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A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole

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ARTICLES

A SLOWER FORM OF DEATH: IMPLICATIONS OF *ROPER V. SIMMONS* FOR JUVENILES SENTENCED TO LIFE WITHOUT PAROLE

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The Supreme Court in *Roper v. Simmons*[1] interpreted the Eighth Amendment to prohibit states from executing offenders for crimes they committed when younger than eighteen years of age. The Court relied on objective indicators of "evolving standards of decency," such as state statutes and jury decisions to support its judgment that a national consensus existed against executing adolescents. The Justices also conducted an independent proportionality analysis of youths' criminal responsibility and concluded that their reduced culpability warranted a categorical prohibition of execution. Juveniles' immature judgment, susceptibility to negative peer influences, and transitory personality development diminished their criminal responsibility. Because of their reduced culpability, the Court held that they could never deserve or receive the most severe sentence imposed on adults.

By contrast, the Court's non-capital proportionality jurisprudence focuses on the seriousness of the offense, rather than the culpability of the offender, to assess whether a punishment is excessive. Focusing only on the gravity of the offense—the harm caused—precludes consideration of adolescents' diminished responsibility when they commit serious crimes for which they receive life without parole (LWOP) sentences. In many jurisdictions, LWOP sentences are mandatory and preclude any individualized consideration of the offender. About ten times as many adolescents receive LWOP sentences every year as ever faced the

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

death penalty, and after *Roper* those numbers only will increase. Moreover, many youths receive LWOP sentences for crimes—such as rape or felony-murder, or those that were committed when younger than sixteen years of age—that would not have been death-eligible prior to *Roper*. As a result, many more and younger juveniles receive the penultimate penalty without any individualized consideration of their lesser culpability and without constitutional recourse.

Despite the disjunction between the Court's death penalty and non-capital proportionality jurisprudence, the same developmental features that reduce adolescents' criminal responsibility for purposes of the death penalty *should* mitigate the sentences they receive for other serious crimes as well. The seriousness of an offense reflects both the harm caused and the culpability of the actor that produced it, and proportionality analyses require a method by which to recognize and accommodate young offenders' diminished responsibility. This article proposes that states formally recognize youthfulness as a mitigating factor by applying a "youth discount" to adult sentence lengths. Such a policy provides a straight-forward method by which to apply *Roper*'s categorical diminished responsibility rationale more broadly. Because the Court is unlikely to extend its *Roper* proportionality analyses to non-capital sentences imposed on adolescents, state legislatures should enact these reforms as a matter of just and sensible penal policy.

Part I of the article briefly analyzes the Court's juvenile death penalty cases and its recent *Roper v. Simmons* decision. Although *Roper* asserted that juveniles lacked the necessary culpability to justify the death penalty, the Court provided minimal social science support for its categorical conclusion. Part II reviews developmental psychological research that bolsters *Roper*'s conclusion that adolescent offenders' culpability differs qualitatively from that of adults. Part III analyzes the Court's non-death penalty proportionality framework which focuses on the seriousness of the offense without regard to the culpability of the offender. The Court's exclusion of juveniles' diminished responsibility from proportionality analyses allows legislatures to enact, trial courts to impose, and appellate courts to affirm, LWOP and other draconian sentences inflicted on very young and manifestly immature offenders. Part IV adapts *Roper*'s categorical approach to adolescents' reduced culpability and proposes a "youth discount" to formally mitigate the sentences of young offenders. It proposes that states use age as a proxy for culpability to provide substantial fractional reductions in sentence lengths for younger offenders. The article concludes with a plea to state legislators to

recognize, as did the Court in *Roper*, "what any parent knows"—kids are different and deserve less severe punishment for their crimes.

I. THE DEATH PENALTY, *ROPER V. SIMMONS*, AND DIMINISHED RESPONSIBILITY

States annually try more than 200,000 chronological juveniles as adults simply because their juvenile court jurisdiction ends at fifteen or sixteen years of age, rather than at seventeen.[2] States try an additional 55,000 youths a year in criminal courts who were within the age jurisdiction of their juvenile courts through various transfer mechanisms.[3] Although states' transfer laws vary considerably, all rely on variations of three general strategies—judicial waiver, legislative offense exclusion, and prosecutorial direct file—to prosecute children in criminal courts.[4] Judicial waiver allows juvenile court judges to waive juris-

2. EILEEN POE-YAMAGATA & MICHAEL A. JONES, NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME 5 (2007), *available at* http://www.buildingblocksforyouth.org/justiceforsome/jfs.pdf (reporting that in thirteen states, juveniles sixteen and seventeen years of age automatically are in criminal court because of jurisdictional age thresholds); *see also* CAMPAIGN FOR YOUTH JUSTICE, THE CONSEQUENCES AREN'T MINOR 6 (2006) (reporting that in states in which juvenile court jurisdiction ends at fifteen or sixteen years of age, the vast majority of youths (70–96%) are prosecuted for non-violent offenses); HOWARD SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS 110–16 (2006) (summarizing states' age jurisdiction of juvenile courts).

3. AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES 19 n.30 (2005), *available at* http://www.amnestyusa.org/countries/usa/clwop/report.pdf (estimating that states tried 55,000 waived juveniles as adults in 1996). Jurisdictional waiver refers to the process by which states transfer youths to criminal court for prosecution as an adult. *See also* PATRICK GRIFFIN, PATRICIA TORBET & LINDA SZYMANSKI, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT 3–10 (1998); SNYDER & SICKMUND, *supra* note 2, at 112–14 (discussing judicial waiver, concurrent jurisdiction, and statutory offense exclusion as three legislative methods to transfer juveniles for criminal prosecution).

4. *See generally* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987) [hereinafter Feld, *Juvenile Waiver Statutes*]; *see also* CAMPAIGN FOR YOUTH JUSTICE, *supra* note 2, at 5 (summarizing how a youth ends up in the adult criminal justice system); BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 208–19 (1999) [hereinafter FELD, BAD KIDS]; GRIFFIN ET AL., *supra* note 3, at 2; SNYDER & SICKMUND, *supra* note 2, at 110–14; Amanda M. Kellar, *They're Just Kids: Does Incarcerating Juveniles with Adults Violate the Eighth Amendment?*, 40 SUFFOLK U. L. REV. 155, 163 (2006) ("[W]hile state legislatures generally follow three basic juvenile transfer models, many states combine them, resulting in unique variations."); Ellen Marrus & Irene Merker Rosenberg, *After* Roper v. Simmons*: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1172–79 (2005) (describing details of states' judicial, prosecutorial, and legislative waiver provisions); Enrico Pagnanelli, *Children as*

diction after conducting a hearing to determine whether a youth is amenable to treatment or poses a danger to public safety.[5] By contrast, legislatures may define juvenile courts' jurisdiction simply to exclude youths charged with serious offenses from their jurisdiction without any hearing.[6] Finally, in more than a dozen states, juvenile and criminal courts share concurrent jurisdiction and prosecutors can "direct file" or prosecute youths charged with serious crimes in either system without any judicial review of their charging/forum-selection decision.[7]

Increase in youth violence and homicide in the late-1980s and early-1990s impelled nearly every state to "get tough" and transfer more and younger juveniles to criminal court.[8] States

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Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons, 44 AM. CRIM. L. REV. 175, 181–83 (2007) (summarizing legislative changes in waiver laws in the 1990s).

5. *See* Kent v. United States, 383 U.S. 541, 562 (1966) (requiring procedural due process in judicial waiver hearings); Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314 (1990) (providing empirical study of waiver decisions); Feld, *Juvenile Waiver Statutes*, *supra* note 4, at 487–94 (discussing criteria trial courts consider during waiver hearings); Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 89–90 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter Feld, *Legislative Exclusion*]; Franklin E. Zimring, *The Punitive Necessity of Waiver*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra*, at 207 [hereinafter Zimring, *Punitive Necessity*]; Franklin E. Zimring & Jeffrey Fagan, *Transfer Policy and Law Reform*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra*, at 407.

6. *See generally* Feld, *Legislative Exclusion*, *supra* note 5, at 83–98, 102–03; Benjamin Steiner et al., *Legislative Waiver Reconsidered: General Deterrent Effects of Statutory Exclusion Laws Enacted Post-1979*, 23 JUST. Q. 34, 49–51 (2006) (describing deterrent rationale of legislative offense exclusion and reporting that adoption of such laws has no effect); Zimring, *Punitive Necessity*, *supra* note 5.

7. Manduley v. Super. Ct. of San Diego, 41 P.3d 3, 33 (Cal. 2002) (upholding Proposition 21 creating prosecutorial direct file statute against due process and equal protection challenges); SNYDER & SICKMUND, *supra* note 2, at 113–14 (summarizing prosecutorial "direct file" laws); Donna M. Bishop & Charles S. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281 (1991) (criticizing administration of "direct file" laws); Feld, *Legislative Exclusion*, *supra* note 5, at 117–19; Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629 (1994) (arguing that prosecutors can act as more objective gatekeepers than either "soft" judges or "get tough" legislators); Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1467–68 (2006) (reporting states that adopted prosecutorial direct file laws, analyzing juvenile arrest rates before and after adoption, and concluding that such laws have no deterrent effect).

8. *See, e.g.*, GRIFFIN ET AL., *supra* note 3, at 3–8; NAT'L RESEARCH COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE, 204–09, 214–18 (2001)

lowered the minimum age for transfer, increased the number of offenses excluded from juvenile court jurisdiction, and shifted discretion from the judicial branch—judges in a waiver hearing—to the executive branch—prosecutors making charging decisions.[9] Although fourteen is the minimum age for transfer in most jurisdictions, some states permit waiver of youths as young as ten years or specify no minimum age and others require adult prosecution of children as young as thirteen.[10] By 1999, more than half of states had enacted mandatory transfer provisions for some serious offenses.[11] Even though most states formally have judicial waiver statutes, prosecutors actually transfer the vast majority of youths without a hearing.[12] Prosecutors in some states

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[hereinafter NAT'L RESEARCH COUNCIL]; JESSICA SHORT & CHRISTY SHARP, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 7 (2005), *available at* http://www.cwla.org/programs/juvenilejustice/Disproportionate.pdf ("Between 1992 and 1999, forty-nine states and the District of Columbia passed laws making it easier for juveniles to be tried as adults through statutory exclusion, mandatory waiver, direct file by prosecutors, or presumptive waiver legislation."); Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 194 (1998) [hereinafter Feld, *Responses to Youth Violence*]; Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 966–97 (1995) [hereinafter Feld, *Violent Youth*].

9. *See* AMNESTY INT'L, *supra* note 3, at 3 (arguing that politicians sought electoral advantage by "lowering the minimum age for criminal court jurisdiction, authorizing automatic transfers from juvenile to adult courts, and increasing the authority of prosecutors to file charges against children directly in criminal court rather than proceeding in the juvenile justice system"); JOLANTA JUSZKIEWICZ, YOUTH CRIME/ADULT TIME (2000), http://www.buildingblocksforyouth.org/ycat/ycat.html; Feld, *Legislative Exclusion*, *supra* note 5, at 124–29.

10. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 2, at 71 (reporting North Carolina transfer law requiring mandatory prosecution of youths thirteen years or older charged with Class A felonies for which, if convicted, they can receive life without parole sentences); SNYDER & SICKMUND, *supra* note 2, at 112–14 (summarizing minimum ages for transfer by judges and prosecutors and noting that some states require adult prosecution of youths as young as thirteen years old charged with murder and other serious crimes).

11. Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1519–23 (2003) (describing role of race, crack cocaine, and gun violence in providing impetus for conservative "get tough" policies); Kellar, *supra* note 4, at 155–56 (describing "get tough" waiver legislative changes of the 1990s); Julie Rowe, Note, *Mourning the Untimely Death of the Juvenile Death Penalty: An Examination of* Roper v. Simmons *and the Future of the Juvenile Justice System*, 42 CAL. W. L. REV. 287, 294 (2006) (describing "get tough" legislative changes in the 1990s).

12. AMNESTY INT'L, *supra* note 3, at 19 (estimating that of the 55,000 waived juveniles tried as adults in 1996, about 36% had a judicial transfer hearing compared with only 13% in 2000); SNYDER & SICKMUND, *supra* note 2, at 110–14 (summarizing statutory waiver mechanisms and processes).

charged about 10% of chronological juveniles as adults.[13] Florida prosecutors alone transferred as many juveniles to criminal courts as did juvenile court judges via waiver hearings in the entire country.[14] Recent statutory changes have made judicial waiver hearings the exception rather than the rule.[15] Prosecutors determined the adult status of 85% of youths tried as adults based solely on age and the offense charged.[16] As a result, states do not assess the culpability or competence of juveniles before they prosecute them in criminal courts.[17] And criminal court judges do not consider adolescents' culpability when they sentence them as adults under mandatory LWOP provisions.

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13. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, JUVENILE JUSTICE 1, 16 (1995); Feld, *Responses to Youth Violence*, *supra* note 8, at 208.

14. *See* Vincent Schiraldi & Jason Ziedenberg, *The Florida Experiment: Transferring Power from Judges to Prosecutors*, 15 CRIM. JUST. 46, 47 (Spring 2000) ("Florida is leading the nation in using prosecutors to make the decision to try children as adults. In 1995 alone . . . Florida prosecutors sent 7,000 cases to adult court, nearly matching the number of cases judges sent to the criminal justice system nationwide that year."); *see also* Bishop & Frazier, *supra* note 7; Charles E. Frazier et al., *Juveniles in Criminal Court: Past and Current Research in Florida*, 18 QLR 573, 579 (1999) ("The number of juveniles transferred to criminal court in Florida grew dramatically from several hundred cases per year prior to the introduction of prosecutor direct file provisions, to several thousand per year today. Transfers increased from roughly 1.3% of the total juvenile filings per year prior in 1979 to a high of 9.6% in 1993.").

15. JUSZKIEWICZ, *supra* note 9 (reporting analyses of 2584 transferred cases from eighteen urban counties in eleven states drawn from a larger sample of forty of the most populous seventy-five counties in the country).

16. *Id.* at 2. "First, 85% of determinations of whether tocharge [sic] a juvenile as an adult were not made by judges, but by prosecutors or by legislatures through statutory exclusions from juvenile court." *Id.* at 4. In 45% of cases, prosecutors simply filed charges against youths in criminal court—a rate three times that of judicial waiver; in another 40% of cases, prosecutors charged youths with statutorily excluded offenses. *Id.* at 17.

17. *See, e.g.*, PATRICIA TORBET et al., Nat'l Ctr. for Juvenile Justice, State Responses to Serious and Violent Juvenile Crime, at xii (1996) (describing trend in early 1990s for more states to exclude serious offenses from juvenile court jurisdiction); Katherine Hunt Federle, *Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 WIS. L. REV. 447, 487–94 (1996) (questioning adequacy of waiver procedures to conduct individualized culpability assessments); Feld, *Legislative Exclusion*, *supra* note 5, at 85–86, (analyzing legislative trends and providing statutory table of offenses excluded from juvenile court jurisdiction). Moreover, waiver statutes typically focus on "amenability to treatment" or "public safety" rather than maturity or culpability. *See* Kent v. United States, 383 U.S. 541, 566–67 (1966); Feld, *Violent Youth*, *supra* note 8, at 1029–34 (analyzing changes in statutory waiver criteria from "amenability to treatment" to "public safety").

