* note 1, at 816 (footnotes omitted); *see also* Dahl, *supra* note 150, at 69 (“Regions in the PFC [prefrontal cortex] that underpin higher cognitive-executive functions mature slowly, showing functional changes that continue well into late adolescence/adulthood.”); Fagan, *supra* note 48, at 238-39 (summarizing recent research reporting that “functions and regions of the brain regulating long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward . . . continue to mature over the course of adolescence, and perhaps beyond age twenty and well into young adulthood”).

204. PRINCIPLES OF NEURAL SCIENCE 9 (Eric R. Kandel et al. eds., 4th ed. 2000) (describing specialized functions of lobes of the brain and reporting that “[t]he frontal lobe is largely concerned with planning future action and with the control of movement”); Sowell et al., *Mapping Continued Brain Growth*, *supra* note 201, at 8819 (mapping the distribution of cortical gray matter in post-adolescents and reporting “an inverse relationship between cortical gray matter density reduction and brain growth primarily in the superior frontal regions that control executive cognitive functioning.”); *Frontline, Inside the Teenage Brain*: Interview with Jay Giedd, at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html> (last visited Mar. 25, 2004) (excerpted in PBS television broadcast, 2002) (“The frontal lobe is often called the CEO, or the executive of the brain. It’s involved in things like planning and strategizing and organizing, initiating attention and stopping and starting and shifting attention.”).

205. *See* Sarah Spinks, *Frontline, Inside the Teenage Brain: Adolescent Brains Are Works in Progress*, at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html> (last visited Mar. 25, 2004) (“The prefrontal cortex sits just behind the forehead. It is particularly interesting to scientists because it acts as the CEO of the brain, controlling planning, working memory, organization, and modulating mood. As the prefrontal cortex matures, teenagers can reason better, develop more control over impulses and make judgments better. In fact, this part of the brain has been dubbed ‘the area of sober second thought.’”).

206. *See* Dahl, *supra* note 150, at 60. According to Dr. Dahl, affect regulation relates to the control of feelings and behavior and “involves some inhibition, delay, or intentional change of emotional expression or behavior to conform with learned social rules, to meet long-term goals, or to avoid future negative consequences.” *Id.* A broad range of cognitive, behavioral, and social changes occur during adolescence and facilitate affect regulation.

207. *See, e.g.*, Sowell et al., *Mapping Continued Brain Growth*, *supra* note 201, at 8819-29.

matter that is composed of neurons.²⁰⁸ A neuron is the basic nerve cell. Dendrites are branch-like protrusions from the neurons that receive electrochemical impulses from other nerve cell. Axons are transmitters to conduct electrochemical impulses from one neuron to the next.²⁰⁹ A process of myelination occurs in which the myelin, a fatty white substance, forms a sheath that surrounds and insulates the axons of certain neurons, gives it a white appearance, and allows for more rapid and efficient neurotransmission.²¹⁰ The brain transmits information through electrochemical impulses and myelination functions like insulation and enhances the speed of the electrochemical impulse.²¹¹

Although the human brain attains its adult weight by early childhood, during the first two decades, it undergoes separate processes of dendritic pruning or loss, and grey matter conversion into white matter through myelination. “[C]ortical grey and cerebral white matter volumes are quite dynamic throughout childhood,” with a loss of grey volume and a corresponding gain in white volume associated with age.²¹² The neural connections or synapses that the brain uses are

208. See PRINCIPLES OF NEURAL SCIENCE, *supra* note 204, at 21-25 (describing the basic types and functionality of neurons); Adolf Pfefferbaum et al., *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology From Infancy to Late Adulthood*, 51 ARCHIVES NEUROLOGY 874, 874, 880 fig.3 (1994) (noting that total brain weight peaks at age 10 and that gray matter volume grows rapidly during the first eighteen months, peaking around age four); Allan L. Reiss et al., *Brain Development, Gender and IQ in Children: A Volumetric Imaging Study*, 119 BRAIN 1763, 1770 (1996) (finding that brain weight peaks between ages five and ten years and that gray matter volume begins to decline as early as age five).

209. See PRINCIPLES OF NEURAL SCIENCE, *supra* note 204, at 21-25.

210. The organic changes in brain maturation and function during adolescence include a density reduction in the gray matter and an increase in myelination and brain growth in the frontal cortex. See NAT'L INST. OF MENTAL HEALTH, *supra* note 201, at 2 (“Unlike gray matter, the brain’s white matter—wire-like fibers that establish neurons’ long-distance connections between brain regions—thickens progressively from birth in humans. A layer of insulation called myelin progressively envelops these nerve fibers, making them more efficient, just like insulation on electric wires improves their conductivity.”); Sowell et al., *Mapping Continued Brain Growth*, *supra* note 201, at 8826 (“The strong correspondence in the age effects for gray matter density reduction and increased brain growth in frontal cortex may provide new insight for making inferences about the cellular processes contributing to postadolescent brain maturation. Regressive (i.e., synaptic pruning) and progressive (i.e. myelination) cellular events are known to occur simultaneously in the brain during childhood, adolescence, and young adulthood . . .”).

211. See, e.g., PRINCIPLES OF NEURAL SCIENCE *supra* note 204, at 18-34; Paus et al., *supra* note 201, at 1908 (“Structural maturation of individual brain regions and their connecting pathways is a condition *sine qua non* for the successful development of cognitive, motor, and sensory functions. The smooth flow of neural impulses throughout the brain allows for information to be integrated across the many spatially segregated brain regions involved in these functions. The speed of neural transmission depends not only on the synapse, but also on structural properties of the connecting fibers, including the axon diameter and the thickness of the insulating myelin sheath.”).

212. Reiss et al., *supra* note 208, at 1770, 1767 (1996) (“Age predicted a significant proportion of the variance in the volumes of both total cortical grey matter and cerebral white matter.”); see

retained, or etched for specific sensory, motor, and intellectual functions, and those that are not exercised are shed and discarded or “pruned.”²¹³ During childhood and in early adolescence, the brain undergoes simultaneous processes of “pruning” and myelination.²¹⁴ In early childhood, the portions of the brain that receive sensory input—the occipital and parietal lobes—myelinate initially to transmit sensory information more efficiently to the temporal and frontal lobes.²¹⁵ During adolescence, the brain undergoes a second period of rapid “pruning” accompanied by further myelination.²¹⁶ The separate and distinct processes of pruning and myelination are critical to proper brain function because dendritic pruning affects cognitive functioning and reasoning ability, while myelin insulation affects the rapidity and quality of brain activity.²¹⁷ Because the process of myelination occurs

also Pfefferbaum et al., *supra* note 208, at 884 (describing “change in human cortical gray matter, matter[and] cortical white matter . . . during the age range from 3 months to 70 years. Head size increased to about age 10 years. Cortical gray matter volume peaked at age 4 years and then decreased throughout the adult age-range sampled. Cortical white matter volume increased through late adolescence (age 20 years) and remained stable thereafter.”).

213. See Spear, *supra* note 149, at 438-39 (“Globally speaking, there is a massive loss of synapses in neocortical brain regions during adolescence . . . leading to an ultimate loss of almost one-half of the average number of synapses per cortical neuron that was evident in the preadolescent period.”).

214. See NAT’L INST. OF MENTAL HEALTH, *supra* note 201, at 1; Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999) (confirming “linear . . . increases in white matter across ages 4 to 20,” but finding, contrary to previous studies, “nonlinear changes in cortical gray matter. . . . Gray matter in the frontal lobe increased during pre-adolescence with a maximum size occurring at 12.1 years for males and 11.0 years for females, followed by a decline during post-adolescence that resulted in a net decrease in volume across this age span.” (emphasis added)); Pfefferbaum et al., *supra* note 208, at 880 fig.3, 885 (“[A]ge-related changes in the gray-white matter ratio suggested that the growth [rate] in white matter exceeded that of gray matter during the first 5 years, followed by a decline in gray matter volume accompanied by continued growth in white matter until about age 20 years, when white matter volume leveled off.”); Spear, *supra* note 149, at 439 (“[P]runing is an example of developmental plasticity whereby the brain is ontogenetically sculpted on the basis of experience to effectively accommodate environmental needs. . . . [A]long with this developmental loss in synapses is an increase in focal activation of the brain, with less widespread activation of brain function during task performance as development proceeds through childhood and adolescence.”).

215. See PRINCIPLES OF NEURAL SCIENCE *supra* note 204, at 349-66 (describing location and functional specialization of sensory, motor, and cognitive capabilities in the brain); Giedd et al., *supra* note 214, at 862 (reporting that “changes in primary visual and auditory cortex occur[] before those in frontal cortex”).

216. See NAT’L INST. OF MENTAL HEALTH, *supra* note 201, at 1.

217. See PRINCIPLES OF NEURAL SCIENCE *supra* note 204, at 147-48 (describing role of myelination of axons in speeding conduction velocity and noting that “conduction in myelinated axons is typically faster than in nonmyelinated axons of the same diameter”); Paus et al., *supra* note 201, at 1908 (“[S]peed of neural transmission depends . . . on structural properties of the connecting fibers, including . . . the thickness of the insulating myelin sheath.”); Sowell et al., *Mapping*

approximately from the back of the brain to the front, the shift from gray matter to white matter in the frontal cortex and the corresponding abilities to process information quickly, to control behavior, and to suppress impulses develop more slowly, and maturation is completed only in the late teens and early twenties.²¹⁸ As a result, the portions of the adolescent brain that mediate sensory input and language functions mature earlier than the portions in the frontal lobe governing “executive functioning” capacities.²¹⁹

The part of the brain called the amygdala—the limbic system located at the base of the brain—is responsible for instinctual or “gut reactions” such as “fight or flight.”²²⁰ Functional magnetic resonance

Continued Brain Growth, *supra* note 201, at 8828 (“[I]t is likely that the visuospatial functions typically associated with parietal lobes are operating at a more mature level earlier than the executive functions typically associated with frontal brain regions. The new findings described here may suggest that cortical thinning or reduction in gray matter density is first accompanied by growth (as seen in the frontal lobes in the postadolescent years) and later by brain shrinkage as the regressive changes overtake the progressive changes (as seen earlier on in the parietal lobes). Perhaps gray matter density reduction associated with growth (presumably increased myelination) is associated with different aspects of improved cognitive functioning than the cortical thinning associated with brain surface contraction (presumably synaptic pruning). It may not be unreasonable to hypothesize that improved accuracy (i.e., improved cognitive task performance) may result from regressive changes such as synaptic pruning, given that unused or less efficient synaptic connections are being pruned away during this age range. On the other hand, increased efficiency (i.e., reduced reaction times) might result from increased myelination observed as brain growth, given that myelinated fibers improve the conduction speed of electrical impulses between various brain regions.” (citation omitted)).

218. See NAT’L INST. OF MENTAL HEALTH, *supra* note 201, at 2 (MRI image analyses of brain development “suggest[] a wave of brain white matter development that flows from front to back, [while] animal, functional brain imaging and postmortem studies have suggested that gray matter maturation flows in the opposite direction, with the frontal lobes not fully maturing until young adulthood”); Pfefferbaum et al., *supra* note 208, at 884-85 (reporting steady rise in myelination from birth to about twenty years of age); Sowell et al., *In Vivo Evidence*, *supra* note 201, at 859 (“Post-mortem studies show that myelination, a cellular maturational event, begins near the end of the second trimester of fetal development and extends well into the third decade of life and beyond. Such autopsy studies reveal a temporally and spatially systematic sequence of myelination, progressing from inferior to superior and from posterior to anterior; that is brain stem and cerebellar regions myelinate before cerebral hemispheres, and frontal lobes myelinate last.” (references omitted)).

219. See Sowell et al., *Mapping Continued Brain Growth*, *supra* note 201, at 8819 (“Maturation, particularly in the frontal lobes, has been shown to correlate with measures of cognitive functioning.”).

220. See, e.g., PRINCIPLES OF NEURAL SCIENCE *supra* note 204, at 986-93 (describing role of amygdala in mediating between emotions and cognition); Dr. David Fassler testified before the Nevada State Judiciary Committee prior to the Nevada Assembly’s 36-6 vote to ban execution of youths under eighteen years of age. See Mark Moran, *Adolescent Brain Development Argues Against Teen Executions*, PSYCHIATRIC NEWS, May 16, 2003, at 8, available at <http://pn.psychiatryonline.org/cgi/content/full/38/10/8>.

“It’s important to understand that the primitive, or instinctual, part of the brain develops first, followed by the parts of the brain that control reasoning and that help us

imaging reveals that teenagers rely more heavily than adults on the amygdala and less heavily on the prefrontal cortex when responding to stressful stimuli.²²¹ Thus, adolescent reactions to fear-evoking stimuli appear to be more instinctual responses rather than the product of cognitive processes.²²² One recent study of MRI imaging of adolescent brains reported that

[i]n regions of frontal cortex, we observed reduction in gray matter between adolescence and adulthood, probably reflecting increased myelination in peripheral regions of the cortex that may improve cognitive processing in adulthood. . . . Neuropsychological studies show that the frontal lobes are essential for such functions as response inhibition, emotional regulation, planning and organization. Many of these aptitudes continue to develop between adolescence and young adulthood. . . . Thus, observed regional patterns of static versus plastic maturational changes between adolescence and adulthood are consistent with cognitive development.²²³

think before we act," Fassler told the panel members. "In terms of actual brain anatomy, we're talking about the amygdala, which is a more primitive part of the brain, responsible for gut reactions, including fear and aggressive behaviors, versus areas like the frontal cortex, which develops later and helps us control our emotions and modify our actions and responses."

