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Death Is Not So Different After All: Graham v. Florida and the Court's "Kids Are Different" Eighth Amendment Jurisprudence

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DEATH IS NOT SO DIFFERENT AFTER ALL: *GRAHAM V. FLORIDA* AND THE COURT'S "KIDS ARE DIFFERENT" EIGHTH AMENDMENT JURISPRUDENCE

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INTRODUCTION

In *Graham v. Florida*, the United States Supreme Court declared that life sentences without the possibility of parole for non-homicides are off-limits for all juveniles.[1] Following its lead from *Roper v. Simmons*, the landmark decision that abolished the juvenile death penalty,[2] the *Graham* Court expanded upon its Eighth Amendment juvenile jurisprudence by ruling that locking up juveniles for life based on crimes other than homicides is cruel and unusual.[3] Thus, the Court categorically barred life sentencing without parole for juveniles who did not kill anyone.[4] This categorical exclusion is a momentous decision that will directly impact the lives of the 123 juvenile offenders whose sentences for non-homicides have relegated them to prison with no prospect of freedom.[5] Now, they at least have the hope that their sentences will be reviewed and that they may win release.

Of even greater import for the thousands of juvenile offenders whose sentences *Graham* does not impact directly, however, is the legal reasoning the Court used in striking down juvenile life without parole for non-homicides. The Court employed an analytical approach previously reserved exclusively for death penalty cases, and it did so without fanfare or obvious heavy lifting.[6] Indeed, the Court's analytical approach unceremoniously demolished the Hadrian's Wall that has separated its "death is different" jurisprudence from non-capital sentencing review since 1972.[7] In its place, the Court fortified an expansive "kids are different" jurisprudence that traces its roots to *Thompson v. Oklahoma*[8] and is now firmly planted with the Court's rulings in *Roper* and *Graham*. And just as *Graham* crossed the

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1. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).
2. Roper v. Simmons, 543 U.S. 551, 568 (2005).
3. *Graham*, 130 S. Ct. at 2030.
4. *Id.*
5. *Id.* at 2052.
6. *Id.* at 2022–23.
7. Furman v. Georgia, 408 U.S. 238, 239 (1972).
8. Thompson v. Oklahoma, 487 U.S. 815 (1988).

rigid divide between the Court's death and non-death cases, it placed the Court's categorical approach to sentencing, formerly the exclusive province of the death penalty, within reach of all juveniles serving adult sentences. This Article describes why this is so and its implications for juvenile offenders sentenced to adult prison time.

Part I explores the *Graham* decision, beginning with a summary of the underlying facts and an analysis of the Court's ruling. It highlights the Court's reasoning and the sources of its conclusion that juvenile life without parole is a cruel and unusual punishment prohibited by the Eighth Amendment. Then, Parts II and III demonstrate the immensity of *Graham*'s ruling in Eighth Amendment jurisprudential terms by tracing the well-traveled divide between capital and non-capital proportionality analysis under the Court's precedents. Following that review, Part IV examines the criminalization of adolescence brought about by sweeping legislative changes that have made it easier to try increasing numbers of juveniles as adults, even while juvenile crime has steadily decreased. Finally, Part V concludes by making the case for an enlightened proportionality review for all juvenile offenders serving adult sentences in adult prisons, viewed through a "kids are different" lens. This lens considers the characteristics of juveniles found first in *Roper*, and now in *Graham*, to be determinative in resolving juveniles' Eighth Amendment challenges.[9]

I. TERRANCE GRAHAM'S PATH TO THE SUPREME COURT AND HIS WEIGHTY VICTORY

Terrance Graham was sixteen years old when he and three other teenagers[10] attempted to rob a barbecue restaurant in Jacksonville, Florida.[11] Although the would-be robbers were unsuccessful, the prosecutor elected to try Graham as an adult rather than as a juvenile.[12] The prosecutor charged Graham with armed burglary with assault or battery, which carried a maximum penalty of life in prison without the possibility of parole,[13] and

9. This argument does not endorse the continued wholesale incarceration of our youth in adult prisons. Rather, it accepts as a present reality that juveniles are being tried and sentenced as adults, and that many juvenile offenders are now serving sentences in adult prisons. Additionally, it offers a developmentally informed approach to proportionality review that would alter those sentences. The larger issues surrounding our nation's criminalization of adolescence are left for another day.

10. Throughout this article, the terms "teenagers," "juveniles," "adolescents," "children," and "youth" are used interchangeably, and without distinction, to refer to those under the age of eighteen.

11. *Graham*, 130 S. Ct. at 2018.

12. Under Florida law, prosecutors have the discretion to charge sixteen and seventeen-year-olds as either juveniles or adults for most felonies. *Id.* (citing FLA. STAT. § 985.227(1)(b) (2003) (subsequently renumbered at § 985.557(1)(b) (2006)).

13. *Id.* (citing FLA. STAT. §§ 810.02(1)(b), (2)(a) (2003)). *See infra* note 21 (noting abolition of parole in Florida).

attempted armed robbery, which carried a maximum sentence of fifteen years.[14] Graham pleaded guilty to both charges, but the trial court withheld adjudication of guilt and sentenced him to three years probation.[15] Within a year, Graham was re-arrested, this time in connection with a home-invasion robbery after he fled from police.[16] Another year passed before the court held a hearing on the probation violations relating to the home invasion and flight.[17] Although Graham denied that he participated in the home invasion, he admitted that he had violated the conditions of his probation by fleeing, even though that admission alone could trigger a life sentence.[18] After hearing evidence related to the home invasion, the court found that Graham had violated the terms of his probation by attempting to evade arrest, committing a home-invasion robbery, possessing a firearm, and associating with persons engaged in criminal activity.[19] At the sentencing hearing, the judge commented to Graham, "I don't know why it is that you threw your life away,"[20] before ruling that Graham deserved the stiffest possible penalty—life in prison without parole[21]—to "protect the community from [his] actions."[22]

On review, the First District Court of Appeal of Florida found that the serious and violent nature of the charges and Graham's age—seventeen at the time of the crimes and nineteen at sentencing—warranted the extreme penalty.[23] That finding was bolstered by the court's view that Graham was incapable of rehabilitation because he had chosen to continue committing crimes "at an escalating pace."[24] After the Florida Supreme Court denied review,[25] the United States Supreme Court granted certiorari.[26] The Court overturned the sentence, ruling that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[27] The Court did not go so far as to erect an outright prohibition of life imprisonment for juveniles, like its ban on the juvenile

14. *Id.* (citing FLA. STAT. §§ 812.13(2)(b), 777.04(1), (4)(a), 775.082(3)(c) (2003)).
15. *Id.*
16. *Id.* at 2018–19.
17. *Id.* at 2019.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 2020. The actual sentence was life in prison; however, because Florida had abolished its parole system, *see* FLA. STAT. § 921.002(1)(e) (2003), the life sentence affords no opportunity for release absent executive clemency. *Graham*, 130 S. Ct. at 2020.
22. *Id.*
23. *Id.*
24. *Id.* (quoting Graham v. State, 982 So. 2d 43, 52 (Fla. Dist. Ct. App. 2008)).
25. *Id.* (citing Graham v. State, 990 So. 2d 1058 (Table) (Fla. 2008)).
26. *Id.*
27. *Id.* at 2034.

death penalty in *Roper*.[28] However, it ruled that states must provide juvenile offenders serving life sentences for non-homicides "some realistic opportunity to obtain release before the end of that term."[29] The upshot for Graham, and for all other juvenile offenders serving life sentences without parole for non-homicides, is that they may now petition for their release from prison. No longer will they face death in prison as the only way to live out their lives.

II. WHAT THE *GRAHAM* COURT DECIDED AND HOW IT GOT THERE

The *Graham* Court[30] began its analysis with a review of the Court's Eighth Amendment precedents, emphasizing at the outset that "the evolving standards of decency that mark the progress of a maturing society" determine whether a punishment is cruel and unusual.[31] While the Cruel and Unusual Punishments Clause prohibits "inherently barbaric punishments under all circumstances," the Court recognized that its precedents generally do not consider punishments challenged as barbaric, but "as disproportionate to the crime."[32] "The concept of proportionality," the Court said, "is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"[33]

The Court next described its proportionality jurisprudence as falling within two general classifications.[34] The first includes challenges to the

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

29. *Graham*, 130 S. Ct. at 2034. At oral argument, counsel for Graham conceded that even a sentence as long as forty years before parole consideration would be constitutional. Transcript of Oral Argument at 6–7, Graham v. Florida, 130 S. Ct. 2011 (2010) (No. 08-7412), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-7412.pdf. However, the Court did not adopt that concession or endorse any other specific length of sentence as inside or outside the reach of the Eighth Amendment. *Graham*, 130 S. Ct. at 2034.

30. Justice Kennedy wrote for the majority, with Justice Stevens filing a concurring opinion in which Justices Ginsburg and Sotomayor joined. *Graham*, 130 S. Ct. at 2036 (Stevens, J., concurring). Chief Justice Roberts filed a separate opinion concurring in the judgment. *Id.* (Roberts, C.J., concurring). Justice Thomas filed a dissenting opinion, joined in whole by Justice Scalia and in part by Justice Alito. *Id.* at 2043 (Thomas, J., dissenting). Justice Alito filed a separate dissenting opinion. *Id.* at 2058 (Alito, J., dissenting).

31. *Id.* at 2021 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

32. *Id.* (citing Hope v. Pelzer, 536 U.S. 730 (2002)).

33. *Id.* (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). This view is not universally held by the Supreme Court Justices. Justices Scalia and Thomas take the position that the Eighth Amendment does not contain a proportionality principle. *See, e.g.*, Ewing v. California, 538 U.S. 11, 32 (2003) (Thomas, J., concurring); Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.).

34. *Graham*, 130 S. Ct. at 2021.

length of sentences in specific cases based on the totality of the circumstances.[35] The Court acknowledged the difficulty of establishing a lack of proportionality in those cases, citing only one of its precedents in which the defendant raised a successful proportionality challenge.[36] Since *Harmelin v. Michigan* in 1991,[37] a slim majority of the Court has recognized a "narrow proportionality principle[] that . . . forbids only extreme sentences that are 'grossly disproportionate' to the crime."[38] The two cases the Court has reviewed under the *Harmelin* standard produced closely divided decisions, and neither sentence rose to the level of disproportionality required by *Harmelin*.[39]

The Court then proceeded to the second classification of Eighth Amendment cases, in which categorical rules define the limits of the Cruel and Unusual Punishments Clause.[40] Within this classification are two subsets: one considering the nature of the offense and another considering the nature of the offender.[41] Under these two categorical approaches, the Court has ruled that the death penalty is impermissible for non-homicide crimes.[42] It has also categorically barred the death penalty for those who function in an intellectually low range[43] and those who committed their crimes before age eighteen.[44] It is the latter classification that received the Court's greatest attention in *Graham*,[45] and for good reason. As noted

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35. *Id.*

36. *Id.* (citing Solem v. Helm, 463 U.S. 277 (1983) (overturning as disproportionate under the Eighth Amendment a life without parole sentence for a seventh non-violent felony, the crime of passing a bad check)). *But see* Hutto v. Davis, 454 U.S. 370 (1982) (per curiam) (upholding a sentence of forty years for possession of marijuana with intent to distribute and for distribution of marijuana); Rummel v. Estelle, 445 U.S. 263, 281, 284–85 (1980) (upholding a sentence of life with possibility of parole for a third non-violent felony, obtaining money by false pretenses).

37. *See Harmelin,* 501 U.S. at 996 (Kennedy, J., concurring) ("[*S*]*tare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years.").

38. *Graham*, 130 S. Ct. at 2021 (quoting *Harmelin*, 501 U.S. at 997, 1000–01 (Kennedy, J., concurring)) (internal quotation marks omitted).

39. *Id.* at 2021–22 (citing Ewing v. California, 538 U.S. 11, 30–31 (2003) (plurality opinion) (upholding a sentence of twenty-five years to life for theft of golf clubs worth in excess of $400 under California's three-strikes recidivist statute)); Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (upholding a sentence of fifty years to life for shoplifting videotapes under California's three-strikes statute).

40. *Graham*, 130 S. Ct. at 2022.

41. *Id.*

42. *Id.* (citing Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that capital punishment for the rape of a child violated the Eighth Amendment)); Enmund v. Florida, 458 U.S. 782 (1982) (holding that capital punishment for a felony murder conviction where defendant did not kill, intend to kill, or attempt to kill violated the Eighth Amendment); Coker v. Georgia, 433 U.S. 584 (1977) (holding that capital punishment for the rape of an adult violated the Eighth Amendment)).

43. *Graham*, 130 S. Ct. at 2022 (citing Atkins v. Virginia, 536 U.S. 304 (2002)).

44. *Id.* (citing Roper v. Simmons, 543 U.S. 551 (2005)).

45. *Id.* at 2023.

above, Terrance Graham was seventeen and still a child in the eyes of the law when he committed the crimes for which he later received a sentence of life without parole. Thus, like Christopher Simmons, whose appeal brought about the abolition of the juvenile death penalty,[46] Graham was a juvenile serving a sentence intended for adults.[47]

In the United States Supreme Court, Graham challenged the entire sentencing practice of condemning juvenile offenders to life in prison.[48] In this respect, Graham's case stood in contrast to all of the Court's adult non-capital sentencing decisions. In each of those cases, the petitioner sought review solely of his particular sentence as disproportionate under the Eighth Amendment.[49] Because Graham's "categorical challenge"[50] to his sentence, if successful, would place that penalty out of constitutional bounds for all juveniles, it more closely resembled the Court's death penalty cases[51] than its individual non-capital proportionality decisions.

Thus, it is not surprising that the Court departed from its adult proportionality jurisprudence by relying on death penalty cases to reach its conclusion that juvenile life without parole for non-homicides offends the Eighth Amendment. The Court's earlier decisions addressing terms-of-imprisonment challenges on proportionality grounds had explicitly eschewed reliance on death penalty cases that applied proportionality principles because "a sentence of death differs in kind from any sentence of imprisonment, no matter how long."[52] But the Court stated that those cases, and the approach to proportionality review taken in them, were unsuited to Graham's challenge because he was challenging a sentencing practice and not solely the sentence he had received.[53] The proper analysis, the Court reasoned, was that used in other cases establishing categorical rules.[54] The fact that all of those cases had been challenges to the death penalty was of no consequence to the Court; it said simply: "The previous cases in this

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46. *See Roper*, 543 U.S. at 578–79.

47. *See Graham*, 130 S. Ct. at 2025 ("Once in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole sentence. But the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences.").

48. *Id.* at 2022–23.

49. *See* notes 29–32 and accompanying text.

50. *Graham*, 130 S. Ct. at 2022.

51. *Id.* at 2023 (citing Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002)).

52. Rummel v. Estelle, 445 U.S. 263, 272 (1980). *But see* Solem v. Helm, 463 U.S 277, 284–88 (1983) (tracing the history of proportionality rules and concluding that the Eighth Amendment does not suggest any distinction between types of punishments, but forbids excessiveness in all punishments).

53. *Graham*, 130 S. Ct. at 2022.

54. *Id.* at 2023.

classification [categorical rules] involved the death penalty."[55] "[I]n addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*,"[56] all of which just happened to be death penalty cases.

Following the lead of those cases, the Court began with an examination of "objective indicia of national consensus"[57] against the punishment, looking first to the enactments of state legislatures.[58] The Court found that thirty-seven states, the District of Columbia, and federal law permitted the imposition of life without parole on juvenile offenders.[59] That number alone—representing three-quarters of the jurisdictions in the country—would have been sufficient in the past for the Court to reject Graham's claim for lack of a national consensus against the punishment.[60] Here, however, the Court looked beyond the raw number and found that the "actual sentencing practices in jurisdictions where the sentence in question is permitted by statute" was the critical question,[61] and that sentencing juvenile non-homicide offenders to life without parole was "most infrequent."[62] By the Court's own count, 123 juvenile offenders were serving life without parole for non-homicides, with seventy-seven of those in Florida and the remaining forty-six in ten other states and the federal system.[63] Thus, with the exception of Florida, other states had imposed the sentence quite rarely, and even though twenty-six additional states, the District of Columbia, and federal law authorized the sentence, none of those jurisdictions had sentenced a juvenile offender to life without parole for a non-homicide.[64]

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55. *Id.* at 2022.

56. *Id.* at 2023; *see also Kennedy*, 554 U.S. at 447 (prohibiting the death penalty for rape of a child); *Roper*, 543 U.S. at 568 (prohibiting the death penalty for defendants who committed their crimes before age eighteen); *Atkins*, 536 U.S. at 321 (concluding that "death is not a suitable punishment for a mentally retarded criminal").

57. *Graham*, 130 S. Ct. at 2023.

58. *Id.* (quoting *Atkins*, 536 U.S. at 312).

59. *Id.*

60. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 179–80 (1976) (finding consensus in favor of the death penalty as shown by thirty-five state legislatures' enactment of new death penalty statutes after *Furman v. Georgia*).

61. *Graham*, 130 S. Ct. at 2023.

62. *Id.*

63. The Court cited a study reporting that 109 juvenile offenders were serving life without parole sentences for non-homicides nationwide. *See id.* at 2023 (citing P. ANNINO, D. RASMUSSEN, & C. RICE, JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION 12 (2009), *available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf). After the State of Florida criticized the study as inaccurate and incomplete, *id.* at 2023–24, the Court conducted its own inquiry, which brought the tally to 123, *id.* at 2024.

64. *Id.*

Moreover, the Court reasoned, the evidence of consensus was not undermined by the fact that many jurisdictions do not explicitly prohibit the practice of sentencing juveniles to life without parole for non-homicides.[65] The fact that the practice is permitted, the Court explained, "does not justify a judgment that many States intended to subject [juvenile] offenders to life without parole sentences."[66] Instead, it was the movement away from treating juvenile crime in juvenile court to trying juveniles as adults that had created the possibility for such extreme sentences to be imposed on those not yet adult in any sense of the word. As the Court recognized, "[o]nce in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole sentence."[67] Even so, the actual use of life without parole for juvenile non-homicide offenders was "exceedingly rare."[68] Based on that fact and the other objective indicia of the nation's evolving standards of decency, the Court concluded that a national consensus had developed against sentencing juvenile offenders to life without parole.[69]

The Court then proceeded to "exercise [its] independent judgment," which required "consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question."[70] As part of that exercise, the "Court considere[d] whether the challenged sentencing practice serves legitimate penological goals."[71] Here, the Court looked directly to *Roper v. Simmons*, its 2005 decision holding that the death penalty violated juveniles' Eighth Amendment right to be free from cruel and unusual punishments.[72] "*Roper*

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65. *Id.* at 2025.

66. *Id.* The Court elaborated:

> [T]he 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. Similarly, the many States that allow life without parole for juvenile nonhomicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate.

Id. at 2026.