For decades, studies have consistently reported racial disparities in waiver decisions[18] and that recent "get tough" reforms have exacerbated racial disparities.[19] As a result of successive screenings, differential processing, and cumulative disadvantage, minority youths comprise the majority of juveniles transferred to criminal court and three-quarters of all youths under age eighteen who enter prison.[20]

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18. *See, e.g.*, AMNESTY INT'L, *supra* note 3, at 15–16 (reporting that, since 1984, black juveniles have comprised the majority of juveniles admitted to prison); U.S. GEN. ACCOUNTING OFFICE, *supra* note 13, at 59 (examining the effects of race on judicial waiver decisions); DONNA M. HAMPARIAN ET AL., YOUTH IN ADULT COURT 104–05 (1982) (explaining that, nationally, 39% of all youths transferred in 1978 were black and, in eleven states, minority youths constituted the majority of juveniles waived); M. A. Bortner et al., *Race and Transfer: Empirical Research and Social Context*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 4, at 277 (analyzing racial disparity in juvenile transfer proceedings); Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 276 (1987) ("[I]t appears that the effects of race are indirect, but visible nonetheless.").

19. *See* CAMPAIGN FOR YOUTH JUSTICE, *supra* note 2, at 11 (reporting that youths of color are disproportionately waived at rates two to five times greater than their proportion of the youth population); POE-YAMAGATA & JONES, *supra* note 2, at 17 (stating that the minority proportion of youths transferred to criminal court was five times the make-up of the general population in Connecticut, Massachusetts, Pennsylvania, and Rhode Island); JUSZKIEWICZ, *supra* note 9, at 5 (reporting, for example, that black juveniles accounted for approximately three out of ten felony arrests, but eight out of ten felony cases filed in criminal court); MIKE MALES & DAN MACALLAIR, THE COLOR OF JUSTICE 7–8 (2000) (studying juvenile transfer and criminal court sentencing practices in Los Angeles and reporting that "[c]ompared to white youths, minority youths are 2.8 times as likely to be arrested for a violent crime, 6.2 times as likely to wind up in adult court, and 7 times as likely to be sent to prison by adult courts"); NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 2, at 16–19; NAT'L RESEARCH COUNCIL, *supra* note 8, at 216 ("A high proportion of the juveniles transferred to adult court are minorities. . . . The preponderance of minorities among transferred juveniles may be explained in part by the fact that minorities are disproportionately arrested for serious crimes."); Bortner, *supra* note 18, at 277 (analyzing sources of racial disparity in juvenile transfer proceedings).

20. *See, e.g.*, POE-YAMAGATA & JONES, *supra* note 2, at 220 ("In 1997, minorities made up three-quarters of juveniles admitted to adult state prisons, with blacks accounting for 58%, Hispanics 15%, and Asians and American Indians 2%."); Bortner, *supra* note 18, at 277 (analyzing cumulative consequences of racial disparities in transfer decisions). One study reported that criminal court judges imprisoned transferred black youths at a rate eighteen times greater than that of white offenders and Hispanic youth at seven times the rate of white youths. MALES & MACALLAIR, *supra* note 19, at 9. Another study of waiver practices in eighteen urban counties in eleven states reported that minority youths comprised 82% of all juveniles tried in criminal courts and white juveniles only 18%. JUSZKIEWICZ, *supra* note 9 (reporting that African-American youths constituted more than half (57%) of youths prosecuted in criminal courts and Latino

Once states convict juveniles in criminal court, judges sentence them as if they were adults and send them to the same prisons as adults.[21] Most states provide no formal recognition of youthfulness as a mitigating factor in sentencing. Some states explicitly deny very young juveniles the protection of the common law infancy defense and many states require judges to impose mandatory LWOP sentences on children as young as twelve or thirteen years of age.[22] Until the Court's recent *Roper* decision, states executed youths for crimes they committed when they were sixteen or seventeen years of age.[23]

For two decades prior to *Roper v. Simmons*, the Court considered several cases posing the question of whether the Eighth Amendment prohibited states from executing offenders for crimes they committed as juveniles.[24] In *Eddings v. Oklahoma*, the

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youths constituted another quarter (23%)); *see also* POE-YAMAGATA & JONES, *supra* note 2, at 25–26 (providing numbers to support the claim that a disproportionate number of minorities were in adult prison in 1996).

21. *See* JAMES AUSTIN ET AL., U.S. DEP'T OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS, at iii, x (2000), *available at* http://www.ncjrs.org/pdffiles1/bja/182503.pdf (reporting about 14,500 juveniles confined in adult facilities); Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. REV. 1083, 1089 (2006) ("[O]nce children are prosecuted as adults, they become subject to the same penalties as adults, including life without the possibility of parole."); Victor Streib & Bernadette Schrempp, *Life Without Parole for Children*, 21 CRIM. JUST. 4, 6 (Winter 2007) ("[Apart from the death penalty], essentially every other criminal sentence is available. Indeed, one of the political arguments to abolish the death penalty for juveniles was that they would remain eligible for LWOP, a sufficiently harsh punishment even without the death penalty."); Rowe, *supra* note 11, at 294 ("Once a juvenile offender is in adult court, sentences may be more severe, and the worst offenders may be sentenced to life in prison without possibility of parole.").

22. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 2, at 13 ("Youth tried as adults face the same punishments as adults. They can be placed in adult jails pre- and post-trial, sentenced to serve time in adult prisons, or be placed on adult probation with few to no rehabilitative services. Youth also are subject to the same sentencing guidelines as adults and may receive mandatory minimum sentences or life without parole."); MARC MAUER ET AL., THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 17 (2004) ("A life sentence mandated for any *adult* defendant who committed a particular crime applied in full force to *juveniles* convicted in adult court for that crime."); Feld, *Responses to Youth Violence*, *supra* note 8, at 212–20 (summarizing state correctional responses to juveniles sentenced as adults).

23. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361 (1989).

24. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Earlier decisions adverted to the importance of considering youthfulness as a mitigating factor in capital sentencing. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (remanding sixteen-year-old defendant for resentencing after trial court's failure properly to consider youthfulness as a mitigating factor and

Court reversed the death penalty of a sixteen-year-old because the trial court failed to consider the emotional development and family background as mitigating factors.[25] In 1988, a plurality of justices in *Thompson v. Oklahoma* concluded that all fifteen-year-old offenders lacked the culpability necessary for imposition of the death penalty.[26] The following year, the Court in *Stanford v. Kentucky* upheld the death penalty for offenders who were sixteen or seventeen years of age when they committed a capital offense.[27] Although *Stanford* acknowledged that juveniles generally were less culpable than adults, the Court rejected a categorical ban and instead allowed juries to decide on a case-by-case basis whether a particular youth possessed sufficient culpability to warrant execution.[28]

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noting that "youth is more than a chronological fact" and "minors, especially in their earlier years, generally are less mature and responsible than adults."); Lockett v. Ohio, 438 U.S. 586, 608–09 (1978) (requiring sentencing jury to consider all relevant mitigating factors including age of defendant); Roberts v. Louisiana, 431 U.S. 633, 637 (1977) (per curiam) (holding that a statute allowing for no consideration of particularized mitigating factors in deciding whether the death sentence should be imposed violated the Eighth and Fourteenth Amendments).

25. *Eddings*, 455 U.S. at 115–117 (1982). The Court found that the trial judge did, however, consider age as a mitigating factor. *Id.* at 115.

26. Thompson v. Oklahoma, 487 U.S. 815, 822–23 (1988) (plurality opinion). The *Thompson* plurality's proportionality analysis considered both objective indicators of "evolving standards of decency"—e.g., state statutes, jury practices, and the views of national and international organizations—and the Justices' own subjective sense of "civilized standards of decency." *Id.* at 830. The *Thompson* Court emphasized that deserved punishment must reflect individual culpability and concluded that "[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." *Id.* at 834. The Court asserted:

> [L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. . . . Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Id. at 835.

27. Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

28. *Id.* at 375–76. The Court argued that juvenile waiver and capital sentencing procedures were adequate to determine individual culpability unless there was a national consensus, "not that seventeen or eighteen is the age at which most persons, or even almost all persons, achieve sufficient maturity to be held fully responsible for murder; but that seventeen or eighteen is the age before which *no one* can reasonably be held fully responsible." *Id.* at 376.

In 2005, the Court in *Roper v. Simmons* overruled *Stanford* and categorically barred states from executing youths for crimes committed prior to eighteen years of age.[29] Several years prior to *Roper*, the Court in *Atkins v. Virginia* held that the Eighth Amendment barred states from executing criminal defendants with mental retardation.[30] In *Atkins*, the Court found a national consensus existed because thirty states barred the practice, legislative changes increasingly disfavored executing defendants with mental retardation, and few states actually executed mentally impaired offenders.[31] The *Atkins* Justices also conducted an independent proportionality analysis and concluded that defendants suffering from mental retardation lacked the culpability necessary to warrant execution.[32] Commentators immediately noted the constitutional implications of *Atkins*' proportionality analyses for executing juvenile offenders.[33]

Like its *Atkins* analyses, empirical and normative factors informed the *Roper* Court's assessment of "the evolving standards of decency that mark the progress of a maturing society."[34] State legislation and jury sentencing decisions provided corresponding evidence of a national consensus against executing juveniles.[35] The number of states opposed to executing juveniles equaled the number of states in *Atkins* that opposed executing defendants

29. Roper v. Simmons, 543 U.S. 551, 575 (2005) (prohibiting execution of youths for crimes committed when seventeen years of age or younger).

30. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

31. *Id.* at 314–16 (counting state statutes and emphasizing that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change" that enabled the Court to find the existence of a national consensus).

32. *Id.* at 315–16.

33. *See, e.g.*, Jeffrey Fagan, Atkins, *Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 207 (2003) ("The *Atkins* decision, though welcomed by both popular and legal policy audiences, naturally raises the question: what about juveniles?"); Barry C. Feld, *Competence, Culpability, and Punishment: Implications of* Atkins *for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 463–64 (2003) ("[T]he same psychological and developmental characteristics that render mentally retarded offenders less blameworthy than competent adult offenders also characterize the immaturity of judgment and reduced culpability of adolescents and should likewise prohibit their execution.").

34. *Roper*, 543 U.S. at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

35. *Id.* at 564–66 (noting that legislative trends prohibiting executing children corresponded with those in *Atkins* in which the Court held that the Eighth Amendment barred execution of defendants with mental retardation). *See also* Feld, *supra* note 33, at 489–98 (analogizing between state laws and jury practices in executing defendants with mental retardation and juveniles).

with mental retardation.[36] Moreover, even after *Stanford* allowed states to execute sixteen- and seventeen-year-old offenders, not a single capital state lowered the age of youths' eligibility for the death penalty, with five states raising it.[37] Similarly, in the decade prior to *Roper*, only three states actually executed offenders for crimes committed as juveniles.[38] National and international legal, professional, religious, and social organizations universally opposed executing juveniles.[39]

In addition to the objective indicators of a national consensus, the Justices also conducted a proportionality analysis of adolescents' culpability to decide whether the death penalty ever could be an appropriate punishment for juveniles. Speaking for the majority, Justice Kennedy offered three reasons, based simply upon age, why states could not punish criminally responsible juvenile offenders as severely as adult offenders.[40] First, juveniles' culpability cannot be equated with that of adults. Juveniles' immature judgment and lesser self-control cause them to commit acts impulsively and without full appreciation of the consequences.[41] Second, juveniles are more susceptible than adults to negative peer influences.[42] Moreover, juveniles' greater dependence on parents and community spreads responsibility for their delicts more broadly.[43] Third, juveniles' personalities are more

36. *Roper*, 543 U.S. at 564.

37. *Id.* at 565.

38. *Id.* at 564–65.

39. *Id.* at 575–78.

40. *Id.* at 569–72.

41. *Id.* at 569 ("[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often that in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))); *see* Daniel R. Williams, Roper v. Simmons *and the Limits of the Adjudicatory Process*, 2005 MICH. ST. L. REV. 1113, 1127 (2005) (endorsing the Court's immaturity rationale).

> With responsibility philosophically tied to the capacity for choosing, we tend to see youths as less responsible, less accountable, because we understand *youth* as a time when this capacity to choose wisely is still underdeveloped. Empirical claims about adolescent risk-taking, poor judgment, and impulsiveness gained analytical traction in the public debate over juvenile executions because they rooted the abolitionist argument about diminished responsibility in the inferior capacity of juveniles to choose.

Id. at 1127.

42. *Roper*, 543 U.S. at 569 ("Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.").

43. *Id.* (noting that juveniles are more susceptible to negative influences because they "have less control, or less experience with control, over their own environment"). The Court explained, "Their own vulnerability and comparative

transitory and less well formed compared to adults' personalities, with juveniles' crimes providing less reliable evidence of depraved character.[44] Because juveniles' character is transitional, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a great possibility exists that a minor's character deficiencies will be reformed."[45] These normal developmental characteristics of adolescents correspond with traditional justification for mitigation of punishment such as diminished capacity, duress and provocation, and the absence of bad character.[46] The Court's rationale recognized both adolescents' reduced moral culpability and their capacity for growth and change—their diminished responsibility for past offenses and their unformed and perhaps redeemable character.[47] Additionally, the Court noted that juveniles' immature judgment, susceptibility to negative influence, and transitory character also negate the retributive and deterrent justifications for the death penalty.[48] Although *Roper* spared the lives of more

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lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* at 570.

44. *Id.* at 570 ("[T]he character of a juvenile is not as well formed as that of an adult.").

45. *Id.*

46. *See, e.g.*, Elizabeth F. Emens, *Aggravating Youth:* Roper v. Simmons *and Age Discrimination*, 2006 SUP. CT. REV. 51, 73 (2005); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1016 (2003).

47. Williams, *supra* note 41, at 1133 ("We cannot execute him for his crime because we cannot say, given his incomplete *beingness*, his yet-to-be-formed character, that his evil deed reflects his irredeemable evil being. . . . That is why all the talk about unformed frontal lobes and adolescent risk-taking and bad judgment speaks to the issue of culpability. It is not that the adolescents are less responsible, but that they are, like the mentally retarded, less complete as persons. . . . [P]erhaps the most difficult job for a capital jury is to accept the idea that juvenile offenders have greater redemptive possibilities than adult offenders, that they are more likely to reform themselves precisely because they are unformed persons when the crime occurred."); *see also* Ellen Marrus & Irene Merker Rosenberg, *After* Roper v. Simmons*: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151 (2005).

48. *Roper*, 543 U.S. at 571. *Roper* rejected retribution or deterrence as justification for execution:

> Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: "'retribution and deterrence of capital crimes by prospective offenders.'"

Id. (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)). The *Roper* Court continued:

than seventy young offenders on death row, the decision effectively converted those capital sentences to life without the possibility of parole.[49]

Justice O'Connor, who provided the swing vote which produced the contradictory outcomes in *Thompson* and *Stanford*, dissented from the Court's ruling in *Roper*.[50] While she conceded that adolescents, as a class, are less mature or culpable than adults, she objected that the majority provided no evidence to contradict state legislatures' judgments that "at least *some* seventeen-year-old murderers are sufficiently mature to deserve the

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> Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. . . . Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.*

Similarly, the Court concluded that juveniles' immaturity of judgment decreased the likelihood that the threat of execution would deter them, arguing that "the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.*

49. *See* Elizabeth Cepparulo, Note, Roper v. Simmons*: Unveiling Juvenile Purgatory: Is Life Really Better than Death?*, 16 TEMP. POL. & CIV. RTS. L. REV. 225, 225 (2006) (noting that the impact of *Roper* was to convert capital sentences to sentences of life without the possibility of parole because, "[I]n many states, life without parole and death are the only two options when sentencing homicide offenders"); *see also* Davis v. Jones, 441 F. Supp. 2d 1138, 1149 (M.D. Ala. 2006) (finding that defendant was seventeen years old at the time of his conviction and capital sentence, and, as a result of *Roper*, "the sentence of death is no longer constitutionally valid, [so] the only sentencing alternative is life without parole"); Duncan v. State, 925 So. 2d 245, 281 (Ala. Crim. App. 2005) (holding that, because of *Roper*, case remanded with instructions to "set aside the appellant's death sentence and resentence him to imprisonment for life without the possibility of parole"); Duke v. State, 922 So. 2d 179, 181 (Ala. Crim. App. 2005) (holding that following *Roper*, the case of a sixteen-year-old convicted of capital crime must be remanded "to set aside Duke's sentence of death and to resentence him to life imprisonment without the possibility of parole—the only other sentence available for a defendant convicted of capital murder"); Lecroy v. State, 954 So. 2d 747, 748 (Fla. Dist. Ct. App. 2007) (affirming the trial court's decision to conform the defendant's sentence to the state supreme court's specifications: life without the possibility of parole for twenty-five years); State v. Craig, 944 So. 2d 660, 662 (La. Ct. App. 2006) (rejecting seventeen-year-old capital defendant's claim that post-*Roper* resentencing to life imprisonment at hard labor without benefit of parole violated state constitutional prohibition of excessive punishment); State v. Chapman, 611 S.E.2d 794, 832 (N.C. 2005) (remanding juvenile convicted of capital murder for resentencing).