He cited research using functional magnetic resonance imaging demonstrating that teens use their brains differently from adults when reasoning or solving problems. "For example, they tend to rely more on these instinctual structures, like the amygdala, and less on the more advanced areas, like the frontal lobes, which are associated with more goal-oriented and rational thinking."

Id.

221. See NAT'L INST. OF MENTAL HEALTH, *supra* note 201, at 2 (noting that processing of emotions shifted from the amygdala to the frontal lobe over the course of the teenage years and that "areas of the frontal lobe showed the largest differences between young adults and teens. This increased myelination in the adult frontal cortex likely relates to the maturation of cognitive processing and other 'executive' functions."); cf. Abigail A. Baird, M.A. et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 195, 198 (1999) ("[D]evelopmental perturbation of the amygdala and its connections can result in profound behavioral disturbances. These disturbances are not as pronounced when damage occurs during adulthood. Adults who have lesions of the amygdala suffer from various affect recognition deficits, but they do not manifest the myriad of social and emotional disturbances consistent with limbic developmental abnormalities." (citations omitted)).

222. See Arredondo, *supra* note 195, at 15 ("Adolescents tend to process emotionally charged decisions in the limbic system, the part of the brain charged with instinctive (and often impulsive) reactions. Most adults use more of their frontal cortex, the part of the brain responsible for reasoned and thoughtful responses. This is one reason why adolescents tend to be more intensely emotional, impulsive, and willing to take risks than their adult counterparts." (footnote omitted)); Dahl, *supra* note 150, at 67 ("[T]here may be a gradual shift toward a stronger dorsolateral-prefrontal cortex influence on AR [affect regulation] skills across adolescent development, which fits a more traditional concept of 'cognitive' processes.").

223. Sowell et al., *In Vivo Evidence*, *supra* note 201, at 860 (reference omitted).

Many adolescents' decisions about risky behavior appear to be more a function of "gut reactions" than of conscious thought processes.²²⁴ Just as organic features produce the developmental characteristics of mentally retarded defendants, similarly, the behaviors of adolescents may have a significant neurobiological component.²²⁵

Although this section focuses primarily on deserved punishment and adolescents' reduced culpability, the Supreme Court in *Atkins* and *Thompson* noted that mentally retarded and younger offenders also were less susceptible than rational adult actors to the deterrent threat of capital punishment.²²⁶ Whether substantive changes in criminal law doctrines or liability produce any deterrent effect on criminal behavior remains controverted.²²⁷ However, all of the developmental characteristics that render adolescent offenders less culpable—impaired judgment and reasoning, limited impulse control, and susceptibility to peer influences—also reduce the likelihood that the threat of execution or draconian sentences will have any appreciable deterrent effect on younger offenders decisions to commit crimes.²²⁸

224. See Dahl, *supra* note 150, at 64 ("These affective influences are relevant . . . to many day-to-day 'decisions' that are made at the level of gut feelings about what to do in a particular situation (rather than any conscious computation of probabilities and risk value). These gut feelings appear to be the products of affective systems in the brain that are performing computations that are largely outside conscious awareness (except for the feelings they evoke).").

225. See Spear, *supra* note 149, at 447 ("To the extent that transformations occurring in adolescent brain contribute to the characteristic behavioral predispositions of adolescence, adolescent behavior is in part biologically determined.").

226. See *supra* notes 40, 78; see also *Enmund v. Florida*, 458 U.S. 782 (1982) (finding that death sentence for felony-murder would not serve as a deterrent where person sentenced to death neither killed nor intended to kill victim).

227. See, e.g., Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 951 (2003) ("[T]here is growing evidence to suggest skepticism about the *criminal law's* deterrent effect—that is, skepticism about the ability to deter crime through the manipulation of criminal law rules and penalties. The general existence of the system may well deter prohibited conduct, but the formulation of criminal law rules within the system, according to a deterrence-optimizing analysis, may have a limited effect or even no effect beyond what the system's broad deterrent warning has already achieved. We suggest that, while it may be true that manipulation of criminal law rules *can* influence behavior, it does so only under conditions not typically found in the criminal justice systems of modern societies.").

228. See BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 229-30 (1999) (summarizing research evaluating whether increased certainty and predictability of waiver laws had a deterrent effect on youths committing serious crimes). While states exclude serious offenses from juvenile court jurisdiction in order to increase the certainty and severity of criminal sanctions, several evaluation studies report no appreciable deterrent effect of such legislative changes. For example, after New York excluded juveniles thirteen years of age or older charged with murder, and juveniles fourteen years of age or older charged with kidnapping, arson, and rape, N.Y. PENAL LAW § 30.00(2) (McKinney 1998 & Supp. 2004) (enacted 1978), an evaluation of the impact of the law found no systematic decrease in juvenile arrests for the excluded

B. *Atkins, Adolescents, and Adjudicative Competence*

In addition to their reduced culpability, the Supreme Court in *Atkins* noted that the developmental disabilities of defendants with mental retardation also reduced their competence to stand trial and adversely affected the fairness and reliability of criminal proceedings.²²⁹ As states transfer more and younger offenders for adult prosecution, criminal courts increasingly encounter more youths whose immaturity and developmental limitations also pose difficult questions about their adjudicative competence.

In reaction to significant increases in the juvenile arrest rates for violent crimes in the late 1980s and early 1990s, virtually every state revised its transfer laws to prosecute more juveniles in criminal court.²³⁰ Changes in waiver statutes use offense criteria either as guidelines to control and limit judicial discretion, to guide prosecutorial charging decisions, or automatically to exclude serious offenses from juvenile court jurisdiction.²³¹ Changes in waiver laws reflect a cultural and legal reconceptualization of youths from innocent and dependent children to responsible, adult-like offenders, and criminal sentencing laws typically

offenses. See Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW & SOC'Y REV. 521, 529-32 (1988). Another quasi-experiment compared juvenile arrest rates in Idaho with those in Montana and Wyoming before and after Idaho excluded youths fourteen year or older and charged with murder, rape and robbery from juvenile court jurisdiction. See Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96, 99 (1994). It found that violent juvenile crimes actually *increased* in Idaho and *decreased* in the comparison states following the changes. See *id.* at 100-01. The study concluded that "the movement away from the traditional juvenile court model to the more punitive criminal justice system did not deter youth from committing violent crimes." *Id.* at 102.

229. See *supra* note 43 and accompanying text.

230. See TORBET ET AL., *supra* note 92, at 1, 6 fig.4; Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, in YOUTH VIOLENCE 189, 195-98, 205-06 (Michael Tonry & Mark H. Moore eds., 1998) [hereinafter Feld, *Responses to Youth Violence*]; Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1562-63 (2003). These changes have a clearly disproportionate affect on minority youth. See Feld, *Violent Youth and Public Policy*, *supra* note 92, at 977-78 & nn.44-46.

231. See PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT, & CONTROL, NAT'L RESEARCH COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 206-09 (Joan McCord et al. eds., 2001), available at <http://www.nap.edu/books/0309068428/html/>; TORBET ET AL., *supra* note 92, at 3; Feld, *Responses to Youth Violence*, *supra* note 230, at 196-97; Jolanta Juszkievicz, *Youth Crime/Adult Time: Is Justice Served?*, BUILDING BLOCKS FOR YOUTH, Oct. 26, 2000, at 30-31 & fig.10, at <http://www.buildingblocksforyouth.org/ycat/ycat.html> (reporting that in a multi-jurisdiction study of juveniles tried as adults in eighteen large urban counties, prosecutors transferred forty-five percent, legislative exclusion accounted for an additional forty percent, and judges transferred only fifteen percent of youths); David S. Tanenhaus & Steven A. Drizin, "Owing to the Extreme Youth of the Accused": *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 665-66 (2003).

provide no formal recognition of youthfulness once states transfer a juvenile to criminal court.²³² When states try youths as adults, criminal court judges sentence them as if they are adults, imposing the same length sentences, sending them to the same prisons, and executing them for the crimes they committed as children.²³³

Waiver reforms that lower the age of transfer eligibility to fourteen years of age or even younger present criminal courts with many youths whose developmental immaturity, rather than—or in addition to—mental illness, presents significant issues of adjudicative competence as well as diminished responsibility.²³⁴ The influx of more young juveniles into criminal courts raises questions about their ability to understand the trial process and to make critical legal decisions.²³⁵

Adjudicative competence refers to a person's ability to understand the nature and consequences of legal proceedings, to make decisions, and to assist counsel.²³⁶ A defendant must be able to understand the

232. For in-depth discussions of these effects of the modern changes in waiver laws, see FELD, *supra* note 228; Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327 (1999); and Feld, *supra* note 2.

233. See Feld, *Responses to Youth Violence*, *supra* note 225, at 212-13; Ellie D. Shefi, Note, *Waiving Goodbye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 U. MICH. J.L. REFORM 653, 663-68 (2003) (summarizing the impact of changes in waiver policies on juveniles incarcerated in adult prisons); Tanenhaus & Drizin, *supra* note 231, at 643 (“[I]n 1998 nearly 200,000 children under eighteen were tried as adults; some 18,000 children were housed in adult prisons, 3500 of whom shared living spaces with adults.”).

234. See PATRICK GRIFFIN ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, UNITED STATES DEP'T OF JUSTICE, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER PROVISIONS 14-15 (1998), available at <http://www.ncjrs.org/pdffiles/172836.pdf> (reporting that 23 states have at least one provision to transfer a juvenile to criminal court with no minimum age specified); Feld, *Legislative Exclusion*, *supra* note 92, at 91-101 (describing changes in waiver laws that transfer more and younger juveniles to criminal court without either judicial hearing or assessment of competence); Thomas Grisso, *Juveniles' Competence to Stand Trial: New Questions for an Era of Punitive Juvenile Justice Reform*, in MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT, COMPETENCY AND SENTENCING FOR A HARsher ERA OF JUVENILE JUSTICE 23, 28-33 (Patricia Puritz et al. eds., 1997), available at <http://www.abanet.org/crimjust/juvjus/mtntefull.pdf> [hereinafter Grisso, *New Questions*] (discussing ways in which young adolescents are limited in their ability to understand the trial process, assist counsel, and make decisions regarding their own defense); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 6-7 (1997).

235. See Bonnie & Grisso, *supra* note 133, at 73; Grisso et al., *supra* note 154, at 358 (“The issue that [this] study addresses—the relationship between immaturity and competence to stand trial—has been largely unnoticed (at least in policy circles) during the last decade or so, as legislatures around the country have moved to facilitate the adjudication of younger and younger offenders in adult criminal court.”); Richard E. Redding & Linda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 374-78 (2001).

236. See *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (“It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the

purpose of the trial process, to provide information to and process information from counsel, to reason appropriately, and realistically to apply that information to the legal situation she confronts.²³⁷ Competence is necessary to assure the legitimacy of the criminal process, to reduce the risk of erroneous convictions, and to protect the dignity and autonomy of the defendant.²³⁸ Because criminal courts employ a low standard of competence and threshold for criminal liability, recognizing the diminished responsibility of youth as grounds for mitigation of punishment becomes even more imperative.²³⁹

Typically, defendants' mental illness or developmental disability provides reasons to question their competence to stand trial and their ability to understand proceedings and to assist counsel.²⁴⁰ However, developmental immaturity also may render juveniles incompetent to stand trial.²⁴¹ Juveniles' questionable competence does not derive

proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”).

237. See Grisso et al., *supra* note 154, at 335 (noting that adjudicative competence entails “a basic comprehension of the purpose and nature of the trial process (Understanding), the capacity to provide relevant information to counsel and to process information (Reasoning), and the ability to apply information to one’s own situation in a manner that is neither distorted nor irrational (Appreciation)”).

238. See Bonnie & Grisso, *supra* note 133, at 76 (“The dignity of the criminal process is undermined if the defendant lacks a basic moral understanding of the nature and purpose of the proceedings against him or her. The accuracy or reliability of the adjudication is threatened if the defendant is unable to assist in the development and presentation of a defense. Finally, to the extent that decisions about the course of adjudication must be made personally by the defendant, he or she must have the abilities needed to exercise decision-making autonomy.”).

239. See, e.g., Zimring, *supra* note 1, at 274.

240. See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam opinion) (requiring a defendant to possess “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and a “rational as well as factual understanding of proceedings against him” to be competent to stand trial (internal quotation marks omitted)).

