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# **The Youth Discount: Old Enough To Do The Crime, Too Young To Do The Time**

Barry C. Feld\*

## I. INTRODUCTION

In a trilogy of cases, the Supreme Court applied the Eighth Amendment to the entire category of juvenile offenders, repudiated its “death is different” jurisprudence, and required states to consider youthfulness as a mitigating factor in sentencing. *Roper v. Simmons* prohibited states from executing offenders for murder they committed when younger than eighteen years of age.<sup>1</sup> *Roper* reasoned that immature judgment, susceptibility to negative influences, and transitory personalities reduced youths’ culpability and barred the most severe sentence.<sup>2</sup> *Graham v. Florida* extended *Roper*’s diminished responsibility rationale and prohibited states from imposing life without parole (LWOP) sentences on youths convicted of nonhomicide offenses,<sup>3</sup> and repudiated the Court’s earlier Eighth Amendment position that “death is different.”<sup>4</sup> *Miller v. Alabama* and *Jackson v. Hobbs* [*Miller/Jackson*], combined *Roper* and *Graham*’s diminished responsibility rationale with another strand of death penalty jurisprudence to bar *mandatory* LWOP sentences for youths convicted of murder,<sup>5</sup> required judges to make individualized sentencing decisions, and emphasized the importance of youthfulness as a mitigating factor.

Despite the Court’s recognition of adolescents’ reduced criminal responsibility, *Graham* provided nonhomicide offenders very limited relief—

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<sup>1</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>2</sup> *Id.* at 569–72.

<sup>3</sup> 130 S. Ct. 2011, 2026 (2010); see, e.g., Terry A. Maroney, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765, 765 (2011) (noting that “the *Graham* Court easily applied to juvenile life without parole the developmental conclusions that had partially underlain its earlier abolition of the juvenile death penalty.”).

<sup>4</sup> *Graham*, 130 S. Ct. at 2030 (majority opinion); *Id.* at 2046 (Thomas, J. dissenting).

<sup>5</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2467 (2012) (finding “the mandatory scheme flawed because it gave no significance to ‘the character and record of the individual offender or the circumstances’ of the offense and ‘exclud[ed] from consideration . . . the possibility of compassionate or mitigating factors.’”).

“some meaningful opportunity to obtain release.” Similarly, *Miller/Jackson* only required an individualized evaluation of culpability and consideration of the mitigating qualities of youthfulness, but did not preclude an LWOP sentence for juveniles who murder.

*Roper* and *Graham*’s categorical treatment of adolescents’ diminished responsibility and *Miller/Jackson*’s focus on the mitigating qualities of youth provide the rationale for a Youth Discount—a proportional reduction of adult sentence lengths based on the youth of the offender. A Youth Discount provides a straightforward way for legislatures to recognize juveniles’ categorically diminished responsibility and formally to incorporate youthfulness as a mitigating factor in sentencing. It requires only that legislators exhibit the political courage to recognize, as has the Court, that “children are different” and deserve less severe punishment than adults for their actions. Part II analyzes *Roper*’s abolition of the juvenile death penalty and reviews developmental psychological and neuroscience research that bolster its conclusion that youths are less criminally responsible than adults. Part III examines *Graham*’s rejection of the Court’s “death is different” jurisprudence and reformulation of Eighth Amendment proportionality analyses to accommodate the diminished responsibility of young nonhomicide offenders. Part IV analyzes *Miller/Jackson*’s repudiation of mandatory LWOP sentences for juveniles who murder by using reasoning from the Court’s death penalty precedents to require individualized assessments and to weigh youthfulness heavily. Part V proposes a Youth Discount to formally recognize youthfulness as a mitigating factor. Legislators should use age as a conclusive proxy for diminished responsibility and provide all young offenders with substantially shorter sentences.

## II. *ROPER V. SIMMONS* AND DIMINISHED RESPONSIBILITY

The Supreme Court had considered whether the Eighth Amendment prohibited states from executing juvenile offenders prior to *Roper v. Simmons*.<sup>6</sup> In 1989, *Stanford v. Kentucky* upheld the death penalty for sixteen or seventeen year-

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<sup>6</sup> 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 noting that “youth is more than a chronological fact” and “minors, especially in their earlier years, generally are less mature and responsible than adults.”); *Thompson v. Oklahoma*, 487 U.S. 815, 822–23 (1988) (plurality opinion) (concluding that fifteen-year-old offenders lacked culpability to warrant execution). *Thompson*’s proportionality analysis considered both objective factors—e.g., state statutes, jury practices, and the views of national and international organizations—and the justices’ own subjective sense of “civilized standards of decency.” *Id.* at 830. *Thompson* 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.

old youths convicted of murder.<sup>7</sup> In 2005, *Roper* overruled *Stanford* and prohibited states from executing youths for crimes committed prior to eighteen years of age.<sup>8</sup> *Roper* relied on the analytic methodology the Court used earlier in *Atkins v. Virginia* to bar execution of defendants with mental retardation.<sup>9</sup> *Roper* found that state laws and jury decisions evidenced a national consensus against executing juveniles.<sup>10</sup> The *Roper* majority's proportionality analysis offered three reasons why states could not punish juveniles as severely as adults.<sup>11</sup> First, juveniles' immature judgment and limited self-control cause them to act impulsively and without full appreciation of consequences.<sup>12</sup> Second, juveniles' greater susceptibility to negative peer influences and inability to escape their criminogenic environments reduce their responsibility.<sup>13</sup> Third, their transitory personality development provides less reliable evidence of depraved character.<sup>14</sup>

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<sup>7</sup> *Stanford v. Kentucky*, 492 U.S. 361, 375–76 (1989) (acknowledging that most juveniles were less criminally responsible than adults, but rejecting a categorical ban and allowing juries to decide whether a youth's culpability warranted execution).

<sup>8</sup> *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (prohibiting execution of youths for crimes committed when seventeen years of age or younger).

<sup>9</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (barring states from executing defendants with mental retardation). *Atkins* found a national consensus existed because thirty states barred the practice and few states actually executed offenders with mental retardation. *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). The *Atkins* Justices' independent proportionality analysis concluded that mentally impaired defendants lacked the culpability to warrant execution. *Id.* at 315–16.

Commentators noted the constitutional implications of *Atkins*' proportionality analyses for executing juvenile offenders. See, e.g., Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles From Capital Punishment*, 33 N.M. L. REV. 207, 207 (2003) (noting that “The *Atkins* decision . . . 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.”).

<sup>10</sup> *Roper*, 543 U.S. at 564–66 (noting that legislative trends prohibiting executing children corresponded with those in *Atkins*). See also Feld, *supra* note 9, at 489–98 (analogizing between state laws and jury practices in executing defendants with mental retardation and juveniles).

<sup>11</sup> *Roper*, 543 U.S. at 569–72.

<sup>12</sup> *Id.* at 569 (“[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”).

<sup>13</sup> *Id.* at 569–570 (“Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure . . . Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”).

<sup>14</sup> *Id.* at 570 (“[T]he character of a juvenile is not as well formed as that of an adult.”). Because juveniles' character is transitional, “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a great possibility exists that a minor's

These developmental features—immature judgment, lack of self-control, and susceptibility to social influences—also negated retributive and deterrent justifications for the death penalty.<sup>15</sup> As a result of *Roper*, states converted the sentences of seventy youths on death row to life without the possibility of parole.<sup>16</sup>

#### A. Categorical vs. Individual Diminished Responsibility

The *Roper* majority and dissents differed on several issues,<sup>17</sup> but they

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character deficiencies will be reformed.” *Id.*

<sup>15</sup> *Id.* at 571. *Roper* noted the two penal functions served by the death penalty—retribution and deterrence—and concluded that:

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

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.*

<sup>16</sup> 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, e.g., *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) (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.”).

<sup>17</sup> The majority and dissents disagreed about the proper denominator to calculate the existence of a national consensus against executing juveniles—all states or only those with death penalty laws. *Roper*, 543 U.S. at 595–96 (O’Connor, J., dissenting); *id.* at 609–11 (Scalia, J., dissenting) (arguing that relevant states are those that employ the death penalty).

The majority and dissent also differed over the role of international law in interpreting the Constitution. Compare *id.* at 575–78 (majority opinion) (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), and *id.* at 624 (Scalia, J., dissenting) (arguing that the views of the rest of the world “ought to be rejected out of hand”).

The dissents criticized the majority for failing to condemn the Missouri Supreme Court for anticipatorily overruling *Stanford*. *Id.* at 593–94 (O’Connor, J., dissenting) (criticizing Court’s failure to reprove Missouri Supreme Court for failing to follow *Stanford*); *id.* at 628–29 (Scalia, J., dissenting) (complaining that “the Court affirms the Missouri Supreme Court without even admonishing that court for its flagrant disregard of our precedent in *Stanford*.”).

disagreed fundamentally whether to bar the death penalty categorically or to evaluate youths' culpability individually.<sup>18</sup> 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.<sup>19</sup>

Clinicians do not diagnose people younger than eighteen with antisocial personality disorder, and *Roper* declined to allow jurors to make culpability assessments that clinicians eschew.<sup>20</sup> The Court feared that a brutal murder could overwhelm the mitigating role of youthfulness.<sup>21</sup> *Roper* used age as a conclusive proxy for diminished responsibility to prevent jurors from treating youthfulness as an aggravating factor.<sup>22</sup>

<sup>18</sup> 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 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))).

<sup>19</sup> *Roper*, 543 U.S. at 572–73 (majority opinion) (emphasis added).

<sup>20</sup> *Id.* at 573 (noting that psychologists cannot differentiate between an immature juvenile's crime and the “rare juvenile offender whose crime reflects irreparable corruption.”).

<sup>21</sup> See Elizabeth F. Emens, *Aggravating Youth: Roper v. Simmons and Age Discrimination*, 2005 SUP. CT. REV. 51, 83 (2005) (arguing that “to 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.”).

<sup>22</sup> *Id.* at 52 (noting that the prosecutor in *Roper* improperly argued the defendant's age was an aggravating, rather than mitigating, factor); Norman J. Finkel, *Prestidigitation, Statistical Magic, and Supreme Court Numerology in Juvenile Death Penalty Cases*, 1 PSYCHOL. PUB. POL'Y & L. 612, 636 (1995) (reporting social science studies showing that “[w]hen heinousness increases, it exerts a more powerful effect than age”).

Post-*Roper* commentators' vehement criticism bolsters the accuracy of Justice Kennedy's intuition. 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) (describing horrific crimes committed

### B. Developmental Psychology and Adolescent Culpability

*Roper*'s three justifications for adolescents' reduced culpability—immature judgment, susceptibility to negative peer influences, and transitional identities—relied more on intuition—“as any parent knows”<sup>23</sup>—than on scientific evidence.<sup>24</sup> Although *amicus* briefs presented developmental psychological and neuroscience research, the Court did not analyze or identify the decisive evidence.<sup>25</sup>

*Roper* analyzed youths' reduced culpability within a retributive sentencing framework. Retributive sentencing theory proportions punishment to a crime's seriousness.<sup>26</sup> A crime's seriousness is defined by two elements—harm and

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 . . . by not basing its decision on the respondent's moral culpability but rather on the Justices' individual perceptions and biases”); 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); Steven J. Wernick, *Constitutional Law: Elimination of the Juvenile Death Penalty—Substituting Moral Judgment for a True National Consensus*, 58 FLA. L. REV. 471 (2006); 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) (arguing that if juveniles are immature, then “harsher punishments are needed to control them.”).

<sup>23</sup> *Roper*, 543 U.S. at 569 (observing summarily that juveniles are immature, impulsive, and irresponsible).

<sup>24</sup> *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) (noting that “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.”).

<sup>25</sup> Denno, *supra* note 24, 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).