50. *Roper*, 543 U.S. at 587 (O'Connor, J., dissenting). In her *Roper* dissent, Justice O'Connor reviewed her rationale to explain the different outcomes in *Thompson* and *Stanford*. *Id.* at 590–92.

death penalty in an appropriate case."[51] She strongly questioned whether the differences in culpability between a seventeen-year-old juvenile and an eighteen-year-old adult are "universal enough and significant enough to justify a bright-line prophylactic rule against capital punishment of the former."[52] She also disputed the majority's categorical conclusion that capital sentencing juries could not adequately assess an individual youth's culpability or give appropriate weight to youthfulness as a mitigating factor.[53]

In a separate dissent, Justice Scalia criticized the majority's calculus for finding a national consensus against executing juveniles when only eighteen states—47% of those that allowed capital punishment—prohibited it.[54] He attributed the infrequency of juvenile death sentences to the relative uncommonness of juvenile capital crimes and to jurors' ability properly to consider youthfulness as a mitigating factor.[55] Justice Scalia further disparaged the majority's selective reliance on social science research that was never introduced into evidence to support its categorical conclusion that *all* juveniles lacked sufficient culpability ever to warrant execution.[56] Finally, Justice Scalia condemned the majority's rejection of individualized jury consideration of a youth's culpability in favor of a categorical prohibition.[57] He chided the majority for providing no evidence that "juries cannot be trusted with the delicate task of weighing a defendant's youth" and objected that such a view "undermines the very foundations

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

> [T]he Court adduces no evidence whatsoever in support of its sweeping conclusion that it is only in "rare" cases, if ever, that seventeen-year-old murderers are sufficiently mature and act with sufficient depravity to warrant the death penalty. The fact that juveniles are generally *less* culpable for their misconduct than adults does not necessarily mean that a seventeen-year-old murderer cannot be *sufficiently* culpable to merit the death penalty. . . . But an especially depraved juvenile offender may nevertheless be just as culpable as many adult offenders considered bad enough to deserve the death penalty.

Id. at 599–600.

52. *Id.* at 601.

53. *Id.* at 602. Justice O'Connor objected that the Court's rejection of individualized culpability assessments was contrary to its death penalty jurisprudence that rejected arbitrary, categorical rules in favor of "individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant's immaturity, his susceptibility to outside pressures, his cognizance of the consequences of his actions, and so forth." *Id.* at 602–03.

54. *Id.* at 609 (Scalia, J., dissenting) ("Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.").

55. *Id.* at 614.

56. *Id.* at 617–18.

57. *Id.* at 620.

of our capital sentencing system, which entrusts juries with 'mak[ing] the difficult and uniquely human judgments that defy codification.'"[58]

The majority and dissenting Justices differed on several issues: the proper denominator to use when calculating the existence of a national consensus against executing juveniles—i.e., all states or only those with death penalty laws;[59] the role of international law in interpreting domestic constitutional provisions;[60] and the majority's failure to rebuke the Missouri Supreme Court for anticipatorily overruling *Stanford*.[61] The most substantial difference among the Justices concerned whether to bar the death penalty categorically or to allow juries to conduct individualized assessments of young offenders' culpability.[62] Although both the

58. *Id.* (quoting McCleskey v. Kemp, 481 U.S. 279, 311 (1987)). *See also* Wayne Myers, Roper v. Simmons*: The Collision of National Consensus and Proportionality Review*, 96 J. CRIM. L. & CRIMINOLOGY 947, 991 (2006) ("[T]he central defect in the majority's . . . analysis [is] its complete failure to support the contention that a jury cannot adequately account for youth as a mitigating factor in sentencing decisions.").

59. *Roper*, 543 U.S. at 595–96 (O'Connor, J., dissenting) (contrasting state laws rejecting execution of defendants with mental retardation in *Atkins* with laws regarding executing juveniles); *id.* at 609–11 (Scalia, J., dissenting) (arguing that relevant reference groups are policies of states that employ the death penalty for some offenders).

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

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

62. *Compare id.* at 572–73 (majority opinion) ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability"), *with id.* at 602–03 (O'Connor, J., dissenting) ("[T]hese [Eighth Amendment] concerns may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant's immaturity, his susceptibility to outside pressures, his cognizance of the consequences of actions, and so forth."), *and id.* at 620 (Scalia, J., dissenting) ("[The majority's] startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with 'mak[ing] the difficult and

O'Connor and Scalia dissents argued for individualized culpability assessments, Justice Kennedy opted for a categorical ban:

> The differences between juvenile and adult offenders are too marked and well understood to *risk* allowing a youthful person to receive the death penalty despite insufficient culpability. An *unacceptable likelihood* exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.[63]

Justice Kennedy noted that the psychiatric profession prohibited itself from diagnosing any patient younger than eighteen years of age with "antisocial personality disorder" because they lacked clinical bases with which to differentiate between an immature juvenile's crime and the "rare juvenile offender whose crime reflects irreparable corruption."[64] *Roper* concluded that the Court should not require or allow lay jurors to make culpability determinations that trained professionals eschewed. Justice Kennedy apparently feared that jurors would ignore the mitigating role of youthfulness when the circumstances of a brutal, cold-blooded murder aroused their passions. To the extent that jurors associate youthfulness with innocence, the viciousness of a death-eligible crime might prevent them from identifying with a young offender.[65] Rather than considering a juvenile's age as a mitigating factor, jurors might instead erroneously treat it as an aggravating factor.[66] The accuracy of Justice Kennedy's intuition is reflected in the vehemence with which some commentators have

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uniquely human judgments that defy codification and that buil[d] discretion, equity, and flexibility into a legal system.'" (quoting McCleskey v. Kemp, 481 U.S. 279, 311 (1987))).

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

64. *Id.* at 573.

65. Emens, *supra* note 46, at 83 ("[T]o the extent we see or want to see childhood as a time of innocence, cognitive dissonance may prompt us to reconceive a child who does terrible things as an adult.").

66. *Id.* at 52 (noting that the prosecutor in *Roper* improperly urged the defendant's age as an aggravating, rather than mitigating, factor); Norman J. Finkel, *Prestidigitation, Statistical Magic, and Supreme Court Numerology in Juvenile Death Penalty Cases*, 1 PSYCHOL., PUB. POL'Y & L. 612, 636 (1995) (reporting social science studies showing that "[w]hen heinousness increases, it exerts a more powerful effect than age"); Williams, *supra* note 41, at 1131 ("[T]he tendency to regard youth as an aggravating consideration, to see the juvenile offender as a super-predator who has many years ahead to commit other dangerous acts, threatens to eclipse the mitigating quality of youth."); Rowe, *supra* note 11, at 311 ("By taking these sentencing decisions out of a jury's hands, the Court implicitly doubted American citizens' ability to weigh a body of evidence

used egregious facts of juveniles' crimes to criticize the Court's reasoning and holding.[67] To avoid these risks, the Court used age as a conclusive proxy for culpability to align how the law treats youthful offenders with how the law and our culture believe we should treat them.[68]

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and recommend an appropriate sentence for a sixteen-year-old or seventeen-year-old defendant who kills in cold blood.").

67. *See, e.g.*, Mitchel Brim, *A Sneak Preview into How the Court Took Away a State's Right to Execute Sixteen and Seventeen Year Old Juveniles: The Threat of Execution Will No Longer Save an Innocent Victim's Life*, 82 DENV. U. L. REV. 739, 753 (2005) (beginning with a recitation of a horrific crime committed by juveniles and concluding that "[i]t is a grave injustice, not only to the victim and the victim's family, but also to society as a whole because the Court is able to disrespect the victim and the victim's family by not basing its decision on the respondent's moral culpability but rather on the Justices' individual perceptions and biases"); Moin A. Yahya, *Deterring* Roper*'s Juveniles Using a Law and Economics Approach to Show that the Logic of* Roper *Implies that Juveniles Require the Death Penalty More than Adults*, 111 PENN ST. L. REV. 53, 106 (2006) ("If *Roper* is correct in assuming that juveniles are reckless, voracious consumers of the present, who have little fear of punishment because of their underdeveloped brains, then harsher punishments are needed to control them."); Benyomin Forer, Comment, *Juveniles and the Death Penalty: An Examination of* Roper v. Simmons *and the Future of Capital Punishment*, 35 SW. U. L. REV. 161, 171–75, 180 (2006) (summarizing facts of egregious cases and concluding that "the Court's analysis and determinations were deficient" and "overruled existing case law on flimsy grounds"); Rowe, *supra* note 11, at 319 ("[T]he Court interfered with the function of both state legislatures and sentencing juries, using its subjective views to declare what the law should be and implying that neither legislatures nor juries are competent to correctly assess the culpability of juveniles and determine appropriate sentences."); Steven J. Wernick, Comment, *Constitutional Law: Elimination of the Juvenile Death Penalty—Substituting Moral Judgment for a True National Consensus*, 58 FLA. L. REV. 471 (2006).

68. Emens, *supra* note 46, at 53 ("[W]e think we favor youth, and we think we should favor youth, but in reality we may disfavor youth. Kennedy's reasoning thus suggests that . . . the law must embrace a categorical rule to *align* how we treat young people under law with how we think we do and should treat them."). Emens posits a three-step logic to justify Kennedy's categorical conclusion:

> First, youth is a rational proxy for diminished culpability. Second, jurors will sometimes fail to consider youth as mitigating because they may have negative stereotypes and, worse yet, negative attitudes toward youth. Indeed, they may treat youth as aggravating, thus creating a peculiarly troubling type of error: treating an individual *less favorably* on the basis of the trait, youth, that should prompt *more favorable* treatment. Third, such errors are sufficiently weighty that the Eighth Amendment requires a prophylactic rule that removes such decisions from the jury.

Id. at 101. Professor Williams makes a similar argument to justify denying juries the opportunity to execute juveniles:

> A categorical exemption for juvenile offenders, being overinclusive in the sense that some juvenile offenders exempted from execution are no less responsible for their crimes than adult offenders who actually

II. DEVELOPMENTAL PSYCHOLOGY AND ADOLESCENTS' REDUCED CULPABILITY

Roper offered three reasons—immature judgment, susceptibility to negative peer and environmental influences, and transitional identities—to justify its conclusion that juveniles are less criminally responsible than adults. Although its conclusions about the differences between adolescents and adults seem intuitively obvious,[69] the Court provided surprisingly little scientific evidence to support its assertions.[70] Several of the sixteen *amicus* briefs presented developmental psychological and neurobiological research bolstering *Roper*'s rationale of juveniles' reduced culpability, but the Court neither presented nor analyzed that social science evidence.[71] We know much more about adolescents' judgment, decision making, and self-control, and that research has important implications for understanding youths' criminal responsibility and formulating sentencing policy.

Retributive sentencing theory proportions punishment to the seriousness of the offense.[72] Two separate elements—harm

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> have been executed for comparable crimes, reflects an aversion to the "risk [of] allowing a youthful person to receive the death penalty despite insufficient culpability." We take away the capital decision-making prerogative from the jury when it comes to juvenile offenders because we simply don't trust juries *enough* to reliably decide, over time and across jurisdiction, that moral question rightly.

Williams, *supra* note 41, at 1130 (quoting Roper v. Simmons, 543 U.S. at 572–73).

69. *Roper*, 543 U.S. 551, 569 (observing summarily that "as any parent knows," juveniles are immature and irresponsible).

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

71. Denno, *supra* note 70, at 382–87 (arguing that while the Court relies on the "scientific and sociological studies respondent and his *amici* cite," it fails to identify which studies or data supported its conclusions about the differences between adolescents and adults).

72. *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."); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 589–91 (2005) (summarizing principles of retributive sentencing theory); *see also* ANDREW VON HIRSCH, CENSURE AND SANCTIONS 15 (1993); ANDREW VON HIRSCH, PAST OR FUTURE

and culpability—define the seriousness of a crime and the punishment deserved.[73]

> [T]he degree of blameworthiness of an offense is generally assessed according to two kinds of elements: the nature and seriousness of the harm caused or threatened by the crime; and the offender's degree of culpability in committing the crime, in particular, his or her degree of intent (mens rea), motives, role in the offense, and mental illness or other diminished capacity.[74]

An offender's age does not affect the amount of harm caused—a fifteen-year-old can inflict the same injuries as an adult.[75] However, culpability subsumes an offender's ability to appreciate the wrongfulness of her actions and to control her behavior.[76] Because youthfulness directly affects culpability, it necessarily influences assessments of blameworthiness and ultimately the seriousness of a crime.[77] *Roper* emphasized that youth-

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CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 31 (1985).

73. *See* Stanford v. Kentucky, 492 U.S. 361, 393 (1989) (Brennan, J., dissenting) ("[T]he proportionality principle takes account not only of the 'injury to the person and to the public' caused by a crime, but also of the 'moral depravity' of the offender." (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977))); Enmund v. Florida, 458 U.S. 782, 815 (1982) (O'Connor, J., dissenting) (arguing that the offender's culpability—"the degree of the defendant's blameworthiness"—is central to determining the penalty); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 707 (1998) ("[A] sentence must correspond to the crime—not just to the harm caused by the offense, but also to the culpability of the offender."); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 822 (2003) ("Only a blameworthy moral agent deserves punishment at all, and blameworthiness (and the amount of punishment deserved) can vary depending on the attributes of the actor or the circumstances of the offense."); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL 271 (Thomas Grisso & Robert Schwartz eds., 2000) ("But dessert is a measure of fault that will attach very different punishment to criminal acts that cause similar amounts of harm.").

74. Frase, *supra* note 72, at 590.

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

76. Zimring, *supra* note 73, at 271; *see also* David O. Brink, *Immaturity, Normative Competence and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1557 (2004) ("[J]uveniles tend to be less competent in discriminating right from wrong and in being able to regulate successfully their actions in accord with these discriminations. If they are less competent, then they are less responsible.").

77. Just desserts theory and criminal law grading principles base the degree of deserved punishment on the actor's culpability. For example, a per-

fulness affects judgment, reasoning ability, and self-control and reduces the culpability of juveniles who fail to exhibit adult-like qualities.[78] Although states may hold youths accountable for the harms they cause, *Roper* explicitly limited the severity of the sentence a state could impose on them because of their diminished responsibility.[79] Even after youths develop the nominal ability to distinguish right from wrong, their bad decisions lack the same degree of moral blameworthiness as those of adults and warrant less severe punishment.[80]

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

78. *See* AMNESTY INT'L, *supra* note 3, at 113 (arguing that penal proportionality requires consideration of both the nature of the offense and the culpability of the offender). The report also noted:

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

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

79. Zimring uses the term "diminished responsibility" to refer to adolescents who possess "the minimum abilities for blameworthiness and thus for punishment . . . [whose] immaturity . . . still suggests that less punishment is justified." Zimring, *supra* note 73, at 273; *see also* Scott & Steinberg, *supra* note 73, at 830 (arguing that compared with adults, youths act more impulsively, weigh consequences differently from adults, and discount risks because of normal developmental processes that "undermine [their] decision-making capacity in ways that are accepted as mitigating culpability").

