


GETTING JUVENILE LIFE WITHOUT PAROLE “RIGHT” AFTER
MILLER V. ALABAMA

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I. INTRODUCTION

In its 2012 decision in Miller v. Alabama, the United States Supreme Court declared unconstitutional a mandatory sentence of life without the possibility of parole for children, barring states from automatically imposing the sentence on the basis of the crime committed and without individualized consideration of the defendant’s status as a child or of the child’s particular life circumstances. In the process, the Court declined to impose a categorical ban on such sentences because of the possibility that—although the instances should be “uncommon”—jurors could find some children are “irreparably corrupted” or “irretrievably depraved.” The Court also declined to decide the issue whether there

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2. Id. at 2461. According to the Court, the sentence of mandatory life without parole for juveniles “runs afoul of our cases’ requirement of individualized sentencing for defendants facing the most serious penalties.” Id. Miller consolidates two cases, Miller v. Alabama, which was on writ of certiorari to the Court of Criminal Appeals of Alabama, and Jackson v. Hobbs, which was on writ of certiorari to the Supreme Court of Arkansas. The majority opinion in Miller was written by Justice Kagan and joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor. Chief Justice Roberts and Justices Scalia, Thomas, and Alito dissented.
3. Id. at 2469.
4. The Court has primarily used the term “irretrievably deprived” in this context. See, e.g., Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (“Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably deprived character’ than are the actions of adults.”); Roper v. Simmons, 543 U.S. 551, 553 (2005) (“The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably deprived character.”).
is an age below which life without parole for children, also known as “juvenile life without parole” (JLWOP), is categorically unconstitutional; Evan Miller and Kuntrell Jackson, the petitioners in Miller, had urged the Court to draw such a line for children who were under fifteen at the time of their crimes.6

In this essay, we argue that the Miller Court should have categorically barred LWOP as a sentencing option for children because, given the stakes, the risk of an erroneous determination about a child’s “retrievability” is unacceptably high. Specifically, in Part II we argue that the Court should have stayed true to its recent recommitment to treating children as children even when they have committed violent crimes. The attributes of childhood and adolescence make it difficult (if not impossible) to know that a particular child cannot be rehabilitated, and the understandable politics and emotions associated with the sentencing process make it likely that the sentence of LWOP will sometimes be imposed in circumstances where the child can be rehabilitated. Consistent with these concerns, in Part III we attempt to provide some guidance to lawmakers who must abide by Miller’s terms and who are inclined to do this “right” according to traditional principles of blameworthiness and consistent with our modern concept of the child as a dependent, developing individual. The essay concludes that the states’ approaches to juvenile justice will continue to lack integrity until they are fully consistent with this concept, including with the obligations it imposes on adults and the government to provide affected children with the opportunities necessary for decent outcomes.

II. THE PROBLEM WITH LIFE WITHOUT THE POSSIBILITY OF PAROLE AS A SENTENCING OPTION FOR CHILDREN

Miller is the third in a series of recent decisions in which the Court recognized that “children are different” in ways that diminish their blameworthiness and thus implicate the Eighth Amendment’s prohibition of “cruel and unusual punishments.”8 Roper v. Simmons,9

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7. Id. at 2470.
8. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.
decided in 2005, categorically barred the juvenile death penalty.\footnote{See id. at 578 (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).} \textit{Graham v. Florida},\footnote{130 S. Ct. 2011 (2010).} decided in 2010, categorically barred life without parole for juveniles convicted of non-homicide offenses.\footnote{See id. at 2034 (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”).} As the Court explained in \textit{Miller, Roper} and \textit{Graham} identified “three significant gaps between juveniles and adults”:

First, children have a “lack of maturity and an underdeveloped sense of responsibility,” leading to recklessness, impulsivity, and heedless risk-taking. Second, children “are more vulnerable . . . to negative influences and outside pressures,” including from their families and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as “well formed” as an adult’s; his traits are “less fixed” and his actions less likely to be “evidence of irretrievabl[e] deprav[ity].”\footnote{Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (citations omitted) (quoting \textit{Roper}, 543 U.S. at 569–70).}

In all three cases the Court found that these differences are constitutionally significant because they “diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”\footnote{Id. at 2465.} Specifically, the Court found that such sentences cannot be justified by the law’s interest in retribution, deterrence, incapacitation, or rehabilitation.\footnote{Id.}

In recognizing these factual and penological distinctions between children and adults, the Court did not ignore that children sometimes commit heinous crimes; nor did it ignore the resulting harm and damage done to others.\footnote{See, e.g., id. at 2469 (“No one can doubt that [Miller] and Smith committed a vicious murder.”); id. (“That Miller deserved severe punishment for killing Cole Cannon is beyond question.”). In addition to these express recognitions of the violence and personal loss at issue in the cases are the recognitions implicit in the Court’s use of the victims’ names throughout its opinion. See, e.g., id. at 2468 (referring to Jackson’s victim by her name, “Laurie Troup” and “Troup,” in its description and analysis of the crime).} Rather, consistent with its Eighth Amendment jurisprudence generally, it required that punishments be proportional both to the crime and to the blameworthiness of the criminal.\footnote{Id. at 2453, 2465–66.} It thus reaffirmed that our modern criminal justice system
is no longer, as it was in centuries past, based on the “eye-for-an-eye” principle.\textsuperscript{18} The Court also fully embraced the modern concept of the child as a still-developing individual and citizen who, because of this, sometimes makes bad decisions and thus requires the continuing guidance and protection of responsible adults, including of the state as parens patriae, until the age of majority.\textsuperscript{19}

The Miller Court parted ways with these philosophical guideposts, however, at least in part because of the nagging possibility that some particular child might be “irreparably corrupted” and thus warranting permanent incapacitation.\textsuperscript{20} We believe that the Court was wrong to do so. The imposition of any terminal punishment such as the death penalty or life without parole, which reflects a final judgment that a child is, in Justice Ginsburg’s words, a “throwaway person,”\textsuperscript{21} is both negligent and cruel.

Imposing terminal punishments on children is negligent because it allows the responsible adults and the state as “back-up parent” to abandon their childrearing and child protection obligations with impunity, and (relatedly) because it assumes that we can know without ever trying that a child cannot be rehabilitated. The two children in Miller are paradigmatic examples of this lack of accountability: Both were involved in brutal, senseless crimes when they were only fourteen. Up to that point, however, neither had ever had the benefit of parents or guidance of the sort (either personal or institutional) that our society assumes is required if children are to grow into good adults and citizens.\textsuperscript{22} In effect, before they were


\textsuperscript{19} Miller, 132 S. Ct. at 2464 (noting that children have an “underdeveloped sense of responsibility” and that their characters are “not as ‘well formed’ as an adult’s” (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)); Samuel M. Davis et al., Children in the Legal System 1–2 (Robert C. Clark et al. eds., 4th ed. 2009); Doriane Lambelet Coleman, The Legal Ethics of Pediatric Research, 57 DUKE L.J. 517, 614–18 (2007).

\textsuperscript{20} Miller, 132 S. Ct. at 2469. The specter of the irretrievably depraved child who would get away was first debated in Roper. Justice O’Connor, writing in dissent, was particularly animated on the point that a seventeen-year-old murderer can be sufficiently and irretrievably depraved so as to merit the death penalty, and thus the sentence ought not to have been categorically barred. Roper, 544 U.S. at 599 (O’Connor, J., dissenting). She argued that sentencing should be individualized to enable decisionmakers to distinguish among those who are and are not so depraved. Id. at 602–03. In the course of her opinion, she rejected the notion that the differences between children and adults, which she described as established “beyond cavil,” require a finding that no individual child should be subject to the death penalty. Id. at 599.


\textsuperscript{22} See Miller, 132 S. Ct. at 2462, 2469 (discussing Miller’s childhood); id. at 2468 (noting
incarcerated at the age of fourteen, they might as well have been raised in the wild by the violent and irresponsible adults who populated their inescapable lives. Miller’s background is particularly extraordinary in this respect. As the Court explained, his “stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten.” Because the prosecutors assigned to Miller’s and Jackson’s cases chose to try them as adults and not as juveniles, they were also never “parented” by the state either before or following their incarcerations; they were simply transferred by their parens patriae from one child-unfriendly environment to another.

Imposing such a terminal punishment on children is also cruel (in the common if not also the legal sense of this term) because the judgment, at the time it is made, can never be based on evidence “beyond reasonable doubt,” which we should require for the extraordinary decision to “throw away” a child. Beyond reasonable doubt evidence of “irretrievable depravity” in children and adolescents likely does not exist: despite some high-profile suggestions to the contrary, neither social science nor neurobiology in their current states can support the claim that a particular child, even one who has been especially violent, will always be this way.

the pertinent facts of Jackson’s background).

23.  Id. at 2462, 2468–69; see also Brief of Amici Curiae J. Lawrence Aber et al. in Support of Petitioners at 21–28, 30–31, Miller, 132 S. Ct. 2455 (No. 10-9646) (explaining the significance of the child’s environment to both delinquency and rehabilitation).
25.  Id. at 2461–62.
26.  See In re Winship, 397 U.S. 358, 363–64 (1970) (explaining that the reasonable doubt standard is necessary to ensure “that the moral force of the criminal law [is] not . . . diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned”); id. at 369–72 (Harlan, J., concurring) (noting that the reasonable doubt standard “is bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free”); see also Alexander Volokh, n Guilty Men, 146 U. PA. L. REV. 173, 198–99 (1977) (elaborating on this commitment).
28.  The Court in Roper explained that:

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. . . . [T]his difficulty
This is especially true when the subject of the inquiry is a younger adolescent. And given the stakes involved in the decision to abandon a child in prison, the issue of his irretrievability should not be resolved permanently on the basis of anecdote, hunch, or even common sense. The risk of error associated with these more traditional evidentiary approaches is simply too high. Moreover, the Court itself noted in Roper, “[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”

Because this risk of error increases as the child’s age decreases, it is particularly troubling that the Miller Court declined to decide the issue whether there is an age below which JLWOP violates the Eighth Amendment. Given the passions that are typically aroused by violent

underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. Roper v. Simmons, 543 U.S. 551, 573 (2005) (citations omitted); see also id. at 570 (“The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”).

29. Brief of Amici Curiae J. Lawrence Aber et al. in Support of Petitioners, supra note 23, at 29–31. Amici explained that: Sentencing adolescents to life without parole is especially perverse from a rehabilitative standpoint, because compared to adults, adolescents are particularly amenable to change as they mature and develop. Studies demonstrate that most adolescents will “age out” of their risk-taking behavior, fully develop their ability to control impulses, and respond to meaningful incentives and opportunities to succeed. Studies and statistics confirm that crime rates typically rise in early adolescence, peak during mid-to-late adolescence, and then decline. Research indicates that most violent adolescent offenders’ “criminal careers” span a period of less than one year. Thus, a large majority of young adolescents will limit their deviant and antisocial behaviors to their adolescent years.

Id. at 29–30 (footnotes omitted).


31. Roper, 543 U.S. at 573. If there was any doubt about the latter, the Roper prosecutor’s argument that, where a heinous crime is at issue, “youth [is] aggravating rather than mitigating,” should cement the point. Id.; see also id. at 558 (“Age . . . . Think about age. Seventeen years old. Isn’t that scary? Doesn’t that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.”); id. at 573 (explaining the prosecutor’s error in this regard). This claim is not merely intuitive; as Professor Terry Maroney has shown, it also has empirical support. See Maroney, supra note 5, at 123–26 (noting that judges tend to discount such evidence where the facts of the crime are particularly violent); Scott, supra note 27, at 29–34 (describing the “moral panic” phenomenon that causes decisionmakers in criminal cases to exaggerate the future threat and thus to react with more emotion than rational judgment in the sentencing process).
crime—passions that understandably cloud the judgment of even well-meaning people—it is likely an insufficient safeguard merely to suggest, as the Court did, that the sentence should be “uncommon” in general, or that there may be some kind of sliding scale of acceptability based on age.\(^3^2\) Indeed, in our view it is inevitable that prosecutors, courts, and juries in individual cases will often presume that their particular circumstances are uncommon—because the crime itself should be, and because we hope that only the rare child would be so involved—and thus it will take time, the commitment of untold numbers of children to JLWOP, additional litigation against sentencing regimes designed to circumvent\(^3^3\) Miller, and the establishment of new jurisdictional patterns before a justiciable measure of “(un)commonality” emerges.

It is not our position that the law ought to ignore the “rare case . . . in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a [terminal] sentence.”\(^3^4\) As Justice O’Connor suggested in her dissent


\(^{33}\) This may indeed be a very long process. In Pennsylvania, where defense lawyers have already begun the process of seeking parole for inmates currently under mandatory life sentences for murders committed when they were juveniles, prosecutors show no willingness to concede that any of the inmates were inappropriately sentenced to JLWOP. In testimony before the Pennsylvania Senate Judiciary Committee on July 12, 2012, the Pennsylvania District Attorneys Association argued against applying Miller retroactively and called for a minimum sentence of sixty years before an inmate would be eligible for parole under a life sentence with parole. See generally Hearing Before the Senate Judiciary Comm. Regarding Juveniles Serving Life Without Parole (2012) (testimony of Craig Stedman, Lancaster Cnty. Dist. Att’y), available at http://senatorgreenleaf.com/judiciary/2012/071212/stedman.pdf. In Iowa, the Governor peremptorily commuted the sentences of all inmates serving life without parole for murders they committed as juveniles, but conditioned their parole on each inmate serving a minimum of sixty years in prison. Brandstand Moves to Prevent the Release of Dangerous Murderers in Light of Recent U.S. Supreme Court Decision, IOWA.GOV (July 16, 2012), https://governor.iowa.gov/2012/07/branstad-moves-to-prevent-the-release-of-dangerous-murderers-in-light-of-recent-u-s-supreme-court-decision/. According to the Governor’s press release, his action “gives the opportunity for parole in compliance with the recent Supreme Court decision; however, the action also protects victims from having to be re-victimized each year by worrying about whether the Parole Board will release the murderer who killed their loved one.” Id. The Governor’s action has been criticized by others and is being challenged in court. See discussion infra note 54.

\(^{34}\) Roper, 543 U.S. at 572. Justice O’Connor, dissenting in Roper, made the point that the evidence did not support the claim that such offenders are “rare.” Id. at 599–600. However one might characterize that evidence, in our view it is reasonable to extrapolate from the scientific facts of child development that fewer adolescents are irretrievable than retrievable, and that the younger the adolescent is, the more likely he is to be retrievable. The latter is likely the basis for the Miller majority’s dictum that the JLWOP sentence should be “uncommon,” particularly when the defendant was fourteen at the time he committed the crime at issue. Miller, 132 S. Ct. at 2469.
in *Roper*, the public is understandably afraid of and has an interest in permanently incapacitating true psychopaths as well as others whose environments have so deeply and permanently damaged them that they are, in effect, the equivalent of psychopaths. Moreover, sentencing requires consideration of both proportionality and blameworthiness, which means that serious attention must be paid both to the crime and to the individual criminal. Because of this, it is also important not to ignore the small risk of error in the other direction: that a process that disallows JLWOP might result in an “irretrievably depraved” child one day being paroled. This risk is more theoretical than real, however, because it can be corrected by the parole process itself; that is, as evidence of irretrievability mounts over the years—either because the individual remains violent or becomes increasingly so—the possibility of release becomes (or should become) ever more remote. Of course the same cannot be said of the individual who is prematurely labeled a “throwaway.” By definition, the sentence of LWOP offers no possibility of error correction.

III. GETTING JUVENILE LIFE WITHOUT PAROLE “RIGHT” AFTER *MILLER*

Given the foregoing analysis, we turn to the difficult problem of how to implement the Court’s decision in *Miller*, which allows states to pursue JLWOP for a small number of juvenile offenders who are “irretrievably depraved,” but provides little guidance for doing so. This problem is especially difficult, because in our view, based on the state of the scientific evidence, it is impossible to get JLWOP “right,” especially when the sentencing decision is made soon after the conviction. But because our goal in this essay is to offer suggestions

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35. See *Roper*, 543 U.S. at 598–603 (O’Connor, J., dissenting) (exploring when offenders are sufficiently depraved to merit the death penalty).

36. This could happen for the same reason we should not permit terminal sentences: given the state of the relevant science, we simply cannot know whether a child is retrievable. See supra note 27 and accompanying text (elaborating on this point).

37. See, e.g., *Charles Manson Skips His 12th Parole Hearing*, FOXNEWS.COM, April 11, 2012, http://www.foxnews.com/us/2012/04/11/manson-skips-12th-parole-hearing-may-be-his-last/ (making clear that Manson’s periodic, required parole hearings are basically *pro forma* and given that he apparently remains both unrepentant and dangerous, it is widely expected that he will die in jail).

38. See *Miller*, 132 S. Ct. at 2466 (“Imprisoning an offender until he dies alters the remainder of his life ‘by a forfeiture that is irrevocable.’” (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010))).
for how states might implement Miller responsibly, we proceed on the basis it is possible at least to get it more right than not, and that there are approaches that might be effective to minimize the risk of error. The three approaches we present below meet Miller’s minimum dictates, are consistent with the need to ensure that sentences in these cases are proportional both to the crime and to the blameworthiness of the individual, and are consistent with our prevailing concept of the child.

A. The Legislative Choice to Eliminate JLWOP

As we have already intimated, the approach that is most faithful to the trend in recent Supreme Court decisions dealing with severe punishment of juveniles, to the modern concept of the child including the appropriate role of the state in the child’s life, and to the scientific facts about child development, is to eliminate JLWOP as a sentencing option. We will not repeat this argument, which is set out in Part II, except to emphasize that it does not put public safety at risk so long as the parole process functions with integrity. A child who turns out to be “irretrievably depraved” will not be paroled if he receives a sentence less than JLWOP; his depravity will continue to manifest over time and will be taken into consideration when a decision about release must be made. The only implication for the state and society is administrative: the obligation periodically to review the case to establish either continued depravity or rehabilitation. It is our view that such a relatively small burden is justified in circumstances where the state incarcerates a child, potentially for life.

This approach is consistent with Miller, which merely sets minimum constitutional requirements for states that choose to permit children to be sentenced to LWOP. Indeed, the case can be viewed as an invitation to the states to examine comprehensively their sentencing laws to determine if the JLWOP option was intentional or the unintended consequence of their waiver statutes.39 The opportunity to remedy the negative effects of what Professor Elizabeth Scott has called a “moral panic” about an imaginary generation of child “superpredators” that caused legislatures in the

39. Id. at 2472–73. For another (particularly troubling) example of the unintended consequences of waiver statutes, see Editorial, Adolescents in Grown-Up Jails, N.Y. TIMES (Oct. 15, 2012), http://www.nytimes.com/2012/10/16/opinion/adolescents-in-grown-up-jails.html?src=recg (describing how, in order to separate them from the adult prisoner population, adolescent prisoners are sometimes placed in solitary confinement).
1990s improvidently to enact many of the associated statutes could be sufficiently appealing in the current political and criminological period.  

B. The Legislative Choice to Delay the Parole Decision

A second, intermediate approach would be to impose a conditional sentence of life in prison, but to delay the parole decision to give the state, in its role as parens patriae, an opportunity to stabilize and evaluate the child. Depending upon his age at the time of the conviction, the interim period could extend from conviction until the child reaches the age of majority, or it could be established for some predetermined number of years. In any event, the period selected would have to be sufficient to permit a meaningful decision about parole, taking into consideration the offender’s development, his background up to the time of his offense, and the evidence of potential for rehabilitation. During this period, the state would provide the child with an age-appropriate environment and evidence-based opportunities for rehabilitation. Once this interim period was over, an appropriate board or commission would hear relevant evidence from both the child and the state and make the final determination whether the child’s life sentence was with or without the possibility of parole.