241. See, e.g., Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform*, CRIM. JUST., Fall 1997, at 4, 7-9 (questioning youths’ ability to understand trial process, to assist counsel, and to make strategic legal decision); Grisso et al., *supra* note 154, at 356; Redding & Frost, *supra* note 235, at 397. About half the states address juveniles’ competency to stand trial as delinquents, and statutes and case law conclude that they have a fundamental right not to be tried while incompetent. See, e.g., FLA. STAT. ANN. § 985.223 (West 2001) (incompetency in juvenile delinquency cases); KAN. STAT. ANN. § 38-1637 (2000) (proceedings to determine competency in delinquency proceedings); *In re Charles B.*, 978 P.2d 659, 660 (Ariz. Ct. App. 1998) (“Although the Juvenile . . . has no mental disorder or disability, he fits the description of ‘incompetent’ . . . because he lacks a present ability to consult with his attorney with a reasonable degree of rational understanding, and he does not have a rational and factual understanding of the proceeding against him.”); *Golden v. State*, 21 S.W.3d 801, 803 & n.2 (Ark. 2000) (holding that a juvenile has a due process right to a competency determination prior to adjudication and that such evaluation consists of an “‘age appropriate’ capacity standard to apply to juveniles, which is different from adults”); *In re S.H.*, 469 S.E.2d 810, 811 (Ga. Ct. App. 1996) (providing juveniles with procedural rights in delinquency proceedings would be meaningless if defendant was not

necessarily from mental illness or disability, but rather from generic developmental limitations which affect their ability to communicate, to reason and understand, and to exercise judgment and make sound decisions. Although a relaxed standard of competence may be appropriate for delinquents tried in juvenile court, youths tried in criminal court must demonstrate an adult standard of competence.²⁴²

While competence focuses primarily on the ability to understand and reason, youths' immaturity of judgment also affects their decision-making capability. Research evaluating adolescents' and young adults' competence to participate in their trials found significant differences in understanding and judgment.²⁴³ Most youths younger than thirteen or fourteen years of age lacked even basic competence either to understand or to meaningfully participate in their defense.²⁴⁴ Many youths younger than sixteen years of age lacked competence either to stand trial as adults or to make legal decisions without the assistance of counsel, and many older youths exhibited substantial impairment.²⁴⁵ Moreover, youths' limited time-perspective, emphasis on short-term versus long-term consequences, and concerns about peer approval cause them to make immature decisions relative to those of adults.²⁴⁶ One recent study reported that:

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

capable of exercising them); *In re J.M.*, 769 A.2d 656, 662 (Vt. 2001) (holding that the "evaluations of a particular juvenile's competency are to be made with regard to juvenile [developmental] norms").

242. See Grisso et al., *supra* note 154, at 359-61 ("Most children and adolescents who are found incompetent to proceed in criminal court because of immaturity could likely be adjudicated in a juvenile delinquency proceeding under a more relaxed competence standard.").

243. See *id.* at 343-46; Redding & Frost, *supra* note 235, at 374-78 (summarizing research on adjudicative competence of adolescents and reporting that younger age, lower IQ, and mental illness combine to detract from juveniles ability to understand proceedings and to assist counsel).

244. See Bonnie & Grisso, *supra* note 133, at 87-88 ("Some youths, especially those who are nearer to the minimum age for waiver to criminal court, may have significant deficits in competence-related abilities due not to mental disorder but to developmental immaturity. . . . Formalistic, disorder-oriented application of current standards, therefore, may result in unfair jeopardy for youths whose developmental incapacities impair their ability to participate in their defense."); Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 652-53 (1995) (reporting that majority of juveniles younger than fourteen failed to meet adult standard of competence); Grisso et al., *supra* note 154, at 344 ("30 % of 11- to 13-year-olds, and 19 % of 14- to 15-year-olds, were significantly impaired on one or both of these subscales [measuring understanding and reasoning].").

245. See Grisso et al., *supra* note 154, at 356; Scott & Grisso, *supra* note 142, at 170-71.

246. See Bonnie & Grisso, *supra* note 133, at 91.

stand trial by clinicians who perform evaluations for courts. . . . Not surprisingly, juveniles of below-average intelligence are more likely than juveniles of average intelligence to be impaired in abilities relevant for competence to stand trial. Because a greater proportion of youths in the juvenile justice system than in the community are of below-average intelligence, the risk for incompetence to stand trial is therefore even greater.²⁴⁷

Atkins noted that the disabilities of mentally retarded defendants adversely affected their competence to stand trial, reduced the assistance they could provide to their lawyers, and impaired their demeanor and effectiveness as witnesses.²⁴⁸ *Atkins* also found that mental retardation exposed such defendants to the dangers of erroneous convictions because of their greater susceptibility to interrogation techniques and the concomitant dangers of false confessions.²⁴⁹ The same concerns about the dangers of erroneous convictions exist with respect to the competence of adolescents.²⁵⁰ Juveniles' diminished understanding of rights, confusion about trial processes, limited language skills, and inadequate decision-making abilities increase their vulnerability to interrogation tactics and their likelihood of giving false confessions.²⁵¹

247. Grisso et al., *supra* note 154, at 356.

248. See *supra* notes 33-35, 43-52 and accompanying text.

249. See *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002); see also Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 580 fig.20 (2002) (finding that ninety-six percent of mentally retarded subjects completely failed to understand at least one aspect of the *Miranda* warnings).

250. *Atkins* emphasized the inability of defendants with mental retardation to assist their attorneys or to present a favorable demeanor to jurors. See *Atkins*, 536 U.S. at 320-21. Adolescents too have a pronounced disability to assist in their own defense. See *Bonnie & Grisso*, *supra* note 133, at 91-92; Grisso, *New Questions*, *supra* note 234, at 30-31 (“[O]ne study asked detained juveniles why defendants must be truthful with their lawyers. About one-third of them (compared to about 10 % of adult offenders) believed that this was necessary so that the lawyer could decide whether to advocate the defendant’s interests, to report the defendant’s guilt to the court, or to decide whether to “let him go or send him up.”); Grisso, *supra* note 152, at 141 (arguing that quite apart from adjudicative competence, the effectiveness of a juvenile’s ability to participate may affect trial outcomes by “the impression that the defendant’s lack of attentiveness to the trial process might have on the judge or jury.”); Ann Tobey et al., *Youths’ Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 225, 231-34 (Thomas Grisso & Robert G. Schwartz eds., 2000) (arguing that juveniles are less effective as clients than adults due to differences in understanding, memory, attention and motivation).

251. See Saul M. Kassir & Katherine L. Keichel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 125 (1996) (noting that there is considerable evidence that “youth, [low] intelligence, personality, stress, [and] mental state” are all factors that can make a defendant vulnerable not only to giving a false confession but also to believing his own false confession); Lisa M. Krzewinski, *But I Didn’t Do It: Protecting the Rights of Juveniles During Interrogation*, 22 B.C. THIRD WORLD L.J. 355, 356 (2002) (questioning

Juveniles are less able than adults to exercise their *Miranda* rights and exhibit a significant tendency to comply with authority, such as by confessing to police.²⁵²

When the Supreme Court in *In re Gault* applied the privilege against self incrimination to delinquency proceedings,²⁵³ the “warning” safeguards developed in *Miranda v. Arizona*²⁵⁴ became available to juveniles. Courts evaluate juveniles’ waivers of Fifth Amendment rights and the voluntariness of any confessions by assessing whether the they made a “knowing, intelligent, and voluntary” waiver under the “totality of the circumstances.”²⁵⁵ Even before *Miranda* and *Gault*, the Supreme Court had cautioned trial judges to closely scrutinize the impact of youthfulness and inexperience on the validity of waivers and the voluntariness and reliability of confessions.²⁵⁶ However, the Court in

juveniles’ capacity to understand privilege against self-incrimination or to voluntarily give reliable statements).

252. See Grisso et al., *supra* note 154, at 353, 356.

253. See 387 U.S. 1, 42-57 (1967). See generally Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 153-57 (1984) [hereinafter Feld, *Criminalizing Juvenile Justice*] (analyzing Supreme Court’s rationale to incorporate constitutional privilege against self-incrimination in state delinquency proceedings); Barry C. Feld, *Juveniles’ Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 105, 111-20 (Thomas Grisso & Robert G. Schwartz eds., 2000) (analyzing inadequacy of *Miranda* framework to safeguards juveniles’ ability to exercise privilege against self-incrimination).

254. 384 U.S. 436 (1966). Although the Supreme Court has never explicitly held that *Miranda* applies to juvenile proceedings, the Court, in *Fare v. Michael C.*, 442 U.S. 707, 717 n.4 (1979), “assume[d] without deciding that the *Miranda* principles were fully applicable to the present [juvenile] proceeding.” For further discussion of the applicability of *Miranda* to juvenile proceedings, see, for example, Larry E. Holtz, *Miranda in a Juvenile Setting: A Child’s Right to Silence*, 78 J. CRIM. L. & CRIMINOLOGY 534 (1987).

255. See Feld, *Criminalizing Juvenile Justice*, *supra* note 253, at 169-90; see also *Fare*, 442 U.S. at 725.

256. In *Haley v. Ohio*, 332 U.S. 596 (1948), police interrogated a fifteen-year-old “lad” in relays beginning shortly after midnight, denied him access to counsel, and confronted him with confessions by co-defendants until he finally confessed at five o’clock a.m. The Supreme Court reversed his conviction and ruled that a confession obtained under these circumstances was involuntary:

What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic.

Id. at 599-601.

Fare v. Michael C. retreated from its earlier concern that youthfulness might increase suggestibility and vulnerability to coercion²⁵⁷ and endorsed the adult “totality of the circumstances” test as the standard by which to evaluate the admissibility of juvenile confessions.²⁵⁸ The “totality” approach provides trial judges with discretion to protect youths who lack capacity or who succumb to police coercion without unduly limiting police ability to interrogate juveniles.²⁵⁹

In *Gallegos v. Colorado*, 370 U.S. 49 (1962), the Court reiterated that the age of the accused constituted a special circumstance that affects the voluntariness of confessions and re-emphasized the vulnerability of youth:

[A] 14-year-old boy, no matter how sophisticated, . . . is not equal to the police in knowledge and understanding . . . and . . . is unable to know how to protect his own interests or how to get the benefits of his constitutional rights. . . .

. . . A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. . . . 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.

Id. at 54.

The Court in *In re Gault* repeated that “admissions and confessions of juveniles require special caution.” 387 U.S. at 45. Thus, the Court long had recognized that youths are not the equals of adults in the interrogation room and that they require greater procedural safeguards than adults, such as the presence of counsel, to compensate for their vulnerability and susceptibility to coercive influences.

257. See *Fare*, 442 U.S. at 726-28 (finding a “knowing, intelligent and voluntary” waiver of *Miranda* rights by a sixteen-year-old offender with several prior arrests who had “served time” in a youth camp).

258. See *id.* at 718-24. *Fare* held that a youth’s request to speak with his probation officer when police interrogated him constituted neither a per se invocation of his *Miranda* privilege against self-incrimination nor the functional equivalent of a request for counsel which would have required further questioning to cease. See *id.* at 722. Earlier, the California Supreme Court had held in *People v. Burton* that when a child who is in custody and who is interrogated without the presence of counsel requests to see one of his or her parents, then further questioning must cease. See 491 P.2d 793, 798 (Cal. 1971). In *In re Michael C.*, 579 P.2d 7 (Cal. 1978), *rev’d sub nom. Fare v. Michael C.*, 442 U.S. 707 (1979), the California Supreme Court extended *Burton*’s “parental request” rule to a youth’s request to consult with his probation officer. See *id.* at 11. The Supreme Court in *Fare* rejected this position and distinguished the role of counsel from that of probation officers in the *Miranda* process.

259. The *Fare* Court concluded that there were

no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile’s age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

442 U.S. at 725.

Fare declined to give children greater procedural protection than adults.²⁶⁰ Instead, the Court insisted that children must invoke their legal rights with adult-like technical precision and denied that young people lacked the ability to exercise or validly waive their rights.²⁶¹ The Court

260. See *id.*; see also Feld, *Criminalizing Juvenile Justice*, *supra* note 253, at 171 & n.100 (criticizing *Fare*); Francis Barry McCarthy, *Pre-Adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 492 (1981) (“The Supreme Court’s decisions in delinquency cases [through *Fare*] indicate that an application of the rules with respect to the interrogation of adults is not to be mechanically carried over to the interrogation of juveniles.”); Irene Merker Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 694 (1980) (arguing that when, “as in [*Fare*], . . . the Court purports to interpret the content of a right uniformly for children and adults, it may in fact grant juveniles far less than their adult counterparts.”).

261. See *Fare*, 442 U.S. at 722-24. Most states that follow *Fare* use the adult “totality of the circumstances” test, and allow juveniles to waive *Miranda* rights and other constitutional rights. See Kimberly Larson, Note, *Improving the “Kangaroo Courts”: A Proposal for Reform in Evaluating Juveniles’ Waiver of Miranda*, 48 VILL. L. REV. 629, 645-46 & n.91 (2003) (summarizing majority of states’ use of “totality of circumstances” test and factors they consider); see also, e.g., *Quick v. State*, 599 P.2d 712, 719-20 (Alaska 1979) (holding that juvenile may waive *Miranda* rights without consulting parent or other adult); *Carter v. State*, 697 So. 2d 529, 532-33 (Fla. Dist. Ct. App. 1997) (affirming “totality” approach and upholding trial court exclusion of “Grisso Test” used to measure juvenile’s ability to comprehend *Miranda* warnings); *Dutil v. State*, 606 P.2d 269, 271-72 (Wash. 1980) (declining to adopt *per se* rule requiring presence of parent, guardian or counsel).

Judges focus on characteristics of the juvenile, such as age, education, and IQ, and on circumstances surrounding the interrogation, such as methods and length of the questioning, when determining the voluntariness of a juvenile’s waiver. See, e.g., *West v. United States*, 399 F.2d 467, 469 (5th Cir. 1968); *Lara*, 432 P.2d at 217-18. Several leading cases provide extensive lists of factors for trial judges to consider when assessing the validity of juveniles’ waiver decisions—age, education, physical condition, presence of or opportunity to consult with parent or other adult, length of interrogation, method of interrogation, knowledge of the charges, subsequent repudiation of the statement, understanding of the warnings given, warning of possible transfer to criminal court, and the like. See, e.g., *Fare*, 442 U.S. at 725; *Riley v. State*, 226 S.E.2d 922, 926 (Ga. 1976); *State v. Benoit*, 490 A.2d 295, 301-02 (N.H. 1985).

