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Kids Get the Darndest Sentences: *State v. Mitchell* and Why Age Should Be a Factor in Sentencing for First Degree Murder

Benjamin L. Felcher[1]

Introduction

On October 21, 1996, the State of Minnesota sentenced a fifteen-year-old boy charged with murder to serve life in prison.[2] The court imposed this sentence on Eric Mitchell, a young boy whose physically abusive mother kicked him out of their home, who suffered from auditory hallucinations, and who attempted suicide several times.[3] The judge who sentenced Mitchell felt that the day of sentencing was the "darkest day" he had ever known.[4] The judge executed the sentence because the Minnesota statutes require life in prison for first degree murder.[5] Eric Mitchell appealed to the Supreme Court of Minnesota, arguing that the application of a life sentence was cruel and unusual punishment as applied to a fifteen-year-old child.[6]

In *State v. Mitchell*,[7] the Minnesota Supreme Court held that sentencing a fifteen-year-old boy to life in prison with no

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2. *See* State v. Mitchell, 577 N.W. 2d 481, 486 (Minn. 1998).

3. *See id.* at 486-87.

4. *Id.* at 487-88.

5. *See id.* The judge stated that he had a "responsibility beyond what I personally feel," and found it his legal duty to impose the statutorily mandated sentence. *Id.* The Minnesota Sentencing Guidelines separate first degree murder from all other offenses and specify that life imprisonment shall be imposed upon those found guilty of the crime. *See* MINN. SENTENCING GUIDELINES § II(2)(A) (1999). (stating that "[f]irst degree murder is excluded from The Sentencing Guidelines, because by law the sentence is mandatory imprisonment for life").

6. *See Mitchell*, 577 N.W.2d at 488; *see also* MINN. CONST. art. I, § 5 (prohibiting cruel or unusual punishment).

7. *Id.* at 481.

possibility of parole for thirty years did not constitute "cruel or unusual" punishment for constitutional purposes.[8] In so doing, the court held that Mitchell did not have a fundamental right to have his age considered at sentencing in adult court.[9] The court also emphasized that the power to permit age considerations in sentencing decisions resides in the legislature.[10] This Article will argue that although *Mitchell* was a correct legal decision, the case highlights the need for legislative change: the legislature should require the judiciary to consider age as a mitigating factor when sentencing children processed in adult court.

The *Mitchell* court relied on Minnesota's waiver process[11] to address the potential differences between juvenile and adult offenders.[12] A child transferred to adult court, according to such reliance, has received substantive and procedural constitutional protection.[13] This conclusion not only gives short shrift to the extent of difference between adults and children but also ignores the reality of the waiver process: the certification process gives little consideration to the sentence that a child will receive in adult court.[14] When waiving a child to adult court, the juvenile court often gives most weight to the state's interest in public safety and to the child's amenability to treatment.[15] There is, in other

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8. *Id.* at 488. The Minnesota Constitution prohibits cruel *or* unusual punishment, so a Minnesota court need not find a punishment "unusual" in order to find it unconstitutional. *See* MINN. CONST. art. I, § 5 (emphasis added).

9. *See Mitchell*, 577 N.W.2d at 491.

10. *See id.*

11. *See* Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, n.13 (1998) (noting that the procedure for prosecuting a chronological minor in the adult criminal system is variously referred to as one of several synonymous terms: "waiver," "certification," "bindover" and "transfer"). Minnesota courts use the term "certification" most often, reflecting the statutory language. *See* MINN. STAT. § 260B.125 (2000) (using the word "certification" throughout the section); *see, e.g.*, *In re* Welfare of K.A.P., 550 N.W.2d 9 (Minn. Ct. App. 1996) (using "certification" throughout the opinion). *But see* State v. Behl, 564 N.W.2d 560, 563 (Minn. 1997) (referring to the procedure as "waiver"). This Article will use the terms "waiver" and "certification" interchangeably.

12. *See Mitchell*, 577 N.W.2d at 491.

13. *See id.* at 491-92.

14. *See* MINN. STAT. § 260B.125(4) (2000) (setting out role of "public safety" in certification proceeding). Presumptive certification, applicable to only 16- or 17-year-olds, is the only place in the statute where sentencing is mentioned. *See* MINN. STAT. § 260B.125(3)(2) (2000) (establishing presumptive certification where child's offense carries presumptive prison time under adult sentencing guidelines).

15. *See In re* Welfare of T.D.S., 289 N.W.2d 137, 137-40 (Minn. 1980) (finding that only issues for a certification hearing are public safety and the child's amenability to treatment); State v. Duncan, 250 N.W.2d 189, 189-94 (Minn. 1977) (court need only find either threat to public safety *or* a lack of amenability to treatment to approve a certification to adult court).

words, no requirement that the juvenile court consider the possibility that a grossly disproportionate sentence looms in the child's adult court future.

Criminal courts in Minnesota are not empowered to consider age as a mitigating factor in sentencing for first degree murder. This lack of consideration is especially problematic in Minnesota because of the state's professed desire for a rational sentencing policy, a desire that drove the adoption of determinate sentencing guidelines in adult court.[16] Children are subjected to sentences created with mature adult offenders in mind.[17] Children standing trial as adults receive sentences that are therefore ipso facto disproportionate. The failure to consider the adult court disposition during the procedure represents a tacit recognition that the consideration of age in sentencing is properly the province of the court in which the child is sentenced.[18]

Using Minnesota as a case study, this Article argues that the legislature should require the adult court to consider age as a mitigating factor at sentencing. Part I will situate *Mitchell* by first examining the principles underlying Minnesota sentencing

16. *See* Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. J. 1 (1993) (summarizing criticisms of The Minnesota Sentencing Guidelines and arguing that the determinate system should be retained as it provides for "rational and effective sentencing"). In fact, the subject of this Article is moot in some states because they possess statutory schemes that do allow for age considerations in sentencing children in adult court. *See* BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 239-40, 316-18 (1999) (noting, as examples, the statutes of Louisiana, North Carolina, Tennessee, and Utah). Indeed, one state, Nevada, has gone even further as the state's supreme court declared that a life sentence imposed on a 14-year-old amounted to cruel and unusual punishment under the state constitution and was thus forbidden in the state. *See* Naovarath v. State, 779 P.2d 944 (Nev. 1989). However, it is still the case that "most states have no explicit policy stipulating youth as a mitigating factor" in sentencing. *See* Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 267, 279 (1991). In fact, California is currently considering changing its waiver policy in a way that will bring many more chronological youths into the state's adult criminal system and thus increase the import of a rational sentencing policy for juveniles prosecuted in adult court. *See* Evelyn Nieves, *California Proposal Toughens Penalties for Young Criminals*, N.Y. TIMES, March 6, 2000, at A1. Although not an empirically reliable indicator of the level of national discussion, it is at least noteworthy that The New Yorker Magazine recently carried a cartoon in which one woman says to another about her child, "He's in that awkward age when he can be tried as an adult." THE NEW YORKER, March 6, 2000, at 32.

17. The juvenile court has a complete range of statutorily created sentencing options. *See* MINN. STAT. § 260B.193, .198 (2000) (setting out the available dispositions for juvenile offenders).

18. *See infra* notes 60-64 and accompanying text.

policy as expressed in the state's Sentencing Guidelines.[19] Part I will next inquire into the process of transferring children to adult court in Minnesota.[20] Part I will further contextualize the decision by outlining the role that proportionality considerations play in criminal sentencing, as explicated in the Supreme Court's Eighth Amendment jurisprudence.[21] Finally, Part I will offer a brief account of how the Supreme Court has assessed the fundamental rights of children in order to provide a potentially different framework for thinking about kids and sentencing.[22] Part II will detail the court's decision in *Mitchell*.[23] Finally, Part III will argue that the Minnesota legislature should heed the state court's clarion call to alter the Sentencing Guidelines and require judges to consider age as a mitigating factor for children who have been processed to adult court.[24]

I. Background

A. Sentencing Policy in Minnesota

Any discussion of sentencing in Minnesota must be placed in the context of the state's Sentencing Guidelines.[25] Minnesota was one of the first of a growing number of states to adopt guidelines based on determinate sentencing principles.[26] In an attempt to create a rational sentencing policy, the Minnesota legislature empowered the Minnesota Sentencing Guidelines Commission to formulate a sentencing regime.[27] Although it is hard to attribute legislative purpose to guidelines that were passed by the

19. *See infra* notes 25-37 and accompanying text.

20. *See infra* notes 38-64 and accompanying text.