In addition to ensuring that the state was not “throwing away” a child upon conviction and that it was undertaking its own child welfare and child protection responsibilities, this interim period between conviction and the parole eligibility decision would afford the state valuable evidence of retrievability or irretrievability. This new evidence would not eliminate the risk of an erroneous decision about the child’s essential nature, but it could significantly reduce it. Importantly, the interim period would also provide a cooling off period between the crime and conviction on the one hand and the parole decision on the other, thus further ensuring that the emotions surrounding the crime were properly balanced against the child’s culpability.

Structuring the delay and delineating the terms of the state’s responsibilities necessarily would be decided on a state-by-state basis. This would permit experimentation and development of best practices. Nevertheless, to have the desired impact, certain conditions

40. Scott, supra note 27, at 11.
would have to be mandatory for all states.

First, there would be no consideration of parole at the time of conviction so as to avoid a decision dictated largely by the emotional impact of the crime on the jury. Otherwise, the likely inclination of jurors would be to deny parole eligibility. Even an interim suggestion to deny parole would make it politically difficult for a subsequent jury or parole board to reach a contrary decision.

Second, for evidence of potential for rehabilitation to be meaningful, there would have to be a real and sustained effort by the state to “retrieve” the child during the period between conviction and the parole decision; indeed, that would be the principal reason to delay the parole eligibility decision.

Third, the actual parole decision would be made only at the end of the interim period, when fully-developed evidence would be available for the decision. Any interim decision would be inadequately informed and likely to change the focus of the final decision from whether the evidence supports giving the offender an opportunity for parole to whether subsequent evidence changed the interim decision.

Fourth, the parole decision-maker optimally would be a judicial or quasi-judicial board whose members would include experts in the fields of child development and psychopathology, as well as parole experts. Such a board fits nicely with current parole systems following best practices. 41

C. The Legislative Choice to Permit the Sentence of JLWOP

According to Strict Procedural Safeguards

The third approach is the least protective of the three. It assumes a political environment in which the first two approaches are not viable and is based on the features suggested or mandated by Miller. Relatedly, it mirrors individualized sentencing in capital cases, with which states allowing JLWOP at the time of Miller are familiar. 42 Its


exact contours would emerge over time, but should include at least the following:

First, sentencing should occur in a separate phase of the trial that follows conviction. Although Miller does not dictate this, it is the only practical way to implement those conditions that the Court has mandated. This is because the decision whether to make the offender eligible for parole involves consideration of information and factors that would be inappropriate for consideration in the portion of the trial focused primarily on the murder and whether the defendant is guilty. As the Court recognized in Gregg v. Georgia\textsuperscript{43} and Woodson v. North Carolina,\textsuperscript{44} the individualized decision contemplated in Miller requires a procedural mechanism that ensures the focus for the decision will be on all of the relevant factors and not just the crime.\textsuperscript{45}

Second, the sentencing phase of the trial should be designed in such a way as to ensure to the extent possible that the jurors’ emotional reactions to the crime do not unduly influence its consideration of the child’s blameworthiness.\textsuperscript{46} Thus, the presentation of and response to the prosecution’s aggravating evidence should be formally separated from the presentation of and response to the defendant’s mitigating evidence. The rules of evidence also should be relaxed in this part of the proceeding to permit a more natural presentation of information to the jury.\textsuperscript{47}

\textsuperscript{43} 428 U.S. 153 (1976).

\textsuperscript{44} 428 U.S. 280 (1976).

\textsuperscript{45} See id. at 304 (“[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (citation omitted)); Gregg, 428 U.S. at 206 (“The new Georgia sentencing procedures . . . focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant,” and “[i]n this way the jury’s discretion is channeled.”). 46. See supra note 31 and accompanying text (noting that prosecutors have cast defendants’ young age as “scary” rather than as a mitigating factor, that judges tend to discount evidence of youth, and that decisionmakers exaggerate future threat).

47. In the sentencing phase of a capital trial, some rules of evidence are relaxed. In Florida, for example, a juror can find a mitigating circumstance if it is proven by a preponderance of the evidence. Fla. Std. Jury Instr. (Crim.) 7.11, available at http://www.floridasupremecourt.org/jury_instructions/instructions.shtml#. In addition, the U.S. Supreme Court has reversed a death sentence because a state court barred the use of hearsay evidence to prove a mitigating circumstance. See generally Green v. Georgia, 442 U.S. 95 (1979). In North Carolina, hearsay evidence is permitted if the other side has an opportunity to rebut it.
Third, specifically with respect to mitigating evidence, *Miller* requires that the sentencing authority, in its consideration of the child’s blameworthiness, hear and consider both scientific evidence about child development in general and evidence concerning the particular child defendant’s life circumstances and role in the crime.\(^{48}\) Specifically with respect to child development science, *Miller* requires that jurors hear about and consider the child’s “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences” and “how those features counsel against irrevocably sentencing [him] to a lifetime in prison.”\(^{49}\) And with respect to the child himself, *Miller* requires that jurors hear about and consider “the family and home environment that surrounds him—and from which he cannot usually extricate himself . . . [and] the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.”\(^{50}\) Importantly, the Court emphasized that a violent childhood and environment and violent adult role models are to be considered mitigating, not aggravating.\(^{51}\) We would anticipate that, over time, developing this evidence would allow states to decide before going to a sentencing phase that a sentence of life without the possibility of parole was inappropriate in particular cases.

Fourth, the final sentencing decision should require the jury to balance the aggravated nature of the crime against the child’s blameworthiness.\(^{52}\) In this context, the jury should be required to determine if the state has shown beyond a reasonable doubt that the

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\(^{48}\) Providing this template for sentencing at least minimizes the extent to which judges can ignore or give short shrift to relevant scientific evidence about child development. *See* Maroney, *supra* note 5, at 119–28. 


\(^{50}\) *Id.* at 2468. 

\(^{51}\) *Id.* (discussing “Jackson’s family background and immersion in violence” and noting as an example that “[b]oth his mother and his grandmother had previously shot other individuals”). *See also* supra note 24 and accompanying text (elaborating on Jackson’s violent upbringing). 

\(^{52}\) *See* supra note 17 and accompanying text (emphasizing that punishments must be proportional to the blameworthiness of the criminal, in addition to the crime).
The defendant is “irretrievably depraved.” If the jury has a reasonable doubt about that ultimate issue, it should sentence the juvenile to life with the possibility of parole, after some minimum number of years in prison, likely between fifteen and thirty years.

One final, cautionary note about this approach: The inclination of some states will be simply to duplicate the individualized sentencing process used in capital cases whenever a child is convicted of a murder for which an adult would automatically be sentenced to LWOP. But going immediately to the sentencing phase of a trial in that manner likely would expose too many children—such as Kuntrell Jackson, for example, who neither killed nor likely intended to kill—to an erroneous JLWOP sentence. Because of this, states should

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54. North Carolina, for example, amended its sentencing for minors subject to life imprisonment without parole to provide that the alternative “life imprisonment with parole” means “the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole.” An Act to Amend the State Sentencing Laws to Comply with the United States Supreme Court Decision in Miller v. Alabama, S.L. 2012-148, 2012 N.C. Sess. Laws (to be codified at N.C. GEN. STAT. §15A-1476). But some states may try to circumvent Miller by establishing a minimum term for life with parole that effectively will be a life sentence without parole. In Iowa, at about the same time that the North Carolina statute was enacted, the Governor announced that he would “commute the life without parole sentences today to life with the possibility of parole only after 60 years for the 38 people who were convicted of First Degree Murder while a juvenile.” Brandstand Moves to Prevent the Release of Dangerous Murderers in Light of Recent U.S. Supreme Court Decision, IOWA.GOV (July 16, 2012), https://governor.iowa.gov/2012/07/branstad-moves-to-prevent-the-release-of-dangerous-murderers-in-light-of-recent-u-s-supreme-court-decision/. His action has been challenged as being inconsistent with Miller. See State v. Lockheart, No. 10-1815, 2012 WL 2814378 (Iowa Ct. App. July 11, 2012). We believe that a minimum term for life with the possibility of parole should be consistent with principles of child development. Some states might decide that a JLWOP sentence is categorically inappropriate for juveniles below a certain age or for juveniles who did not kill and whose role in the homicide was relatively minor. Compare Tison v. Arizona, 481 U.S. 137, 137–38 (1987) (holding the death penalty disproportionate for defendants who have major participation in murder with the mental state of reckless indifference), with Enmund v. Florida, 458 U.S. 782, 782 (1982) (holding the death penalty disproportionate for a robber who does not take human life). These cases do not reference age. Eventually, a trend in such policies might result in the Supreme Court revisiting issues left open in Miller. Cf. Roper v. Simmons, 543 U.S. 551 (2005); Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988).

55. See Miller, 132 S. Ct. at 2475 (Breyer, J., concurring) (opining that unless the State can show that Jackson intended to kill the victim in his case, Laurie Troup, he should not be eligible for JLWOP on re-sentencing). The majority’s opinion explains that “Jackson did not fire the bullet that killed Laurie Troup nor did the State argue that he intended her death.” Id. at 2468 (majority opinion). Jackson’s conviction was instead based on an aiding-and-abetting theory, and the appellate court affirmed the verdict only because the jury could have believed that when Jackson entered the store, he warned Troup that “[w]e ain’t playin’,” not “I thought you all was playin’.” Id. at 2468. In capital cases, the Court has barred categorically the death
consider a threshold, gatekeeping mechanism to ensure that only those children who are potentially “irretrievably depraved” will face a sentencing phase trial to determine if they should be subject to LWOP. The jury could make that decision as a threshold matter, in the same way that capital juries first determine if a statutory aggravating circumstance exists to make a capital defendant eligible for the death penalty. The parties could prepare for such a hearing as they are preparing the case for trial, in the same manner as a capital case. Both sides could have ready, almost immediately after trial, prepared reports by their experts setting out general information about child development, information about the particular child’s development and potential for rehabilitation, and information about the child’s role in the murder. That would be sufficient to permit the court to decide whether the case involves an “uncommon” child who may be “irretrievably depraved.”

IV. CONCLUSION

It is inherent in our culture and law that, biological distinctions aside, children are a *tabula rasa*. It is because of this idea that we give the adults in their lives so much freedom and power to control their environments and to form their characters. It is also because of this idea that periodically we fight as a body politic about the balance of that freedom and power among parents and the state. Importantly,
adults seek to control children through the age of majority at least in part because we believe that it is possible to have real influence over the child’s character, values, and commitments through late adolescence. Indeed, examples abound of our conviction that children in mid-to-late adolescence are particularly malleable in these respects—from parents who take their children out of high school to minimize the extent to which they can be socialized by teachers and peers to high school administrators who, often with the support of parents’ associations, devote significant (and precious) time and money to co-curricular behavior management and values education.

We cannot simultaneously subscribe to this idea and its associated politics and also believe that we are reasonable when first we abandon a child and then imprison him for life without the possibility of parole when he goes astray. Our approach to children in the law is one of rights and responsibilities: adults, including both parents and the state, have rights of control that they are responsible to exercise in the children’s best interests. When we fail, utterly, to write a good or at least a minimally decent childhood onto the tabula rasa, we have failed in our responsibilities. In such cases, we are blameworthy.

To assure that we do not fail the child who is subject to the penal system, we must continue to treat him as the child he is. Until we are provided with unassailable evidence of his irreparable corruption as an adult, we must continue to assume—as we do for our other children who are not subject to the penal system—that the story of his character, values, and potential is not yet entirely written. In the

whether fundamentalist Christians have the right to influence the curriculum of the public schools).

59. See Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (seeking control over children’s associations and education especially beginning at age fourteen); Meyer, 262 U.S. at 397–98 (seeking control over the curriculum of children through the eighth grade).

60. Yoder is the best-known Supreme Court decision ratifying the legitimacy of this view, but it is certainly not limited to the Court or to the Amish. See, e.g., Benefits to Homeschooling: A Growing List from Our Homeschool Family to Yours, PEAH’S HOMESCHOOL-CURRICULUM-SAVINGS.COM, http://www.homeschool-curriculum-savings.com/benefits-to-homeschooling.html (last visited Sept. 7, 2012) (listing “more opportunities for character building,” “less peer pressure,” and “more control over outside influences” as reasons to homeschool children and teenagers).


62. DAVIS, supra note 19, at 1–2.
process, we cannot allow ourselves to think that merely re-labeling him a “juvenile” somehow transforms either his essential nature or our essential responsibilities toward him. We cannot have it both ways: he is and remains a child until the age of majority, and we largely write his story.

132 S.Ct. 2455
Supreme Court of the United States
Evan MILLER, Petitioner
v.
ALABAMA.
Kuntrell Jackson, Petitioner
v.
Ray Hobbs, Director, Arkansas Department of Correction.


Synopsis
Background: Following transfer from state juvenile court to state circuit court and affirmation of transfer, 928 So.2d 1081, defendant was convicted in the Alabama Circuit Court, Lawrence County, No. CC–06–08, A. Phillip Reich II, J., of capital murder committed when he was 14 years old. Defendant appealed his conviction and the resulting sentence of life in prison without possibility of parole. The Alabama Court of Criminal Appeals, 63 So.3d 676, affirmed. In another case, after affirmance of a defendant's convictions in Arkansas for capital felony murder and aggravated robbery committed at age 14, 359 Ark. 87, 194 S.W.3d 757, defendant petitioned for state habeas relief, challenging his sentence of life in prison without possibility of parole. The Arkansas Circuit Court, Jefferson County, dismissed the petition. Defendant appealed. The Arkansas Supreme Court, ––– S.W.3d ––––, 2011 WL 478600, affirmed. Certiorari was granted in each case.

[Holdings:] The Supreme Court, Justice Kagan, held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments.

Reversed and remanded.

Chief Justice Roberts filed a dissenting opinion, in which Justices Scalia, Thomas, and Alito joined.

Justice Thomas filed a dissenting opinion, in which Justice Scalia joined.

Justice Alito filed a dissenting opinion, in which Justice Scalia joined.

West Codenotes
Limited on Constitutional Grounds

*2457 Syllabus*

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

In each of these cases, a 14–year–old was convicted of murder and sentenced to a mandatory term of life imprisonment without the possibility of parole. In No. 10–9647, petitioner Jackson accompanied two other boys to a video store to commit a robbery; on the way to the store, he learned that one of the boys was carrying a shotgun. Jackson stayed outside the store for most of the robbery, but after he entered, one of his co-conspirators shot and killed the store clerk. Arkansas charged Jackson as an adult with capital felony murder and aggravated robbery, and a jury convicted him of both crimes. The trial court imposed a statutorily mandated sentence of life imprisonment without the possibility of parole. Jackson filed a state habeas petition, arguing that a mandatory life-without-parole term for a 14–year–old violates the Eighth Amendment. Disagreeing, the


court granted the State's motion to dismiss. The Arkansas Supreme Court affirmed.

In No. 10–9646, petitioner Miller, along with a friend, beat Miller's neighbor and set fire to his trailer after an evening of drinking and drug use. The neighbor died. Miller was initially charged as a juvenile, but his case was removed to adult court, where he was charged with murder in the course of arson. A jury found Miller guilty, and the trial court imposed a statutorily mandated punishment of life without parole. The Alabama Court of Criminal Appeals affirmed, holding that Miller's sentence was not overly harsh when compared to his crime, and that its mandatory nature was permissible under the Eighth Amendment.

*Held:* The Eighth Amendment forbids a sentencing scheme that mandates *2458* life in prison without possibility of parole for juvenile homicide offenders. Pp. 2463 – 2475.

(a) The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560, 125 S.Ct. 1183, 161 L.Ed.2d 1. That right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned'" to both the offender and the offense. *Ibid.*

Two strands of precedent reflecting the concern with proportionate punishment come together here. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. See, *e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525. Several cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, *Roper v. Simmons* held that the Eighth Amendment bars capital punishment for children, and *Graham v. Florida*, 560 U.S. ——, 130 S.Ct. 2011, 176 L.Ed.2d 825, concluded that the Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a nonhomicide offense. *Graham* further likened life without parole for juveniles to the death penalty, thereby evoking a second line of cases. In those decisions, this Court has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death. See, *e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (plurality opinion). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life without parole for juveniles violates the Eighth Amendment.

As to the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for sentencing purposes. Their "'lack of maturity'” and "‘underdeveloped sense of responsibility’” lead to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S., at 569, 125 S.Ct. 1183. They "are more vulnerable ... to negative influences and outside pressures,” including from their family and peers; they have limited "contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And because a child's character is not as "well formed” as an adult's, his traits are "less fixed” and his actions are less likely to be "evidence of irretrievable[ly] deprav[ity].” *Id.* at 570, 125 S.Ct. 1183. *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.

While *Graham*’s flat ban on life without parole was for nonhomicide crimes, nothing that *Graham* said about children is crime-specific. Thus, its reasoning implicates any life-without-parole sentence for a juvenile, even as its categorical bar relates only to nonhomicide offenses. Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. The mandatory penalty schemes at issue here, however, prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. This contravenes *Graham*’s (and also *Roper*’s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

*2459* *Graham* also likened life-without-parole sentences for juveniles to the death penalty. That decision recognized that life-without-parole sentences "share some characteristics with death sentences that are shared by no other sentences.” 560 U.S., at ——, 130 S.Ct., at 2027. And it treated life without parole for juveniles like this Court's cases treat the death penalty, imposing a categorical bar on its imposition for nonhomicide offenses. By likening life-without-parole sentences for juveniles to the death penalty, *Graham*...
makes relevant this Court's cases demanding individualized sentencing in capital cases. In particular, those cases have emphasized that sentencers must be able to consider the mitigating qualities of youth. In light of Graham's reasoning, these decisions also show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Pp. 2463 – 2469.

(b) The counterarguments of Alabama and Arkansas are unpersuasive. Pp. 2469 – 2475.

(1) The States first contend that Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836, forecloses a holding that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment. Harmelin declined to extend the individualized sentencing requirement to noncapital cases “because of the qualitative difference between death and all other penalties.” Id., at 1006, 111 S.Ct. 2680 (KENNEDY, J., concurring in part and concurring in judgment). But Harmelin had nothing to do with children, and did not purport to apply to juvenile offenders. Indeed, since Harmelin, this Court has held on multiple occasions that sentencing practices that are permissible for adults may not be so for children. See Roper, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1; Graham, 560 U.S. ——, 130 S.Ct. 2011.

The States next contend that mandatory life-without-parole terms for juveniles cannot be unconstitutional because 29 jurisdictions impose them on at least some children convicted of murder. In considering categorical bars to the death penalty and life without parole, this Court asks as part of the analysis whether legislative enactments and actual sentencing practices show a national consensus against a sentence for a particular class of offenders. But where, as here, this Court does not categorically bar a penalty, but instead requires only that a sentencer follow a certain process, this Court has not scrutinized or relied on legislative enactments in the same way. See, e.g., Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56.

In any event, the “objective indicia of society's standards,” Graham, 560 U.S., at ——, 130 S.Ct., at 2022, that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment. Fewer States impose mandatory life-without-parole sentences on juvenile homicide offenders than authorized the penalty (life-without-parole for nonhomicide offenders) that this Court invalidated in Graham. And as Graham and Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702, explain, simply counting legislative enactments can present a distorted view. In those cases, as here, the relevant penalty applied to juveniles based on two separate provisions: One allowed the transfer of certain juvenile offenders to adult court, while another set out penalties for any and all individuals tried there. In those circumstances, this Court reasoned, it was impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice). The same is true here. Pp. 2469 – 2474.