67. *Id.* at 2025. The Court pointed out the extreme nature of the transition to adult penalties:

> For example, under Florida law a child of any age can be prosecuted as an adult for certain crimes and can be sentenced to life without parole. The State [of Florida] acknowledged at oral argument that even a 5-year old, theoretically, could receive such a sentence under the letter of the law.

Id. at 2025–26.

68. *Id.* at 2026.

69. *Id.* (citing Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

70. *Id.* (citing Kennedy v. Louisiana, 554 U.S. 407, 436–39 (2008); Roper v. Simmons, 543 U.S. 551, 568 (2005); Solem v. Helm, 463 U.S. 277, 292 (1983)).

71. *Id.* (citing *Kennedy,* 554 U.S. at 439–47; *Roper*, 543 U.S. at 571–72; *Atkins*, 536 U.S. at 318–20).

72. *Id.* (citing *Roper,* 543 U.S. at 569–73).

established that because juveniles have lessened culpability[,] they are less deserving of the most severe punishments."[73] The *Roper* Court had concluded that juveniles possess a lower level of culpability based on three general differences between juveniles and adults:

> First, as any parent knows and as the scientific and sociological studies . . . tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[74]

It is precisely that "comparative immaturity and irresponsibility of juveniles[]" that had led "almost every State [to] prohibit[] those under 18 years of age from voting, serving on juries, or marrying without parental consent."[75] The second difference was that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[76] The Court observed that juveniles' particular vulnerability "is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment."[77] The Court concluded by recognizing a "third broad difference" between juveniles and adults—"the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[78]

The *Roper* Court then explained the implications of the three differences that set juveniles apart from adults. First, "[t]he susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'"[79] Second, juveniles' "own vulnerability and comparative lack of control over their

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73. *Id.* (citing *Roper*, 543 U.S. at 569–71).

74. *Roper*, 543 U.S. at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)) (citing Eddings v. Oklahoma, 445 U.S. 104, 115–16 (1982) ("Even the normal 16-year-old customarily lacks the maturity of an adult.")). The Court also recognized that "adolescents are overrepresented statistically in virtually every category of reckless behavior." *Id.* (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992)).

75. *Id.* at 569, 581–87 (referring to the Court's Appendices B–D, which provide an exhaustive list of minimum-age requirements for voting, jury service, and "marriage without parental or judicial consent," respectively).

76. *Id.* at 569 (citing *Eddings*, 455 U.S. at 115).

77. *Id.* (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.").

78. *Id.* at 570 (citing ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)).

79. *Id.* (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)).

immediate surroundings mean [they] have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[80] Finally, "[t]he 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."[81] Thus, the *Roper* Court concluded that, from a moral standpoint, a juvenile's transgressions cannot be equated with those of an adult because a juvenile is more susceptible to reform than an adult.[82] The Court explained that "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[83]

These differences and their implications for assessing culpability drove the Court's decision in *Roper*, and the *Graham* Court found no reason to reconsider the *Roper* Court's conclusions.[84] Instead, *Graham* found even more support for treating juveniles differently from adults. "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."[85] Because "[j]uveniles are more capable of change than are adults,"[86] *Graham* concluded, "[f]rom 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."[87]

The Court turned next to the nature of the offenses to which the "harsh penalty"[88] of life without parole might apply. Acknowledging "that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment

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80. *Id.* (citing Stanford v. Kentucky, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting)).

81. *Id.*

82. *Id.*

83. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)); *see also* Steinberg & Scott, *supra* note 77, at 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.").

84. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

85. *Id.* (citing Brief for Am. Med. Ass'n et al. as Amici Curiae at 16–24, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621); Brief for Am. Psychological Ass'n et al. as Amici Curiae at 22–27, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621)).

86. *Id.*

87. *Id.* at 2026–27 (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

88. *Id.* at 2027.

than are murderers,"[89] the Court said that "[t]here is a line 'between homicide and other serious violent offenses against the individual.'"[90] Crimes like robbery and rape "differ from homicide crimes in a moral sense."[91] Thus, the Court concluded that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[92]

Having examined the age of the offender and nature of the crime, the Court then turned to the punishment itself. The Court recognized the harshness of life without parole for juveniles, "the second most severe penalty permitted by law,"[93] based on the sheer number of years a juvenile offender will serve in prison compared to an adult, particularly an adult of advanced years.[94] Like the death penalty, life without parole "alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration . . . ."[95] The deprivation is most severe for juvenile offenders, for as the Court observed, "[a] 16-year old and a 75-year old each sentenced to life without parole receive the same punishment in name only."[96]

The Court then considered the penological justifications for the practice of sentencing juvenile offenders to life without parole. The Court took as its starting point the principle that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[97] Life without parole for juvenile offenders, the Court concluded, finds no adequate justification in any of the four penological goals recognized as legitimate.[98] First, "retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender."[99] Second, deterrence does not justify the sentence "in light of juvenile nonhomicide offenders' diminished moral responsibility."[100] Third,

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89. *Id.* (citing Kennedy v. Louisiana, 554 U.S. 407, 436–39 (2008); Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782, 796 (1982); Coker v. Georgia, 433 U.S. 584 (1977)).

90. *Id.* (quoting *Kennedy*, 554 U.S. at 438).

91. *Id.*

92. *Id.*

93. *Id.* at 2016 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

94. *Id.* at 2028.

95. *Id.* at 2027 (citing Solem v. Helm, 463 U.S. 277, 300–01 (1983)).

96. *Id.* at 2028 (citing Roper v. Simmons, 543 U.S. 551, 572 (2005); *Harmelin*, 501 U.S. at 996).

97. *Id.*

98. *Id.*

99. *Id.* ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987))) ("[T]he case for retribution is not as strong with a minor as with an adult." (quoting *Roper*, 543 U.S. at 571)).

100. *Id.* at 2029. "[T]he same characteristics that render juveniles less culpable than adults

incapacitation does not warrant a life without parole sentence because it "denies the juvenile offender a chance to demonstrate growth and maturity."[101] The Court also warned that "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."[102] Fourth and last, rehabilitation does not justify the sentence because it "forswears altogether the rehabilitative ideal."[103]

The absence of any penological justification, the diminished culpability of juvenile offenders, and "the severity of life without parole sentences" all led the Court to conclude that sentencing juvenile non-homicide offenders to life without parole is cruel and unusual and therefore forbidden by the Eighth Amendment.[104] But the Court did not go so far as to require that all juvenile offenders be released from prison. Instead, the Court maintained that it was sufficient that they be given some possibility of gaining release: "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[105]

The Court then explained why it was necessary to adopt a categorical rule against juvenile life without parole. First, a "clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment."[106] A categorical rule is necessary because, while a state's "laws that fail to take defendants' youthfulness into account at all would be flawed,"[107] some state statutes required consideration of the defendant's age, yet still were "insufficient to prevent the possibility that the [juvenile] offender will receive a life without parole sentence for which he or she lacks the moral culpability."[108]

The Court also said that creating a rule requiring sentencers to consider the juvenile offender's age, weighed against the seriousness of the crime in

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suggest . . . that juveniles will be less susceptible to deterrence." *Id.* at 2028 (quoting *Roper*, 543 U.S. at 571).

101. *Id.* ("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.").

102. *Id.*

103. *Id.* at 2030 ("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. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability.").

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 2031.

108. *Id.*

a case-by-case gross disproportionality inquiry, would not adequately protect juvenile offenders.[109] "The case-by-case approach to sentencing must, however, be confined by some boundaries. The dilemma of juvenile sentencing demonstrates this."[110] The Court illustrated the point by positing a juvenile offender of "sufficient psychological maturity" and a crime reflecting "sufficient depravity" to warrant the most severe penalty.[111] Even then, the Court said that "it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change."[112]

Continuing with its explanation, the Court noted the "special difficulties encountered by counsel in juvenile representation."[113] The Court stated the truism that "[j]uveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense."[114] Moreover, juveniles are impulsive and have difficulty weighing long-term consequences, which can lead to poor decisions and, as a result, impaired legal representation.[115] "A categorical rule" protects juvenile offenders from those deficiencies and "avoids the risk that . . . a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide."[116]

"Finally, a categorical rule gives all juvenile[s]" serving life without parole for non-homicides "a chance to demonstrate maturity and reform."[117] The Court explained: "Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. . . . A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term."[118]

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109. *Id.* at 2031–32

110. *Id.*

111. *Id.* at 2032 (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).

112. *Id.*

113. *Id.*

114. *Id.* (citing Brief for NAACP Legal Defense & Education Fund et al. as Amici Curiae Supporting Petitioners at 7–12, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621)); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 272–73 (2005)).

115. *Id.* (citing Brief of J. Lawrence Aber et al. as Amici Curie Supporting Petitioners at 35, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621)).

116. *Id.*

117. *Id.*

118. *Id.* at 2032–33.

The Court concluded its analysis by noting that life without parole for juvenile non-homicide offenders is "a sentencing practice rejected the world over."[119] While not dispositive, the judgments of other nations are "not irrelevant."[120] As with the juvenile death penalty the Court rejected in *Roper*, "'the United States now stands alone in a world that has turned its face against' life without parole for juvenile nonhomicide offenders."[121] Although international law in no way prohibits the United States from sentencing juvenile offenders to life without parole, the "overwhelming weight of international opinion against" the sentence provided "respected and significant confirmation for [the Court's] own conclusions."[122]

Taken together, all of the factors the Court considered led to one conclusion: Sentencing juveniles to spend their entire lives in prison with no opportunity to seek parole is cruel and unusual and therefore violates the Eighth Amendment.[123] The Court's ruling is both remarkable and unremarkable. It is unremarkable precisely because it relies on *Roper*'s recognition that juveniles do not think or act like adults and that those differences are of constitutional significance. And it is remarkable in that, without pausing, the Court deftly applied its capital jurisprudence in the context of a non-capital sentence. The following section shows just how

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119. *Id.* at 2033.

120. *Id.* (quoting Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982)).

121. *Id.* at 2034 (quoting Roper v. Simmons*,* 543 U.S. 551, 577 (2005)).

122. *Id.* (quoting *Roper,* 543 U.S. at 578).

123. *Id.* Justice Stevens concurred in the majority decision and was joined by Justices Ginsburg and Sotomayor. *Id.* at 2036 (Stevens, J., concurring). The concurrence is quite short, and its apparent purpose was to deflect Justice Thomas's dissent. Justice Stevens noted that Justice Thomas had argued that the Court's holding was not entirely consistent with the Court's rulings in its term-of-years proportionality decisions. *Id.* That being the case, Justice Stevens said, the dissents in those cases (of which Justice Stevens was the primary author) "more accurately describe the law today than Justice Thomas's rigid interpretation of the Amendment." *Id.* Chief Justice Roberts concurred in the judgment that Terrance Graham's sentence violated the Eighth Amendment, but the Chief Justice would not have crossed the "death is different" divide. *Id*. (Roberts, C.J., concurring). He would have analyzed Graham's sentence using the case-by-case approach that employs the "narrow proportionality review of noncapital" cases, informed by *Roper*'s conclusion that "juvenile offenders are generally less culpable than adults who commit the same crimes." *Id*. (internal quotation marks omitted). Justice Thomas filed a strenuous dissent, taking the Court to task for its application of the categorical approach to this case involving a non-capital offense. *Id.* at 2043 (Thomas, J., dissenting). To Justice Thomas, the *Graham* decision was a wholly improper imposition of the Court's "own sense of morality and retributive justice [on] that of the people and their representatives." *Id.* at 2058. Finally, Justice Alito wrote a separate dissent, making two points: First, he said, nothing in the Court's holding prevents a sentence of a term of years without possibility of parole; and second, the question whether Graham's sentence violated the narrow proportionality principle of the Court's non-capital cases was not properly before the Court because Graham abandoned that argument in favor of a categorical rule. *Id.* (Alito, J., dissenting). Of course, the Court had relied on the categorical approach in deciding the case, so Justice Alito's comment seems oddly critical of Chief Justice Roberts, who reached the same conclusion as the majority based on the narrow proportionality analysis reserved for a case-by-case inquiry. *See id.* at 2036–42 (Roberts, C.J., concurring).

remarkable that was by tracing the development of two very distinct lines of Eighth Amendment analysis: one for death penalty cases and another for cases involving all other sentences.

III. PROPORTIONALITY REVIEW IN DEATH AND NON-DEATH CASES: WORLDS APART

By using death penalty analysis in a non-death case, the *Graham* Court, as Justice Thomas lamented, embarked on virgin territory.[124] Nearly four decades of the modern death penalty era passed without a breach in the wall separating capital from non-capital sentencing review. Those years saw the Court's "death is different" capital jurisprudence flourish while prisoners serving long sentences saw their chances of gaining relief diminish with each Supreme Court decision.[125] How these distinctive analytical paths developed, despite their interpretation of the same Eighth Amendment prohibition against cruel and unusual punishment, is the subject of what follows.

A. The Evolution of the Court's "Death Is Different" Jurisprudence

The modern era of death penalty law has its origin, most would agree,[126] in the 1972 decision *Furman v. Georgia*,[127] in which the Court

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124. *Id.* at 2046 (Thomas, J., dissenting).

125. *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1151–57, 1186–93 (2009) (arguing for abandonment of the two-tier approach to sentencing review because of its failure as a matter of both law and policy); Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1051 (2004) (critiquing the inconsistency in the Court's death penalty and prison sentence cases); Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 164–65 (2008) (describing conflicts in the interests of capital and non-capital defendants and how death penalty reforms may undermine reform in the non-capital system). The one exception to the increasingly stringent, and completely unforgiving, non-capital line of cases is *Solem v. Helm*, 463 U.S. 277 (1983), and, as discussed *infra*, its ray of hope was short-lived. *See* Harmelin v. Michigan, 501 U.S. 957, 996 (1991).

126. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 361–62 (1995) (noting that the history of death penalty law could begin with a number of different cases, but that *Furman* is the "fairly conventional" choice); *see also* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 267 (2002) (noting that the *Furman* decision "touched off the biggest flurry of capital punishment legislation the nation had ever seen").

127. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam). The opinion consisted of one paragraph invalidating the death sentences for the three petitioners. Justices filed their own separate concurring opinions. *See id.* at 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 314 (Marshall, J., concurring). The remaining four Justices filed separate dissents, often joining in the others' opinions. *See id.* at 375

struck down the death penalties imposed on three men under the Eighth Amendment.[128] Only Justices Brennan and Marshall argued that the death penalty was on its face a cruel and unusual punishment always prohibited by the Eighth Amendment.[129] Three other Justices—Douglas, Stewart, and White—explicitly reserved judgment on the question whether a less arbitrary, more circumscribed death penalty sentencing scheme than those before the Court could withstand constitutional scrutiny.[130] The effect of the *Furman* ruling was to abolish the death penalty everywhere it existed—in thirty-nine states, the District of Columbia, and under federal law.[131]

Four years later, the Court disappointed everyone who had hoped that *Furman* spelled the end of the death penalty in America[132] when it returned to the subject in *Gregg v. Georgia*[133] and its four companion cases.[134] If any

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(Burger, C.J., dissenting, joined by Blackmun, Powell, and Rehnquist, JJ.); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting, joined by Burger, C.J., and Blackmun and Rehnquist, JJ.); *id.* at 465 (Rehnquist, J., dissenting, joined by Burger, C.J., and Blackmun and Powell, JJ.). The *Furman* decision was the longest in the Court's history at that time. Steiker & Steiker, *supra* note 125, at 165.

128. *Furman*, 408 U.S. at 239–40 (striking down capital sentences for two men convicted of rape—one in Texas and one in Georgia—and one convicted of murder, also in Georgia; all three were black).

129. *Id.* at 305 (Brennan, J., concurring) ("When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity."); *id.* at 358–59 (Marshall, J., concurring).

130. *Id.* at 256–57 (Douglas, J., concurring). "[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws . . . ." *Id.* at 256–57, 310 (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 313 (White, J., concurring) ("That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."). Justice White also opined that "capital punishment . . . has for all practical purposes run its course." *Id.*

131. *Id.* at 411 (Blackmun, J., dissenting). Rhode Island's was the only death penalty that escaped the Court's judgment because it was completely non-discretionary—it imposed a mandatory death penalty for a life prisoner who commits murder. *Id.* at 307 (Stewart, J., concurring). Rhode Island's law was not invalidated until 1976, when the Court rejected mandatory sentencing. *See* Roberts v. Louisiana, 428 U.S. 325, 325 (1976); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); *see also* Steiker & Steiker, *supra* note 126, at 362 n.22 ("Only Rhode Island's capital punishment law was left untouched by *Furman* in 1972, because it was wholly nondiscretionary and thus not invalidated until the Court later rejected mandatory sentencing in 1976.").

132. *See, e.g.*, MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT, at xi (1973). Meltsner was one of the NAACP Legal Defense and Education Fund lawyers who were involved in the *Furman* litigation. The book, which tells the story of the *Furman* case, begins with an introduction in which Meltsner praises the Fund's role in leading to the abolition of the death penalty and thereby "right[ing] a deeply felt, historic wrong." *Id.*; *see also* Steiker & Steiker, *supra* note 126, at 362 ("Indeed, the main question left in the wake of *Furman* was whether there would *be* any future cases.").

133. Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).

doubt about the vitality of the death penalty remained before the Court took up those cases, no one could claim ignorance after the Court ruled. As death penalty scholars Carol and Jordan Steiker have explained: "The extent to which *Furman* was a beginning and not an end to constitutional regulation of the death penalty became clear only in 1976, when the *Gregg* Court considered five new state statutory schemes in light of its decision in *Furman*."[135] *Gregg* minced no words in affirming the constitutional viability of capital sentencing: "We now hold that the punishment of death does not invariably violate the Constitution."[136]

As it waded into the business of regulating capital sentencing, the *Gregg* Court declined to chart the definitive features necessary for a constitutional death penalty system.[137] Rather, the Court examined each statute individually, gauging whether it measured up to the norm recognized by the Court in the 1958 case, *Trop v. Dulles*: "the evolving standards of decency that mark the progress of a maturing society."[138] That examination, the Court emphasized, "does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction."[139] The clearest indication of the public attitude toward the death penalty, the *Gregg* Court said, was the thirty-five state legislatures that enacted new death penalty statutes after *Furman*.[140] So too, juries are a "significant and reliable objective index of contemporary values."[141]

Those measures of "acceptab[ility] to contemporary society," however, were not sufficient to meet Eighth Amendment standards; a challenged punishment must also "comport[] with the basic concept of human dignity

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134. *Roberts*, 428 U.S. at 325; *Woodson*, 428 U.S. at 280; Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

135. Steiker & Steiker, *supra* note 126, at 363.

136. *Gregg*, 428 U.S. at 169.

137. *Id.* at 195 ("We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman,* for each distinct system must be examined on an individual basis.").

138. *Id.* at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding that the denationalization of a person convicted by court martial of desertion, but giving no aid to any foreign power, violated the Eighth Amendment)).