<sup>26</sup> See E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 161 (2009) (arguing that “the offender's blameworthiness for an offense is generally assessed according to two elements: the nature and seriousness of the harm foreseeably caused or threatened by the crime and the offender's culpability in committing the crime (in particular, the offender's degree of intent (*mens rea*), motives, role in the offense, and mental illness or other diminished capacity.”); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 48 (1976) (“[P]unishing someone conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it.”); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 589–91 (2005) [hereinafter Frase, *Proportionality*] (summarizing principles of retributive sentencing theory); see also ANDREW VON HIRSCH, CENSURE AND SANCTIONS 15 (1993); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 31 (1985).

culpability—which determine how much punishment an actor deserves.<sup>27</sup>

[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.<sup>28</sup>

An offender's age has no bearing on the amount of harm caused—children and adults can inflict the same injuries.<sup>29</sup> But youths' inability fully to appreciate wrongfulness or to control their behavior may reduce culpability and lessen blameworthiness for the harms they cause.<sup>30</sup>

<sup>27</sup> 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) [hereinafter Scott & Steinberg, *Blaming Youth*] (“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 G. Schwartz eds., 2000) (“But desert is a measure of fault that will attach very different punishment to criminal acts that cause similar amounts of harm.”).

<sup>28</sup> Frase, *Proportionality*, *supra* note 26, at 590.

<sup>29</sup> 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).

<sup>30</sup> Just deserts theory and criminal law grading principles base the degree of deserved punishment on the actor's culpability. For example, a person may cause the death of another individual with premeditation and deliberation, intentionally, “in the heat of passion,” recklessly, negligently, or accidentally. See JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 105–45 (2d ed. 1960). The criminal law treats the same objective harm—for example, the death of a person—quite differently depending on the actor's culpability.

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



Developmental psychology and neuroscience research inform how children's thinking and behaving change and may influence criminal responsibility.<sup>31</sup> By mid-adolescence, most youths can distinguish right from wrong and reason similarly to adults under controlled conditions.<sup>32</sup> But the ability to make good

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*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 "the 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).

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 27, at 273. See also FRANKLIN ZIMRING, *AMERICAN YOUTH VIOLENCE* 75 (1998) [hereinafter ZIMRING, *AMERICAN YOUTH VIOLENCE*] (arguing that "even after a youth passes the minimum threshold of competence, this barely competent youth is not as culpable and therefore not as deserving of a full measure of punishment as a fully qualified adult offender."); Scott & Steinberg, *Blaming Youth*, *supra* note 27, 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] decisionmaking capacity in ways that are accepted as mitigating culpability").

<sup>31</sup> See, e.g., Steinberg & Cauffman, *supra* note 30, 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).

<sup>32</sup> For example, adolescents and adults make informed consent medical decisions similarly. See *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 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). But see Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC

choices under laboratory conditions differs from decisions made in stressful circumstances with incomplete information.<sup>33</sup> Emotions, excitement, or stress contribute to riskier decisions by youths than by adults.<sup>34</sup>

### 1. Immature Judgment and Self-Control

Developmental psychologists distinguish between youths' cognitive abilities

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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).

<sup>33</sup> 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 27, 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 REV. 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 L. & 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”).

<sup>34</sup> Researchers distinguish decisions made under conditions of “cold” and “hot” cognition. 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.”) (citations 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 thinking under conditions of strong feelings or high arousal. The cognitive processes involved in hot cognition may, in fact, be much more important for understanding why people [—especially youths—] make risky choices in real-life situations.”); Bernd Figner et al., *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk Taking in the Columbia Card Task*, 35 J. EXPERIMENTAL PSYCHOL. 709, 726–28 (2009) (reporting that adolescents are more heavily influenced by the emotional limbic system and make riskier decisions under stressful conditions); Scott, *supra* note 32, at 1645 (arguing that youthfulness impairs consideration of alternatives or weighing and comparing consequences); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 33, at 259 (“[S]ensation seeking increases during adolescence, leading to increased risk taking as a means of achieving excitement.”).

and their judgment and self-control.<sup>35</sup> Although mid-adolescents' cognitive abilities are comparable with adults, their judgment and impulse control does not emerge for several more years.<sup>36</sup> Youths' immature judgment reflects differences in risk perception, appreciation of future consequences, and experience with autonomy.<sup>37</sup> Youths' generic difference from adults in knowledge and experience, time perspective, risk proclivity, and impulsivity renders their bad choices categorically less blameworthy.<sup>38</sup>

Adolescents underestimate risks and focus on short-term gains rather than

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<sup>35</sup> 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 16, 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.*

<sup>36</sup> See Scott & Steinberg, *Blaming Youth*, *supra* note 27, 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 L. & 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.").

<sup>37</sup> See, e.g., Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 53 (1998) (describing characteristics of youths that distinguish their decision making capabilities from those of adults); Scott & Steinberg, *Blaming Youth*, *supra* note 27, 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."); Scott et al., *Legal Contexts*, *supra* note 36, at 229–35 (describing psycho-social and developmental factors that contribute to juveniles' immature judgment); Elizabeth S. Scott and Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008) (noting that "considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices."); Steinberg & Cauffman, *Maturity of Judgment*, *supra* note 33, at 252 (emphasizing temperance, perspective, and judgment as ways in which adolescents' thinking diverges from adults).

<sup>38</sup> See Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008) (suggesting that because youths assess and weigh risks differently than adults, they are less likely to anticipate that someone might get hurt or killed in the commission of a felony); Scott & Grisso, *supra* note 30, 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 27, at 813; Scott et al., *Legal Contexts*, *supra* note 36, 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").

possible long-term losses to a greater extent than do adults.<sup>39</sup> They possess less information<sup>40</sup> and consider fewer options than do adults.<sup>41</sup> They weigh costs and benefits differently than adults and apply different subjective values to outcomes.<sup>42</sup> Youths crave sensation and excitement—the adrenaline rush—which increases their propensity to engage in risky behaviors.<sup>43</sup> Risk-taking and sensation-seeking peak around sixteen or seventeen—the ages when youths’ involvement in criminal activity also increases—and then decline in adulthood.<sup>44</sup>

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<sup>39</sup> See Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 19 (1992) (“[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.”); see also Thomas Grisso, *Society’s Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 L. & HUM. BEHAV. 229, 241 (1996) (arguing that “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.”); Thomas Grisso, *What We Know About Youths’ Capacities as Trial Defendants*, in YOUTH ON TRIAL 139, 161 (Thomas Grisso & Robert G. Schwartz eds., 2000) (“[A]dolescents . . . may differ from adults in the weights that they give to potential positive and negative outcomes . . . [and] are more likely than adults to give greater weight to anticipated gains than to possible losses or negative risks.”).

<sup>40</sup> 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.”); Elizabeth S. Scott, *Criminal Responsibility in Adolescence Lessons from Developmental Psychology*, in YOUTH ON TRIAL 291, 304–05 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Scott, *Lessons*] (“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)).

<sup>41</sup> See Taylor-Thompson, *supra* note 36, 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.”).

<sup>42</sup> See Scott, *supra* note 32, at 1608, 1645–47 (discussing how youths’ perceptions of and preferences for risk differ from those of adults). Young people may discount negative future consequences because they have more difficulty than adults integrating it because of their more limited experience. See William Gardner & Janna Herman, *Adolescents’ AIDS Risk Taking: A Rational Choice Perspective*, in ADOLESCENTS AND THE AIDS EPIDEMIC 17, 17–19 (William Gardner et al. eds., 1990); Taylor-Thompson, *supra* note 36, at 154 (“Adolescents, more than adults, tend to discount the future and to afford greater weight to short-term consequences of decisions.”).

<sup>43</sup> See Scott & Steinberg, *Blaming Youth*, *supra* note 27, 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 30, at 163 (arguing that adolescents are more willing to take physical and social risks for the sake of experiencing novel and complex sensations).

<sup>44</sup> See, e.g., Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764 (2008).

## 2. Neuroscience and Brain Development

The differences that social scientists observe between youths' and adults' thinking and behavior correspond with human brain development.<sup>45</sup> Two neurobiological systems—the prefrontal cortex (PFC) and the limbic system—influence youths' ability to exercise judgment and to control impulses.<sup>46</sup> The PFC controls executive functions such as reasoning, planning, and impulse control.<sup>47</sup>

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<sup>45</sup> See Scott & Steinberg, *Blaming Youth*, *supra* note 27, summarizing research on brain development and its implications for adolescent self-control:

[R]egions of the brain implicated in processes of long-term planning, regulation of emotion, impulse control, and the evaluation of risk and 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 34, 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, THE TEEN BRAIN STILL UNDER CONSTRUCTION, available at <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 33, at 438 (“[T]he adolescent brain is a brain in flux, undergoing numerous regressive and progressive changes in mesocorticolimbic regions.”).

<sup>46</sup> See Dahl, *supra* note 34, 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 . . .”); Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 217 (2010); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 91–92 (2008).

<sup>47</sup> The prefrontal cortex [PFC] operates as the CEO of the brain and controls planning, goal-directed responses, risk assessment, and impulse control. See, e.g., B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 244 (2000) (associating PFC with a variety of cognitive abilities and behavior control); B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 68 (2008) (reporting that brain’s

During late-adolescence, increased myelination<sup>48</sup> and synaptic pruning<sup>49</sup> improve reasoning ability and impulse control.<sup>50</sup> By contrast, the limbic system controls instinctual behavior, such as the fight-or-flight response.<sup>51</sup> During adolescence, the

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ability to control behavior continues to mature through late adolescence); Gruber & Yurgelun-Todd, *supra* note 46, 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.”); R.K. Lenroot & Jay N. Giedd, *Brain Development in Children and Adolescents: Insights from Anatomical Magnetic Resonance Imaging*, 30 NEUROSCI. & BIOBEHAV. REVS. 718, 723 (2006) (reporting that adolescents are less able to self-regulate or control behavior); Deborah Yurgelun-Todd, *Emotional and Cognitive Changes During Adolescence*, 17 CURRENT OPINION IN NEUROBIOLOGY 251, 253 (2007); Sowell et al., *Mapping Continued Brain Growth*, *supra* note 45, at 8819 (describing brain growth in post-adolescents “in the superior frontal regions that control executive cognitive functioning”); *Frontline: Inside the Teenage Brain—Interview with Jay Giedd* (PBS television broadcast Mar. 31, 2002), available at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html> (“The frontal lobe is often called the CEO, or the executive of the brain. It’s involved in things like planning and strategizing and organizing, initiating attention and stopping and starting and shifting attention.”).

<sup>48</sup> Myelin is a white, fatty substance that forms a sheath that surrounds and insulates the neural axons and facilitates 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. Zoltan Nagy, Helena Westerberg & Torkel Klingberg, *Maturation of White Matter is Associated with the Development of Cognitive Functions During Childhood*, 16:7 J. COGNITIVE NEUROSCI. 1227, 1231 (2004); ELKHONON GOLDBERG, *THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND* 144 (2001) (explaining that “[t]he presence of myelin makes communication between different parts of the brain faster and more reliable.”).

<sup>49</sup> The gray matter or brain cell neurons that cover the top layer of the brain begin to thin through a process of synaptic pruning which eliminates unused neuronal connections. The pruning and elimination of unused connections promotes greater efficiency and strengthens the brain’s ability to process complex information. B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 241 (2000) (reporting that “increasing cognitive capacity during childhood may coincide with a gradual loss [of grey matter] rather than formation of new synapses”); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT’L ACAD. SCI. 8174, 8175 (2004).

<sup>50</sup> See Gruber & Yurgelun-Todd, *supra* note 46, at 325 (“The significant correlations between white matter volume and processing speed are consistent with evidence suggesting that increased myelination of axons produces faster conduction velocity of neural signals and more efficient processing of information, and further suggest 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 45, 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 45, 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.”).

<sup>51</sup> See, e.g., 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,

two systems are out of balance and teenagers rely more heavily on the limbic system and less heavily on the PFC than do adults.<sup>52</sup> Youths' heightened quest for pleasure and emotional rewards develops more rapidly than does the system for self-control and self-regulation.<sup>53</sup> Although neuroscientists have not established direct links between brain development and real-life behavior nor found a way to individualize among young offenders on the basis of brain development, their research helps to explain adolescents' impulsive behavior.<sup>54</sup>

### 3. Peer Group Influences

Roper ascribed juveniles' diminished responsibility to their greater susceptibility to negative peer influences.<sup>55</sup> Juveniles commit crimes in groups to a greater extent than do adults.<sup>56</sup> The presence of peers stimulates greater neural

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195 (1999) (reporting that the amygdala is "a neural system that evolved to detect danger and produce rapid protective responses without conscious participation.").