*2460 (2) The States next argue that courts and prosecutors sufficiently consider a juvenile defendant's age, as well as his background and the circumstances of his crime, when deciding whether to try him as an adult. But this argument ignores that many States use mandatory transfer systems. In addition, some lodge the decision in the hands of the prosecutors, rather than courts. And even where judges have transfer-stage discretion, it has limited utility, because the decisionmaker typically will have only partial information about the child or the circumstances of his offense. Finally, because of the limited sentencing options in some juvenile courts, the transfer decision may present a choice between a light sentence as a juvenile and standard sentencing as an adult. It cannot substitute for discretion at post-trial sentencing. Pp. 2473 – 2475.

No. 10–9646, 63 So.3d 676, and No. 10–9647, 2011 Ark. 49, ——S.W.3d ——, reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. BREYER, J., filed a concurring opinion, in which SOTOMAYOR, J., joined. ROBERTS, C.J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA, J., joined.

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Opinion

Justice KAGAN delivered the opinion of the Court.

The two 14–year–old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile’s “lessened culpability” and greater “capacity for change,” Graham v. Florida, 560 U.S. ––––, ––––, ––––, 130 S.Ct. 2011, 2026–2027, 2029–2030, 176 L.Ed.2d 825 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on “cruel and unusual punishments.”

*2461 1

A

In November 1999, petitioner Kuntrell Jackson, then 14 years old, and two other boys decided to rob a video store. En route to the store, Jackson learned that one of the boys, Derrick Shields, was carrying a sawed-off shotgun in his coat sleeve. Jackson decided to stay outside when the two other boys entered the store. Inside, Shields pointed the gun at the store clerk, Laurie Troup, and demanded that she “give up the money.” Jackson v. State, 359 Ark. 87, 89, 194 S.W.3d 757, 759 (2004) (internal quotation marks omitted). Troup refused. A few moments later, Jackson went into the store to find Shields continuing to demand money. At trial, the parties disputed whether Jackson warned Troup that “[w]e ain’t playin’,” or instead told his friends, “I thought you all was playin’.” Id., at 91, 194 S.W.3d, at 760 (internal quotation marks omitted). When Troup threatened to call the police, Shields shot and killed her. The three boys fled empty-handed. See id., at 89–92, 194 S.W.3d, at 758–760.

Arkansas law gives prosecutors discretion to charge 14–year–olds as adults when they are alleged to have committed certain serious offenses. See Ark.Code Ann. § 9–27–318(c) (2) (1998). The prosecutor here exercised that authority by charging Jackson with capital felony murder and aggravated robbery. Jackson moved to transfer the case to juvenile court, but after considering the alleged facts of the crime, a psychiatrist's examination, and Jackson's juvenile arrest history (shoplifting and several incidents of car theft), the trial court denied the motion, and an appellate court affirmed. See Jackson v. State, No. 02–535, 2003 WL 193412, *1 (Ark.App., Jan. 29, 2003); §§ 9–27–318(d), (e). A jury later convicted Jackson of both crimes. Noting that “in view of [the] verdict, there's only one possible punishment,” the judge sentenced Jackson to life without parole. App. in No. 10–9647, p. 55 (hereinafter Jackson App.); see Ark.Code Ann. § 5–4–104(b) (1997) (“A defendant convicted of capital murder or treason shall be sentenced to death or life imprisonment without parole”). 1 Jackson did not challenge the sentence on appeal, and the Arkansas Supreme Court affirmed the convictions. See 359 Ark. 87, 194 S.W.3d 757.

1 Jackson was ineligible for the death penalty under Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion), which held that capital punishment of offenders under the age of 16 violates the Eighth Amendment.

[1] Following Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), in which this Court invalidated the death penalty for all juvenile offenders under the age of 18, Jackson filed a state petition for habeas corpus. He argued, based on Roper’s reasoning, that a mandatory sentence of life without parole for a 14–year–old also violates the Eighth Amendment. The circuit court rejected that argument and
One night in 2003, Miller was at home with a friend, Colby Smith, when a neighbor, Cole Cannon, came to make a drug deal with Miller's mother. See 6 Record in No. 10–9646, p. 1004. The two boys followed Cannon back to his trailer, where all three smoked marijuana and played drinking games. When Cannon passed out, Miller stole his wallet, splitting about $300 with Smith. Miller then tried to put the wallet back in Cannon's pocket, but Cannon awoke and grabbed Miller by the throat. Smith hit Cannon with a nearby baseball bat, and once released, Miller grabbed the bat and repeatedly struck Cannon with it. Miller placed a sheet over Cannon's head, told him “ ‘I am God, I've come to take your life,’ ” and delivered one more blow. Miller v. State, 63 So.3d 676, 689 ( Ala. Crim. App. 2010). The boys then retreated to Miller's trailer, but soon decided to return to Cannon's to cover up evidence of their crime. Once there, they lit two fires. Cannon eventually died from his injuries and smoke inhalation. See id., at 683–685, 689.


Like Jackson, petitioner Evan Miller was 14 years old at the time of his crime. Miller had by then been in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him. Miller, too, regularly used drugs and alcohol; and he had attempted suicide four times, the first when he was six years old. See E.J.M. v. State, 928 So.2d 1077, 1081 ( Ala. Crim. App. 2004) (Cobb, J., concurring in result); App. in No. 10–9646, pp. 26–28 (hereinafter Miller App.).

For the first time in this Court, Arkansas contends that Jackson's sentence was not mandatory. On its view, state law then in effect allowed the trial judge to suspend the life-without-parole sentence and commit Jackson to the Department of Human Services for a "training-school program," at the end of which he could be placed on probation. Brief for Respondent in No. 10–9647, pp. 36–37 (hereinafter Arkansas Brief) (citing Ark.Code Ann. § 12–28–403(b)(2) (1999)). But Arkansas never raised that objection in the state courts, and they treated Jackson's sentence as mandatory. We abide by that interpretation of state law. See, e.g., Mullaney v. Wilbur, 421 U.S. 684, 690–691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).


the question in light of transfer hearings' importance. See id., at 1081 ("[A]lthough later mental evaluation as an adult affords some semblance of procedural due process, it is, in effect, too little, too late").

Relying in significant part on testimony from Smith, who had pleaded to a lesser offense, a jury found Miller guilty. He was therefore sentenced to life without the possibility of parole. The Alabama Court of Criminal Appeals affirmed, ruling that life without parole was “not overly harsh when compared to the crime” and that the mandatory nature of the sentencing scheme was permissible under the Eighth Amendment. 63 So.3d, at 690; see id., at 686–691. The Alabama Supreme Court denied review.

We granted certiorari in both cases, see 565 U.S. ———, ——— S.Ct. ———, ——— L.Ed.2d ——— (2011) (No. 10–9646); 565 U.S. ———, ——— S.Ct. ———, ——— L.Ed.2d ——— (2011) (No. 10–9647), and now reverse.

II

The Eighth Amendment’s prohibition of cruel and unusual punishment “guarantees individuals the right not to be subjected to excessive sanctions.” Roper, 543 U.S., at 560, 125 S.Ct. 1183. That right, we have explained, “flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned’ ” to both the offender and the offense. Ibid. (quoting Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). As we noted the last time we considered life-without-parole sentences imposed on juveniles, “[t]he concept of proportionality is central to the Eighth Amendment.” Graham, 560 U.S., at ———, 130 S.Ct., at 2021. And we view that concept less through a historical prism than according to “the evolving standards of decency that mark the progress of a maturing society.” Estelle v. Gamble, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)).

The three dissenting opinions here each take issue with some or all of those precedents. See post, at 2479 – 2480 (opinion of ROBERTS, C.J.); post, at 2482 – 2485 (opinion of THOMAS, J.); post, at 2487 – 2489 (opinion of ALITO, J.). That is not surprising: their authors (and joiner) each dissented from some or all of those precedents. See, e.g., Kennedy, 554 U.S., at 447, 128 S.Ct. 2641 (ALITO, J., joined by ROBERTS, C.J., and SCALIA and THOMAS, J.J., dissenting); Roper, 543 U.S., at 607, 125 S.Ct. 1183 (SCALIA, J., joined by THOMAS, J., dissenting); Atkins, 536 U.S., at 337, 122 S.Ct. 2242 (SCALIA, J., joined by THOMAS, J., dissenting); Thompson, 487 U.S., at 859, 108 S.Ct. 2687 (SCALIA, J., dissenting); Graham v. Collins, 506 U.S. 461, 487, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (THOMAS, J., concurring) (contending that Woodson was wrongly decided). In particular, each disagreed with the majority’s reasoning in Graham, which is the foundation stone of our analysis. See Graham, 560 U.S., at ———, 130 S.Ct., at 2036 (ROBERTS, C.J., concurring in judgment); id., at ———, 130 S.Ct., at 2043–2056


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To start with the first set of cases: Roper and Graham establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, “they are less deserving of the most severe punishments.” Graham, 560 U.S., at ——, 130 S.Ct., at 2026. Those cases relied on three significant gaps between juveniles and adults. First, children have a “‘lack of maturity and an underdeveloped sense of responsibility,’” leading to recklessness, impulsivity, and heedless risk-taking. Roper, 543 U.S., at 569, 125 S.Ct. 1183. Second, children “are more vulnerable ... to negative influences and outside pressures,” including from their family and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. Ibid. And third, a child’s character is not as “well formed” as an adult’s; his traits are “less fixed” and his actions less likely to be “evidence of irretrievable depravity.” Id., at 570, 125 S.Ct. 1183.

Our decisions rested not only on common sense—on what “any parent knows”—but on science and social science as well. Id., at 569, 125 S.Ct. 1183. In Roper, we cited studies showing that “‘only a relatively small proportion of adolescents’ who engage in illegal activity ‘develop entrenched patterns of problem behavior.’” Id., at 570, 125 S.Ct. 1183 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). And in Graham, we noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”—for example, in “parts of the brain involved in behavior control.” 560 U.S., at ——, 130 S.Ct., at 2026. We reasoned that those findings—transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s “moral culpability” and enhanced the prospect that, as the years go by and neurological development occurs, his “‘deficiencies will be reformed.’”

The evidence presented to us in these cases indicates that the science and social science supporting Roper’s and Graham’s conclusions have become even stronger. See, e.g., Brief for American Psychological Association et al. as Amici Curiae 3 (“[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court’s conclusions”); id., at 4 (“It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance”); Brief for J. Lawrence Aber et al. as Amici Curiae 12–28 (discussing post-Graham studies); id., at 26–27 (“Numerous studies post-Graham indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency” (footnote omitted)).

Roper and Graham emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because “‘[t]he heart of the retribution rationale’” relates to an offender’s blameworthiness, “‘the case for retribution is not as strong with a minor as with an adult.’” Graham, 560 U.S., at ——, 130 S.Ct., at 2028 (quoting Tison v. Arizona, 481 U.S. 137, 149, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); Roper, 543 U.S., at 571, 125 S.Ct. 1183). Nor can deterrence do the work in this context, because “‘the same characteristics that render juveniles less culpable than adults’”—their immaturity, recklessness, and impetuosity—“make them less likely to consider potential punishment.” Graham, 560 U.S., at ——, 130 S.Ct., at 2028 (quoting Roper, 543 U.S., at 571, 125 S.Ct. 1183). Similarly, incapacitation could not support the life-without-parole sentence in Graham: Deciding that a “juvenile offender forever will be a danger to society” would require “mak[ing] a judgment that [he] is incorrigible”—but “‘incorrigibility is inconsistent with youth.’” 560 U.S., at ——, 130 S.Ct., at 2029 (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky.App.1968)). And for the same reason, rehabilitation could not justify that sentence. Life without parole “forswears altogether the rehabilitative ideal.” Graham, 560 U.S., at ——, 130 S.Ct., at 2030. It reflects “an irrevocable judgment about [an
Graham concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children. To be sure, Graham’s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. See id., at ——, 130 S.Ct., at 2028–2032. But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So Graham’s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.

[11] Most fundamentally, Graham insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And in other contexts as well, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. Cf. id., at ——, 130 S.Ct., at 2028–2032 (generally doubting the penological justifications for imposing life without parole on juveniles). “An offender’s age,” we made clear in Graham, “is relevant to the Eighth Amendment,” and so “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” Id., at ——, 130 S.Ct., at 2031. THE CHIEF JUSTICE, concurring in the judgment, made a similar point. Although rejecting a categorical bar on life-without-parole sentences for juveniles, he acknowledged “Roper’s conclusion that juveniles are typically less culpable than adults,” and accordingly wrote that “an offender’s juvenile status can play a central role” in considering a sentence’s proportionality. Id., at ——, 130 S.Ct., at 2039; see id., at ——, 130 S.Ct., at 2042 (Graham’s “youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive”).

In discussing Graham, the dissents essentially ignore all of this reasoning. See post, at 2478 – 2480 (opinion of ROBERTS, C.J.); post, at 2488 – 2489 (opinion of ALITO, J.). Indeed, THE CHIEF JUSTICE ignores the points made in his own concurring opinion. The only part of Graham that the dissents see fit to note is the distinction it drew between homicide and nonhomicide offenses. See post, at 2480 – 2481 (opinion of ROBERTS, C.J.); post, at 2488 – 2489 (opinion of ALITO, J.). But contrary to the dissents’ charge, our decision today retains that distinction: Graham established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.

But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—the unknowns prohibit a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punished a juvenile offender. That contravenes Graham’s (and also Roper’s) foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.

And Graham makes plain these mandatory schemes’ defects in another way: by likening life-without-parole sentences imposed on juveniles to the death penalty itself. Life-without-parole terms, the Court wrote, “share some characteristics with death sentences that are shared by no other sentences.” 560 U.S., at ——, 130 S.Ct., at 2027. Imprisoning an offender until he dies alters the remainder of his life “by a forfeiture that is irrevocable.” Ibid. (citing Solem v. Helm, 463 U.S. 277, 300–301, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)). And this lengthiest possible incarceration is an “especially harsh punishment for a juvenile,” because he will almost inevitably serve “more years and a greater percentage of his life in prison than an adult offender.” Graham, 560 U.S., at ——, 130 S.Ct., at 2028. The penalty when imposed on a teenager, as compared with an older person, is therefore “the same ... in name only.” Id., at ——, 130 S.Ct., at 2028. All of that suggested a distinctive set of legal rules: In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment. We imposed a categorical ban on the sentence’s use, in a way unprecedented for a term of imprisonment. See

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Of special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the “mitigating qualities of youth.” Johnson v. Texas, 509 U.S. 350, 367, 113 S.Ct. 2658, 290 (1993). Everything we said in Roper and Graham about that stage of life also appears in these decisions. As we observed, “youth is more than a chronological fact.” Eddings, 455 U.S., at 115, 102 S.Ct. 869. It is a time of immaturity, irresponsibility, “impetuousness[,] and recklessness.” Johnson, 509 U.S., at 368, 113 S.Ct. 2658. It is a moment and “condition of life when a person may be most susceptible to influence and to psychological damage.” Eddings, 455 U.S., at 115, 102 S.Ct. 869. And its “signature qualities” are all “transient.” Johnson, 509 U.S., at 368, 113 S.Ct. 2658. Eddings is especially on point. There, a 16–year–old shot a police officer point-blank and killed him. We invalidated his death sentence because the judge did not consider evidence of his neglectful and violent family background (including his mother’s drug abuse and his father’s physical abuse) and his emotional disturbance. We found that evidence “particularly relevant”—more so than it would have been in the case of an adult offender. 455 U.S., at 115, 102 S.Ct. 869. We held: “[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered” in assessing his culpability. Id., at 116, 102 S.Ct. 869.

In light of Graham’s reasoning, these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as Graham noted, a greater sentence than those adults will serve.7 In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, Graham indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.

7 Although adults are subject as well to the death penalty in many jurisdictions, very few offenders actually receive that sentence. See, e.g., Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, Felony Sentences in State Courts 2006—Statistical Tables, p. 28 (Table 4.4) (rev. Nov. 22, 2010). So in practice, the sentencing schemes at issue here result in juvenile homicide offenders receiving the same nominal punishment as almost all adults, even though the two classes differ significantly in moral culpability and capacity for change.
After *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. See, e.g., *Graham*, 560 U.S., at ——, 130 S.Ct., at 2032 (“[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings”); *J.D.B. v. North Carolina*, 564 U.S. ——, ——, 131 S.Ct. 2394, 2400–2401, 180 L.Ed.2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Both cases before us illustrate the problem. Take Jackson's first. As noted earlier, Jackson did not fire the bullet that killed Laurie Troup; nor did the State argue that he intended her death. Jackson's conviction was instead based on an aiding-and-abetting theory; and the appellate court affirmed the verdict only because the jury could have believed that Jackson entered the store, he warned Troup that “[w]e ain't playin',” rather than told his friends that “I thought you all was playin'.” See 359 Ark., at 90–92, 194 S.W.3d, at 759–760; *supra*, at 2461. To be sure, Jackson learned on the way to the video store that his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point. All these circumstances go to Jackson's culpability for the offense. See *Graham*, 560 U.S., at ——, 130 S.Ct., at 2027 (“[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability”). And so too does Jackson's family background and immersion in violence: Both his mother and his grandmother had previously shot other individuals. See Record in No. 10–9647, *pp. 80–82. At the least, a sentencer should look at such facts before depriving a 14–year–old of any prospect of release from prison.

That is true also in Miller's case. No one can doubt that he and Smith committed a vicious murder. But they did it when high on drugs and alcohol consumed with the adult victim. And if ever a pathological background might have contributed to a 14–year–old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug–addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten. See 928 So.2d, at 1081 (Cobb, J., concurring in result); Miller App. 26–28; *supra*, at 2461 – 2462. Nonetheless, Miller's past criminal history was limited—two instances of truancy and one of “second–degree criminal mischief.” No. CR–03–0915, at 6 (unpublished memorandum). That Miller deserved severe punishment for killing Cole Cannon is beyond question. But once again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty.

We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. *Graham*, 560 U.S., at ——, 130 S.Ct., at 2030 (“A State is not required to guarantee eventual freedom,” but must provide “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation”). By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between “the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Roper*, 543 U.S., at
The Court upheld that penalty, reasoning that “a sentence which is not otherwise cruel and unusual” does not become “so simply because it is ‘mandatory.’” Id., at 995, 111 S.Ct. 2680. We recognized that a different rule, requiring individualized sentencing, applied in the death penalty context. But we refused to extend that command to noncapital cases “because of the qualitative difference between death and all other penalties.” Ibid.; see id., at 1006, 111 S.Ct. 2680 (KENNEDY, J., concurring in part and concurring in judgment). According to Alabama, invalidating the mandatory imposition of life-without-parole terms on juveniles “would effectively overrule Harmelin.” Brief for Respondent in No. 10–9646, p. 59 (hereinafter Alabama Brief); see Arkansas Brief 39.

We think that argument myopic. Harmelin had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children. Capital punishment, our decisions hold, generally comports with the Eighth Amendment—except it cannot be imposed on children. See Roper, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1; Thompson, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702. So too, life without parole is permissible for nonhomicide offenses—except, once again, for children. See Graham, 560 U.S., at ——, 130 S.Ct., at 2030. Nor are these sentencing decisions an oddity in the law. To the contrary, “[o]ur history is replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults.” J.D.B., 564 U.S., at ——, 131 S.Ct., at 2404 (quoting Eddings, 455 U.S., at 115–116, 102 S.Ct. 869, citing examples from criminal, property, contract, and tort law). So if (as Harmelin recognized) “death is different,” children are different too. Indeed, it is the odd legal rule that does not have some form of exception for children. In that context, it is no surprise that the law relating to society’s harshest punishments recognizes such a distinction. Cf. Graham, 560 U.S., at ——, 130 S.Ct., at 2040 (ROBERTS, C.J., concurring in judgment) (“Graham ’s age places him in a significantly different category from the defendant[t] in ... Harmelin ”). Our ruling thus neither overrules nor undermines nor conflicts with Harmelin.