21. *See infra* notes 65-97 and accompanying text.

22. *See infra* notes 98-106 and accompanying text.

23. *See infra* notes 107-134 and accompanying text.

24. *See infra* notes 135-174 and accompanying text.

25. *See* MINN. STAT. § 244 apps. I-V (2000).

26. *See* Kimberly K. Hall, *Criminal Law-Minnesota Sentencing Guidelines: Plea Agreements Are Not Sufficient Justification for Departure*, 23 WM. MITCHELL L. REV. 189, 192 (1997) (stating "Minnesota pioneered the determinative sentencing system").

27. *See* Richard S. Frase, *The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines*, 28 WAKE FOREST L. REV. 345, 346-47 (1993) [hereinafter Frase, *The Role of the Legislature*]. Professor Richard S. Frase has written ably and extensively on the purposes underlying the adoption of the Minnesota guideline system. *See* Richard S. Frase, *Sentencing Principles in Theory and Practice*, *in* 22 CRIME AND JUSTICE: A REVIEW OF RESEARCH 363, 431 (Michael Tonry ed., 1997) [hereinafter Frase, *Theory and Practice*] (containing bibliographic references to Professor Frase's work on the Minnesota guidelines).

Sentencing Guidelines Commission, as Professor Frase has noted, "subsequent legislation, appellate case law, and trial court departure practices" can provide some insight into the more general purposive goals of the legislature.[28] Professor Frase finds the guidelines to be in line with a "limiting retributivist" approach to punishment "guided by a general principle of restraint and economy that [Norval] Morris labels 'parsimony.'"[29] Frase finds increasing rates of departure from the guidelines, with "mitigating departures far outweighing aggravating departures in all years" as evidence of parsimonial and limiting retributivist presence in the guidelines.[30]

The guidelines do permit sentencing judges to depart from presumptive sentences in light of mitigating or aggravating circumstances.[31] The case law establishes that although the list of mitigating factors set out in the guidelines is not exclusive, in order to be relevant in considering a downward departure from the presumptive sentence, the factor must "tend to excuse or mitigate the offender's culpability for the offense."[32] Minnesota courts will consider numerous factors for a downward departure, "including the defendant's age."[33]

The Sentencing Guidelines, however, set first degree murder aside from offenses for which mitigating factors, including age, can be considered.[34] This fact, however, should not completely remove first degree murder from the larger determinative purposes of the guidelines.[35] The same considerations of parsimony and limiting retributivism that apply to presumptive sentences should also apply to the mandatory sentence for first degree murder.[36]

The Minnesota legislature has approved a guideline system aimed at achieving a rational sentencing policy, a component of

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28. Frase, *The Role of the Legislature*, *supra* note 27, at 347.

29. *See id.* at 354. For more on the nature of "limiting retributivism" as a punitive philosophy, see NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974); Norval Morris, *Desert as a Limiting Principle*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 180 (Andrew VonHirsch & Andrew Ashworth eds., 1998). For more on the theory of parsimony, see Michael Tonry, *Proportionality, Parsimony, and Interchangability of Punishments*, *in* PENAL THEORY AND PRACTICE 59-84 (1994).

30. Frase, *Theory and Practice*, *supra* note 27, at 404-06.

31. *See* MINN. SENTENCING GUIDELINES § II(D) (1999).

32. State v. Esparza, 367 N.W.2d 619, 620-21 (Minn. Ct. App. 1985); *see also* State v. Staten, 390 N.W.2d 914 (Minn. Ct. App. 1986).

33. State v. Trog, 323 N.W.2d 28, 31 (Minn. 1982).

34. *See* MINN. SENTENCING GUIDELINES § II(E) (1999).

35. *See supra* notes 26-30 and accompanying text.

36. *See supra* notes 26-30 and accompanying text.

which is the exclusion of first degree murder from the range of offenses for which judges may consider mitigating factors.[37] If this exclusion is to be considered "rational" for youths sentenced in adult court, it must be because there exists a separate procedural device that ensures consideration of adult court sentences before those children appear in adult court. An examination of the Minnesota certification system, however, demonstrates that this is not in fact the case.[38]

B. Juvenile Waiver

Juvenile courts were established nationwide in the first part of the twentieth century.[39] These courts conceived of juvenile offenders as troubled youths and sought to address the children's "real needs" of rehabilitation.[40] At their inception, most juvenile courts had procedures for waiving jurisdiction over serious offenders.[41] In the 1980s, in response to the perception of an explosion of juvenile crime, many states revised their procedures for waiving juvenile jurisdiction and certifying children to stand trial in adult court.[42] The newer statutes abandoned the full rehabilitative approach to juvenile crime and expressly espoused a more retributive approach to serious offenders, with the aims of protecting the public from dangerous youths and administering deserved punishment.[43] Minnesota amended its juvenile waiver statutes in line with these retributive goals.[44]

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37. *See* MINN. SENTENCING GUIDELINES § II(E) (1999).

38. *See infra* notes 39-64.

39. The history of the formation of juvenile courts is an oft told tale. *See* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 137-63 (1977); Janet A. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N. CAR. L. REV. 1083 (1991); Barry C. Feld, *Criminalizing Juvenile Justice: Rules for Procedure for Juvenile Court*, 69 MINN. L. REV. 141, 142-64 (1984); Francis Barry McCarthy, *supra* note 11, at 640-46. For a contemporaneous account of the early juvenile courts, see Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

40. *See generally* PLATT, *supra* note 39 (explaining the formation of juvenile courts).

41. *See* Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AMER. CRIM. L. REV. 371, 377 (1997); McCarthy, *supra* note 11, at 644.

42. *See* FELD, *supra* note 16, at 189-244; Laureen D'Ambra, *A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders is Not a Panacea*, 2 ROGER WILLIAMS L. REV. 277, 281-286; Klein, *supra* note 41, at 377-382.

43. *See* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 81 (1988).

44. *See* MINN. STAT. § 260B.125 (2000); *see also* Paula R. Brummel, *Doing Adult Time for Juvenile Crime: When the Charge, Not the Conviction Spells Prison for Kids*, 16 LAW & INEQ. J. 541, 546-54 (1996); Barry C. Feld, *Juvenile Court*

The Minnesota statutes set out the process for referring a child to adult court.[45] The statutes construct two categories of juvenile offenders: those who are presumptively waivable and those who are not.[46] Children are presumptively waivable in two circumstances. First, children aged sixteen or seventeen years old are presumed to be subject to adult court jurisdiction if they are accused of a crime that carries a statutory presumption of jail time or involved a firearm.[47] Second, a child will be subject to the presumption of waivablility if the child has previously been prosecuted for a felony pursuant to the waiver statutes and found guilty of the charged offense.[48] A child can rebut the presumption of certification by a showing of "clear and convincing evidence" that public safety would not be threatened by his remaining in the juvenile system, and that he is amenable to treatment.[49]

Any child not subject to presumptive certification who has reached the age of fourteen and is accused of a felony still may face the possibility of being prosecuted in adult court.[50] The court will consider six public safety factors when presented with a petition for certification: the seriousness of the alleged offense, the culpability of the child, the child's prior record, the child's history of treatment, the adequacy of programs available and the possible dispositions available in the juvenile sentencing regime.[51] The burden on the prosecuting authority to sustain a waiver ruling, according to the plain words of the statute, requires no consideration of the length of the sentence the child may face in adult court.[52] In addition, the statute provides that a court should accord more weight to the seriousness of the offense and the child's

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Legislative Reform and the Serious Young Offender, Dismantling the Rehabilitative Ideal, 65 MINN. L. REV. 167 (1981) (examining these legislative changes and their connection to retributive penalogical aims); Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Juvenile Waiver*, 86 J. CRIM. LAW & CRIMINOLOGY 449 (1996) (examining 330 transfers in Minnesota from 1986-1992).

45. *See* MINN. STAT. § 260B.125 (2000).

46. *See* MINN. STAT. § 260B.125(2)-.125(3) (2000).

47. *See* MINN. STAT. § 260B.125(3)(2) (2000). The firearm provision includes "brandishing, displaying, threatening with, or otherwise employing a firearm." *Id.*

48. *See* MINN. STAT. § 260B.125(5) (2000). The child does not have to have been found guilty of the original charge; he will qualify for the presumption even if he was found guilty of a "lesser-included offense" in the original proceeding, but this lesser-included offense must have been a felony. *Id.*

49. *See* MINN. STAT. § 260B.125(3) (2000).

50. *See* MINN. STAT. § 260B.125(1) (2000).

