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PROPORTIONALITY AND PUNISHMENT: IMPOSING LIFE WITHOUT PAROLE ON JUVENILES

Wayne A. Logan*

The Eighth Amendment provides that 'no cruel and unusual punishment shall be inflicted.' The Supreme Court has interpreted to this to mean a punishment cannot be 'grossly disproportionate' to the crime. In this article, the author addresses whether an offender's age should play a role in assessing whether a sentence is "grossly disproportionate." Specifically, the author addresses the increasingly common practice of imposing life without parole on offenders who are under sixteen years of age at the time they committed their offense, and whether such offenders' youthful status should play a role in proportionality analysis. The article first provides an overview of the rise in punitive approaches in juvenile sentencing and then examines the evolving standards used by the Supreme Court to assess proportionality. The author argues that, given the special traits of the population at issue, and the systemic shortcomings of the juvenile waiver system that ushers juveniles into adult court, appellate courts need to modify the proportionality analysis they employ when assessing the constitutionality of life without parole imposed on those less than sixteen.

INTRODUCTION

Daily it seems we are warned that a new breed of young "superpredator" is at large in America, committing depraved acts of brutality seemingly without care.¹ Worse yet, experts urge that

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1. See, e.g., Peter Annin, 'Superpredators' Arrive: Should We Cage the New Breed of Vicious Kids?, NEWSWEEK, Jan. 22, 1996, at 57, 57 (discussing a purported new breed of extremely violent juvenile offenders). The historical statistics appear to support such concern. Between 1983 and 1992, juveniles accounted for 25% of the increase in murders, forcible rapes, and robberies. See

"time is running out": something must be done now because a crime wave of unprecedented proportion looms due to imminent sharp increases in the numbers of such offenders.² In this anxious climate, each tragic act of juvenile violence receiving play in the media³ spurs renewed efforts by politicians⁴ to make juvenile justice more

George Bundy Smith & Gloria M. Dabiri, *The Judicial Role in the Treatment of Juvenile Delinquents*, 3 J.L. & POL'Y 347, 361 (1995) (citing HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, FACT SHEET NO. 16, ARE JUVENILES DRIVING THE VIOLENT CRIME TRENDS? (1994)). Between 1988 and 1992, the number of juveniles arrested for murder increased by 51% (as opposed to only 9% for adults). See Joseph F. Yeckel, Note, *Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice*, 51 WASH. U. J. URB. & CONTEMP. L. 331, 355 (1997) (citing HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, FACT SHEET NO. 14, JUVENILE VIOLENT CRIME ARREST RATES 1972-1992 (1994)).

2. See, e.g., Judy Brisco, *Breaking the Cycle of Violence: A Rational Approach to At-Risk Youth*, FED. PROBATION, Sept. 1997, at 3, 3-4 (referring to such offenders as "fatherless, Godless, and jobless" and questioning how the damage can be minimized). James Alan Fox, Dean of the Northeastern University College of Criminal Justice, sounds a similar clarion call: "Our nation faces a future juvenile violence problem that may make today's epidemic pale in comparison." JAMES ALAN FOX, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING 3 (1996). He adds that "[t]here is, however, still time to stem the tide, and to avert the coming wave of teen violence. But time is of the essence." *Id.* at i; see also Mortimer B. Zuckerman, *Scary Kids Around the Corner*, U.S. NEWS & WORLD REP., Dec. 4, 1995, at 96, 96 (describing that time is of the essence for dealing with violent crime).

3. See, e.g., Ron Stodghill II, *No More Kid Stuff*, TIME, Aug. 24, 1998, at 62, 62-63 (recounting the murder and sexual abuse of an 11-year-old allegedly committed by 7 and 8-year-old neighbors). See generally Jennifer Vogel, *Throw Away the Key: Juvenile Offenders are the Willie Hortons of the 90s*, UTNE READER, July/Aug. 1994, at 56, 56 ("Politicians and the major media, having discovered a boom market in the public frenzy for bigger jails and longer sentences, have made juvenile offenders the Willie Hortons of the '90s.").

At the same time, the archetypal image of the youthful killer of the 1990s is that of the nihilistic, explosive urban predator, prompting many to raise questions over the implicit racial overtones of punitive reforms. See, e.g., Marcus Mabry & Evan Thomas, *Crime: A Conspiracy of Silence*, NEWSWEEK, May 18, 1992, at 37, 37 ("The fear of young black men. It's not something that most people like to talk about, at least not in public. . . . But left unspoken is the fact that, for most Americans, crime has a black face. . . . The fear is greatest of inner-city youths, in high tops and gang colors."); cf. Jon Pareless, *How Real is "Realness" in Rap?*, N.Y. TIMES, Dec. 11, 1994, § 2, at 34 ("The image of black outlaws—living fast, sowing mayhem and dying young—is a hot property, especially if they're on the boom box rather than at the door.").

4. See, e.g., Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 336 (1991) (discussing the rampant appeal of punitive-oriented legislation among lobbyists and politicians); E.J. Dionne Jr., *Populist Politics*, WASH. POST, Feb. 13, 1996, at A19 (discussing the role played by crime in the successful early stages of the 1988 Bush presidential campaign); cf. Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. (forthcoming 1998) (discussing the "galvanizing effect" child sex offenses have had on national legislative efforts to deal with sex offenders). The considerable political appeal of juvenile justice

punitive, with questions of efficacy falling on deaf ears⁵ and significant recent decreases in juvenile violent crime being ignored altogether.⁶

The upshot of this situation is that juvenile offenders are now being prosecuted and punished as adults like never before.⁷ One

reform is underscored by the alacrity with which the legislation is often enacted. See, e.g., Wendy Kaminer, *Crime and Community*, ATLANTIC MONTHLY, May 1994, at 111, 116 ("Amendments passed hastily by the Senate, without hearings, required that juveniles over the age of thirteen be federally prosecuted as adults for certain crimes . . .").

5. See, e.g., CHARLES H. SHIREMAN & FREDERIC G. REAMER, REHABILITATING JUVENILE JUSTICE 51 (1986) (discussing negative results of increasing harsh sanctions); Abbe Smith, *The Dream of Growing Older: On Kids and Crime*, 36 B.C. L. REV. 953, 959 (1995) ("[C]riminalizing juvenile delinquency is the wrong approach both as a matter of principle and as a matter of policy. It ignores the nature of most youthful offenders and youthful offenses."); Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, 40 CRIME & DELINQ. 475, 477 (1994) ("Anyone who has spent much time talking with judges or corrections officials knows that most, whatever their political affiliations, do not believe that harsher penalties significantly enhance public safety.").

6. The most recent data indicate an actual decline in the rate and number of juvenile arrests for violent crime. See Howard N. Snyder, *Juvenile Arrests 1996*, JUV. JUST. BULL. (U.S. Dep't Justice, Office of Juvenile Justice & Delinquency) Nov. 1997, at 1 (reporting that from 1994 to 1995, juvenile arrests for murder, forcible rape, robbery and aggravated assault dropped by 3%; 1996 reflected a 6% decline relative to 1995. Juvenile arrests for murder, in particular, declined 3% between 1993 and 1994, 14% between 1994 and 1995, and another 14% between 1995 and 1996).

Recent data also call into question the accuracy of the image of the unrepentant "superpredator," with research indicating that juveniles of today do not commit more acts of violence than those of a generation ago. See MELISSA SICKMUND ET AL., U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 24-25 (1997).

Furthermore, the debate over punitive reforms often fails to take note of at least two important facts: that juvenile arrests for serious crimes are relatively infrequent (18% of all juvenile arrests) and that juvenile arrests for murder and rape, the crimes igniting the most public concern, account for less than 7% of all juvenile arrests. See MICHAEL A. JONES & BARRY KRISBERG, NATIONAL COUNCIL ON CRIME & DELINQUENCY, IMAGES AND REALITY: JUVENILE CRIME, YOUTH VIOLENCE AND PUBLIC POLICY 10-11 (1994).

Also, as to the demographics, there is reason to question whether in fact America is on the verge of being overrun by violent young "superpredators." Ample evidence supports the view that the next several decades do not portend a dramatic increase in the juvenile population. See Franklin E. Zimring, *Crying Wolf Over Teen Demons Crime*, L.A. TIMES, Aug. 19, 1996, at B5 (noting that between 1996 and 2010 the number of males under the age of 18 is expected to grow by only 14%); see also Kevin Johnson, *Study Eases Fear of Teen Crime Wave*, USA TODAY, Dec. 13, 1996, at A1 (noting that experts' warnings about an "explosion in youth crime" now appear unfounded).

7. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES: 1994-1996, at 42 (1997) [hereinafter REFORM INITIATIVES] ("The widespread enactment of legislation enhancing juvenile exposure to criminal prosecution is a direct response to reported escalations of juvenile violent crime in recent years."); see also PATRICIA TORBERT ET AL., U.S. DEP'T OF JUSTICE, STATE RESPONSES TO

troubling consequence of this punitive shift will be examined here: the imposition on juvenile offenders of life sentences in adult prisons without possibility of parole ("LWOP").⁸ Despite the fact that LWOP is second only to the death penalty in terms of its severity, Eighth Amendment proportionality challenges brought by juveniles against such sentences have met with limited success in state courts, and no success in the federal system.⁹ As a result, prison inmates who are not yet old enough to purchase cigarettes from the prison canteen have no constitutional basis to challenge the length of their sentences.

This Article seeks to address the fundamental question raised by such appeals: what role, if any, should the age of the offender play in the constitutional assessment of whether a given sentence comports with Eighth Amendment proportionality requirements?¹⁰ After providing a brief overview of the recent surge toward punitive treatment of juvenile offenders, the Article reassesses recent developments in the area of Eighth Amendment proportionality analysis. Concluding that the majority of courts have adopted an unduly narrow view of proportionality, especially with respect to the review of

SERIOUS AND VIOLENT JUVENILE CRIME 6 (1996) ("More juveniles are being charged and tried in criminal court, detained longer, and incarcerated more frequently in the adult correctional system than ever before.").

This punitive impulse is not unfamiliar: "From antiquity every generation has entertained the opinion that many if not most of its youth are the most vicious in the history of the race. . . . [O]ur ancestors also saw their world disintegrating under assaults from juvenile barbarians. . . ." DONNA MARTIN HAMPARIAN ET AL., *THE VIOLENT FEW* 11 (1978); see also THOMAS J. BERNARD, *THE CYCLE OF JUVENILE JUSTICE* 21-35 (1992) (discussing "cycles" associated with juvenile justice reform measures, which result from public perceptions of the incidence and severity of juvenile crime).

8. Figures derived from the National Corrections Reporting Program reflect that in 1996 alone an estimated 15 offenders under the age of 18 were sentenced to LWOP in state prisons nationwide. Conversation with Alan Beck, Bureau of Justice Statistics Statistician (Apr. 15, 1998) (transcript on file with author). At least 15 others were sentenced to life plus a term of years, and at least 173 were sentenced to life terms. See *id.*

9. The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Whether a punishment is "excessive," and hence contrary to the Eighth Amendment, is guided by two basic analytic approaches. First, a punishment is excessive if it fails to make a "measurable contribution to acceptable goals of punishment. . . ." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Second, a sentence cannot stand if it is "grossly disproportionate" to the crime. See *Solem v. Helm*, 463 U.S. 277, 288 (1983). This latter, more common method of analysis, proportionality analysis, is the main focus here.

10. Although in principle the arguments made here with regard to proportionality analysis extend to those age 16-18 at the time of their offense, discussion will be directed mainly to those offenders under age 16 in light of the Supreme Court's decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), that the Eighth Amendment permits the death penalty to be imposed on those at least age 16 at the time of their offense.

LWOP sentences imposed on juveniles, the Article argues for a reevaluation of proportionality analysis: an approach that takes into account the unique characteristics of juveniles and gives effect to the very real systemic flaws that can, without requisite findings of culpability, subject them to harsh adult punishments.

I. JUVENILE JUSTICE TRANSFORMED

Since its inception at the dawn of this century,¹¹ the juvenile justice system has been guided by the idea that rehabilitation, not punishment, is the proper method for handling deviant behavior among youths.¹² This benign perspective was based both on the view that pre-adults lack the moral and judgmental maturity of their elders, and hence are less deserving of legal culpability, and the belief (or hope) that those of tender age can yet be channeled away from long-term criminal behavior.¹³ In full recognition of these ideals, the United States Supreme Court has repeatedly acknowledged the unique role the juvenile system plays in the larger criminal justice system.¹⁴ Indeed, the Court has made clear that the juvenile justice system does not extend the same array of procedural protections as the adult system,¹⁵ in part out of fear that the juve-

11. In 1899, Illinois became the first American jurisdiction to develop a court system dedicated exclusively to processing juvenile offenders. See ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 101-63 (1969) (describing the history of the juvenile court system). Originating in the Progressive Era, and stemming from the good works of such reformers as Lucy Flower and Julia Lathrop, the Illinois system had a distinctly paternalistic philosophy. See *id.* at 130-31. Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 451 (1985). By 1945, all U.S. jurisdictions had established an independent juvenile system. See *id.*

Before the advent of the juvenile justice system, the common law of infancy posed the only limitation on the prosecution of youths. See Sanford J. Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 659-60 (1970). Under this regime, children less than 7 years of age presumably lacked criminal intent, while those aged 7-14 could be tried as adults but were rebuttably presumed incapable of forming the requisite *mens rea*. See *id.* at 660.

12. See Thomas & Bilchik, *supra* note 11, at 450.

13. See Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 PEPP. L. REV. 907, 909-11 (1995) (detailing the treatment model of the juvenile court system).

14. See *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (endorsing "the proposition that less culpability should attach to a crime committed by a juvenile" due to the relative inexperience, lesser education, and immaturity of youngsters, as well as their greater propensity to act as a result of "peer pressure" and "emotion"); *Schall v. Martin*, 467 U.S. 253, 263 (1984) ("The State has 'a *parens patriae* interest in preserving and promoting the welfare of the child' . . ." (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982))).

15. For example, the Court has held that there exists no constitutional right to a jury trial in juvenile proceedings. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971). Some four years earlier, however, the Court held that juveniles are entitled to certain due process rights, including: the right to counsel;

nile system would otherwise become adversarial and stray from its fundamental rehabilitative mission.¹⁶

In recent years, however, juvenile justice has experienced a sea-change in philosophy and practice.¹⁷ This transformation is most evident in: (1) the dramatic expansion in the scope of juveniles eligible for "waiver" or "transfer"¹⁸ into adult court for prosecution and (2) the range of harsh adult punishments that can be imposed as a result, including mandatory LWOP and the death penalty.¹⁹

the right to adequate written notice of charges; the right to confront and cross-examine witnesses; and the privilege against self-incrimination. See *In re Gault*, 387 U.S. 1, 9-10 (1967); see also *In re Winship*, 397 U.S. 358, 368 (1970) (holding that standard of proof beyond a reasonable doubt applies to juvenile proceedings). In the wake of *McKeiver*, 11 states have on their own instituted jury trials for juveniles. See Joseph B. Sanborn Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 76 JUDICATURE 230, 233 (1993).

16. See *McKeiver*, 403 U.S. at 545.

17. See Forst & Blomquist, *supra* note 4, at 323 (describing recent shifts in juvenile justice system emphasis). Thomas Grisso observes that the current punitive emphasis in juvenile justice came about in three distinct stages. Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 LAW & HUM. BEHAV. 229, 230-31 (1996). The first stage involved the extension of protective due process rights to juveniles as a result of the Warren Court's landmark decisions in *Kent v. United States*, 383 U.S. 541 (1966), and *In re Gault*, 387 U.S. 1 (1967). See Grisso, *supra*, at 230. The second stage arose out of the politically popular determinate sentencing movement of the early 1980s, which in contrast to the open-ended juvenile rehabilitative model, sought to introduce uniformity in juvenile sentencing. See *id.* at 230-31. We are now in the third stage of the evolution, one in which "reforms seek to make the severity of determinate penalties for adolescent violent offenders more like those for adults who are convicted of the same offenses." *Id.* at 231.

18. The terms "waiver" and "transfer" are most often seen as synonymous; "waiver" will be used throughout here.

19. The pronounced shift in philosophy has prompted many commentators to re-think the fundamental role of the juvenile court. See, e.g., Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 38-39 (1990) (questioning whether any distinct role remains for the juvenile system due to the increasing convergence of the juvenile and adult systems); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 69 (1997) (urging that states "abolish juvenile courts . . . and formally recognize youthfulness as a mitigating factor in the sentencing of younger criminal offenders"). But see Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 166-85 (arguing that despite its shortcomings the juvenile system is superior to the adult system in handling juvenile offenders).