80. Brink, *supra* note 76, at 1570 (emphasizing both cognitive and volitional aspects of responsibility). According to Brink, "Normative competence

For decades, developmental psychologists have studied how children's thinking and behaviors change as they mature.[81] By mid-adolescence, most youths can distinguish right from wrong and reason similarly to adults.[82] For example, youths and adults use comparable reasoning processes when they make informed consent medical decisions.[83] But the ability to make good choices

involves the cognitive ability to discriminate right from wrong, but also the affective and cognitive abilities to regulate one's emotions, appetites, and actions in accordance with this normative knowledge. One central ingredient in normative competence is impulse control." *Id.*

81. *See, e.g.*, Steinberg & Cauffman, *supra* note 78, at 391 ("Developmental psychology, broadly defined, concerns the scientific study of changes in physical, intellectual, emotional, and social development over the life cycle. Developmental psychologists are mainly interested in the study of 'normative' development (i.e., patterns of behavior, cognition, and emotion that are regular and predictable within the vast majority of the population of individuals of a given chronological age), but they are also interested in understanding normal individual differences in development (i.e., common variations within the range of what is considered normative for a given chronological age) as well as the causes and consequences of atypical or pathological development (i.e., development that departs significantly from accepted norms).").

82. *See, e.g.*, Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOLOGIST 99, 100 (1983). For example, when youths make informed consent medical decisions, adolescents fourteen years of age or older make decisions comparable to those of adults. *See id.* at 100–01; *see also* 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); Cynthia V. Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 434–36 (2006) (arguing that the cognitive competence of adolescents enables them to form the *mens rea* to commit a crime and essentially refutes claims that the criminal law should treat them differently than adults). Developmental psychological research on adolescents' cognitive decision-making ability suggests that "for most purposes, adolescents cannot be distinguished from adults on the ground of competence in decision making alone." *Id. But see* Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 406–07 (1999) (criticizing cognitive studies as methodologically limited and failing to assess real-life decision making); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1609 (1992) (criticizing researchers who find no differences between adolescents' and adults' decision making for focusing too narrowly on cognitive as opposed to judgmental factors).

83. Roper v. Simmons, 543 U.S. 551, 617–21 (2005) (Scalia, J., dissenting) (arguing that the Court cited research on adolescents' competence to make informed consent decisions in the context of abortion); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 52–53 (1998) (concluding that cognitive capacity and formal reasoning ability of mid-adolescents does not differ significantly from that of adults). Research on young peoples' 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 to support

when provided with complete information under laboratory conditions differs from the ability to make good decisions under stressful conditions with incomplete information.[84] Emotions play a significant role in decision making, and researchers distinguish between "cold cognition" and "hot cognition."[85] For ado-

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that adolescents aged fifteen or older possess less competence than adults to provide knowing, intelligent, and voluntary informed consent); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1595 (1982) (noting that fourteen-year-olds' choices did not differ significantly from those of adults in terms of "evidence of choice, reasonable[ness of] outcome, rational[ity of] reason[ing], and understanding" when responding to 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 82, at 1627–30.

84. *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 73, 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 decision-makers 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) ("[T]he decision making capacity of adolescents may be more vulnerable to disruption by the stresses and strains of everyday living than that of adults. That is, unlike adults, adolescents may exhibit considerably poorer cognitive performance under circumstances involving everyday stress and time-limited situations than under optimal test conditions."); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 250 (1996) [hereinafter Steinberg & Cauffman, *Maturity of Judgment*] ("[T]he informed consent model is too narrow in scope . . . because it overemphasizes cognitive functioning (e.g., capacity for thinking, reasoning, understanding) and minimizes the importance of noncognitive, psychosocial variables that influence the decision-making process (i.e., aspects of development and behavior that involve personality traits, interpersonal relations, and affective experience.)").

85. *See, e.g.*, Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 PSYCHOL. PUB. POL'Y & L. 115, 119 (2007) ("[A]dolescents are much less capable of making sound decisions when under stressful conditions or when peer pressure is strong. Psychosocial researchers have referred to cognition in these different contexts as *cold* versus *hot*. The traits that are commonly associated with being an adolescent—short-sightedness (i.e., inability to make decisions based on long-term planning), impulsivity, hormonal changes, and susceptibility to peer influence—can quickly undermine one's ability to make sound decisions in periods of hot cognition." (citation omitted)); Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 60, 61 (2001) ("*Cold cognition* refers to thinking under conditions of low emotion and/or arousal, whereas *hot cognition* refers to think-

lescents, in particular, mood volatility, an appetite for risk and excitement, and stress adversely affect the quality of decision making.[86]

In the mid-1990s, the John D. and Catherine T. MacArthur Foundation sponsored a decade-long research network on Adolescent Development and Juvenile Justice (ADJJ) to study juveniles' decision making and judgment, adjudicative competence, and criminal culpability. Over the next decade, the ADJJ Network produced a series of books and articles, and convened a national conference to present its research findings on adolescent development and the implications of adolescent development for juvenile and criminal justice system policies.[87]

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ing 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.").

86. *See, e.g.*, Cauffman & Steinberg, *Cognitive and Affective Influences*, *supra* note 84, at 1780; Scott, *supra* note 82, at 1645 ("[Youths' 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 . . . ."); Dahl, *supra* note 85, at 62 ("[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."); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 84, at 259 ("[S]ensation 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.").

87. *See* MacArthur Found. Research Network on Adolescent Dev. & Juvenile Justice, *Network Overview* (2006), http://www.adjj.org/downloads/552network_overview.pdf. *See generally* PETER W. GREENWOOD, DELINQUENCY PREVENTION AS CRIME-CONTROL POLICY (2006) (describing successful intervention programs to reduce delinquency); THOMAS GRISSO, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS (2004) (examining prevalence of mental disorders among delinquent populations and its implications for competency, court processing, and dispositions); OUR CHILDREN, THEIR CHILDREN (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (examining racial disparities in juvenile justice administration); THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 5 (analyzing culpability of juveniles and transfer to criminal court); YOUTH ON TRIAL, *supra* note 73 (analyzing adjudicative competencies of adolescents and their implications for juvenile justice administration); FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING (2004) (describing irrationality of criminal justice policies that treat adult and adolescent sexual offenses the same).

The ADJJ research reports a disjunction between youths' cognitive abilities and the quality of their judgment.[88] Even though adolescents by age sixteen exhibit intellectual and cognitive abilities comparable with adults,[89] they do not develop the psycho-social maturity, ability to exercise self-control, and competence to make adult-quality decisions until their early-twenties.[90] The "Immaturity Gap" represents the sharp cleavage between adolescents' intellectual maturity, which reaches near-adult levels by age sixteen, and their psycho-social maturity of judgment that does not emerge for nearly another decade.[91] This latter deficit provides the basis for finding the reduced criminal responsibility of youths.

Roper attributed youths' diminished culpability to a "lack of maturity and . . . underdeveloped sense of responsibility . . . [that] often result in impetuous and ill-considered actions and decisions."[92] The Court focused on adolescents' immaturity of judgment to reduce culpability, rather than simple cognitive ability to distinguish right from wrong which is the typical criminal law inquiry.[93] Youths' immature judgment manifests itself in sev-

88. MacArthur Found. Research Network on Adolescent Dev. & Juvenile Justice, *Development and Criminal Blameworthiness* (2006), http://www.adjj.org/downloads (follow "3030PPT- Adolescent . . ." hyperlink) [hereinafter MacArthur Found. Research Network] (reporting a disjunction between youths' cognitive ability and their maturity of judgment). "By age sixteen, individuals show adult levels of performance on tasks of basic information processing and logical reasoning. Yet in the real world, adolescents show poorer judgment than adults." *Id.*

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

90. *See* Scott & Steinberg, *supra* note 73, at 813 ("Psycho-social development proceeds more slowly than cognitive development. As a consequence, even when adolescent cognitive capacities approximate those of adults, youthful decision-making may still differ due to immature judgment."); Elizabeth Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 224 (1995) [hereinafter Scott et al., *Legal Contexts*]; Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 152 (2003) ("[F]or all the importance of cognitive development, aspects of behavior that involve interpersonal and affective experience may offer even more information about an adolescent's decision-making processes."). *Contra* Ward, *supra* note 82, at 446–56 (arguing that even very young children possess sufficient rationality to act instrumentally and therefore no reasons exist to punish them differently than adults).

91. MacArthur Found. Research Network, *supra* note 88 (graph entitled, "The Immaturity Gap").

92. Roper v. Simmons, 543 U.S. 551, 569 (2005) (citing Johnson v. Texas, 509 U.S. 350, 367 (1993)).

93. *See* Cauffman & Steinberg, *Cognitive and Affective Influences*, *supra* note 84, at 1765; Scott et al., *Legal Contexts*, *supra* note 86, at 227; Scott & Grisso, *supra* note 78, at 157. Psycho-social factors affecting adolescents' decisions to engage

eral domains—perceptions of risk, appreciation of future consequences, capacity for self-management, and ability to make autonomous choices—that distinguishes them from adults.[94] Because all youths' differences in knowledge and experience, short-term versus long-term time perspectives, attitude toward risk, and impulsivity are elements of normal development, their bad choices are categorically less blameworthy than those of adults.[95]

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in crime include "peer influence, temporal perspective (a tendency to focus on short-term versus long-term consequences), and risk perception and preference. . . . We designate these psychosocial influences as 'judgment' factors, and argue that immature judgment in adolescence may contribute to choices about involvement in crime."). *Id.*; *see also* Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 84, at 252; Steinberg & Cauffman, *supra* note 78, 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)").

94. *See, e.g.*, Morse, *supra* note 83, at 53 (describing characteristics of youths that distinguish their decision-making capabilities from those of adults); Scott & Steinberg, *supra* note 73, at 813 ("[E]ven when adolescent cognitive capacities approximate those of adults, youthful decision-making may still differ due to immature judgment. The psycho-social factors most relevant to differences in judgment include: (a) peer orientation, (b) attitudes toward and perception of risk, (c) temporal perspective, and (d) capacity for self-management. . . . [I]mmature judgment can affect outcomes because these developmental factors influence adolescent values and preferences that drive the cost-benefit calculus in the making of choices."); Scott et al., *Legal Contexts*, *supra* note 90, at 229–35 (describing psycho-social and developmental factors that contribute to juveniles' immature judgment); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 84, at 252 (emphasizing temperance, perspective, and judgment as ways in which adolescents' thinking diverges from adults); Taylor-Thompson, *supra* note 90, at 144 ("[A]dolescents think differently than mature adults. . . . They fixate on an initial possibility in the decision-making process and fail to adjust as new information becomes available.").

95. *See* Scott, *supra* note 82, at 1610; Scott & Grisso, *supra* note 78, at 160–61 (noting that psycho-social developmental factors affecting judgment and criminal responsibility in adolescents include: "(1) conformity and compliance in relation to peers, (2) attitude toward and perception of risk, and (3) temporal perspective"); Scott & Steinberg, *supra* note 73, at 813; Scott et al., *Legal Contexts*, *supra* note 90, at 227 (proposing "judgment" framework to evaluate quality of adolescent decision-making that includes not only cognitive capacity, but also influence of factors such as "conformity and compliance in relation to peers and parents, attitude toward and perception of risk, and temporal perspective"); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 84, at 258–62.

A. *Immature Judgment, Risky Behavior, and Impulsivity*

"As any parent knows," kids do stupid, dangerous, and destructive things. To exercise good judgment and self-control, a person must be able to think ahead, delay gratification, and restrain impulses. Adolescents act more impulsively, fail to consider long-term consequences, and engage in riskier behavior than adults.[96] Their propensity to take risks is reflected in higher incidence of accidents, suicides, homicides, unsafe sexual practices, and the like.[97]

To calculate risks, a person has to identify potential positive and negative outcomes, estimate their likelihood, and then apply value preferences to optimize outcomes.[98] To a greater extent than adults, adolescents underestimate the amount and likeli-

96. *See* Scott & Steinberg, *supra* note 73, 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.").

97. *See* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, *in* ADOLESCENT RISK TAKING 66, 67 (Nancy J. Bell & Robert W. Bell eds., 1993); Marrus & Rosenberg, *supra* note 4, at 1162–63 (describing various ways in which juveniles engage in risky behavior—unprotected sex, drugs, drinking, driving recklessly, and the like). Teenagers' greater proclivity to engage in unprotected sex and to speed and drive recklessly reflects various forms of risk-taking with respect to health and safety. *See* John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 38–48 (2001) (summarizing criminological research reporting peak of criminal involvement in mid-to-late adolescence with sharp desistance thereafter and attributing youthful involvement to normal developmental transition to adulthood); Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL, *supra* note 73, at 291, 300–301 [hereinafter Scott, *Lessons*] ("Many adolescents become involved in criminal activity in their teens and desist by the time they reach young adulthood. [C]riminologists . . . conclude that participation in delinquency is 'a normal part of teen life.' For most adolescent delinquents, desistance from antisocial behavior also seems to be a predictable part of the maturation process."); Scott et al., *Legal Contexts*, *supra* note 90, at 230; Spear, *supra* note 84, at 421 ("[W]ith half or more of adolescents exhibiting drunk driving, sex without contraception, use of illegal drugs, and minor criminal activities, 'reckless behavior becomes virtually a normative characteristic of adolescent development.'" (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence*, 12 DEVELOPMENTAL REV. 339, 344 (1992))).

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

hood of risks, employ a shorter timeframe in their calculus, and focus on potential gains rather than losses.[99] Juveniles fifteen years of age and younger act much more impulsively than do older adolescents, but even sixteen- and seventeen-year-old youths fail to exhibit adult levels of self-control.[100] Because of their youth and inexperience, adolescents may possess less information[101] or consider fewer options than adults when they make decisions.[102] Similarly, youths and adults use about the same amount of time to solve simple problems, but the length of time used to solve complex problems increases with age.[103]

The ADJJ Research Network studied juveniles' ability to delay gratification, to evaluate risks, and to exercise self-control.[104] It reports that adolescents' risk perception actually declines during mid-adolescence and then gradually increases into adulthood—sixteen- and seventeen-year-old youths perceive

99. *See* Furby & Beyth-Marom, *supra* note 98, at 19 ("[A]dolescents [may] judge some negative consequences in the distant future to be of lower probability than do adults or to be of less importance than adults do."); Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants, in* YOUTH ON TRIAL, *supra* note 73, at 139, 161 ("[A]dolescents . . . may differ from adults in the weights that they give to potential positive and negative outcomes . . . [and] are more likely than adults to give greater weight to anticipated gains than to possible losses or negative risks."); Scott, *Lessons*, *supra* note 97, at 305–06 ("[A]dolescents . . . could differ from adults in the subjective value that is assigned to perceived consequences . . . [and] may weigh costs and benefits differently, sometimes even viewing as a benefit what adults would consider to be a cost.").

100. MacArthur Found. Research Network, *supra* note 88 (graph entitled, "Impulsivity Declines with Age").

101. *See* Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) ("Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."); Scott, *Lessons*, *supra* note 97, at 304–05 ("Adolescents, perhaps because they have less knowledge and experience, are less aware of risks than are adults. . . . [T]he fact that adolescents have less experience and knowledge than adults seems likely to affect their decision making in tangible and intangible ways." (citation omitted)); Taylor-Thompson, *supra* note 90, at 153 ("Adolescents assess risk differently than adults. This may result from adolescents being unaware of risks that adults typically perceive, having incorrect information about risks, or calculating the probability or magnitude of the risk in ways that adults would not." (footnotes omitted)).

102. *See* Taylor-Thompson, *supra* note 90, at 153 ("In situations where adults will likely perceive and weigh multiple alternatives as part of rational decision-making, adolescents typically see only one option. This inflexible 'either-or-mentality' becomes especially acute under stressful conditions.").