51. *See* MINN. STAT. § 260B.125(4) (2000).

52. *See id.*

prior record than to other factors.[53]

The exact contours of waiver decisions, as set out in the case law, demonstrate that the treatment the waived child will receive in adult court is a minimal factor in the certification process.[54] The trial court has wide discretion to decide the waiver issue, as appellate courts apply the "clearly erroneous" standard when reviewing waiver decisions.[55] The decision-making process in the trial court thus becomes all the more important because of the lessened likelihood that waiver decisions will be overturned.

Legislation and case law demonstrate two significant developments in waiver decision making. First, the Minnesota legislature amended the waiver statute in 1996 to promote public safety objectives.[56] Since then, courts have increasingly based assessments of a child's dangerousness solely on the offense at issue.[57] Previous to the amendment, courts considered a child's dangerousness not in isolation with the offense at issue, but rather required non-offense related evidence of dangerousness.[58] The amendment effectively ended such analysis; juveniles, even in non-presumptive cases, are increasingly waived based almost entirely on the offense they committed.[59]

Second, the case law reveals the lack of consideration that courts give to the adult sentence looming in the child's adult court future.[60] The Minnesota statute only requires that courts look to

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53. *See id.* That all non-presumptive waivers are subject to judicial discretion ostensibly lessens the potential for injustice in this inequitably balanced weighing process. *See* MINN. STAT. § 260B.125(2) (2000) ("Except as provided . . . the juvenile court *may* order a certification.") (emphasis added).

54. *See infra* notes 60-62 and accompanying text.

55. *See, e.g., In re* Welfare of D.T.H., 572 N.W.2d 742, 744 (Minn. Ct. App. 1997) (noting that a trial court's decision will not be reversed unless "clearly erroneous so as to constitute an abuse of discretion.") (quoting *In the* Welfare of T.L.J., 495 N.W.2d 237, 240 (Minn. Ct. App. 1993)).

56. *See id.*

57. *See id.* at 745 (noting that non-offense related evidence of dangerousness is not required by the statute).

58. *See In re* Welfare of K.A.P., 550 N.W.2d 9, 12 (Minn. Ct. App. 1996) (noting that "[u]nder earlier versions of the certification statute, it has been held that the state must present evidence of dangerousness other than the offense charged in the petition itself.") (citing *In re* Welfare of K.P.H., 289 N.W.2d 722, 725 (Minn. 1980)).

59. This trend has not been without its critics. *See D.T.H.*, 572 N.W.2d at 746 (Davies, J., dissenting) (objecting to the finding of waiver because "[e]ven in cases in which a juvenile is charged with the most heinous offense, reference cannot be based solely on the juvenile's age and the seriousness of the crime").

60. The only case where the adult sentence was considered is the tremendously truncated discussion in *K.A.P.*, 550 N.W.2d at 12. The court mentioned that the trial court "compared the presumptive adult criminal sentence (306 months) to the time remaining in the juvenile system," but also stated that the trial court determined that the time remaining "did not provide an adequate period of

the available dispositions in the juvenile system,[61] and the case law is full of decisions certifying children to adult court based wholly on findings that the time remaining for juvenile court jurisdiction was adjudged insufficient.[62] The case law, however, is practically devoid of discussions of the dispositions "available" in adult court.[63] A child sentenced for murder in juvenile court faces as much as five or six years.[64] In adult court, this sentence is enlarged to at least thirty years. Courts that waive children give short shrift to the extremity of the disproportion between these two sentences.

C. Supreme Court Eighth Amendment Jurisprudence

In 1910, the Supreme Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[65] The Eighth Amendment, which provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted" codifies this precept in American law.[66] In *Weems v. U.S.*,[67] the

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supervision." *Id.* Thus even when a juvenile court does consider the looming sentence, it appears that it takes a back seat to considerations of the available juvenile dispositions.

61. *See* MINN. STAT. § 260B.125(4) (2000).

62. *See, e.g., D.T.H.*, 572 N.W.2d at 745 (stating that a "prosecutor only needed to show that retaining the juvenile in the juvenile system did not serve public safety" goals); *In re* Welfare of J.S.J., 550 N.W.2d 290, 294 (Minn. Ct. App. 1996) (upholding waiver where "the juvenile system [was] not equipped to work with the child"); *In re* Welfare of S.J.G., 547 N.W.2d 456, 459 (Minn. Ct. App. 1996) (upholding waiver where the court found the child was "unlikely to succeed in treatment."); *In re* Welfare of K.M., 544 N.W.2d 781, 785 (Minn. Ct. App. 1996) (upholding waiver where ability of juvenile system to deal with child was limited because of "long history of violent, gang-related activity"); *In re* Welfare of M.J.B., 509 N.W.2d 920, 923 (Minn. Ct. App. 1993) (upholding waiver where the "time remaining before M.J.B.'s 19th birthday was insufficient for treatment within the juvenile system.").

63. *See supra* notes 60-62 and accompanying text.

64. Although normally the jurisdiction of the juvenile court would terminate upon the offender's 19th birthday, MINN. STAT. § 260B.193(5) (2000), the Extended Jurisdiction Juvenile Prosecution statute creates the possibility of remaining in the juvenile system until the age of 21. *See id.* at 260B.193(5)(b).

65. Weems v. U.S., 217 U.S. 349, 367 (1910).

66. U.S. CONST. amend. VIII.

67. 217 U.S. 349 (1910). At issue in *Weems* was a disbursing officer's sentence of 15 years to "cadena" for falsifying a cash book for the port of Manila in the Philippines. *See id.* at 357. Cadena is defined as "an afflictive penalty consisting of imprisonment at 'hard and laborious work,' originally with a chain hanging from the waist to the ankle and carrying with it the accessory penalties of civil interdiction, perpetual absolute disqualification from office, and, in the case of 'cadena temporal,' surveillance by the authorities during life." BLACK'S LAW DICTIONARY 203 (6th ed.) (1990). Weems was sentenced to "cadena temporal." *See*

Court established that the Constitution requires proportionality in sentencing.[68] The Eighth Amendment has thus served as a constitutional basis for challenges to excessively harsh prison sentences.[69]

After *Weems*, the Supreme Court did not re-consider the proportionality principle in connection with prison sentence duration for six decades, until its decision in *Rummel v. Estelle*.[70]

Weems, 217 U.S. at 358.

68. Proportionality is the proposition that a punishment should not exceed the guilt incurred by the commission of a particular crime, gauged by the heinousness of the crime and the culpability of the offender. *See* Chris Baniszewski, *Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment's Proportionality Requirement*, 25 ARIZ. ST. L.J. 929, 942 (1993).

69. *See infra* notes 70-97 and accompanying text. Eighth Amendment considerations arise in three settings: challenges to the death penalty, to the treatment of prisoners and to the length of prison sentences. On a number of occasions the Court has expounded upon the Eighth Amendment when the death penalty is involved. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 622 (1977) (holding that a sentence of death imposed for the crime of rape was grossly disproportionate and excessive punishment forbidden by the Eighth amendment); Gregg v. Georgia, 428 U.S. 153, 207 (1976) (holding that under the circumstances punishment of death for the crime of murder did not violate the Eighth and Fourteenth amendments and noting that retribution and possible deterrence to capital crimes could be taken into consideration to determine if the death penalty should be used); Furman v. Georgia, 408 U.S. 238, 240 (1972) (holding that death is uniquely and unusually severe punishment and states may no longer inflict it for punishment of crimes). For discussion concerning the death penalty and juveniles, see Seung Oh Kang, *The Efficacy of Youth as a Mitigating Circumstance: Preservation of the Capital Defendant's Constitutional Rights Pursuant to Traditional Eighth Amendment Jurisprudence*, 28 SUFFOLK U. L. REV. 747, 764-77 (1994) (arguing against maintaining the line of 16 years old as a death penalty cut-off age and supporting the application of a consistent "rights of man" analysis); Dominic J. Ricotta, *Eighth Amendment–The Death Penalty for Juveniles: A State's Right or a Child's Injustice?* Thompson v. Oklahoma, 108 S.Ct. 2687 (1988), 79 CRIM. L. & CRIMINOLOGY 921 (1988). Decisions dealing with the treatment of prisoners also invoke Eighth Amendment analysis. *See* Jonathan A. Vold, *The Eighth Amendment "Punishment" Clause After* Helling v. McKinney*: Four Terms, Two Standards, and A Search for Definition*, 44 DEPAUL L. REV. 215 (1994) (examining the Court's conception of the term "punishment," but also giving summary of the Court's application of the Eighth Amendment in the prison context). Finally, the Court considers the Eighth Amendment when an individual challenges the length of a prison sentence. *See infra* notes 70-97 and accompanying text. Although all of these situations involve the Eighth Amendment, the actual application of the Eighth Amendment differs depending on the particular issue involved. For this reason, this Article focuses solely upon the Court's decisions involving the duration of prison sentences.