III

Alabama and Arkansas offer two kinds of arguments against requiring individualized consideration before sentencing a juvenile to life imprisonment without possibility of parole. The States (along with the dissents) first contend that the rule we adopt conflicts with aspects of our Eighth Amendment caselaw. And they next assert that the rule is unnecessary because individualized circumstances come into play in deciding whether to try a juvenile offender as an adult. We think the States are wrong on both counts.

A

The States (along with Justice THOMAS) first claim that Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), precludes our holding. The defendant in Harmelin was sentenced to a mandatory life-without-parole term for possessing more than 650 grams of cocaine. Given our holding, and the dissents' competing position, we see a certain irony in their repeated references to 17–year–olds who have committed the “most heinous” offenses, and their comparison of those defendants to the 14–year–olds here. See post, at 2477 (opinion of ROBERTS, C.J.) (noting the “17–year old [who] is convicted of deliberately murdering an innocent victim”); post, at 2478 (“the most heinous murders”); post, at 2480 (“the worst types of murder”); post, at 2489 (opinion of ALITO, J.) (warning the reader not to be “confused by the particulars” of these two cases); post, at 2489 (discussing the “17 1/2–year–old who sets off a bomb in a crowded mall”). Our holding requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes. By contrast, the sentencing schemes that the dissents find permissible altogether preclude considering these factors.

[16] Alabama and Arkansas (along with THE CHIEF JUSTICE and Justice ALITO) next contend that because many States impose mandatory life-without-parole sentences on juveniles, we may not hold the practice unconstitutional.


In considering categorical bars to the death penalty and life without parole, we ask as part of the analysis whether “objective indicia of society's standards, as expressed in legislative enactments and state practice,” show a “national consensus” against a sentence for a particular class of offenders. *2471 Graham, 560 U.S., at ——, 130 S.Ct., at 2022 (quoting Roper, 543 U.S., at 563, 125 S.Ct. 1183).

By our count, 29 jurisdictions (28 States and the Federal Government) make a life-without-parole term mandatory for some juveniles convicted of murder in adult court. 9 The States argue that this number precludes our holding.

9 The States note that 26 States and the Federal Government make life without parole the mandatory (or mandatory minimum) punishment for some form of murder, and would apply the relevant provision to 14-year-olds (with many applying it to even younger defendants). See Alabama Brief 17–18. In addition, life without parole is mandatory for older juveniles in Louisiana (age 15 and up) and Texas (age 17). See La. Child. Code Ann., Arts. 857(A), (B) (West Supp. 2012); La.Rev.Stat. Ann. §§ 14:30(C), 14:30.1(B) (West Supp.2012); Tex. Family Code Ann. §§ 51.02(2)(A), 54.02(a)(2)(A) (West Supp.2011); Tex. Penal Code Ann. § 12.31(a) (West 2011). In many of these jurisdictions, life without parole is the mandatory punishment only for aggravated forms of murder. That distinction makes no difference to our analysis. We have consistently held that limiting a mandatory death penalty law to particular kinds of murder cannot cure the law’s “constitutional vice” of disregarding the “circumstances of the particular offense and the character and propensities of the offender.” Roberts v. Louisiana, 428 U.S. 325, 333, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (plurality opinion); see Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). The same analysis applies here, for the same reasons.

We do not agree; indeed, we think the States’ argument on this score weaker than the one we rejected in Graham. For starters, the cases here are different from the typical one in which we have tallied legislative enactments. Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in Roper or Graham. Instead, it mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of Roper, Graham, and our individualized sentencing cases that youth matters for purposes of meting out the law’s most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments. See, e.g., Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (relying on Woodson’s logic to prohibit the mandatory death penalty for murderers already serving life without parole); Lockett, 438 U.S., at 602–608, 98 S.Ct. 2954 (plurality opinion) (applying Woodson to require that judges and juries consider all mitigating evidence); Eddings, 455 U.S., at 110–117, 102 S.Ct. 869 (similar). We see no difference here.

In any event, the “objective indicia” that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment. In Graham, we prohibited life-without-parole terms for juveniles committing nonhomicide offenses even though 39 jurisdictions permitted that sentence. See 560 U.S., at ——, 130 S.Ct., at 2023. That is 10 more than impose life without parole on juveniles on a mandatory basis. 10 And *2472 in Atkins, Roper, and Thompson, we similarly banned the death penalty in circumstances in which “less than half” of the “States that permit [ted] capital punishment (for whom the issue exist[ed])” had previously chosen to do so. Atkins, 536 U.S., at 342, 122 S.Ct. 2242 (SCALIA, J., dissenting) (emphasis deleted); see id., at 313–315, 122 S.Ct. 2242 (majority opinion); Roper, 543 U.S., at 564–565, 125 S.Ct. 1183; Thompson, 487 U.S., at 826–827, 108 S.Ct. 2687 (plurality opinion). So we are breaking no new ground in these cases. 11

10 In assessing indicia of societal standards, Graham discussed “actual sentencing practices” in addition to legislative enactments, noting how infrequently sentencers imposed the statutorily available penalty. 560 U.S., at ——, 130 S.Ct., at 2023. Here, we consider the constitutionality of mandatory sentencing schemes—which by definition remove a judge’s or jury’s discretion—so no comparable gap between legislation and practice can exist. Rather than showing whether sentencers consider life without parole for juvenile homicide offenders appropriate, the number of juveniles serving this sentence, see post, at 2477, 2478 – 2479 (ROBERTS, C.J., dissenting), merely reflects the number who have committed homicide in mandatory-sentencing jurisdictions. For the same reason, THE
Chief Justice's comparison of ratios in this case and Graham carries little weight. He contrasts the number of mandatory life-without-parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, with "the corresponding number" of sentences in Graham (i.e., the number of life-without-parole sentences for juveniles who committed serious nonhomicide crimes, as compared to arrests for those crimes). Post, at 2461–2462. But because the mandatory nature of the sentences here necessarily makes them more common, the Chief Justice's figures do not "correspond" at all. The higher ratio is mostly a function of removing the sentence's discretion.

Where mandatory sentencing does not itself account for the number of juveniles serving life-without-parole terms, the evidence we have of practice supports our holding. Fifteen jurisdictions make life without parole discretionary for juveniles. See Alabama Brief 25 (listing 12 States); Cal.Penal Code Ann. § 190.5(b) (West 2008); Ind.Code § 35–50–2–3(b) (2011); N.M. Stat. §§ 31–18–13(B), 31–18–14, 31–18–15.2 (2010). According to available data, only about 15% of all juvenile life-without-parole sentences come from those 15 jurisdictions, while 85% come from the 29 mandatory ones. See Tr. of Oral Arg. in No. 10–9646, p. 19; Human Rights Watch, State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP), Oct. 2, 2009, online at http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole (as visited June 21, 2012, and available in Clerk of Court's case file). That figure indicates that when given the choice, sentencers impose life without parole on children relatively rarely. And contrary to the Chief Justice's argument, see post, at 2462, n. 2, we have held that when judges and juries do not often choose to impose a sentence, it at least should not be mandatory. See Woodson v. North Carolina, 428 U.S. 280, 295–296, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion) (relying on the infrequency with which juries imposed the death penalty when given discretion to hold that its mandatory imposition violates the Eighth Amendment).

In response, the Chief Justice complains: "To say that a sentence may be considered unusual because so many legislatures approve it stands precedent on its head." Post, at 2479. To be clear: That description in no way resembles our opinion. We hold that the sentence violates the Eighth Amendment because, as we have exhaustively shown, it conflicts with the fundamental principles of Roper, Graham, and our individualized sentencing cases. We then show why the number of States imposing this punishment does not preclude our holding, and note how its mandatory nature (in however many States adopt it) makes use of actual sentencing numbers unilluminating.

Graham and Thompson provide special guidance, because they considered the same kind of statutes we do and explained why simply counting them would present a distorted view. Most jurisdictions authorized the death penalty or life without parole for juveniles only through the combination of two independent statutory provisions. One allowed the transfer of certain juvenile offenders to adult court, while another (often in a far-removed part of the code) set out the penalties for any and all individuals tried there. We reasoned that in those circumstances, it was impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice). In Thompson, we found that the statutes "tell us that the States consider 15–year–olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), but tell us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders." 487 U.S., at 826, n. 24, 108 S.Ct. 2687 (plurality opinion) (emphasis deleted); see also id., at 850, 108 S.Ct. 2687 (O'Connor, J., concurring in judgment); Roper, 543 U.S., at 596, n., 125 S.Ct. 1183 (O'Connor, J., dissenting). And Graham echoed that reasoning: Although the confluence of state laws "make[ ] life without parole possible for some juvenile nonhomicide offenders," it did not "justify a judgment" that many States actually "intended to subject such offenders" to those sentences. 560 U.S., at ———, 130 S.Ct., at 2025. 12

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12 THE CHIEF JUSTICE attempts to distinguish Graham on this point, arguing that there "the extreme rarity with which the sentence in question was imposed could suggest that legislatures did not really intend the inevitable result of the laws they passed." Post, at 2480. But neither Graham nor Thompson suggested such reasoning, presumably because the time frame makes it difficult to comprehend. Those cases considered what legislators intended when they enacted, at different moments, separate juvenile-transfer and life-without-parole provisions—by definition, before they knew or could know how many juvenile life-without-parole sentences would result.


All that is just as true here. Almost all jurisdictions allow some juveniles to be tried in adult court for some kinds of homicide. See Dept. of Justice, H. Snyder & M. Sickmund, Juvenile Offenders and Victims: 2006 National Report 110–114 (hereinafter 2006 National Report). But most States do not have separate penalty provisions for those juvenile offenders. Of the 29 jurisdictions mandating life without parole for children, more than half do so by virtue of generally applicable penalty provisions, imposing the sentence without regard to age. 13 And indeed, some of those States set no minimum age for who may be transferred to adult court in the first instance, thus applying life-without-parole mandates to children of any age—be it 17 or 14 or 10 or 6. 14 As in Graham, we think that “underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.” 560 U.S., at ———, 130 S.Ct., at 2026. That Alabama and Arkansas can count to 29 by including these possibly (or probably) inadvertent legislative outcomes does not preclude our determination that mandatory life without parole for juveniles violates the Eighth Amendment.

Nor does the presence of discretion in some jurisdictions' transfer statutes aid the States here. Alabama and Arkansas initially ignore that many States use mandatory transfer systems: A juvenile of a certain age who has committed a specified offense will be tried in adult court, regardless of any individualized circumstances. Of the 29 relevant jurisdictions, about half place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer to juvenile court. 15 Moreover, several States at times lodge this decision exclusively in the hands of prosecutors, again with no statutory mechanism for judicial reevaluation. 16 And those “prosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decisionmaking.” Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, P. Griffin, S. Addie, B. Adams, & K. Firestine, Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting 5 (2011).


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Even when States give transfer-stage discretion to judges, it has limited utility. First, the decisionmaker typically will have only partial information at this early, pretrial stage about either the child or the circumstances of his offense. Miller's case provides an example. As noted earlier, see n. 3, supra, the juvenile court denied Miller's request for his own mental-health expert at the transfer hearing, and the appeals court affirmed on the ground that Miller was not then entitled to the protections and services he would receive at trial. See No. CR–03–0915, at 3–4 (unpublished memorandum). But by then, of course, the expert's testimony could not change the sentence; whatever she said in mitigation, the mandatory life-without-parole prison term would kick in. The key moment for the exercise of discretion is the transfer—and as Miller's case shows, the judge often does not know then what she will learn, about the offender or the offense, over the course of the proceedings.

Second and still more important, the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing. Because many juvenile systems require that the offender be released at a particular age or after a certain number of years, transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult (here, life without parole). In many States, for example, a child convicted in juvenile court must be released from custody by the age of 21. See, e.g., Ala.Code § 12–15–117(a) (Cum. Supp. 2011); see generally 2006 National Report 103 (noting limitations on the length of juvenile court sanctions). Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole after a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate. For that reason, the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the Eighth Amendment.

IV

Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment. We accordingly reverse the judgments of the Arkansas Supreme Court and Alabama Court of Criminal Appeals and remand the cases for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BREYER, with whom Justice SOTOMAYOR joins, concurring.

I join the Court's opinion in full. I add that, if the State continues to seek a sentence of life without the possibility of parole for Kuntrell Jackson, there will have to be a determination whether Jackson “kill[ed] or intend[ed] to kill” the robbery victim. Graham v. Florida, 560 U.S. ——, ——, 130 S.Ct. 2011, 2027, 176 L.Ed.2d 825 (2010). In my view, without such a finding, the Eighth Amendment as interpreted in Graham forbids sentencing Jackson to such a sentence, regardless of whether its application is mandatory or discretionary under state law.

In Graham we said that “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.” Ibid. (emphasis added). For one thing, “compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed.” Id., at ——, 130 S.Ct., at 2026 (internal quotation marks omitted). See also ibid. (“[P]sychology and brain science continue to show fundamental differences between juvenile and adult minds” making their actions “less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults” (quoting Roper v. Simmons, 543 U.S. 551, 570, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005))); ante, at 2464. For another thing, Graham recognized that lack of intent normally diminishes the “moral culpability” that attaches to the crime in question, making those that do not intend to kill “categorically less deserving of the most serious forms

Given Graham’s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim. Quite simply, if the juvenile either kills or intends to kill the victim, he lacks “twice diminished” responsibility. But where the juvenile neither kills nor intends to kill, both features emphasized in Graham as extenuating apply. The dissent itself here would permit life without parole for “juveniles who commit the worst types of murder,” post, at 2480 (opinion of ROBERTS, C.J.), but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.

I recognize that in the context of felony-murder cases, the question of intent is a complicated one. The felony-murder doctrine traditionally attributes death caused in the course of a felony to all participants who intended to commit the felony, regardless of whether they killed or intended to kill. See 2 W. LaFave, Substantive Criminal Law §§ 14.5(a) and (c) (2d ed. 2003). This rule has been based on the idea of “transferred intent”; the defendant's intent to commit the felony satisfies the intent to kill required for murder. See S. Kadish, S. Schulhofer, & C. Streiker, Criminal Law and Its Processes 439 (8th ed. 2007); 2 C. Torcia, Wharton's Criminal Law § 147 (15th ed. 1994).

But in my opinion, this type of “transferred intent” is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole. As an initial matter, this Court has made clear that this artificially constructed kind of intent does not count as intent for purposes of the Eighth Amendment. We do not rely on transferred intent in determining if an adult may receive the death penalty. Thus, the Constitution forbids imposing capital punishment upon an aider and abettor in a robbery, where that individual did not intend to kill and simply was “in the car by the side of the road ..., waiting to help the robbers escape.” Enmund, supra, at 788, 102 S.Ct. 3368. Cf. Tison, supra, at 157–158, 107 S.Ct. 1676 (capital punishment permissible for aider and abettor where kidnaping led to death because he was “actively involved” in every aspect of the kidnaping and his behavior showed “a reckless disregard for human life”). Given Graham, this holding applies to juvenile sentences of life without parole a fortiori. See ante, at 2466–2467. Indeed, even juveniles who meet the Tison standard of “reckless disregard” may not be eligible for life without parole. Rather, Graham dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who “kill or intend to kill.” 560 U.S., at ———, 130 S.Ct., at 2027.

Moreover, regardless of our law with respect to adults, there is no basis for imposing a sentence of life without parole upon a juvenile who did not himself kill or intend to kill. At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. See 2 LaFave, supra, § 14.5(c). Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively. Ante, at 2464–2465. Justice Frankfurter cautioned, “Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a State's duty toward children.” May v. Anderson, 345 U.S. 528, 536, 73 S.Ct. 840, 97 L.Ed. 1221 (1953) (concurring opinion).

To apply the doctrine of transferred intent here, where the juvenile did not kill, to sentence a juvenile to life without parole would involve such “fallacious reasoning.” Ibid.

This is, as far as I can tell, precisely the situation present in Kuntrell Jackson's case. Jackson simply went along with older boys to rob a video store. On the way, he became aware that a confederate had a gun. He initially stayed outside the store, and went in briefly, saying something like “We ain't playin'” or “I thought you all was playin,'” before an older confederate shot and killed the store clerk. Jackson v. State, 359 Ark. 87, 91, 194 S.W.3d 757, 760 (2004). Crucially, the jury found him guilty of first-degree murder under a statute that permitted them to convict if, Jackson “attempted to commit or committed an aggravated robbery, and, in the course of that offense, he, or an accomplice, caused
it is not “unusual” for the murderer to receive a mandatory sentence of life without parole. That reality should preclude finding that mandatory life imprisonment for juvenile killers violates the Eighth Amendment.

Our precedent supports this conclusion. When determining whether a punishment is cruel and unusual, this Court typically begins with “objective indicia of society's standards, as expressed in legislative enactments and state practice.” *Graham v. Florida, 560 U.S. 70, 130 S.Ct. 1183, 1184, 176 L.Ed.2d 825 (2010)*; see also, *Kennedy v. Louisiana, 554 U.S. 407, 422, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008); Roper v. Simmons, 543 U.S. 551, 564, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)*. We look to these “objective indicia” to ensure that we are not simply following our own subjective values or beliefs. *Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. 2909, 2920, 49 L.Ed.2d 859 (1976)* (joint opinion of Stewart, Powell, and Stevens, JJ.). Such tangible evidence of societal standards enables us to determine whether there is a “consensus against” a given sentencing practice. *Graham, supra, at 130 S.Ct., at 1184–1185, 176 L.Ed.2d 825 (2010)*. If there is, the punishment may be regarded as “unusual.” But when, as here, most States formally require and frequently impose the punishment in question, there is no objective basis for that conclusion.

Our Eighth Amendment cases have also said that we should take guidance from “evolving standards of decency that mark the progress of a maturing society.” *Ante, at 2463* (quoting *Estelle v. Gamble, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)*; internal quotation marks omitted). Mercy toward the guilty can be a form of decency, and a maturing society may abandon harsh punishments that it comes to view as unnecessary or unjust. But decency is not the same as leniency. A decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency. As judges we have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty.

In this case, there is little doubt about the direction of society’s evolution: For most of the 20th century, American sentencing practices emphasized rehabilitation of the offender and the availability of parole. But by the 1980's, outcry against repeat offenders, broad disaffection with the rehabilitative model,


and other factors led many legislatures to reduce or eliminate the possibility of parole, imposing longer sentences in order to punish criminals and prevent them from committing more crimes. See, e.g., Alschuler, The Changing Purposes of Criminal Punishment, 70 U. Chi. L.Rev. 1, 1–13 (2003); see generally Crime and Public Policy (J. Wilson & J. Petersilia eds. 2011). Statutes establishing life without parole sentences in particular became more common in the past quarter century. See Baze v. Rees, 553 U.S. 35, 78, and n. 10, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (Stevens, J., concurring in judgment). And the parties agree that most States have changed their laws relatively recently to expose teenage murderers to mandatory life without parole. Jackson Brief 54–55; Alabama Brief 4–5.