103. MacArthur Found. Research Network, *supra* note 88 (graph entitled, "With Age, Longer Time Spent Thinking Before Acting").

104. *Id.*

fewer risks than do either younger or older research subjects.[105] Mid-adolescents are the most "present-oriented" of all the age groups studied; future orientation gradually increases into the early twenties.[106] Youths weigh costs and benefits differently than adults and give different subjective values to outcomes which affect their ultimate choices.[107] A study of people's ability to delay gratification reported that adolescents more often opted for an immediate, but much smaller payout, whereas adults delayed a reward unless the immediate value was only slightly discounted.[108] Youths also view *not* engaging in risky behaviors differently than adults, which also leads to riskier choices by adolescents.[109]

Youths engage in risky behavior because it provides heightened sensations, excitement, and an "adrenaline rush."[110] Their

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

106. *Id.* (graph entitled, "Future Orientation Increases with Age").

107. *See* Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decision-Making*, 37 VILL. L. REV. 1607, 1608, 1645–47 (1992) (discussing how youths' perceptions of and preferences for risk differ from those of adults). Young people may discount negative future consequences because they have more difficulty than adults integrating a future consequence into their more limited experiential baseline. *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 90, at 154 ("Adolescents, more than adults, tend to discount the future and to afford greater weight to short-term consequences of decisions.").

108. MacArthur Found. Research Network, *supra* note 88 (graph entitled, "Older Individuals Are More Willing to Delay Gratification").

109. *See* Scott & Steinberg, *supra* note 73, at 815 ("[A]dolescents are less risk-averse than adults, generally weighing rewards more heavily than risks in making choices. In part, this may be due to limits on youthful time perspective; taking risks is more costly for those who focus on the future."); Scott & Grisso, *supra* note 78, at 163; Taylor-Thompson, *supra* note 90, 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.").

110. *See* Scott & Grisso, *supra* note 78, 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 84, 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." (quoting D. Wilson and M. Daly, *Lethal Confrontational Violence Among Young Men, in* ADOLESCENT RISK TAKING, *supra* note 97, at 84)); Taylor-Thompson, *supra* note 90, at 153 (arguing that sensation-seeking activity increases for youths between sixteen and nineteen years of age).

preferences for risk[111] and sensation-seeking[112] peak at sixteen and seventeen years of age and then sharply decline with adulthood. The widest divergence between the perception of and the preference for risk occurs during mid-adolescence when youths' criminal activity also increases. All of these risk proclivities are heightened by youths' feelings of "invulnerability" and "immortality."[113]

Adolescents' and adults' differences in thinking and behavior reflect basic developmental differences in the human brain which does not fully mature until the early twenties.[114] Adolescents simply do not have the physiological capacity of adults to

111. MacArthur Found. Research Network, *supra* note 88 (graph entitled, "Preference for Risk Peaks in Mid-Adolescence").

112. *Id.* (graph entitled, "Sensation-Seeking Declines with Age").

113. *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 98, at 19–21.

114. *See* Scott & Steinberg, *supra* note 73, 86. Summarizing some of the preliminary research on brain development and its implications for adolescent self-control, Scott and Steinberg write:

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

Id. at 816; *see also* Dahl, *supra* note 85, 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."). *See generally* Nat'l Inst. of Mental Health, *Teenage Brain*, http://www.nimh.nih.gov/health/publications/teenage-brain-a-work-in-progress.shtml (last visited Jan. 28, 2008); Tomáš Paus et al., *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCIENCE 1908 (1999); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859 (1999) [hereinafter Sowell et al., *In Vivo Evidence*]; Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819 (2001) [hereinafter Sowell et al., *Mapping Continued Brain Growth*] (discussing significant changes in brain structure prior to adulthood); Spear, *supra* note 84, at 438 ("[T]he adolescent brain is a brain in flux, undergoing numerous regressive and progressive changes in mesocorticolimbic regions.").

exercise judgment or control impulses.[115] The prefrontal cortex (PFC) of the frontal lobe of the brain operates as the "chief executive officer" to control advanced cerebral activities.[116] Executive functions include reasoning, abstract thinking, planning, anticipating consequences, and impulse control.[117] During adolescence and into the early twenties, increased myelination[118] of the

115. *See* Dahl, *supra* note 85, at 60 (arguing that affect regulation relates to the control of feelings and behavior and "involves some inhibition, delay, or intentional change of emotional expression or behavior to conform with learned social rules, to meet long-term goals, or to avoid future negative consequences"); Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice*, 3 OHIO ST. J. CRIM. L. 321, 330 (2006) ("An adolescent's level of cortical development may therefore be directly related to her or his ability to perform well in situations requiring executive cognitive skills. Younger, less cortically mature adolescents may be more at risk for engaging in impulsive behavior than their older peers . . . .").

116. *See* PRINCIPLES OF NEURAL SCIENCE 9 (Eric R. Kandel et al. eds., 4th ed. 2000) (describing specialized functions of lobes of the brain and reporting that "[t]he frontal lobe is largely concerned with planning future action and with the control of movement"); Gruber & Yurgelun-Todd, *supra* note 115, at 323 ("The frontal cortex has been shown to play a major role in the performance of executive functions including short term or working memory, motor set and planning, attention, inhibitory control and decision making."); Sowell et al., *Mapping Continued Brain Growth*, *supra* note 114, at 8819 (describing brain growth in post-adolescents "in the superior frontal regions that control executive cognitive functioning"); *Frontline: Inside the Teenage Brain—Interview with Jay Giedd* (PBS television broadcast Mar. 31, 2002), http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html ("The frontal lobe is often called the CEO, or the executive of the brain. It's involved in things like planning and strategizing and organizing, initiating attention and stopping and starting and shifting attention.").

117. *See, e.g.*, Sarah Spinks, *Frontline: Inside the Teenage Brain—Adolescent Brains Are Works in Progress* (PBS television broadcast Mar. 31, 2002), http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html ("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'."); *see also* Aronson, *supra* note 85, at 119 ("The frontal lobe does play an important role in aggressiveness, impulse control, regulation of emotion, and executive decision-making functions.").

118. Myelin is a white, fatty substance that forms a sheath that surrounds and insulates the axons of certain neurons and allows for more rapid and efficient neurotransmission. Myelination and brain growth in the frontal cortex during adolescence improve brain function by acting like the insulation of a wire to increase the speed of neural electro-conductivity. *See* Nat'l Inst. of Mental Health, *supra* note 114 ("A layer of insulation called myelin progressively envelops these nerve fibers, making them more efficient, just like insulation on electric wires improves their conductivity.").

PFC improves cognitive function and reasoning ability.[119] By contrast, the amygdala—the lymbic system located at the base of the brain—controls instinctual behavior, such as the "fight or flight" response.[120] Adolescents rely more heavily on the amygdala and less heavily on the PFC than do adults when they experience stressful situations.[121] Their impulsive behavior reflects a "gut reaction" rather than sober reflection.[122] Novel circumstances

119. *See* PRINCIPLES OF NEURAL SCIENCE, *supra* note 116, at 147–48 (describing the role of myelination of axons in speeding conduction velocity and noting that "conduction in myelinated axons is typically faster than in nonmyelinated axons of the same diameter"); Gruber & Yurgelun-Todd, *supra* note 115, at 325 ("The significant correlation between white matter volume and processing speed are consistent with evidence suggesting that increased myelination of axons produces faster conduction velocity of neural signals and more efficient processing of information, and further suggests that some of the increased cognitive abilities characteristic of adult maturation may be associated with developmental increases in relative white matter volume."); Paus et al., *supra* note 114, at 1908 ("The smooth flow of neural impulses throughout the brain allows for information to be integrated across the many spatially segregated brain regions involved in these functions. The speed of neural transmission depends not only on the synapse, but also on structural properties of the connecting fibers, including the axon diameter and the thickness of the insulating myelin sheath."); Sowell et al., *Mapping Continued Brain Growth*, *supra* note 114, 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.").

120. *See, e.g.*, PRINCIPLES OF NEURAL SCIENCE, *supra* note 116, at 986–93 (describing role of amygdala in mediating between emotions and cognition).

121. *See* Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 195, 198 (1999) (showing that processing of emotions shifted from the amygdala to the frontal lobe over the course of the teenage years); Nat'l Inst. of Mental Health, *supra* note 114 ("[A]reas 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.").

122. *See* David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System*, 14 STAN. L. & POL'Y REV. 13, 15 (2003) ("Adolescents tend to process emotionally charged decisions in the limbic system, the part of the brain charged with instinctive (and often impulsive) reactions. Most adults use more of their frontal cortex, the part of the brain responsible for reasoned and thoughtful responses. This is one reason why adolescents tend to be more intensely emotional, impulsive, and willing to take risks than their adult counterparts."); Dahl, *supra* note 85, 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).").

and aroused emotions especially challenge youths' ability to exercise self-control and to resist impulsive decisions.

Neuroscience research provides a hard-science explanation for social scientists' observations about adolescents' behavior and self-control. Adolescents' immature brains do not provide a biological deterministic excuse for criminal behavior, however. Scientists have not established a direct link between immature adolescent brain structure and function and its impact on real-life decisions and behavior under stressful conditions or a basis on which to individualize among young offenders on the basis of brain development.[123] Rather, the neuroscience research enhances our understanding of how and why juveniles think and behave differently from adults and furnishes a basis for mitigating punishment.[124]

B. *Peer Group and Community Influences*

Roper also ascribed juveniles' diminished responsibility to their greater susceptibility than adults to negative peer group influences.[125] To a greater extent than do adults, juveniles commit their crimes in groups, and group offending increases youths' risks of accessorial criminal liability for serious crimes they did not necessarily intend or personally commit.[126] Their

123. Aronson, *supra* note 85, at 136 (emphasizing "lack of clear causal pathway from brain structure to behavior"); Stephen J. Morse, *New Neuroscience, Old Problems, in* NEUROSCIENCE AND THE LAW: BRAIN, MIND AND THE SCALES OF JUSTICE 157 (Brent Garland ed., 2004) (explaining that as long as the law assumes that people are rational, the biological causes of their behavior are legally irrelevant).

124. *But see* Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 405–06 (2006) (arguing that the simple fact of neuron-anatomical differences between adolescent and adult brains do not compel differences in how the law responds to them); Ward, *supra* note 82, at 460–65 (arguing that neurobiological explanations for adolescent behavior do not provide a basis for punishing them differently than adults).

125. *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (noting adolescent susceptibility to negative peer influences); Scott, *supra* note 82, at 1643–44 (describing adolescent responsiveness to peer influences); Scott & Steinberg, *supra* note 73, 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."); Steinberg & Cauffman, *Maturity of Judgment, supra* note 84, at 253–54.

126. Police arrest two or more juveniles for committing a single crime more often than they do adults. *See, e.g.*, SNYDER & SICKMUND, *supra* note 2, at 77 (1999) (showing percentages of various crimes committed in groups by juveniles between 1973 and 1997); Franklin E. Zimring, *Kids, Groups and Crime:*

susceptibility to peer influences interacts with their propensity to take risks, and they engage in riskier behavior when they are together than they would when they are alone.[127] Youths' ability to resist peer influences only approaches adult levels of self-control in the late teens and early twenties.[128] While failing to resist peer pressures does not excuse criminal liability, this normal developmental characteristic provides another basis on which to lessen their criminal responsibility compared with adults.[129] Because youths disproportionately commit their crimes in groups, more juveniles may be prosecuted as accessories and

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Some Implications of a Well-Known Secret, 72 J. CRIM. L. & CRIMINOLOGY 867, 870 (1981) (noting that 64% of robberies committed by people under age twenty-one were committed in groups while only 39% of robberies committed by people twenty-one and older were committed in groups). This group offending increases their prospects for prosecutions as accessories and exposes them to the same criminal penalties as principals. *See, e.g.*, FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 152 (Michael Tonry & Norval Morris eds., 1998) [hereinafter ZIMRING, AMERICAN YOUTH VIOLENCE] ("Accessorial liability can interact with the vulnerability of adolescents to group pressure to create very marginal conditions for extensive criminal sanctions."); Scott & Grisso, *supra* note 78, at 162 ("Peer influence seems to operate through two means: social comparison and conformity. Through social comparison, adolescents measure their own behavior by comparing it to others. Social conformity . . . influences adolescents to adapt their behavior and attitudes to that [sic] of their peers."); Taylor-Thompson, *supra* note 90, 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.").

127. *See* Scott & Steinberg, *supra* note 73, 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."); Zimring, *supra* note 73, 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.").

128. MacArthur Found. Research Network, *supra* note 88 (graph entitled, "With Age, Individuals Become More Resistant to Peer Influence"); Zimring, *supra* note 73, at 280 ("A teen may know right from wrong and may even have developed the capacity to control his or her impulses while alone, but resisting temptation while alone is a different task than resisting the pressure to commit an offense when adolescent peers are pushing for misbehavior and waiting to see whether or not the outcome they desire will occur.").

129. *See, e.g.*, Zimring, *supra* note 73, 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.").

states convict many youths serving LWOP sentences as accessories, rather than principals, to felony-murder.[130]

The opportunity to learn positive behavior and to acquire self-control is socially constructed, and children's families, schools, and communities affect their developmental prospects, life chances, and risks of criminal involvement.[131] Political economy and community structure contribute to higher crime rates in urban inner-cities,[132] and subcultural norms expose some minority youths to far greater pressures to engage in criminal activity than most youths confront.[133] *Roper* recognized that

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130. *See infra* notes 180, 197–98 and accompanying text.

131. *See* Arenella, *supra* note 78, at 82 (emphasizing that children depend on others to develop and exercise their moral capacities).

> The 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.

Id.; *see also* Arredondo, *supra* note 122, at 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); Jeffrey Fagan, *Context and Culpability in Adolescent Crime*, 6 VA. J. SOC. POL'Y & L. 507, 535–39 (1998) [hereinafter Fagan, *Context and Culpability*] (suggesting that criminogenic social context contributes to young gang members' criminal behavior); Jeffrey Fagan, *Context of Choice by Adolescents in Criminal Events*, *in* YOUTH ON TRIAL, *supra* note 73, at 371, 376 [hereinafter Fagan, *Choice by Adolescents*] (noting that social context contributes to adolescents' violent behavior); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 547 (2000) ("[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."); 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).

132. *See* ROBERT J. BURSIK, JR. & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME 58 (1993) ("[L]ow levels of systemic control increase the likelihood of crime, high levels of crime decrease the effectiveness of systemic control, and the entire process spirals onward."); Arredondo, *supra* note 122, at 16 (arguing that delinquent youths typically come from chaotic homes and unresponsive neighborhoods and that, as a result, they have "not had the necessary developmental opportunity of internalizing [lessons learned from] consistently benevolent, reliable, and fair adult authority figures"); 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 the crack cocaine industry in urban, inner-city neighborhoods).

133. *See, e.g.*, ELIJAH ANDERSON, STREETWISE (1990) (describing subcultural norms and the "code of the street" that sustains violence in urban set-

juveniles are unable to escape from these criminogenic environments as readily as adults because of their greater dependency.[134]

In summary, *Roper* relied on intuition—"what any parent knows"—rather than the substantial body of recent developmental psychological research. However, the Court correctly identified the normal developmental characteristics of adolescents that impair their judgment, reduce their culpability, and diminish their criminal responsibility compared with adults. The Court recognized that youths are more impulsive, seek exciting and dangerous experiences, and prefer immediate rewards to delayed gratification. They misperceive and miscalculate risks and discount the likelihood of bad consequences. They succumb to negative peer and adverse environmental influences. All of these normal characteristics increase their likelihood of causing devastating injuries to themselves and to others. Although they are just as capable as adults of causing great harm, their immature judgment and lack of self-control reduces their culpability and warrants less-severe punishment.