70. 445 U.S. 263 (1980). At issue was a Texas recidivist statute under which William Rummel had been sentenced to life in prison. *See id.* at 266. Rummel was found guilty of obtaining less than $150 by false pretenses, but because the offense was his third felony conviction, he received a mandatory life sentence. *See id.* at 265-66. Rummel challenged "the State's authority to impose a sentence of life imprisonment, as opposed to a substantial term of years." *Id.* at 270-71. The Supreme Court, in a 5-4 decision, upheld Rummel's sentence. *See id.* at 285.

The Court asserted that there is little room for proportionality review in noncapital cases by stating that "one could argue without fear of contradiction by any decision of this Court that for crimes . . . punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative."[71] The Court characterized its precedent as providing relief from only "grossly disproportionate" punishments.[72]

The dedication to deferring to legislative determinations regarding prison sentences was seriously called into question three years later in *Solem v. Helm*.[73] In *Solem*, the Court overturned the imposition of a life sentence without the possibility of parole for the cashing of a $100 check for which the defendant did not have an account.[74] Justice Powell's majority opinion insisted that proportionality has a place in judicial review of noncapital sentences.[75] Justice Powell set out the "objective factors" that a

71. *Id.* at 274. The Court showed concern that a court could base Eighth Amendment decisions "merely on the subjective views of individual justices." *Id.* at 274. The Court was uncomfortable with judicial efforts at line drawing between differing terms of imprisonment and thus declared that the state "is entitled to make its own judgment as to where such lines lie." *Id.* at 284. Rummel attempted to provide "objective" factors to the Court to aid in the analysis, but the Court was unpersuaded that his methods were indeed helpful. *See id.* at 277-81. Rummel argued that the Court could consider how other similar crimes within the particular jurisdiction were graded. *See id.* at 275-76. He also suggested a comparison to sentences imposed in other jurisdictions. *See id.* at 277-80. In rejecting these criteria as not providing enough of an "objective" standard, the Court noted the discretion incumbent in prosecutorial charging decisions as well as state courts' discretion to admit evidence of past crimes at sentencing hearings as proof that the whole range of sentencing procedure was dominated by subjective decisions that would create prohibitive complexities for the type of review Rummel suggested. *See id.* at 281.

72. *See id.* at 271.

73. 463 U.S. 277 (1983).

74. *See id.* at 281. Because Helm had been convicted of several previous crimes, he was sentenced under the South Dakota recidivist statute. *See id.* The Court of Appeals held that Helm's sentence was distinguishable from the one upheld in *Rummel* because Helm had no possibility of parole and a survey of penalties for similar crimes in other states showed that Helm's sentence was much greater than he would have received anywhere else. *See id.* at 297. The Supreme Court affirmed this determination. *See id.* at 303.

75. *See id.* at 284-86. Powell supported the position that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted" with an inquiry into the history of the adoption of the Eighth Amendment into the Bill of Rights. *See id.* at 290. Powell also found that the "principle of proportionality has been recognized explicitly in this Court for almost a century." *Id.* at 286. Responding to the contention that proportionality is only applicable to capital sentences, Powell stated that there is no basis for such an assertion because the "constitutional language itself suggests no exception for imprisonment" and it would be "anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality

court should apply when assessing the constitutionality of a sentence and asserted that a court must consider "(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."[76] Powell recognized that application of the first component of the test "assumes that courts are competent to judge the gravity of an offense, at least on a relative scale," but asserted that this assumption was justified because courts have traditionally done so, citing principled distinctions made upon the "absolute magnitude" of crimes, differences based upon attempted versus completed crimes as well as distinctions based on the culpability of an offender.[77] Applying this analytical framework, the Court found Helm's sentence "significantly disproportionate to his crime, and . . .therefore prohibited by the Eighth Amendment."[78]

The *Solem* dissent asserted that "today's holding cannot rationally be reconciled with *Rummel*."[79] The dissent recognized that in some cases the Court had applied a proportionality analysis but argued that "proportionality review has been carried out only in a very limited category of cases, and never before in a case involving solely a sentence of imprisonment."[80] Very little ground for agreement existed as the dissent felt that the Court had "launche[d] into unchartered and unchartable waters" by introducing the specter of judicial subjectivity into sentencing.[81] This dissent highlights the principles that underlie opposition to

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analysis, but the intermediate punishment of imprisonment were not." *Id.* at 288-89.

76. *Id.* at 292.

77. *See id.* at 292-93. Powell also stated that this list of established principles was "by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale." *Id.* at 294.

78. *Id.* at 303.

79. *Id.* at 304 (Burger, J., dissenting). Justice Powell did not think that *Solem* was inconsistent with *Rummel* because *Hutto v. Davis*:

> [made] clear that *Rummel* should not be read to foreclose proportionality review of sentences of imprisonment. *Rummel* did reject a proportionality challenge to a particular sentence. But since the *Rummel* Court—like the dissent today—offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation. Here the facts are clearly distinguishable.

Id. at 304 n.32. *Hutto* involved a 40 year sentence imposed for marijuana possession. *See* Hutto v. Davis, 445 U.S. 370, 375 (1982). The Court upheld the sentence. *Id.*

80. *Id.* at 306 (Burger, J., dissenting).

81. *Id.* at 314 (Burger, J., dissenting).

considering age as a mitigating factor and also sets the stage for the wide disparity of opinions offered by the Court in *Harmelin v. Michigan*.[82]

Harmelin is the latest Supreme Court case to address proportionality and noncapital sentences.[83] The five justice majority agreed only on two very narrow propositions: mandatory penalties do not violate the Eighth Amendment,[84] and the "individualized capital sentencing doctrine"[85] is not applicable to noncapital sentences.[86] On the issue of proportionality, however, the Court produced three disparate opinions.[87]

Justice Scalia's opinion asserted that the Constitution contains no proportionality requirement at all.[88] Scalia first

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82. 501 U.S. 957 (1991).

83. *See id at* 961. Ronald Allen Harmelin was convicted of possession of 672 grams of cocaine. *See id.* His conviction was reversed on state constitutional illegal seizure grounds but this decision was vacated on rehearing where the Court of Appeals rejected Harmelin's argument that his life sentence constituted cruel and unusual punishment. *See id.* Although Justice Scalia wrote the opinion for the 5-4 Court, his opinion was joined in full only by Chief Justice Rhenquist. *See id.* For commentary on the *Harmelin* decision, see JoAnne Aylward Pierce, *Constitutional Law–Eighth Amendment Proportionality Analysis of Terms for Years Uncertain–* Harmelin v. Michigan, 111 S.Ct. 2680 (1991), 26 SUFFOLK U. L. REV. 210 (1992); Pamela L. Bailey, Harmelin v. Michigan: *Is the Eighth Amendment's Proportionality Guarantee Left an Empty Shell?*, 24 PAC. L.J. 221 (1992); Kathi A. Drew & R. K. Weaver, *Disproportionate or Excessive Punishments: Is There a Method for Successful Constitutional Challenges?*, 2 TEX. WESLYAN L. REV. 1 (1995);

84. *See Harmelin*, 501 U.S. at 994.

85. *See id.* at 994-96. Harmelin argued that the mandatory life sentence could only be the harshest of a series of penalties available to a sentencing court, imposed only after a determination that such a sentence would not be grossly disproportionate to the particular crime and defendant. *See id.* This procedure constitutes the "individualized capital sentencing doctrine." *Id.* at 995 (citing Sumner v. Shuman, 483 U.S. 66, 73 (1987)). The Court declined to apply this doctrine to noncapital sentences, stating that "if petitioner's sentence forecloses some 'flexible techniques' for later reducing his sentence, it does not foreclose all of them, since there remain the possibilities of retroactive legislative reduction and executive clemency." *Id.* at 996 (internal citations omitted).

86. *See Harmelin*, 501 U.S. at 994-96.

87. *See id.* Justice Marshall filed a fourth opinion but his separate dissent offered no idiosyncratic analysis on proportionality, agreeing with Justice White's dissent on the issue. *See id.* at 1027-28 (Marshall, J., dissenting) (filing separately in order to distinguish his views on the death penalty from Justice White's).

