The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time

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Barry C. Feld*

I. INTRODUCTION

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

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

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² *Id.* at 569–72.

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

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

⁵ *Miller v. Alabama*, 132 S. Ct. 2455, 2467 (2012) (finding “the mandatory scheme flawed because it gave no significance to ‘the character and record of the individual offender or the circumstances’ of the offense and ‘exclud[ed] from consideration . . . the possibility of compassionate or mitigating factors.’”)
"some meaningful opportunity to obtain release." Similarly, Miller/Jackson only required an individualized evaluation of culpability and consideration of the mitigating qualities of youthfulness, but did not preclude an LWOP sentence for juveniles who murder.

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

II. ROPER V. SIMMONS AND DIMINISHED RESPONSIBILITY

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

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6 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Earlier decisions adverted to the importance of considering youthfulness as a mitigating factor in capital sentencing. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (remanding sixteen-year-old defendant for resentencing after trial court's failure properly to consider youthfulness as a mitigating factor and noting that "youth is more than a chronological fact" and "minors, especially in their earlier years, generally are less mature and responsible than adults."); Thompson v. Oklahoma, 487 U.S. 815, 822-23 (1988) (plurality opinion) (concluding that fifteen-year-old offenders lacked culpability to warrant execution). Thompson's proportionality analysis considered both objective factors—e.g., state statutes, jury practices, and the views of national and international organizations—and the justices' own subjective sense of "civilized standards of decency." Id. at 830. Thompson emphasized that deserved punishment must reflect individual culpability and concluded that "[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." Id. at 834.
old youths convicted of murder. In 2005, Roper overruled Stanford and prohibited states from executing youths for crimes committed prior to eighteen years of age. Roper relied on the analytic methodology the Court used earlier in Atkins v. Virginia to bar execution of defendants with mental retardation. Roper found that state laws and jury decisions evidenced a national consensus against executing juveniles. The Roper majority's proportionality analysis offered three reasons why states could not punish juveniles as severely as adults. First, juveniles' immature judgment and limited self-control cause them to act impulsively and without full appreciation of consequences. Second, juveniles' greater susceptibility to negative peer influences and inability to escape their criminogenic environments reduce their responsibility. Third, their transitory personality development provides less reliable evidence of depraved character.

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

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

9 Atkins v. Virginia, 536 U.S. 304, 321 (2002) (barring states from executing defendants with mental retardation). Atkins found a national consensus existed because thirty states barred the practice and few states actually executed offenders with mental retardation. Id. at 314–16 (counting state statutes and emphasizing that "[t]here is not so much the number of these States that is significant, but the consistency of the direction of change" that enabled the Court to find the existence of a national consensus). The Atkins Justices' independent proportionality analysis concluded that mentally impaired defendants lacked the culpability to warrant execution. Id. at 315–16. Commentators noted the constitutional implications of Atkins' proportionality analyses for executing juvenile offenders. See, e.g., Jeffrey Fagan, Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles From Capital Punishment, 33 N.M. L. Rev. 207, 207 (2003) (noting that "The Atkins decision . . . naturally raises the question: what about juveniles?"); Barry C. Feld, Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents, 32 Hofstra L. Rev. 463, 463–64 (2003) ("[T]he same psychological and developmental characteristics that render mentally retarded offenders less blameworthy than competent adult offenders also characterize the immaturity of judgment and reduced culpability of adolescents and should likewise prohibit their execution.").

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

11 Roper, 543 U.S. at 569–72.

12 Id. at 569 ("[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often that in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.").

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

14 Id. at 570 ("[T]he character of a juvenile is not as well formed as that of an adult."). Because juveniles' character is transitional, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a great possibility exists that a minor's
These developmental features—immature judgment, lack of self-control, and susceptibility to social influences—also negated retributive and deterrent justifications for the death penalty. As a result of Roper, states converted the sentences of seventy youths on death row to life without the possibility of parole.

A. Categorical vs. Individual Diminished Responsibility

The Roper majority and dissents differed on several issues, but they...
disagreed fundamentally whether to bar the death penalty categorically or to evaluate youths' culpability individually. Justice Kennedy opted for a categorical ban:

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

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

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18 Compare id. at 572–73 (majority opinion) (“The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability”), with id. at 602–03 (O’Connor, J., dissenting) (“[T]hese [Eighth Amendment] concerns may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant’s immaturity, his susceptibility to outside pressures, his cognizance of the consequences of actions, and so forth.”), and id. at 620 (Scalia, J., dissenting) (“[The majority’s] startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with ‘mak[ing] the difficult and uniquely human judgments that defy codification and that build[d] discretion, equity, and flexibility into a legal system.’” (quoting McCleskey v. Kemp, 481 U.S. 279, 311 (1987))).

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

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

21 See Elizabeth F. Emens, *Aggravating Youth: Roper v. Simmons and Age Discrimination*, 2005 SUP. CT. REV. 51, 83 (2005) (arguing that “to the extent we see or want to see childhood as a time of innocence, cognitive dissonance may prompt us to reconceive a child who does terrible things as an adult.”).

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

B. Developmental Psychology and Adolescent Culpability

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

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

by juveniles and concluding that “[i]t is a grave injustice, not only to the victim and the victim’s family, but also to society as a whole . . . by not basing its decision on the respondent’s moral culpability but rather on the Justices’ individual perceptions and biases”); Benyomin Forer, Comment, Juveniles and the Death Penalty: An Examination of Roper v. Simmons and the Future of Capital Punishment, 35 Sw. U. L. Rev. 161, 171–75, 180 (2006) (summarizing facts of egregious cases); Steven J. Wernick, Constitutional Law: Elimination of the Juvenile Death Penalty—Substituting Moral Judgment for a True National Consensus, 58 Fla. L. Rev. 471 (2006); Moin A. Yahya, Deterring Roper’s Juveniles: Using a Law and Economics Approach to Show that the Logic of Roper Implies that Juveniles Require the Death Penalty More Than Adults, 111 Penn St. L. Rev. 53, 106 (2006) (arguing that if juveniles are immature, then “harsher punishments are needed to control them.”). 23 Roper, 543 U.S. at 569 (observing summarily that juveniles are immature, impulsive, and irresponsible).

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

Denno, supra note 24, at 382–87 (arguing that while the Court relies on the “scientific and sociological studies respondent and his amici cite,” it fails to identify which studies or data supported its conclusions about the differences between adolescents and adults).

26 See E. Thomas Sullivan & Richard S. Frase, Proportionality Principles in American Law: Controlling Excessive Government Actions 161 (2009) (arguing that “the offender’s blameworthiness for an offense is generally assessed according to two elements: the nature and seriousness of the harm foreseeably caused or threatened by the crime and the offender’s culpability in committing the crime (in particular, the offender’s degree of intent (mens rea), motives, role in the offense, and mental illness or other diminished capacity,)”); Andrew von Hirsch, Doing Justice: The Choice of Punishments 48 (1976) (“[P]unishing someone conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it.”); Richard S. Frase, Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?, 89 Minn. L. Rev. 571, 589–91 (2005) [hereinafter Frase, Proportionality] (summarizing principles of retributive sentencing theory); see also Andrew von Hirsch, Censure and Sanctions 15 (1993); Andrew von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals 31 (1985).
culpability—which determine how much punishment an actor deserves.  

The degree of blameworthiness of an offense is generally assessed according to two kinds of elements: the nature and seriousness of the harm caused or threatened by the crime; and the offender’s degree of culpability in committing the crime, in particular, his or her degree of intent (mens rea), motives, role in the offense, and mental illness or other diminished capacity.

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

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

28 Frase, Proportionality, supra note 26, at 590.

29 See, e.g., Ernest Van Den Haag, Punishing Criminals 174 (1975) (arguing that the victim of a crime is just as victimized, regardless of the age of the perpetrator, and the need for social defense is the same).

30 Just deserts theory and criminal law grading principles base the degree of deserved punishment on the actor’s culpability. For example, a person may cause the death of another individual with premeditation and deliberation, intentionally, "in the heat of passion," recklessly, negligently, or accidentally. See Jerome Hall, General Principles of Criminal Law 105–45 (2d ed. 1960). The criminal law treats the same objective harm—for example, the death of a person—quite differently depending on the actor’s culpability.