<sup>52</sup> See *id.* at 199 (showing that processing of emotions shifted from the amygdala to the frontal lobe over the course of the teenage years); Sarah-Jayne Blakemore, *Adolescent Development of the Neural Circuitry for Thinking About Intentions*, 2:2 SOC. COGNITIVE & AFFECTIVE NEUROSCI. 130 (2007); Stephanie Burnett et al., *Development During Adolescence of the Neural Processing of Social Emotion*, 21:9 J. COGNITIVE NEUROSCI. 1736 (2009); Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 161–62 (2010).

<sup>53</sup> See David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principle for Effective Decision-Making*, 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 34, 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)").

<sup>54</sup> Terry A. Maroney, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765, 769 (2011) (arguing that "the data support conclusions only at the aggregate level, [but] they shed little light on the developmental status of any given young person, except insofar as she is a member of the group. While links between structural attributes, brain-level functional data, and externalized behaviors are strengthening, they remain largely speculative."); Aronson, *supra* note 34, at 136 (emphasizing "lack of clear causal pathway from brain structure to behavior"); 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 does not compel differences in how the law responds to them).

<sup>55</sup> See *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (noting adolescent susceptibility to negative peer influences).

<sup>56</sup> Police arrest two or more juveniles for committing a single crime more often than they do adults. See, e.g., HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CENTER FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 77 (1999) (showing percentages of various crimes committed in groups by juveniles between 1973 and 1997); Scott & Grisso, *supra*

activity in the reward centers of the brain which may increase risk-taking.<sup>57</sup> Youths engage in riskier behavior when together than they would when alone which increases exposure to accessorial liability for crimes they did not intend or personally commit.<sup>58</sup> Youths' reduced ability to resist peer pressures diminishes criminal responsibility compared with adults.<sup>59</sup> All the defendants in *Roper*, *Graham*, *Miller*, and *Jackson* committed their crimes with one or more co-offenders.

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note 30, 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 of their peers."); Taylor-Thompson, *supra* note 36, 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."); Scott & Steinberg, *Blaming Youth*, *supra* note 27, 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.").

<sup>57</sup> See, e.g., Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14:2 DEVELOPMENTAL SCI. F1, F8 (noting that with adolescents, "awareness of peers selectively amplifies activity in the adolescent brain's incentive processing system, which in turn influences subsequent decisions about risk.").

<sup>58</sup> Group offending increases youths' prospects for prosecution as accessories and exposes them to the same criminal penalties as principals. See, e.g., ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 30, at 152 ("Accessorial liability can interact with the vulnerability of adolescents to group pressure to create very marginal conditions for extensive criminal sanctions."); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 626 (2005); Scott & Steinberg, *Blaming Youth*, *supra* note 27, 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."); Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 22 (2008) (arguing that fear of social rejection may lead to spur-of-the-moment decisions to engage in group crime).

<sup>59</sup> See, e.g., Gardner & Steinberg, *supra* note 58, at 626; Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531 (2007) (reporting that "[T]here is little doubt that peers actually influence each other and that the effects of peer influence are stronger during adolescence than in adulthood."); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, in YOUTH ON TRIAL 271, 282 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Zimring, *Penal Proportionality*] ("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."); Franklin E. Zimring, *Toward a Jurisprudence of Youth Violence*, 24 CRIME & JUSTICE 477, 488–90 (1998) (noting that "The ability to resist peer pressure is yet another social skill that is a necessary part of legal obedience and is not fully development in many adolescents.").



### III. *GRAHAM V. FLORIDA*: REFRAMING PROPORTIONALITY FOR JUVENILE OFFENDERS

The language and history of the Eighth Amendment does not dictate different tests for capital and non-capital sentences. But the Court has used different proportionality analyses based on its view that “death is different.”<sup>60</sup> Apart from *Roper*, the Court had not applied proportionality principles to juveniles as a class, prohibited lengthy sentences for them, or established a minimum age for LWOP sentences.<sup>61</sup> As a result, lengthy mandatory minimum or LWOP sentences imposed on juveniles did not elicit close judicial scrutiny.<sup>62</sup> Although the seriousness of a crime—harm and culpability—should be proportional to the sentence imposed,<sup>63</sup> appellate courts focused on the gravity of harm rather than the culpability of the actor.<sup>64</sup> But the reduced culpability that precludes the death penalty for juvenile offenders is just as diminished for other sentences.<sup>65</sup>

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<sup>60</sup> See generally John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 923–26 (2011) (analyzing Court’s dual-track proportionality analyses and distinction between capital and non-capital sentence review). 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); Rachel E. Barkow, *Categorizing Graham*, 23 FED. SENT’G REP. 49 (2010); Richard S. Frase, *Graham’s Good News—and Not*, 23 FED. SENT’G REP. 54, 54 (2010) (noting “Court’s previous two-track distinction between death and prison sentences.”); Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT’G REP. 58, 58 (2010) (noting that the Court’s Eighth Amendment jurisprudence “proceeded along two tracks—capital and noncapital, with the two tracks applying different tests and leading to different outcomes.”).

<sup>61</sup> 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).

<sup>62</sup> See generally Cepparulo, *supra* note 16, at 225 (“For juveniles no longer facing death, the opportunity to introduce mitigating evidence is lost.”); Logan, *supra* note 27, at 703–09 (reviewing cases upholding LWOP sentences on juveniles).

<sup>63</sup> Stinneford, *supra* note 60, at 916 (“From a retributive point of view, a punishment is proportionate to the offense if it matches the offender’s moral culpability or desert.”); see also Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 73 (2005); *supra* notes 26–30 and accompanying text.

<sup>64</sup> See, e.g., *State v. Massey*, 803 P.2d 340, 348 (Wash. Ct. App. 1991) (upholding a mandatory LWOP imposed on a thirteen-year-old and reasoning that test of proportionality “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. 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”).

<sup>65</sup> Professor Zimring argues:

Doctrines of diminished responsibility have their greatest impact when large injuries have

*Graham v. Florida* considered whether *Roper's* diminished responsibility rationale would apply to a nonhomicide juvenile offender sentenced to life without parole.<sup>66</sup> *Graham* arose at the intersection of two lines of Eighth Amendment proportionality cases. One line of cases raised “gross disproportionality” claims and challenged term-of-year sentences that greatly exceeded the seriousness of the crime. The other line of cases made “categorical disproportionality” claims and challenged imposition of the death penalty on categories of offenders or offenses—e.g., those with mental retardation, juveniles, and nonhomicide offenses.<sup>67</sup>

Challenges to length-of-years sentences required the Court to consider whether the Eighth Amendment contains a proportionality principle that applies to non-capital sentences.<sup>68</sup> *Solem v. Helm* held that a sentence of life without possibility of parole for a property crime violated the Constitution.<sup>69</sup> *Solem's* proportionality analyses focused on three factors: “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”<sup>70</sup> By contrast, *Harmelin v. Michigan* upheld a life without parole sentence imposed on a first-time drug dealer.<sup>71</sup> After *Harmelin*,

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 30, at 84.

<sup>66</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2020–21 (2011).

<sup>67</sup> *Id.* at 2021; *see, e.g., Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting execution for raping a child); *Enmund v. Florida*, 458 U.S. 782 (1982) (barring execution for felony murderer who did not kill or intend to kill victim); *Coker v. Georgia*, 433 U.S. 548 (1977) (barring execution for rape of an adult woman); *Lockett v. Ohio*, 438 U.S. 586 (1978) (barring execution for felony murderer who did not kill or intend to kill).

<sup>68</sup> *See generally*, Frase, *Proportionality*, *supra* note 26, at 581–83 (reviewing Supreme Court’s criminal sentencing proportionality decisions); *See Harmelin v. Michigan*, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in judgment) (elaborating upon principles of “narrow proportionality” review in non-capital cases); *Rummel v. Estelle*, 445 U.S. 263, 284–85 (1980) (approving life with the possibility of parole sentence for a recidivist following his third conviction for minor property crimes).

<sup>69</sup> *See Solem v. Helm*, 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 the “constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.” *Id.* at 284, 286.

<sup>70</sup> *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.

<sup>71</sup> The fractured Court could not agree on a constitutional rationale. *Compare Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (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

courts only review length-of-years sentences that cross some ill-defined “grossly disproportionate” threshold.<sup>72</sup>

Categorical challenges to the death penalty involved entire classes of offenses or offenders.<sup>73</sup> Some decisions barred execution for nonhomicide crimes and some felony murderers.<sup>74</sup> Others prohibited states from executing less culpable offenders—juveniles and the mentally disabled.<sup>75</sup>

*Graham* posed “a categorical challenge to a term-of-years sentence.”<sup>76</sup> It required the Court to decide the validity of a sentence—life without parole—applied to “an entire class of offenders who have committed a range of crimes,”<sup>77</sup> rather than to decide whether it was grossly disproportionate as applied to the individual. *Graham* repudiated the Court’s historical “death is different” distinction, extended *Roper*’s reduced culpability rationale, and “declare[d] an

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sentence by finding it proportional under an Eighth Amendment analysis). A majority of the Court could not agree with either opinion’s legal reasoning. However, Justice Kennedy’s *Harmelin* concurrence provided the operative rule to assess disproportionate sentences. *Id.* at 1001 (arguing that the Eighth Amendment prohibits “only extreme sentences that are ‘grossly disproportionate’ to the crime”); Frase, *Proportionality*, *supra* note 26, at 581–83 (analyzing *Harmelin* and the factors Justice Kennedy proposed).

<sup>72</sup> See *Harmelin*, 501 U.S. at 998–1001 (Kennedy J., concurring). According to Justice Kennedy:

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

*Id.* at 1001; see also *Ewing v. California*, 538 U.S. 11, 19, 30–31 (2003) (“We hold that Ewing’s sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.”); Barkow, *supra* note 60, at 49 (noting that “Court applied an exceedingly deferential proportionality test” based on Kennedy’s *Harmelin* concurrence); Frase, *Proportionality*, *supra* note 26, at 581–83 (analyzing the factors Kennedy proposed in *Harmelin* and the limited utility they provide defendants challenging a disproportionate sentence).

<sup>73</sup> Frase, *supra* note 60, at 54 (noting that “death is different” for categories of offenders—e.g. juveniles—and categories of offenses—e.g. nonhomicide crimes).

<sup>74</sup> See e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting execution for raping a child); *Enmund v. Florida*, 458 U.S. 782 (1982) (barring execution for felony murderer who did not kill or intend to kill victim); *Coker v. Georgia*, 433 U.S. 584 (1977) (barring execution for rape of an adult woman).

<sup>75</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (barring execution of youths who committed their crimes while younger than eighteen years of age); *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring execution of defendants with mental retardation).

<sup>76</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2022–23 (2010); Leslie Patrice Wallace, “*And I Don’t Know Why It Is That You Threw Your Life Away*”: Abolishing Life Without Parole, *The Supreme Court in Graham v. Florida Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 53–57 (2010) (analyzing the two lines of cases).

<sup>77</sup> *Graham*, 130 S. Ct. at 2022–23.

entire class of offenders immune from a noncapital sentence . . .”<sup>78</sup>

Once the Court framed *Graham* as a categorical challenge to a sentencing practice,<sup>79</sup> it replicated *Roper*’s proportionality analyses and found a national consensus against imposing an LWOP sentence on nonhomicide juvenile offenders.<sup>80</sup> *Graham* rested on three features—the offender, the offense, and the sentence.<sup>81</sup> It reiterated *Roper*’s rationale that juveniles’ reduced culpability warranted less severe penalties than those imposed on adults convicted of the same crime.<sup>82</sup> *Graham* explicitly based young offenders’ diminished responsibility on social science and neuroscience research. “[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”<sup>83</sup>

*Graham* invoked the Court’s felony-murder death-penalty decisions and concluded that even the most serious nonhomicide crimes “cannot be compared to murder in their ‘severity and irrevocability.’”<sup>84</sup> Because the criminal responsibility

<sup>78</sup> *Id.* at 2046 (Thomas, J., dissenting) (complaining that “[t]oday’s decision eviscerates that distinction. ‘Death is different’ no longer.”).

<sup>79</sup> The Court distinguished *Harmelin* because *Graham* raised a categorical rather than individual proportionality challenge. Barkow, *supra* note 60, at 49 (noting that “the Court concluded that *Harmelin*’s threshold test that required a finding of gross disproportionality between the gravity of the offense and the severity of the penalty ‘does not advance the analysis.’” Instead, the Court summarily asserted that “‘the appropriate analysis is the one used in cases that involved the categorical approach.’”); Tamar R. Birkhead, *Graham v. Florida: Justice Kennedy’s Vision of Childhood and the Role of Judges*, 6 DUKE J. CONST. L. & PUB. POL’Y 66, 67 (2010) (noting the Court’s application of capital punishment analysis to a term-of-years sentencing practice to exempt an entire class of offenders).