Ironically, the pro-juvenile rights rulings of the Supreme Court, hard won by child advocates, may have contributed to the modern punitive impulse. See Forst & Blomquist, *supra* note 4, at 331 (discussing how enhanced procedural protections afforded by the Supreme Court facilitated change of focus of juvenile courts to resemble offense-based orientation of adult courts).

A. Waiver

Juveniles have always been "waived" to adult court for criminal prosecution,²⁰ typically on the basis of individualized, case-by-case judicial determinations in instances of especially serious and notorious crimes.²¹ The last twenty years, however, have witnessed a dramatic shift with respect to waiver.²² Although loath to extend adult privileges and rights to juveniles, society is increasingly amenable to holding youths to adult standards of responsibility,²³ evincing a deep cynicism for the long-held view that juveniles lack the competence and legal capacity prerequisite to criminal liability.²⁴

20. See DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 285 (1980); see also *Breed v. Jones*, 421 U.S. 519, 535 (1975) (observing that "not all juveniles can benefit from the special features and programs of the juvenile-court system").

21. See HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE & DELIQUENCY PREVENTION, *JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 85* (1995). One commentator has noted that waiver of especially serious offenders can act as a "safety-valve" of sorts to preserve juvenile court jurisdiction by defusing abolitionist sentiment arising in the wake of widely reported cases. See Gordon A. Martin Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 *CONN. L. REV.* 57, 62-63 (1992).

22. See REFORM INITIATIVES, *supra* note 7, at 42 (discussing the expansion of transfer provisions within the states).

23. See, e.g., REFORM INITIATIVES, *supra* note 7, at 42 ("The dramatic expansion in transfer legislation is based on the premise that some offenses warrant criminal prosecution and some juveniles are beyond rehabilitation."); Dale Parent et al., *Key Legislative Issues in Criminal Justice: Transferring Serious Juvenile Offenders to Adult Courts*, NAT'L INST. JUST. (U.S. Dep't of Justice, Office of Justice Programs), Jan. 1997, at 1 ("The purpose of transfer laws has not been to rehabilitate youthful violent offenders but rather to protect the public from them.").

This intolerance is at odds with research indicating that young offenders are rarely irredeemable. See, e.g., ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* 204-42 (1993) (noting "turning points" in the lives of one-time delinquents who become law-abiding adults).

24. This cynicism, at least in part, doubtless stems from the enduring difficulty of defining "childhood" with any degree of specificity. See Mark I. Soler, *Re-Imagining the Juvenile Court*, in *CHILD, PARENT, AND STATE: LAW AND POLICY READER* 596, 597-98 (S. Randall Humm et al. eds., 1993) (articulating the social constructionist view that regards childhood as a construct rather than a natural developmental stage); John E. Coons et al., *Puzzling Over Children's Rights*, 1991 *BYU L. REV.* 307 (examining developmental boundaries between childhood and adulthood).

The developmental concept of "adolescence" itself is a product of the Progressive Era, emerging with the special dispensations of the juvenile system. See Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 *CAL. W. INT'L L.J.* 193, 200 (1994); see also Peter Applebome, *No Room for Children in a World of Little Adults*, *N.Y. TIMES*, May 10, 1998, § 4, at 1 (noting that modern American

In a three-year period, between 1992 to 1995, forty jurisdictions enacted or expanded provisions for juvenile waiver to adult court.²⁵ Waiver takes three basic forms: (1) judicial waiver, historically the most common method, whereby a juvenile court judge conducts an individual evaluation on the basis of offender and offense-based criteria;²⁶ (2) prosecutorial waiver (also referred to as "concurrent jurisdiction" or "direct file"), which permits the local prosecuting attorney to decide in which court to file charges;²⁷ and (3) statutory exclusion (also called "automatic waiver" or "mandatory transfer"), which requires that juveniles of a minimum age accused of certain serious crimes be prosecuted in adult court.²⁸ All fifty states and the District of Columbia have waiver provisions of some kind, with most having hybrid combination of the three basic forms.²⁹

With these changes has come a dramatic expansion in the scope and number of juvenile offenders eligible, or indeed required, to be

culture and commerce both reflect and drive the increasing merger of childhood and adulthood).

25. See SICKMUND ET AL., *supra* note 6, at 29.

26. After a motion by the prosecutor, the court typically examines the eight factors identified by the Court in *Kent v. United States*, 383 U.S. 541 (1966), which are:

1. The seriousness of the alleged offense
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or property
4. The prosecutive merit of the complaint
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . by the juvenile court.

Id. at 566-67.

27. See Joseph B. Sanborn, Jr., *Certification to Criminal Court: The Important Policy Questions of How, When, and Why*, 40 CRIME & DELINQ. 262, 263 (1994).

28. See *id.* at 264 (explaining that as a technical matter, the term "waiver" is inapt under this regime insofar as no initial change in jurisdiction over juveniles is involved; rather, juveniles satisfying the criteria under this approach are automatically prosecuted in adult court from the outset).

29. See Parent et al., *supra* note 23, at 1. Only 16 states use judicial waiver alone, giving juvenile judges sole discretion to make waiver decisions. See *id.* In 20 states, judges are empowered to make some waiver decisions subject to statutory law that exclude certain juveniles from juvenile court jurisdiction. See *id.* Four states utilize all three types of waiver procedure, depending on the circumstances. See *id.*; see also REFORM INITIATIVES, *supra* note 7, at 43 ("Eighteen states have enacted 'once waived, always waived' legislation, under which a juvenile once waived to adult court subsequently must be charged in criminal court regardless of the offense.").

prosecuted in adult court.³⁰ Today forty-one states allow or require juveniles fourteen or younger to be prosecuted in adult court; at least twelve of these states indicate no minimum age for transfer, theoretically permitting seven or eight-year-olds to be waived to adult court.³¹ In addition, Indiana and Vermont specify ten as the minimum waiver age for murder;³² Montana and Missouri use age twelve;³³ and Georgia, Illinois, New York, North Carolina and the U.S. Government designate age thirteen as the minimum age.³⁴

B. Imposing the "Penultimate Penalty" on Juveniles

Once waived into adult court, a juvenile offender is deemed an adult, and therefore, the thinking goes, should be treated like one.³⁵ For offenders who are at least sixteen years of age at the time of their crimes, this means that the death penalty might be in store.³⁶

30. In 1988, 7000 youths age 17 or younger were waived; in 1992, the number escalated to 11,000—a 68% increase. See Parent et al., *supra* note 23, at 2. Variations in juvenile incarceration are also evident among the states. In 1993, for instance, North Carolina accounted for over 23% of all juveniles admitted to adult institutions. See *id.* at 4. As of June 30, 1994, four states (Florida, North Carolina, Arkansas and Georgia) accounted for 100% of the juveniles 13-15 years of age housed in adult facilities. See *id.*

31. See Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1043-44 (1995).

32. IND. CODE ANN. § 31-30-3-4 (1997); VT. STAT. ANN. tit. 33, § 5506 (1991).

33. MO. REV. STAT. § 211.071(1) (West 1996); MONT. CODE ANN. § 41-5-206 (1997).

34. 18 U.S.C. § 5032 (1994); GA. CODE ANN. § 15-11-5(b)(2)(A) (Supp. 1998); 705 ILL. COMP. STAT. 405/5-4 (West Supp. 1998); N.Y. SENTENCE CHARTS V (McKinney 1997); N.C. GEN. STAT. § 7A-608 (1995). Meanwhile, original juvenile court jurisdiction extends through age 17 in most states (37 states and the District of Columbia); through age 16 in 10 states; and age 15 in 3 states. See REFORM INITIATIVES, *supra* note 7, at 44.

35. See Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 947 (1995) ("No longer deemed a vulnerable and salvageable 'child,' the juvenile tried as an adult is written off for rehabilitation. Instead, the criminal justice system mechanically metes out punishment for the crime in full measure, commensurate with the full moral responsibility of the 'adult.'").

36. See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding, by a 5-4 margin, that the Eighth Amendment does not forbid execution of offenders who are at least 16 years of age at the time of their capital offense); *cf.* *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (setting aside, by a 5-3 vote in which Justice Kennedy did not participate, the death sentence of a 15-year-old capital defendant).

Although Justice O'Connor joined Justices Brennan, Marshall, Blackmun, and Stevens in the result of *Thompson*, she refrained from saying that a per se bar on the execution of 15-year-olds should exist, focusing instead on the narrower ground that offenders under 16 "may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to an offender's execution." *Id.* at 857-58 (O'Connor, J., concurring).

But even short of the death penalty, juvenile offenders increasingly risk being sentenced to society's penultimate punishment, LWOP.³⁷

Currently, the statutory law of only a handful of states expressly prohibits imposition of LWOP on those under age sixteen at the time of their offense,³⁸ while the overwhelming majority of American jurisdictions appear to permit such sentences³⁹ or even

Notwithstanding the Court's somewhat shaky proscription against the execution of those less than 16 at the time of their offense, 20 of the 38 death penalty states specify 16 as the minimum age, 4 states specify age 17, and the remainder specify age 18 or higher. See Sam Howe Verhovek, *Texas Legislator Proposes the Death Penalty for Murderers as Young as 11*, N.Y. TIMES, Apr. 18, 1998, at A7 (citing figures provided by the Death Penalty Information Center).

37. See, e.g., Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (calling LWOP "the second most severe [sentence] known to the law"); United States v. D'Anjou, 16 F.3d 604, 613 (4th Cir. 1994) (referring to LWOP as the "second most serious penalty available").

Although not new to American penology, LWOP in recent years has attracted new attention because of the ongoing debate over capital punishment. Promising similar incapacitative value to the death penalty, but encumbered by far less political controversy, LWOP is seen as a sentencing compromise by both ends of the political spectrum. See Julian H. Wright, Note, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All*, 43 VAND. L. REV. 529, 533 n.19 (1990); Mary E. Medland & Craig Fisher, *Life Without Parole Offered as Alternative to the Death Penalty*, CRIM. JUST. NEWSL., Jan. 16, 1990, at 4-5.

38. See D.C. CODE ANN. § 22-2404(a) (1996); IND. CODE § 35-50-2-3(b) (West 1998); OR. REV. STAT. § 161.620 (1997). A few other jurisdictions, by virtue of the age minimum adopted for waiver or sentencing regime limitations, effectively proscribe imposition of LWOP on those less than age 16. See ALA. CODE § 12-15-34.1 (Supp. 1997); DEL. CODE ANN. tit. 10, § 1010 (1997). In addition, several jurisdictions do not employ LWOP altogether. See IDAHO CODE § 18-4004 (Supp. 1998); KAN. STAT. ANN. §§ 21-4633, -4638 (1995); KY. REV. STAT. ANN. § 532.030 (Michie 1990); N.M. STAT. ANN. § 31-21-10 (Michie 1994).

39. See, e.g., ARIZ. CONST. art. IV, pt. 2, § 22(1); ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 1997); ARK. CODE ANN. § 9-27-318(b)(2) (Michie 1998); COLO. REV. STAT. § 18-1-105(4) (1997); GA. CODE ANN. §§ 17-10-31.1, 15-11-5-(2)(A) (Supp. 1998); 705 ILL. COMP. STAT. 405/5-4 (West Supp. 1998); 730 *id.* 5/5-8-1 (West Supp. 1998); ME. REV. STAT. ANN. tit. 17-A, § 1251 (West Supp. 1997); MD. CODE ANN., CTS. & JUD. PROC. § 3-804(e) (Supp. 1997); MD. ANN. CODE art. 27, § 412(6)(g) (Supp. 1997); MASS. ANN. LAWS ch. 119, § 72B (Law. Co-op. Supp. 1998); *id.* ch. 265, § 2 (Law. Co-op. 1992); MICH. STAT. ANN. § 28.1072(1)(g) (Law. Co-op. Supp. 1998); *id.* § 28.1081 (Law. Co-op. 1986); MISS. CODE ANN. § 43-21-151 (Supp. 1992); *id.* § 97-3-21 (1994); NEV. REV. STAT. § 62.080 (Michie Supp. 1997); *id.* § 200.030 (Michie 1997); N.J. STAT. ANN. §§ 2A:4A-26, 2C:11-3(b)(2)-(3) (West 1997); OHIO REV. CODE ANN. § 2151.26(c)(1) (Anderson Supp. 1997); *id.* § 2929.03(E)(2) (Anderson 1996); OKLA. STAT. tit. 10, § 7301-1.3(4) (West 1998); *id.* tit. 21, § 701.9(A) (West Supp. 1998); PA. STAT. ANN. tit. 18, § 1102 (West 1998); *id.* tit. 42, § 6355(e) (West Supp. 1998); R.I. GEN. LAWS § 11-23-2 (Supp. 1997); *id.* § 14-1-7 (1994); S.C. CODE ANN. §§ 20-7-7605(5), 16-3-20(A) (Law Co-op. Supp. 1997); TENN. CODE ANN. § 37-1-134(a)(1) (1996); *id.* § 39-13-202(c) (1997); UTAH CODE ANN. § 76-3-206(1) (1995); *id.* § 78-3a-603 (Supp. 1998); VT. STAT. ANN. tit. 13, § 2303 (Supp. 1997); *id.* tit. 33, § 5506 (1991).

make LWOP mandatory upon conviction in adult court.⁴⁰ As a result, in the State of Washington, for instance, offenders as young as eight years of age can be sentenced to LWOP,⁴¹ while in Vermont, ten-year-olds can draw such terms.⁴²

The courts have entertained several constitutional challenges to LWOP as applied to those under age sixteen, typically, but not always, in regard to a murder conviction.⁴³ Two years ago, for instance, in *Harris v. Wright*⁴⁴ the Ninth Circuit rejected a fifteen-year-old's Eighth Amendment challenge to his mandatory LWOP sentence imposed for the robbery-murder of a shop owner, committed with his thirteen-year-old co-defendant.⁴⁵ Writing for himself and Judge Leavy, Judge Alex Kozinski first determined that Harris' sentence was consistent with "evolving standards of decency," noting that at least twenty-one other states allowed LWOP to be mandatorily imposed on fifteen-year-olds.⁴⁶ Next, and of primary significance here, Judge Kozinski concluded that Harris' sentence was not disproportionate. Citing *Harmelin v. Michigan*,⁴⁷ the Supreme Court's fractured decision on mandatory LWOP for an adult offender convicted of drug trafficking, Judge Kozinski concluded that an "inference of gross disproportionality"⁴⁸ can arise only in death penalty challenges: "[I]f we put mandatory life imprisonment without parole into a unique constitutional category, we'll be hard pressed to distinguish mandatory life with parole; the latter is nearly indistinguishable from a very long, mandatory term of years;

40. See ARK. CODE ANN. § 5-4-104 (Michie Supp. 1995); *id.* § 9-27-318(b)(2) (Michie 1998); CONN. GEN. STAT. ANN. § 46b-127 (West Supp. 1998); *id.* § 53a-35a (West 1994); FLA. STAT. ANN. §§ 775.082, 985.225 (West Supp. 1998); HAW. REV. STAT. § 571-22(b) (Supp. 1997); *id.* § 706-656 (1993 & Supp. 1997); IOWA CODE § 902.1 (West 1994); LA. REV. STAT. ANN. § 14:30.1(B) (1997); MINN. STAT. ANN. §§ 260.125, 609.184 (West Supp. 1998); MO. REV. STAT. § 565.020(2) (West Supp. 1997); N.H. REV. STAT. ANN. § 169-B:24 (Supp. 1997); *id.* § 630:1-a(III) (1996); N.C. GEN. STAT. § 14-17 (Supp. 1997); TEX. FAM. CODE ANN. § 54.02(a) (West 1996); TEX. PENAL CODE ANN. 12.31 (West 1994); WASH. REV. CODE §§ 10.95.030, 13.40.110 (West Supp. 1998). The law of several states, including California, does not make clear whether LWOP can be imposed on those under age 16. See CAL. WELF. & INST. CODE § 707 (Deering Supp. 1997); *id.* § 1732.6 (Deering Supp. 1998); CAL. PENAL CODE § 190.5 (Deering Supp. 1998).

41. See *State v. Furman*, 858 P.2d 1092, 1102 (Wash. 1993).

42. See VT. STAT. ANN. tit. 13, § 2303 (Supp. 1997); *id.* tit. 33, § 5506 (1991).

43. See, e.g., *Workman v. Kentucky*, 429 S.W.2d 374, 378 (Ky. 1968) (reversing LWOP sentence imposed on 14-year-old for forcible rape); *State v. Foley*, 456 So. 2d 979, 984 (La. 1984) (upholding sentence of LWOP at hard labor for 15-year-old convicted of aggravated rape).