Offender culpability is central to ensuring rational and proportional sentencing. See Tison v. Arizona, 481 U.S. 137, 156 (1987) (reasoning that “Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.”); see also David O. Brink, Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes, 82 Tex. L. Rev. 1555, 1557 (2004) ("[J]uveniles tend to be less competent in discriminating right from wrong and in being able to regulate successfully their actions in accord with these discriminations. If they are less competent, then they are less responsible."); Elizabeth S. Scott & Thomas Grisso, The Evolution of
Developmental psychology and neuroscience research inform how children’s thinking and behaving change and may influence criminal responsibility. By mid-adolescence, most youths can distinguish right from wrong and reason similarly to adults under controlled conditions. But the ability to make good

Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88 J. CRIM. L. & CRIMINOLOGY 137, 176 (1997) ("[Adolescents’] criminal choices are presumed less to express individual preferences and more to reflect the behavioral influences characteristic of a transitory developmental stage that are generally shared with others in the age cohort. This difference supports drawing a line based on age, and subjecting adolescents to a categorical presumption of reduced responsibility."); Laurence Steinberg & Elizabeth Cauffman, The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders, 6 VA. J. SOC. POL’Y & L. 389, 407–09 (1999) (explaining that youths lack “the ability to control [their] impulses, to manage [their] behavior in the face of pressure from others to violate the law, or to extricate [themselves] from a potentially problematic situation,” and that these deficiencies render them less blameworthy).

Zimring uses the term “diminished responsibility” to refer to adolescents who possess “the minimum abilities for blameworthiness and thus for punishment ... [whose] immaturity ... still suggests that less punishment is justified.” Zimring, supra note 27, at 273. See also FRANKLIN ZIMRING, AMERICAN YOUTH VIOLENCE 75 (1998) [hereinafter ZIMRING, AMERICAN YOUTH VIOLENCE] (arguing that “even after a youth passes the minimum threshold of competence, this barely competent youth is not as culpable and therefore not as deserving of a full measure of punishment as a fully qualified adult offender.”); Scott & Steinberg, Blaming Youth, supra note 27, at 830 (arguing that compared with adults, youths act more impulsively, weigh consequences differently from adults, and discount risks because of normal developmental processes that “undermine [their] decisionmaking capacity in ways that are accepted as mitigating culpability”).

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

For example, adolescents and adults make informed consent medical decisions similarly. See Roper v. Simmons 543 U.S. 551, 617–21 (2005) (Scalia, J., dissenting) (arguing that the Court cited research on adolescents’ competence to make informed consent decisions in the context of abortion); Stephen J. Morse, Immaturity and Irresponsibility, 88 J. CRIM. L. & CRIMINOLOGY 15, 52–53 (1998) (concluding that cognitive capacity and formal reasoning ability of mid-adolescents does not differ significantly from that of adults). Research on young peoples’ ability to make informed medical decisions tends to support equating adolescents’ and adults’ cognitive abilities. See Thomas Grisso & Linda Vierling, Minors’ Consent to Treatment: A Developmental Perspective, 9 PROF. PSYCHOL. 412, 423 (1978) (finding that little research evidence exists to support that adolescents aged fifteen or older possess less competence than adults to provide knowing, intelligent, and voluntary informed consent); Lois A. Weithorn & Susan B. Campbell, The Competency of Children and Adolescents to Make Informed Treatment Decisions, 53 CHILD DEV. 1589, 1595 (1982) (noting that fourteen-year-olds’ choices did not differ significantly from those of adults in terms of “evidence of choice, reasonable[ness of] outcome, rational[ity of] reason[ing], and understanding” when responding to medical and psychological treatment hypotheticals). But see Elizabeth Cauffman et al., Justice for Juveniles: New Perspectives on Adolescents’ Competence and Culpability, 18 QUINNIPIAC
choices under laboratory conditions differs from decisions made in stressful circumstances with incomplete information. Emotions, excitement, or stress contribute to riskier decisions by youths than by adults.

1. Immature Judgment and Self-Control

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

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


\textsuperscript{36} See Scott & Steinberg, Blaming Youth, supra note 27, at 813 ("Psycho-social development proceeds more slowly than cognitive development. As a consequence, even when adolescent cognitive capacities approximate those of adults, youthful decision making may still differ due to immature judgment."); Elizabeth Scott et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 L. & Hum. Behav. 221, 224 (1995) [hereinafter Scott et al., Legal Contexts]; Kim Taylor-Thompson, States of Mind/States of Development, 14 Stan. L. & Pol'y Rev. 143, 152 (2003) ("[F]or all the importance of cognitive development, aspects of behavior that involve interpersonal and affective experience may offer even more information about an adolescent's decision-making processes.").

\textsuperscript{37} See, e.g., Stephen J. Morse, Immaturity and Irresponsibility, 88 J. Crim. L. & Criminology 15, 53 (1998) (describing characteristics of youths that distinguish their decision making capabilities from those of adults); Scott & Steinberg, Blaming Youth, supra note 27, at 813 ("[E]ven when adolescent cognitive capacities approximate those of adults, youthful decision-making may still differ due to immature judgment. The psycho-social factors most relevant to differences in judgment include: (a) peer orientation, (b) attitudes toward and perception of risk, (c) temporal perspective, and (d) capacity for self-management."); Scott et al., Legal Contexts, supra note 36, at 229–35 (describing psycho-social and developmental factors that contribute to juveniles' immature judgment); Elizabeth S. Scott and Laurence Steinberg, Adolescent Development and the Regulation of Youth Crime, 18 The Future of Children 15, 20 (2008) (noting that "considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices."); Steinberg & Cauffman, Maturity of Judgment, supra note 33, at 252 (emphasizing temperance, perspective, and judgment as ways in which adolescents' thinking diverges from adults).

\textsuperscript{38} See Elizabeth S. Scott & Laurence Steinberg, Adolescent Development and the Regulation of Youth Crime, 18 The Future of Children 15, 20 (2008) (suggesting that because youths assess and weigh risks differently than adults, they are less likely to anticipate that someone might get hurt or killed in the commission of a felony); Scott & Grisso, supra note 30, at 160–61 (noting that psycho-social developmental factors affecting judgment and criminal responsibility in adolescents include: "(1) conformity and compliance in relation to peers, (2) attitude toward and perception of risk, and (3) temporal perspective"); Scott & Steinberg, supra note 27, at 813; Scott et al., Legal Contexts, supra note 36, at 227 (proposing "judgment" framework to evaluate quality of adolescent decision-making that includes not only cognitive capacity, but also influence of factors such as "conformity and compliance in relation to peers and parents, attitude toward and perception of risk, and temporal perspective").
The youth discount

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

39 See Lita Furby & Ruth Beyth-Marom, Risk Taking in Adolescence: A Decision-Making Perspective, 12 DEVELOPMENTAL REV. 1, 19 (1992) ("[A]dolescents [may] judge some negative consequences in the distant future to be of lower probability than do adults or to be of less importance than adults do."); see also Thomas Grisso, Society’s Retributive Response to Juvenile Violence: A Developmental Perspective, 20 L. & HUM. BEHAV. 229, 241 (1996) (arguing that “midadolescents typically might not yet have achieved adultlike ways of framing problems . . . and generating alternative responses to stressful situations or weighing the potential consequences of their alternatives."); Thomas Grisso, What We Know About Youths’ Capacities as Trial Defendants, in YOUTH ON TRIAL 139, 161 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[A]dolescents . . . may differ from adults in the weights that they give to potential positive and negative outcomes . . . [and] are more likely than adults to give greater weight to anticipated gains than to possible losses or negative risks.").

40 See Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) ("Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."); Elizabeth S. Scott, Criminal Responsibility in Adolescence Lessons from Developmental Psychology, in YOUTH ON TRIAL 291, 304–05 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Scott, Lessons] ("Adolescents, perhaps because they have less knowledge and experience, are less aware of risks than are adults . . . [T]he fact that adolescents have less experience and knowledge than adults seems likely to affect their decision making in tangible and intangible ways." (citation omitted)).

41 See Taylor-Thompson, supra note 36, at 153 ("In situations where adults will likely perceive and weigh multiple alternatives as part of rational decision-making, adolescents typically see only one option. This inflexible ‘either-or-mentality’ becomes especially acute under stressful conditions.").