<sup>80</sup> *Graham*, 130 S.Ct. at 2023. Although thirty-seven states authorized LWOP sentences for juvenile nonhomicide offenders, few states, other than Florida, actually imposed it.

[T]here are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just 10 States . . . Thus, only 11 jurisdiction nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while 26 states . . . do not impose them despite apparent statutory authorization.

*Id.* at 2024 (citations omitted).

<sup>81</sup> *Id.* at 2026 (considering “the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question”). *Graham* involved a less culpable offender, a less culpable offense, and an LWOP sentence. See, e.g., Carol S. Steiker & Jordan M. Steiker, *Graham Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT’G REP. 79 (2010) (noting that the combination of three factors led to the result in *Graham*—juveniles, conviction for a nonhomicide crime, and an LWOP sentence).

<sup>82</sup> *Graham*, 130 S.Ct. at 2026 (noting that “a juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’”).

<sup>83</sup> *Id.* at 2026; see *supra* note 73 and accompanying text.

<sup>84</sup> *Graham*, 130 S. Ct. at 2027; see also *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (barring

of juveniles who did not murder was doubly diminished, an LWOP sentence was grossly disproportionate.<sup>85</sup>

Although execution differs from life imprisonment, the Court equated the death penalty with LWOP sentences for juveniles as similarly ultimate sanctions—“the sentence alters the offender’s life by a forfeiture that is irrevocable.”<sup>86</sup> No penal rationale—retribution,<sup>87</sup> deterrence,<sup>88</sup> incapacitation,<sup>89</sup> or rehabilitation<sup>90</sup>—justified the penultimate sanction for nonhomicide juvenile offenders. As a result of “the limited culpability of juvenile nonhomicide offenders and the severity of life without parole sentences,” *Graham* prohibited states from imposing a life

the death penalty for rape of a child); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (barring the death penalty for rape of an adult woman).

<sup>85</sup> See *Graham*, 130 S. Ct. at 2027 (noting that “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.”).

<sup>86</sup> *Id.* at 2027; *id.* at 2032 (noting that “[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.”); Eva S. Nilsen, *From Harmelin to Graham—Justice Kennedy Stakes out a Path to Proportional Punishment*, 23 FED. SENT’G REP. 67, 69 (2010) (noting the inconsistency between rehabilitation and LWOP sentences that “‘forfears altogether the idea that the defendant can change.’”); Wallace, *supra* note 76, at 58 (arguing that the rationale of *Graham* should also preclude lengthy term of year sentences that deny juveniles hope of release as well as LWOP).

<sup>87</sup> An LWOP for juveniles violated retributive proportionality principles because a juvenile would serve more years and a larger percentage of life in prison than would an older offender. *Graham*, 130 S. Ct. at 2028 (arguing that “A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.”).

<sup>88</sup> *Id.* at 2029 (concluding that the marginal deterrent effect of an LWOP sentence on a juvenile cannot justify the sentence).

<sup>89</sup> *Id.* (acknowledging that incapacitation might reduce future risk of offending, but arguing that a judge cannot predict at the time of sentencing that a “juvenile offender forever will be a danger to society” or will remain irredeemably incorrigible).

<sup>90</sup> An LWOP sentence deprives a young offender of incentive or opportunity to grow and change. *Id.* “A young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual . . . A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender’s crime is reinforced by the prison term.” *Id.* at 2032–33.

LWOP denies the offender hope or the prospect of redemption. *Id.* at 2027. This sentence “constitutes a ‘denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.’” See Alice Ristorph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT’G REP. 75, 76 (2010) (arguing that “Hope, or its denial, distinguishes LWOP from other prison sentences—not irrevocability, and not any necessary difference in the actual length of incarceration.”).

LWOP also denies youth access to vocational training programs or rehabilitative services afforded to those who may return to the community. *Graham*, 130 S. Ct. at 2030. See also ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 4 (2012) (reporting that most juvenile lifers do not participate in vocational training or rehabilitative programs because of state or prison policies).

without parole sentence on youths who did not commit murder.<sup>91</sup>

*Graham* ruled categorically and denied trial courts the option to impose LWOP sentences on a case-by-case basis. *Graham* reiterated clinicians' inability to distinguish between most juveniles who have the capacity to change and the few who might be incorrigible. Moreover, the same immaturity that diminished youths' responsibility increased the risk of error in assessing their culpability.<sup>92</sup> Developmental immaturity impairs youths' ability to understand legal proceedings, to communicate with counsel, and to make legal decisions.<sup>93</sup>

As in *Roper*, the principal difference among the *Graham* Justices focused on whether to apply a categorical rule and bar LWOP for all nonhomicide juveniles or to impose the sentence on a case-by-case basis. Chief Justice Roberts agreed that *Graham*'s sentence was disproportionate, but argued that sentences should be individualized, rather than applied categorically.<sup>94</sup> Chief Justice Roberts included the "culpability of the offender"<sup>95</sup> in his proportionality analyses, a departure from

<sup>91</sup> *Graham*, 130 S. Ct. at 2030.

<sup>92</sup> The Court noted that:

[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense . . . Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions . . . [and] impair the quality of a juvenile defendant's representation.

*Id.* at 2032; HUMAN RIGHTS WATCH, "WHEN I DIE . . . THEY'LL SEND ME HOME": YOUTH SENTENCED TO LIFE IN PRISON WITHOUT PAROLE IN CALIFORNIA, AN UPDATE 5 (2012) (reporting that "Youth are often poorly represented and do not always adequately understand legal proceedings."); Birkhead, *supra* note 79, at 69 (arguing that juveniles' mistrust of authority figures, limited understanding of the justice system, and inability to work effectively with counsel put them at a distinct disadvantage in criminal proceedings).

<sup>93</sup> See, e.g., Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 73 (Thomas Grisso & Robert G. Schwartz eds. 2000); Frase, *supra* note 60, at 56 (noting that juvenile defendants pose greater risks of unwise litigation choices, poorer communication with counsel, and an increased risk of ineffective defense representation and likelihood that they will receive an unconstitutionally harsher sentence); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 343 (2003); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLIN. PSYCHOL. 459, 475 (2009).

<sup>94</sup> *Graham*, 130 S. Ct. at 2036–37 (Roberts, C.J., concurring); see also *id.* at 2042 (arguing that "Some crimes are so heinous, and some juvenile offenders are so highly culpable, that a sentence of life without parole may be entirely justified under the Constitution.").

<sup>95</sup> *Id.* at 2039. For example, the Ninth Circuit, in *Harris v. Wright*, rejected a fifteen-year-old juvenile's proportionality challenge to a mandatory LWOP sentence: "Youth has no obvious bearing on this problem: If we can discern no clear line for adults, neither can we for youths. Accordingly, while capital punishment is unique and must be treated specially, mandatory life without parole is, for young and old alike, only an outlying point on the continuum of prison sentences." 93 F.3d 581, 585

previous non-capital proportionality decisions that defined crime seriousness primarily on the basis of the harm caused.<sup>96</sup> Although he characterized Graham's LWOP sentence as grossly disproportionate,<sup>97</sup> he did not identify what factors distinguish it from other youths' nonhomicide crimes in which an LWOP might be imposed.<sup>98</sup>

Justice Thomas' dissent criticized the *Graham* majority for repudiating the Court's "death is different" jurisprudence<sup>99</sup> and for adopting a categorical prohibition of a non-capital sentence.<sup>100</sup> He rejected the conclusion that all youths always lack the culpability to warrant an LWOP sentence and argued that trial courts could individualize and balance the seriousness of a crime with a youth's diminished responsibility.<sup>101</sup> He noted the anomaly of barring juvenile LWOPs for nonhomicide crimes, but leaving "intact state and federal laws that permit life-

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(9th Cir. 1996). Although Chief Justice Roberts asserted that the Court's prior proportionality analyses included consideration of the "offender's mental state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history," these factors do not necessarily address the culpability of the actor. *Graham*, 130 S. Ct. at 2037 (Roberts, C.J., concurring). Rather, they deal with *mens rea*, harm, or risk. *Mens rea*—the intent or mental state necessary to establish criminal liability—requires only knowledge of "right from wrong" and defendants may assert the lack of such knowledge with an infancy or insanity defense. All of the youths in *Roper*, *Graham*, and *Miller/Jackson* possessed the *mens rea*—i.e., knowledge of wrongfulness—necessary to find them guilty of a crime. Significantly, these cases added consideration of culpability—i.e. normative judgment about blameworthiness—for youths who otherwise meet the minimum threshold of *mens rea* for criminal liability. See *infra* notes 140–155 and accompanying text.

<sup>96</sup> See *supra* notes 60–65 and accompanying text.

<sup>97</sup> *Graham*, 130 S. Ct. at 2041 (Roberts, J., concurring) (noting that "Florida is an outlier in its willingness to impose sentences of life without parole on juveniles convicted of nonhomicide crimes.").

<sup>98</sup> See, e.g., Frase, *supra* note 60, at 54 (noting that "Justice Roberts's concurrence continued to apply a standard of 'gross disproportionality' without saying what that means—disproportionate relative to what?").

<sup>99</sup> Justice Thomas objected that:

Until today, the Court has based its categorical proportionality rulings on the notion that the Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are "most deserving of execution." . . . Today's decision eviscerates that distinction. "Death is different" no longer. The Court now claims not only the power categorically to reserve the "most severe punishment" for those the Court thinks are "the most deserving of execution," but also to declare that "less culpable" persons are categorically exempt from the "second most severe penalty."

<sup>100</sup> *Graham*, 130 S. Ct. at 2046–47 (Thomas, J., dissenting). Justice Thomas complained that the majority's reinvigorated non-capital proportionality analyses "impose[s] a categorical proportionality rule banning life-without-parole sentences not just in this case, but in every case involving a juvenile nonhomicide offender, no matter what the circumstances."

<sup>101</sup> *Id.* at 2055 (arguing that "The integrity of our criminal justice system depends on the ability of citizens to stand between the defendant and an outraged public and dispassionately determine his guilt and the proper amount of punishment based on the evidence presented.").

without-parole sentences for juveniles who commit homicides.”<sup>102</sup> He characterized this as disproportionality based on categories of crimes rather than characteristics of offenders,<sup>103</sup> an inconsistency the Court would later address in *Miller and Jackson*.

#### IV. *MILLER V. ALABAMA AND JACKSON V. HOBBS*: “CHILDREN ARE DIFFERENT”

Forty-two states permit judges to impose LWOP sentences on adults or juveniles convicted of murder.<sup>104</sup> In twenty-nine states, the LWOP sentence is mandatory.<sup>105</sup> Mandatory sentences preclude individualized culpability evaluations and equate the criminal responsibility of juveniles with adults.<sup>106</sup> Courts rarely invalidate juvenile LWOP sentences<sup>107</sup> and most reject juveniles’

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 2055–56 (objecting that “the Court’s conclusion that life-without parole sentences are ‘grossly disproportionate’ for juvenile nonhomicide offenders in fact has very little to do with its view of juveniles, and much more to do with its perception that ‘defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.’”); *see also* Wallace, *supra* note 76, at 59 (arguing that “the very essence of *Graham*’s reasoning should also preclude life without parole even for juvenile murderers . . . [B]y stating that juveniles are less culpable than adults[, t]he Court’s reasoning does not distinguish between the *non-homicide* [sic] and *homicide* juvenile offender . . .”).

<sup>104</sup> AMNESTY INT’L & HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 25 n.44 (2005), available at <http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf> (listing states’ LWOP sentencing provisions).

<sup>105</sup> *Id.*

<sup>106</sup> Defining a crime’s seriousness primarily on the basis of the harm caused and the defendant’s mens rea—knowledge of wrongfulness to cause that harm—precludes any individualized consideration of culpability or diminished responsibility. *See In re Stanford*, 537 U.S. 968, 969 (2002) (Stevens, J., dissenting) (advocating proportionality analyses that include an evaluation of the offender’s culpability); Brink, *supra* note 30, 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 27, 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.”).