139. *Id.*

140. *Id.* at 179–80. Congress, too, enacted a death penalty statute in 1974, limited to aircraft piracy that results in death. *Id.* at 180.

141. *Id.* at 181 (citing Furman v. Georgia, 408 U.S. 238, 439–40 (Powell, J., dissenting)). *See also* Woodson v. North Carolina, 428 U.S. 280, 293, 295 (1976) (finding general juror reluctance to convict when the death penalty was mandatory and reluctance to impose the death penalty when given the discretion to sentence the defendant to life in prison).

at the core of the [Eighth] Amendment."[142] The Court explained that a punishment "totally without penological justification [would] result[] in the gratuitous infliction of suffering"[143] and thereby violate that core concept. The Court said that applying the death penalty for certain grievous crimes serves two penological purposes—retribution and deterrence—and therefore does not violate human dignity in those instances.[144] However, where any capital sentencing scheme affords discretion to the sentencer, "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" to survive constitutional scrutiny.[145]

The Court then proceeded to uphold three states' death penalty statutes—those of Florida, Georgia, and Texas—based on their particular statutory schemes' mix of procedural protections.[146] The Court approved the statutes because each was a "carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."[147] Making the death penalty mandatory for certain crimes, however, went too far and caused the Court to strike down as unconstitutional the death penalty statutes in the two remaining cases.[148] In *Woodson*, the Court rejected North Carolina's mandatory death penalty statute and set the issue in its historic context: "The history of mandatory death penalty statutes in the United States . . . reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh

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142. *Id.* at 182 (citing *Trop*, 356 U.S. at 100 (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.")).

143. *Id.* at 183 (citing *In re* Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878)).

144. *Id.* at 183, 186–87.

145. *Id.* at 189.

146. *See id.* at 196–98 (approving a statutory scheme that narrowed the class of murderers subject to the death penalty by requiring a bifurcated proceeding, finding at least one statutory aggravating factor, permitting consideration of other aggravating and mitigating circumstances, and providing for automatic appeal to the Georgia Supreme Court); Jurek v. Texas, 428 U.S. 262, 276 (1976) (approving a statutory scheme that narrowed its definition of capital murder, requiring a jury to consider five categories of aggravating circumstances, permitting consideration of mitigating circumstances, focusing on the particular circumstances of the individual offense and individual offender, and providing for prompt appeal); Proffitt v. Florida, 428 U.S. 242, 252, 258–60 (1976) (approving a statutory scheme that required an advisory jury and judge to weigh eight aggravating factors against seven mitigating factors to determine whether the death sentence is warranted based on the particular circumstances of the offense and particular characteristics of the offender and providing for automatic appeal to the Supreme Court of Florida);.

147. *Gregg*, 428 U.S. at 195.

148. Roberts v. Louisiana, 428 U.S. 325, 331–36 (1976) (holding that a Louisiana death penalty statute that mandated the death sentence for certain crimes violated the Eighth Amendment); Woodson v. North Carolina, 428 U.S. 292–305 (1976) (plurality opinion) (holding that a North Carolina death penalty statute that mandated the death sentence for all first degree murders violated the Eighth Amendment).

and unworkably rigid."[149] The Court continued, stating the basis for its conclusion: "The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—both point conclusively to the repudiation of automatic death sentences."[150] The fatal problem for both North Carolina and Louisiana was that their statutes provided no standards to guide jurors in deciding whether a case was first-degree murder and subject to the death penalty or not.[151]

The upshot of the *Gregg* opinions for death penalty jurisprudence was to entrench the Court in an ongoing regulatory role unlike any it would ever take on in the non-capital context.[152] And so began the "death is different" era.[153]

One year after *Gregg*, the Court again considered the Georgia death penalty statute. In *Coker v. Georgia*, the Court struck down the death penalty as a disproportionate sentence for the rape of an adult woman.[154] With its consideration of the Eighth Amendment question, the four-person plurality established the general contours of the analytical framework the Court has used in every case since *Coker* to determine whether the death penalty is an excessive punishment under the Eighth Amendment.[155]

The *Coker* plurality first stressed that the determination whether a punishment is excessive "should be informed by objective factors to the maximum possible extent."[156] As in *Gregg*, the Court considered two objective factors. It looked first to what the states had legislated.[157] There, the Court concluded that never in the preceding fifty years had a majority of states authorized the death penalty for rape, and at the time of the *Coker* decision, only Georgia had made the rape of an adult woman a capital offense.[158] The Court also considered international law and opinion for the

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149. *Woodson*, 428 U.S. at 292–93.

150. *Id.* at 293.

151. *Id.* at 301–04 (invalidating a statutory scheme that provided no guided discretion in mandatory sentencing and no consideration of particular circumstances of the offense or the offender, which are essential to "the evolving standards of decency" (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); *Roberts*, 428 U.S. at 335–36 (invalidating a statutory scheme that required instructions on second degree murder and manslaughter even if no evidence supported the charges because it created standardless jury decisions).

152. *See* Steiker & Steiker, *supra* note 126, at 363.

153. Furman v. Georgia, 408 U.S. 238, 286–91 (1972) (Brennan, J., concurring) (arguing that death differs from other punishments not merely in degree but in kind, and that because of its severity and finality, has always been cruel and unusual).

154. Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion). The plurality was comprised of four Justices, with Justices Brennan and Marshall again separately concurring.

155. *See* Steiker & Steiker, *supra* note 125, at 178.

156. *Coker*, 433 U.S. at 592.

157. *Id.* at 593–95.

158. *Id.* at 594–95. Before *Furman* invalidated the death penalty nationwide in 1972, sixteen

first time—here, as a component of its legislative analysis[159]—by stating that it was "not irrelevant" that only three of sixty nations surveyed in 1965 "retained the death penalty for rape."[160] The second objective factor the Court examined was jury decisions.[161] There too, the Court found little support for imposing the death penalty for rape because Georgia juries had rendered the sentence only six times since *Furman*, a number which accounted for only ten percent of all rape sentences during those five years.[162]

The Court then turned from consideration of objective indicia of consensus against the death penalty to the exercise of its own independent judgment: "[F]or 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."[163] Bringing that judgment to bear on the acceptability of the death penalty for rape, the *Coker* plurality acknowledged the "seriousness of rape": "It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and

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states made the rape of an adult woman a capital offense, but by 1977, Georgia's statute was the sole remnant of that capital sentencing history. *Id.* at 593–94. At the time, three other states, Florida, Mississippi, and Tennessee, authorized the death penalty for the rape of a child by an adult. *Id.* at 595.

159. In later cases, the Court has considered the international community in bringing its own judgment to bear on the constitutionality of the death penalty, rather than as a part of its legislative review. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 577–78 (2005) (holding as unconstitutional under the Eighth and Fourteenth Amendments laws imposing the death penalty on offenders who were under the age of 18 at the time of their crime, and noting that the "overwhelming weight of international opinion [was] against [a] juvenile death penalty"); Thompson v. Oklahoma, 487 U.S. 815, 830 (1988) (holding as unconstitutional under the Eighth Amendment laws that allow imposing the death penalty on offenders who were under the age of eighteen at the time of their offense and noting that this ruling is consistent with "other nations that share our Anglo-American heritage, and by the leading members of the Western European community" (footnote omitted)). Of all the factors that comprise the Court's searching review of death penalty cases, the views of the international community is the one most criticized by dissenting Justices. *See, e.g.*, *Roper*, 543 U.S. at 622–28 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.) ("Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage."); Atkins v. Virginia, 536 U.S. 304, 324–25 (2002) (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, JJ.) ("I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."); *Thompson*, 487 U.S. at 868–69 n.4 (Scalia, J., dissenting, joined by White, J.). Justice Scalia opined:

> In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.

Id.

160. *Coker*, 433 U.S. at 596 n.10 (citing UNITED NATIONS, DEP'T OF ECON. & SOC. AFFAIRS, CAPITAL PUNISHMENT 40, 86 (1968)).

161. *Id.* at 596.

162. *Id.*

163. *Id.* at 597.

autonomy of the female victim . . . . Short of homicide, it is the 'ultimate violation of self.'"[164] But when compared to murder, which ends a life, the Court regarded rape as less deserving of the ultimate punishment.[165] Therefore, the death penalty for rape was an excessive punishment that violated the Eighth Amendment.[166] By declaring the death penalty off-limits for a particular offense, the *Coker* Court launched what would become a series of categorical rulings that set and re-set the boundaries of the death penalty in America.

In the first of those cases, the Court faced "the question whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life."[167] In *Enmund v. Florida*, Justice White, who wrote for the *Coker* plurality, wrote for the majority. He applied the *Coker* methodology[168] to vacate the death sentence of a getaway driver who was convicted of felony murder, but who neither attempted or intended to kill nor participated in the killing.[169] The Court's analysis expanded on *Coker* in two respects: first, by considering the number of actual executions of non-triggermen since 1955 (none),[170] and second, by requiring individualized consideration of the capital offender's character and record.[171] Here, Florida had treated Enmund the

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164. *Id.* (footnote omitted).

165. *Id.* at 598.

166. *Id.* ("Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.").

167. Enmund v. Florida, 458 U.S. 782, 787 (1982).

168. *Id.* at 789–801. The Court again tallied the number of jurisdictions that authorized the death penalty in those circumstances—eight, *id.* at 792, and the number of such defendants whom juries had sentenced to death in the ten years post-*Furman*—just three, including the petitioner, *id.* at 795. Noting that "it is for us ultimately to judge," the Court then exercised its independent judgment. *Id.* at 797. As in *Coker*, the defendant had not taken a life and so did not deserve the ultimate punishment. *Id.* The Court's analysis concluded with its rejection of the "two principal social purposes" of capital punishment—retribution and deterrence. *Id.* at 798–99 (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)). Both failed as legitimate social purposes. *Id.* at 798–801.

169. *Id.* at 801. *Enmund*'s holding lasted only five years. In *Tison v. Arizona*, the Court reaffirmed the *Coker* methodology but held that, because the legislative landscape and number of jury verdicts against defendants for felony murder had changed dramatically since *Enmund*, allowing the death penalty without a showing of intent was no longer excessive under the Eighth Amendment. 481 U.S. 137, 154 (1987). Thus, the Court brought its own judgment to bear and concluded that a participant in a felony murder who did not intend to kill but who evinced a "reckless indifference to human life" could receive the death penalty without offending the Constitution. *Id.* at 158.

170. *Enmund*, 458 U.S. at 794–95.

171. *Id.* at 798 (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978)); *see also* Eddings v. Oklahoma, 455 U.S. 104, 104 (1982) (reversing and remanding for consideration of all mitigating factors, including Eddings's youth (he was sixteen years old), his turbulent and often violent family life, his emotional disturbance, and his mental and emotional developmental problems).

same as his co-defendants who had killed, which the Court held was "impermissible under the Eighth Amendment."[172]

After *Enmund*, the Court's attention was drawn away from categories of offenses for which the death penalty was an unconstitutional punishment to categories of offenders whose execution was said to offend the Eighth Amendment. The first such case the Court considered, *Thompson v. Oklahoma*,[173] was decided in 1988; two additional cases, *Penry v. Lynaugh*[174] and *Stanford v. Kentucky*,[175] were both decided on the same day the following year.

William Wayne Thompson was fifteen years old when he "actively participated" with three older persons in a brutal murder.[176] Like his adult co-defendants, Thompson was sentenced to death.[177] In a now familiar litany, the Court previewed its analysis: "[W]e first review relevant legislative enactments, then refer to jury determinations, and finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."[178] To reach that conclusion, the Court also considered new categories of information—various statutes relating to the treatment of those under sixteen years of age as minors,[179] the views of respected professional organizations,[180] and well-established developmental differences between juveniles and adults that make juveniles less culpable.[181] Based on that analysis, the Court established a categorical bar against imposition of the death penalty on a person under the age of sixteen.[182]

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172. *Enmund*, 458 U.S. at 798.

173. Thompson v. Oklahoma, 487 U.S. 815 (1988).

174. Penry v. Lynaugh, 492 U.S. 302 (1989).

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

176. *Thompson*, 487 U.S. at 819.

177. *Id.* at 818.

178. *Id.* at 822–23 (footnotes omitted). The states' death penalty statutes, for the most part, did not establish a minimum age for imposition of the death penalty, *id*. at 826, but all eighteen states that expressly established a minimum age required the defendant to be at least sixteen, *id.* at 829. During the period 1982 through 1986, only five defendants who received the death penalty, including Thompson, were younger than sixteen at the time of the offense, compared with 1,388 who were sixteen or older. *Id*. at 832–33. Based on all of the factors it considered, the Court concluded that the imposition of the death penalty on one so young did not serve either of the social purposes of the death penalty—neither retribution nor deterrence. *Id.* at 836–38.

179. *Id.* at 824.

180. *Id.* at 830.

181. *Id.* at 833–35.

182. *Id.* at 838. The Court declined the entreaties of Thompson's counsel and various *amici curiae* for the Court to "draw a line" protecting anyone under the age of eighteen from the death penalty, restricting itself to "the case before us." *Id.*

The following year, the Court backtracked when it rejected two categorical challenges on the same day. In *Penry v. Lynaugh*, the Court found no national consensus against the execution of mentally retarded persons.[183] In *Stanford v. Kentucky*, it reached the same conclusion regarding juveniles aged sixteen and seventeen at the time of their offenses.[184] In neither case did state statutes or jury sentencing decisions persuade the Court to prohibit the death penalty for the specific category of offenders.[185] While admonishing the states to provide for consideration of all mitigating evidence in each individualized sentencing decision,[186] the Court was not prepared to go further. The *Stanford* plurality even went so far as to reject the principle that the Court should bring its own judgment to bear in deciding the acceptability of the juvenile death penalty.[187]

By 2002, however, the Court was ready to reconsider the question whether execution of a mentally retarded person offends the Eighth Amendment. In *Atkins v. Virginia*, the Court found the national consensus against such executions that it had found wanting in *Penry*.[188] Writing for the Court, Justice Stevens began with a simple acknowledgement: "Much has changed since then."[189] And indeed, much had changed in the Court's expanding endorsement of considerations relevant to the question whether a national consensus existed.

Only eighteen states expressly prohibited the punishment; of those, sixteen had changed their laws in the past decade to bar execution of the mentally retarded.[190] Clearly, nothing close to a majority of states prohibited the practice, but that did not trouble the Court. Instead, Justice Stevens reasoned for the first time in a capital case that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[191] Every state legislature that had acted since *Penry*

183. Penry v. Lynaugh, 492 U.S. 302, 344 (1989) (stating that only two state statutes prohibited execution of the mentally retarded).

184. Stanford v. Kentucky, 492 U.S. 361, 370–71 (1989) (observing that only twelve states declined to impose the death penalty on seventeen-year-olds and fifteen states declined to impose it on sixteen-year-olds).

185. *Penry*, 492 U.S. at 334–35; *Stanford,* 492 U.S. at 370–74.

186. *Penry*, 492 U.S. at 340; *Stanford*, 492 U.S. at 375.

187. *Stanford*, 492 U.S. at 377–78 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.).

188. Atkins v. Virginia, 536 U.S. 304, 315–16 (2002) (finding that nearly twenty states had exempted the mentally retarded from the death penalty since *Penry* and that even in states permitting such executions "the practice [was] uncommon," with only five offenders having IQs under seventy executed during the same time).

189. *Id.* at 314.

190. *See id.* (noting that, by 1989, fourteen states had barred capital punishment for the mentally retarded and that in the 1990s several states passed laws also barring capital punishment for the mentally retarded).

191. *Id.* at 315 (footnote omitted).

had enacted a prohibition against the execution of the mentally retarded,[192] and the federal government had done the same when it amended the federal death penalty law in 1994.[193] Moreover, even in states with no prohibition against the execution of the mentally retarded, only five had executed such offenders since *Penry*.[194] The Court then cited, again for the first time, additional support for the prohibition from organizations with expertise in mental retardation, diverse religious communities, the world community, and polling data showing widespread consensus among Americans that executing the mentally retarded is wrong.[195] While "by no means dispositive, [the] consistency" of those data with the legislative history "len[t] further support to [the Court's] conclusion that there is a consensus among those who have addressed the issue."[196]

Moving on from its demonstration of a consensus against executing the mentally retarded, the Court next elaborated "two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution."[197] The first is that "a serious question" exists whether either retribution or deterrence, the justifications the Court has recognized for the death penalty, apply to the mentally retarded because of their diminished culpability and diminished ability to control their behavior.[198] The second is that the reduced capacity of mentally retarded persons makes them more likely to make false confessions or be bad witnesses and less likely to provide meaningful assistance to their counsel.[199] Thus, they "face a special risk of wrongful execution."[200] Finally, bringing its independent judgment to bear, the Court found no reason to disagree with the state legislatures that had acted in recent years,[201] concluding that execution of the mentally retarded was "excessive" and therefore unconstitutional.[202]

The Court did not hand down a similar ruling for juveniles on the day it decided *Atkins* as it had with *Stanford* and *Penry* thirteen years earlier. However, the Court returned to that question three years later in *Roper v. Simmons*, where it chose to follow *Atkins*'s lead.[203] First, the *Roper* Court

192. *Id.* at 314–15.
193. *Id.* at 314 n.10 (citing Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c) (2000)).
194. *Id.* at 316.
195. *Id.* at 316 n.21.
196. *Id.* at 317 n.21 (citing Thompson v. Oklahoma, 487 U.S. 815, 830 & n.30, 831 (1988)).
197. *Id.* at 318.
198. *Id.*
199. *Id.* at 320–21.
200. *Id.* at 321.
201. *Id.*
202. *Id.*
203. Roper v. Simmons, 543 U.S. 551, 563–64 (2005).

found evidence of a national consensus against the juvenile death penalty similar to that in *Atkins*.[204] Here, too, it was "the consistency of the direction of change" that was significant.[205] Next, the Court exercised its independent judgment and considered at length whether juveniles fall within the "narrow category of crimes and offenders" for which the death penalty is reserved.[206] Because of the three general differences between juveniles and adults[207] discussed above in connection with *Graham*, the Court concluded that juveniles did not fall within that "narrow category."[208] For those same reasons, neither retribution nor deterrence was a sufficient penological justification for the continued existence of the juvenile death penalty.[209] The Court also expressly denounced the *Stanford* plurality's rejection of the constitutional requirement that the Court "bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders."[210]

Finally, the Court considered "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty"[211] and that "[t]he opinion[s] of the world community, while not controlling . . . provide respected and significant confirmation for our own conclusions."[212] Moreover, the "affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[213] And so the United States joined the rest of the world in repudiating the execution of juveniles.

The final case in this catalog of the Court's death penalty jurisprudence is *Kennedy v. Louisiana*, a categorical ruling in which the Court held that the Eighth Amendment prohibits the death penalty for the rape of a child.[214]

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204. *Id.* at 564–65 (eighteen states explicitly excluded juveniles from the death penalty, and twelve more rejected the death penalty for anyone; even in the remaining states, executing juveniles was rare).