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

43 See Scott & Steinberg, Blaming Youth, supra note 27, at 815 ("[A]dolescents are less risk-averse than adults, generally weighing rewards more heavily than risks in making choices. In part, this may be due to limits on youthful time perspective; taking risks is more costly for those who focus on the future."); Scott & Grisso, supra note 30, at 163 (arguing that adolescents are more willing to take physical and social risks for the sake of experiencing novel and complex sensations).

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

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

\textsuperscript{45} See Scott & Steinberg, Blaming Youth, supra note 27, summarizing research on brain development and its implications for adolescent self-control:

[R]egions of the brain implicated in processes of long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward continue to mature over the course of adolescence, and perhaps well into young adulthood. At puberty, changes in the limbic system—a part of the brain that is central in the processing and regulation of emotion—may stimulate adolescents to seek higher levels of novelty and to take more risks; these changes also may contribute to increased emotionality and vulnerability to stress. At the same time, patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving planning and decision making, suggest that these higher-order cognitive capacities may be immature well into middle adolescence.


\textsuperscript{46} See Dahl, supra note 34, at 60 (arguing that affect regulation relates to the control of feelings and behavior and “involves some inhibition, delay, or intentional change of emotional expression or behavior to conform with learned social rules, to meet long-term goals, or to avoid future negative consequences”); Staci A. Gruber & Deborah A. Yurgelun-Todd, Neurobiology and the Law: A Role in Juvenile Justice, 3 OHIO ST. J. CRIM. L. 321, 330 (2006) (“An adolescent’s level of cortical development may therefore be directly related to her or his ability to perform well in situations requiring executive cognitive skills. Younger, less cortically mature adolescents may be more at risk for engaging in impulsive behavior than their older peers . . . ”); Laurence Steinberg, A Dual Systems Model of Adolescent Risk-Taking, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 217 (2010); Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 DEVELOPMENTAL REV. 78, 91–92 (2008).

\textsuperscript{47} The prefrontal cortex (PFC) operates as the CEO of the brain and controls planning, goal-directed responses, risk assessment, and impulse control. \textit{See, e.g.}, B.J. Casey et al., Structural and Functional Brain Development and Its Relation to Cognitive Development, 54 BIOLOGICAL PSYCHOL. 241, 244 (2000) (associating PFC with a variety of cognitive abilities and behavior control); B.J. Casey et al., The Adolescent Brain, 28 DEVELOPMENTAL REV. 62, 68 (2008) (reporting that brain’s
During late-adolescence, increased myelination\(^{48}\) and synaptic pruning\(^{49}\) improve reasoning ability and impulse control.\(^{50}\) By contrast, the limbic system controls instinctual behavior, such as the fight-or-flight response.\(^{51}\) During adolescence, the

\(^{48}\) Myelin is a white, fatty substance that forms a sheath that surrounds and insulates the neural axons and facilitates more rapid and efficient neurotransmission. Myelination and brain growth in the frontal cortex during adolescence improve brain function by acting like the insulation of a wire to increase the speed of neural electro-conductivity. Zoltan Nagy, Helena Westerberg & Torkel Klingberg, Maturation of White Matter is Associated with the Development of Cognitive Functions During Childhood, 16:7 J. COGNITIVE NEUROSCI. 1227, 1231 (2004); ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND 144 (2001) (explaining that "[t]he presence of myelin makes communication between different parts of the brain faster and more reliable.").

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

\(^{50}\) See Gruber & Yurgelun-Todd, supra note 46, at 325 ("The significant correlations between white matter volume and processing speed are consistent with evidence suggesting that increased myelination of axons produces faster conduction velocity of neural signals and more efficient processing of information, and further suggest that some of the increased cognitive abilities characteristic of adult maturation may be associated with developmental increases in relative white matter volume."); Paus et al., supra note 45, at 1908 ("The smooth flow of neural impulses throughout the brain allows for information to be integrated across the many spatially segregated brain regions involved in these functions. The speed of neural transmission depends not only on the synapse, but also on structural properties of the connecting fibers, including the axon diameter and the thickness of the insulating myelin sheath."); Sowell et al., Mapping Continued Brain Growth, supra note 45, at 8828 ("[I]t is likely that the visuospatial functions typically associated with parietal lobes are operating at a more mature level earlier than the executive functions typically associated with frontal brain regions.").

\(^{51}\) See, e.g., Abigail A. Baird et al., Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 195,
two systems are out of balance and teenagers rely more heavily on the limbic system and less heavily on the PFC than do adults. Youths’ heightened quest for pleasure and emotional rewards develops more rapidly than does the system for self-control and self-regulation. Although neuroscientists have not established direct links between brain development and real-life behavior nor found a way to individualize among young offenders on the basis of brain development, their research helps to explain adolescents’ impulsive behavior.

3. Peer Group Influences

Roper ascribed juveniles’ diminished responsibility to their greater susceptibility to negative peer influences. Juveniles commit crimes in groups to a greater extent than do adults. The presence of peers stimulates greater neural

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

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

53 See David E. Arredondo, Child Development, Children’s Mental Health and the Juvenile Justice System: Principle for Effective Decision-Making, 14 STAN. L. & POL’Y REV. 13, 15 (2003) (“Adolescents tend to process emotionally charged decisions in the limbic system, the part of the brain charged with instinctive (and often impulsive) reactions. Most adults use more of their frontal cortex, the part of the brain responsible for reasoned and thoughtful responses. This is one reason why adolescents tend to be more intensely emotional, impulsive, and willing to take risks than their adult counterparts.”); Dahl, supra note 34, at 64 (“These affective influences are relevant ... to many day-to-day ‘decisions’ that are made at the level of gut feelings about what to do in a particular situation (rather than any conscious computation of probabilities and risk value). These gut feelings appear to be the products of affective systems in the brain that are performing computations that are largely outside conscious awareness (except for the feelings they evoke.”).

54 Terry A. Maroney, Adolescent Brain Science After Graham v. Florida, 86 NOTRE DAME L. REV. 765, 769 (2011) (arguing that “the data support conclusions only at the aggregate level, [but] they shed little light on the developmental status of any given young person, except insofar as she is a member of the group. While links between structural attributes, brain-level functional data, and externalized behaviors are strengthening, they remain largely speculative.”); Aronson, supra note 34, at 136 (emphasizing “lack of clear causal pathway from brain structure to behavior”); Stephen J. Morse, Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note, 3 OHIO ST. J. CRIM. L. 397, 405-06 (2006) (arguing that the simple fact of neuron-anatomical differences between adolescent and adult brains does not compel differences in how the law responds to them).


56 Police arrest two or more juveniles for committing a single crime more often than they do adults. See, e.g., HOWARD N. SNYDER & MELISSA SICKMUND, NAT’L CENTER FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 77 (1999) (showing percentages of various crimes committed in groups by juveniles between 1973 and 1997); Scott & Grisso, supra
activity in the reward centers of the brain which may increase risk-taking. Youths engage in riskier behavior when together than they would when alone which increases exposure to accessorial liability for crimes they did not intend or personally commit. Youths’ reduced ability to resist peer pressures diminishes criminal responsibility compared with adults. All the defendants in Roper, Graham, Miller, and Jackson committed their crimes with one or more co-offenders.

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

Group offending increases youths’ prospects for prosecution as accessories and exposes them to the same criminal penalties as principals. See, e.g., Zimring, AMERICAN YOUTH VIOLENCE, supra note 30, at 162 (“Peer influence seems to operate through two means: social comparison and conformity. Through social comparison, adolescents measure their own behavior by comparing it to others. Social conformity . . . influences adolescents to adapt their behavior and attitudes to that of their peers.”); Taylor-Thompson, supra note 36, at 153–54 (“The choice to engage in antisocial conduct is often linked to the adolescent’s desire for peer approval. Prodding by peers can substitute for, and even overwhelm, an adolescent’s own ‘better’ judgment about whether to engage in certain conduct.”); Scott & Steinberg, Blaming Youth, supra note 27, at 813 (“[T]eens are more responsive to peer influence than are adults. Susceptibility to peer influence increases between childhood and early adolescence as adolescents begin to individuate from parental control. This susceptibility peaks around age fourteen and declines slowly during the high-school years.”).