44. 93 F.3d 581 (9th Cir. 1996).

45. *Id.* at 585. The 13-year-old, Barry Massey, also received a mandatory LWOP sentence, which had been previously upheld on appeal. See *Washington v. Massey*, 803 P.2d 340, 348 (Wash. Ct. App. 1990).

46. See *Harris*, 93 F.3d at 583-84.

47. 501 U.S. 957 (1991).

48. *Harris*, 93 F.3d at 584 (quoting *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring)).

and that, in turn, is hard to distinguish from shorter terms."⁴⁹ Nor was it of any constitutional moment that Harris was fifteen at the time of his offense. According to Judge Kozinski:

Youth has no obvious bearing . . . : If we can discern no clear line for adults, neither can we for youths. Accordingly, while capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences. Like any other prison sentence, it raises no inference of disproportionality when imposed on a murderer.⁵⁰

Although *Harris* is consistent with the majority of other decisions dealing with LWOP imposed on those under age sixteen, other courts have differed both in their analysis of the question and their outcomes. The supreme courts of Nevada and Kentucky, for instance, have reversed LWOP sentences imposed on juvenile offenders on Eighth Amendment grounds.⁵¹ In striking down a LWOP sentence imposed on a thirteen-year-old convicted of murder, the Nevada supreme court stated:

Because, by statute, homicides committed by . . . ten or eleven year olds, are punishable by adult standards, careful judicial attention must be given to the subject of fair and constitutional treatment of children who find themselves caught up in the adult criminal justice system.

. . . [The court must] look at both the age of the convict and at his probable mental state at the time of the offense.

....

When a child reaches twelve or thirteen, it may not be universally agreed that a life sentence without parole should never be imposed, but surely all agree that such a severe and hopeless sentence should be imposed on prepubescent children,

49. *Id.* at 584-85 (citing *Harmelin*, 501 U.S. at 996).

50. *Id.* at 585 (citing *Harmelin*, 501 U.S. at 995-96). In dissent, Judge Pregerson asserted that the Washington State aggravated murder statute, triggering mandatory LWOP, was unconstitutionally ambiguous because it failed to express the legislature's clear intent to impose mandatory LWOP on youthful offenders such as Harris. *See id.* at 586-87 (Pregerson, J., dissenting). In support of his position, Judge Pregerson cited *Thompson v. Oklahoma*, 487 U.S. 815 (1988), where the Court noted that merely because a state permits juveniles to be prosecuted as adults "it does not necessarily follow that the legislature . . . deliberately concluded that it would be appropriate to impose capital punishment on [juveniles]." *Harris*, 93 F.3d at 586 (Pregerson, J., dissenting) (quoting *Thompson*, 487 U.S. at 850).

51. *See Workman v. Kentucky*, 429 S.W.2d 374, 378 (Ky. 1968) (reversing LWOP sentences for two 14-year-olds convicted of forcible rape); *Naovarath v. Nevada*, 779 P.2d 944, 948-49 (Nev. 1989) (reversing LWOP sentence for 13-year-old convicted of first-degree murder).

if at all, only in the most exceptional of circumstances. Children are and should be judged by different standards from those imposed upon mature adults.⁵²

The varied approaches outlined above reflect more than mere differing conceptions of childhood responsibility. They reflect fundamentally divergent conceptualizations of the Eighth Amendment. Judge Kozinski's avowed concern in *Harris* for indeterminacy with respect to sentence length has obvious appeal: in practical terms, one would indeed be hard-pressed to distinguish between mandatory LWOP and "a very long, mandatory term of years."⁵³ This, however, does not and should not lead to the *a priori* conclusion that "[y]outh has no obvious bearing," or that "[i]f we can discern no clear line for adults, neither can we for youths."⁵⁴ As will be argued shortly, the imposition of LWOP on juveniles is not merely "an outlying point on the continuum of prison sentences."⁵⁵ Rather, because juveniles differ in important ways from adults, age must play a distinct and central role in the proportionality analysis of juvenile LWOP sentences, especially when mandatorily imposed.

For this to occur, however, there must be some agreement on what proportionality means, and whether and to what extent proportionality analysis applies in the context of LWOP. What follows next is an overview of proportionality jurisprudence with special attention dedicated to the judicial treatment of LWOP.

II. THE ROLE OF PROPORTIONALITY ANALYSIS IN LWOP

It is a fundamental tenet of Anglo-American law that punishment must be proportional to the crime for which it is imposed.⁵⁶ Since its landmark 1910 decision in *Weems v. United States*,⁵⁷ the Supreme Court has recognized that a proportionality requirement

52. *Naovarath*, 779 P.2d at 946-47.

53. *Harris*, 93 F.3d at 585.

54. *Id.*

55. *Id.* According to the Kentucky Supreme Court, "life without parole for a juvenile, like death, is a sentence different in quality and character from a sentence to a term of years subject to parole." *Hampton v. Kentucky*, 666 S.W.2d 737, 741 (Ky. 1984).

56. See *Weems v. United States*, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that a punishment for crime should be graduated and proportioned to the offense.").

57. 217 U.S. 349 (1910) (striking down on proportionality grounds a sentence of 15 years at hard labor imposed on a U.S. Coast Guard officer under the Philippine Criminal Code for falsifying a public document). Proportionality was first raised as a constitutional issue in Justice Field's dissent 18 years earlier. See *O'Neil v. Vermont*, 144 U.S. 323, 338-39 (1892) (Field, J., dissenting). However, because the Eighth Amendment did not yet apply to the states, the majority did not squarely address the issue. See *id.* at 331-32. In *Weems*, the issue was reached because, at the time, the Philippines was subject to U.S. Constitutional constraints. 217 U.S. at 361.

inheres in the Eighth Amendment.⁵⁸ Although initially the Court conceived the Eighth Amendment as barring only disproportionate physical punishment,⁵⁹ in 1958 in *Trop v. Dulles*⁶⁰ the Court expressly expanded Eighth Amendment protection to non-physical punishments.⁶¹ In subsequent opinions, most notably in *Coker v. Georgia*⁶² and *Enmund v. Florida*,⁶³ the Court expounded on the proportionality principle in the context of the death penalty. In the early 1980s, the Court was asked to address whether LWOP, a sentence enjoying renewed use in the wake of the Court's heightened procedural and substantive limits on capital sentences, satisfied Eighth Amendment proportionality requirements.⁶⁴

A. LWOP Meets Proportionality

In its 1980 opinion *Rummel v. Estelle*,⁶⁵ the Supreme Court issued its first modern pronouncement on proportionality with respect to sentence length. Rummel was imprisoned under a Texas recidivist statute mandating life (with possibility of parole) for three prior felonies: fraudulent use of a credit card (\$80), uttering a bad

58. See *Robinson v. California*, 370 U.S. 660, 666 (1962) (holding for the first time that the Eighth Amendment applies to the States).

59. Before *Weems*, the Court seemingly interpreted the Eighth Amendment as prohibiting only barbaric or tortuous forms of punishment. See, e.g., *In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . ."); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) ("[P]unishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden . . .").

60. 356 U.S. 86 (1958).

61. *Id.* at 101 ("There may be involved no physical mistreatment, [and] no primitive torture."). Indeed, although not free from doubt, there is reason to believe that the result reached in *Weems* itself turned both on the physical and mental aspects of the unusual sentence at issue in that case. See *Weems*, 217 U.S. at 377 ("It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. . . Its punishments come under the condemnation of the Bill of Rights both on account of their degree and kind."); see also *Gregg v. Georgia*, 428 U.S. 153, 171-72 (1976) (observing that the proportionality analysis in *Weems* was based on a comparison of the crime and the sentence); Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 385 (1980) (asserting that *Weems* was premised on both aspects of the sentence).

62. 433 U.S. 584, 592 (1977) (declaring that the death penalty is disproportionate when the conviction is for rape of an adult female).

63. 458 U.S. 782, 787-88 (1982) (declaring that the death penalty is disproportionate as applied to a robber who aided and abetted in a felony-murder but who did not kill or intend to kill).

64. See *Wright*, *supra* note 37, at 534 ("With the apparent need to develop alternatives to the death penalty after *Furman*, life-without-parole received increased attention from lawmakers and judges."). The author discusses several cases from the 1970s and 1980s, see *id.* at 534-40, noting of these cases that the constitutionality of LWOP "may never have been argued thoroughly, but it has been decided definitively," *id.* at 538.

65. 445 U.S. 263 (1980).

check (\$28.36), and theft by false pretenses (\$120.75).⁶⁶ The Court rejected Rummel's proportionality challenge, concluding that the Texas legislature knew best how to punish its recidivists, and that federal appellate courts were powerless to intervene.⁶⁷ In due deference to this legislative wisdom, the Court reasoned, findings of excessiveness with respect to sentence length should be "exceedingly rare."⁶⁸

Three years later, in *Solem v. Helm*,⁶⁹ the Court had before it a challenge to an actual LWOP sentence and reached a different result.⁷⁰ In *Solem*, the petitioner was sentenced to mandatory LWOP after a career of petty crime, the fourth and final predicate offense being uttering a "no account" check for \$100, making him eligible for mandatory LWOP under South Dakota's recidivist statute.⁷¹ In striking down the sentence as disproportionate, Justice Powell flatly rejected the State's argument that proportionality analysis was inapplicable to terms of imprisonment:

The constitutional language itself suggests no exception for imprisonment. . . . It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms.⁷²

Justice Powell next articulated three "objective" factors that must inform proportionality analysis:

First, we look to the gravity of the offense and the harshness of the penalty. . . . Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive

66. See *id.* at 264-66. Rummel was eligible for parole after 12 years, a "possibility" the Court could "hardly ignore." See *id.* at 280-81.

67. See *id.* at 274.

68. See *id.* at 272.

69. 463 U.S. 277 (1983). In 1982, the Court handed down *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam), where the Court reversed and remanded to the Fourth Circuit for reconsideration in light of *Rummel*. *Id.* at 374-75.

70. *Solem*, 463 U.S. at 303.

71. *Id.* at 281-82.

72. *Id.* at 288-89.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.⁷³

Applying these criteria, the *Solem* five-member majority found the LWOP sentence excessive.⁷⁴ The majority distinguished *Rummel* on the basis that Rummel was eligible for parole, likely within twelve years of his commitment, whereas Solem could be released solely upon the rare grant of executive clemency.⁷⁵

Decided within three years of each other, and by the narrowest of margins, *Rummel* and *Solem* scarcely clarified proportionality analysis. On the one hand, *Rummel* stood for a notably deferential, federalism-based method of analysis, an approach not entirely abandoned by the *Solem* majority. At the same time, the proportionality test announced by *Solem*, at least in the context of LWOP, highlighted the Court's willingness to undertake a critical examination of the potential excessive duration of a sentence. It was not until eight years later, in *Harmelin v. Michigan*,⁷⁶ that the Court examined the question again, but provided little more in the way of clarity.

B. *Proportionality's Elusive Consensus*

In *Harmelin*, the Court addressed whether a mandatory LWOP sentence imposed upon petitioner's conviction of possession of 672 grams of cocaine violated proportionality.⁷⁷ Writing for an exceptionally fractured Court, Justice Scalia rejected the challenge, a result agreed with by four other members of the Court.⁷⁸ According to Justice Scalia, mandatory punishment was not per se contrary to

73. *Id.* at 290-91 (citations omitted).

74. *Id.* at 303.

75. *See id.* at 301-03. State and lower federal courts in the years before *Solem* also had occasion to invalidate excessive, non-capital sentences on proportionality grounds. *See, e.g.*, *Hart v. Coiner*, 483 F.2d 136, 138 (4th Cir. 1973) (reversing a mandatory life sentence for a third felony conviction); *United States v. McKinney*, 427 F.2d 449, 450 (6th Cir. 1970) (affirming a five-year sentence for refusal to submit to induction into the military); *Thacker v. Garrison*, 445 F. Supp. 376, 376-80 (W.D.N.C. 1978) (granting writ of habeas corpus for a 48-50 year sentence for safe cracking); *In re Lynch*, 503 P.2d 921, 922 (Cal. 1972) (reversing an indeterminate life sentence for a second offense of indecent exposure); *People v. Lorentzen*, 194 N.W.2d 827, 834 (Mich. 1972) (vacating a 20-year mandatory minimum sentence for selling any amount of marijuana); *State v. Kimbrough*, 46 S.E.2d 273, 275-77 (S.C. 1948) (setting aside a 30-year prison term for burglary).

76. 501 U.S. 957 (1991).

77. *Id.* at 961-62.

78. *See id.* at 996. Only Chief Justice Rehnquist signed on to Justice Scalia's opinion in its entirety. *See id.* at 961. Justice Kennedy wrote a concurring opinion joined in by Justices O'Connor and Souter, agreeing with the judgment and Part IV of Justice Scalia's opinion. *See id.* at 996 (Kennedy, J., concurring).

the Eighth Amendment.⁷⁹ While arguably cruel, mandatory punishments were not “unusual” in constitutional terms.⁸⁰ As a corollary, a defendant facing a mandatory non-capital sentence was not entitled to proffer or to have sentencing consideration given to mitigating factors.⁸¹

Writing only for himself and Chief Justice Rehnquist, Justice Scalia also concluded that proportionality analysis applies only in the review of death sentences: “[p]roportionality 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.”⁸² According to Justice Scalia, *Solem’s* implicit conclusion to the contrary was “simply wrong,”⁸³ and he therefore concluded that Harmelin’s sentence was constitutional.⁸⁴

Concurring separately, and joined by Justices O’Connor and Souter, Justice Kennedy distanced himself from Justice Scalia’s conclusion that proportionality analysis applies only to capital cases, and reaffirmed “the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years.”⁸⁵ This narrowness was evidenced by his statement that “only extreme sentences that are ‘grossly disproportionate’ to the crime” are barred.⁸⁶ Justice Kennedy distinguished *Solem* on the ground that the facts there involved relatively minor, non-violent recidivist crimes, which paled in comparison to Harmelin’s serious drug charge.⁸⁷ As to the application of *Solem*, Justice Kennedy stated that

79. *See id.* at 994-95.

80. *See id.*

81. *See id.* at 995-96. The three concurring Justices agreed with this conclusion. *See id.* at 996 (Kennedy, J., concurring).

82. *Id.* at 994. At the same time, Justice Scalia offered a narrow caveat: “This is not to say that there are no absolutes; one can imagine extreme examples that no rational person, in no time or place, could accept. But for the same reason these examples are easy to decide, they are certain never to occur.” *Id.* at 985-86.

83. *See id.* at 965.

84. *See id.* at 990 (reaffirming the essential federalism-based view of *Rummel* that the legislative determination of the sentencing state is essentially immune from constitutional attack as to non-capital sentences).

85. *Id.* at 996 (Kennedy, J., concurring).

86. *Id.* at 1001 (Kennedy, J., concurring) (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)). Justice Kennedy identified “some common principles that give content to the uses and limits of proportionality review.” *Id.* at 998 (Kennedy, J., concurring). First, reviewing courts must grant substantial deference to the legislature’s broad authority to determine the types and limits of punishment. *See id.* (Kennedy, J., concurring). “The second principal is that the Eighth Amendment does not mandate adoption of any one penological theory. . . . Third, marked divergences . . . are the inevitable, often beneficial result of the federal structure.” *Id.* at 999 (Kennedy, J., concurring). Finally, “that proportionality review by federal courts should be informed by ‘objective factors to the maximum possible extent.’” *Id.* at 1000 (Kennedy, J., concurring) (citations omitted).

87. *See id.* at 1002-03 (Kennedy, J., concurring).

"intra-jurisdictional and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."⁸⁸

Dissenting, and joined by Justices Blackmun and Stevens, Justice White agreed with Justice Kennedy that the Eighth Amendment contains a "proportionality requirement"⁸⁹ applicable to capital and non-capital sentences alike, and applied *Solem's* three-part proportionality review to Harmelin's sentence, finding it disproportionate.⁹⁰ In separate dissents, Justice Marshall⁹¹ and Justice Stevens (joined by Justice Blackmun)⁹² agreed that the Eighth Amendment contains a proportionality requirement, which was violated under the facts.