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

<sup>107</sup> *See, e.g., Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968) (prohibiting life sentence for fourteen-year-old convicted of rape because “[t]he intent of the legislature in providing a penalty of life imprisonment without benefit of parole . . . was to deal with dangerous and



pleas to consider youthfulness as a mitigating factor.<sup>108</sup> Although *Roper* treated youthfulness as a categorical mitigating factor, many trial judges treat it as an aggravating factor when they sentence juvenile murderers.<sup>109</sup> Even if LWOP

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incurable individuals who would be a constant threat to society. We believe that incorrigibility is inconsistent with youth.”); *Naovarath v. State*, 779 P.2d 944, 947 (Nev. 1989) (finding that LWOP sentence imposed on thirteen-year-old convicted of murder violated state constitution provisions against cruel and unusual punishment, but granting only limited right to be considered for parole eligibility in the distant future); *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 disproportionate 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”).

<sup>108</sup> See, e.g., *Tate v. State*, 864 So.2d 44, 54 (Fla. Dist. Ct. App. 2003) (rejecting the argument that “a life sentence without the possibility of parole is cruel or unusual punishment on a twelve-year-old child . . .”); *Edmonds v. State*, 955 So.2d 864, 895–97 (Miss. Ct. App. 2006) (approving an LWOP sentence imposed on a youth convicted of murder committed at thirteen years of age); *State v. Standard*, 569 S.E.2d 325, 329 (S.C. 2002) (upholding a “two-strike” LWOP sentence imposed on a fifteen-year-old convicted of burglary based on his prior juvenile conviction for a serious felony, a sentence presumably invalid after *Graham*); *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); Paul G. Morrissey, *Do the Adult Crime, Do the Adult Time: Due Process and Cruel and Unusual Implications for a 13-Year-Old Sex Offender Sentenced to Life Imprisonment in State v. Green*, 44 VILL. L. REV. 707, 738 (1999); AMNESTY INT’L & HUMAN RIGHTS WATCH, *supra* note 104, at 1 (noting that when courts sentence children as adults, the punishment is all too often no different from that given to adults).

<sup>109</sup> See Donna Bishop & Charles Frazier, *Consequences of Transfer, in* CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 227, 236–37 (Jeffrey Fagan & Franklin E. Zimring eds. 2000) (comparing the sentences imposed on youths transferred to criminal courts with those of adults and noting that “transferred youths are sentenced *more* harshly, both in terms of the probability of receiving a prison sentence and the length of the sentences they receive. In other words, we see no evidence that criminal courts recognize a need to mitigate sentences based on considerations of age and immaturity.”); Megan C. Kurlychek & Briand D. Johnson, *Juvenility and Punishment: Sentencing Juveniles in Adult Criminal Court*, 48 CRIMINOLOGY 725 (2010) (reporting that judges sentenced waived juveniles more harshly than similar young adult offenders in four states); David S. Tanenhaus & Steven A. Drizin, *Owing to the Extreme Youth of the Accused’: The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 665 (2003) (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.”).

Youths convicted of murder are more likely to enter prison with LWOP sentences than are adults convicted of murder. AMNESTY INT’L & HUMAN RIGHTS WATCH, *supra* note 104, 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 towards children who

sentences are not mandatory, judges can impose consecutive terms that create functional LWOP sentences.<sup>110</sup>

In 2009, more than 2,500 people were serving LWOP sentences for crimes they committed as children.<sup>111</sup> The number of juveniles serving life sentences and lengthy consecutive terms is much larger.<sup>112</sup> Most juveniles who received an LWOP sentence had no prior adult or juvenile convictions.<sup>113</sup> Although states may not execute a felony murderer who did not kill or intend to kill,<sup>114</sup> more than one-quarter of LWOP sentences imposed on juveniles were for a felony murder, such as the defendant in *Jackson*.<sup>115</sup>

The Court in *Miller v. Alabama* and *Jackson v. Hobbs* extended *Roper* and *Graham* to their logical conclusion and banned mandatory LWOP sentences for youths convicted of murder.<sup>116</sup> Justice Kagan responded to the claim in Justice

commit murder than adults,” and that “age has not been much of a mitigating factor in the sentencing of youth convicted of murder”); HUMAN RIGHTS WATCH, *supra* note 92, at 4 (reporting that “in more than half the cases where there was an adult co-defendant, the adult received a lower sentence than the young person who was sentenced to life without parole.”).

<sup>110</sup> 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. 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 *Roper v. Simmons* and emphasized the clear difference between death and lesser sentences); *Hawkins v. Hargett*, 200 F.3d 1279, 1284 (10th Cir. 1999) (upholding a 100-year sentence imposed on a thirteen-year-old juvenile for burglary, rape, and robbery.).

<sup>111</sup> See, e.g., KENNETH ROTH ET AL., HUMAN RIGHTS WATCH WORLD REPORT 538 (2009) (estimating 2,502 youths serving LWOP sentences for crimes committed while younger than eighteen years of age), available at <http://www.hrw.org/en/node/79365>); HUMAN RIGHTS WATCH, *supra* note 92, at 2 (reporting that “The number of youth sentenced to life without parole in the US has risen to 2,570”); ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 17–25 (2009), available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_noexitseptember2009.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf) (summarizing number, location, and ethnic composition of offenders serving life sentences for crimes committed as juveniles).

<sup>112</sup> See *id.* at 3, 17 (reporting that 6,807 juveniles serving life with the possibility of parole sentences).

<sup>113</sup> *Id.* at 31. More than half (59%) of juveniles received an LWOP sentence for their first-ever conviction. AMNESTY INT’L & HUMAN RIGHTS WATCH, *supra* note 104, at 1.

<sup>114</sup> *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (holding the death penalty unconstitutional when imposed on felony-murder defendant who did not kill or intend to kill).

<sup>115</sup> AMNESTY INT’L & HUMAN RIGHTS WATCH, *supra* note 104, at 27–28; HUMAN RIGHTS WATCH, *supra* note 92, at 4 (reporting that nearly half of youths sentenced to LWOP did not actually commit the murder). In Michigan, courts convicted nearly half the juveniles serving LWOP sentences as accessories rather than as principals. DEBORAH LABELLE, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 4 (2004), available at [www.aclumich.org/pubs/juvenilelifers.pdf](http://www.aclumich.org/pubs/juvenilelifers.pdf).

<sup>116</sup> *Miller/Jackson* reaffirmed *Roper* and *Graham*’s constitutional premise that immaturity, susceptibility to peer influences, and transitional personality development reduced youths’ culpability and warranted less severe punishment than adults:

Thomas' *Graham* dissent that *Graham* rested on categories of crimes rather than characteristics of offenders, emphasizing that "none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific."<sup>117</sup>

*Miller/Jackson* invoked another line of death penalty cases that barred mandatory capital sentences and required individualized culpability assessments.<sup>118</sup> Mandatory death sentences precluded consideration of the crime, the offender, and relevant mitigating circumstances.<sup>119</sup> *Miller/Jackson* invoked those precedents to require individualized culpability assessments prior to imposing an LWOP sentence.<sup>120</sup> Mandatory LWOP sentences prevent the sentencing judge from

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Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." . . . First, children have a "lack of maturity and underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk taking. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have "limited contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."

*Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (citations omitted); *see also, supra* notes 30–53 and accompanying text (reviewing developmental psychological research bearing on adolescents' criminal responsibility).

<sup>117</sup> *Miller*, 132 S. Ct. at 2465. *Roper* barred the death penalty for all children, and *Graham* equated a nonhomicide juvenile's LWOP sentence with the death penalty. *Id.* at 2466 (noting that *Graham* "viewed this ultimate penalty for juveniles as akin to the death penalty, [and] we treated it similarly to that most severe punishment.").

<sup>118</sup> *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (holding that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense"). *Woodson* condemned "[A] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense [which] excludes . . . the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass . . ." *Id.*

<sup>119</sup> *See Sumner v. Shuman*, 483 U.S. 66, 74 (1987) (requiring the sentencing authority to consider mitigating circumstances relative to the offense and the defendant as an individual); *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (requiring "reasoned moral response" that reflects offender's individual culpability).

<sup>120</sup> *Miller*, 132 S. Ct. at 2463 (postulating that "[t]he concept of proportionality is central to the Eighth Amendment," and precludes "sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty.") Justice Kagan emphasized that "children are constitutionally different from adults for purposes of sentencing" and invoked the Court's death penalty jurisprudence to require "individualized sentencing for defendants facing the most serious penalties." *Id.* at 2464, 2460. She noted that "In those cases, we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Id.* at 2463; *see, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978).

considering youthfulness or other mitigating factors and thereby disproportionately equate juveniles' and adults' culpability.<sup>121</sup> *Miller/Jackson* asserted that once judges conducted an individualized culpability assessment and properly considered youths' generic diminished responsibility, there would be very few occasions in which to impose an LWOP sentence.<sup>122</sup>

Justice Thomas' dissent argued that *Harmelin v. Michigan* had upheld a mandatory LWOP sentence for an adult without requiring individualized sentencing.<sup>123</sup> Justice Kagan responded that a sentencing scheme that was valid for adults could still violate the constitution when applied to children. "We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children . . . So if (as *Harmelin* recognized) 'death is different,' children are different too."<sup>124</sup> Chief Justice Roberts argued that no national consensus against mandatory LWOP sentences existed because the majority of states approved the practice for adults and juveniles convicted of murder.<sup>125</sup> Justice Kagan asserted that *Miller/Jackson* did not absolutely preclude an LWOP sentence for a juvenile murderer, but only required its individualized application after taking into account the youthfulness of the offender.<sup>126</sup> Individualized

<sup>121</sup> *Miller*, 132 S. Ct. at 2467. "Such mandatory penalties, by their nature, preclude a sentence from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."; see also *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (requiring sentencer to consider "the mitigating qualities of youth."). *Miller/Jackson* emphasized that

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

*Miller*, 132 S. Ct. at 2468. The Court noted that the fifteen jurisdictions in which judges have discretion to impose LWOP sentences on juveniles only accounted for 15% of youths, whereas the 29 jurisdictions in which LWOP is mandatory accounted for 85% of all youths sentenced. *Id.* at 2471–72 n.10.

<sup>122</sup> *Id.* at 2469 (noting that "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."); see also, *id.* at 2471–72 n.10 (observing that "when given the choice, sentencers impose life without parole on children relatively rarely.").

<sup>123</sup> *Id.* at 2485–86 (Thomas, J., dissenting).

<sup>124</sup> *Id.* at 2470 (majority opinion); see also *id.* at 2465 (noting that *Roper* and *Graham* invalidated punishments for children that could be imposed on adults).

<sup>125</sup> *Id.* at 2479 (Roberts, C.J., dissenting).

<sup>126</sup> *Id.* at 2471 (majority opinion) (noting that "[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime . . . [but] mandates only that a sentence follow a

assessment avoided the danger that juvenile waiver statutes and criminal sentencing provisions could produce more severe outcomes than the legislature intended.<sup>127</sup>

Justice Breyer filed a separate concurrence in *Jackson* because fourteen-year-old Jackson was convicted of felony murder and received a mandatory LWOP sentence as an accomplice rather than as the shooter. The Court's felony-murder decisions limited the death penalty to those who killed or intended to kill.<sup>128</sup> Because *Graham* recognized the "twice diminished" moral culpability of youths "who do not kill, intend to kill, or foresee that life will be taken,"<sup>129</sup> Justice Breyer reasoned that a juvenile who neither killed nor intended to kill is no more culpable than a youth convicted of a nonhomicide felony.<sup>130</sup> As a result, at Jackson's

certain process—considering an offender's youth and attendant characteristics before—imposing a particular penalty.”).

<sup>127</sup> *Id.* at 2472 (noting that the interaction of independent statutes—transfer to adult court and penalties for people convicted in criminal court—made it “impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice.)”). Justice Kagan observed:

[m]ost States do not have separate penalty provisions for those [waived] juvenile offenders. Of the 29 jurisdictions mandating life without parole for children, more than half do so by virtue of generally applicable penalty provisions, imposing the sentence without regard to age. And indeed, some of those states set no minimum age for who may be transferred to adult court in the first instance, thus applying life without parole mandates to children of any age—be it 17 or 14 or 10 or 6.

*Id.* at 2473. Even in jurisdictions that conduct judicial waiver hearings, the issues of waiver—amenability to treatment—and the age limits of juvenile court jurisdiction pose different questions than the amount of punishment a youth convicted of murder deserved. *Id.* at 2474 (noting that “the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing,” and judges confront an extreme forced choice between lenient sanctions as a juvenile and standard punishment as an adult).