While appellate courts identify factors that bear on the validity of a juvenile’s waiver of *Miranda* rights, they do not assign controlling weight to any particular element and instead rely on the discretion of the trial court. When judges apply the “totality” test, they exclude only the most egregiously obtained confessions and then only on a haphazard basis. See Feld, *Criminalizing Juvenile Justice*, *supra* note 253, at 176 & nn.120-21; see also, e.g., *In re W.C.*, 657 N.E.2d 908, 913 (Ill. 1995) (upholding validity of waiver by thirteen-year-old who was “illiterate and moderately mentally retarded with an IQ of 48, . . . the equivalent developmentally of a six- to eight-year-old[,] . . . possessing the emotional maturity of a six- to seven-year-old”); Wallace J. Mlyniec, *A Judge’s Ethical Dilemma: Assessing a Child’s Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1902 (1996) (noting that “[p]olice seldom do more . . . than [get] the child’s answer ‘yes’ to the police officer’s question ‘do you understand these rights’” before determining that a child has waived his rights). Even overtly coercive police interrogation techniques combined with a juvenile’s young age and mental deficiencies do not prevent trial judges from finding—and appellate courts from upholding—a waiver to be “voluntary.” See, e.g., *W.M. v. State*, 585 So. 2d 979 (Fla. Dist. Ct. App. 1991) (Farmer, J., dissenting) (“[T]he court . . . holds that a 10 year old boy with an I.Q. of 69 or 70, who had been placed by school authorities in a learning disability program . . . , who had no prior record with the police, who was crying and upset when taken into custody, and who was then held by the police for nearly 6 hours . . . without any nonaccusatorial adult

explicitly rejected the view that developmental or psychological differences between juveniles and adults required different rules or special procedural protections during interrogation.²⁶²

Despite *Fare's* endorsement of the "totality" approach, reasons exist to question whether a typical juvenile can waive her rights in a "knowing, intelligent, and voluntary" manner. Evaluation studies indicate that most juveniles who receive a *Miranda* warning do not understand it well enough to exercise or waive their rights²⁶³ Juveniles

present, could in the end knowingly and voluntarily confess to nearly every unsolved burglary on the police blotter." Courts admit confessions of illiterate, mentally retarded juveniles with IQs in the 60s, whom psychologists characterize as incapable of abstract reasoning. *See, e.g.,* *People v. Cheatham*, 551 N.W.2d 355, 359, 370 (Mich. 1996) (upholding validity of waiver by an illiterate juvenile with an IQ of 62 because "[l]ow mental ability in and of itself is insufficient to establish that a defendant did not understand his rights"); *State v. Cleary*, 641 A.2d 102, 105, 109 (Vt. 1994) (upholding validity of waiver by juvenile with limited ability to read or write and an IQ of 65).

262. *See Fare*, 442 U.S. at 725 ("This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.").

A few states recognize youths' developmental limitations and unique vulnerabilities during interrogation. Some state courts have adopted strategies to assure the validity of a juvenile's waiver of rights such as requiring the presence of a parent or an "interested adult." *See, e.g.,* *People v. Saiz*, 620 P.2d 15, 20-21 (Colo. 1980) (applying "fruit of the poisonous tree" doctrine to confessions obtained without the presence of a parent in violation of statute); *Lewis v. State*, 288 N.E.2d 138 (Ind. 1972) (requiring parents to be informed of child's rights and requiring an opportunity for child to consult with parents or an attorney before a child can waive his *Miranda* rights) (superceded by statute, *see infra*); *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 657 (Mass. 1983) (requiring in most cases, and in all cases for a minor under age fourteen, that the state show that "a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights"); *In re E.T.C.*, 449 A.2d 937, 940 (Vt. 1982) (holding, as a matter of state constitutional law, in order to establish a valid waiver by a juvenile, the youth "must be given the opportunity to consult with an adult; . . . that adult must be one who is not only genuinely interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution, e.g., a parent, legal guardian, or attorney representing the juvenile; and . . . the independent interested adult must be informed and be aware of the rights guaranteed to the juvenile"). Several states provide the right to the presence of a parent or interested adult by statute. *See, e.g.,* COLO. REV. STAT. § 19-2-511(1) (1999) (requiring parent or counsel to be present at interrogation and advised of juvenile's *Miranda* rights); IND. CODE ANN. § 31-32-5-1 (West 1998) (codifying and expanding *Lewis v. State* so that only a parent or attorney can waive an unemancipated minor's rights). Other states require a juvenile below the age of fourteen years to actually consult with an interested adult, while providing older juveniles only with an opportunity to consult with an interested adult as a prerequisite to a valid waiver. *See In re B.M.B.*, 955 P.2d 1302, 1312-13 (Kan. 1998); *State v. Presha*, 748 A.2d 1108, 1118 (N.J. 2000).

263. *See* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 59-93, 106-07 (1981) (finding that juveniles under age fifteen have a significantly lesser understanding of *Miranda* warnings than do adults, and that juveniles fifteen or sixteen years of age and of average intelligence have a slightly better than fifty percent chance to adequately understand the warnings); Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A*

most frequently misunderstood the advisory that they had the right to consult with an attorney and to have one present during interrogation.²⁶⁴ Younger juveniles exhibited even greater difficulties understanding their rights.

As a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for comprehension The vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights.²⁶⁵

Although younger juveniles exhibited significantly poorer comprehension than did comparable adults, the level of understanding by youths sixteen and older, although more similar to that of adults, left much to be desired.²⁶⁶ Even if juveniles abstractly understand the words

Study of 17 Cases, CRIM. JUST., Summer 2000, at 26, 28 (reporting that more than half of juveniles in a small sample size study did not understand the words of the *Miranda* warning); A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 53-54 (1970) (reporting that over ninety percent of the juveniles whom police interrogated waived their rights, that an equal number did not understand the rights they waived, and that even a simplified version of the language in the *Miranda* warning failed to cure these defects); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1153-54 (1980) [hereinafter Grisso, *Juveniles' Capacities to Waive*] (reporting that most juveniles who received the warnings did not understand their rights well enough to waive them, that only 20.9% of the juveniles, as compared with 42.3% of the adults, demonstrated adequate understanding of the four components of a *Miranda* warning, and that 55.3% of juveniles as contrasted with 23.1% of the adults exhibited no comprehension of at least one of the four warnings); Thomas Grisso, *Juveniles' Consent in Delinquency Proceedings*, in CHILDREN'S COMPETENCE TO CONSENT 131, 138-42 (Gary B. Melton et al. eds., 1983) [hereinafter Grisso, *Juveniles' Consent in Delinquency Proceedings*].

264. See Grisso, *Juveniles' Capacities to Waive*, *supra* note 263, at 1152 tbl.1 (finding that only 29.9% of juveniles had adequate understanding of the right to an attorney, while 63.1% to 89.3% understood each of the other elements of the *Miranda* warning); see also Beyer, *supra* note 263, at 33-34 (reporting that juveniles' misunderstood role of defense counsel).

265. Grisso, *Juveniles' Capacities to Waive*, *supra* note 263, at 1160.

266. See *id.* at 1157. A replication of Grisso's study in Canada reported that very few juveniles fully understood their warnings and that the youths who lacked comprehension waived their rights more readily. See Rona Abramovitch et al., *Young Persons' Comprehension of Waivers in Criminal Proceedings*, 35 CAN. J. CRIMINOLOGY 309, 320 (1993) ("[I]t seems likely that many if not most juveniles who are asked by the police to waive their rights do not have sufficient understanding to be competent to waive them."). Another study of 115 high school students from Virginia reported that youths interpreted the warning that "anything said could be used against them" to mean that "any disrespectful words directed to the police would be reported to the judge." Ellen R. Fulmer, Note, *Novak v. Commonwealth: Are Virginia Courts Providing Special Protection to Virginia's Juvenile Defendants?*, 30 U. RICH. L. REV. 935, 956-57 (1996) (quoting Brief of Amicus Curiae on Behalf of Youth Advocacy Clinic and Mental Disabilities Clinic, University of Richmond Law School at 29, *Novak v. Commonwealth*, 457 S.E.2d 402 (Va. Ct. App. 1995) (No. 1416-92-1)); see also Shavaun M. Wall & Mary Furlong, *Comprehension of Miranda Rights by Urban Adolescents*

of the *Miranda* warning, they may not appreciate the significance and function of their rights.²⁶⁷ Research conducted under laboratory conditions may fail to capture the social context and stressful conditions associated with actual police interrogation.²⁶⁸

Adolescents have difficulty grasping the basic concept of a "right" as an entitlement that they can exercise without adverse consequences.²⁶⁹ Children question whether law enforcement officials will punish them if they exercise their rights.²⁷⁰ Societal expectation of youthful obedience to authority and youths' inferior social status relative to adults render juveniles more vulnerable to police interrogation techniques.²⁷¹ Many people from traditionally disempowered communities, such as females, African-Americans, and youth, pragmatically use indirect speech patterns to avoid conflict when dealing with authority figures.²⁷² People with lower social status than their interrogators typically respond more passively, talk more readily, acquiesce to police suggestions more easily, and speak less assertively.²⁷³ Thus, *Fare's* requirement that youths

with *Law-Related Education*, 56 PSYCHOL. REP. 359, 369-72 (1985) (reporting that urban, black high school students' participation in a year-long "Street Law" course that included education about *Miranda* rights did not improve their understanding or comprehension in ways that would enable them to assert their rights).

267. See Larson, *supra* note 261, at 649-53 (reviewing social psychological research and juveniles' limited understanding of the concept of "rights" as an entitlement to be exercised).

268. See Abramovitch et al., *supra* note 266, at 319 (noting that responses to hypothetical questions in a relaxed atmosphere do not replicate adequately the conditions created by police who "can be gentle or tough, can explain the rights well or poorly, and in many ways can exert varying amounts of pressure to comply"); Grisso, *Juveniles' Consent in Delinquency Proceedings*, *supra* note 263, at 139.

269. See Grisso, *New Questions*, *supra* note 234, at 29-30; Larson, *supra* note 261, at 651-52.

270. See GRISSE, *supra* note 263, at 109-30 & tbl. 20 (finding that only 33.2% of juveniles understood that there was no penalty for asserting a right); Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 171 (1989) (arguing that immaturity, inexperience, and lower verbal competence than adults render youths especially vulnerable to police interrogation tactics).

271. Gerald D. Robin, *Juvenile Interrogation and Confessions*, 10 J. POLICE SCI. & ADMIN. 224, 225 (1982) ("[F]actors which are particularly characteristic of juveniles which highlight the coercive aspects involved in juvenile waiver on *Miranda* rights [include] their low social status in relation to their adult interrogators, societal norms concerning youthful obedience to authority, children's greater dependence upon adults, and their lower threshold of intimidation.").

272. See Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 261 (1993); Beyer, *supra* note 263, at 35 (reporting that victims of abuse fear police and feel they have to confess because "[h]aving been powerless when adults abused them in the past, these young people probably could not do anything but comply with police").

273. See Ainsworth, *supra* note 272, at 316; Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 57 (1968). Barbara Kaban and Ann E. Tobey argue that juveniles are especially susceptible to the coercive pressures of authority figures because of their social disadvantage:

invoke *Miranda* rights with adult-like precision contradicts the normal social reactions and verbal styles of most delinquents.

Juveniles' lack of understanding and vulnerability to coercion raise questions about the adequacy of the *Miranda* warning as a procedural safeguard to prevent youths from giving unreliable or false confessions.²⁷⁴ Deceptive interrogation techniques may be especially effective when employed against the young and inexperienced.²⁷⁵ Interrogation tactics such as presenting false evidence, using leading questions, and adopting police interpretations are more likely to induce juveniles to give false or inaccurate confessions than adults.²⁷⁶ The coercive context of interrogation and youths' limited understanding and verbal skills render young offenders more likely to comply with authority, to acquiesce in police interpretations, to fill in gaps through fabrication, to tell police what they think they want to hear, and to give

From early childhood on, children are taught to answer questions directed to them by adults. Police officers often occupy an elevated position of power relative to children. . . . [W]hen a "status differential" exists in the interview context, lower-status individuals are more likely to defer to the authority of higher-status individuals. . . .

[W]hen an adult interviewer presents himself or herself as authoritarian or unfriendly, children have more difficulty disagreeing with the adult.

Barbara Kaban & Ann E. Tobey, *When Police Question Children: Are Protections Adequate?*, 1 J. CENTER CHILD. & CTS. 151, 155 (1999).

274. See *Colorado v. Connelly*, 479 U.S. 157, 166-67 (1986) (holding that the Fourteenth Amendment Due Process Clause only protects defendants against police coercion, but reliability of confession is governed by state evidence law); Larson, *supra* note 261, at 659-65 (proposing alternatives to *Miranda* framework to protect juveniles' ability to exercise rights); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 115-17 (1997) (analyzing Supreme Court's post-*Miranda* decision involving involuntary confessions).