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See, e.g., Gardner & Steinberg, supra note 58, at 626; Laurence Steinberg & Kathryn C. Monahan, Age Differences in Resistance to Peer Influence, 43 DEVELOPMENTAL PSYCHOL. 1531 (2007) (reporting that “[T]here is little doubt that peers actually influence each other and that the effects of peer influence are stronger during adolescence than in adulthood.”); Franklin E. Zimring, Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility, in YOUTH ON TRIAL 271, 282 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Zimring, Penal Proportionality] (“But if social experience in matters such as anger and impulse-management also counts, and a fair opportunity to learn to deal with peer pressures is regarded as important, expecting the experienced-based ability to resist impulses and peers to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking.”); Franklin E. Zimring, Toward a Jurisprudence of Youth Violence, 24 CRIME & JUSTICE 477, 488–90 (1998) (noting that “The ability to resist peer pressure is yet another social skill that is a necessary part of legal obedience and is not fully development in many adolescents.”).
III. GRAHAM V. FLORIDA: REFRAming PROPORTIONALITY FOR JUVENILE OFFENDERS

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


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

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

64 See, e.g., State v. Massey, 803 P.2d 340, 348 (Wash. Ct. App. 1991) (upholding a mandatory LWOP imposed on a thirteen-year-old and reasoning that test of proportionality “does not embody an element or consideration of the defendant’s age, only a balance between the crime and the sentence imposed. Therefore, there is no cause to create a distinction between a juvenile and an adult who are sentenced to life without parole for first degree aggravated murder.”); State v. Stinnett, 497 S.E.2d 696, 701–02 (N.C. Ct. App. 1998) (upholding mandatory LWOP sentence imposed on fifteen-year-old convicted of murder and noting that “when a punishment does not exceed the limits fixed by statute, the punishment cannot be classified as cruel and unusual in a constitutional sense”).

65 Professor Zimring argues:

Doctrines of diminished responsibility have their greatest impact when large injuries have
Graham v. Florida considered whether Roper’s diminished responsibility rationale would apply to a nonhomicide juvenile offender sentenced to life without parole. Graham arose at the intersection of two lines of Eighth Amendment proportionality cases. One line of cases raised “gross disproportionality” claims and challenged term-of-years sentences that greatly exceeded the seriousness of the crime. The other line of cases made “categorical disproportionality” claims and challenged imposition of the death penalty on categories of offenders or offenses—e.g., those with mental retardation, juveniles, and nonhomicide offenses.

Challenges to length-of-years sentences required the Court to consider whether the Eighth Amendment contains a proportionality principle that applies to non-capital sentences. Solem v. Helm held that a sentence of life without possibility of parole for a property crime violated the Constitution. Solem’s proportionality analyses focused on three factors: “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.” By contrast, Harmelin v. Michigan upheld a life without parole sentence imposed on a first-time drug dealer. After Harmelin,
courts only review length-of-years sentences that cross some ill-defined "grossly disproportionate" threshold.\textsuperscript{72}

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

\textit{Graham} posed "a categorical challenge to a term-of-years sentence."\textsuperscript{76} It required the Court to decide the validity of a sentence—life without parole—applied to "an entire class of offenders who have committed a range of crimes,"\textsuperscript{77} rather than to decide whether it was grossly disproportionate as applied to the individual. \textit{Graham} repudiated the Court's historical "death is different" distinction, extended \textit{Roper}'s reduced culpability rationale, and "declare[d] an sentence by finding it proportional under an Eighth Amendment analysis). A majority of the Court could not agree with either opinion's legal reasoning. However, Justice Kennedy's \textit{Harmelin} concurrence provided the operative rule to assess disproportionate sentences. \textit{Id.} at 1001 (arguing that the Eighth Amendment prohibits "only extreme sentences that are 'grossly disproportionate' to the crime"); Frase, \textit{Proportionality, supra} note 26, at 581–83 (analyzing \textit{Harmelin} and the factors Justice Kennedy proposed).

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


\textit{Graham, 130 S. Ct. at 2022–23.}
entire class of offenders immune from a noncapital sentence...

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

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

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

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

80 *Graham*, 130 S.Ct. at 2023. Although thirty-seven states authorized LWOP sentences for juvenile nonhomicide offenders, few states, other than Florida, actually imposed it. There are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just 10 States. Thus, only 11 jurisdiction nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while 26 states . . . do not impose them despite apparent statutory authorization.

*Id.* at 2024 (citations omitted).

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

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

83 *Id.* at 2026; see *supra* note 73 and accompanying text.

84 *Graham*, 130 S. Ct. at 2027; see also *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (barring
of juveniles who did not murder was doubly diminished, an LWOP sentence was grossly disproportionate.\textsuperscript{85}

Although execution differs from life imprisonment, the Court equated the death penalty with LWOP sentences for juveniles as similarly ultimate sanctions—"the sentence alters the offender's life by a forfeiture that is irrevocable."\textsuperscript{86} No penal rationale—retribution,\textsuperscript{87} deterrence,\textsuperscript{88} incapacitation,\textsuperscript{89} or rehabilitation\textsuperscript{90}—justified the penultimate sanction for nonhomicide juvenile offenders. As a result of "the limited culpability of juvenile nonhomicide offenders and the severity of life without parole sentences," \textit{Graham} prohibited states from imposing a life sentence for rape of a child); \textit{Coker v. Georgia}, 433 U.S. 584, 592 (1977) (barring the death penalty for rape of an adult woman).

\textsuperscript{85} \textit{See Graham}, 130 S. Ct. at 2027 (noting that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.").

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

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

\textsuperscript{88} \textit{Id.} at 2029 (concluding that the marginal deterrent effect of an LWOP sentence on a juvenile cannot justify the sentence).

\textsuperscript{89} \textit{Id.} (acknowledging that incapacitation might reduce future risk of offending, but arguing that a judge cannot predict at the time of sentencing that a "juvenile offender forever will be a danger to society" or will remain irredeemably incorrigible).

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

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

LWOP also denies youth access to vocational training programs or rehabilitative services afforded to those who may return to the community. \textit{Graham}, 130 S. Ct. at 2030. \textit{See also Ashley Nellis, The Sentencing Project, The Lives of Juvenile Lifers: Findings from a National Survey} 4 (2012) (reporting that most juvenile lifers do not participate in vocational training or rehabilitative programs because of state or prison policies).
without parole sentence on youths who did not commit murder.  

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

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

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91 *Graham*, 130 S. Ct. at 2030.

92 The Court noted that:

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

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


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

95 *Id.* at 2039. For example, the Ninth Circuit, in *Harris v. Wright*, rejected a fifteen-year-old juvenile's proportionality challenge to a mandatory LWOP sentence: "Youth has no obvious bearing on this problem: If we can discern no clear line for adults, neither can we for youths. Accordingly, while capital punishment is unique and must be treated specially, mandatory life without parole is, for young and old alike, only an outlying point on the continuum of prison sentences." 93 F.3d 581, 585
previous non-capital proportionality decisions that defined crime seriousness primarily on the basis of the harm caused.\textsuperscript{96} Although he characterized Graham’s LWOP sentence as grossly disproportionate,\textsuperscript{97} he did not identify what factors distinguish it from other youths’ nonhomicide crimes in which an LWOP might be imposed.\textsuperscript{98}

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

\textsuperscript{96} See supra notes 60–65 and accompanying text.

\textsuperscript{97} Graham, 130 S. Ct. at 2041 (Roberts, J., concurring) (noting that “Florida is an outlier in its willingness to impose sentences of life without parole on juveniles convicted of nonhomicide crimes.”).

\textsuperscript{98} See, e.g., Frase, supra note 60, at 54 (noting that “Justice Roberts’s concurrence continued to apply a standard of ‘gross disproportionality’ without saying what that means—disproportionate relative to what?”).

\textsuperscript{99} Justice Thomas objected that:

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

\textsuperscript{100} Graham, 130 S. Ct. at 2046–47 (Thomas, J., dissenting). Justice Thomas complained that the majority’s reinvigorated non-capital proportionality analyses “impose[s] a categorical proportionality rule banning life-without-parole sentences not just in this case, but in every case involving a juvenile nonhomicide offender, no matter what the circumstances.”

\textsuperscript{101} Id. at 2055 (arguing that “The integrity of our criminal justice system depends on the ability of citizens to stand between the defendant and an outraged public and dispassionately determine his guilt and the proper amount of punishment based on the evidence presented.”).
without-parole sentences for juveniles who commit homicides." He characterized this as disproportionality based on categories of crimes rather than characteristics of offenders, an inconsistency the Court would later address in Miller and Jackson.