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

In many jurisdictions, transfer is automatic for youths charged with murder. *See, e.g.,* Barry C. Feld and Donna M. Bishop, *Transfer of Juveniles to Criminal Court* in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 801, 818–22 (Barry C. Feld & Donna M. Bishop eds., 2012) (describing waiver practices without individual assessments); PATRICK GRIFFIN, SEAN ADDIE, BENJAMIN ADAMS & KATHY FIRESTINE, U.S. DEP'T OF JUSTICE, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 5 (2011).

<sup>128</sup> *See* *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (requiring consideration of felony murderer's “intentions, expectations, and actions.”); *Tison v. Arizona*, 481 U.S. 137 (1986); *Lockett v. Ohio*, 438 U.S. 586 (1978).

<sup>129</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010).

<sup>130</sup> *Id.* (finding that children “who [did] not kill or intend to kill” have a “twice diminished” culpability based on their age and the nature of their crime). Justice Breyer asserted that “[g]iven *Graham's* reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim. . . . [W]here the juvenile neither kills nor intends to kill, both features emphasized in *Graham* as

resentencing hearing, the trial judge could not impose an LWOP sentence.

#### V. YOUTH DISCOUNT: AGE-AS-A-PROXY FOR REDUCED CULPABILITY

*Graham* gave the 123 youths serving LWOP sentences for nonhomicide crimes very limited relief. It required states to provide them with “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,”<sup>131</sup> but did not define states’ responsibility to provide youths with resources with which to change or identify when they would become eligible for parole.<sup>132</sup> Does a “meaningful opportunity” to change require states to provide rehabilitative programs?<sup>133</sup> Would a first parole release hearing in forty years provide “some meaningful opportunity to obtain release”? *Graham* enjoined the states to develop “the means and mechanisms for compliance”<sup>134</sup> and emphasized that parole review would not guarantee eventual release.<sup>135</sup>

*Miller/Jackson* requires individualized culpability assessments and recognizes

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extenuating apply.” *Miller*, 132 S. Ct. at 2475–76 (Breyer, J., concurring).

<sup>131</sup> *Graham*, 130 S. Ct. at 2030; see also Nilsen, *supra* note 86, at 69 (arguing that “[t]he state is required to give juveniles a chance to reform themselves and must revisit the life sentence in something akin to a parole hearing.”).

<sup>132</sup> See, e.g., *Graham*, 130 S. Ct. at 2057 (Thomas, J., dissenting) (identifying several issues raised, but unresolved by the majority opinion. “[W]hat, exactly, does . . . a ‘meaningful’ opportunity [to obtain release] entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions . . .”); Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT’G REP. 75, 76 (2010) (noting that *Graham* requires “only the opportunity to obtain release, not a guarantee of eventual release. Much will depend on the nature of parole review as established by the states, and on the decision makers in individual cases . . .”); Wallace, *supra* note 76, at 66 (summarizing questioning during oral argument in which *Graham*’s counsel conceded that parole eligibility after 40 years or grant of parole to 1 out of 20 applicants could be constitutional).

<sup>133</sup> See, e.g., Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 12 (2011) (arguing that states “must employ a rehabilitative model for incarceration of juveniles” in separate youth prisons to realistically comply with *Graham*’s requirement of “meaningful opportunity” for reform).

<sup>134</sup> *Graham*, 130 S. Ct. at 2030. The Court adopted a similar strategy in *Atkins* to remit to states the responsibility to assess whether and how defendants’ mental retardation affected their death-eligibility. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>135</sup> *Graham*, 130 S. Ct. 2011, 2034 (2010). The Court asserted:

while the Eighth amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

*Id.* at 2030.

the mitigating role of youthfulness.<sup>136</sup> However, neither decision provides legislatures, judges, or parole boards with any practical guidance as to how to incorporate the mitigating qualities of youth into sentencing or release decisions. State courts are divided whether to apply *Miller/Jackson* retroactively to the thousands of youths who previously received mandatory LWOP sentences for murder.<sup>137</sup> State legislatures are scrambling to revise sentencing laws to convert mandatory LWOP statutes to life *with* the possibility of parole,<sup>138</sup> to impose minimum terms of years,<sup>139</sup> or to specify mitigating factors in sentencing

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<sup>136</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (instructing judges “to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”).

<sup>137</sup> To preserve finality of judgments, the Court, in *Teague v. Lane*, restricted the retroactive applicability of constitutional rulings to “watershed rules of criminal procedure.” 489 U.S. 288, 288 (1988). The Court gives retroactive effect only to rules that safeguard the accuracy of convictions and “implicate the fundamental fairness of the trial.” *Id.* at 312. In the context of death penalty decisions, the Court, in *Ring v. Arizona*, applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and held that when imposing a capital sentence, a jury rather than a judge must find the existence of aggravating factors beyond a reasonable doubt. 536 U.S. 584, 589 (2002). However, in *Schriro v. Summerlin*, the Court characterized *Ring* as a procedural ruling and declined to give it retroactive application. 542 U.S. 348 (2004). See generally Katharine A. Ferguson, *The Clash of Ring v. Arizona and Teague v. Lane: An Illustration of the Inapplicability of Modern Habeas Retroactivity Jurisprudence in the Capital Sentencing Context*, 85 B.U. L. REV. 1017 (2005).

State courts are divided whether to apply *Miller/Jackson* retroactively to offenders who received mandatory LWOP sentences as juveniles. Compare, e.g., *Geter v. State*, No. 3D12 1736, 2012 WL 4448860, at \*3 (Fla. 3d DCA Sept. 27, 2012) (holding that *Miller* was “not of fundamental significance” but, instead, was “a procedural change in law” regarding criminal sentencing, and, thus, could not be applied retroactively); *People v. Carp*, No. 307758, 2012 WL 5846553 (Mich. Ct. Ap. 2012) (following *Teague* and holding that Michigan law does not apply retroactively to cases on collateral review because the decision is procedural and does not comprise a watershed ruling), with *State v. Simmons*, 99 So.3d 28 (La. 2012) (remanding mandatory LWOP juvenile for reconsideration and resentencing based on *Miller*); *State v. Lockheart*, 820 N.W.2d 769 (Iowa Ct. App. 2012) (remanding for resentencing in accordance with *Miller* in which the sentencing court shall “have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”); *People v. Williams*, 982 N.E.2d 181, 196–97 (Ill. App. 2012) (holding that “[U]nder the proportionate punishment analysis in *Miller*, defendant was denied a ‘basic “precept of justice”’ by not receiving any consideration of his age from the circuit court in sentencing,” and finding that a new rule applies retroactively “where it has made a substantial or substantive change in the law . . . *Miller* not only changed procedures, but also made a substantial change in the law in holding under the Eighth Amendment that the government cannot constitutionally apply a mandatory sentence of life without parole for homicides committed by juveniles.”); *People v. Morfin*, 981 N.E.2d 1010 (2012) (same).

<sup>138</sup> See, e.g., N.C. GEN. STAT. ANN. § 15A-1340.19A (West 2012) (providing that a juvenile convicted of first degree felony murder shall be sentenced to “life imprisonment *with* parole” and become eligible for parole release after a minimum of 25 years imprisonment) (emphasis added). A juvenile convicted of murder may be sentenced to life *without* parole after consideration of mitigating factors that include: Age at the time of the offense; Immaturity; Ability to appreciate the risks and consequences of the conduct; Intellectual capacity; Prior record; Mental health; Familial or peer pressure; Likelihood of rehabilitation; and any other mitigating factor. *Id.* at § 15A-1340.19B(c).

<sup>139</sup> See, e.g., CAL. PENAL CODE § 1170(2)(B) (West 2013) (allowing juvenile sentenced to

guidelines.<sup>140</sup> To circumvent a *Miller/Jackson* resentencing hearing, the Iowa Governor commuted mandatory LWOP sentences of thirty-eight juveniles to mandatory sixty-year prison terms instead.<sup>141</sup>

Rather than try to weigh the role of youthfulness on a discretionary basis, states should formally incorporate an offender's age as a mitigating factor in sentencing statutes.<sup>142</sup> The Court's jurisprudence of youth recognizes that juveniles who produce the same harms as adults are not their moral equals and do not deserve the same consequences for their immature decisions.<sup>143</sup> *Roper*, *Graham*, and *Miller/Jackson* endorse youthfulness as a mitigating factor that applies to capital and non-capital sentences.<sup>144</sup>

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LWOP to file petition for resentencing after 15 years and instructing court to consider juvenile's involvement in rehabilitation programs, showing of remorse, and the like); *Id.* at § 1170 (2)(J) (West 2013) (applying statute retroactively).

<sup>140</sup> See, e.g., ALA. CODE § 13A-5-51 (2013) (specifying generic mitigating factors for judge to consider when sentencing juveniles convicted of capital crimes).

<sup>141</sup> Douglas A. Berman, *Reviewing Just Some of the Miller Meshugas in Some States*, SENT. L. & POL'Y 30, (Nov. 2012), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2012/11/reviewing-just-some-of-the-miller-meshugas-in-some-states.html](http://sentencing.typepad.com/sentencing_law_and_policy/2012/11/reviewing-just-some-of-the-miller-meshugas-in-some-states.html). The strategy was to avoid the individualized resentencing hearing order in *State v. Lockheart*, 820 N.W.2d 769 (Iowa Ct. App. 2012) (requiring resentencing and consideration of mitigating circumstances).

<sup>142</sup> As the Court repeatedly has recognized, [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

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

<sup>143</sup> See Scott, *Lessons*, *supra* note 40, 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, *Penal Proportionality*, *supra* note 59, 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."); ZIMRING, *AMERICAN YOUTH VIOLENCE*, *supra* note 30, at 144 ("[W]hen 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."); Scott & Grisso, *supra* note 30, 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."); Victor Streib & Bernadette Schrempf, *Life Without Parole for Children*, 21 CRIM. JUST. 4, 12 (Winter 2007) ("[Adolescents'] crimes may be the same as those of adults, but these offenders simply are not adults and should not be sentenced as if they were.").

<sup>144</sup> *Miller*, 132 S. Ct. at 2482 (Roberts, C.J. dissenting) (noting that "[t]he principle behind today's decisions seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences



*Roper* eschewed individualized culpability assessments and adopted a categorical sentencing rule 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.”<sup>145</sup> The Court feared that a judge or jury could not properly consider the mitigating quality of youthfulness when confronted with a hideous crime.<sup>146</sup> *Roper* and *Graham* based their categorical holding on the inability of clinicians or jurors to distinguish between most juveniles who are immature and a rare more culpable youth.<sup>147</sup> They adopted a categorical rule despite their recognition that juveniles’ culpability could vary.<sup>148</sup> The Court reasoned that notwithstanding individual variability, a rule that 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.”<sup>149</sup> *Roper* and *Graham*’s categorical

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for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive.”).

<sup>145</sup> *Roper v. Simmons*, 543 U.S. 551, 572–73 (2004).

<sup>146</sup> *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.”). *Emens*, *supra* note 21, at 87 (“Even if there are a few juveniles who could be among the worst of society’s offenders, jurors will make errors of unacceptable frequency and magnitude. For this reason, we cannot trust ourselves to decide that a child is culpable enough to be punished as an adult . . .”).

<sup>147</sup> *See Roper*, 543 U.S. at 573 (“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.”).

<sup>148</sup> *Id.* at 574.

The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

*Id.* 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. *See Brink*, *supra* note 30, 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 30, at 148 (“The range of individual variation among youths of the same age is notoriously large.”); Fagan, *supra* note 9, 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 . . .”).