275. See Kaban & Tobey, *supra* note 273, at 158 ("Interrogation procedures designed for adults but used with children increase the likelihood of false confessions and may even undermine the integrity of the fact-finding process."); Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1169 (2001) (noting that "*Miranda* offers suspects little protection from deceptive interrogation techniques"); Welsh White, *False Confessions in Criminal Cases*, CRIM. JUST., Winter 2003, at 5; White, *supra* note 274, at 118-21 (summarizing standard interrogation techniques especially likely to elicit false confessions from suspects who are particularly suggestible such as youth and those with mental retardation).

276. See Beyer, *supra* note 263, at 28-29; Matthew B. Johnson & Ronald C. Hunt, *The Psychological Interface in Juvenile Assessment of Miranda*, 18 AM. J. FORENSIC PSYCHOL. 17, 29-32 (2000) (reporting that stressful conditions may cause children to change their stories and actually believe their distorted perception of the event); Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 715-16 (1992) (attributing children's difficulty making decisions to exercise their rights to socialization to obey authority figures); Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004, 1011 (1999) (discussing the susceptibility of children to suggestion about allegations of sexual abuse).

unreliable and false confessions.²⁷⁷ Immaturity and suggestibility increase the likelihood of false confessions.²⁷⁸ Youths are also less able than adults to think strategically and to appreciate the consequences of admissions, and are more likely than adults to assume responsibility out of a misguided feeling of loyalty to peers.²⁷⁹ Aggressive questioning by police further increases the likelihood of false confessions, and instances abound of juveniles confessing to homicides and other serious crimes that they did not commit.²⁸⁰ Although younger offenders are at greatest risk, even older youths evidence a heightened risk of giving false confessions.²⁸¹ Juveniles' lack of competence and vulnerability to

277. See Gisli H. Gudjonsson, *Suggestibility and Compliance Among Alleged False Confessors and Resisters in Criminal Trials*, 31 MED. SCI. & L. 147, 148-49 (1991) (reporting a correlation between suggestibility and being an imprisoned, self-identified "false confessor"); Johnson & Hunt, *supra* note 276, at 24 (noting compliance as "tendency to go along with instructions and directions without actual acceptance of the premises"); Krzewinski, *supra* note 251, at 360 (describing interrogation technique by which "juveniles will readily agree to an officer's words without understanding the significant implications of these words"); Tanenhaus & Drizin, *supra* note 231, at 671-89 (summarizing three homicide interrogation cases demonstrating police use of leading questions, suggesting answers, and drafting confessions for very young offenders).

278. See Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221, 227 (1997) ("[C]oerced-internalized confessions . . . all have . . . factors in common [including] a suspect who is 'vulnerable'—that is, one whose memory is malleable by virtue of his or her youth, interpersonal trust, naiveté, suggestibility, lack of intelligence, stress, fatigue, alcohol, or drug use . . ."); Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for An Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & HUMAN BEH. 141, 152 (2003) (describing research in which younger, more suggestible experimental subjects presented with false evidence were more likely to confess to wrong-doing).

279. See Beyer, *supra* note 263, at 29-31; Grisso, *New Questions*, *supra* note 234, at 32; Kaban & Tobey, *supra* note 273, at 155-56 ("A failure to consider consequences may be due to a lack of understanding of the consequences as well as a failure to consider them. For instance, a child may be more easily led into making damaging statements under the pretense that if he or she tells the police what they want to know the child can go home.").

280. See Krzewinski, *supra* note 251, at 357-63 (summarizing cases of demonstrably false confessions obtained from juveniles and the police interrogation techniques that produce them); Tanenhaus & Drizin, *supra* note 231, at 671-89 (describing several instances of false confessions by young juveniles); Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 349-55 (2001) (summarizing and analyzing cases of false confessions obtained from innocent juveniles); see also Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 443-44 (1998) ("[S]ome interrogation manual writers and trainers persist in the unfounded belief that contemporary psychological methods will not cause the innocent to confess—a fiction so thoroughly contradicted by all of the research on police interrogation that it can be labeled a potentially deadly myth. This fiction perpetuates the commonly held belief that only torture can cause an innocent suspect to confess, and it allows some police to rationalize accepting coerced and demonstrably unreliable confession statements as true." (footnotes omitted)).

281. See Fagan, *supra* note 48, at 245 (reporting that "[i]n experiments and other laboratory studies, the spread in susceptibility scores in these experiments suggests that many defendants older

coercive interrogation increase the risks of false confessions and erroneous convictions.

IV. YOUTH POLICY AND CRIME POLICY: CAPITAL PUNISHMENT AND LWOP SENTENCES

Youths' immature judgment, limited self-control, and inability to appreciate fully the consequences of their behavior reduce their degree of criminal responsibility and deserved punishment. While young offenders possess sufficient understanding and culpability to hold them accountable for their acts, their crimes are less blameworthy than those of adults, justifying a categorically different sentencing policy.²⁸² Similarly, youths' diminished adjudicative competence increases the likelihood of false confessions and erroneous convictions. The Court's reasoning in *Atkins* and the analogous developmental limitations of adolescents should ban imposition of the death penalty. Penal proportionality and the reduced culpability of youth also should preclude sentences of Life Without Parole (LWOP) and even of lengths equivalent to those of adult offenders. As a matter of sentencing policy, there is no principled basis on which to distinguish between the diminished responsibility of youth that precludes the death penalty and the reduced culpability that warrants shorter sentences for all serious crimes.²⁸³ And, it is the reality of draconian sentences, rather than the risk of execution, that faces far more irresponsible young offenders.

than sixteen would be prone to false confessions" and citing the false confessions given by fifteen- to seventeen-year-old defendants in the Central Park jogger case as a paradigmatic example).

282. See Scott & Steinberg, *supra* note 1, at 830 ("[Y]ouths are likely to act more impulsively and to weigh the consequences of their options differently from adults, discounting risks and future consequences, and over-valuing (by adult standards) peer approval, immediate consequences, and the excitement of risk taking. These influences are predictable, systematic and developmental in nature (rather than simply an expression of personal values and preferences), and they undermine decisionmaking capacity in ways that are accepted as mitigating culpability.").

283. Professor Zimring argues that

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

FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 84 (1998). Similarly, international human rights conventions, such as the International Covenant on Civil and Political Rights ("ICCPR"), provide for separate and mitigated treatment for juveniles in general, see ICCPR arts. 10.2(b), 10.3, and not just with respect to capital punishment, see ICCPR art. 6.5.

The case of Lionel Tate graphically illustrates the hazards of disproportionality and adjudicative incompetence when states try young offenders as adults in criminal court. The grand jury indicted twelve-year-old Tate for first-degree murder for the brutal injuries he inflicted on a six-year-old girl.²⁸⁴ Under Florida's waiver law,²⁸⁵ Tate's indictment for a capital crime required the state to prosecute him as an adult, and his conviction of first degree murder required the judge to impose a mandatory sentence of life in prison without parole.²⁸⁶ The Florida Court of Appeals reversed his conviction, holding that the trial judge should have conducted a competency hearing to determine whether Tate understood the consequences of proceeding to trial and whether he was able to assist counsel prior to and during the trial.²⁸⁷ However, it rejected Tate's contention that imposing a mandatory LWOP sentence on a twelve-year-old child was disproportionate or constituted "cruel and unusual punishment."²⁸⁸

For two decades the Supreme Court has struggled with the question of whether the Eighth Amendment's prohibition on cruel and unusual punishment contains a "narrow proportionality principle" that "applies to noncapital sentences."²⁸⁹ The Court in *Rummel v. Estelle*²⁹⁰ held that it did not violate the Eighth Amendment for a State to sentence a three-time offender to life in prison with the possibility of parole.²⁹¹ Subsequently, in *Solem v. Helm*²⁹² the Court held that the Eighth Amendment prohibited a sentence of "life without possibility of parole" for a repeat offender convicted of a minor property crime.²⁹³ *Solem*

284. See *Tate v. State*, 864 So. 2d 44, 47 (Fla. Dist. Ct. App. 2003).

285. FLA. STAT. ANN. § 985.225 (West 2001 & Supp. 2004).

286. See *id.* § 985.225(1); see also *Tate*, 864 So. 2d. at 48; Tanenhaus & Drizin, *supra* note 231, at 678-81 (summarizing waiver procedures, rejected plea offers, and failed defense strategy that ultimately led both prosecutor and judge to recommend that Governor Jeb Bush commute Tate's mandatory LWOP sentence imposed following conviction for murder as manifestly unjust for a twelve-year-old).

287. See *Tate*, 864 So. 2d at 48 ("[A] competency evaluation was constitutionally mandated to determine whether Tate had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a rational, as well as factual, understanding of the proceedings against him.").

288. See *id.* at 54 (discussing other Florida cases affirming sentences of life without parole imposed on defendants convicted of murder at ages thirteen and fourteen years).

289. *E.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in judgment).

290. 445 U.S. 263 (1980).

291. See *id.* at 284-85 (approving *Rummel's* sentence under a recidivism statute for his third conviction for relatively minor property crimes).

292. 463 U.S. 277 (1983).

293. See *id.* at 281, 303. The Court noted that the Eighth Amendment's ban on cruel and unusual punishments "prohibits . . . sentences that are disproportionate to the crime committed," *id.*

identified three factors that a court must consider to determine whether a sentence is so disproportionate that it violates the Eighth Amendment: “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”²⁹⁴ However, in *Harmelin v. Michigan*²⁹⁵ a fractured Court rejected a proportionality challenge and upheld a sentence of life without possibility of parole for a first-time offender convicted of a drug offense.²⁹⁶

In his concurrence in *Harmelin*, Justice Kennedy asserted that “[t]he Eighth Amendment proportionality principle also applies to noncapital sentences.”²⁹⁷ His concurrence has emerged as the operative test for disproportionality and holds that the Eighth Amendment prohibits “only extreme sentences that are ‘grossly disproportionate’ to the crime.”²⁹⁸ While conceding that the contours of the proportionality principle are unclear, Kennedy identified four factors—the primacy of legislative judgments about penalties, the multiplicity of legitimate penal objectives, the limited role for federal oversight of state sentencing schemes, and the requirement that objective factors inform federal proportionality review—to enable a court to determine whether a penalty is “grossly disproportionate.”²⁹⁹ Recently, the Court in *Ewing v. California*³⁰⁰ upheld the imposition of a sentence of twenty-five years to

at 284, and that the “constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.” *Id.* at 286.

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

295. 501 U.S. 957 (1991).

296. *Compare id.* at 994 (Scalia, J.) (announcing opinion of the Court and arguing that proportionality principle only limited application of death penalty but did not constitute a general feature of Eighth Amendment analysis) *with id.* at 997, 1009 (Kennedy, J., concurring) (upholding sentence by finding it proportional under an Eighth Amendment analysis). Neither Scalia’s nor Kennedy’s legal reasoning was agreed to by a majority of the Court.

297. *Id.* at 997.

298. *Id.* at 1001.

299. *See id.* at 998-1001 (Kennedy J., concurring). According to Justice Kennedy,

[a]ll of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are “grossly disproportionate” to the crime.

Id. at 1001.

300. 538 U.S. 11 (2003).

life under California's "three-strike" sentencing statute for the theft of three golf clubs.³⁰¹

Given the imprecision of the Supreme Court's interpretation of the proportionality principle in noncapital cases, courts have struggled with its application to LWOP sentences imposed on juvenile offenders.³⁰² Although proportionality emphasizes the relationship between the seriousness of the crime and the sentence imposed, courts focus almost exclusively on the gravity of the crime rather than the culpability of the actor who caused the harm when they assess seriousness.³⁰³ In *Harris v. Wright*,³⁰⁴ Judge Alex Kozinski rejected Harris' Eighth Amendment challenge to a mandatory LWOP sentence imposed on a fifteen-year-old convicted of murder.³⁰⁵ Kozinski emphasized that proportionality analyses are strictly circumscribed to instances of "gross disproportionality"³⁰⁶ and insisted

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

301. *See id.* at 19, 30-31 ("We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments.").

302. *See generally* Logan, *supra* note 2, at 703-09 (reviewing cases upholding LWOP sentences on juveniles).

303. For example, see, *State v. Massey*, 803 P.2d 340 (Wash. Ct. App. 1991), where the court upheld a mandatory sentence of life without parole imposed on a thirteen-year-old juvenile convicted of aggravated murder:

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

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

304. 93 F.3d 581 (9th Cir. 1996).

305. *See id.* at 583-85.

306. *See id.* at 584 ("Disproportion analysis, however, is strictly circumscribed; we conduct a detailed analysis only in the 'rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'").

prison sentence, it raises no inference of disproportionality when imposed on a murderer.³⁰⁷

By emphasizing only the gravity of the offense and the harm caused, rather than the culpability of the offender, courts engage in circular reasoning—serious crimes are serious—and thereby exclude considerations of moral blameworthiness from the proportionality inquiry.³⁰⁸

Although *Stanford* established sixteen as the minimum age at which states can impose the death penalty, for noncapital sentencing, the Court has not set any minimum age for imposing sentences of life without parole on younger offenders.³⁰⁹ Youthfulness may be a relevant factor, albeit not a controlling one, when courts assess culpability.³¹⁰ However, courts only conduct proportionality analyses when sentences are “grossly disproportionate” to the seriousness of the crime rather than to the culpability of the criminal. They routinely uphold LWOP and other very lengthy sentences imposed on very young offenders and rebuff claims that youthfulness is a mitigating factor that should trump mandatory sentences.³¹¹ Indeed, for some perverse reasons, courts may treat youthfulness as an aggravating, rather than mitigating, factor.³¹²

307. *Id.* at 585 (citation omitted).