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

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

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102 Id.
103 Id. at 2055–56 (objecting that “the Court’s conclusion that life-without parole sentences are ‘grossly disproportionate’ for juvenile nonhomicide offenders in fact has very little to do with its view of juveniles, and much more to do with its perception that ‘defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.’”); see also Wallace, supra note 76, at 59 (arguing that “the very essence of Graham’s reasoning should also preclude life without parole even for juvenile murderers . . . [B]y stating that juveniles are less culpable than adults[, t]he Court’s reasoning does not distinguish between the non-homicide [sic] and homicide juvenile offender . . . ”).
105 Id.
106 Defining a crime’s seriousness primarily on the basis of the harm caused and the defendant’s mens rea—knowledge of wrongfulness to cause that harm-precludes any individualized consideration of culpability or diminished responsibility. See In re Stanford, 537 U.S. 968, 969 (2002) (Stevens, J., dissenting) (advocating proportionality analyses that include an evaluation of the offender’s culpability); Brink, supra note 30, at 1576 (“[E]ven if juveniles cause the same harm as their adult counterparts, they are less culpable, because less responsible, because less normatively competent.”); Logan, supra note 27, at 703 (“By divorcing ‘crime’ from offender culpability in proportionality analysis, these courts subscribe to an essentially circular inquiry: because murder, for instance, is a very ‘serious’ crime in the eyes of the legislature, it can be met with a very ‘serious’ statutory punishment.”).

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

107 See, e.g., Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) (prohibiting life sentence for fourteen-year-old convicted of rape because “[t]he intent of the legislature in providing a penalty of life imprisonment without benefit of parole . . . was to deal with dangerous and
pleas to consider youthfulness as a mitigating factor.\textsuperscript{108} Although \textit{Roper} treated youthfulness as a categorical mitigating factor, many trial judges treat it as an aggravating factor when they sentence juvenile murderers.\textsuperscript{109} Even if LWOP

 incurrible individuals who would be a constant threat to society. We believe that incorriibility is inconsistent with youth.”); Naovarath v. State, 779 P.2d 944, 947 (Nev. 1989) (finding that LWOP sentence imposed on thirteen-year-old convicted of murder violated state constitution provisions against cruel and unusual punishment, but granting only limited right to be considered for parole eligibility in the distant future); People v. Dillon, 668 P.2d 697, 726–27 (Cal. 1983) (reducing life sentence imposed on seventeen-year-old convicted of felony murder because he “was an unusually immature youth”); People v. Miller, 781 N.E.2d 300, 308 (Ill. 2002) (rejecting as disproportionate an LWOP sentencing imposed on a fifteen-year-old, passive accessory to a felony murder and holding that “a mandatory sentence of natural life in prison with no possibility of parole grossly distorts the factual realities of the case and does not accurately represent defendant’s personal culpability such that it shocks the moral sense of the community”).

\textsuperscript{108} \textit{See}, e.g., Tate v. State, 864 So.2d 44, 54 (Fla. Dist. Ct. App. 2003) (rejecting the argument that “a life sentence without the possibility of parole is cruel or unusual punishment on a twelve-year-old child . . . .”); Edmonds v. State, 955 So.2d 864, 895–97 (Miss. Ct. App. 2006) (approving an LWOP sentence imposed on a youth convicted of murder committed at thirteen years of age); State v. Standard, 569 S.E.2d 325, 329 (S.C. 2002) (upholding a “two-strike” LWOP sentence imposed on a fifteen-year-old convicted of burglary based on his prior juvenile conviction for a serious felony, a sentence presumably invalid after \textit{Graham}); State v. Foley, 456 So.2d 979, 984 (La. 1984) (affirming LWOP sentence imposed on fifteen-year-old juvenile convicted of rape); State v. Pilcher, 655 So.2d 636, 644 (La. Ct. App. 1995) (upholding LWOP sentence imposed on fifteen-year-old); Swinford v. State, 653 So.2d 912, 918 (Miss. 1995) (upholding LWOP sentence imposed on fourteen-year-old convicted of aiding and abetting murder); State v. Green, 502 S.E.2d 819, 832 (N.C. 1998) (upholding life imprisonment sentence for thirteen-year-old convicted of rape, recognizing that “the chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime,” but emphasizing that Green was morally responsible for the crime because he possessed sufficient mental capacity to form criminal intent); Paul G. Morrissey, \textit{Do the Adult Crime, Do the Adult Time: Due Process and Cruel and Unusual Implications for a 13-Year-Old Sex Offender Sentenced to Life Imprisonment} in \textit{State v. Green}, 44 \textit{VILL. L. REV.} 707, 738 (1999); \textit{AMNESTY INT’L & HUMAN RIGHTS WATCH}, \textit{supra} note 104, at 1 (noting that when courts sentence children as adults, the punishment is all too often no different from that given to adults).

\textsuperscript{109} \textit{See} Donna Bishop \& Charles Frazier, \textit{Consequences of Transfer, in Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court} 227, 236–37 (Jeffrey Fagan \& Franklin E. Zimring eds. 2000) (comparing the sentences imposed on youths transferred to criminal courts with those of adults and noting that “transferred youths are sentenced more harshly, both in terms of the probability of receiving a prison sentence and the length of the sentences they receive. In other words, we see no evidence that criminal courts recognize a need to mitigate sentences based on considerations of age and immaturity.”); Megan C. Kurlychek \& Briand D. Johnson, \textit{Juvenility and Punishment: Sentencing Juveniles in Adult Criminal Court}, 48 \textit{CRIMINOLOGY} 725 (2010) (reporting that judges sentenced waived juveniles more harshly than similar young adult offenders in four states); David S. Tanenhaus \& Steven A. Drizin, \textit{Owing to the Extreme Youth of the Accused”}; \textit{The Changing Legal Landscape of Juvenile Homicide}, 92 \textit{J. CRIM. L. & CRIMINOLOGY} 641, 665 (2003) (citing the impact of “get tough” politics and arguing that “[b]y the mid-1990's [sic], youth had ceased to be a mitigating factor in adult court, and instead had become a liability.”).

Youths convicted of murder are more likely to enter prison with LWOP sentences than are adults convicted of murder. \textit{AMNESTY INT’L & HUMAN RIGHTS WATCH}, \textit{supra} note 104, at 33 (reporting that judges imposed LWOP sentences on juveniles convicted of murder more frequently than they did adults and concluding that “states have often been more punitive towards children who
sentences are not mandatory, judges can impose consecutive terms that create functional LWOP sentences.\textsuperscript{110}

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

The Court in \textit{Miller v. Alabama} and \textit{Jackson v. Hobbs} extended \textit{Roper} and \textit{Graham} to their logical conclusion and banned \textit{mandatory} LWOP sentences for youths convicted of murder.\textsuperscript{116} Justice Kagan responded to the claim in Justice
Thomas’ *Graham* dissent that *Graham* rested on categories of crimes rather than characteristics of offenders, emphasizing that “none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific.”¹¹⁷

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

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

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

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

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

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

¹²⁰ *Miller*, 132 S. Ct. at 2463 (postulating that “[t]he concept of proportionality is central to the Eighth Amendment,” and precludes “sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty.”) Justice Kagan emphasized that “children are constitutionally different from adults for purposes of sentencing” and invoked the Court’s death penalty jurisprudence to require “individualized sentencing for defendants facing the most serious penalties.” *Id.* at 2464, 2460. She noted that “In those cases, we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death.” *Id.* at 2463; see, e.g., *Woodson* v. North Carolina, 428 U.S. 280 (1976); *Lockett* v. Ohio, 438 U.S. 586 (1978).
considering youthfulness or other mitigating factors and thereby disproportionally equate juveniles' and adults' culpability. Miller/Jackson asserted that once judges conducted an individualized culpability assessment and properly considered youths' generic diminished responsibility, there would be very few occasions in which to impose an LWOP sentence.

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

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

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

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

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

123 Id. at 2485–86 (Thomas, J., dissenting).

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

125 Id. at 2479 (Roberts, C.J., dissenting).

126 Id. at 2471 (majority opinion) (noting that "[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime . . . [but] mandates only that a sentence follow a
assessment avoided the danger that juvenile waiver statutes and criminal sentencing provisions could produce more severe outcomes than the legislature intended.  