<sup>149</sup> *Roper*, 543 U.S. at 573 (“If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty.”).

rule and *Miller/Jackson*'s affirmation of the mitigating qualities of youthfulness reflect the judgment that youths who cause the same harm still deserve less severe punishment because of their reduced blameworthiness.<sup>150</sup>

Chief Justice Roberts in *Graham*<sup>151</sup> and the dissents in *Roper*, *Graham*, and *Miller/Jackson* advocated individualized culpability assessments rather than a categorical rule.<sup>152</sup> Despite the Court's preference for individualized discretion, a categorical rule of mitigation is preferable for two reasons.<sup>153</sup> Culpability is not an objective fact, but a normative conclusion about criminal responsibility. As a result, judges cannot define or identify what constitutes the adult level culpability among offending youths that deserves adult punishment.<sup>154</sup> Clinicians lack tools with which to assess impulsivity, foresight, and preference for risk, and any metric with which to equate those qualities with criminal responsibility.<sup>155</sup> The inability

<sup>150</sup> 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, *Blaming Youth*, *supra* note 27, 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: A GENERAL THEORY OF THE CRIMINAL LAW 548, 574–92 (1997); Morse, *supra* note 54, at 405 (“The criteria for responsibility are behavioral and normative, not empirically demonstrable states of the brain.”); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15 (1998); Scott & Steinberg, *Blaming Youth*, *supra* note 27, at 801 (“Because these developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults under conventional criminal law conceptions of mitigation.”); Fagan, *supra* note 9, 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.”).

<sup>151</sup> 130 S. Ct. at 2042 (Roberts, C.J., concurring) (cautioning that “[o]ur system depends upon sentencing judges applying their reasoned judgment to each case that comes before them.”).

<sup>152</sup> Some commentators also endorsed individualized assessments. See, e.g., ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 30, at 149–52 (arguing that age is an incomplete proxy for culpability and proposing individualized culpability assessments without specifying the factors judges would consider); Cepparulo, *supra* note 16, at 253 (arguing against mandatory LWOPs for juveniles and proposing that “[n]o juvenile should be given a punishment as solemn as LWOP without an individual assessment of proportionality in relation to the crime committed.”); Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309 (2012) (criticizing *Graham* for failing to recognize that some nonhomicide offenders commit horrific crimes that deserve LWOP sentences).

<sup>153</sup> Brink, *supra* note 30, 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).

<sup>154</sup> See *Stanford v. Kentucky*, 492 U.S. 361, 396–99 (Brennan, J., dissenting); AMNESTY INT’L & HUMAN RIGHTS WATCH, *supra* note 104, 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 37, at 62 (observing that “there are no reliable and valid measures” of culpability that accurately can distinguish adolescents from adults).

<sup>155</sup> *Roper v. Simmons*, 543 U.S. 551, 573 (2004); ZIMRING, AMERICAN YOUTH VIOLENCE,

to define and measure immaturity, or to equate it with culpability, would introduce a systematic bias toward over-punishing the vast majority of less blameworthy youths.<sup>156</sup> The law uses age-based categories to approximate the maturity required for other activities—e.g., voting, driving, and consuming alcohol—because it is impossible or inefficient to try to make individualized judgments about maturity.<sup>157</sup> A categorical rule controls for the inability of judges or juries to fairly balance the abstract idea of youthfulness against the aggravating reality of a horrific crime.<sup>158</sup>

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*supra* note 30, 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.”); Scott & Steinberg, *Blaming Youth*, *supra* note 27, 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.”); Elizabeth Cauffman, *Aligning Justice System Processing with Developmental Science*, 11 CRIMINOLOGY & PUB. POL’Y 751, 754 (2012) (arguing that “[a]lthough tailoring sentencing and treatment to the specific characteristics of each offender is a worthwhile goal, it is also a highly elusive one. Research has shown that clinical judgment or forensic evaluation is fallible. . . [T]he degree of uncertainty when applied to a specific individual remains large.”).

<sup>156</sup> See, e.g., Fagan, *supra* note 9, 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 in Atkins v. Virginia Will Affect the Execution of Juvenile Offenders*, 17 BYU J. PUB. L. 451, 479 (2003) (noting that when the Court requires individualized culpability assessments it raises difficult definitional questions: “What is the ‘normal’ adult level of culpability? How do we measure it?”).

<sup>157</sup> See, e.g., *Roper*, 543 U.S. at 581–86 (providing statutory appendices listing limits on juveniles’ rights to vote, marry, and serve on a jury as a result of immaturity); FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 35–36 (1982); Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law’s View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 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); Zimring, *Penal Proportionality*, *supra* note 59, at 287; Scott, *supra* note 32, at 1608, 1611.

<sup>158</sup> *Stanford v. Kentucky*, 492 U.S. 361, 398 (1988) (Brennan, J., dissenting) (“It is thus unsurprising that individualized consideration at transfer and sentencing has not in fact ensured that

*Roper* rightly feared that jurors could not distinguish between a youth's diminished responsibility for causing the harm and the harm itself. Although *Miller/Jackson* requires individualized culpability assessments, the Court did not identify any factors to indicate the heightened culpability that would justify an LWOP sentence.

There exists a more straightforward, objective sentencing policy alternative to subjective speculation about youths' culpability. A categorical Youth Discount would provide adolescents with substantially reduced sentences based on age-as-a-proxy for culpability.<sup>159</sup> The Youth Discount would give the largest sentence reductions to the youngest, least mature offenders based on a sliding scale of diminished responsibility.<sup>160</sup> On a sliding scale keyed to developmental differences and diminished responsibility, the maximum sentence that a fourteen-year-old offender received would be substantially reduced from that which an adult would receive—e.g. no more than twenty or twenty-five percent the length. The

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juvenile offenders lacking an adult's culpability are not sentenced to die."'). *Roper*, 543 U.S. at 573 (recognizing 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.'). The heinousness of a crime almost invariably trumped jurors' assessments of a youth's immaturity. Brink, *supra* note 30, at 1581; Simona Ghetti & Allison D. Redlich, *Reactions to Youth Crime: Perceptions of Accountability and Competency*, 19 BEHAV. SCI. & L. 33, 45–47 (2001).

<sup>159</sup> BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 315–21 (1999) (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*]; Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 520–528 (1987) (arguing that proportional sentencing requires recognition of youths' reduced culpability). *But see* Joseph L. Hoffman, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L. J. 229, 233 (1989) (describing age as an imperfect proxy for a complex of factors, "includ[ing] maturity, judgment, responsibility, and the capability to assess the possible consequences of one's conduct," that constitute culpability); ZIMRING, *AMERICAN YOUTH VIOLENCE*, *supra* note 30, at 150 (objecting to categorical youth discount because "age is an incomplete proxy for levels of maturity during the years from age 12 to 18."). Zimring argues that "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.*

<sup>160</sup> Feld, *Abolish*, *supra* note 159, at 118–21; *see also* Model Penal Code § 6.11A(a) cmt. c (providing that "offenders under 18 should be judged less blameworthy for their criminal acts than older offenders—and age-based mitigation should increase in correspondence with the youthfulness of individual defendants."); ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE*, 231 (2008) (arguing for sentences proportionate to the seriousness of the offense and culpability of the offender and insisting that "immaturity and the harm of the offense should count, such that younger offenders should be punished less severely than older youths . . ."); Scott & Steinberg, *Blaming Youth*, *supra* note 27, at 837 ("[A] systematic sentencing discount for young offenders in adult court[] might satisfy the demands of proportionality."); *See also* Zimring, *Penal Proportionality*, *supra* note 59, 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").

maximum sentence a mid-adolescent could receive would be no more than half the adult length. The substantially deeper discounts for the youngest offenders correspond with their greater developmental deficits in judgment, self-control, appreciation of consequences, and the like.<sup>161</sup>

A Youth Discount recognizes that same-length sentences exact a greater penal bite from younger offenders than older ones.<sup>162</sup> A judge would take the Youth Discount off of the appropriate sentence that she would impose on an adult convicted of the same crime.<sup>163</sup> A Youth Discount incorporates the decreased

<sup>161</sup> Brink, *supra* note 30, at 1572 (“[A] juvenile is less responsible for her crime than her adult counterpart is for the same crime and . . . all else being equal, the younger the juvenile the less responsible she is for her crime.”); Zimring, *Penal Proportionality*, *supra* note 59, 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.”).

<sup>162</sup> The Court in *Miller/Jackson* struck down mandatory LWOP for juvenile offenders because “every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old . . .” *Miller v. Alabama*, 132 S. Ct. 2455, 2467 (2012); 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.”); Arredondo, *supra* note 53, at 19 (“Because of differences in the experience of time, any given duration of sanction will be experienced subjectively as longer by younger children.”); Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 21–22 (2002) (describing substantive quality of punishment adolescents experience in adult incarceration as far harsher than the sanctions they experience as delinquents); Feld, *Abolish*, *supra* note 159, at 112–13 (“[Y]ouths experience objectively equal punishment subjectively as more severe.”).

<sup>163</sup> Because the length of an LWOP is indeterminate, states should apply a Youth Discount to a presumptive life sentence length of about forty years—i.e. the average age at which adult murderers enter prison and their projected, albeit reduced, life expectancy. 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: An Analysis of Years of Lost Life*, 79 J. URBAN HEALTH 5 (Sep. 2002) (discussing the reduced life expectancies of prisoners in New York convicted of non-violent drug offenses). By one estimate, the average age of murderers 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 18 and 34. JAMES ALAN FOX & MARIANNE W. ZAWITZ, BUREAU OF JUST. STATS., U.S. DEP’T JUSTICE, HOMICIDE TRENDS IN THE U.S., available at <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 77.4 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, NAT. VITAL STATISTICS REP.: U.S. LIFE TABLES, 2003 3 (last modified Mar. 28, 2007), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54\\_14.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf).

likelihood of recidivism with age and the increased costs of confining geriatric inmates.<sup>164</sup>

A Youth Discount would preclude LWOP, lengthy mandatory-minimum, or virtual life sentences—e.g. lengthy consecutive terms of years.<sup>165</sup> As *Miller/Jackson* foreshadows, “occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”<sup>166</sup> Shortly after *Miller/Jackson*, the California Supreme Court in *People v. Caballero* held that a 110-year-to-life sentence imposed on a juvenile convicted of several nonhomicide offenses violated *Graham* because it did not provide “a meaningful opportunity to obtain release.”<sup>167</sup> A lengthy mandatory minimum sentence that fails to take account of the mitigating qualities of youth may violate *Miller/Jackson*’s injunction.<sup>168</sup>

<sup>164</sup> AMNESTY INT’L & HUMAN RIGHTS WATCH, *supra* note 104, at 8; LABELLE, *supra* note 115, at 22; NELLIS, *supra* note 90, at 33 (noting that before LWOP inmates grow old and die in prison, “they will require substantially greater health care and medical services. Thus, life sentences add to the rising geriatric prison population and place heavy financial burdens on states.”).

<sup>165</sup> AMNESTY INT’L & HUMAN RIGHTS WATCH, *supra* note 104, at 8 (recommending that states abolish LWOP sentences for crimes committed by juveniles); MARC MAUER ET AL., THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 32 (2004) (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”); MPC §6.11A(f) (recommending that for youth sentences, “The court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law.”); SCOTT & STEINBERG, *supra* note 160, at 246 (concluding that after *Roper*, “youths also should be excluded from the criminal sentence of Life Without Parole (LWOP).”); WALLACE, *supra* note 76, at 53 (arguing that any lengthy term of years sentence denies juvenile offender a meaningful opportunity to reenter society).

<sup>166</sup> *Miller*, 132 S. Ct. at 2469; *see also id.* at 2489 (Alito J., dissenting) (criticizing the majority for going “out of its way to express the view that the imposition of a sentence of life without parole on a ‘child’ (i.e., a murderer under the age of 18) should be uncommon.”).

<sup>167</sup> *People v. Caballero*, 282 P.3d 291 (Cal. 2012). In *Caballero*, the defendant was convicted of three counts of attempted first-degree murder plus a consecutive term for firearm enhancement, all of which were stacked consecutively to yield a sentence of 110-years-to-life. The California Supreme Court rejected the state’s claim that cumulative sentences that were not explicitly designated as life without parole did not violate *Graham*’s categorical rule with respect to juvenile nonhomicide offenders:

[S]entencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender’s natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment . . . [T]he state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.

*Id.* at 295.