C. *The World After Harmelin*

In the wake of *Harmelin*, state and lower federal courts have struggled mightily to assess the precise contours of proportionality analysis.⁹³ Despite its splintered rationale, however, *Harmelin* permits several basic teachings. First and foremost, seven members of the Court adhere to the historic view that the Eighth Amendment contains a proportionality requirement that extends to capital and

88. *Id.* at 1005 (Kennedy, J., concurring) ("The proper role for comparative analysis of sentences, then is to validate an initial judgment that a sentence is grossly disproportionate to a crime.").

89. *See id.* at 1013 (White, J., dissenting).

90. *See id.* at 1027 (White, J., dissenting). In so concluding, Justice White took Justice Kennedy to task over what he perceived as the unduly narrow scope of Kennedy's proportionality analysis. *See id.* at 1018-20 (White, J., dissenting). Justice White characterized Justice Kennedy's re-articulation of *Solem* as "an empty shell," *id.* at 1018 (White, J., dissenting), making "any attempt at an objective proportionality analysis futile." *Id.* at 1020 (White, J., dissenting).

91. *See id.* at 1027-28 (Marshall, J., dissenting).

92. *See id.* at 1028-29 (Stevens, J., dissenting).

93. *See, e.g.,* *United States v. Cardoza*, 129 F.3d 6, 18 (1st Cir. 1997) (stating *Harmelin* "has, at the very least, cast doubt on the exact method by which a reviewing court should approach such challenges in non-capital cases"); *United States v. Gonzales*, 121 F.3d 928, 942 (5th Cir. 1997) ("[T]he contours of the proportionality principle are less than pellucid."), *cert. denied*, 118 S. Ct. 726, and *cert. denied*, 188 S. Ct. 1084 (1998); *United States v. Sarbello*, 985 F.2d 716, 722 (3d Cir. 1993) ("[T]he Supreme Court has not provided clear guidance regarding the propriety or nature of proportionality review in non-capital cases."); *State v. Mace*, 921 P.2d 1372, 1377 n.4 (Utah 1996) (characterizing proportionality as an "evolving jurisprudence").

The commentary has been almost uniformly critical of *Harmelin*. *See, e.g.,* Bruce Campbell, *Proportionality and the Eighth Amendment: Harmelin v. Michigan*, 15 HARV. J.L. & PUB. POL'Y 284 (1992); G. David Hackney, *A Trunk Full of Trouble: Harmelin v. Michigan*, 27 HARV. C.R.-C.L. L. REV. 262 (1992); Mary K. Woodburn, Comment, *Harmelin v. Michigan and Proportionality Review Under the Eighth Amendment*, 77 IOWA L. REV. 1927 (1992).

non-capital sentences alike.⁹⁴ Second, it appears that a majority of the Justices believe that a defendant facing a statutorily mandated minimum sentence, even LWOP, is not entitled to have possible mitigating factors considered by the sentencing authority.⁹⁵ Finally, Justice Kennedy's circumscribed view of *Solem* has emerged as the operative test for proportionality.⁹⁶ Consistent with this view, only sentences raising an "inference of gross disproportionality" based on a "threshold comparison of the crime committed and the sentence imposed" trigger the inter- and intrajurisdictional analysis of the second and third parts of the three-part *Solem* test.⁹⁷

94. See *Harmelin*, 501 U.S. at 996 (Kennedy, J. concurring) ("[S]tare decisis counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years."). Justice Kennedy's position, joined by Justices O'Connor and Souter, as well as the positions of the four dissenters who also urged the use of proportionality analysis, account for a seven-member majority. See *id.* at 1014 (White, J., dissenting) (stating that the Eighth Amendment contains a proportionality requirement); *id.* at 1027-28 (Marshall, J., dissenting) (same); *id.* at 1028-29 (Stevens, J., dissenting) (same). The view that proportionality applies to non-capital cases is also widely endorsed by legal commentators. See, e.g., Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 146 (1995-1996) (arguing that Supreme Court cases before *Harmelin* did not limit proportionality review to capital cases); Earl Martin, *Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 115 n.172 (1997) (discussing proportionality in non-capital cases).

95. See *Harmelin*, 501 U.S. at 994-95 ("Severe, mandatory penalties may be cruel, but they are not unusual in a constitutional sense . . . There can be no serious contention, then that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'"); see also *United States v. Prior*, 107 F.3d 654, 658-60 (8th Cir.) (en banc), cert. denied, 118 S. Ct. 84 (1997) (refusing to call the defendant's mandatory LWOP sentence cruel and unusual punishment); *Scrivner v. Tansy*, 68 F.3d 1234, 1240 (10th Cir. 1995) (finding no error in refusing to allow defendant to present mitigating evidence in a non-capital case).

96. Although some doubt has been expressed as to the continued vitality of *Solem* in the wake of *Harmelin*, the great majority of courts have concluded that *Solem's* three-part test remains intact, although in the modified form enunciated by Justice Kennedy. See, e.g., *Gonzales*, 121 F.3d at 943 n.11 (concluding that the Kennedy opinion represents "the least common denominator among a majority of the *Harmelin* Court"); *United States v. Kratsas*, 45 F.3d 63, 67 (4th Cir. 1995) ("[T]he continuing applicability of the *Solem* test is indicated by the fact that a majority of the *Harmelin* Court either declined expressly to overrule *Solem* or explicitly approved of *Solem*.").

97. Many courts have employed a threshold determination of gross disproportionality before examining the other two *Solem* factors. See, e.g., *Gonzales*, 121 F.3d at 943 n.11; *Prior*, 107 F.3d at 660; *United States v. Santos*, 64 F.3d 41, 47 (2d Cir. 1995), vacated 516 U.S. 1156 (1997); *United States v. Brant*, 62 F.3d 367, 368 (11th Cir. 1995); *United States v. Cupa-Guillen*, 34 F.3d 860, 864 (9th Cir. 1994); *United States v. Easter*, 981 F.2d 1549, 1556 (10th Cir. 1992); *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 38 (2d Cir. 1992); *Tart v. Massachusetts*, 949 F.2d 490, 504 n.16 (1st Cir. 1991); *United States v. Salmon*, 944 F.2d 1106, 1130-31 (3d Cir. 1991).

Despite the foregoing, proportionality analysis in the lower courts reflects a decided uncertainty, most notably with respect to the "threshold comparison," in Justice Kennedy's words, "of the crime committed and the sentence imposed."⁹⁸ As discussed, proportionality analysis remains very much alive in the context of non-capital sentences, most especially LWOP.⁹⁹ However, courts typi-

Among the states, Justice Kennedy's formulation enjoys similar popularity. See, e.g., *State v. Lujan*, 911 P.2d 562, 566 (Ariz. Ct. App. 1995) (noting that "[t]he important test . . . is whether the sentence is grossly disproportionate" and a comparative test is only undertaken if this is satisfied (quoting *State v. Bartlett*, 830 P.2d 823, 825 (Ariz. 1992))); *State v. Matteson*, 851 P.2d 336, 340 (Idaho 1993) (stating that a jurisdictional assessment is appropriate only upon an initial finding of "gross disproportionality" between the "crime committed and the sentence imposed" (quoting *State v. Brown*, 825 P.2d 482, 491 (Idaho 1992))); *State v. Lee*, 841 S.W.2d 648, 654 (Mo. 1992) (en banc) (requiring a finding of gross disproportionality and noting that *Harmelin* "altered" the *Solem* test); *State v. Bonner*, 577 N.W.2d 575, 580 (S.D. 1998) (stating that threshold test can terminate inquiry); *Diaz-Galvan v. State*, 942 S.W.2d 185, 186 (Tex. Crim. App. 1997) (same); *Smith v. State*, 922 P.2d 846, 849 (Wyo. 1996) (same).

Fairly viewed, the now-prevailing view based on Justice Kennedy's concurrence constitutes a restriction of *Solem*, most often serving to preclude analysis of the *Solem* jurisdictional factors. See *Simmons v. Iowa*, 28 F.3d 1478, 1482 n.5 (8th Cir. 1994) (referring to *Solem's* "more demanding proportionality analysis" and "the less exacting review dictated by *Harmelin*").

98. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). Although not critical to the discussion here, strong reason exists to question whether Justice Kennedy's now-ascendant threshold test deserves the deference now paid to it. Steven Grossman observes:

The fact that [Justice Kennedy] chose to examine the harshness of the sentence and the seriousness of the crime prior to engaging in comparative analyses in *Weems* and *Solem* hardly suggests, as Kennedy asserted, that a clear finding of gross disproportionality is required to even engage in such analyses. Instead it is more likely that the Court recognized that it made little sense to compare a crime to others of equal seriousness unless it was first determined how serious the crime at issue was.

Grossman, *supra* note 94, at 157.

99. Although not giving rise to a per se inference of "gross disproportionality," the courts continue to dedicate special scrutiny to LWOP for proportionality purposes. See, e.g., *United States v. Organek*, 65 F.3d 60, 63 (6th Cir. 1995) (stating that either LWOP or death sentence must be in place before proportionality review is triggered); *United States v. D'Anjou*, 16 F.3d 604, 612 (4th Cir. 1994) ("[O]utside the capital sentencing context, an extensive proportionality analysis is required only in those cases involving life sentences without parole."); *United States v. Meirovitz*, 918 F.2d 1376, 1381 (8th Cir. 1990) (reviewing a LWOP sentence); *Herring v. State*, 691 So. 2d 948, 958 (Miss. 1997) ("Extended proportionality analysis is not required by the Eighth Amendment for a sentence unless it's a sentence of life in prison without the possibility of parole or a sentence which is manifestly disproportionate to the crime committed." (quoting *Hewlett v. State*, 607 So. 2d 1097, 1107 (Miss. 1992))).

The Third Circuit refrains from extended proportionality review when parole is available. See *United States v. Whyte*, 892 F.2d 1170, 1176 n.16 (3d Cir. 1989). The Tenth Circuit views parole availability as relevant to proportional-

cally not only now use Justice Kennedy's "threshold comparison" as a basis to short-circuit the full-blown, three-part proportionality analysis otherwise required by *Solem*, but also articulate and employ an understanding of the test at distinct odds with how it was originally conceived in *Solem*. In *Solem*, the Court outlined the following analysis for courts to use in assessing the first prong of its test:

When sentences are reviewed under the Eighth Amendment, courts should be guided by the objective factors that our cases have recognized. First, we look to the gravity of the offense and the harshness of the penalty. In *Enmund*, for example, the Court examined the circumstances of the defendant's crime in great detail. In *Coker* the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. In *Robinson* the emphasis was placed on the nature of the "crime." And in *Weems*, the Court's opinion commented in two separate places on the pettiness of the offense.¹⁰⁰

....

. . . Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender.

....

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices . . . A court, of course, is entitled to look at a defendant's motive in committing a crime.¹⁰¹

Thus, when the *Solem* Court "look[ed] to the gravity of the offense and the harshness of the penalty,"¹⁰² it conceived of "gravity" not just in terms of the harm caused by the predicate offense. Rather,

ity analysis. See *Gutierrez v. Moriarty*, 922 F.2d 1464, 1473 (10th Cir. 1991); see also *United States v. Lemons*, 941 F.2d 309, 320 (5th Cir. 1991) ("The availability of parole is a proper consideration in reviewing a sentence."); *Speer v. State*, 890 S.W.2d 87, 92-93 (Tex. App. 1994) (attaching importance to parole availability in proportionality challenge by 15-year-old offender to life sentence).

100. *Solem v. Helm*, 463 U.S. 277, 290-91 (1983) (citations and footnote omitted). The Court's references to *Weems* and *Robinson*, both non-capital cases, in addition to the capital cases of *Coker* and *Enmund* support the conclusion of the seven justices in *Harmelin* that a general proportionality requirement inheres in the Eighth Amendment.

101. *Id.* at 292-93. The majority added that the list of factors was "by no means exhaustive." *Id.* at 294.

102. *Id.* at 290-91.

the Court also looked to the culpability of the offender.¹⁰³ In so doing, the Court acted in a manner consistent with a basic precept of Anglo-American law: that proportionality bars punishment in excess of the moral blame of the offender.¹⁰⁴ Although proportionality may be said to serve broad utilitarian goals, it is at bottom a requirement premised on retributive doctrine, and more specifically on the imperative that an offender receive his or her "just deserts [sic]."¹⁰⁵ Indeed, even Justice Scalia in *Harmelin* acknowledged the

103. See *id.* at 297 n.22 (reciting the case of a defendant, "who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind").

104. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 394 (1989) (Brennan, J., dissenting) ("Proportionality analysis requires that we compare 'the gravity of the offense,' understood to include not only the injury caused, but also the defendant's culpability, with 'the harshness of the penalty.'" (quoting *Solem*, 463 U.S. at 292)); *Thompson v. Oklahoma*, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring) ("[P]roportionality requires a nexus between the punishment imposed and the defendant's blameworthiness." (quoting *Enmund v. Florida*, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting))); *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[P]unishment should be directly related to the personal culpability of the criminal defendant."); *Enmund*, 458 U.S. at 801 ("[P]unishment must be tailored to [petitioner's] personal responsibility and moral guilt."); *Hayes v. Arave*, 977 F.2d 475, 481 n.11 (9th Cir. 1992) ("With rare exceptions, our system of criminal justice operates under the assumption that the sentence should fit not only the crime, but the defendant as well."), *overruled on other grounds*, *Rice v. Wood*, 77 F.3d 1138 (9th Cir. 1996).

105. Central to retributive theory is the notion that the criminal offender is a rational actor and as such "deserves" punishment in accord with the degree of harm caused and the blameworthiness involved. See C.S. Lewis, *The Humanitarian Theory of Punishment*, in CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS AND JUSTIFICATIONS 194, 195 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972) ("[T]he concept of Desert [sic] is the only connecting link between punishment and justice."). Norval Morris has spoken of retributive desert as a "limiting principle," in the sense that it controls the extent of punishment: "Desert [sic] is not a defining principle; it is a limiting principle. The concept of 'just desert' [sic] sets the maximum and minimum of the sentence that may be imposed for any offense and helps to define the punishment relationships between offenses . . ." NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 199 (1992); see also H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 230-37 (1968) (discussing retributive punishment); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 11 (1968) (discussing utilitarian and retributive theories of punishment).

Proportionality in effect operates as a wedge against the broader utilitarian goals of legislators, who may attempt to justify extreme sentences with utilitarian principals, even at the expense of the individual. See Grossman, *supra* note 94, at 149 (citing the notable extreme example in *Rummel v. Estelle*, 445 U.S. 263, 288 (1980), that even if a state wishes to deter overtime parking, "it cannot do so by punishing such behavior with a grossly excessive prison sentence"); see also Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1123 (1979) ("[T]o the extent that dominant utilitarian theories of punishment conflict with the retributive concept of proportionality, the latter, because of its constitutionally sanctioned function in protecting the

essential role of culpability and retribution in proportionality analysis, although he disagreed with his fellow justices on its application in non-capital cases.¹⁰⁶

Most courts have adopted a decidedly restrictive view of Justice Kennedy's comparison of "the *crime committed* and the sentence imposed."¹⁰⁷ "Crime" is now typically conceived solely in terms of the relative seriousness of a given offense, to the exclusion of offender culpability.¹⁰⁸

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.¹⁰⁹ This perspective is especially dominant among the federal courts.¹¹⁰

dignity of the individual offender, must necessarily set the upper boundary on the state's power to punish.").

106. *Harmelin*, 501 U.S. at 989.

107. *Id.* at 1005 (Kennedy, J., concurring) (emphasis added).

108. See, e.g., *United States v. Prior*, 107 F.3d 654, 660 (8th Cir.) (en banc) (noting that while petitioner's "sentence is harsh . . . it is not grossly disproportionate given the equally serious nature of his crime," and recognizing the societal problems caused by drugs), *cert. denied*, 118 S. Ct. 84 (1997); *Tart v. Massachusetts*, 949 F.2d 490, 540 (1st Cir. 1991) (examining the "seriousness of the offense in relation to the harshness of the punishment").