III. ADOLESCENT CRIMINAL RESPONSIBILITY AND LIFE WITHOUT PAROLE (LWOP) SENTENCES

Roper categorically barred the death penalty for juveniles because of their reduced culpability. However, the Court's rationale has broader applicability for sentencing youths. Juveniles' criminal responsibility is just as diminished when states sentence them to life without parole (LWOP) as it is when it executes

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tings); Elijah Anderson, *The Social Ecology of Youth Violence*, 24 CRIME & JUST. 65, 82–88 (1998) (describing the "code of the street" that requires youths to respond violently to disrespect or to suffer loss of face); Fagan, *Choice by Adolescents*, *supra* note 131, at 374 (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"); Fagan, *Context and Culpability*, *supra* note 131, at 535–39 (1999); Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence and Social Identity*, 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 . . . .").

134. Roper v. Simmons, 543 U.S. 551, 569 (2005) ("[J]uveniles have less control, or less experience with control, over their own environment."); *see* Scott & Steinberg, *supra* note 73, 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.").

them.[135] Although the Court's capital punishment jurisprudence insists that "death is different,"[136] there is no principled penal basis to distinguish between juveniles' diminished responsibility that precludes the death penalty from their equally reduced culpability for other severe sentences.[137]

Lionel Tate exemplifies disproportionate sentences that states impose when they try young offenders in criminal court and punish them as if they are the moral equals of adults. A grand jury indicted twelve-year-old Tate for first-degree murder for brutal "wrestling" injuries he inflicted on a six-year-old girl.[138] Once the grand jury indicted Tate for a capital crime, state law required the prosecutor to try him as an adult.[139] Moreover, Florida, like several other states, prohibited Tate from raising the common law infancy defense which would have required consideration of his diminished responsibility.[140] After the jury convicted him of first-degree murder, the judge imposed a mandatory LWOP sentence without regard to his youthfulness or reduced culpability.[141] The Court of Appeals later reversed his

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135. *See, e.g.*, Streib & Schrempp, *supra* note 21, at 9–11 (providing summary table analyzing states' juvenile LWOP provisions).

136. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994 (1991) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."); Eddings v. Oklahoma, 455 U.S. 104, 110, 113 (1982); Rummel v. Estelle, 445 U.S. 263, 272 (1980) (The Court's death penalty cases have limited applicability "[b]ecause a sentence of death differs in kind from any sentence of imprisonment, no matter how long"); Lockett v. Ohio, 438 U.S. 586, 605 (1978).

137. Professor Zimring argues:

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

ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 127, at 84.

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

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

140. *See Tate*, 864 So. 2d at 53; Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687, 688–89 (2006) (reporting that several jurisdictions, including Florida, abrogated the common law infancy defense and required criminal courts to sentence twelve- and thirteen-year-old defendants as if they were thirty-five-year-old adults).

141. *See* FLA. STAT. ANN. § 985.225(1) (West 2001 & Supp. 2004); *see also Tate*, 864 So. 2d. at 48; David S. Tanenhaus & Steven A. Drizin, *"Owing to the*

conviction because the trial court failed to consider whether his youthfulness rendered him incompetent to stand trial.[142] However, the court rejected his contention that a mandatory LWOP sentence imposed on a twelve-year-old child was disproportionate or "cruel and unusual punishment."[143] Forty-two states permit judges to impose LWOP sentences on all offenders—adults or juveniles—convicted of certain serious offenses, such as murder. In twenty-seven of those states, the LWOP sentence is mandatory for all offenders convicted of those crimes and judges do not conduct any proportionality evaluation or consider individual circumstances, such as youthfulness, prior to its imposition.[144]

For decades, the Court has vacillated about whether the Eighth Amendment contains a "narrow proportionality principle" that "applies to non-capital sentences" and, if so, how to define grossly disproportionate sentences that violate the Constitution.[145] The Court in *Rummel v. Estelle* held that a state could sentence a three-time, minor, property offender to life in prison with the possibility of parole without running afoul of the Eighth Amendment.[146] Several years later, *Solem v. Helms* held that a sentence of life without possibility of parole for a recidivist convicted of a minor property crime violated the Constitution.[147] To

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Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide, 92 J. CRIM. L. & CRIMINOLOGY 641, 678–81 (2002) (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, which both found to be manifestly unjust for a twelve-year-old).

142. *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.").

143. *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).

144. AMNESTY INT'L, *supra* note 3, at 25 n.44 (listing states' LWOP sentencing provisions).

145. *See generally*, Frase, *supra* note 72, at 576–88 (reviewing Supreme Court's criminal sentencing proportionality decisions); *see also* Harmelin v. Michigan, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in judgment) (elaborating upon principles of "narrow proportionality" review in non-capital cases).

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

147. *See Solem v. Helms*, 463 U.S. 277, 281, 303 (1983). The Court noted that the Eighth Amendment's ban on cruel and unusual punishments "prohibits . . . sentences that are disproportionate to the crime committed," and that

decide whether a sentence is so disproportionate that it violates the Eighth Amendment, the Court focused on three proportionality factors: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[148] Subsequently, in *Harmelin v. Michigan*, a fractured Court upheld against a proportionality challenge a sentence of life without parole imposed on a first-time drug offender.[149]

Justice Kennedy's *Harmelin* concurrence asserted that "[t]he Eighth Amendment proportionality principle also applies to non-capital sentences,"[150] and his decision provides the operative test to assess disproportionate sentences.[151] Four factors contribute to the Court's reluctance to conduct proportionality reviews: the primacy of legislative judgments about penalties, the multiplicity of legitimate penal goals, the Court's limited constitutional role to oversee state criminal sentences, and the importance of objective factors to guide judicial proportionality review.[152] With these imperatives for judicial restraint, courts will conduct a comparative *Solem* evaluation only if a sentence clearly

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

148. *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.

149. *Compare Harmelin*, 501 U.S. 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 opinion's legal reasoning was agreed to by a majority of the Court.

150. *Id.* at 997 (Kennedy, J., concurring).

151. *Id.* at 1001 (arguing that the Eighth Amendment prohibits "only extreme sentences that are 'grossly disproportionate' to the crime"); Frase, *supra* note 72, at 581–83 (analyzing *Harmelin* and the factors Justice Kennedy proposed).

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

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

Id. at 1001.

crosses the "grossly disproportionate" threshold.[153] The Court applied those factors in *Ewing v. California* and upheld a sentence of twenty-five years to life for the theft of three golf clubs.[154]

Although *Roper* barred the death penalty for juveniles, the Court has never applied proportionality principles to other juvenile sentences or found a minimum age below which states may not impose LWOP sentences.[155] As a result, appellate courts consistently refuse to conduct proportionality reviews of LWOP sentences because judges imposed them on juveniles rather than adults.[156] Although penal proportionality requires a principled relationship between the seriousness of a crime—harm and culpability—and the sentence imposed, courts focus solely on the gravity of the crime—harm—rather than the culpability of the actor.[157] Courts use a circular logic and reason that a serious crime is serious because of the harm the actor caused without

153. *See* Frase, *supra* note 72, at 581–83 (analyzing the factors Kennedy proposed in *Harmelin* and the limited utility they provide defendants challenging a disproportionate sentence).

154. *See* Ewing v. California, 538 U.S. 11, 19, 30–31 (2003) ("We hold that Ewing's sentence of twenty-five 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.").

155. *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).

156. *See generally* Cepparulo, *supra* note 49, at 225 ("For juveniles no longer facing death, the opportunity to introduce mitigating evidence is lost. . . . [J]uvenile offenders, because of their age and immaturity at the time of the offense, should be afforded greater protection from permanent incarceration than adult offenders."); Logan, *supra* note 73, at 703–09 (reviewing cases upholding LWOP sentences on juveniles).

157. For example, see *State v. Massey*, where the court upheld a mandatory sentence of life without parole imposed on a thirteen-year-old 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.

State v. Massey, 803 P.2d 340, 348 (Wash. Ct. App. 1991) (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").

any consideration of culpability. Although prior to *Roper*, death-eligible juveniles received an individualized culpability assessment, they enjoy no comparable consideration of personal culpability prior to the imposition of a mandatory LWOP sentence. The Ninth Circuit, in *Harris v. Wright*, rejected a fifteen-year-old juvenile's constitutional challenge to a mandatory LWOP sentence imposed for murder.[158] *Harris* held that the Eighth Amendment bars only "grossly disproportionate" sentences[159] and asserted:

> Youth has no obvious bearing on this problem: If we can discern no clear line for adults, neither can we for youths. Accordingly, while capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences. Like any other prison sentence, it raises no inference of disproportionality when imposed on a murderer.[160]

Similarly, the Seventh Circuit, in *Rice v. Cooper*, affirmed a mandatory LWOP sentence imposed on an illiterate, mildly retarded sixteen-year-old murderer, even though the statute excluded consideration of any mitigating factors, including youthfulness.[161] The court found no constitutional barrier to imposing a mandatory LWOP sentence as long as the youth possessed the criminal intent necessary to commit the crime.[162]

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158. *See* Harris v. Wright, 93 F.3d 581, 583–85 (9th Cir. 1996).

159. *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.'" (quoting Harmelin v. Michigan, 501 U.S. 947, 1005 (1991))).

160. *Id.* at 585.

161. Rice v. Cooper, 148 F.3d 747, 752 (7th Cir. 1998) ("A sentence of natural life in prison . . . is exceptionally severe when the defendant is a minor and suffers from deficits of understanding, even if they are not such deficits as would preclude him from being forced to stand trial and from being convicted. But we cannot find any basis in decisions interpreting the Eighth Amendment, or in any other sources of guidance to the meaning of 'cruel and unusual punishments,' for concluding that the sentence in this case was unconstitutionally severe.").

162. *Id.* ("[Rice was] morally responsible in the further sense of having sufficient mental capacity to form the intent required to be found guilty of the crime. When the severity of the sentence is not disproportionate to the gravity of the crime, and . . . the defendant is fully responsible in both the moral and the legal sense for the crime, there is no basis for deeming the sentence unconstitutionally severe."). Even though the sentencing judge indicated that he would have preferred to impose a less severe sentence, "[t]he Supreme Court has rejected the argument that mandatory penalties, including life imprison-

Defining the seriousness of an offense solely by the harm caused excludes from a proportionality review any individualized consideration of diminished responsibility.[163]

Many states have adopted *mandatory* LWOP sentencing statutes that preclude consideration of youthfulness as a mitigating factor. Several states have abrogated the common-law infancy defense for very young children and removed the only substantive criminal law protections based on youthfulness prior to conviction.[164] Appellate courts very rarely find LWOP sentences disproportional[165] and routinely uphold them against juveniles'

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ment without parole . . . are unconstitutional just because . . . they prevent the consideration of mitigating factors." *Id.*

163. *See* Brink, *supra* note 76, at 1576 ("[E]ven if juveniles cause the same harm as their adult counterparts, they are less culpable, because less responsible, because less normatively competent."); Logan, *supra* note 73, 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."). Justice Stevens has advocated proportionality analyses that include an evaluation of the offender's culpability:

> 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.

In re Stanford, 537 U.S. 968, 969 (2002) (Stevens, J., dissenting) (quoting Stanford v. Kentucky, 492 U.S. 361, 394 (1988) (Brennan, J., dissenting)).

164. Carter, *supra* note 140, at 689–92 (reporting that several states—Washington, Florida, North Carolina, Illinois, and Colorado—expressly bar consideration of infancy defense and deem twelve- and thirteen-year-old defendants the moral and legal equivalents of adults). Carter reports that in four of these states, sentencing statutes require judges to impose mandatory sentences without regard to the age of the defendant even if the child was less than fourteen years of age at the time of the crime. *Id.* at 740–41.

165. *See, e.g.*, Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) (Life sentence for fourteen-year-old convicted of rape violated Eighth Amendment because "[t]he intent of the legislature in providing a penalty of life imprisonment without benefit of parole . . . was to deal with dangerous and incorrigible individuals who would be a constant threat to society. We believe that incorrigibility is inconsistent with youth."); Naovarath v. State, 779 P.2d 944 (Nev. 1989) (finding that LWOP sentence imposed on thirteen-year-old convicted of murder violated state constitution provisions against cruel and unusual punishment, but granting only limited right to be considered for parole eligibility in the distant future). 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 make judgment that a thirteen-year-old must be pun-

pleas to consider their youthfulness as a mitigating factor.[166] The Florida 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 . . . ."[167] The North Carolina Supreme Court in *State v. Green* approved a mandatory LWOP sentence imposed on a thirteen-year-old convicted of rape.[168]

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

166. *See, e.g.*, State v. Foley, 456 So. 2d 979, 984 (La. 1984) (affirming LWOP sentence imposed on fifteen-year-old juvenile convicted of rape); State v. Pilcher, 655 So. 2d 636, 644 (La. Ct. App. 1995) (upholding LWOP sentence imposed on fifteen-year-old); Swinford v. State, 653 So. 2d 912, 918 (Miss. 1995) (upholding LWOP sentence imposed on fourteen-year-old convicted of aiding and abetting murder); State v. Green, 502 S.E.2d 819, 832 (N.C. 1998) (upholding life imprisonment sentence for thirteen-year-old convicted of rape, recognizing that "the chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime," but emphasizing that Green was morally responsible for the crime because he possessed sufficient mental capacity to form criminal intent); AMNESTY INT'L, *supra* note 3, at 1 (noting that when courts sentence children as adults, "the punishment is all too often no different from that given to adults"); Massey, *supra* note 21, at 1089 ("[O]nce children are prosecuted as adults, they become subject to the same penalties as adults, including life without the possibility of parole."). *But see* Hawkins v. Hargett, 200 F.3d 1279, 1284 (10th Cir. 1999) ("[A]ge is a relevant factor to consider in a proportionality analysis. . . ." (citing State v. Green, 502 S.E.2d 819, 832 (N.C. 1998)).

167. Tate v. State, 864 So. 2d 44, 54 (Fla. Ct. App. 2003). *Tate* cited other recent Florida cases approving LWOP sentences imposed on young offenders. *Id.* at 54–55. *See, e.g.*, Phillips v. State, 807 So. 2d 713, 717–18 (Fla. 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); Blackshear v. State, 771 So. 2d 1199, 1200–02 (Fla. 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").

168. *See Green*, 502 S.E.2d at 827–28; *see also* Paul G. Morrissey, *Do the Adult Crime, Do the Adult Time: Due Process and Cruel and Unusual Implications for a 13-Year-Old Sex Offender Sentenced to Life Imprisonment in* State v. Green, 44 VILL. L. REV. 707, 738 (1999) ("Green's young age does not lend itself to a per se ruling

Green reasoned that states often transfer very young offenders to criminal court,[169] that age and reduced culpability do not bear on "whether a punishment is grossly disproportionate to the crime,"[170] and that even young offenders may deserve harsh punishment and require incapacitation.[171] In *Edmonds v. State*, the Mississippi Court of Appeals approved an LWOP sentence imposed on a youth convicted of murder committed at thirteen years of age.[172] The South Carolina Supreme Court in *State v. Standard* upheld a "two-strike" LWOP sentence imposed on a fifteen-year-old convicted of burglary based on his prior juvenile conviction for a serious felony.[173] *Standard* reasoned that because other jurisdictions impose similarly draconian sentences on juveniles, such sentences do not offend our "contemporary standards of decency."[174]

Even states that do not formally impose LWOP sentences on juveniles allow judges to create "virtual lifers." After the court of appeals overturned an invalid LWOP sentence imposed on a fifteen-year-old juvenile, the trial judge in *People v. Demirdjian* simply resentenced him to two consecutive life sentences.[175] The Tenth Circuit, in *Hawkins v. Hargett*, upheld a 100-year sentence

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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.'" (quoting FLA. STAT. ANN. § 985.225(1) (West 1997))).

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

170. *Id.* at 832.