Justice Breyer filed a separate concurrence in Jackson because fourteen-year-old Jackson was convicted of felony murder and received a mandatory LWOP sentence as an accomplice rather than as the shooter. The Court’s felony-murder decisions limited the death penalty to those who killed or intended to kill. Because Graham recognized the “twice diminished” moral culpability of youths “who do not kill, intend to kill, or foresee that life will be taken,” Justice Breyer reasoned that a juvenile who neither killed nor intended to kill is no more culpable than a youth convicted of a nonhomicide felony. As a result, at Jackson’s certain process—considering an offender’s youth and attendant characteristics before—imposing a particular penalty.”).  

Justice Kagan observed:  

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

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

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

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

[134]
resentencing hearing, the trial judge could not impose an LWOP sentence.

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

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

_Miller/Jackson_ requires individualized culpability assessments and recognizes

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

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


135 _Graham_, 130 S. Ct. 2011, 2034 (2010). The Court asserted: while the Eighth amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

_Id_. at 2030.
the mitigating role of youthfulness.\textsuperscript{136} However, neither decision provides legislatures, judges, or parole boards with any practical guidance as to how to incorporate the mitigating qualities of youth into sentencing or release decisions. State courts are divided whether to apply \textit{Miller/Jackson} retroactively to the thousands of youths who previously received mandatory LWOP sentences for murder.\textsuperscript{137} State legislatures are scrambling to revise sentencing laws to convert mandatory LWOP statutes to life with the possibility of parole,\textsuperscript{138} to impose minimum terms of years,\textsuperscript{139} or to specify mitigating factors in sentencing

\textsuperscript{136} Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (instructing judges “to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”).


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

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

\textsuperscript{139} \textit{See}, e.g., \textit{CAL. PENAL CODE} § 1170(2)(B) (West 2013) (allowing juvenile sentenced to
guidelines. To circumvent a Miller/Jackson resentencing hearing, the Iowa Governor commuted mandatory LWOP sentences of thirty-eight juveniles to mandatory sixty-year prison terms instead.

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

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


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


See Scott, Lessons, supra note 40, at 309 (“[Adolescents’ choices] reflect immaturity and inexperience and are driven by developmental factors that will change in predictable and systemic ways. A legal response that holds young offenders accountable, while recognizing that they are less culpable than their adult counterparts, serves the purposes of criminal punishment without violating the underlying principle of proportionality.”); Zimring, Penal Proportionality, supra note 59, at 278 (“[E]ven after a youth passes the minimum threshold of competence that leads to a finding of capacity to commit crime, the barely competent youth is not as culpable and therefore not as deserving of a full measure of punishment as a fully qualified adult offender.”); ZIMRING, AMERICAN YOUTH VIOLENCE, supra note 30, at 144 (“[W]herever a young offender’s need for protection, education, and skill development can be accommodated without frustrating community security, there is a government obligation to do so.”); Scott & Grisso, supra note 30, at 182 (“Subjecting thirteen-year-old offenders to the same criminal punishment that is imposed on adults offends the principles that define the boundaries of criminal responsibility.”); Victor Streib & Bernadette Schrempp, Life Without Parole for Children, 21 CRIM. JUST. 4, 12 (Winter 2007) (“[Adolescents’] crimes may be the same as those of adults, but these offenders simply are not adults and should not be sentenced as if they were.”).

Miller, 132 S. Ct. at 2482 (Roberts, C.J. dissenting) (noting that “[t]he principle behind today’s decisions seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences
Roper eschewed individualized culpability assessments and adopted a categorical sentencing rule because “[t]he differences between juvenile and adult offenders are too well marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”\textsuperscript{145} The Court feared that a judge or jury could not properly consider the mitigating quality of youthfulness when confronted with a hideous crime.\textsuperscript{146} Roper and Graham based their categorical holding on the inability of clinicians or jurors to distinguish between most juveniles who are immature and a rare more culpable youth.\textsuperscript{147} They adopted a categorical rule despite their recognition that juveniles’ culpability could vary.\textsuperscript{148} The Court reasoned that notwithstanding individual variability, a rule that occasionally “under-punishes the rare, fully-culpable adolescent still will produce less aggregate injustice than a discretionary system that improperly, harshly sentences many more undeserving youths.”\textsuperscript{149} Roper and Graham’s categorical

\begin{footnotesize}
\textsuperscript{146} See id. at 573 (“An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”). Emens, supra note 21, at 87 (“Even if there are a few juveniles who could be among the worst of society’s offenders, jurors will make errors of unacceptable frequency and magnitude. For this reason, we cannot trust ourselves to decide that a child is culpable enough to be punished as an adult . . . ”).
\textsuperscript{147} See Roper, 543 U.S. at 573 (“It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”).
\textsuperscript{148} Id. at 574.
\textsuperscript{149} Id. Development is highly variable—a few youths may be mature prior to becoming eighteen years of age, while many others may not attain maturity even as adults. See Brink, supra note 30, at 1570 (arguing that the development of normative competence is part of the maturation process from childhood to adulthood). “Though not all individuals mature at the same rate, and some individuals never mature, this sort of normative maturation is strongly correlated with age. The reduced normative competence of juveniles provides a retributive justification for reduced punishment for juveniles.” Id.; see also Zimring, AMERICAN YOUTH VIOLENCE, supra note 30, at 148 (“The range of individual variation among youths of the same age is notoriously large.”); Fagan, supra note 9, at 209 (“The age at which adolescents realize the developmental competencies that constitute culpability will vary: a significant number of juveniles will be immature and lacking in the developmental attributes of culpability well before age eighteen, and some may still lack these competencies after age eighteen . . . ”).
\textsuperscript{149} Roper, 543 U.S. at 573 (“If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty.”).
\end{footnotesize}
rule and *Miller/Jackson*’s affirmation of the mitigating qualities of youthfulness reflect the judgment that youths who cause the same harm still deserve less severe punishment because of their reduced blameworthiness.\(^{150}\)

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

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\(^{150}\) In contemporary criminal law theory, penal proportionality may reflect either the quality of an actor’s choice or what that choice indicates about the actor’s moral character. The former focuses on the blameworthiness of the choices made, while the latter focuses on what that choice indicates about the actor’s bad character. See Scott & Steinberg, *Blaming Youth*, supra note 27, at 801–02; see also R.A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345, 367–68 (1993); Michael Moore, *Choice, Character, and Excuse*, in *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 548, 574–92 (1997); Morse, *supra* note 54, at 405 (“The criteria for responsibility are behavioral and normative, not empirically demonstrable states of the brain.”); Stephen J. Morse, *ImmatURITY AND IrRESPONSIBILITY*, 88 J. CRIM. L. & CRIMINOLOGY 5 (1998); Morse, *supra* note 54, at 405 (“Because these developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults under conventional criminal law conceptions of mitigation.”); Fagan, *supra* note 9, at 242 (“[A]dolescence, per se, is a mitigating status because youths’ developmental deficits are not the deficits of an atypical adolescent but are ‘normal’ developmental processes common to all adolescents.”).

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

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

\(^{153}\) Brink, *supra* note 30, at 1578 (arguing that age provides an imperfect boundary marker for immaturity and proposing to use age as a rebuttable presumption of incapacity to achieve individualized justice).

\(^{154}\) See Stanford v. Kentucky, 492 U.S. 361, 396–99 (Brennan, J., dissenting); AMNESTY INT’L & HUMAN RIGHTS WATCH, *supra* note 104, at 48 (“[W]hile the rate at which the adolescent brain acquires adult capabilities differs from individual to individual . . . researchers have identified broad patterns of changes in adolescents that begin with puberty and continue into young adulthood.”); Morse, *supra* note 37, at 62 (observing that “there are no reliable and valid measures” of culpability that accurately can distinguish adolescents from adults).