88. *See id.* at 965. Scalia delved into the history of the Punishments Clause and concluded that "it is most unlikely" that the English common law tradition included proportionality guarantees. *Id.* at 974. There is considerable debate about the historical existence of proportionality protections. *See* Banieszewski, *supra* note 68, at 930-936 (1993) (noting that "whether the English Declaration of Rights contained a proportionality principle is subject to considerable debate"). Scalia also found the history of the Eighth Amendment's adoption and early judicial construction of the Clause persuasive evidence that it was not meant to include proportionality considerations. The intent of the framers is, like the contents of the

launched into a scathing critique of the Court's decision in *Solem*, contending that the decision ignored precedent and "was simply wrong."[89] Scalia warned that application of proportionality would reduce Eighth Amendment protections to the subjective values of individual judges.[90] Realizing that the Court "has not remained entirely in accord with the proposition that there is no proportionality requirement" in the Constitution, he rested by claiming that proportionality review is only applicable in death sentence cases.[91]

Justice Kennedy's concurrence dismissed Scalia's extreme position, recognized a "narrow proportionality principle," and framed his opinion around how to perform such review.[92] Justice Kennedy interpreted *Solem* as requiring a "threshold comparison of the crime committed and the sentence imposed."[93] If the threshold is met, only then should a court engage in inter- and intra-jurisdictional analysis.[94] The remaining Justices found "no justification for overruling or limiting *Solem*" and that the Court should have, therefore, simply applied the three factor test set out in that decision.[95]

English Declaration of Rights, a matter of disagreement. *See id.* at 936-40; Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839 (1969) (arguing that the framers did intend to include proportionality guarantees); Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 CRIM. L. & CRIMINOLOGY 378 (1980) (arguing that the adoption of the Bill of Rights was not intended to include proportionality guarantees).

89. *Harmelin*, 501 U.S. at 965.

90. *See id.* at 986-90.

91. *Id.* at 990-94.

92. *See id.* at 997-98 (Kennedy, J., concurring).

93. *Id.* at 1005 (Kennedy, J., concurring). Kennedy put forth five "common principles that give content to the uses and limits of proportionality review" in order to argue that Harmelin's punishment is "within the constitutional boundaries established by our prior decisions." *Id.* at 998, 1004 (Kennedy, J., concurring) Kennedy's five principles are: (i) setting prison terms is a penalogical judgment that is the province of the legislature; (ii) the Eighth Amendment does not mandate the adoption of a particular penalogical theory; (iii) different penalogical theories will affect the types of sentences a system imposes; (iv) proportionality review must be done with objective factors; and (v) the Eighth Amendment prohibits only punishments that are "grossly disproportionate" to the crime for which they are imposed. *See id.* at 998-1001 (Kennedy, J., concurring).

94. Kennedy compared the crime at issue in *Harmelin* with the crime committed in *Solem* and found that possession of 672 grams of cocaine was "far more grave" than the non-violent, minor crimes at issue in *Solem*. *Id.* at 1001-05 (Kennedy, J., concurring.). Because the "threshold" was not met, Kennedy found no reason to subject Harmelin's sentence to any type of comparative analysis. *See id.*

95. *Id.* at 1021 (White, J., dissenting). The remaining Justices objected to Kennedy's position which essentially argued "that *Solem's* analysis should be reduced from three factors to one." *Id.* at 1009. Justice Marshall filed a separate

This survey of Supreme Court Eighth Amendment decisions demonstrates several established principles about the scope of proportionality review in noncapital cases. The determination of sentences is largely reserved to legislative discretion.[96] At least seven justices agree, however, that the Constitution requires some level of proportionality between crime and sentence, between culpability and punishment.[97] Legislatures should be vigilant in maintaining this correlation for all offenders, especially juvenile offenders.

D. Kids and Fundamental Rights

Proportionality is not, however, the only area of law that can impact a consideration of youth as a mitigating factor in sentencing. The general framework of children and fundamental rights provides a mode for thinking about the legal import of youth.[98] The Supreme Court has concluded that the Constitution does not afford co-extensive fundamental rights to children and adults.[99] The Court has required some, but not all, of the same procedural safeguards in juvenile court as in adult court;[100]

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dissent but explicitly asserted his agreement with the majority of Justice White's opinion. *See id.* at 1027-29. Justice Stevens agreed "wholeheartedly with Justice White's dissenting opinion," but filed separately to emphasize that because a life sentence "does not even purport to serve a rehabilitative function," the crime committed must be so atrocious as to create in society an interest in retribution and incapacitation that outweighs its interest in rehabilitation. *Id.* at 1028 (Stevens, J., dissenting). Stevens asserted that it is hard to argue that all offenders guilty of possession of large amounts of cocaine are beyond rehabilitation. *See id.* at 1029.

96. *See supra* notes 71-81 and accompanying text.

97. *See Harmelin*, 501 U.S. 957.

98. The issue of fundamental rights and children has come up most recently in connection with curfew laws. *See* Gregory Z. Chen, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U. L. REV. 131 (1997); Brian J. Lester, *Is It Too Late for Juvenile Curfews: QUTB and the Constitution*, 25 HOFSTRA L. REV. 665 (1996); Brian Privor, *Dusk 'til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415 (1999); Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163 (1984).

99. *See* Schall v. Martin, 467 U.S. 253 (1984) (noting that although the Court has applied certain constitutional rights with equal force to adults and children, "the Constitution does not mandate elimination of all differences in the treatment of juveniles"); Bellotti v. Baird, 443 U.S. 622, 634 (1979) (finding that precedent demonstrates the "conclusion that the constitutional rights of children cannot be equated with those of adults"); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding that the requirement of a jury trial does not apply to proceedings in juvenile court).

100. For cases where the Court has found co-extensive constitutional rights, see *In re* Gault, 387 U.S. 1 (1967) (holding that the "essentials of due process," such as notice of charges, apply in juvenile court); *In re* Winship, 397 U.S. 358 (1970) (holding that the beyond a reasonable doubt standard is applicable to juvenile court

decided whether schools are permitted to restrict students' free speech;[101] and found the limits of the need for parental consent in children's lives.[102] The Supreme Court has identified three reasons for limiting minors' constitutional rights.[103] First, courts will be prone to limit children's rights if the activity at issue involves the "peculiar vulnerability" of children.[104] Second, the Court found that the inability of children to make informed mature decisions justifies limits on the fundamental rights of children.[105] Finally, the Court recognizes that the unique relationship between parents and their children may place some restrictions on a child's exercise of her fundamental rights.[106] These considerations must be heeded when dealing with children in a legal setting; only then can society properly construct and adhere to a rational policy for dealing with serious juvenile offenders.

II. Minnesota Sentences a Child

The need for age to be considered as a mitigating factor at sentencing for children waived to adult court on first degree murder charges is demonstrated by the case of Eric Mitchell. On November 17, 1994, fifteen-year-old Eric Mitchell hung out at a new friend's house with some other high school students in

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proceedings). For cases where the Court has found constitutional rights to *not* be co-extensive, see *Schall*, 467 U.S. at 253 (holding that constitutional limits to pretrial detention are different for adults and children); *McKeiver*, 403 U.S. at 528 (holding that there is no right to a jury trial in juvenile court).

101. *See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (holding that free speech guarantees apply in the school setting).

102. *See* Bellotti v. Baird, 443 U.S. 622 (holding parental notification/judicial approval requirement of abortion statute impermissibly burdened a minor's right to abortion).

103. *See id.* at 634. The three reasons are (1) the particular vulnerability of children, (2) minors' "inability to make critical decisions in an informed, mature manner," and (3) the role of parents in rearing their children. *Id.* The last of these reasons, the parental role, does not add to the argument for proportionality in sentencing. The Court recognizes the significance of the parent in the child's life because parent's "have the right, coupled with the high duty, to recognize and prepare" the child for socially responsible participation in society. *Id.* at 637 (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)). Although it is possible that a waived child's parents would continue to be a presence in the child's life during and after incarceration, they cannot claim to have lived up to the "high duty" envisioned by the Court. The lack of applicability of this factor should not, however, weigh against applying proportionality analysis to children sentenced in adult court as the lack of parental guidance does not make the child less vulnerable or better able to make mature, informed decisions.

104. *See Bellotti*, 443 U.S. at 634.