171. *See id.* at 833 (emphasizing judicial deference to legislative sentencing policy judgments and concluding that "the adult justice system, with its primary goals of incapacitation and retribution, is the appropriate place for violent youthful offenders, such as defendant").

172. Edmonds v. State, 955 So. 2d 864, 895–97 (Miss. Ct. App. 2006) (rejecting juvenile's request for jury instruction as to sentencing consequences if convicted and finding that LWOP sentence does not need to take account of the degree of culpability of the actor).

173. State v. Standard, 569 S.E.2d 325, 329 (S.C. 2002).

174. *Id.* (noting that nineteen states allow LWOP sentences for thirteen-year-old convicted of serious crimes). The court reasoned that the prevalence of such penalties "'is evidence of changing public sentiment toward modern society's violent youthful offenders, and that "sentencing a thirteen-year-old defendant to mandatory life imprisonment . . . is within the bounds of society's current and evolving standards of decency." Thus, modern society apparently condones the severe punishment of individuals who commit serious crimes at young ages.'" *Id.* (quoting Hawkins v. Hargett, 200 F.3d 1279, 1285 (10th Cir. 1999) (citation omitted)).

175. People v. Demirdjian, 50 Cal. Rptr. 3d 184, 188–89 (Ct. App. 2006) (noting that while California law prohibits sentencing juveniles under sixteen years of age to life without parole, the court dismissed the juvenile's reliance on

imposed on a thirteen-year-old juvenile for burglary, rape, and robbery.[176]

Juveniles lack recourse to proportionality reviews or individualized culpability assessments and courts regularly uphold LWOP sentences and extremely long terms of imprisonment imposed on twelve- through sixteen-year-old youths.[177] About one of every six juveniles who received an LWOP sentence was fifteen years of age or younger when they committed their crimes.[178] More than half (59%) of juveniles received an LWOP sentence for their first-ever criminal conviction.[179] More than one-quarter (26%) of youths received an LWOP sentence for a felony murder to which they were an accessory, rather than the principal.[180] Although the Supreme Court's death penalty jurisprudence treats youthfulness as a mitigating factor, trial judges perversely treat it as an aggravating factor and sentence juveniles

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Roper v. Simmons and emphasized the clear difference between death and lesser sentences).

176. *See Hawkins*, 200 F.3d 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).

177. AMNESTY INT'L, *supra* note 3, at 1–6; *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, 11 (Fla. 1999) (vacating death penalty imposed on sixteen-year-old convicted of murder and reducing sentence to life imprisonment without a possibility of parole); State v. Broadhead, 814 P.2d 401, 406–07 (Idaho 1991) (overruled on other grounds) (affirming life sentence with fixed minimum of fifteen years imposed on fourteen-year-old convicted of murdering his father); State v. Shanahan, 994 P.2d 1059, 1061–63 & n.1 (Idaho Ct. App. 1999) (holding that life sentence for murder imposed on fifteen-year-old did not constitute cruel and unusual punishment); State v. Pilcher, 655 So. 2d 636, 642–44 (La. App. 1955) (approving life without parole sentence of fifteen-year-old convicted of murder); State v. Mitchell, 577 N.W.2d 481, 488–90 (Minn. 1998) (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, 365–70 (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. Taylor, No. 02C01-9501-CR-00029, 1996 WL 580997, at *22–24 (Tenn. Crim. App. Oct. 10, 1996) (sentence of life without parole plus sixty years imposed on sixteen-year-old convicted of robbery, rape, and felony murder); State v. Massey, 803 P.2d 340, 348 (Wash. Ct. App. 1990) (approving mandatory LWOP sentence imposed on youth convicted of committing murder at thirteen years of age).

178. AMNESTY INT'L, *supra* note 3, at 1.

179. *Id.*

180. *Id.* at 1–2.

more severely than their adult counterparts.[181] Youths convicted of murder are more likely to enter prison with LWOP sentences than are adults convicted of murder.[182]

Appellate courts' refusal to conduct proportionality analyses of non-capital sentences poses an even greater challenge for those seeking justice for children than the death penalty.[183] Prior to the 1970s, virtually no states imposed LWOP sentences on criminals and most used indeterminate sentencing systems that allowed for parole release.[184] The "get tough" policies that gathered momentum in the 1970s included both the resumption of capital punishment *and* the adoption of LWOP sentences.[185] During the 1980s and 1990s, states reduced judicial sentencing discretion, enacted mandatory minimum sentence provisions,

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181. In *Roper v. Simmons*, defense counsel urged the jury to consider the defendant's youthfulness as a mitigating factor "in deciding just what sort of punishment to make." 543 U.S. 551, 558 (2004). In rebuttal, the prosecutor responded, "Age, he says. Think about age. Seventeen-years-old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." *Id.* The prosecutor's view of youthfulness as an aggravating factor is reflected in sentencing practices. *See* Bishop & Frazier, *supra* note 7, at 236–37 (comparing the sentences imposed on youths transferred to criminal courts with those of adults). Bishop and Frazier note that, "[T]ransferred youths are sentenced *more* harshly, both in terms of the probability of receiving a prison sentence and the length of the sentences they receive. In other words, we see no evidence that criminal courts recognize a need to mitigate sentences based on considerations of age and immaturity." *Id.*; *see also* Tanenhaus & Drizin, *supra* note 141, 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").

182. AMNESTY INT'L, *supra* note 3, at 33 (reporting that judges imposed LWOP sentences on juveniles convicted of murder more frequently than they did adults and concluding that "states have often been more punitive toward children who commit murder than adults," and that "age has not been much of a mitigating factor in the sentencing of youth convicted of murder").

183. Massey, *supra* note 21, at 1100–06 (describing courts' nearly universal rejection of juveniles' constitutional challenges to LWOP sentences); *see also* MAUER ET AL., *supra* note 22, at 5–8 (arguing that LWOP defendants do not receive close appellate scrutiny or automatic appointment of counsel on appeal as do those who receive capital sentences.) Mauer notes that "unlike defendants in capital cases, persons sentenced to life have no right to post-conviction counsel in most states." *Id.* at 20.

184. MAUER ET AL., *supra* note 22, at 5–8 (explaining that indeterminate sentences and parole meant that many prisoners sentenced to "life" typically served terms of five, fifteen, or twenty years); MICHAEL TONRY, SENTENCING MATTERS 6–13 (1996) (describing indeterminate sentencing systems and the shift to determinate sentencing and elimination of parole).

185. *See* Gregg v. Georgia, 428 U.S. 153, 154–55 (1976) (reauthorizing the death penalty after the Court's earlier decision invalidated state death penalty statutes (citing Furman v. Georgia, 408 U.S. 238 (1972))); *supra* note 10 and accompanying text (describing politics of "get tough" on crime policies).

adopted LWOP sentences, and reduced or eliminated parole eligibility.[186] By 2005, forty-eight states and the District of Columbia had enacted LWOP sentences.[187] Ironically, death penalty abolitionists provided bipartisan support for LWOP sentences as a "humane" alternative to capital punishment.[188] However, the number of people sentenced to death has increased marginally despite the near-universal adoption of LWOP sentences, while judges impose LWOP sentences on many more defendants who would not be eligible for the death penalty.[189] Thus, LWOP statutes have had a substantial "net-widening" impact that extends well beyond the narrow category of death-eligible defendants.[190] Between 1992 and 2003, the number of inmates on death row increased from 2575 to 3374, a 31% rise, while the number of prisoners serving life without parole sentences grew from 12,453 to 33,633, a 170% increase.[191]

By 2004, 2225 people were serving LWOP sentences for crimes they committed as children, and after *Roper*, many more youths will join their cumulative ranks every year.[192] Prior to 1980, children rarely received LWOP sentences; judges now sentence youths to LWOP three times as frequently as they did in 1990.[193] The average age at which juveniles committed the crimes for which they received an LWOP sentence is sixteen years, but judges may impose such sentences on children as

186. *See generally* MAUER ET AL., *supra* note 22, at 1 (attributing increase in length of prisoners' sentences since the 1970s to police changes such as "mandatory sentencing, 'truth in sentencing,' and cutbacks in parole release"); TONRY, *supra* note 184, at 6–13 (summarizing changes in sentencing laws in the 1970s and 1980s).

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

188. *Id.* at 1938 (arguing that death penalty abolitionists promoted life without parole sentences as an alternative to executions); *see also* MAUER ET AL., *supra* note 22, at 5 (attributing increased imposition of LWOP sentences as an alternative to the death penalty).

189. *Life and Death*, *supra* note 187, at 1848–51 (attributing decline in capital sentences to decreased public and jury support for the death penalty because of greater sense of safety associated with a reduction in violent crime).

190. *See id.* at 1839 ("Twenty years of experience with life-without-parole statutes shows that although they have only a small effect on reducing executions, they have doubled and tripled the lengths of sentences for offenders who never would have been sentenced to death or even been eligible for the death penalty.").

191. *Id.* at 1851–52.

192. AMNESTY INT'L, *supra* note 3, at 1.

193. *Id.* at 2.

young as twelve or thirteen years of age.[194] We do not know how many more juveniles are serving "virtual life" sentences, but we can safely assume that those numbers are even larger than those who received LWOP sentences. The majority of juveniles who received an LWOP sentence had no prior adult *or* juvenile convictions.[195] Although states may not impose the death penalty on a felony-murderer who did not intend or actually participate in the killing,[196] more than one-quarter of juveniles received their LWOP sentence for a felony-murder.[197] A survey in Michigan reported that nearly half the juveniles serving LWOP sentences were convicted as accessories to their crimes, rather than as principals.[198] Judges impose LWOP sentences on black juveniles at a rate about ten times greater than they do white youths, and blacks comprise the substantial majority of all youths serving LWOP sentences.[199] In Michigan, more than two-thirds (69%) of all juveniles serving LWOP sentences are black, despite comprising only 15% of the youth population.[200] The LWOP disparity is a culmination of the effects of every discretionary decision in the juvenile and criminal justice systems that treats black youths more harshly.[201]

IV. "YOUTH DISCOUNT": YOUTHFULNESS AS A CATEGORICAL MITIGATING FACTOR

The Supreme Court's proportionality jurisprudence does not require states to enact, or courts to conduct, individualized culpability assessments, or to formally recognize youthfulness as a mitigating factor in sentencing. But, states should adopt and apply the principle of youthfulness as a mitigating factor as part

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

195. *Id.* at 28.

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

197. AMNESTY INT'L, *supra* note 3, at 27–28.

198. DEBORAH LABELLE, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 4 (2004), *available at* www.aclumich.org/pubs/juvenilelifers.pdf.

199. AMNESTY INT'L, *supra* note 3, at 39.

200. LABELLE, *supra* note 198, at 6.

201. *See* MALES & MACALLAIR, *supra* note 19, at 8 (reporting judges eight times more likely to sentence black youths than white youths to imprisonment); JOAN MCCORD ET AL., JUVENILE CRIME, JUVENILE JUSTICE (2001) (documenting cumulative effect of racially disparate decisions at each stage of the juvenile justice system); POE-YAMAGATA & JONES, *supra* note 2 (finding disproportionate minority overrepresentation at each stage of the juvenile justice system); *supra* notes 18–20 and accompanying text.

of a just and fair sentencing policy. As the Supreme Court repeatedly has recognized,

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.[202]

The principle of youthfulness as a mitigating factor should apply both to capital and non-capital sentences. It holds youths accountable and recognizes their diminished responsibility, without excusing their criminal conduct.[203] Even when they produce the same harms, the crimes of children are not the moral equivalents of those of adults because of their reduced culpability.[204] Sentencing policy can recognize this developmental reality

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

203. *See* Scott & Grisso, *supra* note 78, at 174 (arguing that youthfulness does not excuse criminal liability, but that liability should not be equivalent to that of adults). The authors continue:

> 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 outlyers [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.

Id.; *see also* Scott, *Lessons*, *supra* note 97, at 309 ("[Adolescents' choices] reflect immaturity and inexperience and are driven by developmental factors that will change in predictable and systemic ways. A legal response that holds young offenders accountable, while recognizing that they are less culpable than their adult counterparts, serves the purposes of criminal punishment without violating the underlying principle of proportionality."); Zimring, *supra* note 73, at 278 ("[E]ven 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.").

204. *See* ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 126, at 144 ("[W]henever a young offender's need for protection, education, and skill development can be accommodated without frustrating community security, there is a government obligation to do so."); Feld, *Legislative Exclusion*, *supra* note 5, at 99; Scott & Grisso, *supra* note 78, at 182 ("Subjecting thirteen-year-old offenders to the same criminal punishment that is imposed on adults offends the principles that define the boundaries of criminal responsibility."); Streib & Schrempp, *supra* note 21, at 11 ("[Adolescents'] crimes may be the same as

and protect young people from the adult consequences of their immature decisions.[205]

Roper opted to treat adolescents' diminished responsibility categorically rather than individually. Despite the Court's general preference for individualized culpability assessments, it adopted a categorical prohibition because "[t]he differences between juvenile and adult offenders are too well marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[206] The Court feared that a heinous crime would overwhelm a jury's ability to properly consider youthfulness as a mitigating factor.[207] *Roper* concluded that neither clinicians nor jurors could accurately distinguish between the vast majority of immature juveniles, who deserve leniency, and the rare youth who might exhibit adult-like culpability.[208]

Although some commentators advocate individualized culpability assessments prior to imposing an LWOP sentence on a juvenile,[209] a bright-line rule like *Roper*'s that categorically treats youthfulness as a mitigating factor is preferable to a system of guided discretion. *Roper* endorsed a categorical bright-line even though it recognized individual variability in culpability.

> The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity

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those of adults, but these offenders simply are not adults and should not be sentenced as if they were.").

205. *See* Scott, *supra* note 82, at 1656 ("[I]f the values that drive risky choices are associated with youth, and predictably will change with maturity, then our paternalistic inclination is to protect the young decisionmaker . . . from his or her bad judgment."); *see also* ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 126, at 96, 142–45.

206. Roper v. Simmons, 543 U.S. 551, 572–73 (2004).

207. *See id.* at 573 ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.").

208. *See id.* ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.").

209. *See, e.g.*, Massey, *supra* note 21, at 1109–14 (advocating for individualized proportionality review prior to imposition of an LWOP sentence); Cepparulo, *supra* note 49, at 253 (arguing against mandatory LWOPs for juveniles and proposing that "[n]o juvenile should be given a punishment as solemn as LWOP without an individual assessment of proportionality in relation to the crime committed").

> some adults will never reach. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.[210]

Despite individual variability, the Court reasoned that a rule which occasionally "under-punishes the rare, fully-culpable adolescent still will produce less aggregate injustice than a discretionary system that improperly, harshly sentences many more undeserving youths."[211]

Treating adolescents' reduced culpability categorically rests on *Roper*'s moral foundation of lesser blameworthiness and represents a normative judgment about deserved punishment.[212] Because all adolescents share characteristics of immature judgment, impulsiveness, and lack of self-control that systematically reduce their culpability, all young offenders should receive categorical reductions of adult sentences.[213] The principle of youthfulness as a mitigating factor represents a moral and criminal policy judgment that no child deserves to be sentenced as severely as an adult convicted of a comparable crime, that is, causing the same harm.[214] "Even if there are a few juveniles who

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

211. *Id.* at 573 ("If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under eighteen as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty.").

212. In contemporary criminal law theory, penal proportionality may reflect either the quality of an actor's choice or what that choice indicates about the actor's moral character. The former focuses on the blameworthiness of the choices made, while the latter focuses on what that choice indicates about the actor's bad character. *See* Scott & Steinberg, *supra* note 73, at 801–02; *see also* R. A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345, 367–68 (1993); Michael Moore, *Choice, Character, and Excuse*, *in* PLACING BLAME 548, 574–92 (1997); Morse, *supra* note 124, at 405 ("The criteria for responsibility are behavioral and normative, not empirically demonstrable states of the brain."); Ward, *supra* note 82, at 461.