\(^{155}\) *Roper v. Simmons*, 543 U.S. 551, 573 (2004); ZIMRING, *AMERICAN YOUTH VIOLENCE*,
to define and measure immaturity, or to equate it with culpability, would introduce a systematic bias toward over-punishing the vast majority of less blameworthy youths.\(^{156}\) The law uses age-based categories to approximate the maturity required for other activities—e.g., voting, driving, and consuming alcohol—because it is impossible or inefficient to try to make individualized judgments about maturity.\(^{157}\) A categorical rule controls for the inability of judges or juries to fairly balance the abstract idea of youthfulness against the aggravating reality of a horrific crime.\(^{158}\)

\(^{156}\) See, e.g., Fagan, supra note 9, at 248 ("The difficulties and statistical error rates in measuring immaturity for juveniles invite complexity in the consistent application of the law."). Fagan contends:

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

\(^{157}\) See, e.g., Roper, 543 U.S. at 581–86 (providing statutory appendices listing limits on juveniles’ rights to vote, marry, and serve on a jury as a result of immaturity); Franklin E. Zimring, The Changing Legal World of Adolescence 35–36 (1982); Donald L. Besche, The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law’s View of the Decision-Making Capacity of Minors, 48 EMORY L.J. 65, 89–91 (1999) (analyzing the inconsistency between punishing adolescents like adults while denying their autonomy claims in areas outside of the criminal law); Richard O. Brooks, "The Refurbishing": Reflections Upon Law and Justice Among the Stages of Life, 54 BUFF. L. REV. 619 (2006) (noting that the designation of diminished responsibility for juveniles is an example of our legal system’s provision of legal duties and immunities based upon stages of life); Rhonda Gay Hartman, Adolescent Autonomy: Clarifying An Ageless Comindrum, 51 HASTINGS L.J. 1265, 1268 (2000) (arguing that presumption of decisional incapacity pervades most areas of law and conflicts with a model of adolescent autonomy); Zimring, Penal Proportionality, supra note 59, at 287; Scott, supra note 32, at 1608, 1611.

\(^{158}\) Stanford v. Kentucky, 492 U.S. 361, 398 (1988) (Brennan, J., dissenting) ("It is thus unsurprising that individualized consideration at transfer and sentencing has not in fact ensured that..."
Roper rightly feared that jurors could not distinguish between a youth’s diminished responsibility for causing the harm and the harm itself. Although Miller/Jackson requires individualized culpability assessments, the Court did not identify any factors to indicate the heightened culpability that would justify an LWOP sentence.

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

juvenile offenders lacking an adult’s culpability are not sentenced to die.”). Roper, 543 U.S. at 573 (recognizing that “the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”). The heinousness of a crime almost invariably trumped jurors’ assessments of a youth’s immaturity. Brink, supra note 30, at 1581; Simona Ghetti & Allison D. Redlich, Reactions to Youth Crime: Perceptions of Accountability and Competency, 19 BEHAV. SCI. & L. 33, 45-47 (2001).


160 Feld, Abolish, supra note 159, at 118-21; see also Model Penal Code § 6.11A(a) cmt. c (providing that “offenders under 18 should be judged less blameworthy for their criminal acts than older offenders—and age-based mitigation should increase in correspondence with the youthfulness of individual defendants.”); ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE, 231 (2008) (arguing for sentences proportionate to the seriousness of the offense and culpability of the offender and insisting that “immaturity and the harm of the offense should count, such that younger offenders should be punished less severely than older youths . . .”); Scott & Steinberg, Blaming Youth, supra note 27, at 837 (“[A] systematic sentencing discount for young offenders in adult court[] might satisfy the demands of proportionality.”); See also Zimring, Penal Proportionality, supra note 59, at 288 (arguing that the penal law of youth crime should develop “a sliding scale of responsibility based on both judgment and the practical experience of impulse management and peer control”);
maximum sentence a mid-adolescent could receive would be no more than half the adult length. The substantially deeper discounts for the youngest offenders correspond with their greater developmental deficits in judgment, self-control, appreciation of consequences, and the like.161

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

161 Brink, supra note 30, at 1572 (“[A] juvenile is less responsible for her crime than her adult counterpart is for the same crime and . . . all else being equal, the younger the juvenile the less responsible she is for her crime.”); Zimring, Penal Proportionality, supra note 59, at 288 (“[A]dolescents learn their way toward adult levels of responsibility gradually. This notion is also consistent with . . . long periods of diminished responsibility that incrementally approach adult standards in the late teens . . . [and with] less-than-adult punishments that gradually approach adult levels during the late teen years.”).

162 The Court in Miller/Jackson struck down mandatory LWOP for juvenile offenders because “every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old . . . .” Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012); see Andrew von Hirsch, Proportionate Sentences for Juveniles: How Different than for Adults?, 3 PUNISHM. & SOC’Y 221, 227 (2001) (“A given penalty is said to be more onerous when suffered by a child than by an adult. Young people, assertedly, are psychologically less resilient, and the punishments they suffer interfere more with opportunities for education and personal development.”); Arredondo, supra note 53, at 19 (“Because of differences in the experience of time, any given duration of sanction will be experienced subjectively as longer by younger children.”); Jeffrey Fagan, This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 21–22 (2002) (describing substantive quality of punishment adolescents experience in adult incarceration as far harsher than the sanctions they experience as delinquents); Feld, Abolish, supra note 159, at 112–13 (“[Y]ouths experience objectively equal punishment subjectively as more severe.”).

likelihood of recidivism with age and the increased costs of confining geriatric inmates.\footnote{AMNESTY INT’L & HUMAN RIGHTS WATCH, supra note 104, at 8; LABELLE, supra note 115, at 22; NELLIS, supra note 90, at 33 (noting that before LWOP inmates grow old and die in prison, “they will require substantially greater health care and medical services. Thus, life sentences add to the rising geriatric prison population and place heavy financial burdens on states.”).}

A Youth Discount would preclude LWOP, lengthy mandatory-minimum, or virtual life sentences—e.g. lengthy consecutive terms of years.\footnote{Miller, 132 S. Ct. at 2469; see also id. at 2489 (Alito J., dissenting) (criticizing the majority for going “out of its way to express the view that the imposition of a sentence of life without parole on a ‘child’ (i.e., a murderer under the age of 18) should be uncommon.”).}

As Miller/Jackson foreshadows, “occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”\footnote{People v. Caballero, 282 P.3d 291 (Cal. 2012). In Caballero, the defendant was convicted of three counts of attempted first-degree murder plus a consecutive term for firearm enhancement, all of which were stacked consecutively to yield a sentence of 110-years-to-life. The California Supreme Court rejected the state’s claim that cumulative sentences that were not explicitly designated as life without parole did not violate Graham’s categorical rule with respect to juvenile nonhomicide offenders: [S]entencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender’s natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment . . . [T]he state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. Id. at 295. In setting a date for parole eligibility, the Caballero Court noted that “[u]nder Graham’s nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile’s crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board.” Id.}

Shortly after Miller/Jackson, the California Supreme Court in People v. Caballero held that a 110-year-to-life sentence imposed on a juvenile convicted of several nonhomicide offenses violated Graham because it did not provide “a meaningful opportunity to obtain release.”\footnote{See, e.g., Nilsen, supra note 86, at 69 (arguing that “[t]he expansion of an individualized}
Professional organizations and most academic analysts endorse the concept of a Youth Discount.\textsuperscript{169} The American Bar Association criticized LWOP sentences for juveniles and proposed shorter sentences for juveniles than those imposed on adults, formally recognized youthfulness as a mitigating factor, and recommended earlier parole release consideration.\textsuperscript{170} The American Law Institute’s revised Model Penal Code sentencing provisions explicitly adopted the Youth Discount. The MPC provides that when states sentence offenders convicted of crimes committed prior to the age of eighteen, “the offender’s age shall be a mitigating