The Court attempts to avoid the import of the fact that so many jurisdictions have embraced the sentencing practice at issue by comparing this case to the Court's prior Eighth Amendment cases. The Court notes that Graham found a punishment authorized in 39 jurisdictions unconstitutional, whereas the punishment it bans today is mandated in 10 fewer. Ante, at 2471. But Graham went to considerable lengths to show that although theoretically allowed in many States, the sentence at issue in that case was “exceedingly rare” in practice. 560 U.S., at ——, 130 S.Ct., at 2026. The Court explained that only 123 prisoners in the entire Nation were serving life without parole for nonhomicide crimes committed as juveniles, with more than half in a single State. It contrasted that with statistics showing nearly 400,000 juveniles were arrested for serious nonhomicide *2479 offenses in a single year. Based on the sentence's rarity despite the many opportunities to impose it, Graham concluded that there was a national consensus against life without parole for juvenile nonhomicide crimes. Id., at ——, 130 S.Ct., at 2024–2026.

Here the number of mandatory life without parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, is over 5,000 times higher than the corresponding number in Graham. There is thus nothing in this case like the evidence of national consensus in Graham.1

1 Graham stated that 123 prisoners were serving life without parole for nonhomicide offenses committed as juveniles, while in 2007 alone 380,480 juveniles were arrested for serious nonhomicide crimes. 560 U.S., at ——, 130 S.Ct., at 2024–2025. I use 2,000 as the number of prisoners serving mandatory life without parole sentences for murders committed as juveniles, because all seem to accept that the number is at least that high. And the same source Graham used reports that 1,170 juveniles were arrested for murder and nonnegligent homicide in 2009. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, C. Puzzanchera & B. Adams, Juvenile Arrests 2009, p. 4 (Dec. 2011).

The Court disregards these numbers, claiming that the prevalence of the sentence in question results from the number of statutes requiring its imposition. Ante, at 2471 – 2472, n. 10. True enough. The sentence at issue is statutorily mandated life without parole. Such a sentence can only result from statutes requiring its imposition. In Graham the Court relied on the low number of actual sentences to explain why the high number of statutes allowing such sentences was not dispositive. Here, the Court excuses the high number of actual sentences by citing the high number of statutes imposing it. To say that a sentence may be considered unusual because so many legislatures approve it stands precedent on its head.2

2 The Court's reference to discretionary sentencing practices is a distraction. See ante, at 2471 – 2472, n. 10. The premise of the Court's decision is that mandatory sentences are categorically different from discretionary ones. So under the Court's own logic, whether discretionary sentences are common or uncommon has nothing to do with whether mandatory sentences are unusual. In any event, if analysis of discretionary sentences were relevant, it would not provide objective support for today's decision. The Court states that “about 15% of all juvenile life-without-parole sentences”—meaning nearly 400 sentences—were imposed at the discretion of a judge or jury. Ante, at 2471 – 2472, n. 10. Thus the number of discretionary life without parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, is about 1,000 times higher than the corresponding number in Graham.

The Court also advances another reason for discounting the laws enacted by Congress and most state legislatures. Some of the jurisdictions that impose mandatory life without parole on juvenile murderers do so as a result of two statutes: one providing that juveniles charged with serious crimes may be tried as adults, and another generally mandating that those convicted of murder be imprisoned for life. According to the Court, our cases suggest that where the sentence results
from the interaction of two such statutes, the legislature can be considered to have imposed the resulting sentences “inadvertent[ly].” Ante, at 2472 – 2474. The Court relies on Graham and Thompson v. Oklahoma, 487 U.S. 815, 826, n. 24, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion), for the proposition that these laws are therefore not valid evidence of society's views on the punishment at issue.

It is a fair question whether this Court should ever assume a legislature is so ignorant of its own laws that it does not understand that two of them interact *2480 with each other, especially on an issue of such importance as the one before us. But in Graham and Thompson it was at least plausible as a practical matter. In Graham, the extreme rarity with which the sentence in question was imposed could suggest that legislatures did not really intend the inevitable result of the laws they passed. See 560 U.S., at ———, 130 S.Ct., at 2025–2026. In Thompson, the sentencing practice was even rarer—only 20 defendants had received it in the last century. 487 U.S., at 832, 108 S.Ct. 2687 (plurality opinion). Perhaps under those facts it could be argued that the legislature was not fully aware that a teenager could receive the particular sentence in question. But here the widespread and recent imposition of the sentence makes it implausible to characterize this sentencing practice as a collateral consequence of legislative ignorance. 3

3 The Court claims that I “take issue with some or all of these precedents’” and “seek to relitigate” them. Ante, at 2464, n. 4. Not so: applying this Court's cases exactly as they stand. I do not believe they support the Court's decision in this case.

Nor do we display our usual respect for elected officials by asserting that legislators have accidentally required 2,000 teenagers to spend the rest of their lives in jail. This is particularly true given that our well-publicized decision in Graham alerted legislatures to the possibility that teenagers were subject to life with parole only because of legislative inadvertence. I am aware of no effort in the wake of Graham to correct any supposed legislative oversight. Indeed, in amending its laws in response to Graham one legislature made especially clear that it does intend juveniles who commit first-degree murder to receive mandatory life without parole. See Iowa Code Ann. § 902.1 (West Cum. Supp. 2012).

In the end, the Court does not actually conclude that mandatory life sentences for juvenile murderers are unusual. It instead claims that precedent “leads to” today's decision, primarily relying on Graham and Roper. Ante, at 2464. Petitioners argue that the reasoning of those cases “compels” finding in their favor. Jackson Brief 34. The Court is apparently unwilling to go so far, asserting only that precedent points in that direction. But today's decision invalidates the laws of dozens of legislatures and Congress. This Court is not easily led to such a result. See, e.g., United States v. Harris, 106 U.S. 629, 635, 1 S.Ct. 601, 27 L.Ed. 290 (1883) (courts must presume an Act of Congress is constitutional “unless the lack of constitutional authority ... is clearly demonstrated”). Because the Court does not rely on the Eighth Amendment's text or objective evidence of society's standards, its analysis of precedent alone must bear the “heavy burden [that] rests on those who would attack the judgment of the representatives of the people.” Gregg, 428 U.S., at 175, 96 S.Ct. 2909. If the Court is unwilling to say that precedent compels today's decision, perhaps it should reconsider that decision.

In any event, the Court's holding does not follow from Roper and Graham. Those cases undoubtedly stand for the proposition that teenagers are less mature, less responsible, and less fixed in their ways than adults—not that a Supreme Court case was needed to establish that. What they do not stand for, and do not even suggest, is that legislators—who also know that teenagers are different from adults—may not require life without parole for juveniles who commit the worst types of murder.

That Graham does not imply today's result could not be clearer. In barring life *2481 without parole for juvenile nonhomicide offenders, Graham stated that “[t]here is a line ‘between homicide and other serious violent offenses against the individual.’ ” 560 U.S., at ———, 130 S.Ct., at 2027 (quoting Kennedy, 554 U.S., at 438, 128 S.Ct. 2641). The whole point of drawing a line between one issue and another is to say that they are different and should be treated differently. In other words, the two are in different categories. Which Graham also said: “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.” 560 U.S., at ———, 130 S.Ct., at 2027 (emphasis added). Of course, to be especially clear that what is said about one issue does not apply to another, one could say...
that the two issues cannot be compared. *Graham* said that too: “Serious nonhomicide crimes ... cannot be compared to murder.” *Ibid.* (internal quotation marks omitted). A case that expressly puts an issue in a different category from its own subject, draws a line between the two, and states that the two should not be compared, cannot fairly be said to control that issue.

*Roper* provides even less support for the Court's holding. In that case, the Court held that the death penalty could not be imposed for offenses committed by juveniles, no matter how serious their crimes. In doing so, *Roper* also set itself in a different category than this case, by expressly invoking “special” Eighth Amendment analysis for death penalty cases. 543 U.S., at 568–569, 125 S.Ct. 1183. But more importantly, *Roper* reasoned that the death penalty was not needed to deter juvenile murderers in part because “life imprisonment without the possibility of parole” was available. *Id.*, at 572, 125 S.Ct. 1183. In a classic bait and switch, the Court now tells state legislatures that—*Roper*’s promise notwithstanding—they do not have power to guarantee that once someone commits a heinous murder, he will never do so again. It would be enough if today's decision proved Justice SCALIA’s prescience in writing that *Roper*’s “reassurance ... gives little comfort.” *Id.*, at 623, 125 S.Ct. 1183 (dissenting opinion). To claim that *Roper* actually “leads to” revoking its own reassurance surely goes too far.

Today's decision does not offer *Roper* and *Graham*’s false promises of restraint. Indeed, the Court's opinion suggests that it is merely a way station on the path to further judicial displacement of the legislative role in prescribing appropriate punishment for crime. The Court's analysis focuses on the mandatory nature of the sentences in this case. See *ante*, at 2466 – 2469. But then—although doing so is entirely unnecessary to the rule it announces—the Court states that even when a life without parole sentence is not mandatory, “we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” *Ante*, at 2469. Today's holding may be limited to mandatory sentences, but the Court has already announced that discretionary life without parole for juveniles should be “uncommon”—or, to use a common synonym, “unusual.”

Indeed, the Court’s gratuitous prediction appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges. If that invitation is widely accepted and such sentences for juvenile offenders do in fact become “uncommon,” the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits them.

This process has no discernible end point—or at least none consistent with our Nation’s legal traditions. *Roper* and *Graham* *2482* attempted to limit their reasoning to the circumstances they addressed—*Roper* to the death penalty, and *Graham* to nonhomicide crimes. Having cast aside those limits, the Court cannot now offer a credible substitute, and does not even try. After all, the Court tells us, “none of what *Graham* ] said about children ... is crime-specific.” *Ante*, at 2465. The principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently. See *ante*, at 2467 – 2469.

There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive. Unless confined, the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults. Learning that an Amendment that bars only “unusual” punishments requires the abolition of this uniformly established practice would be startling indeed.

* * *

It is a great tragedy when a juvenile commits murder—most of all for the innocent victims. But also for the murderer, whose life has gone so wrong so early. And for society as well, which has lost one or more of its members to deliberate violence, and must harshly punish another. In recent years, our society has moved toward requiring that the murderer, his age notwithstanding, be imprisoned for the remainder of his life. Members of this Court may disagree with that choice. Perhaps science and policy suggest society should show greater mercy to young killers, giving them a greater chance to reform themselves at the risk that they will kill again. See *ante*, at 2464 – 2466. But that is not our decision to make. Neither the text of the Constitution nor our precedent prohibits legislatures from requiring that juvenile murderers be sentenced to life without parole. I respectfully dissent.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.
Today, the Court holds that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” Ante, at 2460. To reach that result, the Court relies on two lines of precedent. The first involves the categorical prohibition of certain punishments for specified classes of offenders. The second requires individualized sentencing in the capital punishment context. Neither line is consistent with the original understanding of the Cruel and Unusual Punishments Clause. The Court compounds its errors by combining these lines of precedent and extending them to reach a result that is even less legitimate than the foundation on which it is built. Because the Court upsets the legislatively enacted sentencing regimes of 29 jurisdictions without constitutional warrant, I respectfully dissent.1

1 I join THE CHIEF JUSTICE’s opinion because it accurately explains that, even accepting the Court’s precedents, the Court’s holding in today’s cases is unsupportable.

I

The Court first relies on its cases “adopt[ing] categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty.” Ante, at 2463. Of these categorical proportionality cases, the Court places particular emphasis on Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), and Graham v. Florida, 560 U.S.—, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). In Roper, the Court held that the Constitution prohibits the execution of an offender who was under 18 at the time of his offense. *2483* 543 U.S., at 578, 125 S.Ct. 1183. The Roper Court looked to, among other things, its own sense of parental intuition and “scientific and sociological studies” to conclude that offenders under the age of 18 “cannot with reliability be classified among the worst offenders.” Id., at 569, 125 S.Ct. 1183. In Graham, the Court relied on similar considerations to conclude that the Constitution prohibits a life-without-parole sentence for a nonhomicide offender who was under the age of 18 at the time of his offense. 560 U.S., at ——, 130 S.Ct., at 2030.

The Court now concludes that mandatory life-without-parole sentences for duly convicted juvenile murderers “contraven[e] Graham’s (and also Roper’s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.” Ante, at 2466. But neither Roper nor Graham held that specific procedural rules are required for sentencing juvenile homicide offenders. And, the logic of those cases should not be extended to create such a requirement.

The Eighth Amendment, made applicable to the States by the Fourteenth Amendment, provides that: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” As I have previously explained, “the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous methods of punishment—specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted.” Graham, supra, at ——, 130 S.Ct., at 2044 (dissenting opinion) (internal quotation marks and citations omitted).2 The clause does not contain a “proportionality principle.” Ewing v. California, 538 U.S. 11, 32, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (THOMAS, J., concurring in judgment); see generally Harmelin v. Michigan, 501 U.S. 957, 975–985, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J.). In short, it does not authorize courts to invalidate any punishment they deem disproportionate to the severity of the crime or to a particular class of offenders. Instead, the clause “leaves the unavoidably moral question of who ‘deserves’ a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty.” Graham, supra, at ——, 130 S.Ct., at 2045 (THOMAS, J., dissenting).

2 Neither the Court nor petitioner argue that petitioner’s sentences would have been among the ‘modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.’ ” Graham, 560 U.S., at ——, n. 3, 130 S.Ct., at 2048, n. 3 (THOMAS, J., dissenting) (quoting Ford v. Wainwright, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)). Nor could they. Petitioners were 14 years old at the time they committed their crimes. When the Bill of Rights was ratified, 14–year–olds were subject to trial and punishment as adult offenders. See Roper v. Simmons, 543 U.S. 551, 609, n. 1, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (SCALIA, J., dissenting). Further, mandatory death sentences were common at that time. See Harmelin v. Michigan, 501 U.S. 957, 994–995, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). It
is therefore implausible that a 14–year–old's mandatory prison sentence—of any length, with or without parole—would have been viewed as cruel and unusual. The legislatures of Arkansas and Alabama, like those of 27 other jurisdictions, ante, at 2470 – 2471, have determined that all offenders convicted of specified homicide offenses, whether juveniles or not, deserve a sentence of life in prison without the possibility of parole. Nothing in our Constitution authorizes this Court to supplant that choice.

II

To invalidate mandatory life-without-parole sentences for juveniles, the Court also *2484 relies on its cases “prohib[iting] mandatory imposition of capital punishment.” Ante, at 2463. The Court reasons that, because Graham compared juvenile life-without-parole sentences to the death penalty, the “distinctive set of legal rules” that this Court has imposed in the capital punishment context, including the requirement of individualized sentencing, is “relevant” here. Ante, at 2466 – 2467. But even accepting an analogy between capital and juvenile life-without-parole sentences, this Court’s cases prohibiting mandatory capital sentencing schemes have no basis in the original understanding of the Eighth Amendment, and, thus, cannot justify a prohibition of sentencing schemes that mandate life-without-parole sentences for juveniles.

A

In a line of cases following Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam), this Court prohibited the mandatory imposition of the death penalty. See Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (same); Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). Furman first announced the principle that States may not permit sentencers to exercise unguided discretion in imposing the death penalty. See generally 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. In response to Furman, many States passed new laws that made the death penalty mandatory following conviction of specified crimes, thereby eliminating the offending discretion. See Gregg v. Georgia, 428 U.S. 153, 180–181, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.). The Court invalidated those statutes in Woodson, Roberts, and Sumner. The Court reasoned that mandatory capital sentencing schemes were problematic, because they failed “to allow the particularized consideration” of “relevant facets of the character and record of the individual offender or the circumstances of the particular offense.” Woodson, supra, at 303–304, 96 S.Ct. 2978 (plurality opinion). 3

3 The Court later extended Woodson, requiring that capital defendants be permitted to present, and sentencers in capital cases be permitted to consider, any relevant mitigating evidence, including the age of the defendant. See, e.g., Lockett v. Ohio, 438 U.S. 586, 597–608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion); Eddings v. Oklahoma, 455 U.S. 104, 110–112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Skipper v. South Carolina, 476 U.S. 1, 4–5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Johnson v. Texas, 509 U.S. 350, 361–368, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993). Whatever the validity of the requirement that sentencers be permitted to consider all mitigating evidence when deciding whether to impose a nonmandatory capital sentence, the Court certainly was wrong to prohibit mandatory capital sentences. See Graham v. Collins, 506 U.S. 461, 488–500, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (THOMAS, J., concurring).

In my view, Woodson and its progeny were wrongly decided. As discussed above, the Cruel and Unusual Punishments Clause, as originally understood, prohibits “torturous methods of punishment.” See Graham, 560 U.S., at ——, 130 S.Ct., at 2044 (THOMAS, J., dissenting) (internal quotation marks omitted). It is not concerned with whether a particular lawful method of punishment—whether capital or noncapital—is imposed pursuant to a mandatory or discretionary sentencing regime. See Gardner v. Florida, 430 U.S. 349, 371, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (Rehnquist, J., dissenting) (“The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is *2485 imposed”). In fact, “[i]n the early days of the Republic,” each crime generally had a defined punishment “prescribed with specificity by the legislature.” United States v. Grayson, 438 U.S. 41, 45, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978). Capital sentences, to which the Court analogizes, were treated no differently. “[M]andatory death sentences abounded in our first Penal Code” and were “common in the several States—both at

the time of the founding and throughout the 19th century.” Harmelin, 501 U.S., at 994–995, 111 S.Ct. 2680; see also Woodson, supra, at 289, 96 S.Ct. 2978 (plurality opinion) (“At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses”). Accordingly, the idea that the mandatory imposition of an otherwise-constitutional sentence renders that sentence cruel and unusual finds “no support in the text and history of the Eighth Amendment.” Harmelin, supra, at 994, 111 S.Ct. 2680.

Moreover, mandatory death penalty schemes were “a perfectly reasonable legislative response to the concerns expressed in Furman” regarding unguided sentencing discretion, in that they “eliminat[ed] explicit jury discretion and treat[ed] all defendants equally.” Graham v. Collins, 506 U.S. 461, 487, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (THOMAS, J., concurring). And, as Justice White explained more than 30 years ago, “a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that a criminal's character is such that he deserves death.” Roberts, supra, at 358, 96 S.Ct. 3001 (dissenting opinion). Thus, there is no basis for concluding that a mandatory capital sentencing scheme is unconstitutional. Because the Court's cases requiring individualized sentencing in the capital context are wrongly decided, they cannot serve as a valid foundation for the novel rule regarding mandatory life-without-parole sentences for juveniles that the Court announces today.

The Court rejected that argument, explaining that “[t]here can be no serious contention … that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.’” Id., at 995, 111 S.Ct. 2680. In so doing, the Court refused to analogize to its death penalty cases. The Court noted that those cases had “repeatedly suggested that there is no comparable [individualized-sentencing] requirement outside the capital context, because of the qualitative difference between death and all other penalties.” Ibid. The Court observed that, “even where the difference” between a sentence of life without parole and other sentences of imprisonment “is the greatest,” such a sentence “cannot be compared with death.” Id., at 996, 111 S.Ct. 2680. Therefore, the Court concluded that the line of cases requiring individualized sentencing had been drawn at capital cases, and that there was “no basis for extending it further.” Ibid.

B

In any event, this Court has already declined to extend its individualized-sentencing rule beyond the death penalty context. In Harmelin, the defendant was convicted of possessing a large quantity of drugs. 501 U.S., at 961, 111 S.Ct. 2680 (opinion of SCALIA, J.). In accordance with Michigan law, he was sentenced to a mandatory term of life in prison without the possibility of parole. Ibid. Citing the same line of death penalty precedents on which the Court relies today, the defendant argued that his sentence, due to its mandatory nature, violated the Cruel and Unusual Punishments Clause. Id., at 994–995, 111 S.Ct. 2680 (opinion of the Court).