105. *See id.*

106. *See id.*

Hutchinson, Minnesota.[107] Early in the evening, Mitchell went into a back room of the apartment with two of the people there, one seventeen years old and the other twenty years old.[108] While in the back room, the twenty-year-old stated that he needed money, pulled out a .22 caliber pistol and asked the two juveniles if they knew anyone who would want to buy the gun.[109] They could not think of a buyer so the three decided that the two minors should take the twenty-year-old's car and gun and rob a convenience store.[110] Mitchell and his seventeen-year-old friend drove to George's Food and Fuel.[111] Once there, the two juveniles entered and exited the store twice before Mitchell finally entered the store at 9:37 p.m. and confronted the cashier with the pistol.[112] The surveillance videotape showed that the cashier offered no resistance to the robbery, but within twelve seconds of Mitchell's entrance into the store, the clerk was shot in the face.[113] Mitchell then went behind the counter and kicked the wounded clerk.[114] Police and medical personnel arrived on the scene soon after, and although attempts were made to revive the clerk, he died at the hospital at 10:30 p.m.[115]

The McCleod County Attorney filed first degree murder charges against Mitchell in juvenile court.[116] The County Attorney also requested that the juvenile court refer the case to adult court.[117] After psychological evaluations and hearings, the court signed an order giving adult court jurisdiction over Eric Mitchell.[118] The Court of Appeals upheld the order.[119]

After a jury trial in adult court, Eric Mitchell was found guilty of one count of first degree murder, one count of second degree murder and one count of aggravated robbery.[120] Although

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107. *See* State v. Mitchell, 577 N.W.2d 481, 483 (Minn. 1998).

108. *See id.*

109. *See id.* at 483-84.

110. *See id.* at 484.

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.* During the robbery, Mitchell's wallet fell on the floor of the convenience store. *See id.* The police found Mitchell's wallet, obtained a description of the car that Mitchell and his friend had been driving, found the boys and arrested them. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.* at 486. During the trial, defense counsel requested several jury

conviction of first degree murder in adult court carries a presumptive life sentence with a minimum of thirty years served in prison, the trial court nevertheless granted defense counsel's request for a sentencing hearing.[121] At the sentencing hearing, a psychiatrist testified regarding Mitchell's emotional and psychological trouble.[122] Although the judge at the sentencing hearing stated that imposing the statutory penalty in this case was one of his "darkest days," the sentencing court found that age was the only possible mitigating factor, and that age could not be used as a mitigating factor in a first degree murder case.[123] On appeal to the Minnesota Supreme Court, Mitchell argued, inter alia, that the sentence as applied to a child constituted cruel and unusual punishment and violated his right to substantive due process[124] and equal protection,[125] and that the district court erred by concluding that it did not have the inherent power to consider his age at sentencing.[126]

The Minnesota Supreme Court rejected Mitchell's claim of infliction of cruel and unusual punishment.[127] Focusing on the proportionality of the punishment, the court stated that "Mitchell committed one of the most heinous crimes . . .[t]herefore we cannot say that his punishment was out of proportion to his crime."[128] The court looked to recent legislative activity in connection with juvenile dispositions and concluded that a 1994 change in the certification statute shifted the emphasis "from treatment options

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instructions that were denied. *See id.* These instructions were not part of the sentencing hearing but did form part of the appeal considered by the Minnesota Supreme Court. *See id.* at 485, 493-94. The court rejected the challenge to the instructions, finding that the trial court did not abuse its discretion in refusing to instruct the jury as to circumstantial evidence, the facts of a particular defense theory and intent. *See id.* at 493-94.

121. *See id.* at 486.

122. *See id.* at 486-87. The pre-sentence psychological report compiled by the Department of Corrections disclosed Mitchell's several suicide attempts, his having been kicked out of his physically abusive mother's house and his reports of hearing voices since the death of the convenience store clerk. *See id.*

123. *See id.* at 488.

124. *See id.* at 490-91. Mitchell argued that his substantive due process was violated both because the legislature could not have a rational basis for extreme differences in adult and juvenile sentences and because the sentencing court was statutorily unable to consider his age as a mitigating factor. *See id.*

125. *See id.* at 492-93. Mitchell argued that the grave disparity between his sentence and a sentence imposed on a 15-year-old retained in the juvenile system violated his right to equal protection. *See id.*

126. *See id.* at 488.

127. *See id* at 490.

128. *Id.* at 489.

to public safety."[129] This shift provided evidence that Mitchell's sentence reflected "evolving standards of decency" in the community and therefore could not be deemed unconstitutionally cruel.[130] The court also looked to other jurisdictions in order to conclude that the sentence was not unusual.[131]

Ultimately, the court found that none of Mitchell's constitutional rights had been violated.[132] In the process, however, the court expressed its discomfort with this holding.[133] The court twice noted that it "would prefer" that the legislature provide some type of intermediate sentencing alternative that could be applied to children in Mitchell's situation.[134]

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129. *Id.* *See supra* note 43-44 and accompanying text.

130. *Id.* at 490.

131. *See id.* The court cited a recent Ninth Circuit decision that surveyed juvenile sentencing in adult courts around the country. *See id.* (citing Harris v. Wright, 93 F.3d 581 (9th Cir. 1996) which held that there is no consensus among states on whether sentencing a 15-year-old to life imprisonment is cruel and unusual punishment; thus such a sentence does not offend nationwide standards). In that case, defendant could cite to only two states that required adult courts to consider a juvenile's age in sentencing, while 26 states sentenced no person to mandatory life sentences without the possibility of parole and 21 states subjected 15-year-olds to such punishments. *See id.*

132. The court declared that "there is no fundamental right to have age considered in adult sentencing" and thus only inquired as to whether the legislature had a rational basis to permit sentencing a 15-year-old to life in prison. *See id.* Minnesota has ruled that automatic certification of a 16-year-old to adult court and mandatory life sentences for murder does not violate substantive due process. *See id.* (citing State v. Behl, 564 N.W.2d 560, 568 (Minn. 1997) that held that certification of 16-year-old to adult court without a hearing did not violate substantive due process rights); State v. Walker, 235 N.W.2d 810, 815 (Minn. 1975), *cert. denied*, 426 U.S. 950 (1976) (holding that mandatory life sentence does not violate substantive due process rights even though court was not empowered to consider mitigating factors). The court analogized these decisions to Mitchell's claims to similarly find no substantive due process violation. *See id.* The court quickly disposed of Mitchell's other constitutional claims, finding that procedural due process protects only the "opportunity to be heard" and that Mitchell was afforded this right in his certification hearing. *See id.* at 492. The court also found that the sentence did not violate Mitchell's equal protection rights because the certification process determined that he was not "similarly situated to [other] 15-year-olds who remain in the juvenile system." *Id.* at 493. Finally, the Court found Mitchell's argument that the trial court has inherent authority to depart from statutory sentences unpersuasive. *See id.* Minnesota allows such deviation only in cases of "selective or discriminatory prosecutorial intent." *Id.* (citing State v. Krotzer, 548 N.W.2d 252, 254-55 (Minn. 1996)). There was no allegation of such intent here and thus departure from the guidelines was not in the power of the trial court. *See id.*

133. *See id.* at 491 ("[W]e are sympathetic to the concern expressed by the district court judge who sentenced Mitchell when he stated that there should have been a 'middle ground' [upon which to sentence Mitchell]").

134. *Id.* at 491 "[W]e would prefer that the legislature provide the courts with the option to treat children differently than adults." *Id.* The Court also stated, "we would prefer that the legislature had provided a sentencing alternative . . . for

III. Analysis

The *Mitchell* court handed down a decision with which it showed discomfort.[135] The Minnesota legislature, however, could remedy the problems raised by the *Mitchell* decision with a statute that requires courts to consider age as a mitigating factor at sentencing of waived children in adult court. The remainder of this Article will argue that the legislature should provide this alternative.

Since the beginning of the twentieth century, the Supreme Court has recognized that proportionality in sentencing is required by the Eighth Amendment.[136] Two aspects of the proportionality jurisprudence bear import for the sentencing of children in adult court. First, the emphasis in these cases has been on the great range of legislative determination of proper punishment for crime.[137] The *Weems* decision, even in delineating limits on legislative choice, noted the importance of legislative power in the area.[138] The later twentieth century cases have reinforced this near absolute power of legislatures to fashion prison sentences.[139] Second, although the substantial majority of the Supreme Court agrees that proportionality considerations enter into judicial assessment of particular sentences, there is not similar agreement about how to determine proportionality.[140]

All agree that the gravity of the crime should be considered, but disagree as to whether the seriousness of the crime should be a "threshold" issue or merely a component in a three-part analysis that also looks to inter- and intra-jurisdictional sentences. Critics of the "threshold" element express concern about the inherent subjectivity of such considerations.[141] Although one may argue that the introduction of individualized considerations would give subjectivity a central place in proportionality review, it is such individualized attention that is one of the hallmarks of the juvenile system.[142] Requiring judges to consider age in adult court

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someone like Mitchell—someone still a child, yet certified to stand trial as an adult." *Id.*

135. *See supra* notes 133-134 and accompanying text.