213. *See* Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15 (1998); Scott & Steinberg, *supra* note 73, at 801 ("Because these developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults under conventional criminal law conceptions of mitigation.").

214. *See, e.g.*, Fagan, *supra* note 33, at 242.

> [Adolescence, per se, is a mitigating status because youths' developmental deficits] are not the deficits of an atypical adolescent but are 'normal' developmental processes common to all adolescents. To the degree that there is variation among adolescents, whether offenders or not, these differences are predictable and subject to a variety of contextual, circumstantial, and intra-individual factors. In this juris-

could be among the worst of society's offenders, jurors will make errors of unacceptable frequency and magnitude. For this reason, we cannot trust ourselves to decide that a child is culpable enough to be punished as an adult . . . ."[215]

A categorical rule of mitigation is preferable to individualized sentencing discretion for two reasons.[216] The first is our inability either to define or identify what constitutes adult-like culpability among offending youths.[217] Development is highly variable—a few youths may be mature prior to becoming eighteen years of age, while many others may not attain maturity even as adults.[218] Despite developmental differences, clinicians lack the tools with which to assess youths' impulsivity, foresight, or preference for risk in ways that relate to maturity of judgment and criminal responsibility.[219] Because the vast majority of juveniles are less culpable than adults, the inability to define and measure immaturity or validly to identify the few responsible

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> prudence, the crimes of adolescents are a function of immaturity, compared to the crimes of adults, which are the acts of morally responsible, yet possibly cognitively and emotionally deficient, actors.

Id.

215. Emens, *supra* note 46, at 87.

216. Brink, *supra* note 76, at 1578 (arguing that age provides an imperfect boundary marker for immaturity and proposing to use age as a rebuttable presumption of incapacity to achieve individualized justice).

217. *See* Stanford v. Kentucky, 492 U.S. 371, 396–99 (Brennan, J., dissenting); AMNESTY INT'L, *supra* note 3, at 48 ("[While] the rate at which the adolescent brain acquires adult capabilities differs from individual to individual . . . researchers have identified broad patterns of changes in adolescents that begin with puberty and continue into young adulthood."); Morse, *supra* note 213, at 62 (observing that "there are no reliable and valid measures" of culpability that accurately can distinguish adolescents from adults).

218. *See* Brink, *supra* note 76, at 1570 (arguing that the development of normative competence is part of the maturation process from childhood to adulthood). "Though not all individuals mature at the same rate, and some individuals never mature, this sort of normative maturation is strongly correlated with age. The reduced normative competence of juveniles provides a retributive justification for reduced punishment for juveniles." *Id.*; *see also* ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 126, at 148 ("The range of individual variation among youths of the same age is notoriously large."); Fagan, *supra* note 33, at 209 ("The age at which adolescents realize the developmental competencies that constitute culpability will vary: a significant number of juveniles will be immature and lacking in the developmental attributes of culpability well before age eighteen, and some may still lack these competencies after age eighteen . . . .").

219. Roper v. Simmons, 543 U.S. 551, 573 (2004); ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 126, at 148 ("[We lack] good data on the social skills and social experience of adolescent offenders. The important elements of penal maturity have yet to be agreed upon, let alone assessed in large numbers of cases.").

ones would introduce a systematic bias toward punishing less-culpable youths.[220] A categorical approach reduces the risk of erroneous over-punishment of less blameworthy youths.[221] Every other area of law uses categorical, age-based lines to approximate the level of maturity required for particular activities—e.g., voting, driving, and consuming alcohol—and restricts youths because of their immaturity and inability to make competent decisions.[222]

The second reason to treat youthfulness categorically is the inability of judges or juries to fairly weigh an abstract considera-

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220. *See, e.g.*, Fagan, *supra* note 33, at 248 ("The difficulties and statistical error rates in measuring immaturity for juveniles invite complexity in the consistent application of the law."). Fagan contends:

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

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

221. Scott & Steinberg, *supra* note 73, 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." (citation omitted)).

222. *See, e.g.*, *Roper*, 543 U.S. at 581–86 (providing statutory appendices listing limits on juveniles' rights to drink, drive, vote, marry, and contract as a result of immaturity); FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 35–36 (1982); Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 89–91 (1999) (analyzing the inconsistency between punishing adolescents like adults while denying their autonomy claims in areas outside of the criminal law); Richard O. Brooks, *"The Refurbishing": Reflections Upon Law and Justice Among the Stages of Life*, 54 BUFF. L. REV. 619 (2006) (noting that the designation of diminished responsibility for juveniles is an example of our legal system's provision of legal duties and immunities based upon stages of life); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1268 (2000) (arguing that presumption of decisional incapacity pervades most areas of law and conflicts with a model of adolescent autonomy); Scott, *supra* note 82, at 1608, 1611; Zimring, *supra* note 73, at 287.

tion of youthfulness as a mitigating factor against the aggravating reality of a horrific crime.[223] *Roper* recognized that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[224] When assessing the seriousness of a crime—harm and culpability—the Court rightly feared that jurors could not adequately distinguish between the person's moral responsibility for causing the harm and the harm itself, and that they would not weigh diminished responsibility sufficiently. In surveys of jurors, the heinousness of a crime invariably trumped a youth's immaturity when deciding whether to impose the death penalty.[225]

I long have advocated a categorical "youth discount" that provides adolescents with fractional reductions in sentence-lengths based on age as a proxy for culpability.[226] In addition to recognizing youths' diminished responsibility, a "youth discount" recognizes that same-length sentences exact a greater "penal bite" from younger offenders than older ones.[227] A judge would

223. Stanford v. Kentucky, 492 U.S. 371, 398 (1988) (Brennan, J., dissenting) ("It is thus unsurprising that individualized consideration at transfer and sentencing has not in fact ensured that juvenile offenders lacking an adult's culpability are not sentenced to die.").

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

225. Brink, *supra* note 76, at 1581; Simona Ghetti & Allisson D. Redlish, *Reactions to Youth Crime: Perceptions of Accountability and Competency*, 19 BEHAV. SCI. & L. 33, 45–47 (2001).

226. FELD, BAD KIDS, *supra* note 4, at 315–21 (providing rationale for youth discount and describing its administration); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 121–33 (1997) (providing rationale for categorical "youth discount") [hereinafter Feld, *Abolish*]; *see also* Joseph L. Hoffman, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L. J. 229, 233 (1989) (describing age as an imperfect proxy for a complex of factors, "includ[ing] maturity, judgment, responsibility, and the capability to assess the possible consequences of one's conduct," that constitute culpability). *But cf.* ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 126, at 150 (objecting to categorical youth discount because "age is an incomplete proxy for levels of maturity during the years from age twelve to eighteen"). "The variation among individuals of the same age is great, and individualized determinations of immaturity are thus superior to averages based on aggregate patterns." *Id.*

227. *See* Andrew von Hirsch, *Proportionate Sentences for Juveniles: How Different than for Adults?*, 3 PUNISHMENT & SOC'Y 221, 227 (2001) ("A given penalty is said to be more onerous when suffered by a child than by an adult. Young people, assertedly, are psychologically less resilient, and the punishments they suffer interfere more with opportunities for education and personal development." (citation omitted)); *see also* Arredondo, *supra* note 122, at 19 ("Because of differences in the experience of time, any given duration of sanction will be

take the "youth discount" off of the appropriate sentence that she would impose on an adult offender. A youth would establish her eligibility for and the amount of discount only with a birth certificate. The "youth discount" includes a sliding scale of diminished responsibility and gives the largest sentence reductions to the youngest, least mature offenders.[228] On a sliding scale of diminished responsibility that corresponds with developmental differences, a fourteen-year-old offender might receive a maximum sentence that is perhaps twenty-five percent of the sentence an adult would receive, and a sixteen-year-old defendant might receive a maximum sentence no more than half the adult length. The deeper discounts for younger offenders correspond with their greater developmental differences in maturity of judgment and self-control.[229] By definition, a "youth discount" would

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experienced subjectively as longer by younger children."); Jeffrey Fagan, *This Will Hurt Me More than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 21–22 (2002) (describing substantive quality of punishment adolescents experience in adult incarceration as far harsher than the sanctions they experience as delinquents); Feld, *Abolish*, *supra* note 226, at 112–13 ("[Y]ouths experience objectively equal punishment subjectively as more severe.").

228. Feld, *Abolish*, *supra* note 226, at 118–21; *see also* Scott & Steinberg, *supra* note 73, at 837 ("[A] systematic sentencing discount for young offenders in adult court[ ] might satisfy the demands of proportionality."); Tanenhaus & Drizin, *supra* note 141, 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 227, at 226–27 (arguing for categorical penalty reductions based on juveniles' reduced culpability).

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

Id.; *see also* Zimring, *supra* note 73, 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").

229. Brink, *supra* note 76, at 1572 ("[A] juvenile is less responsible for her crime than her adult counterpart is for the same crime and that, all else being equal, the younger the juvenile the less responsible she is for her crime."); Zimring, *supra* note 73, 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.").

preclude imposing LWOP and other "virtual life" sentences.[230] Because the length of an LWOP is indeterminate, states can assume an actual sentence length of about forty years against which to apply a "youth discount" based on the average age at which adult murderers enter prison and their projected, often reduced, life expectancy.[231] Apart from adolescents' diminished responsibility, the likelihood of recidivism decreases with age and the costs of confining geriatric inmates increase substantially.[232] The specific amount by which to discount the sentences of young offenders is the proper subject of political and legislative debate. Although some legislators may find it difficult to resist the temptation to "get tough" and to engage in demagoguery,[233] states can achieve all of their legitimate penal goals by sentencing youths to no more than twenty or thirty years for even the most serious crimes.

Roper also emphasized that because juveniles' personalities are more transitory and less-fixed, their crimes provide less reliable evidence of moral reprehensibility or "irretrievably depraved character," and that "a greater possibility exists that a minor's

230. AMNESTY INT'L, *supra* note 3, at 8 (recommending that states abolish LWOP sentences for crimes committed by juveniles); MAUER ET AL., *supra* note 22, at 32 (recommending categorical exemption of juveniles from life sentences because they "represent an entire rejection of the longstanding traditions of our treatment of juvenile offenders, which is that rehabilitation should be considered as a primary objective when sentencing children").

231. *See* Alfonso A. Castillo, *Guilty Plea in Gruesome Murder Deal Slammed*, NEWSDAY, Sep. 13, 2007, at A4 (noting that life expectancy of prison inmates is shorter than that of the civilian population "because of unhealthy living conditions and violence."); *cf.* Ernest Drucker, *Population Impact of Mass Incarceration Under New York's Rockefeller Drug Laws*, 79 J. Urban Health 5 (2002) (discussing the reduced life expectancies of prisoners in New York convicted of non-violent drug offenses). By one estimate, the average age of murders is about twenty-nine years. *See* Edward L. Glaeser and Bruce Sacerdote, *Sentencing in Homicide Cases and the Role of Vengeance*, 32 J. LEGAL STUD. 363, 367 (2003) (summarizing data on murder cases in thirty-three large urban counties). Data from the United States Department of Justice reports that two-thirds (65%) of all homicide offenders committed their crimes between ages eighteen and thirty-four. Bureau of Justice Statistics, U.S. Dep't Justice, Homicide Trends in the U.S., http://www.ojp.usdoj.gov/bjs/homicide/teens.htm (graph entitled, "Homicide Type by Age, 1976–2005") (last visited Jan. 28, 2008). Although the average life expectancy for children born today is 77.8 years, it is lower for men, for minorities, and significantly reduced for prison inmates who are exposed to a variety of diseases. *See, e.g.*, Elizabeth Arias, Ctr. for Disease Control, *U.S. Life Tables, 2003*, NAT'L VITAL STATISTICS REP., April 19, 2006, at 3, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf.

232. AMNESTY INT'L, *supra* note 3, at 8; LABELLE, *supra* note 198, at 22.

233. Feld, *supra* note 11 (describing the politicization of crime policies and politician's use of racial code words for electoral advantage).

character deficiencies will be reformed."[234] A "youth discount" enables young offenders to survive serious mistakes with a semblance of their life chances intact.[235] We can hold juveniles accountable, manage the risks they pose to others, and provide them with "room to reform" without extinguishing their lives.[236] Because young offenders eventually will return to the community, the state bears a responsibility to provide them with resources with which to reform as they mature.

CONCLUSION

Roper's diminished responsibility rationale provides a broader foundation to formally recognize youthfulness as a categorical mitigating factor in sentencing. Because adolescents lack the judgment, appreciation of consequences, and self-control of adults, they deserve shorter sentences when they cause the same harms. Adolescents' personalities are in transition, and it is unjust and irrational to continue harshly punishing a fifty- or sixty-year-old person for the crime that an irresponsible child committed several decades earlier.[237]

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

234. Roper v. Simmons, 543 U.S. 551, 570 (2004).

235. *See* ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 126, at 89–96; Franklin E. Zimring, *Background Paper, in* CONFRONTING YOUTH CRIME 27, 66–69 (1978).

236. *See* ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 126, at 81–83, 142–45; Zimring, *supra* note 73, at 283–84.

237. Streib & Schrempp, *supra* note 21, at 12 ("To decide today whether or not this adolescent offender should continue to be imprisoned into those adult years and even into old age is to assume extrahuman powers to predict human behavior generations into the future.").

"youth discount" provides a reasonable approximation of "what any parent knows"—kids are different and engage in stupid and dangerous behavior because they are kids.

It will take political courage for legislators to enact laws that benefit powerless, easily demonized groups, such as juvenile murderers. It will take even greater political courage when enacting responsible penal policy exposes a politician to a charge by her opponent that she is "soft on crime." Politicians over-reacted during the "crime panic" of the 1990s and enacted "get tough" waiver and criminal sentencing laws—offense exclusion, prosecutorial direct file, and mandatory LWOP sentences—that are irrational, inhumane, unjust, and counterproductive. Political leaders bear the responsibility to restore rationality, humanity, and decency to the justice systems. Public opinion supports policies to rehabilitate serious young offenders to reduce future crime rather than simply to incarcerate them for longer periods.[238] Our greater scientific understanding of adolescent development, positive public support for less punitive policies, *and* low crime rates may strengthen progressive legislators' resolve to promote just and sensible youth crime policies.[239]

238. BARRY KRISBERG & SUSAN MARCHIONNA, ATTITUDES OF U.S. VOTERS TOWARD YOUTH CRIME AND THE JUSTICE SYSTEM 3 (2007) (reporting strong public support for rehabilitation as a strategy to prevent and reduce juvenile crime), *available at* http://www.nccd-crc.org/nccd/pubs/zogby_feb07.pdf; Brink, *supra* note 76, at 1585 ("There is support for treating youthful offenders as juveniles and for sentencing that is rehabilitative . . . ."); Daniel S. Nagin et al., *Public Preferences for Rehabilitation Versus Incarceration of Juvenile Offenders: Evidence from a Contingent Valuation Survey*, 5 CRIMINOLOGY & PUB. POL'Y 627, 644 (2006) ("[M]embers of the public are concerned about youth crime and want to reduce its incidence, but they are ready to support effective rehabilitative programs as a means of accomplishing that end—and indeed favor this response to imposing more punishment through longer sentences.").

239. Donna M. Bishop, *Public Opinion and Juvenile Justice Policy: Myths and Misconceptions*, 5 CRIMINOLOGY & PUB. POL'Y 653, 656–57 (2006) (summarizing survey results of public opinion regarding support for rehabilitation); Francis T. Cullen, *It's Time to Reaffirm Rehabilitation*, 5 CRIMINOLOGY & PUB. POL'Y 665, 666–68 (2006) (reporting the continuing public support for idea of rehabilitation, and offering that rehabilitation provides a cultural and criminological alternative to simply locking up offenders); Nagin et al., *supra* note 238, at 645–46.