The Arizona Supreme Court recently interpreted Justice Kennedy's approach in *Harmelin* as "not look[ing] at the particular crime or the particular offender, but [rather] whether the offense generally poses a sufficient threat to warrant the sentence imposed." *State v. DePiano*, 926 P.2d 494, 497 (Ariz. 1996), *cert. denied*, 117 S. Ct. 782 (1997). In *DePiano*, the court renounced the proportionality analysis established in *State v. Bartlett*, 830 P.2d 823 (Ariz. 1992) ("*Bartlett II*"), which entailed "an examination of the facts and circumstances of the particular crime and the particular offender." *DePiano*, 926 P.2d at 497. In its place, *DePiano* established that "the initial threshold disproportionality analysis is to be measured by the nature of the offense generally and not specifically. We think this is particularly true for serious violent offenses." *Id.* Turning to the 34-year sentence before it, imposed upon a mother for two counts of child-abuse, the *DePiano* Court unhesitatingly denied the proportionality challenge under both the Arizona and United States Constitutions. *Id.*

In dissent, Justice Zlaket sharply criticized the en banc majority for its about-face and reaffirmed his allegiance to *Bartlett II*, stating:

[T]he facts and circumstances of the crime and the individual offender must be examined when determining gross disproportionality. It is the only logical way to apply punishment in a system rooted in concepts of justice and fairness. All defendants are not alike, just as all crimes, even if given the same label, are not identical.

Id. at 505 (Zlaket, J., concurring in part and dissenting in part).

109. Not surprisingly, the Supreme Court's decisions approving sentences of life (*Rummel*) and LWOP (*Harmelin*) for non-violent recidivist acts and drug possession, respectively, have been used as "benchmarks" to readily deny proportionality challenges to heavy sentences for violent crime. See, e.g., *United States v. Gonzales*, 121 F.3d 928, 943 (5th Cir. 1997) (using *Rummel* as "benchmark" and upholding 30-year sentence enhancement for use of a machine gun in drug deal), *cert. denied*, 118 S. Ct. 726, and *cert. denied*, 118 S. Ct.

Within the states, however, less uniformity and a greater attention to individual offender culpability reigns. In California, for instance, proportionality is violated if the punishment "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."¹¹¹ Under the California Constitution, a reviewing court must examine "the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts."¹¹² As part of this analysis,

[t]he court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. If the court concludes that the penalty imposed is "grossly disproportionate to the defendant's individual culpability," or, stated another way, that the punishment "shocks the conscience and offends fundamental notions of human dignity," the court must invalidate the sentence as unconstitutional.¹¹³

California reviewing courts then must evaluate the latter two *Solem* factors, comparing the challenged punishment to "the punishment prescribed for more serious crimes" in California, and to the "punishment for the same offense in other jurisdictions."¹¹⁴ "The importance of each prong depends on the facts of each case. An examination of the first prong alone can result in a finding of cruel or unusual punishment."¹¹⁵

Kansas has adopted a similar test, looking first to "the nature of the offense and the character of the offender . . . with particular

1084 (1998); *McGruder*, 954 F.2d at 317 (using *Rummel* as a guide and upholding LWOP for recidivist violent offense).

110. See generally Kathi A. Drew & R.K. Weaver, *Disproportionate or Excessive Punishments: Is There a Method for Successful Constitutional Challenges?*, 2 TEX. WESLEYAN L. REV. 1, 19 (1995) ("In the literally hundreds of cases dealing with proportionality since *Harmelin*, the federal courts have not declared a single prison sentence to be disproportionate.").

This view is often manifest in the appellate tenet that non-capital sentences falling within statutorily prescribed limits will not be disturbed so long as the lower court committed no "abuse of discretion." See, e.g., *United States v. Simpson*, 8 F.3d 546, 550 (7th Cir. 1993) ("[A] particular offense that falls within legislatively prescribed limits will not be considered disproportionate unless the sentencing judge has abused his discretion." (quoting *United States v. Vasquez*, 966 F.2d 254, 261 (7th Cir.1992))).

111. *People v. Thongvilay*, 72 Cal. Rptr. 2d 738, 748 (Ct. App. 1998) (citing *People v. Dillon*, 668 P.2d 697 (Cal. 1983) (quoting *In re Lynch*, 503 P.2d 921, 930 (1972))).

112. *People v. Hines*, 938 P.2d 388, 443 (Cal. 1997), *cert. denied*, 118 S. Ct. 855 (1998).

113. *Id.* at 443-44 (citations omitted).

114. *Thongvilay*, 72 Cal. Rptr.2d at 749.

115. *Id.*

regard to the degree of danger present to society," and then to the *Solem* comparative factors.¹¹⁶ Massachusetts considers "the nature of the offender and offence [sic] in light of the degree of harm to society" along with the latter two *Solem* factors.¹¹⁷ Other state courts, without expressly saying so, plainly take culpability into account when assessing proportionality challenges.¹¹⁸ Even more specifically, and of special significance here, the youthfulness of the offender has been considered by state courts in assessing proportionality, under both the U.S. and the respective state constitutions.¹¹⁹

116. *State v. Scott*, 947 P.2d 466, 470 (Kan. Ct. App. 1997) ("Relevant to this inquiry are the facts of the crime, the violent or nonviolent nature of the offense, the extent of culpability for the injury resulting, and the penological purposes of the prescribed punishment."), *aff'd in part and rev'd in part*, No. 75,684, 1998 WL 272730 (Kan. May 29, 1998).

The Kansas Constitution, like that of several other states, including North Carolina, contains a proscription that is arguably broader than the federal bar, prohibiting "cruel or unusual" punishments, as opposed to punishments that are both "cruel and unusual." *See, e.g.*, KAN. CONST. bill of rights, § 9; MINN. CONST. art. I, § 5; N.C. CONST. art. I, § 27; WYO. CONST. art. 1, § 14.

The constitutions of Indiana, New Hampshire, Oregon, Rhode Island, and West Virginia require that a punishment be "proportioned" to the offense. *See* IND. CONST. art. I, § 16; N.H. CONST. pt. 1, arts. XVIII, XXX-III; OR. CONST. art. I, § 16; R.I. CONST. art. I, § 8; W. VA. CONST. art. III, § 5. The Louisiana Constitution prohibits "cruel, excessive, or unusual punishment." LA. CONST. art. I, § 20; *see also* *State v. Jones*, 639 So. 2d 1144, 1154 (La. 1994) ("A punishment that is disproportionate to the offense and the offender is unnecessarily severe and, therefore, excessive per se.").

117. *Massachusetts v. Dunn*, 680 N.E.2d 1178, 1182 (Mass. App. Ct. 1997) (quoting *Massachusetts v. Alvarez*, 596 N.E.2d 325, 331 (Mass. 1992)).

118. *See, e.g.*, *People v. Easton*, 629 N.Y.S.2d 15, 16 (App. Div. 1995) (holding that under the "particular circumstances" of the case, the sentence of 15-years-to-life for drug possession was disproportionate); *Diaz-Galvan v. State*, 942 S.W.2d 185, 196 (Tex. Crim. App. 1997) (noting that "threshold proportionality analysis" requires consideration of pre-sentence investigation report or other basis to assess "relative aggravation or mitigation"); *Smith v. State*, 922 P.2d 846, 850 (Wyo. 1996) (considering offender traits as "threshold" proportionality determination).

119. *See, e.g.*, *People v. Dillon*, 668 P.2d 697, 726-27 (Cal. 1983) (reversing life sentence imposed on 17-year-old, noting that defendant was an "unusually immature youth"); *State v. Moore*, 906 P.2d 150, 153-54 (Idaho Ct. App. 1995) (noting that "consideration must be given to the youth and immaturity of the offender" but concluding that a term of 25-years-to-life imposed on a 14-year-old for first degree murder of police officer was not disproportionate); *Workman v. Kentucky*, 429 S.W.2d 374, 378 (Ky. 1968) (finding LWOP disproportionate when imposed on 14-year-old for rape); *State v. Pilcher*, 655 So. 2d 636, 642-43 (La. Ct. App. 1995) (denying the challenge brought by a 15-year-old against a mandatory LWOP sentence for two counts of second degree murder, noting the age of the defendant); *May v. State*, 398 So. 2d 1331, 1334 (Miss. 1981) (remanding the sentence of a 14-year-old with mental retardation); *Naovarath v. State*, 779 P.2d 944, 948-49 (Nev. 1989) (invalidating LWOP sentence imposed on 13-year-old for murder); *cf. Pennsylvania v. Green*, 151 A.2d 241, 246 (Pa. 1959) (reducing the death sentence of a 15-year-old, stating "age is an important factor in determining the appropriateness of the penalty and should

Notwithstanding the foregoing, the reality is that most American courts, especially federal courts, refuse to take account of such considerations in proportionality analysis.¹²⁰ This refusal, as dis-

impose upon the sentencing court the duty to be ultra vigilant in its inquiry into the makeup of the convicted murderer").

The courts are less receptive to arguments that advanced age should play a role in proportionality analysis. *See, e.g.*, *United States v. Rudolph*, 970 F.2d 467, 469-70 (8th Cir. 1992) (denying claim by 46-year-old that 15-year term was cruel and unusual); *United States v. LaRouche*, 896 F.2d 815, 831-32 (4th Cir. 1990) (stating that defendant's advanced age did not render disproportionate a 15-year sentence for conspiracy to commit mail fraud, mail fraud, and conspiracy to defraud the Internal Revenue Service); *cf. United States ex rel. Villa v. Fairman*, 810 F.2d 715, 717-18 (7th Cir. 1987) (holding a quadriplegic defendant's sentence of 30 to 90 years was not cruel and unusual). In Colorado, young and old offenders alike are entitled to only an "abbreviated" proportionality review that examines the "gravity of the offense, the harshness of the penalty, and the possibility of parole" as relevant factors. *Valenzuela v. People*, 856 P.2d 805, 810 (Colo. 1993).

120. *See, e.g.*, *Harris v. Wright*, 93 F.3d 581, 585 (9th Cir. 1996) (upholding a mandatory LWOP sentence for a 15-year-old, stating "[y]outh has no obvious bearing" on proportionality analysis); *Rodriguez v. Peters*, 63 F.3d 546, 568 (7th Cir. 1995) (refusing to consider age of 15-year-old offender in challenge to mandatory LWOP); *People v. Moya*, 899 P.2d 212, 219 (Colo. Ct. App. 1995) (stating age is not a "relevant factor" in the availability or scope of proportionality review under the United States or Colorado Constitutions); *State v. Spence*, 367 A.2d 983, 989 (Del. 1976) (affirming LWOP sentence and stating that the defendant's youth is irrelevant); *Massachusetts v. Diatchenko*, 443 N.E.2d 397, 402-03 (Mass. 1982) (refusing to consider age of a minor in challenge to mandatory LWOP sentence); *People v. Launsbury*, 551 N.W.2d 460, 464 (Mich. Ct. App. 1996) (upholding LWOP sentence for 16-year-old after noting that "murder is a serious offense and that the punishment imposed in this case has been held to be proportionate to the offense"); *State v. Jensen*, 579 N.W.2d 613, 624-25 (S.D. 1998) (affirming LWOP imposed on a 14-year-old for a robbery-murder of a cab driver); *State v. Massey*, 803 P.2d 340, 348 (Wash. Ct. App. 1990) (denying a challenge brought by 13-year-old against a mandatory LWOP sentence, stating that proportionality "does not embody an element or consideration of the defendant's age, only a balance between the crime and the sentence imposed"); *State v. Douglas*, No. 97-0229-CR, 1997 WL 757701, at *4 (Wis. Ct. App. Dec. 10, 1997) (denying proportionality claim of 15-year-old against sentence that extended beyond his natural life, saying "[w]e are not persuaded that based on [petitioner's] age alone, the parole eligibility date is excessive or constitutes cruel and unusual punishment").

The North Carolina Court of Appeals very recently rejected an age-based challenge brought by a 15-year-old to an LWOP sentence imposed for first-degree murder. *See State v. Stinnett*, ___ N.C. App. ___, 497 S.E.2d 696, 701-02 (1998). Petitioner claimed that the interaction of the General Statutes of North Carolina section 7A-608, which requires waiver of any juvenile over age 13 when probable cause exists that the offender has committed a Class A felony, and the General Statutes of North Carolina section 14-17, which mandates LWOP upon conviction, combined to impermissibly preclude consideration of the offender's youth in violation of the Eighth Amendment to the U.S. Constitution and Article I, Section 27 of the North Carolina Constitution. *See id.* at ___, 497 S.E.2d at 700-01. The *Stinnett* court readily rejected the claim stating:

North Carolina courts have consistently held 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. It is within

cussed, contravenes a core underpinning of proportionality, namely, that a sentence must correspond to the crime—not just to the harm caused by the offense, but also to the culpability of the offender.¹²¹ The upshot of the current jurisprudential approach is that state and federal legislatures can exercise virtually unfettered discretion in their formulation of sentences, as can prosecutors in their charging practices, unconstrained by the watchful eye of the judiciary¹²² and its constitutional duty of oversight.¹²³ At present we are in the

the province of the General Assembly to enact a process for dealing with serious offenses committed by juveniles.

Id. at ___, 497 S.E.2d at 701 (citations omitted).

121. For a discussion of the proportionality analysis considering the gravity of the offense and the harshness of the penalty, see *supra* notes 96-106 and accompanying text. See also *Robinson v. California*, 370 U.S. 660, 667 (1962) (stating “the question [of excessive punishment] cannot be considered in the abstract” and must take into consideration the specific circumstances of the offense); *Williams v. New York*, 337 U.S. 241, 247 (1949) (“[P]unishment should fit the offender and not merely the crime.”).

122. See, e.g., *Harris*, 93 F.3d at 584 (refusing to consider a 15-year-old defendant’s age in analysis of mandatory LWOP sentence, stating that “Washington’s legislature has decided that the appropriate punishment for anyone tried and convicted as an adult for aggravated murder is life in prison. The Constitution gives us no power to reverse its judgment”); *Rodriguez*, 63 F.3d at 568 (refusing to consider the age of a 15-year-old offender in a challenge to his mandatory LWOP sentence, stating that “[t]he State of Illinois has adopted legislation mandating that a person found guilty of committing two or more murders must be incarcerated for the rest of his or her nature life”); *Masachusetts v. Diatchenko*, 443 N.E.2d 397, 402 (Mass. 1982) (dismissing a proportionality challenge by a 14-year-old against a mandatory LWOP, stating “[e]ven though the defendant is young, that fact alone does not justify invalidating the Legislature’s choice of punishment for murder in the first degree”); *Stinnett*, ___ N.C. App. at ___, 497 S.E.2d at 701 (rejecting challenge by 15-year-old against his mandatory LWOP sentence, noting that “[l]egislative bodies are free to make exceptions to the statutory rules that children are entitled to special treatment”).

123. While reviewing courts owe legislative determinations great deference, this deference cannot amount to an abandonment of the judiciary’s constitutional oversight responsibilities. A majority of the justices in *Solem* articulated this duty yet again: “[W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been sentenced. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess But no penalty is per se constitutional.” *Solem v. Helm*, 463 U.S. 277, 290 (1983) (footnote omitted); see also *Hutto v. Davis*, 454 U.S. 370, 377 (1982) (per curiam) (Powell, J., concurring) (“[O]ur system of justice always has recognized that appellate courts do have a responsibility—expressed in the proportionality principle—not to shut their eyes to grossly disproportionate sentences that are manifestly unjust.”); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (“We cannot push back the limits of the Constitution to accommodate challenged legislation.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that “[i]t is emphatically the province and duty of the judicial department to say what the law is” and for the Court to stay its hand in deference to the legislative branch would give the latter “a practical and real omnipotence”); *Pilcher*, 655 So. 2d at 643 (“Although the legislature is free to impose any punishment for a given crime, the courts have the authority to say whether that punishment violates the constitution.”).

midst of a "race to the bottom" insofar as juvenile justice is concerned and the courts are virtually nowhere to be found as a buffer in this descent.¹²⁴

Although the Supreme Court has implied that the death penalty cannot, as a federal constitutional matter, be imposed on offenders who have not yet reached sixteen years of age at the time of their crime,¹²⁵ and all death penalty states have specified sixteen as the minimum death-eligible age,¹²⁶ the states are free to impose the "penultimate penalty" of LWOP on those under sixteen—and often in the form of a mandatory minimum sentence. As a result, youths waived to the adult system—unlike their chronological peers that remain in the juvenile system¹²⁷—can be required to spend the rest

124. For a discussion of the recent marked increase in efforts to lower eligibility ages for waiver, see *supra* notes 22-42 and accompanying text.

Commenting on the majority's implicit view that a nine-year-old boy accused of murder was perhaps too young to be waived to adult court, Pennsylvania Supreme Court Justice Papadakos stated:

It is an understatement to say that this is a difficult case . . . Some of our colleagues, however, cry for the recognition of a public policy that children of the age of nine years and under (how about 10 or 11 or 12 years of age, etc.?) must not be treated as murderers and must not be tried as murderers under any circumstances. Perhaps they are right. But that is a matter better left to the Legislature.