136. *See supra* notes 65-69 and accompanying text.

137. *See supra* notes 65-97 and accompanying text.

138. *See* Weems v. United States, 27 U.S. 349, 372 (1910) (characterizing the power of the legislature as "great, if not unlimited, to give criminal character to the actions of men").

139. *See supra* notes 69-97 and accompanying text.

140. *See supra* notes 83-95 and accompanying text.

141. *See supra* notes 92-95 and accompanying text.

142. *See supra* notes 39-40 and accompanying text.

sentencing of youthful offenders is a sensible balance between the desire to protect public safety and the recognition that simply transferring a child to adult court does not automatically make the youth an adult.

A. The Province of the Legislature

The legislature is the proper governmental body to affect the requirement of youth as a mitigating factor at sentencing.[143] The Supreme Court's Eighth Amendment decisions beginning in the 1980s reflect expansive deference to legislative decisions.[144] In fact, all of the justices in *Harmelin* appear to agree on the basic premise that sentencing is largely a legislative concern.[145] Given the disparity in the conceptions of how to apply proportionality review, this agreement about the supremacy of the legislature becomes the salient feature of the Court's Eighth Amendment jurisprudence. Regarding determinations of applicable sentence ranges for given offenses, "the Court effectively defers completely to the legislature."[146]

In fact, a strict application of the Court's proportionality precedent points to the recognition that Mitchell's sentence is constitutionally cognizable. Working with the threshold that Justice Kennedy sought to establish in his *Harmelin* concurrence, it seems doubtful that Mitchell's sentence would be found

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143. *See* FELD, *supra* note 16, at 242 (stating that as a result of *Harmelin*, "formulating a youth sentencing policy properly lies in the hands of legislators rather than courts").

144. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 274 (1980) (stating "one could argue . . . [that] the length of the sentence actually imposed is purely a matter of legislative prerogative").

145. *See* Harmelin v. Michigan, 501 U.S. 957, 962 (1991). Scalia's opinion stated that sentencing is "purely a matter of legislative prerogative." *Id.* (quoting *Rummel*, 445 U.S. at 274). Justice Kennedy admitted that "[t]he efficacy of any sentencing system . . . [involves] fundamental choices and implementing them lies with the legislature." *Id.* at 998 (Kennedy, J., concurring). Justice White's dissent submitted that proportionality review "affords 'substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.'" *Id.* at 1016 (White, J., dissenting) (quoting Solem v. Helm, 463 U.S. 277, 290 (1983)).

146. *Awaiting the Mikado: Limiting Legislative Discretion to Define Criminal Elements and Sentencing Factors*, 112 HARV. L. REV. 1349, 1351 (1999) (arguing for a "criminal estoppel" test to determine the constitutionality of legislatively mandated sentencing factors that increase the maximum penalty available for a defendant). While recognizing that the power of the legislature in criminal matters is great—indeed, the state possesses no power greater than the power to punish—the Court has also emphasized the need to monitor this power, which can easily become an instrument of tyranny, even if motivated by good intentions. *See* Weems v. United States, 27 U.S. 349, 371-75 (1910).

disproportionate.[147] Murder is one of the most serious crimes defined by the Minnesota Statutes.[148] A life sentence without the possibility of parole for the crime of possession of a large amount of drugs was not "grossly disproportionate" under Kennedy's threshold analysis.[149] It is hard to imagine that a lesser sentence for a more serious crime could meet such a threshold.

Solem, the only recent case that overturned a sentence as disproportionate, involved a sentence of life without parole.[150] This difference served as a factual basis for distinguishing prior cases.[151] Mitchell will be eligible for parole after serving thirty years in prison.[152] This fact alone distinguishes his sentence from the one in *Solem* that the Court found unconstitutionally disproportionate.[153] The seriousness of the offense and the fact that the possibility of parole exists makes it doubtful that Mitchell's sentence would meet the threshold set out in Kennedy's *Harmelin* concurrence.

Even if one accepts that Mitchell's sentence does meet the threshold, a comparative analysis of intra- and inter-jurisdictional sentences shows the sentence to be constitutionally permissible. Minnesota's Sentencing Guidelines explicitly value ordinal grading of punishments.[154] The Minnesota legislature has voiced its opinion that first degree murder is a serious enough offense to remove it from this graded system and impose a mandatory sentence of life in prison.[155] Although life in prison is the most serious punishment in the state, it is not a remote outlying point on the penalogical scale.[156] Rather, life in prison is merely the greatest punishment for a crime of significant severity.

An inter-jurisdictional analysis likewise points to the

147. *See Harmelin*, 501 U.S. at 997-1005 (Kennedy, J., concurring).

148. *See* MINN. SENTENCING GUIDELINES § II(E) (1999) (setting first degree murder apart for special treatment under the sentencing guidelines).

149. *See Harmelin*, 501 U.S. at 1001-05 (Kennedy, J., concurring).

150. *See* Solem v. Helm, 463 U.S. 277, 301-03 (1983).

151. *See id.*; *see also* Bailey, *supra* note 83, at 244 (noting that the majority opinion in *Solem* distinguished *Solem* from *Rummel* "based on the fact that there was no possibility of parole (which had been available for the defendant in *Rummel* but not for the defendant in [*Solem*]) to lessen the severity of the defendant's sentence.").

152. *See* State v. Mitchell, 577 N.W.2d 481, 488 (Minn. 1998).

153. *See Solem*, 463 U.S. at 303.

154. *See* Frase, *supra* note 16.

155. *See* MINN. SENTENCING GUIDELINES § II(E) (1999).

156. A person who is convicted of first degree murder as their first and only offense would be eligible for supervised release after serving thirty years. *See* MINN. STAT. § 244.05(4) (2000). Certain repeat offenders must serve life in prison without the possibility of parole. *See id.*

acceptability of Mitchell's sentence. Several states have upheld challenges to life sentences for children found guilty of murder.[157] These challenges involved sentences where there was no possibility of parole. Nevada is the only state that has found life sentences without the possibility of parole for child murderers to be unacceptable, but the state court reached this decision on state constitutional grounds.[158] The law and practice of other jurisdictions shows Mitchell's sentence to be in step with the penalogical practices of the rest of the country and thus constitutionally cognizable under this element of the Supreme Court's proportionality analysis.

The Supreme Court's decisions demonstrate a continuing wariness regarding the subjective nature of assessing the proportionality of specific criminal sentences.[159] This wariness is one of the factors that has led the Court to defer to legislative determinations regarding penalogical policy. The *Mitchell* court thus rightly held that the decision to allow age considerations in sentencing resides with the Minnesota legislature.

B. Kids and the Threshold

Proportionality analysis, however, is not the only way to approach the issue of considering age as a mitigating factor at sentencing. Most people have a visceral sense that children are different from adults. A good deal of social science research on the developmental stages of the maturing process confirms this impression.[160] These differences have also been the source of a

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157. *See, e.g.*, Massachusetts v. Diatchenko, 443 N.E.2d 397 (Mass. 1982) (upholding life sentence for child); State v. Stinnett, 497 S.E.2d 696 (N.C. Ct. App. 1998) (same); State v. Massey, 803 P.2d 340 (Wash. Ct. App. 1990) (same).

158. *See* Naovarath v. State, 779 P.2d 944 (Nev. 1989).

159. Although disagreeing as to the very existence of proportionality considerations in noncapital sentencing, both Scalia and the dissenters in *Harmelin* criticized Justice Kennedy's concurrence for opening up the possibility of judicial subjectivism by introducing the threshold as a precursor to engaging in the more objective inter- and intra-jurisdictional analysis. *See Harmelin*, 501 U.S. at 986 (stating that "the proportionality principle becomes an invitation to imposition of subjective values"); *id.* at 1020 (White, J., dissenting) (asserting that Kennedy's approach makes "any attempt at an objective proportionality analysis futile").