205. *Id.* at 566 (quoting *Atkins*, 536 U.S. at 315) (explaining that the number of states that abandoned the juvenile death penalty after *Stanford* was smaller than those abandoning execution of the mentally retarded, but more states had always prohibited execution of juveniles).

206. *Id.* at 569.

207. *Id.* at 569–70 ("These differences render suspect any conclusion that a juvenile falls among the worst offenders.").

208. *Id.* at 569–71.

209. *Id.* at 571–72.

210. *Id.* at 574 (citing Stanford v. Kentucky, 492 U.S. 361, 377–78 (1989) (plurality opinion)) ("[I]t suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions." (citing Thompson v. Oklahoma, 487 U.S. 815, 833–38 (1988) (plurality opinion); Enmund v. Florida, 458 U.S. 782, 797 (1982))).

211. *Id.* at 575.

212. *Id.* at 578.

213. *Id.*

214. Kennedy v. Louisiana, 554 U.S. 407, 469 (2008).

Making the expected comparisons to *Coker* and its other decisions placing certain offenses out of the death penalty's reach, the Court began with an examination of the relevant state statutes.[215] The Court noted that Louisiana had reintroduced the death penalty for the rape of a child in 1995[216] and that five other states had done the same.[217] Here, the Court confronted arguments from Louisiana that the newly enacted statutes, taken together with those that had been proposed but were not yet enacted, "reflect[ed] a consistent direction of change in support of the death penalty for child rape."[218] The Court easily dispensed with the argument, finding "no showing of consistent change"[219] and no showing as significant as that in *Atkins*[220] or *Roper*.[221]

Bringing its own judgment to bear, the Court acknowledged "the years of long anguish that must be endured by the victim of child rape."[222] In the end, however, the Court concluded that "the death penalty should not be expanded to instances where the victim's life was not taken."[223] Considering the social justifications for the death penalty, retribution "does not justify the harshness of the death penalty here,"[224] and because "the death penalty adds to the risk of nonreporting" of incidents of child rape, any deterrent effect it may have is diminished and cannot, therefore, support its use.[225] Taken together, all of these considerations demonstrated the serious consequences of making child rape a capital offense and led the Court "to conclude . . . that the death penalty is not a proportional punishment for the rape of a child."[226]

These cases show that what began with *Gregg* and was firmly established by *Coker* continues to guide the Court in its scrutiny of categorical death penalty challenges. The Court first looks to the objective indicia of a national consensus against the use of the death penalty. If it

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215. *Id.* at 428.

216. *Id.*

217. *Id.* (naming the states and the years when they reintroduced the death penalty for rape of a child: Georgia, in 1999; Montana, in 1997; Oklahoma, in 2006; South Carolina, in 2006; and Texas, in 2007). The Court was required to dispel any notion that *Coker* had already made capital punishment for child rape unconstitutional so that "[t]he small number of States that have enacted this penalty, then, is relevant to determining whether there is a consensus against capital punishment for this crime." *Id.* at 431.

218. *Id.* at 431.

219. *Id.*

220. *Id.* at 432 (identifying six states, compared with eighteen states in *Atkins*).

221. *Id.* at 432–33 (cataloging five new states, plus twelve that already prohibited the death penalty for anyone under eighteen and fifteen states that prohibited it for anyone under seventeen).

222. *Id.* at 435.

223. *Id.* at 437.

224. *Id.* at 444.

225. *Id.* at 446.

226. *Id.* at 446.

finds such a consensus, the Court then brings its independent judgment to bear on whether the death penalty is excessive in a given instance. But the contours of the Court's analytical framework have been far from static. To borrow the Court's own language, "the consistency of the direction of change" has been marked.[227]

In a number of its death penalty decisions, the Court has granted legitimacy to an ever-expanding array of factors that can lead to the conclusion that a national consensus exists or that can assist the Court in exercising its independent judgment. For example, in *Enmund*, no additional data were required to support the Court's finding of a national consensus against allowing the death penalty for a getaway driver. However, in addition to legislative enactments and jury determinations, the Court also considered the number of executions of persons like Enmund that had occurred since 1955.[228] The *Enmund* Court also expanded on the *Coker* analysis by requiring individualized consideration of a capital offender's character and record.[229] In *Thompson*, the Court considered a wide range of laws that legally disable minors[230] and for the first time acknowledged the views of respected professional organizations and other nations.[231]

But it was in *Atkins* that the Court's expansive analytical framework flourished. First, because no clear majority of states prohibited the execution of the mentally retarded, the Court looked not to the mere number of statutes enacted, but to the "direction of change."[232] The *Roper* Court applied the same reasoning three years later in invalidating the death penalty for juvenile offenders.[233] Second, the *Atkins* Court cited support for abolition of the death penalty for the mentally retarded from a variety of groups not seen in earlier Supreme Court decisions, including organizations for the mentally retarded, religious groups, and even American polling data showing widespread consensus against execution of the mentally retarded.[234] Similarly, the *Roper* Court relied on the work of developmental psychologists and adolescent psychiatric groups, as well as the opinions of members of the international community.[235]

In the end, we are left today with a death penalty jurisprudence that is both broad and deep. It is a body of law that the Court has displayed a

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227. Atkins v. Virginia, 536 U.S. 304, 315 (2002).
228. Enmund v. Florida, 458 U.S. 782, 794–95 (1982).
229. *Id.* at 798 (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978)).
230. Thompson v. Oklahoma, 487 U.S. 815, 824 (1988).
231. *Id.* at 830.
232. *Atkins*, 536 U.S. at 315.
233. Roper v. Simmons, 543 U.S. 551, 566 (2005).
234. *Atkins,* 536 U.S. at 316 n.21.
235. *Roper*, 543 U.S. at 569–78.

willingness to change, sometimes in response to societal changes, but at other times against the current of popular opinion. With the death penalty, the Court has not shied away from staking out a course unpopular with the majority if it means protecting the rights of an accused who is less able, by lack of maturity or mental acuity, to do so himself. All of this, of course, is in the name of the Eighth Amendment. But, as the following section shows, when that same amendment is invoked by one serving a non-capital sentence, even an exceedingly long sentence for a seemingly minor offense, it is as if two separate constitutional provisions exist. That such a separate and distinct analytical framework exists for non-capital cases is beyond dispute. The discussion that follows makes no attempt to answer the question why such separate lines of jurisprudence have evolved when only one Eighth Amendment governs all punishments,[236] but rather seeks to show what the Court has done to those who would challenge their non-capital sentences.

B. The Failed Promise of Non-Capital Proportionality Review

Anyone writing about Eighth Amendment jurisprudence, capital and non-capital sentencing alike, generally begins with *Weems v. United States*.[237] In that 1910 decision, the Court held that being sentenced to twelve years of "hard and painful labor" in chains[238] for the crime of falsifying a public document[239] violated the Eighth Amendment prohibition against cruel and unusual punishment.[240] Even as early as *Weems*, the Court recognized two categories of punishment that would offend the Eighth Amendment: "something inhuman and barbarous, torture and the like"[241]—such as the punishment in *Weems*—and a term of years "so disproportionate to the offense as to constitute a cruel and unusual punishment."[242] Thus,

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236. The increasingly stringent test for non-capital proportionality may be yet another by-product of the American criminal justice system's misguided experiment with mass incarceration—a means of stemming the floodgates, in effect. *See generally* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993 (2010); RYAN S. KING, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2008: DEVELOPMENTS IN POLICY AND PRACTICE 1 (2009), *available at* http://www.sentencingproject.org/doc/sl_statesentencingreport2008.pdf.

237. Weems v. United States, 217 U.S. 349 (1910).

238. *Id.* at 364 (citation omitted).

239. *Id.* at 362–63. Weems was the disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands and was convicted of entering falsely the sums of 208 and 408 pesos as paid out to the lighthouse employees when the sums were not paid. *Id.*

240. *Id.* at 381–82.

241. *Id.* at 368 (citing McDonald v. Commonwealth, 53 N.E. 874, 875 (Mass. 1999)).

242. *Id.* (quoting *McDonald*, 53 N.E. at 875).

disproportionality in sentencing is a vice of long standing—a full century, to be precise. After *Weems*, the future held promise for those challenging lengthy prison terms.

The next significant Eighth Amendment case, nearly fifty years later, offered yet more hope for those suffering excessive punishments. In *Trop v. Dulles*, the Court spoke for the first time of "the evolving standards of decency that mark the progress of a maturing society," the yardstick by which the Eighth Amendment measures all criminal punishments.[243] The Court found no difficulty in ruling that the loss of citizenship faced by Private Trop after his conviction for a one-day stint of desertion from his Army post in French Morocco was constitutionally excessive.[244] In its analysis, the Court warned of the perverse effect the continued existence of the death penalty may have on other punishments when it said, "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination."[245] Thus, even though wartime deserters faced the death penalty, denationalization for a non-wartime deserter was unconstitutionally cruel and unusual: "It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."[246] Moreover, the Court found support for its conclusion in the fact that only two other nations in the world—Turkey and the Philippines—permitted denationalization as a punishment for desertion.[247] The *Trop* Court set itself apart from later non-capital proportionality cases by considering international law. Furthermore, by recognizing the potential for abuse in non-capital sentencing caused by the continued existence of the death penalty, the Court exhibited remarkable prescience.

Four years later, the Court again overturned an imprisonment as cruel and unusual punishment, even though the sentence in *Robinson v. California* was just ninety days in a county jail.[248] In doing so, the Court made the Eighth Amendment prohibition against cruel and unusual punishments applicable to the states through the Fourteenth Amendment for

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243. Trop v. Dulles, 356 U.S. 86, 101 (1958).

244. *Id.* Private Trop had escaped from a stockade, where he was being disciplined, but the next day was walking with a companion back toward the Army base when an Army truck drove by. Trop willingly got into the truck and went back to the base, where he was later court-martialed for desertion and given a dishonorable discharge. *Id.* at 87–88.

245. *Id.* at 99.

246. *Id.* at 101.

247. *Id.* at 103.

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

the first time.[249] Robinson had been convicted under a California statute that criminalized the status of narcotic addiction.[250] The Court compared narcotic addiction to mental illness, leprosy, and venereal disease, the criminalization of which "would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[251] Narcotic addiction was no different, the Court held, even though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual."[252] Emphasizing that the question before the Court could not be considered in the abstract, the Court concluded that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[253] *Robinson* is significant, therefore, in two respects. First, the Court explicitly recognized that very short sentences can run afoul of the Cruel and Unusual Punishments Clause if they are imposed for the wrong reasons. Second, the Court implicitly recognized that the Eighth Amendment was doctrinally grounded in the dignity of every human being. The future of non-capital proportionality review looked bright.

By 1980, however, the promise of *Trop* and *Robinson* had dimmed substantially. In *Rummel v. Estelle*, the Court upheld a mandatory life sentence under a felony recidivist statute following the defendant's conviction for obtaining $120.75 by false pretenses.[254] On the way to its conclusion, the Court staked out a territory separate and apart from its recent death penalty decisions: "Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel."[255] The Court held out no hope for someone who might challenge a sentence as excessive, even a life sentence: "[o]ne could argue without fear of contradiction by any decision of this Court that . . . the length of the sentence actually imposed is purely a matter of legislative prerogative."[256] Only the most outrageous example—mandatory life imprisonment for overtime parking, as suggested by dissenting Justices

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249. *Id.* ("[A] state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.").

250. *Id.* at 660–61 & n.1 ("No person shall use, or be under the influence of, or be addicted to the use of narcotics . . . ." (citation omitted)).

251. *Id.* at 666 (citing Francis v. Resweber, 329 U.S. 459 (1947)).

252. *Id.* at 667.

253. *Id.*

254. Rummel v. Estelle, 445 U.S. 263, 266, 285 (1980).

255. *Id.* at 272.

256. *Id.* at 274.

Powell, Brennan, Marshall, and Stevens[257]—could convince the Court that "a proportionality principle would . . . come into play."[258] The future of proportionality challenges in non-capital cases looked dire indeed after *Rummel*.

Two years later, the Court summarily reversed a lower court's grant of habeas corpus relief in *Hutto v. Davis*.[259] Davis received a sentence of forty years in prison and a fine of $20,000 for possession and distribution of approximately nine ounces of marijuana.[260] Holding that the Fourth Circuit Court of Appeals "failed to heed our decision in *Rummel*," the Court reinstated Davis's sentence.[261] To be sure, the Court could have distinguished Davis's crimes from those committed by Rummel because Davis was not sentenced under a habitual offender statute.[262] But the Court did not draw on that distinction and simply extended its holding in *Rummel* to *Davis*.[263] Justice Brennan wrote a piercing dissent:

> I can only believe that the Court perceives this case as one in which the narrow *Rummel* ruling concerning recidivist statutes can be extended to new terrain without the necessary exertion of argument and briefing. Unfortunately, it is Roger Trenton Davis who must now suffer the pains of the Court's insensitivity, and serve out the balance of a 40-year sentence viewed as cruel and unusual by at least six judges below. I dissent from this patent abuse of our judicial power.[264]

But the next year, in *Solem v. Helm*, the *Rummel* dissenters gained one Justice to become the majority.[265] They rejected *Rummel*'s reasoning[266] and struck down Helm's habitual offender sentence of life without parole for the crime of uttering a "no account" check for $100,[267] Helm's seventh non-

257. *Id.* at 288 (Powell, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) ("A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice.").

258. *Id.* at 274 n.11.

259. Hutto v. Davis, 454 U.S. 370 , 375 (1982) (per curiam).

260. *Id.* at 370–71.

261. *Id.* at 372.

262. *Id.* at 371.

263. *Id.* at 375.

264. *Id.* at 388 (Brennan, J., dissenting, joined by Marshall and Stevens, JJ.).

265. Solem v. Helm, 463 U.S. 277, 304 (1983). Justice Blackmun was in the majority in *Rummel,* but not among the dissenters in *Helm*. *Id.*

266. *Id.* at 303 n.32 (explaining that because "the *Rummel* Court . . . offered no standards" for deciding Eighth Amendment challenges, its ruling must be read as "controlling only in a similar factual situation").

267. *Id.* at 281–82.

violent offense.[268] The Court dismissed the State's argument that the Eighth Amendment's proportionality principle does not apply to felony prison sentences: "The constitutional language itself suggests no exception for imprisonment. . . . It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not."[269] The Court then set out, for the first time in the non-capital sentencing context, three factors to guide courts in reviewing sentences under the Eighth Amendment.[270] Like the factors considered in death penalty cases, the proportionality factors had to be "objective."[271] The first factor is "the gravity of the offense and the harshness of the penalty."[272] Second, the Court said, "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction."[273] Finally, "courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."[274]

Applying those factors to Helm's life without parole sentence, the Court first found Helm's latest crime to be "one of the most passive felonies a person could commit."[275] The Court also found all of his prior crimes minor and non-violent.[276] Furthermore, the sentence of life without parole was far more severe than Rummel's life sentence (with parole) and the most severe punishment authorized by the State of South Dakota.[277] Proceeding to the second and third factors, the Court noted only a handful of crimes, including murder, treason, first-degree arson, and kidnapping, for which the penalty was authorized. The Court also noted a large group of serious crimes, including aggravated assault and a third offense of heroin dealing, for which it was not authorized.[278] Moreover, it appeared that South Dakota

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268. *Id.* at 279–80 (noting that "alcohol was a contributing factor in each case").

269. *Id.* at 288–89. "There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms." *Id.* at 289.

270. *Id.* at 290–92.

271. *Id.* at 290.

272. *Id.* at 290–91 (citing Enmund v. Florida, 458 U.S. 782, 798 (1982)); Coker v. Georgia 433 U.S. 584, 597–98 (1977); Robinson v. California, 370 U.S. 660, 666–67 (1962); Weems v. United States, 217 U.S. 349, 363, 365 (1910)).

273. *Id.* at 291 (quoting *Enmund*, 458 U.S. at 795; *Weems*, 217 U.S. at 380–81).

274. *Id.* (citing *Enmund*, 458 U.S. at 794–95; *Coker*, 433 U.S. at 593–97; *Weems,* 217 U.S. at 380).

275. *Id.* at 296 (citing State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980)).

276. *Id.* at 296–97. The dissent rejected the majority's characterization of Helm's prior crimes as "nonviolent," calling that characterization a "fiction" and asserting that "[b]y comparison Rummel was a relatively model citizen." *Id.* at 304 (Burger, C.J., dissenting, joined by White, Rehnquist, and O'Connor, JJ.).

277. *Id.* at 297.

278. *Id.* at 298–99.

had never given the maximum sentence to any other habitual offender.[279] The Court reasoned that Helm had been treated as severely as more serious criminals and that Helm could have received life without parole in only one other state, Nevada.[280] Therefore, the Court concluded that Helm's sentence was so disproportionate to the crime committed that it violated the Eighth Amendment.[281]

What is notable about the *Solem* Court's analysis of the objective factors is that it did not distinguish between capital and non-capital cases, citing to both as support for each factor.[282] The Court did not explain why it adopted a test different from and narrower than the test already established by earlier death penalty precedents.[283] That departure remains a mystery, and perhaps a costly one for those serving long sentences. The *Solem* Court could not have known that it would be the last to grant relief in a non-capital case for the remainder of the twentieth century and the beginning of the twenty-first.[284] By setting non-capital cases apart from capital cases for purposes of Eighth Amendment proportionality review, the Court, perhaps unwittingly, opened a door that would be slammed shut by *Harmelin v. Michigan* a mere eight years later when a reconstituted Court struck back.[285]

In *Harmelin*, there was no majority opinion on the question of the proportionality of a mandatory life without parole sentence for possession of a large amount of cocaine.[286] The statute was unique to Michigan,[287] but the Court did not even consider that fact. One of the Court's five opinions, authored by Justice Scalia and joined by Chief Justice Rehnquist, explicitly rejected the *Solem* three-part test[288] and pronounced that "the Eighth

279. *Id.* at 299.

280. *Id.* (citing NEV. REV. STAT. § 207.010(2) (1981)) (noting that no one with crimes comparable to Helm's had actually received life without parole in Nevada).

281. *Id.* at 303.

282. *See supra* notes 277–79.

283. *See supra* notes 133–71 and accompanying text.

284. The one non-capital sentencing decision in which the Supreme Court has found a sentence of life without parole disproportionate is *Graham v. Florida*, 130 S. Ct. 2011 (2010), and that decision relied on death penalty proportionality analysis, not the *Solem v. Helm* three-factor test. *See infra* notes 339–41 and accompanying text.