Pennsylvania v. Kocher, 602 A.2d 1308, 1315 (Pa. 1992) (Papadakos, J., concurring).

Dissenting from the *Kocher* majority's decision to remand the case for re-examination of whether the defendant was amenable to treatment in the juvenile system, Justice Larsen was a bit harsher in his judgment, adopting a view common to many members of the bench:

I vigorously and emphatically dissent. The trial judge herein was eminently correct . . . and made a courageous decision that, no doubt, flies in the face of the view taken of the issue by many citizens of this Commonwealth. Whether or not we personally find it "shocking" to try a nine year old child on a charge of murder in criminal court, this Court does not have the authority to rewrite a statute duly enacted by the Legislature.

Id. at 1316 (Larsen, J., dissenting). *But see Naovarath*, 779 P.2d at 946 ("Certainly there must be some age at which a [LWOP] sentence . . . must be judged to be unarguably cruel and unusual.").

125. For a discussion of decisions discussing capital punishment for juveniles, see *supra* note 36 and accompanying text.

126. See Verhovek, *supra* note 36, at A7 (noting that, according to the Death Penalty Information Center, 20 of the 38 death penalty states specify 16 as the minimum age; 4 states specify age 17; and the remainder specify age 18 or higher).

127. This aversion to proportionality review is not evident in the context of judicial review of sentences imposed on juveniles *qua* juveniles. See, e.g., *In re J.M.*, 391 N.W.2d 146, 150 (Neb. 1986) (reviewing juvenile commitment for excessiveness); *State v. S.H.*, 877 P.2d 205, 208 (Wash. Ct. App. 1994) (reviewing length of juvenile commitment for 13-year-old rapist as excessive); see also *In re Caldwell*, 666 N.E.2d 1367, 1377 (Ohio 1996) ("The court must look at not only the delinquent act but also at the overall conduct and behavior of the juvenile, the juvenile's history, the remorse shown by the juvenile and other societal fac-

of their lives in an adult prison without a chance of meaningful appellate review of their sentences.¹²⁸ And, from the perspective of a majority of American appellate courts, this mandatory decision is immune from review because, by definition, the sentence cannot as a threshold matter qualify as "grossly disproportionate."

III. A PLEA FOR PROPORTIONALITY ANALYSIS IN THE ASSESSMENT OF LWOP SENTENCES IMPOSED ON JUVENILES

It is well-settled that sentencing a child as an adult does not in and of itself constitute cruel and unusual punishment.¹²⁹ It is equally well-settled that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence."¹³⁰ The question, as Justice Kennedy put it in *Harmelin*, is rather whether a particular sentence is "extreme" and "grossly disproportionate to the crime."¹³¹ Stating these basic guideposts, however, does not answer when a particular sentence runs afoul of the Eighth Amendment. This is especially so with respect to juveniles, a subset of the population traditionally accorded special treatment by the law. When juveniles are sentenced as adults, the judiciary should be especially sensitive to their relative youth, background and culpability. This necessity becomes even more vital when the inadequacies of the waiver procedures that usher a youth into the adult criminal system are taken into account.

tors that determine what length of commitment is appropriate for rehabilitation.").

128. The State of Washington, for instance, applies its criminal laws without restriction "to children as young as 8 years old." *State v. Furman*, 858 P.2d 1092, 1102 (Wash. 1993) (en banc); see also *Harris v. Wright*, 93 F.3d 581, 585 (9th Cir. 1996) (upholding mandatory LWOP sentence imposed on 15-year-old); *State v. Massey*, 803 P.2d 340, 348 (Wash. 1990) (upholding mandatory LWOP sentence imposed on 13-year-old).

Judicial deference to legislative judgments of this kind would appear to be at odds with the basic common law understanding that a child under 14 years of age is rebuttably presumed incapable of possessing the mens rea to commit a criminal act. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 4.11, at 398 (2d ed. 1986). The burden of proof in overcoming the presumption resides with the prosecution. See *id.* at 399 (citing cases); see also *Naovarath*, 779 P.2d at 946 (invalidating LWOP for 13-year-old because in part "[t]he trial court apparently never considered this presumption of incapacity nor does it appear that counsel could have considered it while evaluating possible defenses or when judging [defendant's] capacity to enter a voluntary plea").

129. See *In re Ernesto M.*, 915 P.2d 318, 324 (N.M. Ct. App.) (stating and citing cases which hold "[s]entencing a child as an adult does not constitute cruel and unusual punishment"), *cert. denied*, 913 P.2d 251 (N.M. 1996).

130. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

131. *Id.* (Kennedy, J., concurring) (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)).

A. Kids Are Different

In denying the proportionality claim of a fifteen-year-old sentenced to a mandatory LWOP sentence, the Ninth Circuit in *Harris v. Wright* stated that if the judiciary "can discern no clear line for adults, neither can [it] for youths . . . [M]andatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences."¹³² Consequently, the court found "[y]outh has no obvious bearing on this problem."¹³³ While perhaps true as a phenomenological proposition, this unmoored view loses sight of a basic reality: juveniles can and do differ from adults in fundamental ways.

The Supreme Court itself has noted that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions."¹³⁴ They "lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."¹³⁵ Indeed, growing evidence supports the view that even older adolescents, those fourteen to eighteen years of age, lack the developmental awareness of adults.¹³⁶ This deficit is exacer-

132. *Harris v. Wright*, 93 F.3d 581, 585 (9th Cir. 1996).

133. *Id.*; see also *People v. Launsbury*, 551 N.W.2d 460, 463 (Mich. Ct. App. 1996) (noting that the Michigan "Supreme Court has already ruled a mandatory life sentence without the possibility of parole for an adult is not cruel or unusual punishment" and concluding likewise for juveniles); *State v. Massey*, 803 P.2d 340, 348 (Wash. Ct. App. 1990) ("[T]here 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.").

134. *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

135. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979); see also *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982). The Court in *Eddings* stated:

[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims . . . but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.

Id. (citations omitted)

136. Research suggests that by age 14, one's legal and moral reasoning skills have largely matured. See LAURENCE D. HOULGATE, *THE CHILD AND THE STATE: A NORMATIVE THEORY OF JUVENILE RIGHTS* 61-73 (1980); Barry C. Feld, *The Decision to Seek Criminal Charges: Just Deserts and the Waiver Decision*, 3 CRIM. JUST. ETHICS 27, 37 (1984). In *Stanford v. Kentucky*, 492 U.S. 361 (1989), Justice Scalia stated:

It is . . . absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards.

Id. at 374.

Even accepting Justice Scalia's common-sense view as accurate, recent studies indicate that the psycho-social dynamic often involved in acts of juvenile violence is far more complex, and shares little with, the problem-solving and decision-oriented studies conducted in laboratory settings. See Grisso, *su-*

bated among even younger offenders,¹³⁷ and especially among youths with “intellectual deficits, learning problems, or psychopathology, all of which are more common in juveniles than in the normal adolescents on whom most of the developmental research on capacities has been performed.”¹³⁸ In deference to such findings, the Supreme Court has categorically concluded that “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.”¹³⁹ More to the point, as noted by Justice O’Connor in her pivotal concurrence in *Thompson v. Oklahoma*, “[t]he special qualitative characteristics of juveniles that justify legislatures in treating them differently from adults for many other purposes are also relevant to Eighth Amendment proportionality analysis.”¹⁴⁰

pra note 17, at 232. As Thomas Grisso notes, homicidal acts of juveniles do not necessarily “involve ‘choices’ based on decision-making or problem-solving processes. More often they occur because of choices leading to situations offering high risks of an assaultive encounter.” *Id.* Grisso discusses numerous studies supporting the view that similarities between adult and juvenile decision making in traditional research contexts “are not generalizable to decision making associated with delinquent behaviors.” *Id.* at 233-34. Rather, even older adolescents manifest marked differences relative to adults in times of stress and uncertainty, “where noncognitive, psychosocial factors play an important role.” *Id.* at 234; *see also* *Thompson v. Oklahoma*, 487 U.S. 815, 837 (“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.”); Gary B. Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445, 465-66 (1984) (“[T]hat children have the capacity to perform competently and responsibly does not mean that they will exercise such maturity of judgment, particularly when the decision is made under circumstances of great stress . . .”).

Indeed, the news contains countless instances of supposedly older, supposedly more “mature” adolescents behaving in decidedly immature, aberrational ways. *See, e.g.*, Donald P. Baker, *17-Year-Old Sentenced to Die in Fla.*, WASH. POST, Feb. 28, 1998, at A3 (recounting the actions of the defendant, then age 16, who believed he was a “vampire” at the time he murdered a married couple and drank his 15-year-old co-defendant’s blood to “fortify” himself); Sam Howe Verhovek, *Bloodshed in a Schoolyard: The Overview; In Arkansas Jail, One Boy Cries and the Other Studies the Bible*, N.Y. TIMES, Mar. 27, 1998, at A1 (describing respective responses of 11 and 13-year-old boys detained for shooting four schoolmates and a schoolteacher in Jonesboro, Arkansas).

137. *See* Kirk Heilbrun et al., *A National Survey of U.S. Statutes on Juvenile Transfer: Implications for Policy and Practice*, 15 BEHAV. SCI. & L. 125, 145 (1997) (“[D]ifferences between adults and adolescents are likely to be greater in both cognitive and psychosocial areas when adolescents are 14, and these differences will increase as the adolescents get younger.”).

138. *Id.*; *see also* Ivan P. Kruh & Stanley L. Brodsky, *Clinical Evaluations for Transfer of Juveniles to Criminal Court: Current Practices and Future Research*, 15 BEHAV. SCI. & L. 151, 159-60 (1997) (citing and discussing studies supporting that youths lack the developmental awareness of adults).

139. *Thompson*, 487 U.S. at 835 (O’Connor, J., concurring).

140. *Id.* at 854 (O’Connor, J., concurring); *see also In re T.A.J.*, 73 Cal. Rptr. 2d 331, 338 (Ct. App. 1998) (upholding statutory rape conviction of 16-year-old,

These characteristics deserve particular attention when assessing the "severity" of LWOP in proportionality analysis. Although "penultimate" in degree of punitive severity to the death penalty, increasingly the psychological toll associated with LWOP is receiving attention.¹⁴¹ Among adult offenders the sentence has been referred to as a "slow death" and 'as equally severe' as a death sentence,¹⁴² prompting some death row inmates to waive their appeals out of fear that they will perhaps succeed and be faced with a mandatory LWOP sentence.¹⁴³ Philosopher John Stuart Mill characterized life in prison in a similarly despairing way:

What comparison can there really be, in point of severity between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?¹⁴⁴

when victim was 14, noting that minors "do not have a constitutionally protected interest in engaging in sexual intercourse").

141. See, e.g., Timothy J. Flanagan, *Adaptation and Adjustment Among Long-Term Prisoners*, in LONG-TERM IMPRISONMENT: POLICY, SCIENCE, AND CORRECTIONAL PRACTICE 109, 112-13 (Timothy J. Flanagan ed. 1995) (noting that "[l]ong-term confinement presents special stresses and amplifies noxious elements of incarceration into major problems"); see also *People v. Bloom*, 774 P.2d 698, 715 n.7 (Cal. 1989) (discussing the psychological severity of LWOP).

142. *Stevens v. State*, 691 N.E.2d 412, 430 (Ind. 1997) (quoting *Smith v. State*, 686 N.E.2d 1264, 1273 (Ind. 1997)).

143. See *id.*; see also *Autry v. McKaskle*, 727 F.2d 358, 363 (5th Cir. 1984) (concluding that prisoner's preference for death over life in prison was not per se irrational); *People v. Guzman*, 755 P.2d 917, 947-48 (Cal. 1988) (finding that defendant's announced intent to seek death penalty did not demonstrate incompetence); *Smith*, 686 N.E.2d at 1273 (explaining defendant's preference for death penalty as "the product of a choice between the lesser of two (legal) evils"); Rob Schneider, *Tired of Empty Life, Killer Now Welcomes Impending Execution*, INDIANAPOLIS STAR, Jan. 18, 1998, at A1 (telling of death row inmate who negotiated his own death sentence because he didn't want to grow old in prison; upon brokering the deal, the inmate reportedly stated "What I've got is a slow death. I'm asking the court to give me justice, give me . . . let me die").

144. LEON SHASKOLSKY SHELEFF, *ULTIMATE PENALTIES: CAPITAL PUNISHMENT, LIFE IMPRISONMENT PHYSICAL TORTURE* 60 (1987) (quoting John Stuart Mill, *Parliamentary Debate on Capital Punishment Within Prisons Bill* (Apr. 21 1868), reprinted in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 271 (Gertrude Ezorsky ed. 1972)); see also Cesare Beccaria, *On Crimes and Punishments*, in *CLASSICS OF CRIMINOLOGY* 206, 210 (Joseph E. Jacoby ed. 1979) (arguing that "perpetual servitude . . . may well be even more cruel"); SHELEFF, *supra*, at 61-62 ("Perpetual imprisonment is accompanied by the darkness of despair . . . almost the only possible justification for the horrors of life imprisonment, is that it has been regarded as constituting a substitute for Capital Punishment, which many persons consider to be a still greater evil." (quoting William Tallock, *PENOLOGICAL AND PREVENTIVE PRINCIPLES* 152 (n.p. 1888))).

From the perspective of youthful offenders, this hopelessness and despair is arguably heightened. As noted by the Kentucky supreme court, "life without parole for a juvenile, like death, is a sentence different in quality and character from a sentence to a term of years subject to parole."¹⁴⁵ In striking down on proportionality grounds an LWOP sentence imposed on a 13-year-old, the Nevada supreme court characterized LWOP as 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 defendant], he will remain in prison for the rest of his days."¹⁴⁶

Compounding this emotional despair and hopelessness is the recognition that young offenders run a far greater risk of physical—and sexual—assault by older, more mature offenders, and will suffer this fate for years to come when sentenced to LWOP.¹⁴⁷

Taken together, the unique characteristics of juveniles and the unusual severity of LWOP compel that special sensitivity attach to proportionality evaluations of juvenile LWOP sentences. But concern for disproportionality should not stop there. Beyond these basic considerations, procedural and systemic considerations exist that singly, and in combination with the foregoing, make it imperative that juveniles sentenced to LWOP not evade proportionality review.

B. *The Confounding Effects of Waiver*

In *May v. Anderson*,¹⁴⁸ Justice Frankfurter cautioned against the "uncritical transfer" of adult legal suppositions to minors.¹⁴⁹ However, the practical, and indeed intended, outcome of juvenile

145. *Hampton v. Kentucky*, 666 S.W.2d 737, 741 (Ky. 1984); see also Victor L. Streib, *Sentencing Juvenile Murderers: Punish the Last Offender or Save the Next Victim*, 26 U. TOL. L. REV. 765, 776 (1995) ("A strong argument can be made that life in prison is as severe, if not more severe, a punishment for a juvenile than is the death penalty.").

146. *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989). One of two defendants in *Stanford v. Kentucky*, 492 U.S. 361 (1989), 16-year-old Heath Wilkins, "waived counsel with the avowed intention of pleading guilty and seeking the death penalty." *Id.* at 400 (Brennan, J., dissenting). Offering no mitigating evidence at sentencing, he informed the trial court that "he would prefer the death penalty to life in prison," stating "[o]ne I fear, the other one I don't." *Id.* (Brennan, J., dissenting).

147. See Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 9 (1989) (stating that juveniles in adult prisons are five times more likely to be sexually assaulted and twice as likely to be beaten by staff, compared with their peers in juvenile facilities).

148. 345 U.S. 528 (1953).

149. *Id.* at 536 (1952) (Frankfurter, J., concurring) (stating that "[l]egal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children").

waiver laws is to do just that. With the dramatic increase in waiver, juveniles increasingly now suffer the full brunt of adult punishment, including LWOP. In a few jurisdictions, the Eighth Amendment can intervene to ensure at least some review of such sentences. In the majority of states, and the federal courts, however, they are effectively immune from constitutional attack. There are at least four problems with the majority position.