In setting a date for parole eligibility, the *Caballero* Court noted that “[u]nder *Graham*’s nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile’s crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board.” *Id.*

<sup>168</sup> *See, e.g.,* Nilsen, *supra* note 86, at 69 (arguing that “[t]he expansion of an individualized

Professional organizations and most academic analysts endorse the concept of a Youth Discount.<sup>169</sup> The American Bar Association criticized LWOP sentences for juveniles and proposed shorter sentences for juveniles than those imposed on adults, formally recognized youthfulness as a mitigating factor, and recommended earlier parole release consideration.<sup>170</sup> The American Law Institute's revised Model Penal Code sentencing provisions explicitly adopted the Youth Discount. The MPC provides that when states sentence offenders convicted of crimes committed prior to the age of eighteen, "the offender's age shall be a mitigating

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

<sup>169</sup> Several academic analysts have explicitly endorsed my proposal for the Youth Discount. See, e.g., Tanenhaus & Drizin, *supra* note 109, 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."); SCOTT & STEINBERG, *supra* note 160 at 246 (concluding that "Proportionality supports imposing statutory limits on the maximum duration of adult sentences impose[d] on juveniles—a 'youth discount,' to use Feld's term."); Model Penal Code § 6.11A, Reporter's Note (acknowledging that the framework of the MPC's recommendation for "specialized sentencing rules and mitigated treatment of juvenile offenders sentenced in adult courts, owes much" to Feld's proposal for a Youth Discount—"a sliding scale of developmental and criminal responsibility . . ."); von Hirsch, *supra* note 162, at 227 (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.*

A study group funded by the National Institute of Justice determined that "[y]ouths' diminished responsibility requires mitigated sanctions to avoid permanently life-changing penalties and provide room to reform." James C. Howell, Barry C. Feld & Daniel P. Mears, *Young Offenders and an Effective Justice System Response: What Happens, What Should Happen, and What We Need to Know*, in FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 213 (Rolf Loeber and David P. Farrington eds., 2012). Following the rationale of *Roper* and *Graham*, it concluded that "[a] categorical rule of youthfulness as a mitigating factor in sentencing is preferable to individualized discretion. *Id.* at 229; DAVID P. FARRINGTON ET AL., *Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing*, 11 CRIMINOLOGY & PUB. POL'Y 729, 743 (endorsing a "maturity discount" that provides a "decrease in the severity of penalties that takes account of younger persons' lesser culpability and diminished responsibility."). A few analysts supported the dissent in *Roper* and advocated for individualized culpability assessments rather than a categorical approach. See *supra* notes 22–23 and accompanying text.

<sup>170</sup> ABA, REPORT WITH RECOMMENDATION #105C 9 (policy adopted Feb. 2008), available at [http://www.americanbar.org/content/dam/aba/migrated/leadership/2008/midyear/updated\\_reports/hundredfivec.authcheckdam.doc](http://www.americanbar.org/content/dam/aba/migrated/leadership/2008/midyear/updated_reports/hundredfivec.authcheckdam.doc).

factor, to be assigned greater weight for offenders of younger ages.”<sup>171</sup> The MPC recommends that sentencing and correctional authorities give priority to young offenders “rehabilitation and reintegration into the law-abiding community” and that judges have authority to impose blended sentences which give youths access to juvenile programs rather than to prison.<sup>172</sup>

Although a small subset of chronic offenders may pose a heightened risk of future recidivism, *Roper* observed that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”<sup>173</sup> *Graham* and *Miller/Jackson* recognized judges’ inability to identify high-risk individuals at the time of sentencing. The inability of adolescents to participate effectively in criminal proceedings compounds this difficulty. Ultimately, proportionality is a retributive concept, not a utilitarian one,<sup>174</sup> and *Roper*, *Graham*, and *Miller/Jackson* rest firmly on retributive grounds—reduced culpability—after examining and rejecting utilitarian justifications for punishment.<sup>175</sup> Accordingly, there is no reason to disregard the categorical mitigating role of youthfulness to speculatively incapacitate some young offenders who may be deemed life-course persistent offenders.<sup>176</sup>

<sup>171</sup> Model Penal Code § 6.11A (a).

<sup>172</sup> Model Penal Code § 6.11A (b) and (d). Blended sentencing provisions allow a criminal court judge to impose a juvenile sentence in lieu of a criminal disposition or to stay imposition of a criminal sentence pending successful completion of a juvenile commitment. *See generally*, Feld & Bishop, *supra* note 127, at 822–24 (explaining variations of blended sentencing provisions); Marcy Rasmussen Podkopacz & Barry C. Feld, *The Back-Door to Prison: Waiver Reform, “Blended Sentencing,” and the Law of Unintended Consequences*, 91 J. CRIM. L. AND CRIMINOLOGY 997 (2001) (describing net-widening effects of juvenile blended sentencing, but approving criminal court blended sentencing alternatives). The MPC proposes that a criminal court judge

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

Model Penal Code at §6.11A (d).

<sup>173</sup> *Roper v. Simmons*, 543 U.S. 551, 573 (2004).

<sup>174</sup> *See generally* Stinneford, *supra* note 60.

<sup>175</sup> *See supra* notes 15, 87–90 and accompanying text; *see also* Lee, *supra* note 60, at 59 (noting that the Court in *Coker v. Georgia* struck down the death penalty for rape while acknowledging that “it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so.”).

<sup>176</sup> *But see* Model Penal Code §6.11A (c) (providing that “When an offender has been convicted of a serious violent offense, and there is a reliable basis for belief that the offender presents a high risk of serious violent offending in the future, priority may be given to the goal of incapacitation . . .”). Comment c. to the MPC recognizes utilitarian sentencing goals—incapacitation—as a basis on which to override the mitigation due to adolescents’ diminished responsibility. While a small subset of serious and chronic offenders may be at heightened risk of future offending, courts lack valid or reliable bases on which to predict future dangerousness.



*Roper, Graham, and Miller/Jackson* emphasized that juveniles' personalities are more transitory and less fixed, their crimes provide less reliable evidence of "irretrievably depraved character," and "a greater possibility exists that a minor's character deficiencies will be reformed."<sup>177</sup> Because adolescence is a period of rapid growth and transition, youths will change more quickly and to a greater degree following conviction than would more hardened, older offenders.<sup>178</sup> Although rates of criminal behavior increase rapidly among males in their teenage years, rates of desistance are equally high as youths mature into their early twenties.<sup>179</sup> States should avoid the iatrogenic consequences of immediately incarcerating more malleable young offenders with adult offenders.<sup>180</sup>

A Youth Discount enables young offenders to survive serious mistakes with the possibility of a life in the future.<sup>181</sup> A Youth Discount imposes sentences that

<sup>177</sup> *Roper*, 543 U.S. at 570.

<sup>178</sup> ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 30, at 82, observes that "the high prevalence of offenses in the teen years and the rather high rates of incidence for those who offend are transitory phenomena associated with a transitional status and life period. Because some degree of criminal offending is normal for adolescents, major interventions may not be necessary to change them and punitive sanctions may be counter-productive." *Id.*

<sup>179</sup> See, e.g., HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 71 (2006) (noting that "most of the youth who reported committing an assault in the later juvenile years stopped the behavior, reporting none in the early adult years"). Criminologists have noted the phenomenon of adolescents' "spontaneous" desistance from delinquency for decades. See e.g., MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 160-63 (1972) (reporting that almost half of youths desisted after a single offense, one-third desisted after a second offense, and the seriousness of the present offense was not predictive of the next offense); PAUL E. TRACY ET AL., DELINQUENCY CAREERS IN TWO BIRTH COHORTS 104 (1990) (reporting that 42 percent of youths desisted after one offense and an additional 28 percent desisted after a second offense).

<sup>180</sup> See, e.g., Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST.: AN ANNUAL REVIEW 189 (1998) (noting that most states do not provide age-segregated dispositional facilities for youths convicted as adults); MPC §6.11A comment j. (recommending prohibition on housing juveniles in adult institutions):

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

*Id.*

DEP'T OF HEALTH AND HUMAN SERVICES, YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 118 (2001) (reporting that "young people placed in adult correctional institutions, compared to those placed in institutions designed for youths, are eight times as likely to commit suicide, five times as likely to be sexually assaulted, twice as likely to be beaten by staff, and 50 percent as likely to be attacked with a weapon."); Edward P. Mulvey & Carol A. Schubert, *Youth in Prison and Beyond*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 843, 846-51 (Barry C. Feld & Donna M. Bishop, eds., 2012) (describing adverse consequences of confining youth in adult prisons).

<sup>181</sup> See ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 30, at 89-96; Franklin E. Zimring,

hold juveniles accountable, manage the risks they pose to others, and provide them with a meaningful opportunity to reform without extinguishing their lives.<sup>182</sup> The characteristics of youth that increase their propensity for wrongdoing—immaturity and plasticity—also provide the mechanism for learning, growth, and change. The child who committed a serious crime at fourteen or fifteen years of age is a very different person than the adult incarcerated decades later.<sup>183</sup> Under a Youth Discount, young offenders eventually will return to the community and states should provide them with “a meaningful opportunity” to reform as they mature.

## VI. CONCLUSION

*Roper*, *Graham*, and *Miller/Jackson* recognized that “children are different” and provided a rationale to categorically recognize youthfulness as a mitigating factor. The Court used age-as-a-proxy-for reduced culpability because no better, more reliable or accurate bases exist on which to assess culpability or individualize sentences. The Court’s independent proportionality analyses reflect a moral judgment about how much punishment young offenders deserve. *Roper* and *Graham* recognized that clinicians, judges, or jurors cannot quantify culpability and feared that efforts to individualize sentences when no objective bases for doing so exist could introduce a systematic bias that treats youthfulness as an aggravating, rather than mitigating, factor. A substantial, categorical Youth Discount of the sentences imposed on juveniles punished as adults provides a sliding scale of severity that corresponds with the increasingly diminished responsibility of younger offenders.

The Court has reached the outer limits of what it can accomplish through interpretation of the Eighth Amendment. A Youth Discount provides a reasonable approximation of “what any parent knows”—kids are different and do stupid and dangerous things because they are kids. The specific amount by which sentences imposed on youths should be substantially discounted is a political and legislative value choice. Although some legislators may find it difficult to resist the temptation to engage in penal demagoguery,<sup>184</sup> states can achieve all of their legitimate penal goals by sentencing youths to no more than twenty or twenty-five

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*Background Paper*, in *CONFRONTING YOUTH CRIME* 27, 66–69 (1978).

<sup>182</sup> See ZIMRING, *AMERICAN YOUTH VIOLENCE*, *supra* note 30, at 81–83, 142–45; Zimring, *Penal Proportionality*, *supra* note 59, at 283–84.

<sup>183</sup> Adolescents’ personalities are in transition, and it is unjust and irrational to continue harshly punishing a fifty-or sixty-year-old person for a crime that an irresponsible child committed many decades earlier. Streib & Schrempp, *supra* note 143, 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.”).

<sup>184</sup> Barry C. Feld, *Race, Politics and Juvenile Justice*, 87 MINN. L. REV. 1447 (2003) (describing the politicization of crime policies and politicians’ use of racial code words for electoral advantage).

years for even the most serious crimes.<sup>185</sup>

It will take political courage for legislators to enact laws that recognize the diminished responsibility of serious young offenders. It will take even greater political courage when an opponent may charge a legislator with being “soft on crime.” The crime panic of the 1990s precipitated a host of “get-tough” waiver and criminal sentencing laws that produced unjust and counterproductive outcomes. The legislators who enacted them are obliged to undo the damage and adopt sensible and rational juvenile sentencing laws. The Court’s jurisprudence of youth, greater understanding of adolescent development, public support for less punitive policies,<sup>186</sup> and low crime rates may enable legislators to adopt a Youth Discount that reflects “what every parent knows.”

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<sup>185</sup> See, e.g., Model Penal Code, §6.11A (g) (providing that “[n]o sentence of imprisonment longer than [25] years may be imposed for any offense or combination of offenses. For offenders under the age of 16 at the time of commission of their offenses, no sentences of imprisonment longer than [20] years may be imposed. For offenders under the age of 14 at the time of commission of their offenses, no sentence of imprisonment longer than [10] years maybe imposed.”).

<sup>186</sup> Public opinion supports policies to rehabilitate serious young offenders to reduce future crime rather than simply to incarcerate them for longer periods. BARRY KRISBERG & SUSAN MARCHIONNA, ATTITUDES OF US VOTERS TOWARD YOUTH CRIME AND THE JUSTICE SYSTEM 3 (2007), available at [http://www.nccd-crc.org/nccd/pubs/zogby\\_feb07.pdf](http://www.nccd-crc.org/nccd/pubs/zogby_feb07.pdf) (reporting strong public support for rehabilitation as a strategy to prevent and reduce juvenile crime); Brink, *supra* note 30, 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.”); 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).