Nothing about our Constitution, or about the qualitative difference between any term of imprisonment and death, has changed since Harmelin was decided 21 years ago. What has changed (or, better yet, “evolved”) is this Court's ever-expanding line of categorical proportionality cases. The Court now uses Roper and Graham to jettison Harmelin’s clear distinction between capital and noncapital cases and to apply the former to noncapital juvenile offenders. The Court's decision to do so is even less supportable than the precedents used to reach it.

*2486 Harmelin’s reasoning logically extends to these cases. Obviously, the younger the defendant, “the great[er]” the difference between a sentence of life without parole and other terms of imprisonment. Ibid. But under Harmelin’s rationale, the defendant's age is immaterial to the Eighth Amendment analysis. Thus, the result in today's cases should be the same as that in Harmelin. Petitioners, like the defendant in Harmelin, were not sentenced to death. Accordingly, this Court's cases “creating and clarifying the individualized capital sentencing doctrine” do not apply. Id., at 995, 111 S.Ct. 2680 (internal quotation marks omitted).

4 In support of its decision not to apply Harmelin to juvenile offenders, the Court also observes that “'[o]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.’
III

As THE CHIEF JUSTICE notes, ante, at 2481 – 2482 (dissenting opinion), the Court lays the groundwork for future incursions on the States’ authority to sentence criminals. In its categorical proportionality cases, the Court has considered “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentencing practice at issue.” Graham, 560 U.S., at ——, 130 S.Ct. at 2022 (quoting Roper, 543 U.S., at 563, 125 S.Ct. 1183). In Graham, for example, the Court looked to “[a]ctual sentencing practices” to conclude that there was a national consensus against life-without-parole sentences for juvenile nonhomicide offenders. 560 U.S., at ——, 130 S.Ct., at 2023–2025; see also Roper, supra, at 564–565, 125 S.Ct. 1183; Atkins v. Virginia, 536 U.S. 304, 316, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

Today, the Court makes clear that, even though its decision leaves intact the discretionary imposition of life-without-parole sentences for juvenile homicide offenders, it “think[s] appropriate occasions for sentencing juveniles to [life without parole] will be uncommon.” Ante, at 2469. That statement may well cause trial judges to shy away from imposing life without parole sentences and embolden appellate judges to set them aside when they are imposed. And, when a future petitioner seeks a categorical ban on sentences of life without parole for juvenile homicide offenders, this Court will most assuredly look to the “actual sentencing practices” triggered by this case. The Court has, thus, gone from “merely” divining the societal consensus of today to shaping the societal consensus of tomorrow.

* * *

Today’s decision invalidates a constitutionally permissible sentencing system based on nothing more than the Court’s belief that “its own sense of morality ... *2487 pre-empts that of the people and their representatives.” Graham, supra, at ——, 130 S.Ct., at 2058 (THOMAS, J., dissenting). Because nothing in the Constitution grants the Court the authority it exercises today, I respectfully dissent.

Justice ALITO, with whom Justice SCALIA joins, dissenting. The Court now holds that Congress and the legislatures of the 50 States are prohibited by the Constitution from identifying any category of murderers under the age of 18 who must be sentenced to life imprisonment without parole. Even a 17 1/2–year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a “child” and must be given a chance to persuade a judge to permit his release into society. Nothing in the Constitution supports this arrogation of legislative authority.

The Court long ago abandoned the original meaning of the Eighth Amendment, holding instead that the prohibition of “cruel and unusual punishment” embodies the “evolving standards of decency that mark the progress of a maturing society.” Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion); see also Graham v. Florida, 560 U.S. ——, ——, 130 S.Ct. 2011, 2020–2021, 176 L.Ed.2d 825 (2010); Kennedy v. Louisiana, 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008); Roper v. Simmons, 543 U.S. 551, 560–561, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); Atkins v. Virginia, 536 U.S. 304, 311–312, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); Hudson v. McMillian, 503 U.S. 1, 8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992); Ford v. Wainwright, 477 U.S. 399, 406, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); Rhodes v. Chapman, 452 U.S. 337, 346, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); Estelle v. Gamble, 429 U.S. 97, 102, 97 S.Ct. 283, 50 L.Ed.2d 251 (1976). Both the provenance and philosophical basis for this standard were problematic from the start. (Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so, and how did this particular philosophy of history find its way into our fundamental law? And in any event, aren’t elected representatives more likely than unaccountable judges to reflect changing societal standards?) But at least at the start, the Court insisted that these “evolving standards” represented something other than the personal views of five Justices. See Rummel v. Estelle, 445 U.S. 263, 275, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (explaining that “the Court’s Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices”). Instead, the Court looked


for objective indicia of our society’s moral standards and the trajectory of our moral “evolution.” See id., at 274–275, 100 S.Ct. 1133 (emphasizing that “‘judgment should be informed by objective factors to the maximum possible extent’ ” (quoting Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion))).

In this search for objective indicia, the Court toyed with the use of public opinion polls, see Atkins, supra, at 316, n. 21, 122 S.Ct. 2242, and occasionally relied on foreign law, see Roper v. Simmons, supra, at 575, 125 S.Ct. 1183; Enmund v. Florida, 458 U.S. 782, 796, n. 22, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); Thompson v. Oklahoma, 487 U.S. 815, 830–831, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988); Coker, 433 U.S., at 596, n. 10, 97 S.Ct. 2861 (plurality opinion).

In the main, however, the staple of this inquiry was the tallying of the positions taken by state legislatures. Thus, in Coker, which held that the Eighth Amendment prohibits the imposition of the death penalty *2488 for the rape of an adult woman, the Court noted that only one State permitted that practice. Id., at 595–596, 97 S.Ct. 2861. In Enmund, where the Court held that the Eighth Amendment forbids capital punishment for ordinary felony murder, both federal law and the law of 28 of the 36 States that authorized the death penalty at the time rejected that punishment. 458 U.S., at 789, 102 S.Ct. 3368.

While the tally in these early cases may be characterized as evidence of a national consensus, the evidence became weaker and weaker in later cases. In Atkins, which held that low-IQ defendants may not be sentenced to death, the Court found an anti-death-penalty trend in the States was the same as in Atkins, but the trend in favor of abolition—five States during the past 15 years—was less impressive. Roper, 543 U.S., at 564–565, 125 S.Ct. 1183. Nevertheless, the Court held that the absence of a strong trend in support of abolition did not matter. See id., at 566, 125 S.Ct. 1183 (“Any difference between this case and Atkins with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change”).

In Kennedy v. Louisiana, the Court went further. Holding that the Eighth Amendment prohibits capital punishment for the brutal rape of a 12–year–old girl, the Court disregarded a nascent legislative trend in favor of permitting capital punishment for this narrowly defined and heinous crime. See 554 U.S., at 433, 128 S.Ct. 2641 (explaining that, although “the total number of States to have made child rape a capital offense ... is six,” “[t]his is not an indication of a trend or change in direction comparable to the one supported by data in Roper ”). The Court felt no need to see whether this trend developed further—perhaps because true moral evolution can lead in only one direction. And despite the argument that the rape of a young child may involve greater depravity than some murders, the Court proclaimed that homicide is categorically different from all (or maybe almost all) other offenses. See id., at 438, 128 S.Ct. 2641 (stating that nonhomicide crimes, including child rape, “may be devastating in their harm ... but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their severity and irrevocability” (internal quotation marks and citation omitted)). As the Court had previously put it, “death is different.” Ford, supra, at 411, 106 S.Ct. 2595 (plurality opinion).

Two years after Kennedy, in Graham v. Florida, any pretense of heeding a legislative consensus was discarded. In Graham, federal law and the law of 37 States and the District of Columbia permitted a minor to be sentenced to life imprisonment without parole for nonhomicide crimes, but despite this unmistakable evidence of a national consensus, the Court held that the practice violates the Eighth Amendment. See *2489 560 U.S., at ———, 130 S.Ct., at 2043–2044 (THOMAS, J., dissenting). The Court, however, drew a distinction between minors who murder and minors who commit other heinous offenses, so at least in that sense the principle that death is different lived on.
Today, that principle is entirely put to rest, for here we are concerned with the imposition of a term of imprisonment on offenders who kill. The two (carefully selected) cases before us concern very young defendants, and despite the brutality and evident depravity exhibited by at least one of the petitioners, it is hard not to feel sympathy for a 14-year-old sentenced to life without the possibility of release. But no one should be confused by the particulars of the two cases before us. The category of murderers that the Court delicately calls “children” (murderers under the age of 18) consists overwhelmingly of young men who are fast approaching the legal age of adulthood. Evan Miller and Kuntrell Jackson are anomalies; much more typical are murderers like Donald Roper, who committed a brutal thrill-killing just nine months shy of his 18th birthday. *Roper, 543 U.S.*, at 556, 125 S.Ct. 1183.

Seventeen-year-olds commit a significant number of murders every year, 1 and some of these crimes are incredibly brutal. Many of these murderers are at least as mature as the average 18-year-old. See *Thompson, 487 U.S.*, at 854, 108 S.Ct. 2687 (O’Connor, J., concurring in judgment) (noting that maturity may “vary widely among different individuals of the same age”). Congress and the legislatures of 43 States have concluded that at least some of these murderers should be sentenced to prison without parole, and 28 States and the Federal Government have decided that for some of these offenders life without parole should be mandatory. See *Ante*, at 2471 – 2472, and nn. 9–10. The majority of this Court now overrules these legislative judgments. 2

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1 Between 2002 and 2010, 17-year-olds committed an average combined total of 424 murders and nonnegligent homicides per year. See Dept. of Justice, Bureau of Justice Statistics, § 4, Arrests, Age of persons arrested (Table 4.7).

2 As the Court noted in *Mistretta v. United States, 488 U.S. 361, 366, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989)*, Congress passed the Sentencing Reform Act of 1984 to eliminate discretionary sentencing and parole because it concluded that these practices had led to gross abuses. The Senate Report for the 1984 bill rejected what it called the “outmoded rehabilitation model” for federal criminal sentencing. S.Rep. No. 98–225, at 38 (1983). According to the Report, “almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.” *Ibid.* The Report also “observed that the indeterminate-sentencing system had two ‘unjustifi[ed]’ and ‘shameful’ consequences. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was uncertainty as to the time the offender would spend in prison. Each was a serious impediment to an evenhanded and effective operation of the criminal justice system.” *Mistretta, supra, at 366, 109 S.Ct. 647* (quoting S.Rep. No. 98–225, at 38, 65 (citation omitted)).

It is true that, at least for now, the Court apparently permits a trial judge to make an individualized decision that a particular minor convicted of murder should be sentenced to life without parole, but do not expect this possibility to last very long. The majority goes out of its way to express the view that the imposition of a sentence of life without parole on a “child” (i.e., a murderer under the age of 18) should be uncommon. Having held in *Graham* that a trial judge with discretionary sentencing authority may not impose a sentence of life without parole on a minor *2490* who has committed a nonhomicide offense, the Justices in the majority may soon extend that holding to minors who commit murder. We will see.

What today’s decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society’s standards. Our Eighth Amendment case law is now entirely inward looking. After entirely disregarding objective indicia of our society’s standards in *Graham*, the Court now extrapolates from *Graham*. Future cases may extrapolate from today’s holding, and this process may continue until the majority brings sentencing practices into line with whatever the majority views as truly evolved standards of decency.

The Eighth Amendment imposes certain limits on the sentences that may be imposed in criminal cases, but for the most part it leaves questions of sentencing policy to be determined by Congress and the state legislatures—and with good reason. Determining the length of imprisonment that is appropriate for a particular offense and a particular offender inevitably involves a balancing of interests. If imprisonment does nothing else, it removes the criminal from the general population and prevents him from committing additional crimes in the outside world. When a legislature prescribes that a category of killers must be sentenced to
life imprisonment, the legislature, which presumably reflects the views of the electorate, is taking the position that the risk that these offenders will kill again outweighs any countervailing consideration, including reduced culpability due to immaturity or the possibility of rehabilitation. When the majority of this Court countermands that democratic decision, what the majority is saying is that members of society must be exposed to the risk that these convicted murderers, if released from custody, will murder again.

Unless our cases change course, we will continue to march toward some vision of evolutionary culmination that the Court has not yet disclosed. The Constitution does not authorize us to take the country on this journey.

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

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

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

INTRODUCTION: LOOKING BACKWARDS, LOOKING FORWARD

Over 100 years ago, the first juvenile court was established in Cook County, Illinois. The original purpose of the court was to separate juvenile offenders from adult offenders, to provide opportunities for rehabilitation and treatment, to create a more informal setting in which to adjudicate criminal conduct by children, and to limit the consequences of engaging in such conduct. Within twenty-five years, almost every state in the country had established a juvenile justice system. The basic premise of the juvenile court—that youth are different from adults, and uniquely capable of rehabilitation—would eventually be echoed in the Court's current Eighth Amendment jurisprudence, though now supported by contemporary behavioral and neuroscientific research in adolescent development, and with more robust procedural protections.

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

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

Kent ushered in a period of profound change for the juvenile justice system. One year after Kent, the Court decided In re Gault, a landmark decision setting forth the Court's broadest statement at that time about the need to protect children's constitutional rights. Eschewing labels of civil versus criminal and rejecting the elevation of form over process, the Court was unequivocal in its view that courts which possess the power to strip children of their liberty, however benevolently intentioned, must operate within the mandates of the Due Process clause of the Fourteenth Amendment. Gault was quickly followed by decisions requiring the state to prove delinquency charges against a juvenile on proof beyond a reasonable doubt and extending the protections of the double jeopardy clause to juveniles. Although the Court declined to extend the right to jury trial to juveniles in McKeiver v. Pennsylvania, a case decided in 1971, the inexorable march toward a more constitutional juvenile court system was underway. Throughout the next few years, every state amended its juvenile court act to ensure full compliance with the Court's constitutional mandates.
This constitutionalization of the juvenile court was the dominant story in juvenile justice until the late 1980s and early 1990s, when increases in violent juvenile crime caused by the lethal combination of crack cocaine and guns spread throughout the country. The prominence accorded to images and stories about violent juvenile offenders sparked a new wave of juvenile justice “reform,” one aimed at limiting the jurisdiction of juvenile court and expanding the jurisdiction of the adult criminal justice system over young offenders. Convinced that the country was headed toward a generation of increasingly violent teens, legislators quickly enacted laws that sought to ensure that youth charged with the most serious offenses would be prosecuted as adults. As yet another period of transformation swept over the juvenile court, concerns for due process and the constitutional rights of juvenile offenders were almost completely eclipsed by concerns for public safety, incapacitation and retribution—the latter being core attributes of the adult criminal justice system. Whatever lingering fealty to principles of rehabilitation and treatment the juvenile court retained was now reserved for an increasingly dwindling number of juveniles charged with crimes. At the same time, youthful offenders in the criminal justice system bore the full brunt of adult punishment, receiving not only lengthy terms of years sentences, but sentences of life without parole and even death.

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

Importantly, the notion that certain offenders might be less blameworthy for their criminal conduct had already found traction with the Court in 2003, when the Court reconsidered its prior caselaw upholding the death penalty for mentally retarded offenders. In Atkins v. Virginia, the Court overruled Penry v. Lynaugh and held that mentally retarded defendants were categorically less blameworthy for their criminal conduct, including murder, than unimpaired adult offenders. They were thus ineligible for the death penalty. Roper followed Atkins’ blueprint in persuading the Court that all juveniles under the age of eighteen were likewise categorically less blameworthy than adults, and could not receive the most serious sentence available—a sentence of death reserved for the worst of the worst criminals. The Court embraced the developmental research articulating the differences between juvenile and adult offenders, and reversed its prior 1989 decision in Stanford v Kentucky which had left the death penalty in place for sixteen- and seventeen-year-old juvenile offenders.

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

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

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

*293 I. DEVELOPMENTAL IMMATURITY: RESEARCH ON ADOLESCENT DEVELOPMENT

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

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

A. Decision-Making

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

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

Adolescents’ decision-making is also likely to be influenced by affective, or emotional, factors. Research has identified three different ways in which emotions can shape the decision-making process: 1) anticipated emotional outcomes; 2) anticipatory emotions; and 3) incidental emotions. First, individuals may choose to perform particular behaviors in a given situation by evaluating the anticipated emotional outcomes of various behavioral options. Behaviors that seem likely to increase positive emotions tend to become more desirable, even if they carry with them a degree of risk. Second, individuals' direct emotional responses to various behaviors also may guide their decision-making. For instance, individuals tend to approach behavioral situations to which they have positive emotional responses and avoid those situations that evoke negative emotions. Finally, incidental, or background, emotions can influence judgments about the risk or desirability of certain behavioral options.

Because adolescence is a period of emotional instability, these emotional influences are particularly salient in adolescents’ decision-making.

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

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

## B. Impulsivity

Impulsivity has been defined as “a predisposition toward rapid, unplanned reactions to internal or external stimuli without regard to the negative consequences of these reactions to the impulsive individuals or others.” As mentioned above, one psychosocial factor likely to influence behavior is temperance, or the ability to regulate one's behavior and evaluate a situation before one acts. In other words, impulsivity can be thought of as actions in the absence of formal decision-making. Because “impulsivity” describes behaviors with minimal or complete lack of forethought, it merits consideration in discussions of culpability.

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

C. Vulnerability

Immaturity in independent functioning, decision-making, and emotional regulation can make adolescents particularly susceptible to risky decision-making, peer influence and adult coercion, and greater sensitivity to invasions of privacy. Consequently, in many legal contexts, adolescents are recognized as a vulnerable population. Adolescent vulnerability is well-documented in developmental research. First, research suggests that adolescents demonstrate lower levels of independent functioning, as manifested in their poor self-reliance and weak self-concept. Poor self-reliance is evidenced in adolescents' difficulty demonstrating independence from peers and authority figures and their concomitant need for social validation. Weak self-concept can be seen in adolescents' difficulty recognizing personal strengths and weaknesses and developing individual values.

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

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

In addition to cognitive characteristics that differentiate adolescents' functioning from that of adults, developmental immaturity is characterized by differences in the ability to regulate emotions. Adolescents tend to demonstrate difficulties recognizing and expressing feelings, managing their emotions, and coping with undesirable feelings. This places adolescents at a disadvantage in high stress situations, and consistent or chronic exposure to stressful stimuli can, in turn, reduce adolescents' opportunities to develop successful emotional regulation abilities. Factors such as childhood maltreatment, maternal depression, exposure to violence, and economic deprivation are associated with poor emotion regulation (i.e., emotion “dysregulation”) in children and adolescents. Empirical evidence also has shown that adolescents with poor emotion regulation often demonstrate both internalizing (e.g., depression and anxiety) and externalizing (e.g., aggressive behaviors) symptoms, and rates of these symptoms and associated mental health diagnoses are elevated among youth involved in the justice system.
Compared with adults, juveniles are particularly vulnerable to the influence and manipulation of others. Youths’ underdeveloped sense of personal identity and independence, coupled with their compromised decision-making abilities, place them at-risk for susceptibility to direct and indirect coercion by peers and authority figures. Furthermore, juveniles have trouble regulating their emotions and have a heightened sensitivity to invasions of privacy--particularly when they have experienced economic or social disadvantages. Together, these findings suggest that juveniles, as a class, have unique needs for protection and guidance that are greater than and different from the needs of adults.

D. Transitory Nature of Adolescence

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

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

There is also empirical evidence directly relating the transitory nature of adolescence to delinquent and criminal behavior. The distinction between individuals who offend only during adolescence and those who persist in offending into adulthood is well established in the psychological literature. One researcher estimated that “chronic” juvenile offenders (i.e., those with five or more arrests) account for only about six percent of the juvenile offender population. A more recent study followed over one thousand serious male adolescent offenders (i.e., those who had committed felony offenses with the exception of less serious property crimes and misdemeanor weapons or sexual assault offenses) over the course of three years and revealed that only 8.7% of participants were found to be “persisters” in that their offending remained constant throughout the thirty-six-month period. The vast majority of youth who engage in delinquent acts desist, and “the typical delinquent youth does not grow up to become an adult criminal.” In other words, not only are youth developmentally capable of change, research also demonstrates that, when given a chance, even youth with histories of violent crime can and do become productive and law abiding citizens, without any intervention.