308. See Logan, *supra* note 2, at 703 (“By divorcing ‘crime’ from offender culpability in proportionality analysis, these courts subscribe to an essentially circular inquiry: because murder, for instance, is a very ‘serious’ crime in the eyes of the legislature, it can be met with a very ‘serious’ statutory punishment.”).

309. *But cf.* Naovarath v. State, 779 P.2d 944, 947 (Nev. 1989) (questioning the constitutionality of imposing an LWOP sentence on any thirteen-year-old, but overturning sentence on more narrow grounds).

310. See, e.g., Hawkins v. Hargett, 200 F.3d 1279, 1284 (10th Cir. 1999) (recognizing that “age is a relevant factor to consider in a proportionality analysis”); State v. Green, 502 S.E.2d 819, 832 (N.C. 1998) (upholding life imprisonment sentence for thirteen-year-old convicted of rape, recognizing that “the chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime,” but emphasizing that Green was morally responsible for the crime because he possesses sufficient mental capacity to form criminal intent).

311. *Cf.* Adams v. State, No. CR-98-0496, 2003 WL 22026043, at *59-*60 (Ala. Crim. App. Aug. 29, 2003) (refusing to grant weight as a factor mitigating against execution to the fact that defendant was seventeen years old at the time he committed crime leading to his death sentence).

312. See SNYDER & SICKMUND, *supra* note 189, at 178 (reporting that “juvenile transfers convicted of murder received longer sentences than their adult counterparts. On average, the maximum prison sentence imposed on transferred juveniles convicted of murder in 1994 was 23 years 11 months. This was 2 years and 5 months longer than the average maximum prison sentence for adults age 18 or older, and 8 months longer than the average maximum sentence for under-18 adults convicted of murder.”); Donna Bishop & Charles Frazier, *Consequences of Transfer*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 236-37 (Jeffrey Fagan & Franklin E. Zimring eds., 2002) (comparing the sentences imposed on youths transferred to criminal courts with those of adults and reporting that “transferred youths are

Although it reversed the trial court on competency grounds, the appellate court in *Tate v. State* “reject[ed] the argument that a life sentence without the possibility of parole is cruel or unusual punishment on a twelve-year-old child.”³¹³ In *State v. Green*,³¹⁴ the North Carolina Supreme Court approved a mandatory sentence of life imprisonment imposed on a thirteen-year-old convicted of a first-degree sexual offense.³¹⁵ The *Green* court noted that many states transfer very young offenders to criminal court for adult prosecution,³¹⁶ that age is a factor that may be considered but is not dispositive “in determining whether a punishment is grossly disproportionate to the crime,”³¹⁷ and that retribution and incapacitation are appropriate sentencing goals even for young offenders.³¹⁸ In *Hawkins v. Hargett*,³¹⁹ the Tenth Circuit Court of Appeals approved sentences totaling 100 years for burglary, rape, and robbery imposed on a juvenile for crimes committed when he was

sentenced *more* harshly, both in terms of the probability of receiving a prison sentence and the length of the sentences they receive. In other words, we see no evidence that criminal courts recognize a need to mitigate sentences based on considerations of age and immaturity.” (footnote omitted); Tanenhaus & Drizin, *supra* note 231, at 665 (citing the impact of “get tough” politics and arguing that “[b]y the mid-1990’s [sic], youth had ceased to be a mitigating factor in adult court, and instead had become a liability”).

313. *Tate v. State*, 864 So. 2d 44, 54 (Fla. Dist. Ct. App. 2003). *Tate* cited other recent Florida cases approving LWOP sentences imposed on young offenders, including *Blackshear v. State*, 771 So. 2d 1199, 1200-02 (Fla. Dist. Ct. App. 2000) (approving three consecutive life sentences imposed for three robberies committed when *Blackshear* was thirteen years of age and noting that “[s]entences imposed on juveniles of life imprisonment are not uncommon in Florida Courts”) and *Phillips v. State*, 807 So. 2d 713, 717-18 (Fla. Dist. Ct. App. 2002) (approving LWOP sentence imposed on fourteen-year-old convicted of murder and rejecting the idea that an LWOP sentence for first-degree murder could ever be so “grossly disproportionate” as to require a finding of unconstitutionality). *Tate*, 864 So. 2d at 54-55.

314. 502 S.E.2d 819 (N.C. 1998).

315. *See id.* at 827-28; *see also* Paul G. Morrissey, Note, *Do the Adult Crime, Do the Adult Time: Due Process and Cruel and Unusual Implications for a 13-Year-Old Sex Offender Sentenced to Life Imprisonment in State v. Green*, 44 VILL. L. REV. 707, 738 (1999) (“*Green*’s young age does not lend itself to a per se ruling of unconstitutionality. Once a juvenile of any age is transferred to superior court, charged with a violation of state law and convicted, the juvenile must be ‘handled in every respect as an adult.’” (footnote omitted)).

316. *See Green*, 502 S.E.2d at 831 (finding that because at least 18 other states permit waiver of offenders thirteen or younger to criminal court, the North Carolina practice did not violate “evolving standards of decency”).

317. *Id.* at 832.

318. *See id.* at 833. The court emphasized judicial deference to legislative policy determinations and the “reasonableness” of the legislative conclusion that “the adult justice system, with its primary goals of incapacitation and retribution, is the appropriate place for violent youthful offenders, such as defendant.” *Id.*

319. 200 F.3d 1279 (10th Cir. 1999).

thirteen years of age.³²⁰ State courts routinely approve sentences of life—with or without possibility of parole—or for extremely long periods of time imposed on thirteen-, fourteen-, or fifteen-year-old youths, whether those youths were convicted of murder or other crimes.³²¹ Few courts ever invalidate lengthy sentences imposed on young offenders for being disproportional.³²²

320. *See id.* at 1285 (rejecting, on habeas appeal of state conviction, argument that imposing consecutive sentences for crimes committed as a thirteen-year-old constituted cruel and unusual punishment).

321. *See, e.g.,* *People v. Moya*, 899 P.2d 212, 219-20 (Colo. Ct. App. 1994) (holding that sentence of life imprisonment with possibility of parole after forty years was not cruel and unusual punishment when imposed on juvenile convicted of robbery and murder); *Brennan v. State*, 754 So. 2d 1, 5 (Fla. 1999) (vacating death penalty imposed on sixteen-year-old convicted of murder and reducing sentence to life imprisonment without a possibility of parole); *State v. Broadhead*, 814 P.2d 401 (Idaho 1991) (overruled on other grounds) (affirming life sentence with fixed minimum of fifteen years imposed on fourteen-year-old convicted of murdering his father); *State v. Shanahan*, 994 P.2d 1059, 1061-63 & n.1 (Idaho Ct. App. 1999) (holding that life sentence for murder imposed on fifteen-year-old did not constitute cruel and unusual punishment); *State v. Mitchell*, 577 N.W.2d 481, 488-91 (Minn. 1998) (holding that mandatory life imprisonment for fifteen-year-old convicted of first-degree murder was not cruel and unusual punishment); *State v. Ira*, 43 P.3d 359 (N.M. Ct. App. 2002) (approving sentence of ninety-one years imposed on fifteen-year-old for rape); *State v. Jensen*, 579 N.W.2d 613, 623-25 (S.D. 1998) (holding that life imprisonment without possibility of parole for fourteen-year-old convicted of murder is not cruel and unusual punishment); *State v. Massey*, 803 P.2d 340, 348 (Wash. Ct. App. 1990) (approving mandatory LWOP sentence imposed on youth convicted of committing murder at thirteen years of age).

322. Examples to the contrary include *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968) (holding that life sentence for fourteen-year-old convicted of rape violated Eighth Amendment) and *Naovarath v. State*, 779 P.2d 944 (Nev. 1989) (finding that a LWOP sentence imposed on thirteen-year-old convicted of murder constitutes cruel and unusual punishment, but granting only limited right to be considered for parole eligibility at some point). The Court in *Naovarath* did not necessarily endorse a categorical prohibition and emphasized the youth's mental and emotional disabilities as well:

To say that a thirteen-year-old deserves a fifty or sixty year long sentence, imprisonment until he dies, is a grave judgment indeed if not Draconian. To the make judgment that a thirteen-year-old must be punished with this severity and that he can never be reformed, is the kind of judgment that, if it can be made at all, must be made rarely and only on the surest and soundest of grounds.

Id. at 947.

A few courts also have ordered youths' lengthy sentences reduced because of their age or immaturity. *See, e.g.,* *People v. Dillon*, 668 P.2d 697, 726-27 (Cal. 1983) (reducing life sentence imposed on seventeen-year-old convicted of felony murder because he "was an unusually immature youth"). In *People v. Miller*, 781 N.E.2d 300 (Ill. 2002), the Illinois Supreme Court confronted the proportionality of an LWOP sentencing statute applied to a fifteen-year-old accessory to a multiple-murder. The Court held that "a mandatory sentence of natural life in prison with no possibility of parole grossly distorts the factual realities of the case and does not accurately represent defendant's personal culpability such that it shocks the moral sense of the community." *Id.* at 308. In finding the statute unconstitutional as applied, the Court emphasized that the fifteen-year-old youth had less than one-minute to decide to stand as a lookout during a shooting committed by two other youths, and emphasized that the youth was a passive participant who never touched or fired a gun. *See id.* at 309.

A. *Youthfulness as a Mitigating Factor in Sentencing*

The Constitution does not *require* state legislatures to recognize or courts to implement a principle of youthfulness as a mitigating factor in sentencing except for the death penalty. The Court never has read the Eighth Amendment to preclude imposition of an LWOP sentence on a twelve-year-old. However, regardless of what the Constitution requires, state legislators and courts *should* explicitly adopt and apply such a principle as part of a fair and just youth sentencing policy. As a matter of crime policy, youths' developmentally diminished responsibility and limited adjudicative competence render them less culpable than adult offenders; as a matter of youth policy, adolescence is a period of rapid growth and transition, and youths are "works in progress" who have not yet become the people they will be as adults.³²³ Youths learn by doing, make mistakes as a by-product of gaining experience, and need protection from the worst consequences of their immature judgment.³²⁴ Youths have a different developmental trajectory from mentally retarded offenders, and with normal maturation they eventually can learn to act responsibly.

A youth and crime policy must manage the risks that youths pose to themselves and to others, and reduce the harm that the justice system inflicts on them as they make the transition to adulthood. A policy to preserve young people's life chances for the future when they will be able to make more responsible choices must protect them from the full penal consequences of their present poor decisions. It holds them accountable because they are somewhat culpable and yet mitigates the severity of sentences because their choices entail less blameworthiness than do those of adults.³²⁵

323. See Arredondo, *supra* note 195, at 14 ("Other than infancy, no stage in human development results in such rapid or dramatic change as adolescence.").

324. Professor Franklin Zimring long has argued that adolescence is a time of semi-autonomy, a "learner's permit" on the road to adulthood, and that young people require special dispensations in order to learn to be responsible adults. See, e.g., ZIMRING, *supra* note 134, at 89-96 (arguing that adolescents require a "learner's permit" to become responsible); Zimring, *supra* note 1, at 283 ("At the heart of this process is a notion of adolescence as a period of 'learning by doing' in which the only way competence in decision making can be achieved is by making decisions and making mistakes.").

325. See, e.g., Scott, *supra* note 152, at 309 (arguing that adolescents' choices "reflect immaturity and inexperience and are driven by developmental factors that will change in predictable and systemic ways. A legal response that holds young offenders accountable, while recognizing that they are less culpable than their adult counterparts, serves the purposes of criminal punishment without violating the underlying principle of proportionality.").

Penal proportionality dictates shorter sentences for youth because of diminished responsibility. While criminal law presumes autonomous choices by free-willed actors, adolescents have not yet acquired experience, self-control, and maturity of judgment to validate such a presumption. Even if a youth is criminally responsible for causing a particular harm, the law should not treat her choices as the moral equivalents of an adult's and impose the same sentence.³²⁶ Political sound-bites—"Adult crime, adult time," or "Old enough to do the crime, old enough to do the time"—provide simplistic answers to complex moral and legal questions.

Youths' normal tendency to make poor decisions reveals less about their subjective character and blameworthiness than do the criminal choices that adults make.³²⁷ Youth is a time of experimentation and exploration, and youths' character remains somewhat unformed and malleable.³²⁸ Like other forms of risky behavior, most adolescent criminality is transitional and normal, and does not indicate a serious commitment to a criminal career.³²⁹ Penal policy should recognize the rapidity and volatility of development during adolescence and avoid draconian sanctions.³³⁰

326. See ZIMRING, *supra* note 283, at 144 ("[W]henever a young offender's need for protection, education, and skill development can be accommodated without frustrating community security, there is a government obligation to do so."); Feld, *supra* note 2, at 99; Scott & Grisso, *supra* note 142, at 182 ("Subjecting thirteen-year-old offenders to the same criminal punishment that is imposed on adults offends the principles that define the boundaries of criminal responsibility.").

327. See Scott & Steinberg, *supra* note 1, at 801 ("Youthful involvement in crime is often a part of this [developmental] process, and, as such, it reflects the values and preferences of a transitory stage, rather than those of an individual with a settled identity."). An adolescent's criminal act may not be as indicative of "bad moral character" as an adult's because youths, "whose identity is in flux and character unformed, are less culpable than typical adult criminals." *Id.* at 825.