sentencing requirement from the death penalty to life without parole for juveniles calls into question any mandatory minimum sentencing for juveniles, because by definition such sentences do not afford any discretion to the sentencer based on individual characteristics of the offender, then or in the future.”). \textsuperscript{169} Several academic analysts have explicitly endorsed my proposal for the Youth Discount. See, e.g., Tanenhaus & Drizin, supra note 109, at 697–98 (“We endorse Feld’s proposals [for a youth discount] because they respect the notion that juveniles are developmentally different than adults and that these differences make juveniles both less culpable for their crimes and less deserving of the harsh sanctions, which now must be imposed on serious and violent adult offenders.”); SCOTT & STEINBERG, supra note 160 at 246 (concluding that “Proportionality supports imposing statutory limits on the maximum duration of adult sentences imposed on juveniles—a ‘youth discount,’ to use Feld’s term.”); Model Penal Code § 6.11A, Reporter’s Note (acknowledging that the framework of the MPC’s recommendation for “specialized sentencing rules and mitigated treatment of juvenile offenders sentenced in adult courts, owes much” to Feld’s proposal for a Youth Discount—“a sliding scale of developmental and criminal responsibility . . .”); von Hirsch, supra note 162, at 227 (arguing for categorical penalty reductions based on juveniles’ reduced culpability): While actual appreciation of consequences varies highly among youths of the same age, the degree of appreciation we should demand depends on age: we may rightly expect more comprehension and self-control from the 17-year-old than a 14-year-old, so that the 17-year-old’s penalty reduction should be smaller. Assessing culpability on the basis of individualized determinations of a youth’s degree of moral development would be neither feasible nor desirable. \textsuperscript{Id.} A study group funded by the National Institute of Justice determined that “[y]ouths’ diminished responsibility requires mitigated sanctions to avoid permanently life-changing penalties and provide room to reform.” James C. Howell, Barry C. Feld & Daniel P. Mears, Young Offenders and an Effective Justice System Response: What Happens, What Should Happen, and What We Need to Know, in From Juvenile Delinquency to Adult Crime: Criminal Careers, Justice Policy, and Prevention 213 (Rolf Loeb and David P. Farrington eds., 2012). Following the rationale of Roper and Graham, it concluded that “[a] categorical rule of youthfulness as a mitigating factor in sentencing is preferable to individualized discretion. \textsuperscript{Id.} at 229; DAVID P. FARRINGTON ET AL., Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing, 11 CRIMINOLOGY & PUB. POL’Y 729, 743 (endorsing a “maturity discount” that provides a “decrease in the severity of penalties that takes account of younger persons’ lesser culpability and diminished responsibility.”). A few analysts supported the dissent in Roper and advocated for individualized culpability assessments rather than a categorical approach. See supra notes 22–23 and accompanying text. \textsuperscript{170} ABA, REPORT WITH RECOMMENDATION #105C 9 (policy adopted Feb. 2008), available at http://www.americanbar.org/content/dam/aba/migrated/leadership/2008/midyear/updated_reports/hundredfivec.authcheckdam.doc.
factor, to be assigned greater weight for offenders of younger ages.”

The MPC recommends that sentencing and correctional authorities give priority to young offenders “rehabilitation and reintegration into the law-abiding community” and that judges have authority to impose blended sentences which give youths access to juvenile programs rather than to prison.

Although a small subset of chronic offenders may pose a heightened risk of future recidivism, Roper observed that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”

Graham and Miller/Jackson recognized judges’ inability to identify high-risk individuals at the time of sentencing. The inability of adolescents to participate effectively in criminal proceedings compounds this difficulty. Ultimately, proportionality is a retributive concept, not a utilitarian one, and Roper, Graham, and Miller/Jackson rest firmly on retributive grounds—reduced culpability—after examining and rejecting utilitarian justifications for punishment. Accordingly, there is no reason to disregard the categorical mitigating role of youthfulness to speculatively incapacitate some young offenders who may be deemed life-course persistent offenders.

171 Model Penal Code § 6.11A (a).

172 Model Penal Code § 6.11A (b) and (d). Blended sentencing provisions allow a criminal court judge to impose a juvenile sentence in lieu of a criminal disposition or to stay imposition of a criminal sentence pending successful completion of a juvenile commitment. See generally, Feld & Bishop, supra note 127, at 822–24 (explaining variations of blended sentencing provisions); Marcy Rasmussen Podkopacz & Barry C. Feld, The Back-Door to Prison: Waiver Reform, “Blended Sentencing,” and the Law of Unintended Consequences, 91 J. CRIM. L. AND CRIMINOLOGY 997 (2001) (describing net-widening effects of juvenile blended sentencing, but approving criminal court blended sentencing alternatives). The MPC proposes that a criminal court judge may impose any disposition that would have been available if the offender had been adjudicated a delinquent for the same conduct in the juvenile court. Alternatively, the court may impose a juvenile-court disposition while reserving power to impose an adult sentence if the offender violates the conditions of the juvenile-court disposition. Model Penal Code at §6.11A (d).


174 See generally Stinneford, supra note 60.

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

176 But see Model Penal Code §6.11A (c) (providing that “When an offender has been convicted of a serious violent offense, and there is a reliable basis for belief that the offender presents a high risk of serious violent offending in the future, priority may be given to the goal of incapacitation . . . ”). Comment c. to the MPC recognizes utilitarian sentencing goals—incapacitation—as a basis on which to override the mitigation due to adolescents’ diminished responsibility. While a small subset of serious and chronic offenders may be at heightened risk of future offending, courts lack valid or reliable bases on which to predict future dangerousness.
Roper, Graham, and Miller/Jackson emphasized that juveniles' personalities are more transitory and less fixed, their crimes provide less reliable evidence of "irretrievably depraved character," and "a greater possibility exists that a minor's character deficiencies will be reformed."177 Because adolescence is a period of rapid growth and transition, youths will change more quickly and to a greater degree following conviction than would more hardened, older offenders.178 Although rates of criminal behavior increase rapidly among males in their teenage years, rates of desistance are equally high as youths mature into their early twenties.179 States should avoid the iatrogenic consequences of immediately incarcerating more malleable young offenders with adult offenders.180

A Youth Discount enables young offenders to survive serious mistakes with the possibility of a life in the future.181 A Youth Discount imposes sentences that
hold juveniles accountable, manage the risks they pose to others, and provide them with a meaningful opportunity to reform without extinguishing their lives. The characteristics of youth that increase their propensity for wrongdoing—immaturity and plasticity—also provide the mechanism for learning, growth, and change. The child who committed a serious crime at fourteen or fifteen years of age is a very different person than the adult incarcerated decades later. Under a Youth Discount, young offenders eventually will return to the community and states should provide them with "a meaningful opportunity" to reform as they mature. 

VI. CONCLUSION

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

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


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

183 Adolescents' personalities are in transition, and it is unjust and irrational to continue harshly punishing a fifty-or sixty-year-old person for a crime that an irresponsible child committed many decades earlier. Streib & Schrempp, supra note 143, at 12 ("To decide today whether or not this adolescent offender should continue to be imprisoned into those adult years and even into old age is to assume extrahuman powers to predict human behavior generations into the future.").

184 Barry C. Feld, Race, Politics and Juvenile Justice, 87 MINN. L. REV. 1447 (2003) (describing the politicization of crime policies and politicians' use of racial code words for electoral advantage).
years for even the most serious crimes.\textsuperscript{185}

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

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

\textsuperscript{186} Public opinion supports policies to rehabilitate serious young offenders to reduce future crime rather than simply to incarcerate them for longer periods. BARRY KRISBERG & SUSAN MARCHIONNA, ATTITUDES OF US VOTERS TOWARD YOUTH CRIME AND THE JUSTICE SYSTEM 3 (2007), available at http://www.nced-erc.org/nced/pubs/zogby_feb07.pdf (reporting strong public support for rehabilitation as a strategy to prevent and reduce juvenile crime); Brink, supra note 30, at 1585 ("There is support for treating youthful offenders as juveniles and for sentencing that is rehabilitative . . . "); Daniel S. Nagin et al., Public Preferences for Rehabilitation versus Incarceration of Juvenile Offenders: Evidence from a Contingent Valuation Survey, 5 CRIMINOLOGY & PUB. POL’Y 627, 644 (2006) ("[M]embers of the public are concerned about youth crime and want to reduce its incidence, but they are ready to support effective rehabilitative programs as a means of accomplishing that end—and indeed favor this response to imposing more punishment through longer sentences."); Donna M. Bishop, Public Opinion and Juvenile Justice Policy: Myths and Misconceptions, 5 CRIMINOLOGY & PUB. POL’Y 653, 656–57 (2006) (summarizing survey results of public opinion regarding support for rehabilitation); Francis T. Cullen, It's Time to Reaffirm Rehabilitation, 5 CRIMINOLOGY & PUB. POL’Y 665, 666–68 (2006) (reporting the continuing public support for idea of rehabilitation, and offering that rehabilitation provides a cultural and criminological alternative to simply locking up offenders).