285. Harmelin v. Michigan, 501 U.S. 957 (1991).

286. *Id.* at 961. A majority of the Court ruled only that the Eighth Amendment does not require an individualized sentencing decision for any sentence other than the death penalty and that, therefore, the mandatory nature of Harmelin's sentence of life without parole was not constitutionally infirm. *Id.* at 994–95 (opinion of Scalia, J., joined by Rehnquist, C.J.). *See also id.* at 996 (Kennedy, J., concurring, joined by O'Connor and Souter, JJ.) (concurring only with Justice Scalia's rejection of Harmelin's challenge to the mandatory nature of his sentencing).

287. *Id.* at 1026 (White, J., dissenting). Even the Federal Sentencing Guidelines, not known for their leniency, would carry a sentence of no more than ten years. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (1990)).

288. *Id.* at 965.

Amendment contains no proportionality guarantee."[289] Justice Kennedy, joined by Justices O'Connor and Souter, authored a second, concurring opinion. They concluded that to get to the intrastate and interstate comparisons contemplated by *Solem*, the Court first had to make the threshold determination that the sentence was "grossly disproportionate" to the crime.[290] To those Justices, Harmelin's sentence of life without parole did not rise to the level of "gross disproportionality," so no comparative analysis was necessary.[291]

The Kennedy trio did not stop there, however. Instead, they narrowed the scope of non-capital proportionality review by dictating five principles that would "give content to the uses and limits of proportionality review."[292] Those principles are that: (1) the fixing of prison terms is within the purview of legislatures, not courts;[293] (2) the Eighth Amendment does not require the states to adopt any particular penological theory;[294] (3) marked differences in sentencing theories and the length of prison terms are the inevitable consequence of a federal system;[295] (4) proportionality review should be informed by objective factors wherever possible;[296] and (5) the Eighth Amendment does not mandate strict proportionality between crimes and their sentences.[297] Although Justice Kennedy's principles did not gain a majority, they were not lost on the other members of the Court, who transformed them into law in a later majority decision.[298]

The dissenters, in three separate opinions,[299] took Justice Scalia to task for failing to explain why the words "cruel and unusual" contain a proportionality principle for some—those sentenced to death—but not for others.[300] In his dissenting opinion, Justice White criticized Justice Kennedy for reducing *Solem*'s analysis from three factors to one.[301] He stated that *Solem* was "directly to the contrary, for there, the Court made clear that 'no

289. *Id.*

290. *Id.* at 1005 (Kennedy, J., concurring).

291. *Id.* at 1004–05. Justice Kennedy, applying the test to the case before the Court, reasoned: "Given the serious nature of petitioner's crime, no such comparative analysis is necessary." *Id.* at 1004.

292. *Id.* at 998.

293. *Id.* at 999.

294. *Id.*

295. *Id.*

296. *Id.* at 1000.

297. *Id.* at 1001.

298. Ewing v. California, 538 U.S. 11, 23–24 (2003).

299. *Harmelin*, 501 U.S. at 1009 (White, J., dissenting, joined by Blackmun and Stevens, JJ.); *id.* at 1027 (Marshall, J., dissenting) (disagreeing with Justice White only in his view that the Eighth Amendment prohibits the death penalty); *id.* at 1028 (Stevens, J., dissenting, joined by Justice Blackmun) (adding to Justice White's dissenting opinion the view that mandatory life without parole "shares an important characteristic of the death sentence: The offender will never regain his freedom").

300. *Id.* at 1014 (White, J., dissenting, joined by Blackmun and Stevens, JJ.).

301. *Id.* at 1009.

one factor will be dispositive in a given case.'"[302] No one factor could be dispositive because no objective assessment of the proportionality of a sentence could be made without comparisons to other penalties and other jurisdictions.[303] Moreover, despite assertions to the contrary, evidence in the decisions of state courts demonstrated that the *Solem* analysis was working well. Only a handful of courts had declared sentences unconstitutionally disproportionate.[304] Unfortunately, the dissenters' protests about the harm wrought by *Harmelin* would fall on deaf ears.

The latest cases to test the Court's non-capital proportionality doctrine are a pair of challenges to California's "three strikes" recidivist statute. In *Ewing v. California*, Justice O'Connor wrote for a slim plurality,[305] and in *Lockyer v. Andrade*, for a slim majority,[306] that rejected petitioners' Eighth Amendment claims because their sentences were not "grossly disproportionate" to their crimes.[307]

The *Ewing* Court looked to Justice Kennedy's five proportionality principles for guidance in applying the Eighth Amendment[308] to Ewing's sentence of twenty-five years to life for stealing golf clubs valued at slightly less than $1200.[309] The Court deferred to the California legislature's prerogative to make and implement policy decisions that would further the penological purposes of its criminal justice system.[310] Thus, the Court had to consider not only Ewing's most recent crime in evaluating the constitutionality of the state's "three strikes" law but all of Ewing's previous crimes as well.[311] Justice O'Connor said that "[a]ny other approach

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302. *Id.* at 1019 (White, J., dissenting, joined by Blackmun and Stevens, JJ.) (citing Solem v. Helm, 463 U.S. 277, 291 n.17 (1983)).

303. *Id.* at 1021 (White, J., dissenting, joined by Blackmun and Stevens, JJ.).

304. *Id.* at 1015–16 & n.2 (citing Ashley v. State, 538 So. 2d 1181 (Miss. 1989); Naovarath v. State, 779 P.2d 944 (Nev. 1989); Clowers v. State, 522 So. 2d 762 (Miss. 1988); State v. Gilham, 549 N.E.2d 555 (Ohio 1988)).

305. Ewing v. California, 538 U.S. 11, 14 (2003) (plurality opinion) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J.); *see also id.* at 31 (Scalia, J., concurring) (rejecting non-capital proportionality principle in its entirety); *id.* at 32 (Thomas, J., concurring) (saying Eighth Amendment contains no proportionality principle). *Ewing* was a 5-4 decision. *Id.* (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.); *id.* at 35 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.).

306. Lockyer v. Andrade, 538 U.S. 63, 65 (2003) (O'Connor, J., joined by Rehnquist, C.J., Scalia, Kennedy, and Thomas, JJ.). As this was a federal habeas case that required the petitioner to show that the lower court's action was "contrary to, or an unreasonable application of" clearly established federal law, Justices Scalia and Thomas were able to join the other Justices to constitute a majority of five. *See also id.* at 77 (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.).

307. *Ewing*, 538 U.S. at 30; *Lockyer*, 538 U.S. at 77 (Souter, J., dissenting).

308. *Ewing*, 538 U.S. at 23–24.

309. *Id.* at 28.

310. *Id.* at 24–28.

311. *Id.* at 29 ("In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism.").

would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions."[312] In the end, the Court recognized that Ewing's sentence was "a long one," but "it reflect[ed] a rational legislative judgment, entitled to deference."[313]

Lockyer v. Andrade was decided similarly.[314] Andrade received two consecutive terms of twenty-five years to life for shoplifting videotapes valued at approximately $150.[315] Because his was a habeas corpus action, Andrade was required to show that his sentence was "contrary to, or involved an unreasonable application of, clearly established federal law," pursuant to 28 U.S.C. § 2254(d)(1).[316] In deciding what constitutes clearly established federal law, the Court rejected Andrade's argument that *Rummel*, *Solem*, and *Harmelin* "clearly establish[ed]" that his sentence was grossly disproportionate to his crime.[317] The Court explained that the "precedents in this area have not been a model of clarity."[318] Through the "thicket of Eighth Amendment jurisprudence," the Court could discern but one "clearly established" legal principle: "A gross disproportionality principle is applicable to sentences for terms of years."[319] Even then, the Court's decisions lacked clarity regarding what constitutes gross disproportionality.[320] What was clear to the Court, however, was that the gross disproportionality principle should be reserved for the "extraordinary case," and Andrade's was not such a case.[321]

Thus, to succeed on a disproportionality challenge to any sentence other than death, future petitioners must show not only that their sentences are disproportionate to their crimes, but that they are "grossly disproportionate." What constitutes gross disproportionality is not clear. The only case in which relief was granted to a non-capital petitioner, *Solem v. Helm*, preceded the Court's wholesale rejection of its earlier precedents and its adoption of the stringent gross disproportionality test as the sole

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312. *Id.*

313. *Id.* at 30.

314. The Court reached the same conclusion as in *Ewing*, although it was required to perform a different analysis because *Lockyer* was a habeas corpus action. Lockyer v. Andrade, 538 U.S. 63, 67–68 (2003).

315. *Id.* at 66. Andrade, having been an addict for nearly twenty years, admitted to taking the videotapes so that he could sell them and buy heroin. *Id.* at 67.

316. *Id.* at 71.

317. *Id.*

318. *Id.* at 72.

319. *Id.*

320. *Id.* at 72–73.

321. *Id.* at 77. "In applying this principle for § 2254(d)(1) purposes, it was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade's sentence of two consecutive terms of 25 years to life in prison." *Id.*

measure of a non-capital penalty's Eighth Amendment viability.[322] Although the Court has never expressly overruled *Solem*, it is for all intents and purposes a dead letter.[323] Not one of the post-*Solem* cases established with any clarity just what it will take for a majority of the Justices to find a sentence so extraordinary as to require striking it down as a cruel and unusual punishment.[324]

The deeply troubling question that remains is why we have come to this—why non-capital proportionality review withers on the vine while capital punishment review flourishes, as ever-increasing considerations hold sway with the Court.[325] We are left to contemplate why conducting a nation-wide legislative tally is a permanent fixture in death penalty cases, while no inter-jurisdictional comparisons are even contemplated unless the non-capital petitioner can prove that he is truly extraordinary and his sentence is grossly disproportionate to his crime. Similarly, the Court has never explained why it will consider the direction of any legislative change and the actual use of the statutes at issue in assessing the proportionality of the death penalty, but not for challenges to long prison sentences. And if the scholarly opinions of experts, the views of the international community, and even polling numbers are all respected parts of the capital proportionality matrix, their absence in non-capital sentencing review is difficult to fathom. Two lines of analysis emanating from the same constitutional provision could not be more different.

While it may be beyond reasonable dispute that "death is different," the Eighth Amendment does not protect capital defendants alone.[326] The

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322. Solem v. Helm, 463 U.S. 277 (1983).

323. *See* Erwin Chemerinsky, *Is Any Sentence Cruel and Unusual Punishment?*, 39 TRIAL 78, 79 (2003).

> By upholding the life sentences imposed on Ewing and Andrade, the Supreme Court has made it extremely unlikely that any sentence will be deemed to constitute cruel and unusual punishment. Not one justice in the majority expressed concern, let alone outrage, that two men have been imprisoned for life for shoplifting a small amount of merchandise.

Id.; Steiker & Steiker, *supra* note 125, at 186 (stating that *Harmelin* majority "refined . . . out of existence" Justice Powell's three-part *Solem* test and that the "new threshold requirement of gross disproportionality has proven an insurmountable hurdle for Eighth Amendment challenges to long prison terms").

324. Even *Graham* does not help with defining the "extraordinary" case that will prove "gross disproportionality" because *Graham* was not decided with those tests, but rather by analyzing juvenile life without parole for non-homicides using the analytical framework previously reserved for death penalty cases.

325. This is not to say that every relevant consideration should not be examined when assessing the validity of the death penalty in a single case or in a category of cases. It is to say that nothing in the language of the Eighth Amendment or the Court's precedents explains why those same concerns should not animate non-capital proportionality review.

326. *See* Steiker & Steiker, *supra* note 125, at 204 ("To recognize that 'death is different' is also to assert that incarceration (as opposed to death) is different, too—less severe, less final, less

problem is that the Court's recent non-capital precedents, with the notable exception of *Graham*, make it appear that a prison term can never be cruel and unusual no matter how long it is. For Justice Stevens, reaching this juncture was constitutionally unthinkable. In his short concurrence in *Graham,* Justice Stevens drove home the moral imperative of proportionality review for Eighth Amendment jurisprudence: "[U]nless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete."[327]

Thus, when *Graham* reached the Supreme Court, the Justices were faced with a dilemma. To follow the tattered remnants of non-capital review left by *Harmelin* and the three-strikes cases would limit the Court's review to examining Graham's crime and sentence for gross disproportionality. On the other hand, to employ capital punishment analysis in reviewing Graham's challenge would cross a divide that no other case had dared. In the end, and no doubt influenced in large part by the legal posture of Graham's claim as a categorical one, the Court chose its robust death penalty analysis over its decidedly anemic non-capital approach. That choice was reinforced by the fact that the closest factual precedent was *Roper*, and it just happened to be a death penalty case. More significant than that distinction was the fact that both cases dealt with juvenile offenders sentenced to the most extreme adult sentences.

With *Graham*, the Court furthered an evolving "kids are different" Eighth Amendment jurisprudence that reaches all juvenile offenders serving adult sentences. This "kids are different" jurisprudence arises from the criminalization of adolescence—the explosion in trying juveniles as adults that followed massive statutory incursions into the exclusive jurisdiction of the juvenile court in the late 1980s and early 1990s. Absent that sea change in the treatment of youth who commit crimes, we would not be where we are today, as the following discussion shows.

IV. THE CRIMINALIZATION OF ADOLESCENCE

The late 1980s and early 1990s saw an unprecedented crackdown on teenagers committing violent crimes. During that decade, forty-five states enacted laws that made it easier to try juveniles as adults,[328] their fears

problematic, and less worthy of attention. In light of our current crisis of mass incarceration, we need to be wary of any such implication.").

327. Graham v. Florida, 130 S. Ct. 2011, 2036 (2010) (Stevens, J., concurring).

328. HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 112 (1999), *available at* https://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html.

fanned by reports of a "bloodbath of teenage violence"[329] by juvenile "super-predators."[330] The "super-predator" scare caught fire among elected representatives across the country.[331] Fearing the worst, they shifted their attention from laws that protect youth to laws that protect the public from this new breed of vicious juveniles.[332] The best way to achieve their public protection goal was to make certain that juveniles who committed serious crimes did serious time, so legislation favoring every mechanism for trying a juvenile as an adult mushroomed.[333]

Public enthusiasm for treating juveniles as adults was captured in the phrase, "[I]f you commit an adult crime, you'd better be prepared to do the time."[334] Juvenile offenders could no longer expect to receive the treatment

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329. Peter Annin, *'Superpredators' Arrive*, NEWSWEEK, Jan. 22, 1996, at 57 ("Should we cage the new breed of vicious kids?"); ANNE-MARIE CUSAC, CRUEL AND UNUSUAL: THE CULTURE OF PUNISHMENT IN AMERICA 174 (2009) (referencing Northeastern University Professor James Allen Fox's 1996 description of a "teenage time bomb"); Richard Zoglin, *Now for the Bad News: A Teenage Time Bomb*, TIME, Jan. 15, 1996, at 52.

330. John J. Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23 (coining the term "super-predators" to refer to "severely morally impoverished" juvenile "street criminals" who Dilulio claimed were responsible for the "youth crime wave"); *see also* WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 26 (1996). "[A]s high as America's body count is today, a rising tide of youth crime and violence is about to lift it even higher. A new generation of street criminals is upon us—the youngest, biggest, and baddest generation any society has ever known." *Id. But see* PETER ELIKANN, SUPERPREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW 41, 75 (1999) (refuting claims of a young super-predator wave of violence).

331. PATRICIA TORBET ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 59–61 (1996) [hereinafter STATE RESPONSES], *available at* http://www.ncjrs.gov/pdffiles/stateresp.pdf (observing that the perception that juvenile crime was on the rise led a vast majority of states to change their laws during the early 1990s, resulting in a more punitive juvenile justice system and greater numbers of juveniles being tried as adults); *see also* MIKE A. MALES, FRAMING YOUTH: TEN MYTHS ABOUT THE NEXT GENERATION 32 (1999) (commenting on media's mischaracterization of youth violence during the 1990s as "soaring" when it was actually decreasing); J. Robert Flores, *Foreword* to HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 ANNUAL REPORT, at iii (2006), *available at* http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR 2006.pdf (reporting that the rate of juvenile violent crime arrests has decreased steadily since 1994, falling to a level "not seen since at least the 1970s"); Julian V. Roberts, *Public Opinion and Youth Justice*, 31 CRIME & JUST. 495, 499–503 (2004) (reporting that the volume of crimes committed by juveniles was overestimated).

332. *See, e.g.*, Andrew K. Block, *A Look Back and a Look Forward: Legislative and Regulatory Highlights for 2008 and 2009 and a Discussion of Juvenile Transfer*, 44 U. RICH. L. REV. 53, 73–75 (2009); Sara Glazer, *Lawmakers Pressured to Give Adult Terms to Juvenile Offenders: Perception That Youth Crime Is Becoming More Violent Borne Out in Statistics*, DALLAS MORNING NEWS, Mar. 13, 1994, at 6A ("[L]awmakers across the country are scrambling to respond to polls indicating that Americans see juvenile punishments as too short and too soft.").

333. *See* STATE RESPONSES, *supra* note 331, at 59–61.

334. Elizabeth S. Scott, Keynote Address at Temple University James E. Beasley School of Law, *Law and Adolescence Symposium: Adolescence and the Regulation of Youth Crime* (Mar. 18, 2006), *in* 79 TEMPLE L. REV. 337, 351 n.54 (2006).

designed for them in the juvenile courts, but increasingly faced the harshest of penalties in courts designed for, and largely populated by, adult offenders. Once in adult court, juveniles faced mandatory minimum sentences[335] that were unheard of in the juvenile system.[336] The fact that the "super-predator" uproar turned out to be a myth[337] was lost on policymakers and prosecutors. In fact, violent juvenile crime had decreased even before the "super-predator" scare hit the pages of the newspapers, and nothing suggested that the declining crime rates were brought about by the harsher laws enacted in the late 1980s and throughout the 1990s.[338] Every year since 1994, violent juvenile crime has decreased, and by 2006, it was at levels last seen in the 1970s.[339] In response to statistics showing the steady decline in youth crime, the person who had warned of a teenage "blood bath" said he never meant that such an atrocity would come to pass, but only that he wanted to get people's attention.[340] But the harm was already done.[341] Once the appetite for getting juveniles into adult courts and adult prisons was whetted by statutes making adult prosecution of juveniles easier, there was no going back.[342] For juveniles, trial in adult criminal court penalized them

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335. *See* SNYDER & SICKMUND, *supra* note 328, at 108.

336. The juvenile justice system has always operated as an indeterminate sentencing system. Delores E. Craig-Moreland & Katherine Haliburton, *Impact of a Juvenile Correctional Facilities Sentencing Matrix*, 4 J. INST. JUSTICE & INT'L STUDIES 73, 73 (2004).

337. ELIKANN, *supra* note 330, at 41–42 (debunking the popular notion that we must live in fear of our children); OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, OJJDP RESEARCH 2000, at 3 (2001), *available at* https://www.ncjrs.gov/html/ojjdp/report_research_2000/findings.html ("No evidence of a new and more serious 'breed' of child delinquent and young murderer exists."); Elizabeth Becker, *As Ex-Theorist on Young "Super-Predators," Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19 (reporting that Dilulio later expressed regret for his careless use of hyperbole and acknowledged that his prediction had not come to pass).