328. See Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 9, 23 (Thomas Grisso & Robert G. Schwartz eds., 2000) (arguing that adolescence "is an inherently transitional time during which there are rapid and dramatic changes in physical, intellectual, emotional, and social capabilities," as well as "a period of tremendous malleability, during which experiences in the family, peer group, school, and other settings have a great deal of influence over the course of development").

329. Franklin E. Zimring argues that most youthful criminality is a relatively normal adolescent phenomenon that youths will outgrow without the necessity of major intervention; formal social control may cause more harm than good. See Zimring, *supra* note 1, at 284; see also Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *PSYCHOL. REV.* 674, 675-77 (1993) (arguing that most youthful offending is "adolescent limited," that most delinquents mature into law-abiding adults, and only a relatively small group become life-course-persistent offenders).

330. See Zimring, *supra* note 1, at 283-84 ("[D]rastic countermeasures that inhibit the natural transition to adulthood may cause more harm than they are worth. . . . Those who regard youth

A protective youth policy would avoid life destructive consequences and provide young people with “room to reform.”³³¹ Youth is a period of “semi-autonomy,” exploration, and risk taking and teenagers require a “learner’s permit” to learn to make responsible choices without suffering fully for the consequences of their mistakes. The ability to make responsible choices is learned behavior and adolescence is the period during which youths learn to control their impulses and to exercise self-control.³³² Unlike the defendants in *Atkins*, juveniles *can learn to be responsible*, and youth and crime policy should provide them with that opportunity.

A youth sentencing policy would impose shorter sentences than for older offenders *simply* because of juveniles’ immaturity and diminished culpability. Youths’ diminished responsibility has broader sentencing policy implications than just prohibiting their execution. Although the Court’s proportionality analyses focus on the death penalty, the principle of youthful reduced culpability should mitigate the severity of all penalties—capital, LWOP, mandatory minimum, and sentence lengths. Formal mitigation of punishment based on youthfulness applies equally to capital and noncapital sentences and recognizes reduced culpability without excusing criminal conduct.³³³

Adolescents as a class characteristically make poorer choices than do adults because of normal physical, neurobiological, psychological, and developmental processes. As the Supreme Court repeatedly has recognized,

youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial

crime as a transitional phenomenon see problems of deviance resolving themselves without drastic intervention and are prone to doubt the efficacy of high-risk interventions on utilitarian grounds.”).

331. See ZIMRING, *supra* note 320, at 81-83; Zimring, *supra* note 1, at 283-84.

332. See Zimring, *supra* note 1, at 279 (“[S]elf-control is a habit of behavior developed over a period of time—a habit dependent on the experience of successfully exercising self-control. This particular type of maturity, like so many others, takes practice.”).

333. See *id.* at 278 (arguing that “even after a youth passes the minimum threshold of competence that leads to a finding of capacity to commit crime, the barely competent youth is not as culpable and therefore not as deserving of a full measure of punishment as a fully qualified adult offender”); Scott & Grisso, *supra* note 142, at 174 (arguing that youthfulness does not excuse criminal liability, but “the evidence disputes the conclusion that most delinquents are indistinguishable from adults in any way that is relevant to culpability, and supports the creation of two distinct culpability categories—although, of course, there will be outliers [sic] in both groups. In short, the predispositions and behavioral characteristics that are associated with the developmental stage of adolescence support a policy of reduced culpability for this category of offenders.”).

recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment” expected of adults.³³⁴

A sentencing policy that recognizes this simple, developmental truism would protect young people from the full consequences of their bad decisions.³³⁵

*B. Youthfulness as an Individualized or Categorical Mitigating Factor:
The Virtue of Bright-lines*

Atkins, *Thompson*, and *Stanford* hinged, in part, on whether judges and juries should decide questions of culpability and mitigation on an individual or categorical basis. Sentencing laws typically eschew categorical bright-lines and consider questions of mitigation individually, and, in non-capital cases, trial judges, rather than juries, typically make sentencing decisions.³³⁶ For example, courts ordinarily evaluate youthfulness not simply in chronological terms, but as part of a broader inquiry into maturity, culpability, and blameworthiness.³³⁷

334. *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (citation omitted) (quoting *Eddings v. Oklahoma* 455 U.S. 104, 115-16 (1982)).

335. See *Scott*, *supra* note 134, at 1656 (“[I]f the values that drive risky choices are associated with youth, and predictably will change with maturity, then our paternalistic inclination is to protect the young decisionmaker . . . from his or her bad judgment.”); see also *ZIMRING*, *supra* note 134, at 96; *ZIMRING*, *supra* note 320, at 142-45.

336. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 377-78 (1989) (Scalia, J.) (arguing that because at least some sixteen- and seventeen-year-old offenders were sufficiently culpable or capable of being deterred, the death penalty should not be categorically banned for all of them).

337. See, e.g., *Eddings v. Oklahoma* 455 U.S. 104, 116 (1982) (defining youthful age to include more than chronological age and requiring evaluation of “the background and mental and emotional development of a youthful defendant”); *Graham v. Collins*, 950 F.2d 1009, 1030 & n.25 (5th Cir. 1992), *aff’d* 506 U.S. 461, (1993) (finding youthful mitigation even for a twenty-two-year-old defendant and noting that chronological age provides an indicator of maturity and stated observing that “inexperience with resultant diminished judgment and self-control” are salient mitigating factors); *Giles v. State*, 549 S.W.2d 479, 483 (Ark. 1977) (recognizing particular importance of chronological age in determining youthfulness, stating that although “chronological age does not necessarily control in the jury’s determination whether a defendant’s youth is a mitigating circumstance, nevertheless, it is certainly an important factor,” but further stating that “[a]ny hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances”); *Hurst v. State*, 819 So.2d 689, 698 (Fla. 2002) (concluding that in order “to give a non-minor defendant’s age significant weight as a mitigating circumstance, the defendant’s age must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems”); *Foster v. State*, 778 So.2d 906, 920 (Fla. 2000) (stating that there is no bright-line, chronological rule for applying youthfulness as a mitigating factor, and the inquiry “entails an analysis of factors which, when placed against the chronological age of the

However, in *Bryant v. State*,³³⁸ the Court of Appeals of Maryland concluded that while non-chronological factors are relevant to an adult capital defendant's degree of maturity and experience,

the closer his or her chronological age is to the eighteen year old baseline . . . [the more] such factor alone tends to support the establishment of immaturity and inexperience and, hence, triggers the need to consider youthful age as a mitigator. Thus, youthful age as a mitigating circumstance is determined, in the first instance, by the chronological age of the defendant, abiding evidence of atypical or unusual maturity and experience that bears on the weight to be accorded that mitigator in the ultimate weighing.³³⁹

While other factors may provide evidence of maturity and experience, the closer a youth is to the minimum age of adult responsibility, the greater the weight the court should assign to it as a mitigating factor.³⁴⁰

The crucial question is whether to treat youths' developmental disabilities categorically or to try to gauge culpability individually. Both reliability and efficiency dictate treating youthfulness categorically. Optimally, legal line-drawing classifies all members of a class who possess a certain characteristic on one side and those without that characteristics on the other. Given human variability and measurement error, every classification necessarily involves some risk of treating similar cases dissimilarly. Death penalty decisions, for example, attempt to distinguish defendants who are less culpable from those who do deserve to receive the death penalty.³⁴¹ *Stanford* regarded age as an imperfect indicator of diminished criminal responsibility, and allowed states and juries to individualize culpability assessments and to identify

defendant, might reveal a much more immature individual than the age might have initially indicated"); *State v. Bey*, 610 A.2d 814, 842 (N.J. 1992) (finding that determinations of youthful age require consideration of both chronological age and other indicators of maturity, but stating that "juries should give greater weight to a defendant's chronological age").

338. 824 A.2d 60 (Md. 2003).

339. *Id.* at 84-85.

340. *See id.* at 87 ("The youthful age mitigating circumstance is intended to mitigate the punishment of persons eighteen years of age and above, but who still lack the maturity of adults.").

341. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (barring execution of insane defendant in part because there is serious question as to "the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life"); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (barring execution of felony-murderer who does not "kill, attempt to kill, or intend that a killing take place or that lethal force will be employed"); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion) (White, J.) (adopting bright-line barring execution for rape because, even though it is a heinous crime deserving serious punishment, "the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life").

those few juveniles who were as blameworthy as death-eligible adults.³⁴² In this instance, however, a bright-line rule based on age is preferable to a system of guided discretion because in balancing the risks of error, a rule that erroneously spares the life of an occasional, potentially culpable adolescent still will produce less aggregate injustice than a discretionary system that improperly finds more undeserving youths death-eligible.

Penal proportionality requires a rough equivalency between a defendant's culpability and the punishment imposed.³⁴³ Adolescents' reduced criminal responsibility represents a normative valuation about deserved punishment rather than a technical legal judgment about whether a particular youth possessed the mens rea defined in the criminal statute.³⁴⁴ Despite the judicial and legislative preference to individualize, a sentencing policy that integrates youthfulness, reduced culpability, and penal proportionality *should* provide all younger offenders with categorical reductions of adult sentences.³⁴⁵ Treating youthfulness as a formal mitigating factor represents a social, moral, and criminal policy judgment about diminished culpability rather than an individualized clinical or psychiatric evaluation and asserts that *no*

342. See *supra* notes 85-94 and accompanying text.

343. See *supra* notes 1-3 and accompanying text; see also, e.g., *Enmund*, 458 U.S. at 825 (O'Connor, J., dissenting) ("[P]roportionality requires a nexus between the punishment imposed and the defendant's blameworthiness . . .").

344. Scott and Steinberg, argue that in contemporary criminal law theory, penal proportionality may reflect either the quality of an actor's choice or what that choice indicates about the actor's moral character. The former focuses on the blameworthiness of the quality of choices made, while the latter focuses on what that choice indicates about the actor's bad character. See Scott & Steinberg, *supra* note 1, at 801-02; see also R. A. Duff, *Choice, Character, and Criminal Liability*, 12 *LAW & PHIL.* 345, 367-68 (1993); MICHAEL MOORE, *Choice, Character, and Excuse*, in *PLACING BLAME* 548, 574-92 (1997). Scott and Steinberg further contend that under either formulation—immaturity of judgment or the unformed character of young offenders—juveniles should receive mitigated sentences compared with adults offenders:

Excuse and mitigation are available to two kinds of wrongdoers: those who are very different from ordinary people (because of endogenous incapacity such as mental disorder), and those who *are* ordinary people whose acts were responses to extraordinary circumstances or were aberrant in light of their past reputations and conduct. Young offenders in a real sense belong in both groups. Adolescent decisionmaking capacity is diminished as compared to adults due to psycho-social immaturity. At the same time, the scientific evidence suggests that most young lawbreakers are "ordinary" persons (and quite different from typical adult criminals) in that normal developmental forces drive their criminal conduct.

Scott & Steinberg, *supra* note 1, at 802 (footnotes omitted).

345. See Scott & Steinberg, *supra* note 1, at 801 ("Because these developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults under conventional criminal law conceptions of mitigation.").

adolescent deserves to be executed or sentenced as severely as an adult.³⁴⁶

There are two reasons to prefer bright-lines to discretionary judgments and to treat youthfulness as a categorical mitigating factor. The first is the inability reliably and efficiently to identify “maturity” and adult-like culpability among offending youths.³⁴⁷ The second is the inevitable tendency to subordinate abstract considerations of youthfulness to the reality of a horrific crime.³⁴⁸ Procedural safeguards and individualized assessments are inadequate to achieve either objective. Of course, youthful development is highly variable and a few youths may be mature and blameworthy prior to becoming eighteen years of age while many others will not have attained maturity even as young adults.³⁴⁹ The question is whether clinical tools or objective

346. See, e.g., Fagan, *Juveniles and Capital Punishment*, *supra* note 48, at 242 (arguing that adolescence, per se, is a mitigating status because youths’ developmental deficits “are not the deficits of an atypical adolescent but are ‘normal’ developmental processes common to all adolescents. To the degree that there is variation among adolescents, whether offenders or not, these differences are predictable and subject to a variety of contextual, circumstantial, and intra-individual factors. In this jurisprudence, the crimes of adolescents are a function of immaturity, compared to the crimes of adults, which are the acts of morally responsible, yet possibly cognitively and emotionally deficient, actors.”).

347. See *Stanford v. Kentucky*, 492 U.S. 371, 396-99 (1989) (Brennan, J., dissenting). Brennan argued that while “[t]here may be exceptional individuals who mature more quickly than their peers, and who might be considered fully responsible for their actions prior to the age of 18,” *id.* at 396, transfer and sentencing policies that take account of “an individual youth’s culpability” and consider it among other aggravating and mitigating factors inadequately take account of the juvenile offender’s lack of responsibility: “Immaturity that constitutionally should operate as a bar to a disproportionate death sentence does *not* guarantee that a minor will not be transferred for trial to the adult court system.” *Id.* at 397.

348. Although *Stanford* relied on juvenile court screening procedures and prosecutorial and jury sentencing discretion to identify those juvenile offenders with adult-like culpability, see *id.* at 375 (Scalia, J.), such screening seldom occurs. See *supra* notes 91-92 and accompanying text. Moreover, the details of a heinous crime inevitably will subordinate any individualized considerations of youthfulness:

A jury is free to weigh a juvenile offender’s youth and lack of full responsibility against the heinousness of the crime and other aggravating factors—and, finding the aggravating factors weightier, to sentence even the most immature of 16- or 17-year olds to be killed. By no stretch of the imagination, then, are the transfer and sentencing decisions designed to isolate those juvenile offenders who are exceptionally mature and responsible, and who thus stand out from their peers as a class.