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

E. Neurological Differences Between Youth and Adults

Recent research using advances in neuro-imaging has revealed that many of the components of developmental immaturity, reviewed above, have a neurological basis. First, brain-imaging research has revealed that the brain's frontal lobes are structurally immature into late adolescence, making them one of the last parts of the brain to fully develop. Because the frontal lobes are primarily responsible for executive functions, their structural immaturity during much of adolescence is partially responsible for youths' deficits in response inhibition, planning ahead, and weighing risks and rewards. Not only is this area of the brain underdeveloped in adolescence, research has shown that this area is less active in adolescents than it is in adults. *299 And, as adolescents move into early adulthood, increasing amounts of brain activity shift to the frontal lobes. Researchers understand these patterns to be linked to the steady decline of impulsivity throughout adolescence and into adulthood. That is, decreased levels of impulsivity seem to coincide with increased levels of frontal lobe maturity.

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

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

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

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

On May 17, 2010, in Graham v. Florida, the United States Supreme Court ruled that sentences of life without the possibility of parole imposed on juveniles convicted of non-homicide offenses violate the Cruel and Unusual Punishment clause of the Eighth Amendment. In an opinion written by Justice Kennedy, the Court held that such a severe and irrevocable punishment was not appropriate for a less culpable juvenile offender. In banning the sentence, Justice Kennedy underscored that case law, developmental research, and neuroscience all recognize that children are different from adults—they are less culpable for their actions and at the same time have a greater capacity to change and mature. Justice Kennedy's opinion was rooted in the Court's earlier analysis in Roper v. Simmons, which had held the death penalty unconstitutional as applied to juveniles. The Graham Court echoed the reasoning in Roper that three essential characteristics distinguish youth from adults for culpability purposes: youth lack maturity and responsibility; they are vulnerable and susceptible to peer pressure; and their characters are unformed. Justice Kennedy reasoned:
No recent data provide reason to reconsider the Court's observations in Roper about the nature of juveniles. As petitioner's amici point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults. 106

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

A. A New Look at Juvenile Sentencing

Together, Graham and Roper provide the framework for a novel, developmentally driven Eighth Amendment jurisprudence that should force a more rigorous examination of permissible sentencing options for juvenile offenders in the criminal justice system. 107 In Graham, the Court *301 held that an indefinite sentence was inherently at odds with the transient nature of adolescence. Justice Kennedy explained:

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

In deciding challenges to sentencing practices under the Eighth Amendment, the Court applies a two-part test: it considers objective indicia—including both state legislation and sentencing practices, and it then brings its own judgment to bear on the issue. 109 The question of objective indicia depends, by definition, on external factors. Conversely, the notion that the Court must use its own judgment to determine whether a sentence conforms to the “‘evolving standards of decency that mark the progress of a maturing society’” 110 has created the opening for the Court's unique treatment of juvenile offenders. 111 We therefore focus on this second prong of the *302 analysis to examine the Court's exercise of its own judgment, in light of evolving standards, regarding the constitutionality of a particular punishment.

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

The second, “categorical” classification of cases assesses the proportionality of a sentence as compared to the nature of the offense or the “characteristics of the offender.” 118 In “categorical” cases, the Court may deem a particular sentence unconstitutional for an entire class *303 of offenders, due to shared characteristics that make them categorically less culpable
than other offenders who commit similar or identical crimes. As part of this proportionality analysis, the Court has tied the legitimacy of any particular sentence to a determination of whether the sentence serves the acceptable purposes, or “legitimate goals,” of punishment-- retribution, deterrence, incapacitation, and rehabilitation. As demonstrated in Graham, a sentence disproportionate to the penological objectives it claims to serve will doom many adult sentences imposed on juveniles. It is this second strand of the Court’s proportionality analysis, focused on the characteristics of the offender, which invites a distinctive application of the Eighth Amendment to juveniles.

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

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

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

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

As in Graham, the Roper Court stressed the incongruity of imposing a final and irrevocable penalty on an adolescent who had the capacity to change and grow. “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.” The Court underscored that the State was not permitted to extinguish the juvenile's “potential to attain a mature understanding of his own humanity.” It noted that “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive” a sentence of life without parole for a non-homicide crime. The Graham Court then expounded on this point:
These salient characteristics mean that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ Accordingly, ‘juvenile offenders cannot with reliability be classified among the worst offenders.’ A juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’”

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

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

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

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

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

This well-developed jurisprudence on mitigation in death penalty cases has been understood to apply because of the extraordinary nature of the punishment. The Court has recognized that unique protections apply because “death is a punishment different from all other sanctions in kind rather than degree.” Graham, however, eliminated the “death is different” adult sentencing distinction--at least when juveniles are involved. This consequence of Graham was expressly noted by the dissent. Under Graham and Roper, sentences that would be deemed *appropriate for adult offenders would be unconstitutional for a child who committed like offenses. In the wake of these cases, courts should similarly look to mitigating factors that may justify a less harsh sentence whenever a child receives a sentence designed for an adult. To ensure that sentences for juveniles are not unconstitutionally disproportionate, courts should evaluate mitigating factors including the
juvenile's age, level of involvement in the offense, external or coercive pressures surrounding the criminal conduct, and other relevant characteristics. These factors should be considered in light of the juvenile's diminished capacity, increased impulsivity, and capacity for change or rehabilitation.

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

B. A New Look at Juvenile Conditions of Confinement

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

The reasoning of both Roper and Graham, however, may now create new opportunities in juvenile conditions cases. The underlying recognition that youth are more vulnerable, more susceptible to outside pressures, and more capable of change than their adult counterparts suggests that courts may be more protective of incarcerated juveniles. Harmful or deplorable conditions, which have been found constitutional in cases involving adults, may therefore be unconstitutional when imposed on juveniles--both because the impact of the harm is more significant for juveniles, and because the expectation of treatment and rehabilitation is higher.

1. Problems Facing Confined Youth

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

In adult facilities, conditions may be even more dangerous for youth. Youth confined with adults are more likely to be physically or sexually abused, and to commit suicide than those in juvenile facilities. \textsuperscript{152} In fact, suicide is the number one cause of death for juveniles in adult jails. \textsuperscript{153} Attempts by facilities' staff to protect youth--generally by placing youth in isolation or administrative segregation, can cause even further damage:
An individual held in solitary confinement for 23 hours a day typically begins to lose his sense of reality, and becomes paranoid, anxious and despondent, all of which can exacerbate existing mental health conditions. Given that many of the youth being held in adult jails have experienced some serious trauma in their lives or have undiagnosed or untreated mental illness, they are particularly vulnerable.  

Moreover, even under similar conditions, and without increased risk of abuse, youth are uniquely vulnerable to the trauma of incarceration in poor conditions. “From a developmental perspective, . . . juveniles need to be with family members and are perhaps more vulnerable to emotional harm from incarceration than adults.” The harsh, and even potentially fatal, conditions for youth in both juvenile and adult facilities, and their unique vulnerability to harm, highlight the importance of the constitutional standard.

2. The Adult Standard: A Tough Bar

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

In 1976, petitioners in Estelle v. Gamble asked the Court to consider whether the Eighth Amendment protects prisoners from harsh prison conditions—in that case the provision of inadequate medical care—even when the initial sentence imposed was constitutional. The Court held that the Eighth Amendment did govern such behavior, concluding that “deliberate indifference to serious medical needs” by prison staff could constitute the “‘unnecessary wanton infliction of pain’ proscribed by the Eighth Amendment.” To hold to the contrary, the Court observed, would allow “the infliction of . . . unnecessary suffering,” and would be “inconsistent with contemporary standards of decency . . . .” Ultimately, however, the Court held that the Eighth Amendment had not been violated when prison doctors prescribed painkillers and rest for the prisoner’s back pain, but did not seek an x-ray or take other steps to identify and treat his pain. Although an x-ray might have revealed a more accurate diagnosis, the failure to provide one was, at most, cause for a malpractice claim and did not constitute cruel and unusual punishment. In Estelle, as a result, the Court established the possibility of Eighth Amendment claims for pure conditions cases, but also set a high bar for what would constitute such a violation. The Court further solidified this approach in Rhodes v. Chapman, holding that the double celling of prisoners did not violate the Constitution. The Court concluded that, at most, double celling “inflicts pain,” but concluded that it did not constitute the “unnecessary or wanton” infliction of pain that violates the Eighth Amendment. “[T]he Constitution,” the Court stated, “does not mandate comfortable prisons.” Thus, the prisoners’ additional complaints regarding limited job and educational opportunities did not rise to the level of constitutional violations. Scholars have noted that Rhodes initiated a line of cases curtailing the use of the Eighth Amendment to challenge prison conditions. Indeed the Rhodes Court explicitly asserted that “[t]o the extent that such conditions are restrictive or even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”
In subsequent cases, the Court further defined the standard for Eighth Amendment conditions cases—and established a uniquely high burden on prisoners seeking relief through the Eighth Amendment. In particular, the Court held that the Constitution was violated in conditions cases only if the prison official had a sufficiently culpable state of mind. In 1994, in Farmer v. Brennan, the Court clarified the precise level of intent prison officials must demonstrate to warrant liability under the Eighth Amendment. Farmer involved a male-to-female transsexual prisoner's complaint that the prison had failed to protect her from assault by the male inmates with whom she was placed. The Court clarified that “deliberate indifference” to the prisoner's need depended on both an objective and subjective component. The harm to the prisoner must be objectively sufficiently serious, denying a prisoner “the minimal civilized measure of life's necessities . . . .” It must also be based on the subjective state of mind of the prison official, which, Farmer clarified, must be more than mere negligence, though it could fall short of intent to harm. The Court concluded that liability under the Eighth Amendment would apply when a prison official “knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” Under this standard, “[i]nmates have the difficult task of exposing the prison official's state of mind.” Although not a complete bar to relief, this standard has imposed significant obstacles to establishing liability in adult prison conditions cases.

As currently understood, the Fourteenth and Eighth Amendments require only freedom from unnecessary restraint and minimally humane conditions of confinement. Food, clothing, shelter and medical care must only be adequate enough to avoid harm. In the main, treatment or training is directed at little more than preserving the peace within the training school.

Moreover, to the extent that a violation of even these minimal standards occurs, federal judges are precluded from issuing sweeping corrective injunctions by the “hands off” doctrine. As early as 1974, the United States Supreme Court began to show great deference to prison administrators and to tell trial court judges to refrain from interfering with the day-to-day operations of prisons.

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

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

The adult standard, although evolving, is still not appropriate for juveniles. As one scholar explained, *311 The constitutional protection available to a child in detention should be more extensive than the protection against punishment applicable to an adult pre-trial detainee in a criminal case. After all, the state's purpose is different. The end result of a juvenile delinquency case is not simply punishment but, based upon state statute, some form of rehabilitation combined with protection of the public. Furthermore, on a practical level children differ from adults. Their needs are different. The injuries that can befall them in detention are both different and greater than adults. Public officials cannot rely upon the maturity of a child as they can an adult.*186

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

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

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

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

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

Assessing the Seriousness of the Harm in Juvenile Cases

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

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

Assessing Official Intent in Juvenile Cases

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

This approach is further supported by the literature on developmental immaturity. Adolescents' decision-making deficits, impulsivity, and overall vulnerability make them dependent on adults for rational decisions regarding their welfare. More specifically, adolescents' limited independent functioning and weak self-concept suggests that they may be less able to identify risks to their development and to protect themselves. A heightened standard would appropriately protect youth from the risk of treatment that could harm youth and interfere with their development into healthy adults. For youth in the juvenile rather than criminal justice system, the explicit purposes of treatment and rehabilitation further support the heightened

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*314
standard. To hold staff liable only if they consciously disregard a risk undermines the requirement implicit in a rehabilitative system that staff proactively engage youth.

III. INTERNATIONAL LAW SUPPORTS DISTINCTIVE TREATMENT OF JUVENILE OFFENDERS

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

Recently, the impact of international law on the Court's opinions has been particularly evident in its death penalty and juvenile sentencing cases. In holding that the death penalty was unconstitutional for those with mental disabilities, the Court noted that, “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” Three years later, in Roper v. Simmons, the Court held the death penalty unconstitutional for juveniles. To support its holding, the Court cited to the United Nation's Convention on the Rights of the Child (which is ratified by every nation in the world except the United States and Somalia), other “significant international covenants,” and the practices of specific countries as evidence of “the overwhelming weight of international opinion against the juvenile death penalty.” In the 2010 case Graham v. Florida, the Supreme Court reiterated the importance of international practice when it used the fact that the United States was the only nation to maintain the practice of sentencing juvenile offenders to life in prison for non-homicide offences as support for declaring the practice unconstitutional. In 2012, the Court will consider the constitutionality of imposing a life sentence without parole on juveniles in a murder case. International law and practice overwhelmingly oppose this practice, which will prove instructive if the Court continues its recent trend of reliance on international opinion.

A. International Law and Juvenile Sentencing

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

Further, many of the international treaties that the Supreme Court has relied on in the past specifically prohibit the imposition of a sentence of life without parole on juveniles. In addition to reminding states of the child's need for “special safeguards and care including appropriate legal protection,” the Convention on the Rights of the Child explicitly bans the imposition of imprisonment without possibility of release for offenses committed by those under eighteen. The International Covenant on Civil and Political Rights (ICCPR), part of the International Bill of Rights, recommends that governments consider age
and desirability of rehabilitation when sentencing juveniles, and grants special protection to minors on account of their age. The Human Rights Committee, the body responsible for overseeing the implementation of the ICCPR, has stated in its observations of United States compliance with the treaty that “the committee is of the view that sentencing children to life sentence without parole is of itself not in compliance with article 24(1) [the right to a child's measures of protection] of the Covenant.” International practice is equally disapproving of the practice. The United States is the only nation in the world that currently imposes life without parole sentences on juveniles. Even in countries where the laws allowing the practice remain on the books, these sentences are not imposed.

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

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

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

B. International Law and Juvenile Conditions

Just as the Supreme Court has turned to international law in its decisions on questions of sentencing, it can, and should, do so for questions of conditions of confinement. International law underscores the unique protections confined juveniles need under the law. When contemplating treatment or punishment, Article 37 of the Convention of the Rights of the Child requires that every child deprived of his or her liberty “be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.” Moreover, international treaties and conventions make clear that children must be treated differently than adults: the law specifically addresses children, and emphasizes the need to treat confined children differently from adults due to their age and future potential for rehabilitation and reintegration into society. Notably, the United Nations Rules for Juveniles Deprived of their Liberty (JDLs), passed by resolution of the U.N. General Assembly in 1990, establish detailed “minimum standards” for the protection of confined juveniles “with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society.” These standards provide a good conceptual framework through which to view the special
requirements necessary for juveniles in detention. International law standards also provide insights into some of the specific conditions youth face in confinement.

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

In contemplating the environment of the confined juvenile, international human rights conventions focus on the rehabilitative and developmental aims of detention. For example, the Committee on the Rights of the Child requires that children are provided with “a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement.” The Convention on the Rights of the Child reaffirms the child's right to privacy for children who are alleged or accused to have infringed the penal law. The JDLs stress that the “possession of personal effects is a basic element of the right to privacy and [is] essential to the psychological well-being of the juvenile.”

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

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

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

One of the few standards specifically addressing safety issues for staff states that “[t]he carrying and use of weapons by personnel should be prohibited in any facility where juveniles are detained.” 258 This area is less developed in child-specific international human rights instruments, *320 which tend to focus on the interests of the child, but an underlying theme seems to be that the best interests of the confined child carry particular weight. When many children are housed together, their interests should be balanced against the best interests of other youth. For example, children should be kept in a juvenile facility past the age of eighteen if such a decision is “not contrary to the best interests of the younger children in the facility.” 259 Likewise, the use of restraint or force on a juvenile is only justified when the child poses an imminent threat to him or herself or others. 260 Consideration of the child’s inherent dignity and the special needs of his or her age are always relevant. 261

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

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

International human rights standards provide clear support for a unique Eighth Amendment juvenile standard in conditions of confinement cases. By highlighting the need for reintegration, rehabilitation, and the support of human dignity, and by articulating juveniles’ *321 unique needs as they relate to conditions of confinement, international law clarifies the need for a more protective Eighth Amendment jurisprudence for juveniles.

IV. CONCLUSION

Kids are different. As Justice Sotomayor wrote in J.D.B v North Carolina, a child's age “is a fact ‘that generates commonsense conclusions about behavior and perception.’” 271 Noting the long history of legal distinctions between children and adults, Justice Sotomayor further observed: “Like this Court's own generalizations, the legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal.” 272 How we sentence and punish children must yield to these differences. And while the Court has historically taken note of juvenile status in a broad array of civil and criminal contexts, 273 the Court's most recent decisions in Roper, Graham, and J.D.B. chart a course for a more pronounced doctrinal shift in our analysis of children's rights under the Constitution. The most severe sentences for children have been struck down, but the banning of these sentences raises larger questions about the constitutionality of any sentencing scheme that fails to take account of the commonsense differences between children and adults—differences confirmed by research. “The literature confirms what experience bears out.” 274
These differences also cannot be ignored when evaluating the conditions under which children are incarcerated. While the Constitution may tolerate the solitary confinement of adult inmates, for example, the isolation of children for weeks or months at a time recalls a Dickensian nightmare, which offends our evolving standard of decency and human dignity. Children’s unique needs for educational services, physical and behavioral health services, and appropriate interactions with nurturing caregivers to ensure their healthy development raise special challenges—but also place special obligations on those responsible for their confinement. As recent Supreme Court case law has shown, children warrant unique protections under the Constitution. Both the sentences they receive, and the conditions under which they serve those sentences, must be tailored to their developmental status.

Footnotes

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4 Ross, supra note 2, at 1039.

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


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

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

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

387 U.S. 1 (1967).

Id. at 27-29.


403 U.S. 528, 545 (1971).

Ross, supra note 2, at 1040-41.

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


The increase in violence in the United States during the late 1980s and early 1990s was due primarily to an increase in violent acts committed by people under age 20. Similarly, dramatic declines in homicide and robbery in recent years are attributable primarily to a decline in youth violence.

The increase in youth homicide was predominantly due to a significant increase in the use of handguns, which converted ordinary teenage fights and other violent encounters into homicides.

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

Id.
John Dilulio is largely credited with creating the “super-predator” myth. Elizabeth Becker, As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets, N.Y. Times, Feb. 9, 2001, http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html?pagewanted=all&src=pm. Based on all that we have witnessed, researched and heard from people who are close to the action, ... here is what we believe: America is now home to thickening ranks of juvenile ‘super-predators’ - radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders. Dilulio subsequently retracted this ‘belief.’ Id. See also William J. Bennett et al., Body Count: Moral Poverty and How to Win America's War Against Crime and Drugs 27 (1996); Lara A. Bazelon, Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court, N.Y.U. L. Rev. 159 (2000) (arguing that rejections to the infancy defense are unfounded and unsupported by empirical data).

Youth On Trial, supra note 5, at 13-14; see also Patricia Torbet et al., Office of Juvenile Justice and Delinquency Prevention, State Responses To Serious and Violent Juvenile Crime xi (1996), available at https://www.ncjrs.gov/pdffiles/statresp.pdf (reporting on the five major changes in the way that serious and violent juvenile offenders are being handled in the criminal justice system).