338. *See* Flores, *supra* note 331, at iii (reporting a steady decline in juvenile violent crime arrests since 1994, down to levels in the 1970s).

339. *Id.*; ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 181 (2008) [hereinafter RETHINKING JUVENILE JUSTICE].

340. CUSAC, *supra* note 329, at 175 (quoting Vincent Schiraldi & Mark Kappelhoff, *Where Have the Superpredators Gone?*, SALON.COM (May 13, 1997), http://www.salon.com/may97/news/news970513.html).

341. *See* SCOTT & STEINBERG, *supra* note 339, at 109–12 (describing episodes of "moral panic" in which public fears generate political responses with punitive policies which impact becomes institutionalized through legislative reform and continues to determine how the justice system deals with youth long after the panic has subsided); *see also* ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE 205 (1994) (chronicling various eras of moral panic across the globe, including the drug panic in the United States during the 1980s).

342. *See* SCOTT & STEINBERG, *supra* note 339, at 10–11, 109–12 (noting that the "moral panic" that swept juveniles into adult court in escalating numbers had an enduring impact because "once the legislative reform process is initiated, it seems to take on a life of its own"); *see also* MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 5 (2004).

> Moral panics . . . typically occur when horrifying or notorious events galvanize public emotion, and produce concern, sympathy, emotion, and overreaction.

twice for society's increased appetite for more punitive measures—first, when they were subjected to the fervor for transferring them out of the jurisdiction of juvenile court, and second, when they were punished under the more punitive measures demanded by the public in response to the War on Drugs.[343]

This certainly was not what the creators of the juvenile court had in mind when they established a separate court system that would recognize that children are different from adults and that their transgressions should be handled differently from those of adults. Although the concept of juvenile delinquency dates as far back as the seventeenth century,[344] it was not until 1899 that the first juvenile court was founded in Chicago.[345] When the Chicago Juvenile Court came into being, it was viewed as part social work and part law, with the goal of rehabilitating those who came before the court.[346] Its inventors "used the doctrine of *parens patriae* to argue that benevolent state treatment of children was in their best interest."[347] Those early reformers found motivation in the objective of protecting young people from the punitive and destructive features of the criminal justice system.[348] Common to all of the juvenile court systems across the country was a commitment to assuring the social welfare of the child; instead of punishment, children received rehabilitation and treatment from a

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> Examples in recent years include the kidnapping of Polly Klaas in California and the crack-overdose death of Len Bias in Maryland. Results included, respectively, California's three-strikes law and the federal 100-to-1 crack cocaine sentencing law.

Id.

343. *See* Steiker & Steiker, *supra* note 125, at 167.

344. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 582 (2002) (commenting that juvenile delinquency "arose in the wake of economic and political conditions endemic to nascent capitalist societies" in Europe (quoting ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY, at xviii (2d ed. 1977))).

345. The Cook County Juvenile Court was the first juvenile court in the country. It was a creature of statute created by an act of the Illinois legislature entitled "An Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children," 1899 ILL. LAWS 131. *See* David S. Tanenhaus, Policing the Child: Juvenile Justice in Chicago, 1870–1925 (1997) (unpublished Ph.D. dissertation, The University of Chicago) (on file with Boyd Law Library, The University of Chicago) (comprehensive treatment of the origins of the Chicago juvenile court system).

346. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 804–05 (2003) (describing delinquents as "wayward but innocent" and in need of the court's firm guidance and rehabilitation); David S. Tanenhaus, *The Evolution of Transfer out of the Juvenile Court, in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO CRIMINAL COURT 13, 18 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (juvenile court was concerned with the social welfare of children, not the assignment of criminal responsibility).

347. Tanenhaus, *supra* note 345, at 18.

348. Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Practice*, 88 CAL. L. REV. 2477, 2482 (2000). *See* PLATT, *supra* note 344, at 137–45 (describing the early development of juvenile courts as "medical-therapeutic").

benevolent court whose mission was to serve the complete child in a "judicial-welfare alternative to criminal justice."[349] By 1925, all but two states had enacted statutes to establish juvenile courts with exclusive original jurisdiction over everyone under the age of eighteen charged with a crime.[350]

Only if the juvenile court waived its jurisdiction could a juvenile be transferred to criminal court for trial as an adult.[351] Juvenile court transfer decisions employed individualized determinations that were made on a case-by-case basis using a "best interests of the child" standard.[352] But as public sentiment and fears of violent teenage criminals captured the attention of elected representatives, two additional avenues for trial of youth as adults gained traction: legislative exclusion and prosecutorial waiver or "direct file."[353] Today, every jurisdiction employs one or more of the three statutory mechanisms for prosecuting juveniles as adults.[354] Each category

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349. Barry C. Feld, *The Transformation of the Juvenile Court – Part II: Race and the "Crack Down" on Youth Crime,* 84 MINN. L. REV. 327, 337 (1999). *See generally* WILLIAM AYERS, A KIND AND JUST PARENT: THE CHILDREN OF JUVENILE COURT (1997).

350. *See* Tanenhaus, *supra* note 345, at 6 (stating that Maine and Wyoming came along later). Over the years, the rehabilitative ideal of the juvenile court suffered setbacks and eventually collapsed. *See* Scott & Steinberg, *supra* note 346, at 804–05 (explaining the effects of the collapse of the rehabilitative model of juvenile justice). The Supreme Court soon acknowledged that a youthful offender called into juvenile court often receives "the worst of both worlds: that he gets neither the [constitutional] protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Kent v. United States, 383 U.S. 541, 556 (1966). Critics of the absence of procedural protections and the sweeping custodial powers of juvenile court judges, *see, e.g.*, Roscoe Pound, *Foreword* in PAULINE V. YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY, at xxvii (1937); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 268 (1st ed. 1971), charted the course that would lead to the recognition of juveniles' due process rights, including the right to counsel, notice of charges, confrontation and cross-examination, and the privilege against self-incrimination. *See In re* Gault, 387 U.S. 1, 13 (1967) (recognizing that "neither the Fourteenth Amendment nor the Bill of Rights is for Adults alone"). The procedural rights afforded juveniles for the first time made juvenile court more like adult criminal court but retained protections for the young through the juvenile court's retention of its "best interests of the child" orientation. SNYDER & SICKMUND, *supra* note 329, at 94.

351. Tanenhaus, *supra* note 345, at 21. The term "transfer" is synonymous with "waiver" in the context of juvenile court vis-à-vis criminal court jurisdiction. A child under the exclusive jurisdiction of the juvenile court because she is under the age of eighteen may be "transferred" to adult criminal court under certain circumstances and for certain offenses. In the same instance, the juvenile court "waives" its exclusive jurisdiction over the matter, and so it is a "waiver" decision as well.

352. SNYDER & SICKMUND, *supra* note 328, at 94.

353. Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO CRIMINAL COURT 83, 84–85 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (internal quotation marks omitted).

354. *Id.; see also* Tanenhaus, *supra* note 345, at 21. In 1910, thirty-two states' juvenile laws set explicit age limits, with only one setting the upper age at nineteen and three setting the upper age at eighteen; the others set their upper age limits at sixteen or seventeen. *Id.* In addition, certain felonies

contributes in its own way to the criminalization of adolescence because each is a mechanism for removing an adolescent from the protection of the juvenile court to face prosecution, conviction, and sentencing in the criminal justice system. However, judicial waiver is qualitatively different from either legislative exclusion or prosecutorial waiver.

Judicial waiver, the most common of the three approaches, was the subject of the inaugural juvenile justice case to reach the United States Supreme Court, *Kent v. United States*.[355] Sixteen-year-old Morris Kent challenged a District of Columbia juvenile court judge's decision to waive juvenile court jurisdiction over him and transfer him to adult criminal court for prosecution and sentencing.[356] Kent had been charged with multiple counts of housebreaking, robbery, and rape.[357] The juvenile court judge—without a hearing, without ruling on defense counsel's motions to retain juvenile court jurisdiction and commit Kent to a psychiatric facility for treatment, without conferring with Kent or his parents, and without making findings or providing reasons—transferred Kent for trial in the United States District Court for the District of Columbia. [358]

On petition for certiorari to the United States Supreme Court, Kent fared much better than he had in the lower courts. While agreeing with the Court of Appeals that the District of Columbia transfer statute permits the juvenile court "considerable latitude" in determining whether to retain or waive jurisdiction over a child charged with a criminal offense, the Court recognized limits on the court's discretion: "But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'"[359] The Court made clear its intention to provide guidance to

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were excluded from juvenile court jurisdiction in some states, and almost every state had transfer mechanisms. *Id.*

355. Kent v. United States, 383 U.S. 541 (1966).

356. *Id.* at 552–53. Although the case did not establish a constitutional right to the procedures it laid out, it made clear that any waiver or transfer statute that did not comport with the basics of due process and fairness would not pass constitutional muster. *Id.* at 557; *see In re* Gault, 387 U.S. 1, 22 (1967) (stating that "the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication"). The Court ruled that due process is not for adults alone and required that juvenile courts provide for right to counsel, notice of charges, and right to confrontation and cross-examination and that the Fifth Amendment privilege against self-incrimination applies to juveniles as well as adults. *Id.*

357. *Kent*, 383 U.S. at 543–44. During police interrogation, Kent volunteered information about his involvement in multiple crimes. *Id.* at 544.

358. *Id.* at 545–46. At trial, Kent was found not guilty by reason of insanity on the rape charges, but was convicted on the six other charges and received a sentence of five to fifteen years for each, or a total of thirty to ninety years. *Id.* at 550. Because of the insanity ruling, Kent was sent to St. Elizabeth's Hospital. *Id.*

359. *Id.* at 553. The Court continued:

future courts and policymakers by attaching an appendix of "determinative factors."[360] Thus, trial of juveniles as adults was not to be treated lightly and had to meet statutory or other provisions which themselves comported with due process and fairness. So it is today that most states' judicial waiver provisions trace their origins to the *Kent* factors.[361]

On the heels of *Kent* and in reaction to increasing juvenile crime rates in the 1970s, legislatures nationwide began to pass "mandatory transfer laws that transformed children who committed serious offenses into automatic adults."[362] "Mandatory transfer" or "mandatory waiver" laws substitute a conditional legislative exclusion for the judicial discretion of ordinary waiver provisions.[363] Mandatory waiver provisions exclude certain offenses for certain ages of children with certain juvenile histories from

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> [The statute] does not confer upon the Juvenile Court a license for arbitrary procedure. The statute does not permit the Juvenile Court to determine in isolation and without the participation or any representation of the child the 'critically important' question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act. It does not authorize the Juvenile Court, in total disregard of a motion for hearing filed by counsel, and without any hearing or statement of reasons, to decide—as in this case—that the child will be taken from the Receiving Home for Children and transferred to jail along with adults, and that he will be exposed to the possibility of a death sentence instead of treatment for a maximum, in Kent's case, of five years, until he is 21.

Id. at 553–54 (footnotes and citations omitted).

360. *Id.* at 565–67. The "determinative factors" came from a policy memorandum prepared in 1959 by the Chief Judge of the District of Columbia Juvenile Court:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
> 4. The prosecutive merit of the complaint . . . .
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults . . . .
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
> 7. The record and previous history of the juvenile. . . .
> 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Id. at 565–66.

361. Robert O. Dawson, *Judicial Waiver in Theory and Practice*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 45, 52 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

362. Tanenhaus, *supra* note 345, at 33.

363. Dawson, *supra* note 361, at 65.

juvenile court jurisdiction; the exclusion is conditional because it is available only if the prosecutor requests it through filing a petition or motion and only if the juvenile court judge finds that the case characteristics match the statutory elements for exclusion.[364] These hybrid provisions signaled what would become a full-frontal onslaught on judicial waiver by a wave of statutory provisions vesting all authority for juvenile prosecution in the hands of the legislature or a prosecutor rather than the judge.

After judicial waiver, the most common species of statute leading to the trial of a juvenile as an adult is legislative or statutory exclusion.[365] This approach removes certain juveniles charged with certain offenses from the jurisdiction of the juvenile court.[366] It focuses on the seriousness of the offense and, at times, the age of the offender, forswearing the rehabilitative ideal of the juvenile courts by opting instead for the retributive criminal justice rationale.[367] A juvenile charged with an excluded offense is tried as an adult automatically without any hearing in either juvenile or criminal court.[368] A form of statutory exclusion that has a dramatic effect on the numbers of juveniles tried as adults is legislation that lowers the upper age limit for juvenile court jurisdiction from seventeen to sixteen or even fifteen.[369] Thirteen states now set the upper age for juvenile court jurisdiction at fifteen or sixteen.[370] Every year, those states try as many as 200,000 juveniles as adults because of their lower age limits for juvenile court jurisdiction,[371] nearly four times the number tried through all other transfer and exclusion mechanisms combined.[372]

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364. *Id*.

365. *See* Feld, *supra* note 353, at 91 ("Legislative offense exclusion . . . provides the primary conceptual alternative to judicial waiver.").

366. Feld*, supra* note 353, at 91; SCOTT & STEINBERG, *supra* note 339, at 97 (discussing the distrust of juvenile court judges reflected in reforms giving criminal courts automatic jurisdiction).

367. Feld*, supra* note 353, at 84–85.

368. *See id*. (noting that legislatures are free to limit the jurisdiction of juvenile courts).

369. Between 1992 and 1995, eleven states lowered the age of transfer. *See* TORBET ET AL., *supra* note 332, at 4 (1996); *see also* Tamar R. Birckhead, *North Carolina, Juvenile Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443 (2008) (criticizing North Carolina laws that lowered the upper limit of juvenile court jurisdiction to fifteen and then provided no mechanism for seeking return to juvenile court and chronicling the human cost and consequences of prosecuting 26,000 sixteen- and seventeen-year-olds in the North Carolina adult criminal courts each year).

370. NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 5 (2007), *available at* http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf (reporting that thirteen states automatically try juveniles ages sixteen and seventeen as adults); *see also* SNYDER & SICKMUND, *supra* note 328, at 114 (same).

371. NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 370, at 5 (reporting that more than 200,000 juveniles are tried annually because of lower age limits on juvenile court jurisdiction); *see also* CAMPAIGN FOR YOUTH JUSTICE, NATIONAL STATISTICS (2010), *available at* http://www.campaignfor youthjustice.org/national-statistics.html (reporting that 200,000 juveniles are tried, sentenced, or

Statutory exclusions have been roundly criticized for mandating adult prosecution purely on the basis of the offense charged (or the offender's age) rather than on any consideration of the offender's individual characteristics.[373] Excluded juveniles have challenged their "automatic adulthood" under these statutes as a denial of due process because they receive neither the safeguards nor the judicial review provided by *Kent*.[374] Their arguments have failed.[375] Even though the consequences of statutory exclusion are comparable to the consequences of waiver, the same procedural safeguards do not apply.[376] For that reason, it is as unfortunate as it is clear that statutory exclusions are here to stay.

The third and final mechanism for converting juveniles to adult criminal defendants is known as prosecutorial waiver or "direct file" legislation.[377] These laws give the prosecutor the unfettered power to choose whether to file charges in juvenile or criminal court without having to justify that choice in a judicial hearing.[378] In the absence of invidious

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incarcerated as adults every year); CAMPAIGN FOR YOUTH JUSTICE, THE CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 6 (2007), *available at* http://www.campaignforyouthjustice.org/documents/CFYJNR_ConsequencesMinor.pdf (reporting that in states in which juvenile court jurisdiction ends at fifteen or sixteen years of age, the vast majority of youth those ages are prosecuted in adult criminal court for non-violent crimes); SNYDER & SICKMUND, *supra* note 328, at 110–16.

372. AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 17 n.30 (2005), *available at* http://www.hrw.org/reports/2005/10/11/rest-their-lives (estimating that states tried 55,000 transferred juveniles as adults in 2000); SNYDER & SICKMUND, *supra* note 328, at 112–14 (outlining methods of transferring juveniles to adult court).

373. *See, e.g.*, Jeffrey Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 CRIM. JUST. & BEHAV. 93 (1990); Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court on Juvenile Justice*, 35 AM. CRIM. L. REV. 371 (1998); Wallace J. Mylniec, *Juvenile Delinquent or Adult Convict—The Prosecutor's Choice*, 14 AM. CRIM. L. REV. 29, 30–33, 44–51 (1976) (arguing that both mandatory waivers and statutory exclusions essentially give the prosecutor control over the forum in which a juvenile will be tried, and that in order to preserve the protections provided by the juvenile justice system, legislatures should include procedural safeguards in these statutes requiring prosecutors to consider the individual characteristics of the juvenile when deciding in which forum to charge a case); Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267 (1991).

374. Feld, *supra* note 353, at 91.

375. *See* United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973) (rejecting Bland's procedural due process argument and holding that principles of separation of powers bar it from intervening in exercise of prosecutorial discretion).

376. *See Bland*, 472 F.2d at 1341 (Skelly Wright, J., dissenting) (arguing that statutory exclusion was a "blatant attempt to evade the force of the *Kent* decision" and that the same procedural protections should apply).

377. Feld, *supra* note 353, at 85; Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 284 (1991).

378. *See* Cox v. United States, 473 F.2d 334, 336 (4th Cir. 1973), *cert. denied*, 414 U.S. 909

discrimination,[379] judges generally will decline to review prosecutorial charging decisions because the separation of powers doctrine bars the judicial branch from passing judgment on the exercise of what are essentially discretionary functions by the executive branch, of which prosecutors are a part.[380] As a result, challenges to the exercise of direct file authority, like challenges to statutory exclusions, generally have been unsuccessful.[381]

In all, forty-five states and the District of Columbia have judicial waiver provisions.[382] Twenty-nine states have enacted certain statutory exclusions that allow for trial of juveniles automatically in adult criminal court.[383] Fifteen states have prosecutorial waiver or "direct file" provisions.[384] With these laws has come a dramatic increase in the number of youth tried in adult criminal court and incarcerated in adult prisons.[385] Although studies consistently report lower admissions to adult prison in recent years, due in part to a decrease in juvenile crime since the mid-1990s,[386] the number of juveniles tried and sentenced as adults remains high.[387]

(1973) (rejecting any requirement of procedural safeguards as a precondition to a prosecutor's exercise of discretion to try a juvenile as adult); *see also* Bishop & Frazier, *supra* note 377, at 285 (describing the discretion that prosecutorial waiver statutes give to prosecutors); Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629 (1994).

379. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) (holding that the Attorney General and U.S. Attorneys had broad discretion as to whom to prosecute and that petitioners' selective prosecution claim asked a federal court to do what it would not—invade the province of the executive); Wayte v. United States, 470 U.S. 598, 607 (1985) (holding that the federal government had broad discretion as to whether to prosecute the petitioner, a vocal Vietnam War critic who had failed to register with the Selective Service).