It is thus unsurprising that individualized consideration at transfer and sentencing has not in fact ensured that juvenile offenders lacking an adult’s culpability are not sentenced to die.

Stanford, 492 U.S. at 397-98 (Brennan, J., dissenting).

349. See Fagan, *supra* note 48, at 209 (noting that “the age at which adolescents realize the developmental competencies that constitute culpability will vary: a significant number of juveniles will be immature and lacking in the developmental attributes of culpability well before age eighteen, and some may still lack these competencies after age eighteen: a few may have attained full

indicators exists with which to distinguish young offenders with culpability equivalent to that of the most culpable adults from the much larger subset of young offenders lacking such culpability. Because the vast majority of youths below age eighteen lack the culpability of adults, efforts to identify those few who may be fully responsible will founder on the inherent difficulties of defining, much less measuring, immaturity and will introduce a systematic bias that will redound to the disadvantage of the many less-blameworthy youths.³⁵⁰ A bright-line approach avoids the greater risk of error inherent in discretionary culpability assessments.³⁵¹ Categorical treatment of all youths that approximately corresponds to their developmental characteristics reduces the risk of error of punishing the less culpable as severely as if they were responsible adults.³⁵² Although some offenders older than age eighteen also may lack the criminal responsibility we ascribe to adults, age eighteen provides a natural legal divide because so many other competence-related rules already draw the line there.

Youthful mitigation represents a legal construct and a normative judgment about deserved punishment that does not correspond with any psychiatric diagnosis or developmental analogue about which an expert

maturity by the age threshold of sixteen set by the U.S. Supreme Court in *Stanford v. Kentucky*, but most will not." (footnote omitted).

350. See, e.g., *id.* at 248 (arguing that "[t]he difficulties and statistical error rates in measuring immaturity for juveniles invite complexity in the consistent application of the law"). Fagan contends that

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

Id. at 253 (footnote omitted); see also Weeks, *supra* note 8, at 479 (noting that if the Court requires individualized culpability assessments it raises difficult definitional questions: "What is the 'normal' adult level of culpability? How do we measure it?").

351. Scott & Steinberg, *supra* note 1, at 836-37 ("[W]e currently lack the diagnostic tools to evaluate psycho-social maturity reliably on an individualized basis or to distinguish young career criminals from ordinary adolescents who, as adults, will repudiate their reckless experimentation. Litigating maturity on a case-by-case basis is likely to be an error-prone undertaking, with the outcomes determined by factors other than immaturity." (footnote omitted)).

352. See, e.g., Scott, *supra* note 76, at 561 (arguing that "a categorical approach that treats individuals below a designated age as legal minors for most purposes works well, despite some inevitable distortion of the developmental capacities of young persons, as long as that age corresponds roughly to some threshold of developmental readiness to assume the responsibilities and privileges of adulthood").

could usefully testify.³⁵³ Unlike the insanity defense which exculpates because a mental disease impairs reason and self-control,³⁵⁴ youthfulness as a mitigating factor does not require the sentencing authority to decide whether antecedent forces, such as a mental illness, caused the youth's behavior. Rather, it conclusively presumes that young people's criminal choices are inherently constrained and differ qualitatively from those of adults.

The Supreme Court in *Atkins* categorically barred executing defendants with mental retardation, but then remitted to the states the most difficult tasks of developing the clinical indicators and procedures with which to identify those defendants whom its rule protected. By contrast, a categorical mitigation of sentences for youthfulness requires only a birth certificate to prove age and eligibility for mitigation. A "youth discount" provides fractional reductions of sentences based on age-as-a-proxy-for culpability.³⁵⁵ It provides a reasonable and objective basis for mitigation that avoids the conceptual and administrative difficulties of more subjective and individualized defenses—diminished responsibility,³⁵⁶ "rotten social background,"³⁵⁷ "social toxin,"³⁵⁸ and

353. Cf. Fagan, *supra* note 48, at 247 ("[I]ndividualized assessments leave triers of fact at the mercy of imperfect diagnostic assessments to determine which adolescents are 'mature' and which are not."); Scott & Steinberg, *supra* note 1, at 836-37.

354. See, e.g., HERBERT FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 19-28 (1972) (emphasizing the centrality of mental disease to every formulation of the insanity defense); GOLDSTEIN, *supra* note 133, at 9 (1967) ("The insanity defense . . . defines the extent to which men accused of crime may be relieved of criminal responsibility by virtue of mental disease.").

355. See Hoffman, *supra* note 79, at 233 (describing age as an imperfect proxy for a complex of factors, "includ[ing] maturity, judgment, responsibility, and the capability to assess the possible consequences of one's conduct," that constitute culpability).

356. The administrative experiences with the insanity and diminished responsibility defenses in the criminal law teach that efforts to individualize culpability assessments necessarily founder on clinical subjectivity, differences among experts about symptomology, the inability of juries or judges rationally and consistently to assess culpability, and uncertainty about the penal purposes being advanced by the inquiry. See, e.g., GOLDSTEIN, *supra* note 133, at 211-26; Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 830-31 (1977); Morse, *supra* note 140, at 55 (concluding that the "law should focus on whether defendants actually formed a mens rea rather than on whether they had the capacity to form it, and both ultimate conclusions and diagnoses should be prohibited"); Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 370-71 (1998) (analyzing "new syndrome" claims and placing them within existing criminal law doctrines of excusing conditions). Although "diminished responsibility" doctrines attempt to link a sane defendant's mental abnormality with some reduced degree of criminal responsibility, efforts to evaluate subjective culpability result in inconsistent, confusing, and arbitrary applications. Diminished responsibility allows the defendant to introduce psychological evidence about why he was less responsible than an ordinary person as a formal mitigation of punishment, although it is unclear to what legal formula that evidence corresponds. Arenella, *supra* at 835-36; Morse, *supra* note 140, at 9-13.

“social adversity”³⁵⁹—that assert external determinants or deficiencies of character excuse or mitigate the degree of criminal liability.

Shorter sentences recognize that young offenders’ choices differ qualitatively from those of adults and enable them to survive their serious mistakes with a semblance of life chances intact.³⁶⁰ They also recognize that the same-length sentences impose a greater “penal bite” on younger offenders than they do on their older counterparts.³⁶¹ A formal mitigation of punishment based on youthfulness avoids inflicting disproportionately harsh penalties on less culpable offenders without excusing their criminal conduct.

357. See generally Richard Delgado, “Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. 9, 15 (1985) (arguing that someone reared in a “rotten social background” characterized by grinding poverty, minimal parental or familial support, exposure to violence and abuse, tutelage in crime by older youths “on the street” cannot make the same moral choices as those born in more advantageous circumstances and should not be held to the same degree of criminal responsibility).

358. See; Patricia J. Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 810-11 (1996) (concluding that the law must evolve to accept “social toxin” defenses). All these subjective, individualized defenses are problematic and polarizing. See, e.g. Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 674, 689-92 (1988) (arguing that “‘compassionate’ over-excusing can have a morally and psychologically undesirable effect on wrongdoers”).

359. See, e.g., MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME AND PUNISHMENT IN AMERICA* 141 (1995) (arguing that recognizing a “social adversity” defense denigrates those offenders by implying that “those people are not responsible adults whose moral choices matter”). Recognizing people’s moral autonomy also assigns responsibility to their willed actions, and a “social adversity” defense that removes that link also would deny the actor’s autonomy. See *id.* Tonry argues that recognizing “social adversity” as a mitigation or excuse to criminal liability would stigmatize all members of the disadvantaged class to whom the defense might be available, remove disincentives to engage in crime, and undermine the objectivity and deterrent functions of criminal law. See *id.* at 146-47.

360. See ZIMRING, *supra* note 134, at 89-96; Franklin E. Zimring, *Background Paper, in CONFRONTING YOUTH CRIME: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS* 27, 66-69 (1978); Zimring, *supra* note 1, at 283.

361. See Andrew von Hirsch, *Proportionate Sentences for Juveniles: How Different than for Adults?*, 3 PUNISHMENT & SOC’Y 221, 227 (2001) (arguing that “[a] given penalty is said to be more onerous when suffered by a child than by an adult. Young people, assertedly, are psychologically less resilient, and the punishments they suffer interfere more with opportunities for education and personal development.”(citation omitted)); see also Arredondo, *supra* note 195, at 19 (arguing that “[b]ecause of differences in the experience of time, any given duration of sanction will be experienced subjectively as longer by younger children”); Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 21-22 (2002) (describing substantive quality of punishment adolescents experience in adult incarceration as far harsher than the sanctions they experience as delinquents); Feld, *supra* note 2, at 112-13 (contending that “youths experience objectively equal punishment subjectively as more severe”).

Youthfulness constitutes a categorical form of diminished responsibility because young people as a group make choices that differ qualitatively from those of adults. States should adopt an explicit “youth discount” in sentencing based on the idea of a sliding scale of criminal responsibility.³⁶² The research evidence is strongest that the maturity of judgment and adjudicative competence of the youngest adolescents is qualitatively lower than that of typical adult offenders. As a result, a fourteen-year-old offender might receive a sentence that was twenty-five percent of the length of the adult penalty, a sixteen-year-old defendant would receive one that was half as long as an adult sentence, and an eighteen-year-old adult would receive the full penalty as presently occurs. The particulars of the “discount rate” reflect youth and crime policy judgments about the extent to which adolescents differ from adults socially and developmentally, and to what degree those factors deserve categorical mitigated consideration. The deeper discounts for younger offenders correspond to their greater developmental limitations and their more limited opportunities to learn to exercise self-control.³⁶³ Because reduced culpability provides the rationale for youthful mitigation, younger adolescents bear less responsibility and deserve proportionally shorter sentences than older youths.

V. CONCLUSION

The deficits in adaptive social skills that defined mental retardation in *Atkins*—reduced abilities to understand and use information, to engage in logical reasoning, to control impulses, and to resist peer

362. Feld, *supra* note 2, at 118-21. See also Scott & Steinberg, *supra* note 1, at 837 (“[A] systematic sentencing discount for young offenders in adult court[] might satisfy the demands of proportionality.”); Tanenhaus & Drizin, *supra* note 231, at 697-98 (“We endorse Feld’s proposals [for a youth discount] because they respect the notion that juveniles are developmentally different than adults and that these differences make juveniles both less culpable for their crimes and less deserving of the harsh sanctions, which now must be imposed on serious and violent adult offenders.”); von Hirsch, *supra* note 361, at 226 (arguing for categorical penalty reductions based on juveniles’ reduced culpability: “While actual appreciation of consequences varies highly among youths of the same age, the degree of appreciation we should demand depends on age: we may rightly expect more comprehension and self-control from the 17-year-old than a 14-year-old, so that the 17-year-old’s penalty reduction should be smaller. Assessing culpability on the basis of individualized determinations of a youth’s degree of moral development would be neither feasible nor desirable.”); Zimring, *supra* note 1, at 288 (arguing that the penal law of youth crime should develop “a sliding scale of responsibility based on both judgment and the practical experience of impulse management and peer control”).

363. Zimring, *supra* note 1, at 288 (“[A]dolescents learn their way toward adult levels of responsibility gradually. This notion is also consistent with . . . long periods of diminished responsibility that incrementally approach adult standards in the late teens . . . [and with] less-than-adult punishments that gradually approach adult levels during the late teen years.”).

pressures—are features of normal adolescents. Because adolescents manifest reduced criminal responsibility as a result of normal developmental processes, the Court should use *Roper v. Simmons* to revisit *Stanford* and correct its error. Both empirically and normatively, the two categories of offenders are legally and morally indistinguishable, and the Court should endorse a categorical prohibition on executing juveniles.

Reconsidering the applicability of the death penalty for juveniles provides an opportunity to think more comprehensively about adolescent criminal responsibility and adjudicative competence. Once the Court recognizes that adolescents possess less criminal culpability than do ordinary adult offenders simply because they are young and immature, then no reason exists to restrict this principle to only capital sentences. Although the Court has resisted extending constitutional proportionality principles to noncapital sentencing out of concerns for federalism and deference to legislative autonomy, state courts and legislatures should formally recognize youthfulness as a categorical mitigating factor in all criminal sentencing statutes. The quality of youths' judgments differs qualitatively from that of adults' and bears directly on their degree of criminal responsibility. Youths have a very different developmental trajectory than defendants with mental retardation and are better able to learn from their mistakes and to learn to act more responsibly in the future. In addition, a successful transition to adulthood requires youths to learn to be responsible even though they sometimes will make serious errors of judgment. Sound youth policy and crime policy support formally recognizing youthfulness as a mitigating factor in sentencing.

Finally, states should set a minimum age of eligibility for criminal prosecution at no less than fifteen or sixteen years of age. The substantial body of developmental research on adolescent immaturity and adjudicative competence indicates that most fourteen- to sixteen-year-old youths are substantially impaired relative to adults and lack adjudicative competence. Trying and sentencing such youths as adults increases the likelihood of erroneous convictions and undermines the legitimacy of the criminal justice system. Ultimately, public officials and policy makers have to recognize that the same principle that prevails in every other legal domain also applies to youths who commit crimes—kids are different.