160. *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 102-15 (1997) (arguing that the findings of developmental psychology provide persuasive evidence of the stages of children's cognitive and volitional development and thus provide a sensible basis from which to treat youth as a mitigating factor in adult court sentences); *see also* Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 716 (1997) (proposing "explicit transfer decision-making guidelines for judges," required competency hearings prior to transfer, and extended juvenile

good deal of legal analysis of children and criminality.[161] For instance, much of the legal research points to the conclusion that most juvenile offenders will "age out" of their criminality.[162] Such facts should be central to assessments of appropriate penalties and should be in the power of a court to consider.[163] Developmental differences between adults and children have led several scholars to recommend the introduction of proportionality review in the sentencing of children in adult court.[164] While this argument satisfies intuition and logic, it ignores the extent to which the law accommodates for these differences.

As noted in Part I, the Supreme Court has held that the range of fundamental rights is not the same for children as it is for adults.[165] The reason this conclusion is not immediately applied to children being sentenced in adult court is because the Court has reached these decisions where the rights of children were being curtailed to a greater extent than would be cognizable for adults.[166] There is no reason, however, that the special constitutional status of children cannot also be used to recognize that in certain situations more protection should be ensured.

Limitations on the fundamental rights of children point to a persuasive rationale for the necessity of allowing for age considerations when sentencing children in adult criminal court. Children are particularly vulnerable to the effects of long sentences in adult prisons.[167] A child will not just spend time in

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jurisdiction mechanisms based on actuarial tables generated by empirical study by social scientists).

161. *See, e.g.*, Feld, *supra* note 160 at 102-15 (discussing how children's psychological development justifies mitigation of adult sentences).

162. *See* FELD, *supra* note 16, at 199-200.

163. *See, e.g.*, Zimring, *supra* note 16, at 279 (arguing that a "coherent waiver policy" must provide for special considerations of age at sentencing for youths in adult court).

164. *See* Feld, *supra* note 160, at 102 (arguing that children should receive proportionally lesser sentences than adults because "they have not yet fully internalized moral norms, developed sufficient empathetic identification with others, acquired adequate moral comprehension, or had sufficient opportunity to develop the ability to restrain their actions" and basing this conclusion largely on the findings of developmental psychology); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole On Juveniles*, 33 WAKE FOREST L. REV. 681 (1998) (arguing that appellate courts need to modify the existing proportionality analysis when assessing the constitutionality of life without parole imposed on youths); *see also* Zimring, *supra* note 16.

165. *See supra* notes 98-106 and accompanying text (discussing the Court's treatment of minors' constitutional rights).

166. *See supra* notes 103-106 and accompanying text (discussing the Court's various rationales for differential treatment of minors' constitutional rights).

167. *See* Julie B. Falis, *Statutory Exclusion—When the Protector Becomes the Abuser*, 32 SUFFOLK U. L. REV. 81, 101-02 (1998) (citing national studies showing

prison but will effectively be reared in the prison environment.[168] A child offender emerges from prison, if at all, having known no adult existence except that of prison. In addition, there can be no question that a child will be more "particularly vulnerable" in a correctional facility than a fully mature adult.[169] Prisoners maneuver through many unsupervised situations and a child will have to make special accommodations to ensure his safety in many of these situations.[170]

Children are also recognized as different because they have not fully developed the ability to make informed, mature decisions.[171] The decision to commit a crime necessarily involves the weighing of potential consequences, and the state enforces many laws based on the recognition that children do not possess the same decision-making capacity as adults.[172] Age limits for

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that children have a 500% higher chance to be sexually assaulted in an adult facility than in a juvenile facility); Thomas F. Geraghty and Will Rhee, *Learning From Tragedy: Representing Children in Discretionary Transfer Hearings*, 33 WAKE FOREST L. REV. 595, 645 (1998) (noting that "[c]hildren are particularly vulnerable to prison brutality when incarcerated with adults").

168. Another aspect of a child's "particular vulnerability" to lengthy prison sentences is a child's different subjective experience of time. *See* FELD, *supra* note 16, at 313-14. As Professor Feld notes, "[a]lthough we measure penalties in units of time—days, months, or years—youths and adults subjectively and objectively conceive of and experience similar lengths of time differently." *Id.* at 313. Giving a helpful analogy, Professor Feld states that "if we think of a sentence as a fraction of our life and conceive of our age as the denominator, then the same numerator will make up a larger proportion of a young person's life than of an older individual's." *Id.* at 314; *see also* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective On Juvenile Justice Reform*, 88 J. CRIM. & CRIMINOLOGY 137 (1997) (examining these developmental issues).

169. *See supra* notes 167-168 (citing examples of the ways in which children are especially susceptible to the dangers of the prison environment).

170. *See* D.B. v. Tewksbury, 545 F. Supp. 896, 902 (D. Or. 1982) (noting that prison guards "do not invite child-adult communication; however, they cannot prevent it").

171. *See supra* notes 103-106 and accompanying text (outlining reasons for limiting minors' constitutional rights).

172. Again, this recognition is borne out by the research of developmental psychologists. *See* FELD, *supra* note 16, at 306-13. Although "social psychologists find few bases on which to distinguish the quality of decisions made by adolescents fifteen years of age or older from those made by adults in terms of either their reasoning processes, the information used, or the qualitative outcomes," Professor Feld notes that "[m]ore recent research indicates that child development occurs more continuously and gradually, rather than as an all-or-nothing invariant stage and sequence." *Id.* at 307-08. Feld notes further that children's "developmentally influenced cost-benefit calculus may induce them to weigh benefits and consequences differently and to discount negative future consequences in ways that may systematically skew the quality of their choices." *Id.* at 311. These social science findings lead Feld to conclude that "predisposition to risk taking reflects generic developmental processes, rather than malevolent personal choices," and thus provides a basis from which to construct a sentencing policy that protects

consuming alcoholic beverages, for driving privileges and for voting are obvious examples. Perhaps more pertinent are state laws imposing curfews on youths.[173] Seeking to both prevent juvenile participation in crime and to protect juveniles from the effects of crime, curfews represent a legal response to perceived limits of minors' decision-making capability.[174] This legal recognition of a child's limited ability to make informed decisions should apply with equal force to the way society responds to children who have exercised that limited choice-making faculty to commit a crime.

Conclusion

Eric Mitchell will not be eligible to rejoin society until 2028. He will be 45 years old. The Minnesota district court was forced to incarcerate a fifteen-year-old boy without the ability to consider that he was a child. Given the strictness of Minnesota's Sentencing Guidelines, the moment of certification to adult court determined Mitchell's sentence. That transfer decision centered solely upon the available dispositions in juvenile court and their ability to protect the public from an adolescent offender. Eric Mitchell faced either the six years available in a juvenile disposition or a thirty year sentence in adult court. As the Minnesota statutes now stand, there is no middle ground. The structure of certification and adult sentencing forces age considerations in adult sentencing to fall through the cracks. The *Mitchell* court voiced frustration with its lack of power to consider age in sentencing.

The law's response to serious youth offenders should be informed by the same concerns that inform the larger legal setting youths operate in on a daily basis. For the most part, this setting seeks to protect children by affording a diminished range of legal rights and constitutional protection. The policy considerations that sanction such curtailment of rights leads logically to a greater range of protection in the arena of criminal sentencing. As one scholar has noted, "it would be ludicrous to argue that the policy toward youth which so heavily influences . . . other cases should be considered totally irrelevant in those exceptional cases in which jurisdictional transfer occurs."[175] By moving a child to adult

youth from the "detrimental consequences of immature decisions." *Id.* at 312.

173. *See supra* note 98 (citing sources discussing the issue of curfew laws).

174. *See* Privor, *supra* note 98, at 423 (stating that "curfew legislation focuses on both prevention of youth-perpetrated crimes and avoidance of youth victimization").

175. Zimring, *supra* note 16, at 279.

criminal court with no protections against full adult penalties, the state short-changes the legal rights of children.

The Minnesota Supreme Court has recognized that it is not empowered to create sentencing policy, that such policy decisions belong to the realm of the legislature. The *Mitchell* court also, however, voiced serious misgivings about its responsibility to administer a sentencing regime that does not allow for the consideration of youth as a mitigating factor in sentencing the most serious juvenile offenders. This circumspection should point the legislature towards a reconsideration of the treatment of children in adult court. Youth should constitute a mitigating factor at sentencing for three reasons: the visceral sense that children are different than adults; the developmental psychology and sociological data that legal scholars find provides empirical support for recognizing the differences of youth; and the differential treatment children already receive from the law rooted in the jurisprudential framework the Supreme Court applies to assessing the fundamental rights of children. These three factors are compelling reasons to heed the call of *Mitchell* and to stop the practice of inflicting grossly disproportionate sentences upon children.