380. Feld, *supra* note 353, at 93.

381. *See, e.g.*, Flakes v. People, 153 P.3d 427, 438 (Colo. 2007) (holding that a "direct file" statute did not violate the separation of powers doctrine and stating that prosecutorial discretion is not unconstitutional); Manduley v. Superior Court, 41 P.3d 3, 16 (Cal. 2002) (holding that a prosecutor has discretion to file certain charges against a juvenile directly in criminal court and that a prosecutor does not usurp any judicial function in exercising such discretion, even though in other situations a juvenile court is authorized to decide whether a juvenile is fit for disposition in juvenile court). *But see* State v. Mohi, 901 P.2d 991, 1006 (Utah 1995) (holding that the "direct file" provision violated juveniles' rights under the state constitution to the uniform operation of the general laws of the state).

382. SNYDER & SICKMUND, *supra* note 328, at 112.

383. *Id.* at 110, 113.

384. *Id.*

385. *See* JAMES AUSTIN ET AL., JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT, at iii (2000).

386. *Juvenile Arrests 2008*, JUVENILE JUSTICE BULLETIN, (Office of Juvenile Justice & Delinquency Prevention, Washington, D.C.), Dec. 2009, at 1, *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf (reporting that juvenile crime continued to decrease in 2008 and that 2008 arrest rates for violent crimes were substantially lower than the peak year of 1994); *see also Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUSTICE BULLETIN, (Office of

At bottom, the problem for anyone adversely affected by judicial waiver, legislative exclusion, or prosecutorial "direct file" is that there is no right to be treated as a juvenile delinquent rather than as an adult criminal. Juvenile courts, and the jurisdiction they exercise, are creatures of statute, and what the legislature gives, the legislature may take away.[388] Thus, nothing can prevent the trial of a juvenile as an adult if the prosecution so chooses or the juvenile court judge waives her exclusive jurisdiction over a given case. What can minimize the negative effects of adult prosecution on one of tender years is a concerted effort to educate the judiciary about the limitations of branding a child as an adult for criminal prosecution. Being tried in criminal court does not automatically make an adult out of a child; it merely changes the court where the proceedings will play out.

Justice Kennedy recognized that simple truth in both *Roper* and *Graham*. Tried as adults and sentenced to the two harshest penalties our criminal justice system knows—death and life without parole respectively—Christopher Simmons and Terrance Graham got a reprieve from the Supreme Court, not because the statutes pursuant to which they were tried as adults were hopelessly broken, but because they were still kids at the time of their crimes and were therefore less culpable than they would have been as adults. The three differences Justice Kennedy highlighted that set juveniles apart from adults[389] find strong support in the literature of child and developmental psychology, and it is that body of knowledge that should guide future courts.

V. AN ENLIGHTENED "KIDS ARE DIFFERENT" EIGHTH AMENDMENT JURISPRUDENCE

Graham's categorical ruling should not be seen as the endgame for juvenile sentencing. Instead, what the Court did should be viewed for what

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Juvenile Justice & Delinquency Prevention, Washington, D.C.), June 2010, at 1 [hereinafter *Juvenile Transfer Laws*], *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf (concluding that transfer laws have little or no general deterrent effect in preventing serious juvenile crime).

387. As of June 30, 2009, by one report a total of 15,500 youth under the age of eighteen and 68,200 who were eighteen or nineteen were incarcerated in adult prisons. HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 20 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf. The dataset does not include a category for those younger than eighteen. However, it reports that the total includes persons under eighteen. Thus, the 15,500 number for those under eighteen is a calculation based on the totals reported for each age group beginning with eighteen to nineteen and ending with sixty-five or older, subtracted from the overall total reported in the table, the remainder comprising the under-eighteen group. *See id.*

388. Feld, *supra* note 353, at 91.

389. Graham v. Florida, 130 S. Ct. 2011, 2018 (2010); Roper v. Simmons, 543 U.S. 551, 569–71 (2005).

it is—a ruling that directly affects a very small cohort of juvenile offenders in adult prison and that leaves undisturbed thousands of other adult sentences being served by offenders who were minors at the time of their crimes, including over 2,000 sentenced to life without parole for homicide.[390] Those whose sentences *Graham* left intact should look to capitalize on the Court's reasoning and pursue categorical rulings across the sentencing spectrum because all adult sentences are by their nature disproportionate when visited upon juveniles. We know this because the Court said as much and because the Court relied on credible sources.[391]

We begin, as the Court so often has done, with an examination of the "objective indicia" of society's "evolving standards of decency."[392] At first blush, a review of legislative enactments would seem to support current sentencing practices because all states have some form of transfer or statutory exclusion that permits or mandates trial of certain juveniles as adults.[393] But, as the Court has recognized in its death penalty precedents, it is not always the sheer number of statutes permitting a practice that governs.[394] The 1990s' rewriting of juvenile transfer and legislative exclusion provisions may have increased the number of juveniles being tried as adults, but it said nothing about juvenile sentencing.[395] Instead, the measures enacted during that flurry of legislative activity simply affect the

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390. *See Frontline: When Kids Get Life* (PBS television broadcast May 21, 2009), *available at* http://www.pbs.org/mgbh/pages/frontline/whenkidsgetlife/ (reporting 2,574 juvenile life without parole sentences, including those for non-homicides); *see also* Michael E. Tigar, *What Are We Doing to the Children? An Essay on Juvenile (In)justice*, 7 OHIO ST. J. CRIM. L. 849, 851 (2010) (stating that more than 2,200 juvenile offenders are serving life without parole for homicides).

391. *See* Graham, 130 S. Ct. at 2026 (citing *Roper*, 543 U.S. at 569); *Roper*, 543 U.S. at 569–70 (citing ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty,* 58 AM. PSYCHOLOGIST 1009, 1013 (2003).

392. *See supra* notes 243–305 and accompanying text.

393. *See supra* notes 345–69 and accompanying text.

394. *See supra* notes 214–36 and accompanying text.

395. *See Juvenile Transfer Laws*, *supra* note 386, at 1; *see generally* CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME & DELINQUENCY, FACT SHEET: YOUTH UNDER AGE 18 IN THE ADULT CRIMINAL JUSTICE SYSTEM 3 (2006), *available at* http://nccd-crc.issuelab.org/sd_clicks/download2/nccd_fact_sheet_youth_under_age_18_in_the_adult_criminal_justice_system (noting that most decisions to charge juveniles in the criminal justice system come from prosecutors and state legislatures, that there has been a 208% increase in the number of youth under eighteen serving time in adult jails on any given day between 1990 and 2004 but that the number of new youth admissions to the adult prison system has dropped since 1996); ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA (2009), *available at* http://www.sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf; SNYDER & SICKMUND, *supra* note 328, at 96 (noting that in the 1990s, state legislatures sought to crack down on juvenile crime by passing laws making it easier to transfer juvenile offenders from the juvenile justice system to the criminal justice system and that between 1985 and 1994, the number of delinquency cases waived to criminal courts rose 83% but has since declined to 1985 levels).

jurisdiction of the juvenile court and either permit or require the juvenile court to relinquish its exclusive jurisdiction over certain juveniles so that they may be tried in adult criminal court.[396]

As the Court said in *Thompson*, juvenile transfer laws show "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*."[397] Similarly, *Graham* recognized that many states had "chosen to move away from juvenile court systems and to allow juveniles to be transferred to, or charged directly in, adult court under certain circumstances"[398] and to face the same sentences as adult offenders.[399] The Court made clear, however, the limits of those laws: "But the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences."[400]

Thus, while the statutes may inform observations about those who are being taken out of juvenile court and tried as adults, any suggestion that they say anything about the appropriate sentences for those young persons would be baseless. In this instance, then, the otherwise "objective" indicia of a national consensus are of no assistance; indeed, they must be disregarded. Courts must look to other sources, as the *Graham* Court did, to determine whether adult sentences are proportionate when inflicted on those who were not adults when they committed the crimes for which they are being sentenced.

In the exercise of its independent judgment, *Graham* quoted liberally from *Roper* to explain the Court's conclusion that juveniles have lesser culpability for the offenses they commit than do adults and therefore do not deserve to be punished as severely as adults.[401] The Court focused on three

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396. *See supra* notes 328–89 and accompanying text.

397. Thompson v. Oklahoma, 487 U.S. 815, 826 n.24 (1988); *see also id*. at 850 (O'Connor, J., concurring).

> When a legislature provides for some 15-year-olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants. . . . however, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate to impose capital punishment on 15-year-olds.

Id.

398. Graham v. Florida, 130 S. Ct. 2011, 2025 (2010).

399. *Id.*

400. *Id.*

401. *Id.* at 2026–27 (quoting Roper v. Simmons, 543 U.S. 551, 569–70 (2005)).

differences that set juveniles apart from adults.[402] First, compared to adults, juveniles lack maturity and have an "underdeveloped sense of responsibility."[403] Second, juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[404] Third, juveniles have characters that are "not as well formed" as those of adults.[405] *Graham* found no reason to reconsider *Roper*'s conclusions and observed that developments in brain science[406] and psychology continue to reflect those fundamental differences between juveniles and adults.[407] So too, the inherent transience of youth sets those in their teenage years apart from adults and is itself the explanation for juveniles' greater capacity for change.[408] Thus, *Graham* found continued validity in *Roper*'s conclusion that "[f]rom 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."[409]

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402. *Id.* at 2026 (quoting *Roper*, 543 U.S. at 569–70).

403. *Id.* (quoting *Roper*, 543 U.S. at 569–70).

404. *Id.* (quoting *Roper*, 543 U.S. at 569).

405. *Id.* (quoting *Roper*, 543 U.S. at 570).

406. *Graham* referred to brain science in passing, while *Roper* referred to it not at all. *Graham* observed only that "parts of the brain involved in behavior control continue to mature through late adolescence." *Id.* (citing Brief for American Medical Association et al. as Amici Curiae at 16–24, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621); Brief for American Psychological Association, et al. as Amici Curiae at 22–27, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621)). In the view of at least one commentator, the Court got it right:

> [T]he behavioral science was crucial to proper resolution of the case [*Roper*] and furnished completely adequate resources to decide the issue. The neuroscience was largely irrelevant. . . . *Roper* properly disregarded the neuroscience evidence and thus did not provide unwarranted legitimation for the use of such evidence to decide culpability questions generally.

Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 410 (2006); *see also* Bruce Bower, *Teen Brains on Trial: The Science of Neural Development Tangles with the Juvenile Death Penalty*, 165 SCI. NEWS 299, 299–301 (2004) (reporting on lack of consensus within the scientific community about brain-imaging studies and legal policy, with David Fassler and Rubin Gur on the side of believing that the science is strong enough, and Ronald Dahl and Elizabeth Sowell believing that the evidence is not yet solid enough to be introduced into the legal system); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood,* 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004) (asserting that adolescent behavioral immaturity mirrors the anatomical immaturity of their brains); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89 (2009) (cautioning against overuse of developmental neuroscience based on analysis of cases in which attempts to put the neuroscience into practice almost universally failed); Elizabeth Sowell et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4, 13–15 (2002) (demonstrating that MRI studies show how a particular brain operates over time, but no more).

407. *Graham*, 130 S. Ct. at 2026.

408. *Id.*

409. *Id.* at 2026–27 (quoting *Roper*, 543 U.S. at 570).

The behavioral science support for *Graham*'s conclusions concerning the lessened culpability of youth is incontrovertible.[410] The "gold standard" in developmental psychology and its legal implications is the collaboration of law professor Elizabeth Scott and developmental psychologist Laurence Steinberg.[411] In their most recent work, *Rethinking Juvenile Justice*, Scott and Steinberg make the case that adolescent offenders are different from adult offenders in ways that bear on their culpability[412] and then tie their developmental case for reduced adolescent culpability to the criminal law doctrine of mitigation.[413]

Scott and Steinberg's work establishes what *Graham* identified as the first distinguishing feature of adolescence—immaturity and "an underdeveloped sense of responsibility."[414] While adolescents' basic cognitive capacity—the ability to employ logical reasoning—equals that of adults by mid-adolescence, their psychosocial and identity development continue well into young adulthood.[415] It is the psychosocial aspects of development that make juveniles less able to control their impulses and more attracted to risky behaviors,[416] both of which feature prominently in criminal offending.[417] Certain critical life skills set even older adolescents apart from adults. Decision-making, for example, is a learned skill that adults, by virtue of their greater experience in life, manage better than adolescents.[418] Teenagers do not think ahead[419] and are prone to making

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410. *See infra* notes 414–53 and accompanying text.

411. Emily Buss, *Rethinking the Connection Between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493, 493 (2009) (reviewing RETHINKING JUVENILE JUSTICE, *supra* note 339). Scott and Steinberg served on the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice from 1995 to 2006 and participated in a large-scale study of juvenile defendants' trial competence, whose results were reported in Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003); *see also* Scott, *supra* note 334; Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547 (2000); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997); Steinberg & Scott, *supra* note 391, at 1009; Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles Be Treated As Adults?*, FED. PROBATION, Dec. 1999, at 52, 52.

412. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 29 ("[S]cientific knowledge about cognitive, psychosocial, and neurobiological development in adolescence supports the conclusion that juveniles are different from adults in fundamental ways that bear on decisions about their appropriate treatment within the justice system.").

413. *Id.* at 133–39.

414. *Graham*, 130 S. Ct. at 2026.

415. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 36, 131.

416. *Id.* at 40–44; *see also* Buss, *supra* note 411, at 495.

417. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 13–15.

418. Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 294 (Thomas Grisso & Robert G. Schwartz eds., 2000).

decisions based on a preference for immediate or short-term results over long-term consequences.[420] Even if adolescents could plan and anticipate future events in the abstract, that capability does not necessarily translate into competence in making real world choices "on the street" when friends are getting ready to hold up a Stop & Shop.[421] Teenagers' tendency to live in the moment leads them to discount risks that would be given great weight by adults, especially when they are under emotional stress or when there is no obvious solution to a problem.[422]

Similarly, limited impulse control, a normative feature of adolescence, impairs decision-making and interferes with adolescents' ability to act on their choices.[423] Thus, adolescents' crimes are more often than not impulsive and unplanned.[424] Even crimes that may appear to the casual observer to be calculated acts of revenge are often impulsive and moralistic in origin when committed by adolescents.[425] In one study, not a single juvenile involved in a shooting could remember deciding to shoot and then pulling the trigger; instead, they all said the gun just "went off."[426] What those adolescents experienced is a dramatic illustration of their psychosocial immaturity, or, as Justice Kennedy put it, their "underdeveloped sense of responsibility."[427]

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419. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 30 (noting that adolescents tend to consider the future consequences of their choices and behavior less than adults); Marty Beyer, *Immaturity, Culpability and Competence in Juveniles: A Study of 17 Cases*, CRIM. JUST., Summer 2000, at 26, 27–28, *available at* http://www.abanet.org/crimjust/juvjus/cjmimmculcom.html. "Adolescents often fail to plan or follow a plan, and get caught up in unanticipated events. They view as 'accidental' consequences that adults would have foreseen." *Id.*

420. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 39; Beyer, *supra* note 420, at 27; *see also* Gerald Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 716 (1992) (explaining the influence of time on the decision-making processes of children and adolescents).

421. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 30; Laurence Steinberg, *Is Decision-Making the Right Framework for the Study of Adolescent Risk-Taking?*, *in* REDUCING ADOLESCENT RISK: TOWARD AN INTEGRATED APPROACH 18–24 (D. Romer ed., 2003).

422. Daniel Seagrave & Thomas Grisso, *Adolescent Development and the Measurement of Juvenile Psychopathy*, 26 LAW & HUM. BEHAV. 219, 229 (2002) (citing S. Small et al., *Adolescents' Perceptions of the Costs and Benefits of Engaging in Health-Compromising Behaviors*, 23 J. YOUTH & ADOLESCENCE 73-87 (1993)); *see* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 266 (1996) ("Between childhood and young adulthood, individuals become more future-oriented.").

423. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 125–26; *see also* Beyer, *supra* note 419, at 27 ("Difficulty in managing impulses is normal in teenagers . . . .").

424. David P. Farrington, *Developmental and Life-Course Criminology: Key Theoretical and Empirical Issues—The 2002 Sutherland Award Address*, 41 CRIMINOLOGY 221 (2003).

425. Beyer, *supra* note 420, at 33 (observing that juveniles have a high moral sense and are intolerant of "anything that seems unfair").

426. *Id.* at 27.

427. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

The second characteristic that *Graham* recognized is the fact that juveniles do not have as much control over their environment as do adults and are more susceptible to negative influences, particularly peers.[428] In fact, susceptibility to peer influence overshadows other prominent features of adolescence.[429] As important as youthful impulsivity and poor decision-making are on their own, when combined with the powerful peer pressure characteristic of youth, they can turn a purely innocent event into every parent's nightmare.[430] Adolescence, and in particular male adolescence, is marked by the substitution of peer relationships for parents and other familial relationships and control, as adolescents seek to establish their own identities as separate and apart from their families.[431] Peers dominate daily social interactions among teens, and they report that they "feel most happy, alert, and intrinsically motivated" when in the company of peers.[432]

The drive to gain acceptance by peers creates fertile ground for juvenile crime. As Franklin E. Zimring has observed, "[m]ost adolescent decisions to break the law or not take place on a social stage, where the immediate pressure of peers is the real motive for most teenage crime."[433] Peer influence over moral judgments about whether to break the law is particularly compelling because moral development is at its peak during

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428. *Id.*

429. *See* Mary Berkheiser, *Capitalizing Adolescence: Juvenile Offenders on Death Row*, 59 U. MIAMI L. REV. 135, 146 (2005). Since the early twentieth century, social scientists have studied the role of peer influence in teenage behavior. Sutherland's theory of differential association theorized that, like all human behavior, criminal behavior is learned from others; *see* EDWIN H. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY (4th ed. 1947). Burgess and Akers restated Sutherland's theory in behavioral psychology terminology. *See* Robert Burgess & Ronald Akers, *A Differential Association-Reinforcement Theory of Criminal Behavior*, 14 SOC. PROBS. 128 (1966); *see also* Albert J. Reiss & David P. Farrington, *Advancing Knowledge About Co-Offending: Results from a Prospective Longitudinal Survey of London Males*, 82 J. CRIM. L. & CRIMINOLOGY 360, 360 (1991) (describing juveniles' "universal pattern" of committing crimes together).

430. These observations are not the province of social scientists alone. Justice Stevens, writing for the Court in *Thompson v. Oklahoma*, commented on the power of peer influence: "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." 487 U.S. 815, 835 (1988) (ruling that the execution of anyone under the age of sixteen violates the Eighth Amendment's prohibition on cruel and unusual punishment).