The first concern arises out of the basic infirmities of waiver itself, a process Franklin Zimring has called the "capital punishment of juvenile justice."¹⁵⁰ Waiver by judicial intervention, historically the most common approach, for years has been harshly criticized for its arbitrariness. James Howell, former Director of Research at the U.S. Office of Juvenile Justice and Delinquency Prevention, recently summarized his comprehensive review of studies concerning judicial waiver as follows:

First, there are enormous disparities from state to state and within states in the transfer of juveniles to the criminal justice system, with respect to offense severity, offense history, age, conviction rates, and incarceration rates. Most of this variation appears to be associated with political and organizational vagaries rather than differences in offenders There is little agreement among transfer decision makers, a lack of formal transfer hearings, and inconsistent application of transfer criteria. Second, there are gross inequities in the transfer and incarceration of minority versus nonminority juveniles Third, there is an enormous disparity in the length of confinement from one state to another for transferred juveniles.¹⁶¹

150. Franklin E. Zimring, *Notes Towards a Jurisprudence of Waiver*, in MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING 193 (J.C. Hall et al. eds., 1981). In addition to the array of serious problems regarding waiver identified to date, it is widely acknowledged that there exists a decided paucity of comprehensive analysis of waiver. See HOWELL, *supra* note 151, at 108 (noting that there exists "little information . . . available on criminal justice system handling of juvenile offenders. . . . The studies and data available to date do not provide an adequate basis for drawing final conclusions regarding the relative merits of the . . . processes for transfer"); Heilbrun et al., *supra* note 137, at 148 (urging that "[i]t is time to address juvenile transfer seriously as an issue for forensic assessment").

151. JAMES C. HOWELL, *JUVENILE JUSTICE AND YOUTH VIOLENCE* 109 (1997).

Concern also exists over the basic relevance of the statutory criteria used by courts, presuming such criteria exist. Katherine Federle concludes that:

The *Kent* criteria . . . provide little assurance that only the most culpable minors will be tried as adults. Non-offender characteristics seemingly have little relevance to an individualized assessment of the minor's maturity and moral blameworthiness

Moreover, the current availability of resources has absolutely nothing to do with an individualized assessment of maturity and blameworthiness. Yet this criterion, perhaps more than any other, provides justification for waiver to adult court.

Added to this mix of arbitrary factors in judicial waiver is the troubling, yet typically invisible, impact of political and community influence over the waiver process. Faced with the often horrific, high-profile acts of youth violence, and the unattractive alternative of the juvenile system that will hold the youth only until age of majority or a similarly short term of years, juvenile judges understandably may feel pressure to waive jurisdiction.¹⁵²

Prosecutorial waiver and statutory exclusion inspire little more faith. With prosecutorial waiver, the local prosecutor, without any set criteria and no judicial review, unilaterally determines whether a juvenile should be prosecuted as an adult, typically on the basis that probable cause exists that the juvenile committed the crime in question.¹⁵³ The supreme courts of Delaware¹⁵⁴ and Utah¹⁵⁵ have now invalidated the practice. As the Delaware supreme court noted:

Katherine Hunt Federle, *Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 WIS. L. REV. 447, 488; see also *id.* at 489 (“[T]here is some suggestion that juvenile court judges equate the seriousness of the offense with maturity and culpability.”).

Barry Feld provides a similarly critical view of judicial waiver decision: “Couching judicial waiver decisions in terms of amenability to treatment or dangerousness effectively grants juvenile court judges broad, standardless discretion. Such waiver provisions are the juvenile equivalent of the discretionary capital punishment statutes that the Supreme Court condemned [in] *Furman v. Georgia*.” Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1008 (1995). See generally Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314 (1990) (discussing the erratic application of waiver criteria); Leone Lee, *Factors Determining Waiver in a Juvenile Court*, 22 J. CRIM. JUST. 329, 334 (1994) (discussing studies showing the erratic application of the waiver criteria).

152. Several states, unsatisfied with this stark and unsatisfying option, have adopted “blended” sentencing options for serious juvenile offenders. See, e.g., Feld, *supra* note 151, at 1038-51.

153. See, e.g., W. VA. CODE § 49-5-10 (Supp. 1997). In 1995, the West Virginia Legislature amended its predecessor statute, depriving the circuit court of the ability to consider “personal and other factors going to the suitability and amenability of a juvenile for . . . juvenile jurisdiction—and effectively assigning solely to the prosecuting attorney the task of deciding which individuals of a class of juveniles will be transferred to adult jurisdiction.” *State v. Robert K.*, 496 S.E.2d 887, 889 (W. Va. 1997). The statute provides prosecutors with the exclusive authority to select juveniles for waiver but provides no standards or criteria to guide their judgments—and no mechanism for the review of such determinations. See *id.* at 890-91.

Prosecutorial waiver accounts for most instances of waiver, not because it is more commonly adopted within the states, but because of high levels of prosecutorial activity in a few states. See Parent et al., *supra* note 23, at 1. This form of waiver has also come under sharp criticism. See, e.g., Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 281, 284-85 (1991) (criticizing prosecutorial waiver); Thomas & Bilchik, *supra* note 11, at 478 (suggesting that effectiveness of prosecutorial waiver depends too much on individual prosecutor); Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in*

In essence, the statutory amendment has stripped the judiciary of its independent jurisdictional role in the adjudication of children by granting the charging authority the unbridled discretion to unilaterally determine which forum has jurisdiction . . . [T]he statute has deprived children . . . [of] the judicial counterweight which they are constitutionally entitled to receive.¹⁵⁶

Statutory exclusion, where juveniles are excluded from juvenile court solely because they satisfy specified age and offense criteria, raises different but no less troubling concerns. Under such regimes, absolutely no evaluation is made of the appropriateness of trying a given juvenile as an adult, with offense seriousness and the age of the offender being the sole determinants of waiver.¹⁵⁷

Exacerbating these systemic flaws are the sharp limits placed on the rights of juveniles to appeal "adult" status. When a right of appeal does exist it most often must be delayed until the juvenile is convicted and sentenced in an adult proceeding.¹⁵⁸

Second, and even more broadly, it is increasingly evident that the justice system has a highly uneven capacity to accurately assess juvenile competency, both for fitness to stand trial and punishment, yet systematically waives juveniles of uncertain competency to adult court for prosecution.¹⁵⁹ As recently noted by one researcher, "[f]or

Juvenile Justice, 35 AM. CRIM. L. REV. 371, 394-98 (1998) (noting multiple concerns including racial discrimination and political influence).

154. See *Hughes v. State*, 653 A.2d 241 (Del. 1994).

155. See *State v. Mohi*, 901 P.2d 991 (Utah 1995).

156. *Hughes*, 653 A.2d at 249. *Hughes* holds that a "reverse amenability" hearing where the juvenile may present evidence is constitutionally required. *Id.* at 247. But see *In re A.L.*, 638 A.2d 814, 816 (N.J. Super. Ct. App. Div. 1994) (upholding prosecutorial waiver provision); *Hansen v. State*, 904 P.2d 811, 813 (Wyo. 1995) (same).

157. See Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 708 (1991); Klein, *supra* note 153, at 390-94 (summarizing criticisms of statutory exclusion and its renunciation of offender-based sentencing).

158. See 2 DONALD T. KRAMER, *LEGAL RIGHTS OF CHILDREN* § 22.20, at 366 (2d ed. 1994) (citing state laws and cases stating that the right of appeal must be delayed); see also Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1265-71 (1996) (noting same and commenting on the marked imbalance between the rights of prosecution and juvenile to appeal waiver).

159. See Deborah K. Cooper, *Juveniles' Understanding of Trial-Related Information: Are They Competent Defendants?*, 15 BEHAV. SCI. & L. 167, 168-69, 177-78 (1997) (citing studies); Heilbrun et al., *supra* note 137, at 145 (same). Virginia is the only state that requires a juvenile's capacity to stand trial be assessed at the waiver hearing. See Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform*, 12 CRIM. JUST. 5, 6 (1997). See generally Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & LAW 3 (1997) (providing extensive overview of relevant studies regarding a child's capacity); Pam Belluck, *Lawyers Struggle in Defense of Children in Deadly Crimes*, N.Y. TIMES, Aug. 17, 1998, at A1 (discussing special problems relating to representing the very young, owing to their limited emotional and intellectual development).

reasons related to their stage of development, adolescents are more at risk than adults of errors in their diagnosis, as well as clinicians' failure to identify the role of mental disorder in their murders."¹⁶⁰ In other instances, even when diagnosed, the psychological afflictions of the young frequently are ignored altogether or otherwise downplayed.¹⁶¹

Compounding the aforementioned shortcomings is a third concern—the enormous judicial deference accorded waiver determinations. Typically, when waiver is reviewed at all it is reviewed for an “abuse of discretion.”¹⁶² The North Carolina Court of Appeals, in rejecting a proportionality challenge brought by a thirteen-year-old

160. Grisso, *supra* note 17, at 237; see also *Stanford v. Kentucky*, 492 U.S. 361, 398 (1998) (Brennan, J., dissenting) (citing and discussing studies done on juvenile death row inmates indicating high rates of psychological, intellectual and emotional disabilities); *id.* at 403 (Brennan, J., dissenting) (“The individualized consideration of an offender’s youth and culpability at the transfer stage and at sentencing has not operated to ensure that the only offenders under 18 singled out for the ultimate penalty are exceptional individuals whose level of responsibility is more developed than that of their peers.”).

The Supreme Court of Pennsylvania recently addressed a competency question relating to a nine-year-old boy facing adult prosecution for murder. See *Pennsylvania v. Kocher*, 602 A.2d 1308 (Pa. 1992). The Pennsylvania Supreme Court reversed the lower court because it had erroneously required the boy to prove he suffered from a mental disease or defect in order to establish amenability to treatment in the juvenile system, contrary to Pennsylvania waiver law. See *id.* at 1314-15.

161. See, e.g., *Naovarath v. State*, 779 P.2d 944, 946 n.3 (Nev. 1989) (invalidating LWOP sentence imposed on 13-year-old and noting uncontradicted testimony of court-appointed psychologist that defendant was “psychotic, delusional and unable to ‘distinguish reality and fantasy.’ . . . [L]ittle heed was paid by anyone to the psychologist’s opinion and that no one ever sought a hearing on [defendant’s] competency at the time of the killing or at the time of the plea of guilty of ‘murder.’”). But see *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (“[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him”); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (evaluating whether a confession was voluntary and noting that when “a mere [15-year-old] child . . . is before us, special care in scrutinizing the record must be used”).

In affirming a mandatory LWOP sentence imposed on another 14-year-old the Illinois Court of Appeals has elsewhere commented rather fatalistically that it was “not beyond comprehension that a fuller investigation might have been made prior to the transfer hearing Undoubtedly the transfer hearing and its result are at the heart of this case.” *People v. Clark*, 494 N.E.2d 551, 559 (Ill. App. Ct. 1986), *rev’d*, 518 N.E.2d 138 (Ill. 1987).

162. See *People v. Cooks*, 648 N.E.2d 190, 197 (Ill. App. Ct. 1995) (stating that “[n]o one criterion is determinative, nor must equal weight be given to every [statutory] factor,” in reviewing waiver decisions under an abuse of discretion standard and denying proportionality challenge against a LWOP sentence brought by 14-year-old); see also *In re T.L.J.*, 495 N.W.2d 237, 240 (Minn. Ct. App. 1993) (reciting abuse of discretion standard); *State v. Green*, 124 N.C. App. 269, 276, 477 S.E.2d 182, 185 (1996) (same); *Kocher*, 602 A.2d at 1310 (same); *State v. Furman*, 858 P.2d 1092, 1097 (Wash. 1993) (en banc) (same).

boy to a mandatory life sentence (with parole), recently highlighted the "hands-off" philosophy common to the bench:

Defendant's age, mental capacity, and lack of a prior criminal record do not change this result. He was found competent to stand trial and was tried and sentenced as an adult. The General Assembly has the discretionary authority to examine our society's evolving standards of decency and to determine when children may be tried as adults. By reducing the age at which a juvenile may be transferred to superior court for trial as an adult from fourteen to thirteen, the General Assembly made this choice.¹⁶³

Fourth and finally, there is the basic issue of whether American legislatures are truly making "choices" worthy of deference by the judiciary. In their head-long rush to "get tough" on juveniles, it is unclear whether legislators comprehend the actual consequences of their radical measures to overhaul juvenile justice. For instance, in *Harris v. Wright*,¹⁶⁴ where the Ninth Circuit dismissed a proportionality challenge against a mandatory LWOP sentence imposed on a fifteen-year-old, the Court was also asked to address whether the Washington statute under which petitioner was sentenced was unconstitutionally vague.¹⁶⁵ Writing for the majority, Judge Kozinski

163. *Green*, 124 N.C. App. at 824, 477 S.E.2d at 189 (1996). The identical sentiment was echoed even more recently by the North Carolina Court of Appeals. See *State v. Stinnett*, ___ N.C. App. ___, 497 S.E.2d 696 (1998). Rejecting an Eighth Amendment challenge brought by a 15-year-old who, pursuant to state law, was waived to adult court upon a mere finding of probable cause that he committed a murder, and was sentenced to mandatory LWOP upon being convicted, the court stated:

North Carolina courts have consistently held 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. It is within the province of the General Assembly to enact a process for dealing with serious offenses committed by juveniles. The General Assembly has chosen a process that excludes juveniles accused of Class A felonies who are thirteen years of age or older from the preferred treatment of juvenile court disposition. Legislative bodies are free to make exceptions to the statutory rules that children are entitled to special treatment. The General Assembly has the constitutional authority to enact laws. Unless their enactments or the way they are applied offend our Constitution or the Constitution of the United States, we are bound by these enactments.

Id. at ___, 497 S.E.2d at 701-02 (citations omitted); see also *State v. Massey*, 803 P.2d 340, 348 (Wash. Ct. App. 1990) (rejecting a proportionality challenge to a mandatory LWOP sentence brought by a 13-year-old, saying "the juvenile court's consideration at declination accounts for the disparity between juvenile and adult sentencing, and in this case the court elected for adult sentencing because the juvenile penalties were insufficient").

164. 93 F.3d 581 (9th Cir. 1996).

165. *Id.* at 585.

distinguished *Thompson v. Oklahoma*,¹⁶⁶ where Justice O'Connor refused to presume that the Oklahoma Legislature intended to permit the execution of fifteen-year-old murderers without an express indication to this effect in the State's law.¹⁶⁷ To Judge Kozinski, Oklahoma's failure to set an express minimum age for the death penalty differed from Washington's failure to expressly define the population possibly subject to LWOP.¹⁶⁸ In *Thompson*, according to Judge Kozinski, Justice O'Connor "premised her opinion . . . on strong evidence of a national consensus against imposing the death penalty for crimes committed before the age of sixteen, and on the special scrutiny the Constitution accords capital punishment."¹⁶⁹ Judge Kozinski reasoned that "[w]here the question isn't life or death the Constitution doesn't require the state to prove its legislature contemplated each specific application of clearly phrased, general laws."¹⁷⁰

Dissenting in *Harris*, Judge Pregerson found the Washington aggravated murder statute unconstitutionally ambiguous because it failed to "evinced the legislature's clear intent to impose a mandatory sentence of life without the possibility of parole on juveniles under the age of 16."¹⁷¹ Noting that the Supreme Court in *Thompson* rejected Oklahoma's argument that a waiver determination was tantamount to a determination of death-eligibility for the fifteen-year-old offender there, Judge Pregerson argued:

Under [the waiver statute], the Washington juvenile court has the discretion to decline jurisdiction over juvenile offenders. In exercising that discretion, the juvenile court may consider the seriousness of the offense and whether the juvenile justice system can adequately protect the public and rehabilitate the defendant. However, it does not necessarily follow . . . that the Washington legislature deliberately concluded that it would be appropriate to impose the penalty of life imprisonment without the possibility of parole Indeed, in the State of Washington, Harris and his codefendant, Massey, are the only juveniles under the age of 16 who are presently serving a mandatory

166. 487 U.S. 815 (1988).

167. See *Harris*, 93 F.3d at 585 (citing *Thompson*, 487 U.S. at 856-59 (O'Connor, J., concurring)).

168. See *id.*

169. *Id.* Justice O'Connor, whose concurrence in *Thompson* was the deciding vote, stopped short of subscribing to her fellow justices' conclusion that there existed an iron-clad national consensus against executing 15-year-olds. *Thompson*, 487 U.S. at 858-59 (O'Connor, J., concurring). Rather, she concluded that there existed "significant affirmative evidence of a national consensus," noting that 18 states forbade the execution of children younger than 16. *Id.* at 858 n.1 (O'Connor, J., concurring).

170. *Harris*, 93 F.3d at 585.