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

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

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

See generally Youth On Trial, supra note 5.


Reason of Adolescence] (explaining that the lack of psychosocial maturity in juveniles makes them especially vulnerable to coercion and outside influences); Elizabeth S. Scott et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 L. & Hum. Behav. 221 (1995) (explaining factors linked to teenage development that may affect decision making capabilities in adolescents).

Atkins, 536 U.S. at 318-20.

Id. at 321.

Roper, 543 U.S. at 568-70.
Id. at 569-70. See generally Erik H. Erikson, Identity: Youth and Crisis (1968) (describing and defining the notion of an identity crisis within the context of youth identities); Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992) (explaining the underlying factors behind reckless behavior in adolescents); Steinberg & Scott, Less Guilty by Reason of Adolescence, supra note 27, at 1013 (exploring the research and theories behind concerns raised by the criminal culpability of children).


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


Id. at 2026 (“No recent data provide reason to reconsider the Court's observations in Roper about the nature of juveniles.”).

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

Id. at 2406. Miranda v Arizona, 384 U.S. 436, 478-79 (1966), is the Supreme Court's seminal decision adopting a set of prophylactic warnings to be given to suspects prior to custodial interrogation by law enforcement. Specifically, the Miranda Court instructed that, prior to questioning, a suspect “must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed.” Id. The Miranda warnings were adopted to protect the Fifth Amendment privilege against self-incrimination from the “inherently compelling pressures” of questioning by the police. Id. at 467. While any police interview has “coercive aspects to it,” Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam), interviews which take place in police custody have a “heightened risk” that statements are not the product of the suspect's free choice.” J.D.B. v North Carolina, 131 S. Ct 2394, 2401 (2011) (citing Dickerson v. United States, 530 U.S. 428, 435 (2000)). Miranda expressly recognized that custodial interrogation in an “unfamiliar ... police dominated atmosphere,” Miranda, 384 U.S. at 445, creates psychological pressures “which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.” Miranda, 384 U.S. at 467.

See Torbet et al., supra note 21, at xv (demonstrating that state legislatures toughened laws “targeting serious and violent juvenile offenders”).

See Bennett et al., supra note 20, at 27 (arguing that youth labeled “superpredators” are capable of equally heinous crimes as adults).


Id. at viii.

Id. at 16.

See Dustin Albert & Laurence Steinberg, Judgment and Decision Making in Adolescence, 21 J. Res. on Adolescence 211, 217 (2011) (explaining that “socioemotional stimuli” has an impact on adolescent decision-making).


Id. at 752-53.

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

Id. at 217.

Id. at 217.

Id.

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


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Id. at 219-20.

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Elizabeth Cauffman et al., Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task, 46 Dev. Psychol. 193, 193 (2010).

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Cauffman & Steinberg, supra note 49, at 745.

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Steinberg, supra note 56, at 220-21.

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Laurence Steinberg et al., Age Differences in Future Orientation and Delay Discounting, 80 Child. Dev. 28, 29-30 (2009).

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Id. at 28, 36.

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Id. at 34-35.

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Kemp et al., supra note 45, at 16.

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Id. at 16.

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

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Id. at 835.

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Kemp et al., supra note 45, at 28.

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Maughan & Cicchetti, supra note 75, at 1534-35.

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Id. at 1540.


81 Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice 31 (2008).

82 See, e.g., Steinberg, supra note 56, at 220-21.

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


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

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


91 Steinberg, supra note 56, at 217.


93 Id.

94 Steinberg, supra note 56, at 217.

95 Rubia, supra note 92, at 18.

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

97 Id. at 219.

98 See Steinberg, supra note 56, at 217.
These decisions should also be read against the backdrop of a series of Supreme Court decisions over the last several decades in which the Court has repeatedly accorded children and youth distinct treatment under the Constitution. While the Court's consideration of juvenile status is particularly pronounced in cases involving children in the juvenile and criminal justice systems, the characteristics of youth have also led to a specialized jurisprudence under the First and Fourth Amendments, as well as the due process clauses of the Fifth and Fourteenth Amendments. See, e.g., J.D.B. v. North Carolina, 131 S. Ct. 2394, 2404 (2011) (determining that age of juvenile is relevant to a Miranda v. Arizona custody analysis under the Fourth Amendment). In civil cases, as well, the Supreme Court has frequently expressed its view that children are different from adults, and has tailored its constitutional analysis accordingly. Reasoning that "during the formative years of childhood and adolescence, minors often lack ... experience, perspective, and judgment," Bellotti v. Baird, 443 U.S. 622, 635 (1979), the Court has upheld greater state restrictions on minors' exercise of reproductive choice. Id. See also Hodgson v. Minnesota, 497 U.S. 417, 444 (1990); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990). The Court has also held that different obscenity standards apply to children than to adults under the First Amendment in Ginsburg v. New York, 390 U.S. 629, 637 (1968), and has concluded that the state has a compelling interest in protecting children from images that are "harmful to minors." Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Commc'n's Comm'n, 518 U.S. 727, 743 (1996). Similarly, the Court has upheld a state's right to restrict when a minor can work, guided by the premise that "[t]he state's authority over children's activities is broader than over the actions of adults." Prince v. Massachusetts, 321 U.S. 158, 168 (1944). The Court's school prayer cases similarly take into account the unique vulnerabilities of youth, and their particular susceptibility to coercion. See Lee v. Weisman, 505 U.S. 577, 593 (1992) (observing that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."). See also Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311-12, 317 (2000).


See Graham, 130 S. Ct. at 2023 ("The analysis begins with objective indicia of national consensus."); id. at 2026 (quoting Roper, 543 U.S. at 575) ("In accordance with the constitutional design, "the task of interpreting the Eighth Amendment remains our responsibility."). The Court has long recognized the independent role it plays in evaluating sentences under the Eighth Amendment. In Coker v Georgia, 433 U.S. 584, 597 (1977), where the Court held that a sentence of death was impermissible in cases of rape, the Court specifically acknowledged that the objective evidence, while important, did not "wholly determine" the issue, "for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." See also Enmund v. Florida, 458 U.S. 782, 797 (1982). Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

Id.

Graham, 130 S. Ct. at 2021 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).
In Roper, Justice Kennedy specifically noted the Court's “rule” that “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” 543 U.S. at 563 (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)) (internal quotations omitted). Justice Kennedy wrote, “Last, to the extent Stanford [v. Kentucky] was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, it suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions.” Roper, 543 U.S. at 574 (internal citations omitted). See also Graham, 130 S. Ct. at 2036 (quoting Roper, 543 U.S. at 575) (internal citations omitted) (“Community consensus, while ‘entitled to great weight,’ is not itself determinative of whether a punishment is cruel and unusual…. In accordance with the constitutional design, ‘the task of interpreting the Eighth Amendment remains our responsibility.’”). In Thompson v. Oklahoma, the Court, in exercising its independent judgment to determine whether the imposition of the death penalty on juvenile offenders under the age of sixteen was unconstitutional under the Eighth Amendment, wrote, “[W]e first ask whether the juvenile's culpability should be measured by the same standard as that of an adult, and then consider whether the application of the death penalty to this class of offenders ‘measurably contributes’ to the social purposes that are served by the death penalty.” 487 U.S. 815, 833 (1988).

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


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

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

Graham, 130 S. Ct. at 2022.

Id. (quoting Harmelin, 501 U.S. at 1005).

Id. (quoting Harmelin, 501 U.S. at 1005).

Id. (emphasis added).

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

Graham, 130 S. Ct. at 2028.

Id.
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170 Id. at 348.
171 Holland & Mlyniec, supra note 23, at 1806.
172 Rhodes, 452 U.S. at 347.
175 Id. at 838.
176 Id. at 834 (quoting Rhodes, 452 U.S. at 347).
177 Id. at 835.
178 Id. at 837.
179 Christine Rebman, Comment, The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences, 49 DePaul L. Rev. 567, 602 (1999). See also Higgins v. Corr. Med. Servs. of Ill., 178 F.3d 508 (7th Cir. 1999) (finding that medical staff did not “consciously disregard” the risk of harm when they failed to treat Plaintiff’s dislocated shoulder—even though he had informed them that the shoulder had “popped out of joint” and a nurse testified that it was hanging “forward and lower than right”). The fact that the Plaintiff had not seemed to be in great pain convinced the court that the medical staff did not consciously disregard the risk.
180 Holland & Mlyniec, supra note 23, at 1807.
182 See, e.g., Madrid v. Gomez, 889 F. Supp. 1146, 1263-64 (N.D. Cal. 1995) (recognizing, however, that isolation can violate the Eighth Amendment when it inflicts serious mental illness).
184 Id. at 1928.
189 See Ingraham v. Wright, 430 U.S. 651, 669 (1977) (“We find ... an inadequate basis for wrenching the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in the public schools.”).
190 See, e.g., Youngberg v. Romeo, 457 U.S. 307, 314-25 (holding as erroneous instructions given to the jury that the proper standard of liability was that of the Eighth Amendment in a case regarding the substantive rights of involuntarily committed mentally retarded persons).
191 Id. at 322.
See, e.g., Lawrence v. Texas, 539 U.S. 558, 576 (2003) ("[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."); Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002) ("within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."); Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988) ("[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982) ("the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) ("[i]t is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.").

Atkins, 536 U.S. at 317 n.21.


Id. at 578.


Id. at P 70.


ICCPR, supra note 219, at art. 14.

Id. at art. 24.


Id. at 990.

U.S. Const., art. VI, cl. 2.


Id. at § 111(3).

231 See ICCPR, supra note 219, at art. 14, P 4 (“In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”); Id. at art. 24, P 1 (“Every child shall have ... the right to such measures of protection as are required by his status as a minor.”). In signing the treaty, the United States made significant reservations to the International Covenant on Civil and Political Rights including “[t]hat the United States considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eights and/or Fourteenth Amendments to the Constitution of the United States”; and “[t]he United States reserves the right, in exceptional circumstances, to treat juveniles as adults.” United States of America's Reservations to the ICCPR, The International Justice Project, http://www.internationaljusticeproject.org/juvICCPR.cfm (last visited Feb. 25, 2012). The Human Rights Committee, the ICCPR’s enforcement body, has stated that it views these reservations as “incompatible with the object and purpose of the Covenant.” Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee: United States of America, P 279, U.N. Doc. CCPR/C/79/Add.50, (Oct. 3, 1995) [hereinafter CCPR Concluding Observations/Comments]. Notably, the United States also entered another reservation to the convention, which allowed the imposition of capital punishment “on any person ... including such punishment for crimes committed by persons below eighteen years of age.” ICCPR, supra note 219, at art. 6, P 5. According to the Committee, this reservation also violated the object and purpose of the Covenant. CCPR Concluding Observations/Comments, at P 281. The reservation was effectively voided by the Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), which held that imposing the death penalty upon juveniles under the age of eighteen violates the Eighth Amendment.

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


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

239 See, e.g., JDLs, supra note 237, at P 3; CRC, General Comment 10, supra note 217, at P 85.
Convention on the Rights of the Child, supra note 220, at art. 37; see also JDLs, supra note 237, at P 29 ("In all detention facilities juveniles should be separated from adults, unless they are members of the same family."); The Beijing Rules, supra note 237, at P 26.3 ("Juveniles in institutions shall be kept separate from adults ... ").

CRC, General Comment 10, supra note 217, P 86.

JDLs, supra note 237, at P 28.

CRC, General Comment 10, supra note 217, at P 89.


JDLs, supra note 237, at P 35.

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

JDLs, supra note 237, at P 51.


CRC, General Comment 10, supra note 217, at P 87.

JDLs, supra note 237, at PP 58-60.

CRC, General Comment 10, supra note 217, at P 87; see also JDLs, supra note 237, at PP 65-67 (prohibiting all disciplinary measures that constitute “cruel, inhuman or degrading treatment ... including corporal punishment”).

CRC, General Comment 10, supra note 217, at P 89.

Id.

Id.

Id.

JDLs, supra note 237, at P 65.

CRC, General Comment 10, supra note 217, at P 86.

Id. at P 89.

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

CRC, General Comment 10, supra note 217, at P 97.

JDLs, supra note 237, at P 85.

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

265 JDLs, supra note 237, at P 38; CRC, General Comment 10, supra note 217, at P 89.
266 CRC, General Comment 10, supra note 217, at P 89.
267 JDLs, supra note 237, at P 38.
268 Id. at P 45.
269 Id. at P 38.
270 Id. at P 47; CRC, General Comment 10, supra note 217, at P 89.
272 Id. at 2403-04.
273 See supra note 107 and accompanying text.
274 J.D.B., 131 S. Ct. at 2403 n.5.

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A killing, a life sentence and my change of heart

Feb. 2, 2013 • original

Editor's note: Jeanne Bishop is the sister of Nancy Bishop Langert, who, along with her husband and their unborn child, was shot to death by a juvenile. Since the murder of her family members, Jeanne Bishop has been an advocate for gun violence prevention, forgiveness and abolition of the death penalty. She is a criminal defense attorney in Chicago.

By Jeanne Bishop, Special to CNN

(CNN) - I have been paying close attention to the changes coming since the U.S. Supreme Court struck down any mandatory life sentences for juveniles who kill. A teenager killed my sister.

He killed her dream, too. She wanted to be a mom.

My sister Nancy married young. She was overjoyed when she got pregnant at age 25. That dream died three months later, when she and her husband walked through the front door of their home and found their killer waiting for them.

He was a 16-year-old with a history of violence. He wanted to see what it was like to kill someone. He found out when he broke in and shot Nancy, Richard and their unborn baby and left them to die on a cold basement floor.

When the killer was arrested, details emerged that turned my stomach. He had joked about murdering my family members, even attended their funeral.

When he was convicted of the murders, he was remorseless. When he was sentenced to life in prison without the possibility of parole, I was glad.
After sentencing, my mother turned to me in the courtroom and said, “We'll never see him again.” I was glad of that, too. I wanted to wipe him off my hands like dirt.

I never spoke his name. I wanted his name to die and Nancy’s to live.

When a coalition of people (including law professors such as Bernardine Dohrn and Randolph Stone whose advocacy on behalf of children I have always admired) launched efforts to abolish juvenile life sentences, I was appalled. The last thing I wanted was to attend parole hearings year after year, to beg bureaucrats not to release the person who had slaughtered my loved ones.

So I publicly fought any change in the sentence. I told myself that fight was not just for my family, but for other family members of loved ones murdered by juveniles who would be affected. I was like Saul early in the Book of Acts, the righteous one with a zeal for justice, before he was struck down and humbled and given a new name: Paul.

Then, I repented.

My road to Damascus moment didn’t come in a blinding light or a voice from heaven. The voice that changed my heart was that of a Mississippi-born, Vietnam veteran, Yale-educated Southern Baptist pastor and academic named Randall O’Brien.

O’Brien told me something true - that Nancy’s killer and I are both children of God, equally beloved and equally fallen. O’Brien reminded me of Jesus’ example on the cross of what to do with those who have harmed us: pray for them.

I had never prayed for the person who killed my loved ones; I had never even uttered his name.

I say it now: David Biro. I began praying for him in the only place I could: the garden where Nancy and Richard and their baby are buried. I dropped to my knees and asked God for something I never could have imagined, that Nancy’s killer get well enough to get out someday.

I don’t know that he will; he is not there yet. But I do know that no one, including him, is beyond the forgiveness and redemption and purpose of God.

My two young sons taught me that. We were talking about loving your neighbor as yourself. Stephen asked, “What about the person who killed Aunt Nancy?”

Brendan replied, “We can’t love what he did. But we have to love him, because God made him for a purpose.”
Brendan is right. God made each of the juveniles serving life sentences for a purpose. I can no longer support a sentence that says never.

Repenting privately would be cowardice, since my past support for locking up some juveniles forever has been so public. So when lawmakers in my state of Illinois consider bills next month that would abolish juvenile life sentences, I will be there to speak in favor of the mercy of a second chance.

Dr. Marcus Borg, a biblical and Jesus scholar, notes that the roots of the Greek word for “repentance” mean “to go beyond the mind that you have.”

My mind is changed; my heart is remade, and a new task lies ahead.

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Fixing Illinois' Unconstitutional Mandatory Life Without Parole Sentencing for Juveniles

by Jeanne Bishop • May 16, 2013 • original (http://www.huffingtonpost.com/jeanne-bishop/life-without-parole-sentencing_b_3275705.html)

Last year, federal courts ruled two of Illinois' laws unconstitutional. The Illinois legislature is acting on one, involving gun rights; it is time for lawmakers to act on the other, which provides that juveniles who commit murder can, as a mandatory sentence, be locked up for life without any possibility of parole.

In June 2012, the U.S. Supreme Court in a case called Miller v. Alabama struck down mandatory life without parole sentences for juveniles. Illinois has such a law on the books and scores of inmates serving that sentence.

Six months later, a 7th Circuit Court of Appeals panel ruled that Illinois' ban on carrying concealed weapons violated the U.S. Constitution. It ordered the Illinois General Assembly to change the law by June 2013.

It's May now, and the Illinois legislature has already taken up measures to try to fix the concealed carry law. The fix on juvenile life sentences? Still waiting.

This matters to me because in 1990, three of my family members were murdered by a juvenile in Winnetka: my sister Nancy, her husband Richard and their unborn baby. Nancy was three months pregnant with her first child when an intruder shot them to death with a stolen handgun. Before Nancy died, she wrote a message in her own blood beside her husband: a heart shape and the letter "u." Love you. It was an act of strength and courage.

The intruder was one month short of his 17th birthday. He is serving three life without parole sentences for the killings.

I believed in that sentence when he got it. I don't anymore.
The sentence is merciless. It says to people whom we have barely allowed to learn to
drive: no matter how sorry you are for your crime, how rehabilitated you are, how
amply you demonstrate your ability to safely rejoin society, we will never let you out.
We will never even allow you to have a single parole hearing in which you can make
the case for your release.

The sentence, when it is mandatory, excludes the voices of victims' families, many of
whom were not permitted to make victim impact statements or express their wishes
when their loved ones' killers were sentenced. Murder victims' family members are not
a monolith: Many support life sentences for juveniles, but others do not. None has
moral superiority over the others; all have suffered grievously. No one speaks for all.

The sentence is wasteful, of human lives and scarce public resources. It says to
taxpayers, no matter how harmless an individual may be rendered by age 60, 70, 80,
he still must be housed in prison till he dies, even if he entered that prison as a
teenager.

Perhaps most importantly, though, mandatory juvenile life sentences violate the
document which enshrines our most precious rights: the Constitution. That matters to
me because I am a lawyer, the daughter and granddaughter and niece of lawyers. I
practice law. I teach it, as an adjunct professor at Northwestern.

Our government is one of separation of powers. The job of courts is to declare what is
constitutional. The job of the legislature is to write constitutional laws.

Lawmakers can't wait around for courts to fix unconstitutional laws; that violates our
deepest principles of federalism. On mandatory juvenile life without parole in Illinois,
our legislature must change the law for people who might be subjected to the sentence
in the future, but it should also change the law for people who have been subjected to
it in the past.

I understand the role of fear in politics. Some lawmakers know the responsible thing
to do but shrink from doing it, out of fear. If I vote for this, the argument goes,
someone will run against me in the next election and send out a mailer claiming I
voted to let murderers out of prison (though this would be untrue; even the most
progressive reform proposal made in the General Assembly this session leaves intact
the possibility that juveniles could be turned down for release and still serve life
sentences).
I've learned from my sister Nancy that life is short, that we cannot waste a minute on something as small as fear. Her bravery at the last teaches me to try to live as courageously as she did.

My hope is that lawmakers will summon that same courage: on juvenile life sentences, take up a reform bill, debate it and enact it now.

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