431. Albert J. Reiss, *Co-Offender Influences on Criminal Careers*, *in* 2 CRIMINAL CAREERS AND "CAREER CRIMINALS" 121 (Alfred Blumenstein et al. eds., 1986); *see also* Edward Pabon et al., *Clarifying Peer Relations and Delinquency*, 24 YOUTH & SOC'Y 149, 160 (1992) (observing that threats of violence and criminal victimization drive Latino youth into groups for protection even more than for purely social reasons).

432. MARK WARR, COMPANIONS IN CRIME: THE SOCIAL ASPECTS OF CRIMINAL CONDUCT 13 (2002) (quoting MIHALY CSIKSZENTMIHALYI & REED LARSON, BEING ADOLESCENT: CONFLICT AND GROWTH IN THE TEENAGE YEARS 71 (1985) (reporting that teens in a community outside Chicago spent a full one-half of the hours in a week with peers)).

433. FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 78 (Michael Tonry & Norval Morris eds., 1998).

adolescence.[434] A teenager may know the difference between right and wrong, "but resisting temptation while alone is a different task from resisting the pressure to commit an offense when among adolescent peers who wish to misbehave."[435] Thus, a necessary condition for a teenager to remain law-abiding is the ability to resist peer pressure, and many lack that skill for a long time.[436] Peer conformity plays such a powerful role in adolescent decision-making that it renders teens much less capable than adults of making decisions based on their own independent judgment.[437] And the desire for peer approval, coupled with the short-term orientation characteristic of youth, causes teens to take risks that adults would anticipate and avoid.[438] It is therefore no accident that the most consistently reported feature of teenage criminality is its group nature.[439]

The third distinguishing feature that influenced the *Graham* Court is the undeveloped nature of adolescents' character as compared to adults.[440] For this concept, the *Roper* Court cited the seminal work of psychologist Erik Erikson, who described the psychosocial developmental stage of adolescence as a "moratorium" during which to allow youths to identify with new roles of competency and invention.[441] Erikson said identity formation is the primary developmental project of adolescence.[442] Thus, adolescence is a time to "try on" different personas and to learn about oneself as reflected through one's interactions with others.[443] Adolescence is a time for both individuation (separating from one's parents) and identity

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434. WARR, *supra* note 432, at 66.

435. ZIMRING, *supra* note 433, at 78.

436. *Id.*

437. Beyer, *supra* note 419, at 33; *see also* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 23 (Thomas Grisso & Robert G. Schwartz eds., 2000) (describing adolescence as a "period of tremendous malleability, during which experiences in the family, peer group, school, and other settings have a great deal of influence over the course of development").

438. Beyer, *supra* note 420, at 27 (reporting that the typical gun-toting sixteen-year-old has no intention of shooting anyone but just wants to scare someone or "look bigger").

439. ZIMRING, *supra* note 434 at 79; *see also* Reiss, *supra* note 432, at 121; WARR, *supra* note 433, at 5. Data from the National Crime Panel show a striking difference between robberies committed by those under twenty-one and those over twenty-one: two-thirds of those under twenty-one committed the crime with others, whereas only slightly over one-third of those over twenty-one offended with others, choosing instead to offend alone. Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 870 (1981) (citing National Crime Panel data, provided by Wesley Skogan, Northwestern University).

440. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

441. ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS 128 (1968).

442. ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 227–29 (1950).

443. *See* Seagrave & Grisso, *supra* note 422, at 226 (cautioning against misidentifying adolescents as "psychopaths in the making" because behaviors common to adolescence also describe adult psychopathy).

development ("creating a coherent and integrated sense of self").[444] The intrinsic nature of this stage of life has caused it to be described as a period of "identity crisis."[445] As youth struggle to define their own unique identities, they experiment in ways that often involve risky, illegal, or dangerous activities, all in the quest for immediate rewards and ever-greater thrills.[446] For most, "this period of experimentation is fleeting; it ceases with maturity as identity becomes settled."[447] The transition to adulthood is marked by "the attainment of a settled identity"—that is, a sense of being a competent person with a useful role to play in society.[448]

Characteristics of adolescence are relevant to adolescent criminal behavior because "a large portion of youthful criminal activity represents the experimentation in risky behavior that is a part of the developmental process of individuation and identity formation—combined with the psychosocial immaturity that contributes to poor judgment and deficient decision-making generally."[449] Because an adolescent's identity is still in the formative process, "an important component of culpability in the typical criminal act—the connection between the bad act and morally deficient character—is missing in [the adolescent's] conduct."[450] Scott and Steinberg further observe that "[m]ost teenagers desist from criminal behavior . . . [as they] develop a stable sense of identity, a stake in their future, and mature judgment."[451] Thus, because most adolescents who commit crimes are "not on a trajectory to pursue a life of crime, a key consideration in responding to their criminal conduct is the impact of dispositions on their prospects for productive adulthood."[452] This concern is particularly poignant when one considers that once in adult court, even a five-year-old is subject to the same mandatory minimum and maximum sentences in adult prison as his adult counterparts.[453]

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444. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 50.

445. *Id.* at 51; ERIKSON, *supra* note 441, at 91 ("We may, in fact, speak of the identity crisis as the psychosocial aspect of adolescing.").

446. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 51.

447. *Id.* at 51.

448. *Id.* at 34–35; James E. Marcia, *Development and Validation of Ego Identity Status*, 3 J. PERSONALITY & SOC. PSYCHOL. 551 (1966) (reporting on empirical research into Erikson's theory regarding the attempt to establish identity during adolescence and finding that those best equipped to resolve the crisis of early adulthood are those who have most successfully resolved the crisis of adolescence).

449. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 53.

450. *Id.* at 137.

451. *Id.* at 53; *see also* Terrie Moffitt, *Adolescent-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674 (1993) (explaining that adolescent offenders fall into one of two groups: a large group whose antisocial behavior begins and ends in adolescence and a much smaller group whose behavior continues into adulthood).

452. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 55.

453. *See* Graham v. Florida, 130 S. Ct. 2011, 2025–26 (2010) (recounting the State of Florida's

To be afforded "some realistic opportunity to obtain release" as mandated by *Graham*,[454] every juvenile offender serving an adult sentence must have his or her sentence reviewed for disproportionality under a categorical analysis that takes full account of his or her youth at the time of the offense and of all of the implications of that youth.[455] If, as the Supreme Court has told us, juveniles have less culpability in death penalty and life without parole cases because of their youth, then that same lessened culpability must diminish their responsibility when they have suffered less severe adult penalties. It is true, as Zimring has observed, that "[d]iminished responsibility is either generally applicable or generally unpersuasive as a mitigating principle."[456]

In addition, reform at the sentencing phase of criminal proceedings involving juveniles is essential to a just and proportionate juvenile sentencing regime. Only such front-end reform will begin to address what Justice Kennedy said the "dilemma of juvenile sentencing demonstrates."[457] That dilemma is a creature of the transformation that occurs with trial in adult court because, once there, no constraints on punishment exist. In adult criminal court, a juvenile may receive any sentence an adult can receive, a consequence to which *Graham* appeared to invite an end.

Whether at the time of sentencing or in a challenge to a sentence already imposed, penal proportionality must be the overriding governing principle. This is not a radical assertion because penal proportionality has

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acknowledgement at oral argument that under Florida law even a five-year-old could be prosecuted as an adult and receive a life without parole sentence); *see also* SNYDER & SICKMUND, *supra* note 328, at 105–06, 108 (noting that legislative enactments may authorize prosecutors to transfer juvenile cases to criminal court—and in some states, bring the original charge in criminal court—and try the juvenile as an adult; likewise, many states have reduced the confidentiality of juvenile court proceedings and have made them more open).

454. *See Graham*, 130 S. Ct. at 2034.

455. One effect of incarceration in an adult prison on an adolescent's youth is the pain of that incarceration. Even one day in an adult prison is harsh for a juvenile offender. Given reports of rampant sexual assault in prison, it seems likely that younger, smaller inmates are more susceptible to assault by their older, more powerful counterparts. *See* Barkow, *supra* note 125, at 1167–68. Yet the pain of incarceration has not received the Court's attention. Every day in our country's prisons, inmates suffer abuse and physical injury at the hands of fellow inmates and rogue guards. *Id.* When Congress was considering the Prison Rape Elimination Act of 2003, it received evidence that over 1,000,000 prisoners had been sexually assaulted in prison over the previous 20 years. *See* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 125–26 (2007); *see also* Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency,* 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 21–22 (2002) (describing the substantive quality of punishment adolescents experience in adult incarceration as far harsher than the sanctions they experience as delinquents); Tigar, *supra* note 391, at 852–53 (telling the story of the sexual abuse by prison guards suffered by fifteen-year-old Joseph Galloway in a Texas detention facility).

456. ZIMRING, *supra* note 433, at 84.

457. *Graham*, 130 S. Ct. at 2032.

always been at the heart of our criminal justice system.[458] However, the Court's non-capital proportionality decisions suggest that we have lost our concern for penal proportionality.[459] To regain the high ground, we must train our sights on restoring the principle that punishment must be proportionate to the culpability of the criminal actor to its central place in our criminal justice policy.[460] Only such a system will have the moral credibility to command the respect of all who operate within it.[461] For our youth, that means recognizing that the normative developmental deficiencies of adolescence mitigate their culpability.[462] Criminal law generally recognizes the following mitigating conditions: diminished capacity, coercive circumstances, and lack of bad character.[463] These conditions are present in adolescent criminal behavior and collectively signify the special nature of adolescence as mitigating.[464]

As discussed above, juveniles lack the fully developed decision-making capacity of adults because their psychosocial development is

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458. *See* FRANCIS ALLEN, HABITS 42–43 (1996) (commenting that for more than two centuries "a persistent strand in liberal thought relating to penal justice has been the notion that the severity of criminal penalties should be limited by and proportioned to the culpability of the offender and his offense"). Even though, or perhaps because, he is a Briton, Allen for decades has written with great insightfulness about the American legal system. *See, e.g.*, Francis Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L. & CRIMINOLOGY 246 (1961) (discussing the balance between constitutional rights of privacy and the law of search and seizure); Francis Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950) (describing the Supreme Court's treatment of civil liberties cases in then-recent years).

459. *See supra* notes 236–327 and accompanying text.

460. *See* Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 10 (2008) (criticizing courts for ignoring the principle of penal proportionality by focusing solely on the gravity of the offense and not on the culpability of the offender); *see also* AMNESTY INT'L & HUMAN RIGHTS WATCH, *supra* note 372, at 113 (arguing that penal proportionality requires consideration of both the nature of the offense and the culpability of the offender and that juveniles are categorically less culpable than adults); Scott & Steinberg, *supra* note 346, at 822 ("Only a blameworthy moral agent deserves punishment at all, and blameworthiness (and the amount of punishment deserved) can vary depending on the attributes of the actor or the circumstances of the offense."); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility, in* YOUTH ON TRIAL 271, 271 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("But desert is a measure of fault that will attach very different punishment to criminal acts that cause similar amounts of harm.").

461. *See* Paul Robinson & John Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997) (explaining the importance of criminal law reflecting social consensus on what actions are worthy of punishment).

462. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 118–48 (describing the role of mitigation in trial of adolescents and explaining the need for a categorical approach that recognizes the mitigating character of youth in assigning blame); Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742 (2000); Steinberg & Scott, *supra* note 77, at 1012.

463. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 130.

464. *Id.*

incomplete. They focus on short-term consequences, are more impulsive and volatile, and are "inclined to engage in risky behaviors that reflect their immaturity of judgment."[465] These normative features of adolescence establish the diminished capacity of adolescents in the eyes of the law.[466] Similarly, the defense of duress based on extreme external circumstances is a natural byproduct of adolescents' lack of control over their environment, coupled with their peer orientation and the extremes to which they feel compelled to go to avoid the ridicule of peers.[467] The environment in which an adolescent lives exacerbates adolescent crime.[468] Because teenagers are generally financially dependent on their parents and legally subject to their authority, they are not in a position to cut themselves loose from their neighborhoods.[469] The law recognizes in these circumstances manifestations of duress or coercion sufficient to mitigate criminal acts.[470] Adolescence is also defined by the third mitigating condition—lack of bad character—because the characters of adolescents are unformed.[471] Most juvenile criminal conduct is the product of transitory developmental processes, and the vast majority of youth will outgrow their criminal inclinations as they mature into adults.[472] Thus, the absence of character development is normative.

Because youth is a mitigating condition, the categorical rule that *Graham* adopted for sentences of life without parole should translate to all crimes committed during adolescence. While "[m]itigating conditions and circumstances affect adult criminal choices in varying and idiosyncratic ways" and thus call for individualized treatment of mitigation defenses, a

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465. *Id.* at 131–33.

466. *Id.* at 133; ZIMRING, *supra* note 433, at 140–41; *see* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 70 (1997).

467. *See* WARR, *supra* note 432, at 46, 49; *see also* Jeffrey Fagan, *Context and Culpability in Youth Crime*, 6 VA. J. SOC. POL'Y & L. 507, 507–08 (1999) (discussing the effect of a person's social setting on adolescent crime); Ruth Beyth-Marom et al., *Perceived Consequences of Risky Behaviors: Adults and Adolescents*, 29 DEVELOPMENTAL PSYCHOL. 549, 559–61 (1993).

468. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 135 (discussing research that shows that when families move out of high-crime neighborhoods, the adolescents in those families are involved in less violent crime and less crime overall) (citing Jens Ludwig et al., *Urban Poverty and Juvenile Crime: Evidence from a Randomized Housing-Mobility Experiment*, 116 Q.J. ECON. 655, 676 (2001)).

469. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 135.

470. *Id.*; *see* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 203 (1982).

471. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 136.

472. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 136–37 (citing Moffitt, *supra* note 451, at 675). *See generally* Alfred Blumstein & Jacqueline Cohen, *Characterizing Criminal Careers*, 237 SCI. 985, 991 (1987) (charting the correlations between age and rate of crime); Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AMER. J. SOC. 552, 555 (1983) (noting that the age of distribution of crime is temporally and geographically consistent and fifteen- to seventeen-year-olds have the highest rate of crime).

categorical approach is appropriate for adolescents because their "development follows a roughly predictable course to maturity and [their] criminal choices are affected predictably in ways that are mitigating of culpability."[473] As the *Graham* Court recognized, even expert psychologists cannot "differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile whose crime reflects irreparable corruption."[474] Scott and Steinberg echo *Graham*'s caution, pointing out that current diagnostic tools permit neither evaluation of psychosocial maturity on an individualized basis nor the identification of young "career criminals" as distinct from ordinary adolescents who will repudiate their youthful recklessness as adults.[475] Moreover, "litigating maturity on a case-by-case basis is likely to be an error-prone undertaking, with the outcomes determined by factors other than psychological immaturity—such as physical appearance or demeanor."[476] Thus, sentencing reform must be systemic and categorical if it is to give proper weight to the mitigating effect of youth.

Barry Feld advocates one possible approach to sentencing reform: a "youth discount" that provides "fractional reductions in sentence-lengths based on age as a proxy for culpability."[477] Feld's system recognizes both the diminished responsibility of youth and the fact that adult sentences "exact a greater 'penal bite' from younger offenders than older ones."[478] Feld proposes a "sliding scale of diminished responsibility that corresponds with developmental differences . . . in maturity of judgment and self-

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473. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 139.

474. Graham v. Florida, 130 S. Ct. 2011, 2029 (2010) (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

475. RETHINKING JUVENILE JUSTICE, *supra* note 339, at 140.

476. *Id.*; *see also id.* at 141 (raising concern about racial and ethnic bias and its effect on punishment of youthful offenders).

477. Feld, *supra* note 460, at 61; *see also* Feld, *supra* note 466, at 121–33 (providing rationale for categorical "youth discount"). *But see* Joseph L. Hoffman, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 233 (1989) (describing age as an imperfect proxy for a complex of factors that constitute culpability, "includ[ing] maturity, judgment, responsibility, and the capability to assess the possible consequences of one's conduct"); ZIMRING, *supra* note 433, at 150 (objecting to categorical youth discount because "age is an incomplete proxy for levels of maturity during the years from age twelve to eighteen");.

478. Feld, *supra* note 461, at 61 (citing Andrew von Hirsch, *Proportionate Sentences for Juveniles: How Different than for Adults?*, 3 PUNISHMENT & SOC'Y 221, 227 (2001)); *see also* David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Nature of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 697–98 (2002).

> We endorse Feld's proposals [for a youth discount] because they respect the notion that juveniles are developmentally different than adults and that these differences make juveniles both less culpable for their crimes and less deserving of the harsh sanctions, which now must be imposed on serious and violent adult offenders.

Id.

control."[479] Feld acknowledges that quantification of the youth discounts is a matter for political and legislative debate[480] but posits that a twenty- or thirty-year sentence is the most a state would ever need to satisfy its legitimate penal goals.[481] With the youth discount, Feld maintains, "[w]e can hold juveniles accountable, manage the risks they pose to others, and provide them with 'room to reform' without extinguishing their lives."[482] Moreover, recognizing the value of mitigation for youthful offenders "provides a buffer against political pressure" to stiffen penalties every time a juvenile commits a serious offense.[483]

Feld's "youth discount" is consonant with Scott and Steinberg's call for a categorical mitigating principle for adolescents who commit crimes, but it is not the only possible approach to proportionality in adolescent sentencing. Given society's special responsibility for the welfare of its young, policy-makers and juvenile-justice experts must seize the opportunity to fashion a system that does justice to both our young people and the society in which they will mature into adulthood. Employing mitigation principles at the sentencing stage will prevent the kinds of sentences that have punished without consideration of proportionality or mercy, which now must be undone through categorical rulings in the state and federal courts. The wave of punitive laws that swept through the country in the late 1980s and early 1990s can no longer be allowed to define criminal justice policy for our youth, especially knowing what we now know of the profound effects that adolescent immaturity has on blameworthiness. Juveniles are not adults, and our sentencing laws need to stop pretending otherwise.

CONCLUSION

The Supreme Court's decision in *Graham v. Florida* mandates review of the sentences of all juvenile offenders serving life without parole for non-homicides. The *Graham* decision also opened the door to sentencing review for those convicted as juveniles and serving time in adult prisons, including those serving life without parole for homicide. Because sentencing youth in the adult criminal justice system was never contemplated by the measures that caused their trial as adults, the sentences juveniles have received do not reflect the lessened culpability that is a

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479. Feld, *supra* note 460, at 62.

480. *Id.* at 63.

481. *Id.*

482. *Id.* at 64 (citing ZIMRING, *supra* note 433, at 152).

483. Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 248 (1998).

necessary attribute of youth. The well-known and well-established differences between adolescents and adults must take center stage in the review of current sentences and the imposition of future ones. The characteristics of youth are and must be seen as mitigating of any punishment that an adult would receive for the same crime. And if the lower courts are not up to the task, youthful offenders will follow in the steps of Terrance Graham and Christopher Simmons by looking to the Supreme Court to protect them when the vicissitudes of majoritarian politics cause those who should know better to lose sight of the fact that they are still kids.