171. *Id.* at 586 (Pregerson, J., dissenting).

sentence of life imprisonment without the possibility of parole.¹⁷²

Judge Kozinski concluded in *Harris* that it is too much to require a finding that a "legislature contemplated each specific application of clearly phrased, general laws."¹⁷³ Some jurisdictions, however, disagree. Illinois, for instance, requires that the waiver decision take account of the possibility that the juvenile will face mandatory LWOP.¹⁷⁴ Commenting on the trial court's failure to heed this factor, the Illinois supreme court has said: "[N]o informed judgment can be made about the disposition . . . where, as here, there is not the slightest consideration" given to the possible outcome.¹⁷⁵ In Nevada, "[b]ecause, by statute, homicides committed by children . . . are punishable by adult standards," the courts dedicate "careful . . . attention . . . to the subject of fair and constitutional treatment of children who find themselves caught up in the adult criminal justice system."¹⁷⁶ Under the reasoning of *Harris*, however, children of shockingly young ages are subject to LWOP upon conviction¹⁷⁷ by virtue of the possibly unanticipated interplay of statutes often contained in disparate sections of a State's statute books. Yet, such legislative "decisions" are essentially immune from judicial review.¹⁷⁸

172. *Id.* at 586-87 (Pregerson, J., dissenting) (citations omitted).

173. *Id.* at 585.

174. See *People v. Clark*, 518 N.E.2d 138, 144 (Ill.1987).

175. *Id.*; see also *Harris v. State*, 674 So. 2d 854, 856 (Fla. Dist. Ct. App. 1996) (remanding juvenile's case because the record was unclear whether the lower court "was actually aware of the practical effect of its sentence," which was LWOP); *Washington v. State*, 642 So. 2d 61, 63-64 (Fla. Dist. Ct. App. 1994) (construing section 39.059(7)(d) of the Florida Statutes Annotated, which requires the sentencing court to provide "written reasons and findings of fact to support imposition of adult sentences"). *But see State v. Taylor*, ___ N.C. App. ___, 496 S.E.2d 811, 816 (1998) (electing not to follow constitutional rule of several other states requiring that a juvenile be informed, prior to the occurrence of a valid confession, that a prosecution in adult court might ensue).

176. *Naovarath v. State*, 779 P.2d 944, 946 (Nev. 1989).

177. For a discussion of states upholding LWOP sentence for children of young ages, see *supra* notes 32-34 and accompanying text.

178. In striking down a mandatory LWOP sentence imposed on an adult offender as a result of a similar interplay, the First Circuit recently stated:

The mandatory imposition of a life sentence here raises questions of whether such a result was strictly intended by the Sentencing Guidelines and whether the method followed to produce that result comports with the Due Process Clause. . . . The life sentence resulted from the convergence of several doctrines in sentencing law, each individually well accepted, and none of which individually is questionable here. But just as folk wisdom recognizes that the whole is often greater and different than simply the sum of its parts, these individual doctrines, each reflecting compromises in our criminal jurisprudence, in this extreme case threaten in combination to erode rights that the Constitution does not permit to be compromised.

United States v. Lombard, 72 F.3d 170, 175 (1st Cir. 1995).

In short, there is scant reason to believe that waiver, in whatever form, serves to winnow in any reliable way only those juveniles that should be prosecuted as adults. As Katherine Federle recently observed, waiver is often based upon "bureaucratic rather than individuated concerns which preclude an assessment of the minor's blameworthiness."¹⁷⁹ The justice system, in defiance of all we now know about juveniles and in a throwback to the bygone days before the emergence of the juvenile system, now elevates offense seriousness above all else, effectively equating offense severity with offender culpability.¹⁸⁰ In the majority of courts that fail to employ a meaningful proportionality analysis with respect to juvenile LWOP, an overriding rationale is that the offenders before them are "adults," and have been properly certified as such. To these courts, waiver serves as a proxy for proportionality analysis, providing an often dispositive assurance that proportionality analysis need not

North Carolina statutory law appears to expressly contemplate such interaction. See N.C. GEN. STAT. §§ 7A-608, 14-17 (1995). Section 7A-608 of the General Statutes of North Carolina mandates that in the event probable cause exists that a juvenile over the age of 13 has committed a Class A felony, the juvenile shall be transferred to superior court for adult adjudication. *Id.* § 7A-608. Section 14-17 of the General Statutes of North Carolina provides that punishment for first-degree-murder shall be death or imprisonment for life "except that any such person who was under 17 years of age at the time of the murder" shall be sentenced to LWOP. *Id.* § 14-17; see also *State v. Stinnett*, ___ N.C. App. ___, 497 S.E.2d 696, 701 (1998) (noting that section 15A-1380.5 of the General Statutes of North Carolina further requires that LWOP sentences are to be reviewed by the court 25 years after their imposition, and at two-year intervals thereafter, permitting the court to recommend commutation by the executive branch).

179. Federle, *supra* note 151, at 484; see also Barry C. Feld, *Bad Law Makes Hard Cases, Reflections on Teen-age Axe-Murderers, Judicial Activism, and Legislative Default*, 8 LAW & INEQ. J. 1, 3-17 (1989) (referring to waiver as a "sentencing choice" and criticizing criteria used).

Justice Brennan, dissenting in *Stanford v. Kentucky*, 492 U.S. 361 (1989), commented on this basic, systemic deficiency at length, noting the widespread presence on American death rows of juveniles possessing far less than adult culpability. *Id.* at 397-98 (Brennan, J., dissenting). According to Justice Brennan, "[i]mmaturity that constitutionally should operate as a bar to a disproportionate death sentence does not guarantee that a minor will not be transferred for trial to the adult court system Psychological, intellectual, and other personal characteristics of juvenile offenders receive little attention at the transfer stage . . ." *Id.* at 397 (Brennan, J., dissenting).

180. Turn-of-the-century juvenile reformer Julian Mack summarized the traditional common law approach to adjudicating youthful offenders as follows:

[The justice system] did not aim to find out what the accused's history was, . . . his heredity, his environments, his associations It put but one question, "Has he committed this crime?" It did not inquire, "What is the best thing to do for this lad?" It did not even punish him in a manner that would tend to improve him; the punishment was visited in proportion to the degree of wrongdoing evidenced by the single act; not by the needs of the boy, not by the needs of the state.

Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1910).

be undertaken.¹⁸¹ As discussed, however, there are compelling reasons to question the reliability of waiver, making the judiciary's confidence a notably empty basis for dispensing with constitutional review.

CONCLUSION

The imposition of LWOP on juveniles raises a host of difficult questions. Nevertheless, most American courts fail to subject such draconian sentences to proportionality analysis, as the Eighth Amendment plainly requires.¹⁸² The prevailing rationale advanced by such courts is that punishment is a legislative prerogative—and that society is well within its rights to impose harsh punishment on juvenile offenders in response to their atrocious crimes.¹⁸³ Perhaps this is so; one can also agree that the Constitution does not “require a precise calibration of crime and punishment.”¹⁸⁴ This is not to say, however, that no limits can or should be placed on the power of the State to punish society's youngest offenders. Rather, what is needed is a critical reexamination of proportionality jurisprudence with respect to juveniles.

This reexamination can usefully begin with the Supreme Court's decision in *Harmelin* itself, discussed at length above.¹⁸⁵

181. This assurance appears to have been an issue with the jury in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), itself. While deliberating the 15-year-old defendant's guilt, the jury made written inquiry of the trial judge as to whether Thompson had been certified as an adult. See Brief for Petitioner at 31, *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (No. 86-6169). After the court responded in the affirmative, the jury convicted Thompson of capital murder. See *id.* at 1.

182. See *Stanford*, 492 U.S. at 382 (O'Connor, J., concurring in part and concurring in judgment) (stating that the judiciary has a “constitutional obligation to conduct proportionality analysis”).

183. Basis also exists for an argument that LWOP, as applied to very young offenders, violates the Eighth Amendment because it serves no valid penological purpose. Imposition of LWOP on such offenders arguably strains any retributive justification. See *United States v. Jackson*, 835 F.2d 1195, 1200 (7th Cir. 1987) (Posner, J., concurring) (“A civilized society locks up [criminals] until age makes them harmless but it does not keep them in prison until they die.”); SAMPSON & LAUB, *supra* note 23, at 204-42 (discussing “turning points” in the lives of former delinquents). Deterrence also has questionable effect under such circumstances. See *Naovarath v. State*, 779 P.2d 944 (Nev. 1989). The Nevada court stated:

It is questionable as to whether a thirteen-year-old can even imagine or comprehend what it means to be imprisoned for sixty years or more. It is questionable whether a sentence of virtually hopeless lifetime incarceration for this seventh grader “measurably contributes” to the social purposes that are intended to be served by this next-to-maximum penalty.

Id. at 947 (citing *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

184. *United States v. Graciani*, 61 F.3d 70, 76 (1st Cir. 1995).

185. For a discussion of the *Harmelin* decision, see *supra* notes 77-92 and accompanying text.

Harmelin instructs that the Eighth Amendment guards against "extreme sentences" that are "grossly disproportionate."¹⁸⁶ One can certainly argue that imposition of a mandatory LWOP sentence on an eight, nine, ten or even fifteen-year-old qualifies as "extreme" and warrants proportionality scrutiny.¹⁸⁷ American law and society have traditionally acknowledged the special station of juveniles, owing to their mental, emotional and developmental uniqueness. Indeed, such solicitude has been repeatedly shown by the Supreme Court, perhaps most notably in *Thompson*.¹⁸⁸ If age can mean the difference between life or death under *Thompson*, it should play some role in *Harmelin's* "threshold" inquiry into the appropriateness of the "penultimate penalty," LWOP, the harshest penalty now imposed on those under age sixteen at the time of their offense.¹⁸⁹

At the same time, however, age per se should not be determinative of proportionality. As Justice O'Connor observed in *Thompson*, even granting "that adolescents are generally less blameworthy than adults who commit similar crimes—it does not necessarily follow that all 15-year-olds are incapable of the moral culpability" prerequisite to harsh punishment, even LWOP.¹⁹⁰ Rather, age should serve as a "trigger" for heightened proportionality analysis, requiring a special vigilance among appellate courts with respect to the background and traits of the young offender to ensure the presence of the culpability prerequisite to LWOP.¹⁹¹

186. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (Kennedy, J., concurring in part and concurring in the judgment).

187. See *Naovarath*, 779 P.2d at 947 ("To make the judgment that a thirteen-year-old must be punished with this severity [LWOP] and that he can never be reformed, is the kind of judgment that, if it can be made at all, must be made rarely and only on the surest and soundest of grounds.").

188. For a discussion of the *Thompson* decision and the special station of juveniles, see *supra* notes 134-140 and accompanying text.

189. See *Harmelin*, 501 U.S. at 1000 (stating that proportionality should be guided by "objective factors to the maximum extent possible"). Chronological age, of course, holds great promise in this regard. See *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (requiring that 16-year-old's age be considered as a mitigating factor in capital sentencing).

190. *Thompson v. Oklahoma*, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring); see also 4 WILLIAM BLACKSTONE, COMMENTARIES *23 ("[T]he capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment.").

191. See *Naovarath*, 779 P.2d at 946 ("In deciding whether the sentence [LWOP imposed on a 13-year-old] exceeds constitutional bounds it is necessary to look at both the age of the convict and at his probable mental state at the time of the offense.").

This special attention is particularly warranted given the undue institutional deference otherwise paid waiver which, as discussed, in no way should substitute as a proxy for youthful culpability. Waiver, as it presently exists, simply does not warrant this deference, a situation not likely to improve as states increasingly turn to statutory and prosecutorial waiver, which pay no heed whatsoever to individual culpability.

Second, even assuming the analysis applied in *Harmelin* should apply to juveniles,¹⁹² the majority's conclusion that non-capital defendants are not entitled to mitigating evidence at the sentencing stage obscures an important distinction.¹⁹³ The Court's "individualized capital-sentencing doctrine" ensures that a death sentence is imposed only on the most deserving offenders.¹⁹⁴ Proportionality analysis, which is conducted exclusively by reviewing courts after a sentence is prescribed, and extends to both capital and non-capital cases, examines a different question: whether a given sentence is "grossly disproportionate." Perhaps quite understandably, the Court is loath to impose on the justice system the significant costs and burdens associated with bifurcated sentencing proceedings in non-capital cases.¹⁹⁵ But this is not to say that constitutional oversight cannot be exercised when such non-capital sentences are themselves renewed.¹⁹⁶ Indeed, neither *Harmelin* nor any other opinion of the Court requires that a defendant's age can never be considered when assessing proportionality.¹⁹⁷ To conclude

192. *Harmelin*, 501 U.S. at 994-96 (examining LWOP in the context of an adult offender).

193. *Id.* at 995-96.

194. Individualization, established in *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976), and guided discretion, mandated in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), are the two principal guiding constitutional doctrines in capital sentencing jurisprudence. See *Torres v. United States*, 140 F.3d 392, 405 (2d Cir. 1998).

195. Barry Feld, however, recently advocated that, in conjunction with the dismantling of the juvenile court, adult sentencing courts be required to take account a juvenile offender's "youthfulness." Feld, *supra* note 19, at 118 ("A statutory sentencing policy that integrates youthfulness, reduced culpability, and restricted opportunities to learn self control with principals of proportionality would provide younger offenders with categorical fractional reductions of adult sentences.").

196. The Supreme Court of South Dakota recently recognized this important distinction. See *State v. Bonner*, 577 N.W.2d 575 (S.D. 1998). Citing *Harmelin*, the South Dakota court looked at "objective factors" in its proportionality review of a 30-year consecutive sentence imposed on a developmentally disabled, 19-year-old offender. *Id.* at 579-83. Invalidating the sentence in part, the court focused on the defendant's lack of a felony record, noting that "[o]bviously this record will not necessarily excuse or mitigate his sentence, but it certainly bears on the question of gross disproportionality." *Id.* at 582; see also *People v. Cisneros*, 855 P.2d 822, 842 (Colo. 1993) (en banc) (Kirshbaum, J., concurring in part and dissenting in part) ("The conclusion that a court may consider a defendant's age in conducting an extended proportionality review in non-capital cases by no means requires the additional conclusion that the broad individualized sentencing doctrine must be extended to other Eighth Amendment contexts.").

197. The illogical nature, and indeed unfairness, of this situation is highlighted by a recent Minnesota case. See *State v. Mitchell*, 577 N.W.2d 481 (Minn. 1998). In *Mitchell*, the Minnesota court rejected a proportionality challenge brought by a 15-year-old who had been sentenced to life imprisonment with no possibility of parole for 30 years. *Id.* at 490. The trial judge noted that the defendant's age constituted a mitigating factor, but that he was precluded

otherwise "ignores reality and requires adherence to the fiction that a defendant's age is never relevant to an evaluation of the defendant's culpability."¹⁹⁸

Over thirty-five years ago, the Supreme Court admonished that questions of proportionality are not to be "considered in the abstract."¹⁹⁹ If this is still so, age must play some role. Without such judicial oversight, as the late Justice William Brennan once observed, the Eighth Amendment's bar against cruel and unusual punishments represents "little more than good advice."²⁰⁰

from imposing a lesser sentence because the sentence was mandatory. *See id.* at 488. The judge added that, "[w]hether it's cruel and inhuman punishment is something that the appellate courts are going to have to make a determination." *Id.*

On appeal, the Minnesota Supreme Court first stated that, because Mitchell had been certified an adult, the sentencing guidelines applied with presumptive force. *See id.* at 491. The Court noted that "there is no fundamental right to have age considered in adult sentencing." *Id.* This settled, the court went on to construe the Minnesota Constitution's bar against "cruel or unusual" punishment. *See id.* at 489. The Court looked to "the evolving standard of decency at the time that Mitchell committed his crime to determine whether the punishment was cruel as applied to him." *Id.* After observing that the State had become "increasingly intolerant of child crime and more tolerant of harsher penalties" at the time of Mitchell's offense, the court found that the sentence was not "cruel." *Id.* at 490. Nor was the sentence "unusual" because the states are "split" on the permissibility of imposing a mandatory life sentence on a 15-year-old: "if this sentence is unusual in any way, it is only because it is unusual for a 15-year-old child to commit such a heinous crime." *Id.* In short, no evaluation was made of Mitchell's culpability, nor did the court recognize that the waiver process itself, which looked only at whether Mitchell was not suitable for juvenile treatment and whether public safety would be served if juvenile jurisdiction were retained, paid no heed whatsoever to culpability *per se*.

198. *Cisneros*, 855 P.2d at 842 (Kirshbaum, J., concurring in part and dissenting in part).

199. *Robinson v. California*, 370 U.S. 660, 667 (1962).

200. *Furman v. Georgia*, 408 U.S. 238, 269 (1972) (*per curiam*) (Brennan, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 104 (1958)).

